

OPINIONS
OF THE
ATTORNEY GENERAL

OF THE
STATE OF WISCONSIN

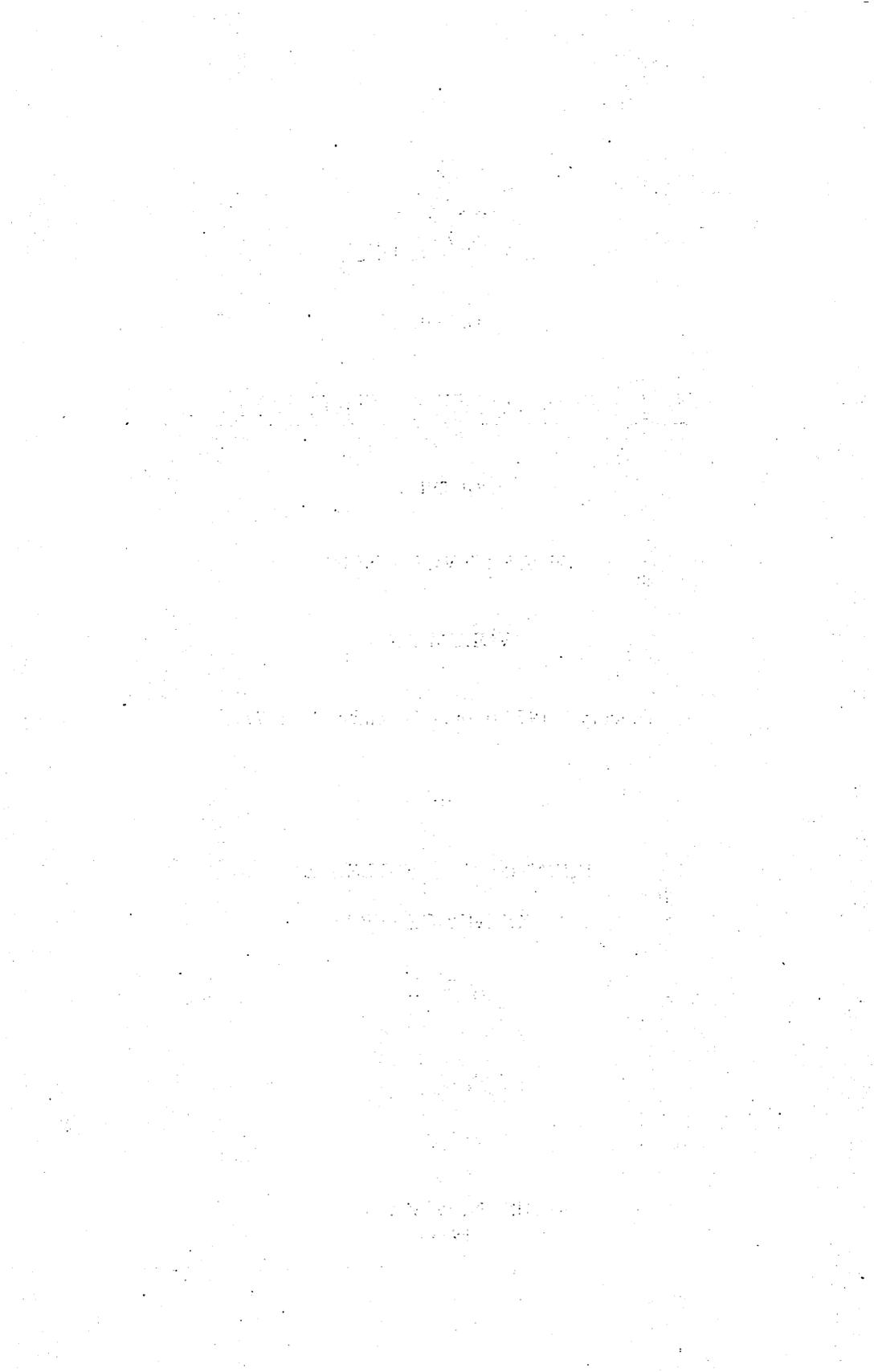
VOLUME 66

January 1, 1977 through December 31, 1977

BRONSON C. LA FOLLETTE
ATTORNEY GENERAL



MADISON, WISCONSIN
1977



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
ORLANDS. 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 Nazianzfrom Oct. 8, 1974 to Nov. 25, 1974
BRONSON C. La FOLLETTE, Madison.....from Nov. 25, 1974 to

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LEGAL SERVICES DIVISION

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HOWARD J. KOOP	Executive Assistant
WILLIAM H. WILKER	Admin., Legal Services Division
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WILLIAM D. BUSSEY ¹	Assistant Attorney General
MARYANN CALEF	Assistant Attorney General
JOHN W. CALHOUN	Assistant Attorney General
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BRUCE A. CRAIG	Assistant Attorney General
LEROY L. DALTON	Assistant Attorney General
THOMAS DAWSON	Assistant Attorney General
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ROBERT W. LARSEN ²	Assistant Attorney General
ALAN M. LEE	Assistant Attorney General
HUMPHREY J. LYNCH ^{1 2}	Assistant Attorney General
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EDWARD MARION	Assistant Attorney General
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JAMES H. McDERMOTT	Assistant Attorney General
MAUREEN A. McGLYNN	Assistant Attorney General
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SCOTT C. MINTER	Assistant Attorney General
ROY G. MITA	Assistant Attorney General
MARGUERITE M. MOELLER	Assistant Attorney General
JOHN C. MURPHY	Assistant Attorney General

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JOHN D. NIEMISTO	Assistant Attorney General
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JAMES H. PETERSEN	Assistant Attorney General
THEODORE L. PRIEBE	Assistant Attorney General
ROBERT D. REPASKY.....	Assistant Attorney General
DAVID C. RICE.....	Assistant Attorney General
PETER B. RITZ.....	Assistant Attorney General
RAYMOND M. RODER ²	Assistant Attorney General
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E. WESTON WOOD.....	Assistant Attorney General
E. GORDON YOUNG	Assistant Attorney General
MICHAEL L. ZALESKI	Assistant Attorney General

¹Resigned, 1977

²Appointed, 1977

OPINIONS
OF THE
ATTORNEY GENERAL

Volume 66

Subdivisions; Plats And Platting; Boundaries; Easement; Right Of Way; For the purpose of determining lot area under the provisions of sec. 236.02(8), Stats.:

- (1) If a lot abuts a public or private road or street, the total lot size (area) does not include the land extended to the middle of the road or street.
- (2) An easement of access to a parcel is not to be included in determining the total lot area.
- (3) A body of navigable water separates a parcel of land as effectively as does a public highway. OAG 1-77

January 10, 1977.

WILLIAM R. BECHTEL, *Secretary*
Department of Local Affairs and Development

You have requested my opinion on a series of questions relating to the calculation of land area for purposes of construing and applying sec. 236.02(8), Stats., and Wis. Adm. Code section H 65.03. Section 236.02(8), Stats., defines "subdivision" for purposes of ch. 236, Stats.:

"(8) 'Subdivision' is a division of a lot, parcel or tract of land by the owner thereof or his agent for the purpose of sale or of building development, where:

"(a) The act of division creates 5 or more parcels or building sites of 1 1/2 acres each or less in area; or

"(b) Five or more parcels or building sites of 1 1/2 acres each or less in area are created by successive divisions within a period of 5 years."

The significance of this section is its specification of the conditions under which a division of land will trigger the application of ch. 236, Stats.

Your first question, which appears substantially identical to your questions four (c) and five, is as follows:

"If a lot abuts a *public* road or street, does the total lot size (area) include the land extended to the middle of the road or street?

"a. Is the answer to this question affected by the status of a public street. Specifically, does it make a difference if the public street is a town road, city street, County Trunk Highway, State Trunk Highway or Federal Highway?"

I assume this question is asked in light of the long-standing Wisconsin rule, stated in *Walker v. Green Lake County*, 269 Wis. 103, 69 N.W.2d 252 (1955), quoting from 25 Am. Jur. *Highways*, sec. 132, p. 426, as follows:

"In the absence of a statute expressly providing for the acquisition of the fee, or of a deed from the owner expressly conveying the fee, when a highway is established by dedication

or prescription, or by the direct action of the public authorities, the public acquires merely an easement of passage, the fee title remaining in the landowner.”

The leading case on the subject appears to be *Spence v. Frantz*, 195 Wis. 69, 217 N.W. 700 (1928):

“It has long been the established law in Wisconsin that the abutting owner has title to the center of the highway or street adjacent to his property, subject to the public easement. It is equally clear that the conveyance of abutting property transfers the legal title to the land to the center of the adjacent street or highway, in the absence of a clear intent to the contrary, even where the conveyance names the highway as the boundary of the parcel conveyed. *Gove v. White*, 20 Wis. 425, 432.” 195 Wis. at 70.

The same rule is applied to the owners of subdivision lots abutting public streets, whether or not the street was included in the recorded plat. *Williams v. Larson*, 261 Wis. 629, 53 N.W.2d 625 (1952).

In my opinion, however, the area of abutting roads or streets is not to be included in determining the size of lots under sec. 236.02(8), Stats., regardless of whether the public holds a fee or an easement, and regardless of the status of such road or street.

This question has apparently never been judicially treated in Wisconsin in the context of sec. 236.02(8), Stats. A similar question has been raised, however, in the context of determining the area of a homestead exempt from execution by creditors. *Weisbrod v. Daenicke*, 36 Wis. 73 (1874). The statute involved in *Weisbrod* exempted as homestead a quantity of land not to exceed one-quarter acre, owned and occupied by any resident of the state. In its construction of this provision, the court held that the exempt area is to be determined without inclusion of the land to the center of the street. The rationale of the holding is set forth in the opinion as follows:

“... while the owner of the abutting lot has an estate in fee to the center of the street, and has the right to the enjoyment of any use of his estate consistent with the servitude to which it is subjected, yet ... he has no right to obstruct the street in front of his lot in an improper manner or for an unreasonable time. *Hundhausen v. Atkins, imp., ante*, p. 29. And it is too obvious

for argument that the use of a street by the public, and its use and occupancy by the owner for a homestead, are wholly inconsistent with each other. The word ‘*occupied*’ has controlling force in determining the question before us and the proper construction of the statute. The object of the statute doubtless is, to secure to the debtor a home--land which he may live upon, occupy and possess as and for a homestead. He has no right to occupy the street for such a purpose, to build upon it, to cultivate it, or to appropriate it to any domestic use. Now suppose the defendant’s lots had been bounded by two wide avenues, like some in this city: is it not apparent, if the land in the streets is computed in the quantity exempt, that the owner would have but a small parcel which he could occupy as a home for his family?” 36 Wis. at 76.

Wegge v. Madler, 129 Wis. 412, 109 N.W. 223 (1906), which cites *Weisbrod, supra*, with approval, is cited as authority in *Loveladies Property Owners Association, Inc. v. Barnegat City Service Co., Inc.*, 60 N.J. Super. 491, 159 A.2d 417 (1960), a New Jersey case dealing with substantially the same issue you raise. That case involved an action to enjoin development of certain platted areas in a subdivision for residential purposes, and to enjoin issuance of building permits, on the ground that lots laid out in the plat did not meet minimum area requirements set forth in the township zoning ordinance. Access to the lots in question was to be provided by a series of private easements. If the area of these easements were to be included in calculating the area of abutting lots, those lots would have satisfied minimum lot size requirements. The court there stated:

“If these access strips had been dedicated by the developers as public streets instead of being reserved as private easements ... no colorable claim for their inclusion in the required lot area would be maintainable, and this despite the fact that title in fee to the strip may rest in the abutting property owners. See *Clarks Lane Garden Apartments v. Schloss*, 197 Md. 457, 79 A. 2d 538 (Ct. App. 1951). In the leading case of *Montgomery v. Hines*, 134 Ind. 221, 33 N.E. 1100 (Sup. Ct. 1893) ... the court voiced the self-evident proposition that:

“‘[l]ot’ and ‘street’ are two separate and distinct terms, and have separate and distinct meanings. The term ‘lots,’ in its common and ordinary meaning, includes

that portion of the platted territory measured and set apart for individual and private use and occupancy; while the term "streets" means that portion set apart and designated for the use of the public ***.' 33 N.E., at page 1101. Thus the determination, in terms of relevance to the present inquiry, of which area is a lot and which a street, these areas being mutually exclusive, depends not on the way title is held, or platted areas apparently bounded on a filed map, but rather on the function which each separate area is to serve as observable by inspection of the plat. ..." 159 A.2d at pp. 422-423.

See also *Sommers v. Mayor and City Council of Baltimore*, 215 Md. 1, 135 A.2d 625 (1957); and *Peake v. Azusa Valley Savings Bank*, 37 Cal. App.2d 296, 99 P.2d 382, 384 (1940).

The functional distinction of *Loveladies*, *supra*, is consistent with *Weisbrod*, *supra*, and appears equally applicable to the construction of sec. 236.02(8), Stats. The purposes of ch. 236, Stats., are set forth in sec. 236.01, Stats. In order to construe sec. 236.02(8), Stats., so as most effectively to accomplish those purposes, especially "to prevent the overcrowding of land" and "to provide for adequate light and air," its 1 1/2 acre cutoff should be calculated exclusive of abutting roads and streets.

As indicated above, sec. 236.02(8), Stats., specifies those divisions of land to which ch. 236, Stats., will apply. Once it has been determined that ch. 236, Stats., is applicable, Wis. Adm. Code ch. H 65, adopted by the Department of Health and Social Services in furtherance of its plat review responsibilities, may also be applicable.

H 65 is authorized by the following statutory provisions:

"(1) Approval of the preliminary or final plat shall be conditioned upon compliance with:

"(d) The rules of the department of health and social services relating to lot size and lot elevation necessary for proper sanitary conditions in a subdivision not served by a public sewer, where provision for such service has not been made. ..." Sec. 236.13(1)(d), Stats.

“(f) The department [of health and social services] may make and enforce rules relating to lot size and lot elevation necessary for proper sanitary conditions in the development and maintenance of subdivisions not served by a public sewer, where provision for such service has not been made.” Sec. 140.05(f), Stats.

Apparently Wis. Adm. Code ch. H 65, does contain its own rule governing treatment of highway easements, found in Wis. Adm. Code section H 65.03:

“**Easements.** Easements for streets or utilities which are greater than 20 feet wide shall not be considered in determining minimum lot area unless approved in writing by the department.”

However, such rule is only applicable for determining minimum lot area for the purposes of Wis. Adm. Code ch. H 65.

Your second question is:

“If a lot abuts a *private* road or street, does the total lot size (area) include the land extended to the middle of the road or street?

“a. Is the answer to this question affected by the number of owners of the private road or street, i.e., single or lot owners association ownership?”

In the context of sec. 236.02(8), Stats., it is my opinion that two requirements must be met in order for the area of a private street to be includable in the area of a lot. First, implicit in the terms adopted by sec. 236.02(8), Stats., to identify areas of land, i.e., lot, parcel and tract, is a concept of unity of ownership. 52 OAG 411 (1963); and *Griffin v. Denison Land Co.*, 18 N.D. 246, 119 N.W. 1041 (1909). As noted in my discussion of your first question, the basis of the argument for inclusion of the area of public roads was private ownership by abutting owners of land underlying the road. In the case of private roads where the abutting owner has no fee interest in the area of the road, no colorable claim can be made to inclusion of the road's area in determining the size of the abutting lot.

Second, even where unity of ownership exists, the area sought to be included must satisfy the functional test laid out above. *Loveladies*, *supra*, expressly holds that the distinction between

streets and lots applies to private as well as public streets. Thus the private driveway on the conventional lot, lying entirely upon an integrated area of land of single ownership, and subject to whatever domestic uses its owner selects, should be included in determining lot size. But a private drive providing a right-of-way through the lands of others, which is not part of an integrated area of land, and not subject to domestic use by the owner, should not be included.

Your third question is:

“Is an easement that has been granted over the land of others for the purpose of ingress and egress to a parcel to be included in the total lot area for the purpose of sec. 236.02 (8) and/or sec. H 65.03, Wis. Admin. Code?”

The answer is no. The unity of ownership and functional distinction criteria apply. Where an easement has been granted for purposes of ingress and egress, the area subject to the easement must be excluded in calculating lot size on the functional basis, just as a public highway is excluded.

Fourth, you ask whether a single lot may consist of two parcels separated by land owned by another party, such as a public highway.

The weight of authority requires that sec. 236.02(8), Stats., be construed as providing a negative response.

“‘The word lot means any portion, piece or division of land.’ It ‘denotes a single piece of land, lying in a solid body and separated from contiguous land by such subdivisions as are usual to designate different tracts of land, and in the subdivision of a tract of land into city lots, each lot in a city constitutes but a single piece or parcel of land.’” 2 McQuillin, *Municipal Corporations* (1966 Rev. Vol.), sec. 7.19, p. 360.

“... Tracts of land, separated by a public thoroughfare, do not constitute a single lot.” 101 C.J.S. *Zoning*, sec. 144, p. 905.

See also *Sanfilippo v. Bd. of Review of Town of Middletown*, 96 R.I. 17, 188 A.2d 464 (1963), where a board of review finding that three parcels constituted a single lot was overturned as arbitrary on the basis of physical facts. Among the facts considered was the intervention of a public highway setting one parcel apart from the others.

A lot for purposes of sec. 236.02(8), Stats., cannot consist of separate parcels which are not susceptible to integration into a single unit of land. This includes the situation where the parcels are separated by land in other possession, such as a public highway.

Wis. Adm. Code section H 65.03(4)(b), permits use of combinations of lots to make up the area required by that chapter. However, inasmuch as the purpose of that chapter is to require sufficient land area for sewage disposal, it is clear that a parcel set off by a highway which is not available for sewage disposal purposes should not be included.

Finally, you ask whether a lot may extend across navigable water such as a channel or lagoon.

The answer is again no. A body of navigable water separates a parcel of land as effectively as does a public highway. Land owners abutting on navigable streams hold a qualified title to the center of the stream bed. *Muench v. Public Service Comm.*, 261 Wis. 492, 501, 53 N.W.2d 514 (1952). Title to the lands underlying navigable lakes is held by the state. *State v. McFarren*, 62 Wis.2d 492, 498, 215 N.W.2d 459 (1974). Abutting land owners are prohibited from placing structures and obstructions in navigable waters without first securing a permit from the Department of Natural Resources. Sec. 30.12, Stats. Therefore, parcels separated by navigable waters are no more susceptible to functional integration than parcels separated by public highways.

I am acutely aware that the answer given to question three above may encourage potential developers to pattern their developments in such a way as to separate lands to be divided by dedicating public roads and/or creating private roads separating lots which are then further divided into less than 5 parcels of 1 1/2 acres each or less thereby avoiding statutory platting requirements. You may wish to monitor developments to determine whether this is in fact occurring and to suggest that the Legislature change the law if it appears that the public purposes underlying the platting laws are being frustrated.

BCL:JCM

Agriculture; Loans; Banks And Banking; Bonds; Funds; A proposal for a state guarantee of loans to young farmers would violate Wis. Const. art. VIII, sec. 3, and a proposal to utilize the state's bonding power to provide low interest loans to young farmers is not authorized by Wis. Const. art. VIII, sec. 7(1) and (2)(a). OAG 2-77

January 11, 1977.

PATRICK J. LUCEY

Governor

You have asked for my opinion on the constitutionality of two legislative proposals. The first would provide a state guarantee of loans to young farmers patterned after a similar Minnesota law. The second would utilize the state's bonding power to provide low interest loans to young farmers.

Each proposal, if enacted into law, would violate the Wisconsin Constitution.

Under the first proposal the state would guarantee loans made by private lenders. In the case of default, the state would be assigned the lender's security and interest in the loan in exchange for payment of the loan by the state. An appropriation would be made from the general fund to a special account in the state treasury to pay lenders for defaulted loans.

Article VIII, sec. 3, of the Wisconsin Constitution provides that the credit of the state shall never be given or loaned, in aid of any individual, association or corporation.

State credit is not loaned unless the state becomes legally liable for debt. *State ex rel. La Follette v. Reuter*, 36 Wis.2d 96, 153 N.W.2d 49 (1967). The giving or lending of the state's credit occurs when it results in the creation by the state of a legally enforceable obligation on the state's part to pay one party an obligation incurred or to be incurred in favor of that party by another party. *State ex rel. Wisconsin Development Authority v. Dammann*, 228 Wis. 147, 280 N.W. 698 (1938). There is no giving or lending of the state's credit when the state does nothing but incur liability directly to the party in

whose favor the obligation is incurred, as in the case where the state lawfully employs someone to perform an authorized service for the state. *Id.* at 196, 197. In *State ex rel. American Legion 1941 Convention Corporation of Milwaukee v. Smith*, 235 Wis. 443, 461, 293 N.W. 161 (1940), the supreme court held the constitutional prohibition was violated by a state appropriation which was to be used as security for a convention corporation's performance of its obligation under a contract between the corporation and the American Legion.

Since the first proposal results in a legally enforceable obligation for the state to pay to a lender an obligation incurred in favor of the lender by a young farmer, it violates art. VIII, sec. 3 of the Wisconsin Constitution.

As to the second proposal, art. VIII, sec. 7, paragraphs (1) and (2)(a) of the Wisconsin Constitution set forth the limited purposes for which the state may contract public debt. Nothing therein provides authority for the state to borrow money to make funds available for low interest loans to young farmers. A recent constitutional amendment has enabled the state to make funds available for veterans' housing loans, but not for the type of loans contemplated by the second proposal.

BCL:APH

Franchises; Contracts; Securities Law; Auto Dealers; The Wisconsin Fair Dealership Law, ch. 135, Wis. Stats., is a public policy declaration concerning the unwarranted termination of dealerships and is designed to protect dealers from overreaching by the grantors of those dealerships. It would therefore be improper for parties to waive, directly or indirectly, the effect of ch. 135 and, in cases where the "dealer" is also a "franchisee" under ch. 553, Wis. Stats., the Commissioner of Securities has the right to deny, suspend or revoke a franchisor's registration or revoke his exemption if the franchisor has contracted to violate or avoid the provisions of ch. 135.

OAG 4-77

January 20, 1977.

JEFFREY B. BARTELL

Commissioner of Securities

You have requested my opinion concerning the effect of ch. 135, Stats., (the "Wisconsin Fair Dealership Law") upon ch. 553, Stats., (the "Wisconsin Franchise Investment Law") which is administered by your office.

You indicate that the relationship between the two chapters becomes relevant to your office by virtue of the fact that a "franchise" as defined in sec. 553.03(4)(a), Stats., could also be a "dealership" as defined in sec. 135.02(2), Stats. If this is the case, you state that all franchise offerings registered or exempted by your office under ch. 553 would also have to comply with ch. 135. This raises the two questions you have posed.

1. May a "franchisee," defined in sec. 553.03(5), Stats., waive or modify any rights or remedies provided to him under ch. 135, Stats.

2. Does the Commissioner of Securities have the authority, under sec. 553.28(1)(h), Stats., to deny, suspend or revoke the franchise registration or revoke the franchise exemption of any offering that contains provisions contrary to ch. 135. You also ask whether you have the right to excise these provisions from the contract and whether denial or revocation of a franchise offering could be based on public policy grounds even if a dealer waives his statutory rights and remedies.

QUESTION ONE

Your question regarding a dealer's (franchisee's) waiver of the provisions of ch. 135 poses four hypothetical examples.

- (1) the dealer expressly waives and renounces his remedies under ch. 135.
- (2) the dealership agreement contains provisions by which the dealer agrees that all aspects of the contract are reasonable, thereby eliminating the protective "good cause" provision of sec. 135.02(6)(a), Stats.
- (3) the dealership agreement deviates from the provisions of sec. 135.04, Stats., which require 90 days prior notice

of termination and a 60-day period for rectification of deficiency by the dealer.

- (4) an explicit provision whereby the parties contract that the dealership agreement will be governed by the laws of a state which has no Fair Dealership Law.

Example One: The central question in situations where parties to an agreement seek a waiver of statutory provisions is whether public policy or public welfare concerns exist within the statute. If they are present, the terms of the statute cannot be waived by the parties to a contract. The Wisconsin Supreme Court, in *Pedrick v. First National Bank of Ripon*, 267 Wis. 436, 439, 66 N.W.2d 154 (1954), stated:

“‘An agreement is against public policy if it ... violates some public statute, ...’ 12 Am. Jur. Contracts, p. 663, sec. 167. ‘... courts of justice will not recognize or uphold any transaction which, in its object, operation, or tendency, is calculated to be prejudicial to the public welfare, to sound morality, or to civic honesty. *The test is whether the parties have stipulated for something inhibited by the law or inimical to, or inconsistent with, the public welfare.*’ ... Agreements against public policy or prohibited by public law ‘... cannot be enforced by one party against the other, either directly or indirectly by claiming damages or compensation for breach of them.’ 12 Am. Jur., Contracts, p. 715, sec. 209.”

In *Kuhl Motor Co. v. Ford Motor Co.*, 270 Wis. 488, 71 N.W.2d 420 (1955), the court considered a statute (sec. 218.01(3)(a), Stats.) which protected motor vehicle dealers from unwarranted termination by automobile manufacturers much in the same way that dealers are protected under ch. 135. The *Kuhl* court found that a waiver of the dealership protection law under examination would be against public policy and void. See also *Posnanski v. Hood*, 46 Wis.2d 172, 180, 174 N.W.2d 528 (1970); *Vic Hansen & Sons, Inc. v. Crowler*, 57 Wis.2d 106, 117, 203 N.W.2d 728 (1973).

An examination of ch. 135 indicates that, as in *Kuhl*, it seeks to abolish an inequality between the contracting parties. Section 135.03, Stats., flatly prohibits improper termination of a dealership. Section 135.05 provides that no agreement for binding arbitration may contain criteria that would provide protection less than that afforded by ch. 135. Under sec. 135.06, Stats., damages are measured

as a consequence of the grantor's "*violation*" and injunctive relief can be granted for "*unlawful*" termination. (Emphasis supplied.) The import of ch. 135 is clearly to protect against overreaching due to an inequality between the parties. The terms of the statute bring it well within the category of statute that expresses public policy and seeks to protect the public welfare. Consequently, it is my opinion that the provisions of ch. 135 cannot be waived.

Example Two: This example differs from the first only in that the waiver is implicit rather than explicit. By agreeing that all terms of the contract are reasonable, the dealer effectively precludes his right to challenge a termination based upon his failure to comply with "reasonable" requirements of the dealership agreement. See sec. 135.02(6)(a), Stats. My conclusion is the same as in example one. The provisions of ch. 135 cannot be waived.

Example Three: Your third example involves a reversal of the statutory notice provision in sec. 135.04 (which requires a 90 day notice of termination of dealerships and 60 day right of the dealer to cure the deficiency upon which the termination is based). The legislature has set forth a legislative scheme designed to achieve its public policy objectives. To sanction any changes therein would threaten the scheme itself and enable the grantors of dealerships a legal basis to exact waivers of ch. 135 and subsequently seek to sustain their validity on this legal premise. Furthermore, the terms of sec. 135.04 are mandatory in nature and leave little room for a liberal construction. It is my opinion that the waiver in example three of your inquiry should also not be recognized.

Example Four: Your fourth example asks whether the parties can stipulate that the laws of another state shall apply. If the dealership transaction falls within Wisconsin's enforcement jurisdiction then the previously discussed prohibition against waiver would apply. See also *Estate of Knippel*, 7 Wis.2d 335, 342, 96 N.W.2d 514 (1959), which holds that contracts intended to commit a fraud on the law are invalid. This view is also supported by Corbin in his treatise on contracts:

"... It would be regarded as contrary to sound policy to enforce a bargain that by the domestic law of the forum would not be valid, *if the demonstrated purpose of a provision that the law of another state shall be applicable is to enable the citizens*

of the forum to nullify requirements of the local law.” Corbin, Contracts, sec. 1446, pp. 486-487. (Emphasis supplied.)

Once it is determined that Wisconsin public policy is involved in the transaction, and it is further determined that the transaction itself is subject to the enforcement jurisdiction of the state, then it can be stated that the parties cannot contractually waive or modify the effect of the statute. To do so would defeat its purpose.

QUESTION TWO

Your second question asks whether the violation of ch. 135 can be used as a basis for denial, suspension and revocation of franchise registrations or exemptions pursuant to sec. 553.28(1)(h), Stats. You also ask whether you can require that contractual terms found in violation of ch. 135 be stricken from franchise agreements subject to ch. 553.

Section 553.28(1)(h), Stats., permits denial, suspension or revocation of any registration statement or the revocation of any exemption if the Commissioner finds:

“(h) that the franchisor’s enterprise or method of business includes or would include activities which are illegal where performed.”

It seems quite clear that a franchisor’s franchise agreement involves his “method of business.” His income is derived not from retail sales or services but, directly or indirectly, from the various provisions of the agreement. The contractual right to terminate a franchisee would manifestly affect the relationship between the parties and thus the “business” of the franchisor.

The second aspect of the question is whether inserting provisions in the franchise agreement which would violate ch. 135, Stats., is an “illegal activity.” Illegal is defined in *Blacks Law Dictionary* (4th Ed.) at p. 882 as conduct “not authorized by law” or “contrary to law.” Chapter 135 is sufficiently explicit in its terms to indicate that noncompliance therewith is illegal as above defined. Section 135.06 speaks in terms of one who “violates” this chapter and the grantor’s “violation” and “unlawful” termination. The fact that no penalty attaches to a violation of ch. 135 is not material to the question. A prohibition alone is sufficient. *Menominee River B. Co. v. Augustus*

Spies L & C Co., 147 Wis. 559, 571, 132 N.W. 1118 (1912), and *Kuhl Motor Co. v. Ford Motor Co.*, *supra*, at p. 498.

Note that it is not necessary that the illegal provisions become operative before you may exercise your authority under sec. 553.28(1)(h), Stats. "The test is whether the parties have *stipulated* for something inhibited by law." (Emphasis supplied.) *Pedrick v. First National Bank of Ripon*, *supra*, 267 Wis. (1954), at p. 439.

It is therefore my opinion that contractual provisions evidencing a violation of ch. 135 would be illegal conduct within the purview of sec. 553.28(1)(h), Stats. Accordingly, you would have the right to deny, suspend or revoke a franchise registration or exemption which contained any such provisions. Although I can find no authority which would authorize you to unilaterally excise offending provisions, it would seem that you could require the parties to do so as a condition of registration or exemption.

Since I have found that statutory rights and remedies granted under ch. 135 are not waivable, your question concerning denial and revocation of a franchisor's registration, if they were waivable, need not be answered.

BCL:BAC

Counties; County Board; Contracts; Governor; Labor; Federal Aid; The Governor can designate counties as agencies of the state to contract with nonprofit private agencies to utilize funds to provide public service jobs under Federal Comprehensive Employment and Training Act. OAG 5-77

January 26, 1977.

PHILIP E. LERMAN, *Executive Director*
State Manpower Council

You request my opinion whether counties acting through their respective boards of supervisors have power to contract with private nonprofit agencies for public service employment positions utilizing funds from Titles II or VI of the Federal Comprehensive Employment and Training Act. You advise that the Governor has

designated the State Manpower Council to administer the program and that funds are channeled through your Council as the state has qualified as prime sponsor under the Act.

You indicate that contractual agreements take two forms:

- “1. Where counties of under 50,000 population sub-contract with private non-profit agencies at our request, so as to minimize our administrative costs by minimizing the number of contracts we have to manage, (or)
- “2. Where counties of over 50,000 receive flat grant amounts from the State Manpower Council and determine what public service employment positions they will fund using monies allocated by us and then sub-contract with private non-profit agencies they select.”

You state that the purpose of the funds is to provide public services while providing employment for persons currently unemployed or underemployed and that the use of the funds is restricted by contract to wages and fringe benefits for the participants plus a small amount for administrative costs.

I am of the opinion that counties have such power if their role is set forth in the State Comprehensive Manpower Plan approved by the Governor and Secretary of Labor and providing that they have been designated by the Governor to perform specific duties for the state pursuant to sec. 16.54(6), Stats., which provides:

“16.54 (6) The governor may accept for the state the provisions of any act of congress whereby funds or other benefits are made available to the state, its political subdivisions, or its citizens, so far as the governor deems such provisions to be in the public interest; and to this end the governor may take or cause to be taken all necessary acts including (without limitation because of enumeration) the making of leases or other contracts with the federal government; the preparation, adoption and execution of plans, methods, and agreements, and the designation of state, municipal or other agencies to perform specific duties.”

Also see sec. 16.54(1), (2), (4), (5), (7), Stats.

Section 16.54(7), Stats., provides:

“The governor may accept for the state at all times the provisions of any act of congress whereby funds are made available to the state for any purpose whatsoever, including the school health program under the social security act, and perform all other acts necessary to comply with and otherwise obtain, facilitate, expedite, and carry out the required provisions of such acts of congress.”

There is no need to set forth the provisions of the Federal Law at length. The Title II you refer to is the Public Employment Programs created by Title II of the Publ. L. 93-203 (1973) and Title VI refers to Emergency Job Programs created by Publ. L. 93-567 (1974). They appear at 29 U.S.C. secs. 801-885, and secs. 961-992. The purpose of both is to include “development and creation of job opportunities and the training, education, and other services needed to enable individuals to secure and retain employment at their maximum capacity.” 29 U.S.C. sec. 811. The law gives a restrictive definition to “public service,” defines “low-income level,” “offender,” “underemployed persons” and “unemployed persons.” It is clear that the intent of the law is to grant most benefits to individual participants, but contemplates cooperation and, where necessary, contractual arrangements between federal, state, and local agencies of government and community-based organizations of a nonprofit private nature and in some instances, other private agencies, institutions and organizations. See 29 U.S.C. sec. 815, 981.

County boards have only such legislative powers as are conferred upon them by statute, expressly or by clear implication. *Maier v. Racine County*, 1 Wis.2d 384, 385, 84 N.W.2d 76 (1957). However, a county is a “governmental agency of the state, performing primarily the functions of the state locally.” *Kyncl v. Kenosha County*, 37 Wis.2d 547, 555, 155 N.W.2d 583 (1968).

Section 59.01(1), Stats., provides that a county is a body corporate and is authorized “to make such contracts and to do such other acts as are necessary and proper to the exercise of the powers and privileges granted and the performance of the legal duties charged upon it.” Section 59.02(1), Stats., provides that “The powers of a county as a body corporate can only be exercised by the board thereof, or in pursuance of a resolution or ordinance adopted by it.” Insofar as contracts between the state and respective counties are concerned, the provisions of sec. 66.30(2), Stats., as recreated by

ch. 123, Laws of 1975, which relates to intergovernmental cooperation agreements, while not determinative of the question you raise, is material.

This situation is different than the one addressed in 64 OAG 208 (1975). Although the Legislature has not expressly provided that counties may participate in the federal program with which we are here concerned, the power to receive and disburse the funds arises from sec. 16.54(6) and (7), Stats. Section 16.54, Stats., was not involved in 64 OAG 208 (1975).

Consequently it is my opinion that the county can act in cooperation with and as an agency of the state in the carrying out of the federal program when the role of the county is included in the State Comprehensive Manpower Plan approved by the Governor and Secretary of Labor, the Governor has designated the counties to perform specific duties, including, if appropriate, the contracting or subcontracting with private nonprofit agencies for the state pursuant to sec. 16.54(6) and (7), Stats., and the program operates in accordance with the federal law involved.

BCL:RJV

Truant Officers; Minors; Juvenile Court; Criminal Law; Liability;
A person cannot be charged with intentionally contributing to the delinquency of a minor under sec. 947.15(1)(a), Stats., on the basis of an allegation that the person either harbored a runaway or truant child, aided in the running away, or in some way encouraged the truancy or the running away, because truancy and uncontrollability are not included under the definition of "delinquent" under sec. 48.12(1), Stats. OAG 6-77

January 28, 1977.

FREDERICK A. FINK, *District Attorney*
Washington County

Your predecessor requested an opinion concerning the construction of sec. 947.15(1)(a), Stats., which deals with contributing to the delinquency of a minor. Specifically, he asked whether a person could be charged with contributing to the

delinquency of a minor on the basis of an allegation that the person either harbored a runaway or truant child, aided in the running away, or in some way encouraged the truancy or running away, in light of changes in sec. 48.12, Stats., removing truancy and uncontrollability from the definition of delinquent.

In responding to this question, I shall assume that the conduct alleged is intentional.

In my opinion, a person could not be charged with contributing to the delinquency of a minor on the basis of such an allegation.

Section 947.15, Stats., reads:

“Contributing to the delinquency of children; neglect; neglect contributing to death. (1) The following persons may be fined not more than \$500 or imprisoned not more than one year in county jail or both, and if death is a consequence may be fined \$1,000 or imprisoned not more than 5 years:

“(a) Any person 18 or older who intentionally encourages or contributes to the delinquency or neglect of any child; or

“(b) Any parent, guardian or legal custodian who by neglect or disregard of the morals, health or welfare of his child contributes to the delinquency of that child.

“(2) An act or failure to act contributes to the delinquency or neglect of a child, although the child does not actually become neglected or delinquent, if the natural and probable consequences of that act or failure to act would be to cause the child to become delinquent or neglected.”

The definition of delinquent is contained in sec. 48.12, Stats.:

“JURISDICTION OF COURT OVER CHILDREN

“Jurisdiction over children alleged to be delinquent or in need of supervision. The juvenile court has exclusive jurisdiction, except as provided in ss. 48.17 and 48.18 over any child:

“(1) *Who is alleged to be delinquent because he has violated any federal criminal law, criminal law of any state, or any county, town or municipal ordinance that conforms in substance to the criminal law; or*

“(2) *Who is alleged to be in need of supervision because:*

“(a) He is habitually truant from school or home; or

“(b) He is uncontrolled by parent, guardian or legal custodian; or

“(c) He habitually so deports himself as to injure or endanger the morals or health of himself or others.” (Emphasis supplied.)

Before the passage of ch. 125, sec. 316, Laws of 1971, there was no subsec. (2) under 48.12. The law before 1971 read:

“**Jurisdiction over children alleged to be delinquent.** The juvenile court has exclusive jurisdiction except as provided in ss. 48.17 and 48.18 over any child who is alleged to be delinquent because:

“(1) He has violated any state law or any county, town, or municipal ordinance; or

“(2) He is habitually truant from school or home; or

“(3) He is uncontrolled by his parent, guardian or legal custodian by reason of being wayward or habitually disobedient; or

“(4) He habitually so deports himself as to injure or endanger the morals or health of himself or others.”

The effect of the 1971 amendment was to remove truancy and uncontrollability from the definition of delinquency. Truancy and uncontrollability are therefore now relevant only to the question of whether a minor is considered “in need of supervision.”

The Wisconsin Supreme Court has held that secs. 947.15(1)(a) and 48.12, both concerning the delinquency of a child, being *in pari materia*, must be construed together. *Jung v. State*, 55 Wis.2d 714, 720, 201 N.W.2d 58 (1972). At this time, the criterion for delinquency under sec. 48.12 is whether the child has violated a criminal law or a parallel ordinance. Thus, only if an adult encourages or contributes to the child’s violation of such a criminal law or ordinance may that adult be charged under sec. 947.15 as contributing to the delinquency of a minor. Since truancy and uncontrollability are no longer considered indications of delinquency, contributing to a child’s truancy or uncontrollability would not amount to contributing to the delinquency of a minor.

Another effect of the 1971 amendment of sec. 48.12 was to remove from the definition of delinquency the habitual deportment now described in sec. 48.12(2)(c). An allegation of intentionally encouraging or contributing to such deportment is not involved in your question, but if it were, such an allegation would not constitute a proper charge, because such deportment is no longer an element of delinquency.

BCL:JHM

Licenses And Permits; Marriage And Divorce; Vital Statistics; Names; Real Estate Examining Board; Real Estate Brokers; Real Estate Examining Board cannot prescribe the name to be used on an application for real estate broker's license. Under sec. 296.36, Stats., the Board should routinely accept name changes of licensed brokers, unless detriment to the public, another professional or the profession is shown. Sex and marital status of the new or renewal license applicant do not justify special procedures or requirements as to names. Use of two names discussed. OAG 7-77

January 31, 1977.

ROY E. HAYS, *Executive Secretary*
Real Estate Examining Board

You have requested my opinion regarding names under which you may issue initial or renewal licenses to married women real estate brokers. Specifically, you ask whether the board should issue or renew licenses in the applicant's birth-given ("maiden") surname or her husband's surname where the applicant has never used her husband's name; has used her husband's name; or is changing from or to use of her husband's surname.

For reasons I will discuss in more detail below, there is nothing distinctive about the sex or marital status of the license applicant in the situations you pose. Although I will respond directly to your question, I will also discuss applicable law and procedures your Board should follow with regard to: license applications of married female applicants who use *any* surname different from their husbands'; initial and renewal applications of persons who use one name for

professional purposes and another for other purposes; and persons who are changing their names, other than through marriage or divorce, from the names in which they were licensed by your Board.

1. In what name should the Board issue an initial or renewal license to a married female applicant who has not used her husband's surname? Nothing in the statutes or common law authorizes the Board to require a woman applicant to be licensed in any name other than that which she consistently uses as her own name. Her use of a surname other than her husband's is not relevant to your licensing procedures, whether the name be her birth-given name, that of an adoptive parent, a previous husband, or some other surname. See *Matter of Natale*, Mo. 1975, 527 S.W.2d 402.

I find nothing in ch. 452, Stats., the Real Estate Examining Board Code, specifying or even referring to names to be used by new applicants. Section 296.36, the general name change statute, does not become relevant unless the person has already been licensed by your Board and is changing his or her name. This is not the case in your first fact situation.

An examination of sec. 452.05 (license applications, contents) indicates that your only concerns in evaluating a license application are: 1) identification of the licensee and determination of the scope and location of the licensee's business; and 2) determination of the "trustworthiness and competency" of each applicant. Section 452.10, license revocations, is perhaps beyond the scope of your questions, although subsec. (1)(a) permits revocation for "a material misstatement in the application for such license." The use of a particular name or names by an applicant could hardly be a "material misstatement" unless it served to thwart the purposes of identification, integrity and competence. The specific name given by the applicant is immaterial, so long as you and the public can identify the licensee readily through consistent use of the name for business and professional purposes.

The common law principles applied to names likewise do not dictate that a married woman applicant use the same surname as her husband, or that she use any particular surname other than that of her choice. The general rule at common law, adopted by Wis. Const. art. XIV, sec. 13, is that in the absence of a statute to the contrary, all persons, including married and divorced women, can adopt whatever name they please as their "legal" name if for an honest purpose. They

can change that name at will, gaining a new name by reputation. See 63 OAG 501 (1974) and other Attorney General opinions cited therein; *Kruzel v. Podell*, 67 Wis.2d 138, 151, 226 N.W.2d 458, 67 A.L.R. 3d 1249 (1975); *Stuart v. Bd. of Supervisors of Elections*, 295 A.2d 223, 226 (Md. 1972); MacDougall, "Married Women's Common Law Right to Their Own Surnames," 1 Womens Rights Law Reporter 2, 4 (1972) regarding the common law generally; and "Women's Name Rights," 59 Marq. L. R. 876, at 878 and 882 (Winter 1976).

A person's "true" or "legal" name is the name by which s/he is known, and which the person uses with no intent to defraud or inflict pecuniary loss. See 34 OAG 72, 73 (1945); and "Women's Name Rights," *supra*, 59 Marq. L. R. at 882.

The common law of names has been adopted (Wis. Const. art. XIV, *supra*) and remains in force in Wisconsin except where clearly abrogated by statute. See *Kruzel, supra*, 67 Wis.2d at 157; 63 OAG at 502; 35 OAG 178 (1946); 20 OAG 627 (1931); MacDougall, "Women's Names in Wisconsin," 48 Wis. Bar Bulletin #4, pp. 30, 31 (Aug. 1975) and citations therein.

In your first question, where no change of name is involved, the Legislature has not abrogated a woman's common law right to be known by whatever name she wishes when she applies for an initial or renewal broker's license. The *Kruzel* case confirms that a woman's surname does *not* change to that of her husband at marriage unless she chooses to adopt his name by consistent usage. 67 Wis.2d at 152.

2. In what name should the Board license a married woman applicant who "has used" her husband's surname? The answer to this question depends on whether you are referring to: a) a woman who was licensed under one name, and then married and assumed her husband's name; b) a woman who has used her husband's surname in all of her dealings with the Board; or c) a woman who has used or uses her husband's surname for some purposes, but uses her birth-given or other surname for all business and professional purposes.

If the applicant married and assumed her husband's surname, after being licensed under a different name, you should renew her license in her "married" name if she so requests. Although she has changed her name, sec. 296.36 specifically exempts from its requirements any name change by marriage or divorce.

If the applicant has consistently used her husband's surname for all purposes, including her contacts with your Board, issue or renew her license in that name. Her husband's surname has become her legal name by her habitual use of it.

I assume your question was directed toward the applicant who has used or uses her husband's name for some purposes, usually social, but wishes to use a different name for business and professional purposes. The use of a second name--whether called "assumed," "fictitious," "professional," "stage," or "married"--is not unique to women. See for example *In re Merolevitz*, 70 N.E.2d 249 (Mass. 1946), in which a petitioner whom birth and school records identified as "Israel Merolevitz" had been known to his friends, business associates, and the public for 15 years as "Irving Merrill."

