OPINIONS

OF THE

ATTORNEY GENERAL

OF THE

STATE OF WISCONSIN

VOLUME 65

January 1, 1976 through December 31, 1976

BRONSON C. LA FOLLETTE

ATTORNEY GENERAL

MADISON, WISCONSIN
1976

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

DEPARTMENT OF JUSTICE

LEGAL SERVICES DIVISION

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DAVID J. HASE[1]	Deputy Attorney General
DAVID J. HANSON[2]	Deputy Attorney General
HOWARD J. KOOP	Executive Assistant
WILLIAM H. WILKER	Admin., Legal Services Division
JAMES P. ALTMAN	Assistant Attorney General
JOHN E. ARMSTRONG	Assistant Attorney General
THOMAS J. BALISTRERI[1]	Assistant Attorney General
DAVID J. BECKER	Assistant Attorney General
CHARLES A. BLECK	Assistant Attorney General
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BETTY R. BROWN	Assistant Attorney General
WILLIAM D. BUSSEY	Assistant Attorney General
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JOHN W. CALHOUN	Assistant Attorney General
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BRUCE A. CRAIG	Assistant Attorney General
LEROY L. DALTON	Assistant Attorney General
THOMAS DAWSON[2]	Assistant Attorney General
FREDERICK J. ERHARDT	Assistant Attorney General
DAVID T. FLANAGAN[2]	Assistant Attorney General
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WILLIAM L. GANSNER	Assistant Attorney General
DAVID J. GILLES	Assistant Attorney General
JOHN J. GLINSKI	Assistant Attorney General
JOHN DOUGLAS HAAG	Assistant Attorney General
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JOHN E. KOFRON	Assistant Attorney General
BEATRICE LAMBERT[2]	Assistant Attorney General
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ALAN M. LEE	Assistant Attorney General
PAMELA MAGEE[2]	Assistant Attorney General
EDWARD MARION[2]	Assistant Attorney General
ROBERT B. McCONNELL	Assistant Attorney General
JAMES H. McDERMOTT	Assistant Attorney General
MAUREEN A. McGLYNN[2]	Assistant Attorney General
JAMES C. McKAY, JR	Assistant Attorney General
DANIEL A. MILAN	Assistant Attorney General
SCOTT C. MINTER[2]	Assistant Attorney General
ROY G. MITA	Assistant Attorney General
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E. GORDON YOUNG	Assistant Attorney General
MICHAEL L. ZALESKI	Assistant Attorney General

[1]Resigned, 1976.

[2]Appointed, 1976

PREFACE

Open Meetings; Anti-Secrecy; Legislation; Wisconsin's Open Meetings of Governmental Bodies Law, secs. 19.81 through 19.98, Stats., discussed. OAG 77-76

September 30, 1976.

DISTRICT ATTORNEYS AND CORPORATION COUNSELS
State of Wisconsin

Wisconsin's new Open Meeting Law became effective July 2, 1976. Chapter 426, Laws of 1975, repealed sec. 66.77, Stats., and created subch. IV of ch. 19 of the statutes consisting of secs. 19.81-19.98, Stats. The legislation is intended to strengthen and clarify provisions, to aid in interpretation and application, to gain a fuller measure of compliance, through voluntary means in most instances, and through judicial proceedings voiding acts of governmental bodies and imposing forfeitures for violations where necessary.

Duties of the Attorney General

Section 19.98, Stats., provides that "Any person may request advice from the attorney general as to the applicability of this subchapter under any circumstances."

This provision is intended to be primarily an educational and preventive measure rather than a remedial one. If timely advice is sought and the members of a governmental body are alerted to the provisions of the law there will be less need for prosecution in the courts. Since advice is necessarily conditioned on a given set of facts, requests should normally be made in writing. The request should set forth all material facts and circumstances. Response will be made in writing as rapidly as possible. Occasionally it will be necessary to respond to telephone inquiries because of emergency situations. Advice given in response to such inquiries is inherently less reliable than written responses. Consequently, such oral advice will not be considered by this office to be the equivalent of the written legal opinions issued to persons authorized by statute to request such opinions.

Duties of District Attorneys, County Corporation Counsels, and Other Governmental Counsel

The provisions of this section do not displace the duty of the district attorney or the corporation counsel to advise county officers and agencies with respect to the law. Members of county governmental bodies should seek the advice of their district attorney or corporation counsel rather than that of the Attorney General. District attorneys and corporation counsels should feel free to seek the advice of this office where they are unable to advise with confidence in any given situation. See sec. 165.25 (3), Stats. In like vein, members of non-county governmental bodies should seek and rely upon the advice of their respective town, city, village, school board or local governmental attorney with respect to legal advice necessary to carry out their duties under the law.

Enforcement

Section 19.97, Stats., places the burden of enforcement on the Attorney General and on the district attorney of the county in which a violation is alleged to have occurred. Enforcement at the local level has the best chance of proving violations. Actions in most cases have to be brought in the county or circuit court in the county of residence of the alleged violator. The differences between procedures of the various courts, pretrial conferences, need for intensive preliminary investigation and the assembling of witnesses and material evidence necessitate that enforcement in most cases should take place at the county level. The new law provides additional incentive in that where the district attorney brings the action, "the court shall award any forfeiture recovered together with reasonable costs to the county."

Before a district attorney can institute an action for forfeiture, some person must file a verified complaint with such officer. Published herewith is a form of verified complaint which may be used by any person, or which you may make available to any person so that such person may sign and file the same with you in proper case. Section 19.97 (1) and (4), Stats., governs forfeiture actions to some degree. However, they are also governed by ch. 288, Stats., to which your attention is directed. Also see *State v. Roggensack* (1962), 15 Wis. 2d 625, 113 N.W. 2d 389.

Section 19.97 (2), Stats., permits the Attorney General or district attorney to seek supplementary legal or equitable relief, in addition to forfeiture, by mandamus, injunction or declaratory judgment. Whereas such relief can be sought in conjunction with a forfeiture action, it is recommended that, in most circumstances, it be sought separately. This recommendation is based in part on the rule of strict construction which is applicable where penal statutes are involved, and sec. 19.81 (4), Stats., provides that such rule shall not apply where enforcement by forfeiture is not involved, but that in such case the subchapter shall be liberally construed to achieve the purposes set forth in sec. 19.81, Stats.

Section 19.97 (3), Stats., provides that any action taken at a meeting held in violation of the subchapter is voidable and that the Attorney General or district attorney may bring such action. The section requires a court to weigh the circumstances and equities involved in each case before holding any action void.

Section 19.97 (4), Stats., permits any person, who has made a verified complaint to the district attorney, to bring a *State ex rel.* action, for forfeitures or to void action taken at a meeting held in violation of the law, where the district attorney refuses or fails to commence an action to enforce the law within 20 days after receiving a verified complaint. In such case, any forfeiture would go to the state, but a court could award costs including reasonable attorneys fees to the person bearing the burden of prosecution, if prosecution were successful.

District attorneys and the Attorney General are empowered to exercise reasonable discretion in enforcing the law, including discretion as to the type of legal action to be brought, if any. Court proceedings should not be instituted on mere suspicion of a violation. Appropriate action should be commenced if there is apparent material and wanton violation and if there are credible witnesses and evidence available to prove the necessary elements of the violation.

Elements of Violation, Complaint, Burden of Proof

Section 19.96, Stats., provides for an increased penalty, in the nature of a forfeiture, of not less than $25 nor more than $300 for violation. To prevail in a forfeiture action against a violator it is necessary to establish that a member of a governmental body

"*knowingly*" *attended* a meeting of such body *held in violation* of the chapter. It is necessary to prove scienter under that portion of the provision. It is my opinion that proof of scienter is not necessary where it can be proven that a member in his official capacity "otherwise violates this subchapter by some act or omission." Failure of a chief presiding officer or his designee to give the public notice required under sec. 19.84, Stats., would be a type of omission which would be prosecutable. Section 19.96, Stats., contains certain defenses a member may raise even where it can be proven that he knowingly attended a meeting held in violation of the subchapter. It is my opinion that it is not necessary to allege that a member did not do the acts necessary to avoid liability, in the complaint. Prosecutors should be aware of these defenses, however, should investigate the minutes or available witnesses to ascertain whether the defenses may be available, and should not bring actions for forfeitures against members who apparently can establish such defenses.

The standard or burden of proof in forfeiture cases for violation of the Open Meeting Law is proof "to a reasonable certainty, by the greater weight of the credible evidence ...," the ordinary burden, rather than the higher standard applicable to traffic regulation cases, set forth in sec. 345.45, Stats., or certain other civil cases, such as those involving fraud.

> "By the greater weight of the evidence is meant evidence which when weighed against that opposed to it has more convincing power. Credible evidence is evidence which in the light of reason and common sense is worthy of belief." See Wis. Jury Inst.-Civil 200, and *Kuehn v. Kuehn* (1960), 11 Wis. 2d 15, 104 N.W. 2d 138.

In certain situations the marshalling of witnesses necessary to prove a violation will be difficult. Reliance may have to be placed on testimony of one or more of the members who attended a meeting and who, themselves, may be subject to an action for forfeiture. Defendant members may be called to testify adversely. In my opinion, they cannot refuse to testify on the basis of the self-incrimination provision where such claim is made on the basis of prosecution or potential prosecution under this statute alone as the statute is not criminal.

Comments on the New Law

This memorandum is not intended to interpret each and every provision of the law. In the main, the provisions are set forth in clear and concise language. Many of the provisions are similar to those contained in former sec. 66.77, Stats., and opinions of this office and of the Supreme Court construing that statute will continue to serve as valid research tools. All of the provisions of the new law cannot be set forth in this memorandum and your attention is directed to the provisions of the law itself. Your attention is directed to the following major changes:

A. *Strict v. Liberal Construction*

Section 19.81 (4) provides that the rule of strict construction in favor of the accused, where construction is necessary, applies only where prosecutions for forfeitures are involved and not to other actions brought under the subchapter or interpretations thereof. In most cases the language and intent are clear. However, even in cases where statutory construction is necessary, a statute imposing a forfeiture, though strictly construed against the state, must be construed so as to carry out the legislative intent. *State v. Peterson* (1930), 201 Wis. 20, 229 N.W. 48.

B. *Convening In Open Session*

Section 19.83 requires that *every meeting* shall be preceded by public notice and shall initially be convened in open session. It provides that all discussion and action, formal or informal be initiated, deliberated and acted upon in open session except where the meeting has been closed, with announcement made for purposes permitted by sec. 19.85.

C. *Public Notice*

Section 19.84 now requires the giving of any notice required by other statute *plus* notice to the public, to news media members who have filed written request *and* to the official newspaper, or, if there is none, to a news medium likely to give notice in the area. State governmental bodies must give notice to the Wisconsin State Journal. Notice to the public can be given by posting in one or more public places, by timely paid or otherwise sufficient newspaper publication, or other means. Written or telephonic communication to members of the news media or official newspaper is sufficient. All notices must

meet the content requirements of subsection (2). In most cases notice must be given at least 24 hours prior to the commencement of the meeting. Even in emergency cases, at least 2 hours' notice is required. The shorter notice can only be used where it is "impossible or impractical" to give the "at least 24 hours" notice.

Section 19.84 (4) requires a separate and complete notice for *each meeting* at a time and date reasonably proximate, and subsection (2) requires that the notice of a meeting include any special subject matter intended for consideration at a contemplated closed session.

Section 19.84 (6) absolves formally constituted subunits from the stricter notice requirements for the purpose of meeting during a recess or after a meeting of the parent body, provided that they meet to discuss or act upon a subject which was a subject of *that* meeting of the parent body. The chief presiding officer of the parent body must make public announcement of the time, place and subject matter of the subunit, at the meeting of the parent body. In my opinion, such announcement would have to include notice of a contemplated closed session of the subunit and the members of the subunit would have to convene in open session and vote to go into closed session with additional public announcement.

D. *Closed Sessions - Procedure*

Section 19.85 (1) states that a motion with majority vote is required to close. The vote of each member must be recorded and the minutes preserved. The chief presiding officer must make public announcement of the nature of business to be discussed and the specific statutory subsection under which the closed session is claimed to be authorized. Only business which relates to the subject matter set forth in the announcement made by the chief presiding officer can be considered. The statute no longer permits a chief presiding officer to call a closed session with or without notice. In each case an open session must be convened on notice, such notice to include notice of any contemplated closed session and subject matter, and vote must be taken to go into closed session with proper additional announcement. A closed session can no longer precede an open session held on the same date.

E. *Specific Exceptions To Open Meetings*

Section 19.85 (1) (a) continues the exemption for deliberating after quasi-judicial trial or hearings. The word "any" has been

added. Argument can now be made that a governmental body can meet in closed session to deliberate after a judicial or quasi-judicial trial or hearing conducted by a different governmental body or court. In my opinion this position is untenable and this exemption should continue to be limited to situations in which the body itself has held the quasi-judicial trial or hearing.

Section 19.85 (1) (b) and (c) divide former sec. 66.77 (4) (b) into two subsections. Subsection (b) is now concerned only with dismissal, demotion, licensing, discipline or tenure. The section permits preliminary discussion and investigation without the necessity of giving actual notice to the individual involved. Before any evidentiary *hearing* can be conducted or formal action taken, notice must be given to the specific person involved so that he may exercise a right to require an open session for those purposes. Exception (c) now covers consideration of employment, promotion, compensation or performance evaluation of any public employe. Notice to the specific individual is not required. However, when considering performance evaluation data, care should be taken to avoid matters covered in (b).

Section 19.85 (1) (d) relates to probation, parole, crime detection or prevention. However, the new language limits discussion or action with relation to probation and parole to specific applications and would not include broad policy discussions.

Section 19.85 (1) (e) is the same as former sec. 66.77 (4) (d).

Section 19.85 (1) (f) exempts discussions of financial, medical, social or personal histories or disciplinary data. The subsection is now limited to specific persons. The words "substantial adverse effect upon the reputation of any person referred to" replace the former words "unduly damage reputations." The change may broaden the exception to some degree, but cannot be relied upon to close a meeting where exception (b) applies and where the employe or person licensed requests that an open session be held.

Section 19.85 (1) (g) continues the exemption for conferences with legal counsel but is more restrictive. Any closed conference must relate to situations where there is present or prospective litigation directly involving the governmental body and the legal counsel must be giving or preparing to give oral or written advice thereto.

Section 19.85 (1) (h) is new and relates to requests for confidential written advice from the state or local ethics board.

Section 19.85 (2) is the same as former sec. 66.77 (5). This section prevents the reconvening into open session within 12 hours after closed session unless public notice of subsequent open session was given at the same time and manner as was required for original open session.

Section 19.85 (3) is new and specifically requires final ratification or approval of collective bargaining agreement to be at open session.

F. *Notice Of Collective Bargaining Negotiations*

Section 19.86 is new. It requires the employer to give notice of contract reopening as provided in sec. 19.84 (1) (b).

G. *Legislative Meetings*

Section 19.87 is new. It makes this subchapter applicable to both houses of the legislature, and committees, subcommittees and subunits thereof. Section 19.87 (1) exempts such bodies from notice requirements of sec. 19.84 where the sole purpose is scheduling business before the senate or assembly. Section 19.87 (2) provides that provisions of this subchapter do not apply to the legislature or subunits where there is a joint rule or rule of either house and meetings are conducted in compliance with such rule.

Section 19.87 (3) also relates to legislative sessions. Partisan caucuses of the *senate* or *assembly* are excepted from the provisions of the law unless otherwise provided by legislative rule.

H. *Ballots, Votes and Records*

Section 19.88 (1) provides that except as otherwise provided by statute, no secret ballot may be used to determine any election or decision, except the *election of* the officers of *such body*. In my opinion this exception should be applied narrowly and would not permit a governmental body to elect by secret ballot, members of committees, officers of the governmental unit such as department heads, or fill vacancies on the body itself.

Section 19.88 (2) retains the right of any member to require that a vote be taken in such manner that the vote of each member is ascertained and recorded except where the election of officers of *such body* is involved.

Section 19.88 (3) is *extremely important.* It applies to *both open* meetings *and closed sessions* and requires that "The motions and roll call votes of each meeting ... shall be recorded, preserved and open to public inspection to the extent prescribed in s. 19.21." Where closed meeting is held for proper purpose the custodian may refuse to permit inspection of such records if the need for secrecy continues, and if sufficient reason is given in accordance with prior opinions of this office and relevant Supreme Court cases. The refusal could be tested in proper mandamus action. Other statutes require some governmental bodies to keep minutes of *all* meetings, both open and closed sessions.

I trust that the foregoing will aid you in understanding the new law and in taking such measures as you deem necessary to aid governmental bodies entitled to your advice and to take prompt enforcement action if circumstances so require.

BCL:RJV

Verified Complaint To Enforce Forfeiture Under Secs. 19.46-19.97 and Ch. 288, Wis. Stats.

OPEN MEETING LAW

Now comes the complainant _____and as and for a verified complaint pursuant to secs. 19.96, 19.97 and 288.02, Stats., alleges and complains as follows:

1. That __he is a resident of the _____ of _____, State of Wisconsin, and that (his)(her) Post Office Address is _____ _____ Street, _____, Wisconsin _____.
   (Zip)

2. That _____ whose Post Office Address is _____ Street, _____, Wisconsin _____ was on the _____ day of _____ 197____ , a [member or chief presiding officer] of _____
   _____

(School Board of School District No. _____ Town of _____ , _____ County, WI, or County Board of Supervisors of _____ County, or designate official title of other governmental body)
and that such _____ is a governmental body
(Board or Committee)
within the meaning of sec. 19.82 (1), Wis. Stats.

3. That said _____ on the _____ day of _____, 197___ , at _____, County of _____, Wisconsin, did knowingly attend a meeting of said governmental body at which a quorum was present and that said meeting was held in violation of secs. 19.96 and _____ [cite other applicable section] in that [set out every act or omission constituting the offense charged]:

_____
_____
_____
_____
_____
_____
_____
_____
_____

and that [such acts so done and performed or such failure to perform such acts] were and are contrary to the form of the statute in such case made and provided.

4. That by reason of said _____ [acts or failure] contrary to and in violation of said statute, said ___ _____ became indebted to the _____ _____ [County of _____ or State of Wisconsin] for the amount prescribed therefore in sec. 19.96, Stats., in the sum of $300.00.
5. That this complaint is made to the District Attorney for _____ County under the provisions of sec. 19.97, Stats., so that such officer may bring an action to recover the forfeiture provided in sec. 19.96, Stats.

WHEREFORE, complainant prays that the District Attorney for _____ County, Wisconsin, timely institute an action against said _____ to recover the forfeiture provided in sec. 19.96, Stats., together with reasonable costs and disbursements as provided by law.

STATE OF WISCONSIN)
) SS
COUNTY OF _____)

_____ being first duly sworn on oath deposes and says that ___ he is the complainant above named, that ___he has read the foregoing complaint and knows the contents thereof and that the same is true of (his)(her) own belief except as to those matters therein alleged to be on information and belief and as to those matters __ he believes the same to be true.

_____
COMPLAINANT

Subscribed and sworn to before me
this _____ day of _____, 197___.

_____

Notary Public, _____ County, Wisconsin
My Commission expires _____

ADDENDA

Partial statement of types of violations:

___ "The governmental body went into closed session for a purpose not within the exemptions set forth in sec. 19.85 (1), Stats.," giving details.

___ "The governmental body went into closed session for the avowed purpose of discussing _____ citing the exemption in sec. 19.85 (1) (___), Stats., but discussed and acted upon other business, to-wit:" giving further details.

___ "The meeting had not been preceded by the public notice required by sec. 19.84, Stats.," citing failure, etc.

Witnesses who can testify to act or omission:

Name	Address	Telephone

Documentary evidence available:

OPINIONS

OF THE

ATTORNEY GENERAL

Volume 65

Anti-Secrecy; Public Records; Pupil information which local education agencies are required to release to the Department of Public Instruction under the reporting provisions of ch. 89, Laws of 1973, may be provided, with or without permission, without violation of the state or federal confidentiality statutes, sec. 118.125 (e), Stats. and sec. 438, P.L. 93-380. OAG 2-76.

February 2, 1976.

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

You have asked my opinion regarding the extent to which the flow of information from local to state education authorities is restricted by sec. 438, P.L. 93-380, known as the Family Education Rights and Privacy Act, and by sec. 118.125, Stats., which regulates the dissemination of student records in Wisconsin. In particular, you wish to know whether local authorities may be compelled to release to the Department of Public Instruction information concerning children receiving special education services under ch. 89, Laws of 1973, when permission for such release has been granted in accordance with the provisions of the above cited confidentiality statutes.

It is my opinion that local agencies are required to release such information to your department. This information must be made available with or without permission from the persons affected, or their parents or guardians, although such permission should be obtained whenever possible.

Chapter 89, Laws of 1973, presents a comprehensive plan for the instruction of Wisconsin children with special educational needs. That chapter begins with the declaration that:

> "It is the policy of this state to provide, as an integral part of free public education, special education sufficient to meet the needs and maximize the capabilities of all children with special educational needs."

Since the adoption of the Wisconsin State Constitution, the state superintendent of Public Instruction has exercised supervisory powers over public instruction in this state. Art. X, sec. 1, Wis. Const. The state constitution also provides for local school districts which have traditionally wielded the primary decision-making power for schools under their care. See particularly secs. 120.12 and 120.13, Stats. Chapter 89, Laws of 1973, reflects this long-standing allocation of powers and responsibilities between state and local educational authorities.

The responsibility for coordinating the development of all special education programs and services in Wisconsin belongs to the Department of Public Instruction, particularly the Division for Handicapped Children created within the department by sec. 115.77, Stats. Local school districts are charged with the actual provision of necessary services. Ch. 89, sec. 1 (3), Laws of 1973. To facilitate the state-wide development of effective special education programs, and to ensure that appropriate services are made available to each child who needs them, local agencies are required to submit information concerning local programs and students enrolled in local programs to the state education authority. Secs. 115.84, 115.85 (1) (c), 115.85 (3), 115.87 (5) (a), and 121.05 (1) (a), Stats. In each instance, the reporting requirement is couched in mandatory terms.

The flow of information from local agencies to the state authorities is part of the essential structure of the ch. 89 program. Without detailed information concerning local programs, the department, particularly the Division for Handicapped Children,

would be unable to perform its supervisory and coordinating functions. In addition, funds for books and equipment, salaries, transportation, board and lodging and for development of new programs are administered by the department. Receipt of funds by local agencies is predicated on the evaluation of reports filed by these agencies with the department. Sec. 115.88, Stats.

There are several instances in which personally identifiable information concerning particular students is essential to performance of duties of the superintendent, the department and the Division for Handicapped Children. These situations arise when the approval of the superintendent or the Division for Handicapped Children is required for providing specified services to individual children. Such services include transportation under secs. 115.77 (3) (e), 115.86 (8), 121.54 (3) and (4), Stats., and placement of pupils in facilities outside the state, sec. 115.85 (2) (c), or in a private facility, sec. 115.85 (2) (d), Stats.

The confidentiality of public school pupil records is protected by sec. 118.125, Stats. This statute declares that all pupil records maintained by a public school shall be confidential, and authorizes local school boards to adopt rules for that purpose. Section 118.125 (e), Stats., provides for release of personally identifiable records of students where written permission has been granted by an adult student or the parent or guardian of a minor student. When such authorization has been given, it extends only to the official specifically named by the student or his parent or guardian to receive the information. The federal Family Educational Rights and Privacy Act similarly permits the release of personally identifiable records or files of students upon the written consent of their parents. Sec. 438 (b) (2) (A), P.L. 93-380.

Section 118.125 (2) (g), Stats., provides that a school board may release to the department any information required under the school laws, chs. 115-121, Stats. This release of information is not conditioned upon a grant of permission by the student or his parent or guardian. The federal statute appears to dispense similarly with the requirement of written permission for release of personally identifiable information when the recipients of such information are "authorized representatives of ... State educational authorities." Sec. 438 (b) (1) (C) (iv), P.L. 93-380. Clearly, the members of the department authorized under sec. 118.125 (2) (g), Stats., to receive information qualify as "State educational authorities."

The federal statute is, however, not entirely unambiguous, in that it also provides that data collected by state educational authorities and other enumerated entities "shall not include information ... which would permit the personal identification of such students or their parents after the data so obtained has been collected." Sec. 438 (b) (3), P.L. 93-380. A reasonable interpretation of this language is that state educational agencies may collect and, by necessary implication, use such personal information, but, as a safeguard to students, may not divulge such information to other entities not specifically authorized to receive it under sec. 438 (b) (1), P.L. 93-380.

It is my opinion that, when permission has been granted, neither the state, nor the federal statute presents an obstacle to full compliance by local authorities with the reporting requirements of ch. 89, Laws of 1973. When information is required or requested by the department in accordance with the provisions of ch. 89, local agencies and officials may not withhold such information, and may if necessary be compelled to release it.

Although the federal act apparently protects local schools in their eligibility for federal funds when they release personally identifiable data to state educational authorities without written permission from the student or his parent or guardian, the language of the federal act is not entirely free from ambiguity. Wherever possible, therefore, prior written permission for release of personally identifiable information should be obtained, especially in the case of local school districts which receive federal funds.

BCL:JWC

Physicians And Surgeons; Public Health; Substantive principles of professional medical conduct are not breached by a doctor's disclosing to public health authorities information about the immunization status of his patients, as reflected in his records, without specific permission of the patients. OAG 3-76

February 12, 1976.

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

You advise that at the present time in Wisconsin there continue to be outbreaks of diseases which are preventable by immunization.

In order to prevent future outbreaks of such diseases, you desire to identify those persons who are unimmunized, and to provide them with voluntary immunizations as recommended by the Department of Health and Social Services.

To facilitate identification of inadequately immunized persons, a pilot project designed to explore the feasibility of an immunization data system has been established in Green County. You have officially requested physicians there to provide immunization information from their records to public health authorities to implement the pilot project.

Since you believe that it is not feasible to attempt to obtain a signed release from each patient, or his parent or guardian, you have requested that the information be provided without attempting to obtain consent, in the same manner as information concerning patients' communicable diseases currently is provided. You have instructed that the data are to be handled carefully, in the same confidential manner as other personal information used for public health purposes.

The State Medical Society of Wisconsin is concerned, however, that physicians who comply with your request risk violating rules respecting the confidential nature of the relationship between physician and patient. You ask, therefore, whether rules respecting physician-patient confidentiality are breached by a doctor's disclosing to public health authorities information about the immunization status of his patients, as reflected in his records, without specific permission of the patients.

I have concluded that, in the circumstances you describe which cause you to seek such information, the rules of confidentiality would not be broken by disclosure.

Substantive principles of professional medical conduct prohibit willful betrayal of a professional secret. Sec. 448.18 (1) (d), Stats. In a recent opinion, I determined that these statutorily expressed principles should be construed in conjunction with the American Medical Association's *Principles of Medical Ethics* (1957) to include within the scope of "professional secrets" confidences entrusted to a physician in the course of medical attendance. 64 OAG 82 (1975). That opinion was concerned in particular with confidential communications made by a patient to a physician. For the reasons set forth below, I conclude that

information about a patient's immunization status is not a professional secret within the protection of the law.

There are few cases treating the subject of what constitutes willful betrayal of a professional secret. In *McPheeters v. Board of Medical Examiners of State of California* (1930), 103 Cal. App. 297, 284 P. 938, the court examined a statutory prohibition nearly identical to sec. 448.18 (1) (d), Stats., declaring the willful betrayal of a professional secret to be unprofessional conduct. The court held that the phrase "willful betrayal of a professional secret" does not apply to any and all disclosures that a doctor may intentionally make, but only to disclosures which would tend to disgrace, embarrass, or incriminate a patient, and which are made with an intent to so injure. Thus, a disclosure of a harmless nature or one made without intent to cause harm is not a breach of the physician-patient relationship.

A patient's immunization status appears to be just such a harmless disclosure as not to fall within the ban of our statute against willfully betraying a professional secret. As a practical matter there is no disgrace or social stigma attaching to a patient's immunization status. Most children are routinely administered the oral polio vaccine at school. Many adults carry a prominent scar showing that they have been immunized against small pox.

There is nothing about an immunization status that requires secrecy, regardless of the fact that it may appear in a physician's records. In fact, entities other than a patient's private physician, such as schools, may retain records of immunization. In addition, a physician's disclosure of immunization status of his patients for the purpose of aiding the department in its efforts to control outbreaks of disease is a disclosure intended to help patients generally, not harm them.

The rationale behind the privilege in the analogous testimonial rule now found in sec. 905.04, Stats., Wisconsin Rules of Evidence, bears a direct relationship to the rules respecting physician-patient confidentiality. The purpose behind the prohibition of a physician's revealing of professional confidences is to protect a patient from humiliation, shame, or disgrace and to insure full disclosure to the physician of all diseases and personal habits so that he may treat the patient properly. *Prudential Insurance Co. v. Kozlowski* (1938), 226 Wis. 641, 276 N.W. 300. See also

Kirkpatrick v. Milks (1950), 257 Wis. 549, 44 N.W. 2d 574. This rationale is clearly inapplicable to a patient's immunization status. It is not a disease or habit, disclosure of which would injure a patient's feelings or reputation. Furthermore, it is unlikely that a patient would refrain from disclosing his immunization status to his doctor in the absence of a guarantee of privacy about the matter.

An examination of the principles of confidentiality expressed in the American Medical Association's *Principles of Medical Ethics* (1957) also supports the conclusion that disclosure of immunization information would not violate rules of confidentiality. Section 9 prohibits a physician from revealing the "confidences entrusted to him in the course of medical attendance or the deficiencies he may observe in the character of patients," unless the law or medical necessity requires it. Immunization status is not a deficiency of character, nor is it of such a confidential nature that a physician should be barred from disclosing it. In 97 C.J.S. *Witnesses*, sec. 296, p. 838, it is stated that "a communication to a doctor is confidential when it is acquired by the doctor as a result of confidence reposed in him as such by the patient." Further, the testimonial privilege statute, sec. 905.04 (1) (c), Stats., defines a confidential communication as one "not intended to be disclosed to third persons." Under either of these tests, a record of a patient's immunization status fails to qualify as a confidential matter. Individuals commonly have no expectation of privacy regarding their immunization status. In fact, immunization is often administered in public settings, such as schools and public health clinics.

Section 140.05 (1), Stats., provides that the Department of Health and Social Services "shall have power to execute what is reasonable and necessary for the prevention and suppression of disease." In considering whether the means you propose to prevent outbreaks of disease are "reasonable and necessary," it is helpful to note the existence of statutes requiring disclosure of medical information. Section 143.04, Stats., for example, requires a physician to notify public health authorities of all cases of communicable diseases which come to his attention. In so reporting, a physician is required to disclose the name and disease of the sick person, as well as other identifying information about the patient. Furthermore, under ch. 39, sec. 624, Laws of 1975

(recreating sec. 140.05 (16), Stats.), children are required to present evidence of immunization against communicable diseases or signed permission to administer needed vaccines in public clinics before entering school. Given these statutory authorizations for disclosure of information regarding contagious diseases and regarding immunization, disclosure by physicians of the immunization status of their patients is an appropriate means of preventing or suppressing disease. Moreover, if safeguards are desirable, they are effected by the fact that the data reported to the department will be treated in a confidential manner, as is other personal information used for public health purposes.

It appears that under sec. 140.05, Stats., the department has authority to promulgate a rule to require the disclosure desired. Since the program is now only in its pilot stage, exercise of the rule-making power at this point may be premature. However, at any time when the pilot program should develop into a state-wide system, it may be the better practice for the department to promulgate such a rule. This would not only be consistent with department practice generally, but would also tend to ensure uniform application of the disclosure requirement throughout the state.

BCL:DJH

Marriage And Divorce; Under sec. 245.16, Stats., a court commissioner is not authorized to be the officiating person in performing a marriage ceremony. OAG 4-76

February 12, 1976.

ROBERT P. RUSSELL, *Corporation Counsel*
Milwaukee County

You have asked my opinion whether a court commissioner may be the officiating person for a marriage under Wisconsin law. The answer is "no."

Section 245.16, Stats., provides in part:

> "... The following are duly authorized to be officiating persons:

"***

"(4) Any judge of a court of record."

No specific mention is made of court commissioners.

The former statute, sec. 245.05, Stats. (1957), read in part:

> "Marriages may be solemnized by any justice of the peace, police justice, municipal judge or court commissioner in the county in which he is elected or appointed, and throughout the state by any judge of a court of record ...."

The present wording of the statute was created by ch. 595, Laws of 1959. A Legislative Council note accompanying ch. 595, Laws of 1959, reads:

> "This is a restatement of Wis. Stat. 1957, secs. 245.05, 245.60 and 245.12. In order to lend greater dignity to a civil ceremony the proposed section permits only a judge of a court of record to perform the ceremony, and attending witnesses must be adults."

The legislature intended that only judges of courts of record and not court commissioners be allowed to officiate at marriage ceremonies. This intention is particularly clear because of the distinction made in the prior statute between court commissioners and judges of courts of record.

The conclusion is consistent with the failure of passage of 1973 Assembly Bill 551, which would have added a fifth subsection to sec. 245.16, Stats., specifically naming court commissioners as persons authorized to perform marriages, and would also have added a new subsection to sec. 252.15, Stats. (which lists the powers and duties of court commissioners), stating that court commissioners may solemnize marriages. Since the current sec. 252.15 contains no reference to court commissioners acting as officiating persons in marriage ceremonies, they may not do so.

BCL:GS

Advertising; Corporations; The prohibition against corporate political contributions and disbursements in sec. 11.38, Stats., is broad and probably would bar, in most cases, purchases of advertising by a corporation in a political party publication. But the bar is not absolute and violations must be determined on a case-by-case basis. OAG 5-76

February 17, 1976.

JAMES R. KLAUSER, *Chairman*
State Elections Board

I.

You have requested my opinion regarding the legality of foreign corporations, or of domestic corporations organized under chs. 180 or 181, Stats., or of associations organized under ch. 185, Stats., purchasing advertising in a publication of a political party and, conversely, of a political party selling advertising in one of its publications to such corporations or associations.

All foreign corporations and all domestic corporations organized under chs. 180 or 181, Stats., and all associations organized under ch. 185, Stats., are prohibited from making either contributions or disbursements, directly or indirectly, to political parties and political parties are prohibited from accepting contributions from such corporations or associations. Secs. 11.38 (1) (a) 1 and (1) (b), Stats. Therefore, if the purchase of advertising is either a contribution or a disbursement, corporations and associations are prohibited from making same. However, political parties are prohibited only from receiving contributions and therefore if the purchase of advertising were deemed to be a disbursement, a party apparently would not be barred from receiving the same. *Compare* sec. 11.38 (1) (b), Stats., *with* sec. 11.38 (1) (a) 1, Stats.; *but* see sec. 11.25 (1), Stats., prohibiting any "person, committee or group" from receiving a disbursement made "for political purposes contrary to law."[1]

A "contribution" is a transfer of anything of value made for political purposes. Sec. 11.05 (5) (a), Stats., defines the term in general[2] to mean:

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[1] See note 5, *infra.*

[2] Subsections (b) through (g) define particular types of contributions consistent with the general definition.

> "A gift, subscription, loan, advance, or deposit of money or anything of value (except a loan of money by a national or state bank made by the bank in accordance with applicable banking laws and regulations in the ordinary course of business), made for political purposes. In this paragraph 'anything of value' means a thing of merchantable value."

A disbursement is likewise a transfer of anything of value made for political purposes. Sec. 11.05 (6) (a), Stats., defines the term in general[3] to mean:

> "A purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value (except a loan of money by a national or state bank made by the bank in accordance with applicable banking law and regulations in the ordinary course of business), made for political purposes. In this paragraph, 'anything of value' means a thing of merchantable value."

Both terms are broadly defined and to some extent these definitions are overlapping, hence blurring any distinction between the two. The use of two terms rather than one reflects the legislative intention to cover broadly all conceivable financial transactions undertaken for political purposes. See *United States v. Congress of Industrial Organizations* (1948), 335 U.S. 106, 122, 68 S.Ct. 1349, 92 L.Ed. 1849.

Resolution of the question you pose, then, depends upon whether the corporate purchase of advertising from a political party, under any or all circumstances, is a transfer of "anything of value" done for "political purposes."

II.

In my opinion, something of value is transferred to, and received by, a political party when advertising is purchased in a party publication. Whether the party uses the advertising revenues to finance its publication or for some other purpose, those revenues in some way cover its cost of operation or otherwise further its purposes. This is so whether the charge for advertising is at a rate equal to, less or greater than, fair market value. *Cf.* Internal Revenue Code of 1954, sec. 276 (a) (1), as amended, 26 U.S.C.

[3] Subsections (b) and (c) define particular types of disbursements consistent with the general definition.

sec. 276 (a) (1); *Treas. Reg.*, secs. 1.276-1 (f) (3) (i) and (ii). Accordingly, the purchase of advertising by a corporation or association from a political party is prohibited by sec. 11.38 (1) (a) 1 and (1) (b), Stats., if that purchase is "for any political purpose."[4]

III.

Section 11.01 (15), Stats., defines an act undertaken for "political purposes" as follows:

> "An act is for 'political purposes' when by its nature, intent or manner it directly or indirectly influences or tends to influence voting at any election. Such an act includes support or opposition to a person's present or future candidacy or to a present or future referendum. ..."

Although sec. 5.02 (12), Stats., defines a "political party" as a "state committee registered under sec. 11.05 organized exclusively for political purposes ...", all transfers of value to a political party are not necessarily contributions or disbursements. Contributions or disbursements are transfers of value "made for political purposes." Secs. 11.01 (5) (a) and (6) (a), Stats. Accordingly, determinative of whether a transfer of value is a contribution or disbursement is the "nature, intent or manner" in which the transaction is made, viewed from the standpoint of the transferor.[5]

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[4] Section 11.38 (1) (a) 1, Stats., specifically prohibits contributions or disbursements "to any political party, ... for any political purpose *or to promote or defeat the candidacy of any person for nomination or election to any public office or any referendum to be submitted to the voters.*" (Emphasis supplied.) An act "in support" or "in opposition to" a candidate for public office, however, "does *not* include the making of a contribution or disbursement for the maintenance of permanent offices or the employment of continuing staff for a continuing political party or permanent committee." Sec. 11.01 (10), Stats. (Emphasis supplied.) Therefore, to the extent that advertising revenues are used to pay for overhead expenses of the political party in whose publication the advertising is placed, those revenues are not contributions or disbursements barred by sec. 11.38 (1) (a) 1 or (1) (b), Stats., unless they serve other "political purposes" of the advertiser. See generally, discussion in part III of this opinion.

[5] While purchases of advertising in a political party publication arguably better fit the concept of a disbursement rather than that of a contribution, they should be considered contributions, if made for political purposes. The structure of campaign finance reporting under ch. 11, Stats., is such that a registered organization's receipts are considered to be contributions and its expenditures are considered to be disbursements. See, *e.g., State of Wisconsin Form EB-2, Election Campaign Financial Report*, and particularly Schedules 1 and 2.

This construction is supported by the holding in *United States v. Chestnut* (S.D. N.Y. 1975), 394 F. Supp. 581, 586-587. The court there found that the additional prohibition upon corporate disbursements imposed by 18 U.S.C. sec. 610 (which is

If the transaction were viewed solely from the standpoint of the transferee, a supplier of goods and services, in the ordinary course of business and for adequate consideration, to a political party or other organization registered under sec. 11.05, Stats., would be deemed to have made a contribution or disbursement. The law certainly contemplates allowing political parties and other registrants under sec. 11.05, Stats., to purchase goods and services from corporate suppliers in the ordinary course of business and for adequate consideration.[6] To construe this statute otherwise would work an absurd and unreasonable result contrary to sound principles of statutory construction. *Volunteers of America v. Industrial Commission* (1966), 30 Wis. 2d 607, 616-617, 141 N.W. 2d 890.

The definition of an "act for 'political purposes' " in sec. 11.01 (16), Stats., is broad. In the case of prohibited corporate political contributions, it is intended to be applied expansively to achieve the purposes of sec. 11.38, Stats., which is to destroy "the influence over elections which corporations [exercise] through financial contribution" and disable corporate officials from using "corporate funds for contribution to political parties without the consent of the stockholders." *United States v. Congress of Industrial Organizations* (1948), 335 U.S. 106, 113, 68 S.Ct. 1349, 92 L.Ed. 1849 (construing a federal statute similar to sec. 11.38, Stats.). However, each case involving an alleged violation of sec. 11.38, Stats., must be considered in light of the applicable principles of statutory construction and constitutional limitations. See *Buckley v. Valeo* (U.S. Sup.Ct. Jan. 27, 1976), 44 U.S. L. Week 4127, 4134 n. 24.

Violation of sec. 11.38, Stats., is a crime under the provisions of sec. 11.61, Stats. Therefore the statute is penal in nature and must be strictly construed. *State v. Joe Must Go Club* (1955), 270 Wis. 108, 70 N.W. 2d 681; *State v. Bronston* (1959), 7 Wis. 2d 627, 97 N.W. 2d 504. An act which serves legitimate interests

similar in form to sec. 11.38, Stats.) applied not to payments made to a political organization (and therefore received by same as a contribution), but rather to the "use by a corporation ... of its funds to promote its own political views ...." 394 F. Supp. at 387.

If a purchase of advertising from a political party is deemed a contribution, the apparent anomaly between secs. 11.38 (1) (a) 1 and (1) (b), Stats., is resolved. It is a prohibited transaction on the part of both the purchaser-corporation or association and the seller-political party.

[6] Such transactions are, of course, reportable as disbursements by the registered political organization. See sec. 11.06 (1), Stats.

other than political might not come within the statutory prohibition. *Miller v. American Telephone and Telegraph Co.* (3d Cir. 1974), 507 F. 2d 759, 764-765. That case was a shareholders' derivative suit challenging the corporation's failure to collect a $1.5 million debt owed by the Democratic Party, based upon the theory that the uncollected debt was an illegal political contribution under 18 U.S.C. sec. 610. The court held that plaintiff "at minimum must establish that legitimate business justifications did not underlie the alleged inaction [failure to collect the debt] of the defendant directors." 507 F. 2d at 765.

Furthermore, sec. 11.38, Stats., might be unconstitutional as applied if it were construed to prohibit all business transactions between a political party as vendor of goods and services and a business corporation or a cooperative association as vendee of those goods and services. *United States v. First National Bank of Cincinnati* (S.D. Ohio 1971), 329 F. Supp. 1251. That case held that a national bank would be deprived of Fifth Amendment property rights if the making of a loan in the ordinary course of business to a candidate for public office were deemed to be a prohibited corporate political contribution or expenditure under 18 U.S.C. sec. 610.[7] Likewise, an application of the statute that would result in the denial of First Amendment rights would be unconstitutional. *Buckley v. Valeo* (U.S. Sup.Ct. Jan. 27, 1976), 44 U.S. L. Week 4127, 4150-4151; *United States v. Congress of Industrial Organizations* (1948), 335 U.S. 106, 68 S.Ct. 1349, 92 L.Ed. 1849; *cf. United States v. Chestnut* (S.D. N.Y. 1975), 394 F. Supp. 581, 588-591.

IV.

Every financial transaction between a corporation or association and a political party is not a *per se* violation of sec. 11.38, Stats. Determination of a violation depends upon a case-by-case analysis. This is not to say, however, that many such transactions would be permissible, particularly since in most such transactions (as with the sale of advertising in a party publication), the effect of the transaction is to promote the party's political interests. A corporate advertiser would bear the heavy burden of establishing that its advertising purchase was not, at least in part, intended to further those political purposes.

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[7] Wherein the terms "contribution" and "expenditure" have meanings similar to the definitions of "contribution" and "disbursement," respectively, in secs. 11.01 (5) and (6), Stats. See 18 U.S.C. sec. 591 (e) and (f).

Relevant factors to consider in determining the purpose intended by the corporate purchase of advertising from a political party include whether the rate paid exceeds the fair market value; whether the content of the advertising directly promotes the seller-party's political philosophy; whether there is a reasonable expectation of the advertiser receiving business as a direct result of such advertising; and the probable disallowance of the advertising expense for income tax purposes under sec. 276, Internal Revenue Code 1954, as amended.

Nevertheless, advertising purchased at a rate not greater than its fair market value and restricted solely to a direct solicitation of business which the advertiser can reasonably expect to come from the audience reached by the party publication might be permissible. For example, a corporate supplier of campaign materials would have a legitimate business interest in the specific market reached by a party publication. Likewise, some corporate businesses serving the area in which a political convention is to be held, such as those providing accommodations or entertainment, would have a legitimate business interest in reaching the subscribers to a political party publication in advance of the convention. Situations such as these would have to be closely scrutinized, but they certainly describe circumstances where advertising such as that with which you are concerned may be permissible.

To summarize, the prohibition against corporate political contributions and disbursements in sec. 11.38, Stats., is broad and probably would bar, in most cases, purchases of advertising by a corporation in a political party publication. But the bar is not absolute and violations must be determined on a case-by-case basis. To facilitate its evaluation of cases involving advertising purchases from political parties by corporations, the Elections Board may want to consider adoption of rules for this purpose pursuant to sec. 227.014 (2), Stats.

BCL:DJH

County Board; Elections; A county which is self-organized pursuant to sec. 59.03, Stats., is empowered by sec. 59.03 (1) (d), Stats., to adopt an ordinance providing a procedure for filling a vacancy in the office of county supervisor allowing for an interim appointment subject to the holding of a subsequent special election in which a person other than the appointee may be selected for the balance of the original term. OAG 6-76

February 17, 1976.

GLENN L. HENRY, *Corporation Counsel*
Dane County

You advise that the Dane County Board of Supervisors, pursuant to sec. 59.03, Stats., has adopted an ordinance to act as a self-organized county. A self-organized county is authorized under sec. 59.03 (1) (d), Stats., to determine the procedure for filling vacancies in the office of county supervisor. In carrying out this grant of authority, the county board adopted the following procedure in sec. 35.07, Dane County Ordinances:

> "FILLING OF VACANCIES OCCURRING WITHIN A TERM. Vacancies in the office of County Supervisor shall be filled by appointment of the County Board Chairman subject to confirmation by the County Board. Prior to such appointment, upon a written request by a County Supervisor to the County Board Chairman, a public hearing shall be held in the supervisory district in which the vacancy occurs, and persons interested in being appointed shall attend. A person so appointed and confirmed shall hold office until his successor is elected and qualified. His (or her) successor shall be elected for the residue of the unexpired term on the first Tuesday of April next after the vacancy happens in case it happens on or before December 31 of an even-numbered year, but, if such vacancy happens after December 31 of an even-numbered year, then such successor shall be elected at the next regular election."

You state that in the event of a vacancy occurring prior to December 31 of an even-numbered year, this ordinance has the effect of filling a vacancy by appointment subject to the holding of

a special election in which a person other than the appointee may be selected for the balance of the original term. You ask whether this procedure for filling vacancies in the office of county supervisor is valid. In my opinion it is.

The Wisconsin Constitution does not expressly provide for the composition of county boards of supervisors, nor the manner of their selection, nor their terms of office. The method of their selection is left for the legislature in Art. XIII, sec. 9, Wis. Const.:

> "All county officers whose election or appointment is not provided for by this constitution shall be elected by the electors of the respective counties, or appointed by the boards of supervisors, or other county authorities, as the legislature shall direct. ... All other officers whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people or appointed, as the legislature may direct."

Section 59.03, Stats., provides, in part:

> "... The boards of the several counties shall be composed of representatives from within the county elected and compensated as provided in this section. ..."

The legislature is also empowered to determine how vacancies in some offices shall be filled. Art. XIII, sec. 10, Wis. Const., provides:

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

The constitution does not specify the method whereby vacancies in the office of county supervisor are to be filled thus leaving determination of that method to the legislature.

Article IV, sec. 22, Wis. Const., provides for a delegation of authority from the legislature to county boards:

> "The legislature may confer upon the boards of supervisors of the several counties of the state such powers of a local, legislative and administrative character as they shall from time to time prescribe."

In interpreting this section, the Supreme Court in *Supervisors of La Pointe v. O'Malley* (1878), 47 Wis. 332, 336, 2 N.W. 632, held:

> "[W]hen any subject of legislation is entrusted to county boards by general words in a statute, they acquire a right to pass any ordinance necessary or convenient for the purpose of disposing of the whole subject so committed to them, and for that purpose have all the power of the state legislature over that subject, unless the statute restricts the power or directs its exercise in a certain way."

The legislature has partially delegated the authority granted to it under the constitution to the county boards of supervisors in self-organized counties. The breadth of this delegation of authority is expressed by sec. 59.025 (2), Stats., which provides:

> "... The powers hereby conferred [by the legislature on the county boards] shall be in addition to all other grants and shall be limited only by express language but shall be subject to the constitution and such enactments of the legislature of statewide concern as shall with uniformity affect every county. In the event of conflict between this section and any other statute, this section to the extent of such conflict shall prevail."

Specifically, the legislature has granted county boards the power to determine the procedure for filling a vacancy in the office of supervisor.

> "A county board may determine the procedure for filling a vacancy." Sec. 59.03 (1) (d), Stats.

In view of the holding in *Supervisors of La Pointe v. O'Malley*, *supra*, and the language of sec. 59.025 (2), Stats., the legislature must be said to have granted to the county boards all the powers of the state legislature over the subject of filling vacancies in the office of supervisor, because the legislature delegated this power to the county boards "by general words in a statute" without restricting or directing its exercise in any way. Support for the position that the legislature has unreservedly delegated the power of filling vacancies to the county board of supervisors can be found in the Legislative Council note commenting on sec. 59.03, (1) (d), Stats., as it was proposed to the legislature:

> "This new paragraph gives the county board acting under sub. (1) [allowing for self-organized counties] complete discretion to determine the method of filling vacancies on the board." 1973 Senate Bill 27, sec. 4.

That section was adopted as proposed. Ch. 118, Laws of 1973.

An interim appointment-subsequent election method for filling a vacancy in an elective office is not unusual. The legislature has provided very similar methods for filling vacancies in other offices. See sec. 17.23 (1) (b), Stats. (relating to vacancies in city offices) and sec. 17.26 (1), Stats. (relating to vacancies in boards of education). It would be anomalous to conclude that Dane County has acted in excess of the authority granted to it by sec. 59.03 (1) (d), Stats., by adopting a procedure which has been used by the legislature itself on other occasions and in similar circumstances.

The procedure adopted by Dane County promotes several desirable policies. It emphasizes citizen participation in the filling of the vacancy, utilizing a special election for long-term vacancies. By requiring that election to be held at the time of the regular Spring election, maximum voter participation is encouraged and the cost of conducting the election is minimized. Furthermore, by adopting this method, the Dane County Board has insured that it will always be able to function with a full complement of supervisors in office.

BCL:DJH

Probation And Parole; Prisons And Prisoners; When a probationer or parolee has been arrested for and charged with a new crime and also appears to have violated other conditions of probation or parole, which violations themselves appear to justify revocation, the Department of Health and Social Services has no obligation to delay revocation hearings until court proceedings on the new crime are completed. It may and should proceed with such hearings and, when appropriate, revoke probation or parole on the basis of the other proven violations of the conditions thereof. Under the described circumstances, the department and the probationer or parolee may, but probably should not, agree to delay revocation hearings until the completion of court proceedings on the new crime.

The use of department-employed hearing examiners to conduct final probation and parole revocation hearings, at which they make rulings on motions and ask supplemental questions of witnesses, and to make a synopsis of the evidence, findings of fact, and a recommendation to the Secretary of the Department of Health and Social Services, who makes the decision on revocation, is consistent with the requirements of due process as defined in applicable federal and state court decisions. OAG 7-76

February 17, 1976.

MANUEL CARBALLO, *Secretary*
Department of Health and Social Services

Your predecessor requested my opinion on a number of questions relating to the probation and parole revocation hearings which your department has been required to conduct and has been conducting since the decision of the Wisconsin Supreme Court in *State ex rel. Johnson v. Cady* (1971), 50 Wis. 2d 540, 185 N.W. 2d 306, which decision preceded the also applicable decisions of the United States Supreme Court in *Morrissey v. Brewer* (1972), 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484, and *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed. 2d 656. Those questions concern the timing of revocation hearings when a new criminal offense is involved and the propriety of the use of departmental employes as hearing examiners to conduct such hearings and to make a synopsis of evidence, findings of fact, and a recommendation concerning disposition to the secretary.

I.

On the first subject, your department advises that when a probationer or parolee, arrested for and charged with a new criminal offense, has also apparently committed violations of other conditions of probation or parole and these other violations themselves appear to require revocation, the department has been conducting revocation hearings prior to the completion of court action on the new offense. When appropriate on the basis of the evidence adduced at these hearings, the department has been revoking probation or parole on the basis of the other proven violations of the conditions thereof.

Under these circumstances, my opinion is requested as to whether:

1. The department may proceed with the revocation hearing before court proceedings on the new criminal offense have been completed and revoke probation or parole on the basis of other proven violations of conditions of probation or parole;

2. The department is obligated to defer the revocation hearing until court proceedings with respect to the new criminal offense have been completed;

3. The probationer or parolee and the department may agree to the postponement of the revocation hearing until court proceedings with respect to the new criminal offense have been completed.

For the reasons discussed below, it is my opinion that under the described circumstances:

1. The department not only "may," but should, proceed with revocation hearings prior to completion of court proceedings on the new offense and, if appropriate, should revoke on the basis of other proven violations of the conditions of probation or parole;

2. The department is not obligated to delay revocation hearings and action until the completion of court proceedings on the new offense; and

3. The probationer or parolee and the department may agree to the postponement of revocation hearings until the completion of the court proceeding on the new offense, but, except in unusual circumstances, I advise against entering into such an agreement.

The state may properly subject a probationer or parolee to many restrictions not applicable to other citizens. *Morrissey*, 408 U.S. at 482. This is done by granting probation or parole under certain stated conditions. One of the conditions is that the probationer or parolee not violate the criminal law. This, however, is only one of a number of conditions imposed and violation of any of them may justify and require revocation of probation or parole.[1]

When it appears that a probationer or parolee, who has been arrested for and is charged with a new crime, has also violated other conditions of his probation or parole and these violations themselves appear to require revocation, the department should not delay revocation to await completion of court proceedings on the new crime. Many months may pass before there is final trial court action on the new crime and many more months will pass before final disposition if there is an appeal. Long delay in achieving a proper and needed revocation of probation or parole is not only undesirable from the point of view of both offender rehabilitation and public protection, but it is also legally suspect and completely unnecessary.

Unreasonable delay in revocation proceedings, which is the usual result of awaiting the outcome of a new criminal prosecution, is legally suspect for at least two reasons. The first is that the Wisconsin Supreme Court has recognized that a parolee, who has violated the conditions of parole and is also awaiting court proceedings on a new criminal offense, is "entitled to be held in prison rather than in the county jail ... where such imprisonment does not count toward the serving of his sentence." *Gaertner v. State* (1967), 35 Wis. 2d 159, 165, 150 N.W. 2d 370. Of course, the parolee cannot be returned to prison or the sentenced probationer imprisoned until at least the preliminary hearing on revocation has been completed and the hearing officer determines that there is probable cause to hold the parolee for a final decision on revocation. *Morrissey*, 408 U.S. at 487.

The second reason why long delay in conducting probation or parole revocation hearings is legally suspect is that, if the probationer or parolee is detained in the county jail on the basis of

[1] A review of recent Wisconsin Supreme Court cases involving revocation of probation or parole reveals that revocation was properly made and, in all of the cases reviewed, revocation was based on a violation of conditions other than that involving the commission of a new crime.

a departmental hold order,[2] rather than because of failure to post bail on the new charge, such delay may constitute a violation of the right of the probationer or parolee to due process of the law. In *Morrissey*, which involved parolees arrested and detained as parole violators, the United States Supreme Court held that due process requires a described "preliminary hearing" and also, if desired by the parolee, a described "revocation hearing."[3] The preliminary hearing must be held:

> "... as promptly as convenient after arrest [as a parole violator] while information is fresh and sources available." *Morrissey*, 408 U.S. at 485.

Thereafter, if the parolee desires a "revocation hearing," that hearing:

> "... must be tendered within a reasonable time after the parolee is taken into custody. A lapse of two months ... would not appear to be unreasonable." *Morrissey*, 408 U.S. at 489.

As demonstrated above, any unreasonable delay in the conduct of revocation hearings may cause legal problems. It is also unnecessary. The department is not obligated to defer revocation hearings until after the completion of court proceedings on the new charge, and whatever happens on the new charge is immaterial to the validity of a revocation properly made on the basis of the violation of other conditions of probation or parole. *Hughes v. State* (1965), 28 Wis. 2d 665, 137 N.W. 2d 439.[4]

The probationer or parolee and the department may enter into an agreement to postpone revocation hearings until after the completion of court proceedings on the new charge. I do not advise

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[2] As pointed out in *In Re LaCroix* (1974), 115 Cal. Rptr. 344, 524 P. 2d 816, 820, f. 2, a case in which review was recently denied by the United States Supreme Court, "The procedural rights mandated by *Morrissey* are applicable only in those instances wherein a parolee has been physically deprived of his conditional liberty pursuant to a claimed parole violation. If he is taken into custody on new criminal charges without having been arrested as a parole violator or subjected to a 'parole hold,' *Morrissey* is inapplicable and continues to be inapplicable until such time as he is subjected to restraint as a parole violator...."

[3] *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed. 2d 656, makes the requirements of *Morrissey* also applicable to revocation of probation.

[4] In *Hughes*, probation was revoked by a Milwaukee court after Hughes had been convicted of a new offense. The new conviction was subsequently set aside and Hughes asserted that the court order revoking probation also had to be vacated. The lower court and the Supreme Court both found no merit in this argument, since the record revealed that probation had been revoked not because of conviction of a new crime, but because of the violation of other conditions of probation.

the department to enter into such an agreement, however, in the absence of some extraordinary circumstances. Doing so in a situation where prompt revocation is desirable or required and is properly based on the violation of other conditions of probation or parole is unnecessary, undesirable, and creates treatment, public protection, and legal problems. It also tends to undermine the probation and parole system by appearing to dilute, if not remove, the accountability of a violator for his violation of the conditions of probation or parole.

Further, as stated by the United States Supreme Court in *Morrissey*, 408 U.S. at 482:

> "... Given the previous conviction and the proper imposition of conditions, the State has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by the conditions of his parole."

Normally, the department should not waive the state's above-described "overwhelming interest" by agreeing to delay a needed revocation to await the completion of court proceedings which are extraneous to the revocation.

II.

The second subject on which my advice is sought deals with the use of a hearing examiner to conduct the final revocation hearing and thereafter to prepare a synopsis of the evidence, findings of fact, and a recommendation concerning disposition to the Secretary of the Department of Health and Social Services. Apparently, defense counsel have:

> "... questioned the independence of these examiners inasmuch as they do enter actively into the proceedings, questioning witnesses and making rulings on motions of counsel. Subsequently, still as employees of the Department, they make recommendations for action by the Secretary."

In my opinion this arrangement for the use of a hearing examiner is consistent with the dictates of due process as set forth in *Morrissey v. Brewer* (1972), 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed. 2d 484; *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed. 2d 656, and other applicable federal cases. Further, there is nothing inconsistent between this arrangement

and the decisions of the Wisconsin Supreme Court in such cases as *State ex rel. Johnson v. Cady* (1971), 50 Wis. 2d 540, 185 N.W. 2d 306, and *Hortonville Education Association v. Joint School District No. 1* (1975), 66 Wis. 2d 469, 225 N.W. 2d 658.

As indicated in the first three above-cited cases, probation and parole revocation is a matter traditionally and properly handled by administrative agencies, and the two types of hearings required by due process, as defined in *Morrissey* and *Scarpelli*, are hearings conducted before employes of such agencies. The fact that the persons conducting the hearings are agency employes is immaterial, inevitable, and in no way violates due process.

The first hearing required by *Morrissey* and *Scarpelli* is a preliminary hearing to determine whether there is probable cause to hold the probationer or parolee for a final decision on revocation. This hearing must be before an "independent officer" who is therein defined as "someone such as a parole officer other than the one who has made the report of parole violations or has recommended revocation." *Morrissey*, 408 U.S. at 486. This hearing, then, properly and consistent with due process is conducted before another parole officer.

The second and final revocation hearing required by due process as defined in *Morrissey* and *Scarpelli* is a hearing which is conducted only if the probationer or parolee so desires. Its purpose is to make "a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation." *Morrissey*, 408 U.S. at 488. This hearing must be before a "neutral and detached" hearing body. *Morrissey*, 408 U.S. at 489.

In Wisconsin, the Department of Health and Social Services, of which you are Secretary, makes the decision on whether the probation or parole of persons in its custody is to be revoked. Secs. 973.10 (2), 57.06 (3), 57.07 (2), and 57.072, Stats. You, as head of the department, are the required "neutral and detached" hearing body and decisionmaker. This fact, however, does not require that you personally conduct or be present at revocation hearings. It is proper and consistent with due process for you to delegate to a hearing examiner the job of conducting the hearing

and thereafter preparing for you, the decisionmaker, a synopsis of the evidence, findings of fact, and a recommendation.[5]

Two attorneys have been appointed and are functioning as revocation hearing examiners. They are employes of the department, but they are not employes of the Division of Corrections, an agent of which is seeking revocation. During the conduct of the hearing the examiner, of course, must rule on motions made to him and he, just as a court,[6] has a right and duty to clarify the testimony presented by asking additional questions of witnesses. These activities, which are innate in the job, do not make the examiner or you, as his principal, other than a "neutral and detached" hearing body as required by *Morrissey* and *Scarpelli.*

Further, these activities by the examiner, together with the fact that he makes a recommendation to you, do not destroy your status as an impartial decisionmaker. Neither you nor he has a direct personal pecuniary interest in the outcome of the proceedings as has been condemned by the United States Supreme Court.[7] Further, neither you nor he was involved "in the events which precipitated decisions ... [you] were required to make" as in *Hortonville Education Association v. Joint School District No. 1* (1975), 66 Wis. 2d 469, 494, 225 N.W. 2d 658.[8] The procedures followed do not give rise to "a risk of actual bias or prejudgment." *Withrow v. Larkin* (1975), 421 U.S. 35, 95 S.Ct. 1456, 1464, 43 L.Ed. 2d 712.

It is my opinion, therefore, that the described use of hearing examiners is consistent with due process as defined in *Morrissey*, *Scarpelli*, and other applicable federal and state court decisions.

BCL:BRB

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[5] Hearing examiners, who perform the tasks described above, are used by most state and federal administrative agencies. Their use in this way is proper and consistent with due process. 2 Davis, *Administrative Law Treatise*, sec. 11.02; 73 C.J.S., *Public Administrative Bodies and Procedures*, secs. 135-142; *Morgan v. United States* (1936), 298 U.S. 468, 481, 482, 56 S.Ct. 906, 80 L.Ed. 1288; *Richardson v. Perales* (1971), 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed. 2d 842.

[6] *Lewis v. State* (1973), 57 Wis. 2d 469, 474, 204 N.W. 2d 527; *State v.* Bergenthal (1970), 47 Wis. 2d 668, 680, 178 N.W. 2d 16.

[7] *Gibson v. Berryhill* (1973), 411 U.S. 564, 93 S.Ct. 1689, 36 L.Ed. 2d 488; *Ward v. Village of Monroeville* (1972), 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed. 2d 267; and *Tumey v. Ohio* (1927), 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749.

[8] See also, *In re Murchison* (1955), 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942.

Automobiles And Motor Vehicles; Police; A person who flees or attempts to elude an unmarked police car, with flashing red lights and/or siren operating, does not violate sec. 346.04 (3), Stats., unless the person knows that the signal from the unmarked vehicle was given by a traffic officer. OAG 8-76

February 20, 1976.

THOMAS B. RUSBOLDT, *District Attorney*
Manitowoc County

You state that a person in a motor vehicle attempted to elude an unmarked police car equipped with a red light on the dashboard or within the grillwork and a siren under the hood. The police car was driven by a traffic officer who turned on both the red light and the siren. You ask whether this violates sec. 346.04 (3), Stats., which reads:

> "No operator of a vehicle, after having received a visual or audible signal from a traffic officer, or marked police vehicle, shall knowingly flee or attempt to elude any traffic officer by wilful or wanton disregard of such signal so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicles or pedestrians, nor shall he increase the speed of his vehicle or extinguish the lights of his vehicle in an attempt to elude or flee."

The intention of the legislature to exclude signals received from vehicles which are not marked as police vehicles is apparent. Many automobiles, some privately owned, which are not police vehicles, qualify as authorized emergency vehicles under the definition in sec. 340.01 (3), Stats., and operators of other vehicles can hardly be expected to know whether the operators of such authorized emergency vehicles are traffic officers or not. The statute here involved requires that the offense be knowingly committed. It is, therefore, my opinion that sec. 346.04 (3), Stats., was not violated under the circumstances you have presented unless the eluder knew that the signal from the unmarked vehicle was given by a traffic officer. This, of course, is a matter of proof.

However, sec. 346.19, Stats., requires that upon the approach of an authorized emergency vehicle giving audible signal by siren, the operator of a motor vehicle shall yield the right of way, drive to the right and stop. I conclude that this is the proper statute to invoke in the case of a driver who flees from an unmarked police vehicle.

BCL:AOH

Education; Public Lands, Commissioners Of; Legislature may direct Public Land Commissioners to invest monies from sale of public lands in student loans but may not direct a specific investment. That portion of 17 OAG 516 (1929) inconsistent with this opinion is repudiated. OAG 11-76

February 23, 1976.

NORMAN C. ANDERSON, *Speaker*
Wisconsin State Assembly

You have indicated that a special committee of the legislature is presently considering use of the school fund as a capital source for the funding of student loans provided for in sec. 39.32, Stats. You have requested my opinion whether and under what conditions the legislature may require the Commissioners of Public Lands to invest monies from the school fund in student loans.

The common school fund was created by Art. X, sec. 2, Wis. Const., as a separate trust fund under the control of the Commissioners of Public Lands. The Attorney General, Secretary of State and Treasurer of the state are designated as the commissioners by Art. X, sec. 7, Wis. Const. Their powers and duties are described in Art. X, sec. 8, Wis. Const., which provides in part:

> "... the commissioners ... shall invest all monies arising from the sale of such lands, as well as all other university and school funds, in such manner as the legislature shall provide ..."