Under common law, a person may use more than one name and may enter a contract or conduct business under any name s/he wishes, so long as no fraud is involved. See Coke, Litt. 3(a), cited at fn. 11, MacDougall, *supra*, 48 Wis. Bar Bull. #4; *Dunn v. Palermo*, 522 S.W.2d 679 at 689 (Tenn. 1975); and *In re Petition of Hauptly*, 312 N.E.2d 857 (Ind. 1974). "The law is chiefly concerned with the identity of the individual, and when that is ascertained and clearly established, the act will be binding on him and on others." 57 Am. Jur. 2d, *Names* sec. 22, pp. 289, 290, quoted in *In re Mohlman*, 216 S.E.2d 147 (NC 1975). Use of a second or "assumed" name is recognized, for example, in sec. 403.401(2), Stats.: "A signature is made by use of any name, including any trade or assumed name, upon an instrument, ..." and in sec. 403.203, Stats.

The Wisconsin Supreme Court early held that a married woman could validly execute business documents in her birth-given name, even though she was generally known by her husband's surname. *Lane v. Duchac*, 73 Wis. 646, 41 N.W. 962 (1889). The majority in *Kruzel*, *supra*, recently reiterated with approval the *Lane* court's holding that "we are aware of no law that will invalidate obligations and conveyances executed by and to her in her baptismal name, if she choose to give or take them in that form. Hence, were she the owner of the note and mortgage in suit, it would be no defense to her action upon them that they were executed to her by her baptismal name." *Lane*, 73 Wis. at 654, quoted in *Kruzel* at 67 Wis.2d 147.

The Wisconsin Legislature appears to have limited this common law right to use more than one name, by implying that licensed

professionals may practice under only one name, and by regulating name changes in some cases. However, sec. 296.36, Stats., does not purport to prescribe the name to be used by a licensed professional in *all* of his or her legal and social relationships.

The history of sec. 296.36 demonstrates a strong legislative concern with the consistency and ease of identification of professionals, and with prevention of injury to the public and the profession from fraudulent changes of name. Chapter 372, sec. 5, Laws of 1943, absolutely prohibited any change from the name in which a professional was originally licensed, except for change by marriage. Chapter 13, Laws of 1945, modified that prohibition to instances in which the licensing board finds that the name change, not occurring at marriage or divorce, operates to compete unfairly, mislead the public, or otherwise damage the public or the profession.

This concern with consistent, prompt, nonfraudulent identification would be difficult to protect if professionals could practice simultaneously under different names. Statutes and regulations concerning name changes, such as Wis. Adm. Code section REB 2.03(4)(b), all refer to the "name," singular, which the licensee uses or wishes to use. I am therefore not advising you that any applicant, male or female, may be licensed simultaneously under more than one name.

This does not mean that you may refuse to license an applicant, who is known for some nonprofessional purposes by a name other than that proposed for the license, solely because he or she uses a different name for nonprofessional acts. You may require some reasonable evidence that the applicant is known by his or her licensed name, or proposes to use that name habitually and consistently for all professional acts. However, since sec. 296.36 is being read in this instance as a statute in derogation of the common law right to "assume" a second name, I decline to extend the law beyond its express application to professional acts. See *Grube v. Moths*, 56 Wis.2d 424, 437, 202 N.W.2d 261 (1972).

If you wish, you may note in your records the name by which the applicant is known for some nonprofessional purposes. Such a cross-reference may be useful in the rare instance when a broker's nonprofessional acts have some bearing on his or her integrity or competence as a broker.

3. What procedures should the Board follow with applicants who are changing their names? If the applicant has changed his or her name before applying for the initial license, no special procedures are required. If the change is being made after licensing, in most cases you may merely conduct an informal review of the change.

Section 296.36, Stats., does not come into play if the person has effected the name change before applying for a license. In such a situation, your proper interest in the trustworthiness and competence of the applicant permits you to require the applicant to list any prior names under which he or she has been known; whether the applicant has held another license under such prior name; and whether the applicant has incurred revocation or other sanctions under such name.

If the applicant has recently effected a common law rather than a judicial change of name, he or she may not yet be generally known by the new name. Under such circumstances, you may require reasonable proof of intent to use the new name consistently, such as a new social security registration and driver's license.

As mentioned earlier, the sex and marital status of the applicant should not impose any special burdens in the application process. Under the guidelines stated by the *Kruzel* court for future judicial name changes (67 Wis.2d at 153), the common law should be permitted to operate unless evidence is put forward to show that some fraud or deception was intended by the name change.

The common law does not control if the applicant is already licensed under a former name, and the new name is not being assumed because of marriage or divorce. The wording of sec. 296.36 does not specify whether you are to hold a hearing on every licensee's "non-marital" name change, or only when an appropriate person objects to the change. Since sec. 296.36 restricts the professional's common law right to assume a nonfraudulent new name at will, the section must be construed strictly. See *Grube v. Moths, supra*, 56 Wis.2d at 437.

Applying the foregoing principles, I decline to extend sec. 296.36 beyond its express terms, and believe that you need not hold a hearing concerning the name change of a licensed broker unless and until a person with some reasonable "stake" in the matter objects.

You may require reasonable reporting of name changes. Some boards use a simple form which I can furnish to you. You may determine the extent and nature of notice to be given regarding the change. Some of the licensing boards which my office advises have merely checked their records for the locality in which the licensee practices in order to determine possible confusion or unfair competition. If you periodically send general mailings to all of your licensees, you might routinely include a list of name changes.

The name change should be presumed valid until found, after hearing, to be unfair competition, misleading, or otherwise detrimental to the profession or the public.

My interpretation of sec. 296.36 differs from that of my predecessor in 1946, who stated in dicta that sec. 296.36 was not an exclusive statutory method for effecting a name change "except as regards persons licensed, as enumerated above, to practice a profession." 35 OAG 178 at 180. That opinion, concerning student name changes, correctly states that a person has an inherent right to change his or her name "in the absence of a provision making the statutory method exclusive," and that the Legislature may prohibit name changes under certain circumstances. 35 OAG at 179. However, nothing in sec. 296.36 requires professionals to go to court for a name change, any more than a nonprofessional must go to court. As stated in *Kruzel v. Podell, supra*, at p. 151, "The licensing laws recognize that a licensed person may change either his given name or his surname to one other than that under which he was originally licensed unless the changed name operates to compete unfairly with another practitioner or misleads the public to its detriment or the detriment of a profession." *Kruzel* thus makes it clear that the last sentence of 35 OAG 178 is overly broad.

I am aware that the dissent in *Kruzel, supra*, at pp. 154-161, suggests that the majority opinion requires a woman to make one, irrevocable choice of a name at marriage. "It ends the right of a married woman ... to use either her married name, or her maiden name, or both." *Kruzel* dissent, 67 Wis.2d at 157. I assume this may be why you have limited your inquiry to married female applicants, rather than all applicants changing names or using two names. I can find nothing in the *Kruzel* majority, Wisconsin statutes, or any other reported case, which imposes an irrevocable choice of a surname upon any person at marriage. The *Kruzel* majority correctly reflected

the nature of a common-law name change, in which one acquires a new name by reputation, by referring to "habitual" or "consistent" use of a husband's surname. A woman's acquaintances will not think of her under her new "married" name unless she "habitually" identifies herself to them by that name. However, to read "habitual" and "consistent" as meaning "perpetual" and "exclusive" is to go farther beyond the common law and the *Kruzel* holding than I am willing to venture. Accord, see "Women's Name Rights," *supra*, 59 Marq. L. R. at 876, and MacDougall, *supra*, 48 Wis. Bar Bull. at 31.

In conclusion, you may follow a relatively simple procedure in handling the cases of licensee name changes which are actually subject to sec. 296.36. As to new license applicants, the Board need only consider whether it has sufficient information to identify the licensee readily and consistently by the name given, and whether information bearing on the applicant's use of another name pertains in any manner to the person's integrity or competence as a real estate broker.

BCL:MVB

Employer And Employee; Industry, Labor And Human Relations, Department Of; Fair Employment; Discrimination; Labor; Fair Employment Practices Act; The Department of Industry, Labor and Human Relations may approve or be party to a job discrimination settlement agreement which includes less than the full back pay liability if the agreement eliminates the discrimination. If the agreement does not eliminate the discrimination the Department may proceed in the matter before it. OAG 8-77

February 1, 1977.

VIRGINIA B. HART, *Chairman*

JOHN C. ZINOS, *Commissioner*

Department of Industry, Labor and Human Relations

You have requested my opinion on two questions concerning the powers of the Commission of the Department of Industry, Labor and Human Relations under the Wisconsin Fair Employment Practices Act, Stats. 111.31 *et seq.*

You first ask whether it is permissible for the Department to approve or otherwise be a party to a settlement agreement which provides the complainant with a financial settlement which is less than the total back pay liability (minus the statutory setoffs contained in sec. 111.36(3)(b), Stats.) of the respondent at the time the agreement is made.

A state agency such as the Department has only those powers which are either expressly conferred by law or which are necessarily implied.

Where a complaint charging discrimination or discriminatory practices in a particular case has been received by the Department, and assuming the Department finds probable cause to believe that discrimination has been or is being committed, the statutes establish certain procedures and confer certain powers to eliminate the discrimination and resolve the dispute. Section 111.36(3)(a), Stats., provides in part:

“(3)(a) If the department finds probable cause to believe that any discrimination has been or is being committed, *it shall immediately endeavor to eliminate the practice by conference, conciliation or persuasion. ...*” (Emphasis added.)

The “conference, conciliation, or persuasion” provision is a mandatory preliminary procedure in proceedings by the Department where a complainant has alleged discrimination or discriminatory practices. See *Watkins v. ILHR Department*, 69 Wis.2d 782, 789-793, 233 N.W.2d 360 (1975); *Murphy v. Industrial Comm.*, 37 Wis.2d 704, 711, 155 N.W.2d 545, 157 N.W.2d 568 (1968). The “conciliation” requirement also reflects the overriding legislative intent to effect the elimination of discrimination and thus better serve the public policy declared by the Fair Employment Practices Act by peaceful persuasion and mutual assent whenever practicable. See *Ross v. Ebert*, 275 Wis. 523, 529, 82 N.W.2d 315 (1957); *Watkins, supra*; *Murphy, supra*. Because the Act clearly favors this policy of peaceful settlement, I believe the Department can approve or be party to an agreement which will effect the elimination of alleged discrimination or unlawful discriminatory practices at any stage in the proceeding. However, where a settlement agreement eliminates the discrimination or discriminatory practice, there is no authority to proceed further since such agreement constitutes conciliation. *Watkins v. ILHR Department, supra*. It follows that the Department

must determine on the facts in each case whether full back pay is needed to eliminate the discrimination.

It is my opinion that the Department may approve a mutual agreement by the parties of a financial settlement which is less than the total back pay liability as long as the Department concludes that the agreement will effect the elimination of any unlawful practice or act, and will effectuate the purposes of the Fair Employment Act.

In your second question you ask:

“In the event that parties to a complaint filed with the Department enter into an agreement to settle the claim without Department approval, may we continue to proceed against the employer under Wis. Stats. 111.31 et seq?”

The principle objective of the Wisconsin Fair Employment Practices Act is the elimination of discrimination in employment. To accomplish that objective, the Department has been granted certain powers, including the power to “receive and investigate complaints charging discrimination or discriminatory practices in particular cases.” Sec. 111.36(1), Stats.

The statutes, principally sec. 111.36, Stats., set forth a number of specific powers designed to aid the Department in its investigation of such complaints. These statutory provisions clearly place the primary responsibility for securing the elimination of discrimination upon the Department. The primary effect of the original complaint is to set in motion the machinery for an inquiry by the Department.

At the preliminary stages, it is the Department that has the responsibility to endeavor to eliminate the practice by conference, conciliation or persuasion. Where such attempts to eliminate the discrimination fail, the Department prepares the notice of hearing which sets forth the allegations of discrimination which the respondent must answer. The Department is empowered to make written findings and order appropriate remedies where it finds after hearing that the respondent has engaged in discrimination. Sec. 111.36, Stats. Thereafter, any person aggrieved by non-compliance with the Department's order may have it enforced specifically by suit in equity. The Department can also seek enforcement of its orders as provided in ch. 101, Stats. Sec. 111.36(3)(c), Stats.

These statutory provisions imply that the Department may proceed against the employer even where parties to the complaint filed with the Department have withdrawn.

In fact the power to proceed may be essential to effectuate the purposes of the Act where the original complaint alleges a pattern of practice that constitutes unlawful discrimination, either historical or ongoing, against more than one person.

It is, therefore, my opinion that the Department's authority to proceed against the employer is not terminated when the original complainant and the respondent reach a settlement agreement that does not eliminate the discriminatory practice. The question of what will eliminate the "practice of discrimination" is a matter for the Department to determine on a case-by-case basis within its discretion.

BCL:JN

Bids And Bidders; Contracts; Housing; Counties; Public Works; County Board; County housing authority, in providing housing for the low income and elderly, can, by reason of sec. 59.075(4), Stats., utilize "Turnkey" construction method without bids. OAG 9-77

February 2, 1977.

WILLIAM J. LUNDSTROM, *Corporation Counsel*
Outagamie County

You state that Outagamie County, pursuant to sec. 59.075, Stats., has created a county housing authority which is considering acquisition of 240 low income, elderly and family housing units in the county. Assuming the authority can comply with the federal standards, you inquire whether the authority may utilize the "Turnkey" construction method¹ without the necessity of complying with the bidding requirements of sec. 66.40(24), Stats.

¹ The "Turnkey method" is a program under which a local housing authority contracts for completed housing to be produced by the developer on his own land or on land which authority may provide and upon completion of construction and the "turning over of the keys" to the authority, payment for the project is made by the authority. *Lehigh Const. Co. v. Housing Authority of City of Orange*, 267 A.2d 41, 42, 56 N.J. 447 (1970).

I am of the opinion that it can.

A county is required to utilize competitive bids with respect to the construction of public works. See 56 OAG 181 (1967). However, we are considering here a county housing authority, which by reason of secs. 59.075 and 66.40(9), Stats., is a “public body and a body corporate and politic” separate and apart from the county. 62 OAG 303 (1973).

Section 66.40(24), Stats., provides:

“(24) **Bids.** When a housing authority has the approval of the council for any project authorized under sub. (9) (a) or (b), said authority shall complete and approve plans, specifications and conditions in connection therewith for carrying out such project, and shall then advertise by publishing a class 2 notice, under ch. 985, for bids for all work which said authority must do by contract. The contract shall be awarded to the lowest qualified and competent bidder. Section 66.29 of the statutes shall apply to such bidding.”

Section 59.075, Stats., permits county boards to create county housing authorities and subsection (1) provides:

“(1) Sections 66.40 to 66.404 shall apply to counties, *except as otherwise provided in this section*, or as clearly indicated otherwise by the context.” (Emphasis added.)

A county housing authority would have to comply with the bidding requirements of sec. 66.40(24), Stats., unless some other statute excepted it from that duty. Section 59.075(4), Stats., is a statute of exception and provides:

“(4) County housing authorities created under this section are urged to utilize those provisions of the federal housing laws whereby private developers may acquire land, build housing projects according to federal standards and turn them over to such housing authorities for due consideration.”

It is my opinion that where a county housing authority has the approval of the county board for any project authorized under sec. 66.40 (9)(a) or (b), Stats., which would include acquisition or construction of low income, elderly and family housing units, acquisition may be by the "Turnkey" construction method without the necessity of complying with the bidding requirements of sec. 66.40(24), Stats., if the provisions of federal law are complied with.

BCL:RJV

Public Officials; Expenses; Per Diems; Salaries And Wages; Officers And Offices; Vacancies; Governor; Status of appointees to newly created state offices discussed. Appointments to such offices do not fill vacancies. Persons entering into the duties of such offices may become de facto officers and be entitled to per diems and expenses. Acts of such de facto officers are binding and effectual. Problems discussed. OAG 11-77

February 4, 1977.

PATRICK J. LUCEY
Governor

SARAH M. DEAN, *Secretary*
Department of Regulation and Licensing

Questions have arisen as to the legal status of nominees to recently created state offices, which have previously been unfilled. It is my understanding that you wish my advice on such questions. The state offices involved are positions created by ch. 86, Laws of 1975, consisting of new citizen memberships on the various examining boards of this state, on the Board of Nursing, and on the Pharmacy Internship Board. Nominees to the offices in question are "nominated by the governor, and with the advice and consent of the senate appointed." Sec. 15.08(1), Stats.

All the nominees in question have been nominated while the 1975 Legislature has been in session. To my personal knowledge, one such nominee was nominated while the 1975 Legislature was in recess, and others among such nominees may have been nominated during a recess of the 1975 Legislature; but for a reason shown below, it is

immaterial whether such nominations were made during a recess of the Legislature.

None of the nominations in question has been confirmed by the Senate. Consequently, none of the nominees involved have been appointed with the advice and consent of the Senate.

At least one of such nominees (the one above mentioned who was nominated while the Legislature was in recess) has not as yet assumed the duties of the position for which he has been nominated, and this may be true of others among the nominees here involved. However, some of such nominees have already assumed the duties of their respective positions, and have engaged in full-fledged participation as board members. It is my understanding that such nominees (hereinafter called "active nominees") have collected per diems under sec. 15.08(7), Stats., and have also been reimbursed for their actual and necessary expenses incurred in the performance of their duties. It is possible that some or all of the active nominees have unpaid claims for per diems and actual and necessary expenses.

GENERAL DISCUSSION

The first question raised is whether a nominee of the Governor to a newly created, previously unfilled state office, not yet appointed to such office with the advice and consent of the Senate, and not yet performing its duties, can lawfully proceed to perform those duties prior to his appointment to such office with the advice and consent of the Senate. In my opinion, he cannot.

A basic and general principle here involved, supported by ample case law, is that, "Where an appointment is made as the result of a nomination by one authority and confirmation by another, *the appointment is not valid and complete until the action of all bodies concerned has been taken.*" (Emphasis supplied; 67 C.J.S. *Officers* sec. 32.) This principle is subject, however, to exceptions created by the Legislature. Two such exceptions are to be found in sec. 17.20(2), Stats., and in sec. 14.22, Stats.

Section 17.20(2), Stats., provides that:

"Vacancies occurring during the recess of the legislature in the office of any officer normally nominated by the governor, and with the advice and consent of the senate appointed, shall be filled by appointment by the governor for the residue of the

unexpired term, subject to confirmation by the senate at the next regular session thereof if the term for which the person was so appointed has not expired. *Any such appointment subject to confirmation by the senate shall be in full force until acted upon by the senate*, and when confirmed by the senate shall continue for the residue of the unexpired term.” (Emphasis supplied.)

Section 17.20(2), Stats., does not apply to a newly created state office, previously unfilled, because it deals only with vacancies and appointed state offices. “Vacancy” is defined in sec. 17.03, Stats. Newly created, unfilled state offices are not considered vacancies.¹

Section 14.22, Stats., provides that,

“Whenever the governor is authorized to make any nomination to office for appointment by and with the advice and consent of the senate, and the legislature is *not in session* at the time such office should be filled, he may make appointment thereto, subject to the approval of the senate at the next succeeding session of the legislature, *and all such appointments shall be as valid and effectual from the time when so made until 20 days after such meeting of the legislature as if he possessed the absolute power of appointment.*” (Emphasis supplied.)

This section is broad enough to encompass appointment by the Governor to a newly created, previously unfilled office, but only in the situation where the Legislature “is not in session at the time such office should be filled.” While the Legislature is “in recess” when it suspends business procedure for a comparatively short time, the “not in session” language found in sec. 14.22, Stats., connotes a termination or dissolution of the session of the Legislature. See *State ex rel. Thompson v. Gibson*, 22 Wis.2d 275, 289, 125 N.W.2d 636 (1964). The 1975 Legislature was “in recess” when at least one of the nominees in question was nominated, but it was then in session, and consequently sec. 14.22 is clearly inapplicable to his situation, or

¹ Offices newly established upon creation by the Legislature of a new *county* and a new *town* are recognized as vacancies. Such vacancies, so created, are not of the type covered by sec. 17.20(2), Stats. The existence of sec. 17.03(12), Stats., under which only a very narrow class of newly created public offices are considered vacancies, strongly intimates that all other newly created public offices are *not* to be deemed vacancies, under an application of the well-known rule of statutory construction that, “The inclusion of one is the exclusion of another.”

to that of any others of such nominees who were nominated during a recess.

Under these general principles, it is my opinion that any one of the nominees in question, who has not yet performed the duties of the office to which he has been nominated, cannot proceed to perform such duties as an officer *de jure*. These nominations do not fall within any statutory exception.

DE FACTO OFFICERS

A. INACTIVE NOMINEES

The second question is whether such inactive nominees could nevertheless proceed to perform the duties of the office to which they are nominated on the basis of being *de facto* officers? In my opinion the answer is no. The Wisconsin supreme court has stated that, "As a general rule, all that is required to make an officer *de facto* is that the individual claiming the office be in possession of it, performing its duties, and claiming to be such officer under color of an election or appointment." *State ex rel. Reynolds v. Smith*, 22 Wis.2d 516, 522, 126 N.W.2d 215 (1964). Under such rule, any nominee of those nominees here in question who has *not* been performing the duties of the office for which he was nominated obviously can make no valid claim to having been or being a *de facto* officer as to such office. The nominee above-mentioned who has not yet performed any of the duties of the office for which he was nominated can, for that reason alone, make no valid claim to having been or being a *de facto* officer in such office.

The third question is whether a currently inactive nominee, despite the present want of *de facto* officer status, could proceed to achieve *de facto* status prospectively by taking possession of the office, and exercising its powers, doing so under color of a letter and certificate of appointment. In my opinion, this question cannot be answered unequivocally. I assume that the inactive nominees will be promptly advised of the contents of this letter; and being so advised, they will then, in my judgment, obviously be rendered incapable of taking possession, in good faith, of the offices for which they have been nominated.

In *State ex rel. Elliott v. Kelly*, 154 Wis. 482, 489, 143 N.W. 153 (1913), the court very clearly indicated that an essential element of

attaining *de facto* officer status in an office was the taking possession of it "in good faith"; but *State ex rel. Reynolds v. Smith*, cited *supra*, 22 Wis.2d 516, 522-524, citing and quoting *State ex rel. Elliott v. Kelly* in support of another proposition, strangely enough appears to hold that one can become an officer *de facto* without having taken possession of the office "in good faith." Such apparent holding is found in the court's ruling that Howard J. Koop and Frank P. Zeidler were *de facto* officers of the State of Wisconsin during the period of November 24 to December 3, 1963 (22 Wis.2d at p. 522); and in the further ruling that, under certain described circumstances, they could not, at the commencement of such period, have entered upon the duties of their respective offices in good faith (22 Wis.2d at 523, 524). In the light of the apparent conflict between the two Wisconsin cases, and the doubt raised thereby, I must qualify any conclusion. However, with such qualification it is my opinion that presently inactive nominees who have not yet performed any of the duties of the offices for which they were nominated, cannot prospectively achieve *de facto* status in such offices simply by taking possession thereof and exercising their powers, under "color of appointment."

B. ACTIVE NOMINEES

The fourth and fifth questions relate to the "active nominees" who have entered upon the duties of the offices for which they were nominated. The fourth question is whether the active nominees are entitled to the per diems and the actual and necessary expenses incurred in the performance of their duties already paid, and the per diems and expenses claimed but not yet paid? The fifth question is whether their official acts, taken in carrying out the duties of their respective offices, are valid and effectual? These are close questions with precedents and arguments to support either answer. On balance, I am of the opinion that the answer is yes to both such questions, because the active nominees acted as *de facto* officers in carrying out the duties of their respective offices.

As shown above, our Supreme Court has said, "As a general rule, all that is required to make an officer *de facto* is that the individual claiming the office be in possession of it, performing its duties, and claiming to be such officer under color of an election or appointment." *State ex rel. Reynolds v. Smith*, *supra*. It is my understanding that the active nominees did perform the duties of their respective offices. I

have no doubt that each active nominee thought himself to be in possession of his respective office and actually exercised its functions.

From the language in *State ex rel. Reynolds v. Smith* one might conclude the third attribute required to make an officer *de facto* is “*claiming* to be such an officer under color of an election or an appointment.” (Emphasis supplied.) This language appears to be unsupported by the two earlier Wisconsin cases cited as supporting it. Those cases and other Wisconsin cases clearly show that such third test of the *de facto* officer is not a “claiming” to be such officer under color of an election or appointment, but instead the holding of such office and the performance of its duties by or under color of title, right, authority, or law, and not merely under claim to such color. See *Schoonover v. Viroqua*, 245 Wis. 239, 244, 14 N.W.2d 9 (1944); The *State ex rel. Jones v. Oates*, 86 Wis. 634, 638, 57 N.W. 296 (1893); *Clausen v. Fond du Lac County*, 168 Wis. 432, 434, 435, 170 N.W. 287 (1919); *Cole v. The President and Trustees of the Village of Black River Falls*, 57 Wis. 110, 113, 114, 14 N.W. 906 (1883). See also 67 C.J.S. *Officers* sec. 138. The language of *Cole*, it should be noted, showing that the third test of a *de facto* officer is that he act “by color of law,” is quoted with obvious approval in *Burton v. State Appeal Board*, 38 Wis.2d 294, 305, 156 N.W.2d 386 (1968), even though on the preceding page of such case there appears the different language from *State ex rel. Reynolds v. Smith*. I am convinced that a proper statement of the third test of an officer *de facto* is that the office of which he has possession, if appointive, is held--not just claimed to be held--under color of an appointment.

Do the active nominees here in question hold their offices under color of an appointment? In my opinion, they do, even though none of such nominees has yet been appointed to the office for which he has been nominated.

Nominees to the offices in question are, pursuant to sec. 15.08(1), Stats., “*nominated* by the governor, and with the advice and consent of the senate *appointed*.” (Emphasis supplied.) This statutory language might be read as meaning that nomination and appointment are two completely separate and distinct acts, so that one merely “nominated” by the Governor pursuant to sec. 15.08(1), Stats., for an office could not, upon taking possession of it and performing its duties, be properly viewed as having possession of such office under color of an appointment thereto. However, I think that

nomination and appointment under sec. 15.08(1), Stats., are not so completely separate and distinct as to compel the adoption of this view. I view the nomination under sec. 15.08(1), Stats., as the initial step of appointment, even though the Senate has the power to deny appointment to the nominee. This initial step in the appointment process, in and of itself, is probably inadequate to vest a nominee taking possession of the office for which he was nominated, and performing its duties, with an airtight claim to holding such office under color of appointment. Where, however, the nomination is accompanied by gubernatorial action indicating that such nominee has received an appointment to such office, although "Senate confirmation" had not yet been obtained, in good faith, it is my opinion that the nominee taking possession of office and carrying out its duties then holds such office under color of appointment.

From information supplied me by the Executive Office, it appears that each of the nominees here in question received a letter from the Governor, which read:

"I am very pleased to enclose the certificate of your appointment as a member of [*Here the appropriate examining board was named*].

"I know that you will make a significant contribution to the _____'s work, and I look forward to your accomplishments as a member. Your willingness to serve the people of Wisconsin in this way is deeply appreciated."

Such letter clearly conveys the idea to its recipient that he is "in business" as a Board member. So, too, does the certificate of his appointment enclosed with the letter. A "colorable right to an office" is "usually to be found in a certificate of election *or a commission of appointment by the legally constituted authority*" (Emphasis supplied; 67 C.J.S. *Officers* sec. 138.) Each active nominee's receipt of such letter and certificate of appointment further supports my conclusion that when he took possession of his respective office and commenced performance of its duties he held such office under color of appointment.

The active nominees have taken possession of their respective offices and commenced performance under gubernatorial action which reinforces their claim to their respective offices. It is therefore

my opinion that they have been acting in such offices as *de facto* officers.

Because the active nominees here in question have been officers *de facto* with respect to their respective offices, it is my further opinion that such active nominees were entitled to the per diems and the actual and necessary expenses incurred in the performance of their duties, which per diems and expenses have already been paid them; and that they are also entitled to collect for per diems and such expenses already claimed, but not yet paid. They were and are so entitled because they entered upon the duties of their respective offices in good faith and pursuant to apparent authority, for reasons above-shown, and because, in the case of each active nominee, no *de jure* officer is claiming his office. See *State ex rel. Reynolds v. Smith*, cited *supra*, 22 Wis.2d 516, 522, 523; *State ex rel. Elliott v. Kelly*, 154 Wis. 482, 489, 143 N.W. 153 (1913). See also 67 C.J.S. *Officers* sec. 145.

The fifth question is whether the acts of such active nominees to date are valid.

It is my opinion that since the active nominees have been *de facto* officers in performing, to date, the respective duties of their offices, the official acts performed by them as *de facto* officers are valid and effectual as to the public and third parties. See *Burton v. State Appeal Board*, 38 Wis.2d 294, 304, 305, 156 N.W.2d 386 (1968); *Cole v. The President and Trustees of the Village of Black River Falls*, 57 Wis. 110, 113, 114, 14 N.W. 906 (1883); 67 C.J.S. *Officers* sec. 146.

FUTURE SERVICE OF ACTIVE NOMINEES

The sixth question is whether the active nominees may continue to perform their duties following this opinion but before confirmation and collect per diems and expenses under sec. 15.08(7), Stats.? The seventh question is whether, if they so continue, their official actions will be valid and effectual as to the public and to third parties?

It is my opinion that if an active nominee continues to perform his duties after this opinion issues (at which time he will presumably be made aware of its contents), challenges may arise if he files claims for per diems for services thereafter rendered and expenses thereafter incurred. Such nominee would have difficulty, after the issuance of

this opinion, claiming that he was performing the duties of his office under color of election or appointment.

As stated above, he has no present right *in law* to such office and the exercise of its powers. In this connection, the Wisconsin supreme court, in a case it later described as the “leading” case on compensation for the *de facto* officer, said: “We decline to follow the lead of courts which deny the right to compensation to officers *de facto* who have, in good faith, performed the duties of a *de jure* office, when there is no other person who, under any circumstances, can properly claim the salary incident.” (Emphasis supplied; *State ex rel. Elliott v. Kelly*, cited *supra*, 154 Wis. at p. 489, quoted in *State ex rel. Reynolds v. Smith*, 22 Wis.2d p. 523, where it is described as the “leading” case.) This language would appear to indicate that our supreme court views it as essential to upholding a *de facto* officer’s claim for compensation that it be based on duties performed “in good faith,” i.e., in an honest belief, reasonably induced, that he held his office lawfully. However, in *State ex rel. Reynolds v. Smith*, the court said: “While the general rule seems to be that a *de facto* officer cannot maintain an action to recover the salary of the office, there is a well-recognized exception where there is no *de jure* officer claiming the office, and the *de facto* officer entered upon the duties of the office in good faith and pursuant to apparent authority.” (Emphasis supplied.)

This language can be read as indicating that so long as a *de facto* officer has entered upon the duties of his office “in good faith and pursuant to apparent authority,” he is entitled to collect the compensation for such office, even though he may thereafter be advised by the Attorney General, directly or indirectly, that he has no lawful claim to such office. This argument is buttressed by that case law which holds that a *de facto* officer is a legal officer until ousted. See *State v. Britton*, 27 Wash.2d 336, 178 P.2d 341, 346 (1947).

However, none of these cases involve a situation where the *de facto* office is claiming expenses or salary after having been advised that he has no *de jure* claim to the office. The question of whether continued belief in apparent legal authority is necessary to maintain *de facto* status is not clearly answered by the cases. In *State ex rel. Reynolds v. Smith*, claims for compensation, after reappointment following Senate rejection of the claimants for the same positions, were denied on the basis that it was unreasonable for the claimants to expect the

Senate to recede. The effect of this opinion declaring that the nominees in question have no *de jure* status may have similar effect. Because of these questions, I would advise a cautious approach and recommend that no claims for expenses or per diems be made.

As to the seventh question, it is my opinion that the active nominees in question, continuing to perform the duties of their respective offices after the issuance of this opinion, and presumably with knowledge of its contents, probably will be performing official acts which are valid and effectual as to the public and third parties. However, there is some doubt about this answer because of the absence of cases directly on point.

No case law has been discovered ruling precisely on this question; but it appears that the case law, mentioned above, which holds that a *de facto* officer is a legal officer until ousted, intimates that all his official acts until ousted must be deemed valid and effectual as to the public and third persons. In *In re Burke*, 76 Wis. 357, 363, 45 N.W. 24 (1890), it was said that earlier Wisconsin cases established "that if the office has been lawfully established, and a person exercises the functions thereof by color of right, but whose election or appointment thereto is illegal, his official acts therein cannot be successfully attacked in collateral proceedings, but in all such proceedings will be held valid and binding until the officer is ousted by the judgment of a court in a direct proceeding to try his title to the office." I read this case as a Wisconsin adoption of the view that a *de facto* officer is a legal officer until ousted, and as supportive of the opinion above-stated. See also *Pamanet v. State*, 49 Wis.2d 501, 507, 508, 182 N.W.2d 459 (1971).

However, my conclusion cannot be stated with certainty for the reasons stated in response to the previous questions. I think that the active nominees here in question, in deciding whether to continue performance of the duties of their respective offices, without Senate confirmation, might be taking the wiser and more commendable course of action if they decided to resume such performance only if and when confirmed. This course of action avoids potential difficulties in obtaining compensation for their services. Moreover, the continued functioning of the active nominees as *de facto* officers after the issuance of this letter may conceivably produce court challenges to their official acts, which will be expensive for Wisconsin taxpayers and this office.

In closing, let me summarize my conclusions.

First, it is my opinion that all the nominees in question, under the circumstances here involved, have acquired no *de jure* status in their respective offices, and can acquire no such status unless and until they are appointed to such offices with the advice and consent of the Senate.

Second, it is my opinion, although qualified, that the nominees who have not yet performed the duties of their respective offices cannot now commence such performance, under a claimed *de facto* occupancy of such offices.

Third, it is my opinion that those nominees who have performed the duties of their respective offices--the so-called "active nominees"--have been holding such offices as *de facto* officers, and are entitled to the per diems and expenses already collected, and are entitled to those claimed but not yet paid.

Fourth, in view of the *de facto* status of such active nominees, it is my opinion that their past official actions are binding and valid as to the public and third parties.

Fifth, if the active nominees continue to perform their duties before confirmation, their acts will probably be valid and they will probably be eligible for expenses and per diems. However, payment of future per diems and expenses could be challenged, and there is doubt as to the validity of their acts.

Sixth, the active nominees might be taking the wiser and more commendable course of action if they decided to discontinue performance of the duties of the offices to which they were nominated, and to resume such performance only if and when appointed to such offices with the advice and consent of the Senate.

BCL:JHM

Governor; Appropriations And Expenditures; Accountancy, Wisconsin State Board Of; Expenditures; Expenses; Salaries And Wages; Public Officials; Funds; Public Purpose Doctrine; Legal limitations on the use of the Governor's contingency fund appropriated by sec. 20.525(1)(c), Stats., discussed. OAG 12-77

February 4, 1977.

PATRICK J. LUCEY
Governor

You have asked for an interpretation by this office of sec. 20.525(1)(c), Stats., which appropriates a contingent fund for the executive office. Specifically, you ask what limitations, if any, exist regarding the use of this fund. Further, if such limitations exist, you ask that I outline them with sufficient specificity to provide guidance for the use of the fund.

Section 20.525(1)(c), Stats., appropriates to the Governor:

“Contingent fund. A sum sufficient for contingent expenses at the discretion of the governor, including, without limitation because of enumeration, the operation of the executive residence and travel and miscellaneous expenses of committees created by executive order, but a statement of all such expenditures shall be rendered to the legislature at the beginning of each regular session.”

I am informed by your office that since the creation of this contingent fund in 1849 it has been used by successive governors for a wide variety of purposes including travel, entertainment, staff, household furnishings, food and beverages, etc. The statute provides that a statement of all such expenditures shall be rendered to the Legislature at the beginning of each regular session. I understand that this has been done with a varying degree of specificity in the past and that there has been no move by the Legislature to limit or further restrict the use of these funds.

A brief historical overview of the legislation involved and the uses of the fund may provide some guidance. The origin of the contingent fund goes back to the time of initial statehood. The first printed statutes in 1849 contain the following language:

“Sec. 8. Six hundred dollars is hereby annually appropriated out of the treasury of this state, (or so much thereof as may be necessary,) to defray the contingent expenses of the executive office, including clerk hire and postage, to be drawn quarterly, upon the order of the governor, and for which he is hereby required to render to the legislature an annual statement of the expenditure from this fund.” Ch. 9, sec. 8, R.S. 1849.

This language has undergone two changes. Each change has vested more apparent discretion in the Governor while retaining the feature of an annual report to the Legislature. The present language was enacted in 1965. From 1917 to 1965 the basic language read as follows:

“(2) **Contingent expenses, rewards.** Annually, beginning July 1, 1963, \$10,000 for contingent expenses to be expended on the order of the governor and at his discretion; but he shall render to the legislature at the commencement of each regular session a statement of all such expenditures. Of this there is allotted so much as may be necessary for payment of rewards as provided in s. 14.19.” Sec. 20.360(2), R.S. 1963.

Senate Journals are indexed back to 1921. A random sample of reports printed in Senate Journals since 1921 shows an inverse relationship between the detail of the report and the amount of money spent. For example, in 1921 then Governor John J. Blaine submitted his report for the operation of the fund from January 6, 1919 to January 3, 1921. The following items are copied from that report:

“Disbursements

“Jan. 22, 1919, Astor Floral Co. Brooklyn,
N.Y. Flowers from State of Wisconsin for
grave of President Theodore Roosevelt.....\$100.00

“May 12, 1919, the Hub, suit for
executive messenger.....\$ 46.00

“Sept. 10, 1920, Fitch Undertaking
Co., Funeral expenses of Justice
J. B. Winslow.....\$382.00

****” Senate Journal, Jan. 19, 1921.

A variety of styles of such reports exists ranging from Governor Blaine’s item by item statement of amount to the summary statement of disbursements contained in Governor Knowles’ 1971 report for the 1969-71 Biennium reprinted below:

“Disbursements:

Travel and Expenses	\$ 6,436.36
Household Food, Staff, Official Dinners and Receptions.....	18,153.86
Flowers and Floral Arrangements	1,152.50
Sundry and Other Disbursements.....	<u>9,287.09</u>

“Net Expenses

.....	\$35,029.81
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“***” Senate Journal, Feb. 3, 1971.

I am of the opinion that within the limitations set forth below, you have broad discretion in the expenditure of these funds so that they may be used for a wide variety of purposes which are related to your functions as Governor or to the business of the state so long as the expenditures are for business-related as opposed to personal items or services. While there may be extra legal controls on the use of this fund, such as political or legislative reaction, this opinion is confined to a discussion of limitations existing under law.

CONSTITUTIONAL RESTRICTIONS

No state funds may be expended in violation of constitutional restrictions. Two constitutional restrictions on public expenditures are particularly relevant. The first is the “public purpose doctrine” and the second is the constitutional restriction on works of internal improvement contained in Wis. Const. art. VIII, sec. 10.

The “public purpose doctrine” as developed in Wisconsin case law requires that public funds be expended for public, as opposed to private, purposes. *City of West Allis v. Milwaukee County*, 39 Wis.2d 356, cert denied, 393 U.S. 1064 (1968); *State ex rel. La Follette v. Rueter*, 36 Wis.2d 96 (1967); *State ex rel. American Legion 1941 Convention Corporation of Milwaukee v. Smith*, 235 Wis. 443 (1940); *State ex rel. Wisconsin Development Authority v. Dammann*, 228 Wis. 147 (1938), 1970 Wis. L. Review 1113. In general, the question of what is a public purpose is left to the Legislature which has broad discretion to determine what is, and what is not, a public purpose. There is ample reason to assume that the contingent fund provided you by the Legislature meets the public purpose test. The discretion vested in you would not invalidate the expenditure as contravening the public purpose doctrine.

As one scholar has observed:

“Whatever its genesis, the elements of the rule are clear - public funds may be spent only for public purposes. Where state funds are concerned, the purpose must also be of statewide concern (a proper *state* expenditure). The fact that the expenditure benefits certain individuals, or one particular class of people, more than other individuals or class, does not rob the expenditure of its public or statewide nature. Conversely, incidental benefits to the public which result from the promotion of private interests cannot justify such aid through the use of public funds. Between these two extremes, the matter of the scope of the undertaking is primarily one for the exercise of ... discretion. ...” William F. Eich, *A New Look at the Internal Improvements and Public Purpose Rules*, 1970 Wis. L. Review 1113, 1115-1116.

Wis. Const. art. VIII, sec. 10, provides in pertinent part:

“The state shall never contract any debt for works of internal improvement or be a party to carrying on such works”

In general, a work of “internal improvement” is construction or alteration which is not necessary or convenient in carrying out the state’s governmental functions. *State ex rel. Warren v. Nusbaum*, 59 Wis.2d 391 (1973); *State ex rel. Bowman v. Barczak*, 34 Wis.2d 57 (1967); *State ex rel. Martin v. Giessel*, 252 Wis. 363 (1948). As an example, the use of state funds to construct a dog house for a personal pet or to make improvements on property not owned by the public would probably violate this constitutional restriction.

STATUTORY RESTRICTIONS

There are a number of specific statutes which deal with the expenditure of state monies. Since the contingent fund provided in sec. 20.525(1)(c) is composed of state general program revenue these funds are subject to the restrictions normally associated with such funds unless the legislative intent appears otherwise. In addition, because you are a “state public official” as that term is defined in sec. 19.42(8), Stats., you are subject to the Code of Ethics for Public Officials set forth in ch. 19, Stats.

Because the fund involved is provided on a “sum sufficient” basis by the Legislature, there is no ceiling on the amount of expenditures

which may be made from the fund in a given year. In general, the same restrictions contained in ch. 20 and elsewhere in the statutes relating to the expenditures of state funds apply to specific items for which the funds might be spent. Thus, for example, the provision in sec. 20.002(4) prohibiting payment of indebtedness incurred prior to the time of an appropriation would be applicable and would prevent a governor from paying debts incurred prior to the time that the appropriation takes effect. Section 20.903 would have the same effect. Also, sec. 20.903(1) provides in part that:

“... it is unlawful for any state agency to authorize, direct or approve the diversion, use or expenditure, directly or indirectly, of any funds, money or property belonging to, or appropriated or set aside by law for a specific use, to or for any other purpose or object than that for which the same has been or may be so set apart. ...”

Section 20.903(1) would make it improper to expend monies from this fund for purposes other than that for which it was intended.

I have not attempted to be exhaustive but rather to be illustrative. The general thrust of the examples listed above should be to illustrate that funds in the contingent fund are subject to the same restrictions on expenditure as are other funds appropriated by the Legislature except where the legislative intent appears otherwise.

There are a variety of strictures on state funds which probably do not apply to the contingent funds. The words “at the discretion of the governor” are in conflict with certain restrictions on travel, moving expenses, etc. which are contained in the statutes. I am of the opinion that the restrictions on travel, moving expenses, method of expenditure contained in chs. 16 and 20 in the statutes are not applicable to the contingent fund since those restrictions conflict directly with the “discretion” granted by the Legislature and must give way to that discretion.

CODE OF ETHICS

As a “state public official” as that term is defined in sec. 19.42(8) you are subject to the restrictions on conduct contained in the Code of Ethics for State Employees, sec. 19.45, Stats. Section 19.45 provides in part:

“(2) No state public official may use his public position or office to obtain financial gain for himself or his immediate family, or for any business with which he is associated.

“***

“(5) No state public official may use or attempt to use his public position to influence or gain unlawful benefits, advantages or privileges for himself or others.”

I take the thrust of these sections to be to prohibit the use of state monies for personal, family, or business purposes unrelated to the functions of your office. Thus, the contingent fund may not be used for purely personal items or for personal business purposes.

I am painfully aware that the distinction between one's public life and private life as an elected constitutional official is not always clear. Furthermore, there is obviously a continuum of goods and services ranging from the purely personal to the clearly business-related. It is not a business-related expense, for example, to feed and clothe yourself. On the other hand, it is certainly legitimate to feed others and entertain others in the course of your duties and to provide the furnishings and staff necessary to maintain the executive mansion.

I offer two further avenues you might pursue in determining whether a proposed use of the contingent fund would be business-related rather than for personal benefit. First, you may wish to adopt as a policy adherence to the internal revenue code as it delineates business-related expenses allowable as deductions from income to private taxpayers. Second, you might consider reviewing with the state Ethics Board any proposed use of the funds which fails to fall clearly within either the business-related expense or personal benefit category.

BCL:DJH

Juvenile Court; Minors; Courts; Licenses And Permits; Counties; County Children's Home; Public Welfare; Foster Homes; Section 48.31 provides counties with express authority to establish and operate juvenile detention homes and shelter care facilities. Detention homes and shelter care facilities established and operated pursuant to sec. 48.31 do not require a ch. 48 license from the Department of Health and Social Services. Counties may lease property for detention home or shelter care use. OAG 13-77

February 8, 1977.

CHARLES M. HILL, SR., *Executive Director*
Wisconsin Council on Criminal Justice

You ask three questions concerning the establishment and operation of detention homes and shelter care facilities.

Question One

“Under Wisconsin law, do counties have the authority to directly operate shelter care facilities?”

Section 48.31, Stats., provides counties with express authority to establish and operate juvenile detention homes and shelter care facilities.

Question Two

“Under Wisconsin law, do such facilities have to be licensed?”

Detention homes and shelter care facilities established and operated pursuant to sec. 48.31, Stats., do not require a ch. 48 license from the Department of Health and Social Services (hereinafter, Department).

Chapter 48, Stats., is silent regarding licensure of detention homes and shelter care facilities. Detention homes and shelter care facilities are not enumerated in sec. 48.66, Stats., which sets out the Department's licensing duties and powers. While the Department must approve plans for such facilities, sec. 48.31(2), Stats., and make periodic inspections into safety and sanitation, sec. 46.17(3), Stats., this authority does not involve licensing. Approval of the

Department is limited to oversight of physical plant. 63 OAG 267 (1974).

The authority to determine the operating policies of county detention homes and shelter care facilities is vested solely in the judge(s) of the juvenile court.¹

Nevertheless, a juvenile detention home and shelter care facility established under sec. 48.31 may be licensed as a foster home. Such a license, while unnecessary for operation pursuant to sec. 48.31, may broaden the utility of the facility. In appropriate circumstances dependent and neglected children could be placed in the facility for foster care. In such an arrangement, however, the placing agency would retain its normal control over foster children in the facility.

Question Three

“If counties have the authority to establish and operate shelter care facilities and if they are not subject to licensing procedures, may a county sublease property for shelter care use?”

Counties may lease property for detention home or shelter care use.

In 65 OAG 93 (1976), I opined that *county child welfare agencies* do not have authority to lease foster home facilities. That conclusion was based on an analysis of the limited powers given county child welfare agencies by sec. 48.57, Stats., in the context of 57 OAG 184 (1968). Those authorities do not apply here.

Section 48.31, Stats., authorizes the *county board* to establish and operate detention homes and shelter care facilities. Accordingly, we must look to the authority of county boards. Section 59.07(1), Stats., provides county boards with broad authority to acquire or lease property for public purposes.

BCL:PRS

¹ In counties having a population of 500,000 or more, the nonjudicial operational policies of sec. 48.31 facilities are established by the county board of public welfare as specified in sec. 48.06(1), Stats.

Licenses And Permits; Regulation And Licensing, Department Of; Investigations; Section 227.09(5), Stats., absolutely requires use of a hearing examiner if an examining board member participates in the decision to commence a proceeding against a licensee, but does not require such use if a board member is involved only in the investigation. OAG 14-77

February 9, 1977.

SARAH DEAN, *Secretary*

Department of Regulation and Licensing

You request my opinion as to the effect of sec. 227.09(5), Stats., as created by ch. 414, Laws of 1975, upon hearings held by boards and examining boards included within your department. Specifically you ask:

“Does this provision of the statutes constitute an absolute requirement that hearing examiners be used as triers of fact in all instances where one or more members of a board have been involved in the investigation of a complaint or in the decision to prosecute?”

The applicable statutory section created by ch. 414, Laws of 1975, reads in material part:

“227.09 Hearing examiners; examination of evidence by agency.

“***

“(2) In any contested case which is a class 2 or class 3 proceeding, where a majority of the officials of the agency who are to render the final decision are not present for the hearing, the hearing examiner presiding at the hearing shall prepare a proposed decision, including findings of fact, conclusions of law, order and opinion, in a form that may be adopted as the final decision in the case. The proposed decision shall be a part of the record and shall be served by the agency on all parties. Each party adversely affected by the proposed decision shall be given an opportunity to file objections to the proposed decision, briefly stating the reasons and authorities for each objection, and to

argue with respect to them before the officials who are to participate in the decision. The agency may direct whether such argument shall be written or oral. If an agency's decision varies in any respect from the decision of the hearing examiner, the agency's decision shall include an explanation of the basis for each variance.

“(5) In any class 2 proceeding, if the decision to file a complaint or otherwise commence a proceeding to impose a sanction or penalty is made by one or more of the officials of the agency, the hearing examiner shall not be an official of the agency and the procedure described in sub. (2) shall be followed.”

Subsection (5), by incorporation of subsec. (2) constitutes an absolute requirement that “if the decision to file a complaint or otherwise commence a proceeding to impose a sanction or penalty is made by one or more of the officials of the agency,” a hearing examiner must be used. Subsection (2), requires that the hearing examiner presiding at the hearing provide to the agency “a proposed decision, including findings of fact, conclusions of law, order and opinion, in a form that may be adopted as the final decision in the case.”

It is clear then that, even though involvement of members of the agency in the decision to commence a proceeding by complaint or otherwise requires that a hearing examiner independent of the agency be used, the ultimate decision of the matter lies not with the hearing examiner but with the agency. The agency may, however, under sec. 227.09(3)(a), Stats., “Direct that the hearing examiner's decision be the final decision of the agency.”

Since the sole test under subsec. (5) is whether the agency secretary, commissioner or board member participates in the decision to prosecute, it is immaterial whether that official has or has not been involved in the investigation of the complaint. Absent personal or pecuniary bias or other special facts and circumstances which make the risk of unfairness intolerably high, mere involvement of the official in nonadversary investigative procedures does not preclude participation in a decision to impose a penalty or sanction, *Withrow v. Larkin*, 421 U.S. 35, 47, 55-58, 95 S. Ct. 1456, 43 L. Ed. 2d 712

(1975). It is not clear, however, what “special facts and circumstances” will be sufficient to disqualify an agency official as an impartial decision-maker under the due process clause of the fourteenth amendment. As a practical matter, the mixing investigative and adjudicatory functions will enhance the possibility of litigation to test the question of fairness.

An agency may find it desirable, in order to avoid the appearance of partiality or bias, to have officials participating in the investigation disqualify themselves from involvement in the final decision-making process under sec. 227.09(6), Stats. Thereafter, the procedure in sec. 227.09(2), Stats., need not be followed, so long as a majority of the officials remaining who are to render the final decision are present for the hearing. Where an official is involved in or votes on the procedure to initiate the proceeding, however, the hearing examiner procedure in sec. 227.09(2), Stats., must be followed, whether or not that official subsequently withdraws from the case.

BCL:WMS

Nurses; Public Health; Counties; County may contract with city for the joint provision of public health nursing services under sec. 66.30(2), Stats. OAG 15-77

February 15, 1977.

GLENN L. HENRY, *Corporation Counsel*
Dane County

You request my opinion whether Dane County and the City of Madison may contract for the joint provision of public health nursing services under the provisions of sec. 66.30, Stats., under the following set of facts:

“Dane County presently employs public health nurses pursuant to sec. 141.06, Wis. Stats. Dane County does not have a County Public Health Department because all of the municipalities in Dane County come under the jurisdiction of full-time health departments. The City of Madison has a full-time health department which provides public health nursing services to the residents of the City of Madison. The Dane

County Public Health Nurses provide services to residents of Dane County outside the City of Madison. The City of Madison feels that it is inequitable for the City to pay approximately 50% of the cost of operation of the Dane County Nurses and receive no benefits from the County's program.

"The City of Madison has proposed entering into a contract with Dane County wherein the net effect would be for Dane County to provide public health nursing services to all of the residents of Dane County, including the residents of the City of Madison, by entering into a contract wherein the City of Madison Health Department would continue to provide public health nursing services to the residents of the City of Madison with nurses in their employment and that Dane County would agree to reimburse the City of Madison for these expenses. This office has concluded that Dane County may not enter into such a contract under sec. 66.30 of the Wisconsin Statutes."

I am of the opinion that Dane County could contract with the City of Madison for the joint provision of public health nursing services under the provisions of sec. 66.30, Stats. Whether such a contract should be entered into is a matter of policy determination for the governing bodies of the two municipalities. Consideration should be given to the creation of a "county health department" or a "city-county health department" under the provisions of sec. 140.09, Stats. The provisions of that section provide for the exercise of broad powers with equitable, and in the case of a city-county department, proportionate sharing of costs by the municipalities in the jurisdictions served. The fact that all municipalities in a county have full-time health departments does not bar a county from creating a county health department or city-county health department as your statement of facts assumes. Where that situation exists a county cannot create a county health *commission* under sec. 141.01, Stats. See sec. 141.01(1), Stats., and 57 OAG 245 (1968). Section 140.09(16), Stats., provides that where a county health department or city-county health department is established, "county nurses shall be transferred to the jurisdiction of the county health department and county health committees shall cease functioning."

It should be noted that the fact that a city, or other municipality, does employ public health nurses and does conduct public health nursing within its boundaries does not exclude a county, not having a

county department of health under sec. 140.09, Stats., from providing public health nursing services to residents within such city or other municipality. See secs. 140.09(11) and 141.06(1), Stats. Where there is a county department of health there is provision for local option as to whether municipalities having full-time health departments shall come under the jurisdiction of the county department.

Sections 66.30(1) and (2), Stats., as amended by ch. 123, Laws of 1975, provide:

“Intergovernmental cooperation. (1) In this section ‘*municipality*’ means the state or any department or agency thereof, or any *city*, village, town, *county*, school district, public library system, public inland lake protection and rehabilitation district, sanitary district or regional planning commission.

“(2) In addition to the provisions of any other statutes specifically authorizing cooperation between municipalities, *unless such statutes specifically exclude action under this section, any municipality may contract with other municipalities, for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by law.* If municipal parties to a contract have varying powers or duties under the law, each may act under the contract to the extent of its lawful powers and duties. This section shall be interpreted liberally in favor of cooperative action between municipalities.” (Emphasis added.)

As stated in 56 OAG 69, 70 (1967):

“Prior rulings under this section make it clear that the service must be one that the receiving municipality is authorized to receive and the performing municipality is entitled to render....”

The last opinion referred to stated that a county could contract with a school district under then sec. 66.30, Stats., to provide nursing services to school districts even though sec. 141.04, Stats., specifically authorized towns, villages and cities to provide jointly for health services under sec. 66.30, Stats., and made no reference to counties or school districts.

Counties have power, under sec. 141.06, Stats., to employ public health nurses and to conduct “generalized public health nursing.”

Under sec. 141.05(1), Stats., cities may employ public health nurses and shall conduct “a generalized public health nursing program.”

Section 141.05(2), Stats., provides:

“(2) Towns, villages and cities may employ public health nurses jointly, salary and other expenses to be paid jointly as agreed upon or in proportion to population.”

Section 141.04, Stats, provides:

“... Towns, villages and cities jointly may provide health services as agreed upon under s. 66.30.”

56 OAG 69 at 71 (1967), had this to say about sec. 141.04, Stats., and its relationship to sec. 66.30(2), Stats.:

“When this section was amended in October, 1961, the authority of towns, villages and cities to provide joint health services was merely expanded without affecting the counties’ powers which already existed in 66.30(2) and 141.06(1). The express powers granted under these sections cannot be limited or abolished by any implications arising from 141.04.”

I am of the opinion that the failure of the Legislature to include counties in secs. 141.04 and 141.05(2), Stats., does not amount to statutory language of exclusion within the meaning of sec. 66.30(2), Stats. It follows that since cities and counties both have express statutory power to employ public health nurses and to conduct generalized public health nursing programs, they may contract for the joint provision of public health nursing services under the provisions of sec. 66.30, Stats.

BCL:RJV

Circuit Court; Clerk Of Courts; Ordinances; Towns; Municipalities; Criminal Law; Villages; Home Rule; Judges; Bonds; Affirmations; Municipal justice files oath and bond with clerk of circuit court who files certified copy of bond with clerk of municipality for which justice was elected. Town boards, including those authorized to exercise village powers, cannot prohibit conduct the same or similar to that prohibited by chs. 941 to 947, except as provided in sec. 66.051(1), (2) and (3), or other express statutes. OAG 16-77

February 16, 1977.

TIMOTHY L. VOCKE, *District Attorney*

Vilas County

You request my opinion as to the place or places a municipal justice must file his oath.

A municipal justice files his oath and bond with the clerk of the circuit court. Within ten days after filing, the clerk of circuit court is required to mail a certified copy of the bond to the clerk of the city, town or village, wherein such justice was elected or appointed, for filing. Sections 19.01(4)(c), 254.03(1) and (2), Stats., are explicit in these requirements. There is no provision requiring filing with any state office.

You also inquire whether a town can adopt ordinances which prohibit conduct which is the same or similar to that prohibited by chs. 941 to 947, Stats. You note that sec. 66.051(4), Stats., expressly refers to cities and villages, but does not expressly include towns. The omission is a significant expression of legislative intent since the word "town" is included in the introduction to sec. 66.051, Stats.

Section 66.051, Stats., provides:

"Power of municipalities to prohibit criminal conduct. The board or council of any town, village or city may:

"(1) Prohibit all forms of gambling and fraudulent devices and practices;

“(2) Cause the seizure of anything devised solely for gambling or found in actual use for gambling and cause the destruction of any such thing after a judicial determination that it was used solely for gambling or found in actual use for gambling;

“(3) Prohibit conduct which is the same as or similar to that prohibited by s. 947.01.

“(4) Nothing in this section shall be construed to preclude cities and villages from prohibiting conduct which is the same or similar to that prohibited by chs. 941 to 947.”

A town has only such powers as are conferred on it by statute or as are necessarily implied therefrom. *Pugnier v. Ramharter*, 275 Wis. 70, 81 N.W.2d 38 (1957).

Some powers of a town are vested in the town board whereas others are vested in the town meeting.

Section 60.18(12), Stats., empowers a town meeting “To direct ... the town board to exercise all powers relating to villages and conferred on village boards by ch. 61, except such power, the exercise of which would conflict with the statutes relating to towns and town boards.”

Section 66.051(4), Stats., is not included in ch. 61, Stats. It, in fact, confers no powers at all but is a rule of construction with respect to subsecs. (1), (2) and (3) of sec. 66.051, Stats., where cities and villages are concerned. The authority of villages to prohibit conduct similar to that prohibited by chs. 941-947, Stats., emanates from the home rule power set forth in sec. 61.34(1) and (5), Stats., as guaranteed by Wis. Const. art. XI, sec. 3. The attempted exercise by towns of the general home rule power is inherently inconsistent with the constitutional rule requiring one system of uniform town government. Wis. Const. art. IV, sec. 23. Town governments cannot change from town to village governments at will. *State ex rel. Holland v. Lammers*, 113 Wis. 398, 411-412, 86 N.W. 677 (1902).

Therefore, sec. 60.18(12), Stats., would not be authority for the use of such home rule village powers even where a town meeting had authorized the town board to exercise village powers. Town boards are therefore limited to the authority granted in sec. 66.051(1), (2) and (3), Stats., or other statutes with respect to prohibiting conduct

which is the same or similar to that prohibited by chs. 941-947, Stats. The provisions of sec. 66.051(1) and (2), Stats., would empower a town board to prohibit conduct substantially similar to that prohibited by ch. 945, Stats. Section 66.051(3), Stats., authorizes prohibition of conduct the same or similar to that prohibited by sec. 947.01, Stats. A search of ch. 60 and other statutes relating to towns would have to be made to determine whether a town board has power to prohibit conduct the same or similar to that prohibited by chs. 941, 942, 943, 944, 946, and secs. 947.02-947.15, Stats.

The problem is not one which is within the direct duties of a district attorney; however, after you have done further research, you may submit further questions on a specific problem area and I will attempt to be of assistance to you. Please refer to 62 OAG Preface (1973) relative to the requirements to be observed by district attorneys requesting an opinion from this office.

BCL:RJV

Anti-Secrecy; Ballots; Collective Bargaining; Elections; Open Meeting; Public Officials; Regents, Board Of; Salaries And Wages; State University System; University; Votes And Voting; University subunit may discuss promotions not relating to tenure, merit increases and property purchase recommendations in closed session.
OAG 17-77

February 23, 1977.

NEWTOL PRESS, *President*

Wisconsin Conference

American Association of University Professors

Pursuant to sec. 19.98, Stats., you request my advice with respect to applicability of provisions of the open meeting law to meetings of departments or formally constituted subunits of the University of Wisconsin system.

This opinion assumes that some governmental body within the meaning of sec. 19.82(1), Stats., is involved in each of the questions you pose. It is my opinion that departments or formally constituted subunits of the University of Wisconsin system or campus are

governmental bodies within the meaning of sec. 19.82(1), Stats., as created by ch. 426, Laws of 1975, and are subject to the open meeting law although they are exempt from giving the notice required by sec. 19.84(1) to (4), Stats. However, they must give the notice required by sec. 19.84(5), Stats., the public notice required by sec. 19.85(1), Stats., and the individual notice required by sec. 19.85(1)(b), Stats., where applicable.

“(1) Are considerations of recommendations of promotions *not* related to tenure covered under exemptions?”

The answer is yes. Section 19.85(1)(b), Stats., permits a closed session where grant or denial of tenure for a university faculty member is involved and requires actual notice to the person under consideration before any evidentiary hearing is held or before final action on grant or denial. Grant of tenure may be considered a promotion for certain purposes. However, sec. 19.85(1)(c), Stats., would apply to promotions not involving a grant or denial of tenure and provides:

“(c) *Considering* employment, *promotion*, compensation or performance evaluation data *of any public employe over which the governmental body has jurisdiction* or exercises responsibility.” (Emphasis added.)

“(2) Are considerations of merit salary increase recommendations covered under exemptions?”

A closed meeting could be held for such purpose under sec. 19.85(1)(c), Stats., since consideration of merit salary increase recommendations is clearly the consideration of “compensation ... of ... [a] public employe.”

“(3) Are meetings of Departmental Committees that consider the purchasing of capital equipment, or plans for building remodeling or construction, covered under exemptions?”

If the committee is formally constituted, the exemption in sec. 19.85(1)(e), Stats., would apply to purchases the committee has power to recommend or delegated power to consummate. Whether the exemption would apply to plans for remodeling or construction would depend on existence of competitive or bargaining reasons

which require a closed session. Section 19.85(1)(e), Stats., allows the convening of a closed session for the purpose of:

“(e) Deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session.”

“(4) Is the law applicable to votes to recommend where the power of the committee is so limited and the final power is vested in administrators or the Board of Regents?”

The answer is yes, subject to the qualifications discussed below.

Section 19.83, Stats., provides that:

“... At any meeting of a governmental body, all discussion shall be held and all action of any kind, formal or informal, shall be initiated, deliberated upon and acted upon only in open session except as provided in s. 19.85.”

A vote may be taken in closed session if the vote is an integral part of the purpose for which the closed session was properly called. However, final approval of collective bargaining agreements must be taken in open session. Sec. 19.85(3), Stats.

“(5) In each of the items above, must the vote of each participant be ‘ascertained and recorded’?”

The answer is no, except as noted below.

The vote of each member must be ascertained, recorded and record preserved where a governmental body votes to convene in closed session. Section 19.85(1), Stats., provides in part:

“(1) Any meeting of a governmental body, upon motion duly made and carried, may be convened in closed session under one or more of the exemptions provided in this section. The motion shall be carried by a majority vote in such manner that the vote of each member is ascertained and recorded in the minutes”

Where a statute does not require voting in a form that the vote of each member can be ascertained and recorded, or where no member demands the vote be taken in that manner, voting may be *viva voce* or by hand. Section 19.88, Stats., provides:

“Ballots, votes and records. (1) 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.

“(2) Except as provided in sub. (1) in the case of officers, any member of a governmental body may require that a vote be taken at any meeting in such manner that the vote of each member is ascertained and recorded.

“(3) The motions and roll call votes of each meeting of a governmental body shall be recorded, preserved and open to public inspection to the extent prescribed in s. 19.21.”

“(6) Some offices that are filled by appointment require (or are traditionally preceded by) an advisory ballot. Must advisory ballots be recorded?”

Under sec. 19.88(1), Stats., most secret advisory ballots are prohibited unless some statute permits them. Depending on the context, an advisory ballot may or may not be a *decision* of a governmental body. I am informed that institutions within the University of Wisconsin System have faculty rules that provide for advisory votes on appointive offices such as department chairperson. The vote may or may not be taken at a meeting. This advisory vote is transmitted directly to the dean. Where an advisory vote is required or permitted and the voters happen to be a group which also constitutes a governmental body and the body itself does not make the appointment or take further action the advisory vote can be taken by secret ballot because the action is neither an election (the ballot being advisory) or a decision (the ballot being a tally of individual preferences and not a departmental recommendation).¹

However, there may be circumstances where an advisory ballot is called for as a recommendation from the governmental body. In such cases I am of the opinion that a paper ballot may be used if it utilizes the name or other identifying mark of the member casting the same. If used, such ballots must be made of record and preserved. If an

¹ Such a result is consistent with the intent of the law in appointments cases such as departmental chairman. If the department elected the chairman, that vote could be taken by secret ballot under sec. 19.88(1), Stats., which provides an exception for “the election of the officers of such body in any meeting.”

advisory vote is by roll call, it must be recorded. See secs. 16.80(2)(a), 19.21(1), (2), 19.88(3), Stats.

Section 19.88(3), Stats., provides:

“(3) The motions and roll call votes of each meeting of a governmental body shall be recorded, preserved and open to public inspection to the extent prescribed in s. 19.21.”

BCL:RJV

Circuit Court; Clerk Of Courts; Counties; County Court; County Judge; County Clerk; Courts; Judges; Justice Court And Justice Of Peace; Municipal Court; Municipalities; Traffic; In traffic regulation cases, sec. 345.315, Stats., controls over sec. 300.05, Stats., insofar as request for substitution of a justice is concerned but not over sec. 300.055, Stats., which grants defendant right to secure transfer to county court upon request, accompanied by \$1 fee, at any time prior to trial. OAG 18-77

February 25, 1977.

WILLIAM F. BOCK, *Corporation Counsel*
Racine County

Your predecessor requested my opinion of the applicability of secs. 300.05, 300.055 and 345.315, Stats., with regard to the transfer of traffic cases from municipal court to the county court. He asked whether sec. 345.315(4), Stats., controls all requests by defendants for transfers of traffic matters from municipal court to county court. In my opinion, it supersedes the provisions of sec. 300.05, Stats., but not of sec. 300.055, Stats.

Section 300.05, Stats., provides:

“(1) Any party may file an affidavit stating that he believes that he cannot have a fair trial because of the prejudice of the justice, naming him. The affidavit shall be filed not later than 7 days after the return day of the process. Upon filing the affidavit, the filing party shall forthwith mail a copy to each party in the action.

“(2) Upon receipt of the affidavit, accompanied by a fee of \$4, the justice shall call in another justice of the county where the offense occurred or transfer the case to the county court of the county where the offense occurred. A justice so called in shall receive compensation as the governing body determines, to be paid by the municipality.

“(3) If the case is transferred to county court, the justice shall transmit to the clerk of the county court all the papers in the action and \$3 as payment of the clerk’s fee and suit tax. The action shall proceed as if it had been commenced in the county court.

“(4) No party is entitled to file more than one affidavit of prejudice in any one action.”

Section 300.055, Stats., provides:

“In counties having a population of less than 500,000, the defendant in municipal court may, at any time prior to trial, transfer the cause to the county court of said county. Upon receipt of such a request, accompanied by a fee of \$1, the justice shall forthwith transmit all the papers in the cause to the clerk of said court.”

Section 345.315, Stats., as amended by ch. 218, Laws of 1973, provides:

“(1) In traffic regulation cases a person charged with a violation may file a written request for a substitution of a new judge or justice for the judge or justice assigned to the trial of that case. The written request shall be filed not later than 7 days after the return date of the citation. Upon filing the written request, the alleged violator shall forthwith serve a copy thereof on each party to the action.

“(2) Not more than one judge or justice can be disqualified in any action. All defendants must join in any request to substitute a judge or justice.

“(3) In a court of record in counties having 3 or more county judges the clerk shall reassign any case transferred by virtue of the substitution of a judge as provided herein. The county board of judges shall make rules for such assignment. All other cases shall be assigned as provided in s. 251.182.

“(4) In municipal court, upon receipt of the written request accompanied by a fee of \$4, the justice shall transfer the case to another justice or to the county court of the county where the offense occurred. Upon transfer, the justice shall transmit to the appropriate court all the papers in the action and the action shall proceed as if it had been commenced therein.”

Section 345.20(2), Stats., provides:

“(2) **Procedure.** The apprehension of alleged violators of traffic regulations and the trial of forfeiture actions for the violation of traffic regulations shall be governed by ss. 345.21 to 345.53. Where no specific procedure is provided in ss. 345.21 to 345.53, ch. 299 shall apply.”

It is my opinion that where no specific procedure is provided in ss. 345.21 to 345.53, Stats., or in ch. 299, Stats., and where the Legislature has provided an express procedure in ch. 300, Stats., such as the right to a change of courts as contrasted with a substitution of judges, the express procedure provided in ch. 300, Stats., may be applicable even where violations of traffic regulations are involved. Both sec. 345.315 and sec. 299.205, Stats., are primarily concerned with change of judge, although application under sec. 345.315(4), Stats., may result in transfer to county court. Whereas sec. 300.05, Stats., is primarily concerned with substitution of judge, although transfer to county court may result, sec. 300.055, Stats., is concerned with the right of a defendant to transfer his case from municipal court to county court.

I will divide my discussion into two parts, one dealing with the relationship of sec. 345.315 to sec. 300.05 and the other with the relationship of sec. 345.315 to sec. 300.055.

Both secs. 300.05 and 345.315, Stats., are concerned with the right of a defendant to have his case tried before a different justice or judge. Both provide that if the case is in municipal court, the justice may reassign the case to another justice of such court or to a judge of the county court, provided the defendant has made a timely request and paid a fee of \$4.00. Under these statutes the action may be transferred to the county court, but the primary purpose of both statutes is to allow for substitution of a judge or justice.

By contrast, sec. 300.055, Stats., is primarily concerned with the right of the defendant to transfer the cause to the county court. The

differences between the county and municipal courts reveal the value of such right.

The county court is a court of record (sec. 253.01, Stats.). The judge is required to be a lawyer (sec. 253.055, Stats.). However, the municipal court is not of record (sec. 254.01, Stats.), nor is the judge necessarily a lawyer. The municipal court has a more limited jurisdiction than a county court. Compare the jurisdiction provisions for a county court (secs. 253.10-13, Stats.), with that of a municipal court (sec. 254.045, Stats.). Finally, sec. 345.50, Stats., provides for different procedures for review of judgments from the county court and the municipal court. Appeals [from both courts] shall be to the circuit court for the county. On appeal from municipal court, the defendant is entitled to a trial de novo and to a jury trial, on request. On appeal from county court the circuit court has power similar to that of the supreme court under ch. 274 to review and to affirm, reverse, remand or modify the judgment appealed from.

The supreme court has reconciled two statutes similar to secs. 345.315 and 300.055. In *State ex rel. Mitchell v. Superior Court*, 14 Wis.2d 77, 80, 109 N.W.2d 522 (1961), the court construed secs. 62.24(2)(a), 61.305, Stats. (1959), which provided that a police justice of the peace shall have exclusive jurisdiction of ordinances of a municipality, and sec. 301.245, Stats. (1959), which provided that the defendant in any action brought in justice court may, on the return day of the process, transfer the cause to certain other courts named, including superior courts of the county which were courts of record, upon payment of a fee of \$1. The court stated:

“We have concluded that it was the intent of the legislature to provide that all civil actions, including those for violations of village or city ordinances, are to be transferred to one of the courts named in sec. 301.245, Stats., upon proper request and the payment of the required fee. The language employed by the legislature is all-inclusive. It provides that any action brought in justice court shall be transferred at the option of the defendant. Only one class of justices of the peace is provided for in our constitution. The words ‘justice court’ therein necessarily include police justice courts. The courts named in the last-mentioned section, with few exceptions, are presided over by judges who are attorneys; they have established courtrooms; and in most instances they have clerks and reporters. The legislative,

as well as the judicial, branch of the state government has been seeking to improve the administration of justice. It is apparent to us that the legislature intended to further this purpose in providing for the transfer of all civil actions to one of the specified courts. In the rural areas where such courts are not available the police justice courts established by the cities or villages will still have exclusive jurisdiction of city and village-ordinance violations as against other justices of the peace. The statutes, although apparently in conflict, are not irreconcilable, and our interpretation leaves all of the statutes in effect.”

In my opinion the reasoning of the court in *Mitchell* is applicable to the reconciliation of secs. 345.315 and 300.055, Stats., and thus, sec. 345.315 does not supersede sec. 300.055. It is my opinion that the Legislature did not intend to override the important right of a defendant in a traffic case to transfer from a municipal court to the county court.

Your predecessor also pointed out that there is some difficulty with the provision in sec. 300.055 which provides that a transfer may be requested “at any time prior to trial.” You inquire whether municipal judges may require defendants to pay witness fees and clerk’s fees as a condition to last minute transfers. In my opinion, such transfers are a matter of right upon request and payment of the \$1.00 fee. The statute does not permit imposition of other conditions.

BCL:RJV

Anti-Secrecy; Open Meeting; Schools And School Districts;
Where school board permits citizens to appear at regular meeting and notes fact in agenda and notice, board may discuss and act on such matters, if urgent, even though express subject was not referred to in notice. There is no requirement that the board delay the matter until the next meeting, although nothing would prevent it from doing so either. OAG 19-77

February 28, 1977.

GARY K. JOHNSON

State Representative

Pursuant to sec. 19.98, Stats., you request my advice on two questions under facts stated below.

You state that the Beloit School Board utilizes an agenda for its regular meetings and that a portion of the meeting is devoted to presentations by "Citizens and Delegations." In the past, certain citizens who have been permitted to speak have requested the board to act on subjects which were not included in the matters which the board had included in its agenda and which the board had given notice to the public and news media as being within the stated purpose of the meeting. On January 7, 1977, the board's attorney advised that "The basic concept of the open meeting law is to give notice, in advance, of the subject matter that will be acted upon or even discussed," and that "unless extreme urgency exists, the board may wish to withhold all discussion or consideration of a subject presented by a member of the board or audience so that the subject matter can be incorporated in a written notice for a future meeting." At the February 1, 1977, meeting, the board refused to permit a delegation of students to address the board to present a school smoking proposal and to discuss cheerleading at games because the subjects were not listed on the agenda and notice. The board did receive written proposals on the smoking proposal and referred it to the policy committee for consideration at the March meeting. The board adopted a policy that citizens or board members wishing to bring up new items for discussion at meetings must contact the Superintendent by the Monday a week prior to the meeting in order to have the subject included on the agenda.

Your specific questions are:

"(1) Does anything in Subchapter IV of Chapter 19, Wis. Stats., prohibit a governmental body from receiving at a meeting a communication from a citizen or group which relates to a matter not identified in the notice of that meeting which was given under s. 19.84?

"(2) Would a governmental body violate Subchapter IV of Chapter 19, Wis. Stats., by referring to a committee or agency,

or laying over until the next meeting of the body, a matter which was not noticed under s. 19.84, but which was raised by a member of the public at the meeting?"

Your two questions may be conveniently broken into three questions and answered one at a time.

The first question is whether an agenda item stating simply "Citizens and Delegations" is adequate notice under sec. 19.84(2), Stats. Section 19.84(2), Stats., provides as follows:

"Every public notice of a meeting of a governmental body shall set forth the time, date, place *and subject matter of the meeting*, including that intended for consideration at any contemplated closed session, *in such form as is reasonably likely to apprise members of the public and the news media thereof.*" (Emphasis supplied.)

It is my opinion that an agenda item such as "Citizens and Delegations" gives adequate notice to the public of the proposed subject matter of the meeting. If time is set aside in the agenda and notice of the meeting for such matters there is nothing in subch. IV of ch. 19, Stats., which would preclude a governmental body from hearing orderly presentations even though the express subject matter has not been included on the agenda and in the notice of the meeting. Further, such governmental body could on motion of a member, discuss and if urgency required take action on the matter. My opinion assumes that there is no conspiracy between the citizen and the presiding officer to evade the notice requirements of the open meeting law.

The basic thrust of the open meeting law is to provide the best notice available to the public of the nature of the governmental business which will be conducted. This policy does not, in my opinion, require exacting specificity. Thus, such general designations as "miscellaneous business" or "such other matters as may come before the body" are probably adequate notice to the press and the public that items not specifically listed on the agenda may be considered. I would caution, however, that where the presiding officer of a governmental body has specific knowledge that matters may come before the body, they should be included on the agenda.

The second question is whether anything in subch. IV of ch. 19, Stats., requires that a governmental body delay action on matters

which are not specifically noticed under sec. 19.84, Stats., until the next meeting. The answer to this question is no. So long as some general notice of the type of business to be conducted at the meeting is provided, and the general notice is not a subterfuge, the governmental body is not required to refer to committee or delay action until the next meeting of the body.

The third question is whether a governmental body has discretion to refer to committee or delay matters which were generally noticed under sec. 19.84, Stats., until the next meeting. In my opinion, the governmental body does have such authority. The fact that meetings are open to the public does not mean that persons other than board or committee members have a right to speak or otherwise participate in meetings. The degree of participation is a matter for determination by the governmental agency except in the case of an adversary proceeding or hearing required by law in which an interested party may have special rights. Wisconsin Constitution art. I, secs. 3 and 4, and the first amendment to the United States Constitution protect the right of freedom of speech and petition to government for redress of grievances. These constitutional protections are not absolute and are subject to reasonable regulation. Further, they do not mandate the particular procedure to be followed by a governmental body.

State v. Swicker, 41 Wis.2d 497, 164 N.W.2d 512 (1969), appeal dismissed, 396 U.S. 26.

State v. Givens, 28 Wis.2d 109, 135 N.W.2d 780 (1965).

State ex rel. Poole v. Menomonee Falls, 55 Wis.2d 55, 200 N.W.2d 580 (1972).

An agenda item such as "Citizens and Delegations" or "Miscellaneous Business" means only that the governmental body within its discretion may decide to hear such matters. Nothing in the open meeting law or the Constitution prevents any governmental body from referring matters on an agenda to a committee for further study or recommendation or from adjourning without completing all of the business contained on the agenda. These are questions of policy to be resolved by the governmental body.

The provision of a forum for citizen participation and some assurance that this forum is provided on an equal basis to all interested parties is a particularly compelling interest to be weighed

when deciding the question of how to proceed in individual cases on determining a general policy.

BCL:RJV:DJH

Counties; Agriculture; County Board; Supervisors, Board Of; Land; Municipalities; Real Estate; Pursuant to secs. 59.07(1)(a) and 59.873, Stats., a county can own and operate a lime pit in another county, within reasonable distance, if such operation is necessary to obtain sufficient supply to furnish lime at cost to farmers within the county operating such pit. However, absent a cooperation agreement pursuant to sec. 66.30, Stats., lime cannot be sold or distributed to farmers in such other county. OAG 20-77

March 8, 1977.

JAMES C. EATON, *District Attorney*
Barron County

You state that Barron County owns and operates lime quarries in both Barron County and Dunn County and sells lime at cost to farmers in both counties.

You request my opinion whether a county which does not have a cooperation agreement with another county can own and operate a lime pit in another county and can sell lime to farmers in such other county at cost.

I am of the opinion that Barron County can own and operate a lime pit in another county if such pit is within reasonable distance from the boundaries of Barron County, and such operation is necessary for the purpose of selling and distributing lime at cost to Barron County farmers, but that, absent a cooperation agreement, Barron County cannot sell and distribute lime to farmers in such other county.

A "county is a creature of the state and exists in large measure to help handle the state's burdens of political organization and civil administration" at the local level. *State v. Mutter*, 23 Wis.2d 407, 127 N.W.2d 15 (1964), appeal dismissed 379 U.S. 201 (1964). A county board has only such powers as are expressly conferred upon it

by statute or which may be necessarily implied from those expressly given. *Dodge County v. Kaiser*, 243 Wis. 551, 11 N.W.2d 348 (1943).

Wis. Const. art. IV, sec. 22, provides:

“The legislature may confer upon the boards of supervisors of the several counties of the state such powers of a *local*, legislative and administrative character as they shall from time to time prescribe.” (Emphasis added.)

Section 59.873, Stats., provides:

“The board may manufacture agricultural lime and sell and distribute it at cost to farmers and acquire lands for such purposes.”

Section 59.07(1)(a), Stats., provides in part that the county board may:

“(1)(a) Take and hold land sold for taxes and acquire, lease or rent property, real and personal, for public uses or purposes of any nature, including without limitation acquisitions for county ... lime pits for operation under s. 59.873”

In *Heimerl v. Ozaukee County*, 256 Wis. 151, 157, 40 N.W.2d 564 (1949), which held that then sec. 86.106, Stats., which provided that counties could construct and maintain private roadways and driveways, was unconstitutional, the court referred to then sec. 59.08(18), Stats., which is now sec. 59.873, Stats., the lime statute quoted above, and by *dicta* indicated that the manufacture, sale and distribution of lime at cost to farmers was a *governmental function* necessary to the health, safety and welfare of the *community* as a whole. The conclusion was based on benefit to the community or county concerned. One of the reasons given for striking down sec. 86.106, Stats., was that the power granted was not limited to exercise within the county or municipality concerned but would permit any municipality to “enter into contracts with any county in the state.”

In 36 OAG 14 (1947), it was stated that sec. 59.08(18), Stats. (1947), would permit a county to sell lime at cost to a federal agency which would then sell to farmers at the same cost. There was no indication that sales could be to farmers of other counties. In 52 OAG 222 (1963), it was stated that a county could acquire lands outside the county but within three-fourths mile of the county line for a

county park; however, an express statute, sec. 27.05(3), Stats., permitted acquisition of land outside the county but within three-fourths of a mile of the county line.

Neither sec. 59.07(1)(a) nor sec. 59.873, Stats., expressly provide that land may be acquired outside the county for lime pits or that sales may be made to farmers operating farms not within the county. In my opinion there is no implied power to permit a county to distribute or sell lime at cost to farmers outside the county. Manufacture, distribution and sale of lime at cost to farmers within the county serve a legitimate county purpose and amount to the exercise of a proper governmental function. The county could obtain a supply by the purchase of real estate and quarry or manufacture the lime within the boundaries of the county. It is my opinion that the county can also acquire real estate in another county for the purpose of mining, quarrying, crushing or manufacturing lime to obtain an adequate supply to carry out its express statutory power of distributing and selling lime at cost to its own farmers.

In 2 McQuillin, Mun. Corp. (3rd Ed.), sec. 10.07, pp. 751-753, the following is stated:

“... Extraterritorial powers of some kinds are in some states expressly conferred on municipal corporations by the state constitution, or by statutes, or charters. And the rule is well established that the legislature may confer such extraterritorial power, at least for certain purposes, unless prohibited by the state constitution. However, unless the right to exercise a power outside the boundaries has been so delegated to the municipality, the general rule is that the powers of a municipal corporation are limited by its boundaries and cannot be exercised outside thereof. *There is some authority, however, for applying the general rule against extraterritorial powers only to governmental as distinguished from proprietary powers and powers not essential to the proper conduct of the affairs of the municipality.*” (Emphasis added.)

In 10 McQuillin, Mun. Corp. (3rd Ed.), sec. 28.05, pp. 9-10, it is stated:

“Notwithstanding certain statements and decisions to the contrary, particularly among the older cases, likely influenced to some extent by an esteemed author on municipal corporations,

it is believed that the rule, supported by the weight of authority as well as by the better reasoning, is that a municipal corporation, where not expressly prohibited, may purchase real estate outside of its corporate limits, for legitimate municipal purposes, especially under a broad statutory or charter provision conferring power to purchase and hold real estate sufficient 'for the public use, convenience or necessities.'"

Among the cases supporting these general statements of law are *Becker v. The City of La Crosse*, 99 Wis. 414, 75 N.W. 84 (1898), *Schneider v. Menasha*, 118 Wis. 298, 95 N.W. 94 (1903), and *Superior W., L. & P. Co. v. Superior*, 174 Wis. 257, 181 N.W. 113 (1921).

The exception to the general doctrine that a municipal corporation cannot exercise its powers beyond its own limits, as stated in the last quote from *McQuillin* above, is not inconsistent with the general principle that counties can only exercise those powers expressly granted or necessarily implied. In *Becker, supra*, p. 419, it is stated:

"The general doctrine is clear that such corporations cannot usually exercise their powers beyond their own limits. The right to exercise extraterritorial powers can only arise by express grant of authority, as indicated in *Mayor v. Moran*, 44 Mich. 602, or by necessary implication from other powers granted, as is pointed out in *Coldwater v. Tucker*, 36 Mich. 474. And the powers so exercised must be directly within the range of corporate purposes. ..."

In *Becker* it was held that a city has no power to accept a privilege, granted by the legislature of another state, to construct a highway over territory belonging to such other state.

However, even at a time when cities still exercised powers similar to the more limited powers of today's counties, the court recognized that by virtue of an express grant of authority to "purchase and hold real estate sufficient for the public use, convenience or necessities," the city "possessed, by implication, all the powers reasonably necessary to the proper exercise of such express powers, and those essential to the objects and purpose of its corporate existence." *Schneider, supra*, p. 301. The court concluded that such implied authority included the power to purchase real estate outside

corporate limits for the ordinary business function of obtaining a supply of crushed rock to be used upon the city streets, saying:

“The rule that a city cannot exercise its governmental authority outside its limits has nothing to do with the case in hand. This court held that it cannot exercise such authority in *Becker v. La Crosse*, 99 Wis. 414, 75 N.W. 84. It at the same time recognized that a city may exercise its mere right to own and use property for legitimate city purposes outside its boundaries.” *Schneider*, *supra*, p. 303.

In *Schneider*, pp. 301, 302, it is stated:

“... The acquirement of a supply of crushed rock for use upon the city streets was a legitimate city purpose. That is conceded. It must be conceded, also, that to obtain such supply by the purchase of real estate and manufacturing the crushed rock therefrom within the city limits would be a legitimate exercise of corporate power. Would an act which does not involve the exercise of sovereign authority,—one in the exercise of the ordinary business functions of a city inside the city limits,—cease to be such if performed just over the boundary line or within a convenient distance from the city?”

The court held that the city had such power but stated, at p. 306, that there must be no ulterior motive involved in the acquisition and that:

“... If the agents of the city should go so far from its boundary to obtain land for its use that the element of convenience would be no longer apparent, there would undoubtedly be such an abuse of authority as to render the act void. ...”

At p. 305 of *Schneider*, the court stated this test:

“In testing the question of whether a municipality has exceeded its corporate authority in going outside its boundaries in any given case, we must first determine the purpose in view. If that be found to be the exercise of police authority, or authority to govern in any sense, the conclusion must be that the end does not justify the act. If it be found to be the mere exercise of a business function, the conclusion must be that the mere act of going beyond the boundary does not necessarily involve excess of power. In determining whether corporate authority has been

exceeded by reason of distance from the city limits the act in question reaches, we must solve that by an appeal to reason and common sense, keeping in mind that municipal corporations, in their business matters, are governed by very much the same rules as private corporations. ...”

In *Superior W., L. & P. Co. v. Superior*, 174 Wis. 257, 181 N.W. 113 (1921), it was held that a city may acquire real estate for a waterworks plant outside its boundaries and in another state where not prohibited by statute. At p. 299, the court stated:

“... That a city may acquire and own property, including real estate, beyond its borders to enable it to perform its municipal functions or powers expressly conferred upon it, was settled in this state by the case of *Schneider v. Menasha*, 118 Wis. 298, 95 N. W. 94, following the decided current of authority in this country, as will fully appear by the perusal of the opinion therein. The case of *Becker v. La Crosse*, 99 Wis. 414, 75 N. W. 84, involved an exercise on the part of the city of La Crosse of governmental functions in the state of Minnesota, the authority to do which was of course denied. The exercise of municipal functions on the part of a municipality beyond its boundaries is an entirely different matter from the owning of real estate in its proprietary capacity so far as it may be necessary or convenient for the discharge of municipal powers and functions. Neither the law nor public policy of this state interferes with the acquirement by the city of *Superior* of that portion of the waterworks plant reaching beyond the boundary line of this state. ...”

In my opinion, Barron County is not precluded from owning and operating a lime quarry in Dunn County for the purpose of selling and distributing lime at cost to Barron County farmers, simply because the quarry is in another county, unless the acquisition or its operation is otherwise unreasonable or unlawful.

Acquisition and operation of a lime pit in another county *and* sales to farmers in such other county would be permissible where there was a formal joint cooperation agreement under sec. 66.30, Stats., as sec. 59.07(11), Stats., grants to the county board the authority to:

“Join with the state, other counties and municipalities in a cooperative arrangement as provided by s. 66.30, including the

acquisition, development, remodeling, construction, equipment, operation and maintenance of land, buildings and facilities for regional projects, whether or not such projects are located *within the county. ...*” (Emphasis added.)

BCL:RJV

Agriculture; Forest Crop Law; Forestry; Forests; Liens; Regents, Board Of; State University System; Taxation; University; Forest land transferred to the University for purpose of forestry and timber studies and related research is exempt from property taxation under sec. 70.11(1), Stats., and is not subject to tax as “agricultural land” under sec. 70.116, Stats. The University lacks authority to enter its lands under subch. I, ch. 77, Stats., the forest crop law, or continue the previous entry of lands it acquires. OAG 21-77

March 9, 1977.

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

Your predecessor in office asked my opinion on three questions involving the applicability of the forest crop law--subch. I, ch. 77, Stats.--to land owned by the Board of Regents of the University of Wisconsin System.

I.

The first question is whether property transferred to the University for the purpose of forestry and timber studies and related research, including biological studies, is to be treated as other than agricultural property and exempt from property taxation under sec. 70.11, Stats. No inquiry was made as to the authority of the Board of Regents to acquire property for these purposes, and I express no opinion on that point.