To answer your question it is necessary to ask, first, whether the language "... and shall invest ... in such manner as the legislature shall provide ..." affords to the legislature the constitutional power to direct the Board of Commissioners of Public Lands to invest school funds in a particular manner; and second, whether the term

"invest" as used in Art. X, sec. 8, Wis. Const., may include the loaning of monies at interest to students.

The legislature has no power to alter or impair the powers and duties of the commissioners conferred by the constitution. See *State ex rel. Owen v. Donald* (1915), 160 Wis. 21, 151 N.W. 331. However, the constitutional provisions that created and specified the powers and duties of the Commissioners of Public Lands also expressly left other matters to the direction of the legislature.

Since the constitution is not a grant of powers but a limitation upon legislative power, the legislature may adopt any reasonable provisions unless prohibited by some express constitutional provision. *State ex rel. Dudgeon v. Levitan* (1923), 181 Wis. 326, 193 N.W. 499. Article X, sec. 8, does not contain any express prohibition upon the enactment of statutes directing that school fund monies be invested in a certain manner or in a particular type of investment and, in fact, it expressly directs that investments be made in a manner provided for by the legislature.

The proceedings of the constitutional convention indicate that the framers of this provision were using the word "shall" in its mandatory sense, and envisioned that the legislature would direct how investments would be made. Quaife, *The Attainment of Statehood,* (1928), p. 553. The concerns which led to the establishment of a Board of Public Land Commissioners were related almost entirely to the appraisal and the sale of land rather than matters related to investment practices. The selection of three constitutional officers as commissioners was designed as a check upon the legislative enthusiasm to sell land. Such a check was also felt to be necessary to prevent the appointment of influential private persons as commissioners who might sell land on terms favorable to themselves and their friends. However, the independence of the commissioners guaranteed by the constitutional structure was not envisioned as depriving the legislature of the power to direct the manner of investment of school funds, including those derived from the sale of school lands. 16 OAG 591 (1927).

Although the primary purpose for a constitutionally designated commission was control over land sales, the commissioners are also charged with the duty to invest the school funds. While the legislature may require investment, and may specify allowable

types of investments and procedures for investment, it is my opinion that the legislature may not remove entirely the control of the commissioners over these investments. Thus, the ultimate decision whether or not to make a specific individual investment rests with the Commissioners of Public Lands.

My conclusion as to the division of power over the investment of the proceeds from the sale of school lands and other school funds designates separate spheres of authority for the commissioners and the legislature.

> (a) The commissioners control the sale and appraisal of lands.
>
> (b) The legislature may require investment and describe the *type and manner* of investment of school fund monies.
>
> (c) The commissioners are charged with guarding the integrity of the school fund by insisting that outlays of school fund monies retain their investment character. The ultimate decision whether or not to make a *particular individual* investment rests with the Commissioners of Public Lands.

Directly following the ratification of the constitution, the legislature, in ch. 24, sec. 61, Laws of 1849, made provisions for the investment of the monies received by the school fund. Section 64 of that chapter provided that the commissioners might invest by making loans to any citizen and prescribed an interest rate of seven percent. Thus the intent was manifested that the legislature would specify the particular method and form of investment of school funds. These directions are now found in ch. 25 of the Statutes. Section 25.01, Stats., specifies those investments which are authorized for the common school fund. At present, there is no explicit statutory authorization for investment in student loans.

The Wisconsin Supreme Court has defined investment as "the placing of capital or laying out of money in a way intended to secure income or profit from its employment ..." *Brownie Oil Co. v. Railroad Commission* (1932), 207 Wis. 88, 240 N.W. 827. This definition is broad enough to include the making of loans at interest.

It should be emphasized that, although the term "investment" in Art. X, sec. 8, may be given a rather broad interpretation, it nevertheless operates to limit legislative power over school funds. Thus, to the extent that legislative enactments authorize no investments, but direct grants of school fund monies for the operation of state agencies, they violate constitutional restrictions. *State ex rel. Owen v. Donald, supra.* The placement of school fund monies must be in fact in the nature of a true investment.

You have advised that student loans under sec. 39.32, Stats., bear interest at a rate of 7 percent, and are guaranteed as to both interest and principal by the federal government. Thus, although it is conceivable that a particular type of loan might carry such a low rate of interest that it would lose its character as an investment, this does not appear to be the case with the higher educational aids loans authorized under sec. 39.32, Stats. It is therefore my opinion the legislature has the power to authorize the use of school fund monies for the student loan program.

BCL:RDR

Public Records; Register Of Deeds; Register of deeds can deny public access to so-called confidential portions of certificates of marriages and fetal deaths only on a case-by-case basis and specific reasons must be given in each case. That portion of 53 OAG 22 (1964) inconsistent herewith is withdrawn. OAG 12-76

February 25, 1976.

DANIEL G. GOLDEN, *District Attorney*
Portage County

You request my opinion whether the register of deeds may limit the right of any person to inspect and copy certificates of marriages and fetal deaths recorded in his office.

You state that a portion of State of Wisconsin Form VS-20 (Marriage) is labelled "CONFIDENTIAL INFORMATION" and that a similar section of State of Wisconsin Form VS-18 (Fetal Death) is headed "CONFIDENTIAL INFORMATION FOR MEDICAL AND HEALTH USE ONLY."

You indicate that the register of deeds has been following advice given by a former attorney general with respect to withholding portions of certificates of live births. Part of that certificate, State of Wisconsin Form VS-1, is headed: "CONFIDENTIAL INFORMATION FOR MEDICAL AND HEALTH USE ONLY." In 53 OAG 22 (1964), it was stated that much of the confidential portion of the birth record contained information furnished by the patient to the physician within the professional relationship and that the register of deeds, in furnishing a certified copy, should omit the confidential section and should indicate that the copy furnished included only the nonconfidential portion. You inquire whether the same procedure can be followed with respect to certificates of marriages and fetal deaths.

It is my opinion that the procedure suggested in 53 OAG 22 (1964) cannot be followed as a general policy but that the custodian of the record *in each case* must determine whether it is in the public interest to withhold any portion of the three certificates involved. If the custodian denies the right of inspection and copying, or denies the person seeking a certified copy access to the whole record, he must state specific reasons for his denial. The person seeking inspection or a full copy would then have a right to seek to compel furnishing of the entire document by a mandamus action. In such case the court would review the record *in camera* and determine whether the reasons given by the custodian were sufficient to deny inspection or certification of the entire record. *Beckon v. Emery* (1967), 36 Wis. 2d 510, 153 N.W. 2d 501; *State ex rel. Youmans v. Owens* (1965), 28 Wis. 2d 672, 137 N.W. 2d 47.

There is no question that certificates of marriages, births, and fetal deaths are public records, authorized by law to be registered, filed, and indexed by the register of deeds. Secs. 59.51 (7) and 69.21, Stats. He is directed to allow "any person" to examine, take notes from, or make copies of all books and papers required to be kept in his office. Sec. 59.14 (1), Stats. Similarly, sec. 19.21 (2), Stats., provides that:

> "Except as expressly provided otherwise, any person may with proper care, during office hours and subject to such orders or regulations as the custodian thereof prescribes, examine or copy any of the property or things ... [required by law to be kept by said custodian]. Any person may, at his

> own expense and under such reasonable regulations as the custodian prescribes, copy or duplicate any materials ...."

Finally, the register of deeds is authorized to furnish "any applicant a certified copy of a record ... of any birth, fetal death, death, marriage or divorce." Sec. 69.23 (1), Stats. He is also required to furnish a certified copy of any record in his office to "any person, on demand and payment of the legal fees therefor ...." Sec. 59.51 (8), Stats. Section 889.18 (3), Stats., provides for a forfeiture for any officer who unreasonably refuses to furnish a certified copy of a record when tendered the legal fee therefor.

Clearly, certificates of marriages, fetal deaths, and births, except certificates of illegitimate births (see sec. 69.30 (1), Stats.), are subject to inspection and copying by any person. The general rule of full inspection is qualified only where there are specific statutory restrictions to the contrary, or where the custodian states specific, sufficient reasons for denial of disclosure. The custodian may impose reasonable rules and regulations on the examination and copying of records. See 58 OAG 67 (1969).

Section 69.05, Stats., provides that the state registrar shall prepare forms of certificate of births, fetal deaths and marriages, among others. State of Wisconsin Form VS-20, the marriage certificate, asks for the following information under the section headed "Confidential Information": color (race); number of this marriage; whether the last marriage ended by death, divorce, or annulment; date last marriage ended; usual occupation; kind of business or industry; and information as to service in the U.S. Armed Forces. There is no statute making such information confidential and it is questionable whether a pledge of confidence would have to be used to secure any of it. All items, with the exception of information as to prior service in the U.S. Armed Forces, are required by sec. 245.18, Stats., which governs the contents of marriage certificates. It is my opinion that the register of deeds could not limit inspection or copying of that portion of the certificate unless some other special circumstance existed which would constitute sufficient reason in a given case.

Section 69.34 (1), Stats., provides that "[t]he certificate of fetal death shall contain such items as the department [of health and social services] determines are necessary ...." The portion of the fetal death certificate which is headed "CONFIDENTIAL"

calls for information on race, education of mother and father, previous deliveries, number born dead, number living, prenatal visits, whether birth was legitimate, birth weight, injuries to fetus, congenital malformations or anomalies of fetus, type of delivery and instruments and surgical procedures used, complications related to pregnancy, complications not related to pregnancy, and complications of labor.

There is no statute making such information confidential, except in the case of an illegitimate birth, where the whole certificate is confidential. Sec. 69.30 (1), Stats. That section provides that all certificate of illegitimate births shall be kept in a separate file and are subject to public inspection only on court order.

Information concerning congenital malformations is not necessarily confidential, though it is subject to limited privilege. Section 69.32 (1), Stats., requires a physician, midwife, parent, guardian or other responsible person to make a separate report to the department explaining the nature of congenital deformities. Such report is in addition to any notice required in a birth certificate. Section 69.32 (2), Stats., provides:

> "The reports, notices or explanations of all cases of congenital deformity or physical defect provided for by this section shall be treated as confidential to the extent that the name or address of the deformed or defective person shall not be published by any newspaper, magazine or other paper or publication of general or special circulation."

I am not aware of any reason why data regarding race, education of the parents, birth weight, previous deliveries, number living and born dead are confidential. It is questionable whether a pledge of confidence is necessary to secure the information as it is required by a form promulgated pursuant to statute. While medical, personal and social histories are involved, such information can, in the usual case, be withheld only if disclosure would unduly damage reputations. *State ex rel. Youmans v. Owens, supra.* The possibility of some damage to reputations or mere embarrassment would not justify withholding the information.

BCL:RJV

Licenses And Permits; Veterinarian; Veterinary Examiners, Board Of; The Veterinary Examining Board lacks authority to condition the renewal of licenses upon either reexamination or continuing education. OAG 13-76

March 12, 1976.

JOAN M. ARNOLDI, D.V.M., *Chairman*
Veterinary Examining Board

You request my opinion as to whether the Veterinary Examining Board is authorized to require veterinarians licensed in this state to furnish current evidence of competency as a condition of license renewal. This evidence would consist of either compliance with continuing education requirements established by the board or a reexamination or both.

Section 453.06 (1), Stats., provides, in material part:

> "... Veterinarians holding an existing license shall not be required to take any examination for renewal of their license. ..."

It is my opinion that sec. 453.06 (1), Stats., precludes the board from requiring reexamination as a condition of license renewal. It is also my opinion that the board lacks the authority to compel compliance with continuing education requirements as a condition of license renewal.

It is a fundamental principle of administrative law that "administrative agencies have only such powers as are expressly granted to them or necessarily implied and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds." *State ex rel. Farrell v. Schubert* (1971), 52 Wis. 2d 351, 357, 190 N.W. 2d 529. The relevant statutes here are sec. 15.08 (5), which empowers boards to make rules for the "guidance" of the trade or profession and to "define and enforce professional conduct and unethical practices not inconsistent with the law relating to the trade or profession," and sec. 15.08 (6), Stats., which directs the board to "foster the standards of education or training" of the profession. The question is whether either or both of these sections authorizes the board to require continuing education as a condition of license renewal.

Arguably, sec. 15.08 (5), Stats., could, on its face, support a rule requiring continuing education. However, in *Osco Drug, Inc. v. Pharmacy Examining Board* (1974), 61 Wis. 2d 689, 693, 214 N.W. 2d 47, the court held that the general language of sec. 15.08 (5), Stats., did not " 'necessarily impl[y]' a grant of authority to the pharmacy board to regulate advertising," because "it is clear that where the legislature has intended to control advertising in connection with a particular calling, it has expressed its intent in specific statutory language." Similarly, when the legislature has chosen to authorize an examining board to require continuing education or training, it has done so in specific language. For example, sec. 441.10 (3) (b), Stats., relating to renewal of licenses of practical nurses, provides in part that "an application for license renewal [shall include] such ... facts bearing upon [the applicant's] current competency as the board requires ...." Likewise, sec. 456.07, Stats., specifically requires continuing education as a condition of annual re-certification as a licensed nursing home administrator. In light of the holding in *Osco* and the specific statutory provisions authorizing other examining boards to require continuing education or evidence of continuing compentency, the general language of sec. 15.08 (5) cannot be interpreted to authorize the Veterinary Examining Board to impose such requirements by rule.

The board's mandate in sec. 15.08 (6), Stats., is to "foster the standards of education or training pertaining to its ... profession." The word "foster" means "to promote the growth or development of: encourage." *Webster's Seventh New Collegiate Dictionary*, p. 330 (1965 ed.). This directive falls short of supporting a continuing education requirement as a condition of license renewal particularly when viewed in light of the legislative rejection of an examination requirement for relicensure of veterinarians. Sec. 453.06 (1), Stats.

Though continuing education may be a desirable means of encouraging and evaluating professional competency, the power to require continuing education cannot be found in the present statutes. The legislature has not provided express authority to the board in secs. 15.08 (5), 15.08 (6), or ch. 453, Stats., to establish a continuing education requirement as a condition of license renewal. Nor is there any basis in these statutes to support a necessary implication of such authority. It is, therefore, my

opinion that the board presently lacks the power to condition the renewal of licenses upon continuing education.

BCL:WMS

Apprentices; Education; Apprentices indentured under ch. 106, Stats., may lawfully be charged tuition at schools in the state vocational, technical and adult education system for related instruction that apprentices must receive as a condition of their apprenticeship. OAG 14-76

March 16, 1976.

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

In light of the recently enacted tuition requirements for schools in the vocational, technical and adult education system, ch. 39, secs. 288 and 728, Laws of 1975, and in light of the fact that over 90 percent of indentured apprentices in this state attend local vocational schools in order to satisfy the related instruction requirements of their apprenticeship indentures, you request my opinion on the legality of charging such tuition to apprentices indentured under ch. 106, Stats., for such required, related instruction. Specifically, you ask:

1. Whether the tuition requirement violates the intent of sec. 106.01 (10), Stats.?

2. Whether the state can legally require that apprentices pay tuition to attend local vocational schools as a condition of their apprenticeship?

3. Whether the tuition requirement can be applied to apprentices whose indentures were approved before enactment of the tuition requirement?

4. Whether the tuition requirement applies only to students, and if so, whether it can apply to persons who are employed apprentices, as defined in sec. 106.01 (1), Stats., when attending vocational school classes?

In an earlier opinion, 64 OAG 24 (1975), I concluded that there is no constitutional prohibition against the charging of tuition for any course of instruction offered at a school in the vocational, technical and adult education system. I further concluded that the charging of such tuition, and the manner and extent whereby such charges are to be made, are policy matters which the legislature is free to determine in the exercise of its legislative power. It is my opinion, for the reasons stated below, that the legislature has established no legal impediment to the charging of such tuition to apprentices indentured under ch. 106, Stats., for the related instruction that apprentices must receive as a condition of their apprenticeship.

An apprentice, as defined in sec. 106.01 (1), Stats., is any person, 16 years of age or over, who enters into a contract whereby services are exchanged for instruction in any trade, craft or business. The contract entered into between an apprentice and an employer is known as an "indenture," sec. 106.01 (2), Stats., and must contain, *inter alia*, a requirement that the apprentice spend no fewer than a specified number of hours in related instruction. Sec. 106.01 (5) (d), Stats. The employer must pay the apprentice for time spent in such required, related instruction at the same rate per hour as for services. Sec. 106.01 (6), Stats.

Section 106.01 (10), Stats., requires:

> "... all school officers and public school teachers to cooperate with the department and employers of apprentices to furnish, in a public school or any school supported in whole or in part by public moneys, such instruction as may be required to be given apprentices."

In answer to your first question, I do not believe that the intent of sec. 106.01 (10), Stats., is violated by the charging of tuition to apprentices for instruction at vocational, technical and adult education schools. Section 106.01 (10), Stats., is a declaration of legislative intent to promote public education of persons engaged as apprentices. 31 OAG 155, 158 (1942). Publicly funded schools must cooperate in furnishing the kinds of instruction required of apprentices, but this is not inconsistent with charging apprentices tuition for the instruction they do receive.

Your second question, whether the state can legally require that apprentices pay tuition to attend local vocational schools as a

condition of their apprenticeship, assumes certain facts which are not necessarily correct. The state does require that persons who attend vocational schools pay tuition. Sec. 38.24 (1), Stats., as amended by ch. 39, Laws of 1975. The state also requires that apprentices spend a certain number of hours in related instruction. Sec. 106.01 (5) (d), Stats. It does not follow, however, that the state requires apprentices to receive such related instruction at public vocational schools which charge tuition. My predecessors have pointed out that the question of which school an apprentice should attend is to be decided by agreement between the apprentice and the employer, 18 OAG 177, 178 (1929), subject to the approval of the department. 40 OAG 248, 250 (1951); Ind 85.01 (3) and 85.08 (2), Wis. Adm. Code. Granting, however, that the vast majority of apprentices do in fact attend public vocational schools to receive the related instruction required by sec. 106.01 (5) (d), Stats., and their indentures, I believe that the state may lawfully require such apprentices to pay the tuition charges, and at the same time, require them to attend a minimum number of hours of related instruction.

In answer to your third question, whether an indenture was entered into before or after enactment of the tuition requirement has no legal bearing on the state's power to enact the tuition requirement. The state lawfully can apply its tuition requirement to apprentices whose indentures were made and approved before imposition of the requirement. Moreover, any unanticipated difficulty or expense to the apprentice, resulting from the tuition requirement, is not likely to relieve the apprentice from his or her indenture. *cf. Clune v. School District* (1918), 166 Wis. 452, 166 N.W. 11, 6 A.L.R. 736. If the apprentice is unable or fails to complete the instruction required by the indenture, the department may declare the indenture at an end. Sec. 106.01 (5j), Stats.

Your fourth and final question asks, in essence, whether employed apprentices who are paid for the hours they attend vocational schools are somehow exempt from student tuition charges by virtue of their paid, employment status. I am of the opinion that they are not. Section 38.24 (1) (c), Stats., as amended by ch. 39, Laws of 1975, exempts from the tuition requirement for vocational adult programs those students enrolled in adult high school, adult basic education and English as a second language. There are no other exceptions to the tuition

requirement. It is a basic rule of statutory construction that where there is an express exception in a statute, the statute applies to all other cases not excepted and no other exceptions will be read into it. *In Re Monks Club, Inc.* (1964), 64 Wash. 2d 845, 394 P. 2d 804, 807. Accordingly, since those classes of persons specifically exempted from the tuition requirement do not include apprentices, I believe that such requirement is applicable to apprentices regardless of the fact that they are paid by their employers for the time they spend in vocational school instruction.

It may be that there is a reasonable basis for exempting apprentices as a class from the tuition requirement. 31 OAG 155, 158-159 (1942). Nonetheless, it is for the legislature to determine whether tuition should be charged at schools in the vocational, technical and adult education system, and which classes of persons should be exempted from any tuition requirement.

BCL:DCR

County Board; Public Health; A county board has the power to reduce membership on a sec. 51.42 board from fifteen to nine, but must do so by abolishing the offices of specific members as their current terms expire. OAG 16-76

March 16, 1976.

JOSEPH SALITURO, *Corporation Counsel*
Kenosha County

You state that in 1972 Kenosha County, by board resolution, established a Community Mental Health, Mental Retardation, Alcoholism and Drug Abuse Board, hereinafter referred to as a sec. 51.42 board, consisting of fifteen members. In early 1975 the county board, by resolution, reduced the number of members from fifteen to nine. The county board *chairman* subsequently appointed nine members to serve on the new board. There was no formal action abolishing the first board and creating a new board. One of the members who served on the fifteen-member board, and who was not appointed to the new board, claims that he has a right to continue to serve.

You request my opinion whether an individual member of the original sec. 51.42 board remains a member of that board under these circumstances. It is my opinion that he does.

It appears to me that further action by the county board will be necessary to rectify the situation. Under sec. 51.42 (4), Stats., appointments to the board are to be made by the county board and the county board chairman has no power to appoint. The nine members he has appointed have at most a *de facto* status. Assuming that a member of the fifteen-member board was legally appointed, he has a right to serve until his term expires and a successor is legally appointed, unless:

1. he is removed for cause by a two-thirds vote of the county board pursuant to sec. 51.42 (4) (d), Stats., or

2. his office becomes vacant upon the occurrence of an event specified in sec. 17.03, Stats., or

3. the sec. 51.42 board is legally abolished by resolution of the county board.

The power of a county board to abolish, reestablish or transfer duties of any board or commission under sec. 59.025 (3), Stats., is in part limited by reason of sec. 59.025 (2), Stats., which provides that powers granted:

> "... shall be limited only by express language *but shall be subject to* the constitution and *such enactments of the legislature of statewide concern as shall with uniformity affect every county.* ..." (Emphasis added.)

The provisions of sec. 51.42, Stats., including subsec. (1), make it clear that the structure and powers of such board are a matter of statewide concern. The uniform effect of the statute is not disturbed by separate provisions for counties with population over 500,000, or by the fact that establishment of such board is optional under sec. 51.42 (3) (a), Stats. *Thompson v. Kenosha County* (1974), 64 Wis. 2d 673, 687, 688, 221 N.W. 2d 845.

If a county board no longer wishes to participate in the programs under sec. 51.42, Stats., it may, pursuant to sec. 59.025 (2) and (3), Stats., totally abolish the sec. 51.42 board in that county. However, a county board may not abolish a sec. 51.42 board and transfer its functions to another agency not created by statute. See 63 OAG 580 (1974).

A county board is without power to abolish the entire board and reestablish a new nine-member board for the primary purpose of membership change. However, a county desiring to continue the sec. 51.42 board, but reduce its size may do so by a resolution abolishing offices held by specific members. Nevertheless, the board may not be reduced to less than nine members. Sec. 51.42 (4) (b), Stats.

If the sec. 51.42 board were to be reduced by six members, it would be appropriate to abolish the offices of two members in each of the three classes of membership; that is, those with three years, two years and one year, respectively, remaining of their terms. In this way, the reduction to a nine-member board would take place over a period of years. In doing so, however, care must be taken to ensure that there continues to be representation from each of the mental disability interest groups specified in sec. 51.42 (4) (b), Stats.

BCL:RJV

Constitutional Law; Legislature; The legislature has the duty to resubmit a proposed constitutional amendment to the people when the previous election at which the amendment was submitted has been voided by court order, notwithstanding the fact that an appeal has been taken from the order voiding the election. OAG 17-76

March 19, 1976.

FRED A. RISSER, *Senate President Pro Tem.*
Chairman, Senate Organization Committee

NORMAN C. ANDERSON, *Speaker of the Assembly*
Member, Assembly Rules Committee

You state that a proposed constitutional amendment relating to internal improvements for transportation facilities was approved by a majority of each house of the 1973 and 1975 legislatures and then submitted to a vote of the people in April, 1975.

You further state that the election has been voided by the Dane County Circuit Court and that the order of the court has been appealed and stayed in part by the circuit court.

You therefore ask my opinion:

> "Is it now the duty of the current Legislature to prescribe a new date (November 1976) to resubmit the proposed amendment to the people as provided in Article XII, section 1 of the Wisconsin Constitution?"

Article XII, sec. 1, Wis. Const., requires the legislature "... to submit ... proposed ... amendments to the people in such manner and at such time as the legislature shall prescribe ...."

The question then is whether the legislature has already complied with this constitutional mandate by submitting the proposed amendment to the people in April, 1975.

In order to answer this question, it is necessary to determine the effect, if any, of the circuit court's order and of the appeal taken therefrom. That is, it is necessary to determine whether the order or appeal in any way nullifies the legislature's prior action, leaving it with a continuing duty to resubmit the proposed amendment to the people.

In *State ex rel. La Follette v. Kohler* (1930), 200 Wis. 518, 549, 228 N.W. 895, 69 A.L.R. 348, it was held:

> "... In cases where ... it [is] impossible to ascertain the true result of the election, there was held to be no election, or, as the phrase goes, 'the election was held void.' ..."

And, on page 550, *id.*, the court held:

> "... The general feature of these laws is that ... where a candidate for an office violates ... the law his election thereto shall be void; that is, it shall be no election...."

By voiding the April, 1975, transportation facilities referendum election, therefore, the court has declared that there was no election. In view of this, the legislature cannot, as yet, be said to have complied with the constitutional mandate to submit the proposed amendment to the people. The effect of the order voiding the election, therefore, is to nullify the legislature's previous submission of the proposed amendment to the people, leaving the legislature with a continuing duty to resubmit the proposed amendment to the people and to prescribe the manner and time of such submission.

As you indicate, an appeal to the Wisconsin Supreme Court has been taken from the whole of the circuit court's order, and a part of the order has been stayed by the circuit court. Specifically, the stay has been granted by the circuit court only of that part of the order relating to the destruction of paper ballots. The stay does not affect the order insofar as it voids the election. Therefore, it has no effect on the question of whether or not the legislature is obliged to resubmit the proposed amendment to the people.

The appeal, however, as indicated, has been taken from the whole of the order, including that part which voids the election.

In *Slabosheske v. Chikowske* (1956), 273 Wis. 144, 153, 77 N.W. 2d 497, the court held that, in the absence of positive statutory provisions to the contrary, an appeal perfected as the law requires, does by its own force stay proceedings under the order appealed from. However, the court also held that such a stay merely stays the proceedings of the court which made the determination sought to be reviewed and does not affect the order itself. *Id.* at 154.

The court in *Slabosheske* held that an appeal from a judgment of the circuit court, holding that a school district referendum election was valid, operated to stay the execution of the judgment of the trial court but that the appeal did not nullify the judgment.

Hence, although a stay has been effected in this case by the appeal itself, the stay does not nullify the order voiding the election but operates only against its enforcement; that is, it only prevents further proceedings in the subordinate court in the action in which the order was rendered. *Slabosheske, supra,* at 154; 4 Am. Jur. 2d, *Appeal and Error,* sec. 371, p. 845; 4A C.J.S., *Appeal and Error,* sec. 632, p. 431.

Furthermore, as stated in 4A C.J.S., *Appeal and Error, id.,*

> "... it is generally held that, as a ... [stay] has the effect of merely staying proceedings without destroying the force and effect of the judgment and leaves the proceedings in the condition in which it finds them, a judgment, order, or decree which does not command or permit any act to be done, or is not of a nature to be actively enforced by execution or otherwise, but is self-executing, is not ... [stayed] ...."

This general rule that self-executing orders cannot be stayed is applicable to orders in election contests. 4A C.J.S., *Appeal and Error, supra,* at 433. As stated in 4 Am. Jur. 2d, *Appeal and Error,* sec. 379, p. 850,

> "Where judgments of the court in an election contest are reviewable by appeal ... the judgment is generally viewed as self-executing and therefore cannot be stayed ...."

Hence, the order of the circuit court voiding the April, 1975, transportation facilities referendum election is unaffected by the appeal and remains in full force and effect.

Therefore, it is my opinion that the legislature has a continuing duty, pursuant to Art. XII, sec. 1, Wis. Const., to resubmit the proposed constitutional amendment relating to internal improvements for transportation facilities to the people in such manner and at such time as the legislature shall prescribe.

I am not unmindful of the chance that the Supreme Court may either reverse the circuit court or find that the circuit court had no jurisdiction to act, in which case the April, 1975 election would be reinstated. However, I must base my advice on the facts as they currently exist and the legal precepts that govern under the current facts.

BCL:JJG

Highways; Municipalities; The word "highway," as used in secs. 343.05 (1) and 343.44 (1), Stats., does not include public parking lots. OAG 19-76

March 24, 1976.

JAMES WENDLAND, *District Attorney*
Dunn County

You have asked whether a person must have a driver's license to drive a motor vehicle on a public parking lot. The answer to your question depends upon whether a free municipal parking lot is a highway as defined in sec. 340.01 (22), Stats., for the purpose of enforcement of secs. 343.05 (1) and 343.44, Stats. In my opinion it is not.

Section 343.05 (1), Stats., provides in part:

> "... no person shall operate a motor vehicle upon a highway in this state unless such person has a license issued to him by the division..."

Also sec. 343.44 (1), Stats., provides in part:

> "No person whose operating privilege has been duly revoked or suspended pursuant to the laws of this state shall operate a motor vehicle upon any highway in this state..."

Section 340.01 (22), Stats., defines the word highway as used in chs. 340 to 349, Stats., in part as follows:

> " 'Highway' means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel...."

Within the meaning of this definition a public parking lot could be regarded as being a part of a public way. As such, a parking lot would be a highway.

If this conclusion were correct, the rules of the road, ch. 346, Stats., would be applicable to public parking lots. See sec. 346.02 (1), Stats. But this is not the case. Section 346.61, Stats., specifically provides that the traffic regulations relating to reckless and drunken driving are applicable to conduct upon highways *and* "upon all premises held out to the public for use of their motor vehicles, whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof." It seems clear that this language is intended to make these particular rules of the road applicable also to parking lots. A similar provision is found in sec. 346.66, Stats., which makes accidents occurring in parking lots reportable as required by sec. 346.70, Stats. If public parking lots were highways, these statutes, making selected rules of the road applicable in parking lots, would be unnecessary, because the rules of the road apply on highways.

Further and highly persuasive evidence of legislative intent that public parking lots are not highways for the purpose of enforcement of ch. 346, Stats., generally, is found in the committee note to sec. 346.61, Stats.:

> "Most provisions of this chapter are applicable only upon highways. This section gives the sections relating to reckless and drunken driving somewhat broader applicability. They will apply in such areas as parking lots, filling stations and loading platforms." 40 Wis. Stats. Ann. 361, Legislative Committee Notes (1957) to sec. 346.61, Stats.

Moreover, for many years it has been the position of the Division of Motor Vehicles that a driver's license is not necessary to drive a motor vehicle in a public parking lot. This practical, long-continued construction of the law by the administrators charged with the duty of applying it is entitled to great weight in determining the meaning of the statute. *Trczyniewski v. Milwaukee* (1961), 15 Wis. 2d 236, 112 N.W. 2d 275.

It is, therefore, my opinion that the legislature did not intend the word "highway," as used in secs. 343.05 (1) and 343.44 (1), Stats., to include public parking lots. However, this would not be applicable to any part of a parking lot dedicated and used as a road or street.

BCL:AOH

Law Enforcement; Municipalities; Under sec. 66.30, Stats., a county may contract to furnish certain law enforcement services to cities, villages and towns within the county but cannot take over *all* law enforcement functions. A deputy sheriff may not be designated as a city police chief. OAG 20-76

March 25, 1976.

DAVID B. DEDA, *District Attorney*
Price County

You state that the fourth-class cities of Park Falls and Phillips are considering disbanding their police departments and propose contracting with Price County for the furnishing of police services. It is suggested that such services could be provided by the sheriff's department.

Your first question is whether a county may contract with cities, towns and villages for the furnishing of law enforcement services in such municipalities.

The answer to this broad question is "yes." However, a county cannot take over *all* law enforcement duties within such municipalities.

It was stated in 58 OAG 72 (1969), that there is some latitude under sec. 66.30, Stats., for counties to contract with municipalities within the county to furnish or supplement certain law enforcement services in the respective municipalities. It was suggested that before entering into any cooperative arrangement the parties should consider the availability of provisions for mutual assistance between law enforcement agencies. See secs. 66.305 and 66.315, Stats.

However, the power to contract for the furnishing of certain law enforcement services is, under sec. 66.30, Stats., limited to those areas where each municipality has separate statutory authority to perform the same particular act. In my opinion, neither of the municipalities involved could abolish any of the offices they are required to have by the constitution or applicable statute.

In 60 OAG 85 (1971), it was stated that there is no present legal authority by which a county, even when acting with the consent of cities, towns and villages within it, could create a metropolitan police agency to serve all of the law enforcement needs within such county. Any power to create such an agency, which would greatly alter the respective powers and duties of sheriffs, chiefs of police, police, constables and, in some degree, those of the county board, city councils, village and town boards, must come from the legislature. Also see 61 OAG 79 (1972).

You next inquire whether each city may designate a county deputy sheriff as chief of police per 62.09 (1), Stats., if such county take-over were permitted by sec. 66.30, Stats. The answer is "no."

Section 62.09 (1) (a), Stats., requires each city to have a chief of police. It is not an office which can be dispensed with under sec. 62.09 (1) (b), Stats. Furthermore, I believe that the offices of chief of police and deputy sheriff are incompatible. See 58 OAG 247 (1969). Section 62.09 (13) (a), Stats., provides that "The chief of police shall have command of the police force of the city under the direction of the mayor. It is his duty to obey all written orders of the mayor or common council. ..." A deputy sheriff is appointed by the sheriff under sec. 59.21, Stats., and is primarily under the direction and supervision of the sheriff.

Finally, you ask whether a section of the jail must be designated as the city, rather than county, jail as per 62.09 (13) (b), if such county take-over were permitted by 66.30, Stats.

Although a city may have a jail, I am aware of no statute requiring a city to have one. However, sec. 66.508, Stats., permits construction and operation of a county-city safety building which can contain a jail. Applicable in all cases where the city maintains a jail is sec. 62.09 (13) (b), Stats., which provides:

> "(b) The chief of police shall have charge of all city jails, including that portion of any jail which is used by the city in a joint city-county building."

Section 59.68 (1), Stats., provides that each county shall provide a jail at the county seat. *Green County v. Monroe* (1958), 3 Wis. 2d 196, 201, 87 N.W. 2d 827. Section 59.23 (1), Stats., provides that the sheriff shall "take the charge and custody of the jail maintained by his county and the persons therein ...." Where it is proper for a city to incarcerate persons in a jail in a building owned and operated by the county which is not a joint city-county building, I am of the opinion that no portion of the facility need be denominated a city jail and that the sheriff has the sole duty of charge and custody of the jail and the persons therein.

BCL:RJV

Liability; Public Health; Liability, reimbursement and collection for services provided under secs. 51.42 and 51.437, Stats., programs discussed. OAG 22-76

April 13, 1976.

GLENN L. HENRY, *Corporation Counsel*
Dane County

You have asked my opinion about several aspects of liability, reimbursement and collection for services provided by boards established under secs. 51.42 and 51.437, Stats. These boards are commonly known as community mental health, mental retardation, alcoholism and drug abuse services boards, and community developmental disabilities service boards, respectively. Several of the issues you have raised are discussed in 63 OAG 560 (1974).

Your first question is whether certain statutory provisions relating to legal settlement apply to programs established under secs. 51.42 and 51.437, Stats. Although the resolution of this issue is complicated by conflicting statutes, it is my opinion that the concept of legal settlement is alien to the operation of these programs.

Sections 46.10 (maintenance of inmates or outpatients at public institutions), 51.09 (1) (b) (drug addicts), 51.10 (2) (voluntary admissions for mental illness), and 51.45 (16) (d) (prevention and control of alcoholism), Stats., retain references to determination of and liability based upon legal settlement. All of these references predate the establishment of 51.42 and 51.437 boards, which changed the entire approach to the admission, commitment and treatment of those in need of services authorized by those statutes.

I have concluded that the concept of legal settlement is not applicable to any of the services provided through the boards. There are at least three reasons which require this conclusion. First, the elaborate provisions under which these boards operate contain no reference to legal settlement. Reimbursement to the boards for services provided or purchased is based upon a grant-in-aid system whereby the state agreed to pay 60 percent of the approved budget in 1974 and 100 percent in 1975, both amounts subject to the limitations placed upon the state's appropriation under sec. 20.435 (2) (b) and (2) (c), Stats. With the repeal and recreation of secs. 51.42 (8) and 51.437 (8), Stats., by ch. 39, Laws of 1975, the Department of Health and Social Services is committed to funding these programs essentially on a per-capita basis beginning July 1, 1975. The concept of legal settlement is inconsistent with this form of cost sharing.

Second, sec. 51.08, Stats., which contained formulas for reimbursement to counties based on legal settlement, was repealed by ch. 90, Laws of 1973. There is no longer any mechanism for determining eligibility for reimbursement based on legal settlement.

Third, sec. 51.002, Stats., now provides that any person committed under ch. 51 (mental health act) shall be committed under the care and custody of a 51.42 or 51.437 board unless the person is a nonresident of the state. In that case, commitment is

made through the Department of Health and Social Services. Those sections which retain references to determinations of legal settlement anticipate direct commitments by a judge to a particular facility rather than to a board as is now required. Therefore, any finding of legal settlement made by a judge pursuant to these sections has no legal effect on collection by the boards.

Under the former system for admission and treatment of the mentally ill, persons without legal settlement in any county were denominated state-at-large charges for which the state assumed the entire cost of treatment. There is no longer a state-at-large charge because the state has provided grants-in-aid regardless of the patient's legal settlement. The only situation presently approximating a state-at-large case is the commitment or admission of a person who is a nonresident of the state. Such a person is enrolled by the Department of Health and Social Services, and the state assumes the entire liability. The reference to nonresidents in sec. 51.002, Stats., is a further indication that legal settlement determinations were not intended to play a part in the 51.42 and 51.437 programs.

I reach this conclusion despite the general rule that repeals by implication are not favored in the law. An exception to this general rule is made if the earlier act is so manifestly inconsistent and repugnant to the latter act that they cannot reasonably stand together. *Pattermann v. Whitewater* (1966), 32 Wis. 2d 350, 356, 145 N.W. 2d 705; *Kienbaum v. Haberny* (1956), 273 Wis. 413, 420, 78 N.W. 2d 888. Moreover the rule of statutory construction that a later enacted statute prevails over and supersedes the earlier one so far as they are repugnant and irreconcilable is applicable here. *State ex rel. Mitchell v. Superior Court* (1961), 14 Wis. 2d 77, 79, 109 N.W. 2d 522; *Abdella v. Abdella* (1954), 268 Wis. 127, 130, 66 N.W. 2d 689.

A study of the legislative history of the current law discloses that at no point in the development of the programs under secs. 51.42 and 51.437, Stats., did the legislature contemplate contracting with counties for recovery of funds based on legal settlement.

It is worth noting that, according to the Department of Health and Social Services, no request for legal settlement adjustments

has been received from any county since the establishment of these boards. In contrast, the department received hundreds of requests before the changes discussed herein were effective. This is an acknowledgement by the several counties that no mechanism is available to file legal settlement claims.

The retention of the references to legal settlement in the sections mentioned at the outset of this opinion can best be explained as a "legislatively dropped stitch." See *Scharping v. Johnson* (1966), 32 Wis. 2d 383, 394, 145 N.W. 2d 719. Failure to change all such references is significant only in pointing out the complexity of this gradual conversion to a new system for treating persons afflicted with various mental illnesses. This process already has resulted in several amendments since the 51.42 and 51.437 boards were established.

Your second question is whether or not a person must be a legal resident of the county in order to obtain these services or whether it is enough that he physically reside within the county. The Department of Health and Social Services has taken the position that boards should adopt the definition of "residence" found in sec. 49.10 (12) (c), Stats. Legal residence as defined therein is the voluntary concurrence of physical presence and intent to remain, physical presence being prima facie evidence of intent to remain. I agree with the department's position subject to the admonition that this rule, which substantially codifies the common law rule, creates a rebuttable presumption.

It is often difficult to determine residence of an individual who requires emergency care. Though sec. 51.002, Stats., requires committing or admitting patients under the care and custody of a board, as a practical matter emergency patients are committed by judges directly to a particular facility, or directly admitted by a facility. Such action can be justified by the impracticability of physicially transferring a person in need of immediate emergency care to his county of residence for enrollment under the care and custody of the appropriate board. In order to comply with the letter and spirit of sec. 51.002 and the entire mental health act as revised, information concerning the person's place of residence should be procured at the earliest possible time. Thereafter, the appropriate board should be instructed to enroll such person in its program. That board then would be liable for the cost of care and treatment.

Where counties act jointly, the Department of Health and Social Services is required to approve cooperative agreements pursuant to sec. 51.42 (3) (c), Stats. Such agreements do not always contain provisions for division of liability. The department has left this matter to the discretion of the counties under both secs. 51.42 and 51.437 and, in turn, the counties usually work out an agreement on a comparative population basis.

In all commitments or admissions, every effort should be made to resolve differences of opinion relative to an applicant's place of residence as soon as possible. I am hereby suggesting to the Department of Health and Social Services that a need exists for prompt legislative action to establish a method for resolving such disputes. Although other methods might be available, the procedures formerly used in legal settlement disputes would appear workable.

Finally, you ask whether a board may refuse care to an eligible person because funds to be provided by the state are insufficient to cover all eligible persons in the county. Under sec. 51.42, Stats., the primary responsibility for these programs rests with the respective counties. Boards established under sec. 51.437 are funded pursuant to sec. 51.42 (8). See sec. 51.437 (8), as amended by ch. 39, Laws of 1975. Formerly, the state's financial involvement was limited to secs. 51.42 (8) (c) and 51.437 (8) (c), Stats. Under these statutes, the department agreed to provide an appropriation by way of a grant-in-aid of 60 percent in the year 1974 and 100 percent beginning January 1, 1975. The latter provision was repealed by ch. 39, Laws of 1975. Section 51.437 (8) was repealed and recreated to provide that 51.437 boards shall be funded pursuant to sec. 51.42 (8). That subsection contains a new formula for both programs, effective July 1, 1975, based upon per-capita considerations.

Both the repealed subsections and the existing provisions expressly limit state funding to that "within the limits of the appropriation" under sec. 20.435 (2) (b) and former sec. 20.435 (2) (c). Therefore, these grants-in-aid constitute assistance in defraying the costs of meeting the counties' obligation. There never has been any guarantee that full funding would be available at the state level for all eligible persons.

The appropriations under sec. 20.435 (2) (a) and former sec. 20.435 (2) (c) always have provided for a sum certain amount. When that amount is expended, the authority of the department to reimburse counties for such services is extinguished. The department cannot increase the appropriation set by the legislature. As set forth under Art. VIII, sec. 2, Wis. Const.: "No money shall be paid out of the treasury except in pursuance of an appropriation by law. ..."

Finally, it is well established that the legislature may properly impose new duties involving financial obligations upon counties without providing any appropriation whatsoever on the theory that the county is a political subdivision or agency of the state. *Columbia County v. Wisconsin Retirement Fund* (1962), 17 Wis. 2d 310, 116 N.W. 2d 142. Thus, where the legislature has imposed on the counties an absolute duty to carry out a program, and the state's grants-in-aid are not sufficient for full funding, the counties bear the responsibility for funding those programs.

BCL:DPJ

Municipalities; Schools And School Districts; A City Health Department may inspect and license public school lunchrooms pursuant to a specific ordinance even though sec. 160.01 (3), precludes public school lunchrooms from regulation as restaurants by the Department of Health and Social Services and its designated agents.

The authority in the Department of Public Instruction, under sec. 115.33, Stats., to ensure a sanitary facility is not precluded by sec. 160.01 (3), Stats. OAG 23-76

April 13, 1976.

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

You ask my opinion as to whether sec. 160.01 (3), Stats., removes the authority of the Health Department of the City of Milwaukee, as local agent for the Department of Health and Social Services, to inspect public school lunchrooms.

Section 115.345, Stats., as created by ch. 190, Laws of 1973, authorizes school districts, with the approval of the Superintendent of Public Instruction, to establish programs to provide the opportunity for elderly persons to participate in the school lunch program. A number of school districts, including Milwaukee, apparently had already implemented some type of program furnishing meals to elderly persons prior to passage of ch. 190. Hence, sec. 6 of such chapter reads as follows:

> "APPLICABILITY. This act shall have no effect upon school districts which are carrying on food services programs for the elderly on the effective date of this act. However, the superintendent shall approve such programs before state aid may be disbursed under this act. No retroactive payments may be made."

Mr. George A. Kupfer, Superintendent of the Bureau of Consumer Protection and Environmental Health, City of Milwaukee Department of Health, has informed me that private school lunchrooms are included within the department's restaurant inspection and licensing program. For purposes of the instant question, I presume that the City Health Department is acting as a designated agent for the State Department of Health and Social Services pursuant to such department's authority to designate an agent for the enforcement of ch. 160. See sec. 160.03 (6), Stats. Mr. Kupfer further informs me that neither the state nor the city has maintained the inspection or licensing program in public schools because of the principle that a statute imposing license fees does not apply to state public agencies, unless the intent is clearly expressed. See 46 OAG 211, 212 (1957); 53 C.J.S. 558.

Chapter 190, Laws of 1973, amended the definition of "restaurant" of sec. 160.01 (3), Stats. (1971), to exclude "any public school lunchroom." As of the effective date of ch. 190, April 30, 1974, the Department of Health and Social Services, by virtue of such amendment, lost whatever control it had over public school lunchrooms unless sec. 6, quoted above, is construed to continue such control. It is my opinion that neither the Department of Health and Social Services nor the Health Department of the City of Milwaukee, as agent for the Department of Health and Social Services, has authority over public school lunchrooms in the City of Milwaukee by virtue of the present ch. 160, Stats.

Section 6, previously quoted, provides that food service programs not in compliance with ch. 190, but initiated prior to the effective date of such chapter, may be continued. The apparent intent of such section was to allow school districts the flexibility of continuing prior instituted programs of food service for the elderly with the specific condition, however, that approval of the Superintendent of Public Instruction of such programs is necessary to receive state aid.

For example, sec. 115.345, Stats., provides that the new food service programs must provide at least one meal per day for each day that the school is in regular session. If, however, a school district had been conducting a food service program prior to passage, which program provided for the serving of meals only three days a week, this program could be continued in such form regardless of the new, more stringent requirements. It would be unreasonable to construe sec. 6 of ch. 190, Laws of 1973, to require public school lunchrooms in districts beginning programs for the elderly before the effective date of ch. 190, Laws of 1973, to be subject to regulation as restaurants while those conducting the same or similar programs instituted after such date not to be subject to the regulation. Section 6 of ch. 190 states that the act shall have no effect upon school districts, not that it shall have no effect upon the regulatory powers of the Department of Health and Social Services and its designated agents. By amendment of sec. 160.01 (3), Stats. (1971), the legislature excepted "any public school lunchroom" from the definition of "restaurant" and your department is thereby precluded from regulating public school lunchrooms under sec. 160.02, Stats.

The City of Milwaukee does, however, have authority independent of ch. 160, Stats., to act in the area of health regulation. Section 62.11 (5), Stats., adopted by Milwaukee as sec. 6.04, Milwaukee Charter, provides as follows:

> "(5) POWERS. Except as elsewhere in the statutes specifically provided, the council shall have the management and control of the city property, finances, highways, navigable waters, and the public service, and shall have power to act for the government and good order of the city, for its commercial benefit, and for the health, safety, and welfare of the public, and may carry out its powers by license, regulation, suppression, borrowing of money, tax levy, appropriation, fine,

> imprisonment, confiscation, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants, and shall be limited only by express language."

Having such authority to establish regulations and licensing programs for the promotion of public health, the concern then is whether such an exercise of the city's police power is applicable to public schools.

In *Hartford Union High School v. Hartford* (1971), 51 Wis. 2d 591, 187 N.W. 2d 849, the City of Hartford attempted to impose its municipal building code on the construction of a public high school by the Hartford School District. The municipal building code required the purchase of a building permit by the school district prior to construction. This attempt to impose a local building code and collect a building permit fee is analogous to the instant question, that of imposing local food service regulation and license requirements on public school lunch programs.

The court approached the sovereign immunity problem at p. 593 with this introduction:

> "In many of the cases in other jurisdictions the courts have decided this ever-recurring conflict between school districts and municipalities solely on the basis of whether education in that jurisdiction was a state function and if so, sovereign immunity completely protected the school district from municipal building regulations. The more modern approach to the problem admits the building of public schools is a part of education and may be a state function but recognizes immunity of the school district, not because of sovereignty but because the state has affirmatively acted in such a comprehensive manner as to pre-empt the area and thus exclude any application of police power by a municipality whether under home rule or otherwise. ..."

Thereafter the court thoroughly examined the question of preemption and decided as follows at p. 599:

> "We hold that while the state building code is comprehensive, there was no intention on the part of the state to pre-empt the field and public buildings including public and private schools must conform thereto and to such local

> building codes as are not inconsistent therewith. We would think a school district would be anxious to conform to local building codes and to co-operate with local building inspectors for the safety of the public and especially the children who are required to use such buildings. There is no doubt that the state of Wisconsin has the constitutional power to prescribe standards regulating school construction and can entirely pre-empt the field so as to deprive municipalities of any voice in these matters, but it has not done so. Therefore, the school district was properly required to pay a building permit fee and accept the inspection of its addition to the high school."

An argument could be made in the instant situation that the state had preempted the regulation, and that by dropping public schools from the definition of "restaurant," the legislative intent was to preclude both the state and cities from regulating this area.

However, applying the analysis used in *Hartford*, I find no indication of legislative intent to completely preempt the entire area of regulation of food service. Thus, the removal of public school lunchrooms from the definition of "restaurant" in ch. 160, Stats., does not in my view preclude the city from inspecting public school lunchrooms. On the contrary, such inspection is now on firmer ground since the question of preemption by the state is removed. The removal of public schools from the definition of "restaurant" does not preclude the Department of Public Instruction, after complaint, from inspecting the lunchroom facility to ensure that it is not "... in such condition as to endanger the lives or health of the pupils ...." Sec. 115.33, Stats.

There is further evidence to show that both state and local health officials are intended to be active in public schools. Sections 141.01 (6) (b) and 141.015 (8), read together, require the local health officer under the direction of the district health officer to "make a sanitary inspection periodically of all school buildings ... and report thereon to those responsible for the maintenance thereof." I conclude therefore that the Milwaukee City Health Department can be empowered by specific ordinance to inspect and license public school lunchrooms.

BCL:WMS

Discrimination; Pharmacy; The state and local units of government are not "purchasers" under sec. 100.31, Stats., and sellers of drugs are not prohibited from offering or according to them pricing arrangements which are not made available to other purchasers. OAG 27-76

April 23, 1976.

ROBERT DUNN, *Secretary*
Department of Administration

This is in reply to your letter dated April 21, 1976, requesting my opinion as to the application of sec. 100.31, Stats., created by ch. 168, Laws of 1975, to purchases of drugs made by the state and local units of government.

In general, sec. 100.31 requires a seller of drugs to make available to all purchasers the same price schedules, trade discounts and promotional allowances as the seller offers or grants to its most favored purchaser. A seller who violates the law may be subjected to actions for treble damages brought by purchasers to whom the same prices and related trade opportunities are not made available.

Section 100.26 (1), Stats., provides that a violation of sec. 100.31 constitutes a misdemeanor. Since a criminal offense is involved, a strict construction of sec. 100.31 is required and any ambiguity therein should be resolved in favor of potential violators.

Section 100.31 (1) (c) defines "purchaser" as "any person who engages *primarily* in selling drugs *directly* to consumers" (emphasis added).

It is an established principle that the antitrust laws, which include price discrimination laws, are to be construed liberally, and that the exceptions from their application are to be construed strictly. *Abbott Laboratories, et al. v. Portland Retail Druggists Assn., Inc., et al.* (March 24, 1976), 96 S.Ct. 1305 (1976), 1976-1 Trade Cases paragraph 60,781. In construing price discrimination laws, the federal and state courts consistently have stated that the legislative purpose of such laws is to curb and prohibit all devices by which large buyers gain discriminatory preferences which give

them unfair competitive advantages over smaller ones by virtue of their greater purchasing power. However, it seems unlikely, for reasons discussed below, that either the state or local units of government will be substantial competitors of the private sector in the retailing of drugs to consumers.

The main question is whether the state, or local units of government, are purchasers engaged *primarily* in selling drugs *directly* to consumers. The answer to this ultimately must be determined on the basis of the specific facts involved. However, appropriate guidelines, which will protect the public treasury, concerned sellers and competing retailers, are found in the recent decision of the United States Supreme Court in *Abbott Laboratories, supra.* In that case, a group of commercial pharmacies brought action against 12 drug manufacturers, charging that by selling drugs to certain hospitals, each of which had a pharmacy, at prices lower than those charged to the plaintiffs, the defendants violated the federal price discrimination law. The main issue was whether the challenged sales were exempt under the Nonprofit Institutions Act, which excludes from the application of the price discrimination law purchases of supplies by nonprofit institutions and organizations "for their own use."

Section 100.31 does not contain any express exemption for drug purchases made by any governmental body or nonprofit institution. However, it is my opinion that the same standards as the court used in determining what drug purchases were for the hospitals "own use" in the *Abbott Laboratories* case, also should be followed in determining whether or not the state or any local unit of government is a purchaser engaged "primarily in selling drugs directly to the public" under sec. 100.31, Stats.

Drug purchases made by state and local governmental bodies ordinarily are intended for use in the care of patients in publically funded institutional operations and public health care facilities. Drugs used therein usually are not sold directly to the patient but, rather, are dispensed in the course of providing a health care service. Accordingly, applying the reasoning of the *Abbott Laboratories* case, drug purchases by the state and local units of government are exempt from sec. 100.31 if the drugs are dispensed:

1. To the inpatient for use in his treatment at the health care facility. (An inpatient is one admitted for at least overnight bed occupancy.)

2. To the patient admitted to an emergency facility for use in the patient's treatment there.

3. To the outpatient for personal use on the health care facility premises. An outpatient is one, other than an inpatient or a patient admitted to the emergency facility, who receives treatment or consultation on the premises.

4. To the inpatient, or to the emergency facility patient, upon his discharge and for his personal use away from the premises.

5. To the outpatient for personal use away from the premises.

6. To the health care facility's employe or student for personal use or for the use of his dependent.

7. To the physician who is a member of the health care facility's staff, but who is not its employe, for personal use or for the use of his dependent.

Section 100.31 also would not apply to drugs furnished without charge by a governmental agency as part of any other type of public health program.

Purchases by the state and local units of government for the following types of dispensation are not exempt if they are sold:

1. To the former patient, by way of a renewal of a prescription given when he was an inpatient, an emergency facility patient, or an outpatient.

2. To the physician, who is a member of the health care facility's staff, for dispensation in the course of the physician's private practice away from the health care facility.

3. To the walk-in customer who is not a patient of the health care facility.

Since most drugs purchased by the state and local units of government primarily are put to the exempted uses described above, it is my opinion that those governmental bodies would not be a "purchaser" under sec. 100.31, Stats., and sellers can offer them pricing arrangements which are not made available to other purchasers.

BCL:DAM

County Board; County Treasurer; A county board does not have power to deny salary to a county treasurer during a period of sickness where such official has not resigned or has not been removed for cause. Under present statutes county board does not have power to establish sick leave and vacation benefits for elected county officials. Remedies discussed. OAG 28-76.

May 6, 1976.

ROGER L. HARTMAN, *District Attorney*
Buffalo County

You state that a resolution of the county board purports to establish sick leave and vacation benefits for both county employes and elected county officials. The resolution grants leave of absence with pay in the event of sickness not to exceed one day per month with accumulation rights up to seventy-five days. It further sets vacation leave at five days after one year, ten days after two years and fifteen days after ten years with no accumulation of vacation pay. You state that the county treasurer, in her first elected term, has requested maternity leave of about three months. She has organized her office in a manner she believes will not require another person to replace her as she has a trained deputy who is paid by the county.

You inquire whether a county board has power to deny salary to a duly elected county treasurer during a period of sickness where such official has not resigned, has not been determined incapable of discharging the duties of the office, or has not been removed for cause.

I am of the opinion that it cannot.

You also inquire whether a county board has power to establish sick leave and vacation leave benefits for elected county officials?

I am of the opinion that it does not have such power under present statutes.

The county board has power under sec. 59.15 (2) (c), (d), Stats., to regulate compensation, vacation and sick leave benefits for appointive officials, deputies of elected officers and employes. Subparagraph (c), in addition to referring to power to fix

compensation, expressly grants power to "establish regulations of employment" and subparagraph (d) permits a contract for services of employes to include "setting up the hours, wages, duties and terms of employment." Subparagraph (a) expressly excepts "elective offices included under sub. (1), supervisors and circuit judges" with respect to powers granted the county board under subsec. (2). Compensation for elected officials other than supervisors and judges is controlled by secs. 59.15 (1) and 66.197, Stats. Both statutes are concerned with monetary compensation. Section 59.15 (1), Stats., provides that prior to the earliest time for filing nomination papers for any elective office, other than supervisors or circuit judges, the board shall fix:

> "... the total annual compensation for services to be paid him (exclusive of reimbursements for expenses out-of-pocket provided for in sub. (3)). The annual compensation may be established by resolution or ordinance, on a basis of straight salary, fees, or part salary and part fees, and if the compensation established is a salary, or part salary and part fees, it shall be in lieu of all fees, including per diem and other forms of compensation for services rendered, except those specifically reserved to the officer in such resolution or ordinance. The compensation established shall not be increased nor diminished during the officer's term and shall remain for ensuing terms unless changed by the board."

Section 66.197, Stats., permits an increase but not decrease of the "salary" of certain elected county officials during their terms.

In my opinion, the statutes last referred to above do not authorize a county board to regulate leave time for elected officials or to deny them portions of the fixed compensation when they are physically absent from their offices.

As used in the Wisconsin Constitution and in various statutes such as secs. 62.09 (6) (b) and 66.196, Stats., the words "salary" and "compensation" are employed synonymously and generally contemplate payment for services in money. *Geyso v. City of Cudahy* (1967), 34 Wis. 2d 476, 149 N.W. 2d 611. Also see 63 Am. Jur. 2d, *Public Affairs and Employees*, sec. 360, p. 844.

In *State ex rel. Conway v. Elvod* (1975), 70 Wis. 2d 448, the court was dealing with an attempt of a county board to diminish the salary of a county judge during his term. The court was in

part concerned with sec. 59.15 (1), Stats., which prohibits decrease in compensation during the officer's term. The court treated salary as the equivalent of compensation and held that the county board had acted in excess of its powers. At p. 450 the court stated:

> "A county is totally a creature of the legislature, and its powers must be exercised within the scope of authority ceded to it by the state. *Columbia County v. Wisconsin Retirement Fund* (1962), 17 Wis. 2d 310, 317, 318, 116 N.W. 2d 142; *Kyncl v. Kenosha County* (1968), 37 Wis. 2d 547, 555, 155 N.W. 2d 583...."

Wisconsin statutes do not provide for leaves of absence for elected county officials such as the county treasurer. Such officer when duly elected and qualified has a right to hold office for the term for which he or she was elected. The compensation is established for the office. The officer holding the office is entitled to the compensation provided for the office as an incident of the office. *Schultz v. Milwaukee County* (1947), 250 Wis. 18, 22, 26 N.W. 2d 260. In 63 Am. Jur. 2d, *Public Officers and Employees*, sec. 362, p. 846-847, it is stated:

> "Compensation does not constitute any part of the public office to which it is annexed. It is a mere incident to the lawful title or right to the office, and belongs to the officer so long as he holds the office. When an office with a fixed salary has been created, and a person duly elected or appointed to it has qualified and enters upon discharge of his duties, he is entitled, *during his incumbency*, to be paid the salary, fees or emoluments prescribed by law...." (Emphasis added.)

An officer might forfeit the right to the office and compensation by some act which would cause a vacancy in the office. Resignation and removal would in most cases terminate right to compensation although in some cases an officer who resigns may be entitled to compensation where he continues to serve on a *de facto* basis until his successor was elected or appointed and qualified. See *State ex rel. Brunkhorst v. Krenn* (1959), 8 Wis. 2d 116, 123, 98 N.W. 2d 394; 48 OAG 23, 26 (1959).

Section 59.12 (1), Stats., provides that the term of a county treasurer "shall continue 2 years and until his successor qualifies."

Section 59.14 (1), Stats., provides that the county treasurer "shall keep his office at the county seat in offices provided by the county" and "shall keep such office open during the usual business hours of each day, Sundays excepted," etc.

This does not mean that the elected officer must be physically present in such office during all of such hours. See 31 OAG 194 (1942), 40 OAG 163 (1951), and *Andreski v. Ind. Comm.* (1952), 261 Wis. 234, 52 N.W. 2d 135. Section 59.19 (1), Stats., provides that a county treasurer may appoint "one or more deputies to aid him in the discharge of the duties of his office" and that such deputies "in the absence of the treasurer from his office or in case of a vacancy in said office or any disability of the treasurer to perform the duties of his office, ... may perform all the duties of the office of treasurer until such vacancy is filled or such disability is removed." The county board has power to determine how many deputies, if any, shall be paid county funds. Sec. 59.15 (2) (c), Stats.

At 63 Am. Jur. 2d, *Public Officers and Employees*, sec. 399, p. 873, it is stated:

> "... And it is the purpose of the law that the incumbent of an office shall devote his personal attention to the duties of the office to which he is appointed or elected. But this does not mean that he shall lose his title to the office or his right to the emoluments or salary connected with it because he may be absent or away from the office for a short, occasional, or even a protracted, period of time and does not during such period of time personally give his time and attention to the duties of the office. This is true whether he is absent from office through illness, because he is missing, or upon purely personal business, and even though during his absence the duties of the office devolve upon another officer who by law is entitled to compensation for performing them. ...
>
> "An incumbent of a public office is under a legal obligation to perform the duties attached to it, and may incur a civil or criminal liability for failure to do so. Derelictions of this character are remediable by removal or impeachment, or by such punishment as the law provides. But they do not necessarily affect the officer's right to compensation. And it may be laid down as a general rule that in the absence of

some provision of the law to the contrary, an officer does not lose his right to the salary or emoluments of his office by his neglect to perform his official duties, at least where such neglect does not amount to an abandonment of the office.

"The foregoing rules as to compensation of a public officer who is absent from his office or derelict in the performance of his official duties cannot prevail against statutory provisions which prevent the payment of compensation to the officer unless he has performed the duties of his office. ..."

I am not aware of any statute which prevents the payment of compensation to a county treasurer when he has not performed the duties of his office.

Section 17.09 (1), Stats., provides that the county treasurer may be removed from office "by the county board, for cause, by a vote of two-thirds of all the supervisors entitled to seats on such board." Section 17.16 (2), Stats., defines "cause" as "inefficiency, neglect of duty, official misconduct or malfeasance in office."

Section 59.19 (2), Stats., does provide:

"If any county treasurer is incapable of discharging the duties of his office, the county board may, if they see fit, appoint a person treasurer who shall serve until such disability is removed. ..."

No procedure is set forth. It is my opinion that some type of hearing before the county board would be necessary to determine incapability. However, even if this were done and another person were appointed, the duly elected county treasurer might be entitled to the compensation provided for the office absent resignation, death, removal, or conduct equivalent to abandonment of the office.

County boards of course do have leverage to partially insure that elected officials are attentive to their duties. The board determines how many, if any, deputies are to be paid from county funds. In addition, the board can institute removal proceedings under sec. 17.09 (1), Stats., if cause appears to be present. The board, of course, has power to fix the compensation which will pertain to the office for the next term and power to grant increases during a term. The electorate also acts as a restraining force, as they determine which officials are worthy of re-election.

BCL:RJV

Banks And Banking; Interest; Loan fees which relate to the amount borrowed rather than to identifiable expenses incurred as a result of the particular transaction must be considered as interest for purposes of ch. 138, Stats. These loan fees are to be amortized over the contract term of the loan to determine the actual rate and a subsequent voluntary prepayment will not render an otherwise legal rate usurious. These fees must be rebated in accordance with sec. 138.05 (2), Stats., when the rate, including such fees, exceeds 10 percent. OAG 29-76

May 14, 1976.

R. J. MCMAHON, *Commissioner*
Office of the Commissioner of Savings and Loan

You request my opinion as to whether a loan fee charged to a borrower by a lender would constitute interest for purposes of sec. 138.05, Stats., and, if considered as interest, as to how that fee is to be amortized for purposes of calculating the interest rate. You advise that such fees are generally charged to the borrower in one lump sum, are based upon the amount borrowed, and may or may not be intended to cover the costs of appraisals, title examinations, and other third-party services.

You have directed my attention particularly to secs. 138.05 (1) and (2) which provide in part 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;
>
> "***
>
> "(2) Any loan for which the rate of interest exceeds $10 per $100 for one year computed upon the declining principal balance may be prepaid by the borrower at any time in whole or in part. Upon prepayment of any such loan in full by cash,

renewal or refinancing, the borrower shall be entitled to a refund of unearned interest charged. ..."

I.

It is my opinion that such a loan fee, based upon the amount of the loan, must be considered interest for purposes of secs. 138.05 (1) and (2), Stats., to the extent that it does not relate to identifiable expenses actually and in good faith incurred in relation to the particular transaction.

The general rule is that a lender in addition to interest at the highest lawful rate may charge and be reimbursed for his expenses actually and in good faith incurred. 29 OAG 360, 363 (1940); 45 Am. Jur. 2d, *Interest and Usury*, sec. 204; 91 C.J.S. *Usury*, sec. 48.

It has long been the policy in Wisconsin that in cases of alleged usury, the courts will look through the form to the substance of the transaction. *State v. J. C. Penney* (1970), 48 Wis. 2d 125, 179 N.W. 2d 641; *Randall v. Home Loan & Investment Co.* (1944), 244 Wis. 623, 12 N.W. 2d 915; *Friedman v. Wisconsin Acceptance Corp.* (1927), 192 Wis. 58, 210 N.W. 831; *Lee v. Peckham* (1863), 17 Wis. *383. Where a loan fee is charged and no services are actually rendered to the borrower, the fee constitutes interest and will not be allowed if to do so will increase the cost of such a loan beyond the lawful interest rate. *McFarland v. Carr* (1862), 16 Wis. 259; *Industrial Bank of Washington v. Page* (D.C. Cir. 1957), 249 F. 2d 938, 939; 45 Am. Jur. 2d, *Interest and Usury*, sec. 204. At 91 C.J.S., *Usury*, sec. 48 at p. 632, the conclusion is reached that "... a charge for pretended services or expenses, not actually rendered or incurred, ... affects the transaction with usury if thereby the lawful rate of interest on the loan is exceeded. ..."

In *McFarland v. Carr, supra*, the lender charged the maximum rate plus an additional $50 bonus to be paid to the lender's agent. The court held that the extraction of the bonus rendered the mortgage usurious because no services had actually been rendered to the borrower. By way of dicta, the court noted that if the charge had been for services actually rendered by the agent to the borrower, a contrary conclusion would have been reached.

The United States Supreme Court came to the same conclusion when faced with a case involving bonuses paid to an agent of a lender. In *Fowler v. Equitable Trust Co.* (1891), 141 U.S. 384, 12 S.Ct. 1, 35 L.Ed. 786, the court determined that because the agent receiving the bonus was acting for the lender, any commission in excess of the maximum rate made the loan usurious.

Any interpretation which excluded loan fees from the scope of sec. 138.05, Stats., would render the rate ceilings in that section a nullity and would clearly be contrary to the intent of the legislature. The broad statutory language indicates the legislature's intention to limit all devices for exacting compensation for a loan regardless of the form of the transaction.

A flat fee based on the amount of the loan is not necessarily related to the actual expenses of the lender. Such a flat fee must be considered interest to the extent it does not relate to identifiable expenses related to the particular transaction. When such a fee is charged which increases the cost of the loan such as to render it in violation of the usury laws, it is necessary to determine whether this additional charge is actually related to the transaction. In virtually every instance the portion of such fees paid to third parties on behalf of the borrower will meet the test of being actually and in good faith incurred. Other expenses of the lender which are not paid to third parties may or may not qualify depending on the facts and circumstances and their relation to the particular transaction. General expenses such as overhead, heat, light, etc. would not qualify because they do not relate to the particular transaction.

I should also point out that in certain loan situations covered by the Wisconsin Consumer Act, the legislature has determined which loan costs, to the exclusion of all others, can be charged to the borrower in addition to the highest interest rates. Sec. 422.202 (2) (a), Stats.; *cf.*, the Federal Truth-in-Lending Act, 15 U.S.C. secs. 1601, *et seq.*, and especially sec. 1605. However, the Consumer Act is probably not applicable to the typical loan situation since it is not applicable to first lien real estate mortgages where the annual percentage rate does not exceed 12 percent and the amount financed is $25,000 or less. Secs. 421.202 (7) and 428.101, Stats. Also, the Consumer Act is not applicable where the amount financed in a consumer credit transaction exceeds $25,000. Sec. 421.202 (6), Stats.

However, in the situation involving a first lien real estate loan subject to ch. 428, Stats., the statutes provide that a creditor cannot charge for reimbursement of attorney's fees except as to the reasonable fees for opinions of title and specified amounts in the event of foreclosure. Sec. 428.103 (1) (e), Stats.

II.

Your second question concerns the amortization of this fee for purposes of determining whether the loan is usurious under sec. 138.05 (1) (a), Stats., or whether prepayment of the loan must be allowed under sec. 138.05 (2), Stats. Chapter 138 does not deal directly with this issue. However, other authorities shed light on the proper interpretation.

In an April 14, 1969, Federal Reserve Board letter cited in para. 30,018 of CCH *Consumer Credit Guide*, the Federal Reserve Board took the position "That points are to be computed over the maturity of the mortgage. ..."

There are no Wisconsin cases which deal with the question of amortization. However, the United States Supreme Court has addressed this issue with respect to the agent's bonus. The court, in *Fowler v. Equitable Trust Co., supra*, held that in determining whether or not the agent's bonus renders the loan usurious, the bonus is spread over the term of the loan.

A similar conclusion was reached in *Montgomery Federal Savings & Loan Ass'n. v. Baer* (D.C. C.A. 1973), 308 A. 2d 768, where the court was dealing with the spreading of "points" or loan fees. At 308 A. 2d 773, the court gave the rationale behind its decision:

> "... The payment of points by the borrower although paid in full the first year is in consideration of the lender making the full loan for the entire term and the borrower does not pay such a fee for the privilege of having the use of the money for only one year."

See also *B.F. Saul Co., et al. v. West End Park North, Inc.* (1968), 250 Md. 707, 246 A. 2d 591, for further discussion reaching this conclusion.

As to those loans paid before maturity, the case law indicates that a voluntary prepayment would not render an otherwise legal loan usurious.

> "... a borrower's voluntary payment of a loan before maturity, made pursuant to a prepayment option in the contract, will not render the transaction usurious if the total interest received by the lender does not exceed the interest computed at the maximum lawful rate from the time the loan became available to the borrower to the absolute maturity date specified in the contract. ..." 55 Am. Jur., *Usury*, sec. 48, p. 360.

See also *French v. Mortgage Guarantee Co.* (1940), 16 Cal. 2d 26, 104 P. 2d 655, and *B. F. Saul Co., et al. v. West End Park North, Inc., supra.*

III.

In conclusion it is my opinion that the loan fees you describe must be considered as interest for purposes of ch. 138, Stats. to the extent that they do not relate to identifiable expenses actually and in good faith incurred in relation to the particular transaction. This fee is to be spread over the entire contract term of the loan to determine the actual rate and a subsequent voluntary prepayment will not render an otherwise legal rate usurious. Since these fees are considered as interest for purposes of ch. 138, it should be noted that in cases of prepayment they must be rebated in accordance with sec. 138.05 (2), Stats., when the rate, including fees, exceeds 10 percent.

BCL:RAV

Nurses; A licensed practical nurse may serve as a "charge nurse" under sec. H 32.08 (5), Wisconsin Administrative Code, but in so doing must avoid activities which would constitute the practice of professional nursing under sec. 441.11 (2), Wis. Stats. OAG 30-76

May 17, 1976.

ELAINE F. ELLIBEE, R.N., *Secretary*
State of Wisconsin Board of Nursing

You have asked my opinion whether a licensed practical nurse may be employed for compensation and given the duties of a

"charge nurse" in a Wisconsin health care facility or ward, and whether it is within the province of the Board of Nursing to determine whether the function of "charge nurse" constitutes the practices of professional nursing as defined in ch. 441, Stats.

It is my opinion that a licensed practical nurse may function as a "charge nurse," and that a blanket determination of whether the function of a "charge nurse" constitutes the practice of professional nursing is outside of the province of the Board of Nursing.

In your letter you advise that certain health facilities —particularly nursing homes--utilize licensed practical nurses in a position designated as "charge nurse." You indicate that the "charge nurse" will be, for substantial periods of time, the senior health practitioner at a facility.

1. Your first question is: May a person *not* a registered nurse lawfully undertake for compensation the responsibilities of a "charge nurse" in a Wisconsin health care facility or ward?

As you have indicated, the designation "charge nurse" is not a title utilized to describe a type of or subclassification of the nursing practice. It is not described in either the statutory sections providing for the licensing of nurses both professional and practical, nor included within the regulations of the Nursing Board.

The answer to your questions requires a balancing of the duties and powers of two state authorities, the Department of Health and Social Services which is responsible for the development and enforcement of standards for nursing homes pursuant to sec. 146.30 (2), Stats.; and the Board of Nursing which is responsible for the enforcement of ch. 441, Stats., relating to the practice of nursing.

Wherever possible, statutes and rules thereunder should be construed to avoid conflict, *State ex rel. La Crosse Public Library v. Bentley* (1916), 163 Wis. 632, 158 N.W. 306. It is my opinion that the rules promulgated by the Department of Health and Social Services under 146.30 (2) establishing minimum staffing patterns can be construed to avoid conflict with ch. 441, Stats., and the duties of the Board of Nursing.

Section 146.30 (2), Stats., provides in pertinent part:

> "STANDARDS. The department may develop, establish and enforce standards for the care, treatment, health, safety, welfare and comfort of patients in nursing homes and for the construction, general hygiene, maintenance and operation of nursing homes, which, in the light of advancing knowledge, will promote safe and adequate accommodation, care and treatment of such patients in nursing homes; and promulgate and enforce rules consistent with this section. ..."

Pursuant to sec. 146.30 (2), Stats., the Department of Health and Social Services has promulgated rules establishing minimum staffing requirements for nursing homes. The nursing home rules classify homes by the general level of care provided. The minimum staffing requirements are determined by the level of care required and number of patients residing in the home. The minimum requirement for any nursing home is one registered professional nurse. This professional nurse is responsible for supervision of the nursing staff.

All nursing homes must provide 24-hour nursing service. Section H 32.08 (5), Wis. Adm. Code, adopted pursuant to sec. 146.30 (2), Stats., requires that on each tour of duty a nurse be designated as a "charge nurse." The "charge nurse" is to take charge of the tour of duty.

The function of the "charge nurse" is distinct from the supervision of the nursing staff by a professional nurse which is also required at all times. The "charge nurse" is physically present at the facility. The professional nurse/supervisor may not be physically present at the facility at all times.

Supervision does not require the immediate physical presence of the professional nurse, but may be satisfied by having a professional nurse on call, *Huss v. Vande Hey* (1965), 29 Wis. 2d 34, 138 N.W. 2d 192. The supervision must, however, be "specific." I would conclude that the "specific direction" for acts beyond simple acts is not satisfied by general instructions or directions, but requires individualized instructions by the professional nurse or physician related to the particular problem.

I do not find that the duties of a "charge nurse" are necessarily incompatible with the authority of a licensed practical nurse under

sec. 441.11 (2), Stats. Where patients are in a stable clinical condition, under conditions of fixed care and defined procedure, a practical nurse may properly make rounds, review records and note changes. These acts can be within the scope of training provided for licensed practical nurses (see N. 3.04, Wis. Adm. Code), and can be simple acts not requiring substantial nursing skills and/or, can be acts which may be performed under the supervision of the professional nurse. A practical nurse functioning as a "charge nurse" must, however, carefully avoid engaging in the practice of professional nursing.

The Board of Nursing is responsible for the interpretation and application of ch. 441 and in particular for the enforcement of sec. 441.11 (1), Stats., regulating the practice of professional nursing.

Under sec. 156.30 (2), Stats., the Department of Health and Social Services is authorized to "develop, establish and enforce" standards in nursing homes for the "care, treatment, health, safety, welfare and comfort of patients in nursing homes." Thus, while it is within the jurisdiction of the Department of Health and Social Services to prescribe minimum staffing requirements for nursing homes, and within the jurisdiction of the Department of Health and Social Services to determine whether a professional nurse is required on a particular tour, there is no authority in the Department of Health and Social Services to authorize any practical nurse to engage in acts that would be in violation of sec. 441.11 (1). In particular H 32.08 (5) cannot authorize a practical nurse to act as a nursing supervisor, or engage in any act, except under specific direction, which involves substantial nursing skills.

Although the Board of Nursing may not make a blanket determination that "charge nurses" be professional nurses, the Board may apply the provisions of ch. 441 and the sanctions therein to any practical nurse who engages in the practice of professional nursing, while acting as a "charge nurse." The provisions of sec. 441.13 (1) set forth below would also appear to apply to the nursing home operator who "knowingly employ[s] another in violation of [chapter 441]."

Section 441.11 (1), Stats., provides:

> "PRACTICE OF PROFESSIONAL NURSING. The practice of professional nursing within the terms of this

chapter means the performance for compensation of any act in the observation or care of the ill, injured or infirm, or for the maintenance of health or prevention of illness of others, which act requires substantial nursing skill, knowledge or training, or application of nursing principles based on biological, physical and social sciences, such as the supervision of a patient, the observation and recording of symptoms and reactions, the execution of procedures and techniques in the treatment of the sick under the general or special supervision or direction of a physician, the execution of general nursing procedures and techniques and the supervision and direction of trained practical nurses and less skilled assistants."

Section 441.13 (1), Stats., provides:

"Any person violating this chapter or knowingly employing another in violation of this chapter may be fined not more than $250 or imprisoned not more than one year in the county jail."

A violation of ch. 441 must be determined on the particular facts of the situation in light of sec. 441.11 (1) and (2), Stats., and appropriate Board rules. Because it is clearly possible, as a matter of fact, to function as a "charge nurse" and not violate sec. 441.11 (1), an assumption that functioning as a "charge nurse" of itself constitutes the practice of professional nursing would be improper.

In conclusion, it is my opinion that within the limits set forth in this opinion, and prescribed by ch. 441, Stats., and rules promulgated thereunder, a licensed practical nurse may be employed for pay as a "charge nurse" under H 32.08.

2. Your second question asks whether it is within the province of the Board of Nursing to determine whether the "charge nurse" function constitutes the practice of professional nursing.

The answer to your second question is contained in the answer to question number one. While it is an appropriate function for the Board of Nurses to determine, within the limits of sec. 441.11, what activities require substantial nursing skills and what activities are "simple" and thus within the scope of practical nursing, the Board may not conclude that a "charge nurse" must necessarily be

a professional nurse. Such a determination would be an undue intrusion into the area of jurisdiction of the Department of Health and Social Services and would probably be incorrect as a matter of fact.

The Board may, based on evidence available to it, seek to institute prosecution for violation of sec. 441.11, Stats.

3. Your third question asks whether the answer to question number one is dependent on whether the condition of the patients in a given facility represents a "simple" or a "complex" nursing situation.

The answer is no. The general level of care required in a nursing home facility is obviously relevant to determining whether a professional nurse or a licensed practical nurse may act as a "charge nurse" and also is relevant to determining whether any particular actions are the practice of professional nursing.

The possibility that "complex" situations may arise will not of itself determine whether a licensed practical nurse may function as a "charge nurse." A licensed practical nurse may act even in "complex" situations under appropriate supervision. The Board is required to interpret supervision in the same way that the term has been interpreted by the Wisconsin Supreme Court in *Huss v. Vande Hey*, *supra*.

4. Your fourth question is whether the availability by telephone of an off-duty registered nurse constitutes a "constructive presence" such that the off-duty registered nurse is "in charge."

As I have concluded that a licensed practical nurse may function as a "charge nurse," it is not necessary to create a "constructive presence." However, the general requirement that a professional nurse be on call to provide supervision is an essential aspect of my opinion.

5. Finally, you ask what are the liabilities if any (a) of the practical nurse who assumes the responsibilities of a "charge nurse"; and (b) of the employer or registered nurse who causes the practical nurse to assume such responsibilities.

Both the licensed practical nurse and the employer may be prosecuted if they violate sec. 441.11, Stats.

The employment of a licensed practical nurse as a "charge nurse" under the conditions I have discussed above would not, of itself, constitute negligent or tortious conduct.

BCL:RDR

Associations; Credit Unions; Corporations; Organizations and associations eligible for credit union membership under sec. 186.05 (1) (b), Stats., defined and discussed. OAG 31-76

May 20, 1976.

WILLIAM H. HUGHES, *Commissioner*
Office of Commissioner of Credit Unions

You ask for a definition of the term "organizations and associations" as used in sec. 186.05 (1) (b), Stats., authorizing their membership in credit unions.

In the preceding subsec. (186.05 (1) (a)), the legislature authorized "members of bona fide fraternal, religious, cooperative, labor, rural, educational or similar organization" to join credit unions.

The term "organizations and associations" used in subsec. (1) (b) is broad enough to include the ones enumerated in the preceding subsection, as well as others.

According to *Webster's Third International Dictionary*, p. 1590 (1961 ed.), an organization is defined in part as "a group of people that has a more or less constant membership, a body of officers, a purpose, and usu. a set of regulations." It also defines this term as merely "something organized."

In *United Brotherhood of Carpenters and Joiners of America v. U.S.* (Cal. 1947), 67 S.Ct. 775, 330 U.S. 395, 91 L.Ed. 973, the U.S. Supreme Court held a law, dealing with members of organizations and associations, applicable to both incorporated and unincorporated groups.

The term "association" is sometimes used in Wisconsin statutes in connection with corporations. See ch. 215, Stats., regulating building and loan associations, ch. 216, Stats., regulating investment associations, and sec. 185.01 (1) which describes a cooperative as an "association incorporated under" ch. 185, Stats.

The legislature has also dealt with the term as applicable to groups which may be unincorporated, as firemen's relief associations (see sec. 213.10, Stats.) and police relief associations (see sec. 213.11). The statutes also provide for incorporation of religious societies (see ch. 187, Stats.) and fraternal societies (ch. 188). Labor unions may be either incorporated or unincorporated and in either case are included in the definition of a person under sec. 111.02 (2), Stats.

It seems clear that the legislature intends the broad terms "organizations" and "associations" to include all the foregoing groups and others, incorporated or unincorporated.

The Wisconsin Supreme Court, in *Herman v. United Automobile, A. & A. I. Workers* (1953), 264 Wis. 562, 567, 59 N.W. 2d 475, held a labor union to be a voluntary association, which the court defined as:

> "... a voluntary unincorporated association is a name applied to a group of individuals who have joined together for a certain object and who are called, for convenience by a common name. The constitution and by-laws are controlling as to all questions of discipline, doctrine, or internal policy."

The court does not, however, recognize every group as a voluntary association entitled to hold and deal with property. In *In re Estate of Powell* (1945), 248 Wis. 520, 22 N.W. 2d 604, the court held that an unincorporated board of from eleven to twenty-one members, with president, secretary, and treasurer, was "not even a voluntary association" (*loc. cit.* 248 Wis. 520) and would not be entitled to receive a bequest. The court said: (248 Wis. 520)

> "... Where it has been the intention of the testatrix to vest title to a bequest in trust, not in individual members of an unincorporated group, but in the group as a whole, the fact that the group has no legal entity or capacity to take title to the property is fatal to its competency as a trustee. ..."

An association, in order to become a member of a credit union as a group, would need sufficient legal structure to hold and deal with the funds involved. It would require some form of organization by which authority could be conferred upon some person to perform the functions of a member of the credit union

under sec. 186.06, Stats., and to deal generally with the funds of the group. Such organization would require some form of "contract of the association, usually embodied in a written instrument designated 'constitution' or 'articles of association.'" 7 C.J.S. 19, *Associations*, sec. 1.

The association should also have sufficient permanency to complete the objects it undertakes, although that may be done by provision in its articles for succession in memberships.

You have referred to bowling teams and softball teams as examples of associations eligible for membership. Neither would constitute a legal entity within the meaning of sec. 186.06 and 186.07, Stats., without adopting a form of organization which is probably unusual for such teams. A bowling association or a sunshine club could be organized to constitute a legal entity; but whether it had done so would require some reference to its records, such as by-laws, rules, or minutes.

There are, of course, many corporations and associations which could not qualify for membership in a specific credit union, since sec. 186.05 (1) (b), Stats., requires that they be "composed of individuals the majority of whom are eligible for membership" in the credit union. The individuals to be considered are stockholders, shareholders, or members of a corporation, and members in the case of an unincorporated association. This brings me to your request that I cite specific examples to illustrate types of organizations which would be eligible as well as those which would not be eligible for credit union membership.

Based on common knowledge, large corporations such as General Motors, American Telephone and Telegraph and United States Steel, have stockholders residing throughout the country. The majority of these stockholders are not employes of said corporation nor are they unified by residence in a particular community. Accordingly, an employes credit union of these companies chartered under the laws of Wisconsin could not accept the corporate account of the company nor could a community type of credit union accept such accounts.

On the other hand, where the majority of stockholders are also employes of a company, it is equally clear that an employes credit union of the company could accept the corporate account. This situation will usually arise in connection with co-operatives organized under ch. 185.

Nonstock corporations chartered under ch. 181 include many fraternal and religious organizations. Its members are defined in either the articles of incorporation or in the by-laws. Sec. 181.02 (7), Stats. It necessarily follows that a credit union organized by these corporations could accept the account of the parent corporation.

Labor unions are usually unincorporated associations. They, of course, are eligible for membership in a credit union of employes whom they represent in labor negotiations.

Other unincorporated associations such as sunshine clubs and bowling teams must have sufficient structure for purposes of identity to be eligible for membership in a credit union. See discussion of this situation, supra.

Finally, some mention should be made of the status of community credit unions incorporated to serve a specific area or community as provided under sec. 186.05 (1) (a), Stats. This type of credit union could accept for membership any organization where the majority of its stockholders, shareholders or members reside within the area prescribed by the charter of the credit union.

BCL:BL:WLJ

Criminal Law; Bingo games sponsored by church organizations using local cable television facilities to broadcast the program where viewers participate in their homes are in violation of ch. 163. While bingo games conducted pursuant to ch. 163 enjoy exemption from the constitutional definition of lottery, bingo games which contravene the provisions of ch. 163 constitute lotteries in this state. Such lotteries are prosecutable under sec. 163.54 or secs. 945.02 (3) and 945.03 (4). The fact that community antenna television is regulated by the Federal Communications Commission does not preclude a prosecution on the grounds of federal preemption. The state criminal standard does not conflict with the federal regulation. OAG 32-76

May 20, 1976.

JAMES BABLITCH, *District Attorney*
Rock County

You have requested my opinion whether Wisconsin law permits a church to use a local cable television facility to broadcast a bingo

program involving viewer participation. In the situation you have described the local television outlet will provide the studio and technical people necessary to air the program. Bingo cards, good for the entire show, will be distributed through cooperating local merchants at a cost of $1.00 each. On October 20, 1971, my predecessor responded to a question from your predecessor relating to bingo programs aired on cable TV. (60 OAG 382) That opinion, although somewhat dated, should be read in conjunction with this one.

Until 1973, bingo was a lottery forbidden by secs. 945.02 and 945.03 (4), Stats. In 1973, Art. IV, sec. 24 of the Wisconsin Constitution was amended in the following manner:

> "The legislature shall never authorize any lottery, or grant any divorce, *but may authorize bingo games licensed by the state, and operated by religious, charitable, service, fraternal or veterans' organizations or those to which contributions are deductible for federal or state income tax purposes. All profits must inure to the licensed organization and no salaries, fees or profits shall be paid to any other organization or person. ...*"

The legislature subsequently amended sec. 945.01 (2), Stats., by adding the following sentence:

> "(2) (am) 'Lottery' does not include bingo as defined in s. 163.03 (1) if it is conducted pursuant to ch. 163."

Chapter 163, the Bingo Control Act, was enacted to implement the constitutional amendment. The basic goals stated in sec. 163.02, Stats., are: 1) close control over all phases of the conduct of bingo, 2) discouragement of commercialization, and 3) fostering of the lawful purposes for which bingo profits may be used by prevention of commercial gambling and criminal participation.

Specific provisions of ch. 163 encourage and enforce these policies. For example, under sec. 163.51 (2), Stats., bingo may be played only on premises which are owned by an organization licensed to conduct bingo, are publicly owned, are owned by another licensed organization, or are used regularly by the licensed organization for a purpose other than bingo, except that a rented,

borrowed, or donated tent may be used at a limited period bingo occasion. Under sec. 163.51 (4), Stats., each player who purchases a regular bingo card is entitled "to a place with sufficient room in which to play." Section 163.51 (21), Stats., provides in part that "... at any time during the bingo occasion, a card may be changed at no additional cost. Cards shall be sold or rented only on the premises at which bingo is being conducted. ..."

I conclude that televised bingo conflicts directly with each of the above mentioned provisions. Televised bingo would be "played" in the television studio and in the homes of viewers and other places not falling into the categories of premises on which bingo may lawfully be played. Moreover, the requirement for sufficient room in which to play is not easily reconciled with a television game situation. Finally, distribution of cards through commercial outlets is clearly foreclosed by sec. 163.51 (21). It is difficult to envision any distribution scheme for cards which would permit a viewer to change his card while a televised broadcast of the bingo occasion was in progress.

Certain other provisions of ch. 163 strongly suggest that the legislature, in enacting the statutes relating to bingo in Wisconsin, intended to permit only bingo occasions taking place at a single location. For example, sec. 163.14 (5), Stats., requires the premises on which bingo occasions are conducted to be adequate and suitable for bingo, and to be owned by the applicant, another licensed organization, or the public, or used by the applicant on a regular basis for purposes other than bingo. Further, sec. 163.51 (22), Stats., provides that when more than one room is used for any one bingo game, the caller shall be in the room where the greatest number of players is present and shall announce the numbers in a manner clearly audible to players in each room. Both these provisions are clearly inconsistent with the conduct of bingo at such diverse locations as television studios and homes of viewers. In addition, sec. 163.51 (13), Stats., requires players to be above the age of 18. Section 163.51 (16), Stats., requires winners to be determined and prizes awarded on the same day the bingo occasion is conducted. These last two provisions would be unenforceable if home participation in televised bingo games were to be permitted.

Consequently, I conclude that bingo programs involving viewer participation and broadcast over local cable television facilities are

not conducted pursuant to ch. 163 of the statutes. To the extent that such a program violates ch. 163 it is not constitutionally protected. Therefore, such bingo games would constitute a lottery in violation of sec. 945.02 (3) and 945.03 (4), Stats. Alternatively, a violation of ch. 163 could be prosecuted under sec. 163.54.

In 60 OAG 382 my predecessor expressed some reservations concerning possible federal preemption in this area. Specifically, that opinion raised the question whether a state prosecution would be prevented because of superseding federal regulations. It was concluded that such a determination must be made on a case-by-case basis.

In order to determine whether a state prosecution is foreclosed by federal regulation, an analysis of the applicable federal regulations and state laws is required. The fact that the illegal act is broadcast pursuant to federal regulations permitting such broadcasts does not necessarily preclude state action against the organization conducting the event.

The Federal Communications Commission (FCC) has regulatory jurisdiction over "cable television." *United States v. Southwestern Cable Company* (1968), 352 U.S. 157, 88 S.Ct. 1994, 20 L.Ed. 2d 1001. 18 U.S.C. sec. 1304 and FCC Rules 47 C.F.R., sec. 76.213 (1974), prohibit the transmission by cable channels of lottery information whether or not the lotteries are legal under state law. Wisconsin state lottery laws make lotteries illegal whether or not they are conducted on the airways. While it is true that a state cannot, in exercising its police powers, undertake what amounts to imposing a direct burden upon interstate commerce, local police regulations related to suitable protection of the people of the state and reasonable in their requirements are not invalid because they would incidentally affect interstate commerce. However, such legislation may not conflict directly with legislation enacted by Congress pursuant to its constitutional authority. *Savage v. Jones* (1911), 225 U.S. 501, 32 S.Ct. 715, 56 L.Ed. 1182.

State statutes affecting interstate commerce are generally valid when they effectuate a legitimate public interest with only incidental effects on interstate commerce. Only where the burden on such commerce is clearly excessive in relation to the putative

local benefits is the validity of the statute called into question. The matter is always one of degree and the extent of the permissible burden depends on the nature of the local interest involved and whether it could be promoted as well with a lesser impact on interstate activities. *Pike v. Bruce Church, Inc.* (1970), 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed. 2d 174.

In this instance it appears that Congress, by regulating the broadcasting of promotional information on lotteries, has circumscribed its regulation under the Commerce Clause and thereby left part of the area open to state regulation provided that the legislation is not inconsistent with federal legislation. A number of cases have held that a federal statute which neither forbids, nor legalizes and approves, certain conduct does not preclude exercise of state police power over subjects normally within such power and also reachable by federal regulation. *Gilvary v. Cuyahoga Valley R. Co.* (1934), 292 U.S. 57, 54 S.Ct. 573, 78 L.Ed. 1123; *Kelly v. State of Washington ex rel. Foss Co.* (1937), 302 U.S. 1, 58 S.Ct. 87, 82 L.Ed. 3. *International Union, U.A.W. v. Wisconsin Employment Relations Board* (1948), 336 U.S. 245, 69 S.Ct. 516, 93 L.Ed. 651.

The United States Supreme Court faced the issue of FCC authority over CATV and affirmed without opinion a district court opinion in *T.V. Pix, Inc. v. Taylor* (D.C. Nev., 1968), 304 F. Supp. 459, aff'd w/o op. 396 U.S. 556, 90 S.Ct. 749, 24 L.Ed. 2d 746. In that case, the three-judge district court held that Nevada statutes attempting to regulate CATV within the state as a public utility were not unconstitutional under the Commerce Clause. The court reasoned that the power of the FCC in this area remained dormant and unexercised. While recognizing that CATV is an integral part of interstate commerce, the court emphasized the essentially local character of the community antenna system. The court stated that:

> "Appropriate state regulation of such primarily local facilities or services in interest [sic] commerce in the absence of federal legislative intervention, is not proscribed by the commerce clause of the Constitution." 304 F. Supp. at 463.

Furthermore, I have not found any direct evidence that Congress in enacting 18 U.S.C. sec. 1304 intended to supplant state regulation of television lotteries. In fact, the opposite conclusion is suggested by 18 U.S.C. sec. 3231, which provides in part:

"Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof."

Consequently, it appears that the state statute and the federal regulations stand in harmony and that there is no actual conflict. In addition, there is no evidence of a congressional intent to preempt the field. I therefore conclude that the parties conducting cable television bingo in contravention of Wisconsin law may be prosecuted for such violations. Parties defendant in such a prosecution would include both the sponsoring organization and the cable TV station itself. To the extent that 60 OAG 382 would suggest preemption in a case such as the one you pose that opinion is modified.

BCL:FJE

Investment Board, Wisconsin; Real Estate; Street Improvement; State Investment Board has the authority to voluntarily contribute money to a private improvement association for street improvements, if the improvements will directly benefit the board's property. OAG 33-76

May 26, 1976.

GEORGE H. AUSTIN, *Executive Director*
Investment Board

You have asked whether the State of Wisconsin Investment Board has the authority to disburse funds to a private membership association to finance street improvements which may or may not directly benefit property owned by the board. Mitchell Street Improvement Association is implementing the improvements on a portion of Mitchell Street in the City of Milwaukee where the board owns property. These improvements, mini-malls, landscaping, widened sidewalks, etc., are to be financed one-half by the City of Milwaukee and one-half by property owners in the area who contribute voluntarily.

The answer depends upon whether the improvement will directly benefit the board's property.

As an administrative agency of the State of Wisconsin, the board has only those powers expressly granted or reasonably implied in the statutes under which it proceeds. *State ex rel. Farrell v. Schubert* (1971), 52 Wis. 2d 351, 190 N.W. 2d 529. Sections 25.14 through 25.18, Stats., dealing with the management of trust funds, focus on the board's powers and duties to make investments. It appears from these statutory provisions that the authorized management activities of the board must bear a direct relationship to the making of investments, or to the preservation and protection of investments already made. The subject disbursement is not related to either of these functions if benefits which might accrue to the board's property as a result of civic improvements by the private association are too remote and uncertain to be characterized as measures protective of the real estate investment. Rather, such a disbursement would be, in effect, a charitable contribution, and as such, beyond the implied powers of the board.

On the other hand, it is stated in sec. 25.17 (8), Stats., that the board shall:

> "... manage, operate, lease, exchange, sell and convey ... any real property acquired by said board. ..."

A manager is defined in *Webster's Seventh New Collegiate Dictionary,* p. 513, as one who "conducts business or household affairs with economy and care." Real estate management specifically has been defined broadly as "the entire responsibility for directing, supervising, overseeing, administering, and controlling the property ..." *In re Brennan's Will* (1929), 251 N.Y. 39, 166 N.E. 797.

At the least the term "manage" implies activity that goes beyond the mere maintenance or upkeep of real property. In my opinion, it includes the power to take whatever actions seem best suited to preserving the property or enhancing its value. Disbursing funds to a private association for street improvements which will increase the value of investment property is a proper action for a prudent manager to take.

In sum, the board must determine initially whether the disbursement of funds will be of direct benefit to property which it owns. If the determination is affirmative, then the board may

authorize such disbursement in its character as manager of the property.

BCL:WMS

Medical Aid; Public Health; Municipalities; Reimbursement; Transportation; Medical Treatment; County Board; Power of county to provide limited rescue functions in connection with ambulance service and to make reasonable charges therefor discussed in view of secs. 59.07 (41), 146.35 and 146.50, Stats. OAG 34-76

June 11, 1976.

JAMES A. BOTTONI, JR., *Corporation Counsel*
Washington County

You request my opinion whether a county board has authority to provide for ambulance services, directly or by contract, and to make reasonable charges therefor.

I am of the opinion that it can.

You also inquire whether a county board has authority to provide, directly or by contract, rescue services and to make reasonable charges therefor.

I am of the opinion that it can, providing that the personnel and equipment utilized in the rescue or attempted rescue are necessary to the operation of the ambulance service involved. This does not mean that a county has authority to contract for or make reasonable charges against users of every type of emergency medical services a county can engage in under sec. 146.35 (3), Stats.

Section 59.07 (41), Stats., provides that the county board has power to:

> "(41) AMBULANCES. Purchase, equip, operate and maintain ambulances and contract for ambulance service for conveyance of the sick or injured and make reasonable charges for the use thereof."

The statute permits reasonable charges for the use of ambulance service which is a broader term than ambulance. The statute did not refer to ambulance service in earlier years. 42 OAG 18, 120 (1953). The statute also refers to "equip, operate and maintain ambulances" and to "conveyance of the sick or injured."

Historically ambulance attendants have rendered limited rescue services, at the scene and enroute.

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

> "(42) RESCUE EQUIPMENT. Appropriate money for the purchase of boats and other equipment necessary for the rescue of human beings and the recovery of human bodies from waters of which the county has jurisdiction under s. 2.04."

This statute is specific authority for certain counties to engage in rescue operations on boundary waters. However, in my opinion, it does not mean that the failure of the legislature to mention rescue operations in sec. 59.07 (41), Stats., or in secs. 59.07 (36) and (63), Stats., concerned with county fire protection, or in sec. 59.07 (64), Stats., relating to preservation of public peace and good order, prevents a county from conducting limited rescue operations within the county.

Prior to 1974, "ambulance" and "ambulance service" were not defined in the statutes. By reason of sec. 990.01 (1), Stats., they were to be construed according to their common and approved usage.

In *Tiedebohl v. Springer* (1951), 55 N.M. 295, 232 P. 2d 694, it was stated that an ambulance is a wheeled vehicle used for the conveyance of the sick and wounded. The case held that a pumper fire truck carrying an inhalator to an emergency did not qualify as an ambulance and was not on official business as a fire truck and did not qualify within a statute exempting ambulances from speed limits when traveling in emergencies.

However, Webster's Third New International Dictionary defines ambulance as "a vehicle equipped for transporting wounded, injured, or sick persons or animals." The term is derived from the French and was commonly referred to as a traveling hospital.

Section 59.07 (41), Stats., refers to "ambulance service" in addition to "ambulance." Ambulance service is a more comprehensive term. *Robinson v. Board of County Com'rs.* (1972), 210 Kan. 684, 504 P. 2d 263. In my opinion it contemplates the rendering of limited emergency services, over and above mere conveyance, and contemplates that such services be rendered at the scene and enroute.

In 1973 the legislature created sec. 146.50, Stats., regulating ambulance service providers and ambulance attendants and sec. 146.35, Stats., regulating emergency medical services. In my opinion such statutes clearly empower a county to directly provide for emergency medical services and in some aspects limit, and in some aspects expand the scope of emergency ambulance services which a county can provide directly or by contract and make reasonable charge therefor under sec. 59.07 (41), Stats.

Chapter 321, Laws of 1973, creating sec. 146.50, Stats., regulating ambulance service providers and ambulance attendants became effective December 29, 1974. After that date the authority of the county to provide for ambulance service under sec. 59.07 (41), Stats., was conditioned upon compliance with the licensing requirements set forth therein. Licenses are issued by the Department of Health and Social Services and there is provision for provisional licenses. Section 146.50 (3), Stats., provides that counties are exempt from all rules prescribing standards *for ambulances* and other vehicles until January 1, 1979. However, their contract providers are not exempt and *personnel* of the county and of any contract provider must be licensed. The definition of "person" is broad enough to include a county. Section 146.50 (1) and (2), Stats., provides in part:

"(1) DEFINITIONS. In this section:

"(a) 'Ambulance' means an emergency vehicle, including any motor vehicle, boat or aircraft, whether privately or publicly owned, which is designed, constructed or equipped to transport patients.

"(b) 'Ambulance service provider' means a person engaged in the business of transporting sick, disabled or injured persons by ambulance to or from facilities or institutions providing health services.

"(c) 'Ambulance attendant' means a person who is responsible for the administration of emergency care procedures, proper handling and transporting of the sick, disabled or injured persons, including but not limited to, ambulance attendants and ambulance drivers.

"(d) 'Person' includes any individual, firm, partnership, association, corporation, trust, foundation, company, any

governmental agency other than the U.S. government, or any group of individuals, however named, concerned with the operation of an ambulance.

"***

"(2) AMBULANCE SERVICE PROVIDER AND AMBULANCE ATTENDANT LICENSES REQUIRED. No person may operate as an ambulance service provider or an ambulance attendant unless he holds an ambulance service provider license or ambulance attendant license issued under this section."

The broad definitions of "ambulance" and "ambulance service provider" would permit a county to make reasonable charges under sec. 59.07 (41), Stats., for a greater variety of forms of transportation than originally contemplated under the latter statute. I am informed that the rules tentatively proposed would permit an ambulance attendant to render limited on-the-scene care including extrication from vehicles. Proposed rules would require ambulance attendants to have a minimum of 81 hours of specialized training.

Chapter 322, Laws of 1973, effective July 3, 1974, created sec. 146.35, Stats., regulating the furnishing of emergency medical services. Section 146.35 (1), (3) and (4), Stats., provides in part:

"(1) EMERGENCY MEDICAL TECHNICIAN -- ADVANCED (PARAMEDIC) DEFINED. As used in this section, 'emergency medical technician -- advanced (paramedic)' means a person who is specially trained in emergency cardiac, trauma and other lifesaving or emergency procedures in a training program or course of instruction prescribed by the department and who is examined and licensed by the department as qualified to render the following services:

"(a) Render rescue, emergency care and resuscitation services.

"(b) While caring for patients in a hospital administer parenteral medications under the direct supervision of a licensed physician or registered nurse.

"(c) Perform cardiopulmonary resuscitation and defibrilation on a pulseless, nonbreathing patient.

"(d) Where voice contact with or without a telemetered electrocardiogram is monitored by a licensed physician and direct communication is maintained, upon order of such physician perform the following:

1. Administer intravenous solutions.

2. Perform gastric and endotracheal intubation.

3. Administer parenteral injections.

"(e) Perform other emergency medical procedures prescribed by rule by the department.

"***

"(3) EMERGENCY MEDICAL SERVICES PROGRAMS. Any county, municipality, hospital or combination thereof may, after submission of a plan approved by the department, conduct a program utilizing emergency medical technicians -- advanced (paramedics) for the delivery of emergency medical care to the sick and injured at the scene of an emergency and during transport to a hospital, while in the hospital emergency department, and until care responsibility is assumed by the regular hospital staff. Nothing in this section shall be construed to prohibit the operation of fire department, police department or other emergency vehicles utilizing the services of emergency medical technicians -- advanced (paramedics) in conjunction with a program approved by the department.

"(4) LICENSING OF EMERGENCY MEDICAL TECHNICIANS -- ADVANCED (PARAMEDICS). (a) No person shall be employed as an emergency medical technician -- advanced (paramedic) in conjunction with an emergency medical services program authorized under sub. (3) unless he holds an emergency medical technician -- advanced (paramedic) license issued under this section. Persons so licensed may perform all procedures specified in sub. (1) under the conditions and circumstances set forth in this section and prescribed by rule of the department.

"***"

The statute is clear authority for the county to directly engage in a wide range of emergency rescue operations in conjunction with

or independent of providing ambulance services. Such authority requires that the county plan be approved by the Department of Health and Social Services and that the paramedics involved be licensed. There is no provision for contracting for such services or for the making of reasonable charges. I am of the opinion, however, that the county could make reasonable charges where the personnel and equipment utilized in the rescue or attempted rescue are necessary to the operation of the ambulance service involved. I am advised that rules proposed would require a minimum of 1,000 hours of training for paramedics. A clearer demarcation of what services performed by a paramedic can be charged for by a county may be forthcoming when the Department of Health and Social Services promulgates rules with respect to ambulance service providers.

You may wish to discuss these matters further with the Bureau of Emergency Health Services, 5721 Odana Road, Madison, Wisconsin.

BCL:RJV

Zoning; Foster Homes; Public Welfare; Municipalities; Contracts; Taxation; Foster homes contracted for (i.e., leased) by the Department of Health and Social Services, pursuant to sec. 48.52, Stats., are immune from local zoning to the extent that the zoning conflicts with the Department's possessory use of property for purposes contemplated by ch. 48, Stats. However, immunity for leased facilities is subject to sec. 13.48 (13), Stats., as amended by ch. 90, sec. 2, Laws of 1973. Section 48.64, Stats., agreements between the Department and proprietors of foster homes do not serve to immunize the proprietor's property from local zoning.

County agencies providing child welfare services do not have authority to lease real property for foster home use.

The Department may assert its immunity from local zoning for property it acquires a possessory interest in by virtue of a sublease pursuant to sec. 48.52 (2), Stats.

Property leased by the Department pursuant to sec. 48.52 (2), Stats., is not rendered exempt from property taxation. The lessor remains responsible for tax payment. OAG 35-76

June 15, 1976.

MANUEL CARBALLO, *Secretary*
Department of Health and Social Services

In an opinion issued by my predecessor on February 19, 1974, (63 OAG 34) you were given the following advice:

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

Confusion has arisen due to use of the phrase "contracted for" as it appears in the second sentence of the above excerpt. You have properly pointed out that the "contracted for" language could

be construed in a way that would result in virtually all foster homes being immune from local zoning. The confusion is due to the fact that all foster home proprietors enter into written agreements (i.e., contracts) with the Department of Health and Social Services or a county child welfare agency. These agreements which are required by sec. 48.64, Stats., and rules promulgated thereunder, specify how children will be placed in the facility, the room and board stipend the proprietors will receive for each child, the staffing of the home and the provision of social services to children in the home.

The words "contracted for" in the previous opinion do not refer to the agreements required by sec. 48.64, Stats. Such a construction would be contrary to the opinion's conclusion that not all licensed foster homes are immune from local zoning. Even though the proprietors of privately owned foster homes and homes owned and operated by private child welfare agencies must enter into sec. 48.64, Stats., agreements, the opinion stated that such facilities do not enjoy immunity.

The state must own outright or have a possessory interest in real property in order to assert that the property falls under its immunity from local zoning. The phrase "contracted for" was drawn from sec. 48.52 (2) (a), Stats., with respect to situations where the Department of Health and Social Services (hereinafter, the Department) acquires a possessory interest in a facility. By comparison, the agreements required by sec. 48.64, Stats., amount to mere purchase agreements for child care services.[1]

New issues have arisen from discussion of this matter among members of our staffs. Consequently, you now seek my opinion on the following questions:

> "1. What types of arrangements between state agencies and persons who wish to provide group home facilities would convey a sufficient possessory interest to the state so as to extend zoning immunity to the facility?
>
> "2. Since the term 'contracted for' was adopted from s. 48.52 (2), Wis. Stats., does it apply only to facilities

[1] To avoid further confusion, it should be pointed out that the term "operated," in the phrase "owned, operated or contracted for" is surplusage in the context of determining whether a foster home facility enjoys immunity from local zoning.

for which the Department contracted? If s. 48.52 (2) applies only to the Department, does s. 48.57 (1) (h) provide the basis for similar authority for county agencies?

"3. If a state agency contracts with a non-profit corporation or organization which has leased the property from another party, does such an arrangement convey a possessory interest to the state?

"4. If a leasor-leasee arrangement conveys a possessory interest to the state, can the agreement provide that the property will remain on the tax roll with the leasor responsible for payment of the real estate taxes?"

QUESTION ONE

In keeping with 63 OAG 34, as clarified above, it is my opinion that real property leased by the Department pursuant to sec. 48.52, Stats., is immune from local zoning to the extent that the zoning conflicts with the Department's possessory use of the property for ch. 48, Stats., purposes. Other than arrangements whereby the Department acquires fee ownership, only a genuine lease agreement would vest the Department with a sufficient possessory interest so as to enable it to assert immunity for the property.

63 OAG 34 was grounded in the well-established principle that the state and its agencies are not subject to general statutes or municipal ordinances unless a statute specifically provides otherwise. *Milwaukee v. McGregor* (1909), 140 Wis. 35, 121 N.W. 642; *Green County v. Monroe* (1958), 3 Wis. 2d 196, 87 N.W. 2d 827. *Green County, supra*, is cited in the 1965 revision of 8 McQuillin, *Mun. Corp.* (3d ed.), for the following general rule:

> " 'Municipal zoning regulations or restrictions usually do not apply to the state or any of its subdivisions or agencies, unless the legislature has clearly manifested a contrary intent.'" Sec. 25.15, at 45.

In *Milwaukee v. McGregor, supra*, the Supreme Court partially based its decision on what is called the "statutory theory" of state immunity:

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

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

The Department has express statutory authority to maintain its own foster homes for the care of children in its custody or contract for the use of private facilities for that purpose. Section 48.52, Stats., provides in part:

> "(1) FACILITIES MAINTAINED OR USED FOR CHILDREN. The department may maintain or use the following facilities for the care of children in its legal custody:
>
> "***
>
> "(b) Foster homes;
>
> "(c) Group homes;
>
> "***
>
> "(2) USE OF OTHER FACILITIES. (a) ... The department may also use other public facilities *or contract for the use of private facilities* for the care and treatment of children in its legal custody; ..." (Emphasis supplied.)

In both legal and common language usage, "lease" is the appropriate term for describing a contract for the use of real property for a definite period of time. See sec. 704.01, Stats.; *Black's Law Dictionary*, 1035 (Rev. 4th ed. 1968); and, *Webster's New World Dictionary of the American Language*, 804 (Second College ed. 1968). Conversely, "a lease is a contract." *Town of Menominee v. Skubitz* (1972), 53 Wis. 2d 430, 435, 192 N.W. 2d 887. See also, 51 C.J.S., *Landlord & Tenant*, sec. 202 (2), p. 518.

Thus, I conclude that the principle of *Milwaukee v. McGregor*, *supra*, and *Green County*, *supra*, immunizes from local zoning foster homes leased by the Department pursuant to subsec. (2) of sec. 48.52, Stats., as well as those owned by the Department pursuant to subsec. (1).

There is no Wisconsin case law on the precise point of whether immunity from local zoning extends to property leased by a state agency. To the limited extent that this proposition has been litigated, it appears that the bulk of reported case law has been decided by New Jersey courts. In *Tim v. City of Long Branch* (1947), 135 N.J.L. 549, 53 A. 2d 164, 171 A.L.R. 320, the court considered the question of whether or not an agency of the United States Government, acting pursuant to the Lanham Act, could convert a leased residence into an apartment house in violation of local zoning ordinances. The court decided in favor of the United States, holding that the agency involved had express statutory authority to ignore local zoning ordinances where it was impractical to follow them. It was held that the Lanham Act, enacted pursuant to the war powers of Congress, supersedes state and local police powers.

In *Carrol v. Board of Adjustment of Jersey City* (1951), 15 N.J. Super. 363, 83 A. 2d 448, the court considered an appeal from a judgment which revoked a building permit and set aside a zoning variance granted by a city board of adjustment. The appellant argued that the proposed building was for the use of a state agency, that a lease with the agency had been executed before the variance was granted, and that the state agency was in "dire" need of such office space. The court rejected the private lessor's claim of immunity by holding:

> "In the absence of overriding legislation to the contrary, the immunity which a governmental agency may have from use prohibitions contained in a zoning ordinance does not extend to a private owner, even though he leases the land to the governmental agency for such use." 83 A. 2d at 450.

Carrol, supra, cited *Tim, supra*, with approval. The court found the language in the Lanham Act, relieving the National Housing Agency from strict compliance with local zoning, to be the sort of "overriding legislation" necessary to extend immunity to property leased by a government agency. However, the "overriding legislation" test was soon abandoned.

In the later case of *Thanet Corp. v. Board of Adjustment of Township of Princeton* (1969), 104 N.J. Super. 180, 249 A. 2d 31, *aff'd.* 260 A. 2d 1, petition for certification to Appellate Division, Super. Ct., denied, 262 A. 2d 207, the court considered the denial

of a lessor's application for a zoning variance. The lessor had executed a twenty year assignable ground lease with the United States Post Office Department. The *Thanet* court implicitly overruled *Carrol, supra.* It first determined that the Post Office Department had the authority to enter into the lease in question. Next, the court examined the Post Office Department's statutory grants of authority to determine whether or not the agency was subject to local zoning ordinances. The court found no statute subjecting the Post Office Department to local zoning requirements. The court then stated the following rule:

> " '... where the immunity from local zoning regulation is claimed by any agency or authority which occupies a superior position in the governmental hierarchy, the presumption is that such immunity was intended in the absence of express statutory language to the contrary.' *Aviation Services v. Board of Adjustment, Hanover Township* (1956), 20 N.J. 275, 282, 119 A. 2d 761, 765." 249 A. 2d at 33.

Finally, the court held that:

> "The United States Government, whether as owner or lessee, is immune from local zoning ordinances." 249 A. 2d at 35.

It is important to note that the court does not distinguish federal immunity from state immunity, but speaks of both in identical terms.

Thanet, supra, appears to reflect the modern trend toward extending governmental zoning immunity. See Rathkopf, *The Law Of Zoning And Planning,* 3rd ed., sec. 53-1, p. 53-11. More important, its language and reasoning appear to be in accord with the general rule of *Milwaukee v. McGregor, supra,* and, when applied to the question at hand, supportive of the conclusion that the Department's immunity extends to foster home facilities which it leases pursuant to sec. 48.52, Stats.

The recent amendment of sec. 13.48 (13), Stats., warrants mentioning again. As pointed out in 63 OAG 34, ch. 90, sec. 2, Laws of 1973, narrowed the scope of state immunity by amending sec. 13.48 (13), so as to make new construction of state facilities subject to local zoning. It is important to note in the context of this question that the amended statute applies to facilities

constructed for the benefit of or *use* of the state or any state agency. Thus, an arrangement whereby a new facility is to be constructed by private persons for the purpose of leasing it to the Department would not immunize the facility from local zoning.

QUESTION TWO

63 OAG 34 did not speak to the issue of whether sec. 48.57, Stats., authorized county child welfare agencies to lease foster home facilities. County child welfare agencies will not have occasion to assert immunity for leased facilities if they do not have authority to enter into such arrangements.

Section 48.52, Stats., confers powers upon the Department. It does not mention counties or county child welfare agencies. Although sec. 59.07 (1), Stats., provides county boards with broad authority to acquire or lease property for public purposes, this office has previously stated that county child welfare services must be provided according to and within the limitations of secs. 48.56 and 48.57, Stats. 51 OAG 184 (1962). Accordingly, authority for county child welfare agencies to lease foster home facilities can only be found in sec. 48.57, Stats.

Section 48.57 (1), Stats., provides, in part:

> "The county agency ... shall have authority:
>
> "***
>
> "(c) To provide appropriate care and training for children in its legal custody, including placing those children in licensed foster homes in this state or contracting for care of them by licensed child welfare agencies;
>
> "***
>
> "(h) To contract with any parent or guardian or other person for the care and maintenance of any child."

Section 48.52 (2), Stats., expressly authorizes "contracts" for the use of "facilities." Similarly, sec. 48.52 (1), Stats., refers to "facilities." The absence of the word "facilities" in sec. 48.57 (1), Stats., is an important omission, especially since all three sections were originally enacted by the same legislation. Chapter 575, sec. 7, Laws of 1955.

Although it might be possible to stretch the language of sec. 48.57 (1), Stats., to encompass leases of property, I cannot advise the adoption of such a strained construction. Therefore, it is my opinion that neither sec. 48.52, Stats., nor sec. 48.57 (1), Stats., authorizes county child welfare agencies to lease real property for use as foster home facilities. Accordingly, the answer to the first part of question two is "yes," and the second part, "no."

QUESTION THREE

If the Department enters into contract under sec. 48.64, Stats., with a non-profit corporation or organization for placement of children in a facility the corporation has leased from a third party, the contract does not extend immunity from zoning to the facility. Section 48.64 agreements are mere contracts for services which do not convey a possessory interest in real estate to the Department. However, if the Department in effect subleases a leased property pursuant to sec. 48.52 (2), Stats., it would acquire a possessory interest and immunity would extend to the property.

With respect to county agencies contracting with non-profit organizations who have leased property from third parties, contracts pursuant to secs. 48.57 (1) (c) or (h) and/or 48.64, Stats., are mere service agreements conveying no possessory interest to the agency. In accordance with my opinion on question two, county agencies lack authority to sublease property for foster home use.

QUESTION FOUR

Section 70.11 (1), Stats., provides, in part:

> "The property described in this section is exempted from general property taxes:
>
> "(1) PROPERTY OF THE STATE. Property *owned* by the state ..." (Emphasis added.)

The word "owned" is not a technical term. Rather, it is a general expression used to describe a variety of interests depending on the context in which it is used. In some instances, it may denote less than absolute (i.e., fee) ownership. *State v. Jelco* (1957), 1 Wis. 2d 630, 635-636, 86 N.W. 2d 428. Cf., *Mitchell Aero, Inc. v. Milwaukee* (1969), 42 Wis. 2d 656, 680, 168 N.W. 2d 183; *Hahn v. Walworth County* (1961), 14 Wis. 2d 14, 109

N.W. 2d 653; *State ex rel. Wisconsin Univ. Bldg. Corp. v. Bareis* (1950), 257 Wis. 497, 21 N.W. 2d 721; and *Ritchie v. Green Bay* (1934), 215 Wis. 433, 254 N.W. 113. But, in the context of our tax exemption statutes, "owned" has been construed to mean something more than a leasehold interest.

In *Armory Realty Co. v. Olsen* (1933), 210 Wis. 281, 291, 246 N.W. 513, the court stated:

> "... The word 'owned' as found and used in our exemption statutes is to be taken and understood to be used in its ordinary sense, calling for proprietorship of the title to the property, not a mere privilege or right to use it. *Douglas County Agric. Society v. Douglas County*, 104 Wis. 429, 80 N.W. 740; *Katzer v. Milwaukee*, 104 Wis. 16, 80 N.W. 41. ..."

In *Douglas County Agric. Society v. Douglas County* (1899), *supra*, the court held that the word "owned" as used in a statute exempting property of agricultural fair associations from taxation, did not exempt leased property from taxation.

In IX OAG 224 (1920), this office opined that lands leased to the board of regents of normal schools were not exempt from taxation. However, the opinion sanctioned the legitimacy of an arrangement whereby the board paid the lessor the amount of the property taxes as part of the lease agreement.

The above cited cases and opinion relied, in part, on the general rule that tax exemption statutes must be strictly construed. Even though it was recently held that this rule is not applicable when the state claims an exemption, *State v. City of Madison* (1972), 55 Wis. 2d 615,198 N.W. 2d 615, it is my opinion that construing "owned" in the exemption statutes to mean something more than a leasehold interest is of continuing validity. Accordingly, it is my opinion that property leased by the Department pursuant to sec. 48.52, Stats., is not rendered exempt from general property taxation by virtue of the Department's leasehold. If the property were subject to tax, it remains on the tax roll with the lessor ultimately responsible for tax payment. However, the burden of paying the tax may be allocated between the lessor and lessee in the lease agreement.

Regarding property taxation of foster home facilities generally, I note that sec. 70.11 (2), Stats., exempts county owned property and sec. 70.11 (19), Stats., exempts the property of a private child welfare agency, licensed pursuant to sec. 48.60, Stats., which is actually used for providing care to dependent, neglected or delinquent children.

BCL:PS

Bail; Bonds; Court Commissioner; Courts; Criminal Law; Defendant; Judges; Public Officials; Judges and court commissioners have power, prior to the filing of a criminal complaint, to release on bail persons arrested for commission of a felony. OAG 36-76

June 23, 1976.

BRUCE E. SCHROEDER, *District Attorney*
Kenosha County

You ask whether judges and court commissioners have power, prior to the filing of a criminal complaint, to release on bail persons arrested for commission of a felony.

I have concluded that they do.

In order to act in criminal proceedings judicial officers must have jurisdiction both of the subject matter and of the person of the defendant. Cf. *State v. Weidner* (1970), 47 Wis. 2d 321, 323, 324, 177 N.W. 2d 69.

Jurisdiction of the subject matter is the power to hear and determine matters of the general class to which the proceedings in question belong. *Id.*, 324. That power derives from the constitution and statutes of this state. *Id.*, 325.

Section 969.03 (1), Stats., grants to judges[1] the power to release on bail a "defendant charged with a felony." Section 969.02 (1), Stats., similarly provides that a "judge may release a defendant charged with a misdemeanor ..."

---

[1] A "judge" is a judge of a court of record, and, for the purpose of setting bail, *inter alia*, includes a court commissioner. Sec. 967.02 (6), Stats.

On first reading these statutes might seem to empower judicial officers to hear and determine requests for release on bail only after an arrestee has been formally charged by complaint or other process with a crime of a particular grade.

In the criminal law, however, "charge" can mean an accusation or oral charge as well as a formal complaint, indictment or information. *Black's Law Dictionary* (Rev. 4th Ed.), "charge," pp. 294, 295. It is apparent from the bail provisions as a whole that, as used in the above subsections, "charged" means an accusation or oral charge as well as a formal complaint, indictment or information.

Both statutes establishing the power of judicial officers to release on bail further provide in part that:

> "Once bail has been given and a charge is pending *or is thereafter filed* or transferred to another court, the latter court shall continue the original bail in that court subject to s. 969.08." (Emphasis added.) Secs. 969.02 (3) and 969.03 (2), Stats.

The legislature thus contemplated and dealt with the situation in which the charge is filed after bail has been given. This indicates an intent that bail is proper prior to the filing of charges.

Additional evidence of such intent is found in sec. 969.01 (1), Stats., which mandates that:

> "Before conviction, a defendant *arrested for a criminal offense* shall be admitted to bail, except as provided in s. 971.14 (1)." (Emphasis added.)

The supreme court has indicated, albeit in dictum, that an accused otherwise entitled to bail is entitled to bail upon his arrest. *Gaertner v. State* (1967), 35 Wis. 2d 159, 165, 150 N.W. 2d 370. It would be anomalous if an accused were entitled to be admitted to bail on arrest but no judicial officer had power to admit to bail prior to a complaint being filed where the arrest is effected without a complaint-based warrant. See gen. sec. 968.04 (1) (a), Stats.

Statutes should be construed to avoid such anomalies, and to accomplish the object of the bail provisions, see gen. *Ortman v. Jensen and Johnson, Inc.* (1975), 66 Wis. 2d 508, 520, 225 N.W. 2d 635. The phrase "charged with a felony," or misdemeanor, in

the statutes establishing the power of judicial officers to set bail, must be construed to mean, not formally charged, but simply, in accord with an accused's right to bail, "arrested for a criminal offense," i.e., accused or orally charged with a crime, of the specified grade.

Since the legislature intended that bail could be given prior to the filing of charges, it follows that it also intended that judicial officers have power, prior to the filing of charges, to set bail, and release a defendant informally charged with, i.e., arrested for, a felony. Cf. *Hoeffner v. United States* (8th Cir. 1898), 87 F. 185, 187, 30 C.C.A. 60; 8 C.J.S., *Bail*, sec. 39b (4), p. 107.

Failure to file a complaint does not otherwise affect a judicial officer's subject matter jurisdiction, derived from statute. *Gaertner v. State*, *supra*, 164.

Personal jurisdiction attaches in a criminal proceeding when an accused appears before a judicial officer voluntarily or pursuant to a properly issued warrant or summons, or is lawfully arrested without warrant. Cf. *State v. Chabonian* (1972), 55 Wis. 2d 723, 726, 201 N.W. 2d 25; sec. 968.04 (1), (2), Stats.

When a defendant is arrested on a warrant or summons, a complaint already will have been filed, and the question of jurisdiction you present will not arise, see secs. 968.02 (2) and 968.04 (1), (2), Stats. Lack of probable cause for arrest goes to the question of jurisdiction over the person. Thus, if there is lack of probable cause a problem of jurisdiction over the person might arise. See *Lampkins v. State* (1971), 51 Wis. 2d 564, 570, 187 N.W. 2d 164; *State ex rel. La Follette v. Raskin* (1966), 30 Wis. 2d 39, 45, 139 N.W. 2d 667.

A complaint plays no part in the attachment of personal jurisdiction when the arrest is effected without a warrant. See *Pillsbury v. State* (1966), 31 Wis. 2d 87, 91, 92, 142 N.W. 2d 187; sec. 968.04 (1) (a), Stats. Nor does it play any part when personal jurisdiction is acquired by the voluntary appearance of the accused. Failure to file a complaint in these situations, therefore, is immaterial to the judicial officer's acquisition of jurisdiction of the person of the accused.

> "Bail is the by-product of custody. The power to admit to bail is inherent in the court so long as the prisoner is in its custody." *State v. Chisholm* (1971), 29 Conn. Sup. 339, 287 A. 2d 389, 390.

The power to release on bail persons arrested for commission of a felony should not be exercised in a vacuum. Both the supreme court and the legislature have identified a number of factors that properly should be considered by a judicial officer in determining the amount of bail, among which are the nature and gravity of the offense, the potential penalty the defendant faces, and the strength of the evidence. *Whitty v. State* (1967), 34 Wis. 2d 278, 286, 149 N.W. 2d 557; sec. 969.01 (4), Stats.

It will be difficult, if not impossible, for a judicial officer to consider these factors if a complaint stating or implying them has not been filed. In that situation consultation with a member of the prosecutor's staff prior to determining the amount of bail will obviate any appearance of abuse of discretion for failure to consider such factors.

If a judicial officer, in a particular case, declines to consult with the district attorney, and the district attorney disagrees with that officer's determination of the amount of bail, the state's remedy is to petition the judge before whom the case is pending, after a complaint has been filed, to alter the amount of the bail, or the conditions of the bond. Sec. 969.08 (1), Stats.

If a pattern of setting what the district attorney considers too low bail develops, especially if a particular judicial officer engages in the practice, the system for setting bail adopted in Milwaukee county might be considered. In Milwaukee, court commissioners do not set bail in felony cases, nor do judges on an *ad hoc* basis. Rather when the courts are not in regular session, bail in felony cases is set at the request of the defendant by the duty judge for the week, who is determined on a rotational basis. See Michael D. Goulee, *Pretrial Release-Bail Procedures,* 32 Gavel no. 4, p. 23 (1972).

BCL:TJB

Public Health; Mental Health Clinic; Salaries And Wages; County Board; The authority to establish salaries for the staff employed by a county's 51.42/51.437 board lies with such board, and not with the county board, but such authority is subject to the general budgetary control of the county board. OAG 37-76

June 24, 1976.

JAMES L. BARTELLS, *District Attorney*
Lafayette County

You ask my opinion on two questions, which you state in the following manner:

> "Does the authority to establish salaries for the staff employed by the 51.42/51.437 boards lie with the County Board of Supervisors or the county's 51.42/51.437 board? Also, would the previous question be influenced by the fact that a 51.42/51.437 board had not previously exceeded its state limit and thus the county had been reimbursed 100% for 51.42/51.437 board expenditures?"

By way of background for such questions, you state:

> "The facts giving rise to this question are: The Lafayette County 51.42/51.437 board adopted salary raises for staff employees in addition and subsequent to raises approved by the County Board in its annual budget. The salary raises have not been approved by the County Board. In Lafayette County, the 51.42/51.437 board has not exceeded State funding limits and, therefore, the county has been reimbursed 100% for its 51.42/51.437 budget. The proposed salary raises would cause the 51.42/51.437 board to exceed its county budget, but not state funding limits and would, therefore, be 100% reimbursable."

In my opinion, the authority to set salaries of 51.42/51.437 board personnel is vested in the 51.42/51.437 board, but any salary increases authorized must be limited to those funds budgeted and approved by the county board.

Section 59.15 (2) and (4), Stats., grants county boards broad powers as to establishment of employe positions, number of personnel, amount of compensation and employment regulations. However, sec. 51.42 (5) (h) 5., Stats., specifically confers on the community mental health, mental retardation, alcoholism and drug abuse governing and policy-making board of directors (hereinafter "the 51.42 board") the power to "Fix the salaries" of personnel employed to administer the program defined in sec. 51.42 (2) (a), Stats. Likewise, sec. 51.437 (6) (a), Stats., confers on a community developmental disabilities services board (hereinafter

"the 51.437 board") the power to "establish salaries" for the community developmental disabilities service program. In this instance, therefore, the power of the county board set forth in sec. 59.15 (2) and (4), Stats., to fix the salary or compensation of county employes, is, to some extent, limited by the express language in secs. 51.42 (5) (h) 5. and 51.437 (6) (a), Stats. However, such limitation does not negate the general budgetary control of the county board.

Although sec. 51.42 (5) (h) 5., Stats., does authorize a 51.42 board to "Fix the salaries of personnel employed to administer the program," the preface to subsec. (5) emphasizes that such power is subject to the provisions of the balance of the section. One such provision is sec. 51.42 (3) (b), Stats., which reads as follows:

> "(3) (b) The county board or boards of supervisors shall review and approve the overall plan, program and *budgets* proposed by the [51.42] board." (Emphasis added.)

Section 51.437 (1) (a), Stats., provides that county boards have the primary governmental responsibility for the development, approval and continuing modification of a county plan for the delivery of services to developmentally disabled citizens. Section 51.437 (4) (b), Stats., sets forth the statutory basis for the creation of a so-called 51.42/51.437 board:

> "(4) (b) In counties having population of less than 500,000, county boards may designate the community mental health, mental retardation, alcoholism and drug abuse board established under s. 51.42 as the community developmental disabilities board."

The 51.42/51.437 board involved here is essentially a 51.42 board, with additional 51.437 board responsibilities. Thus, board personnel will act in such dual capacities.

The mere fact that the 51.42 board takes on 51.437 responsibilities does not obviate the fact that salary increases authorized under sec. 51.42 (5), Stats., are, by virtue of sec. 54.42 (3) (b), Stats., limited to those funds budgeted and approved by the county board(s). There is nothing necessarily inconsistent in placing such specific direct salary control in the 51.42/51.437 board while at the same time placing general budgetary control (indirect salary control) in the county board. See *Kenosha County Court House Local v. Kenosha County* (1966), 30 Wis. 2d 279, 283, 140 N.W. 2d 277.

In responding to your inquiry, I do not consider the fact that the 51.42/51.437 board has not exceeded state funding limits to be a controlling factor. Admittedly, requirements attached to the receipt of state grants-in-aid could to some extent affect the local salary structure of such board. See secs. 51.42 (8), (10) and (12) and 51.437 (8), Stats. However, I do not identify anything from the facts presented here which indicates that any requirement or pressure to raise salaries has been imposed on the local board by the state under these provisions.