Section 70.11(1), Stats., with exceptions not relevant here, exempts from property taxation property owned by the state. This exemption is equally applicable to lands held by and for the Board of Regents. *State ex rel. Wisconsin Univ. Bldg. Corp. v. Bareis*, 257 Wis. 497, 44 N.W.2d 259 (1950), and *Aberg v. Moe*, 198 Wis. 349,

224 N.W. 132 (1929). However, the Legislature has restricted the effect of this exemption by other statutes. Section 70.116 provides:

“Taxation of university agricultural lands. All agricultural lands owned or held by the board of regents of the university of Wisconsin system including those used for experimental purposes shall be subject only to the tax levied for school purposes the same as other real estate. If such taxes are not paid, the real estate shall be subject to tax sale as are privately owned lands.”¹

It is not clear on the face of the statute whether agricultural lands include forest lands. In construing the statute, the following rule should be kept in mind:

“Although the general rule of taxation is that all property, wherever located and by whomsoever owned, is subject to taxation, with the property owner having the burden of proving that he falls within an exception to that rule, it has been held that an exemption in favor of the state must be construed to make the exemption the rule and taxation the exception.” *State (Board of Regents) v. Madison*, 55 Wis.2d 427, 432, 198 N.W.2d 615 (1972).

The opinion there, in construing sec. 70.116, went on to say, at pp. 433-434:

“... Webster’s, *New International Dictionary* (3d ed. unabridged) defines ‘agricultural’ as follows:

“‘[O]f, relating to, or used in agriculture . . . : characterized by or engaged in farming as the chief occupation . . . : founded or designed to promote the interest or study of agriculture . . . : of or having the characteristics of the farmer or his way of life. . . .’

“The dictionary definition of the term ‘agriculture’ is:

“‘[T]he science or art of cultivating the soil, harvesting crops, and raising livestock: Tillage, Husbandry, Farming: the science or art of the production

¹ This opinion assumes, without deciding, the validity of sec. 70.116, Stats.

of plants and animals useful to man and in varying degrees the preparation of these products for man's use and their disposal (as by marketing). . . .'

"We think that the term 'agricultural lands' is synonymous with 'land of agricultural character' which indicates that the land in question either must actually be used in connection with raising crops or livestock, or be capable of being readily prepared for such use. ..."

Although the statutes contain no definition of agricultural lands expressly made applicable to the use of that term in sec. 70.116, ch. 70 does draw a distinction in other places between agricultural lands and forest lands. Section 70.32(2)(b) provides that in a town the assessor shall classify the property subject to taxation in one of several classes. The classes include, among others, agricultural, productive forestland and nonproductive forestland.

The forest crop law, in sec. 77.02(3), provides as a condition for the entry of land under the law that the Department of Natural Resources must find that the land will be "held permanently for the growing of timber under sound forestry practices, rather than for agricultural ... or other purposes."

In light of the foregoing statutes and the previously mentioned rule requiring a broad construction of a provision exempting state property from taxation, I believe that University lands held for the purpose of forestry and timber studies and related research, including biological studies, do not constitute agricultural lands subject to taxation under sec. 70.116, Stats., and would, therefore, be exempt from property taxation under sec. 70.11(1), Stats.

II.

The second question is whether the University may qualify as an owner, under sec. 77.02, so that its land may be entered under the forest crop law.

While there is no provision in ch. 77, Stats., which expressly precludes the state or one of its agencies, including the University of Wisconsin, from entering its lands under the forest crop law, it is my opinion, based upon historical perspective of the statutes involved and upon sound principles of statutory construction and other logical considerations, that the University lacks such authority.

Historically, it appears that the forest crop law was designed to serve two primary functions.² One purpose was to provide a system for equitably taxing private lands in a fashion which would encourage the growing of timber on lands unsuitable for other purposes. Today, that program is implemented primarily under the Forest Crop and Woodland Tax Law provisions of ch. 77, Stats. The other function which the law served was to provide town governments with a source of revenue from tax delinquent unmarketable, cutover forest lands, and to encourage the reforestation of these lands while held by county governments. Today, that program is continued and implemented primarily under the provisions of secs. 28.10 and 28.11, Stats., relating to the establishment of county forests.

Such forest lands as are held by the University are neither private nor taxed lands upon which the provisions of ch. 77, Stats., could operate, nor are they "county forests" within the provisions of secs. 28.10 and 28.11, Stats. In addition, while the encouragement of forestation is an element common to chs. 28 and 77, Stats., the only suggestion of the direct involvement of the University under any of their provisions appears in sec. 28.07, Stats., which provides:

"28.07 Cooperation. The department [of natural resources] may cooperate with the college of agriculture of the university of Wisconsin and with departments of this or other states, with federal agencies or with counties, towns, corporations or individuals, to the best interest of the people and the state, in forest surveys, research in forestry and related subjects, forest protection and in assistance to landowners to secure adoption of better forestry practice."

Such statute does not relate to, nor support, the entry of University lands under the forest crop law.

Generally speaking, the Legislature determines which lands will be subject to a tax and which lands will be exempt. Property of the state is normally exempt and a clear manifestation of intent to tax state property must be shown before it can be subject to taxation. *State (Board of Regents) v. Madison, supra*, p. 432. Sections 70.115, 70.116 and 70.117, Stats., are examples of specifically

² Land Use Controls and Recreation in Northern Wisconsin, G. Graham Waite, 42 MLR 271 (1959).

allowed legislative exceptions to the normal rule of exemption which attaches to state owned lands. However, by no reasonable interpretation could any of those statutes be viewed as authorizing or directing the subjection of state lands to taxation under the forest crop law.

In addition, having concluded as we have that the University forest land is not subject to taxation even under sec. 70.116, Stats., I see no reason why the University would find it desirable to enter its forest lands under the forest crop law.

The purpose of the forest crop law is stated in sec. 77.01, Stats., to be the encouragement of forest growth and sound forestry practices on land not more useful for other purposes, in a manner which will not hamper the towns from receiving revenue from such lands. To effectuate this purpose, land entered under the law is subject to certain restrictions and possible penalties in exchange for property tax exemption or deferral. Since University land is already exempt from property taxation, entry of such land under the law would only serve as an attempt to subject it to various restrictions and penalties without any compensating advantage. Therefore, it is clear that a literal application of the forest crop law to state land would severely limit the usefulness of such land.

In this regard it is also appropriate to note that statutes of general application, in particular those of a regulatory nature, are not considered to apply to the state, unless the state is explicitly included by appropriate language. *State ex rel. Dept. of Public Instruction v. ILHR*, 68 Wis.2d 677, 229 N.W.2d 591 (1975). No such "appropriate language" appears in the statutes here under consideration. In fact, they appear to exclude application to state lands. Intent to that effect is found in sec. 77.03, Stats., which specifically provides that entry of land under the forest crop law finalizes "a contract *between the state and the owner*, running with said lands." (Emphasis added.) Since under normal rules of contract law the state, like any other contracting party, cannot enter into a contractual relationship with itself, the Legislature must obviously have intended and anticipated that the "owner" of the subject forest crop lands be an entity other than the state.

III.

The third question asks whether the University must pay the withdrawal tax and penalty imposed by sec. 77.10, Stats., if it withdraws land which has previously been entered under the forest crop law.

This question will not normally arise under the facts assumed and discussed in answering your second inquiry, since as there indicated, state lands may not be entered under the forest crop law. However, this question might arise in the event that the University acquired land which the grantor had previously entered under the forest crop law, if the land were not withdrawn from the law prior to the transfer of title. The usual, and probably better, practice when a state agency desires to purchase land which is entered under the forest crop law, is to have the land withdrawn from the law prior to completion of the sale. In such a case, the liability for the deferred tax and penalty are discharged by the seller, and the land unquestionably passes to the state free from any restriction under the forest crop law.

While no authority exists for the state to enter its lands under the forest crop law, its agencies are not precluded from purchasing lands which are entered under the law. However, the same lack of authority which precludes such agencies from entering land under the forest crop law also normally precludes such agencies from maintaining acquired land under the program after acquisition. As previously pointed out, the state cannot enter into a contractual relationship with itself. Likewise, when the state purchases lands under the forest crop law, it cannot, as a purchaser and new owner, assume a contractual obligation running to itself. When the state purchases such forest crop land the commitments of the prior owner made to the state under the forest crop law merge with the state's title and are thereby discharged.

As stated in Restatement, Property sec. 555(1):

“The obligation arising out of a promise respecting the use of land is extinguished whenever the right to enforce the promise and the obligation upon it come to be in one person.”

And in Restatement, Contracts sec. 451:

“Where a person subject to a contractual duty or to a duty to make compensation acquires the correlative right in the same capacity in which he owes the duty, the duty is discharged.”

Another line of reasoning supports this conclusion.

If a lien has attached to land before the state acquires it, the state has an obligation to discharge that lien. An example of this is where the state obtains title after May 1st in a given year and before the property taxes for that year have been paid. Pursuant to secs. 70.01 and 70.10, Stats., the lien of the property taxes for that year attaches as of May 1st. Though the levy is not made until the tax roll showing those taxes has been delivered to the local treasurer (sometime in the summer or fall), the lien is deemed to date back to May 1st, because of the express provision in sec. 70.01. *Foscato v. Byrne*, 2 Wis.2d 520, 523-524, 87 N.W.2d 512 (1958) and *Van Dyke v. U.S.*, 156 F. Supp. 155, 158 (1957). In contrast to the effective date of the property tax lien, the obligation to pay the withdrawal tax and penalty, under the forest crop law, cannot be said to create a lien which attaches to land conveyed to the state, effective as of a time prior to the conveyance.

The taxes due when land is withdrawn from the forest crop law are determined by the Department of Revenue, pursuant to secs. 77.10(2) and 77.04(1), Stats., after the withdrawal. I find no specific language in the pertinent statutes even suggesting that the determination of the amount due creates a lien upon the land as of the time of withdrawal. Section 77.10(1)(b), Stats., provides that, if a purchaser of land entered under the law declines to certify his intention to continue the practice of forestry thereon, his action is ground for canceling the entry under par. (a). Under that paragraph, the cancellation is accomplished by order of the Department of Natural Resources. Such an order cannot be issued until *after* the transfer of title; and in the absence of any provision for making the order relate back to the time the grantor still held title, the order must be viewed as operating only prospectively. Thus, there can be no levy--and without a levy, no lien--until after the grantee has acquired title. When the grantee is the state it would be too late for a lien to be effective, since there is no basis for making the lien date back to a time prior to the state's title to the land, and since state land is exempt from taxation.

It might be contended that the forest crop law makes towns third-party beneficiaries in contracts between the state and owners of land

and that the towns have certain rights as against the state, arising from the state's acquisition of lands entered under the law. The answer is that towns are no better off than counties in this regard. *State v. Mutter*, 23 Wis.2d 407, 127 N.W.2d 15 (1964), held that since counties are mere creatures of the state, the state can amend the forest crop law so as to increase the costs of withdrawing county lands from the program and make the amendment applicable to lands previously entered under the law. The opinion states, at page 412:

“... The law is clear in Wisconsin that the legislature, in its relationship with municipal or quasi-municipal corporations of the state, is not obliged to heed prior legislative expressions. Thus, the legislature by statute can take away from a municipality what it has previously given to it by statute. ...”

Also, see *Marshfield v. Cameron*, 24 Wis.2d 56, 63, 127 N.W.2d 809.

BCL:EWW

Navigable Waters; Plats And Platting; Public Access; Streams;
The application of secs. 236.16(3) and (4), Stats., which concern lake and stream shore plats, discussed in reference to proposed subdivisions which do not immediately abut a lake or stream, but where the subdivider holds an interest in lands lying between the proposed subdivision and the lake or stream. OAG 22-77

March 8, 1977.

WILLIAM R. BECHTEL, *Secretary*
Department of Local Affairs and Development

You have requested my opinion on a number of issues relating to the administration of sec. 236.16(3) and (4), Stats., which concern lake and stream shore plats. Your questions deal specifically with the applicability of these sections to the situation in which a subdivision proposed to be created is not immediately abutting a lake or stream, but where the subdivider holds an interest in lands lying between the proposed subdivision and the lake or stream.

Section 236.16(3) and (4), Stats., provide:

“(3) Lake and stream shore plats. All subdivisions abutting on a navigable lake or stream shall provide public access at least 60 feet wide providing access to the low watermark so that there will be public access, which is connected to existing public roads, at not more than one-half mile intervals as measured along the lake or stream shore except where greater intervals and wider access is agreed upon by the department of natural resources and the head of the planning function, and excluding shore areas where public parks or open-space streets or roads on either side of a stream are provided. No public access established under this chapter may be vacated except by circuit court action.

“(4) Lake and stream shore plats. The lands lying between the meander line, established in accordance with s. 236.20 (2) (g), and the water’s edge, and any otherwise unplattable lands which lie between a proposed subdivision and the water’s edge shall be included as part of lots, outlots or public dedications in any plat abutting a lake or stream. This subsection applies not only to lands proposed to be subdivided but also to all lands under option to the subdivider or in which he holds any interest and which are contiguous to the lands proposed to be subdivided and which abut a lake or stream.”

The issues raised will be discussed in the order in which you present them. Your first three questions concern related aspects of the definition and applicability of the term “lake and stream shore plats,” as used in sec. 236.16(3) and (4), Stats., and will be considered together. These questions and my answers are:

“1. Can a subdivision plat which does not abut a lake or stream be considered to be a lake or stream shore plat?”

Yes, if it is the type of subdivision which must be made to abut a lake or stream under the provisions of sec. 236.16(4), Stats.

“2. Can the provisions applying to lake and stream shore plats be applied to any and all plats?”

Yes, the provisions of sec. 236.16(3) and (4), Stats., apply to any plats falling within their terms.

“3. Do the respective captions in Chapter 236 of the Wisconsin Statutes have significance?”

The captions on sec. 236.16(3) and (4), Stats., have no critical legal significance.

A title or heading of a statute is not part of the statute, sec. 990.001(6), Stats., and cannot prevail over the language of the statute, although it can be persuasive as to proper interpretation and indicative of legislative intent. *Pure Milk Products Coop. v. NFO*, 64 Wis.2d 241, 219 N.W.2d 564 (1974); *State v. Mahaney*, 55 Wis.2d 443, 198 N.W.2d 373 (1972). However, where as here, the body of the statute is otherwise clear and free from ambiguity, resort cannot be made to the caption to create a doubt where none would otherwise exist. See *Wisconsin Valley Imp. Co. v. Public Serv. Comm.*, 9 Wis.2d 606, 101 N.W.2d 798 (1960).

A reading of these statutory sections discloses no legislative attempt to create a class of "lake and stream shore plats" to which their requirements are applicable. Rather, each section specifies the type of subdivision to which its terms are to be applied. Section 236.16(3), Stats., requires that public access to the waters be provided in "All subdivisions abutting on a navigable lake or stream." Section 236.16(4), Stats., has a more extensive application, and requires in effect that certain subdivisions be made to abut a lake or stream.

Your fourth question is:

"4. If the provisions which apply to lake and stream shore plats are applied to plats which do not conform to the statutory definition can a plat which does not abut be converted into an abutting plat?"

In effect, this question asks whether a proposed plat which does not abut a lake or stream may be made to abut a lake and stream and become subject to the requirements applicable to abutting plats. The answer to the question is clearly "yes." The very purpose of sec. 236.16(4), Stats., is to force developers who would plat in the vicinity of a lake or stream to refrain from holding in separate ownership a strip of unbuildable, unplattable land between the land proposed for subdivision ownership and the abutting water. This requirement is of particular significance in relation to sec. 236.16(3), Stats., requiring public access to the waters in "All subdivisions abutting on a navigable lake or stream."

Examination of the legislative history of ch. 304, Laws of 1965, discloses that a primary purpose in creating sec. 236.16(4), Stats., was to prevent subdividers from avoiding the public access requirements of sec. 236.16(3), Stats., by omitting strips of land from plats and thus creating plats not abutting lakes or streams.

Your fifth and sixth questions are:

“5. Does not the act of including unplattable lands in a plat automatically make them plattable?”

“6. If unplattable lands are included in a plat as part of lots, outlots or public dedications have not these lands by this act become plattable?”

The only reference to “unplattable” lands in sec. 236.16, Stats., is found in subsec. (4) of that provision, where it is stated that “any otherwise unplattable lands which lie between a proposed subdivision and the water’s edge shall be included as part of lots, outlots or public dedications in any plat abutting a lake or stream.” No definition of that term is provided elsewhere in ch. 236, Stats. However, analysis of those terms which are defined, together with the general requirements of the chapter and the particular legislative purpose underlying sec. 236.16(4), Stats., does suggest a meaning for the term. Section 236.02(5), Stats., defines a “plat” as a map of a subdivision. A “subdivision” is defined as the division of a lot or parcel into smaller parcels of certain specified sizes. Sec. 236.02(8), Stats. Other sections specify the minimum sizes into which parcels may be divided. Thus, sec. 236.16(1), Stats., sets limits on the area and width of lots, and sec. 236.45, Stats., authorizes towns, counties and municipalities to adopt subdivision control ordinances, pursuant to which they may set different minimums. In addition to these basic regulations, plats are required to meet certain designated criteria as to roads, public improvements and sewerage facilities to qualify for approval. Secs. 236.13, 236.03, and 236.10, Stats. With respect to lands lying within 500 feet of lakes and streams, sec. 236.13(2m), Stats., requires assurance of adequate drainage areas to prevent pollution and protect the public health. Presumably, lands which are too small in area or of improper width, which cannot be adequately drained, or which are incapable of being brought within the other requirements of ch. 236, Stats., are those which are unplattable for purposes of sec. 236.16(4), Stats.

Generally speaking, "unplattable land" refers to land which is unplattable in the sense that it cannot, by itself, support a plat, under ch. 236, Stats. If land can support a plat, without the addition of other lands to satisfy the requirement of ch. 236, Stats., such land is plattable and the requirements of sec. 236.16(4), Stats., do not apply.

The legislative purpose of sec. 236.16(4), Stats., discussed above supports this conclusion. That section is aimed primarily at preventing subdividers from creating narrow, unplatted buffer zones between platted lands and the water's edge, and thus avoiding requirements of public access to the waters. Thus the "unplattable" lands referred to in the section would be those included in such buffer zones, which because of their size, shape, etc., could not be independently subdivided and platted.

Your seventh and eighth questions ask:

"7. If the caption LAKE AND STREAM SHORE PLATS has no significance and can be interpreted to cover any and all plats, then what is the significance of the final 8 words in the first sentence of 236.16 (4)?

"8. Can the latter provision, the 8 final words of the first sentence be disregarded having the effect of converting a plat which does not abut into one which does abut?"

These questions are merely a rephrase of questions which have been answered previously. The final eight words of the first sentence of sec. 236.16(4), Stats., are "in any plat abutting a lake or stream." These words, as also noted above, merely indicate the type of plat to which the requirements of sec. 236.16(4), Stats., are applicable. I do not find them in the least ambiguous. They are simply used in the statute to help describe circumstances under which certain proposed plats must include lands which have the effect of making the plat abut a lake or stream.

BCL:DJH:JCM

Plats And Platting; Register Of Deeds; Surveys; Certified survey maps provided for by sec. 236.34, Stats., are corrected by subsequent recording of corrected survey maps. OAG 23-77

March 24, 1977.

BARTLEY G. MAUCH, *District Attorney*
Sauk County

You ask how certified survey maps provided for by sec. 236.34, Stats., can be corrected.

Section 236.295, Stats., allows recording of certain instruments with the register of deeds to correct plats. Section 236.295 applies only to correction of plats and not to correction of certified survey maps. Further, plats cannot be corrected by use of certified survey maps. 49 OAG 113, 114 (1960); 55 OAG 14, 18-19 (1966).

Correction of certified survey maps is not mentioned in ch. 236, Stats. Corrections of such maps can be achieved, however, by recording subsequent certified survey maps.

You ask further how subsequent certified survey maps used for corrections can be cross-referenced.

Section 236.34(2), Stats., provides that certified survey maps be numbered consecutively and be kept in a separate bound volume marked "Certified Survey Maps of County" by the register of deeds. Section 59.51(1), Stats., requires that separate indexes be kept of all instruments recorded with the register of deeds. A proper index system will reference all certified survey maps recorded affecting the same parcel or parcels of land.

BCL:JPA

Creditors' Actions; Interest; Mortgages; Savings And Loan Associations; Imposition of a prepayment penalty by a savings and loan association on mortgage loans can only be made when the conditions of sec. 215.21(11), Stats., are met. Section 215.21(19) also discussed. OAG 25-77

March 29, 1977.

R. J. McMAHON,

Commissioner of Savings and Loan

You ask under what circumstances a state-chartered savings and loan association may impose a prepayment penalty on outstanding mortgage loans. In your opinion request you note a possible conflict between sec. 138.05(2), Stats., applicable generally to all lenders, and sec. 215.21, Stats., applicable only to state-chartered savings and loan associations.

Section 138.05(2), Stats., provides as follows:

“(2) Any loan for which the rate of interest charged 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 which shall be determined as follows:

“(a) On any such loan which is repayable in substantially equal, successive instalments at approximately equal intervals of time and the face amount of which includes predetermined interest charges, the amount of such refund shall be as great a proportion of the total interest charged as the sum of the balances scheduled to be outstanding during the full instalment periods commencing with the instalment date nearest the date of prepayment bears to the sum of the balances scheduled to be outstanding for all instalment periods of the loan.

“(b) On any other such loan, the amount of such refund shall not be less than the difference between the interest charged and interest, at the rate contracted for, computed upon the unpaid principal balances of the loan from time to time outstanding prior to prepayment in full.”

The pertinent subsections of sec. 215.21, Stats., are as follows:

“(11) **Penalty interest; when charged.** When the aggregate of principal payments made by a borrower during any 12-month period exceeds 20 per cent of the original amount of the loan, the association may charge 90 days interest on that part of

prepayment which exceeds 20 per cent of said original amount, provided the mortgage note makes express provision therefor.

“(19) **Repayment of loans.** A borrower may repay his loan at any time by giving 30 days’ written notice of his intention to do so, subject to sub. (11).”

It is my opinion that the two above quoted statutory provisions were designed to deal with separate but related lending situations and are therefore not in conflict with each other. One statute deals with loans generally, the other deals with loans by savings and loan associations.

Section 138.05(2), Stats., provides the right to prepay all loans which bear an interest rate in excess of 10 percent. The Legislature has provided that where the lender has received unearned interest payments, these payments should be returned to the borrower. Section 138.05(2)(a) and (b) provides methods for determining if any refund of interest is due to the borrower. The payment of unearned interest to the lender results under some types of precomputed loan transactions. Section 138.05(2), Stats., applies to all lenders, including those who precompute the interest on their loans with the result of receiving unearned interest in the early installment periods.

Although sec. 138.05(2), Stats., does not state whether a penalty can be attached to this right to prepay, a consideration of this question is not necessary here. Likewise, it is not necessary to consider here the Wisconsin Consumer Credit Act which gives to the consumer the right to prepay without a penalty certain loan transactions covered by the Act. Sec. 422.208, Stats.

Section 215.21(11), Stats., relating to mortgage loans from savings and loan associations, provides for a penalty upon prepayment of such a loan in certain limited circumstances, i.e., when the aggregate of principal payments made by the borrower during a twelve-month period exceeds 20 percent of the original amount of the loan and the mortgage loan expressly provides for such a penalty. Further, this penalty may not be imposed unless the mortgage note makes express provision therefor.

Additionally, sec. 215.21(19), Stats., enlarges the right to prepayment beyond that granted in sec. 138.05(2), Stats. One who borrows from a savings and loan association has the right, upon giving 30 days' written notice, to prepay all such loans, not only those which carry an interest rate in excess of 10 percent, and is subject to a prepayment penalty only if, and to the extent that, sec. 215.21(11), Stats., applies.

Even if one were to conclude that there is a conflict between these two statutory provisions which are designed to deal with two separate but related situations, any such conflict can be avoided by applying the following general rule of statutory construction:

“... [W]hen both a general statute and a specific statute relate to the same subject matter, the specific statute controls.”
Estate of Zeller, 39 Wis.2d 695, 700, 159 N.W.2d 599 (1968).

In my opinion, the imposition of prepayment penalties for mortgage loans of savings and loan associations are limited to the circumstances of sec. 215.21(11), Stats. The legislative intent of sec. 215.21(19), Stats., is to give borrowers the right to repay mortgage loans at any time on 30 days' notice. This right is made subject only to sec. 215.21(11). Section 215.21(11) is specific as to the conditions precedent to the imposition of a prepayment penalty and the maximum size of the penalty. This specificity is also consistent only with the legislative intention that sec. 215.21(11) provides for the limited circumstances in which a penalty can be attached to a borrower's exercise of his right to repay his loan to a savings and loan association. *Expressio unius est exclusio alterius*, i.e., the expression of one thing is the exclusion of another.

Therefore, I conclude that savings and loan associations may exact prepayment penalties on mortgage loans only in conformity with sec. 215.21(11), Stats.

BCL:JEA

Anti-Secrecy; Collective Bargaining; Education, Board Of; Open Meeting; Schools And School Districts; Discussion of public notice requirements for meetings of city district school board under secs. 19.81-19.98 and 120.48, Stats. OAG 26-77

March 26, 1977.

MARSHALL H. BOYD, *District Administrator*
Portage Public Schools

Pursuant to sec. 19.98, Stats., you request my advice on a number of questions relating to the open meeting law as created by ch. 426, Laws of 1975.

I will answer the questions you pose on the basis of the facts stated in your request. However, since it appears that you are seeking advice to aid the school board in the proper conduct of its meetings, I suggest that the board seek and rely on the advice of its attorney who, in most cases, is in the best position to render legal advice in view of all of the special circumstances existing for each case. Your letter states that a "city district Board of Education" is involved, and this opinion assumes that it is a city school district operating under subch. II of ch. 120, Stats.

"(1) Under 19.84 (1) (a) does a regular or special meeting of a city district Board of Education require posting of notices as well as newspaper and radio notices? If so, would the front door of the school constitute a reasonable public place and how many places are required?"

Section 19.84(1)(a) and (b), Stats., provides:

"(1) Public notice of *all meetings* of a governmental body shall be given in the following manner:

"(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." (Emphasis added.)

Section 120.48(1), Stats., as amended by ch. 426, Laws of 1975, provides:

"(1) The school board in a city school district shall hold regular monthly meetings at such times as it prescribes by rule.

Special meetings may be held under rules adopted by the school board. *The school board shall inform the public of its regular monthly meetings, either by publication of a class 1 notice, under ch. 985, with the specific exception that insertion thereof need not be at least one week before the meeting, or by other means which may include posting.* All school board meetings shall be open to the public except as provided in subch. IV of ch. 19 and except that the public shall be excluded from a hearing before the school board on charges against an employe, if requested by the employe against whom the charges are preferred.”

There must be compliance with the provisions of both subsec. (1)(a) and subsec. (1)(b) of sec. 19.84, Stats.

I am enclosing a copy of an opinion, 63 OAG 509 (1974), which is concerned with the meaning of the word “communication,” which was also used under former sec. 66.77(2)(e), Stats. In reading that opinion you should note that the provisions of present sec. 19.84(1)(b), Stats., are more extensive than those of former sec. 66.77(2)(e), Stats.

Posting is not required by subsecs. (1)(a) or (1)(b) of sec. 19.84, Stats. Posting may be a means of informing the public of regular or special meetings or as a supplement to the publication of a class 1 notice for a city school district regular monthly meeting. See sec. 120.48, Stats. The front door of the school, if reasonably accessible to the public, would constitute a proper place for posting of notices. The statutes do not specify a number of places where posting must occur. Since neither sec. 19.84(1) nor sec. 120.48, Stats., *require* publication of a notice in a newspaper, the provisions of sec. 985.02(2), Stats., which require, when posting is elected in place of publication, posting in “at least 3 public places likely to give notice to persons affected” are not applicable. However, three public places would be a prudent number to utilize. Where posting is to be relied upon, the number of places used might well vary depending on the size of the district, the number and location of schools and the place or places the board customarily holds its meetings.

“(2) Is the Board limited to agenda items or can it revise or add to the agenda if that step is included as an agenda item, i. e. ‘agenda revisions’?”

The board is not necessarily limited to agenda items. The use of an agenda item entitled "agenda revisions" is minimal compliance with the law unless it represents a subterfuge to avoid the law. However, this practice should be avoided. Where members know specific items in advance of the meeting, they should be communicated to the presiding officer who should give notice of the supplemental agenda in the manner described above. Matters of importance or of wide interest should be postponed until more specific notice can be given. See 66 OAG 68 (1977).

Section 19.84(2), Stats., refers to the content of the required notice:

"(2) Every public notice of a meeting of a governmental body shall set forth the time, date, place and subject matter of the meeting, including that intended for consideration at any contemplated closed session, in such form as is reasonably likely to apprise members of the public and the news media thereof." (Emphasis added.)

The notice should be as specific and informative as possible. See discussion at 63 OAG 509, 511 (1974) and 66 OAG 68 (1977).

"(3) Under 19.85 [1] (e) are negotiation strategies and topics for consideration by the Board allowable under this sub-section or does 'bargaining reasons' refer to purchase of properties, investments, and other specified public business?"

Where a board is meeting for the purpose of collective bargaining under subch. IV or V of ch. 111, it is not a "governmental body" within the meaning of sec. 19.82(1), Stats., and a board would not have to comply with the public notice requirements of sec. 19.84, Stats., when meeting for those purposes. The open session, required for final ratification or approval of a collective bargaining agreement would be subject to the notice requirements. See sec. 19.85(3), Stats. However, a city district school board must also comply with the notice requirements of sec. 120.48, Stats. Thus, where collective bargaining strategies are to be discussed at a regular meeting the board would have to comply with any public notice requirements contained in its rules applicable to special meetings, open or closed.

It is my opinion that a board could meet in closed session for the purpose of forming negotiation strategies. I recommend, however,

that the board give notice of a meeting as prescribed by secs. 19.84(1)(a), (b) and (2), Stats., specifying that an open meeting will be held for the purpose of taking a vote to convene in closed session for the purpose of discussing labor negotiation strategies citing the exemptions in sec. 19.85(1)(c) and (e), Stats.

The exemption in sec. 19.85(1)(e), Stats., provides:

“(e) Deliberating or negotiating the purchasing of public properties, the investing of public funds, or conducting other specified public business, whenever competitive or bargaining reasons require a closed session.”

It is my opinion that the last two phrases are not limited to situations involving the purchasing of public properties or the investing of public funds.

“(4) Can a city district school board vote to preliminarily approve bargaining proposals in closed session without violating sec. 19.85(3), Stats.?”

I am of the opinion that it can. A governmental body can vote to take action on matters discussed at a closed session if such action is an integral part of the reason for which the permitted closed session was convened. Some consensus is necessary, where closed sessions are utilized, before an open meeting duly noticed is convened. Members could, of course, change their votes at the open session when the matters of final ratification or approval were before the board.

Section 19.85(3), Stats., provides:

“(3) Nothing in this subchapter shall be construed to authorize a governmental body to consider at a meeting in closed session the final ratification or approval of a collective bargaining agreement under subch. IV or V of ch. 111 which has been negotiated by such body or on its behalf.”

I construe this section as requiring an open session, duly convened on notice, for the purpose of taking final action, whether it be in the form of final ratification or final approval.

“(5) Closed session notice. Does naming the subject (i.e. purchase of property, public fund investment) satisfy the statute or must statutory reference such as Wis. Stat.

19.85 (1) (e) [be included] as part of the agenda reference?"

Section 19.85(1), Stats., provides in part:

“(1) Any meeting of a governmental body, upon motion duly made and carried, may be convened in closed session under one or more of the exemptions provided in this section. The motion shall be carried by a majority vote in such manner that the vote of each member is ascertained and recorded in the minutes. *No motion to convene in closed session may be adopted unless the chief presiding officer announces to those present at the meeting at which such motion is made, the nature of the business to be considered at such closed session, and the specific exemption or exemptions under this subsection by which such closed session is claimed to be authorized.* Such announcement shall become part of the record of the meeting. No business may be taken up at any closed session except that which relates to matters contained in the chief presiding officer’s announcement of the closed session. ...” (Emphasis added.)

I am of the opinion that stating the general subject of the closed session is not sufficient. There should be specific reference to the specific statutory exemption which is being relied upon as set forth in sec. 19.85(1), Stats. Where an open session is convened into closed session sec. 19.85(1), Stats., requires the chief presiding officer to announce to those present the nature of the business to be considered at the closed session and the specific exemption or exemptions in the subsection by which the closed session is claimed to be authorized. Procedure requires similar reference where notice of a contemplated closed session is given under sec. 19.84(2), Stats.

I am also of the opinion that a closed session cannot be held prior to an open session or as the first order of business. A governmental body can reconvene into open session if notice of such subsequent open session is given as required by sec. 19.85(2), Stats.

Section 19.83, Stats., provides:

“**Meetings of governmental bodies.** *Every meeting of a governmental body shall be preceded by public notice as provided in s. 19.84, and shall be held in open session.* At any meeting of a governmental body, all discussion shall be held and all action of any kind, formal or informal, shall be *initiated,*

deliberated upon and acted upon only in open session except as provided in s. 19.85.” (Emphasis added.)

Section 19.85(2), Stats., quoted above, requires that notice be given of the *subject matter*, “including that intended for consideration at any contemplated closed session, *in such form as is reasonably likely to apprise members of the public and the news media thereof.*”

This provision is to be construed *in pari materia* with sec. 19.85(1), Stats., which contains provisions as to the specificity of the notice to be given where an action is taken in open session to reconvene as a closed session. These provisions require reference to the specific exemption or exemptions relied upon.

BCL:RJV

Bicycles; Cities; Licenses And Permits; Motor Vehicles; Municipalities; Ordinances; Villages; The licensing of bicyclists, the creation of bicycle courts and the impoundment of bicycles is a matter of statewide concern. Cities and villages cannot exercise such regulation in the absence of express legislative authorization. OAG 27-77

March 30, 1977.

JOHN RADCLIFFE, *Coordinator*
Office of Highway Safety Coordination

You have requested my opinion on four questions that relate to the control and regulation of bicycles and their operation. You have also indicated to me in a second letter that your concern is with local action, such as municipal ordinances, which authorizes such control and regulation. For the reasons given below, such local action is unauthorized by state law.

In order to keep the subject matter in proper context, some general principles will be discussed before answering your specific questions.

A bicycle is a vehicle within the meaning of the word “vehicle,” as that word is used in the vehicle code, chs. 340 through 348, Stats. *Rasmussen v. Garthus*, 12 Wis.2d 203, 107 N.W.2d 264 (1960);

Miller v. Keller, 263 Wis. 509, 57 N.W. 711 (1952); sec. 340.01(74), Stats.

The vehicle code is a matter of statewide concern and application. *Madison v. Reynolds*, 48 Wis.2d 156, 180 N.W.2d 7 (1970).

In addition to many general provisions of the vehicle code, which are applicable to bicycles such as rules of the road, ch. 346, Stats., examples of specific legislation are found in secs. 347.02, 349.18 and 346.79.

We have judicial recognition of the vehicle code as being a matter of statewide concern. We also have judicial and legislative recognition of the bicycle as a vehicle subject to such code. Additionally, common observation or experience shows that the operation of bicycles is not limited to intra-city use. It has not been uncommon and it is becoming even more common for bicyclists to engage in cross-country bicycling. Further, in the large metropolitan areas, the use of the bicycle between the major city and the adjacent communities is very common. Additionally, bicycles are often transported by motor vehicle for use in different locales. We also have the common situation of nonresidents, for example, students using their bicycles for extended periods while living away from home.

In *Madison v. Tolzmann*, 7 Wis.2d 570, 97 N.W.2d 513 (1958), the court noted at page 573, that cities in the regulation of matters of statewide concern have only such powers as are either expressly conferred by the Legislature or implied as being necessary and convenient to carry out the express legislative grants of authority.

Accordingly, any local or municipal regulation controlling the operation of bicycles or bicyclists must be authorized by state law and cannot conflict with state law.

The first question you ask is:

“1. Can a bicycle court, using junior high students as judges, bailiff, and clerk be legally implemented in a city or village?”

I know of no provision of law which would authorize such a court.

Your second question is:

“2. Is the impounding of a bicycle following the violation of a traffic law by a bicyclist legal?”

I have found no provision of state law that specifically authorizes the adoption of a municipal ordinance which would allow the impoundment of a bicycle for violation of a traffic ordinance or statute. Cities and villages do have broad police powers under secs. 62.11 and 61.34, Stats. Section 62.11, Stats., authorizes "confiscation," while sec. 61.34, Stats., authorizes "suppression." Notwithstanding these broad grants of power, I am of the opinion that the power to impound in this instance does not exist. The rationale in support of this view will be included in the discussion of your next question.

Thirdly, you ask:

"3. Can the issue of a bicycle license plate be legally held back for an indefinite time pending the passing of a written and skills test by the bicycle owner or driver?"

It is clear from your question that what is intended is to have the issuance of a bicycle license plate serve the dual functions of vehicle registration and vehicle operator's license.

For the reasons previously discussed, I am of the opinion that municipal licensing of vehicle operators must be based on express statutory authorization.

The licensing provisions of ch. 343, Stats., only apply to the licensing of operators of motor vehicles. (Sec. 343.01(2)(b), Stats.) Chapter 343 does not provide for licensing of operators by local governments. It is my opinion that municipalities cannot rely on the provisions of ch. 343 as authority to license bicyclists. As stated previously, however, cities and villages do have broad powers, including the general power to license. (Secs. 62.11 and 61.34, Stats.) However, such grants of legislative authority must obviously be considered within the context of the activity that is to be licensed. The activity in this instance is one of statewide concern. Because bicycling is a matter of statewide use and concern, and because of specific state legislation regarding bicycles, reliance on the broad general powers of cities and villages to further regulate bicycling and bicyclists is not, in my opinion, warranted and would not be proper. Accordingly, the authority to license bicyclists must, as indicated by the court in *Madison v. Tolzmann, supra*, be found within the language of some specific grant of authority. I find no express or specific grant of authority to license bicyclists. The only grant of

legislative authority that might possibly support local licensing of bicyclists is found in sec. 349.18(2), Stats., which provides:

“Any city or village may by ordinance:

“(2) Regulate the operation of bicycles and require their registration, including the payment of a registration fee.”

Chapter 349, Stats., entitled “Powers of State and Local Authorities,” is largely as its title indicates, a grant of authority to enact or enforce traffic regulations which must be in harmony with the motor vehicle code. Its purpose is to aid in the enactment and enforcement of uniform albeit local laws on a subject matter of statewide concern. Subsection (1)(b) of sec. 349.03, Stats., does allow nonconformity in those situations where such authority “is expressly authorized by ss. 349.06 to 349.25.” Accordingly, the obvious question is whether the language of sec. 349.18(2), Stats., expressly authorizes the licensing of bicycle operators.

It is clear from sec. 349.18(2), Stats., that the Legislature has expressly exempted bicycle registration from the general requirement of uniformity. However, the language of sec. 349.18(2), Stats., does not expressly authorize local licensing of bicycle operators or bicyclists. The [motor] vehicle code is precise and technical. The code distinguishes between the registration of vehicles, the licensing of operators and the operation of vehicles. Accordingly, I must assume that if the Legislature had intended that municipalities be expressly empowered to license bicyclists, the words customarily employed in the vehicle code to grant licensing authority would have been used in the particular instance of bicyclists. For example, sec. 349.24, Stats., authorizes municipalities to license chauffeurs and taxicab drivers. Under sec. 349.25, Stats., certain counties may license hayride, sleigh and bobsled drivers.

The language “regulate the operation of bicycles” in sec. 349.18(2), Stats., is not sufficiently precise or express to cover the licensing of bicyclists. Such authority would have to be implied from the language of the statute. To find such authority by implication would violate the mandate of sec. 349.03(1)(b), Stats., which requires that such authority be “expressly” given by the Legislature.

In conclusion, it is my opinion that there is no statutory authority that expressly authorizes municipal licensing of bicyclists; that such authority cannot be implied, for to do so, would not only be

inconsistent with the provisions of sec. 349.03(1)(b), but would result in local legislation in an area of statewide concern.

It would be improper to use bicycle registration as a means of licensing bicyclists. Registration of the vehicle does not carry with it licensing of the operator.

Lastly, you have asked:

“4. Can a city or village legally require a license for bicycle drivers under 16 and those above 16 without a motor vehicle operator’s license?”

Based on the discussion of question three, the answer to this question is no.

BCL:CAB

Cities; Counties; Municipalities; Ordinances; Plats And Platting; Villages; Discussion of the application of municipal and county subdivision control ordinances within the municipality’s extraterritorial plat approval jurisdiction. OAG 28-77

March 31, 1977.

ERIC J. LUNDELL, *District Attorney*
St. Croix County

Your predecessor asked whether the requirements of a municipal subdivision control ordinance, adopted pursuant to sec. 236.45, Stats., which is applicable within the municipality’s “extraterritorial plat approval jurisdiction,” control over more restrictive county subdivision control ordinance provisions, also adopted under the statutory authority contained in sec. 236.45, Stats.

Section 236.02(2), Stats., defines “extraterritorial plat approval jurisdiction” to mean “the unincorporated area within 3 miles of the corporate limits of a first, second or third class city, or 1 1/2 miles of a fourth class city or a village.”

Assuming that the specific ordinance provisions adopted by the municipality and the county are otherwise valid, the answer to this

general question is obviously controlled by the provisions of sec. 236.13(4), Stats., which reads:

“(4) Where more than one governing body or other agency has authority to approve or to object to a plat and the requirements of such bodies or agencies are conflicting, the plat shall comply with the most restrictive requirements.”¹

This subsection is intended to safeguard the rights of the subdivider by eliminating delays in plat approval occasioned by conflicting plat requirements. As stated in the 1955 *Report of the Wisconsin Legislative Council* (Vol. IV, Subdivision and Platting of Land), which recommended the adoption of sec. 236.13(4), Stats:

“A subdivider sometimes finds himself caught between the conflicting requirements of more than one agency whose requirements must be met in order to entitle his plat to record. At present he has no recourse except to try to work out a compromise between the agencies. One subdivider complained to the advisory committee that he had the approval of a plat delayed a year while the town board and the city council attempted to settle their differences on requirements. The committee proposal will provide a statutory standard for settling these conflicts so that the subdivider can proceed without too much delay. It is also legislative recognition of the fact that these conflicts should not be a burden on the subdivider.” 1955 *Report*, p. 20.

Section 236.13(4), Stats., does not conflict with sec. 236.45(3), Stats. The latter statute simply states that a municipal subdivision control ordinance enacted under the authority of sec. 236.45, Stats., may apply within the municipality’s extraterritorial plat approval jurisdiction as well as within its corporate limits, and the statute is not intended to contravene or negate the provisions of sec. 236.13(4), Stats. I find nothing on the face of these two statutory provisions suggesting any necessary conflict between them. In fact, the compatibility of these two statutory provisions is specifically recognized in the legislative council note to proposed sec. 236.45(3),

¹ The application of sec. 236.13(4), Stats., to “competing” county and municipal ordinance provisions has been previously discussed in 61 OAG 289 (1972), 62 OAG 315 (1973) and 64 OAG 175 (1975).

as appended in bill form to the 1955 *Report, supra*. The subsection then read essentially as subsequently enacted and as appears in the present statutes. That note read, in part, as follows:

“Under sub. (3) the subdivision regulations apply in any area where the municipality, town or county has the right to approve or object to plats. It must be remembered that under s. 236.13 where those regulations conflict, the more restrictive apply. ...”

Your predecessor also requested my opinion as to whether a municipal subdivision control ordinance must contain a specific provision making it applicable to the municipality’s “extraterritorial plat approval jurisdiction” before the municipality may apply its ordinance extraterritorially.

The answer to this question is no.

Section 236.10(1)(b)2., Stats., provides:

“(1) To entitle a final plat of a subdivision to be recorded, it *shall* have the approval of the following in accordance with the provisions of s. 236.12:

“***

“(b) If within the extraterritorial plat approval jurisdiction of a municipality:

“***

“2. The governing body of the municipality if, by July 1, 1958, or thereafter it adopts a subdivision ordinance or an official map; and” (Emphasis added.)

The foregoing statute, read with sec. 236.45(3), Stats., indicates that once a municipality adopts a subdivision control ordinance any plat within the extraterritorial plat approval jurisdiction of the municipality is controlled by such ordinance and must be approved by the municipality. However, sec. 236.10(5), Stats., provides that a municipality may waive its statutory authority in this regard partially or totally and may subsequently rescind any such waiver. That subsection provides in part:

“(5) Any municipality may waive its right to approve plats within any portion of its extraterritorial plat approval

jurisdiction by a resolution of the governing body filed with the register of deeds”

In light of the foregoing, it is evident that a municipal subdivision control ordinance, enacted under sec. 236.45, Stats., automatically applies within the extraterritorial plat approval jurisdiction of the enacting municipality. In order to waive part or all of this statutory grant, the governing body must take appropriate legislative action.

BCL:JCM

Anti-Secrecy; Open Meeting; Newspapers; Where a governmental body has convened in open session on proper notice, it can convene in closed session for proper purposes to discuss an element of subject matter for which the meeting was called, and which is proper to discuss in closed session, upon motion made and adopted with vote of each member recorded, if proper public announcement is made to those present at the meeting and if such closed session was not contemplated at the time notice for the open session was given. OAG 29-77

April 4, 1977.

LLOYD J. PAUST, *City Attorney*
Columbus

Pursuant to sec. 19.98, Stats., you request my advice on the following question:

Can a governmental body go into closed session at a properly convened open session, for a proper purpose, where advance 24 or 2 hour notice of the closed session was not given at the time notice of the open session was given pursuant to sec. 19.84, Stats.?

The answer is yes, provided that at the time of giving notice of the subject matter or agenda of the session, the chief presiding officer or his or her designee did not contemplate, nor have knowledge that any member of the governmental body contemplated, a closed session.