BCL:JCM

Zoning; Ordinances; Villages; County Board; Water; Municipalities; Towns exercising village powers can zone shorelands concurrently with counties, provided that the town ordinance is in conformance with or more restrictive than the county ordinance. OAG 38-76

June 24, 1976.

ANTHONY S. EARL, *Secretary*
Department of Natural Resources

You have propounded several questions regarding the following fact situation: Sawyer County adopted a shoreland zoning ordinance under sec. 59.971, Stats. Shortly thereafter, the Town of Spider Lake, Sawyer County, also adopted a shoreland zoning ordinance under sec. 60.74 (7), Stats. It was subsequently approved by the Sawyer County Board. Except for minimum lot size requirements, the ordinances are similar. An individual now desires a variance to build an addition to an existing structure which constitutes a nonconforming use. Answers to the questions are necessary to determine what jurisdiction has authority to grant a variance.

Each of your questions follows, together with my responses.

1. Can a town adopt and enforce shoreland zoning regulations similar to those regulations enforced by counties pursuant to Section 59.971 in an area that has already been zoned by a county pursuant to Section 59.971?

In my opinion, the answer is yes if the town has been authorized to exercise village powers. Ordinarily a town cannot zone on the same subject matter where there is county-wide zoning. Sec. 60.74 (1) (a), Stats. However, sec. 60.18 (12), Stats., permits a town board, upon resolution of its electors, to exercise all powers conferred upon villages if not in conflict with other town statutes. Moreover, sec. 60.74 (7) expressly authorizes towns to adopt zoning ordinances (subject to county board approval) in the manner provided in sec. 61.35, Stats., which relates to village planning. That section incorporates sec. 62.23, Stats., which relates to city planning. Section 62.23 authorizes adoption of a master plan and official map; in particular, sec. 62.23 (7) provides for adoption of zoning ordinances. Section 144.26, Stats., which relates to your department's advisory role in municipal shoreland zoning, incorporates sec. 62.23 (7) in its definition of "regulations."

> "To aid in the fulfillment of the state's role as trustee of its navigable waters ... it is declared to be in the public interest to ... authorize municipal shoreland zoning regulations ...." Sec. 144.26 (1), Stats.
>
> " 'Regulation' refers to ordinances enacted under ss. 59.971 and 62.23 (7) ...." Sec. 144.26 (2) (e), Stats.

While sec. 144.26 (2) (c) defines "municipality" or "municipal" as county, village or city, I construe this to include towns exercising village powers under sec. 60.18 (12) and 60.74 (7).

It can be argued that sec. 59.971 (2) (b), Stats. prohibits the Town of Spider Lake from exercising its shoreland zoning power. That section provides:

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

The implication is that, except for existing, more restrictive ordinances, towns have no authority to enact shoreland zoning ordinances. Indeed, this would be consistent with sec. 60.74 (1), which provides that a town ordinarily cannot adopt zoning ordinances where a county-wide ordinance exists.

It is my opinion, however, that certain other provisions of the statutes limit the application of sec. 59.971 (2) (b) to towns that are not exercising village powers. For example, sec. 59.971 (2) (a) makes applicable the provisions of sec. 59.97, Stats., unless otherwise specified. Section 59.97 (3) (e) provides that a master plan adopted under sec. 62.23 shall control over county ordinances in unincorporated territory. Section 60.74 (7) provides that, where county zoning exists, a town exercising village powers must put its zoning ordinance to a referendum and subject the ordinance to county board approval. Thus, there is nothing in the statutory scheme to indicate that towns exercising village powers are prohibited from adopting shoreland zoning. Safeguards exist to assure that the town's ordinances will be in conformance with or as restrictive as county ordinances.

Enactment of sec. 59.971 did not grant new authority which was not already present in the statutes. Sections 59.97 (4) (c), and 60.74 (1) (a) 3., for example, both refer to zoning regulation and restriction of:

> "The areas in or along natural watercourses, channels, streams and creeks in which trades or industries, filling or dumping, erection of structures and the location of buildings may be prohibited or restricted."

Section 59.971 was important only because it *required* counties to zone shorelands and authorized the DNR to establish advisory guidelines.

Thus, enactment of sec. 59.971 indicates that the legislature intended counties to have primary responsibility for shoreland zoning in unincorporated areas of the county. 63 OAG 69, 73 (1974). However, there is no indication the legislature intended to repeal the authority of towns exercising village powers to zone within their limits.

The "... cardinal principle of statutory construction is to save and not to destroy. ..." and "... the earlier act will be considered to remain in force unless it is so manifestly inconsistent and repugnant to the later act that they cannot reasonably stand together. ..." *State v. Dairyland Power Cooperative* (1971), 52 Wis. 2d 45, 51, 187 N.W. 2d 878.

A reasonable construction in light of these rules dictates that towns exercising village powers be permitted to adopt and enforce shoreland zoning regulations even where a county has zoned as long as the ordinance is in conformance with or more restrictive than the county's.

2. Can a county's shoreland zoning ordinance, or any portions of such an ordinance, be preempted by a town zoning ordinance adopted after the county zoning ordinance?

While nothing prohibits a town from enforcing its shoreland zoning regulations concurrently with a county, the town ordinance cannot preempt a county ordinance.

If the town ordinance were to supersede a county shoreland zoning ordinance, the effect would be a loss in state-wide uniformity of regulations advocated by sec. 144.26 (7). 63 OAG 69, 73 (1974) concluded that the legislature did not intend municipal extraterritorial zoning to supersede county zoning in overlapping areas. Similarly, I conclude that the legislature did not intend that towns authorized to exercise village powers should enact zoning ordinances which preempted county ordinances. An opposite conclusion is untenable in light of the requirement in sec. 60.74 (7) that the town ordinance be approved by the county board.

3. Could a town and a county exercise concurrent jurisdiction in a situation where a town adopts shoreland zoning regulations after the county has adopted an ordinance pursuant to Section 59.971?

The answer to this question is yes, if the town shoreland zoning ordinance is consistent with or more restrictive than the county zoning ordinance. Again, I speak only of towns exercising village powers.

In the circumstances which you mention, where Sawyer County and the Town of Spider Lake are in fact exercising concurrent jurisdiction, it is my opinion that the individual seeking a variance must obtain permission from both the town and the county boards of appeal. Section 59.971 (4) (b), Stats., provides that the procedures set forth in sec. 59.99, Stats., shall apply to ordinances enacted pursuant to sec. 59.971. Section 59.99 provides for the appointment of a county board of adjustment, and among its

powers is the ability "to authorize upon appeal in specific cases such variance from the terms of the [county] ordinance as will not be contrary to the public interest." Since Sawyer County adopted an ordinance pursuant to sec. 59.971, the individual in question must obtain a variance from the terms of that ordinance from the Sawyer County board of adjustment.

Section 60.74 (7), Stats., gives town boards with village power zoning rights in the manner provided in sec. 61.35, Stats. That section incorporates the provisions of sec. 62.23. Therefore, pursuant to sec. 62.23 (7) (e) (7), a town board must also appoint a board of appeals among whose powers shall be "to authorize upon appeal in specific cases such variance from the terms of the [town] ordinance as will not be contrary to the public interest." Pursuant to this section, the individual you mention must also obtain a variance from the terms of the town ordinance from the Spider Lake board of appeals.

While the town and the county jurisdictions are concurrent, in fact each has effected separate and distinct zoning ordinances, pursuant to powers granted under different sections of the statutes. An individual cannot exempt himself from the duty to obey one local ordinance by obtaining an exemption from the requirements of a similar but separate ordinance enacted by a different local authority.

A subsequent request from your office asks for my opinion to three more questions. Each of your additional questions follow, together with my responses.

1. Do counties have exclusive authority to zone shorelands in unincorporated areas?

The answer is clearly no in light of the discussion above and in 63 OAG 69 (1974). Towns authorized by sec. 60.74 (7) to accomplish master planning, and cities and villages authorized by sec. 62.23 (7a) to enact extraterritorial zoning can all zone shorelands in unincorporated areas.

2. If they do not have exclusive authority, what is the relationship of their authority to zone shoreland with the extraterritorial zoning powers of incorporated municipalities?

I am in agreement with the opinion of my predecessor in 63 OAG 69 (1974) wherein it was concluded that municipal

extraterritorial zoning cannot supersede county shoreland zoning but is effective insofar as it is consistent with or more restrictive than the county regulations.

3. If a town has authority to issue its own shorelands ordinance, must the town ordinance be in strict conformity with the county shoreland zoning ordinance?

The town zoning ordinance may be more restrictive than the county shoreland zoning ordinance, but not less so. Conformity may be assured by county board approval of the ordinance under sec. 60.74 (7) and by departmental consultation under sec. 144.26 (7). I should point out that I am again referring only to towns exercising village powers since, ordinarily, towns cannot enact zoning ordinances wherever county-wide zoning exists. Sec. 60.74 (1), Stats.

BCL:LMC

Barbers; Cosmetic Art; Licenses And Permits; Education; Cosmetology Examining Board may admit to examination a student who has successfully completed prescribed courses of study at a registered school where the student's diploma is withheld by the school for the student's failure to meet his or her financial obligation to the school. OAG 40-76

July 9, 1976.

DAVID GOTZION, *Chairman*
Cosmetology Examining Board

My opinion has been requested on whether students attending a school of cosmetology, who have complied with all of the course work requirements of sec. 159.08, Stats., but who have not received their diplomas because of failure to meet their financial obligations to the school, can be prevented from taking the board's operator examination.

Section 159.06 (1), Stats., provides in part:

"... All applicants for examination shall complete the requirements necessary to obtain a license, other than the examination, before being eligible for such an examination."

Section 159.08 (4), Stats., which was enacted in 1973, provides that an operator's license shall be issued to one "who has successfully completed an apprenticeship as prescribed by s. 159.12, or who has graduated from the course prescribed by s. 159.02 in a registered school of cosmetology" and who has passed an examination conducted by the Department of Health and Social Services, predecessor to the Cosmetology Examining Board in administering ch. 159, Stats.

Prior to 1973, the statute provided that an operator's license should be issued to one who had "completed 2 years as a registered apprentice," or "completed the course prescribed by section 159.02 in a registered school of cosmetology."

The past practice of the board has been to admit to the examination persons who have successfully completed the prescribed course of study, but whose diplomas have been withheld by the school for failure of the student to meet his or her financial obligations to the school.

The question is whether such a procedure may be continued in light of the change in the law requiring "graduation" rather than "completion" of the course prescribed. The answer depends upon the meaning of the word "graduated" to be used in interpreting the statute.

The word "graduated" is not defined in ch. 159 or in the board rules promulgated in accordance with the provisions of that chapter. *Webster's Seventh New Collegiate Dictionary* gives the following primary definitions of the verb "graduate":

> "... 1: to grant an academic degree or diploma to 2: to admit to a particular standing or grade ...."

The first definition implies a formal granting of the degree or diploma; the second a recognition of a particular standing or grade. The underlying concept in both definitions is the attainment of a given level of knowledge or proficiency. The question here is whether the legislature used the word "graduation" in its formal sense or whether it used the word to denote a level of skill and proficiency.

A close reading of sec. 159.08 (4), Stats., both before and after its 1973 alterations, suggests that what the legislature had in mind was not the mechanical issuance of the diploma. Rather, the

diploma is an assurance that the applicant for an operator's license has acquired knowledge and practical expertise in line with board standards for the practice of cosmetology.

The statute before 1973 required only that applicants "complete" the prescribed course, and contained no standards for measuring the adequacy of the applicant's performance during the course. "Graduation," in contrast, logically denotes *successful* completion of the course as recognized by the school.

Support for this position can be found in the legislature's treatment of the apprenticeship alternative to the prescribed course of study. Under the pre-1973 version of sec. 159.08 (4), the applicant need only have "completed 2 years as a registered apprentice." The present law requires him to have "*successfully* completed an apprenticeship as prescribed by s. 159.12." (Emphasis added.)

Moreover, the situation you have described, in which a school withholds a diploma because an otherwise qualified student has failed to meet his or her financial obligations to the school, illustrates the doubtful relation of a literal diploma requirement to the purpose of the statute. If the purpose of the examination is to limit the practice of cosmetology to persons trained and knowledgeable in the field, refusal to allow an applicant to take the examination could not be justified by lack of a diploma when the lack is based upon failure to meet financial obligations to the school.

This consideration is underscored by the fact that, in the case of privately owned schools, a literal diploma requirement would allow these private profit-making entities to effectively deny Wisconsin citizens the opportunity to pursue a lawful and useful calling for which they are otherwise qualified. The licensure of cosmetologists is an exercise of the police power of the state, undertaken to protect the health, safety and welfare of the state's citizens. Denial for failure to meet financial obligations would serve the pecuniary interest of the school instead and be tantamount to making the state a collections agent for the school. Adequate remedies are available to the schools through normal collections procedures. I would observe as a practical matter that working graduates are more likely to be able to pay such obligations.

In conclusion, it is my opinion that the term "graduated" as used in sec. 159.08 (4), Stats., means the successful completion of the prescribed course of study at a registered school, and that a diploma issued by the school is not the only permissible proof of this accomplishment. Therefore, when a diploma is withheld for failure of the student to meet financial obligations to the school, such applicant for an operator's license may nevertheless be allowed to take the board's examination upon a showing that he or she has successfully completed the required course of study.

BCL:GBS:WHW

Condemnation; Redevelopment Authority; Urban Renewal; Assuming a Redevelopment Authority properly proceeds under sec. 66.431, Stats., to satisfy all statutory and other legal requirements necessary to establish a project area and implement a redevelopment plan therefore, it may proceed to condemn any property within the project area even though some portions of the urban renewal area are not in fact blighted. OAG 41-76

July 15, 1976.

FRED A. RISSER, *Chairman*
Senate Organization Committee

I have your July 9 letter requesting an opinion on the Madison Redevelopment Authority's statutory powers. Your question reads:

> Assuming that the Madison Redevelopment Authority, in cooperation with the City of Madison, designates a redevelopment or urban renewal area, and assuming that throughout the process of condemning and acquiring the included parcels and improvements all statutory requirements applicable to this project are met, and assuming that within the project area there is a small percentage of the total number of parcels and improvements that are clearly not in and of themselves blighted or deteriorated; does the Madison Redevelopment Authority have the statutory power to condemn and acquire these properties as part of the renewal project?

The Madison Redevelopment Authority is created and functions under the provisions of sec. 66.431, Stats. Under sec. 66.431 (5) (a) 3., Stats., a redevelopment authority has the power "within the boundaries of the city to acquire by purchase, lease, eminent domain, or otherwise, any real or personal property or any interest therein, together with any improvements thereon, *necessary or incidental to a redevelopment or urban renewal project.* ..." (Emphasis added.)

Assuming that the Redevelopment Authority properly proceeds under sec. 66.431, Stats., to satisfy all statutory and other legal requirements necessary to establish a project area and implement a redevelopment plan therefore, it is my opinion that the Redevelopment Authority may proceed to condemn any property within the project area even though some portions of the urban renewal area is not in fact blighted.

The leading case on the subject is *Berman v. Parker* (1954), 348 U.S. 26, 99 L.Ed. 27. In that case the U.S. Supreme Court clearly stated:

> "... Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending. But we have said enough to indicate that it is the need of the area as a whole which Congress and its agencies are evaluating. If owner after owner were permitted to resist these redevelopment programs on the ground that his particular property was not being used against the public interest, integrated plans for redevelopment would suffer greatly. The argument pressed on us is, indeed, a plea to substitute the landowner's standard of the public need for the standard prescribed by Congress. But as we have already stated, community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis--lot by lot, building by building.
>
> "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch. ..." 348 U.S., pp. 35-36.

The last sentence above was quoted with approval by the Wisconsin Supreme Court in *Kamrowski v. State* (1966), 31 Wis. 2d 256, 266-267, 142 N.W. 2d 793, 798, and other courts, including ours, have reached conclusions similar to that in *Berman.* See 45 A.L.R. 3d 1096, 1110, sec. 4; 40 Am. Jur. 2d 1073, sec. 18; *David Jeffrey Co. v. Milwaukee* (1954), 267 Wis. 559, 585, 66 N.W. 2d 362; *State ex rel. Milwaukee v. Circuit Court* (1958), 3 Wis. 2d 439, 449, 88 N.W. 2d 339.

Thus, in *David Jeffrey Co. v. Milwaukee, supra,* in sustaining the Blighted Area Law, sec. 66.43, Stats., a blight elimination law similar to sec. 66.431, Stats., granting to cities the power to acquire by eminent domain any real property "necessary or incidental to a redevelopment project," our court upheld the authority of cities to condemn bare or vacant land for such purposes, concurring with the view expressed by the trial court, that:

> " 'Here again it is to be noted that the law is directed against slum and blighted *areas*, not individual structures. It must be presumed that the legislature believed that the evils resulting from blight are inherent not in the particular structures but in the entire blighted area as a whole. ... The necessity for acquiring vacant parcels and unoffending buildings within a blighted area to effectuate a sound workable plan of redevelopment is obvious.
>
> " '... It is apparent, however, that to single out and except from the provisions of the law vacant land and unoffending structures would render the whole program of blighted-area redevelopment futile and ineffective. ...'" 267 Wis., p. 585.

And in *State ex rel. Milwaukee v. Circuit Court, supra,* at p. 449, the court stated:

> "... The Blighted Area Law places wide discretion in the city council as to what properties should be included in this redevelopment project. See sec. 66.43 (3) (j) 1 and 2, Stats. Not only are properties to be included which are '*necessary*' for either the proper clearance, or the redevelopment, of the area but also those which are '*incidental*' to either of such purposes. Sec. 66.43 (3) (j) 2.

> "If it be essential that certain presently nonoffending structures, or vacant parcels, be included in the area to be acquired and redeveloped as a condition precedent to obtaining federal financing of the project, the taking of them would at least be *'incidental'* to the taking and redevelopment of those offending properties already constituting a slum area. ..."

It is my opinion that our court would follow the rationale of the foregoing decisions in concluding that the existence of unblighted properties within a redevelopment or urban renewal area is not, in and of itself, fatal to the exercise of authority under sec. 66.431, Stats.

BCL:JCM

Personal Injury; Public Assistance; Collection Agencies; Counties; Attorneys; County is a necessary party to an action on a claim where it has received an assignment under sec. 49.65, Stats. The county may take steps necessary to enforce its claim. Compromise and attorney fees discussed. OAG 42-76

July 19, 1976.

JOSEPH J. SALITURO, *Corporation Counsel*
Kenosha County

You ask several questions relative to procedure in recovering assignments of personal injury claims under sec. 49.65 (1), Stats., from recipients of public assistance.

Your first question is whether the county is a necessary party in an action to recover damages for the injury. Section 803.03 (2), Stats., which became effective January 1, 1976, provides in part:

> "(a) JOINDER OF RELATED CLAIMS. A party asserting a claim for affirmative relief shall join as parties to the action all persons who at the commencement of the action have claims based upon subrogation to the rights of the party asserting the principal claim, derivation from the principal claim, or assignment of part of the principal claim. ... Any party asserting a claim based upon subrogation to part of the claim of another, derivation from the rights or claim of another, or assignment of part of the rights or claim of

another shall join as a party to the action the person to whose rights he is subrogated from whose claim he derives his rights or claim, or by whose assignment he acquired his rights or claim.

"(b) OPTIONS AFTER JOINDER. Any party joined pursuant to par. (a) may 1. participate in the prosecution of the action, 2. agree to have his interest represented by the party who caused his joinder, or 3. move for dismissal with or without prejudice. If the party joined chooses to participate in the prosecution of the action, he shall have an equal voice with other claimants in such prosecution. If he chooses to have his interest represented by the party who caused his joinder, he shall sign a written waiver of his right to participate which shall express his consent to be bound by the judgment in the action. Such waiver shall become binding when filed with the court, but a party may withdraw his waiver upon timely motion to the judge to whom the case has been assigned with notice to the other parties. A party who represents the interest of another party and who obtains a judgment favorable to such other party may be awarded reasonable attorneys fees by the court. ..."

The note of the judicial council to sec. 803.03 (2), states in part:

"Sub. (2) is new. It is intended to foster economy of judicial effort by requiring that all 'parts' of a single cause of action whether arising by subrogation, derivation, or assignment, be brought before the court in one action."

The foregoing statute incorporated requirements similar to those for subrogation previously laid down in *Heifetz v. Johnson* (1973), 61 Wis. 2d 111, 211 N.W. 2d 834. Section 803.03, Stats., applies generally to all actions. It could be superseded by a specific statute with *conflicting* provisions. Such a conflict does not exist here. Section 49.65, Stats., which relates specifically to assignments to the county of personal injury claims of recipients of public assistance, provides in pertinent part:

"... This assignment shall not divest any such recipient of his right to control the cause of action and any litigation in connection therewith that he may elect to assert. The unit of government extending public assistance shall in no way represent said recipient in this matter."

Control of an action was defined in *Rohm & Haas Company v. Chemical Insecticide Corp.* (D.C. Del. 1959), 171 F. Supp. 426, 429, following *Miller v. Liggett & Meyers Tobacco Co.* (C.C.E.D. Mo. 1881), 7 F. 91, 92-93, as, "... the right to make motions, offer evidence, cross examine witnesses, or take an appeal. ..."

If the right of the recipient of public assistance to "control" the litigation under sec. 49.65, Stats., were in conflict with the right of the county as assignee to "participate in the prosecution" under sec. 803.03 (2) (a), it would be necessary to resort to judicial rules of statutory construction to determine which prevailed.

It is a general rule, however, that statutes must be construed, wherever possible, to avoid conflict.

> *Brunette v. Bierke* (1955), 271 Wis. 190, 72 N.W. 2d 702;
> *Moran v. Quality Aluminum Casting Co.* (1967), 34 Wis. 2d 542, 150 N.W. 2d 137;
> *Raisanen v. Milwaukee* (1967), 35 Wis. 2d 504, 151 N.W. 2d 129.

I believe that secs. 803.03 (2) and 49.65 can be construed to give effect to both. Construing sec. 803.03 (2) in the light of sec. 49.65 gives the county the right to participate in the action to the extent necessary to protect its claim while the assignor of the claim controls the action to the extent necessary to enforce his rights.

In conclusion, the county which has taken an assignment of a claim under sec. 49.65 is a necessary party to an action by the assignor to enforce that claim and as owner of a claim by assignment may bring action in its own name if necessary.

Your second question is whether the county is bound by an agreement made by its assignor for contingent attorneys fees.

This, too, is partially covered by the new sec. 803.03 (2) which provides in pertinent part:

> "... A party who represents the interest of another party and who obtains a judgment favorable to such other party may be awarded reasonable attorneys fees by the court. ..."

This language follows the rule laid down by the court in *State Farm Mut. Automobile Ins. Co. v. Geline* (1970), 48 Wis. 2d 290, 179 N.W. 2d 815.

It is impossible to predict what might be found to be reasonable attorney fees in any given case, but presumably that finding would be affected by whether an attorney representing the county participates in the action. In any event, the court in determining a reasonable fee for the portion of the recovery assigned to the county would not be bound by an agreement of the recipient assignor. The award of costs in such a case would be governed by sec. 271.23, Stats.

Your third question is whether the county may accept a partial settlement of its claim where the recipient assignor accepts a compromise of his claim.

Since the county's claim is for a fixed amount, it cannot be satisfied by payment of a lesser sum without some other consideration, according to *Holman Mfg. Co. v. Dapin* (1923), 181 Wis. 2d 97, 193 N.W. 2d 986 and *Petersime Incubator Co. v. Klinke* (1946), 248 Wis. 166, 21 N.W. 2d 377.

The general rule is stated in 15A C.J.S. *Compromise and Settlement,* sec. 9, pp. 198-200, that:

> "Except where it is otherwise provided by statute, and except where the rule has been expressly repudiated by judicial decision, it appears to be well settled that an agreement of a creditor to accept less than the amount due on a liquidated or undisputed claim is ineffectual, unless based on a new consideration, such as the payment of the lesser sum before the debt is due, the insolvency of the debtor, or the forbearance of an insolvent debtor's right to go into bankruptcy."

The latter type of exception seems significant in connection with claims under sec. 49.65, Stats. Presumably, the assignor of a claim under sec. 49.65 would not have received assistance if he had assets out of which to pay his medical bills. In a case in which he cannot hope to obtain a judgment large enough to bring him a substantial surplus over the county's claim, a compromise of that claim may be necessary to obtain his cooperation in prosecuting the suit. Cooperation of the recipient of the medical assistance might be essential to securing judgment even if the county were to bring suit as plaintiff, joining the assignor as a defendant. Such cooperation could constitute additional consideration supporting a compromise between the county and the assignor-recipient whereby the county obtains a partial payment which could not otherwise be collected.

I am informed that the Department of Health and Social Services has published no rule with respect to compromises under sec. 49.65 of the statutes. If a compromise is valid under judicial rules, the Department of Health and Social Services and its auditors would be obligated to recognize it. It would probably be desirable, however, to obtain the department's consent to compromises so as to avoid questions being raised in its audits.

BCL:BL

County Board; Health And Social Services, Department Of; The power to classify positions in a County Department of Social Services resides in the state department of Health and Social Services and not in a county board or in a committee of such county board. OAG 43-76

July 19, 1976.

JAMES WENDLAND, *District Attorney*
Dunn County

Your office, by letter dated March 22, 1976, has requested an opinion relating to the classification of an employe in the county Department of Social Services. You state that an employe in the county Department of Social Services has been classified as a Case Aide I by the County Welfare Board whereas the county administrator takes the position that she should be classified as a Case Aide II. He has requested that you secure an opinion whether the County Welfare Board has the authority to classify personnel within such department or whether such power resides in the County Board of Supervisors by virtue of sec. 59.025, Stats.

I am of the opinion that the power to classify probably rests in neither agency. Positions are subject to classification and reclassification. Individuals are appointed to positions. I further am of the opinion that the establishment and maintenance of the state merit system as prescribed in PW-PA 10, Wisconsin Administrative Code as required by secs. 49.50, 46.22 (6) and 59.15 (2) (c), Stats., is a matter of statewide concern and the functions of making appointments to, examinations for, and classifications of positions cannot be transferred to the County Board of Supervisors or a committee thereof. The power of the county board to establish salaries for such positions under sec.

59.15 (2) (c), Stats., is expressly limited by the last sentence of such section. See 63 OAG 580 (1974), 46 OAG 137 (1957).

Federal law, including 42 U.S.C.A. 302 (5) and 602 (a), involving public health and welfare, require that the state plan for administration of old age, AFDC, and other federally assisted programs shall include methods for establishment and maintenance of personnel standards on a merit basis and for the selection, tenure and compensation of employes.

The legislature, in sec. 49.50, Stats., has provided that the Department of Health and Social Services shall adopt and supervise a merit system program applicable to county welfare department employes. Section 49.50 (2), Stats., provides:

> "(2) RULES AND REGULATIONS, MERIT SYSTEM. The department shall adopt rules and regulations, not in conflict with law, for the efficient administration of aid to the blind, old-age assistance, aid to families with dependent children and aid to totally and permanently disabled persons, in agreement with the requirement for federal aid, including the establishment and maintenance of personnel standards on a merit basis. *The provisions of this section relating to personnel standards on a merit basis supersede any inconsistent provisions of any law relating to county personnel;* but this subsection shall not be construed to invalidate the provisions of s. 46.22 (6)." (Emphasis added.)

Sections 46.22 (1), (2) (b) and (3), Stats., require that the director of the county welfare department and the employes within such department be appointed subject to secs. 49.50 (2) to (5) and the rules promulgated thereunder. The Department of Health and Social Services, through its Division of Family Services, has promulgated rules. Ch. PW-PA 10, Wis. Adm. Code.

Section 46.22 (3), Stats., provides in part:

> "... The county director shall recommend *to the county board of public welfare the appointment* of employes necessary to administer the functions of the department, subject to sub. (6) and s. 49.50 (2) to (5) and the rules promulgated thereunder. The county director shall make recommendations to the county board of supervisors who shall fix the salary of such employes."

This section makes it clear that the power to appoint is in the County Board of Public Welfare and not in the County Board of Supervisors. See also 62 OAG 114 (1973).

I am advised that the Department of Health and Social Services has not delegated the department's authority as permitted by sec. 49.50 (5), Stats., to the county.

Section PW-PA 10.15 (1) (b), Wis. Adm. Code, provides that:

> "(b) Each position in the agency shall be allocated *by the division* to one of the classifications established by the plan." (Emphasis added.)

Sections PW-PA 10.06 (34) and (35), Wis. Adm. Code, define re-allocations and reclassifications in the following terms:

> "(34) RE-ALLOCATION. The reassignment of a position to a different pay range or classification in the classification plan with no change in duties and responsibilities.
>
> "(35) RECLASSIFICATION. (a) *Duty changes.* The reassignment of a position to a different classification because of changes in the duties and responsibilities of the position.
>
> "(b) *CAREER PROGRESSION.* The reassignment of a person to a higher classification in a connected series which has been specifically designed and designated as a career progression series. The advancement is based upon the individual's demonstrated capacity to perform tasks which require a higher degree of functional skills or attainment of specified additional training."

I would observe in conclusion that where questions arise as to whether a position is properly classified, the employe, agency, or other interested party may wish to bring the matter to the attention of the Division of Family Services for review.

BCL:WHW

Transportation; Education; Funds; Appropriations And Expenditures; Schools And School Districts; Funds made available through the Elementary Secondary Education Act may be used in dual enrollment programs to transport children from parochial schools to public schools and return. OAG 44-76

July 22, 1976.

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

In your letter of May 14, 1976, you indicate that the Wisconsin Department of Public Instruction is the State Educational Agency (SEA) responsible for the administration of the Elementary and Secondary Education Act of 1965 (ESEA) as most recently amended by PL 93-380. In your letter you ask my opinion as to whether funds provided to the Department of Public Instruction pursuant to Title I of the ESEA may be used to transport children from parochial school to public school and back to parochial school. It is my opinion that such funds may be used as you have indicated.

Title I of the ESEA provides funds to the Department of Public Instruction which in turn approves plans of local school districts and provides these funds for their implementation. The purpose of these programs is to upgrade the education of economically and socially deprived children. Examples of programs administered by local educational agencies are remedial reading and mathematics designed to raise students' achievement to the appropriate grade levels based on their age. Grants are made by the Department of Public Instruction to local educational agencies. With respect to participation of children enrolled in private schools, sec. 20 U.S.C.A. 241e-1 provides:

> "(a) To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate ...."

These programs must be furnished to children attending private elementary and secondary schools on an "equitable" basis (see 20 U.S.C.A. 241e-1 (b) (2)).

In *Wheeler v. Barrera* (1974), 417 U.S. 402, 41 L.Ed. 2d 159, the court held that any conflict between programs or expenditures of funds and state statutes and constitutions is a question of state, not federal, law. Thus, in the instant case, the question is whether federal ESEA funding of transportation of parochial school students from parochial school to public school and back is in conflict with the Wisconsin Constitution or with any Wisconsin statutes.

You have informed me that such transportation is necessary in some instances where dual enrollment programs are being provided. The term "dual enrollment" or "shared time" refers to enrollment of nonpublic school children in public schools for specific courses of study or activity.

Dual enrollment programs are provided in Wisconsin to avoid the prohibition in Art. I, sec. 18 of the Wisconsin Constitution against teachers being paid with public funds for teaching in parochial schools. See 55 OAG 124 (1966). Dual enrollment itself is not prohibited by the Wisconsin Constitution. *Id.* at 132. In addition, Art. I, sec. 23 of the Constitution removes any state constitutional prohibition against publicly funded transportation of children to and from parochial schools. Thus the Wisconsin Constitution does not prohibit use of federal funds to transport parochial school children in the manner you contemplate.

In your letter you referred to secs. 121.54 (2) (b) and (c), Stats. These sections provide for transportation for parochial school children which is funded in part by the local public schools and to a larger extent by the Department of Public Instruction. However, there is no statutory requirement that children attending parochial schools may be provided transportation as a part of a federally funded program. In fact, insofar as Title I of the ESEA is concerned, using federal funds to supplant state funded programs is specifically forbidden by 45 C.F.R. 17 (h). Transportation of children as a part of a Title I dual enrollment program does not supplant the state transportation program. Rather, this supportive service makes supplementary educational programs available to parochial school children on a comparable as well as an equitable basis. (*Barrera v. Wheeler* (1973), 475 F. 2d 1338, 1349, fn. 18.)

While, as noted above, there is no statutory provision that parochial school children may be provided transportation as part of a federally funded program, general authority is given to the State Superintendent to receive and disburse federal funds by sec. 115.28 (9), Stats. Since there is no statutory or constitutional prohibition in Wisconsin regarding transportation of parochial school children from parochial school to public school and return as a part of a federally funded dual enrollment program, it is my opinion that the funds may be used as indicated. (*Wheeler v. Barrera* (1974), 417 U.S. 402, 419, 41 L.Ed. 2d 159.)

BCL:JWC

Public Welfare; Dependent Children; Children; Minors; Reimbursement; Welfare; Department of Health and Social Services should seek legislative authority before promulgating rules on recoupment of improperly paid AFDC payments. OAG 45-76

July 29, 1976.

MANUEL CARBALLO, *Secretary*
Department of Health and Social Services

You have asked whether authority exists in Wisconsin law to establish a program consistent with federal regulations for the recoupment of overpayments made under the Aid to Families with Dependent Children (AFDC) program.

Federal regulations require a state plan for AFDC to specify a uniform statewide policy for recoupment of overpayments of assistance. 45 CFR sec. 233.20 (a) (12). The provisions of such policy, within certain limitations, are left to the discretion of the state. Recoupment is allowed but not required as reflected by Title 45 CFR 233.20 (g) (12) which reads:

> "The plan may provide for recoupment in all situations specified herein, or only in certain of the circumstances specified herein, and for waiver of the overpayment where the cost of collection would exceed the amount of the overpayment."

The federal regulation prohibits the state from recouping any overpayment unless the recipient has income or resources, exclusive of the current assistance payment, available in the amount by which the agency proposes to reduce payment. However, this limitation does not apply in cases where the overpayments were caused by the recipient's willful withholding of information concerning his income, resources or other circumstances affecting the amount of payment.

The current federal regulation was promulgated after the decision in *National Welfare Rights Organization v. Weinberger* (D.D.C. 1974), 377 F. Supp. 861. The court in that case found that an earlier recoupment regulation was invalid because it permitted states to reduce current assistance payments without the requirement that the recipient have income or resources actually available in the amount of the proposed reduction. Decisions in other jurisdictions are consonant with this principle.

The New Jersey court in *Redding v. Burlington County Welfare Board* (1974), 65 N.J. 439, 323 A. 2d 477, 479, held that the state has a right to recoup AFDC overpayments providing the method of recovery does not diminish present or future AFDC grants below actual need.

In *Cooper v. Laupheimer* (E.D. Pa. 1970), 316 F. Supp. 264, the court stated that the state has a legal right to recover from the mother those funds which she was not entitled to receive, but that the state cannot recover the overpayments by reducing current assistance to the child. The court emphasized that the paramount goal of the AFDC program is the protection of the needy dependent child. Reducing current grants ignores the state's own prior determination of the level of need required by the family.

The court in *Bradford v. Juras* (D. Ore. 1971), 331 F. Supp. 167, 170, likewise held that "recoupment from current assistance grants violates the spirit and the intent of the statute establishing Aid to Families with Dependent Children." The court suggested other alternatives available to the state--seizure of cash balances on hand, revocation of the privilege of maintaining cash reserves, obtaining a civil judgment and seeking to satisfy the judgment when the recipient is able to pay, and criminal prosecution for fraud.

In *Jackson v. Weinberger* E.D. N.Y. February 9, 1976, the plaintiffs challenged federal and state regulations permitting recoupment of AFDC payments by deduction of sums from future payments when the overpayment is caused by the willful withholding of information by the recipient. The plaintiffs argued that the regulations conflict with the "income and resources" rule found in 42 U.S.C. sec. 602 (a) (7) which requires a state to take the income and resources of an applicant for AFDC into consideration in determining need. The court concluded that the plaintiffs' challenge was substantial but that they did not show probable success on the merits sufficient to support a preliminary injunction.

In summary, existing case law appears to require that the state specify a uniform statewide policy on recoupment and provide for recoupment only when the recipient has income or resources actually available exclusive of the current grant. If the overpayments were caused by the recipient's willful withholding of information concerning circumstances affecting the amount of payment, the state may be able to recoup without showing that the recipient has income or resources exclusive of the current grant which are available in fact.

There is a split of authority on the question of whether there must be specific statutory authority for recoupment of AFDC overpayments. *Ogdon v. Workmen's Comp. A.B., San Bernardino Cty. W.D.* (Calif. S.Ct. 1974), 113 Cal. Rptr. 206, 11 Cal. 3d 192, 520 P. 2d 1022, concluded that in the absence of a statute, no liability rests upon the recipient of public assistance to reimburse the state or county for aid legitimately obtained and granted. The court based its conclusion on the fact that at common law, in the absence of fraud in procuring relief, a recipient of charity was under no obligation to repay such charity.

In *Webb v. Swoap* (Calif. Ct. of Appeals 1974), 114 Cal. Rptr. 897, 40 Cal. App. 3d 191, the court observed that, absent a statute authorizing recoupment of aid paid pending appeal, a departmental regulation calling for such recoupment exceeded the department's statutory powers. The court found that none of the general provisions of the statute (such as authority to adopt regulations consistent with law and necessary for administration of aid, or to implement, interpret or make specific the statutes) authorized the recoupment regulation. The court also noted that the regulations

could not be bottomed upon conformity to federal law because the federal regulation on recoupment was permissive and not mandatory.

The court in *Redding, supra*, on the other hand, found that the power to seek recoupment of benefits illegally paid is inherent in the delegation of authority to administer the program. The court held that under the New Jersey statutes and regulations a welfare board has the right and power to bring a civil action to recover overpayments in AFDC assistance except where the overpayment was the result of administrative error.

In requesting my opinion on recoupment of overpayments, you noted that secs. 46.22 (4) (a) and 49.51 (2) (a) (7) provide for administration of the AFDC program by county welfare agencies. Since there is no express provision for recoupment in the statutes, such authority, if it exists, must be implied by secs. 46.22 (4) (a) and 49.51 (2) (a) (7). Unfortunately, there are no court decisions interpreting these sections from which implied authority might be derived. Further, as noted above, there is a split in authority in other jurisdictions as to whether a specific statutory provision is necessary for recoupment of AFDC overpayments. In these circumstances, I must conclude that serious questions remain as to whether a specific statute authorizing recoupment of AFDC payments improperly paid is necessary before rules can be promulgated. Therefore, I suggest that you seek such statutory authorization from the legislature.

BCL:WLJ

Ballots; Secrecy; Elections; Votes And Voting; Governmental Operations, Board Of; Public Officials; Alderman; Cities; A city Common Council may not vote to fill a vacancy on the Common Council by a secret ballot. Sec. 19.88 (1), Stats. OAG 46-76

July 30, 1976.

JAN MEERDINK, *Alderwoman*
Menasha, Wisconsin

You advise that a vacancy in the Common Council of the City of Menasha is about to occur as a result of an announced resignation and that the Common Council will fill that vacancy pursuant to the provisions of sec. 17.23 (1), Stats., which provides in pertinent part:

"Vacancies in offices of cities operating under the general law or special charter shall be filled as follows:

"(a) ... In the office of alderman ... in cities of 2nd, 3rd and 4th class, by the common council ...."

Pursuant to sec. 19.98, Stats., authorizing "any person to request advice from the attorney general" on subch. IV of ch. 19, Stats., Wisconsin's Open Meetings of Governmental Bodies Law, you request my opinion on whether the Common Council may vote by secret ballot to fill the vacancy pursuant to the provisions of above-quoted sec. 17.23 (1), Stats.

The pertinent statutory provision, sec. 19.88 (1), Stats., provides as follows:

"Unless otherwise specifically provided by statute, no secret ballot may be utilized to determine any election or other decision of a governmental body except the election of the officers of such body in any meeting."

It is my opinion that the Common Council may not vote by secret ballot to fill the vacancy in the Common Council of the City of Menasha.

I construe the phrase in sec. 19.88 (1) "officers of such body" to mean the leadership positions or officially designated positions of the body as contrasted with members of the body. Members of the Common Council are, for many purposes, considered officers of the city. But this does not make such council members officers of such body.

RCL:WHW

County Clerk; County Treasurer; Accountants; Bookkeeping; Auditor; Public Officials; Administrative Procedure; County board can only grant powers of indirect supervision to finance director with respect to accounting or bookkeeping duties of county clerk required by statute or board resolution to be performed by such officer. OAG 48-76

August 3, 1976.

VICTOR MOYER, *Corporation Counsel*
Rock County

You advise that Rock County has an administrator appointed under sec. 59.033, Stats., and a finance director. The latter

position was formerly that of auditor appointed under sec. 59.72, Stats., and was redesignated and given additional duties under the provisions of sec. 59.025 (3), Stats.

You state that on June 12, 1975, the Rock County board passed a resolution which provides:

> (1) " ... all accounting functions of the County Clerk's and County Treasurer's offices and all data processing activities, be conducted under the line authority of the finance director .... " and
>
> (2) " ... the Finance Director shall have authority of direct control over accounting policies in all county departments or offices. No accounting procedure policy changes shall be made by any department or office of the county without the prior authorization and approval of the County Finance Director .... " and
>
> (3) " ... Finance Director shall be consulted in process of evaluation of vacant accounting and bookkeeping positions for skill levels required, and should participate in evaluation of applicants."

You indicate that the county clerk does not raise a question "regarding the authority of the board to avail itself of the Finance Director's advice in setting skill levels and selecting employes for accounting and bookkeeping positions. However, the County Clerk contends that the board lacks authority to delegate the keeping of books of account to a finance director or to give such an employe the authority to direct other employes in the keeping of such books of account. He concludes that such board action does violence to the 'immemorial and important' duties of his office."

You inquire whether supervision over the county's books of account can be delegated by the county board to an officer denominated "finance director."

I am of the opinion that it can, providing that such supervision is directed through the county clerk in a manner which will not result in a transfer of statutory powers from the county clerk or substantially interfere with that officer's ability to carry out such duties.

Your second question is whether the finance director can be given supervisory authority over bookkeeping activities of other county employes who are physically located in the office of the county clerk?

I am of the opinion that he or she cannot be given *direct* supervisory power if said employes are deputies of the county clerk appointed under sec. 59.16 (1), Stats.

Although sec. 59.025 (3), Stats., grants the county board broad powers with respect to the creation of offices and positions and transfer of functions and duties between offices, departments and positions, county officers elected under the provisions of Art. VI, sec. 4, Wis. Const., are expressly excepted from such powers. The office of county clerk is such an office.

In 24 OAG 787 (1935), it was stated that the county board could appoint an auditor but could not transfer to such officer any of the principal or important duties of the county clerk. The opinion stated that the statutes setting forth the duties of the county clerk used the terms "accounts" and "books of account" and that the former must refer to original documents and papers then prescribed by statute, and that since the statute provided that the county clerk also was "to keep all the accounts of the county, and all such books of account as the county board shall direct," the county board could transfer the duties of supervising and "taking charge" of the system of books prescribed by the tax commission to the auditor. At p. 789 of that opinion it was stated:

> "The rule that the duties of the constitutional officer cannot be transferred to another is now confined to those immemorial and important duties that characterize the office."

Even if such rule is applicable to the county clerk, such officer was not from time immemorial charged with the keeping of *all* the accounts of the county or with *all* bookkeeping duties. The opinion at 24 OAG 787, 793 (1935) states that historically such officer was strictly a clerk for the board of supervisors, kept a record of its proceedings and preserved and filed accounts acted upon by the board. The opinion concluded that:

> "The principal and important duties of the county clerk have been to act as clerk for the board of supervisors, to

record its proceedings and to keep a record of its orders for payment of money. All these duties remain with the clerk, although the county auditor is given supervision of the books prescribed by the tax commission."

In 63 OAG 196, 199 (1974), which also involved sec. 59.025 (3), Stats., it was stated that the *statutory* powers of the county clerk in regard to budgeting and record keeping could not be transferred to a new position of finance officer and that:

"Powers conferred on a county officer by statute cannot be narrowed, taken away, or enlarged by the County Board except in cases where the legislature has authorized it by statute. *Beal v. The Supervisors of St. Croix Co.* (1861), 13 Wis. 559; *The Town of Crandon v. Forest County* (1895), 91 Wis. 239, 64 N.W. 847; *Reichert v. Milwaukee County* (1914), 159 Wis. 25, 150 N.W. 401." Also see 63 OAG 220, 225 (1974).

Section 59.17 (3) through (8), Stats., set forth certain of the statutory duties of the county clerk with respect to keeping of accounts and books of account:

"(3) SAME. Sign all orders for the payment of money directed by the board to be issued, and keep in a book therefor a true and correct account thereof, and of the name of the person to whom each order is issued; but he shall in no case sign or issue any county order except upon a recorded vote or resolution of the board authorizing the same; nor shall he sign or issue any such order for the payment of the services of any municipal justice, clerk or court, district attorney or sheriff until the person claiming such order files an affidavit stating that he has paid into the county treasury all moneys due the county and collected or received by him in his official capacity; nor shall he sign or issue any order for the payment of money for any purpose in excess of the funds appropriated for such purpose unless first authorized by a resolution passed by the county board pursuant to s. 65.90 (5).

"(4) ACCOUNTS. File and preserve in his office all accounts acted upon by the board, and indorse their action thereon, designating specifically upon every account the amount allowed, if any, and the particular items or charges for which allowed, and such as were disallowed, if any.

"(5) RECEIPTS AND DISBURSEMENTS. Record in a book therefor the reports of the county treasurer of the receipts and disbursements of the county.

"(6) SAME. Keep a true and accurate account in a book therefor of all money which comes into his hands by virtue of his office, specifying the date of every receipt or payment, the person from or to whom the same was received or paid, and the purpose of each particular receipt or disbursement, and keep such book at all times open to the inspection of the county board or any member thereof.

"(7) SAME. Keep in the manner prescribed in subsection (6) a separate account of all moneys paid the county treasurer by him.

"(8) SAME. Keep all of the accounts of the county and all such books of account as the county board directs."

Subsections (3) through (7) are concerned with *which* accounts and *which* books of account must be kept and in some cases provide an express *manner* in which such duties are to be carried out. Where a statute provides that a duty must be carried out in a specific way, the statute controls and the county board cannot require that the duties shall be performed in another manner or by another officer. Subsection (8) is of another nature. The section does not mean that the county clerk shall keep *all* of the accounts of the county. Sections 59.20 (4), 59.395 (5), 59.47 (5), 59.73 (1), (2) and 83.015 (3), Stats., clearly indicate that other officers have duties of keeping accounts and bookkeeping with respect to their offices. Subsection (8) contains no comma, however I construe the phrase "as the county board directs" as being applicable to the first duty, "Keep all of the accounts of the county" and to the second duty, "and [keep] all such books of account as the county board directs." In my opinion the statute empowers the county board to direct *the manner* in which the county clerk shall keep the accounts of the county and books of the county, where a statute does not provide for an express manner, and in addition empowers the county board to direct *which* accounts of the county and books of account, in addition to those set forth in subsecs. (3) through (7) or other statutes, shall be kept by the county clerk. It is my further opinion that subsec. (8) would permit a county board to transfer duties of keeping certain

accounts and books of account from the county clerk to some other officer where an express statute did not require the county clerk to perform the duties.

Section 73.10 (5), Stats., provides that the Department of Revenue "shall inquire into the system of accounting of public funds in use by ... counties ... and all other local public bodies, boards, commissions, departments or agencies; devise, prescribe and at the request of any ... county [etc.] ..., install a system of accounts which is as nearly uniform as practicable and when so installed the system shall be retained in use. ..."

In order to preserve the uniformity of the system installed with the cooperation of the Department of Revenue and any county board resolutions directing the county clerk as to the manner of keeping accounts and books of account where express statute does not control, the county board could authorize the finance officer to exercise only indirect supervision through the county clerk, as to responsibilities and duties expressly given such officer by statute or resolution of the county board, whether said duties are performed by such officer or by deputies or other personnel over whom the county clerk has power of appointment.

BCL:RJV

Drugs; Pharmacy; Health; Health And Social Services; Department Of; The provisions of ch. 168, Laws of 1975, allow only limited substitution of prescribed drugs through a formulary. OAG 49-76

August 5, 1976.

MANUEL CARBALLO, *Secretary*
Department of Health and Social Services

You request my opinion whether the provisions of ch. 168, Laws of 1975, allow unlimited substitution of prescriptions by pharmacists. For the reasons set forth below, it is my opinion that they do not.

The provision of the statute which gives rise to the question is sec. 450.075 (2), Stats. The section sets forth the conditions under which pharmacists are allowed to substitute drugs. The first part of this section is as follows:

> "Subject to sub. (3), a pharmacist shall fill every prescription with a drug product prescribed or its drug product equivalent. ..."

Both "drug product" and "drug product equivalent" have very specific meanings in the statute. Drug product is defined by sec. 450.075 (1) (b) with reference to sec. 140.90 (1) (b). It is "a specific drug in a specific dosage form from a known source of manufacture, whether by brand name or generic name." In other words, it is the physician's prescription.

"Drug product equivalent" is defined by sec. 450.075 (1) (c) as "a drug listed as a drug product equivalent in the formulary prepared under s. 140.90." In other words, it is different than the drug product in terms of brand name or generic name, but is the same as the drug product in terms of its chemical makeup.

The pharmacist who fills a prescription does so pursuant to sec. 450.075 (2). When filling that prescription he has two alternatives. One is to fill the prescription with the drug product--clearly the physician's prescription, and the physician's prescription only. The pharmacist's second alternative is to substitute the prescription with a drug product equivalent. But such equivalent, according to its definition in sec. 450.075 (c), must be found listed in the formulary prepared and published by the Department of Health and Social Services.

BCL:SMS

Conflict Of Interest; County Board; Health; Drugs; Disabled Persons; Where county hospital is authorized to furnish services to prevent or ameliorate mental disabilities, mental retardation, alcoholism and drug abuse, offices of trustee of county hospital and member of community mental health, mental retardation, alcoholism and drug abuse board are incompatible. OAG 50-76

August 5, 1976.

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

You ask whether one individual may serve simultaneously as trustee of a county hospital and as a member of the community mental health, mental retardation, alcoholism and drug abuse board for that county established under sec. 51.42, Stats. This will confirm an oral response previously provided to you.

The rule for determining whether two offices are incompatible is stated in 58 OAG 247 (1969):

> "... two offices are incompatible if there is a conflict of interest or duties, so that the incumbent of one office cannot discharge with fidelity and propriety the duties of both. Incompatibility is not simply a physical impossibility to discharge the duties of both offices at the same time, but is an inconsistency in the functions of the two offices. ..."

If the county hospital is authorized to furnish services to prevent or ameliorate mental disabilities, mental retardation, alcoholism or drug abuse, I am of the opinion that the functions of the two offices in question are inconsistent in at least two areas. Conflict may arise from the statutory powers of each board concerning the governing of county hospitals offering the above services. In addition, there is potential for conflict stemming from the duty of the sec. 51.42 board to contract for necessary services with agencies other than the county hospital.

A county is permitted to establish a county home for relief and support of dependent persons by sec. 49.14, Stats., and to establish a county hospital for treatment of such persons by sec. 49.16, Stats. Section 49.171, Stats., permits a county to establish an infirmary for treatment, care and maintenance of the aged infirm. In addition, sec. 51.25, Stats., provides for the establishment of hospital or facilities for the detention and care of the mentally ill, alcoholics and drug addicts.

Absent establishment of a sec. 51.42 board in a single county, these institutions would be governed by a board of trustees appointed pursuant to sec. 46.18, Stats. Where a 51.42 board has been created in a county, there is question whether a county hospital which furnishes care or services to prevent or ameliorate mental disabilities, mental retardation, alcoholism and drug abuse can be governed by a board of trustees appointed pursuant to sec. 46.18, Stats. The right to govern such hospital may be vested exclusively with the sec. 51.42 board of that county.

Among the purposes of sec. 51.42, Stats., described in subsec. (1) of that statute is the following:

> "... to provide for the integration of administration of those services and facilities organized under this section through the establishment of a unified governing and policy-making board of directors; ..."

In furtherance of that purpose, sec. 51.42 (3) (d) provides that when a single county administers a program under sec. 51.42 (3), the county hospital is to be governed under subsec. (4) of the statute, which provides for the creation of sec. 51.42 boards. The question whether a county hospital offering services under sec. 51.42 may be governed by the sec. 51.42 board to the exclusion of the hospital board of trustees is beyond the scope of this opinion. For purposes of this opinion, it will be assumed that a board of trustees may govern the hospital. The very question of which board is to govern is a source of potential conflict between the boards, and of inconsistency in the respective functions of members of each board.

Further, the sec. 51.42 board may contract with other agencies for necessary services. The interest of a trustee in keeping hospital beds full may sometimes conflict with the interest of a sec. 51.42 board member in providing the most appropriate patient care, when such care may best be obtained by contracting with another public or private facility.

BCL:RJV

Highway Commission, State; Highway Commissioner; Highways; Contracts; Contracts providing for the maintenance of state highways by the counties may be executed by the county highway committees without the approval of the county boards. OAG 51-76

August 6, 1976.

DENNIS J. FLYNN, *Corporation Counsel*
Racine County

You have asked whether a county highway committee may contract for the county by entering into an agreement with the

state highway commission for the maintenance of state highways or whether such contract must be approved by the county board of supervisors.

The county is the arm of the state and is subject to state direction. *McDougall v. Racine County* (1914), 156 Wis. 663, 146 N.W. 794. A county board may not restrict the statutory powers of other county officers unless authorized by the legislature. *Reichert v. Milwaukee County* (1914), 159 Wis. 25, 150 N.W. 401. The county highway committee is a creature of the legislature, not of the board and as such has certain statutory powers and responsibilities. Sec. 83.015, Stats.; *Joyce v. Sauk County* (1931), 206 Wis. 202, 239 N.W. 439.

In ch. 83, Stats., entitled County Highways, there are statutes which designate the highway committee as the contracting party for the county and there are other instances where the county board, or both the board and the committee, must act to contract for the county.

In discussing the issue of whether and under what circumstances the county highway committee may contract for the county, the court in *Joyce v. Sauk County, supra*, held:

> "... the county highway committee is expressly vested with power to make contracts binding upon the county for the prosecution of ... work. ... The statute has created an agency which is empowered to bind the county by contract. ..." [206 Wis. at p. 206.]

Accordingly, as we see from ch. 83, Stats., and *Joyce v. Sauk County, supra,* it is not unusual for the county highway committee to contract for the county.

The answer to your question, of course, depends on which agency or agencies have been designated by the legislature as the contracting party or parties for the county in the statute that authorizes the maintenance of state highways by the counties.

Maintenance of state highways by the counties is authorized in sec. 84.07 (1), Stats., which provides, in part:

> "... The highway commission may arrange with any county highway committee to have all or certain parts of the work of

maintaining the state trunk highways ... performed by the county and any county may enter into such arrangement. ..."[1]

I have been advised that for over twenty years, maintenance contracts have been executed by county highway committees for and on behalf of their respective counties pursuant to the provisions of sec. 84.07 (1), Stats. This extensive period of administrative construction and practice is entitled to great weight. *Milwaukee County v. Schmidt* (1971), 52 Wis. 2d 58, 187 N.W. 2d 777.

The term "arrange" and the phrase "may enter into such arrangement," as used in sec. 84.07 (1), are sufficiently generic so as to reasonably include within their construction or meaning the formal arrangement commonly referred to as a contract. Further, it is clear that in this subsection, the highway commission may make arrangements for county maintenance with the county highway committee.

It is my opinion that the statutory county highway committees are authorized by the legislature to enter into maintenance contracts, executed under and pursuant to the provisions of sec. 84.07 (1), Stats., which are binding on the counties without further approval of the county board.

BCL:CAB

Anti-Secrecy; Public Welfare; Health And Social Services, Department Of; Public Records; Section 47.40 (13), Stats., precludes the release of vocational rehabilitation information for the purpose of determining legal settlement of a dependent person. OAG 53-76

August 10, 1976.

ROBERT P. RUSSELL, *Corporation Counsel*
Milwaukee County

You ask whether sec. 47.40 (13), Stats., prohibits the release of information concerning Division of Vocational Rehabilitation activity to county public welfare departments for the purpose of determining the legal settlement of a dependent person. I am of the opinion that it does.

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[1] For the maintenance of the National System of Interstate Highways, see sec. 84.29 (2), which makes sec. 84.07 (1), as quoted above, applicable to the interstate highway system.

Section 47.40 (13), Stats., forbids any person from soliciting, disclosing, receiving, making use of, authorizing, knowingly permitting, participating in or acquiescing in the use of any information concerning persons receiving vocational rehabilitation. There is one exception to the prohibition--the above acts may be done "for purposes directly connected with the administration of the vocational rehabilitation program." Criminal penalties are provided for violation of sec. 47.40 (13), Stats.

The language of the prohibition is broad and is phrased in a series of alternatives. The statute applies to "any person or persons." Many different actions relating to vocational rehabilitation activity information including disclosure, receipt, use, and acquiescence in use are prohibited. The prohibition applies if the information was acquired either directly or indirectly or if acquired in the course of the performance of official duties. The words of the statute cover a wide range of activities. The argument is made that the release of information to a county welfare department is not a disclosure because counties are subdivisions of the state and the proscribed disclosure involves release to the general public, not to subdivisions of the state. Whether or not such release would be a disclosure, it would be clearly an authorization of use, permission for use or acquiescence in use.

The statute provides an exception for "purposes directly connected with the administration of the vocational rehabilitation program."

The federal rules contain the same requirement that use of information and records be limited to purposes directly connected with the administration of the vocational rehabilitation program. 39 Fed. Reg. 42484, sec. 401.47.

Legal settlement is a concept used to determine liability for general relief charges. Sec. 49.11, Stats. A determination of legal settlement is not a function of the vocational rehabilitation program, nor is it a factor of eligibility for vocational rehabilitation services. Therefore, a determination of legal settlement by counties is not directly connected with the administration of the vocational rehabilitation program and it does not fall within the exception permitted under the statutes.

Neither sec. 47.40 (6) (g), nor sec. 47.40 (9), Stats., creates exceptions which permit release of Division of Vocational Rehabilitation information to counties. Section 47.40 (6) (g) provides that the Department of Health and Social Services shall cooperate with counties in providing services relating to vocational rehabilitation under sec. 47.40, Stats. The directive that the department cooperate with counties does not mean that the Division of Vocational Rehabilitation may release vocational rehabilitation activity information to the counties. The language of sec. 47.40 (6) (g) is qualified by the specific language of sec. 47.40 (13). The very general language of sec. 47.40 (9) must also be read in light of the very specific, prohibitory language of sec. 47.40 (13), Stats.

If the non-availability of Division of Vocational Rehabilitation activity information severely handicaps a county in making legal settlement decisions, the Department of Health, Education and Welfare should be asked to modify the federal regulation and the Wisconsin legislature should be asked to modify sec. 47.40 (13), Stats.

BCL:WLJ

Campaign Expenses; Elections; Votes And Voting; Administrative Code; Constitutionality of Wisconsin's campaign finance law, ch. 11, Stats., discussed in light of *Buckley v. Valeo* (1976), 96 S.Ct. 612. Contribution limitations and disclosure provisions are generally unaffected. Ban on corporate contributions imposed by sec. 11.38, Stats., is probably constitutional.

All direct and indirect disbursement limitations on individuals, groups, and candidates contained in secs. 11.31, 11.26 (9), and 11.315 are invalid, as is the limit in sec. 11.26 (10) on a candidate's personal contribution to his campaign because of conflict with First Amendment rights of speech and association.

Sections 11.01 (16), (10), (9), and 11.23, Stats., defining the scope of regulated activity, should be narrowly construed. Restrictions on referenda-related activity in secs. 11.01 (9) and 11.23 apply only to transactions directly related to a particular result in a referendum.

Board does not have power to relieve minor parties from disclosure of contributors' names and other disclosure requirements imposed by sec. 11.06, Stats. Where a claim exists that a reasonable probability of threats, harassment, or reprisals will result from enforcement of the law, such determinations should be decided by the courts. The Board should oppose such requests allowing the development of an adequate record on the factual questions.

Board is advised to promulgate emergency rules under sec. 227.027, Stats., to publicize its policy regarding administration and enforcement of ch. 11, as modified herein. OAG 55-76

August 16, 1976.

JAMES R. KLAUSER, *Chairman*
State Elections Board

You have asked a number of questions related to the impact of the United States Supreme Court decision in the case of *Buckley v.*

Valeo (1976), 96 S.Ct. 612, on the state's campaign finance law as enforced by the State Elections Board. The Supreme Court in the *Buckley* case held that certain provisions of the Federal Election Campaign Act of 1971 (hereafter FECA), as amended in 1974, violated First Amendment guarantees of freedom of expression and association. It is apparent from the *Buckley* case and a comparison of the Federal Election Campaign Act with our state law that most of the provisions of ch. 11 are unaffected. For example, the court in *Buckley* generally approved the provisions in the FECA imposing contribution limitations and disclosure requirements. Since the provisions in the state law are very similar to those in the FECA,[1] you may presume their continued validity. However, several of the provisions of state law now appear to be unconstitutional and others require a narrow construction in order to avoid unconstitutionality. Your specific questions are related to those sections. Prior to answering your questions I wish to make several preliminary observations.

First, in agreeing to issue this opinion I have considered the alternatives available to the state as a means of obtaining a timely answer on the constitutionality of ch. 11, Stats., in light of the *Buckley* case. One option would have been to advise you to presume the constitutionality of ch. 11 and proceed to enforce it. This option would have required individual persons charged with violations of the act to challenge its provisions, a time-consuming and costly process. In addition, some individuals charged with violations under the act would have those charges used against them in the course of the campaign despite the fact that the law might later be declared unconstitutional. An unnecessary hardship would thus be imposed on candidates faced with the choice of complying with the law or violating the law as written in an effort to raise the constitutional questions.

We also considered and discarded the option of attempting to raise these questions through litigation. Some of the questions presented here are presently before the courts. These cases may not decide all of the issues raised or they may be decided on other grounds.

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[1] Differences in the Wisconsin law on disclosure are noted and discussed by Eric Anderson in a forthcoming student note entitled "Campaign Finance After Buckley," to be published at 1976 Wis. L. Rev. 3. Anderson concludes that none of the differences, including variations in the threshold for determining which committees and individuals must register and report, would render the Wisconsin requirements invalid under *Buckley*.

The enforcement of those portions of the election laws which appear to be obviously unconstitutional may subject board members to personal liability. In the recent case of *Wood v. Strickland* (1975), 420 U.S. 308, reh. den. 421 U.S. 921, the Court held that members of a local school board who violated the due process rights of individual students could be held personally liable where they knew *or should have known* that their actions would violate the student's rights. Members of the Board are likely subject to the same rules of qualified immunity. Consequently I am departing from the long established practice of not issuing an opinion where the question involved is in litigation. Under the circumstances, I feel it is my duty to advise you as to those provisions in state law which appear to be clearly unconstitutional.

Second, you also need to recognize that answering your questions has required certain assumptions as to the severability of our campaign finance law. I conclude below that portions of ch. 11 are unconstitutional. The question then arises whether the remaining portions of the statutes can be saved. In circumstances where it appears that portions of a statute are not severable, a declaration that portions of an act are unconstitutional may result in the entire act being voided. I have concluded for the reasons set forth below that ch. 11 of the Wisconsin Statutes can be interpreted in a narrow manner consistent with the United States Supreme Court decision in the *Buckley* case. However, ch. 11 should be amended at the earliest possible date by legislation which reflects the discussion below.

CAMPAIGN EXPENDITURES

You first ask whether the statutory limitations on campaign expenditures contained in sec. 11.31, Stats., are constitutional.

Section 11.31, Stats., prohibits any candidate for state or local office from making or authorizing disbursements from the campaign treasury which exceed stated limits. For example, candidates for governor are limited to expending $150,000 in the primary and $350,000 in the general election. Sec. 11.31 (1) (a), Stats. Candidates for alderman in cities of the first class may not make or authorize expenditures in excess of $8,000 for both the primary and general elections. Sec. 11.31 (1) (g) 3. d., Stats.

Section 11.31 (3), Stats., limits expenditures by imposing limitations on voluntary committees and individuals. This subsection provides:

> "(3) In addition to the amounts authorized under s. 11.05 (1) and (2), a voluntary committee or individual registered under s. 11.05 and filing an oath under s. 11.06 (7) may receive contributions and make disbursements from the funds or property received under s. 11.12 (1) not exceeding an aggregate total of $50 during any calendar year."

Expenditure limitations of this type were expressly invalidated by the Court in *Buckley*. In fact, the Court struck down *all* expenditure limitations imposed by the FECA on individuals, groups, and candidates. In so doing, the court distinguished expenditure limitations from limitations on contributions and disclosure provisions. The Court stated that "... although the Act's contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association ..." *Buckley* at 636. Moreover, ceilings on expenditures interfere with associational activity by "preclud[ing] most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association." *Buckley* at 636.

Second, the Court felt that the valid governmental interest in alleviating the corrupting influence of large contributions was adequately served by the Federal Act's contribution limits and disclosure provisions and that the expenditure ceilings were relatively less important. *Buckley* at 647-8. Chapter 11, Stats., imposes contribution limits and disclosure provisions similar (although not identical) to the federal act.

Based on *Buckley* it is my opinion that the direct expenditure limitations of sec. 11.31 (1), (3), and (4) are clearly invalid. Additionally, it is my opinion that secs. 11.31 (2), (5), (6), (7) and 11.26 (9), Stats., although they do not impose direct limitations and are therefore not themselves substantively invalid, have no separate function to perform independent of the invalid portions of the statute and should be considered a nullity. 2 *Sutherland Statutes and Statutory Construction*, sec. 44.04 (4th ed. C. Sands, Supp. 1976).

I am also of the opinion that the limit on the size of a candidate's post election advertisement thanking his supporters contained in sec. 11.315, Stats., is invalid since it indirectly imposes an expenditure limitation on the candidate and does not have a direct relation to the election process itself.

PERSONAL CAMPAIGN CONTRIBUTIONS

Second, you ask whether the limitations contained in sec. 11.26, Stats., on contributions of a candidate to his own campaign are constitutional.