Section 19.83, Stats., provides:

“Every meeting of a governmental body shall be preceded by public notice as provided in s. 19.84, and shall be held in open session. At any meeting of a governmental body, all discussion shall be held and all action of any kind, formal or informal, shall be initiated, deliberated upon and acted upon only in open session *except as provided in s. 19.85.*” (Emphasis added.)

Sections 19.84(1) and (2), Stats., provide:

“(1) Public notice of all meetings of a governmental body shall be given in the following manner:

“(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.

“(2) Every public notice of a meeting of a governmental body shall set forth the time, date, place and subject matter of the meeting, *including that intended for consideration at any contemplated closed session* in such form as is reasonably likely to apprise members of the public and the news media thereof.” (Emphasis added.)

The obligation to give the required notice is on the chief presiding officer or his designee. Such notice must include information as to subject matter “intended for consideration at any contemplated closed session.” If the chief presiding officer or his designee knows that a closed session is contemplated, such person is obligated to give the required notice. He may actually contemplate a closed session or know that some member will move to go into closed session for some specific purpose. In such case he should give the required notice even though the body may not be able to muster the vote necessary to actually go into closed session. A governmental body may have voted at a properly called open session to go into closed session at a subsequent session. In such case the chief presiding officer should give notice of the subsequent session with contemplated closed session subject matter noticed. On the given date the body should be convened in open session for again taking a vote of the members then present to determine whether the body should go into closed session.

In other cases the chief presiding officer or his designee would not have knowledge that a member wishes to move for a closed session and no closed session may in fact have been contemplated on the date the open session notice was given. This would not foreclose a governmental body from going into closed session, for proper purpose, to discuss one or more of the items, or elements thereof, which had been noticed for the open session. Section 19.85(1), Stats., makes specific provision for the procedure to be followed in such case and for *public announcement* of the business to be considered and requires reference to the statutory exemption or exemption by which such closed session is claimed to be authorized.

Section 19.85(1), Stats., provides in material part:

“(1) *Any meeting of a governmental body, upon motion duly made and carried, may be convened in closed session under one or more of the exemptions provided in this section. The motion shall be carried by a majority vote in such manner that the vote of each member is ascertained and recorded in the minutes. No motion to convene in closed session may be adopted unless the chief presiding officer announces to those present at the meeting at which such motion is made, the nature of the business to be considered at such closed session, and the specific exemption or exemptions under this subsection by which such closed session is claimed to be authorized. Such announcement shall become part of the record of the meeting. No business may be taken up at any closed session except that which relates to matters contained in the chief presiding officer’s announcement of the closed session. ...*” (Emphasis added.)

BCL:RJV

Counties; County Board; Forests; Land; Natural Resources, Department Of; Public Lands; County boards cannot sell or exchange county forest lands without first withdrawing them from the county forest program under sec. 28.11(11), Stats. The term “exchange” does not include a sale for valuable consideration. OAG 30-77

April 5, 1977.

PATRICK H. STIEHM, *District Attorney*
Washburn County

Your predecessor asked whether sec. 28.11(3)(c), Stats., allows a county board to “exchange” 80 acres of isolated county forest land for 40 privately-owned acres surrounded by other county forest land, along with \$6,000 cash as added consideration.

The term “exchange” signifies a transaction in which the parties give each other things of approximately equal character or value, each as consideration for the other, but in which neither offering consists wholly or in substantial part of money. *Black’s Law Dictionary*, 4th Edition. See also, *Lang v. Fuller*, 21 Wis. 122 (1866); *Topzant v. Koshe*, 252 Wis. 585, 9 N.W.2d 136 (1943). Thus, the proposed transaction described in your letter may be more aptly characterized as an “exchange” of 40 acres for 40 acres, coupled with a “sale” of another 40 acres for money.

Section 28.11(3)(c) authorizes the exchange of “other county-owned lands” for the purpose of consolidating and blocking county forest holdings. This is the only proper purpose for such exchange. 40 OAG 57, 58 (1951). However, I read the power to exchange to be limited to non-forest lands. This is based upon the use of “other” to describe those county-owned lands subject to exchange. The term “other county-owned land” is not synonymous with “county forest land.” While all land in a county forest is county-owned land, all county-owned land is not in county forest status. Section 28.11(3) is at least ambiguous, and I believe the ambiguity should be resolved in favor of the legislative scheme to preserve county forest land or at least subject its withdrawal to the scrutiny of the public and the Department of Natural Resources.

Hence, before the county board either exchanges the first portion or “sells” the second portion of the county forest acreage, it first must withdraw the lands from the county forest under sec. 28.11(11), Stats. The terms of that section evince a strong legislative purpose to discourage the withdrawal of lands from the county forest program, although once withdrawn under sec. 28.11(11), they are subject to sale under sec. 59.07(1)(b), or exchange under sec. 28.11(3), Stats.

In conclusion, I agree with you that the proposed transaction as you have described it is probably not within the county board's power unless the lands are properly withdrawn under sec. 28.11(11), Stats.

BCL:LMC

Automobiles And Motor Vehicles; Counties; County Highway Committee; Highways; Motor Vehicles; Police Powers, Public Health And Safety; Public Health; Safety; Traffic; Counties do not have any general police power authority to control truck traffic, but are restricted to controlling truck traffic under secs. 349.15 and 349.16, Stats. The exercise of the police power under sec. 349.15 need not be based on the condition of the roadbed, but may be exercised to promote the general welfare of the public. OAG 31-77

April 6, 1977.

WILLIAM F. BOCK, *Corporation Counsel*
Racine County

Your office requested my opinion on the following question:

“Concerning the general health, safety and welfare of the inhabitants along a Class A County Trunk Highway, does the county have an over-riding right to limit the vehicular travel as to weight on the highway under the county's rights to protect the health, safety and welfare of the citizens of the county or are they restrained from this type of activity by virtue of Wisconsin Statutes sec. 348.15, sec. 348.16, sec. 349.15 and sec. 349.16?”

Further:

“The view of the County in wanting to impose a weight limitation on vehicles is due to the fact that residences are extremely close to the highway and they fear the noise and vibration from the heavier vehicles will substantially interfere with the residential uses of the property. It does not have to do with the ability of the road to carry the weight.”

For the reasons hereinafter discussed, I am of the opinion that counties, in controlling truck traffic, are limited to the police power authority granted in secs. 349.15 and 349.16, Stats. In exercising the

police power under sec. 349.15, Stats., counties are not restricted to consideration of the carrying capacity of the highway, but may take into consideration the general health, welfare and safety of the public.

Your question does not concern a temporary or emergency situation involving the physical carrying capacity of the roadbed. Therefore, consideration of the county's police power under sec. 349.16, is not relevant and for the most part will not be discussed.

Sections 348.15 and 348.16, Stats., establish the county highway classifications, "A" and "B" and prescribe the legal (truck) weight limits for the two classes. The load limits for a Class "B" highway are sixty percent of the loads allowed on Class "A" highways. Under secs. 348.15(1)(b), and 348.16(1)(b), Stats., all county trunk highways are Class "A" highways unless they have been specifically designated as Class "B" highways by the county highway committee under the authority of sec. 349.15(2), Stats. Section 349.03, Stats., provides that chs. 341 to 348 shall be uniform throughout the state. Thus, the Legislature has made the entire county trunk system of highways, including the Class "B" highways, open to truck traffic. Counties may not permanently prohibit all truck traffic from a county trunk facility, nor may counties permanently restrict a county trunk highway to truck weight limits less than that allowed on a Class "B" highway. 39 OAG 446 (1950).

Counties are agents of the state and may only exercise those powers expressly conferred by the Legislature or necessarily implied to carry out the express powers. *Spaulding v. Wood County*, 218 Wis. 224, 260 N.W. 473 (1935); *State ex rel. Sell v. Milwaukee Co.*, 65 Wis.2d 219, 222 N.W.2d 592 (1974). Section 349.15, Stats., is an express grant of police power to the counties for the control of truck traffic in a particular or limited manner. I am unaware of any statute conferring upon counties the broad police power granted to cities and villages by sec. 349.17, Stats. This section allows those municipalities to establish "truck routes" or, in other words, to bar truck traffic from designated streets.¹ As there is specific legislation governing the control of truck traffic by the counties, additional authority cannot be

¹ In *Hartung v. Milwaukee County*, 2 Wis.2d 269, 86 N.W.2d 475 (1957), the court discusses limitations on this power.

implied under a statute conferring general police power on the counties. *State ex rel. Mitchell v. Superior Court of Dane County*, 14 Wis.2d 77, 109 N.W.2d 522 (1961); *Pruitt v. State*, 16 Wis.2d 169, 114 N.W.2d 148 (1962). Accordingly, the police power of the counties in the regulation of truck traffic on county trunk highways, is limited to sec. 349.15(2), Stats., which provides, in part:

“The county highway committee ... may designate all or parts of such highways to be class ‘B’ highways for the purpose of putting into effect the weight limitations set forth in s. 348.16”

The question arising under sec. 349.15(2), Stats., is whether the designation of a county trunk highway as a Class “B” highway must be grounded on the physical condition of the highway. Another way of putting the issue is to ask, may the county highway committee designate a highway as a Class “B” highway even though it is fully capable of carrying the load limitations of a Class “A” highway?

I see no legitimate basis upon which to conclude that the police power under sec. 349.15(2), Stats., may only be exercised in reference to the physical carrying capacity of the highway. Cities and villages are not so restricted when they create “truck routes” under sec. 349.17, Stats. It appears the only limitation on cities and villages in the establishment of “truck routes” is the abutting residents’ right of ingress and egress. *Hartung v. Milwaukee County*, 2 Wis.2d 269, 86 N.W.2d 475 (1957).

At least, since *State ex rel. Saveland P. H. Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217 (1955), the court has recognized as legitimate the use of the police power to preserve or promote public convenience or general prosperity. Preservation of property values falls within the police power. *Wieland*, 269 Wis. at 290.

Unlike sec. 349.16, Stats., which does limit the exercise of the police power to situations involving the condition of the roadbed, sec. 349.15, Stats., is silent. Therefore, it is only reasonable to conclude the Legislature did not intend to restrict the counties’ police power under sec. 349.15, Stats., and such power may be exercised when it is deemed by the highway committee to be in the interest of the public welfare.

It is my opinion that counties do not have authority to permanently exclude all truck traffic from a county trunk highway.

Under the police power authority of sec. 349.15, Stats., counties may regulate or limit truck traffic by changing the highway classification from "A" to "B." The county highway committee determination to change the highway classification, as authorized by sec. 349.15, Stats., need not be based on the physical condition of the roadbed, but may be based on other appropriate police power considerations such as to promote the general welfare of the public.

The question was not asked and no consideration was given to what effect, if any, such reclassification would have on eligibility for federal or state road aids.

BCL:CAB

Anti-Secrecy; Cities; Collective Bargaining; Fire Department; Municipal Corporations; Municipalities; Open Meeting; Towns; Villages; Volunteer fire department organized as a nonprofit corporation pursuant to sec. 213.05, Stats., is not a governmental or quasi-governmental corporation and is not subject to provisions of the open meeting law, secs. 19.81-19.98, Stats. OAG 32-77

April 6, 1977.

JACK MILL, *Chief*
Palmyra Volunteer Fire Department

Pursuant to sec. 19.98, Stats., you ask whether the Palmyra Volunteer Fire Department is subject to the provisions of the open meeting law, secs. 19.81-19.98, Stats., as created by ch. 426, Laws of 1975.

You state:

"The Palmyra Volunteer Fire Department is incorporated under the laws of the State of Wisconsin and is a non-profit organization engaged in providing fire protection service to the Palmyra Fire Protection District, which consists of the Village of Palmyra and Town of Palmyra, Jefferson County, Wisconsin.

"The Department holds regular monthly meetings and on occasion special meetings. The Department is primarily engaged in personnel matters and the raising of money for the

purchase of fire equipment by the holding of carnivals, picnics, etc. The Department makes budget recommendations to the Palmyra Fire Protection District but has no other control over the budgeting process. The Palmyra Fire Protection District receives funds from the Village and Town to provide fire protection service but none of the money at any time is under the control of the Palmyra Volunteer Fire Department.”

The answer to your question depends on whether the Palmyra Fire Department is a “governmental or quasi-governmental corporation” within the meaning of sec. 19.82(1), Stats., which describes the governmental bodies subject to the open meeting law as follows:

“(1) ‘*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.)

I am of the opinion that the Palmyra Fire Department is not a “governmental or quasi-governmental corporation” within the meaning of sec. 19.82(1), Stats., and is not a governmental body subject to the provisions of secs. 19.81-19.98, Stats.

The Palmyra Volunteer Fire Department was apparently organized as a nonstock, nonprofit corporation under ch. 181, Stats., pursuant to authority granted in sec. 213.05, Stats. It qualifies as a fire department under sec. 213.08, Stats. If it is located in a village, powers of the trustees are in part governed by sec. 213.02, Stats., and under sec. 213.04, Stats., the village board of trustees would have power to disband the company.

In *Tonn v. Strehlau*, 265 Wis. 250, 61 N.W.2d 486 (1953), it was held that a volunteer fire company organized under sec. 213.05, Stats., was a privately organized corporation but that a town could appropriate money to such corporation for a public purpose.

Section 60.29(18), Stats., authorizes a town board to establish a fire department or join with other towns, cities or villages in establishing a joint fire department; to contract with any fire

department established by a town, city or village; or to contract “with any fire association, corporation or individual for the maintaining, housing and manning of the fire fighting equipment of such fire departments,” and sec. 60.29(18m), Stats., makes a town liable for the services of “any fire department ... appearing to fight fire in such town upon request” where the town does not provide protection under sec. 60.29(18), Stats.

In *Rockwood Volunteer Fire Dept. v. Town of Kossuth*, 260 Wis. 331, 50 N.W.2d 913 (1952), the court held that the Town of Kossuth which had no fire department and had not contracted with one for protection, was liable for services provided even where the request came from a private citizen.

However, the fact that a private corporation provides fire service and receives payment therefor, pursuant to sec. 60.29(18m), Stats., or under contract with a town pursuant to sec. 60.29(18), Stats., does not in my opinion change the status of such corporation to a “governmental or quasi-governmental corporation.” Even though a corporation may serve some public purpose, it is not a “governmental or quasi-governmental corporation” under sec. 19.82(1), Stats., unless it also is created directly by the Legislature or by some governmental body pursuant to specific statutory authorization or direction.

BCL:RJV

Automobiles And Motor Vehicles; Criminal Law; Highways; Indians; Land; Law Enforcement; Licenses And Permits; Motor Vehicle Department; Motor Vehicles; Public Lands; Right Of Way; Transportation; The state has jurisdiction over members of the Menominee Tribe on public roads and highways within the Menominee Reservation in respect to the enforcement of state traffic laws that are necessary to protect the highways against depredation or that would impair their use as a public right-of-way. State law enforcement officers can arrest any person who commits a federal offense in their presence. OAG 33-77

April 7, 1977.

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

You requested my opinion on the nature and extent of the state traffic patrol's enforcement authority within Menominee County now that the state no longer exercises general, civil and criminal jurisdiction over the Menominee Indian Reservation. You note that in 1956, the Motor Vehicle Department requested an opinion of the Attorney General on the following questions, among others:

"1. Must the trucks and automobiles belonging to the Menominee Indian Tribe or to individual Indians be [registered] under [sec. 341.04, Stats.] if operated on Wisconsin highways 55 and 47?

"2. Must the drivers be licensed under [sec. 343.05, Stats.]?

"5. Can a Menominee Indian be arrested by a state officer on highways 47 and 55 within the boundary of the reservation for offenses such as operating an automobile while intoxicated and reckless driving?"

The resulting opinion (45 OAG 159 (1956)) answered these questions in the affirmative on the authority of Public Law 280 (67 Stat. 588, 28 U.S.C. sec. 1360, 18 U.S.C. sec. 1162). However, on February 27, 1976, the United States accepted the retrocession of jurisdiction then being exercised by the state within the Menominee Reservation pursuant to Public Law 83-661, (68 Stat. 795, amending Public Law 83-280, 67 Stat. 588) and the Menominee Restoration Act, (87 Stat. 770). Such jurisdictional transfer was accomplished in compliance with the Menominee Restoration Act and 25 U.S.C. sec. 1323 (82 Stat. 79). The jurisdictional change became effective on March 1, 1976 at 12:01 a.m. Central Standard Time. 41 F.R. 8516 (February 20, 1976). The Department of Transportation is, therefore, once again faced with the questions presented in the 1956 opinion. You ask for my opinion on the same question under current law.

To answer your questions it is necessary to carefully consider certain guidelines established by the United States Supreme Court

for resolving jurisdictional questions involving Indians and Indian reservations. References in this opinion to “Menominee Indians” or “Menominees” mean members of the Menominee Tribe as determined by the Tribe.

As I indicated in 64 OAG 184 (1975), judicial decisions concerning the exercise of state jurisdiction within the exterior boundary of Indian reservations are marked by adherence to the following fundamental principles among others. First, an Indian tribe such as the Menominee 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. These basic principles are encompassed in what is commonly referred to as the “Indian Sovereignty Doctrine.”

The more recent cases resolve jurisdictional questions by reading applicable treaties and federal statutes against this backdrop of tribal sovereignty. *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed. 2d 129 (1973). See also, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973); and *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959).

Since Public Law 280 is no longer applicable to the Menominee Reservation, there is no federal statute which authorizes the state to exercise general civil and criminal jurisdiction over tribal members within the exterior boundary of the reservation.

Before considering whether other legislation provides a basis for the exercise of the jurisdiction raised by your questions, it is necessary to consider whether the road system located within Menominee County is within the exterior boundary of the Reservation. For the following reasons it is my opinion that such roadways are within the Menominee Reservation as that Reservation was reestablished by the Menominee Restoration Act (87 Stat. 770, 25 U.S.C. secs. 903-903f), which repealed the Menominee Termination Act of June 17, 1954 (68 Stat. 250, 25 U.S.C. sec. 891, *et seq.*).

It was the purpose of the Termination Act "to provide for orderly termination of federal supervision over the property and members of the Menominee Indian Tribe of Wisconsin." The Act required the Tribe and the Secretary of the Interior to formulate a "plan for the future control of the tribal property and service functions now conducted by or under the supervision of the United States The responsibility of the United States to furnish all such supervision and services to the tribe and to the members thereof, because of their status as Indians, shall cease on April 30, 1961, or on such earlier date as may be agreed upon by the tribe and the Secretary [of the Interior]." 25 U.S.C. sec. 896.

The removal of tribal property from federal trust status was the event that would signal the cessation of federal services to tribal members as Indians. Thereafter, the Tribe was to be subject to state jurisdiction. As a result of termination, title to the road system within the Menominee Reservation was transferred to the State of Wisconsin.

You are no doubt aware of the general jurisdictional uncertainty that the Menominee termination-restoration process created. However, the Menominee Restoration Act and its legislative history supports the conclusion that Congress intended to restore the Tribe to the same jurisdictional status it enjoyed prior to termination. I believe that with the states' retrocession of jurisdiction, the congressional objectives with respect to the jurisdictional relationships were substantially accomplished.

You will recall that Menominee County and the Town of Menominee were created as a result of termination. See *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 409-410, 88 S. Ct. 1705, 20 L. Ed. 2d 697 (1968), and *The Menominee Termination Plan*, 26 F.R. 3726 (April 29, 1961). The Menominee Reservation which had been created by the Treaty of Wolf River in 1854 (10 Stat. 1064), but later modified by the Treaty of February 11, 1856 (11 Stat. 679), thus became conterminous with Menominee County and the Town of Menominee. Chapter 259, sec. 2, [1959] Wis. Sess. Laws 300-01, sec. 2.01 (39m), Stats. The termination legislation did not abrogate the rights secured to the Menominee Tribe by treaty, *Menominee Tribe of Indians v. United States*, *supra*, 391 U.S. at 411-413, nor was title to tribal land other than the road system extinguished as a result of termination. 26 F.R. 3726, *supra*. Clearly

the Menominee Tribe and the Menominee homeland remained substantially intact, notwithstanding termination.

It was the purpose of the Restoration Act to "... repeal the act terminating supervision over the affairs of the Menominee Indian Tribe of Wisconsin, reinstate such supervision, make available to the tribe the federal services lost through termination, and provide for the reestablishment of tribal self-government." S. Rep. No. 93-604, 93d Cong., 1st Sess. (1973) at 1. See also, H.R. Rep. No. 93-572, 93d Cong., 1st Sess. (1973).

Section 3(b) of the Restoration Act expressly repealed the Menominee Termination Act and together with sec. 3(c) reinstated all rights and privileges of the Tribe or its members lost pursuant to the Menominee Termination Act. The specific language is as follows:

"(b) The Act of June 17, 1954, (68 Stat. 250; 25 U.S.C. 891-902), as amended, is hereby repealed and there are hereby reinstated all rights and privileges of the tribe or its members under Federal treaty, statute, or otherwise which may have been diminished or lost pursuant to such Act.

"(c) Nothing contained in this Act shall diminish any rights or privileges enjoyed by the tribe or its members now or prior to June 17, 1954, under Federal treaty, statute, or otherwise, which are not inconsistent with the provisions of this Act."

When the termination and restoration legislation are read against the backdrop of tribal sovereignty, I believe it is clear that Congress intended to restore to the Tribe the full rights of tribal self government which the Tribe enjoyed prior to the passage of the Menominee Termination Act, including the fundamental right to govern its internal affairs within the same territory that constituted the Reservation prior to termination.

Inquiry concerning state jurisdiction also requires consideration of the effect of the Act of March 3, 1901 (31 Stat. 1084, 25 U.S.C. sec. 311), which originally granted to the State of Wisconsin rights-of-way within the Reservation for the purpose of establishing public highways.

The Menominee Tribe had consented to the construction of such roads and highways through the Reservation in the 1856 Treaty,

supra, ratified April 18, 1856 (11 Stat. 679). Article III provides in part:

“To promote the welfare and the improvement of the Menominees, the free relationship between them and the citizens of the United States, it is further stipulated

“(4) That all roads and highways, laid out by authority of law, shall have right-of-way through the lands of the said Indians on the same terms as are provided by law for their location through lands of citizens of the United States.”

The Act of March 3, 1901, provides in material part:

“The Secretary of the Interior is authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper state or local authorities for the opening and establishment of public highways, in accordance with the laws of the state or territory in which the lands are situated, through any Indian reservation”

The courts have considered how this authorizing legislation affects jurisdiction on the highways within the Menominee Indian Reservation in three separate cases: *State v. Tucker*, 237 Wis. 310, 296 N.W. 645 (1941); *Ex Parte Kenoha*, 43 F. Supp. 747, aff'd. (7th Cir. 1942), 131 F.2d 737; and *In Re Fredenberg*, 65 F. Supp. 4 (E.D. Wis. 1946).

In *State v. Tucker*, the court held that the grant by the United States to Wisconsin of a right-of-way and permission to maintain a public highway running through the Menominee Reservation:

“... includes by necessary implication the right of the state to take such possession of the land as will enable it to construct and repair and police the road, and to do all things necessary and incidental to the maintenance of a public highway. The fact that it is a public highway implies that no person, Indian or white may possess, occupy or use it to the exclusion of the general public or use it except on the same terms and upon the same conditions as the general public....” 237 Wis. at 315-316.

The court upheld the conviction of a Menominee Indian for operating his truck upon that part of the state highway within the Reservation without having first registered it as required by Wisconsin Statutes.

A year later, however, in *Ex Parte Kenoha*, the Federal District Court for the Eastern District of Wisconsin questioned the soundness of the *Tucker* decision. The court ordered the release of a Menominee Indian who had been arrested and was being held by the state on a charge of negligent homicide (causing the death of another by operation of a vehicle while intoxicated) that was based on an alleged occurrence on a state highway within the Reservation. The court held that “[n]o express authority has been granted by Congress giving the State courts jurisdiction over an offense such as [negligent homicide].”

In affirming that decision the Seventh Circuit Court of Appeals distinguished *Tucker* on its facts.

“We believe the case before us is materially different from the one before the Wisconsin Supreme Court. Our case deals with a crime, the punishment of a felony. The Wisconsin case dealt with a failure to register an automobile. Our case deals with the crime of manslaughter, covered by federal statute. The Wisconsin case deals with the application of an automobile registration statute to an Indian member of the same reservation.” *Application of Kenoha*, 131 F.2d 737, 738 (7th Cir. 1942).

After concluding that the grant of a right-of-way under 25 U.S.C. sec. 311 could not be construed as an implied grant of jurisdiction to the state over crimes committed by the Menominees, the court observed at 739:

“It is true that the grant of a right to maintain a highway must carry with it certain implications respecting the protection of said highway against depredations. If, however, there were any implications arising therefrom which would subject the Indian members to the Wisconsin penal statute, they would be limited to such penal provisions as serve to protect and preserve the highway, such as speeding, impairing the highway, etc.”

In 1946, the same federal district court that decided *Kenoha* was faced with a fact situation in the case of *In Re Fredenberg* nearly identical to *Tucker*, except that the Menominee Indian convicted in state court of failing to register his truck (used only within the Reservation boundaries, but on the state highway), was granted his application for a writ of habeas corpus. The *In Re Fredenberg* court

again criticized *Tucker* as unsound and held that the establishment of the highway did not alter the historic relationship of the Indian to the state: "There is no legitimate implication to be drawn that Congress intended any grant of jurisdiction when it permitted the state primarily for its own convenience to establish a state highway across the reservation." 65 F. Supp. at 6. Federal district courts, of course, have no jurisdiction over state court decisions. See *United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-1076 (7th Cir. 1970), *cert. denied*, 402 U.S. 983.

Based on these authorities, especially *State v. Tucker*, I am compelled to conclude that 25 U.S.C. sec. 311 is authority for the state to exercise jurisdiction over members of the Menominee Tribe when they are using the public highways located within the Reservation. Such jurisdiction would extend to those activities and conduct that are necessary to protect the highways against depredations or that would impair their use as a public right-of-way. It is, therefore, necessary to consider whether the jurisdiction sought to be exercised by the state meets this general test.

In *State v. Tucker*, the court concluded that vehicles owned and operated by *members* of the Menominee Tribe must be registered under state law if operated on Wisconsin highways located within the Reservation boundaries. Based on that holding, the answer to your first question as to whether trucks and automobiles belonging to individual members of the Menominee Tribe must be registered if driven on state highways 55 and 47, must be answered in the affirmative. However, the enforceability of sec. 341.04, Stats., against the Menominee Tribe as a governmental entity is now an issue in controversy before the courts. That litigation will enable the courts to consider the effect, if any, of the recent guidelines established by the United States Supreme Court for resolving jurisdictional issues such as those under consideration here. I express no opinion on that question here.

In your second question you ask whether members of the Menominee Tribe must be licensed under sec. 343.05, Stats., to operate motor vehicles on public highways within the reservation. In my opinion the answer is yes. The standards for licensing drivers set forth in sec. 343.05, Stats., are clearly designed to ensure that such drivers possess minimum qualifications before they are allowed to operate motor vehicles on the public road system. The licensing

provisions are thus designed primarily to protect and preserve the highway against use by unqualified persons who otherwise might impair the use of such highways by other members of the public.

It is true that the state does not require all operators of motor vehicles on state highways to have a Wisconsin license. Nor does the state require that all motor vehicles be registered under sec. 341.04, Stats. Thus, for example, licensed visitors from neighboring states are permitted to use state roadways without first securing a state license. Since neither the federal government nor the Menominee tribal government have established licensing provisions of their own concerning operation of motor vehicles by tribal members, or registration of motor vehicles owned by the Tribe or tribal members, the question of whether or not such licensing and registration provisions, if enacted, would preempt state jurisdiction over such matters need not be considered here. C.f. *Red Lake Band of Chippewa Indians v. Minnesota, et al.*, ——— Mn. ———, 248 N.W.2d 722 (Dec. 10, 1976).

In your final question you ask whether a Menominee Indian can be arrested by a state officer on highways 47 and 55 within the boundary of the Reservation for offenses such as operating an automobile while intoxicated and reckless driving. It is my opinion that such offenses clearly impair the use of the highways as public rights-of-way and, therefore, any person who commits such an offense is subject to arrest and prosecution by the state.

As the cases discussed above suggest, the state may not have jurisdiction to enforce certain criminal statutes against members of the Menominee Tribe where the offense occurs within the boundaries of the Reservation, whether on or off public highways.

Thus, for example, the federal government has exclusive trial jurisdiction over many offenses committed by Indian persons within the Menominee Reservation. Several such offenses are enumerated in 18 U.S.C. sec. 1153, the Major Crimes Act. Included are murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, and robbery, among others. In addition, the Assimilative Crimes Act, 18 U.S.C. sec. 13, is also applicable to the Menominee Reservation under certain circumstances. Thus, state criminal law becomes federal law except where the offense involves an Indian against the person or property of another Indian, or where the offense has been punished by the tribal court, or where by treaty,

exclusive jurisdiction over the offense is secured to the Indian tribe. See *Williams v. United States*, 327 U.S. 711, 66 S. Ct. 778, 90 L. Ed. 962 (1946); also *United States v. Sosseur*, 181 F.2d 873 (7th Cir. 1950). Compare 18 U.S.C. sec. 1152.

The fact that the federal district court has exclusive jurisdiction to try offenses against the laws of the United States does not necessarily impede state and local officials from assisting in their enforcement. In fact, 18 U.S.C. 3041 specifically authorizes such cooperation in the following terms:

“For any offense against the United States, the offender may, by any justice or judge of the United States, or by any United States magistrate, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any state where the offender may be found, and at the expense of the United States, be arrested and imprisoned or released as provided in chapter 207 of this title, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may be into the office of the clerk of such court, together with the recognizances of the witnesses for their appearances to testify in the case.

“A United States judge or magistrate shall proceed under this section according to rules promulgated by the Supreme Court of the United States. Any state judge or magistrate acting hereunder may proceed according to the usual mode of procedure of his state but his acts and orders shall have no effect beyond determining to hold the prisoner for trial or to discharge him from arrest.”

In *United States v. Bumbola*, 23 F.2d 696, 698 (N.D. N.Y. 1928), the court, in upholding an arrest by a state law enforcement officer without a warrant, held:

“... The court is of the opinion that any peace officer of the state has not only the right, but that it is his duty, to arrest without a warrant any person committing an offense against the laws of the United States in his presence.”

In *Bircham v. Commonwealth*, 238 S.W.2d 1008 (Ky. 1951), the court cited with approval the decision in *U.S. v. Bumbola*, by stating at 1016:

“... In *United States v. Bumbola* [supra] ... the court held that it is the duty of a peace officer of a state to arrest without a warrant any person committing an offense against the laws of the United States in his presence. Thus it will be seen that appellant, for quite a while previous to, and at the time of, his apprehension on First Street, and continuously thereafter, was in overt action in the commission of a felony in the presence of the officers attempting to take him in custody. It not only was their right, it was their duty, to arrest him. ...”

It has also been held in *Whitlock v. Boyer*, 271 P.2d 484, 77 Ariz. 334 (1954), that municipal police officers have the authority to arrest for federal crimes.

Under these authorities it is clear that Wisconsin law enforcement officers have the right and duty to arrest persons committing federal offenses in their presence on the Menominee Reservation; it being understood that trial jurisdiction over the offense rests exclusively with the federal district court.

I do not mean to imply that Wisconsin law enforcement officers have primary responsibility for law enforcement within the Reservation. In fact, it is anticipated that state officers will coordinate such law enforcement activities with federal and tribal officers whenever practicable. The need for cooperation among the various law enforcement agencies is recognized in the Menominee Restoration Act. The Act requires the Secretary of the Interior and the Menominee Restoration Committee to “consult with appropriate state and local government officials to assure that the provision of necessary governmental services is not impaired as a result of the [restoration process]” 25 U.S.C. sec. 903 d(d).

BCL:JN

Counties; County Board; County Surveyor; Ordinances; Public Lands; Register Of Deeds; Surveys; Towns; Requirements for relocating, establishing and perpetuation of the corners of the survey of the public lands discussed. Section 60.38, Stats., requires that resurveys of the public lands be recorded with the register of deeds in the county where the resurveyed land is located and kept as the county board directs by resolution as long as a separate index is maintained. OAG 34-77

April 8, 1977.

C. F. HURC, P.E., *Secretary*

Examining Board of Architects, Professional Engineers, Designers and Land Surveyors

You have asked me several questions concerning the statutory requirements for relocating and reestablishing landmarks, monuments and corner posts of the survey of the public lands of the United States. You refer to these resurveys as the "remonumentation program."

Section 59.635(8), Stats., provides for a resurvey of the public lands by counties. Section 60.38, Stats., provides for a resurvey of the public lands by towns. These sections are the main statutes dealing with resurveys of the public lands in Wisconsin. Such resurveys of the public lands under both secs. 59.635(8) and 60.38, Stats., involve the same requirements. These requirements are set forth in the *Manual of Instructions for the Survey of the Public Lands of the United States 1973*, prepared by the United States Department of the Interior, Bureau of Land Management, and are summarized in this opinion. Section 59.635(8), Stats., also is discussed in 66 OAG 134 (1977).

HISTORY OF PUBLIC LAND SYSTEM

The sectionalized land system devised for the survey of the public lands grew out of an ordinance adopted by the Continental Congress, May 20, 1785, drafted primarily by Thomas Jefferson. The system became part of the Northwest Ordinance of 1787 and established the basis for the original survey of the public lands in the Wisconsin Territory.

The general plan of the sectionalized land system divided the public lands into townships 6 miles by 6 miles, each containing 36 sections one mile by one mile, more or less. Townships were numbered in a prescribed order by ranges east and west, and towns north and south. Sections also were numbered in a prescribed order 1-36 beginning at the NE corner of the township and ending at the SE corner of the township.

Survey of public lands in Wisconsin began in the late 1820's. The baseline was established at the Mississippi River and became the line dividing Illinois and Wisconsin. When the baseline was extended eastward, errors occurred so that the baseline is not a true latitudinal line. The untrue latitude becomes evident northward at points where township corners do not meet on the north-south meridians or range lines.

The principal meridian (fourth) for Wisconsin was to be longitude 90° west of Greenwich, England. The original surveyors missed longitude 90° west by 18-20 miles. Thus, the fourth principal meridian is found at $90^{\circ} 27' 11''$ west of Greenwich. It is a true longitudinal line.

The initial point for Wisconsin is found at the intersection of the base line and the fourth principal meridian. It is located on the Illinois-Wisconsin state line at the south end of the north-south line dividing Grant and LaFayette Counties.

In Wisconsin standard parallels or correction lines occur at 60-mile intervals north from the baseline. Except for the principal meridian, Wisconsin has no guide meridians.

RESURVEY REFERENCES

Survey instructions have varied since 1785, although the general sectionalized system remained essentially unchanged. The first complete *Manual of Instructions for the Survey of the Public Lands of the United States* was published in 1855 by the federal government. Revised manuals were issued in 1881, 1890, 1894, 1902, 1930, 1947 and 1973. Before 1855, instructions were issued by the Surveyor General of the United States by letter or other means. Thus, retracing original Wisconsin surveys made prior to 1855 may require checks of older instructions kept at the Department of Interior, Washington, D.C., Bureau of Land Management.

In the text, C. Brown, *Boundary Control and Legal Principles*, (2d ed. 1969), at p. 30, the author states:

“The 1947 *Manual of Instructions for the Survey of the Public Lands of the United States*, published by the Department of the Interior, Bureau of Land Management, gives guidance for all *government surveyors* for surveys *after* 1947. Original surveys made before 1947 were regulated by the current manual of instruction as of the date of the survey. The first semimanual, without figures, was published for Oregon in 1851. The first complete manual (including figures) was published in 1855. Before 1851 deputy surveyors were issued instructions from the Surveyor General by letter or other writings. From the time of the first sectionalized land survey (1785) until the present many changes have been made and are being made. ...”

Resurveys of the public lands also should refer to the original maps prepared by the Surveyor General and to the original surveyors' field notes, all of which are kept with the Commissioners of Public Lands, 505 North Segoe Road, Madison, Wisconsin.

REQUIREMENTS AND LIMITS OF RESURVEY OF THE PUBLIC LANDS

You ask:

“Are corners that are relocated or established under such a remonumentation program required to be referenced in the manner described in Wis. Stat. s. 60.38?”

My answer is yes.

Section 60.38, Stats., provides:

“**Minutes of survey; location of landmarks.** Such surveyor shall make in all cases a certificate setting forth correct and full minutes of the survey, *and giving exact bearings and distances of each monument from each other monument nearest it on any line in such town*; and such statement shall be recorded in the office of the register of deeds. Such landmarks shall in all cases be set on section corners and quarter posts established by the United States survey; but if there be a clerical error or omission in the government field notes or the bearing trees, mounds or other locating evidences specified therein be destroyed or lost,

and there be no other reliable evidence by which said corners can be identified, said surveyor shall re-establish said corners under the rules adopted by the general government in the survey of the public lands. Such surveyor shall, in all cases, set forth such action in his certificate of the survey." (Emphasis added.)

You are concerned whether the part of the statute italicized above refers to monuments which reference the location of section and quarter-section corners as established by the United States survey or whether it refers to any survey monument on any line which exists and is nearest the relocated or established corner.

It is my opinion that resurvey of public lands is limited to reestablishing those corner posts and lines between them required by the original survey. In other words, the resurvey should follow the footsteps of the original surveyor.

Resurvey to reestablish corner posts of the original survey of public lands is important because federal law declares that the corner posts as originally set are unchangeable. In addition, the location of such corner posts takes precedence over the bearings and line lengths entered in the field notes of the original surveyors. *Manual of Surveying Instructions 1973*, ch. 1:20. When corners have been lost the bearings and lengths of lines in the original field notes then provide proper data to establish lost corners. *Manual of Surveying Instructions 1973*, ch. 3:4.

The limits of the survey of the public lands were set by law but were affected greatly by the professional skills of the surveyors and practical problems which they encountered.

Many of the original surveys lacked accuracy. One quarter section in Wisconsin normally 160 acres more or less, is actually 640 acres, the size of a full section. R. Brinker, *Elementary Surveying*, (5th ed. 1969), p. 434. Brinker continues at pp. 439-440:

"... The accuracy required in the early surveys was of a very low order. Frequently it fell below that which the notes showed. A small percentage of the surveys were made by men drawing upon their imagination in the comparative comfort of a tent. Obviously no monuments were set and the notes serve only to confuse the situation for present-day surveyors and landowners. Some surveyors threw in an extra chain-length at intervals to assure a full measure!

“The poor results obtained in many areas were due primarily to the following reasons:

- “a. Lack of training of personnel. Some contracts were given to men without any technical background.
- “b. Poor equipment.
- “c. Surveys made in unsettled and apparently valueless areas.
- “d. Marauding Indians, swarms of insects, and dangerous animals.
- “e. Lack of appreciation for the need of accurate work.
- “f. Surveys made in piecemeal fashion as the Indian titles and other claims were extinguished.
- “g. Work done by contract at low prices.
- “h. Absence of control points.
- “i. Field inspection not provided until 1850, and not actually carried out until 1880.
- “j. Magnitude of the problem.

“In general, considering the handicaps listed, the work was reasonably well done in most cases.

“***

“... Some of the many sources of error in retracing the public-lands surveys follow:

- “a. Discrepancy between the length of the chain of the early surveyor and that of the modern tape.
- “b. Changes in the magnetic declination and/or the local attraction.
- “c. Lack of agreement between field notes and actual measurements.
- “d. Changes in watercourses.
- “e. Nonpermanent objects which were used for corner marks.
- “f. Loss of witness corners.”

You asked also whether a resurvey of the public lands would include setting center section corners. My answer is no. Federal survey of the public lands began and ended with the placement of quarter section posts. Subdivision of sections was governed by federal rules but was left to local or county surveyors. Sec. 59.62, Stats., *Manual of Surveying Instructions 1973*, ch. 3:74, ff.

Wisconsin surveys of the public lands began at the initial point. Surveys extended northward on the fourth principal meridian (true longitude) and 1/4 section posts were placed every 40 chains (one-half mile). Township corner posts were placed every 480 chains (6 miles). Every 60 miles a standard parallel (true latitude) was run east and west of the principal meridian. The standard parallel was marked every 40 chains with 1/4 section posts and every 480 chains with township corner posts. Also earth curvature corrections were made every 480 chains using the solar, tangent or secant methods. The principal meridian and standard parallel were required to be within 14 links per mile and 3 minutes every 6 miles of the cardinal directions.

Before 1855 it was common for the Surveyor General to issue instructions with each surveying contract. Apparently, instructions issued in Wisconsin for survey of standard parallels or correction lines and townships were similar to the *General Instructions of 1850* issued for Ohio and Indiana. Those instructions provided for township surveys 3 ranges east or west (18 miles) and 10 towns north (60 miles) to the standard parallel where closing corners and standard corners were set for the next survey northward.

Township lines were surveyed starting at the most southerly township. The meridional lines took precedence over the latitudinal lines and were run south to north on true longitude. Latitudinal township lines were run from the meridional lines east to west or west to east in a prescribed order first on random lines in the cardinal direction setting temporary corner posts and then back correcting and setting the permanent corner posts. Again 1/4 corner posts were set every 40 chains and township corner posts every 480 chains. Townships were numbered south to north and ranges were numbered eastward or westward from the principal meridian. Errors in township lines permitted deviation of 21 minutes (old) or 14 minutes (new) in direction and 3 chains falling north-south, east-west. Accumulated errors were required to be placed in the last 1/2 mile on

the west side of the area surveyed and in the last 1/2 mile north at the standard parallel. Closing corners, due to convergence of meridian lines on the north pole were calculated using a formula such as $\text{convergence} = 4/3 \times \text{length of line} \times \text{distance between lines} \times \text{latitude}$. Closing corner posts then were set on the standard parallel. Next, the calculated convergence distance was measured eastward and westward and standard corner posts were set for the survey of another area northward.

Meander corner posts also were required on lines intersecting meanderable bodies of water. Corner posts were placed on streams 3 chains or more in width, and lakes of 25 acres or more.

Surveyors of the public land next divided the townships in a prescribed order into 36 sections beginning at the southeast corner of the township by checking the first mile of both the east and south township line against the measurements of the previous surveyor. If the lines were within 21 minutes (old) or 14 minutes (new) of the cardinal direction, the east and south township lines took precedence in the subdivision of the survey. If not, sectional guide meridians (E) or sectional correction lines (S) were established and used. The section survey commenced at the southwest corner of the southeast section (#36) of the township. Section lines were run parallel to the south and east township lines if they were within the allowable errors previously described. Random lines were employed and a 50 link falling error was permitted. Quarter section posts were placed at the midpoint of section lines. Section corner posts were placed every 80 chains (one mile). Accumulated errors were placed in the most westerly and northerly 1/2 miles of the township so that the maximum number of 640 acre sections could be provided. Thus, the N 1/2 of sections 1-5 and the W 1/2 of sections 7, 18, 19, 30, 31 and both the N 1/2 and W 1/2 of section 6 usually are greater or less than 320 acres.

As previously stated, the survey of the public lands ended with the placement of section and quarter section posts, and where necessary meander corner posts, accompanied by bearings and distances of lines between all established corner posts. Such survey did not subdivide sections or set center section corners. A resurvey of the original survey of the public lands to locate and reestablish original corner posts thus would include only those lines and corner posts required by the original survey. Further, a resurvey should include

careful use of the original survey notes filed with the Commissioner of Public Lands to discover the original locations of corner posts and any deviations from standard rules in any particular survey.

CERTIFICATE OF SURVEY

You ask further where the certificate of survey, required by sec. 60.38, Stats., is to be filed and recorded in the register of deeds office. That is, should an index of such certificates be kept by the register of deeds?

Section 59.51, Stats., provides, in part:

“Register of deeds; duties. The register of deeds shall:

“(1) Record ... all ... instruments and writings authorized by law to be recorded in his office Any county, by county board resolution ... may combine the separate books or volumes for ... miscellaneous instruments ... as long as separate indexes are maintained”

It is my opinion that as long as sec. 60.38, Stats., requires recording the certificate of survey with the register of deeds, he must record the certificate. Further, the county board by resolution may direct the manner in which the register of deeds records such certificates “as long as separate indexes are maintained.” Therefore, after the properly executed certificate of survey is presented to the register of deeds for recording, the keeping and indexing of the recorded certificate is left to the register of deeds.

In closing I should point out that sec. 60.38, Stats., deals with the resurvey of towns on contract with the town board as provided by sec. 60.37, Stats. Section 59.635, Stats., and particularly subdivision (8) thereunder provides for a county resurvey of the public lands by the county surveyor. The importance of pointing out the two types of surveys is that a resurvey of the public lands by the county surveyor commenced under sec. 59.635(8), Stats., requires filing of his notes of survey in his office. Sec. 59.60(2), Stats. However, where the county surveyor contracts with the town for a resurvey of the public lands as provided under 60.37, he must file his notes in his office as provided by 59.60(2), Stats., and also record them with the register of deeds as provided by sec. 60.38, Stats.

BCL:JPA

Counties; County Board; County Court; County Surveyor; Public Lands; Surveys; A resurvey of the public lands under sec. 59.635(8), Stats., requires reestablishing all corner posts placed by government surveyors in the original survey of the public lands. If a county board approves a resurvey program under sec. 59.635(8), Stats., the resurvey must be completed in 20 years or less and at least 5 percent of the resurvey must be completed each calendar year. OAG 35-77

April 8, 1977.

ROBERT H. RASMUSSEN, *District Attorney*
Polk County

You have asked for my opinion on several questions concerning sec. 59.635(8), Stats., which provides for the resurvey and perpetuation of corner posts of the survey of the public lands by the counties.

Section 59.635(8), Stats., provides:

“The records of the corners of the public land survey may be established and perpetuated in the following manner: commencing on January 1, 1970, and in each calendar year thereafter, the county surveyor or a deputy may check and establish or reestablish and reference at least 5% of all corners originally established in the county by government surveyors, so that within 20 years or less all the original corners will be established or reestablished and thereafter perpetuated.”

The notes of such resurvey then would be filed and kept in the office of the county surveyor available for public inspection as provided by sec. 59.60(2), Stats.

You state that the Polk County Board of Supervisors wishes to reestablish the section corners of the original survey of the public lands but does not wish to incur the expense of reestablishing other corners placed during the original survey. It is my opinion that if the county decides to resurvey the public lands under sec. 59.635(8), Stats., it must resurvey to include *all* corner posts required in the original survey. Such a resurvey would require corner posts every 40 chains and include township, section, quarter section, meander and

witness corners, bearings and distances. Such a resurvey is discussed in detail in an opinion I am issuing today to Mr. C. F. Hurc, Secretary, Examining Board of Architects, Professional Engineers, Designers and Land Surveyors.

The reasons for my opinion are as follows:

1. Section 59.635(8), Stats., provides in part that if a resurvey of the public lands is undertaken by the county, the county surveyor may “reestablish and reference at least 5% of *all* corners *originally established ...* by government surveyors, so that within 20 years or less *all* the original corners *will be ...* reestablished.” (Emphasis added.)

2. Section 59.63, Stats., provides a procedure for relocating and reestablishing section corners or any other corners within a section by application of a majority of the landowners in such section to the county court.

3. The corners originally established by government surveyors were set every 40 chains and included township, section, quarter section, meander and witness corners with the bearings and distances thereof. A resurvey of the public lands would require the county surveyor to follow the footsteps of the original surveyor. *Manual of Instructions for the Survey of the Public Lands of the United States 1973*, U.S. Department of Interior, Bureau of Land Management.

You ask further whether the word “may” used in sec. 59.635(8), Stats., limits the need to reestablish all original corners within 20 years or whether it only modifies the 5 percent provisions. You maintain that “may” modifies only the 5 percent provision. Otherwise, there would be no need for the 20-year provision. Your interpretation is correct.

Section 59.635(8), Stats., establishes a program for counties to relocate corners of the original public land survey. Before such a resurvey program commences, however, approval of the county board must be secured because the costs of such resurvey are paid by the county under sec. 59.635(11), Stats.

You also point out that before 1971, sec. 59.635(8), Stats., required counties to resurvey and reestablish corner posts of the public lands. Section 59.635(8), R.S. 1969, reads as follows:

“The records of the corners of the public land survey *shall* be established and perpetuated in the following manner: commencing on January 1, 1970, and in each calendar year thereafter, the county surveyor or a deputy *shall* check and establish or re-establish and reference at least 5% of all corners originally established in the county by government surveyors, so that within 20 years or less all the original corners will be established or re-established and thereafter perpetuated.” (Emphasis added.)

60 OAG 134, 139 (1971) stated that the term “shall” as used in sec. 59.635(8), Stats., was, in effect, permissive rather than mandatory. It is not necessary to discuss the correctness of that opinion herein because the 1971 Legislature amended the section by replacing the word “shall” with the word “may” in the two places indicated above. Apparently, the Legislature saw the wisdom of allowing county boards to evaluate and apportion the costs of resurveys under sec. 59.635(8), Stats. Otherwise the statute remains the same. In any event, it is my opinion that if the county board approves a resurvey under the present statute, the statute requires completion of the resurvey within 20 years. The mandatory nature of the last phrase of the subsection is the basis for my opinion.

The statute provides in part as follows: “in each calendar year ... the county surveyor ... may check and ... reestablish ... *at least 5%* of all corners originally established ... by government surveyors, *so that* within 20 years *or less* all the original corners *will be* ... reestablished ... and thereafter perpetuated.” (Emphasis added.)

Two further conclusions are apparent from the statutory language. After such resurvey program is approved and undertaken-

1. The resurvey may be completed in less than 20 years if county funds permit as determined by the county board. However, at least 5 percent of the corners must be reestablished each year so that the resurvey “*will be*” completed within 20 years.

2. Those corners reestablished under sec. 59.635(8), Stats., also “*will be*” perpetuated. That is, the monuments must be maintained by the county.

Dairy, Food And Drugs; Drugs; Pharmacy; Vitamins not intended for use in the diagnosis, cure, investigation, treatment or prevention of diseases are not drugs within the meaning of sec. 450.06, Stats., and may be sold in stores other than pharmacies. OAG 36-77

April 13, 1977.

EVERETT E. BOLLE, *Director of Legislative Services*
Wisconsin State Assembly

1977 Assembly Resolution No. 13 requests my opinion whether vitamins are drugs within the meaning of sec. 450.06, Stats., and whether vitamins may be sold by stores other than pharmacies.

Section 450.06, Stats., provides in part:

“The term ‘drug’, as used in this chapter, means:

“(1) Articles recognized in the official U.S. Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them, intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in persons or other animals; and

“(2) All other articles intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in persons or other animals; and

“(3) Articles (other than food) intended to affect the structure or any function of the body of persons or other animals; and

“(4) Articles intended for use as a component of any articles specified in subs. (1), (2) or (3)”

Section 450.04, Stats., provides in part:

“***

“(2) No person shall sell ... drugs ... unless he be a registered pharmacist ...

“(3) This shall not interfere ... with the sale of proprietary medicines in sealed packages, labeled to comply with the federal

and state pure food and drug law, with directions for using, and the name and location of the manufacturer”

Proprietary drugs are those which are manufactured on the basis of a secret formula, patented formula, or otherwise protected formula, and which are sold by the manufacturer already packaged and with directions for use under a name chosen by the manufacturer. See 40 OAG 341 (1951).

I am assuming for purposes of this opinion that the vitamins contemplated in the opinion request are recognized in either the official U.S. Pharmacopoeia, the official Homeopathic Pharmacopoeia of the United States, or official National Formulary, and consequently that they are not proprietary drugs. See *State v. Wakeen*, 263 Wis. 401, 57 N.W.2d 364 (1953), in which the court pointed out that because items are listed in the Pharmacopoeia and the Formulary along with the formula for their manufacture, therefore, the formula being in no sense “secret,” the article cannot be a proprietary medicine. See also 14 OAG 18 (1925); 24 OAG 415 (1935). I note that compounds of articles listed in one of the three publications, which are sold under names similar to those articles, for example, “asperline” instead of “aspirin,” and for the treatment of similar ailments, have in the past been considered by this office to be drugs and not proprietary medicines. See 28 OAG 90 (1939).

In several opinions issued by former Attorneys General it has been suggested that because an article is listed in one of the three publications mentioned in sec. 450.06(1), Stats., it is necessarily a drug within the meaning of that statute. See, for example, 16 OAG 780 (1927); 24 OAG 415 (1935). In 37 OAG 410, 412 (1948), however, in what I believe to be a more accurate reading of the statutory language, it was stated that the articles in question were drugs because “they are included in the United States Pharmacopoeia and National Formulary *and* ... they are intended for use in the diagnosis, cure, mitigation, treatment or prevention of diseases.” (Emphasis added.) In other words, an article is not a drug within the meaning of sec. 450.06(1), Stats., merely because it is listed in one of the three publications; it must also be “intended for use” for one of the purposes set forth. To hold that the phrase “intended for use” is merely descriptive of all the articles listed in the publications would render one section of the statute without independent purpose. Statutes are to be construed if possible in such a

way that every portion is given separate effect and no word or phrase is mere surplusage. *State v. Franklin*, 49 Wis.2d 484, 182 N.W.2d 289 (1971); *State ex rel. Knudsen v. Board of Education*, 43 Wis.2d 58, 165 N.W.2d 295 (1969). Therefore, the better construction of sec. 450.06(1), Stats., is that the phrase "intended for use" is not merely descriptive of the articles listed in the three publications, but is instead a standard on the basis of which to differentiate among them.

In the Federal Food, Drug and Cosmetic Act, 21 U.S.C. sec. 301 *et seq.*, the definition of "drug" set forth in sec. 321(a)(2)(g)(1) is substantially the same as that in sec. 450.06, Stats., except that subpart (A) provides, without limitation on the basis of the use to which the articles are put, that the term "drug" includes:

"(A) articles recognized in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them"

In *National Nutritional Foods Ass'n. v. Food and Drug Admin.*, 504 F.2d 761, 788-789 (2d Cir. 1974), *cert. denied*, 420 U.S. 946 (1974), the Court stated that merely because vitamins are listed in the U.S. Pharmacopoeia and the National Formulary they are not necessarily drugs within the meaning of 21 U.S.C. sec. 321. Thereafter in *National Nutritional Foods Ass'n. v. Weinberger*, 512 F.2d 688, 702 (2d Cir. 1975), *cert. denied*, 423 U.S. 827 (1975), the Court reaffirmed its earlier statement. On remand, 418 F. Supp. 394, 398, the district court pointed out that if an article were considered a drug merely because it was listed in the U.S. Pharmacopoeia of the National Formulary, then *all* vitamins must be drugs because all are listed in them; yet these publications themselves classify vitamins as either prophylactic (food) or therapeutic (drug) depending upon the dosage per capsule. Therefore the Court held that the better interpretation of the phrase "recognized in" the U.S. Pharmacopoeia or National Formulary, as used in 21 U.S.C. sec. 321, is "recognized *as drugs*" in them.

In the case of sec. 450.06(1), Stats., even the recognition of an article as a drug in the U.S. Pharmacopoeia or the National Formulary may not be sufficient reason to consider it a drug within the meaning of the statute. The Federal Food, Drug and Cosmetic Act is largely a labeling act. It is directed in part toward protection of

public health and safety, but it also serves to prevent fraud on consumers by providing the public with accurate information about the content of a wide variety of articles intended for public consumption. Sections 450.04 and 450.06, Stats., in contrast, are police measures designed exclusively to protect the health of the state's citizens through regulation of the sale of drugs which contain potentially harmful ingredients. Being enforced by a penalty provision, see sec. 450.05, Stats., they are to be strictly construed. See 50 OAG 200, 203-204 (1961).

Therefore, before an article should be classified as a drug within the meaning of sec. 450.06(1), Stats., the determination must be made of whether it is "intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in persons or other animals." Statements to the contrary in former opinions of the Attorney General are hereby disavowed. In the alternative, granting that vitamins are "intended to affect the structure or any function of the body of persons or other animals," it must also be determined whether they are "food," so as to be outside the scope of sec. 450.06(3), Stats.

In prior opinions of the Attorney General it has been stated that the addition of a drug in harmless quantities to food does not transform the food itself into a "drug" within the meaning of the predecessor statutes to sec. 450.06, Stats. Thus in 14 OAG 18 (1925), tincture of iodine was found to be a drug within the meaning of then sec. 151.04(3), Stats., and consequently could be sold only under the supervision of a registered pharmacist. Yet in 14 OAG 131 (1925), it was stated that salt containing a small amount of sodium iodide is a food and not a drug and therefore could be sold as food if properly labeled. The opinion relied in part on the fact that there was an insufficient amount of iodide in the salt to make it poisonous or deleterious to the health of the average person.

In 50 OAG 200 (1961), the question was presented whether oatmeal reducing cookies containing methyl-cellulose are "drugs" merely because they contain one ingredient which is itself a drug, where the only function which the methyl-cellulose performs is to absorb water and expand in the stomach, creating a feeling of

fullness.¹ The answer was held to “depend largely upon the determination of whether substances which are occasionally used in the treatment of illness must then be considered solely as drugs.” Ultimately it was found that the cookies are not drugs, in part because:

“It is difficult to conceive that the legislature intended to treat as a drug every article which a person consumes for the purpose of helping to correct some bodily condition. ...”

Like methyl-cellulose, vitamins are a component of a wide variety of foods; and like obesity, vitamin deficiency is usually the result of poor eating habits rather than being a “disease” per se. I recognize that in some cases, as of persons suffering from scurvy or rickets, a vitamin deficiency may be so severe as to constitute a disease. I presume that for such persons vitamins of a particular variety and dosage would be prescribed, and that a druggist would be required to compound and sell them. In the ordinary case, however, vitamins are purchased merely as a diet supplement and are not intended to be used for the diagnosis, cure, mitigation, treatment or prevention of disease. Therefore it is my opinion that vitamins are ordinarily food supplements and not drugs, and consequently need not be sold under the supervision of a registered pharmacist.

See also *Board of Pharmacy v. Quackenbush & Co.*, 39 A.2d 28, 22 N.J. Misc. 334 (1940); *Department of State v. Kroeger Grocery & Baking Co.*, 40 N.E.2d 375 (1942), Ind. App., rev'd. on other grounds, 46 N.E.2d 237; *King v. Board of Medical Examiners*, 151 P.2d 282, 286, 65 Cal. App. 2d 644 (1944), in all of which vitamins were found to be diet supplements, therefore food, and not drugs.

Support for this conclusion is found also in *National Nutritional Foods Ass'n. v. Weinberger*, *supra*, which involved a challenge to an FDA regulation classifying vitamins A and D, in tablets or capsules above a specified dosage, as drugs, and below that dosage as food. In enacting the regulation, which the Court upheld, the Commissioner had concluded that vitamins up to a certain dosage are merely food

¹ In this opinion methyl-cellulose was found to be a drug within the meaning of then ch. 151, Stats., because it was included in the United States Pharmacopoeia. This statement is obviously inconsistent with my reading of present sec. 450.06(1), Stats. See above.

supplements. They are neither injurious to the health of the average person nor used by him as other than a dietary supplement. Above that dosage, however, the vitamins were found to have no nutritional advantages. On the contrary, at least in the cases of vitamins A and D, they were found to be actively harmful to the health of most individuals, and to serve no function except for those persons suffering from vitamin deficiency to such an extent that it constituted an actual sickness, and who consequently required abnormally high dosages of vitamins which served the function of curing or mitigating the effects of the disease. Recognizing that a uniform agency rule cannot establish a maximum dosage tailored to individual need, the U.S. Government Recommended Daily Allowances for vitamins set forth in 21 C.F.R. sec. 80.1(f)(1) (1976), were chosen as reasonable outer limits, above which the vitamins ceased to serve a nutritional function and became suitable only for use in the treatment of disease.

In conclusion, this office cannot undertake to establish the dosage limits per capsule at which vitamins cease to be food and become drugs within the meaning of sec. 450.06, Stats. Rather, under the statute as presently written and absent additional legislation, that determination must be made on a case-by-case basis as the issue may arise. Nevertheless, I trust that the discussion above has given you an indication of the considerations which govern in cases where the classification may be open to doubt.

As to your second question, sec. 450.04, Stats., provides that drugs, except for proprietary drugs, may be sold only by a registered pharmacist or a registered assistant pharmacist acting under the supervision of a registered pharmacist. Since it is my conclusion, however, that vitamins are in the ordinary case food and not drugs, sec. 450.04, Stats., does not apply, and they may be sold in stores other than pharmacies.

BCL:WHW

Anti-Secrecy; Cities; Open Meeting; Newspapers; Public notice under sec. 19.84(2), Stats., for meeting of governmental body should be as specific as possible but a governmental body can discuss matters not specifically set forth in the notice and not known to chief presiding officer when the notice was given if the notice contains item similar to "such other matters as are authorized by law." Such procedure should be utilized with restraint. OAG 37-77

April 18, 1977.

LOUIS J. MOLEPSKE, *City Attorney*
Stevens Point

Pursuant to sec. 19.98, Stats., you request my advice on three questions relating to the open meeting law created by ch. 426, Laws of 1975.

"1. Does the chief executive officer of the City or the governing body, at its monthly meeting, have the authority to add subject matter to its agenda at the time of its meeting where the particular subject matter was not known to the governing body or chief executive officer prior to his formulating the agenda?"

The answer is "no." However, governmental bodies may be well advised to place a general item on the agenda such as "such other matters as are authorized by law." In such case the governmental body could discuss, and if urgent, act upon matters which were not specifically referred to in the agenda. See 63 OAG 509, 511 (1974). Matters of considerable importance should not be acted upon in this manner but should be postponed to a subsequent meeting for which more specific notice may be given. Section 19.84(1), Stats., places the duty on the chief presiding officer or his designee to give the required notice. Section 19.84(2) Stats., provides:

"(2) Every public notice of a meeting of a governmental body shall set forth the time, date, place and *subject matter* of the meeting, including that intended for consideration at any contemplated closed session, *in such form as is reasonably likely to apprise members of the public and the news media thereof.*" (Emphasis added.)

This provision does not require a governmental body to utilize a detailed agenda. Many governmental bodies, by custom or procedural rule, do utilize a detailed agenda which is in itself suitable for publishing, posting and delivery to any official newspaper or members of the news media. The notice utilized should be as specific as possible. The intent of the new law is clear. The public is entitled to the best notice which can be given. Consequently when any matters are known in advance to be a part of the agenda they should be described in the notice. Most governmental bodies have rules permitting the consideration of "miscellaneous business." It would be proper to include such a general phrase in the notice where it supplements more specific information about the agenda and the body's rules provide for the consideration of such business. See 66 OAG 68 (1977).

"2. Is there a violation of the Open Meeting Law where a governmental body through its agenda specifies a particular subject matter and thereafter by amendment to the particular subject matter would have the result of increasing the subject matter discussion to other matters where the same is permissible by parliamentary law?"

The answer is "no," if the presiding officer rules that the amendment is germane to the subject matter listed in the original agenda and such ruling is sustained by the body.

"3. May a governing body discuss and act upon related matters which are not on its agenda which however relate to the subject matter indirectly?"

The answer is "no," unless as discussed in answer to your second question above the related matter is ruled by the presiding officer to be germane to the subject matter listed in the original agenda and such ruling is sustained by the body. The presiding officer should apply a test of reasonableness as to what is fairly included within the scope of a particular agenda item. Such matters must be determined on a case-by-case basis.

The stated purpose of the law recognizes that "the public is entitled to the fullest and most complete information regarding the affairs of government as is compatible with the conduct of governmental business." Sec. 19.81(1), Stats. The purpose of the law is not to interfere with or limit the power of a governmental body

to carry out its statutory duties. As noted above, reliance upon a general phrase such as "such other matters as are authorized by law," should be limited and should never be utilized as a means of concealment of the probable introduction and discussion of matters of importance or of wide concern which were known to the chief presiding officer or his designee at the time public notice was required to be given.

BCL:RJV

Cities; Compatibility; County Board; County Supervisor; Hospitals; Public Officials; County board member cannot serve on joint county-city hospital board created under sec. 66.47, Stats., by reason of secs. 59.03(4), 66.11(2), Stats., but city council member could, and whether such member can receive additional remuneration for such service depends on whether he was appointed by the county board chairman, mayor, or mayor and county board chairman. OAG 39-77

April 25, 1977.

JAMES A. WENDLAND, *District Attorney*
Dunn County

You request my opinion on four questions relating to eligibility of members of a county board and of a city council to also serve, during the terms for which they were elected, on the board of a joint county-city hospital.

You state that Dunn County and the City of Menomonie jointly own and operate a hospital pursuant to sec. 66.47, Stats. Two members of the hospital board are also members of the county board, having been appointed by the county board chairman and confirmed by the county board during their terms as county board supervisors. One member of the hospital board is also a city council member and was such a member when appointed to the hospital board by the mayor and confirmed by the city council.

Section 66.11(2), Stats., provides:

“(2) **Eligibility of other officers.** Except as expressly authorized by statute, no member of a town, village or county *board*, or city council shall, during the term for which he is elected, be eligible for any office or position which during such term has been created by, or the selection to which is vested in, such *board* or council, but such member shall be eligible for any elective office. The governing body may be represented on city or village boards and commissions where no additional remuneration is paid such representatives and may fix the tenure of such representatives notwithstanding any other statutory provision. This subsection shall not apply to a member of any such board or council who resigns from said board or council before being appointed to an office or position which was not created during his term in office.” (Emphasis added.)

1. Does a hospital board created pursuant to sec. 66.47, Stats., come under the legal classification or category of “board” as that term is used in the first sentence of sec. 66.11(2), Stats.?

The answer is “no.” The word “board” is used in two places in the first sentence of sec. 66.11(2), Stats. In each case it means town, village or county *board*.

2. Does the selection process of hospital board members set forth in sec. 66.47(5), Stats., fall within the definition of “selection to which is vested in, such board or council” as used in sec. 66.11(2), Stats.?

I am of the opinion that it does.

Section 66.47(5), Stats., provides:

“(5) **Hospital board.** The ordinance shall provide for the establishment of a joint county-city hospital board to be composed as follows: 2 to be appointed by the county board chairman and confirmed by the county board, one for a one-year and one for a 2-year term; 2 by the mayor or other chief executive officer and confirmed by the city council, one for a one-year and one for a 2-year term; and one jointly by the county board chairman and the mayor or other chief executive officer of the city or cities, for a term of 3 years, confirmed by the county board and the city council or councils. Their respective successors shall be appointed and confirmed in like manner for terms of 3 years. All appointees shall serve until their successors

are appointed and qualified. Terms shall begin as specified in the ordinance. Vacancies shall be filled for the unexpired term in the manner in which the original appointment was made.”

It is not necessary that the selection be wholly vested in such board or council for the proscription to apply. The act of confirmation is a significant part of such process. The county board must act to confirm the appointees of the county board chairman and the joint appointee of the mayor and county board chairman. The city council must confirm the appointees of the mayor and the joint appointee of the mayor and county board chairman.

3. Can a county board member serve on a joint county-city hospital board during the term for which he was elected?

The answer is “no.” He can neither be appointed by the county board chairman and confirmed by the county board, appointed by the chairman and mayor and confirmed by both boards, or appointed by the mayor and confirmed by the council. In the first two cases he is ineligible to serve on the hospital board by reason of sec. 66.11(2), Stats. In the last instance he would be eligible to serve on the hospital board, since the selection was not vested in the *county board*, but would lose his eligibility to continue to serve as county supervisor by reason of sec. 59.03(4), Stats., which provides:

“(4) **Compatibility.** No county officer or employe is eligible to the office of supervisor, but a supervisor may also be a member of a town board, the common council of his city or the board of trustees of his village.”

It is unlikely that a county board supervisor would be selected by the mayor and council. However, I am of the opinion that a member of a joint county-city hospital board is a county officer within the meaning of sec. 59.03(4), Stats. Members of the joint board take an oath which is filed with the county clerk. Sec. 66.47(7), Stats. Consequently if a county supervisor were to accept appointment to the hospital board as an appointee of the county board chairman, county board chairman and mayor, or mayor, and would assume such office, he would vacate the office of supervisor. Under common law, if one holding public office accepts another incompatible with the one which he holds, he thereby vacates the first office. *State ex rel. Martin v. Smith*, 239 Wis. 314, 1 N.W.2d 163 (1941).

4. Can a city council member serve on a joint county-city hospital board during the term for which he is elected?

I am of the opinion that such member can. I am of the further opinion, however, that such member could receive no additional remuneration for such service over and above that provided as council member if he were appointed by the mayor and confirmed by the council or jointly appointed by the mayor and county board chairman and confirmed by the county board and council. In the unlikely event that a council member were appointed by the county board chairman and confirmed by the county board, I am of the opinion that such member could receive additional remuneration, over and above his compensation as council member, from the hospital board for service on such board as provided in the ordinance creating the hospital. See secs. 66.47(1), (2) and (7), Stats.

The second sentence of sec. 66.11(2), Stats., provides in part:

“... The governing body may be represented on city or village boards and commissions where no additional remuneration is paid such representatives”

It is noted that the exception does not include counties. I am of the opinion that a joint county-city hospital board would constitute a “city board” within the meaning of sec. 66.11(2), Stats., and that a council member appointed by the mayor and confirmed by the council or appointed by the mayor and county board chairman and confirmed by the county board and council could be considered as representing the governing body of the city so that the exception would apply.

BCL:RJV

Cities; Constitution; Counties; County Board; County Supervisor; Fines; Forfeitures; Municipalities; Municipal Corporations; Ordinances; Public Officials; County board may provide for a penalty in the nature of a forfeiture for violation of a code of ethics ordinance but may not bar violators from running for office. Violation is not a neglect of duties required by law under sec. 59.10, Stats., or ipso facto cause for removal from office under sec. 17.09(1), Stats. OAG 40-77

April 28, 1977.

GLENN L. HENRY, *Corporation Counsel*
Dane County

You request my opinion with regard to what penalties, if any, counties may invoke to enforce a violation of a code of ethics. You indicate that Dane County has adopted a code of ethics, by ordinance, which is applicable to county supervisors, department heads, appointees to administrative agencies and elected officials. This code was adopted pursuant to sec. 19.45(11)(c), Stats.:

“Counties and municipalities may and should establish a code of ethics for local public officials.”

This section is part of subch. III of ch. 19, General Duties of Public Officials, which provides in detail for a code of ethics for state officials, but gives no further directives for a county or municipal code of ethics.

One of the provisions of the Dane County Code requires the timely filing of a statement of economic interest with limited financial disclosure information. A somewhat similar disclosure is required of certain state elective and appointive officials, by secs. 19.43 and 19.44, Stats. For the purpose of this opinion it is assumed that the Dane County provision to this effect is valid.

In order to answer your question as to penalties, I have broken my answer down into specific issues for purposes of analysis.

1. Can a county board provide that violation of its ordinance is punishable by fine or imprisonment?

I am of the opinion it cannot.

The Legislature has provided in sec. 19.50(1), Stats., for fine or imprisonment for violations of codes of ethics adopted or established under sec. 19.48(11)(a) and (b), Stats., which are applicable to state public officials, but has not provided for a penalty in the form of fine or imprisonment for violation of a code adopted by a county or municipality.

Section 939.12, Stats., provides:

“A crime is conduct which is prohibited by *state law* and punishable by *fine or imprisonment* or both. Conduct

punishable only by a forfeiture is not a crime.” (Emphasis added.)

The word “fine” does not include forfeiture, sometimes called fines, imposed by municipal corporations for violating their ordinance. *State v. Hamley*, 137 Wis. 458, 119 N.W. 114 (1909), *Stoltman v. Lake*, 124 Wis. 462, 102 N.W. 920 (1905).

For reasons which become clearer under No. 2, it is important to consider “fine or imprisonment” as one term which loses the meaning inferred in sec. 939.12, Stats., when broken down into its component parts of “fine” and “imprisonment.”

A county is not a sovereign and the sovereign alone can create a crime. *State ex rel. Keefe v. Schmiede*, 251 Wis. 79, 28 N.W.2d 345 (1947). Therefore, “fine or imprisonment” is not a permissible penalty.

However, it should be noted that imprisonment may ultimately result from a failure to pay a forfeiture imposed by an ordinance. The authority for such imprisonment may be found in ch. 288, Collection of Forfeitures.

Sections 288.09(1) and 288.10, Stats., provide:

“(1) Where judgment is recovered pursuant to this chapter it shall include costs and direct that if the same be not paid the defendant (if an individual) shall be imprisoned in the county jail for a specified time, not exceeding six months, or until otherwise discharged pursuant to law. The commitment shall issue, as in ordinary criminal actions, and such defendant shall not be entitled to the liberties of the jail.”

“All forfeitures imposed by any ordinance or regulation of any county, town, city or village, or of any other domestic corporation may be sued for and recovered, pursuant to this chapter, in the name of such county, town, city, village or corporation. It shall be sufficient to allege in the complaint that the defendant is indebted to the plaintiff in the amount of the forfeiture claimed, specifying the ordinance or regulation which imposes it. And when such ordinance or regulation imposes a penalty or forfeiture for several offenses or delinquencies the complaint shall specify the particular offenses or delinquency for which the action is brought, with a demand for judgment for

the amount of such forfeiture. All moneys collected on such judgment shall be paid to the treasurer of such county, town, city, village or corporation.”

Such imprisonment for failure to pay a forfeiture was held constitutional in *Schmiege, supra*, and *Milwaukee v. Johnson*, 192 Wis. 585, 213 N.W. 335 (1927). However, constitutional limitations may be applicable under some circumstances under *Tate v. Short*, 401 U.S. 395 (1971); *State ex rel. Pedersen v. Blessinger*, 56 Wis.2d 286, 294, 201 N.W.2d 778 (1972); and *West Allis v. State ex rel. Tochalauski*, 67 Wis.2d 26, 29, 226 N.W.2d 424 (1975).

2. Can a county board provide that violation of its ordinance is punishable by forfeiture?

I am of the opinion that it can.

In *Schmiege, supra*, the court invalidated a county ordinance providing for a “fine or imprisonment” as penalty for its violation. The court at page 84 went on to say:

“[The ordinance] must be held to be invalid in so far as it attempts ... to impose penalties other than forfeitures and imprisonment necessary for the enforcement of the forfeitures.”

The above statement by the court is supported by the clear inference of sec. 288.10, Stats. That section as quoted above outlines the procedure to be followed by a county, town, city or village to collect forfeitures imposed by any ordinance or regulation of such governmental entities. Although there is no direct legislative provision for the imposition of a forfeiture, the *Schmiege* case and sec. 288.10, Stats., indirectly provide such legislative authority to counties.

It is important to note that on occasion courts have determined that a “fine” is a permissible penalty for violation of an ordinance. For example, in *State ex rel. Pedersen v. Blessinger, supra*, at 290, the court commented:

“... In village, city and county ordinance violations, the sanction can be only a *fine* or a *forfeiture* as those units of government lack sovereignty which is necessary to make such violation a crime involving the punishment of imprisonment. *State ex rel. Keefe v. Schmiege* (1947), 251 Wis. 79, 28 N. W. 2d 345.” (Emphasis added.)

Also, in *Milwaukee v. Horvath*, 31 Wis.2d 490, 494, 143 N.W.2d 446 (1966), the court reaffirmed *Schmiege* in that:

“... where a fine is levied and imprisonment provided on failure to pay the fine, such imprisonment does not violate either sec. 2, art. I, of the Wisconsin constitution, or sec. 1, art. XIII, of the United States constitution.” (Emphasis added.)

Thus comes the distinction between the word “fine” standing alone and in conjunction with “imprisonment” alluded to in answer No. 1. The *Schmiege* court clearly held that “fine or imprisonment” is an impermissible penalty for violation of an ordinance. However, it is my opinion that the word “fine,” when used alone in the context of an ordinance, should be considered a forfeiture.

This distinction was made with reference to a city ordinance in *Johnson, supra*, pp. 589-590:

“The fact that the ordinance provides that the offense ‘shall be punished by a fine’ does not necessarily lead to the conclusion that the offense is criminal or *quasi*-criminal in its nature. When used in a city ordinance the term ‘punishable by fine’ ‘implies a mere forfeiture or penalty collectible by civil action in the name of the city’ *Milwaukee v. Ruplinger*, 155 Wis. 391, 395, 145 N. W. 42. ...”

Thus a fine, when considered a forfeiture, is a permissible penalty for the violation of a code of ethics.

3. Can a county board provide that any person who fails to file a statement of economic interest as required by the ordinance be disqualified from the right to file for elective county office?

I am of the opinion that it cannot. This opinion is confined to consideration of the offices of supervisor, judge, county executive, and those officers elected under Wis. Const. art. IV, sec. 4. Where the constitution has not provided for the qualifications of candidates for such offices, the Legislature has sole authority, and the Legislature has not delegated any powers to county boards to establish qualifications for candidates to such offices. County boards have only such legislative powers as are conferred upon them by statute, expressly or by clear implication. *Maier v. Racine County*, 1 Wis.2d 384, 84 N.W.2d 76 (1957).

Qualifications for constitutional offices, where not established or limited by the constitution, may be established by legislative enactment, and offices omitted from constitutional regulation or created by statute are within the power of the Legislature to regulate, and it may make such rules regarding them as it deems wholesome and proper for the maintenance of good government. *State ex rel. Buell v. Frear*, 146 Wis. 291, 131 N.W. 832 (1911); *State ex rel. Bloomer v. Canavan*, 155 Wis. 398, 408, 145 N.W. 44 (1914).

4. Is a duty to file a statement of economic interest as required by ordinance, one "required by law" within the meaning of sec. 59.10, Stats., applicable to county supervisors?

I am of the opinion that it is not.

Section 59.10, Stats., provides:

"Neglect of duty. Any supervisor who refuses or neglects to perform any of the duties which are required of him *by law* as a member of the county board of supervisors, without just cause therefor, shall for each such refusal or neglect forfeit a sum of not less than fifty nor more than two hundred dollars."
(Emphasis added.)

Specifically, it is my opinion that an ordinance which adopts a code of ethics does not become law such that a supervisor may be penalized for its violation pursuant to sec. 59.10, Stats. In my opinion "required ... by law" in that section refers to a law imposed by the Legislature, not the county board. A duly adopted ordinance constitutes "law" in the broad sense, but not as that term is used in sec. 59.10, Stats.

In 63 OAG 107, 112 (1974), my predecessor stated:

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

Further, in 12 OAG 24, 24-25 (1923), it was stated with respect to a county board rule increasing the majority vote for money appropriations:

“... Such a rule requiring a larger vote than a majority of a quorum present is not a larger vote ‘required by law’ Any other provision as to the vote required must be a provision of the statutory law. ...”

Although violation of an ordinance may not be the basis for a finding of neglect of duty pursuant to sec. 59.10, Stats., sec. 59.04(4), Stats., provides that “The board may punish its members for infraction of its rules by imposing the penalty provided therein.” If the ordinance were adopted as a rule and an appropriate penalty were provided, the board could proceed against a supervisor for violation of the code of ethics under such rule, rather than under sec. 59.10.

5. Can a county board provide that intentional failure of a supervisor to file the required financial statement would constitute grounds for removal of such supervisor from office?

I am of the opinion that it cannot.

Section 17.09(1), Stats., provides that a county supervisor 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.”

Removal procedure is governed by sec. 17.16, Stats., and subsec. (2) defines “cause” as “inefficiency, neglect of duty, official misconduct or malfeasance in office.” Such procedure contemplates a determination by the board on a case-by-case basis whether any act or omission of a board member constitutes cause for removal in the context of surrounding circumstances. If a board adopts a rule or ordinance which provides that failure to file a financial statement is *ipso facto* a cause for removal, it is my opinion that the board is circumventing impermissibly the statute’s procedure of a case-by-case vote applying the more general definition of cause provided by sec. 17.16(2), Stats., as a guideline. This does not mean that a board could not proceed to hearings on removal for cause where the only

ground was alleged intentional failure to file the required financial statement.

BCL:RJV

Aid; Education; Public Instruction, Superintendent Of; Schools And School Districts; State Aid; Teachers; Section 121.17(1)(a), Stats., vests discretion in the state superintendent to withhold state aid from a school district operating under ch. 119, Stats., if the "scope and character of the work" in such district are not maintained because of failure to comply with the 180-day requirement of sec. 121.02(1)(h), Stats. Section 121.17(3), Stats., requires the withholding of state aid from such a school district only if, in the absence of extenuating circumstances set forth in that statutory provision, it fails to employ and pay qualified teachers during the full school session established by the board of school directors. OAG 41-77

April 29, 1977.

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

You have requested my formal opinion on the following questions:

"Under s. 121.17 and other applicable statutes, must a school district operating under Chapter 119 hold school for a certain minimum number of days in order to receive state aid? If the answer to the first question is yes, what is the minimum number of days a school district operating under Chapter 119 must hold school in order to receive state aid?"

Section 121.17, Stats., which sets forth the general circumstances under which the state superintendent may withhold state aid, provides in part:

"121.17 State aid withheld. (1) (a) The state superintendent may withhold state aid from any school district in which the scope and character of the work are not maintained in such manner as to meet his approval.

“(b) No state aid may be paid in any year under this subchapter to a school district which fails to meet the requirements under subs. (2) and (3).”

“***

[Subsection (2) relates to school districts other than ch. 119 districts.]

“(3) Unless the state superintendent is satisfied that failure to meet the requirements of this subsection was occasioned by some extraordinary cause not arising from intention or neglect on the part of the responsible officers, *a school district operating under ch. 119 shall, for the full period during which school is in session during each year as provided by the rules of the board of school directors*, employ teachers qualified under s. 118.19 and pay a salary of not less than \$266 a month to each regular teacher and of not less than \$10 a day to each qualified continuous substitute teacher.

“(4) *Notwithstanding subs. (1) and (3)*, full state school aids shall be paid to districts that fail during an energy emergency, as defined in s. 340.01 (15s), to comply with *the days of school required by that section*.” (Emphasis added.)

Chapter 119, Stats., applies only to cities of the first class. Sec. 119.01, Stats. However, sec. 119.04, Stats., provides in part that:

“... subch. I of ch. 121 ... [is] applicable to the board of school directors and to schools in cities of the 1st class. ...”

Subchapter I of ch. 121 is entitled “State Aid for Elementary and High Schools” and includes secs. 121.01 through 121.22, Stats. One of the very first sections of that subchapter, sec. 121.02, Stats., provides in part:

“**School district standards.** (1) A school district shall meet the following standards under criteria established by the department in compliance with sub. (2).

“***

“(h) School shall be held and students shall receive actual instruction for at least 180 days with additional days included as provided in s. 115.01 (10).”

You advise that your question relates to a school district operating under ch. 119 which, according to the district's report, filed October 28, 1976, established 181 days as the full period during which school would be in session during the 1976-1977 school year. I assume that the 181 days was established by the board pursuant to sec. 119.18(1), (6) and (8), Stats., so as to comply with the 180-day minimum required of all school districts by sec. 121.02(1)(h), Stats., and the 200-day maximum imposed by sec. 119.18(6)(a), Stats.

Section 121.02(1), as repealed and recreated by ch. 90, Laws of 1973, provided that "In order to be eligible for state aids under s. 121.08, a school district shall meet the following standards." The standards then, as now, included the 180-day requirement set forth in paragraph (h). However, the language of the statute directly conditioning eligibility for state aids upon compliance with its standards was deleted by subsequent amendment of the statute by ch. 39, Laws of 1975, and that statute may no longer be relied upon as the statutory authority for withholding state aid for failure to comply with the 180-day requirement.

Section 121.17, Stats., sets forth specific provisions on the withholding of state aid. Section 121.17(2), Stats., which specifies those circumstances under which state aid *must* be withheld from school districts other than ch. 119 districts, specifically conditions state aid on compliance with the 180-day requirement. Significantly, subsec. (3), which specifies those circumstances under which state aid *must* be withheld from ch. 119 districts, contains no such express mandate. One must conclude from the conspicuous absence of the 180-day requirement from this subsection that the Legislature did not intend to require the withholding of school aid from ch. 119 school districts which fail to comply with the 180-day requirement set forth in sec. 121.02, Stats. The requirements of subsec. (3) are solely that, except if excused "by some extraordinary cause not arising from intention or neglect on the part of the responsible officers," the school district shall (a) *employ* teachers qualified under sec. 118.19, Stats., for the full period during which school is in session during each year as provided by the rules of the board of school directors, i.e., here 181 days, and (b) *pay* the regular and substitute teachers not less than the salaries specified.

However, sec. 121.17(1)(a), Stats., does vest discretion in the state superintendent to withhold state aid from a school district operating under ch. 119, Stats., if the "scope and character of the work" in such district are not maintained. Whether failure to comply with the statutory mandate in sec. 121.02(1)(h), Stats., to hold school "for at least 180 days," would justify withholding of school aid under this subsection obviously would depend on the severity of such failure and the attendant circumstances.

BCL:JCM

Birth Control; Drugs; Nurses; Pharmacy; Physicians And Surgeons; Sales; Professional nurse may sell contraceptive articles, including oral contraceptive drugs, under sec. 450.11(5), Stats. OAG 42-77

May 16, 1977.

KARL W. MARQUARDT, *Executive Secretary*

Pharmacy Examining Board

You request my opinion whether sec. 450.11(5), Stats., as created by ch. 346, Laws of 1975, permits the sale of contraceptive articles, including oral contraceptive drugs, by professional nurses, or whether such provision is limited by sec. 450.07(3), Stats., which restricts the dispensing of prescription drugs to registered pharmacists or practitioners.

Section 450.11(5), Stats., as created by ch. 346, Laws of 1975, provides:

"No person except a pharmacist registered under s. 450.02, a physician or surgeon licensed under s. 448.06 (1), or a professional nurse registered under s. 441.06, may offer to sell or sell contraceptive articles."

The definition of a "contraceptive article" is contained in sec. 450.11(1), Stats.:

"As used in this section, 'contraceptive article' means *any* drug, medicine, mixture, preparation, instrument, article or

device of any nature used or intended or represented to be used to prevent a pregnancy.” (Emphasis added.)

Section 450.07(3), Stats., provides:

“No person, except a registered pharmacist or a practitioner, shall prepare, compound, dispense or prepare for delivery for a patient any prescription drug. (Emphasis added.)

The apparent conflict among these provisions arises because oral contraceptive drugs qualify as prescription drugs under the definition set forth in sec. 450.07(1)(a)1., Stats.

One of the purposes behind enactment of the new sec. 450.11(5), Stats., was to accommodate and facilitate the growing phenomenon of family practice clinics by enabling professional nurses to sell contraceptives without requiring that a doctor be present to witness the transaction. That being the case, it is incongruous that the Legislature would pass a law permitting nurses to sell nonprescription contraceptives but not birth control pills.

Also, it is a cardinal rule of statutory construction that conflicts between different statutes, arising by implication or otherwise, are not favored and will not be held to exist if the statutes may otherwise be reasonably construed. *Strong v. Milwaukee*, 38 Wis.2d 564, 570, 157 N.W.2d 619 (1968). It is my opinion that secs. 450.11(5) and 450.07(3), Stats., can be reasonably construed in a way which reconciles any apparent conflict between them.

The term “dispense,” found in sec. 450.07(3), Stats., is distinct in meaning from the term “sell,” found in sec. 450.11(5), Stats. A statutory definition of “dispense” can be found in the Uniform Controlled Substances Act at sec. 161.01(7), Stats., which provides:

“‘Dispense’ means to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling or compounding necessary to prepare the substance for that delivery.” (Emphasis added.)

Similarly, *Webster’s Third New International Dictionary* (1961) defines “dispense” as “to prepare and distribute (medicines).” In contrast, the word “sell” as defined in *Webster’s, supra*, means “to give up (property) to another for money or other valuable consideration.” “Dispense,” as used in sec. 450.07, Stats., is the

broader of the two terms and includes acts which constitute "selling" as well as other matters.

Thus, a pharmacist in dispensing a prescription drug not only delivers it to an ultimate user but is also authorized to involve himself in all steps necessary to prepare the substance for delivery, which may include packaging, labeling or compounding. A nurse in selling a contraceptive article which is a prescription drug may merely turn it over to someone in exchange for a valuable consideration after the drug has already been prepared. A nurse therefore is authorized to act in a much more limited capacity. However, in the usual case involving birth control pills already compounded, packaged, and labeled by the manufacturer the pharmacist's actual role will be little different from the nurse's.

It is presumed that the Legislature in enacting new laws acts with full knowledge of preexisting statutes. *Kindy v. Hayes*, 44 Wis.2d 301, 314, 171 N.W.2d 324 (1969); *Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B.*, 35 Wis.2d 540, 151 N.W.2d 617 (1967). In recreating sec. 450.11, Stats., by ch. 346, Laws of 1975, the Legislature specifically restricted the nurses' activity to one of selling. It was fully aware of sec. 450.07(3), Stats., which allowed only registered pharmacists and practitioners to "dispense" a prescription drug. It is also important to note that the Legislature specifically restricted the authorization to sell to a "professional nurse registered under sec. 441.06, Stats." Such a nurse appears to be only a registered nurse, commonly known as an R.N. Section 441.10, Stats., provides for registration of practical nurses, commonly known as L.P.N.'s, and sec. 441.10(3)(c), Stats., explicitly excludes an L.P.N. from the category of professional nurses. The restriction is in conformity with the purpose behind enactment of sec. 450.11(5), Stats., as it ensures that contraceptives will be sold only by persons well trained to answer questions about them which may occur to the buyers, while at the same time freeing physicians from the duty of participating in the sale itself.

Therefore, it is my opinion that sec. 450.11(5), Stats., now permits a professional nurse registered under sec. 441.06, Stats., as well as pharmacists and practitioners, to offer to sell or sell any contraceptive article, including an oral contraceptive drug, once it has been prepared for delivery. Note, however, that there has been no change in the law regarding who may *prescribe* birth control pills.

Only a medical practitioner may do so. See sec. 450.07(1)(f), Stats. And, of course, a prescription is necessary to anyone to deliver such pills. See secs. 450.07(1)(a) 1. and 450.07(2), Stats. Similarly, there has been no change regarding who may “prepare, compound [or] dispense” birth control pills. Only a registered pharmacist or practitioner may do so. See sec. 450.07(3), Stats.

BCL:SMS

Automobiles And Motor Vehicles; Forfeitures; Motor Vehicles; Municipalities; Ordinances; Snowmobiles; Traffic; Section 349.06(1), Stats., authorizes local authorities to enact and enforce any ordinance which is in strict conformity with traffic regulation provisions of ch. 350 for which the penalty for violation is a forfeiture. OAG 43-77

May 17, 1977.

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

You have requested my opinion on the following question: “Can local municipalities adopt local ordinances which go beyond the scope of Section 350.18, Wis. Stats., and incorporate parts of or all of Chapter 350, Wis. Stats., by reference?”