Section 11.26 (10) provides:

> "(10) Notwithstanding sub. (1), a candidate may make contributions of not more than 150% of the amounts specified to his own campaign, except that any candidate who is covered under s. 11.31 (1) (g) and (h) may make contributions of not more than $500, or 300% of the amounts specified to his own campaign, whichever is greater. The contribution limit of sub. (4) applies to amounts contributed by a candidate personally to his own campaign and to other campaigns, except that a candidate may exceed the limitation if he is authorized under this section to contribute more than the amount specified to his own campaign, up to the amount of that limitation. A candidate's personal contributions must be deposited in his campaign depository account and reported in the normal manner."

In *Buckley*, *supra*, sec. 608 (a) (1) of the FECA was considered by the court. That section imposed a maximum dollar limit on a candidate's use of personal funds, which varied depending on the office sought. The only difference between that section and sec. 11.26 (10) is in the method of calculating the dollar limitation.

In *Buckley*, the Court discussed limitations on a candidate's personal expenditures as follows:

> "The ceiling on personal expenditures by candidates on their own behalf, like the limitations on independent expenditures contained in sec. 608 (e) (1), imposes a substantial restraint on the ability of persons to engage in protected First Amendment expression. The candidate, no less than any other person, has a First Amendment right to

> engage in the discussion of public issues and vigorously and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day. Mr. Justice Brandeis' observation that in our country 'public discussion is a political duty,' *Whitney v. California* 274 U.S. 357, 375, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (1927) (concurring opinion), applies with special force to candidates for public office. Section 608 (a)'s ceiling on personal expenditures by a candidate in furtherance of his own candidacy thus clearly and directly interferes with constitutionally protected freedoms." *Buckley* at 651.

The Court discussed the several justifications advanced for sustaining such limitations and specifically rejected the notion that the government's interest in preventing actual and apparent corruption of the political process was a justification for the limitation. Indeed, the Court pointed out that this interest was adequately served by the contribution limits, and that a candidate's use of his own funds reduces a need for outside contributions, thus reducing any actual or apparent corruption of the political process. *Buckley* at 651. The Court also rejected the second governmental interest advanced: to equalize resources among candidates. That interest was found insufficient to overcome the First Amendment's protection of the "... freedom of a candidate to speak without legislative limit on behalf of his own candidacy." *Buckley* at 651.

Since there are no special or additional justifications which could be advanced to sustain the validity of sec. 11.26 (10), it is my opinion that all of this section except the last sentence relating to deposit and reporting of funds is unconstitutional.

SCOPE OF REGULATED ACTIVITY

Third, you have asked a general question concerning the scope of regulated activity and expression in light of the definitions of political activity and related terms contained in secs. 11.01 (16), 11.01 (10), 11.01 (9) and 11.23, Stats. This poses the most difficult set of questions raised in your request.

Section 11.01 (16) states that:

"(16) An act is for 'political purposes' when by its nature, intent or manner it directly or indirectly influences or tends to influence voting at any election. Such an act includes support or opposition to a person's present or future candidacy or to a present or future referendum. A 'political purpose' does not include expenditures for defense attorney's fees and other legal fees, costs and expenses, or payments supporting any person subject to criminal prosecution for violation of state or federal law, or for any agent or dependent of such a person."

This section, along with the others cited above, evidences a legislative intent to restrict and regulate a broad scope of political activity, including that which may not be directly related to the electoral process. This sweeping effort to regulate protected First Amendment activity, in light of *Buckley*, may be constitutionally overbroad unless subject to narrow interpretation and application.

It is a cardinal rule of statutory construction that where possible statutes are to be construed to preserve their constitutionality. *Town of Madison v. City of Madison* (1955), 269 Wis. 609, 70 N.W. 2d 249. Here, such a construction is not suggested from the face of these sections of the statutes. While the *Buckley* case itself does not directly answer the question since the regulations involved in *Buckley* were more narrowly drawn than those presented here it may help the Board in interpreting and applying ch. 11.

The Court in *Buckley* directly decided that regulation of political activity by imposing expenditure limitations is impermissible and that regulation by requiring public disclosure of expenditures is permissible. In these two areas of regulation, a narrow definition of the political activity subject to regulation is constitutionally mandated to protect freedoms of speech and association. The Court adopted the standard of "express advocacy" of the election or defeat of a particular candidate as an acceptably narrow definition of activity subject to regulation. The Court did not explicitly set forth a single definition of "political activity" which might be applied in other situations.

Despite the focus on these two areas in *Buckley*, it is my opinion that the conclusions drawn there about the permissible scope of regulated activity must be given a broad application to similar provisions, including those in ch. 11, Stats. First, the Court's focus in *Buckley* was at least partly dictated by the scheme of the

FECA, wherein the scope of permissible regulation is indirectly defined through the definitions of "contribution" and "expenditure." Second, in both instances where the Court considered the question it narrowed the scope to encompass only "express advocacy" regarding candidates. Third, this general standard is easily inferrable from the Court's reliance on the distinction between issue discussion and advocacy of a political result. *Buckley* at 663. The Court approved regulation of activities directly affecting elections; general issue discussion must remain unhampered by regulation.

The implications of this standard are clear: sec. 11.01 (16) of the Statutes, if extended to its arguable limit, would impose unconstitutional restrictions upon protected free speech and associational activity. Either the sweep of this section must be narrowed by construction or it must fall as unconstitutional. Such a construction is suggested by the Court in *Buckley*. I am of the opinion that the "express advocacy" standard should be applied by the Board to all phases of political activity regulated under ch. 11. The application of this standard is a perogative of the Board and will have to be accomplished on a case-by-case basis.

For similar reasons, sec. 11.01 (10) should be narrowly construed. That section provides:

> "(10) An act is 'in support of' or 'in opposition to' a candidate when it is done with the primary purpose, or when it carries the substantial consequence, of influencing voting at an election for public office. Such an act does not include the making of a contribution or disbursement for the maintenance of permanent offices or the employment of continuing staff for a continuing political party or permanent committee."

The language "when it carries a substantial consequence" may be subject to an overbroad interpretation. Thus, for example, it is not clear which acts may have such "substantial" consequences. Protected First Amendment activity undertaken for purposes unrelated to an election may have a substantial influence on the outcome of that election. Consequently, it is my opinion that the language "when it carries the substantial consequence" should be interpreted to apply only to acts which are undertaken with the purpose of expressly advocating the election or defeat of an identified candidate.

Sections 11.01 (9) and sec. 11.23 pose somewhat different questions. Section 11.01 (9) provides:

> " 'Group' or 'political group' means any person other than an individual and any combination of 2 or more persons, permanent or temporary, *which makes or accepts contributions or makes disbursements for the purpose of influencing the outcome of any referendum* whether or not engaged in activities which are exclusively political." (Emphasis supplied.)

Section 11.23 provides in pertinent part:

> "(1) Any group or individual *may promote or oppose any referendum* in this state. Before making disbursements, receiving contributions or incurring obligations in excess of $25 in the aggregate in a calendar year *for such purposes*, the group or individual shall file a verified registration statement under s. 11.05 (1), (2) or (2r). In the case of a group the name and mailing address of each of its officers shall be given in the statement. Every group and every individual under this section shall designate a campaign depository under s. 11.14. Every group shall appoint a treasurer, who may delegate his authority but is jointly responsible for the actions of his authorized designee for purposes of civil liability under this chapter. The appropriate filing officer shall be notified by a group of any change in its treasurer within 10 days of the change under s. 11.05 (5). The treasurer of a group shall certify the correctness of each statement or report submitted by it under this chapter. (Emphasis supplied.)
>
> "***
>
> "(4) Each group or individual shall file periodic reports as provided in ss. 11.06, 11.19 and 11.20.
>
> "***"

These two sections do not appear to require reporting of all expenditures and disbursements for groups which engage only in part in attempts to influence elections or referenda. The requirement of sec. 11.23 that expenditures be "for such purposes" restricts its application to receiving contributions or making disbursements for the purpose of promoting or opposing any referendum.

The *Buckley* case itself differentiates between advocacy of ideas and advocacy linked to the election of particular candidates. Section 434 (e) of the FECA was construed narrowly to impose independent reporting requirements on groups and individuals that are not candidates or political committees only:

> "... (1) when they make contributions earmarked for political purposes or authorized or requested by a candidate or his agent, to some person other than a candidate or political committee, and (2) when they make an expenditure for a communication that expressly advocates the election or defeat of a clearly identified candidate." *Buckley* at 664.

The *Buckley* Court discussed two possible justifications for these requirements. One justification was "... to stem corruption or its appearance ..."; the other was to "... shed the light of publicity on spending that is unambiguously campaign-related but would not otherwise be reported ...." *Buckley* at 664. The "anti-corruption" justification may be less compelling in the referendum case where there is no candidate to corrupt. The public information rationale, however, appears to be equally valid in the referendum situation.

I am of the opinion that the restrictions in these sections are constitutional when narrowly construed. It is my advice that the Board adopt a construction of sec. 11.23 which states that it will be applied only to disbursements or receipt of contributions or incurring of obligations *directly* related to express advocacy of a particular result in a referendum.

The Board should announce their interpretations of these sections through emergency rules.

EXEMPTION OF MINOR PARTIES

Fourth, you have asked the extent of the Board's authority to exempt minor parties, whose contributors would be subject to threats, harassment, or reprisals if their identities were disclosed, from the reporting requirements contained in ch. 11.

The Court in *Buckley* upheld disclosure requirements, finding that they serve the substantial governmental interests of information, deterrence of corruption, and detection of violations of the contribution limitations. *Buckley* at 657-8. However, the Court, relying on *NAACP v. Alabama* (1958), 357 U.S. 449, and other cases, noted that the delicate constitutional balance might tip

and prevent application of the disclosure provisions where a minor party could demonstrate that disclosure would subject contributors to threats, harassment, or reprisals. The Court clearly suggests that disclosure requirements of the type found in sec. 11.06, Stats. could be unconstitutionally applied and that relief would be appropriate where a proper evidentiary showing is made. *Buckley* at 659. Your basic question is whether and how the Board could handle such claims.

Section 5.05, Stats., which sets forth the powers and duties of the Board, is silent on the Board's power to act where allegations of unconstitutional application of sec. 11.06, Stats., are made. Chapter 11 provides no direct guidance.

The general rule is that administrative agencies have only those powers which are expressly granted to them or which are necessarily or fairly implied from the statutes governing their responsibilities. *State ex rel. Farrell v. Schubert* (1971), 52 Wis. 2d 351, 190 N.W. 2d 529.

State agencies are granted certain general powers to interpret and apply the statutes which they administer. Sec. 227.06, Stats. Chapter 11 not only fails to address the question of who may grant exemptions, but is devoid of any recognition of a potential need for exemptions. I have considered the question of whether, standing alone, sec. 227.06 provides authority for the Board to decide applications for exemptions. Such a power, even in the absence of express statutory authority, was found by the court in *Doe v. Martin* (D.C. Cir. 1975), 404 F. Supp. 753, under the District of Columbia Campaign Finance Act. An administrative agency's power to pass on the constitutional *applicability* of statutes has been recognized to a limited extent even though administrative agencies have no power to pass on the constitutionality of the legislation itself. See 3 K. Davis, *Administrative Law Treatise*, sec. 20.04 (1958). Wisconsin courts have not considered these questions and I must therefore conclude that the Board's power to make determinations of exemptions for minor parties under sec. 227.06 is doubtful.

A court in examining this question would undoubtedly be influenced by sec. 5.05 which contemplates enforcement by the Board of "laws relating to elections and election campaigns," including violations of ch. 11.

Finally, the wisdom of the Board exercising such power, even if it were to be available, is questionable. The Court in *Buckley* discussed the issue of exemptions with great specificity. While recognizing the inherent difficulties in establishing criteria to carve out a blanket exemption for minor parties, the Court nevertheless provided guidelines as to what kind of evidence would be sufficient to establish a party's entitlement to an exemption.[2] Although they are *dicta*, these guidelines will be used by any court or agency called on to decide individual applications for exemption from the disclosure requirements of sec. 11.06, Stats. There is an inherent difficulty in the 227.06 declaratory ruling procedure as applied to the types of factual questions which are suggested by *Buckley*. A ch. 227 administrative proceeding may not be an adequate adversary proceeding in that there may be no effective response to the allegations of the minor party seeking exemption. In the usual case there will likely be no organized or effective response to the request for exemption. The Board as the trier of law cannot, at the same time, be an adversary. The result can be expected to be an inadequate record for administrative review. A better procedure would be to have the Board oppose the exemption subjecting the claim to an adversary process in another forum.

For all these reasons I am of the opinion that the Board probably does not have and should not exercise the power of administrative review of minor party exemptions. Rather, I would counsel the Board to take an adversary position seeking to enforce the law as to all such groups, using declaratory judgment actions or enforcement proceedings to obtain judicial rulings on the question of exemptions.

AUTHORITY OF THE BOARD TO CONSTRUE STATUTES

Fifth, you ask the extent of the Board's authority to construe the provisions of ch. 11, Stats., so as to avoid unconstitutional overbreadth in secs. 11.01 (16), 11.01 (9), and 11.23, Stats.

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[2] "Minor parties must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim. The evidence offered need show only a reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment or reprisals from either government officials or private parties. The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient. New parties that have no history upon which to draw may be able to offer evidence of reprisals and threats directed against individuals or organizations holding similar views." *Buckley* at 661.

For the reasons suggested above, the provisions of secs. 11.01 (9) and 11.23 are probably not constitutionally overbroad. Those sections for which a narrow construction has been suggested should be interpreted and applied by the Board in the manner suggested.

PROHIBITION OF CORPORATE CONTRIBUTIONS

Although you did not originally ask whether Wisconsin's ban on corporate contributions is constitutional in light of *Buckley*, I feel constrained to comment briefly in light of public concern. You have agreed that such comment would be appropriate. Sections 11.38 (1) (a) and (b), and (2) (a), provide:

> "(1) (a) 1. No foreign or domestic corporation, or association organized under ch. 185, may make any contribution or disbursement, directly or indirectly, to any political party, committee, group, candidate or individual for any political purpose or to promote or defeat the candidacy of any person for nomination or election to any public office or any referendum to be submitted to the voters.
>
> "2. Notwithstanding subd. 1, any such *corporation or association may establish and administer a separate segregated fund and solicit contributions from individuals to* such fund to be utilized for political purposes by such corporation or association, *but the corporation or association may not make any contribution to such fund.* Such fund shall appoint a single treasurer and shall register as a political committee or group under s. 11.05. The corporation or association may not expend more than $500 annually for solicitation of contributions to such fund. (Emphasis supplied.)
>
> "(b) No political party, individual, committee, group or candidate may accept any contribution prohibited by this section.
>
> "(2) (a) *This section does not affect the right of any individual to support candidates* and purposes of his own choosing or his right to subscribe to a regularly published organization newspaper. (Emphasis supplied.)
>
> "***"

Section 610 of the FECA imposes a total ban on corporate contributions at the federal level, similar to that imposed by sec. 11.38, Stats., in state and local elections. The Court in *Buckley* did not directly address the question of corporate contributions. Thus the validity of the similar ban under sec. 11.38, Stats., appears to be unimpaired by the case.

The ban on political contributions by corporations in this state is of long standing and of broad application. See OAG 5-76 (65 OAG 10 (1976)), issued February 17, 1976. It is my opinion that a strong case can be made for the constitutionality of sec. 11.38, Stats., and its total ban on corporate contributions. The long history of the operation of this ban has not inhibited robust political debate in this state. Moreover, individuals and groups have First Amendment rights under the Constitution; corporations do not. Other means of organization are readily available to groups wishing to engage in political activity.

ADMINISTRATION AND ENFORCEMENT

Sixth, you ask that in the event I find any of the Statutes in question to be unconstitutional or capable of unconstitutional application, I advise you as to the posture the Board should assume in the administration and enforcement of those sections.

Those portions of ch. 11 which I find unconstitutional should not be enforced and should be treated as if they did not exist. Those sections of ch. 11 which are susceptible of constitutional applications should be narrowly construed along the lines suggested herein. Those sections of ch. 11 which are not considered in this opinion should be enforced.

In addition, I believe that you should seriously consider the immediate adoption of a series of emergency administrative rules pursuant to sec. 227.027, Stats. Such rules, as you are no doubt aware, may remain in effect for a period of 120 days. If adopted soon, they will provide guidance during the period between now and the fall elections. This set of emergency administrative rules would be a better vehicle for announcing the intentions of the Board than requiring each and every local election official and candidate to carefully compare the provisions of ch. 11 with the rulings contained in this opinion. Moreover, the adoption of such emergency rules has the added advantage of a public announcement of Board policy in a manner which is likely to

provide publicity and actual notice to affected officials and other persons.

BCL:DJH

Elections; Residence; Legislature; A candidate for the legislature need not be a resident of the district which he seeks to represent at the time he files his nomination papers. That portion of 61 OAG 368 (1972) inconsistent herewith is repudiated. OAG 56-76

August 26, 1976.

JAMES R. KLAUSER, *Chairman*
Elections Board

The Elections Board has requested my opinion on several related questions concerning the qualifications of legislative candidates. You first inquire whether such a candidate must be a resident in the district he seeks to represent at the time he files his nomination papers. In my opinion he need not be.

Section 8.15 (4) (b), Stats., applicable to candidates for nomination on a partisan ticket, provides, in part, that:

> "Each candidate shall file with his nomination papers, a declaration, sworn to before any officer authorized to administer oaths, *that he is a resident of the district or county, if he is seeking an office elected on a district or county basis* and he will qualify for office if nominated and elected. ..." (Emphasis supplied.)

The emphasized language in the quoted statutory provision requires a candidate to be a resident of the district he seeks to represent at the time he files his nomination papers. Such a requirement, if applied to candidates for the state legislature, would impose qualifications for nomination beyond those set forth in the Wisconsin Constitution for holding office.

Article IV, sec. 6, Wis. Const., establishes the qualifications for membership in the legislature as follows:

> "No person shall be eligible to the legislature who shall not have resided one year within the state, and be a qualified elector in the district which he may be chosen to represent."

To be "a qualified elector in the district which he may be chosen to represent," a candidate must be, among other things, a resident of the district. *The State ex rel. Wannemaker v. Alder* (1894), 87 Wis. 554, 558, 58 N.W. 1045; Art. III, sec. 1, Wis. Const.; sec. 6.02, Stats. Eligibility to office is generally determined as of the time the person assumes the duties of office, *State ex rel. Zimmerman v. Dammann* (1930), 201 Wis. 84, 92-93, 228 N.W. 593, or, at the earliest, at the time of election, *Cross v. Hebl* (1970), 46 Wis. 2d 356, 361, 174 N.W. 2d 737.

In our electoral system the final choice of the electorate is effectively limited to those candidates selected through the nominating process. The partisan nominating process has particularly great impact on the ultimate result of the election. *Newberry v. United States* (1921), 256 U.S. 232, 285-286, 41 S.Ct. 469, 65 L.Ed. 913 (Pitney J. concurring). Since the nomination process is such an integral part of the scheme by which candidates become office-holders, imposing more stringent qualifications for nomination than for holding office is tantamount, in this instance, to imposing qualifications for office additional to those set by the constitution. *Cf., State ex rel. Wettengel v. Zimmerman* (1946), 249 Wis. 237, 247, 24 N.W. 2d 504.

I am mindful that all doubts as to the constitutionality of an enactment are to be resolved in favor of the act if at all possible, *State ex rel. Hammermill Paper Co. v. La Plante* (1973), 58 Wis. 2d 32, 205 N.W. 2d 784, *In re Appointment of Revisor of Statutes* (1910), 141 Wis. 592, 124 N.W. 670, and that an act should be construed in such a way so as to avoid constitutional objections to its validity, if it will reasonably bear such a construction, *David Jeffrey Co. v. Milwaukee* (1954), 267 Wis. 559, 66 N.W. 2d 362.

However, while the residency requirement set forth in sec. 8.15 (4) (b), Stats., clearly appears applicable to all candidates seeking a position on the September partisan primary ballot, 61 OAG 368 (1972), it is a well-established principle of constitutional law that qualifications prescribed by Constitution are exclusive and it is beyond the power of the legislature to prescribe additional qualifications, *State ex rel. La Follette v. Kohler* (1930), 200 Wis. 518, 553, 228 N.W. 895. It was on the basis of such a conflict that this office previously opined, in 61 OAG 155 (1972), that sec. 8.15 (4) (b), Stats., could not be interpreted as applying to candidates for representatives to Congress, since each house of Congress is the

judge of the elections, returns and qualifications of its own members and the state cannot impose district residency requirements on such candidates where the U.S. Constitution only requires that a representative be an inhabitant of the state at the time of election. Art. I, secs. 2 and 5, U.S. Const.

Such a direct and unavoidable conflict also exists between the provisions of sec. 8.15 (4) (b), Stats., and Art. IV, sec. 6, Wis. Const., when the provision is applied to candidates seeking state legislative office. In my opinion, the residency requirement of sec. 8.15 (4) (b), Stats., adds a qualification for holding the office of state senator or representative to the state assembly in addition to those fixed by Art. IV, sec. 6, Wis. Const., and therefore the statute cannot be constitutionally applied to legislative candidates filing nomination papers for such offices at the September partisan primary.

The board next asks what constitutes "residency" in the above context. This question was previously answered in 61 OAG 368 (1972), where the term "residency" is construed to mean domicile, as opposed to temporary residency. For a more complete discussion of this issue, see 61 OAG 245 (1972), 248-251.

The board further inquires whether it has jurisdiction to refuse to certify a legislative candidate for a ballot position where he is not a resident in the district he seeks to represent at the time he files his nomination papers. Since I have concluded above that a candidate is not required to reside in the district at that time, the board may not refuse certification in the situation posed. However, if it appeared, for example, that the candidate could not meet the requirement of Art. IV, sec. 6, Wis. Const., that he reside within the state for one year to be eligible to the legislature, then the board may refuse to accept his name for the ballot. See sec. 8.30, Stats. Where it appears that a decision adverse to the candidate may be required, action should be taken only after notice to the candidate affording him an opportunity to appear before the board and be heard, if he so desires. See *Manning v. Young* (1933), 210 Wis. 588, 247 N.W. 61.

Finally, the board inquires whether it has an obligation to go beyond the nomination papers filed to find facts concerning a legislative candidate's residency within the district, for the purpose of determining whether he should be certified for a ballot position.

Since a candidate constitutionally may not be required to be a resident in the district at the time he files his nomination papers, the board clearly has no obligation to find facts concerning his residency within the district at that time.

BCL:DJH:JCM

Open Meetings; Anti-Secrecy; Municipalities; Boards of review cannot rely on exemptions in Open Meeting Law, sec. 19.85 (1), to close any meeting in view of explicit requirements in sec. 70.47 (2m), Stats. OAG 57-76

August 26, 1976.

JAMES A. SIMMONDS, *City Attorney*
City of Wausau

Pursuant to sec. 19.98, Stats., you request my advice whether a board of review may meet in closed session in reliance upon the exemption provided in sec. 19.85 (1) (a), Stats., to deliberate, discuss or otherwise act with respect to a hearing conducted before such body.

It is my opinion that it cannot.

Section 19.85 (1) (a), Stats., provides that a governmental body, may, after proper notice or announcement and majority vote, convene in closed session for the purpose of:

> "(a) Deliberating after any judicial or quasi-judicial trial or hearing."

Boards of review do conduct hearings under provisions of sec. 70.47 (8) and (10), Stats.

The new Open Meeting Law, secs. 19.81-19.98, Stats., became effective July 2, 1976. However, an exemption substantially similar to sec. 19.85 (1) (a), Stats., was contained in former sec. 66.77, Stats.

The legislature is presumed to have had knowledge of such exemption when it enacted ch. 151, Laws of 1975, effective January 17, 1976, which created sec. 70.47 (2m), Stats., to provide:

"70.47 (2m) OPEN MEETINGS. All meetings of the board of review shall be publicly held and open to all citizens at all times. No formal action of any kind shall be introduced, deliberated upon or adopted at any closed session or meeting of a board of review."

Boards of review must comply with the more specific statute.

BCL:RJV

County Supervisor; Counties; Public Welfare; Welfare; County Board; Employer And Employe; Administrative Procedure; County board of supervisors is without power to hire and fire employes of county welfare department as such power, in counties under 500,000 which have not elected to be under sec. 46.21, belongs to county board of public welfare to be exercised in compliance with merit system rules promulgated by Department of Health and Social Services. OAG 59-76

September 9, 1976.

LARRY A. SIEGER, *District Attorney*
Vernon County

You request my opinion whether the power to hire and terminate county welfare department employes is within the authority of the county board of supervisors or whether it rests in the county board of public welfare.

For the reasons stated below it is my opinion that such power, in counties of less than 500,000 population and not electing to be under sec. 46.21, Stats., is exclusively within the authority of the county board of public welfare and must be exercised subject to secs. 46.22 (6) and 49.50 (2), Stats., and the merit system rules promulgated by the Department of Health and Social Services.

County boards have broad powers by reason of sec. 59.025, Stats., with respect to the creation of county offices and positions and the transfer of certain management functions to agencies including committees of the board. However, such powers are, by reason of sec. 59.025 (2), Stats., limited "by express language [and] ... subject to the constitution and such enactments of the legislature of statewide concern as shall with uniformity affect

every county." I am of the opinion that the establishment and maintenance of the state merit system required by the *express* language of secs. 49.50, 46.22 (6) and 59.15 (2) (c), Stats., and contained in ch. PW-PA 10, Wis. Adm. Code, is a matter of statewide concern. See OAG 43-76, 65 OAG 123 (1976).

Section 46.22 (1), (2) (b) and (3), Stats., requires that the director of the county welfare department and the employes within such department be appointed subject to sec. 49.50 (2) to (5) and rules promulgated thereunder. Section 49.50 (2), Stats., provides:

> "... The provisions of this section relating to personnel standards on a merit basis supersede any inconsistent provisions of any law relating to county personnel ...."

The remainder of sec. 49.50 (2) to (5) requires the Department of Health and Social Services to adopt and supervise a merit system applicable to county welfare employes. Section 46.22 (6) makes this merit system applicable to a county department of public welfare.

Section 59.15 (2) (c), Stats., provides in pertinent part:

> "(c) the board may provide, fix or change the salary or compensation of any ... position [or] employe ... but no action of the board shall be contrary to or in derogation of the rules and regulations of the department of health and social services pursuant to s. 49.50 (2) to (5) ...."

This section specifically limits the powers of a county board of supervisors with respect to compensation of employes of a county welfare department.

The respective duties of the director of the county board of public welfare, the county board of public welfare and the county board of supervisors are expressly set forth in sec. 46.22 (3), Stats., which provides in part:

> "(3) DIRECTOR. The county director of public welfare shall serve as the executive and administrative officer of the county department of public welfare. ... *The county director shall recommend to the county board of public welfare the appointment of employes necessary to administer the functions of the department, subject to sub. (6) and s. 49.50 (2) to (5) and the rules promulgated thereunder.* The county

director shall make recommendations to the county board of supervisors who shall fix the salary of such employes." (Emphasis added.)

While this language has not been construed by our Supreme Court, similar language which proceeded it has been interpreted in a case involving the power to fix salaries for these employes. Under prior law, sec. 46.22 (3), Stats. (1965), provided that the county director of public welfare "shall recommend to the county board of public welfare the appointment and fixing of salaries of employes necessary to administer the functions of the department ...." The Court in construing that language in *Kenosha County C. H. Local v. Kenosha County* (1966), 30 Wis. 2d 279, 282, 140 N.W. 2d 277, held that the county board of public welfare and not the county board of supervisors had power to fix the salaries of welfare department employes. The Court noted:

"We share the following viewpoint expressed by the trial judge:

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

"This position is also buttressed by two formal opinions of the attorney general. In 1955, in 44 Op. Atty. Gen. 262, 266, the attorney general ruled that sec. 59.15, Stats., did not give the county board of supervisors authority to control the appointment of employees in a county welfare department. Subsequently, in 1957, the attorney general expressed an opinion in 46 Op. Atty. Gen. 137 which asserted that a county board of supervisors does not have the power to fix compensation of employees of a county department of public welfare."

Section 46.22 (3), Stats., was subsequently amended, by ch. 154, Laws of 1969, to give the county board of supervisors power to fix the salaries of the employes involved. The change in the statute relating to salaries did not alter the power of appointment of employes and such power to appoint continues to rest in the county board of public welfare. Moreover, the power to set salaries must be exercised in conformance with rules and

regulations of the Department of Health and Social Services. Sec. 59.15 (2) (c).

The question of termination of employment is answered by reference to these same statutes and related rules. The Department of Health and Social Services, pursuant to sec. 49.50 (2), Stats., has promulgated rules PW-PA 10, Wis. Adm. Code, dealing with terminations of appointment. PW-PA 10.06 (4) defines "Appointing Authority" as "The officer, board, person or group of persons having authority to hire, discipline, and remove subordinate employes." PW-PA 10.10 provides that employes with permanent status may be suspended or terminated only for just cause. PW-PA 10.10 (2) makes it clear that the power of initiation of suspension or termination rests with the appointing authority, which is the county board of public welfare. Also see PW-PA 10.26. Power to initiate layoff is also in the appointing authority by reason of PW-PA 10.17.

In conclusion, it is my opinion that the power to appoint and terminate employes of a county welfare department lies within the exclusive province of the county board of public welfare.

BCL:RJV

Anti-Secrecy; Open Meetings; Newspapers; Written request pursuant to sec. 19.84 (1) (b), Stats., by news media for notice of meetings of governmental body should be filed with chief presiding officer or his designee and separate written request should be filed with each specific governmental body. OAG 60-76

September 13, 1976.

JAMES L. HUSTON, *Managing Editor*
Waukesha Freeman

Pursuant to sec. 19.98, Stats., you request to be advised whether the separate but similar letters you have written to the clerks of towns, villages, cities and school districts in your circulation area are sufficient to impose upon them an enforceable obligation to notify you, according to sec. 19.84 (1) (b), Stats., of all meetings of all governmental bodies within the jurisdiction of the respective town, village, city or school district.

Your letter to a village clerk states in part:

> "By this letter, we are making a formal, written request under sub-chapter IV of Chapter 19 of Wisconsin Statutes to be notified of all meetings of government bodies within the jurisdiction of the Village of _____.
>
> "We're including in our request all meetings of the Village Board, the village's planning commission and all other standing or ad hoc committees or agencies, present or future, of the village or of the Village Board."

I am of the opinion that it does not create an obligation to give notice except in those cases where the chief presiding officer had designated the clerk to whom your letter was addressed as the person responsible to give the public notice required by sec. 19.84 (1), Stats., or where the chief presiding officer or his designee had actual notice of such written request.

Section 19.84 (1), Stats., provides in part:

> "Public notice of all meetings of a governmental body shall be given in the following manner:
>
> "***
>
> "(b) By communication *from the chief presiding officer of a governmental body or such person's designee* to the public, to those news media who have filed a written request for such notice ...." (Emphasis added.)

The statute requires that the communication be given by the "chief presiding officer of a governmental body or such person's designee." It also requires that notice be given "to those news media who have filed a written request for such notice." The statute does not state where such written requests must be filed. I am of the opinion that they must be filed with the chief presiding officer or his designee of an existing governmental body. The specific governmental body should be named and a separate written request should be filed with the chief presiding officer or his designee of each governmental body from which notice is requested.

BCL:RJV

Public Defenders; Indigent; County Board; A county, acting through its county board, has the implied power to create a public defender's office to function as a county agency. OAG 61-76

September 14, 1976.

DANIEL G. GOLDEN, *District Attorney*
Portage County

You ask whether or not a county "can organize a public defender's office not as a nonprofit corporation as is currently being done but as an agency of county government." It is my opinion that a county can lawfully take such action, through its county board, pursuant to the powers granted in secs. 59.025 (3) (a) and 59.07 (5), Stats.

Section 59.025 (3) (a) provides that a county board may:

> "Create any county office, department, committee, board, commission, position or employment it deems necessary to administer functions authorized by the legislature."

Section 59.07 (5) provides in part that the county board shall:

> "... have the management of the business and concerns of the county in all cases where no other provision is made ...."

While a county board ordinarily has only such powers as are expressly conferred upon it or necessarily implied from those expressly given, *Spaulding v. Wood County* (1935), 218 Wis. 224, 260 N.W. 473; *Maier v. Racine County* (1957), 1 Wis. 2d 384, 84 N.W. 2d 76, it is stated in sec. 59.025 (1), Stats., that "it is the intent of the legislature to increase the organizational discretion which county government may exercise in the administration of powers conferred upon county boards of supervisors by the legislature," and, further, in sec. 59.025 (2), that "the powers hereby conferred ... shall be limited only by express language."

Section 967.06, Stats., provides that "Counsel appointed to represent indigent defendants shall be compensated for services." In *Carpenter and another v. County of Dane* (1859), 9 Wis. 249, it was held that such obligation shall be borne by the county wherein the prosecution occurs. Since, in light of the *Carpenter*

holding, a county is not merely authorized but required to pay for legal services for indigent defendants, it would seem that a part of "the management of the business and concerns of the county in all cases where no other [statutory] provision is made" is providing and paying for such representation in a manner consonant with the best interests of the county and consistent with the constitutional right of the indigent defendant to effective representation. It is my opinion that the recently enacted sec. 59.025 (3) (a) (ch. 118, Laws of 1973) gives a county board implied power, in administering this function, to organize a public defender's office as a county agency.

You express concern whether the authority to appoint attorneys for indigent defendants pursuant to sec. 970.02 (6), Stats., remains with sitting judges where the defender's office becomes an agency of county government. Section 970.02 (6) reads in pertinent part:

> "The judge shall in all cases where required by the U.S. or Wisconsin constitution appoint counsel for defendants who are financially unable to employ counsel, unless waived, at the initial appearance. ..."

Our Supreme Court has made it very clear that the power of appointment cannot be controlled or directed by creation of a county public defender's office. See *State ex rel. Milwaukee County v. Wisconsin Council on Criminal Justice, et al.*, decided June 30, 1976, pages 4 and 5, Slip Opinion. A judge acting under sec. 970.02 (6) in a county wherein a public defender's office has been created is free to ignore the existence of such office and to appoint private counsel to represent indigent defendants in all criminal cases. However, I am confident that no county public defender's office would be so ignored, and that judges in any county wherein such an office was created and functioning would, in the exercise of their discretion, put it to good use.

BCL:JHM

Law Enforcement; Police; Boats; Sheriffs; Waters; Navigable Waters; Arrest; Safety; Water safety patrol officers in county patrol, created as a separate agency, do not have to be deputized by sheriff to enforce secs. 30.50-30.80, Stats., Wisconsin's regulation of boating law. OAG 62-76

September 15, 1976.

WILLIAM F. BOCK, *Corporation Counsel*
Racine County

You state that Racine County has established a water safety patrol pursuant to sec. 30.79 (1) (b), Stats., and that the members of said patrol are not members of the sheriff's department nor are they members of any other law enforcement agency in Racine County. Patrol officers are currently deputized by the sheriff.

You inquire whether water safety patrol officers in a county patrol, created as a separate agency under sec. 30.79 (1) (b), Stats., would have law enforcement powers of a sheriff in enforcing secs. 30.50 to 30.80, Stats., even if they were not deputized by the sheriff.

I am of the opinion that they would.

A county may create a water safety patrol as a separate agency. Section 30.01 (1), Stats., defines "municipality" as used in ch. 30, Stats., to include a county.

Section 30.79 (1) (b), Stats., provides:

> " 'Water safety patrol unit' means a unit within an existing municipal law enforcement agency or a separate municipal agency, created by a municipality or by a number of municipalities riparian to a single body of water for the purpose of enforcing ss. 30.50 to 30.80 and any rules and ordinances enacted pursuant thereto."

Section 30.79 (2), Stats., provides that state "Aid shall be granted ... to those municipalities which establish, maintain and operate water safety patrol units" in accordance with this chapter.

Section 30.79 (3), Stats., provides:

> "ENFORCEMENT POWERS. Officers patrolling the waters as part of a water safety patrol unit may stop and board any boat for the purpose of enforcing ss. 30.50 to 30.80 or any rules or ordinances enacted pursuant thereto, if he has reasonable cause to believe there is a violation of such sections, rules or ordinances."

Section 30.79 (4), Stats., is concerned with *jurisdiction* and provides that a municipality may petition the Department of

Natural Resources to "define the waters which may be patrolled by such unit" and that:

> "... *Officers* patrolling the waters as part of such water safety patrol unit *shall have the powers of sheriff in enforcing ss. 30.50 to 30.80*, or rules or ordinances enacted pursuant thereto, on any of the waters so defined ...." (Emphasis added.)

I am of the opinion that the legislature intended to authorize water patrol officers to exercise the powers of a sheriff, set forth in sec. 59.24 (1), Stats., to keep and preserve the peace, investigate, serve process, and arrest and apprehend in both civil and criminal matters directly involved in the enforcement of secs. 30.50-30.80, Stats., and rules and ordinances enacted pursuant thereto. It is my opinion that the legislature had power to confer such powers on water safety patrol officers for these limited purposes and that there is no unconstitutional transfer of immemorial powers from the office of sheriff. In *State ex rel. Milwaukee County v. Buech* (1920), 171 Wis. 474, 482, 177 N.W. 781, it is stated that the rule against transfer of important common-law duties from the office of sheriff, which were impliedly attached to the office by the Constitution "... should be confined to those immemorial principal and important duties that characterized and distinguished the office." In this instance there is no transfer of immemorial duties and the sheriff retains concurrent power to enforce secs. 30.50-30.80, Stats., and rules and ordinances of his county enacted pursuant thereto.

I would point out that there may be considerable advantage in having water safety patrol officers deputized by the sheriff. This would broaden their law enforcement powers enabling them to deal with violations of other laws observed in the course of their duties.

BCL:RJV

Hospitals; Education; Physicians; Patients; Health; Medicine; Medical School; Colleges; Pursuant to sec. 59.07 (1) (d) 1., Stats., as amended by ch. 336, Laws of 1975, effective June 13, 1976, Racine County has the authority to establish a hospital outpatient health facility which would be used to train general practitioners of medicine as a part of a program with the Medical College of Wisconsin. OAG 63-76

September 15, 1976.

WILLIAM F. BOCK, *Corporation Counsel*
Racine County

You request my opinion on this question: Does Racine County have the authority to establish a hospital outpatient health facility which would be used to train general practitioners of medicine as a part of a program with the Medical College of Wisconsin, in addition to providing medical service to Racine County citizens?

Prior to a very recent amendment of sec. 59.07 (1), Stats., your above-stated question could not have been answered without some reasonable degree of doubt as to the correctness of the answer. However, based on this amendment, it is my opinion that the county has the authority, assuming, as I do, that your question refers to an outpatient facility to be used in connection with your county hospital.

The amendment of sec. 59.07 (1) (d) 1., Stats., in question (sec. 1, ch. 336, Laws of 1975, effective June 13, 1976), now gives counties the power to "Construct, purchase, acquire, lease, develop, improve, extend, equip, operate and maintain ... facilities for medical education used in conjunction with ... hospitals ...." The "hospitals" referred to in such amendment are county hospitals. With this new power under such statute, it is my opinion that Racine County has the power to establish the outpatient facility in question, to be used, as you put it, "to train general practitioners as a part of a program with the Medical College of Wisconsin." Such facility would, by its very nature, also provide medical service to Racine County citizens and would lawfully do so as an adjunct of your county hospital.

While you have not requested my opinion on the power of Racine County to fund the facility in question, let me point out that ch. 336, Laws of 1975, contained not only the amendment of sec. 59.07 (1) above shown, but also amended sec. 67.04 (1) (a), Stats., to permit county issuance of bonds in connection with exercise of the new power conferred on counties by the amendment of sec. 59.07 (1), Stats., noted *supra.*

BCL:JHM

Corporations; Secretary Of State; Documents; Articles Of Incorporation; Attorneys; The drafting of Articles of Incorporation and other corporate documents to be filed with the Secretary of State constitutes the practice of law within the meaning of sec. 256.30 (2), Stats. Any relaxation of this restriction is a question for the Wisconsin Supreme Court. OAG 64-76

September 16, 1976.

DOUGLAS LAFOLLETTE
Secretary of State

You ask whether the drafting of Articles of Incorporation and other corporate documents by persons not licensed to practice law would constitute practicing law without a license.

In *State ex rel. Junior Asso. of Milwaukee Bar v. Rice* (1940), 236 Wis. 38, 294 N.W. 550, the court recognized that it was probably impossible to formulate an all-inclusive definition of the practice of law and that the general trend in this area was to determine each case upon its own particular fact situation.

It is therefore necessary to examine the statutes and the case law in order to determine what types of activities constitute the practice of law.

Section 256.30 (2), Stats., provides:

> "Every person who shall appear as agent, representative or attorney, for or on behalf of any other person, or any firm, copartnership, association or corporation in any action or proceeding in or before any court of record, court commissioner, or judicial tribunal of the United States, or of any state, or who shall otherwise, in or out of court for

> compensation or pecuniary reward give professional legal advice not incidental to his usual or ordinary business, or render any legal service for any other person, or any firm, copartnership, association or corporation, shall be deemed to be practicing law within the meaning of this section."

The provisions of ch. 256 dealing with complaints for disbarment or discipline and the basic definition of what constitutes the practice of law for purposes of criminal prosecution do not serve as a limitation upon the court's power to regulate the practice of law. *In re Integration of Bar* (1958), 5 Wis. 2d 618, 93 N.W. 2d 601, and *State ex rel. Junior Asso. of Milwaukee Bar v. Rice, supra.* Rather, these statutes are viewed as an aid to the judicial power vested in the courts.

This office recognized in 49 OAG 79 (1960), that the Wisconsin Supreme Court has long taken the view that it has the inherent or implied power to control the practice of law. Numerous cases from other jurisdictions cited in 49 OAG 79 recognize the concept that the courts have the power to regulate the practice of law and therefore determine what activities constitute the practice of law.

In *State ex rel. Junior Asso. of Milwaukee Bar v. Rice, supra,* the court considered whether certain activities of an independent insurance adjuster constituted the practice of law. The court stated, at page 54:

> "... Giving advice as to legal rights is clearly the function of lawyers. Rendering legal advice for compensation as a customary practice is held to be practicing law under all of the authorities (Brand, Unauthorized Practice Decisions); and such activities on the part of a layman constitute the practice of law by him. An adjuster may communicate to his employer an opinion obtained from an attorney, and may communicate to a claimant an opinion, or the truthful substance of it, rendered by counsel for his employer, or that of a local attorney employed by the defendant, but he may not communicate an opinion of an attorney as his own."

The adjuster could report the finding of his investigation of the facts of the accident and give his opinion as to these facts, but he could not make any recommendations either to the insurance company or claimants as to the advisability of paying or rejecting

claims or presenting claims, since this would involve an analysis of the legal rights and responsibilities of the parties.

In *State ex rel. State Bar v. Keller* (1963), 21 Wis. 2d 100, 123 N.W. 2d 905, the court, in a per curiam opinion in a case remanded from the United States Supreme Court, acknowledged that it could not prevent Keller, a nonlawyer, from appearing in a representative capacity before the Interstate Commerce Commission nor from performing such activities incident to such representation because of federal preemption. However, Keller asserted that his practice before the ICC included the drafting of leases and contracts required to be approved by the Interstate Commerce Commission. The court recognized that Keller could advise whether leases and contracts would comply with federal regulations but stated that

> "... leases and contracts create substantive rights and obligations of parties and to prepare them and advise concerning their significance other than their standing under the interstate commerce laws and regulations would constitute the practice of law outside the scope of his practice before the interstate commerce commission." *Keller, supra*, 21 Wis. 2d 100, at 103.

In *The Florida Bar v. Town* (1965), 174 So. 2d 395, the Florida court addressed itself directly to the question of whether one who is not a lawyer has engaged in the practice of law when he prepares a corporate charter and other related documents. In holding that the drafter had engaged in the practice of law, the court relied on many of the same considerations which the Wisconsin courts have thought important when formulating a general definition of what constitutes the practice of law. At pages 396-397 the Florida court quotes from an earlier opinion:

> " 'It is generally understood that the performance of services in representing another before the courts is the practice of law. But the *practice of law* also *includes the giving of legal advice and counsel* to others as to their rights and obligations under the law and the preparation of legal instruments, *including contracts, by which legal rights are either obtained, secured or given away*, although such matters may not then or ever be the subject of proceedings in a court.

> " 'We think that in determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law *it is safe to follow the rule that if the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services* by one for another as a course of conduct constitutes the practice of law.' (Emphasis supplied.)" *State ex rel. Florida Bar v. Sperry* (1962), 140 So. 2d 587, 591.

The tests applied by the Florida court as to whether the giving of advice and the performance of such services affects important rights of a person and whether the giving of such advice requires the possession of legal skill and knowledge above that possessed by the average citizen, are similar to those adopted by the Wisconsin court and other courts.

Based on these principles, I conclude that drafting Articles of Incorporation and other corporate documents constitutes the practice of law.

However, in some instances the courts have permitted limited unlicensed practice of law by non-lawyers. *State ex rel. Reynolds v. Dinger* (1961), 14 Wis. 2d 193, 109 N.W. 2d 685, involved a challenge to rules authorizing licensed real estate brokers to use standardized forms to construct deeds, land contracts, conditional sale contracts, etc. which were the subject of discussion in 49 OAG 79 (1960). The court held that the rules did in fact permit to a limited extent the practice of law by nonlawyers. However, the court refused to void the rule because it felt in this instance that this practice was a "time-honored method of conveyancing" by licensed real estate brokers which had always worked well in practice. *Dinger* at p. 205.

The facts in *State ex rel. Reynolds v. Dinger* are materially different from the facts here. For example, Form 2 adopted in 1973 entitled "Articles of Incorporation," is a single form which purports to be sufficient for any corporation organized under ch.

180 of the Wisconsin Statutes. The form itself calls for a number of basic decisions concerning the period of existence of the corporation, the purposes of the corporation, the number of shares, the types of shares, and the preferences, limitations, designations, and relative rights of each class or series of shares. These matters, as you are well aware, can be relatively simple or quite complex depending on the objects sought to be accomplished by the incorporators. This is particularly true of the options available under Art. V for spelling out preferences, limitations, designations, and relative rights of each class or series of stock. These decisions can be at least as complex, if not more complex, than the types of decisions which were characterized as the practice of law in the *Dinger* case.

The court in *Dinger* was able to find a long-standing practice dating back to at least 1874 of real estate brokers drafting and completing statutory forms similar to those under consideration in the case. The court also found a long-standing practice of the board requiring general education in legal problems related to real estate transactions. The court noted that the Real Estate Brokers Board publishes an official pamphlet for its members which contemplates that a real estate broker will have knowledge of, and will be able to apply, the complexities of transfers or modifications of title to, or interests in, real estate. Thus, the selection and use of forms by the broker and counseling of the broker's clients on their use occurs under circumstances where substantial safeguards for the public are provided through educational requirements of the Real Estate Brokers Board.

No such long-standing practice of parallel educational requirements exist here. Indeed, this office and the State Bar have consistently advised individuals that the drafting of Articles of Incorporation constitutes the practice of law and has prosecuted persons drafting such documents. Further, while the public is protected by the fact that brokers are required to have an understanding of the complexities of real estate law well in excess of that which might be held by the average member of the public, no such requirement exists for a similar group of individuals in the field of drafting of corporate documents.

Based upon the test adopted by the Wisconsin Supreme Court and courts in other jurisdictions, I conclude that drafting of the Articles of Incorporation, as a contract defining the legal rights

and obligations between the corporation and its shareholders and between the shareholders, does constitute the practice of law for which a license is required. There is nothing in the fact situation as you have presented it to me to take this situation out of the general rule that requires one to have a license to practice law before performing activities which constitute the practice of law. The general rule is binding unless the question raised falls squarely within established exceptions or the Wisconsin Supreme Court relaxes the restrictions.

BCL:LLD

Nursing Homes; Health; Administrative Law; Physicians; Patients; Health And Social Services; Chapter 119, Laws of 1975, invalidates any policy requirement of Department of Health and Social Services that nursing home residents obtain approval from a physician prior to receiving treatment from other licensed health care providers such as dentists, optometrists, podiatrists or chiropractors. OAG 67-76

September 17, 1976.

NORMAN C. ANDERSON, *Chairman*
Assembly Organization Committee

You have asked me to respond to the position taken by the Wisconsin Chiropractic Association that ch. 119, Laws of 1975, which, *inter alia*, created sec. 146.309, Stats., changed existing law relative to the rights of patients in nursing homes as to their freedom of choice of health care providers under the Medicaid program. The association asserts that this right is being curtailed by an interpretation of the Wisconsin Administrative Code requiring the approval of the attending physician of such patient as a condition to the use of the services of other health providers such as dentists, optometrists, podiatrists or chiropractors.

The matters asserted in the association's letter of August 3, 1976, which I will assume to be true for purposes of this opinion, may be summarized as follows:

Rule H 32.07 (2) (a) of the Wisconsin Administrative Code, as currently interpreted and enforced by the department, embraces a concept set forth in a position paper prepared by the Nursing

Home Advisory Council in 1975 called "Total Medical Management--Single Point Accountability." This concept is "one in which the attending physician of a nursing home patient is both entitled and required to have prior knowledge of any medically significant actions contemplated for, to, or with that patient, and the authority to restrict such actions to those which are consistent with his professional evaluation of the patient's medical needs." This concept requires nursing home residents to obtain the approval of a licensed physician before receiving treatment from an alternate health care provider. It is further suggested that there is a possible reluctance on the part of physicians to authorize treatment provided by chiropractors.

There can be little question that administrative policy which conflicts with statutory authority is invalid. Administrative agencies have only such powers as are expressly granted to them or necessarily implied, and any power sought to be exercised must be found within the four corners of the statute under which the agency proceeds. *American Brass Co. v. State Board of Health* (1944), 245 Wis. 440, 448, 15 N.W. 2d 27; *Kindy v. Hayes* (1969), 44 Wis. 2d 301, 307, 171 N.W. 2d 324.

The basic question, then, is whether the asserted practice and policy of the Department of Health and Social Services is in harmony with the statutory provisions embraced by ch. 119, Laws of 1975, commonly referred to as the patient's bill of rights.

Freedom to contract is a constitutional guarantee. Art. I, sec. 12, Wis. Const. Like other fundamental rights, it is not absolute, but rather is subject to the exercise of the police power of the state. 38 OAG 305 (1949). Thus, a person cannot contract for nursing home care under the Medicaid program without observing public policy set forth by the Congress in 42 U.S.C. secs. 1395x(j) and 1396(a)(28) and by the Wisconsin Legislature. Sections 49.46 (2) (a) 7 and 49.45 (11) (c), Stats., provide that admission to a skilled care nursing home requires the prescription of either a doctor of medicine or osteopathy.

Once a person is properly admitted to a nursing home, the question arises as to what rights he has as a resident thereof. The legislature has made it very clear that residents of nursing homes are entitled to the full exercise of the freedom of choice provisions guaranteed medical assistance recipients provided under sec. 49.45 (9), Stats. See 59 OAG 68 (1970).

Section 146.309 (1), Stats., provides in part:

> "Every resident in a nursing home, adult group foster home or residential care institution shall, except as provided in sub. (5), have the right to:
>
> "***
>
> "(m) Use the licensed, certified or registered provider of health care and pharmacist of his choice.
>
> "***
>
> "(n) Be fully informed of his treatment and care and participate in the planning of his treatment and care."

Section 146.309 (6) (b), Stats., provides:

> "Allegations of violations of such rights by persons licensed, certified or registered under chs. 441, 446 to 450, 455 and 456 of the statutes shall be promptly reported by the facility to the appropriate licensing or examining board and to the person against whom the allegation has been made. Any employe of the facility and any person licensed, certified or registered under chs. 441, 446 to 450, 455 and 456 of the statutes may also report such allegations to the board. Such board may make further investigation and take such disciplinary action, within the board's statutory authority, as the case requires."

It appears from the foregoing provisions that a resident of a nursing home is entitled to use a licensed provider of health care in accordance with his desires just as if he were in a private living situation. Thus, as such persons visit a dentist, optometrist, podiatrist, or a chiropractor without first seeking the advice or permission of a doctor of medicine or osteopathy, the resident of a nursing home should be able to call upon such practitioners to meet his or her health needs without first securing the approval of his or her attending physician.

The foregoing view represents a change from the asserted practice heretofore in effect with respect to patient medical care in a nursing home. Rule H 32.07 (2) (a) of the Wisconsin Administrative Code provides:

> "The nursing home shall have a requirement that the health care of every patient, whether or not admitted from a hospital, shall be under the supervision of a physician licensed to practice in Wisconsin who, based on an evaluation of patient immediate and long-term need, prescribes a planned regimen of medical care which covers those applicable patient requirements, such as indicated medications, treatments, restorative services, diet, special procedures recommended for the health and safety of the patient, activities and plans for continuing care and discharge."

Under this rule the attending physician may have stood as a buffer between the nursing home patient and all others licensed to treat the sick.

I am of the opinion that Rule H 32.07 (2) (a), Wis. Adm. Code, on its face, does not directly conflict with sec. 146.309 (1) (m), Stats. The section can be interpreted in harmony with the statute by guaranteeing that nursing home patients have the freedom of choice contemplated by statute.

The Wisconsin Chiropractic Association, however, asserts that the *effect* of the rule, as written, is to preclude such freedom of choice. It is my opinion that if the practices under Rule H 32.07 (2) (a) outlined by the Wisconsin Chiropractic Association occur in such a manner as to deprive patients of their freedom of choice of health care providers, such practices contravene the rights of nursing home residents as guaranteed by ch. 119, Laws of 1975. Such practices must give way to the mandate of the legislature.

It is the function of the legislature, rather than an administrative agency, to determine and define public policy of the state. *Department of Revenue v. Nagel-Hart, Inc.* (1975), 70 Wis. 2d 224, 228, 234 N.W. 2d 350.

While the Medicaid program is a cooperative one involving a federal-state relationship, we find no federal statute or regulation which specifically gives absolute control to the attending physician with respect to the use of other licensed health care providers merely because the patient is a resident of a nursing home. It is true that under sec. 49.45 (3) (d), Stats., a nursing home must have in operation a utilization review program which meets federal requirements, yet it is to be noted that 42 U.S.C. sec. 1395x (h) provides:

> "A utilization review plan of a ... skilled nursing facility shall be considered sufficient if it is applicable to services *furnished* by the institution ...." (Emphasis supplied.)

Utilization statutes cannot be interpreted to vest absolute control of other licensed providers in the attending physician.

The specific question of the association has now been answered. Other questions raised on general departmental authority in the nursing home field and on constitutional implications of the patient bill of rights cannot be considered in a factual vacuum and consideration of these issues are deferred until presented with specific facts and issues to consider.

BCL:WLJ

Libraries; Taxation; Municipalities; A town, city or village which does not maintain a public library, as a municipality or jointly with another municipality under contract, but which makes contributions to a nearby public library, cannot be exempted from the county library tax levy under sec. 43.64 (2), Stats. OAG 69-76

September 22, 1976.

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

You request my opinion whether a town, city or village which does not maintain a public library, but which makes *contribution* to a nearby public library, may be exempted from the county-wide tax for library purposes authorized by sec. 43.64 (2), Stats.

It is my opinion that it cannot, assuming that the municipality involved does not itself maintain a public library located within its boundaries and does not jointly with one or more other municipalities maintain a public library within or without its boundaries. Joint maintenance would be permissible under secs. 66.30, 43.52, 43.56 and 43.60, Stats. This conclusion was also reached, under former statutes, in 60 OAG 389 (1971).

Section 43.64 (2), Stats., renumbered from sec. 43.25 (4), by ch. 152, Laws of 1971, which creates an exemption from the county tax levy in certain cases provides:

"(2) Any city, town or village in a county levying a tax for a county library under sub. (1) shall, upon written application to the county board of the county, be exempted from the tax levy, *if the city, town or village making the application expends for a library fund* during the year for which the tax levy is made a sum at least equal to the sum which it would have to pay toward the county tax levy." (Emphasis added.)

The statute uses the phrase "expends for a library fund." The words "library fund" are not defined in this section or elsewhere in ch. 43, Stats. Statutes creating an exemption are to be narrowly construed. When there are several statutes relating to the same subject matter, they should be read together and harmonized if possible. *City of Milwaukee v. Milwaukee County* (1965), 27 Wis. 2d 53, 133 N.W. 2d 393.

The words "library fund" appear in secs. 43.52 (1) and 43.58 (1), Stats.

Section 43.52 (1), Stats., provides in part:

"(1) Any municipality may establish, equip and maintain a public library, and may annually levy a tax or appropriate money *to provide a library fund, to be used exclusively to maintain the public library*; and may enact and enforce police regulations to govern the use, management and preservation thereof. After December 17, 1971, any municipality desiring to establish a new public library shall obtain a written opinion by the division regarding the feasibility and desirability of establishing the public library before final action is taken. ..." (Emphasis added.)

Section 43.54 (1) (a), Stats., provides that "Each public library established under s. 43.52 shall be administered by a library board ...."

Section 43.56, Stats., provides that "Joint library boards may be created by any 2 or more municipalities by appropriate agreement of their governing bodies. ..."

Section 43.58 (1), Stats., provides in part:

"(1) The library board shall have exclusive control of the expenditure of all moneys collected, donated or appropriated for the library fund ...."

A "library fund" therefore consists of the proceeds of a tax levied and moneys appropriated by a municipality to be used exclusively to maintain "the public library" established, equipped and maintained by the municipality. Expenditures therefrom can only be made by a library board. If a city, town or village does not have a library within its boundaries or is not obligated under contract with one or more other municipalities to operate a library located outside its boundaries, there is no need for the special library fund.

Chapter 43 in its entirety indicates a legislative intent to improve and expand the public library system on a county-wide basis under the supervision of the division for library services. Among the objectives of the system are to encourage the most efficient use of library resources "in a manner that is in harmony with the geographic, economic, population and other factors influencing the needs and development of local communities," sec. 43.01 (2), Stats., and "to plan and coordinate on a state-wide basis public library services," sec. 43.01 (3), Stats. See also secs. 43.09 (2), 43.11, 43.13, 43.15, 43.19 and 43.21, Stats., all of which are concerned with establishing standards and setting up library boards to promote planned development.

Section 43.18 (1), Stats., allows a municipality to withdraw from a library system only "if the resolution [to withdraw] is adopted at least 6 months prior to the close of the system's fiscal year." The purpose of this section appears to be to facilitate orderly development by ensuring to the library board a foreknowledge of expected revenue. Obviously, carefully planned development is not possible if the board in charge of implementation does not know during any one period what its financial resources will be. To allow exemptions from the county-wide tax assessment to one municipality for voluntary contributions made to another would undermine the intent of the legislature that library system development be orderly, efficient, and in accordance with an established plan.

Furthermore, ch. 43 does allow municipalities to pool resources, provided that they do so in the manner set forth in sec. 43.56, Stats. It is my opinion that such informal arrangements as are contemplated in your opinion request are outside the scope of the statute, and that municipalities making contributions in that way

are not entitled to an exemption from the county tax levy under sec. 43.64 (2), Stats.

BCL:RJV

Malt Beverages; Intoxicating Liquors; Beer; Licenses And Permits; Historical Society, State; Taverns; Liquors; Under sec. 44.02 (5), Stats., the State Historical Society may properly engage in the dispensing of fermented malt beverages in the Village Tavern at Stonefield Village. OAG 70-76

September 24, 1976.

RICHARD A. ERNEY, *Associate Director*
State Historical Society of Wisconsin

You have requested my opinion as to whether the State Historical Society of Wisconsin may dispense fermented malt beverages under the following circumstances:

> "As part of its recreation of a village of the 1890's, the Society plans to erect a replica of a tavern at Stonefield Village in Nelson Dewey State Park. In order to maintain the realism of the historic recreation, we would like to offer beer for sale to visitors at the village."

It is my understanding that Stonefield Village was created to depict rural midwestern life before the turn of the century. The village contains a school, church, shops, cheese factory, railroad station, village craft and business places showing the life and economy of a rural community of that day. Among the shops are a confectionary where candy, ice cream and soft drinks are sold and a general store where packaged foods, such as meats and cheese, are sold. The village is located in Nelson Dewey State Park and is operated in conjunction with the State Farm and Craft Museum which was specifically created by the legislature in 1953, see ch. 290, Laws of 1953, which created sec. 44.12, Stats.

Your question raises the three issues of, (1) whether the Society may engage in such commercial activity, (2) whether the fact of such activity taking place in a state park is of legal significance, and (3) local governmental control, if any.

The Society May Sell Fermented Malt Beverages.

The State Historical Society of Wisconsin is an agency of the State. (Sec. 44.01, Stats.) As such, it has those powers which

have been expressly granted by the legislature and may additionally exercise those powers which may be implied as being necessary in the performance of its express authority or duties. *Nekoosa-Edwards Paper Co. v. Public Service Comm.* (1959), 8 Wis. 2d 582, 99 N.W. 2d 821; Sec. 44.01 (1), Stats.

The Society, of course, does not have express authority to dispense fermented malt beverages, but it does have authority under sec. 44.02 (5), Stats., to engage in commercial activity. This subsection reads, in part:

> "... The society may also procure and sell or otherwise dispose of postcards, souvenirs and other appropriate merchandise to help defray the costs of operating its several plants and projects."

The question does not involve the issue of implied power, but involves rather the question of whether fermented malt beverages constitutes "appropriate merchandise" within the intent of sec. 44.02 (5), Stats.

Whenever a series of objects are described in a statute, the doctrine of statutory construction referred to as *ejusdem generis* immediately becomes a possible guide to legislative intent. The court, in *State ex rel. Thompson v. Nash* (1965), 27 Wis. 2d 183, 133 N.W. 2d 769, described this principle of statutory construction as being applicable when a general word follows a specific word in enumeration, the general word is construed to embrace something similar in nature to the specific word.

The word in the statute which precedes the language "other appropriate merchandise," is the word "souvenir." "Souvenir" is defined in *Webster's Seventh New Collegiate Dictionary* as:

> "... something that serves as a reminder: memento."

Accordingly, a souvenir is something in the mind of the beholder, rather than any particular type of object. The word describes nothing and everything capable of transfer and ownership. "Souvenir" is not a specific word in the sense of describing a particular object or class of objects, and for this reason, the doctrine is inapplicable.

It is also apparent that application of *ejusdem generis* would render the phrase "other appropriate merchandise" meaningless.

This is true, for the word "souvenir" is so general and nondescript that there would be no necessity to follow it by another nondescript or general word. In other words, if one were to apply this principle of statutory construction, we would be saying that the statute allows the Society to sell souvenirs and other appropriate souvenirs. It is a cardinal rule of statutory construction that statutes be construed so as to give force and effect to every word or clause and no word or clause should be rendered surplusage. *Garfield v. United States*, 297 F. Supp. 891, (W.D., 1969); *Northern Discount Co. v. Luebke* (1959), 6 Wis. 2d 313, 94 N.W. 2d 605.

Applying this latter rule of statutory construction to the statute under consideration, it is my opinion that the words "other appropriate merchandise" refer to the sale of any merchandise which is in harmony with and furthers the statutory responsibility of the Society to illustrate, portray and preserve the history of the State of Wisconsin. This construction gives proper meaning and emphasis to the word "appropriate" by limiting the commercial activity of the Society to those objects and things which can be and are directly related to the objectives of the Society.

The brewing of beer and the circumstances and setting surrounding its consumption is, indeed, an appropriate object of historical interest. During the heyday of the temperance movement, Mr. F. W. Salem wrote an extended treatise promoting beer as the compromise between total abstinence and excessive whiskey drinking:

> "As extremes do and must perforce exist, the noblest philosophy of life is *compromise.*
>
> "Temperance then is the truest medium between total abstinence and excess, and in the same manner, *beer* occupies the medium position between ardent spirits and water."[1]

Mr. Salem traces the history of beer back thousands of years:

> "Beer is mentioned by Manathos, High Priest of Heliopolis, an Egyptian of Greek education, who lived about 300 B. C. and by Command of Ptolemanus Philadelphus translated the old Egyptian history into Greek. He says that

[1] F. W. Salem, *Beer, its history and its economic value as a National Beverage.* (F. W. Salem & Co., Hartford, Conn., 1880). Reprinted in 1972 by Arno Press, New York. p. 11.

> the Egyptians, thousands of years before, had beer, and that its invention was attributed to Osiris, a divinity representing all the beneficient principles, also that celebrated breweries existed at that time at El Kahrich, the Cairo of Europeans, and at Pelusinium on the river Nile."[2]

Mr. Salem then follows the history of beer through the Roman period when it was reported by both Plutarch and Suetonius that Julius Caesar, after crossing the Rubicon in 49 B. C. gave a great feast at which he served *cerevisia* (beer). Charlemagne (742-814) is said to have given directions on how to brew beer and, in 1268, King Louis IX enacted a law relating to the purity of beer. According to William of Malmsbury, the best breweries in England at the time of Henry II were to be found in the Monasteries.

Mr. Salem states that the pioneers of brewing in the United States were William Penn and a Dutch brewer by the name of Jacobus who established a brewery on Manhatten Island in 1644. He later "became the first burgomaster and is said to have dispensed beer and justice with equal gravity and impartiality, and to the complete satisfaction of the inhabitants of new Amsterdam."[3]

Brewing in Wisconsin began in 1840, when Richard Owens started a small brewery in Milwaukee at the end of Huron Street.[4] By 1879, Wisconsin had 226 breweries and sold 583,068 barrels of beer. Today, however, Wisconsin has only eight breweries, four of which are among the ten largest nationally.

In addition to the importance of the brewing industry to Wisconsin, the integral nature of the tavern to the social, cultural and political life in Wisconsin is also worthy of note. In an article published in the *1914 Proceedings* of the Wisconsin State Historical Society, John H. J. Lacher wrote:

> "... Whether village tavern, or wayside inn, it was the social center of the neighborhood.

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[2] Salem, p. 16. See also Wayne L. Kroll, *Badger Breweries Past and Present* (private printing) p. 10, where it states that man has been making beer for 6,000 years.

[3] Salem, p. 35. See also George Ehret, *Twenty-five Years of Brewing* (The Gast Lithograph & Engraving Co., New York 1891) p. 7.

[4] Kroll, p. 1. Robert Nesbit, *Wisconsin: A History* (University of Wisconsin Press, Madison 1973) p. 333, notes that "unfortunately for the advertising, Milwaukee's first brewery, in 1840, was started by a Welshman making ale."

"The tavern of early Wisconsin discharged many functions. It furnished not only food, drink, and shelter, but was also the place for all indoor amusements, such as dances, concerts, lectures, puppet shows and wax figure exhibitions, for which purposes a suitable hall was usually provided. This hall was also the meeting place of secret societies, like the Masons, Odd Fellows, and the Oriental Evanic Order of 1001, the last named burlesque secret organization then quite popular. Here, too, were held caucuses, town meetings, conventions and elections. The dearth of churches and public buildings in the communities enhanced still more the importance of the tavern, for in their absence the hall was used for religious services or session of the court.

* * *

"While there were a few temperance houses scattered over the State the bar was a prominent feature of nearly all taverns. Advertisements generally mention the choice quality of the beverages kept in stock. The following unique announcement of 1852 was surely a sign of the times:

" 'Planters' House, Hales Corners, Greenfield, Milwaukee County, by William Hale. 'A litter of the critter to be had if desired.'" (advertisement in *Western Star*, Elkhorn, June 10, 1852)[5]

Mr. Lacher also took pains to note that those who ran the taverns were prominent individuals who often engaged in such other activities as running the livery stable, stage line or ferry, had a farm or general store or held public office:

Mr. Lacher stated:

"The foregoing brief description of the taverns of early Wisconsin will suffice to show what important institutions they were to the people of that period and how variously and deeply they affected their lives. It also indicates that the landlords were generally men of consequence in their communities, and that their genial hospitality and wide acquaintance gave them vantage in gaining public esteem and increasing their information, as well as making pecuniary

[5] John H. J. Lacher, "The Taverns and Stages of Early Wisconsin," Wisconsin State Historical Society Proceeding, 1914. Revised 1935. pp. 119-20, 128.

> profit. It is not surprising, therefore, that this occupation attracted men of character and ability, and that many of them attained prominence in their counties and the State, while a few acquired even a national reputation. Very many landlords held county offices, a large number served in the Legislature, two went to Congress and one, General J. M. Rusk, after being governor of the State for three terms, finished his distinguished public career as a member of the President's cabinet. It is to be noted that several clergymen were among the tavernkeepers of that period, but that their ventures were not signally successful. There were also some physicians and lawyers who engaged in this occupation."[6]

This sampling certainly shows that the place of taverns and of beer in the history of Wisconsin (and, indeed, of the world) is quite secure and is one of which any court could easily take judicial notice.

The sale of candy, ice cream, meats and cheese in the recreated village settings adds realism to the portrayal of history. In the same manner, the selling of beer in the recreated village tavern illustrates and adds realism to the portrayal of the scene. Under the circumstances described in this letter, the dispensing of fermented malt beverages is appropriate under the provisions of sec. 44.02 (5), Stats.

The Fact That The Society Proposes To Dispense Beer Within A State Park Is Of No Legal Consequence.

I am unable to find any legislative prohibition that would preclude the Society from dispensing beer on State park grounds. Nor does there appear to be any public policy against governmental dispensing of beer on park lands. For example, see sec. 66.054 (5) (e), Stats., which specifically exempts counties, cities, towns and villages from the licensing requirements of sec. 66.054, when such local governmental bodies engage in selling beer on park grounds.

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[6] Lacher, p. 130. Fred L. Holmes *Old World Wisconsin; Around Europe in the Badger State* (E. M. Hale & Co., Eau Claire 1944) p. 71 states that "[a]mong Germans the tavern is a community club house. After church the whole family, before returning to the farm, is likely to enter to drink beer, while sitting around a table talking with friends and neighbors."

The lands in question are under the jurisdiction of the Department of Natural Resources. I find no administrative rule by that agency that would be relevant.

I have been advised the Department does have a policy which does not favor the proposed activity of the Society and that the Department actually discourages such activity. I have been advised that currently, beer is dispensed on the grounds on only one state park.

I assume the Society has a formal arrangement with the Department regarding its use of these park lands. This agreement, while not essential to its validity, may have been entered into pursuant to the provisions of sec. 44.12, Stats.

It is my suggestion that the Society confer with the Department regarding this proposed activity.

The Society Would Not Be Subject To Local Licensing.

The Society, as an agent of the State, is not subject to local control and regulation in the dispensing of fermented malt beverages.

This office, in 59 OAG 55 (1970), rendered the opinion that the State agency, then known as the Wisconsin State Universities System, was not subject to local regulation under sec. 66.054, Stats., in the dispensing of beer on the several campuses.

There has been no change in sec. 66.054, which would render this opinion obsolete.

Accordingly, it is my opinion that the Society would not be subject to licensing or local control and regulation under sec. 66.054 in the dispensing of fermented malt beverages.

BCL:CAB:SD

Transportation; Public Service; Motor Carriers; Motor Vehicles; Automobiles And Motor Vehicles; Counties; Section 59.968 (3) authorizes a county subsidy when a bus company operates a route which is principally located within the county. OAG 72-76

September 30, 1976.

JOSEPH D. MCCORMACK, *Corporation Counsel*
Ozaukee County

You have requested my opinion on the following question:

> "Does Wisconsin Statute 59.968 (3) permit a county board to provide a subsidy to a private bus company that operates a bus route that principally serves residents of that county, but whose principal volume of business is outside of that county?"

You have advised me that approximately 70 percent of the passengers on this interurban route, which serves the suburbs of Milwaukee County along with Port Washington and other communities of Ozaukee County, are residents of Ozaukee County; that said route only constitutes about 5 percent of the bus company's total volume of business; that the company is operating the route at a monthly loss of $2,400.00 and that abandonment of the route is being sought, but that such course of action will not be pursued if the county provides a monthly subsidy of $2,000.00.

Section 59.968 (3), Stats., authorizes any county board to:

> "Make grants and provide subsidies to private transit companies operating bus lines principally within the county to stabilize, preserve or enhance levels of transit service to the public."

There is no clear indication of what the legislature intended by the language "private transit companies operating bus lines principally within the county." The statutory language is ambiguous and susceptible of two constructions depending upon whether "principally within the county" refers to "private transit companies" or to "bus lines."

If "principally within the county" refers to "private transit companies," then a county could grant subsidies only to those companies whose principal business is within that county. If, on the other hand, "principally within the county" modifies "bus lines," the county could provide subsidies to a company which operates a line which is "principally" located within that county. In my opinion, the latter construction is correct.

The stated purpose of the statute is to "preserve or enhance levels of transit service." Statutes should be construed to effect the evident purpose of the legislation. *Pella Farmers Mut. Ins. Co. v. Harland Richmond Town Ins. Co.* (1965), 26 Wis. 2d 29, 41, 132 N.W. 2d 225. The obvious purpose of the statute in question is to maintain and promote mass transportation. The statute involves county powers and has reference to county boundaries. Surely, the legislature had in mind that transit companies serving such large political areas normally operate in geographic areas that extend beyond the boundaries of the county. A narrow interpretation of the statute, allowing subsidies only to transit companies which have their principal volume of business within the county, would frustrate the stated legislative intent because few transit companies would qualify for the subsidies.

Further, there is some grammatical support for the argument that "principally within the county" attaches to the nearest logical noun--in this case, to "bus lines."

In statutory construction, the plural includes the singular. Sec. 990.001 (1), Stats. Thus, within sec. 59.968 (3), "bus lines" may be read as "bus line." Therefore, in my opinion, the county may grant a subsidy to a bus company when the company operates a bus line which is principally located in the county.

The question remains as to how the words "principally within the county" should be interpreted. Arguments can be made to suggest that "principally" should be determined by comparing the length of the route in the county to its overall length, by comparing the number of county passengers with total passengers, or by combining both length and number of passengers to arrive at a passenger-miles standard.

It is doubtful that the legislature intended to place on county government any sort of mechanical or quantitative formula under which its legislative discretion was to be exercised. The guideline "principally within the county" is provided, and it is within the discretion of each county board to determine whether a route qualifies for the county subsidy. Such factors as length of the route or routes in the county, number of passengers to be benefitted, and volume of business in the county concern the

wisdom of exercising legislative discretion but do not necessarily affect the basic statutory authority to exercise such discretion.

BCL:CAB

Taxation; Constitution; Constitutionality; Municipalities; Towns; Villages; Revenue Law; Property; Assessment; The Tax Increment Law appears constitutional on its face and the Department of Revenue should carry out its duties and responsibilities under the law as directed by the legislature. OAG 73-76

October 4, 1976.

DENNIS J. CONTA, *Secretary*
Department of Revenue

Your predecessor requested my opinion on the constitutionality of the Tax Increment Law created by ch. 105, Laws of 1975.

Under the act the Department of Revenue is charged with certain administrative responsibilities. Subsection (5) (b) of sec. 66.46 of the newly created statute requires the Department to determine and certify the aggregate full value of the taxable property of each taxation district adopting a tax increment financing project. This value constitutes the tax incremental base. Subsection (5) (f) requires the Department to give notice to all governmental entities having the power to levy taxes on property within each district as to both the assessed and equalized value of such property and the assessed and equalized value of the tax increment base.

Your predecessor expressed concern that the law may be unconstitutional, and instructed the staff not to facilitate the creation of tax incremental districts, including the determination and reporting of district values as required by ch. 105, Laws of 1975, until this office has offered your department guidance in meeting its duties under the law.

I. The Tax Incremental Financing Concept.

A. *Description of the Tax Increment Law.*

Chapter 105, Laws of 1975, creates sec. 66.46 of the statutes and authorizes cities and villages to use tax incremental financing in connection with certain public improvement projects.

Section 1 of the act contains legislative findings that an inequitable situation exists when the cost of public works or improvements within a city or village is borne entirely by the city or village, while the benefit from the expansion of tax base which is stimulated by such improvements extends beyond the city or village into all municipalities which share such tax base. The legislature found that when the cost to a city or village of a public improvement project exceeds the future benefit to the city or village, such socially desirable projects have been postponed or cancelled. The legislature further found that the vital and beneficial public purposes of the following laws were being frustrated because of a lack of incentives and financial resources: the urban redevelopment law, the blighted area law, the blight elimination and slum clearance act, the urban renewal act and the promotion of industry. The legislature went on to declare that the purpose of the act was to create a viable procedure whereby a city or village, through its own initiative and efforts, may finance projects which will tend to accomplish these laudable objectives. Finally, under sec. 1, the legislature found and declared that its establishing a tax increment system was in all respects for the benefit of the people of Wisconsin to serve a public purpose in improving and otherwise promoting their health, safety, welfare and prosperity.

Section 4 of the act contains a further legislative declaration that the act is necessary for the welfare of the state and its inhabitants, and that it is the intent of the legislature that the act be liberally construed to effect its purpose.

Section 3 of the act creates sec. 66.46 of the statutes, the "Tax Increment Law." Subsection (2) of sec. 66.46 contains the definitions of twelve terms under the Tax Increment Law.

Subsection (3) grants powers to cities to create tax incremental districts, to define the boundaries of such districts, to prepare, approve and implement project plans, to issue tax incremental bonds and notes, to deposit money into the special fund of any tax incremental district, and to enter into contracts and agreements to implement project plans. This same grant of power is given to villages under sec. 2 of the act.

Subsection (4) of sec. 66.46 sets forth the steps and plans required to implement the provisions of the Tax Increment Law.

This includes the holding of a public hearing by the planning commission pursuant to proper notice, the recommendation by the planning commission to the local legislative body of the boundaries of a tax incremental district, and the adoption by the local legislative body of a proper resolution which includes, *inter alia*, a finding that at least 25%, by area, of the real property within such district is either a "blighted area," in need of "rehabilitation or conservation work," or is suitable for "industrial sites" within the meaning of the appropriate statutes; also, a finding that the improvement of such area is likely to enhance significantly the value of substantially all of the other real property in such district. The planning commission must also adopt a project plan for each tax incremental district which must be submitted to and adopted by the local legislative body.

Subsection (5) of sec. 66.46 requires the Department of Revenue to determine the full aggregate value of the taxable property in such district upon application in writing by the city or village clerk. Upon certification by the local clerk such valuation constitutes the tax incremental base of such district as of the date such district was created. The Department of Revenue also is required to give annual notice to the designated finance officer of all governmental entities having the power to levy taxes on property within each tax incremental district as to both the assessed and equalized value of such property and the assessed and equalized value of the tax increment base. This annual notice must explain that the taxes collected in excess of the base will be paid to the city or village, as provided by law.

Subsection (6) describes the allocation of positive tax increments, created when the tax incremental base for any year is less than the equalized value of taxable property in the district. The tax increment is computed by multiplying the total local general property taxes levied on all taxable property within a tax incremental district in any year by a fraction having a numerator equal to that year's equalized value of all taxable property in such district minus the tax incremental base and a denominator equal to that year's equalized value of all taxable property in such district. These positive tax increments for a tax incremental district are allocated to the city or village creating such district until such time that the aggregate project costs are paid, but not later than fifteen years after the last expenditure identified in the plan is made. No

expenditure may be provided for in the plan more than five years after the district is created, unless the plan is amended pursuant to law. All tax increments must be deposited into a special fund and used only to pay project costs for the district, to reimburse the city or village for such payments, or to satisfy claims of holders of tax incremental bonds or notes issued for the district. Under subsec. (7) the district shall terminate when either positive tax increments are no longer allocable, or when dissolved by the local legislative body.

Subsection (9) allows for the financing of project costs in eight different ways, or any combination thereof, one of which is by payment out of the proceeds of the sale of tax incremental bonds or notes issued under the authority and conditions set forth in this subsection.

Subsection (10) allows for the creation of tax incremental districts which overlap one or more existing districts.

Subsection (11) provides that with respect to the county, school districts or any local governmental body having the power to levy taxes on property in a tax incremental district, the calculation of the equalized valuation of taxable property in a tax incremental district under ch. 70 may not exceed the tax incremental base of the district until the district is terminated. An appropriation is made to pay school districts having territory in a tax incremental district all tax increments which have accrued to them each year.

Subsection (13) directs the Department of Local Affairs and Development to report to the governor and legislature as to the social, economic and fiscal impact of such projects.

The act makes an appropriation of $50,000 in fiscal year 1975-76 to the Department of Revenue to provide funding for implementing the Tax Increment Law.

The act also provides for a court test which this office has been unable to pursue in the absence of a real and existing justiciable controversy between parties in interest which this office could represent. No proper foundation for such a test of the act's constitutionality which would allow a court to accept jurisdiction and render a meaningful decision has been laid.

B. *Example of tax incremental financing.*

Under ch. 70, Stats., counties, school districts and other instrumentalities share in the property taxes collected by cities. Improvements to cities are normally paid for by cities, even though counties, school districts and others share in the expanded tax base created by these improvements. A positive tax increment is the amount of local property tax revenue derived from the increase in value of tax incremental districts as the result of improvements. The Tax Increment Law grants cities (and villages) certain powers to enable them to receive the benefit of the full tax increments until the costs of the improvements giving rise to the increment have been paid.

The Tax Increment Law does not affect the uniform assessment of taxes upon taxpayers. All taxpayers continue to pay property taxes at the same rate upon the equalized value of all property whether located within or outside of the tax incremental districts. The tax increment law simply affects the distribution of some of these taxes assessed and collected by directing their payment for improvements to the tax incremental districts.

Subsection (11) (a) requires a county, school district or other municipalities having the power to levy property taxes to ignore the incremental increase in value in the tax increment district for apportionment purposes.

Assume, for purposes of illustration, that an entire county is composed of four cities, only one of which has a tax incremental district. The equalized values of the property within the four cities are:

City A	$400,000,000 (including increment value)
City B	70,000,000
City C	20,000,000
City D	10,000,000
Total	$500,000,000

Assume further that City A has a tax incremental district with a base value of $20,000,000 and an increment value of $30,000,000; the total equalized full market value of the tax increment district being $50,000,000. Finally, assume that the county needs to raise $1,500,000 in property taxes for its budget.

The percentage of the value for each city, *excluding* the tax increment value as required by subsection (11) (a) would be:

City A	370,000,000 / 470,000,000	=	.787234
City B	70,000,000 / 470,000,000	=	.148936
City C	20,000,000 / 470,000,000	=	.042553
City D	10,000,000 / 470,000,000	=	.021277

The county taxes apportioned to each city would be:

City A	.787234	x	1,500,000	=	$1,180,850
City B	.148936	x	1,500,000	=	223,405
City C	.042553	x	1,500,000	=	63,830
City D	.021277	x	1,500,000	=	31,915
					$1,500,000

The county mill rate for each city would be:

City A	1,180,850 / 370,000,000	=	.0031915
City B	223,405 / 70,000,000	=	.0031915
City C	63,830 / 20,000,000	=	.0031915
City D	31,915 / 10,000,000	=	.0031915

The county taxes collected by each city, determined by applying the mill rate to the total value of all property in each city, including the increment value of the tax incremental district as contemplated by the definition of "tax increment," would be:

City A	.0031915	x	400,000,000	=	$1,276,600
City B	.0031915	x	70,000,000	=	223,405
City C	.0031915	x	20,000,000	=	63,830
City D	.0031915	x	10,000,000	=	31,915
					$1,595,750

The "tax increment" attributable to the county levy would be the product of the county mill rate times the total equalized value of the tax incremental district times a fraction having a numerator

of the total equalized value of the tax incremental district minus the tax incremental base and having a denominator of the total equalized value of the tax incremental district, determined as follows:

$$(.0031915 \times \$50{,}000{,}000) \times \frac{(\$50{,}000{,}000 - 20{,}000{,}000)}{\$50{,}000{,}000}$$

$$\$159{,}575 \times \frac{3}{5} = \$95{,}745$$

The amount of taxes needed by the county is $1,500,000. The "tax increment" of $95,745 comes out of the total $1,595,750 taxes collected by the cities for the county, and the following amounts are distributed to the county by each city:

City A	$1,180,850[1]
City B	223,405
City C	63,830
City D	31,915
	$1,500,000

Thus, the county has paid $95,745 as its annual share of the cost of the improvements made to the tax incremental district.

II. Presumptions Of Constitutionality.

Courts repeatedly have held that the repugnance between a legislative act and the express provisions of the Constitution must be clear and irreconcilable before a statute will be held invalid. *Madison Metropolitan Sewerage District v. Committee on Water Pollution* (1951), 260 Wis. 229, 253-255, 50 N.W. 2d 424; *Nebbia v. People of State of New York* (1934), 291 U.S. 502, 537, 54 S.Ct. 505, 78 L.Ed. 940.

Moreover, in cases where there are two possible constructions of the law, one of which the law would be violative of the Constitution, and the other not, that construction which would save the law must be adopted, even though a different construction would be more obvious or natural. *Petition of Breidenbach*

[1] Because of some rounding of figures in this example, a nominal $5.00 would be overcollected by City A.

(1934), 214 Wis. 54, 62, 252 N.W. 366. Therefore, the search must be for a means of sustaining the act, not for reasons which might require its condemnation. *State ex rel. Thomson v. Giessel* (1953), 265 Wis. 558, 565, 61 N.W. 2d 903.

These propositions were restated by the Court in *State ex rel. La Follette v. Reuter* (1967), 36 Wis. 2d 96, 113, 120, 153 N.W. 2d 49, and in *State ex rel. Bowman v. Barczak* (1967), 34 Wis. 2d 57, 69-70, 148 N.W. 2d 683, where the court quoted from its decision in *Gottlieb v. Milwaukee* (1967), 33 Wis. 2d 408, 415, 147 N.W. 2d 633, 637:

> " 'All legislative acts are presumed constitutional, and every presumption must be indulged to sustain the law if at all possible. *State ex rel. McCormack v. Foley* (1962), 18 Wis. (2d) 274, 279, 118 N. W. (2d) 211; *School Dist. v. Marine Nat. Exchange Bank of Milwaukee* (1960), 9 Wis. (2d) 400, 403, 101 N. W. (2d) 112. If any doubt exists it must be resolved in favor of the constitutionality of a statute. *State ex rel. Thomson v. Giessel* (1953), 265 Wis. 558, 564, 61 N. W. (2d) 903. We as a court are not concerned with the merits of the legislation under attack. We are not concerned with the wisdom of what the legislature has done. We are judicially concerned only when the statute clearly contravenes some constitutional problem. *Chicago & N. W. R. Co. v. La Follette* (1965), 27 Wis. (2d) 505, 521, 135 N. W. (2d) 269.'"

One does not speculate as to possible unconstitutional operation of a statute when there are many areas of permissible constitutional application. *State ex rel. Bowman v. Barczak, supra.*

III. The Uniformity Clause And Equal Protection.

Article VIII, sec. 1, Wis. Const., provides in part that "the rule of taxation shall be uniform."

Uniformity of taxation under Art. VIII, sec. 1, Wis. Const., requires that there be substantial uniformity of rate based on value. *Beals v. State* (1909), 139 Wis. 544, 557, 121 N.W. 347. Once property is selected to be taxed, it must be taxed entirely and the same rate applied to it as to other property in the taxing district. The valuation must be uniform and the rate must be

uniform. *Knowlton v. Supervisors of Rock County* (1859), 9 Wis. *410. The uniformity requirement applies to the assessment or collection of direct taxes on real estate, and not to the distribution of state aids and taxes. *Columbia County v. Wisconsin Retirement Fund* (1962), 17 Wis. 2d 310, 325, 116 N.W. 2d 142. There is a substantial distinction between an inequality in the assessing or collecting of a tax and the distribution of its proceeds. The former may invalidate the tax and the latter not. *State ex rel. Van Dyke v. Cary* (1923), 181 Wis. 564, 572, 191 N.W. 546. The rule of uniformity does not extend to all steps in enforcing collection of the tax, but does extend to those important steps which are essential parts of the tax proceedings. *State ex rel. Owen v. Donald* (1915), 161 Wis. 188, 195, 153 N.W. 238.

By way of comparison, the Fourteenth Amendment of the United States Constitution does not impose on state taxation a requirement of equality as strict as that in the uniformity clause. *Puget Sound Power & Light Co. v. King County* (1924), 264 U.S. 22, 44 S.Ct. 261, 68 L.Ed. 541. Our court has said that Wisconsin's counterpart to the equal protection clause of the federal Constitution is found in Art. I, sec. 1, Wis. Const. *State ex rel. Sonneborn v. Sylvester* (1965), 26 Wis. 2d 43, 50, 132 N.W. 2d 249. The equal protection clause is aimed at "invidious discrimination." Unless the statute under consideration touches fundamental interests, legislative classification is valid under the equal protection clause when any reasonable basis may be conceived to justify a statute that appears discriminatory. The burden is upon the challenger attempting to prove the invalidity of the classification. *Harper v. Virginia State Board of Elections* (1966), 383 U.S. 663, 86 S.Ct. 1079, 1081, 16 L.Ed. 2d 169; *Lehnhausen v. Lake Shore Auto Parts Co.* (1973), 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed. 2d 351.

The Wisconsin Supreme Court expressed the standards for a proper classification in *Cayo v. Milwaukee* (1969), 41 Wis. 2d 643, 165 N.W. 2d 198, and said at p. 650:

> " '... the question whether there is room or necessity for classification is one resting primarily with the legislature, and no court is justified in declaring classification baseless unless it can say without doubt that no one could reasonably conclude that there is any substantial difference justifying different legislative treatment.' "

Under the provisions of the Tax Increment Law the legislature has imposed a financial obligation upon school districts, counties and other governmental units sharing a tax incremental district as part of its territory to pay for their proportionate share of the expense to make improvements to the tax incremental districts created by cities and villages. The reason they should share in the cost is because they will benefit from the future increase in their tax base. The law provides for the uniform imposition of property taxes within the boundaries of the various taxing jurisdictions which have a tax incremental district within their borders. Within each such jurisdiction a tax is applied at a uniform rate upon all property valued at its equalized full market value. A portion of the taxes collected is for a share of the cost of the improvements. The fact that the "increment value" is not included for apportionment purposes does not affect the uniformity of tax assessment or collection. It simply provides the method whereby the financial obligation is determined to pay for the improvements to the tax incremental district.

The legislature desired to spread the cost of public works or improvements within a city or village to all municipalities which share the tax base which has been expanded by the improvements. The legislature determined this will provide for more equitable financing and encourage desired improvements. The provisions of the law are consistent with those objectives. The legislature has declared that a tax increment system serves a public purpose by improving and otherwise promoting the health, safety, welfare and prosperity of the people of Wisconsin.

The purpose of the Tax Increment Law is also to further carry out the objectives of such public purposes as found in the urban redevelopment law, the blighted area law, the blight elimination and slum clearance act, the urban renewal act and the promotion of industry. Urban renewal itself serves a valid public purpose. *David Jeffrey Co. v. Milwaukee* (1954), 267 Wis. 559, 66 N.W. 2d 362; also see 44 A.L.R. 2d 1414, 1420. Similarly, the promotion of industry is for a valid public purpose. *State ex rel. Hammermill Paper Co. v. La Plante* (1973), 58 Wis. 2d 32, 205 N.W. 2d 784.

Generally, the question of what is a public purpose is for the legislature to decide. In exercising its discretion the courts will not interfere unless its action is clearly unconstitutional. Presumably

legislative enactments are constitutional. *State ex rel. Thomson v. Giessel* (1953), 265 Wis. 207, 215, 60 N.W. 2d 763. Although the court is not bound by the declaration of public purpose contained in an act, nevertheless what constitutes a public purpose is in the first instance a question for the legislature to determine and its opinion should be given great weight. *State ex rel. Warren v. Reuter* (1969), 44 Wis. 2d 201, 212, 170 N.W. 2d 790.

Some concern has been expressed over the fact that property owners in municipalities of a county, other than the municipality in which a tax incremental district is located, will have to pay a greater share of the county tax as a result of the creation of the tax incremental district. It is true that if the county did not have to contribute toward the cost of the improvements to a tax incremental district, it would have to collect less taxes from its taxpayers. Thus, in our hypothetical, a mill rate of only 3 mills would be needed to raise the $1,500,000 for the county, with each city contributing:

City A	$1,200,000	(.003 x 400,000,000)
City B	210,000	(.003 x 70,000,000)
City C	60,000	(.003 x 20,000,000)
City D	30,000	(.003 x 10,000,000)
	$1,500,000	

Accordingly, the share of taxes of City A would be increased and those of Cities B, C and D decreased, as follows:

	% of county budget under Tax Increment Law	% of county budget without Tax Increment Law
City A	.787	.800
City B	.149	.140
City C	.043	.040
City D	.021	.020

This assumes that the improvements and subsequent increments would be made even in the absence of the Tax Increment Law. Since the object of the law is to encourage such improvements, however, it is more logical to assume that the improvements would not have been made in the absence of the law, meaning that there

would be no $30,000,000 tax increment, and leaving City A with a total value of $370,000,000 and the county with a total value of $470,000,000. This latter assumption would result in the payment of the same percentage and same amount of taxes by each city for county purposes determined at the rate of .0031915 established in our hypothetical.

Even under the assumption that the improvements and tax increment would have occurred anyway, it must be remembered that the reason for the other cities having to pay a greater share of the county budget is the result of the legislative declaration that all municipalities (including counties) must share in the cost of the improvements made to their territories in return for the benefits they will receive from an increased property tax base. This does not affect the uniformity of tax assessment or collection, but only the distribution of the taxes after their collection, for a valid purpose, and is not unconstitutional.

The Tax Increment Law, and in particular subsection (11) (a), merely apportions taxes which are levied by the existing taxing districts. The property in the tax incremental district is valued in the same manner and pays the same millage of tax as other property. There is a particular use to which the taxes must be put after their collection, consonant with the valid public purpose of the act, but none of this violates the uniformity rule or the equal protection clause. The law provides that the desired projects will pay for themselves, and the taxing jurisdictions and taxpayers which share in the expanded tax base will all share in the paying for the costs of the improvements. The objects of the legislation have a reasonable basis.

Recently the Supreme Court of Iowa upheld the constitutionality of that state's version of the tax incremental financing concept in the case of *Richards v. City of Muscatine* (1975), 237 N.W. 2d 48. On page 60 of that decision reference is made to two Wisconsin cases: *Ehrlich v. City of Racine* (1965), 26 Wis. 2d 352, 132 N.W. 2d 489, and *Gottlieb v. City of Milwaukee* (1967), 33 Wis. 2d 408, 147 N.W. 2d 633. Both cases properly prohibit the use of partial exemptions in *ad valorem* taxation as violating the uniformity clause. The cases are not applicable authority for holding the Tax Increment Law invalid, however, because the law does not create partial exemptions. All property owners pay taxes at the same rate upon the equalized value of their property.

The Tax Increment Law on its face does not appear to violate the uniformity clause of Wisconsin's Constitution or the equal protection clause of the United States and Wisconsin Constitutions.

IV. Taxation Without Representation.

The question of "taxation without representation" also is raised by your predecessor's letter of inquiry. Many examples can be cited of "taxation without representation." For instance, a resident of only one county can own property in another county, but he is subject to a county property tax in each county. A taxpayer can reside in one state and earn income in another state, and be taxed by the other state even though he doesn't reside there. Many sales taxes are paid by nonresidents of the taxing authority.

Under the Tax Increment Law the State of Wisconsin, through its elected legislative representatives and its governor, have adopted a law which gives cities and villages additional powers they may exercise. The object of the law is to encourage the cities and villages to exercise these powers to further the statewide public purpose of eliminating blighted areas and encouraging industrial development. To further encourage the cities and villages to utilize their power to effect these public purposes, the legislature has provided the framework within which the powers can be exercised, and further provided that if the power is exercised by the cities and villages, the cost of the improvements must be shared by those who benefit by sharing in the increased tax base caused by the improvements.

The principle of "taxation without representation" does not mean that no one shall be taxed unless he was represented by someone for whom he had an actual opportunity to vote. The following statement from 71 Am. Jur. 2d, *State and Local Taxation,* sec. 79, p. 403, is in point:

"Sec. 79. Taxation without representation.

"The people who pay taxes imposed by laws are entitled to have a voice in the election of those who pass the laws. But this principle, as practically administered, does not mean that no person—man, woman, or child, resident or nonresident —shall be taxed unless he was represented by someone for whom he had an actual opportunity to vote. And although

taxation and representation are indissolubly connected by the underlying principles of free government, payment by a town official of an order drawn on the town treasury by bridge commissioners appointed under a state statute authorizing them to assess the cost of maintaining highways over certain designated bridges against the towns within a certain area may not be refused upon the ground that the money in the treasury is raised by taxation of the residents of the town, who did not elect the commissioners, since the representation of the inhabitants of the town in the legislature which passed the enabling statute is sufficient to satisfy the principle that there shall be no taxation without representation."

V. Conclusion.

There are no facts before me other than the statute itself. Accordingly, my opinion has been limited to the statutory findings and declarations of public purpose made by the legislature, which carry with them a strong presumption of constitutionality.

The Tax Increment Law is presumptively valid, and nothing appears on its face which would prompt me to advise you not to perform the duties and responsibilities it imposes upon the Department of Revenue. Accordingly, it is my opinion that the law should be administered as directed by the legislature.

BCL:APH

Public Lands; Property; Public Lands, Commissioners Of; Water; Swamp Lands; Lakes; Navigable Waters; Mineral Rights; State reservation of land and interests in lands under ch. 452, Laws of 1911 and sec. 24.11 (3), Stats., discussed. OAG 74-76

October 5, 1976.

BOARD OF COMMISSIONERS OF PUBLIC LANDS

You have been contacted by an attorney who is in the process of examining title to and rendering an opinion on lands which he has described in his letter as follows:

"Part of the Southeast Quarter (SE 1/4) of the Southwest Quarter (SW 1/4) of Section Seventeen (17), Township Thirty-one (31) North, of Range Eight (8) West, situated in the Town of Bloomer, Chippewa County, Wisconsin."

The letter further states:

> "The entire section of land was conveyed to the State of Wisconsin under the swamp lands act of September 28, 1850. The patent from the State of Wisconsin to John McGee was dated February 13, 1914 and made specific reference to the Act of Congress of 1850 and then recited that the conveyance 'is subject to reservations as provided by paragraph 6, Section 1, Chapter 452 Wisconsin Laws of 1911.'
>
> "At some time prior to the date of said patent from the State of Wisconsin, there was created an artificial lake that now covers submerged lands in the 40 acre tract above described.
>
> "One of the problems here is that my clients and several others owning property along the edge of Marshmiller Lake have been unaware of the legal consequences of the 'reservation' and have paid no attention to it in the past. Now that they have found out that this constitutes a chain of land or 66 feet, in fee, from the border of the lake, they are obviously quite concerned. I presume that all previous conveyances in all cases have simply excepted routinely, reservations, restrictions and easements of record, and no one has bothered to look up the cited portion of Chapter 452 of Wisconsin Laws of 1911.
>
> "I would like to point out that according to my investigation, at the time of the original government survey, O'Neil Creek and none of its tributaries were in the 40 acre tract above described. However, once damned [sic], the lake did and now protrudes into that 40 acres."

Paragraph 6, under sec. 1 of ch. 452, Laws of 1911, reads, in part:

> "Every contract, certificate of sale, or grant hereunder of public lands shall be subject to the continued ownership by the state; of the fee to all lands bordering on any meandered or non-meandered stream, river, pond or lake, navigable in fact for any purpose whatsoever, to the extent of one chain on every side thereof, and shall reserve to the people the right of access to such lands and all rights necessary to the full enjoyment of such waters ...."

Legislative History

The provision appeared in sec. 209, subsec. 6, Stats. (1911). The language remained unchanged until the enactment of ch. 279, Laws of 1951, which amended the provision by striking the language, "shall be subject to the continued ownership by the state, of the fee to all lands bordering on any meandered or non-meandered stream, river, pond or lake, navigable in fact for any purpose whatsoever, to the extent of one chain on every side thereof ...."

The provision under consideration last appeared in sec. 24.11 (3), R.S. 1949, but, of course, was law until the effective date of ch. 279, Laws of 1951, which was June 8, 1951. Accordingly, the provisions of sec. 1 of ch. 452, Laws of 1911, were in force from June 29, 1911, the effective date of ch. 452, Laws of 1911, to the effective date of the amendment or June 8, 1951, a period of approximately forty years.

You were previously advised that "attempts to repeal chapter 452, Laws of 1911, failed for many years." A review of the legislative history does not show this to be the fact. The relevant legislative history of the law in question up to the 1951 session of the legislature is as follows:

Created by ch. 452, Laws of 1911.

Appeared in 1911 Statutes, as sec. 209, subsec. 6.

Chapter 597, Laws of 1913, renumbered subsec. 6 to subsec. 3.

Chapter 454, Laws of 1917 made extensive revisions to ch. 15 of the 1915 Statutes, but only resulted in a renumbering of sec. 209, subsec. 3 to sec. 24.11 (3).

Between 1917 and the passage of ch. 279 in 1951, there was no legislative action involving the provision, except sec. 4978, Stats. (1917). This section repealed ch. 452, Laws of 1911, and ch. 597, Laws of 1913. It is probably this statute that gave rise to the claim that attempts had been made to repeal the law. The repeal of the prior session laws had no legal significance, for the law prior

to the repeal of the session laws had been recreated by ch. 454, Laws of 1917.[1]

Adverse Possession

First, consideration must be given to the question of whether the state lost title to those lands which were sought to be retained under and by virtue of ch. 452, Laws of 1911, through adverse possession. Generally, in the absence of statutory permission, adverse possession will not run against the state. 3 Am. Jur. 2d, *Adverse Possession*, sec. 205. Wisconsin is in accord with the general rule that a claim based on adverse possession cannot be asserted against the sovereign. *Lemieux v. Agate Land Co.* (1927), 193 Wis. 462, 214 N.W. 454. However, legislative permission was granted by the enactment of ch. 79, Laws of 1931 (effective May 3, 1931). The 1931 amendment to sec. 330.10, Stats. (1929), provided:

> "... But no person can obtain a title to real property belonging to the state by adverse possession, prescription or user unless such adverse possession, prescription or user shall have been continued uninterruptedly for more than forty years."

Approximately twenty-six years after granting the above permission, the legislature enacted ch. 192, Laws of 1957 (effective June 19, 1957). The amendment of 1957 added the following language to sec. 330.10, Stats. (1955):

> "... No title to real property held in trust by the state under s. 24.01 (2) to (6) shall be obtained by adverse possession, prescription or user."

The language of the statute has remained unchanged since the 1957 amendment, but has been renumbered to sec. 893.10 (1), Stats. (1973).

Thus, prior to the Act of 1931, no claim of title based on adverse possession could be asserted against the state. For

[1] Section 4978, Stats. (1917) was in the nature of a revisor's bookkeeping entry or more accurately, a housekeeping entry. The practice dates back to the time when the statutes were not biennually published and it was essential to avoid confusion and error. A full explanation of this practice can be found in 1930 Wis. Anno., under sec. 371.01, successor to sec. 4978. Section 371.01 is now sec. 991.01. Also, see sec. 990.03 (3).

approximately twenty-six years, 1931 to 1957, the legislature had given its consent to such claims as to any and all public lands. Since the Act of 1957, the legislature has revoked its permission as to those lands described in sec. 24.01 (2) to (6). The lands described in sec. 24.01 (2) to (6), are generally referred to as trust lands. At the present time, it is sufficient to state that the subject lands of this opinion fall within the classification of trust lands. Accordingly, as to the subject lands, the Act of 1957 precludes adverse possession.

The period of legislative consent as to public trust lands only extended between 1931 and 1957, a period of twenty-six years. It can, therefore, be contended that title to such lands could not be perfected through adverse possession, for such claim must be based on forty years of adverse possession.

The question of adverse possession, as stated previously, only involves the fee interest in the sixty-six foot shoreland strip. Despite the fact that legislative consent to adverse possession of trust lands only lasted for a period of twenty-six years, an argument in support of private claims to title based on this doctrine can be made.[2]

Such argument would necessarily be based on occupation that commenced after the enactment of ch. 452, Laws of 1911. Further, the occupation would have had to commence prior to June 19, 1917, in order for the forty years of adverse possession to have run prior to the revocation of consent by the Act of 1957. Thus, such claims are restricted to those that existed uninterruptedly commencing during the six-year period between 1911 and 1917, insofar as the subject matter of this opinion is concerned.

The argument is premised on the theory that the several statutes of limitations, which establish the doctrine of adverse possession, look to the accomplishment of past fact, i.e., occupation, as a bar to the claims of another. Thus, when sec. 330.10, Stats. (1929) was amended in 1931, allowing adverse possession against the state, there was nothing in the language of the amendment to suggest that occupation prior to such consent would not give rise to

[2] Retroactive application of sec. 300.10, Stats. (1931), would raise the constitutional question of whether the legislature may grant title to public trust lands when such authority is exclusively vested in the commissioners. This constitutional issue will not be discussed for the law of adverse possession appears to be dispositive.

bar the claim of the state. In other words, the argument would have to take the position that the statute estopped the state from claiming title as to anyone who adversely possessed state lands for the requisite period, regardless of whether a portion of such period of occupation occurred prior to the enactment of ch. 79, Laws of 1931.

If this argument is correct, there may be those who can claim title to trust lands. The subsequent revocation of consent as to adverse possession of trust lands (ch. 192, Laws of 1957), would not have divested such persons of vested rights. *Christenson v. Wikan* (1948), 254 Wis. 141, 35 N.W. 2d 329.

In discussing this issue, but in a somewhat different manner, it is noted in 2 C.J.S., *Adverse Possession*, sec. 6:

> "*Prospective or retrospective operation.* Adverse possession statutes have a prospective application only, and will not be given a retrospective operation. They apply where possession is taken after they have gone into effect, and a compliance with their provisions is necessary to obtain the benefit thereof. However, it has been held that the law as it exists at the time of the perfection of the adverse possession and the passage of title controls, rather than the law as it existed at the beginning of the adverse possession, and the effect of adverse possession is subject to change by statute at any time."[3]

The argument that possession prior to the existence of the right of adverse possession may be considered in achieving the subsequently prescribed period, in my opinion, fails to recognize the status of the sovereign and the nature of adverse possession.

In *Polanski v. Town of Eagle Point* (1966), 30 Wis. 2d 507, 141 N.W. 2d 281, it was noted that the underlying idea of adverse possession is not to reward the one in possession, but rather to impose a penalty upon the negligent owner. Such theory of adverse possession is inconsistent with retroactive application of the statute against the sovereign. It is incompatible with the concept of the school fund. The state could hardly be considered negligent when the law prior to legislative consent precluded adverse possession. The theory of adverse possession is only consistent with prospective application.

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[3] Footnotes omitted, no Wisconsin authority given.

In *Shellow v. Hagen* (1960), 9 Wis. 2d 506, 511, 512, 101 N.W. 2d 964, the court, in considering the elements necessary to establish an easement by prescription (adverse possession), stated:

> "... An act is hostile when it is inconsistent with the right of the owner and not done in subordination thereto. ...
>
> "***
>
> "The concept of adverse use includes a use which is wrongful or may be made wrongful by the owner, is open and notorious, and not made in subordination to the right of the owner. ..."

Any use of state trust lands by private citizens was by operation of law subordinate to the rights of the public, for in the absence of legislative consent, such use could never be considered superior to the rights of the public at large.

It is my opinion that the case law and underlying theory of adverse possession do not support the argument favoring retrospective operation of ch. 79, Laws of 1931.

Lands Involved

The property involved was originally acquired by the state by that Act of Congress which is generally referred to as "an Act of Congress to enable the State of Arkansas and other states, to reclaim the swamp lands within their limits," approved September 28, 1850.

The Act of 1850 is also referred to as the Swamp Lands Act of 1850.

The lands conveyed to the state by the Swamp Lands Act of 1850 and other lands were partitioned by ch. 537, Laws of 1865, so that one-half of such lands or the proceeds from such lands would be used for school purposes and one-half was to be used for drainage or reclamation. This division has no significant bearing on this opinion as will be subsequently shown.

School Lands

As noted above, fifty percent of the lands received by the state, pursuant to the Act of September 28, 1850, constituted what is

generally referred to as school lands.[4] Such lands are subject to the protection and mandate of Art. X, sec. 2, Wis. Const., which reads, in part:

> "The proceeds of all lands that have been or hereafter may be granted by the United States to this state for educational purposes (except the lands heretofore granted for the purposes of a university) ... shall be set apart as a separate fund to be called 'the school fund,' the interest of which and all other revenues derived from the school lands shall be exclusively applied to the following objects, to wit:
>
> "1. To the support and maintenance of common schools, in each school district, and the purchase of suitable libraries and apparatus therefor.
>
> "2. The residue shall be appropriated to the support and maintenance of academies and normal schools, and suitable libraries and apparatus therefor."

Additionally, Art. X, secs. 7 and 8, Wis. Const., provide, in part:

> "SECTION 7. The secretary of state, treasurer and attorney-general, shall constitute a board of commissioners for the sale of the school and university lands and for the investment of the funds arising therefrom. ...
>
> "SECTION 8. Provision shall be made by law for the sale of all school and university lands after they shall have been appraised ... The commissioners shall have power to withhold from sale any portion of such lands when they shall deem it expedient, and shall invest all moneys arising from the sale of such lands, as well as all other university and school funds, in such manner as the legislature shall provide ...."

In *The State ex rel. Sweet and others v. Cunningham and others* (1894), 88 Wis. 81, 82, 83, 57 N.W. 1119, the court

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[4] Other lands which fall within the category of school lands are Rock River Canal, Act of June 18, 1838; 500,000 Acre Lands, Act of September 4, 1841; Sixteen Section, Act of August 6, 1846; Indemnity School Lands, Act of February 26, 1859; Indemnity Swamp Lands, Act of March 2, 1855; University Lands, Act of June 12, 1838; Agricultural College, Act of July 2, 1862; Source of this enumeration is a revisor's note or annotation under Art. X, sec. 2, Wis. Const., found in Vol. 2, 1927 Stats. To be precise, "University Lands" are not "School Lands," as that term is used herein. However, for our purposes, university lands may be considered as "school lands" for the legal principles discussed are applicable to such lands, the same as if they were "school lands."

considered school lands under the provisions of Art. X, and concluded:

> "... These lands mostly belong to the school fund of the state. The school fund is a trust fund, and is placed by the constitution beyond the power of the legislature to divert it to any other use than the support of the schools of the state. It could not set them, or any part of them, apart for a state park. Const. Wis. art. X, sec. 2; *Lynch v. The Economy*, 27 Wis. 69; *People v. Allen*, 42 N.Y. 404. Neither could it withhold these lands from sale. That power is confided to the discretion of the commissioners of public lands by the constitution, and lies in no other office or body. Const. Wis. art. X, sec. 8; *State ex rel. Crawford v. Hastings*, 10 Wis. 525; *McCabe v. Massuchelli*, 13 Wis. 478; *State ex rel. Kennedy v. Brunst*, 26 Wis. 412 ...."

In discussing the division of swamp lands under the provisions of ch. 537, Laws of 1865, the court in *State ex rel. Owen v. Donald* (1915), 160 Wis. 21, 114, 151 N.W. 977, stated:

> "The deliberately made partition of lands derived by the state under the swamp land act, which was made under the state law of 1865 and confirmed by the act of 1869, illustrated by acquiescence therein for more than thirty years by all who had to do therewith, is a binding exercise of the state's option to take such part of the lands in question for drainage as it deemed necessary. The school fund share thereby passed wholly within the constitutional jurisdiction over lands held in trust for educational purposes, possessed by the commissioners of public lands under the ruling in *State ex rel. Sweet v. Cunningham*, 88 Wis. 81, 57 N. W. 1119, 59 N. W. 503, or by the legislature, according as we must decide there is a difference between the two classes of lands."[5]

The above authority makes it quite clear that the legislature cannot use school lands for other purposes. In the *Cunningham* case, *supra*, the court struck down an attempt by the legislature to use such lands for park purposes, and in the *Owen* case, *supra*, the attempted use of school lands for forest reserves was similarly voided.

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[5] See report of referee in *State ex rel. Owen v. Donald* (1916), 162 Wis. 609, 157 N.W. 946, which appears to vitiate the division of swamp lands between the drainage fund and the school fund with the result that all such swamp lands constitute normal school lands.

Under Art. X, sec. 8, Wis. Const., the discretion to withhold such lands from public sale is vested in the commissioners and they are not in this matter subject to legislative direction.

Other Lands

There is no constitutional provision which precludes the legislature from directing the retention of non-school lands or from prescribing a particular use for such lands. However, I mention without discussion that such lands may be subject to a particular use by the terms of the federal grant or act.

Ch. 452, Laws of 1911

As to retention of fee interests, ch. 452, Laws of 1911, which created sec. 209, subsec. 6, Stats. (1911), only involved conveyances or transactions of public lands which abutted navigable waters. A navigable body of water is any body of water capable of floating logs. *Olson v. Merrill* (1877), 42 Wis. 203.[6] The statute in question excepted from all conveyances or transactions the fee interest to a strip of land sixty-six feet in width abutting such waters. Additionally, it appears that a right of access to such lands was reserved as well as all mineral, mining rights and water-power rights.

The purpose of the Act was to prohibit the sale of any public lands, including school lands, which were situated within sixty-six feet of a navigable body of water and to permanently set aside such lands for public parkway use.

Shortly after the passage of the Act in question, the Public Lands Commissioners were advised by the Attorney General that the statute was unconstitutional insofar as it attempted to use school trust lands for park purposes.

This opinion [1 OAG 89, 92 (1911)] stated:

> "The provision reserving to the public lands bordering on any meandered or nonmeandered stream, river, pond or lake navigable, in fact, for any purpose whatever to the extent of

[6] The definition of navigable waters was changed in *Muench v. Public Service* Comm. (1951), 261 Wis. 492, 53 N.W. 2d 514. Navigable, in fact, now refers to any stream capable of floating any boat, skiff or canoe, etc. As the period of the statute in question runs from 1911 to 1951, the earlier definition would seem more appropriate. See also *Degayner and Company v. DNR* (1975), 70 Wis. 2d 936, 236 N.W. 2d 217.

one chain on either side thereof, cannot be carried out so far as these school lands are concerned for the reason that the Legislature has no power to set apart or appropriate the school lands or any portion thereof for state park or for any other purpose other than that contemplated by the constitution; neither can the legislature withhold such lands from sale. See *State v. Cunningham*, 88 Wis. 81."

The views expressed in 1 OAG 89 are as valid today as they were when written. The legislature apparently recognized its invalidity when it amended the section in 1951.[7]

Regardless of the public benefit and enjoyment sought to be obtained or more accurately retained by the provisions of sec. 209, subsec. 6, Stats. (1911), I can only conclude that the law in question, insofar as it attempted to use school lands for the creation of public parkways, was repugnant to the Constitution and, therefore, void *ab initio*. *State ex rel. Martin v. Zimmerman* (1939), 233 Wis. 16, 288 N.W. 454. However, the statute was not unconstitutional as applied to those public lands which were not subject to the mandate of Art. X, Wis. Const.

Specific Land In Question

The specific parcel in question was acquired under the Swamp Lands Act of September 28, 1850. Therefore, as indicated previously, under the Act of 1865, the question could be raised as to whether such lands belong to the drainage fund or the school fund.[8]

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[7] A note found in the bill jacket in the Legislative Reference Library pertaining to the amendment of sec. 24.11 (3), Stats. (1949), by ch. 279, Laws of 1951, states:
"24.11 (3) Amended. 'The reservation to State of the 1 chain (66') on the sale of State School Lands on meandered or nonmeandered streams, rivers, ponds and lakes should be eliminated. I feel such a reservation as it affects the constitutional trust lands (under our jurisdiction) is unconstitutional as it tends to kinder the sale of such land for the benefit of the school funds, or the full value is not received of the lands which were originally granted to the state for school purposes. (The state conservation department possibly would not be in favor of the repeal of this part of this section as far as it concerns the state park and forestry lands under their control.)" [Authored by T. H. Bakken, Chief Clerk of the Commissioners of Public Lands.]

[8] Chapter 537, Laws of 1865, equally divided the swamp land grants of September 28, 1850 and March 2, 1855, between the school fund and the drainage fund. However, as indicated in n. 5, it was held in *State ex rel. Owen v. Donald, supra*, at 620, that the drainage fund was vitiated by subsequent acts of the legislature with the result that all such lands are to be treated as school lands. Also see sec. 24.145, Stats.

The minutes of the Board of Commissioners of Public Lands for October 5, 1911, show, upon receipt of the Attorney General's opinion (1 OAG 89), the following action:

> "Opinion by Attorney General to effect that Chapt 452, Laws of 1911, is unconstitutional, so far as it applies to School lands, was considered and it was Moved by Mr. Dahl: That sales of State School lands be made only in conformity with opinion of Attorney General dated Sept 1911, as to constitutionality of Chapt 452, Laws of 1911, and, that sales of other state lands be made in conformity with said law until further interpretation thereof by the Attorney General."

This acquiescence in the opinion of the Attorney General shows that the commissioners apparently did not intend to reserve from any conveyance or transaction involving school lands a sixty-six foot strip along navigable waters. However, the certificate involving the parcel now under consideration, which was issued on May 28, 1912, provides:

> "... the said purchaser, his heirs, assigns or other legal representatives be entitled to a Patent for the land herein described, subject to the reservations provided for in Paragraph 6, Section 1, of said Chapter 452 of the Laws of Wisconsin for the year 1911, which reads as follows:
>
> "6. Every contract certificate of sale or grant hereunder of public lands shall be subject to the continued ownership by the state, of the fee to all lands bordering on any meandered or non-meandered stream, river, pond or lake, navigable in fact for any purpose whatsoever, to the extent of one chain on every side thereof, and shall reserve to the people the right of access to such lands and all rights necessary to the full enjoyment of such waters and of all minerals in said lands, and all mining rights therein, and shall also be subject to continued ownership by the state of all water power rights on such lands or in any manner appurtenant thereto. Such conveyance shall also be subject to a continuing easement in the state and its assigns to enter and occupy such lands in any manner necessary and convenient to the removal of such mineral from such lands and to the proper exercise of such mineral rights, and shall be further subject to the continuing easement in the state and its assigns to enter and occupy such

lands in any manner necessary and convenient to the development, maintenance and use of any such water rights. Nothing contained in this section shall be construed to provide for the continued ownership in the state of any stone used for building purposes nor of any sand or gravel."

The patent, which was issued on February 13, 1914, provides:

"To Have and to Hold the Same, together with all the Rights, Privileges, Immunities and Appurtenances of whatsoever nature thereunto belonging unto the said John McGee and to his heirs and assigns forever, subject to reservations to State provided by paragraph 6, Section 1, Chapter 452, Wis. Laws of 1911."

There are, of course, two possible explanations for this apparent inconsistency, 1) the lands may not have been school lands, but may have, under the Act of 1865, been classified or treated as drainage lands, or 2) the commissioners may have simply had a change of mind. Whatever the explanation may be, the fact remains the sixty-six foot strip was not conveyed and this intent was clearly expressed in the instruments documenting the transaction.

Even if the lands were school lands and even if the commissioners were improperly motivated by what I have considered to be an unconstitutional act of the legislature, such assumed facts do not change the conclusion that the lands were not conveyed. The certificate quoted above evidences the intent of the commissioners not to convey the strip and such intent must have been understood by the purchaser.

Artificial Lake

The letter of inquiry raised three additional facts:

1. The body of water is an artificial lake.

2. The lake was created prior to issuance of the patent.

3. At the time of the original government survey, the subject lands did not border on any navigable body of water.

It does not seem significant that the body of water in question is an artificial lake.[9] The language in the statute, as well as in the certificate, is sufficiently broad so as to cover any navigable body of water.

It does not seem significant that at the time of the original government survey, there were no navigable waters within the subject lands. Nor does the situation that existed at the time of the patent control.

In my opinion, the circumstances that existed at the time of execution of the certificate, i.e., sale, would be controlling. In *Mathy v. Mathy* (1940), 234 Wis. 557, 562, 291 N.W. 761, our court noted that in the construction of a deed:

> "... the situation of the parties when the instrument was drawn may be considered and the instrument must be viewed in the light of the existing circumstances. ..."

There is no language in the statute or certificate to support and it would be manifestly unfair to conclude that circumstances following the sale would govern. For example, if the subject lands did not involve a navigable body of water at the time of sale, the instrument and intent of the parties would have been to convey all lands. Then, assume that following the sale the purchaser's neighbor dammed a stream which created an artificial lake on purchaser's lands. Surely, such subsequent act of the stranger to the sale could not result in a forfeiture to the state of lands that were intended to be conveyed and were, in fact, conveyed. Nor, would the subsequent acts of the purchaser enlarge the state's interest. For example, assume the subject lands were crossed by a stream which the purchaser dammed after the sale and created a lake. Surely, the state's interest would be measured from the bank of the original stream which was, of course, the existing situation at the time of the sale. The state's interest would not be enlarged by the creation of the lake which may have occurred many years after the sale. Under this latter hypothetical situation, the state would own those presumably submerged lands extending from the

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[9] Title to submerged lands of an artificial lake is not in the state, nor necessarily in titleholder to the bank, but depends on title to the bed itself. *Skalitsky v. Consolidated Badger Coop.* (1948), 252 Wis. 132, 31 N.W. 2d 153.

thread of the original stream to a point sixty-six feet from the original bank.[10]

The particular lake in question is known as Marshmiller Lake. I have been informed by the Department of Natural Resources that it is a natural lake. Apparently, and according to the records of the Department of Natural Resources, the lake was enlarged by the construction of a dam. The records of the department show that the dam was constructed in 1870. However, permission to construct and maintain the dam was given to one Marshall Miller and L. C. Stanley, some thirteen years later by ch. 230, Laws of 1883. This subsequent act of the legislature may have been in the nature of ratifying an existing situation. In any event, it does appear that the lake may have existed in its present form as early as the date of the sale or May, 1912.

Conclusion

It is my opinion that fee title to the sixty-six foot strip of shoreland is in the State of Wisconsin. This opinion is not dependent on whether the subject lands are school lands, nor is it dependent on whether the act reserving such lands was constitutional or unconstitutional. The conclusion is based on the documents surrounding the transaction which are unambiguous and show that the land was not conveyed. *Grosshans v. Rueping* (1967), 36 Wis. 2d 519, 153 N.W. 2d 619.

The intent not to convey was clearly expressed in the documents pertaining to the transaction. The fact that such intent may have been motivated by what appears to be an unconstitutional statute does not vitiate the clear intent and act of the parties.

At this point in time, the lands constitute school lands (sec. 24.145, Stats.). If in the judgment of the board such lands should now be sold, they should be appraised and publicly offered as required by law.

The Reservation Of Lesser Interests Under Ch. 452, Laws of 1911

In addition to retention of the fee interest in the sixty-six foot water frontage strip, the statute provided for retention of certain

[10] Title to submerged lands of an artificial lake depends on title to the bed. *Skalitsky v. Consolidated Badger Coop., supra.* Ownership of the bed of a stream may be separated from the abutting lands. *Norcross v. Griffiths* (1886), 65 Wis. 599, 27 N.W. 606; *Bright v. City of Superior* (1916), 163 Wis. 1, 156 N.W. 600.

lesser interests. These interests which were to be retained included a right of access to the retained water frontage strip, all rights necessary to the full enjoyment of the waters, retention of the mineral rights and other rights.

The question is: in what parcel of land are these lesser interests located? Are these lesser interests to be retained in the water frontage strip, or in the parcel actually conveyed? There is no difficulty with the interest described as the right of access. This interest, of course, was to be retained in the parcel conveyed so that the public could cross the private lands to get to the retained lands.

The statute and the certificate cited above first refer to the retention of the fee interest in the sixty-six foot abutting strip. The retention of these other interests is then referred to in conjunction with "such lands," or "said lands." One possible construction is that the language "such lands" or "said lands" does refer to the retained strip. Under this construction, little effect is given to those words of the statute that retain these lesser rights, for the fee interest, with the exception of the right of access, would have included such lesser rights in any event. This construction would appear to violate the rule of statutory construction that effect must be given, if possible, to every word and clause of the statute. *Prechel v. City of Monroe* (1968), 40 Wis. 2d 231, 161 N.W. 2d 373.

A second possible construction is to say that these lesser interests only relate to those lands not retained. This construction, at first blush appears to be reasonable, for it gives effect to retention of the fee interest, as well as effect to retention of the lesser interests.

The third possible construction would be to say that these lesser interests relate to both the intended retained parcel or water frontage strip, as well as the parcel actually conveyed.

In my opinion, sec. 6 of ch. 452, Laws of 1911, constitutes a coherent, consistent plan of land use only when it is interpreted to apply to that portion of the public lands which are conveyed to a private party. Under that interpretation, the state conveys the tract of land but retains to the public the right to benefit from any mineral deposits therein. The last sentence in the act assures the buyer that the reserved public rights will not prevent the use of the

sand, gravel and building stone found on the land. Thus, the rights conveyed to the private party are sufficient for agricultural, residential and recreational use. The rights reserved to the public are associated with commercial exploitation of subsurface resources, recreational use of the navigable waters and the development of water power. By contrast, to say that "said lands" and "such lands" refer only to the sixty-six foot strip along navigable waters is both impractical and renders the entire reservation statute a meaningless redundancy. Certainly, there is no need to expressly reserve mineral interests in land that is already held in fee simple. The reservation under that interpretation would be redundant and the sand, gravel and stone exception becomes entirely meaningless. Beyond that, I am unable to perceive any rational legislative purpose or public benefit to be derived from a mining operation restricted to a long, twisting, sixty-six foot strip of shoreline.

Accordingly, it is my opinion that it was the intent of the statute to retain these other interests in those lands which were, in fact, conveyed by the state. Actually the statute, as it now reads, clearly retains these other interests in the entire parcel conveyed (sec. 24.11 (3), Stats.).

The character, magnitude and value of these lesser interests raises the issue of whether such provisions independently considered are in harmony with Art. X, Wis. Const., when applied to school lands.

Under Art. X, and from the extensive discussion in *State ex rel. Owen v. Donald, supra*, it appears that the commissioners have the responsibility as trustees of the school fund to produce as much income as reasonably possible for the support of the schools. Can the legislature legitimately frustrate the sale and value of school lands by retaining public interests in such lands? The Constitution vests in the commissioners the authority and responsibility to sell such lands. The Constitution does not provide that the legislature may direct the state to retain an interest or interests in such lands. In my opinion, these interests are of such magnitude that they would most certainly affect value. For example, if the public had the right to use the entire parcel to the extent "necessary to the full enjoyment of such waters," such public reservation would seriously affect marketability and value.

There are serious questions regarding the constitutionality of these provisions as applied to school lands. However, as in the situation of the retained fee interest, these lesser interests were expressly retained in the documents pertaining to the transaction. Under Art. X, sec. 8, Wis. Const., the commissioners have the power to withhold from sale "any portion of such lands." As the commissioners may clearly withhold such lands from sale, then in my opinion, they may withhold from sale particular interests in such lands. The constitution does contemplate the eventual sale of such lands. Similarly, I must conclude that the commissioners in their discretion, must sometime offer these lesser interests for public sale.

In conclusion, it is my opinion that the act of the legislature which intended to permanently set aside or reserve the lesser interests, was unconstitutional as applied to school lands. However, regardless of the constitutionality of the statute, these lesser interests in the entire parcel were expressly retained. The state presently holds such interests and they should be offered for public sale when the commissioners deem it expedient.

General Observations

The foregoing discussion covered issues that were not particularly relevant to the specific lands in question. However, the statute was in existence from 1911 to 1951 and during this period of forty years there were literally hundreds of transactions involving sales by the commissioners of public lands. Under the broad language of the act all transactions would be subject to the provisions of the statute.

The issues are of great public, as well as private, concern as considerable interest and publicity has been evidenced.

The following summation and discussion of the legal principles involved may be of some benefit if and when additional inquiries are made regarding these forty years of public land transactions.

School Lands

As to school lands, it is my opinion that the entire statute was unconstitutional; that no fee interest or lesser interests were retained by the state because of, or due to the statute alone. However, if the documents pertaining to a particular transaction expressly provided for the retention of such interests, then such

interests were, in fact and law, retained, for this was the intent of the parties.[11]

Thus, in each instance involving school lands, the documents reflecting such transaction must be examined to determine if the lands and interests in lands were expressly reserved by some language in the specific documents.

It is to be kept in mind that grants of land by a public body are to be construed most strongly against the grantee. *Brody v. Long* (1961), 13 Wis. 2d 288, 108 N.W. 2d 662.

Non-School Lands

The statute, as applied to non-school lands, was not repugnant to the Constitution. Therefore, it is not necessary to examine specific documents pertaining to the transactions, for the provisions of the statute were incorporated into said documents by operation of law.[12]

Thus, the state now holds title to the fee interest in any strip of land abutting navigable waters and the lesser interests as well, if the transaction occurred during the period under consideration.

Mining Rights

From the discussion above under the heading "Reservation of Lesser Interests," it is apparent that during the period from the enactment of ch. 452, Laws of 1911, until the 1951 amendment, the state reserved certain interests in the land, including mining rights.

Section 24.11 (3), Stats., from the 1951 amendment to the present time, has reserved mining rights in all public land transactions, as the issue of mining rights is presented by the current language of sec. 24.11 (3), and because of the recent public interest, a brief discussion is deemed appropriate.

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[11] Even assuming the parties were of the belief that the provisions of sec. 209, subsec. 6, Stats. (1911), were valid and controlling, this belief which I have concluded would have been in error, is not the type of mutual mistake as to void the entire contract. 17 Am. Jur. 2d sec. 143, *Contracts*. Such result would create even greater problems.

[12] In *State ex rel. Bldg. Owners and Managers Ass'n of Milwaukee, Inc. v. Adamany* (1974), 64 Wis. 2d 280, 294, 219 N.W. 2d 274, it was held that every contract is subject to the law of the state, when written.

Section 24.11 (3), as it now reads, presents a strange anomaly in the law which can be best appreciated by an examination of the legislative history involving mining rights. This discussion is not intended to be exhaustive of the subject matter, but is merely intended to raise the issue, for, in my opinion, there is no clear answer short of judicial determination or legislative action.

For over one hundred years, the state has reserved mining rights in lands sold, but not completely paid for. Section 52 of ch. 28 of the 1858 Statutes, provided that the certificate of sale did not carry with it any mining rights.[13] The purpose of such reservation was, of course, to protect the state in the event of nonpayment or forfeiture. This same type of reservation can be found today in sec. 24.24 (2), Stats.

It appears that up to the enactment of ch. 452, Laws of 1911, the state did not retain any mining rights, but relinquished such rights upon issuance of the patent.

Following the enactment of ch. 452, Laws of 1911, and up to the amendment of 1951, the state, in all transactions attempted to retain mining rights. As to school lands, I have concluded that the statute requiring retention of these rights, including mining rights, was constitutionally questionable. However, such rights, including mining rights, were retained by the state if the conveyancing instruments so provided.

As to non-school lands, mining rights were retained in any transaction between 1911 and 1951.

In summation, it is my conclusion that:

1. Patents issued prior to the enactment of ch. 452, Laws of 1911, did not reserve to the state mining rights unless for some reason such reservation was expressly stated in the patent.

2. Between the years 1911 and 1951, mining rights were reserved in transactions involving non-school lands. This reservation exists by operation of law and even in the absence of express language in the certificate or patent.

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[13] Section 52, ch. 28, Stats. (1858), only applied to school and university lands. Section 26 of ch. 29, Stats. (1858), presumably made the provisions of sec. 52, ch. 28, applicable to all swamp lands.

3. Between the years 1911 and 1951, no mining rights were reserved in school lands by operation of law. However, if the documents expressly refer to such reservation, such rights were reserved to the state by agreement.

This discussion now leads us to consideration of sec. 24.11 (3), Stats. (1973).

Section 24.11 (3), Stats. (1973)

Section 24.11 (3), Stats., provides:

"RESERVATION. Every contract, certificate of sale, or grant hereunder of public lands shall reserve to the people the right of access to such lands and to any meandered or nonmeandered stream, river, pond or lake navigable in fact for any purpose whatsoever, bordered by such lands and all rights necessary to the full enjoyment of such waters, and of all minerals in said lands, and all mining rights therein, and shall also be subject to continued ownership by the state of all waterpower rights on such lands or in any manner appurtenant thereto. Such conveyance shall also be subject to a continuing easement in the state and its assigns to enter and occupy such lands in any manner necessary and convenient to the removal of such mineral from such lands and to the proper exercise of such mineral rights, and shall be further subject to the continuing easement in the state and its assigns to enter and occupy such lands in any manner necessary and convenient to the development, maintenance and use of any such water rights. Nothing contained in this section shall be construed to provide for the continued ownership in the state of any stone used for building purposes nor of any sand or gravel."

The above-quoted statutory language has remained the same since the amendment of 1951. Although the provision no longer refers to retention of the fee interest, the other lesser interests are retained.