Section 349.06(1), Stats., reads:

“Except for the suspension or revocation of motor vehicle operator’s licenses, any local authority may enact and enforce any traffic regulation which is in strict conformity with one or more provisions of chs. 341 to 348 and 350 for which the penalty for violation thereof is a forfeiture.”

Section 350.18, Stats., reads:

“Counties, towns, cities and villages may regulate snowmobile operation on snowmobile trails maintained by or on snowmobile routes designated by the county, city, town or village.”

Section 349.06(1), Stats., is a restatement of part of sec. 85.84, Stats. (1955), which read: "Except for the suspension or revocation of motor vehicle operators' licenses, any local authority may pass any ordinance, resolution, rule or regulation in strict conformity with the provisions of this chapter." The legislative history of sec. 349.06(1), Stats., reveals that the change from the phrase "ordinance, resolution, rule or regulation" to "traffic regulation" was intended merely to be a simplification of language and not a change in meaning. Section 349.06(1), Stats., therefore, authorizes local authorities to enact and enforce any ordinance, resolution, rule, or regulation which is in strict conformity with one or more provisions of ch. 350 for which the penalty for violation is a forfeiture.

The fact that such ordinances incorporate provisions of ch. 350 by reference presents no problem, since it has been uniformly held that an ordinance may adopt by reference a statute or part thereof. *Hackbarth v. State*, 201 Wis. 3, 229 N.W. 83 (1930); 25 Op. Att'y Gen. 283 (1936).

Section 350.18, Stats., merely authorizes local authorities to regulate snowmobile operation on snowmobile trails and routes in addition to those areas indicated by other provisions in ch. 350. Therefore, there is no inconsistency or conflict between secs. 350.18 and 349.06(1), Stats., nor is sec. 350.18 in any way a limitation on the scope of sec. 349.06(1).

In summary, then, it is my opinion that local authorities may adopt ordinances incorporating by reference traffic regulation provisions of ch. 350, Stats., for which the penalty for violation is a forfeiture.

BCL:JJG

Bonds; Hotels, Boarding Houses And Restaurants; Municipalities; Hotels, motels and marinas are not permissible "projects" under the definition provided in sec. 66.521(2)(b), Stats. There is no authority under sec. 66.521, Stats., to establish a reserve fund from bond proceeds for payment of principal of and interest on the bonds, except as may be contemplated under the limited circumstances of sec. 66.521(7)(h), Stats. OAG 44-77

May 23, 1977.

EVERETT E. BOLLE, *Director of Legislative Services*
Wisconsin State Assembly

Under 1977 Assembly Bill No. 18, I have been asked to provide an opinion to the following questions:

“1. Are hotels, motels and marinas considered to be ‘projects’ under the definition provided in section 66.521 (2) (b) of the statutes?”

“2. Is a municipality authorized to use the proceeds from the sale of revenue bonds under section 66.521 of the statutes to establish a reserve for payment of the principal of and the interest on the bonds?”

From my examination of the current statutes involved, the answer to both of your questions is no.

Section 66.521(2)(b), Stats., defines the terms “project” and “industrial project” under Wisconsin’s Industrial Revenue Bond Law. These definitions make no direct reference to hotels, motels and marinas as permissible projects. It could be argued that such facilities were intended to be included within the meaning of the term “recreational facilities, convention centers and trade centers” found in paragraph 11 of the definition section. However, it is doubtful that this was the legislative intent, and for bonding purposes it would be preferable to specifically mention such facilities by name in the statutory definition. Private bond counsel undoubtedly would be unwilling to render an unqualified approving opinion for a bond issue which contemplated the use of funds in this manner under the current law. 62 Op. Att’y Gen. 141 (1973), opined that industrial development revenue bonding was not available for facilities of a retail automobile dealership because sec. 66.521, Stats., was intended to encompass businesses which were primarily industrial rather than retail and commercial in nature. The inclusion of hotels, motels and marinas as permissible projects seems to border on the periphery of the original intent of the law. Such facilities ordinarily would be viewed as retail and commercial in their nature. On the other hand, tourism is regarded as a major industry in Wisconsin, and such facilities could be viewed as part of the tourism industry. At any rate,

the specific reference to hotels, motels and marinas within the statutory definition would clarify the legislative intent.

As to the second question, there is nothing in sec. 66.521, Stats., which specifically authorizes bond proceeds to be used to establish a debt service fund. The first paragraph of sec. 66.521(7), Stats., does not provide for the intentional establishment of a reserve fund, but simply directs that if any portion of the proceeds is not needed for the purpose for which the bonds were issued that it be applied to the payment of principal and interest on the bonds. Section 66.521(7) and (13), Stats., provide for the application of proceeds from the sale of bonds, but no provision is made therein that proceeds may be used as a reserve for payment of the principal of and interest on the bonds, except as may be contemplated under the limited circumstances of sec. 66.521(7)(h), Stats. Legislation would have to be enacted to provide for this.

BCL:APH

Children; Foster Homes; Guardian; Minors; Parental Rights; Public Welfare; The potential liability of placement agencies and foster parents for the torts of foster children is the same as natural parents' liability. They are only liable for property damage or physical injury which results from a failure to provide reasonable supervision. The greater exposure falls on the foster parent. Section 895.035, Stats., does not apply to placement agencies or foster parents. OAG 45-77

June 1, 1977.

RAYMOND L. PAYNE, *District Attorney*
Douglas County

Your predecessor had requested my opinion on two questions concerning the liability of the Douglas County Department of Social Services and foster parents for damage done by children placed in foster homes.

First, he inquired whether the Douglas County Department of Social Services (hereinafter, the county department) could be held

liable for damage done to a foster home, or any other premise or facility, by a foster child in the department's legal custody.

Second, he inquired whether the foster parents themselves could be liable for damage done to any property by a foster child in their care. And in that regard, whether sec. 895.035, Stats., applied to foster parents.

I interpret these questions as asking: 1) whether the county department may be held liable to foster parents or third parties for the torts of a foster child; and 2) whether a foster parent may be held liable for injury to the persons or property of third parties caused by the tort of a foster child. It is my opinion that both questions must be answered affirmatively, subject to the qualifications developed below.

It is a long-established common law principle that the mere relationship of parent and child does not impose upon the parent liability for every tort of the child. 67 C.J.S. *Parent And Child* sec. 66. Accord, *Hopkins v. Droppers*, 184 Wis. 400, 198 N.W. 738 (1924). However, parents are liable for their childrens' torts which result from a failure of the parent to exercise control over their children when they know, or should have known, that the absence of control will result in injury to another. Liability in such circumstances is based on parental negligence rather than the relationship of parent and child. 67 C.J.S. *Parent And Child* sec. 68.

In *Seibert v. Morris*, 252 Wis. 460, 32 N.W.2d 239 (1948), our court adopted the Restatement, 2 Torts, formulation of the duty and attendant liability of parents for the conduct of children:

“A parent is under a duty to exercise reasonable care so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them, if the parent (a) knows or has reason to know that he has the ability to control his child, and (b) knows or should know of the necessity and opportunity for exercising such control.

“Comment:

“... b. The duty of a parent is only to exercise such ability to control his child as he in fact has at the time when he has the opportunity to exercise it and knows the necessity of

so doing....” Restatement, 2 Torts, sec. 316, pages 858-859, quoted in *Seibert*, at page 463.

The continued applicability of the *Seibert* standard was affirmed in *Gerlat v. Christianson*, 13 Wis.2d 31, 108 N.W.2d 194 (1960).

While the above-cited cases and the rule they adopt deal with torts causing physical injury, I consider the rationale of *Seibert* to be equally applicable to situations where a child’s tortious conduct results in property damage.

The Children’s Code, ch. 48, Stats., delineates the rights and responsibilities associated with child care in terms of guardianship and legal custody. In most instances, a child’s natural parents are his guardians. “Guardian” is defined in sec. 48.02(9), Stats., as follows:

“‘Guardian’ means guardian of the person and refers to the person having the right to make major decisions affecting a child including the right to consent to marriage, to enlistment in the armed forces, to major surgery and to adoption The guardian has legal custody of the child unless legal custody is given by the court to another person. ...”

As is apparent, among the duties of guardianship is the exercise of legal custody. Section 48.02(10), Stats., defines “legal custody” as follows:

“‘Legal custody’ means the right to the care, custody and control of a child and the duty to provide food, clothing, shelter, ordinary medical care, education and discipline for a child. Legal custody may be taken from a parent only by court action.”

I consider the duties *Seibert* imposes on “parents” to be a function of legal custody. Therefore, when legal custody of a child is transferred by a court from a natural parent or guardian to the county department pursuant to secs. 48.34, 48.345 or 48.35, Stats., the recipient agency assumes the responsibility and attendant liability for the conduct of the child.¹ If such children were simply kept in agency institutions our inquiry would end here. Fortunately,

¹ While we are here discussing transferral of custody to the county department, this statement is equally true if custody is transferred to any of the persons or agencies enumerated in said statutes.

however, they are generally placed in the healthier environment of a foster home. Thus, the question becomes who is liable for the child's conduct once he is placed in a foster home?

Placement does not completely absolve the agency of liability. It retains legal custody,² supervises the foster home, and has usually established rules which at least partially prescribe the manner in which the child is cared for. However, because of the nature of the *Seibert* duties, the greater exposure falls on the foster parent exercising physical custody. The immediate control and supervision of the child is the foster parent's responsibility.

Accordingly, when the foster parents themselves are the aggrieved party, whether the placement agency or the foster parents will bear the loss will depend on which party, if either, was negligent in the performance of its duties. Regarding the claims of third parties, since foster parents are responsible for the immediate control and supervision of children living in their homes, in most cases the foster parents, rather than the placement agencies, would be liable for those torts which could have been avoided by more effective parental supervision. But the placement agency might be liable in those situations in which it could be shown that it had acted negligently in placing a child in a foster home (e.g., placement of a child with known dangerous propensities in a foster home without first fully notifying the foster parents of the child's problem).

With respect to the applicability of sec. 895.035, Stats., to children placed in foster homes, it is my opinion that this provision does not apply to either the foster parents or placement agencies. This statute imposes vicarious liability upon the "parent or parents having legal custody" for property damage or physical injury resulting from the wilful, malicious or wanton acts of minor children. As a statute in derogation of the common law, it must be strictly construed. Neither

² It is unclear from the authorities whether foster parents exercise mere physical custody or delegated legal custody. The revisors of the Children's Code observed that, when a welfare agency placed a child in a foster home, the foster parents were given physical custody of the child, but the agency could remove the child from the home without petitioning the court since the agency retained legal custody. Sec. 48.02, 1955 Revision Committee Note, W.S.A., p. 363. But in *Goller v. White*, 20 Wis.2d 402, 122 N.W.2d 193 (1962), the court spoke of placement of a foster child as a "delegation" of legal custody. While I believe the former to be the better view, both characterizations denote immediate care by the foster parents with some retained responsibilities in the placing agency.

foster parents nor placement agencies are "parents" in the strict sense of the term. The Legislature was familiar with the definition of "parent" adopted in sec. 48.02(11), Stats., of the Children's Code when it enacted ch. 895.

The legislative history of ch. 208, Laws of 1957, the original parental liability statute, supports this construction. Several amendments proposed substitutes for the phrase "the parent or parents having legal custody." The substitutes proposed were: (1) "a parent having legal custody"; (2) "a parent of an unemancipated minor child, or any other person having legal custody of a minor child"; and (3) "any person having legal custody." In view of the alternatives offered, the language enacted clearly indicates legislative intent to limit application of sec. 895.035 to parents, as defined in sec. 48.02(11), who are exercising legal custody.

BCL:PRS

Banks And Banking; Collection Of Account; Creditors' Actions; Criminal Law; "Past consideration" as that term is used in sec. 943.24(3), Stats., is present in a situation in which one party belatedly delivers to another a check in consideration for goods transferred at an earlier date from the payee to the drawer, although said check is later determined to have been worthless at the time of issuance.

"Past consideration" as that term is used in sec. 943.24(3), Stats., is also present in a situation in which an employe pays back his employer by way of a worthless check for money discovered missing from a restaurant cash register for which the employe was responsible. OAG 46-77

June 2, 1977.

WILLIAM N. BELTER, *District Attorney*
Waushara County

You have requested my opinion concerning the meaning of the phrase "past consideration" as it is used in sec. 943.24(3), Stats., relating to the issuance of worthless checks in the following two fact situations:

“Under the first set of circumstances ‘A’ sold corn to ‘B’, who picked the same upon ‘A’s’ property for two days. Upon completion of the picking and weighing of the corn on November 8, 1974, the final amounts due were transmitted by ‘A’ to ‘B’ who issued a check dated November 9, 1974, which he brought to ‘A’s’ farm on November 11, 1974, in payment for the corn purchased. Apparently, there was no intention to extend any credit in this matter, and ‘A’ expected to receive payment upon completion of the delivery of the corn.

“The second situation involves an employee in a restaurant, who was to manage the restaurant for the owner. The owner, in checking out the cash register, found that the amount of money that should have been available was substantially ‘short’ and upon the discovery thereof, the employee responsible for the cash register and the owner came to an understanding as to the amount of the shortage and a check in settlement therefore was issued by the employee that same evening. Shortly thereafter, the employee informed a cook in the kitchen, that he was going to cancel the check in the morning, and when the check was presented for payment, payment had been stopped.”

You express concern that in both of the above situations, it is not clear whether or not the consideration for the issuance of the checks would constitute a “past consideration” within the meaning of the criminal statute.

Section 943.24, Stats., reads as follows:

“(1) Whoever issues any check or other order for the payment of money which, at the time of issuance, he intends shall not be paid is guilty of a misdemeanor and may be fined not more than \$1,000 or imprisoned not more than one year or both.

“(2) Any of the following is prima facie evidence that the person at the time he issued the check or other order for the payment of money, intended it should not be paid:

“(a) Proof that, at the time of issuance, he did not have an account with the drawee; or

“(b) Proof that, at the time of issuance, he did not have sufficient funds or credit with the drawee and that he failed

within 5 days after receiving notice of nonpayment or dishonor to pay the check or other order; or

“(c) Proof that, when presentment was made within a reasonable time, the issuer did not have sufficient funds or credit with the drawee and he failed within 5 days after receiving notice of nonpayment or dishonor to pay the check or other order.

“(3) This section does not apply to a postdated check or to a check given for a past consideration, except a payroll check.”

Subsection (3) appears to provide that one who gives another a check or order for the payment of money which, at the time of issuance he intends not to be paid, is not subject to criminal liability under sec. 943.24(1), Stats., if the check or order is postdated or is given as compensation for past consideration, except in the case of a payroll check. The problem is to determine what constitutes “past consideration.”

Although none of the forerunners to sec. 943.24, Stats., contain the specific exceptions set forth in subsec. (3) of the current statute, it is evident from a plain reading of sec. 943.24, Stats., and from other unchallenged interpretations of the earlier statutes, that the prohibition against issuing worthless checks was designed to address simultaneous transactions in which goods or services are transferred in exchange for a check delivered at the time.

It is my opinion that in either case you describe prosecution would not properly lie under sec. 943.24, Stats., because in each case past consideration motivated issuance of the check.

Your question has been raised tangentially in Opinions of the Attorney General interpreting earlier worthless check statutes. In Wisconsin, criminal liability for issuing worthless checks was first set forth in sec. 4438a, Ann. Stats. (1889), which was created by ch. 136, Laws of 1887. Section 4438a, Stats. (1915), prohibited the making, uttering, or delivering of a worthless instrument commonly referred to as a bank check, with the intent to defraud another. In 1 Op. Att’y Gen. 195 (1913), one of my predecessors was asked to render an opinion as to the applicability of sec. 4438a, Stats. (1911), to a situation where a merchant had let run for some time an account with a firm from which he had purchased goods. Upon being pressed for the money he owed, the merchant issued to the firm three

postdated checks. The first check was protested by the bank when presented for payment because of insufficient funds.

This office opined that the merchant had given a check for a preexisting debt and that:

“... It was not given to obtain goods, wares and merchandise or to deprive the party to whom given of anything valuable; it was given for a debt already contracted prior to the giving of the check. ...” 1 Op. Att’y Gen. 196, 197 (1913).

While it is true that the check was postdated by 12 days, it is also true that it was delivered in partial payment of a debt which had “run for some time;” and that its issuance represented and was accompanied by only the merchant’s promise that the money would be at the bank at a future date. The firm could not have been persuaded to turn title to the goods over to the merchant on the faith of the check because said check was not delivered until sometime after title was transferred.¹

Section 4438a, Stats. (1915), was repealed by ch. 164, Laws of 1917, and replaced by a similar statute which, aside from creating a presumption to defraud based on the drawee’s refusal to make payment on a check, draft or order, issued by another, contained no significant modification of the earlier statute.

Our supreme court reviewed a conviction obtained under the above statute in *Merkel v. State*, 167 Wis. 512, 167 N.W. 802 (1918), where the defendant apparently refused to try to rebut the aforementioned presumption that he intended to defraud the issuee from whom he had bought certain meats. In affirming the conviction the court stated:

“The evidence also sufficiently shows *prima facie* that the check was given for meats sold to the defendant and that at least some of the goods sold on the faith of the check were delivered at the time the check was given. ...” *Merkel v. State, supra*, at p. 514.

¹ For a further discussion of the necessity of title passing simultaneous with the issuance of a check before an action for prosecution could lie under sec. 4438a, R.S. 1889, see 4 Op. Att’y Gen. 25, 26 (1915).

Again, one key element necessary for successful prosecution under the worthless check statute then in existence was that possession of the goods be relinquished on faith that the purchaser had funds in the bank sufficient to pay the check given at the time possession was transferred.

In 11 Op. Att’y Gen. 137 (1922), this office was again presented with a set of facts similar to those presented in 1 Op. Att’y Gen. 195 (1913). The Attorney General cited the above quote from page 514 of *Merkel v. State* and concluded:

“From the wording of this statute and from the history of it, it is manifest that the intent to defraud is a necessary element of the crime. When credit has been extended to the debtor it is difficult to see how he can defraud the creditor by issuing a check on a bank where he has no funds. He does not obtain money or other property by his implied false representations.”
11 Op. Att’y Gen. (1922), at p. 140. See also 15 Op. Att’y Gen. 499, 501 (1926).

In 26 Op. Att’y Gen. 50 (1937) the Attorney General stated that there was no violation of sec. 343.401, Stats. (1925), (formerly numbered sec. 4438a, Stats.), where a person issued a worthless check for services rendered and, upon being asked a second time to pay for the services, issued another worthless check. The opinion explained:

“... The relationship of creditor and debtor existed. The giving of the check, even though it was worthless, did not in any way change his relationship or injure the recipient of the check. In other words, the element of intent to defraud is never present in the giving of a check in payment of a past due account, for the reason that no fraud can be perpetrated by the giving of such check when it is in payment of a past due account. ...”

Chapter 696, Laws of 1955, repealed sec. 343.401, Stats. (1953), and created in its place sec. 943.24, Stats. (1955), in conjunction with the enactment of the new Wisconsin Criminal Code.

The language of sec. 943.24, Stats. (1955), in expressly excluding from its scope postdated checks and those given for past consideration (with the exception of payroll checks) is in accord with the interpretation made by some of my predecessors and our supreme court in *Merkel v. State*, *supra*, of earlier worthless check statutes.

Subsection (3) of sec. 943.24, Stats., does not state what constitutes "past consideration" as that phrase is used in that subsection of the statutes. However, a look at the comments by the drafters of what eventually became sec. 943.24, Stats., is in order.

The draft replacement for sec. 343.401, Stats. of 1953, which became sec. 943.24, Stats., contained substantially the same language as current sec. 943.24, Stats., with the exception that subsec. (3) of the current statute was omitted. In defining the scope of that draft of the statute, the Legislative Council's comment read as follows:

"LEGISLATIVE COUNCIL COMMENT: *Scope.* The principal difference between this section and the old one on issue of worthless check is in the intent. The old section required an intent to defraud. Therefore, it was held that issuing a worthless check for something which you have already obtained--the services of an employe, for example--was not covered by the old section because there was no intent to defraud. *This state of the law was undesirable because it assumed that the only time society is harmed is when the actor receives some property at the time he gives the check. ... [T]he only effective deterrent to this type of conduct seems to be an increase in the scope of the criminal sanctions.*" *Wisconsin Legislative Council Reports*, Vol. 3, pp. 94-95 (1949-1950). (Emphasis added.)

However, in a later draft of this statute the aforementioned subsec. (3) had been added and provided as follows:

"(3) This section does not apply to a check given for a past consideration except a payroll check or to a postdated check." *Wisconsin Legislative Council Reports*, Vol. 2, pp. 118-119 (1951-1953).

In explaining the purpose for this restrictive provision in what eventually became the almost identical language of subsec. (3) of the current worthless check statute, the Judiciary Committee commented as follows:

"COMMENT. This section covers persons who at the time they issue a check or other order for the payment of money, intend that it shall not be paid. As stated in subsection (3), two types of checks are not included: (a) a check given for a past consideration except a payroll check, and (b) a postdated

check. *Payroll checks are included because they are always given for past consideration* Postdated checks are not included ... [because] [t] he person who takes a postdated check is put on notice that there may not be sufficient funds in the account of the issuer.” *Wisconsin Legislative Council & Counsel Committee Report*, Vol. 2, p. 119 (1951-1953). (Emphasis added.)

Aside from the above Judiciary Committee comment, the record is silent as to why the drafters modified the language in their later draft by adding subsec. (3). However, the record does indicate that several members of the Legislative Council attempted to have all forms of checks given for past consideration excluded from the reach of the statute for fear that to do otherwise “would extend the civil law into criminal cases.” *Wisconsin Legislative Council Reports*, Vol. 5, p. 5 (1953-1955).²

The above chronology of events leading up to the enactment of our current worthless check statute demonstrates that the objective of the drafters was not to change the type of activity made criminal therein, except in the case of payroll checks, which are based on past consideration, and the issuance of which consequently cannot involve an intent to defraud. The exception in the case of payroll checks was added in order to address a specific problem in metropolitan areas where special reliance is placed on such checks. Had subsec. (3) not been added to the statute, any check, whether based on past or present consideration, would have fallen within its reach, provided the drawer’s intent that the check not be paid were established.

There has been no legislation or Wisconsin case law defining the term “past consideration” as used in subsec. (3). The history of the development of sec. 943.24, Stats., suggests that checks given either for services already performed or for goods already received, or for a past due obligation, are examples of transactions involving past consideration because in each case the drawer is not receiving anything of value at the time the check is issued.

² None of the above-cited comments to the revised worthless check statute were included in the final enacted statute. However, these comments are interpretative aids in determining the scope of this criminal statute.

I am also of the opinion that the definition of "past consideration" which is used in contract law is inapplicable here. *Black's Law Dictionary*, page 380 (Rev. 4th Ed.), defines past consideration as "An act done before the contract is made, which is ordinarily by itself no consideration for a promise." This definition, however, is irreconcilable with the obvious interpretation given the phrase by the drafters of sec. 943.24, and alluded to in the above comments of the Judiciary Committee.

Applying the doctrine of "noscitur a sociis," the meaning of the phrase "past consideration" takes color and expression from the tenor of the entire statutory phrase of which it is a part and must be construed so as to harmonize with the context of sec. 943.24(3) as a whole. See *Lewis Realty v. Wisconsin R. E. Brokers' Board*, 6 Wis.2d 99, 94 N.W.2d 238 (1959). For example, a payroll check is not ordinarily thought of as being given for an act done before the employment contract is made; instead it usually follows an agreement as to the terms of employment, form of compensation, and the actual performance of the work. The only form of past consideration associated with a payroll check is derived from the fact that it is given in recompense (consideration) for work already performed and usually in accordance with an earlier agreement. It is apparent, therefore, that in employing the term "past consideration" to describe the class of transactions to which sec. 943.24 is inapplicable, the Legislature was using that term in the context of an act done at a former or preceding time and for which a check is subsequently issued; not an act which is done before a contract involving that act is made.

In the situations you have presented, both checks were given for past consideration. "B" 's check was given for corn which he had received from "A" at an earlier time, and it was compensation for a past due obligation. The restaurant employe's check was given as compensation or recompense to the owner for money which had disappeared from the cash register at an earlier time. In neither situation was there a service rendered or a fee or other form of consideration given the issuer simultaneous with the issuance of the check. Neither check was a payroll check. Therefore, it is my opinion that an action for prosecution of the check issuers would not properly lie under sec. 943.24, Stats.

Finally, the lack of express legislative or judicial guidelines make it impossible to determine how much time must pass between the issuance of a check and the provision of a service or commodity in order for past consideration to exist. Each case must be evaluated on the basis of the particular facts associated with it.

BCL:MKW

Hotels, Boarding Houses And Restaurants; Intoxicating Liquors; Licenses And Permits; Sales; Statutes; Where a licensed class "B" retailer of fermented malt beverages also conducts a restaurant business on the premises, sec. 66.054(8)(a), Stats., does not operate to permit the licensee to conduct any other business on the premises. OAG 47-77

June 3, 1977.

DONALD A. POPPY, *District Attorney*
Calumet County

You advise us that a person holding a valid class "B" retailers' license for the sale of fermented malt beverages pursuant to sec. 66.054(8)(a), Stats., also conducts a restaurant business on his premises. He is allowing these facilities to be rented for auctions. You question whether the licensee, in permitting his facilities to be used for auctions, is in violation of the above statutes. You suggest that sec. 66.054(8)(a), Stats., could conceivably be interpreted to mean that as long as a premises is also a restaurant, hotel, bowling alley, etc., then any other lawful business may be conducted on the licensed premises. Section 66.054(8)(a), Stats., provides in pertinent part:

"Class 'B' retailers' licenses shall be issued only to persons 18 years of age or over of good moral character, who are citizens of the United States and of the state, and have resided in this state continuously for not less than one year prior to the date of filing the application. No such license shall be granted for any premises where any other business is conducted, in connection with said licensed premises and no other business may be conducted on such licensed premises after the granting of such license except that such restriction shall not apply to a hotel, or

to a restaurant not a part of or located in any mercantile establishment, or to a combination grocery store and tavern, or to a combination sporting goods store and tavern in towns, villages and cities of the fourth class, or to novelty store and tavern, or to a bowling alley or recreation premises or to a bona fide club, society or lodge that shall have been in existence for not less than 6 months prior to the date of filing application for such license. ...”

Section 66.054(15), Stats., subjects those in violation of sec. 66.054(8)(a), Stats., to penalties of up to a \$500 fine or imprisonment of up to 90 days in the county jail, or both.

It is my opinion that sec. 66.054(8)(a), Stats., does not operate to permit the auction business to be conducted on these premises. This result is consistent with the opinion of 24 Op. Att’y Gen. 425 (1935) to the effect that it would be unlawful to operate a restaurant and grocery store combination on a licensed class “B” retailer’s premises.

Section 66.054(8)(a), Stats., must be strictly construed. As stated in *Corpus Juris Secundum*:

“Statutes and ordinances imposing licenses and business taxes are generally to be construed liberally in favor of the citizen and strictly against the government, whether state or municipal, especially where they provide penalties for their violation.” 53 C.J.S. Licenses sec. 13, pp. 495-496 (1948).

This general principle of strict construction if applied automatically would appear to limit the application of the statute and permit the conduct of any other lawful business on the premises.

Nevertheless, our Supreme Court, in commenting upon the construction of a penal statute, has said that:

“[w] hile such statute must be construed with such strictness as carefully to safeguard the rights of the defendant and at the same time preserve the obvious intention of the legislature, the rule of strict construction is not violated by taking the common-sense view of the statute as a whole and giving effect to the object of the legislature, if a reasonable construction of the words permits it. [Citing cases.]” *Zarnott v. Timken-Detroit Axle Co.*, 244 Wis. 596, 600, 13 N.W.2d 53 (1944).

An identical view of the limits of the canon of strict construction has been expressed by the United States Supreme Court:

“The canon in favor of strict construction [of penal statutes] is not an inexorable command to override common sense and evident statutory purpose. ... Nor does it demand that a statute be given the ‘narrowest meaning’; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.” *United States v. Brown*, 333 U.S. 18, 25-26 (1948); *accord, United States v. Moore*, 423 U.S. 122, 145 (1975).

The wording of the statute itself convinces me that the Legislature intended to generally prohibit the conduct of all business on the premises of licensed class “B” retailers of fermented malt beverages, subject only to a very few limited and specific exceptions. For example, one specific exception to the rule exists where a restaurant business is conducted on the licensed premises. A common sense approach necessarily suggests that the exceptions should not work to obviate the rule. To suggest that these circumstances then permit the licensee to engage in any other business on the premises would allow the exceptions to swallow the rule and such an interpretation thus runs contrary to the meaning and intent of the Legislature. A reasonable construction of the words of sec. 66.054(8)(a), Stats., taken as a whole, supports this conclusion.

BCL:WLG

Drugs; Nurses; Physicians And Surgeons; Prisons And Prisoners; Public Health; Preparation of medication by a nurse under direction of a physician is permissible under sec. 450.04(3), Stats.

Delivery of such medication to prisoners by jail attendants pursuant to instructions of the physician is permissible under sec. 450.07(2), Stats. OAG 48-77

June 6, 1977.

ROBERT P. RUSSELL, *Corporation Counsel*
Milwaukee County

You ask whether the following circumstances are in accord with, or violative of, Wisconsin statutes.

“The County Jail is staffed with two registered nurses who provide coverage for 16 hours a day, Monday through Friday. Milwaukee County also employs a part time physician who, on a Monday through Friday basis, examines inmates who report that they are ill. Theoretically, this physician is on call 24 hours a day, seven days a week. After the physician has made a determination that a particular inmate should receive prescription drugs, he prepares the appropriate order indicating the name of the inmate, the type of drug, the dosage and the time to be given. Bulk medications are provided to the Jail in their original containers from the General Hospital Pharmacy. During the course of the nurses’ tour of duty she prepares these prescriptions in accordance with the doctor’s order by placing the appropriate drug in the prescribed amount into an envelope on which she transcribes the name of the inmate for whom it is intended, the type of drug, the dosage and the time to be given. These envelopes are then given to a deputy sheriff who delivers them to the inmates in the cell blocks. When the nurses are off shift or on weekends, the medications are prepared as indicated in advance in sufficient quantity to meet the needs of the inmate when the nurses are not on duty. It is then the responsibility of the jailer to see to it that the pre-packaged prescriptions are appropriately delivered.”

The statutes most directly involved are:

“450.07(2) No person except a practitioner shall deliver any prescription drug except upon the prescription of a practitioner. ...”

“450.07(3) No person, except a registered pharmacist or a practitioner, shall prepare, compound, dispense or prepare for delivery for a patient any prescription drug.”

“By reference in sec. 450.07(1)(b), Stats.,” delivery is defined in sec. 161.01(6):

“‘Deliver’ or ‘delivery’ means the actual, constructive or attempted transfer from one person to another ... whether or not there is any agency relationship.”

“Dispense” is not defined in ch. 450 of the statutes but the definition under sec. 161.01(7) also includes delivery to an ultimate user.

The term practitioner is defined in sec. 450.07(1)(d) as one “licensed by law to prescribe and administer prescription drugs” which presumably does not include nurses, deputy sheriff or jailer.

Section 450.04(3), Stats., however, provides in part:

“(3) This shall not interfere with the dispensing of drugs, medicines or other articles by physicians”

Two previous opinions of this office have touched on this question. The opinion in 41 Op. Att’y Gen. 23 issued in 1952 dealt primarily with the provisions of secs. 151.04(2) and (3) and 151.07(3) of the statutes of 1951 which were substantially the same as secs. 450.04(2) and (3) and 450.07(3) of the statutes of 1975.

The tacit assumption of the 1952 opinion was that the delivery by a third person of drugs prescribed by a doctor would have violated sec. 151.04(2) (now sec. 450.04(2) or 450.07(3)) if it had not been under a doctor’s supervision. The 1952 opinion was approved and explained in the opinion in 63 Op. Att’y Gen. 335 (1974). The later opinion indicated that the hypothetical facts given in the request for the opinion “would take the activity out of the exception contained in sec. 450.04(3), Stats.” 63 Op. Att’y Gen. at p. 336.

Under the cited opinions the delivery of the prescribed medication to prisoners would violate the law unless it can be said to be done under the supervision of the doctor, so that it may be considered to have been “by” a physician under the exception contained in 450.04(3), Stats. Whether a nurse actually administers medication under the supervision of a doctor may depend on the facts in a given case.

If a nurse is employed by a doctor, the supreme court said in *Huss v. Vande Hey*, 29 Wis.2d 34, 43, 138 N.W.2d 192 (1965):

“Whether the medical doctor is physically present or absent at the time physical therapy is rendered by a nurse in his office,

the doctor is fully responsible for her conduct under the doctrine of *respondeat superior*.”

In the case of a nurse not employed by a doctor, it is indicated in 70 C.J.S. *Physicians and Surgeons* sec. 54(e), pp. 978-980, that although a physician is liable for the negligence of nurses in his employ he is not ordinarily liable for negligent acts of nurses who are not in his employ unless in the course of ordinary care “he could have or should have been able to prevent their injurious effects and did not.” See also *Nickley v. Eisenberg*, 206 Wis. 265, 239 N.W. 426 (1931).

While a doctor’s liability for negligence of others is not necessarily determinative of whether a drug is dispensed “by” him within the meaning of sec. 450.04(3), it may be helpful in determining what the Legislature intended. In *State v. Maas*, 246 Wis. 159, 165, 16 N.W.2d 406 (1944), the court described a purpose of the legislation:

“The drug business is intimately associated with public health. The legislature has prescribed rules and regulations to protect the public from the mistakes of the untrained.”

To require that prescription drugs be administered under competent supervision accords with that purpose.

On the assumption that the nurses who are on duty Monday through Friday are under the supervision of the doctor who is employed on a Monday through Friday basis, the situation would fall within the exemption in sec. 450.04(3) as interpreted in the opinions in 41 Op. Att’y Gen. 23 (1952) and 63 Op. Att’y Gen. 335 (1974).

You also ask about the situation on weekends when prepackaged medications are distributed by a deputy sheriff or jailer according to instructions on the packages. If this be a delivery, as it appears to be under the above-quoted definition, sec. 450.07(2) is applicable. That section prohibits delivery “except upon the prescription of a practitioner.” The phrase “upon the prescription of a practitioner” is, I believe, sufficiently flexible to allow for mere transmission which has been prescribed by a doctor. Since violation of sec. 450.07(2) is subject to penalty, it is “to be interpreted strictly against the state and liberally in favor of the accused” *State v. Bronston*, 7 Wis.2d 627, 633, 97 N.W.2d 504, 98 N.W.2d 468.

It is my opinion that delivery of medication by a deputy sheriff or a jailer in the manner you have described is done "upon the prescription of a practitioner" and is not violative of statute.

BCL:BL

Education; Schools And School Districts; Students; Tuition; Vocational And Adult Education; Students who attend state vocational, technical and adult institutions are eligible for tuition grants under sec. 39.30, Stats. OAG 49-77

June 6, 1977.

JAMES A. JUNG, *Executive Secretary*
Higher Educational Aids Board

You have requested my opinion with respect to whether or not certain categories of students enrolled in vocational, technical and adult education (VTAE) programs in area technical colleges are eligible for grants under the Wisconsin Tuition Grant Program set forth in sec. 39.30, Stats.

Subsections 39.30(3)(e) and (j), Stats., provide a tuition grant to a student for any semester or term in the amount that the student's tuition or instruction-related fees exceed the resident fee at the Madison campus of the University of Wisconsin. You have indicated that in the past, students receiving grants under that section were students enrolled in private post-secondary institutions. More recently, as you indicate in your letter, there are at least two categories of students who are attending vocational-technical institutions who pay tuition charges in excess of that charged undergraduates at the University of Wisconsin at Madison.

Such students are eligible for grants under this program. Section 39.30(2), Stats., makes any full-time resident student registered at an accredited nonprofit post high school, educational institution in this state eligible for grants under the program. Subsection 39.30(1)(d), Stats., defines an accredited institution to include any institution accredited by a nationally recognized accrediting agency or if not so accredited, one whose credits are accepted on transfer by not less than three institutions which are so accredited.

Although your letter does not indicate the status of the various VTAE institutions with respect to accrediting, I have determined that the vocational, technical and adult educational institutions in this state are accredited by the North Central Accrediting Association of Secondary Schools and Colleges, which is a nationally recognized accrediting agency. In addition, I have also been advised that the credits of the VTAE institutions in this state are transferable to at least three accredited institutions within the meaning of the language of 39.30(1)(d).

The vocational-technical institutions are also accepted by the United States Commissioner of Education as institutions of higher education for purposes of student loans within the meaning of sec. 39.32, Stats.

The vocational-technical institutions are established by district boards, are financed through a district tax levy and by fees and tuition under sec. 38.24, Stats. None of the schools operate to obtain a profit nor pay any dividends to any person. The fees and tuition are based upon a percentage of the combined estimated statewide operational costs of the various programs. Section 39.30(2) limits the grants to students attending nonprofit institutions. In this case the vocational, technical and adult education schools are not engaged in a for profit enterprise of any sort and are nonprofit within the meaning of 39.30(2).

The language of the statute itself indicates clearly that a student at a vocational, technical and adult education institution which is accredited by a national accrediting party, as are all of the vocational, technical and adult institutions maintained under ch. 38, Stats., and who otherwise meets the eligibility requirements of sec. 39.30, is entitled to the grants provided for in that section.

You have indicated in your letter that the original intent of the Legislature at the time that the program was initially enacted in 1965 was to provide grants for students enrolled in private post-secondary institutions. As I have concluded that the statute is clear on its face and not ambiguous, it is inappropriate to look to extrinsic aids for interpreting the statute, *Tanck v. Clerk, Middleton Jt. School Dist.*, 60 Wis.2d 294, 210 N.W.2d 708 (1973).

Nevertheless, it is possible to accept the position that the initial intent of the Legislature in 1965 was to provide grants for students

enrolled in private institutions, without modifying my conclusion. In 1965 there was no general tuition requirement for students at a vocational-technical institution. Tuition charges applicable generally to the vocational-technical system were initially imposed by ch. 39, Laws of 1975. It is unlikely that the Legislature at that time would have anticipated that tuition charges at public vocational or technical colleges would exceed the charges at the University of Wisconsin at Madison. The apparent purpose of the Tuition Grant Program was to equalize, as much as possible, the student assistance structure and give each student equal freedom to attend any public or private institution. In the report of the Governor's Scholarship and Loan Committee dated May 25, 1965, the Committee notes that the purpose of the student grant program is to place the state in a substantially neutral position with respect to the student's choice of a school. Based upon the data and statistics available to the Committee at that time, the Committee had concluded that the cost of attendance at a private institution was in excess of the costs of attending a state institution and that the additional tuition costs were passed on to the students, thereby limiting their freedom to choose the particular institution that they wished to attend. It would be unreasonable to conclude that the Legislature intended to place the state in a neutral position with respect to students at private schools but did not intend to adopt a similar position of neutrality with respect to students attending public vocational-technical schools.

The true intention of the Legislature is primarily to be determined by reading the language chosen by the Legislature. *State ex rel. Neelen v. Lucas*, 24 Wis.2d 262, 128 N.W.2d 425 (1964). The primary purpose behind sec. 39.30, when it was initially enacted in 1965, may have been to provide tuition grants to private students. Both the language and the logic of the section are equally applicable to the present circumstance where students of public vocational-technical institutions are in essentially the same position as private school students were in 1965.

It is therefore my opinion that students attending state vocational, technical and adult institutions who meet the other requirements of sec. 39.30 are eligible for tuition grants under that section.

BCL:RDR

Governor; Lieutenant Governor; Public Officials; Lieutenant Governor who becomes Acting Governor may retain Lieutenant Governor's staff. OAG 50-77

June 13, 1977.

MARTIN J. SCHREIBER
Lieutenant Governor

You have asked me whether the Lieutenant Governor may maintain his present staff when he becomes Acting Governor following Governor Lucey's departure on or about July 1. I understand that there are five positions involved. Two persons are presently employed by the Lieutenant Governor pursuant to sec. 14.33, Stats., and three are employed by him with the permission of the Senate Organization Committee pursuant to secs. 13.20 and 14.33, Stats.

In my opinion the Lieutenant Governor is entitled to maintain this staff when he serves as Acting Governor absent affirmative action on the part of the Legislature to modify sec. 14.33, Stats., and to terminate the appropriations for the salaries and general operation of the office of the Lieutenant Governor made pursuant to sec. 20.765(4)(a), Stats.

Historically the position of Lieutenant Governor was created in Wisconsin to fulfill two functions. First, the person occupying that office is available to take over the powers and duties of the governorship in the event that, through absence, removal, resignation, death or disability, the Governor should be unable to carry out the duties of his office. See Wis. Const. art. V, sec. 7. In fact, this function was the sole reason advanced for creating the office of Lieutenant Governor in the course of the constitutional debates. See Quaife, "Attainment of Statehood," V. 29, p. 268 (Dec. 21, 1847). See also *State ex rel. Martin v. Heil*, 242 Wis. 41, 7 N.W.2d 375 (1943). Secondly, pursuant to Wis. Const. art. V, sec. 8, the Lieutenant Governor shall also preside over the Senate during his term in office.

By statute a third duty has been added to the office of Lieutenant Governor. Pursuant to sec. 14.34, Stats., he "shall have such

additional duties as are assigned to him by the governor in writing.” In addition, I understand that the Lieutenant Governor and his office have participated in the Nursing Home Ombudsman program and the Council for Consumer Affairs program, funds for both of which having been appropriated under sec. 20.765(4)(b) and (d) respectively.

In regard to the Lieutenant Governor’s duty to serve as Acting Governor, Wis. Const. art. V, sec. 7 provides:

“In case of the impeachment of the governor or his removal from office, death, inability from mental or physical disease, resignation, or absence from the state, the powers and duties of the office shall devolve upon the lieutenant governor for the residue of the term or until the governor, absent or impeached, shall have returned or the disability shall cease.”

It is clear from this provision “that it was not intended that the office of lieutenant governor should become vacant on account of any vacancy in the office of governor. ... Upon the resignation of the governor, the office becomes vacant and, by the express terms of the constitution, the powers and duties of the office devolve upon the lieutenant governor for the residue of the term. He therefore retains the office of lieutenant governor and executes the duties and powers of governor.” 1906 Op. Att’y Gen. 602, 603. Thus, in the event that the Lieutenant Governor becomes Acting Governor pursuant to sec. 14.32, Stats., and Wis. Const. art. V, sec. 7, he assumes all of the powers and duties of the Governor, while at the same time continuing to occupy the office and to exercise the functions of Lieutenant Governor. *State ex rel. Martin v. Heil, supra*; *State ex rel. Martin v. Ekern*, 228 Wis. 645, 280 N.W. 393 (1938); 1906 Op. Att’y Gen. 602.

However, pursuant to Wis. Const. art. IV, sec. 9, as Acting Governor the Lieutenant Governor is relieved of his duties as President of the Senate and another person is selected by the Senate to fill that office. This is the only function of the Lieutenant Governor that is specifically terminated when the Lieutenant Governor assumes the duties and powers of the office of the Governor pursuant to sec. 14.32, Stats., and Wis. Const. art. V, sec. 7.

The Lieutenant Governor’s staff is authorized under sec. 14.33, Stats., and sec. 13.20(1)(a), Stats. Pursuant to sec. 14.33, Stats.:

“The lieutenant governor may employ one administrative assistant under s. 16.08 (2) (g). He may employ one secretary under s. 16.08 (2) (g) or under the classified service but such secretary shall be reimbursed at the same rate as head clerks under the legislative salary schedule and may be employed for such period and upon such terms as the lieutenant governor determines. In addition, the lieutenant governor may employ such other staff as the senate committee on organization allows.”

Section 13.20(1)(a), Stats., provides in part:

“**LEGISLATIVE EMPLOYES.** (1) **Number; qualifications; staffing pattern.** (a) The legislature or either house thereof may employ such clerical, professional or other assistants as in the judgment of the joint committee on legislative organization or the committee on organization in each house are necessary to enable it to perform its functions and duties and to best serve the people of this state.”

Pursuant to the above two provisions, the Lieutenant Governor has employed five staff members.

The appropriations for the office of the Lieutenant Governor are found in subch. VIII, “Legislative,” of ch. 20, Stats. Section 20.765, Stats., provides in part:

“There is appropriated to the legislature for the following programs:

“***

“(4) **Office of the Lieutenant governor.** (a) *General program operations.* A sum sufficient for the salaries and general operations of the office of the lieutenant governor.”

Pursuant to the above provision, a sum sufficient for the salaries of the five staff members and for the general operation of the office of the Lieutenant Governor has been appropriated.

The foregoing statutory provisions and the legislative action taken pursuant thereto make it clear that the present staff of the Lieutenant Governor has the unequivocal authorization of the Legislature. Any determination that this staff is no longer required when the Lieutenant Governor serves as Acting Governor and has the services

of the Governor's staff would involve questions of public policy and require modification of sec. 14.33, Stats. Such determination must be left to the Legislature. *Muskego-Norway Consolidated Schools Joint School Dist. No. 9 v. Wisconsin Employment Relations Board*, 35 Wis.2d 540, 151 N.W.2d 84 (1967).