Accordingly, any and all transactions since 1951 presumably would be subject to such reservations. It is my opinion that such broad and extensive reservations would so seriously affect the value of school lands that the statute would be unconstitutional as

applied to school lands.[14] Therefore, in my further opinion, such reservations could not by operation of law be incorporated into the documents pertaining to the transaction. If, on the other hand, the documents expressly retained such rights, then the state possesses such rights by express agreement of the parties. It is my opinion that the state does not, under the Constitution, have the right to *permanently* retain these interests in school lands and such interests should be sold[15] at such time as the commissioners deem it advisable.

As to non-school lands, I am of the opinion that such described interests have been retained by the state and under sec. 24.11 (3) cannot be sold outright, but some of the interests may, in specific situations, be assigned, as for example, the right to mine a particular ore.

Fiduciary Duties

The commissioners of public lands have a constitutional duty to act as trustees in the sale of school and university lands for the exclusive benefit of the State School Fund, Art. X, sec. 7, Wis. Const. This duty necessarily implies an obligation to maximize the financial benefit from the sale of such lands or interest in such lands. Thus, where the law regarding public lands is uncertain, as it seems to be with regard to the reservation of real property rights, the commissioners are required by law, despite any natural and unavoidable sympathy for the private property owners, to advance that reasonable legal interpretation most favorable to the interests of the school fund.

Finally, I would point out that the issues involved herein are so complex and important that, in fairness to the public and private interests involved, they can only be fully resolved in a judicial proceeding or proceedings.

BCL:CAB

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[14] Art. X, secs. 7 and 8, Wis. Const., vests in the commissioners the power to withhold lands (or interests in lands) from sale. The statute infringes upon their discretion. *State ex rel. Sweet v. Cunningham, supra*; *State ex rel. Owen v. Donald, supra.*

[15] The retention of such interests in lands sold to other state agencies is also involved. In such instances, the interests may be sold by the commissioners and the proceeds credited to the school fund. This is also true for transactions that occurred prior to the 1951 amendment of sec. 24.11 (3), Stats.

Veterans Affairs, Department Of; Governor; Civil Service; Veterans; Military Personnel; The secretary of the Department of Veterans Affairs may only be removed from office by the governor for cause. The board has no authority to discharge, suspend, or take disciplinary action that would prevent the secretary from fulfilling the statutory duties of his office. OAG 78-76

October 14, 1976.

RALPH JIRIKOWIC, *Chairman*
Board of the Department of Veterans Affairs

You have requested my opinion on the following questions:

> "Under Section 15.05 of Wisconsin Statutes, what powers does the Board [of Veterans Affairs] have relating to the continuation, discipline, and dismissal of the Secretary who is granted an 'indefinite term' under the above statute? Does any other entity have power or powers in this regard? If the board has discretion relating to the discipline or dismissal, what standards and procedures should be applied in the exercise of that discretion?"

The answers to your first two questions can be found in secs. 15.05 (1), and 17.07 (3), Stats. The relevant language of sec. 15.05 (1), reads:

> "(a) If a department is under the direction and supervision of a secretary, the secretary shall be nominated by the governor, and with the advice and consent of the senate appointed, to serve at the pleasure of the governor, ...
>
> "(b) 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, except that the secretary of veterans affairs shall be appointed by the governor with the advice and consent of the senate for an indefinite term, outside the classified service. ..."

The Department of Veterans Affairs is unique. Section 15.49, Stats., provides that the department is under the direction and supervision of the board. The general rule in such situations, as can be seen from sec. 15.05 (1) (b), is that the board appoints a

secretary who serves at the pleasure of the board. However, sec. 15.05 (1) (b), Stats., clearly provides an exception to this general rule in the case of the Department of Veterans Affairs by providing for gubernatorial appointment. The subsection (sec. 15.05 (1) (b)), is silent, however, as to whether the secretary is to serve at the pleasure of the board or the governor.

It would be absurd to conclude that the board could terminate the appointment of the governor. The term of office of the secretary is fixed by law as being "indefinite." Such term clearly implies that the appointee is to hold office until removed by the appointing authority. In this regard, sec. 17.07, Stats., specifically provides:

> "Removals from office of legislative and appointive state officers may be made as follows:
>
> "***
>
> "(3) State officers appointed by the governor by and with the advice and consent of the senate, ... by the governor at any time, for cause; ..."

Accordingly, the Board of Veterans Affairs has no responsibility or authority under sec. 15.05, Stats., or under any other provision of law with respect to the tenure of the secretary of the Department of Veterans Affairs. Such responsibility and authority is vested in the governor as the chief executive officer of the state being separate and distinct from his responsibility and authority as a member of the board under sec. 15.49, Stats.

Removals for cause are governed by sec. 17.16, Stats.

I do not know what type of action you would contemplate within the term "discipline." Under such circumstances, I cannot say unequivocally that the board is powerless to take appropriate action which would conceivably fall within the term "discipline." However, in my opinion, it would not be proper and the board has no authority to discharge, suspend or take any action that would hinder, frustrate or prevent the secretary from performing the duties and responsibilities of his statutory office.

In view of the answers to the first two questions, it is not necessary to answer your third question.

BCL:CAB

Veterinarian; Medicine; Physicians And Surgeons; Humane Society; Vaccination; Health; Animals; The termination of the life of animal by injection is not the practice of veterinary medicine. OAG 80-76

October 21, 1976.

O. A. HILDEBRANDT, D.V.M., *Chairman*
Veterinary Examining Board

You request my opinion as to whether performing intravenous euthanasia upon animals constitutes the practice of veterinary medicine. You advise that this question arises because the Wisconsin Humane Society wishes to use non-licensed personnel to do the euthanasia. For the purpose of this opinion I am adopting the general definition of euthanasia as "an easy death or means of inducing one." *Webster's Third New International Dictionary* (3rd ed. 1970).

Section 453.02 (b), Stats., defines the practice of veterinary medicine in these words:

> "(6) To 'practice veterinary medicine' means to examine into the fact or cause of animal health, disease or physical condition, or to treat, operate, prescribe or advise for the same, or to undertake, offer, advertise, announce, or hold out in any manner to do any of said acts, for compensation, direct or indirect, or in the expectation thereof."

Wisconsin case law does not clarify or supplement this definition.

It is my opinion that the termination of the life of an animal by the indicated means does not constitute the practice of veterinary medicine. The general rule of statutory construction of the licensing statutes is set forth in 70 C.J.S., 7, *Physicians and Surgeons,* at p. 828:

> "Generally a statute making the practice of medicine, dentistry, or optometry without a license or certificate an offense is to be strictly construed, although not so as to defeat the obvious legislative intent."

Section 453.02 (6), Stats., states that, "To ... examine into the fact or cause of animal health, disease or physical condition, or to treat, operate, prescribe or advise for the same ...." is the practice of veterinary medicine. This definition is virtually the same as the definition of "treat the sick" appearing in sec. 445.01 (a), R.S. 1973. With reference to this definition of "treat the sick," (previously in sec. 445.02, Stats.), a former attorney general discussed whether a licensed osteopath could vaccinate a person against smallpox:

> "It is doubtful whether vaccination falls within this definition, since it does not require that a diagnosis be made nor is the patient sick and in need of treatment." 29 OAG 148 (1940).

Where the intent is to terminate the life of the animal there is no need to examine into the health of the animal or treat the animal in the sense set forth by sec. 453.02 (6), Stats. Where the purpose is to extinguish life, it matters little whether a person is qualified to practice veterinary medicine as long as the life of the animal is extinguished in a humane manner.

No statute sets forth exactly how the life of an animal is to be terminated. The act must, however, comply with the provisions of ch. 948, Stats., which prohibits cruelty to animals. Section 948.06 of that chapter provides:

> "No person may expose any domestic animal owned by another to any known poisonous substance or controlled substance listed in s. 161.14, whether mixed with meat or other food or not, so that the substance is liable to be eaten by the animal and for the purpose of harming the animal. This section shall not apply to poison used on one's own premises and designed for the purpose of rodent or pest extermination nor to the use of a controlled substance in bona fide experiments carried on for scientific research or in accepted veterinary practices."

The section applies to poisons left to be eaten by animals and does not restrict their use in methods other than through ingestion. The use of poisons in intravenous euthanasia is governed by the general statute pertaining to mistreatment of animals, sec. 948.02, Stats., which provides:

> "No person may treat any animal, whether belonging to himself or another, in a cruel manner. This section does not prohibit bona fide experiments carried on for scientific research or normal and accepted veterinary practices."

There is no reason to presume that a lay employe of a humane society, properly trained in administering intravenous euthanasia, will do so in a cruel manner.

I conclude based upon the above discussion that ch. 455, Stats., does not preclude lay persons from the performance of intravenous euthanasia upon animals.

This opinion does not, of course, deal with the legality of lay persons administering drugs subject to the U.S. Controlled Substances Act of 1970 or ch. 161, Stats. (Uniform Controlled Substances Act). You have not requested this advice since such question is properly addressed to the agencies charged with enforcement of such laws.

BCL:DJH:WMS

County Sanitarian; Sanitarians; County Board; Administrative Code; Environmental Sanitation; County board which creates solid waste management system and board may withhold or take away functions specified in sec. 59.07 (135), Stats. OAG 81-76

October 26, 1976.

RICHARD E. GARROW, *Corporation Counsel*
Manitowoc County

You request my opinion whether a county board which establishes a solid waste management board pursuant to sec. 59.07 (135), Stats., may withhold or take away from the latter board any of the powers specified in that section.

I am of the opinion that it may. My conclusion is based upon the language of sec. 59.07 (135), Stats., and the significance of sec. 59.025, Stats., with regard to the powers of county boards in the creation and organization of agencies of county government.

Two aspects of the statutory language are significant. First, the provisions authorizing creation of solid waste management boards and the exercise of certain enumerated powers are couched in discretionary language. Second, the language of the statute indicates that the solid waste management boards are creations of the county boards rather than of the legislature.

As originally enacted in ch. 130, Laws of 1971, sec. 59.07 (135), Stats., provided in part:

> "(135) SOLID WASTE MANAGEMENT. The county board of any county may establish and operate a solid waste management system or participate in such system jointly with other counties, cities, villages or towns. For this purpose, the county board may exercise the following powers: ..."

Among the powers enumerated were administrative powers, the power of eminent domain and such legislative powers as the power to adopt and enforce ordinances and provide for forfeitures, and to appropriate funds and levy taxes.

Chapter 105, Laws of 1973, amended the introduction to sec. 59.07 (135), Stats., to provide:

> "... Except in counties having a population of 500,000 or more, the county board or boards of supervisors of any county or combination of counties establishing a solid waste management system may create a solid waste management board to operate the system. ... For the purpose of operating the solid waste management system, the board may exercise the following powers:"

That portion of the statute enumerating the powers was not amended.

The present sec. 59.07 (135), Stats., provides that the county board of any county *may* establish and operate a solid waste management system, and for that purpose *may* create a solid waste management board to operate the system. The word "county" was deleted by the 1973 amendment from the phrase, "the county board may exercise the following powers:"

Retention of the word "may" in these provisions indicates that the legislature intended that the county board could exercise the enumerated powers if it determined to operate the system itself. Alternatively, the solid waste management board, if created, could exercise such of the powers as are within its legal authority.

It is my opinion that all of the powers enumerated in sec. 59.07 (135), Stats., may properly be exercised by the solid waste management board. The statute, in delegating these powers, provides, "For the purpose of operating the solid waste management system, the board may exercise the following powers ..." I interpret this language as a direct delegation of powers by the legislature to the board operating the solid waste management system, whether that board is the county board or the solid waste management board.

The power of eminent domain may be delegated by the legislature to a public board. See sec. 32.02 (1), Stats. Legislative powers, including the power to enact ordinances, appropriate funds and levy taxes, can be delegated in local matters to political subdivisions, quasi-municipal corporations or public bodies. *Milwaukee v. Sewerage Comm.* (1954), 268 Wis. 342, 67 N.W. 2d 624. I am of the opinion that the delegation by the legislature of these powers to a solid waste management board established pursuant to sec. 59.07 (135), Stats., by county board action is constitutional, since a solid waste management board is a public body created pursuant to statute. See *West Milwaukee v. Area Bd. Vocational, T. & A. Ed.* (1971), 51 Wis. 2d 356, 187 N.W. 2d 387.

The statute expressly provides that the solid waste management board is the creation of the county board. The statute itself does not create the board, but only gives county boards the power to do so. In an unpublished opinion to the corporation counsel for Brown County, dated November 10, 1972, my predecessor considered sec. 50.07 (135), R.S. 1971. That opinion indicated that where the legislature has desired to create a separate and independent agency for a specific function, it has expressly provided that such agency be a public body corporate and politic. Solid waste management boards have not been so designated.

The legislature, in sec. 59.025, Stats., manifested its intent to give to counties "the largest measure of organizational autonomy compatible with the constitution and general law." Sec. 59.025 (2), Stats. To that end, county boards were given broad powers to create, consolidate and abolish county offices and agencies, and to allocate functions and privileges among them.

Section 59.025 (2), Stats., provides in part that:

> "... The powers hereby conferred shall be in addition to all other grants and shall be limited only by express language but shall be subject to the constitution and such enactments of the legislature of statewide concern as shall with uniformity affect every county...."

While sec. 59.07 (135), is an enactment of statewide concern, it is not one which "shall with uniformity affect every county" within the meaning of sec. 59.025 (2), Stats. It is discretionary with each county board whether to establish a solid waste management system. Section 59.07 (52), Stats., provides for substantial variance for counties over 500,000 population, and sec. 66.24 (8), Stats., authorizes metropolitan sewerage districts to exercise the powers granted to county boards under sec. 59.07 (135), Stats., in certain cases. See secs. 66.20-66.26 and sec. 59.96, Stats.

Therefore, a county board which has created a solid waste management board could, pursuant to sec. 59.025 (3) (b) and (c), Stats., abolish such board or transfer some or all of its functions, including functions specified under sec. 59.07 (135), Stats., to another agency, including a committee of the board. In other words, the county board has the power to remove some of the powers enumerated in sec. 59.07 (135), Stats., from an established solid waste management board.

Because the powers granted by sec. 59.025, Stats., are in addition to all other grants, and limited only by express statutory language, the powers of county boards in creating solid waste management boards are properly considered in light of sec. 59.025, Stats.

Section 59.025 (3) (a), Stats., allows the county board to "Create any county ... board ... it deems necessary to administer functions authorized by the legislature." No express language of sec. 59.07 (135), Stats., requires that a solid waste management board exercise all the powers and duties enumerated in that statute. Therefore, consistent with the terms and purpose of sec. 59.025, Stats., it is my opinion that a county board may establish a solid waste management board having only such of the powers enumerated in sec. 59.07 (135), Stats., as it deems necessary to administer the solid waste management of the county.

BCL:WHW

Campaign Expenses; Elections; Voting; Public Officials; Candidates; Campaign contribution limits contained in sec. 11.26 (1) (d), (2), and (9), Stats., are probably valid and enforceable, despite the fact that they are expressed as a percentage of disbursement limits in sec. 11.31, Stats., previously declared invalid. Statement in opinion of August 16, 1976, to the effect that sec. 11.26 (9) should be treated as a nullity is withdrawn. Section 11.26 (9), Stats., is probably constitutional. OAG 82-76

October 27, 1976.

DAVID ADAMANY, *Chairman*
State Elections Board

In an opinion to your predecessor on August 16, 1976, I considered the effect of the U.S. Supreme Court decision in *Buckley v. Valeo* (1976), 96 S.Ct. 612, on the state's campaign finance law. I determined that the provisions of sec. 11.31, Stats., imposing disbursement limits on candidates were invalid as violative of the First Amendment rights of free speech and association. You now ask whether the disbursement figures in sec. 11.31, Stats., may nevertheless be used as a standard to calculate contribution limits. Specifically, you inquire whether sec. 11.26 (1) (d) and 11.26 (2), which provide for determination of contribution limits by individuals and committees, respectively, by use of a percentage of the invalid disbursement limits in sec. 11.31, Stats., may continue to be enforced. You also inquire about sec. 11.26 (9), Stats., which provides that no candidate may accept more than 65 percent of the value of his total authorized disbursement from committees, now that candidates are no longer subject to a ceiling on total disbursements.

REFERENCE TO INVALID SECTIONS

Section 11.26 (1) (a), (b) and (c), Stats., sets specific dollar limits on individual contributions to candidates for the following offices:

> "(1) No individual may make any contribution or contributions, directly or indirectly, to a candidate for election or nomination to any of the following offices and to any

individual or voluntary committee under s. 11.06 (7) acting in support of such a candidate to the extent of more than a total of the amounts specified per candidate:

"(a) Candidates for governor, lieutenant governor, secretary of state, state treasurer, attorney general, state superintendent of public instruction and justice of the supreme court, $10,000.

"(b) Candidates for state senator, $1,000.

"(c) Candidates for representative to the assembly, $500."

Section 11.26 (1) (d), Stats., limits individual contributions to candidates for all other state and local offices to "5% of the value of the candidate's authorized disbursement limitation under s. 11.31, or $100, whichever is greater."

In sec. 11.26 (2), Stats., committee contributions are similarly restricted:

"(2) No committee other than a political party committee may make any contribution or contributions, directly or indirectly, to a candidate for election or nomination to any of the following offices and to any individual or voluntary committee under s. 11.06 (7) acting in support of such a candidate to the extent of more than a total of the amounts specified per candidate:

"(a) Candidates for governor, lieutenant governor, secretary of state, state treasurer, attorney general, state superintendent of public instruction and justice of the supreme court, 4% of the value of the candidate's authorized disbursement limitation under s. 11.31.

"(b) Candidates for other state and local offices, 5% of the value of the candidate's authorized disbursement limitation under s. 11.31."

Section 11.26 (9), Stats., provides:

"No candidate may receive more than 65% of the value of his total authorized disbursement limitation under s. 11.31 from all other committees subject to a filing requirement, including political party committees."

The court in *Buckley* expressly approved contribution limits on individuals as well as committees. Though all the limits in question in *Buckley* were expressed in specific dollar amounts, there is no suggestion that a contribution limit expressed as a percentage of another figure is constitutionally suspect. In fact, the *Buckley* court expressed the opinion that the Congress' failure to engage in "fine tuning" in determining the contribution limits for various federal offices does not invalidate the legislation. *Buckley* at 640. The question remains, however, whether the validity of sec. 11.26 (1) (d), (2), and (9) is affected by the fact that they provide for determination of contribution limits by use of a percentage of the invalid disbursement limits in sec. 11.31.

It is my opinion that it is not. I must caution you however, that the law in this area is far from clear and the Wisconsin Supreme Court might take one of several approaches when faced with this question.

A statute invalid by reason of its unconstitutional nature may be viewed as void *ab initio*. See *Bonnett v. Vallier* (1908), 136 Wis. 193, 200, 116 N.W. 885. "[T]he [invalid] act, in legal contemplation, is as inoperative as though it had never been passed, or as if the enactment had never been written, and it is regarded as invalid, or void, from the date of enactment." 16 C.J.S. Constitutional Law, sec. 101, pp. 471, 472. If we must treat sec. 11.31, Stats., as though it never existed, then sec. 11.26 (1) (a), (2), and (9), Stats., would be rendered a nullity, since they are dependent on sec. 11.31. A reference in one statute to an invalid statute, if viewed as never having existed, is a reference to nothing.

There is also authority for the proposition that where a statute is declared unconstitutional, all acts whose effectiveness is made conditional on its validity are likewise invalid. 16 C.J.S. Constitutional Law, sec. 101a, p. 474. It might be argued that the literal dependence of sec. 11.26 (1) (d), (2), and (9), Stats., on sec. 11.31, Stats., makes the effectiveness of those sections conditional on the validity of sec. 11.31, Stats. Since sec. 11.31 is invalid, it may be argued that those sections referring to it to compute contribution limits are a nullity. In layman's terms, once the expenditure limit is voided there is nothing to multiply the percentage contribution limitations with; i.e, 65% x 0 = 0.

On the other hand, there is reason to believe that the rule in Wisconsin on the incorporation of repealed statutes by reference, set forth in *Union Cemetery v. Milwaukee* (1961), 13 Wis. 2d 64, 68, 108 N.W. 2d 180, may control in the present situation:

> "... When the adopting statute incorporates an earlier statute or a limited and a particular provision thereof by specific reference, such incorporation takes the statute as it existed at the time of incorporation and does not prospectively include subsequent modifications or a repeal of the incorporated statute or portions thereof."

See also 2A Sutherland, *Statutory Construction* (4th Ed.), sec. 51.08; 35 OAG 235 (1946), 35 OAG 362 (1946). While the effect of invalidation of a statute on the ground of unconstitutionality is not identical to that of repeal of a statute, the principle of statutory construction set forth above may apply in both cases. Reference to an invalid statute to fill in a legislative detail may be as permissible as reference to a repealed one. If so, absent a strong showing of legislative intent that the contribution limits and the disbursement limits must function interdependently, the contribution limits might be upheld.

I am persuaded that it is my duty to adopt this latter view in support of the validity of these sections. It is consistent with the cardinal rule of statutory construction to save statutes wherever possible and the apparent legislative intent to enact a reasonable scheme of contribution limits. So long as there is a reasonable chance of preserving legislation as against the contention that it is void I believe that it is the duty of the Attorney General to do so.

However, I do not rule out the possibility of a court striking down the sections in question as a nullity because of their dependence on a statute which is void *ab initio*. So far, our research has disclosed that our Supreme Court has not faced this precise issue. The doubts about the validity of the sections are significant and will certainly be raised should you attempt prosecution under these sections. Although I will assist you and defend the application of these sections it would be preferable to avoid the uncertainty, litigation and appeals which will attend enforcement of the statute in its present form. Therefore, I urge you to seek remedial legislation to remove all doubts about the validity of contribution limits which are presently dependent on the unconstitutional disbursement limits.

LEGISLATIVE INTENT

Even though these sections may be separable and stand independent of the expenditure limitations the further question of whether the legislature would have intended them to continue in the absence of expenditure limits must be answered.

My reasoning in support of the continued validity of these sections follows. It is well established that a preamble or declaration of policy set forth by the legislature is highly instructive of the legislative purpose. *State ex rel. Harvey v. Morgan* (1966), 30 Wis. 2d 1, 139 N.W. 2d 585. In sec. 11.001, Stats., entitled "Declaration of Policy," the legislature addresses several kinds of problems in campaign financing, and sets forth the goals hoped to be achieved by the reforms in ch. 11, the state's campaign finance law. One of the stated objectives is to prevent candidates from becoming "overly dependent on large contributions," *i.e.*, to alleviate the potential corrupting influence of large private contributions. This objective is largely capable of being achieved by the contribution limits alone, without concurrent expenditure limits. Thus, there is strong evidence from the Act itself that the legislature would have dealt with the matter of contribution limits regardless of the validity of the disbursement limits.

You note that the court in *Buckley* recognized that federal contribution limits are severable from and may function independently of expenditure limits. In fact the *Buckley* court was influenced by the fact that the contribution limits and disclosure provisions remained to serve the government's valid interest in alleviating the corrupting influence of large contributions. *Buckley* at 647-8. If the contribution limits in question are invalid, the chief means of eliminating corruption brought about by large contributions will vanish, at least regarding individual contributions to local candidates and committee contributions to all candidates. Such a result seems to be contrary to legislative intent.

The 65 percent committee contribution limit may also reflect a legislative desire to deter candidacies based solely on the support of special interest groups. The limit effectively obliges candidates to seek out individual contributions, thereby ensuring that candidates expending large sums have a broad base of popular support and simultaneously promoting individual involvement in the political process. The absence of disbursement limits does not affect the attainment of these objectives.

CONSTITUTIONALITY OF SEC. 11.26 (9)

A more difficult question is posed by your inquiry regarding the constitutionality of sec. 11.26 (9), Stats., which provides:

> "(9) No candidate may receive more than 65% of the value of his total authorized disbursement limitation under s. 11.31 from all other committees subject to a filing requirement, including political party committees."

Unlike sec. 11.26 (1) (d) and (2), this section is not, strictly speaking, a contribution limit. Rather it has aspects of a contribution limit, an expenditure limit, and a source restriction. In my prior opinion I stated that I believed that this provision of the law was now a nullity since it was dependent upon the invalid disbursement limitations. In light of the discussion above I now withdraw that opinion. However, several new constitutional questions not considered in that opinion are raised if sec. 11.26 (9) is valid.

The court in *Buckley* approved the concept of limits on contributions by individuals and committees. In effect, sec. 11.26 (9) does not operate to impose a maximum dollar amount on each committee's support of a particular candidate. Rather, it totally prohibits contributions by committees to candidates who have reached the committee financing limit. Thus, it is more restrictive than the contribution limits approved by the court in *Buckley*. The provision also has aspects of a disbursement limitation on the candidate, in that it disallows an entire category of contributions to him once he has reached a certain dollar amount of receipts from that group. Expenditure limits were expressly disapproved by the court in *Buckley*.

On the other hand, the government interests manifested in the enactment of the 65 percent committee contribution limit appear to be strong. Presumably the legislature felt a need to encourage candidacies based on broad popular support, rather than on the backing of special interest groups and political parties. The governmental interest in promoting disclosure in the political process is also indirectly served, since any candidate who spends more than 65 percent of his disbursement limitation will have to record some individual contributions. These will provide more particularized information about a candidate's source of support.

There is no federal counterpart to the 65 percent limit, and the *Buckley* case itself does not resolve the question of validity. There is, of course, a strong presumption that a regularly enacted statute is valid and constitutional. *In re City of Beloit* (1968), 37 Wis. 2d 637, 155 N.W. 2d 633. In the absence of convincing evidence of invalidity, I must conclude that the statute is probably constitutional.

In summary, although the constitutionality of the 65 percent limit is, in my opinion, somewhat doubtful the board should continue to enforce it. I hereby withdraw that portion of my opinion to you of August 16, 1976, that advised you to consider sec. 11.26 (9) as a nullity. Other contribution limits are probably valid and enforceable although substantial doubt exists because of their reliance or expenditure limitations which are now void.

BCL:DH

Anti-Secrecy; Open Meeting; Municipalities; Public Utilities; A municipal public utility commission managing a city owned public electric utility is a governmental body under sec. 19.82 (1), Stats., and its meetings are subject to secs. 19.81-19.98, Stats. OAG 83-76

October 28, 1976.

LEO W. MACK, *District Attorney*
Winnebago County

You state that the City of Menasha owns an electric generating plant which operates as an electric public utility. By reason of charter ordinance, approved by the electorate, management and control has been delegated to a five-person commission as permitted by sec. 66.068, Stats.

You request my opinion on the following questions:

1. Is the commission a governmental body within the meaning of sec. 19.82 (1), Stats., as created by ch. 426, Laws of 1975?

It is my opinion that it is.

2. Do the provisions of secs. 19.81-19.98, Stats., as created by ch. 426, Laws of 1975, apply to the municipal electric utility commission when it conducts utility business meetings?

It is my opinion that they do.

Section 19.82 (1), Stats., as created by ch. 426, Laws of 1975, provides:

> " *'Governmental body' means a* state or *local* agency, board, *commission*, committee, council, department or public body corporate and politic *created by* constitution, *statute*, *ordinance*, rule or order; a governmental or quasi-governmental corporation; or a formally constituted subunit of any of the foregoing, but excludes any such body or committee or subunit of such body which is formed for or meeting for the purpose of collective bargaining under subch. IV or V of ch. 111." (Emphasis added.)

The utility commission you refer to meets the express terms of the statutory definition.

Section 66.068 (1), (2), (3) and (7), Stats., provides in material part:

> *'Management.* (1) In cities owning a public utility, the council shall ... provide for a nonpartisan management thereof, and create for each or all such utilities, a board of 3 or 5 or 7 commissioners, to take entire charge and management of such utility, to appoint a manager and fix his compensation, and to supervise the operation of the utility *under the general control and supervision of the ... council.*
>
> "(2) The commissioners shall be elected by the board or council for a term ....
>
> "(3) The commissioners shall choose from among their number a president and a secretary. They may command the services of the city engineer and may employ and fix the compensation of such subordinates as shall be necessary. *They may make rules for their own proceedings and for the government of their department. They shall keep books of account,* in the manner and form prescribed by the public service commission, *which shall be open to the public.*
>
> "***
>
> "(7) In cities of the second, third or fourth class the *council may provide for the operation of a public utility* or utilities *by the board of public works or by another officer or*

officers, in lieu of the commission above provided for." (Emphasis added.)

A municipal utility commission is not a body corporate separate from the city. It is an agency or department of city government which has power to carry out a proprietary function. *Flottum v. Cumberland* (1940), 234 Wis. 654, 664, 291 N.W. 777, holds that a municipal utility commission is a city commission.

In *Richmond v. Lodi* (1938), 227 Wis. 23, 25, 277 N.W. 620, it was stated:

> "... The management, as between itself and the village, sustains a relation described as governmental, even though in the relations of the utility with others, its character is proprietary. ..."

Section 66.068 (3), Stats., provides that the books of account shall be open to the public, and secs. 19.81-19.98, Stats., require that the meetings of the utility shall be open to the public except in those cases set forth in the exemptions in sec. 19.85, Stats. Whereas sec. 66.068 (3), Stats., permits the commission to make rules for its own proceedings, such rules cannot be in conflict with the provisions of secs. 19.81-19.98, Stats.

BCL:RJV

Attorneys; Sheriffs; Public Officials; County Board; District Attorney; Corporation Counsel; County board has no power to authorize sheriff to employ a police legal advisor to give day-to-day advice to the sheriff unless such person is an assistant district attorney or assistant county corporation counsel. OAG 85-76

October 29, 1976.

WILLIAM L. SEYMOUR, *Corporation Counsel*
Walworth County

You inquire whether, in a county having a district attorney and county corporation counsel, the county board may authorize the sheriff to employ an attorney as a police legal advisor in his department "as liaison with the District Attorney's Office and the Courts, for case preparation prior to submission to the District Attorney's Office, for interpretation of laws and court decisions,

for formulating and reviewing policy, advising on complaints against officers, anticipating trends in the law and developing operating and training procedures to cope with them."

I am of the opinion that an attorney can be employed in the sheriff's department and perform the duties stated if and only if such attorney is an assistant district attorney or assistant county corporation counsel.

During the last session, the legislature broadened the organizational powers of counties, including the authority to create and assign duties to certain county offices.

Section 59.025, Stats., as created by ch. 118, Laws of 1973, provides in part:

> "(2) INTENT AND CONSTRUCTION. For the purpose of giving counties the largest measure of organizational autonomy compatible with the constitution and general law, it is hereby declared that this section shall be construed in favor of the rights, powers and privileges of counties to organize and administer county functions. *The powers hereby conferred shall be in addition to all other grants and shall be limited only by express language but shall be subject to the constitution and such enactments of the legislature of statewide concern as shall with uniformity affect every county. In the event of conflict between this section and any other statute, this section to the extent of such conflict shall prevail.*
>
> "(3) CREATION OF OFFICES. *Except for* the offices of supervisor, judge, county executive and county assessor and *those officers elected under section 4 of article VI of the constitution,* the county board may:
>
> "(a) *Create any* county office, department, committee, board, commission, *position or employment it deems necessary to administer functions authorized by the legislature.*
>
> "(b) Consolidate, abolish or reestablish any county office, department, committee, board, commission, position or employment.

"(c) *Transfer some or all functions, duties, responsibilities and privileges of any county office,* department, committee, board, commission, position or employment *to any other agency* including a committee of the board. (Emphasis added.)

"***"

The district attorney is a constitutional officer elected under Art. VI, sec. 4, Wis. Const. Therefore, a county board has no power to transfer functions, duties or responsibilities from his office by reason of sec. 59.025 (3) (c), Stats. Powers conferred on a county officer by statute cannot be narrowed, taken away, or enlarged by the county board *except in cases where the legislature has authorized it by statute. Beal v. The Supervisors of St. Croix* Co. (1861), 13 Wis. 559; *The Town of Crandon v. Forest County* (1895), 91 Wis. 239, 64 N.W. 847; *Reichert v. Milwaukee County* (1914), 159 Wis. 25, 150 N.W. 401.

In 63 OAG 196 (1974), my predecessor discussed the transfer of duties of a county officer elected under Article IV, sec. 4, Wis. Const., and concluded that the statutory powers of a county clerk in regard to budget and record-keeping could not be transferred under sec. 59.025 (3) to a newly-created position of Finance Officer. See also OAG 48-76, August 3, 1976, 65 OAG 132 (1976). The legislature had not authorized the transfer of functions with which that June 5, 1974 opinion was concerned. In contrast, the legislature has authorized transfer of certain statutory duties of district attorneys to county corporation counsels. See sec. 59.07 (44), Stats., infra. The question is whether advising a county officer such as the sheriff is a duty which may be transferred from the district attorney to an officer *other than* the county corporation counsel or one of his assistants.

The position of district attorney, though constitutional, is not one of inherent powers, but is subject to the specific directions of the legislature. *State ex rel. Kurkierewicz v. Cannon* (1969), 42 Wis. 2d 368, 380, 166 N.W. 2d 255.

The primary duties of district attorney are set forth in sec. 59.47, Stats., which provides in part:

"The district attorney shall:

"(1) Prosecute or defend all actions, applications or motions, civil or criminal, in the courts of his county in which the state or county is interested or a party; and when the place of trial is changed in any such action or proceeding to another county, prosecute or defend the same in such other county.

"(2) Prosecute all criminal actions before any court in his county, other than those exercising the police jurisdiction of incorporated cities and villages in cases arising under the charter or ordinances thereof, when requested by such court; and upon like request, conduct all criminal examinations which may be had before such court, and prosecute or defend all civil actions before such courts in which the county is interested or a party.

"(2m) Give advice to supervisors of soil and water conservation districts and represent them and the district in all matters, proceedings and actions arising under ch. 92.

"(3) Give advice to the county board and other officers of his county, when requested, in all matters in which the county or state is interested or relating to the discharge of the official duties of such board or officers; examine all claims against the county for officers', interpreters', witnesses' and jurors' fees in criminal actions and examinations when presented to the county board, and report in writing thereto as to the liability of the county to pay the same.

"***

"(8) Serve as legal adviser to the county highway commissioner and draw all papers required in the performance of the commissioner's duties, and attend to all legal matters in and out of court where such commissioner shall be a party.

"***"

Many of the duties specified in sec. 59.47, Stats., are matters of statewide concern and could not be transferred from the office of district attorney, absent express statute, even if sec. 59.025 (3), Stats., did not except the office. Some of the duties therein are special and of an exclusive nature which must remain in the province of the district attorney. Thus, it is against public policy

and the impartial administration of the criminal law for a court to allow attorneys for private persons to appear as prosecutors. *State v. Scherr* (1960), 9 Wis. 2d 418, 426, 101 N.W. 2d 77. I am of the opinion that it is also against public policy and the impartial administration of the criminal law to permit county employes to interfere with the statutory duties of the district attorney in the area of prosecution for violations of the criminal law.

On the other hand, the legislature has expressly provided that some duties, including advising the county board and county officers and representing the county in civil matters, may be exercised by a county corporation counsel appointed under sec. 59.07 (44), Stats., as well as by a district attorney.

Section 59.07 (44), Stats., provides in part:

> "In counties not having a population of 500,000 or more, [the county board may] employ a corporation counsel, and fix his salary. The corporation counsel may, when authorized by a majority of the county board, appoint one or more assistant corporation counsels to aid him in the performance of his duties. The assistants so appointed shall have authority to perform all the duties of the corporation counsel. ... *The duties of the corporation counsel shall be limited to civil matters and may include giving legal opinions to the board and its committees and interpreting the powers and duties of the board and county officers. Whenever any of the powers and duties conferred upon the corporation counsel are concurrent with similar powers or duties conferred by law upon the district attorney, the district attorney's powers or duties shall cease to the extent that they are so conferred upon the corporation counsel and the district attorney shall be relieved of the responsibility for performing such powers or duties.* Opinions of the corporation counsel on all such matters shall have the same effect as opinions of the district attorney. ..." (Emphasis added.)

Although sec. 59.07 (44), Stats., states that the duties of a corporation counsel shall be limited to civil matters, our supreme court has stated that a corporation counsel has a duty to advise the county board and its members "of the statutory limitations, both civil and criminal, resulting from specific actions of the board" or legal implications resulting therefrom. *State v. Davis* (1974), 63 Wis. 2d 75, 80, 216 N.W. 2d 31.

In my opinion the power to advise county officers resides either in the district attorney or the corporation counsel. I construe the provisions discussed above as expressing legislative intent to limit the transfer of the district attorney's powers to county corporation counsel exclusively. This would prevent the employment pursuant to sec. 59.025 (3) (a) of an attorney who is not an assistant district attorney or assistant county corporation counsel to give day-to-day advice to the sheriff and members of his department with respect to their duties and functions. Since the duty to advise county officers, including the sheriff, is vested solely within the district attorney or county corporation counsel, it is my opinion that no transfer of powers, duties or functions from the county corporation counsel may be made to an attorney employed within the sheriff's department under sec. 59.025 (3) (c).

BCL:RJV

Anti-Secrecy; Open Meeting; Newspapers; Open Meetings of Governmental Bodies Law, subch. IV of ch. 19, Stats., does not require that notice of a meeting be given by a legal notice or paid publication.

Method of giving notice pursuant to sec. 19.84 (1), Stats., discussed. OAG 86-76

October 29, 1976.

RICHARD F. FOLTZ
Burlington

Pursuant to sec. 19.98, Stats., as created by ch. 426, Laws of 1975, you request my opinion whether the notice required under sec. 19.84 (1) (b), Stats., requires publication as a legal notice in the official newspaper of the governmental unit.

I am of the opinion that it does not. I refer you to 63 OAG 509 (1974), which discusses the meaning of "communication" under sec. 66.77 (2) R.S. 1973. The advice given in 63 OAG 509 is applicable to the present law.

Section 19.84 (1), Stats., requires the giving of any notice:

"(a) As required by any other statutes; and

"(b) By communication from the chief presiding officer of a governmental body or such person's designee to the public, to those news media who have filed a written request for such notice, and to the official newspaper designated under ss. 985.04, 985.05 and 985.06 or, if none exists, to a news medium likely to give notice in the area."

Notice to the public can be given by posting in one or more public places likely to be noticed by the public or those who might be concerned. Written or telephonic communication to members of the news media or official newspaper is sufficient. A written communication is desirable as it reduces the chances for error. While paid publication is not required under sec. 19.84, the governmental body or its chief presiding officer may decide that, because of the particular nature of the meeting to be held, the preferable means of providing notice is by paid publication. All notices must meet the content requirements of sec. 19.84 (2), Stats. Notice must be given at least 24 hours prior to the commencement of the meeting except in the case of an emergency, and in such case, at least 2 hours' notice is required. The shorter notice can only be used where it is "impossible or impractical" to give the "at least 24 hours" notice.

Section 19.84 (4) requires a separate and complete notice for *each meeting* at a time and date reasonably proximate to the meeting, and subsec. (2) requires that the notice of a meeting include any special subject matter intended for consideration at a contemplated closed session.

BCL:RJV

Bids And Bidders; Contracts; Public Works; Architects And Engineers; Professional Engineer; Administration, Department Of; Procedures; State contracts for the purchase of professional architectural and engineering consulting services must comply with the bidding requirements of sec. 16.75 (1), Stats., unless waived by the Governor. OAG 87-76

November 2, 1976.

ROBERT H. DUNN, *Secretary*
Department of Administration

Your predecessor asked whether the Department of Administration is required by law to purchase professional

architectural and engineering consulting services by means of the bidding process.

The following sections of the Wisconsin Statutes must be considered:

"16.06 *Contractual services.* The department or its agents may contract for personal services which can be performed more economically or efficiently by such contract."

"16.70 *Purchasing; definitions.* As used in ss. 16.70 to 16.81 the following terms shall mean:

"***

"(4) 'Contractual services' includes all materials and services, and any construction work involving less than $2,500 for construction work to be done for or furnished to the state or any agency thereof."

"16.75 *Buy on low bid, exceptions.* (1) (a) All orders awarded or contracts made by the department for all materials, supplies, equipment and contractual services, except as otherwise provided in subs. (3) and (7), shall be awarded to the lowest responsible bidder, taking into consideration the location of the institution or agency, the quantities of the articles to be supplied, their conformity with the specifications, the purposes for which they are required and the date of delivery, but preference shall always be given to materials, supplies, equipment and contractual services of Wisconsin producers, distributors, suppliers and retailers. Bids shall be received only in accordance with such standard specifications as are adopted by the department as provided in this subsection. Any or all bids may be rejected. Each bid, with the name of the bidder, shall be entered on a record, and each record with the successful bid indicated shall, after the award or letting of the contract, be opened to public inspection.

"(b) When the estimated cost exceeds $10,000, due notice inviting bids shall be published as a class 2 notice, under ch. 985, and the bids shall not be opened until at least 7 days from the last day of publication. The official advertisement shall give a clear description of the materials, supplies, equipment or service to be purchased, the amount of the bond

or check to be submitted as surety with the bid and the date of public opening.

"(c) When the estimated cost is $10,000 or less, the lowest responsible bidder shall be selected in accordance with simplified bidding procedures established by the department for such contracts.

"***

"(6) Subsections (1) to (5), except as to their requirements in connection with printing and stationery, shall not be deemed to apply to the purchase of supplies, materials or equipment from the federal government or any agency thereof and, with the approval of the governor, may be waived with respect to purchases from private sources when such action is deemed to be in the best interests of the state.

"***"

"16.85 *Department of administration; powers, duties.* The department of administration shall exercise the powers and duties prescribed by ss. 16.85 to 16.91:

"(1) To take charge of and supervise all engineering or architectural services or construction work performed by, or for, the state, or any department, board, institution, commission or officer thereof, including nonprofit-sharing corporations organized for the purpose of assisting the state in the construction and acquisition of new buildings or improvements and additions to existing buildings as contemplated under ss. 13.488, 36.09 and 36.11, except the engineering, architectural and construction work of the highway commission and the engineering service performed by the department of industry, labor and human relations, department of revenue, public service commission, department of health and social services and other departments, boards and commissions when such service is not related to the maintenance, construction and planning of the physical properties of the state;

"(2) To furnish engineering and architectural services whenever requisitions therefor are presented to him by any department, board, commission or officer;

"(3) To act and assist any department, board, commission or officer requesting such co-operation and assistance, in letting contracts for engineering or architectural work authorized by law and in supervising the work done thereunder;

"***"

"16.87 *Approval of contracts by secretary and governor; audit.* Every contract for engineering or architectural service and every contract involving an expenditure of $2,500 or more for construction work to be done for, or furnished to the state, or any department, board, commission or officer thereof, shall, before it becomes valid or effectual for any purpose, have indorsed thereon in writing the approval thereof of the secretary or a designated assistant, and all such contracts over $15,000 shall also have approval of the governor; and no payment or compensation for work done under any contract involving $2,500 or more, except highway contracts, shall be made unless the written claim therefor is audited and approved by the secretary or a designee. Any change orders to contracts requiring approval under this section shall require prior approval by the secretary or a designated assistant, and any such change orders over $15,000 shall also have the approval of the governor.

"16.89 *Construction controlled by chapter 16.* No department, independent agency, constitutional office or agent of the state shall employ engineering, architectural or allied services or expend money for construction purposes on behalf of the state, except as provided in this chapter."

Section 16.75 (1), Stats., requires that "contractual services" shall be purchased by the Department of Administration from the lowest responsible bidder. Section 16.70 (4) specifies that the term "contractual services" includes "*all* materials and services."

The term "all ... services" is not defined in ch. 16, Stats. One would normally conclude that the use of the term "all" prior to "services" would require broad application of the section including such matters as personal and professional services rendered by architects and engineers. However, such a broad construction of sec. 16.75 (1) and 16.70 (4), Stats., is in conflict with the general rule that personal service contracts involving professional or artistic

endeavors are generally not included within the scope of statutes requiring government contracts to be let to the lowest responsible bidder. In the case of *Flottum v. City of Cumberland* (1940), 234 Wis. 654, 291 N.W. 777, our state Supreme Court held that a contract to perform professional engineering services should not be included within the scope of a statute requiring local government contracts to be let to the lowest responsible bidder. In the *Flottum* case a statute requiring "all public service work" to be let on bid was deemed not to include services requiring peculiar professional education and experience. This is the general rule in most jurisdictions. See Anno. 15 A.L.R. 3d 733.

The basis for this general rule appears to be that, 1) professional work is generally of a type which cannot be written into specifications; 2) establishing the lowest bid as a test of employing professionals would result in obtaining the least competent individual; and 3) employment of a professional is in large part based upon trust, competence or artistic traits.

In addition to this general rule of construction it appears that long standing administrative construction within the Department of Administration has exempted contracts for architectural or engineering services from the bidding requirements. However, despite this understanding within the Department of Administration, the Governor continues to sign personal service contracts. Since the Governor has authority to waive bidding requirements and no specific procedure is specified for the Governor to exercise this waiver, his signature probably constitutes such a waiver.

Based on the foregoing, it appears that the words "contractual services" and "all ... services" are ambiguous. That is to say that the statute is capable of being understood by reasonably well informed persons in two or more different senses. *State ex rel. Neelen v. Lucas* (1964), 24 Wis. 2d 262, 267, 128 N.W. 2d 425, *Kindy v. Hayes* (1969), 44 Wis. 2d 301, 308, 171 N.W. 2d 324. When words in a statute are ambiguous, resorting to matters outside the face of the statute to determine the meaning of the statute is appropriate. Such an inquiry is made for the purpose of ascertaining the legislative intent. *Kindy v. Hayes, supra.* In such circumstances our state Supreme Court has instructed us to determine legislative intent:

> "... from the language of the statute in relation to its scope, history, context, subject matter and the object intended to be remedied or accomplished [citation omitted] and when there are statutes relating to the same subject matter they should be read together and harmonized, if possible. ..." *City of Milwaukee v. Milwaukee County* (1965), 27 Wis. 2d 53, 56, 133 N.W. 2d 393.

The ambiguity in the words "all ... services" is resolved by the legislative history of sec. 16.70 (4), Stats. The predecessor section to sec. 16.70 (4), Stats., reads as follows:

> "(4) The words 'contractual services' include gas, electricity, steam, telephone, telegraph, freight, express, drayage, towels, drinking water, postage, printing, binding and similar services, and any contract involving less than $1,000 for construction work to be done for, or furnished to the state or any agency thereof."

This section was amended by 1967 Senate Bill 17. The drafting record for that bill contained in the file of the Legislative Reference Bureau includes the following paragraph:

> "Present s. 16.70 (4) excludes by failure to enumerate many technical and professional services for which the state contracts. The intent of the revision is to eliminate any enumeration of specifics, identifying contractual services by the general terms 'materials and services.'"

Moreover, the analysis by the Legislative Reference Bureau which was specifically printed on the face of 1967 Senate Bill 17 stated in part:

> "The bill eliminates the enumeration of specifics as they relate to technical and professional services for which the state may contract, to specific items which the department may procure in performing their property management functions, and to other specifics which may exclude by the failure to enumerate."

This sentence does not make sense as stated. It does make sense if interpreted to mean that the legislature intended to include all services and avoid the *exclusio* rule. I would conclude based on this legislative history combined with the broad statutory language "all materials and services" that competitive bidding is required for professional service contracts.

Such a result is not in conflict with other sections of the statutes giving the department power to deal with specific issues related to architectural and engineering services.

Section 16.06 is a general authorization to the department to contract for personal services. The language in sec. 16.06 relates specifically to the power of the department to contract for personal services outside of the civil service system. The general authority to make such contracts does not conflict with the more specific restrictions of the purchasing statutes regulating bidding on such contracts.

Section 16.85 provides general authorization for the department to take charge of, supervise and furnish all architectural and engineering services performed by or for the state, its agencies or officers, and to assist in letting contracts for such architectural and engineering work. That section neither provides nor refers to any procedure that the department should follow in purchasing such services, and does not mention negotiation or awarding of contracts without bidding.

Section 16.89 expressly says that the state shall not employ architectural or engineering services except *as provided* in ch. 16. This appears to be a clear mandate by the legislature. It precludes the inference that negotiation and awarding of such contracts without bidding is permitted because sec. 16.85 makes no reference to bidding. Since sec. 16.75 (1) specifically covers all contractual services, I conclude that secs. 16.75, 16.85 and 16.89 are in *pari materia* and must be construed with reference to each other.

Substantial latitude is provided to the Department of Administration and to the Governor in obtaining professional services. Subsections 16.75 (1) and (6), Stats., do provide for discretion in that the architect or engineer selected must be the lowest *responsible* bidder and that any and all bids may be rejected. Further, the bidding requirements may be waived with the approval of the Governor when such action is deemed in the best interests of the state.

The present procedures requiring the Governor's signature on personal service contracts insures a valid waiver of the bidding requirements and would, in my opinion, effectively insulate such

contracts from any charge that they were not entered into pursuant to ch. 16 procedures as is required by sec. 16.89.

BCL:DJH:DAM

Public Records; Deeds; Register Of Deeds; County Board; Counties; When in its judgment the existing tract index, for any reason, is unfit, unreliable or unserviceable, the county board of any county may contract with a competent person for the compilation of a new and corrected tract index. A performance bond may be required. OAG 88-76

November 3, 1976.

CHARLES A. POLLEX, *District Attorney*
Adams County

You indicate that Adams County presently has a tract index system which is insufficient in that it has not been currently maintained. The first question presented is whether sec. 59.55, Stats., provides the board of a county having a population of less than 500,000 with authority to contract with a private person for the completion of a new tract index.

Section 59.55 (4), Stats., grants the board of any county broad discretion when it comes to ordering a new and corrected index, and provides in pertinent part:

> "Whenever in *the judgment of the county board* of any county any existing tract index or indices become unfit for use, because of mistake therein or of imperfection in or insufficiency of plan, or because of becoming ... *unserviceable or unreliable for any reason* the county board may at any meeting thereof, by resolution, order a new and corrected set of tract indices ... and ... contract with any competent person to do said work, at a price not exceeding five cents per folio ...." (Emphasis added.)

Statutes are to be initially viewed in light of the plain and ordinary meaning of their language and as a general rule, where a statute is plain and unambiguous, interpretation is unnecessary. *Weather-Tite Co. v. Lepper* (1964), 25 Wis. 2d 70, 74, 130 N.W. 2d 198.

Under the facts as you present them, it would therefore be permissible for the Adams County Board to adopt an appropriate resolution ordering a new and corrected tract index. It would likewise be permissible for the board to contract with a competent person for the services incident to the compilation of an index if, in its judgment, a new and corrected system is necessary.

You have also inquired about the county board's authority to contract with a private person for the day-to-day maintenance of the tract index.

Section 59.55 (4), Stats., is silent with respect to the day-to-day maintenance of a new and corrected tract index, or even alterations, changes or additions to the system.[1]

A county has only such power as is conferred upon it by statute, expressly or by clear implication. *Frederick v. Douglas County* (1897), 96 Wis. 411, 418, 71 N.W. 798; *Maier v. Racine County* (1957), 1 Wis. 2d 384, 84 N.W. 2d 76. Had the legislature intended to authorize a county to contract for the day-to-day maintenance of a tract index, it could have expressly done so, placing a limitation on the compensation to be paid as it did with the basic compilation provisions of sec. 59.55 (4), Stats. See the *Fourth Biennial Report* and *Opinions of the Attorney General* (1908), p. 894, wherein the same rationale was followed, concluding that a county could not contract for the compilation of the first or initial tract index.

Therefore, while the Adams County Board can order a new and corrected tract index and enter into a contract with a competent person for such purposes, I am of the opinion that the board is without authority to contract for the day-to-day maintenance of the system.

Your final question asks whether a county can require a bond to assure proper performance by the person with whom it contracts for the compilation of a new and corrected tract index.

It has long been the general rule that a register of deeds, required by law to keep a tract index, is liable on his official bond

[1] In comparison, sec. 59.55 (2), Stats., provides that the county board of supervisors, in counties having a population of 500,000 or more, may also supplement the contract for the compilation and completion of alterations, change or additions to the system. Even in this instance, the register of deeds must "maintain and keep up" the system once completed pursuant to such contract(s).

for damages sustained as the result of the negligent compilation of a tract index. *Johnson v. Brice* (1899), 102 Wis. 575, 78 N.W. 1086. Also see 30 OAG 440 (1941), and 63 OAG 254 (1974).

To my knowledge, there are no reported Wisconsin cases treating similar liability issues where the tract index was prepared by a person other than a register of deeds. It is entirely conceivable, however, that claims could be made directly against the register of deeds who has long been held primarily responsible for the preparation and upkeep of the tract index. See 1 OAG 493 (1912), 12 OAG 503 (1923); and sec. 59.51 (3), Stats.

There is no doubt but that it would be in the public's best interest to require the person performing such services to obtain a bond protecting the county and its officers against claims that might arise out of the compilation of the tract index.

Section 59.55 (4), Stats., places no limitations on the contract authorized therein other than on the price to be paid per folio. Section 59.01, Stats., provides that a county is empowered to make such contracts and to do such other acts as are necessary and proper to the exercise of the powers and privileges granted and the performance of the legal duties charged upon it. When these sections are read together, it is clearly implied that the county board would be properly discharging its legal duties by requiring, as part of the procurement process, that the vendee obtain a bond to protect the county and appropriate county officers from claims stemming from errors in or omissions from the final corrected tract index. *Maier v. Racine County, supra.*

Lastly, I call to your attention that the county board has the authority to procure insurance or bonds to protect the county and the public against liability, loss or damage resulting from any act, neglect or default of its officers, department heads and employes. Sec. 59.07 (2) (d), Stats.

BCL:MEP

University; Students; Elections; Administrative Code; Campuses of the University of Wisconsin System have no present authority to regulate political canvassing in university-owned dormitories which does not involve the solicitation of monetary contributions. OAG 89-76

November 2, 1976.

RODNEY A. ZEMKE, *District Attorney*
Eau Claire County

You have requested my opinion as to the validity of a policy of the University of Wisconsin-Eau Claire which prohibits any type of door-to-door political solicitation in university-owned dormitories. I am informed that by the words "political solicitation" you mean political canvassing on behalf of a political candidate or political party.

In 61 OAG 373 (1972) my predecessor ruled that door-to-door political canvassing for votes in University of Wisconsin-owned dormitories could be banned by the Director of Housing pursuant to the following policy statement which had been developed by a committee, approved by the campus administration, and endorsed by the Student Senate:

> "Solicitation in the University Residence Halls will require approval of the Director of Housing, who may seek the advice of the Inter-Residence Hall Council."

I am further informed that in implementing this policy, the university has adopted the following guidelines:

> "(1) Political solicitation of any type must be restricted to the lobby or rooms that have been properly reserved for that purpose. Any individual group must contact the individual residence halls to secure permission to solicit within these areas. In certain cases, literature of the sponsoring group may be left at the reception desk. The placement of any literature in the students' mailboxes must coincide with current solicitation policy in that regard.

"(2) Under no circumstances will solicitation that results in the advertisement or selling of a product be allowed within the residence halls. This would include door-to-door and/or any area within the residence halls.

"(3) An individual or student group who feels that their cause is of vital importance to those students residing in the halls may petition through the Inter Residence Hall Council and the Housing Office for special exemption from the above-stated policy."

You have expressed doubts as to the validity of this policy on constitutional grounds. Because of recent changes in Administrative Code rules by the Board of Regents, it is unnecessary to reach the constitutional questions. The above rule is outside the scope of authority granted to the campus by the Board of Regents and is therefore unenforceable.

Individual campuses of the University of Wisconsin System possess only those powers delegated to them by the Board of Regents. Recent changes to the Wisconsin Administrative Code make it clear that the University of Wisconsin-Eau Claire, or any other campus for that matter, has not been authorized by the Board of Regents to adopt rules regarding political solicitation except insofar as solicitation of monetary contributions is concerned. Section 36.11 (1), Stats., which deals with the powers of the Board of Regents, provides as follows:

"... (a) The board may adopt rules under ch. 227 to protect the lives, health and safety of persons on property under its jurisdiction and to protect such property and to prevent obstruction of the functions of the system. Any person who violates any rule created under this paragraph may be fined not more than $500 or imprisoned not more than 90 days or both."

Pursuant to this grant of authority the Board of Regents in March of 1976 adopted rules relating to peddling and solicitation. Section UWS 18.06 (16), Wis. Adm. Code, provides in pertinent part as follows:

"(16) SELLING, PEDDLING AND SOLICITING. (a) No person may sell, peddle or *solicit for the sale of goods, services, or contributions* on any university lands except:

"***

"(6). *Solicitation of political contributions* under Chapter 11, Wis. Stats. and institutional regulations governing time, place and manner." (Emphasis added.)

It is evident from the above-quoted language that in adopting these rules, the board has limited its concern in this area to the solicitation of contributions. These rules became effective April 1, 1976. While such contributions would normally be monetary, it appears that the reference to ch. 11, Stats., would include in kind contributions as well. For convenience I will refer to all such contributions as "monetary contributions." Thus, the above language would not authorize an individual campus, under sec. 36.11 (1), Stats., to adopt rules relating to political canvassing not involving monetary contributions. Consequently, it is my opinion that an individual campus of the University of Wisconsin System does *not* have authority under sec. UWS 18.06 (16), Wis. Adm. Code, to ban political canvassing not involving the solicitation of monetary contributions.

The question may also arise whether an individual campus can adopt a rule which purports to regulate nonmonetary canvassing and solicitation by university students, and enforce such rule by punishing violations under the student disciplinary process. In adopting rules relating to student discipline, the Board of Regents has also apparently foreclosed sanctions for nonmonetary solicitations. I refer you specifically to sec. UWS 17.06, Wis. Adm. Code, which defines the offenses subject to disciplinary measures. None of the offenses defined in this section would appear to encompasss political solicitation not involving contributions. For example, sec. 17.06 (1) (e), specifically authorizes discipline for violations of ch. UWS 18, Wis. Adm. Code. As discussed above, those sections of ch. UWS 18, Wis. Adm. Code, relating to solicitations are applicable only to monetary solicitations. Consequently, I conclude that a rule such as that passed by the University of Wisconsin-Eau Claire, insofar as it purports to regulate nonmonetary political canvassing, is outside the scope of authority delegated to the institution by the Board of Regents and is unenforceable against students as well as nonstudents.

Because your question relates only to political canvassing not involving money, it is unnecessary to discuss constitutional

questions relating to the attempted enforcement of such a rule against persons seeking political contributions.

BCL:MM

Criminal Law; Senate; Legislature; Public Officials; A vacancy in the office of a state senator is created under the provisions of Art. XIII, sec. 3 and Art XIII, sec. 10, Wis. Const., as implemented by sec. 17.03 (5), Stats., upon his conviction of and sentence for any felony punishable by imprisonment in state prison, and no further specific action is required by the state senate to implement those provisions. OAG 90-76

November 3, 1976.

FRED A. RISSER, *Chairman*
Committee on Senate Organization

On behalf of the senate committee on organization, you have requested my opinion whether a felony conviction of a member of the senate automatically creates a vacancy or whether further action is required by the senate to implement sec. 17.03 (5), Stats., and the Wisconsin Constitution relating to the qualifications of legislators (Article IV, Section 6) and eligibility to hold office (Article XIII, Section 3).

I assume your question relates to a recent instance where a state senator was convicted by a state court of and sentenced for two felonies, both of which were punishable by imprisonment for up to three years in state prison.

It is my opinion that upon conviction and sentencing, a vacancy is thereby created in the office of such state senator. Under the provisions of Art. XIII, sec. 3, and Art. XIII, sec. 10, Wis. Const., as implemented by sec. 17.03 (5), Stats., no further action is required by the state senate.

Article XIII, sec. 10, Wis. Const., reads:

> "*Vacancies in office.* SECTION 10. The legislature may declare the cases in which any office *shall be deemed vacant*, and also the manner of filling the vacancy, where no provision is made for that purpose in this constitution." (Emphasis added.)

Section 17.03 (5), Stats., provides in part as follows:

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

"***

"(5) His conviction by a state or United States court of and sentence for treason, *felony or other crime* of whatsoever nature *punishable by imprisonment in* any jail or *prison for one year or more*, or his conviction by any such court of and sentence for any offense involving a violation of his official oath, in either case whether or not sentenced to imprisonment. A vacancy so created shall in no case be affected by a stay of execution of judgment. ..." (Emphasis added.)

Section 939.60, Stats., defines a felony as follows:

"*Felony and misdemeanor defined.* A crime punishable by imprisonment in the state prison is a felony. Every other crime is a misdemeanor."

Art. IV, sec. 6, Wis. Const., provides:

"*Qualifications of legislators.* SECTION 6. No person shall be eligible to the legislature who shall not have resided one year within the state, and be a qualified elector in the district which he may be chosen to represent."

Art. IV, sec. 7, Wis. Const., provides, in part:

"*Organization of legislature; quorum; compulsory* attendance. SECTION 7. Each house shall be the judge of the elections, returns and qualifications of its own members ...."

1912 OAG 796 interpreted an earlier version of present day sec. 17.03, Stats., and applied it to the office of state senator. That opinion concluded that when an event occurred which the statute specified as causing a vacancy, the office became vacant *ipso facto.* This opinion further stated at p. 801:

" 'The legislature may declare the cases in which any office shall be deemed vacant, and also the manner of filling the vacancy.' Art. XIII, Sec. 10 Constitution.

> "This they have done by chapter 42 of the statutes. It is true that the constitution makes each house the sole judge of the election and qualification of its own members. Art. IV, sec. 7. This does not prevent the calling of the special election to fill the vacancy. The fact that a new member is elected does not give him any authority to act if in fact no vacancy exists. That question may still be passed upon by the senate."

See also 1912 OAG 790 and 3 OAG 760 (1914).

In my opinion, the general conclusions reached in 1912 OAG 796 still accurately state the law, although the statutory provisions involved have been altered somewhat in their detail in subsequent years.

Such interpretation follows from the unambiguous mandate of legislation which specifies the conditions under which an office "shall be deemed vacant."

This result is consistent with and supported by decisions in other jurisdictions. See *McCluskey v. Hunter* (1928), 33 Ariz. 513, 266 P. 18, and authorities cited therein. In *McCluskey*, the statute provided that "An [incumbent's] office shall be deemed vacant" upon the happening of any of a number of events, including "His conviction of a felony ...." The court held that, on the happening of any such event, a vacancy in the office is created *ipso facto*, saying, at p. 21:

> "In providing that from and after the happening, before the expiration of the term, of any one of the ten events enumerated in 221 an office shall be deemed vacant, the Legislature meant that these events are merely conditions the legal effect of the occurrence of any one of which is to render the office vacant. To say that an office shall be 'deemed' vacant upon the happening of a certain event is equivalent to saying that it shall be vacant when that event occurs, for the word 'deemed' as used here means 'treated as,' 'regarded as,' 'presumed' or 'considered.' ... When, therefore, an officer is convicted of a felony ... or when in fact any one of the ten events mentioned in 221 happens during his term, the office occupied by him up to that time is in the eyes of the law vacant, and it is immaterial which one of the ten has occurred, for the Legislature has given them each the same effect, its purpose evidently being to provide that a vacancy

> should arise just as surely upon the happening of any one of them as another. The language, 'shall be deemed vacant,' is imperative in form and no other construction of it is possible. ..."

This is not to say, however, that an incumbent of the office is necessarily precluded from showing, for instance, that the event relied upon to create the vacancy never occurred, though such circumstance should exist only rarely. Neither should the vacation be considered as a "removal" from office, since the latter is a distinctly different subject. *McCluskey*, p. 23. As stated by another court, in *People v. Sharb* (1893), 100 Cal. 537, 35 P. 163, at 164:

> "... The 10 events mentioned in section 996 are merely conditions, upon the occurrence of any one of which the Legislature has declared the office shall become vacant, not as a penalty or forfeiture, but simply as the legal effect of the happening of any one of the events mentioned."

As pointed out in *Becker v. Green County* (1922), 176 Wis. 120, 184 N.W. 715, sec. 17.03 (5), Stats., undoubtedly had its genesis in implementation of sec. 3 as well as sec. 10, Art. XIII, Wis. Const.:

> "Sec. 3, art. XIII, of the constitution provides that 'no person convicted of any infamous crime in any court within the United States ... shall be eligible to any office of trust, profit, or honor in this state.' By sec. 2, ch. 11, Revised Statutes of 1849, it was provided that 'Every office shall become vacant on the happening of either of the following events before the expiration of the term of such office: ... 5. His conviction of any infamous crime, or of any offense involving a violation of his official oath.' This provision has continued in the statutes without change until 1917, and is found as a part of sec. 17.02 of the statutes of that year. The constitutional provision disqualified the plaintiff from further holding the office of county judge, and the statutory provision referred to expressly provided that his office should become vacant upon his conviction of any infamous crime. We have no doubt that the crime of which he was convicted was infamous within the meaning of that term as used in the constitution as well as the statute. While there has been

> much debate as to what constitutes an infamous crime, we think, by the great consensus of authority upon the subject, it is now deemed to mean as here used--a crime punishable by imprisonment in the state prison. 12 Cyc. 135; Words & Phrases, 3573 *et seq.*" *Becker, supra*, at 176 Wis., p. 124.

Thus, the term "infamous crime," as used in Art. XIII, sec. 3., Wis. Const., is synonymous with "felony," as that term is defined under sec. 939.60, Stats., and includes all felonies. See 63 OAG 75, 76 (1974), 41 OAG 181 (1952). An earlier opinion in 24 OAG 210 (1935) did conclude that the words "infamous crime" as used in Art. XIII, sec. 3, Wis. Const., were synonymous with the term "felony" as used in Art. III, sec. 2, Wis. Const., which latter term had been interpreted by the court as limited to such offenses as were felonies at the time the Constitution was adopted. However, that opinion erroneously relied upon a still earlier opinion, reported in 9 OAG 529 (1920), which was, in effect, repudiated by the holding in *Becker, supra.*

Based on the foregoing, I am of the opinion that the convictions referred to in your inquiry are felonies within the meaning of secs. 17.03 (5) and 939.60, Stats., and also "infamous crimes" within the meaning of Art. XIII, sec. 3, Wis. Const. I further conclude that a vacancy occurred in the office of the state senator involved upon his conviction and sentence for such crimes, pursuant to those provisions and Art. XIII, sec. 10, Wis. Const. Having so concluded, the question whether a vacancy would also have resulted from the senator's loss of elector status, under Art. III, sec. 2, Wis. Const., or Art. III, sec. 6, Wis. Const., and sec. 6.03 (1) (b), Stats., need not be discussed.

Finally, in *Becker, supra*, at p. 129, the court clearly stated the following in reference to the time such vacancy takes effect:

> "... It must be borne in mind that he was effectually divested of any right or title to the office. His status with reference to the office was fixed at the time of his conviction. ..."

See also *State v. Turner* (1918), 168 Wis. 170, 169 N.W. 304, where it was held that under the terms of Art. XIII, sec. 3, acceptance of a federal office by a state officer *ipso facto* vacated the latter office.

Although the conviction operates to vacate such office *ipso facto*, the vacation does not interfere or conflict with the constitutional provision that each house shall be the sole judge of the elections, returns and qualifications of its own members. In the absence of a constitutional provision for that purpose, the legislature, exercising the legislative power the Constitution vested in the senate and assembly, may declare when a vacancy occurs. Art. IV, sec. 1, and Art. XIII, sec. 10, Wis. Const. It has done so in sec. 17.03, Stats., and has further directed that upon the happening of such vacancy notice thereof be given to appropriate public officials, including those authorized by law to cause such vacancies to be filled. Secs. 17.01, 17.02 and 17.17, Stats. The authority for such legislative enactments emanates directly from the Constitution itself and such statutes in no way unconstitutionally delegate the determination of when a vacancy occurs. They constitute, as previously explained, the legislature's determination of those circumstances which cause a vacancy during the term. It has been held, in fact, that a constitutional provision, providing that no person convicted of an infamous crime "shall be eligible to the legislature, or capable of holding any office of trust or profit in this state," has the force of positive law declaring a fixed policy of the state limiting the power of the legislature in declaring who shall be eligible for such offices. *State ex rel. Moore v. Blake* (1932), 225 Ala. 124, 142 So. 418.

BCL:JCM

Licenses And Permits; Foods; A person who extracts honey for the purpose of preparing it for sale is subject to the licensing requirement of sec. 97.28, Stats., unless the honey is sold on a retail basis only at a fixed place of business. OAG 91-76

November 5, 1976.

THE HONORABLE, THE ASSEMBLY
Legislature

Pursuant to Assembly Resolution No. 51, you have requested my opinion whether a person extracting honey is subject to licensing as a food processor under sec. 97.28, Stats., or under any other provision. I have also received correspondence from individual assemblymen describing the problem in greater detail and informing me of a concern by licensees about the propriety of an increase in the license fee from $5.00 to $20.00 per year.

"The test of a reasonable [license] fee is that it shall be no greater than is sufficient to cover the expenses of administration." *Meyers v. Matthews* (1955), 270 Wis. 453, 460, 71 N.W. 2d 368, appeal dismissed, 350 U.S. 927, rehearing denied, 350 U.S. 977. The license fee is used by the Department of Agriculture to cover the costs of issuing the license and of investigating the construction and sanitary conditions of the plant and equipment. Sec. 97.28 (5), Stats. The increase in minimum license fees from five dollars to twenty dollars was enacted by the legislature as part of the biennial budget bill. See sec. 574, ch. 39, Laws of 1975. In the absence of facts which would clearly establish a contrary conclusion twenty dollars does not appear to be a unreasonable charge for performance of these functions.

The next question is whether the removal of honey from honeycombs with a machine known as an "extractor" constitutes food processing within the purview of sec. 97.28, Stats.

Section 97.28 (1) requires an operator of a food processing plant to obtain a license from the Department of Agriculture. Section 97.28 (2), defines "food processing plant" as:

> "... *any place where food is* manufactured or *prepared for sale through the process of* canning, *extracting*, fermenting, distilling, pickling, freezing, drying, smoking, grinding, mixing, stuffing, packing, bottling, cutting and packaging, or otherwise treating or preserving the same *for sale as and for food* ...." (Emphasis added.)

As used in ch. 97, Stats., "food" means articles used for food or drink by man, including components of such articles. See sec. 97.01 (2), Stats. According to the Wisconsin Administrative Code, "extracted honey" is:

> "... honey which has been separated from the crushed or uncrushed comb by centrifugal force, gravity, straining, or other means." Ag 91.01 (2), Wis. Adm. Code.

Webster's Third New International Dictionary (unabridged) contains the following definition of "extract:"

> "1d: to separate or otherwise obtain (as constituent elements or juices) from a substance by treating with a solvent (as alcohol), distilling, evaporating, *subjecting to pressure or centrifugal force*, or by some other

chemical or mechanical process [-ing an essence] [-ing the juice of apples] [*-ed honey*]." (Emphasis added.)

One who separates or withdraws honey from honeycombs by mechanical or other means is an extractor of honey. Honey constitutes an article of food. Any place where this extraction occurs for the purpose of preparing the honey for sale is a "food processing plant" and would, within the statutory requirement, be subject to licensing.

It has been suggested that the term "extracting" as used in sec. 97.28, Stats., refers to a more technical process or procedure in the food processing industry and, therefore, should not render a farmer subject to licensing solely because he harvests honey. Such a construction is in conflict with the Department of Agriculture's rule and the normal meaning of the words employed. Moreover, both extraction and sale of the honey at wholesale for public consumption triggers the licensing requirement.

The Department of Agriculture has informed me that it has licensed honey extractors under sec. 97.28, Stats., or its predecessors, for at least 20 years. This has been the practice since the enactment of the statute by ch. 510, Laws of 1947, which extended the licensing requirement from canners to all food processors.

Even though the statute here is probably unambiguous, I would point out that even if it were ambiguous the construction and interpretation given to a statute by the agency charged with its administration is entitled to great weight if such interpretation is reasonable and not contrary to the clearly expressed meaning of the law. *Mednis v. Industrial Commission* (1965), 27 Wis. 2d 439, 444, 134 N.W. 2d 416; *Chevrolet Division G.M.C. v. Industrial Commission* (1966), 31 Wis. 2d 481, 488, 143 N.W. 2d 532. When an administrative interpretation has been unchallenged over a period of many years, such interpretation will control. *Forsberg Paper Box Co. v. Department of Taxation* (1961), 14 Wis. 2d 93, 109 N.W. 2d 457.

Moreover the clear intention of the law is that the state protect consumers from unwholesome processing of all types of food by a licensing system which includes inspections to assure proper handling and storing of food, sanitary conditions, and sound equipment. This intention is furthered by the broad construction

of the terms "extraction" and "food processing plant" adopted by the Department of Agriculture.

Section 97.28 (2), Stats., in addition to defining "food processing plant," also creates certain exceptions to the general requirement that processing activities be licensed. Among these exceptions are:

> "... retail merchants having a fixed or established place of business in this state *if such merchant does not also sell at wholesale any food processed by the merchant* or engage in [processing delicatessen foods for retail]." (Emphasis added.)

This exception excuses from the licensing requirement any person who is strictly a retail seller of honey and who has a fixed place of business in the state. The typical example is one who produces honey only for personal consumption and/or for sale at a roadside stand. However, one who sells at retail without a fixed place of business or at wholesale any portion of a honey crop is subject to licensing.

Several inquirers raise an equal protection issue because of this distinction. Should honey extractors who sell at wholesale be licensed when those selling at retail or extracting honey only for their own use are exempt from the licensing requirement? In other words, is the classification rational?

A licensing classification is "presumed to be valid unless the court can say no state of facts can reasonably be conceived that would sustain it." *State ex rel. Real Estate Board v. Gerhardt* (1968), 39 Wis. 2d 701, 710, 159 N.W. 2d 622. In *Adams v. Milwaukee* (1913), 228 U.S. 572, the court upheld a classification of milk vendors which required those who produced milk outside of Milwaukee for sale in the city to obtain a certificate of inspection, including proof of administration of a tuberculin test to the animals, whereas those producing milk in the city needed only to obtain a permit from the city to keep cows. The court reasoned that the animals and milk-producing facilities within the city could be inspected by city health officials, while those outside the city could not be, and therefore it found the classification to be reasonable.

The same rationale may be applied in the present case. The only merchants exempted from the licensing requirement are those who have a fixed place of business in the state and who do not sell any of the food which they process at wholesale. A purchaser from an exempt processor-retailer has some opportunity if he wishes to observe or inquire into the cleanliness of the operation and the reputation of the retailer. On the contrary, if there are unidentified intermediate processors, the purchaser is more effectively prevented from observing the cleanliness of the facility or operation. Therefore, the state arguably has a stronger interest in regulating the production of such wholesale processors than it does in regulating the production of the processor-retailers. In my opinion the presence of this different interest is sufficient to sustain the classification as reasonable.

BCL:LMC

Residence; Aliens; Citizenship And Naturalization; Law Enforcement; Sections 62.13 (4) (d) and 66.11 (1), Stats., making citizenship a prerequisite to becoming a police officer or deputy sheriff violate the Fourteenth Amendment of the United States Constitution when applied to resident aliens. OAG 92-76

November 11, 1976.

HOWARD G. BJORKLUND, *Administrator*
Division of Law Enforcement Services
Department of Justice

You have requested my opinion concerning the validity of requiring United States citizenship as a prerequisite to employment as a police officer. In particular, you request my opinion on the constitutionality of sec. 66.11 (1), Stats., which provides in pertinent part:

> "No person shall be appointed deputy sheriff of any county or police officer for any city unless he is a citizen of the United States. ..."

It is my conclusion that the citizenship requirement of sec. 66.11 (1), Stats., violates the Fourteenth Amendment of the United States Constitution and is, therefore, unconstitutional when applied to resident aliens. Although every presumption must be indulged

to sustain a law if at all possible, *Ortman v. Jensen and Johnson Inc.* (1975), 66 Wis. 2d 508, 521, 225 N.W. 2d 635, the state must have a compelling interest to justify any law which discriminates against a "suspect classification." Alienage is a suspect classification. *Graham v. Richardson* (1971), 403 U.S. 365, 31 S.Ct. 1848, 29 L.Ed. 2d 534. Given the existing federal case law I am unable to fashion a tenable argument in support of the statute.

In 64 OAG 65 (1975) I concluded that statutes requiring citizenship as a condition of being a practical nurse were unconstitutional because they deprived resident aliens of benefits mandated by the Fourteenth Amendment. Since the applicable law is discussed in detail in that opinion, I will not repeat the discussion. For present purposes, it is sufficient to note that the Supreme Court has held that a citizenship requirement could permissibly apply to:

> "... persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." *Sugarman v. Dougall* (1973), 413 U.S. 634, 647, 37 L.Ed. 2d 853, 93 S.Ct. 2842.

Therefore, the only question remaining is whether police officers come within the exception noted in *Sugarman.* I conclude they do not.

Although police officers exercise discretion in performing their duties, it can hardly be said they participate directly in formulating or reviewing questions of broad public policy. This conclusion is substantiated by reference to sec. 62.13 (3), Stats., concerning the appointment of chiefs of police. Section 62.13 (3) does not require chiefs of police to be citizens. Since our court has held in *State ex rel. Evjue v. Weatherly* (1949), 255 Wis. 225, 228, 38 N.W. 2d 472, that sec. 62.13 (3) "does not in any way incorporate section 66.11 into the qualifications of a chief of police," it is clear that chiefs of police in Wisconsin need not be United States citizens. It is impossible to conclude that citizenship is essential to the quality of police officers but not essential to the chief who has a broader policy function.

It is likewise impossible to conclude that citizenship is necessary to ensure loyalty. The Supreme Court has held that a state may not require citizenship as a prerequisite to taking a bar exam, even though attorneys are "officers of the court." *In re Griffiths* (1973), 413 U.S. 717, 37 L.Ed. 2d 910, 93 S.Ct. 2851. The quality and loyalty of police officers, like that of attorneys, can be maintained by character investigation and continued evaluation after hiring.

The state's interests in the quality and loyalty of its police officers are adequately protected by providing for an examination of physical and educational qualifications, habits, reputation and experience. Sec. 62.13 (4) (c) and (d), Stats. The Law Enforcement Standards Board has also prescribed minimum qualifications for recruitment including age, educational requirements, possession of a driver's license, and good physical and emotional health. Wis. Adm. Code Chapter LES 2. Since standards and procedures already exist for ensuring competent, loyal police officers, the broad exclusion of a whole class is clearly unnecessary.

I would also note that sec. 62.13 (4) (d), Stats., requires, among other things, that the competitive examination for police officer positions "shall be free for all citizens of the United States." In light of my conclusion that citizenship is unnecessary to maintaining the quality of police officers, I must also conclude that the competitive examination may not exclude resident aliens. The Supreme Court has recently found a Civil Service Commission regulation barring noncitizens from taking a required competitive examination to be in violation of the Fifth Amendment. *Hampton v. Mow Sun Wong* (1976), 96 S.Ct. 1895, 48 L.Ed. 2d 495. It is clear from the court's discussion that an equivalent state regulation would violate the Fourteenth Amendment. *Hampton*, at 96 S.Ct. 1911.

Since I have concluded that those portions of secs. 66.11 (1) and 62.13 (4) (d) that require citizenship as a prerequisite to becoming a police officer are violative of the Fourteenth Amendment, any Law Enforcement Standards Board rule requiring citizenship as a standard of eligibility would also be unconstitutional. It is my opinion that you should disregard the

citizenship requirements in sec. 62.13 (4) (d) and sec. 66.11 (1), Stats., as it applies to resident aliens.

BCL:AML

Administrative Code; Indians; Safety; Public Health; Federal Land Banks; State does not have jurisdiction to enforce Wisconsin Administrative Code with respect to construction of buildings on Oneida Indian Reservation trust land. 58 OAG 91 (1969) withdrawn. OAG 94-76

November 17, 1976.

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

You requested my opinion concerning the applicability of the Wisconsin Administrative Code to the construction of a building on land held in trust by the United States for the Wisconsin Oneida Indian Tribe. I understand the building will be leased to the United States Postal Service for use as a post office.

For the following reasons, it is my opinion that the Wisconsin Administrative Code is not enforceable as to buildings constructed on land held in trust by the United States for the Oneida Tribe or on tribally owned land within the reservation.

The policy of leaving Indian people and Indian land free from state jurisdiction and control is deeply rooted in the nation's history. See *McClanahan v. Arizona State Tax Commission* (1973), 411 U.S. 164, 168, 93 S.Ct. 1257, 36 L.Ed. 129. This policy is derived from tribes' historical status as independent sovereign nations. Although tribes have lost external sovereignty, the United States Supreme Court has always recognized that Indian tribes are "distinct political communities having territorial boundaries within which their authority is exclusive." *Worcester v. The State of Georgia*, 6 Pet. 515, 8 L.Ed. 483 (1832).

Although the concept of internal tribal sovereignty has undergone considerable change in the years since *Worcester, supra*, it is, nevertheless, clear that certain basic legal principles are still applicable where questions of state jurisdiction over Indian people

or Indian land within the exterior boundaries of a reservation arise. First, a federally recognized Indian tribe is a legitimate governmental entity possessing attributes of sovereignty over both its members and its territory, and as such has the power to regulate its internal and social relations. Second, state law can have no role to play within the reservation boundaries except with the consent of the tribe itself or in conformity with treaties and acts of Congress or where the courts have determined that state law shall apply. See 64 OAG 124 (1975); *United States v. Mazurie* (1975), 419 U.S. 544, 95 S.Ct. 710, 42 L.Ed. 2d 706; *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res.* (8th Cir. 1956), 231 F. 2d 89.

The Oneida Tribe is federally recognized as a governmental entity in both treaties with the United States and in federal legislation. The tribe was a party to the Six Nations Memorial to the President of 1810 and approved the Menominee Treaty of 1831 (7 Stat. 342). The Oneida Tribe was also party to a number of treaties with the United States which established and later modified the present Oneida Reservation near the City of Green Bay.

The Menominee Treaty of 1831, *supra*, set aside approximately five hundred thousand acres as a future home for the various New York tribes including the Oneida. Most but not all of that land was ceded to the United States by the Treaty of January 15, 1838, with the New York Indians (7 Stat. 550), in return for one million eight hundred twenty-four thousand acres of land directly west of the State of Missouri. At about the same time in the Treaty of February 3, 1838 (7 Stat. 566), the Oneida ceded all their remaining land near Green Bay, Wisconsin, to the United States except that reserved in Article 2, which provides:

> "From the foregoing cession there shall be reserved to the said Indians *to be held as other Indian lands are held* a tract of land containing one hundred (100) acres, for each individual, and the lines of which shall be so run as to include all their settlements and improvements in the vicinity of Green Bay." (Emphasis added.)

The courts have considered treaty language similar to that quoted above, in view of internal tribal sovereignty, to mean that state jurisdiction does not extend to tribal land and tribal members

unless specifically authorized by federal legislation. See, e.g., *McClanahan, supra*; *Mescalero Apache Tribe v. Jones, supra.* See also *The Kansas Indians* (1866), 5 Wall 737 and *The New York Indians* (1866), 5 Wall 761.

The Oneida Tribe is also organized under the Indian Reorganization Act of June 18, 1934 (48 Stat. 984, 25 U.S.C. sec. 461478), and has adopted a constitution and bylaws pursuant thereto which set forth the basic organization for the exercise of tribal governmental power (25 U.S.C. sec. 476). Thus organized, the tribe secured a corporate charter from the federal government for the purpose of engaging in business activities (25 U.S.C. sec. 477). Both the corporate charter and the constitution and bylaws were approved by the Secretary of the Interior.

The Oneida Tribe thus has the same rights of self-government as do other federally recognized tribes. The question, therefore, is whether Congress has limited the Oneida Tribe's right to exclusively regulate land use within the reservation by conferring such jurisdiction upon the State of Wisconsin.

The courts now resolve jurisdictional questions involving the application of state law to Indian persons and Indian land by reading applicable treaties and federal statutes against the backdrop of tribal sovereignty. See 64 OAG 124 (1975); *McClanahan, supra*; *Mescalero Apache Tribe v. Jones* (1973), 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed. 2d 114; *Williams v. Lee* (1959), 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed. 2d 251. With these considerations in mind, it is necessary to determine whether P.L. 280 (67 Stat. 588, 28 U.S.C. sec. 1360 and 18 U.S.C. sec. 1162) granted the state authority to extend its general civil laws, such as the State Administrative Code, to Indian trust land within the Oneida Reservation.

58 OAG 91 (1969) expressed the opinion that Public Law 280 provided specific congressional authorization to Wisconsin to apply local zoning laws to land held in trust by the United States for the Winnebago Tribe. The provisions of P.L. 280 (28 U.S.C. sec. 1360 (a) and (b)), under consideration there, state:

> " '(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name

of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

" '***

" '(b) Nothing in this section shall authorize the alienation, encumberance, 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; ...'"

For the companion statute dealing with criminal jurisdiction, see 18 U.S.C. sec. 1162.

Subsequent to 58 OAG 91 (1969), it was held in *Santa Rosa Band of Indians v. Kings County* (9th Cir. 1975), 532 F. 2d 655, that Kings County, California, was without jurisdiction to enforce its zoning ordinance or building code on Indian reservation trust lands. (See also *United States v. County of Humboldt* (N.D. Calif. 1976). The court in *Santa Rosa* rejected for a number of alternative reasons, the state's argument that P.L. 280 was authorization for the exercise of such jurisdiction. Significant to our analysis is the court's discussion of 28 U.S.C. sec. 1360 (b), *supra*, which expressly disclaims authorizing state "encumbrance or taxation of any real ... property ... held in trust by the United States." The court observed at 667 that:

"... The word 'encumbrance' [as used in P.L. 280] is of course ambiguous, and courts have split on whether or not it evidences an intent to exempt trust lands from state zoning and land use regulations. Compare *Snohomish County v. Seattle Disposal Co.*, 70 Wash. 2d 668, 425 P. 2d 22 (1967), *cert. denied*, 389 U.S. 1016, 88 S.Ct. 585, 19 L.Ed. 2d 662 (1967) (Douglas and White JJ., dissenting), *with Rincon Band of Mission Indians v. County of San Diego* [S.D. Cal. 1971), 324 F. Supp. 371, *rev'd on other grounds* (9th Cir.

> 1974), 495 F. 2d 1], and *Aqua Caliente Band of Mission Indians' Tribal Council v. City of Palm Springs*, 347 F. Supp. 42 (C.D. Cal. 1972), *vacated and remanded* by this court in an unpublished order, January 24, 1975. ... Relying on the canon of construction applied in favor of Indians, the Court has ruled in different contexts that the word 'encumbrance' is to be broadly construed and is not limited to a burden which hinders alienation of the fee, see *Squire v. Capoeman* [(1956), 351 U.S. 1, 76 S.Ct. 611, 100 L.Ed. 883], *United States v. Rickert* [(1903), 188 U.S. 432, 23 S.Ct. 478, 47 L.Ed. 532]; *Kirkwood v. Arenas*, 243 F. 2d 863 (9th Cir. 1957), rather focussing on the effect the challenged state action would have on the value, use and enjoyment of the land. See Hastings L.J., at 1498-1499. *Compare* the majority and dissenting opinions in *Snohomish*, *supra*. Following the Court's lead, and resolving, as we must, doubts in favor of the Indians, we think that the word as used here may reasonably be interpreted to deny the state the power to apply zoning regulations to trust property."

The court also held at 658 that "any concurrent jurisdiction the states might inherently have possessed to regulate Indian use of reservation lands has long ago been preempted by extensive federal policy and legislation." In support, the court cited numerous cases and 25 C.F.R. sec. 1.4 (a), which provides in relevant part as follows:

> "... none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States ...."

In *Bryan v. Itasca County* (1976), 96 S.Ct. 2102, 48 L.Ed. 2d 710, Justice Brennan for a unanimous court in effect confirmed the analysis of P.L. 280's legislative history in *Santa Rosa Band v. Kings County*, *supra*. The court, however, held that 28 U.S.C. sec. 1360 (a), the section of P.L. 280 that many states have relied upon as authority for extending their general civil laws to Indian persons and Indian land within reservations, was not intended by Congress to confer such authority. The court reasoned that sec. (a):

> "... seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the states to decide such disputes. ..." 96 S.Ct. 2109.

The court went on to observe that "this construction finds support in the consistent and uncontradicted references in the legislative history to 'permitting' '*State courts to adjudicate* civil controversies' arising on Indian reservations, H.R. Rep. No. 848, at 5, 6, U.S. Code Cong. & Admin. News 1953, p. 2411 (emphasis added), and the absence of anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations." 96 S.Ct. 2109.

Bryan concerned the question reserved in *McClanahan, supra*: whether the grant of civil jurisdiction to the states conferred by sec. 4 of P.L. 280 (28 U.S.C. sec. 1360 (a)), is a congressional grant of power to the states to tax reservation Indians. In answering no, the court concluded without qualification that P.L. 280 does not confer general state regulatory control over Indian reservations. At 96 S.Ct. 2111, the court stated:

> "... nothing in its legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private, voluntary organizations,' *United States v. Mazurie* (1975), 419 U.S. 544, 557, 95 S.Ct. 710, 718, 42 L.Ed. 2d 706--a possible result if tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers, including taxation, of state and local governments." (Citing with approval in f.n. 14, *Santa Rosa Band of Indians v. Kings County, supra.)*

In summary, *Santa Rosa Band, supra*, held that county zoning laws constitute an "encumbrance" upon Indian land as that word is defined under federal law and such zoning laws are, therefore, invalid under 28 U.S.C. sec. 1360 (b). *Bryan* on the other hand held that 28 U.S.C. sec. 1360 (a) is not authority for a state to enforce its general civil regulatory laws upon Indian persons or Indian land located within reservation boundaries.

The opinion expressed in 58 OAG 91 (1969) cannot be reconciled with the construction placed upon P.L. 280 by the United States Supreme Court in *Bryan.* It is, therefore, withdrawn. Based on the United States Supreme Court's analysis in *Bryan,* and in view of the Oneida Tribe's internal sovereignty, it is my opinion that the state does not have jurisdiction to require the application of the Wisconsin Administrative Code to the construction of buildings on Oneida Reservation trust land.

This is not to say that buildings constructed on land held in trust for the Oneida Tribe will be constructed without consideration of basic safety standards and other building code regulations. On construction projects that do not come under applicable federal building regulations, the usual practice is to adopt the state building code. This was done with the Oneida post office building in the construction contract. By adopting state building codes, those persons involved with the construction and use of the building are assured that the building meets minimum safety standards. It should also be kept in mind that disregard of the state building code could affect liability if members of the public are injured while using such buildings. In *American Exch. Bank of Madison, Wis. v. United States* (1958), 257 F. 2d 938, 79 ALR 2d 879, the court held that the federal government would be liable for injuries under the Federal Tort Claims Act to a person who fell on the steps of the Madison post office where the lack of a handrail violated the standard of care established by the state building code. Disregard of code requirements could be costly if they are not observed. In private litigation, violation of the code is negligence per se.

BCL:JDN

Schools And School Districts; Education; Sectarian Instruction; Superintendent Of Schools; Public Instruction, Superintendent Of; The state superintendent of the Department of Public Instruction does not have the authority to determine whether public schools are segregated or the authority to take enforceable action to desegregate public schools. OAG 96-76

November 26, 1976.

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

You ask my opinion on the following questions:

> "(1) Is there authority under the constitution and laws of Wisconsin and of the United States for the state superintendent of public instruction to determine whether a school is desegregated?
>
> "(2) May the state superintendent order compliance with desegregation procedures and take legal action to secure compliance therewith?
>
> "(3) Is the state superintendent authorized by Wisconsin statutes to promulgate 'Guidelines For Equal Educational Opportunity' as administrative rules under Chapter 227, Stats., as amended by Chapter 162, Laws of Wisconsin, 1973?
>
> "(4) Would your answers to questions 1, 2 and 3 above be changed considering the new desegregation procedures contained in Public Law 93-380 signed August 21, 1974, copy of which is attached?"

You indicate that these questions arise because, among other things, the Department of Public Instruction published at your predecessor's request Bulletin No. 3356 entitled "Guidelines For Equal Educational Opportunity." The bulletin sets out:

> "... methods of identifying segregative procedures ... along with suggestions for elimination and prevention of segregation. There is also information required to be submitted by the district concerned with identifying segregative procedures and corrective action taken and future action to be taken. The procedures outlined on page 5 of the 'Guidelines' require the state superintendent to determine whether the district is in compliance with the desegregation guidelines and to notify any district in noncompliance with such guidelines to prepare a plan of compliance therewith."

You further indicate that the "Guidelines" provide:

"If there is failure to comply with the suggested guidelines on page 6 ... the state superintendent will:

"(1) Notify in writing the United States Department of Health, Education, and Welfare that, effective immediately and continuing until further notification to the contrary, said school district is in a state of noncompliance.

"(2) Notify the Wisconsin State Attorney General of the affected school district's failure or refusal to comply with these guidelines and request the Attorney General to take legal action to secure compliance."

In order to provide meaningful answers to your questions, it is appropriate to first discuss briefly the law relating to equal educational opportunity.

In *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) (*Brown* I), the U.S. Supreme Court held that segregation of children in public schools on the basis of race deprives minority group children of equal educational opportunities and therefore denies them equal protection of the laws under the Fourteenth Amendment. This case clearly declares *de jure* segregation, i.e., segregation initiated and perpetuated by a state agency, unconstitutional.

In *Brown v. Board of Education*, 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955) (*Brown* II), and in *Green v. County School Board*, 391 U.S. 430, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968), the U.S. Supreme Court placed the burden directly on the school board to act affirmatively to eliminate segregation. In *Green*, which involved a southern rural school district, the court held that a plan of desegregation which merely gave the pupils a choice of schools was insufficient to eliminate a *de jure* dual school system. In that case the court at 391 U.S. 437-438, citing *Brown* II, wrote that school boards operating state compelled dual systems are "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. ..." This affirmative obligation of local school boards was affirmed in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971), a case involving an urban school district. Your attention is also directed to the recent

order of the Federal District Court for the Eastern District of Wisconsin in the Milwaukee School District segregation case. *Kevin Armstrong, et al. v. Donald J. O'Connell, et al.*, 408 F. Supp. 765, 825 (1976). The obligation of state school officials to eliminate school desegregation is less well recognized. Courts have uniformly relied on local, as opposed to state, efforts to desegregate, except where state authorities had assumed virtually total control of statewide school operations, see *Lee v. Macon Co. Board of Education*, 267 F. Supp. 485 (M.D. Ala. 1967), or where an effective remedy for local segregative practices absolutely required the participation of state officials, see *Morgan v. Hennigan*, 397 F. Supp. 410 (Mass. 1974), the Boston school desegregation case. Voluntary action by state school officials to remedy segregation in the public schools has been upheld where statutory authorization existed for them to take such steps. See, e.g., *Vetere v. Allen*, 15 N.Y.2d 259, 258 N.Y. So. 2d 77, 206 N.E.2d 174, *cert. denied*, 382 U.S. 825 (1965); *Booker v. Board of Education*, 45 N.J. 161, 212 A.2d 1 (1965).

Since the question appears to turn on either the powers of the state superintendent or direct involvement in fostering segregation, it is necessary to examine the state Constitution and state statutes governing to see whether a duty is imposed or a right is conferred on the superintendent to eliminate segregation in the local school districts.

There is no specific statutory authority granting the state superintendent authority to investigate, make findings of law or order changes in allegedly segregated school districts. It is therefore necessary to determine whether the more general grants of power may be interpreted as permitting the state superintendent to become involved in altering the practices of segregated school districts.

Wis. Const. art. X, sec. 9, provides in part:

> "The supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct; and their qualifications, powers, duties and compensation shall be prescribed by law. ..."

37 OAG 347 (1948), concluded that Wis. Const. art. X, sec. 1, gave the state superintendent supervisory authority over all institutions of public instruction but only to the extent authorized by the legislature.

Before analyzing specific legislative grants of power to the superintendent and answering your specific questions, it would be helpful to review the historical development of legislation regarding the superintendent's powers.

> "It is a well established practice in American legal processes to consider relevant information about the historical background of the enactment of a statute in the course of making decisions about how it is to be construed and applied. ..." 2A Sutherland Statutory Construction, 4th Ed., sec. 48.03, p. 191.

Wisconsin is the only state in the Union that does not have a state school board.[1] The Wisconsin legislature in 1849, after the adoption of the Constitution, initiated a policy of local control of common school districts. While it recognized the principle of state control in education, it nonetheless delegated large powers to subordinate units, particularly the local school district.

> "Thus the state helped in establishing in the public mind the idea of popular participation in the control of the common schools in both maintenance and government. ... The laws made each district supreme, with authority to do as much or as little as it pleased. ..." Patzer, *Public Education in Wisconsin*, pp. 38-39.

As might be expected, the powers and duties of the state superintendent, as prescribed in Revised Statutes of Wisconsin, 1849, were largely inspectional and clerical.[2] In 1902, Wis. Const. art. X, sec. 1, was amended to allow the legislature to provide by law for powers and duties of the state superintendent. In 1903, the legislature enacted ch. 37 relating to the duties of the state superintendent. Section 2 of that chapter provided in part:

> "He shall have general supervision over the common schools of the state, and it shall be his duty:
>
> "School work. 1. To ascertain, so far as practicable, the conditions of the public schools of the state; to stimulate interest in education; to spread as widely as possible, through public addresses, bulletins, and by conferences with school officers, teachers and parents, a knowledge of methods which

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[1] State Education, *Structure and Organization*, HEW Office of Education, 1964.

[2] Revised Statutes of Wisconsin 1849, ch. 9, secs. 44-46.

may be employed to introduce desirable improvements in the organization, government and instruction of the schools:"

These general grants of power remain substantially the same today (see sec. 115.28(1), (3)). The policy in Wisconsin of local school district control has continued with few notable exceptions to the present time. (See sec. 121.02 and sec. 121.08, Stats.) The legislative scheme with respect to the office of state superintendent has been to grant general supervisory powers and to specify related powers and duties as political and social exigencies dictate. The general powers can be construed only as being equal or inferior in rank to those enumerated powers (2A Sutherland Statutory Construction, 4th Ed., p. 112).

In my opinion the state superintendent has not been given the express or implied authority to determine whether a school is segregated, order compliance with desegregation procedures, take legal action to secure compliance therewith, or promulgate administrative rules relating thereto. This answers your first three questions.

The answer to your fourth question is also "no." Public Law 93-380, the Educational Amendments of 1974, need be considered only when an affirmative plan of desegregation is being proposed. This statute does not direct or authorize any particular party in state government to initially determine that segregation exists.

Although your formal powers in this area are presently limited, it is my opinion that your power to "ascertain the condition of the public schools" and to "spread as widely as possible a knowledge of the means and methods which may be employed to improve schools," sec. 115.28(1), Stats., permits you, for example, to ascertain the student population by race of each public school in each school district in the state and to include the results of such an investigation in your report to the governor and the legislature.

It is also my opinion that you are free to suggest solutions to problems involving segregated schools and issue guidelines and bulletins encouraging a realistic approach to the problem. These guidelines would not be binding on the schools and would not have the effect of administrative rules because no statute authorizes you to promulgate such guidelines as rules under ch. 227.

You point out that Bulletin No. 3356 provides that upon failure of a school district to comply with the guidelines therein, the state superintendent shall report such noncompliance to the Department of Health, Education and Welfare and that the superintendent shall ask the Wisconsin Attorney General to take legal steps to secure compliance. Again you are advised that while you may gather and report facts, you do not have the authority to determine that a school district is unlawfully segregated. Since the guidelines do not have the force and effect of law, the Attorney General has no power to enforce them.

BCL:JWC

Zoning; Ordinances; Towns; Village; Mobile Homes; Municipalities; In a town in which a county-wide zoning ordinance is effective, a town ordinance which purports to regulate the location of individual mobile homes is a zoning ordinance which can only be enacted in compliance with the provisions of sec. 60.74 (7) or (8), Stats. Once the exercise of town zoning authority under sec. 60.74 (7), Stats., is approved by referendum, town zoning ordinances and amendments need only be approved by the county board. Section 60.74 (7), Stats., requires the appropriate town authorities to hold a public hearing on town zoning, but no further hearing by the county authorities is required. OAG 97-76

November 30, 1976.

ROBERT W. WING, *District Attorney*
Pierce County

You advise that Pierce County has adopted a county-wide zoning ordinance, under sec. 59.97, Stats., which allows mobile homes to be located on one-acre tracts of land in agricultural and residential districts. Recently, however, a town in which the county zoning ordinance is effective adopted a town ordinance which purports to regulate the size and location of mobile homes and temporary dwellings within the town. This ordinance, which has been submitted for approval of the Pierce County Board of Supervisors, defines a "Free Standing Unit" as "a Mobile Home on a tract of land" and provides that "A free standing Mobile Home ... cannot be located on any tract less than twenty (20) acres."

Based on the foregoing, you request my opinion on three questions concerning the relationship of town and county ordinances regulating mobile homes. Your questions are treated in the order in which you present them.

> 1. Is the provision of the town ordinance prohibiting mobile homes on any tract of land less than 20 acres a town zoning ordinance subject to the provisions of sec. 60.74 (7) inasmuch as the county has already adopted a county zoning ordinance?

The answer to this question is yes.

Towns are given specific authority to license and regulate mobile home *parks* under sec. 66.058, Stats., and sec. 66.058 (2) (b), Stats., provides that such power is "in addition to all other grants and shall be deemed limited only by the express language of this section." However, sec. 66.058, Stats., does not grant towns general authority to regulate the use and location of individual mobile homes outside mobile home parks, 60 OAG 131, 133 (1971), and even town ordinances clearly regulating mobile home parks may be required to comply with the procedural requirements applicable to town zoning ordinances enacted under the general town zoning authority, sec. 60.74, Stats., *Edelbeck v. Town of Theresa* (1973), 57 Wis. 2d 172, 203 N.W. 2d 694, particularly where the ordinance purports to zone through regulation of "the density and distribution of population" or the location of such mobile homes, as is the case here. See sec. 60.74 (1) (a) 1., Stats.; *David A. Ulrich, Inc. v. Town of Saukville* (1959), 7 Wis. 2d 173, 178, 96 N.W. 2d 612. Therefore, it is apparent that the town ordinance involved here is subject to the provisions of sec. 60.74, Stats.

Towns do not have independent zoning authority under sec. 60.74, Stats., when the county has adopted a county-wide zoning ordinance under sec. 59.97, Stats. *Edelbeck*, *supra*, p. 182a. Such towns may nevertheless enact separate town zoning ordinances under the specific circumstances set forth in sec. 60.74 (7) and (8), Stats. Subsection (8) applies to town boards which are participating in a regional planning program under sec. 60.29 (41), Stats. Your letter makes no mention of such a program and therefore my opinion assumes that none exists and subsec. (8) does not apply. Subsection (7) provides:

"(7) Town boards granted village powers by resolution adopted pursuant to section 60.18 (12) shall have power to adopt town zoning ordinances in the manner provided in section 61.35 notwithstanding any provision of this section or section 60.75 provided, however, that in counties which have adopted a zoning ordinance under section 59.97 the exercise of the power to adopt a town zoning ordinance shall be subject to approval by a referendum vote of the electors of the town held at the time of any regular annual town meeting. Any zoning ordinance adopted by a town board and any amendment thereof under this subsection shall be subject to the approval of the county board in counties having a county zoning ordinance."

Based on the foregoing, it is apparent that the provisions of the town ordinance prohibiting mobile homes on any tract of land less than 20 acres is a zoning enactment subject to the provisions of sec. 60.74, Stats., and in light of the existence of a county-wide zoning ordinance under sec. 59.97, Stats., such town ordinance provision could only be enacted under sec. 60.74 (7) or (8), Stats.

2. Must the town first hold a referendum before submitting the ordinance to the county board for its approval?

This question cannot be answered yes or no.

In order to act under the provisions of sec. 60.74 (7), Stats., the town must have been granted village powers under sec. 60.18 (12), Stats. Where the county has adopted a county-wide zoning ordinance under sec. 59.97, Stats., the exercise of zoning authority by such a town must first be approved by "a referendum vote of the electors of the town held at the time of any regular annual town meeting." The town zoning ordinance itself is not subject to such referendum approval, but the exercise of zoning authority must be authorized by the referendum. Subsequent to a favorable referendum on the question of exercise of zoning authority generally town zoning ordinances and amendments need only be submitted to the county board for approval.

3. Before the county board can approve the zoning ordinance of a township under the provisions of sec. 60.74 (7), must the county board or the zoning committee hold a public hearing prior to county board approval or disapproval?

The answer to this question is no.

A regular zoning ordinance can only be validly adopted upon compliance with applicable statutory hearing requirements. *State ex rel. Ryan v. Pietrzykowski* (1969), 42 Wis. 2d 457, 463, 167 N.W. 2d 242. However, although notice and public hearing is typically required in the zoning process under most statutes, the courts are normally satisfied that minimal due process is afforded if some type of general hearing is provided before some governmental entity at some point in the zoning process; and it is also clear that such hearing need not be before the legislative body which will ultimately adopt, approve or reject the proposed zoning. See 8A McQuillin, *Municipal Corporations* (rev. ed. 1965), sec. 25.251, pp. 184-185, 188; *Krimendahl v. Common Council of City of Noblesville* (1971), 256 Ind. 191, 267 N.E. 2d 547; *Burke v. Board of Representatives of Stamford* (1961), 148 Conn. 33, 166 A. 2d 849. Thus, in construing sec. 59.97, Stats. (1947), in *Jefferson County v. Timmel* (1952), 261 Wis. 39, 54, 51 N.W. 2d 518, the court recognized that a town need hold no public hearing before approving county-wide zoning ordinances, saying:

> "As we construe sec. 59.97, Stats. 1947, it is not required that a public hearing be held in each town as a condition precedent to the town boards voting approval of a zoning ordinance, or an amendment thereto, but only that the one county-wide hearing required by sec. 59.97 (2), Stats. 1947, be held. ..." 51 N.W. 2d at p. 526.

Section 60.74 (7), Stats., establishes the statutory procedure which the town must follow in adopting a zoning ordinance or amendment, by referring to sec. 61.35, Stats., which in turn incorporates the provisions of sec. 62.23 (7) (d), Stats. Taken together these statutes only require a public hearing by the appropriate town authorities prior to final adoption of a zoning ordinance or amendment by the town board and do not require a hearing before the county board.

Your inquiries and the facts you have provided deal with procedural considerations relating to the adoption of the town ordinance in question. While I have serious reservations this opinion does not consider the validity or the merits of the ordinance as an exercise of the police power. In this regard, however, I direct your attention generally to 95 A.L.R. 2d 716, 96

A.L.R. 2d 232 and 48 A.L.R. 3rd 1210. I do not have sufficient factual information to consider these issues but I invite your attention to them.

BCL:JCM

Law Enforcement; Police; Criminal Law; Rule-Making; Sheriffs; Public Officials; Constables; Convicted felons may not serve as sheriffs, deputy sheriffs, patrolmen, policemen, or constables as these law enforcement officers are "public officers" within the meaning of that term in sec. 17.03(5), Stats., and they hold an "office of trust, profit or honor in this state" within the purview of Wis. Const. art. XIII, sec. 3. OAG 98-76

December 3, 1976.

HOWARD G. BJORKLUND, *Secretary*
Law Enforcement Standards Board
Department of Justice

You have requested my opinion whether nonpardoned felons may be certified and employed as law enforcement officers under the Wisconsin Constitution and statutes.

As you indicate in your request, convicted felons are presently disqualified from certification by virtue of Wis. Adm. Code section LES 2.01(1)(d), "unless the applicant has been granted an absolute and unconditional pardon." I understand that the Law Enforcement Standards Board has been asked to consider repeal of this rule, and wishes to know the consequences of repeal.

Wis. Const. art. XIII, sec. 3, provides in part:

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

In *Becker v. Green County*, 176 Wis. 120, 184 N.W. 715 (1922), the court defined an "infamous crime" as one punishable by imprisonment in a state prison. Since sec. 939.60, Stats., defines a felony in the same way, it follows that an infamous crime within the meaning of Wis. Const. art. XIII, sec. 3, is a felony. The question remains whether law enforcement offices are offices of "trust, profit or honor" in Wisconsin.

In *Martin v. Smith*, 239 Wis. 314, 1 N.W.2d 163 (1941), the court held that the president of the University of Wisconsin does not hold an office of trust, profit or honor because he is appointed by and serves at the will of the Board of Regents, which may withdraw at any time the powers it has conferred upon him. The court noted that the line between an officer and an employe is often a fine one, but stated:

> " 'An office is where, for the time being, a portion of the sovereignty, legislative, executive or judicial, attaches, to be exercised for the public benefit.'" 239 Wis. at p. 330.

The court noted further that, in general, an officer serves for a definite time and is required to take an oath of office upon assuming his responsibilities, but that the primary characteristic of an officer is that "there is devolved upon him by law the exercise of some portion of the sovereign power of the state in the exercise of which the public has a concern." 239 Wis. at p. 332.

In consequence, in determining whether a law enforcement officer holds a position of public trust under Wis. Const. art. XIII, sec. 3, it is necessary to look to the nature of the duties conferred upon him by law and to determine whether a portion of the sovereign power attaches to him by virtue of his position.

I. CONSTABLES

Town constables are elected biennially at town meetings to serve for a two-year term. As a precondition to serving, they must take an official oath and file an official bond. See secs. 60.19 - 60.22, 60.53, Stats. The duties of a constable are set forth in sec. 60.54, Stats., and include the duties to:

> "(1) Serve within his county any writ, process, order or notice, and execute any order, warrant or execution lawfully directed to or required to be executed by him by any court or officer.
>
> "***
>
> "(5) Impound cattle, horses, sheep, swine and other animals at large on the highways in violation of any duly published order or bylaw adopted at an annual town meeting.
>
> "(6) Cause to be prosecuted all violations of law of which he has knowledge or information.

"***

"(7) Perform all other duties required by any law."

Pursuant to sec. 59.24, Stats., constables may "call to their aid such persons or power of their county as they may deem necessary" for service of processes and the apprehension of persons for breach of the peace or for felony. Under sec. 947.06(1), Stats., they have a duty to "suppress unlawful assemblies" within their jurisdiction and for that purpose may order persons unlawfully assembled to disperse.

Given the nature of their powers and duties set forth above, constables exercise a portion of the sovereign power of the state since they are required to use the police power of the state to apprehend violators of the law. That being the case, they are public officers as that term is defined in *Martin v. Smith, supra,* and therefore nonpardoned felons may not serve as constables.

Section 61.29, Stats., provides that village constables "shall be governed in every respect by the law prescribed for constables in towns." Consequently they, too, hold an office of "trust, profit or honor" within the meaning of Wis. Const. art. XIII, sec. 3.

II. COUNTY SHERIFFS

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

> "Sheriffs ... and all other county officers ... shall be chosen by the electors of the respective counties once in every two years. ..."

Pursuant to sec. 59.13, Stats., a sheriff must file an official bond and take an official oath following his election to office. He shares many of the duties of a constable, among them, the duties to serve processes in civil and criminal actions, to apprehend persons for felonies and breaches of the peace, and to prevent unlawful assemblies. See secs. 59.23, 59.24, 264.07, and 947.06, Stats. In addition, under sec. 59.24, Stats., a sheriff is responsible for preserving peace and for suppressing riots and insurrections within his county.

In view of the similar duties which they exercise it is my opinion that sheriffs, like constables, are public officers within the meaning of Wis. Const. art. XIII, sec. 3. Consequently, nonpardoned felons may not serve as county sheriffs.

III. DEPUTY SHERIFFS

Pursuant to sec. 59.21, Stats., a sheriff, within 10 days of entering upon the duties of his office, shall appoint deputy sheriffs for his county in the manner set forth in that statute. Although deputy sheriffs hold office "on good behavior" rather than for a fixed term (see sec. 59.21 (8)(b), Stats.), they may be required to file an official bond. Sec. 59.22, Stats.

In 3 OAG 672 (1914), it was stated:

> "That a deputy sheriff is an officer has often been held by the courts.
>
> "The deputy sheriff is an officer coeval in point of antiquities with the sheriff. The creation of deputies arises from an impossibility of the sheriff's performing all the duties of his office in person ...."

Furthermore a deputy sheriff is among those persons empowered by sec. 59.24, Stats., to "keep and preserve the peace ... and quiet and suppress all affrays, routs, riots, unlawful assemblies and insurrections" in their respective counties. Consequently the legislature has delegated to deputy sheriffs some portion of the sovereign police power of the state, and I adhere to the opinion of my predecessor, set forth above. Therefore, nonpardoned felons may not serve as deputy sheriffs.

IV. APPOINTED POLICEMEN AND PATROLMEN

Policemen and patrolmen present a more difficult class of law enforcement officers to categorize as either public officers or public employes. They are not elected; they normally serve permanently rather than for a fixed term; and they neither take an official oath nor file an official bond upon assuming their duties. However, as the court stated in *Martin v. Smith*, *supra*, the principal characteristic of an officer is that he exercise some portion of the sovereign power for the public benefit. It is my opinion that some of the powers and duties of police and patrolmen are of a sovereign nature, and consequently that they are officers within the meaning of Wis. Const. art. XIII, sec. 3.

Policemen clearly have been given authority to exercise certain powers of the sovereign for the benefit of the public. Section 62.09(13)(a), Stats., provides in part:

> "... The chief [of police] and each policeman shall possess the powers, enjoy the privileges and be subject to the liabilities conferred and imposed by law upon constables ...."

Thus to the extent that a constable exercises some part of the sovereign power, policemen have been given the same authority.

In addition, policemen have the authority to "arrest with or without process" any person violating any state law or city ordinance, sec. 62.09(13)(a), Stats. Sections 968.24 and 968.25, Stats., permit law enforcement officers, including policemen, to stop persons whom they suspect have committed or are about to commit a crime, to question those persons, and to search them for weapons. See also secs. 968.07(1)(d) and 968.08, Stats., giving policemen the authority to arrest and release persons without a warrant on the basis of probable cause.

These statutes clearly give to policemen powers which are exercised "on the street" and which by their very nature call for substantial independent judgment and discretion on the part of the policeman. As the Illinois Supreme Court found in *Coursey v. Greater Niles Township Publishing Corp.*, 40 Ill.2d 257, 239 N.E.2d 837 (1968):

> "... Although as a patrolman [the plaintiff] is 'the lowest in rank of police officials' and would have slight voice in setting departmental policies, his duties are peculiarly 'governmental' in character and highly charged with the public interest. It is indisputable that law enforcement is a primary function of local government and that the public has a far greater interest in the qualifications and conduct of law enforcement officers, even at, and perhaps especially at, an 'on the street' level than in the qualifications and conduct of other comparably low-ranking government employees performing more proprietary functions. ..."

The court held that patrolmen are within the "public official" classification.

Our own supreme court has decided the question of whether policemen are public officers or employes in both ways. In *Heffernan v. Janesville*, 248 Wis. 299, 21 N.W.2d 651 (1946), the court held that police officers (patrolmen) are not public officers, and therefore are ineligible for back pay for a period of improper

suspension. However, five years later in *Larson v. Lester*, 259 Wis. 440, 49 N.W.2d 414 (1951), the court found that the term "public officers," as used in sec. 270.58, Stats. (1951), included police officers, who consequently could be indemnified for judgments obtained against them for acts committed in their official capacity.

In *Matczak v. Mathews*, 265 Wis. 1, 60 N.W.2d 352 (1953), Justice Currie distinguished the results in the two cases, on the following basis:

> "Some words and phrases are subject to more than one meaning, depending upon the context in which used. The term '*public officer*' falls within this category. A city police patrolman is not a public officer in the sense of having a salary attached to his position which would be due to him if he were wrongfully suspended or ousted from such position irrespective of whether he had sustained any actual damage thereby. On the other hand, a police patrolman is commonly referred to as a police officer and in this sense is a public officer. We are satisfied that it was the intention of the legislature to include police officers within the term '*public officers*' appearing in sec. 270.58, Stats."

For the reasons set forth above, I am satisfied that policemen are also "public officers" in the constitutional sense. Therefore, a felon who has not received an absolute and unconditional pardon may not be appointed to serve as a policeman.

In summary, law enforcement officers in Wisconsin enumerated herein have been delegated some portion of the sovereign power of the state by virtue of their authority to make arrests and to engage in other peace-keeping activities. Whether or not their actions are or may be subsequently nullified by a superior officer or a prosecutor or a court, by apprehending criminals and engaging in similar related activities, they are exercising the police power of the sovereign. In consequence they hold office within the meaning of Wis. Const. art. XIII, sec. 3, as interpreted, and a convicted felon who has not received an absolute and unconditional pardon is ineligible for all such positions.

BCL:WHW

Transportation; Bus Drivers; Licenses And Permits; Motor Vehicles; Automobiles And Motor Vehicles; Schools And School Districts; Public Instruction, Superintendent Of; Safety; Under secs. 121.54(7), 343.12 and 340.01(56), Stats., a school bus and school bus operator need only be provided for the transportation of those students engaged in the extracurricular activity of the school. Exceptions to the requirements of providing a school bus and school bus operator for the transportation of students discussed. OAG 99-76

December 8, 1976.

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

On behalf of the Joint Committee for Review of Administrative Rules, you have asked for my opinion on the following questions:

> "The question to be asked is whether s. 121.54 (7), Wis. Stats., requires extracurricular transportation of school children to be performed solely in school buses as defined in s. 340.01 (56), Wis. Stats., and driven by school bus operators licensed under s. 343.12, Wis. Stats. The department is also requested to ask when school children may be transported to and/or from school in a motor vehicle other than a 'school bus'."

As indicated in your letter, these questions were the subject matter of 64 OAG 45 (1975). The questions were essentially answered in the opinion. However, it appears from the questions being asked that the Committee may not fully understand the views expressed in the opinion.[1] Accordingly, in answering these questions, I will be merely elaborating on the earlier opinion.

It is important in dealing with this question to understand the basic legislative framework which has been created in secs. 121.54(7), 343.12, and 340.01(56), Stats. Those sections, particularly sec. 343.12, which requires that no person shall operate a school bus transporting school children unless he has a

[1] While ch. 120, Laws of 1975, changed the definition of "school bus," contained in sec. 340.01(56) that change does not affect the conclusions reached in 64 OAG 45 (1975).

school bus operator's license, and sec. 340.01(56), which contains a broad definition of school bus, evidence a clear intent on the part of the legislature that, with limited exceptions, children being transported to and from school and children being transported while engaged in extracurricular activities should be transported in vehicles which meet certain minimal safety standards and which are driven by persons who are able to meet the requirements for a school bus operator's license. Thus, the general presumption in looking at particular cases is that children being transported to and from school or children being transported while engaged in extracurricular activities should be transported in vehicles and by drivers which meet the special requirements adopted for the safety of those transported.

EXTRACURRICULAR ACTIVITIES

Section 121.54(7), Stats., does not require the extracurricular transportation of school children to be performed solely in "school buses," as defined in sec. 340.01(56), Stats. The previous opinion concluded that at "casual" or "occasional" times, a vehicle with a seating capacity of less than ten could be used for the transportation of school groups engaged in extracurricular activities (64 OAG at pp. 47, 48). The opinion further concluded that such a vehicle under the circumstances of "casual" or "occasional" use, would not be a school bus and that the driver need not be licensed as a school bus operator (64 OAG at p. 48). The opinion went on to explain, however, that under the law, such use could not be on a regular basis, for the statutory term, "casual" means occurring by chance or without regularity, and the statutory term "occasional" means occurring at irregular or rare intervals (64 OAG at p. 48).

First it should be noted that under secs. 121.54(7) and 340.01(56), Stats., a school bus is only required for the transportation of those groups of students actually "engaged" in the extracurricular activity. In other words, a school bus and licensed school bus operator are only necessary for the transportation of the participants in the activity. As an example, it may be necessary to transport the football team to a game in school buses because they are "engaged" in the extracurricular activity. It would not be necessary to transport persons who are spectators. Further, the statute does not require students driving to extracurricular activities such as dances and transporting other

students, to do so in school buses. This would normally be "casual" or "occasional" use of a particular vehicle.

It has been suggested that "casual" and "occasional" are the antithesis of "planned" and that therefore "planned" trips not falling within any other exemption must be accomplished in a "school bus." This is not the only interpretation available and may be unduly restrictive in light of the fact that virtually all school activities are planned.

Therefore, in conclusion to the first question, it is my opinion that a motor vehicle having a capacity of less than ten, may be used on a "casual" or "occasional" basis to transport groups of students engaged in an extracurricular activity. Such a vehicle would not constitute a "school bus" within the meaning of the law and need not be driven by a licensed school bus operator. Chartered common carrier buses are also an exception to the requirement of providing a school bus and licensed school bus operator. Further, it is only the transportation of student participants in the extracurricular activity that falls within the requirements of providing a "school bus" and licensed school bus operator.

GENERAL EXCEPTIONS

The answer to the second question, which is, "when school children may be transported to and/or from school in a motor vehicle other than a 'school bus'" is found in sec. 340.01(56), Stats., and discussed in 64 OAG at pp. 47 and 48. In summary, the circumstances under which children may be transported to and from school in other than a "school bus" are:

1. The transportation of the student in a vehicle owned or operated by the student's parents or guardians.

2. A vehicle having a capacity of less than ten used for the reciprocal transportation of students.

This exception, found in sec. 340.01(56)(b), Stats., is explained in 64 OAG at p. 48, as the common situation involving two or more families taking turns driving each other's children to and from school. The word "reciprocal transportation" is not a term of precise definition and the Department of Transportation appears to have some latitude in defining this term and in applying it.

3. The transportation of students in buses operated by a common motor carrier.

I am aware that there has been criticism of your department as well as the Department of Public Instruction and my office for what have been alleged to be unduly restrictive applications of these statutes. This criticism is unfortunate and it misses the mark. Our effort has been to give meaning to the terms used by the legislature to deal with this question. This is an area where caution is advised. The school bus laws and the administrative rules adopted pursuant thereto are health and safety measures. Violation of the express standards contained therein amounts to negligence per se in this state and may subject the operator of a vehicle which violates the standards to liability for damages caused as a result. However, as the discussion above indicates the words "extracurricular," "groups," and "reciprocal" are not susceptible of precise definition and are subject to interpretation by the department. The interpretation adopted by your department would be entitled to great weight. Finally, the focus of the efforts of those who would change the law must be the whole legislature which adopted it and has the power to amend it.

I hope this letter sufficiently addresses the questions of the Committee. If not, you may contact Mr. Albert Harriman of this office for further explanation. In this same regard, if you have any questions regarding your proposed administrative rules, feel free to call on Mr. Harriman for assistance.

BCL:DJH:CAB

Schools And School Districts; Education; Tuition; Public Assistance; Residence, Domicile And Legal Settlement; The term "legal settlement" as used in sec. 121.77(1), Stats., is interpreted. OAG 100-76

December 28, 1976.

THE HONORABLE, THE ASSEMBLY
Legislature

1975 Assembly Resolution 47 requests my interpretation of the term "legal settlement" as used in sec. 121.77(1), Stats., which provides:

3. The transportation of students in buses operated by a common motor carrier.

I am aware that there has been criticism of your department as well as the Department of Public Instruction and my office for what have been alleged to be unduly restrictive applications of these statutes. This criticism is unfortunate and it misses the mark. Our effort has been to give meaning to the terms used by the legislature to deal with this question. This is an area where caution is advised. The school bus laws and the administrative rules adopted pursuant thereto are health and safety measures. Violation of the express standards contained therein amounts to negligence per se in this state and may subject the operator of a vehicle which violates the standards to liability for damages caused as a result. However, as the discussion above indicates the words "extracurricular," "groups," and "reciprocal" are not susceptible of precise definition and are subject to interpretation by the department. The interpretation adopted by your department would be entitled to great weight. Finally, the focus of the efforts of those who would change the law must be the whole legislature which adopted it and has the power to amend it.

I hope this letter sufficiently addresses the questions of the Committee. If not, you may contact Mr. Albert Harriman of this office for further explanation. In this same regard, if you have any questions regarding your proposed administrative rules, feel free to call on Mr. Harriman for assistance.

BCL:DJH:CAB

Schools And School Districts; Education; Tuition; Public Assistance; Residence, Domicile And Legal Settlement; The term "legal settlement" as used in sec. 121.77(1), Stats., is interpreted. OAG 100-76

December 28, 1976.

THE HONORABLE, THE ASSEMBLY
Legislature

1975 Assembly Resolution 47 requests my interpretation of the term "legal settlement" as used in sec. 121.77(1), Stats., which provides:

> "121.77 Admission of nonresident pupils. (1) Every elementary school and high school shall be free to all persons of school age who reside in the school district. If facilities are adequate, a school board may admit nonresident pupils who meet the entrance requirements to the schools of the school district. Nonresident pupils shall have all the rights and privileges of resident pupils and shall be subject to the same rules and regulations as resident pupils. The school board shall charge tuition for each nonresident pupil, except a nonresident pupil having legal settlement, as defined in s. 49.10, in the school district."

You ask specifically "... does a student who is a minor and who moves with his family from school district A to school district B maintain legal settlement in school district A for one year, and hence retain the right to attend school in school district A without paying tuition, when no member of the student's family is receiving public assistance?"

Chapter 102, Laws of 1959, which created sec. 49.10, Stats., relating to legal settlement, was discussed in 50 OAG 86 (1961), wherein it was noted that the purpose of ch. 102, Laws of 1959, was to "fix responsibility for support of a dependent upon the political subdivision which presumably benefited from his productive years."

Section 49.10(2), Stats., provides that a minor has the legal settlement of his father if living or his mother if his father is dead or in event of legal change of custody, the legal settlement of the child is the same as the person having custody.

Earlier legislation did use the concept of "legal settlement" in the adjustment of public school tuition for minor students who were a public charge. (See ch. 430, sec. 2, Laws of 1935.) This legislation was repealed by ch. 122, Laws of 1941. Thereafter, use of the concept of legal settlement was not employed until the enactment of ch. 45, Laws of 1967, which recreated sec. 40.91(1). In the recodification process instituted by ch. 92, Laws of 1967, this section was renumbered 121.77(1). It was amended to its present form by ch. 313, Laws of 1967. There is nothing in the history of this legislation to indicate that the Legislature intended to qualify or otherwise limit the term "legal settlement" or to limit the effect of the incorporation of sec. 49.10 into sec. 121.77(1).

Section 49.10, Stats., applies to all residents of the State of Wisconsin. A determination of legal settlement becomes a necessary factor only when an individual has been the beneficiary of a public grant or service and the liability for the cost of which the disbursing municipality or agency seeks to fix by determining the legal settlement of the beneficiary.

Under the facts which you relate, the legal settlement of the minor student would remain in district A for a period of one year (49.10(7)). The answer to your question, therefore, is yes, the minor student would be entitled to attend school district A tuition free but only for a period of one year. Without going into the complexities of sec. 49.10, it should be observed that legal settlement of the minor student could extend beyond the period of one year if, for instance, a dependent person's support were received before the end of the year.

BCL:JWC

Reimbursement; Public Officials; Appropriations And Expenditures; Expenses; Salaries And Wages; Counties; County Board; Only county board supervisors can serve on committees of the county board under sec. 59.06, Stats., and persons who are not supervisors cannot serve thereon or be compensated by per diem or receive reimbursement for expenses. OAG 101-76

December 29, 1976.

JAMES C. EATON, *District Attorney*
Barron County

You request my opinion whether persons *who are not county board members and who are serving on a nonstatutory county board committee* such as a Committee on Aging may be paid a per diem.

The answer to this question is no.

If the committee is a *county board committee*, its membership must be limited to members who are supervisors. Section 59.06(1), Stats., provides that county board committees shall be appointed "*from the members* of the board" (emphasis added), and sec. 59.06(2), Stats., provides for the compensation to be paid such members. 21 OAG 389 (1932); 22 OAG 79 (1933); 23 OAG

712 and 834 (1934); 24 OAG 649 (1935); 57 OAG 130 (1968). Persons on county board committees who are not county board members have no official status.

35 OAG 169 (1946) is not in conflict. That opinion was not concerned with a committee of the county board appointed under sec. 59.06, Stats., but with a statutory farm drainage board prescribed by then sec. 88.04(10), Stats., whose membership was not limited to county board members.

This is not to say that a county board is without power to create a committee on aging composed of noncounty board members and to provide compensation and expense reimbursement for the members serving thereon. As you suggest, sec. 59.07(93), Stats., is one statute which grants the board power to involve itself in matters pertaining to the aged. There are other statutes which directly or indirectly authorize a county to engage in activities which are of special concern to the aged.

Where a county has power to act in a given area and the duty has not been constitutionally or statutorily assigned to an officer elected under Wis. Const. art. VI, sec. 4, or to the county executive, county assessor or judge, and the matter is not one of such statewide concern that it must be carried out by the use of the officer, board, commission or committee established by or under the statute which prescribes composition and qualifications for membership, the county board has power to create any committee, commission, position or office to carry out such power as it deems necessary and to determine the method of selection of any officers involved. See sec. 59.025(1), (2), (3) and (4), Stats.

A committee created by a county board under sec. 59.025(3)(a), Stats., is not a committee of the board. In view of secs. 59.03(4) and 66.11(2), Stats., there is a question whether membership could include county board members. However, sec. 59.025(3)(c), Stats., would permit such duties to be carried out by a committee of the board. Where a committee is created by a county board under sec. 59.025(3)(a), Stats., and is not composed of county board supervisors, the county board can authorize payment of compensation in the form of salary or per diem to committee members and can reimburse such members for their necessary and reasonable expenses by reason of sec. 59.15(2) and (3), Stats. Where the duty is carried out by a committee of the

county board composed of county board members, any right to compensation for such services is governed by secs. 59.06(2), 59.03(1)(c), (2)(c), (3)(i) and (j), Stats.

BCL:RJV

Vocational, Technical And Adult Education, Board Of; Vocational And Adult Education; Transportation; Funds; Appropriations And Expenditures; VTAE Board may subsidize public bus line to provide transportation under sec. 38.14(6), Stats. OAG 102-76

December 30, 1976.

EUGENE LEHRMANN, *State Director*
Board of Vocational, Technical and Adult Education

You have asked the following questions:

> "1. May funds available for general use in the Northeast Wisconsin District VTAE treasury be used to pay subsidies to a publicly operated bus company which wishes to extend services to the VTAE campus?
>
> "2. May funds available in the student council budget be used for the same purpose?"

You have informed me that you foresee a situation where a bus line extended to a VTAE campus and used by both students and non-students begins to operate at a loss. In order to continue service to the campus, the bus company asks the VTAE district board to subsidize the line to the extent of the difference between revenue derived from fares and operating costs. The funds referred to in your second question are in the student council budget and are raised by a non-compulsory student activity fee.

Assuming these facts, it is my opinion that VTAE district funds may be used to subsidize a publicly operated bus company.

A VTAE district, being a quasi-municipal corporation (63 OAG 187 (1974)), has only such powers given by statute or necessarily implied. *Schaut v. Joint School District*, 191 Wis. 104, 210 N.W. 270 (1926).

Section 38.14(6), Stats., provides:

> "(6) TRANSPORTATION. The district board may provide transportation for students within the district, but no state aid may be paid for this service.

The language of this section is not specific as to the means of providing transportation. The district board may decide whether or not it will provide transportation, and also the manner and costs of such transportation. Thus in my opinion, it is within the board's discretion to decide that a subsidy of a publicly owned bus company as contemplated by the Northeast Wisconsin District is the best means of providing transportation for its students. Any benefit derived by non-students from the continuation of the bus company's services may be considered incidental.

In answer to your second question, sec. 38.14(6), Stats., speaks only to the authority of the district board concerning transportation of students. Student council funds derived from noncompulsory student fees while under the control of the board in its fiduciary relationship to the students are not, properly speaking, district funds. The authorization for expenditure of such funds rests with the student council which, depending on that body's bylaws, can presumably authorize their use for any lawful purpose including transportation.

BCL:WHW

STATUTES AND CONSTITUTIONAL PROVISIONS, SESSION LAWS, LEGISLATIVE BILLS, OPINIONS OF THE ATTORNEY GENERAL, AND RESOLUTIONS REFERRED TO AND CONSTRUED

U.S. CODE

UNITED STATES CONSTITUTION

WISCONSIN CONSTITUTION

RESOLUTIONS

BILLS

SESSION LAWS

OPINIONS

STATUTES

INDEX

Page

Page

Page

Page

Page

Page

Page

County Board

Page

Page

Page

Drugs

Education

Page

Page

Page

Page

Page

Page

Page

Page

Page

Page

Page

Page

Public Property

Public Records

Page

Page

Page

Page

Page

Page

Page

Page

Page

Taxation

Towns

Page

Page

Page

Zoning