This conclusion is borne out by the treatment of a parallel question, i.e., whether, the office of the Lieutenant Governor not being vacant, the Lieutenant Governor's salary would cease when the Lieutenant Governor, serving as Acting Governor, received the Governor's salary. In *State ex rel. Chatterton v. Grant*, 73 P. 470, 12 Wyo. 1 (1903), the Wyoming Supreme Court met and resolved this issue when the Wyoming Secretary of State, under a constitutional provision similar to Wis. Const. art. V, sec. 7, became Acting Governor on the death of the incumbent Governor. There, the Wyoming Supreme Court held that the Secretary of State could not be deprived of the compensation belonging to his office upon assuming the powers and duties of Governor. The Court's language is enlightening:

“In view of our statutes, or rather the absence of statutory provision on the subject, we cannot conceive of any principle upon which the salary attaching to the Office of Secretary of State can be denied him, whatever may be his right to the compensation provided by law for the Office of Governor.” (Emphasis supplied.)

The Wisconsin Legislature specifically responded to the double compensation problem under sec. 14.32(2), Stats., which provides:

“When acting as governor because of a vacancy in the office of governor ... the lieutenant governor shall receive the annual salary and all other rights, privileges and emoluments of the office of governor. The annual salary paid in such instance shall be in lieu of all other compensation provided for the lieutenant governor.”

In my opinion, the Legislature will have to take similar affirmative action if it wishes the Lieutenant Governor's staff dismissed and its funding terminated when the Lieutenant Governor serves as Acting Governor.

This conclusion is supported, indeed required, by the doctrine of separation of powers. Under the Wisconsin Constitution legislative

power is vested in the Senate and the Assembly. Wis. Const. art. IV, sec. 1. The status of the legislative and executive departments is one of equality, and neither may exercise any control over nor exercise any of the powers of the other. *State ex rel. Broughton v. Zimmerman*, 261 Wis. 398, 52 N.W.2d 903 (1952); *Goodland v. Zimmerman*, 243 Wis. 459, 10 N.W.2d 180 (1943). An opinion by the Attorney General that the Lieutenant Governor may not retain a staff which was authorized and funded by the Legislature where no constitutional problem is apparent would be tantamount to a modification of sec. 14.33, nullification of a legitimate legislative appropriation and, consequently, would be a serious violation of the doctrine of separation of powers.

In summary, since the staff was legitimately employed pursuant to sec. 14.33, Stats., and sec. 13.20, Stats., and as it was duly funded under sec. 20.765(4)(a), and since the Office of Lieutenant Governor will not be vacant while the Lieutenant Governor serves as Acting Governor, it is my opinion that the Lieutenant Governor may maintain his five-member staff when he assumes the powers and duties of the office of Governor on July 1, 1977.

P.S. Normally, the Attorney General is able to avoid rendering an opinion which reaches absurd results. At least that is what he tries to do. However, once in a while an opinion comes along where it is impossible. This is such an opinion and I cordially invite the Legislature's attention to this matter so that remedial legislation may be passed at an early date.

BCL:DJH

Advertising; Optometry; The prohibition against advertising the price of lenses, frames and complete glasses contained in sec. 449.10, Stats., violates the first amendment to the United States Constitution and therefore is invalid. Further, price advertising of lenses, frames and complete glasses by optometrists is not unprofessional conduct under sec. 449.08, Stats. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S. Ct. 1817 (1976).

60 Op. Att'y Gen. 335 (1971) and 48 Op. Att'y Gen. 223 (1959) are withdrawn. OAG 51-77

June 15, 1977.

SARAH DEAN, *Secretary*

Department of Regulation and Licensing

You ask whether *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S. Ct. 1817 (1976), invalidates that part of sec. 449.10, Stats., which prohibits optometrists from advertising the price of lenses, frames, complete glasses or any optometric service as follows:

“Prohibited advertising. It shall be unlawful for any person to advertise either directly or indirectly by any means whatsoever any definite or indefinite price or credit terms on lenses, frames, complete glasses or any optometric services; to advertise in any manner that will tend to mislead or deceive the public; to solicit optometric patronage by advertising that he or some other person or group of persons possess superior qualifications or are best trained to perform the service; or to render any optometric service pursuant to such advertising.”

In my opinion the *Virginia* case voids four words in sec. 449.10, Stats., i.e., “lenses, frames, complete glasses,” on the ground that price advertising of these items (prescription drugs in the *Virginia* case) is communication protected by the first amendment to the United States Constitution. These words can be severed from the section without making the section meaningless. Sec. 990.001(11), Stats.; *State ex rel. Milwaukee County v. Boos*, 8 Wis.2d 215, 224, 99 N.W.2d 139 (1959).

The holding in the *Virginia* case, that the state may not prohibit price advertising of prescription drugs by licensed pharmacists, is based on the first amendment right to freedom of speech. The Supreme Court stated that the protection of the first amendment extends to free speech as “communication,” meaning, that the listener has a protectible right to receive information independent of the right of the speaker to give it. Further, “commercial speech,” i.e., speech presented in the form of a paid advertisement, carried in a form that is sold for profit, or involving a solicitation to purchase or otherwise pay or contribute money, is protected at least to the extent that it conveys purely factual information of public interest.

In more concrete terms, the interest of an advertiser in commercial advertisement, even though purely economic, is entitled to the protection of the first amendment, while the interest of a consumer in obtaining price information “may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.” 96 S. Ct. at p. 1826.

“Generalizing, society also may have a strong interest in the free flow of commercial information. Even an individual advertisement though entirely ‘commercial,’ may be of general public interest. ...” (p. 1827.)

The court did recognize that the state has a valid interest in maintaining standards of professionalism:

“... Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. Cf. *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). But it may not do so by keeping the public in ignorance of the entirely lawful terms that competing pharmacists are offering. ...” (p. 1829.)

Also the state may have a valid interest in *regulating* commercial speech, for example, where it is false, deceptive, misleading or proposes illegal transaction. In this case, however, the court found that what was in issue was merely the right of free access to truthful information, and it held that the state may not “completely suppress the dissemination of concededly truthful information about entirely lawful activity, fearful of that information’s effect upon its disseminators and its recipients.” 96 S. Ct. at p. 1831.

See also, *Terminal-Hudson Electronics v. Dept. of Con. Aff.*, 407 F. Supp. 1075 (1976), in which an injunction was granted staying the enforcement of a California statutory ban on the advertisement of eyeglass prices. On March 22, 1976, Mr. Justice Rehnquist stayed the enforcement of the preliminary injunction (Case No. A-760). On June 7, 1976, the court vacated the stay and remanded the case for consideration in light of the *Virginia* decision. See 96 S. Ct. 2619 (1976). To date, there has been no final decision on this case.

In conclusion, in light of the *Virginia* decision, it is my opinion that sec. 449.10, Stats., to the extent it prohibits price advertising on lenses, frames and complete glasses, is in violation of the first amendment. Consequently, it is also my opinion that advertising by optometrists of prices of lenses, frames and complete glasses is not unprofessional conduct under sec. 449.08, Stats.

Further, in light of the *Virginia* case, 60 Op. Att'y Gen. 335 (1971) and 48 Op. Att'y Gen. 223 (1959) are withdrawn.

BCL:JPA

Official Proceedings; Public Officials; Veterans Affairs, Department Of; Quorum for Board of Veterans Affairs is four, since Board has statutory membership of seven and "membership" as used in sec. 15.07(4), Stats., means authorized number of positions and not number of positions which are currently occupied. Resignation of board member is not effective until successor is chosen and qualifies. Sec. 17.01(13), Stats. OAG 53-77

June 1, 1977.

CLIFFORD R. WILLS, *Acting Secretary*
Department of Veterans Affairs

You request my opinion as to the number of board members required to constitute a quorum for the transaction of business which the Board of Veterans Affairs is authorized by statute to conduct.

You state that Thomas C. Goodwin, former Chairman, recently resigned and that the Governor has not made any nomination to fill such vacancy. You further state that Joseph I. Thompson was

nominated by Governor Lucey on April 15, 1977, for a 6-year term ending May 1, 1983, to fill a vacant position, but that he has not been confirmed by the Senate.

It is my opinion that four members are necessary to constitute a quorum.

Section 15.49, Stats., provides:

“There is created a department of veterans affairs under the direction and supervision of the board of veterans affairs. *The board shall consist of 7 members* who shall be veterans, including one who shall be a Spanish-American war veteran for the duration of the Spanish American veteran now serving, appointed for staggered 6-year terms.” (Emphasis added.)

Section 15.07(4), Stats., provides:

“**Quorum.** A majority *of the membership of a board* constitutes a quorum to do business and, unless a more restrictive provision is adopted by the board, a majority of a quorum may act in any matter within the jurisdiction of the board.” (Emphasis added.)

I am of the opinion that the words “membership of a board” as used in the above subsection, means the *authorized number of positions* and not the number of positions which are currently occupied. In certain situations positions on a board may be physically vacant, and in other situations there may be a “vacancy” which is subject to filling by appointment where the office continues to be occupied by a holdover.

Construction of sec. 15.07(4), Stats., is aided by the rule of construction given in sec. 990.001(8m), Stats., which provides:

“(8m) **Quorum.** A quorum of a public body is a majority *of the number of members fixed by law.*” (Emphasis added.)

Section 15.49, Stats., fixes the number of members on the Board of Veterans Affairs at seven. A majority of seven is four.

Wisconsin, by statute, secs. 15.07(4) and 990.001(8m), is in accord with the general rule set forth in *McQuillin Mun Corp* (3rd ed. 1968) sec. 13.27b., which states:

“In determining the legal quorum of a municipal governing body, ordinarily the whole membership of the body is to be counted. Where vacancies occur, the whole number entitled to membership must be counted and not merely the remaining members. ...”

You also inquire whether Joseph I. Thompson can serve prior to confirmation by the Senate. It is my opinion that he cannot.

Senate Bulletin for the period ending May 21, 1977, indicates that the nomination of Joseph I. Thompson, as a member of the Veterans Affairs Board, to succeed Thomas G. Krajewski, to serve for the term ending May 1, 1983, has been referred to the Committee. It is immaterial that Mr. Thompson filed his oath with the Secretary of State on April 26, 1977. His appointment is not complete until he is confirmed.

Section 15.07(1)(a), Stats., prescribes that members of the Board “shall be nominated by the governor, and with the advice and consent of the senate appointed, to serve for terms prescribed by law.” Mr. Krajewski continues in office as a holdover. See *State ex rel. Thompson v. Gibson*, 22 Wis.2d 275, 125 N.W.2d 636 (1964).

Mr. Goodwin continues to hold his office as a member although he has submitted his resignation. Volume 15, Civil Appointments, Department of State, Document #197 indicates that Thomas Clark Goodwin was appointed March 20, 1975, “as a member of the Board of Veterans Affairs to succeed Vivian Munson, ... to serve for the remainder of the term ending May 1, 1979.” He was appointed to fill a vacancy and holds office “until his successor is ... appointed and qualifies” by reason of sec. 17.28, Stats. Although he has submitted his resignation, it is not effective until his successor qualifies. Section 17.01(13), Stats., provides in part:

“Resignations shall be made in writing, shall be addressed and delivered to the officer or body prescribed in this section *and shall take effect, in the case of an officer whose term of office continues by law until his successor is chosen and qualifies, upon the qualification of his successor*; and in the case of other officers, at the time indicated in the written resignation, or if no time is therein indicated, then upon delivery of the written resignation. ...” (Emphasis added.)

Anti-Secrecy; Open Meeting; Schools And School Districts;
Specificity of notice required by governmental body where agenda
item includes item "Citizens and Delegations," cross reference 66
OAG 68 (1977). OAG 54-77

June 29, 1977.

GEORGE BLAKELY, *Attorney*
City of Beloit

Pursuant to sec. 19.98, Stats., you request to be advised with respect to four questions concerned with notice requirements under the open meeting law. You are particularly concerned with interpretations of the law contained in 66 OAG 68 (1977), which involved the school district for which you serve as legal counsel.

That opinion dealt with the use of the phrase "Citizens and Delegations," which was one of many agenda items. The opinion does not state that a board may utilize such phrase as the single or all inclusive notice to conduct the regular business of the board. The opinion states the law requires that the public notice be as specific as possible. It is presumed that school board members as public officers will act in good faith to comply with the law to the best of their abilities and will not knowingly attempt to evade provisions of the law.

The board is not required to utilize a citizen input period at regular board meetings. In general, the degree of citizen participation is for board determination. The agenda item the board has utilized, "Citizens and Delegations," is broad and is an invitation to allow citizen input on any subject within jurisdiction of the board. Whether the board may wish to utilize a more restrictive item or otherwise legally limit citizen participation by requiring the citizen to timely notify the board of the intended subject matter so that more specific notice may be given is a matter within the discretion of the board. Where request for advice is made pursuant to sec. 19.98, Stats., this office attempts to be constructive in aid of assuring compliance with the open meeting law. The office does not intend to mandate the manner in which the business of a governmental body must be conducted. The law sets forth minimum requirements as far as public

notice is concerned. A governmental body may give more extensive notice than is required by statute. Opinions from this office are usually based on a given set of facts and, where the open meeting law is concerned, often determine whether there has been compliance with the law. The fact that an opinion states that there has been minimal compliance with the law should not be utilized by governmental bodies to pattern their procedures according to the minimal procedure referred to. Governmental bodies should attempt to comply with both the letter and spirit of the law. It is prudent for governmental bodies to seek and rely upon the advice of their own attorneys where questions of compliance are involved. As attorney for the school district, this responsibility is yours and cannot be shifted to this office. The school board is in need of advice on a continuing basis and such advice must be conditioned on the material facts then and there existing.

I will further attempt to answer your questions with respect to 66 OAG 68 (1977), although some are argumentative in nature and others are fully treated in the opinion.

1. Is the item in the publicly-noticed agenda, "Citizens and Delegations," sufficient to apprise members of the public and news media of *any* subject matter that a citizen's delegation may bring up at such meeting?

The answer is "yes," if the subject matter is within the jurisdiction of the board. If the matter is one of importance or of wide public interest, it would be prudent for the board to reserve discussion or action until a subsequent meeting for which more specific notice can be given. The board, in such case, may wish to refer the matter to a committee or invite further citizen input. Please also refer to the discussion in paragraphs two and three of this letter.

2. May a citizen and board member, other than the presiding officer, arrange or conspire to evade the notice requirement by the use of the agenda item "Citizens and Delegations"?

The answer is "no." The board should provide that members wishing to introduce matters, timely advise the presiding officer so that full public notice can be given. It is within the discretion of the board whether citizens shall be required to notify the presiding officer

of the specific subject matter involved in their appearance, so that timely, specific notice may be given.

The opinion referred to stated that, where the agenda item "Citizens and Delegations" was utilized and a citizen raised an issue which was not treated by express language in the agenda, the "governmental body *could* on motion of a member, discuss and *if urgency required* take action on the matter." (Emphasis added.)

3. Is urgency *ever* required before action can be taken?

The answer is "no." But see answer to Question No. 1 as to prudent procedure for the board to follow. Urgency may in part justify the taking of immediate action. It is impossible to set forth standards to determine when a matter is urgent which would apply to all situations.

You inquire:

4. How is a forum provided on an equal basis for persons not in attendance, although interested in the subject, where the item, "Citizens and Delegations" is utilized?

The opinion referred to does not advocate the use of the agenda item, "Citizens and Delegations," with respect to providing a forum for citizen input. Where such an item is used, and public notice is given, it does inform the public and news media that citizens and delegations may bring matters within the jurisdiction of the board to the attention of the board and gives them an apparent right to be present, hear any petitions made and to make appearances themselves. The item was evidently used by the presiding officer with the approval of the board. As stated in paragraphs two and three of this letter, the board may wish to utilize some other item or procedure to provide a forum on a more equal and specifically publicized basis.

BCL:RJV

Appropriations And Expenditures; Bids And Bidders; Contracts; Counties; County Board; Funds; Public Works; Heavy movable diesel engine utilized in county lime quarry is equipment rather than materials or supplies and may be purchased by county board or committee to which board has delegated power if funds have been appropriated without resort to competitive bidding if county has not otherwise required by resolution or ordinance. Secs. 59.08(1), 66.29(1)(c), Stats. OAG 55-77

July 1, 1977.

JAMES C. EATON, *District Attorney*
Barron County

You request my opinion whether a committee of the county board, which has been delegated the responsibility of operating the county lime quarry, may purchase a diesel engine at a cost of \$37,000.00 without taking bids and without letting the contract to the lowest responsible bidder.

You state that the engine is rated at 510 horsepower, is skid-mounted and affixed to a base by means of clamps but is not bolted to its mount. No wiring is involved; the engine is movable with great effort and is not covered or located in any type of building.

I am of the opinion that the county board of supervisors or any duly appointed and properly constituted committee thereof¹ would have power to make such a purchase without resort to competitive bidding if the board had not enacted an ordinance or resolution requiring competitive bidding on this type of purchase and if the board had appropriated the funds for such purpose.²

¹ *French v. Dunn County*, 58 Wis. 402, 17 N.W. 1 (1883); *Forest County v. Shaw*, 150 Wis. 294, 136 N.W. 642 (1912); *First Savings & Trust Co. v. Milwaukee County*, 158 Wis. 207, 148 N.W. 22 (1914).

² Whether the resolution creating the agricultural committee, under sec. 59.06, Stats., does authorize the committee to make any purchases or purchases of this type without competitive bidding cannot be answered without examination of such resolution. Examination at the county level would also be necessary to determine whether the board had appropriated funds necessary for such purchase.

Section 59.08(1), Stats., as amended by ch. 244, Laws of 1975, provides:

“All public work, including any contract for the construction, repair, remodeling or improvement of any public work, building, or furnishing of supplies or material of any kind where the estimated cost of such work will exceed ... \$5,000 shall be let by contract to the lowest responsible bidder. The contract shall be let and entered into pursuant to s. 66.29, except that the board may by a three-fourths vote of all the members entitled to a seat provide that any class of public work or any part thereof may be done directly by the county without submitting the same for bids. This section ... *does* not apply to highway contracts which the county highway committee is authorized by law to let or make.”

Some types of machinery may constitute fixtures rather than equipment and installation would thus constitute improvement of a public work and require purchase by competitive bids. See *State ex rel. Gisholt v. Norsman*, 168 Wis. 442, 169 N.W. 429 (1919), and *Wisconsin Dept. of Revenue v. Smith Harvestore Products, Inc.*, 72 Wis.2d 60, 240 N.W.2d 357 (1976).

In *Harvestore, supra*, the court stated at pp. 67, 68:

““... Whether articles of personal property are fixtures, *i.e.*, real estate, is determined in this state, if not generally, by the following rules or tests: (1) Actual physical annexation to the real estate; (2) application or adaptation to the use or purpose to which the realty is devoted; and (3) an intention on the part of the person making the annexation to make a permanent accession to the freehold.””

The diesel engine in your question at most meets only the second portion of the three-part test. It is a heavy piece of machinery, clamped to skids, but movable, and designed to be moved to various locations in the lime quarry. It is not located within a building and is not connected to the real estate by bolts to a fixed platform and does not involve electric wiring. It does not constitute an improvement to a public work.

The issue therefore is whether such an engine is comprehended within the terms “supplies or materials.” If this piece of equipment constitutes “supplies or materials,” it has to be let by competitive

bids. If it does not, the contract need not be let by competitive bidding and the county may make the contract it deems most provident. *Cullen v. Rock County*, 244 Wis. 237, 240, 12 N.W.2d 38 (1943); *Pembar, Inc. v. Knapp*, 14 Wis.2d 527, 111 N.W.2d 476 (1961); *Consolidated School Dist. v. Frey*, 11 Wis.2d 434, 105 N.W.2d 841 (1960).

If the contract is not subject to the bid section, the county could invite bids and reject any or all bids, or contract on the basis of reasonable business judgment with one who is not the low bidder. *Menzl v. Milwaukee*, 32 Wis.2d 266, 271, 145 N.W.2d 198 (1966).

35 Op. Att'y Gen. 88 (1946) attempted to define "supplies and materials." It was determined that a contract to buy an FM radio to be used in aiding the highway committee in snow removal work could not be classified as a contract for the furnishing of supplies or material. The opinion reasoned:

"... Words of a statute are required to be construed according to the common and approved usage of the language. Sec. 370.01 (1); *Wisconsin B. & I. Co. v. Ind. Comm.*, (1940) 233 Wis. 467 at 478. The word 'supplies' is ordinarily considered to mean something that is used or consumed or which is capable of such use. See *United States Rubber Co. v. Washington E. Co.*, (1915) 86 Wash. 180, 149 P. 706, L. R. A. 1915 F 951. The word 'materials' is usually understood to mean something that enters into or forms part of a finished structure or which is capable of such use. *United States Rubber Co. v. Washington E. Co.*, *supra*. See also *Southern Surety Co. v. Metropolitan S. Comm.*, (1925) 187 Wis. 206 at 216. There are, of course, numerous cases involving the question of whether a particular commodity or article is included within the words 'supplies' or 'materials' or both. So far as we can determine none has gone so far as to hold that an FM radio or anything comparable to it is included within either. Such authority as there is, most nearly in point, supports the view that an FM radio would not ordinarily be considered as falling within the designation 'supplies' or 'materials.' *Peter's Garage, Inc. v. City of Burlington*, (1939) 121 N. J. L. 523, 3 A. (2d) 634 ... affirmed 123 N. J. L. 227, 8 A. (2d) 910. ..."

The court in *Peter's Garage, Inc.*, *supra*, held that a contract to purchase a dump truck does not fall within a statute requiring a city

to award contracts for furnishing of "materials, supplies or labor" to the lowest bidder. A dump truck is an "apparatus," not "materials" or "supplies." The court also cited cases where contracts for the purchase of a combination pumper, chemical and hose wagon, a fire truck and miscellaneous fire equipment, a chemical engine, a truck chassis, an oil burner and voting machines were held not within the purview of the statute.

The reasoning in 35 Op. Att'y Gen. 88 (1946), was reiterated in 47 Op. Att'y Gen. 69 (1958), where it was determined that a contract to purchase farm machinery by a county for use in limited farming operations conducted at the county hospital was also not subject to the competitive bidding requirements of sec. 66.29 through sec. 59.08(1). The farming machinery was considered "equipment," not "supplies" or "material."

Also see 40 Op. Att'y Gen. 22 (1951), wherein it was stated that equipment such as mattresses, chairs and dressers for a county hospital were not supplies or materials under sec. 59.08, Stats., and 46 Op. Att'y Gen. 9 (1957), wherein it was stated that furniture for a county home was equipment rather than supplies or materials.

I am of the opinion that the diesel engine is not a public work, an improvement of a public work, or supplies or materials within the meaning of secs. 59.08(1), 66.29(1)(c), Stats., but constitutes equipment and would not be required to be purchased through competitive bidding procedures absent resolution or ordinance by the county board requiring such procedure.³

In closing, it is appropriate to point out that the narrow statutory distinction discussed in this opinion is but one of many statutory inconsistencies which contribute to the current unfortunate lack of uniformity in our local bidding laws. This is surely an area of the law presently in need of serious legislative consideration.

BCL:RJV

³ Section 59.07(7), Stats., authorizes a county to appoint a purchasing agent and to require that all purchases, including equipment and supplies or materials, other than those involved in highway contracts a county highway committee is authorized to make, be made in the manner the county board specifies. See 47 Op. Att'y Gen. 323 (1958), and sec. 83.015(2), Stats. I am advised that your county does not have an ordinance which requires purchases of equipment, supplies or materials to be made by competitive bid.

Anti-Secrecy; Legislature; Public Officials; Public Records; Telephone; Records kept by the Assembly Chief Clerk of telephone credit card numbers and of long-distance telephone calls of representatives are subject to the public records law. Custodian may make a determination whether to disclose or divulge records in specific instances. OAG 56-77

July 11, 1977.

ED JACKAMONIS, *Chairman*

Assembly Committee on Organization

Pursuant to a motion made and adopted by the Assembly Committee on Organization, I have been asked to comment on the following issue:

“The Assembly Chief Clerk has been requested to disclose the identity and numbers of telephone credit cards issued to Legislators. Further, the Chief Clerk has been requested to allow inspection of records of long-distance calls by telephone users, which are furnished to the Chief Clerk as part of the billing process for telephone services. These records disclose, among other things, the telephone number and location of persons called; thus, disclosure may invade the privacy of those persons called.

“The Committee desires an Opinion (a) discussing the rights of all parties involved in or affected by the disclosure of the requested information; and (b) limitations on, and legality of, disclosure of these records.”

Section 19.21, Stats., concerning the custody and delivery of official property and records, provides in part:

“(1) Each and every officer of the state ... is the legal custodian of and shall safely keep and preserve all property and things received from his predecessor or other persons and required by law to be filed, deposited, or kept in his office, or which are in the lawful possession or control of himself or his deputies, or to the possession or control of which he or they may be lawfully entitled, as such officers.

“(2) Except as expressly provided otherwise, any person may with proper care, during office hours and subject to such orders or regulations as the custodian thereof prescribes, examine or copy any of the property or things mentioned in sub. (1). Any person may, at his own expense and under such reasonable regulations as the custodian prescribes, copy or duplicate any materials, including but not limited to blueprints, slides, photographs and drawings. ...”

Although none of the cases or opinions of the Attorney General interpreting this section of the statutes have concerned the duties of legislative, as opposed to executive or judicial, officials, at common law public records were considered to include legislative and judicial as well as executive records. 66 Am. Jur. 2d, *Records and Recording Laws* sec. 2. The Assembly Chief Clerk is an officer of the Legislature. Wisconsin Constitution art. XIII, sec. 6, provides:

“The elective officers of the legislature, other than the presiding officers, shall be a chief clerk and a sergeant at arms, to be elected by each house.”

The duties of the chief clerks of the Legislature are set forth in secs. 13.15 to 13.17, Stats. The keeping of the telephone records is not specifically included within those duties; however sec. 13.15(1), Stats., provides in part that the chief clerk “shall perform all such duties as by custom appertain to his office and all duties imposed by law or by the rules.” I understand from your letter that, whether by custom or by rule, the duty of maintaining the telephone records of legislators appertains to the office of chief clerk. That being the case, those records are “in [his] lawful possession or control.” Sec. 19.21(1), Stats.

Since the Assembly Chief Clerk is an “officer” of the Legislature, in my opinion he is also an “officer of the state” within the meaning of sec. 19.21, Stats., and consequently records lawfully within his control may be examined by the public in the manner provided in sec. 19.21(2), Stats.

The right of the public to examine and copy records maintained by an officer of the state is not absolute, however. See *State ex rel. Youmans v. Owens*, 28 Wis.2d 672, 137 N.W.2d 470 (1965); *Beckon v. Emery*, 36 Wis.2d 510, 153 N.W.2d 501 (1967); and 63 Op. Att’y Gen. 400 (1974), which contains a detailed discussion of the public

right to full access to all public records and the qualifications on that right. There are only three such qualifications. Two of them, i.e., reasonable regulations as to hours, procedure, etc., and express statutory limitations, do not concern us here. The third is stated as follows in 63 Op. Att’y Gen. 400 at page 406:

“The custodian may and has a duty to deny inspection where he determines that permitting inspection would result in harm to the public interest which outweighs any benefit that would result from granting inspection. ...”

For example, and with no attempt to be exhaustive, it may in some circumstances be justifiable to withhold information obtained under a pledge of confidentiality, minutes of a grand jury investigation, or evidence relevant to a criminal prosecution.

On the other hand, as far as I am aware, an assertion of a right to privacy on the part of persons with whom the officeholder deals or to whom the records refer has never been successfully asserted as a reason to justify denial of access to those records, except in a case where some other basis for denial also exists, such as the danger of “undue” damage to a person’s reputation. Correspondence directed to an officer of the state in his official capacity is subject to no general privilege against disclosure, even though the identity of the correspondents will of necessity be revealed when the correspondence is made public. See 63 Op. Att’y Gen. 400, *supra*. In my opinion, records of calls by telephone users are of a similar nature, and no general privilege against disclosure attaches to them.

Furthermore, public policy favors the right of inspection. As stated in *Beckon v. Emery, supra*, at page 516:

“... It is only in the unusual or exceptional case, where the harm to the public interest that would be done by divulging matters of record would be more damaging than the harm that is done to public policy by maintaining secrecy, that the inspection should be denied. ...”

Since, as stated above, there may exist special circumstances which will justify maintaining the secrecy of records that otherwise would be available to the public, I cannot state categorically that all of the telephone records within the control of the Assembly Chief Clerk must be made available to the public. It is the duty of the custodian of records to determine in the first instance whether

circumstances exist which justify nondisclosure in a particular case, that is, weigh whether the harm done to the public interest by disclosure outweighs the right of a member of the public to have access to particular public records or documents. *State ex rel. Youmans, supra*, at page 681.

BCL:WHW

Automobiles And Motor Vehicles; Fees; Forests; Motor Vehicles; Natural Resources, Department Of; Parking; Parks; Sales; State Parks; Taxation; Fees collected by the Department of Natural Resources for admissions to state parks and forests are subject to sales taxation under sec. 77.52(2)(a)2. OAG 58-77

July 14, 1977.

DANIEL G. SMITH, *Deputy Secretary*
Department of Revenue

You request my opinion whether fees imposed by the Department of Natural Resources pursuant to sec. 27.01(2r), Stats., are subject to sales taxation under sec. 77.52(2)(a)2., Stats. It is my understanding that the Department of Natural Resources currently collects sales tax on many fees and charges, e.g., camping fees, charges for electricity and firewood provided campers, greens fees and equipment rentals. Wis. Adm. Code section NR 45.16. The Department does not, however, collect sales tax on fees imposed pursuant to sec. 27.01(2r), Stats., on persons who operate motor vehicles in state parks and forests. For the reasons which follow, I am of the opinion that such fees are admission fees and therefore subject to the Wisconsin sales tax.

The sales tax in Wisconsin is a privilege tax levied and imposed upon "persons" for the privilege of selling, performing, or furnishing specified services. Sec. 77.52(2), Stats.; *Ramrod, Inc. v. Department of Revenue*, 64 Wis.2d 499, 219 N.W.2d 604 (1974). The Department of Natural Resources is clearly a "person" for purposes of sales taxation. According to sec. 77.51(3), Stats.:

"'Person' includes ... the state of Wisconsin, including any unit or division thereof"

As you state in your letter, the sales tax is levied and imposed on the sales of admissions. Section 77.52(2)(a)2., Stats., provides that the sales tax applies to:

“2. The sale of admissions to places of amusement, athletic entertainment or recreational events or places, the sale, rental or use of regular bingo cards, extra regular cards, special bingo cards and the sale of bingo supplies to players and the furnishing, for dues, fees or other considerations, the privilege of access to clubs or the privilege of having access to or the use of amusement, entertainment, athletic or recreational devices or facilities.”

The authority to impose and collect fees from persons operating motor vehicles in state parks and forests is granted the Department of Natural Resources by sec. 27.01(2r)(a), Stats., which states in pertinent part:

“(2r) **Admission fees.** (a) No person may operate an automobile, motor truck, motor delivery wagon, bus, motorcycle or other similar motor vehicle or trailer or semitrailer used in connection therewith in Council Grounds state forest or Point Beach state forest or in developed recreational areas in other state forests designated as such by the department or in any state park or roadside park except those specified in par. (b), unless such vehicle has affixed thereto an annual admission sticker or a daily admission tag as herein provided. ...”

It is apparent from the foregoing statutory language alone that the fee collected by the Department of Natural Resources is an admission fee both in description and application. The statutory subsection is captioned “Admission Fees” and although a title is not part of a statute, it can be persuasive of the interpretation to be given the statute. *Pure Milk Products Co-op v. National Farmers Organization*, 64 Wis.2d 241, 219 N.W.2d 564 (1974). Additionally, the subsection describes the receipts of payment as “admission” tags and “admission” stickers. It is a fundamental rule of construction that words in a statute should be given their ordinary and accepted meaning. *Snorek v. Boyle*, 18 Wis.2d 202, 118 N.W.2d 132 (1962); *Estate of Riebs*, 8 Wis.2d 110, 98 N.W.2d 453 (1959). The clear language of the statute indicates that the money collected is an admission fee. Admittedly, interpreting a statute which might result

in the imposition of a tax demands special caution, and any doubt must be resolved in favor of the person upon whom the tax is to be imposed. *National Amusement Co. v. Dept. of Revenue*, 41 Wis.2d 261, 163 N.W.2d 625 (1969). However, one "is not to search for doubt in an endeavor to defeat an obvious legislative intention." *National Amusement Co., supra*.

It should also be noted that the fee is applied as an admission fee. While the measure of the fee is the motor vehicle, the fee is collected from any person operating a motor vehicle who desires admission to the park or forest. Only persons who operate vehicles which are exempted by sec. 27.01(2r)(b) or whose fees have been waived by the Department of Natural Resources under Wis. Adm. Code section NR 45.17 may enter the park or forest without paying the admission fee.

In light of the above analysis of the fee both as defined and as applied and in view of the fact that state parks and forests provide recreational enjoyment to visitors, I conclude that the fee collected pursuant to sec. 27.01(2r), Stats., constitutes a sale of admission to a recreational place under sec. 77.52(2)(a)2., Stats., and is subject to the sales tax imposed pursuant thereto.

Section 27.01(2r), Stats., does not authorize collection of the admission fee from pedestrians or bicyclists who enter a state park or forest. This fact, however, does not affect my initial determination that the fee charged is an admission fee; nor does it necessitate a revision of the further conclusion that admission fees collected pursuant to this statutory subsection are taxable as sales of admissions under sec. 77.52(2)(a)2. The substantial additional costs incurred by the state in construction and maintenance of roads and parking lots to accommodate automobiles clearly provide a rational basis for charging an admission fee for motor vehicles, but not for pedestrians or bicyclists. Since there is a rational basis for charging a fee depending on the mode of entry, I see no equal protection objection to the conclusion that the admission fees collected are subject to Wisconsin sales tax.

The general exemptions from the sales tax are enumerated in sec. 77.54, Stats. None of these exemptions is applicable to the collection of admission fees to state parks and forests. You indicate in your letter that the argument has been made to your department that the admission fee collected by the Department of Natural Resources is a

parking fee imposed by a governmental unit and thereby is excluded from sales taxation by sec. 77.52(2)(a)9., Stats. In my opinion such argument ignores clear statutory language. Section 27.01(2r)(a), Stats., states that the fee is an "admission fee," not a "parking fee." Moreover, the fee is collected only from persons who "operate" motor vehicles. While parking may be incidental to the operation of a motor vehicle, 60 C.J.S. *Motor Vehicles* sec. 6(2), p. 160, I do not believe a fee for "operation" of a vehicle can be characterized as a parking fee to achieve tax exemption. As stated by the Wisconsin Supreme Court in *Ramrod, Inc. v. Department of Revenue*, 64 Wis.2d 499, 504, 219 N.W.2d 604 (1974):

"It is a long-established rule of statutory construction in this state that tax exemptions, deductions and privileges are matters of legislative grace and tax statutes are to be strictly construed against the granting of the same. One who claims such an exemption must point to an express provision granting such exemption and bring himself clearly within the terms of the exemption. ..."

Since the fees charged by the Department of Natural Resources pursuant to sec. 27.01(2r), Stats., are admission fees and since their sale constitutes a taxable service under sec. 77.52(2)(a)2., Stats., for which no exemption has been provided, I conclude that such fees are subject to Wisconsin sales taxation.

BCL:SCM

Bids And Bidders; Counties; County Highway Committee; Highways; Highways And Bridges; Land; Public Works; Sales; Land acquired in name of a county by its county highway committee for use as gravel pit can be sold by the county board, when no longer required for highway purposes, at public sale pursuant to sec. 83.08(4), Stats. Public sale must be held on notice, by auction or written bids, with sale to highest qualified bidder. OAG 59-77

July 18, 1977.

JAMES WENDLAND, *District Attorney*
Dunn County

You request my opinion on a number of questions based on the following facts:

“... Dunn County purchased with County funds a small parcel of land in 1942, ostensibly for the purpose of opening a gravel pit. However, the gravel pit was never opened, and the land has not been used by the County for any other purpose which is even remotely connected to highway construction or maintenance. (The original intended use for highway purposes is not recited in the deed to Dunn County.) The County now desires to sell this parcel, which is landlocked, to an adjoining property owner.”

Your first question is whether this land is “owned by the County for highway purposes” within the meaning of sec. 83.08(4), Stats.

I am of the opinion that it is if it was acquired by the county at the instance of the county highway committee. Further research of county highway committee records will have to be conducted.

It is probable, however, that the land was acquired at the instance of the county highway committee, for use as a gravel pit, with title taken in the name of the county pursuant to the provisions of sec. 83.07(2), Stats. (1941), which is almost identical to present sec. 83.07(2), Stats., which provides:

“(2) *In case the county highway committee or town board deems it desirable to acquire any lands or the right to take stone, gravel, clay or other material, from private lands for use in the execution of the committee's or board's duty, or to acquire the right of access to any lands, or the right of drainage across any lands, the committee or board may purchase or condemn such lands or right and take title thereto in the name of the county or town, and the cost thereof shall be paid out of the highway improvement funds.*” (Emphasis added.)

As stated in 31 Op. Att’y Gen. 241 (1942), the power to acquire lands under such statute must be connected to the execution of the

committee's duties, viz., the construction or maintenance of highways.

Your second question is whether, if this land is owned by the county for highway purposes, sale must be at "public sale" under sec. 83.08(4), Stats., or whether the land may be sold at private sale pursuant to sec. 59.07(1)(c), Stats.

I am of the opinion that the land must be sold at "public sale" pursuant to sec. 83.08(4), Stats., since that is a specific statute which would control over power the county has under sec. 59.07(1)(c), Stats., which is a general statute. The opinion in 60 Op. Att'y Gen. 425 (1971) did not refer to sec. 83.08(4), Stats., but did cite cases which indicated that sales of public lands may be limited by express statute.

Section 83.08(4), Stats., provides:

"(4) Subject to the approval of the highway commission *the county board is authorized and empowered to sell at public sale property, owned by the county in fee for highway purposes, when the county board shall determine that such property is no longer necessary for the county's use for highway purposes. The funds derived from such sale shall be deposited in the county highway fund and the expense incurred in connection with the sale shall be paid from that fund. However, approval of the highway commission is not required where county funds only have been used.*" (Emphasis added.)

If purchased pursuant to sec. 83.07(2), Stats., the necessary funds came from the county highway fund, and sec. 83.08(4), Stats., provides that where lands held for highway purposes are sold, the proceeds of sale be deposited to such fund.

Your third question is as to the meaning of "public sale" as that term is used in sec. 83.08(4), Stats.

The term is not defined in the statutes and I have not found a Wisconsin case which is directly in point. In *Eldred v. Sexton*, 30 Wis. 193, 199 (1872), the court was concerned with interpretation of a federal statute dealing with the sale of public lands. The court stated:

"It is very evident that the purposes sought to be accomplished by requiring the public lands to be offered at

public sale before they become subject to private entry, are, 1. To give all persons an equal opportunity to purchase the same; and 2, to give the government the benefit of the increased price which might result from competition. ...”

In my opinion a “public sale” as used in sec. 83.08(4), Stats., can be by auction or written bids, and must be held in a public place, to which the public as such has access, pursuant to notice of the time and place of such sale in order that the purchasers may advise themselves of the terms and title of the property and be able to bid on an intelligent and competitive basis, and wherein the property is sold to the highest qualified bidder. See *Matthews v. Linn*, 78 S.D. 203, 99 N.W.2d 885 (1959); *Howell v. Gibson*, 208 S.C. 19, 37 S.E.2d 271, 276 (1946); *In re Nevada-Utah Mines & Smelters Corporation*, 198 F. 497 (S.D. N.Y. 1912); and other cases cited in 35 Words & Phrases, pp. 625-627.

BCL:RJV

Anti-Secrecy; Contracts; Open Meeting; Schools And School Districts; Teachers; “Private conference” held under sec. 118.22(3), Stats., on nonrenewal of teacher’s contract is a “meeting” within sec. 19.82(2), Stats., and school board could hold closed session under sec. 19.85(1)(c), Stats., although specific notice to teacher under sec. 19.85(1)(b) would have to be given where nonrenewal was based on charges and teacher would have right to require open meeting where evidentiary hearing was held or before final action or nonrenewal where charges were involved. OAG 60-77

July 19, 1977.

JAMES F. CLARK, *Legal Counsel*

Wisconsin Association of School Boards

You asked what effect subch. IV of ch. 19, Stats., entitled “Open Meetings of Governmental Bodies,” has on the provisions of sec. 118.22(3), Stats.

Section 118.22(3), Stats., provides:

“At least 15 days prior to giving written notice of refusal to renew a teacher’s contract for the ensuing school year, the employing board shall inform the teacher by preliminary notice in writing that the board is considering nonrenewal of the teacher’s contract and that, if the teacher files a request therefor with the board within 5 days after receiving the preliminary notice, the teacher has the right to a private conference with the board prior to being given written notice of refusal to renew his contract.”

Specifically you ask the following questions:

“Question 1: Is the ‘private conference’ a ‘meeting’ within s. 19.82(2), stats.?”

Subchapter IV of ch. 19, Stats., applies to every “governmental body” defined by sec. 19.82(1), Stats., holding “meetings” as defined by sec. 19.82(2), Stats. Section 118.22(3), Stats., grants the teacher a right to a private conference with the “board,” not merely a conference with a representative of the board. A school board convening under sec. 118.22(3), Stats., is holding a meeting “for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body” (sec. 19.82(2), Stats.), and therefore, is subject to the provisions of subch. IV of ch. 19, Stats.

“Question 2: If so, is the proper purpose for convening the ‘private conference’ in closed session the consideration of employment under s. 19.85(1)(c), stats., or the consideration of dismissal under s. 19.85(1)(b)? Please note that the Wisconsin Supreme Court has characterized ‘nonrenewal’ as *not re-hiring*, while ‘dismissal’ means to *remove from employment*, as by *discharge*. *Hortonville Education Association v. Joint School District No. 1*, 66 Wis. 2d 469, 481 (1975); *Richards v. Board of Education*, 58 Wis. 2d 444, 460b (1973); and *Millar v. Joint School District*, 2 Wis. 2d 303, 312 (1957).”

The first stage in the usual nonrenewal case is properly a matter for a closed session under sec. 19.85(1)(c), Stats.¹ The board should

¹ Section 19.85(1)(c) permits closed sessions for the purpose of “Considering employment, promotion, compensation or performance evaluation data of any public

give notice of the meeting with the agenda item that the board will convene in closed session, pursuant to sec. 19.85(1)(c), Stats., to consider the nonrenewal of teacher contract or contracts. The procedure for convening in closed session in sec. 19.85(1), Stats., should be followed. Names need not be given and no notice need be given, at this stage, to individuals involved, where no charges have been made which will be investigated. Nonrenewal is "Considering employment" and it is proper to consider performance evaluation data. The board can determine which teacher contracts it tentatively intends not be renewed in closed session.

The second stage of nonrenewal proceedings is the procedure under sec. 118.22(3) involving notice to the individual teacher and an opportunity for a private conference. Notice of this conference must be given under sec. 118.22(3), Stats., to the individual teacher. The teacher has a right to a private conference before there is any final determination of nonrenewal and before written notice of nonrenewal is given. Nonrenewal not based on charges is not dismissal in the usual sense. *Hortonville Ed. Assn. v. Joint Sch. Dist. No. 1*, 66 Wis.2d 469, 481, 225 N.W.2d 658 (1975). When a school board proceeds under sec. 118.22, Stats., to consider the renewal of a contract of a nontenured teacher, it is considering an employment relation, and a "hearing" is not required unless charges are made which damage his or her good name, reputation, honor or integrity or when refusal to reemploy imposes stigma or other disability. *Richards v. Board of Education*, 58 Wis.2d 444, 206 N.W.2d 597 (1973).

The question remains, however, whether the word "dismissal" in sec. 19.85(1)(b) should be given a broader meaning allowing the teacher in a private conference to decide under sec. 19.85(1)(b) whether the meeting should be open to the public. The plain language of sec. 118.22(3), Stats., does not grant a right to a hearing, but rather to a private conference. Our courts have said that a nonrenewal is not a dismissal. Consequently I am of the opinion that notice is properly given under sec. 19.85(1)(c) and that a teacher does not have a right to turn such private conference into an open

employe over which the governmental body has jurisdiction or exercises responsibility."

meeting unless the test for damage or disability set forth in *Richards, supra*, is met.

“Question 3: Under what circumstances or occurrences, if any, are the provisions of s. 19.85(1)(b) regarding an ‘evidentiary hearing’ applicable to the ‘private conference’?”

If a nonrenewal is preceded by charges which might damage the good name, reputation, honor or integrity of a teacher or where nonrenewal may impose substantial stigma or other disability, a board should initially give notice of the meeting with an agenda item that it intends to go into closed session under both subsecs. (b) and (c) of 19.85(1), Stats. Subsection (b) is involved where the board is to investigate “charges against such person” and although nonrenewal may not be dismissal, it borders on discipline where serious charges are concerned, especially where the charges involve reputation, etc., as above. The individual would not have to have personal notice of the initial closed session (although I would recommend such notice), but would have to have actual notice of any closed session which consisted of an evidentiary hearing, or at which final action of nonrenewal were to be taken so that he or she could exercise the right to have such evidentiary hearing or meeting held in open session.

I consider the words “evidentiary hearing” as meaning a formal examination of *charges* by the receiving of testimony from interested persons, irrespective of whether oaths are administered, and receiving evidence in support or in defense of specific charges which may have been made. Where an evidentiary hearing is held, the parties are entitled to seasonably know the charges and claims preferred, have a right to meet such charges or claims by competent evidence, and the right to be heard by counsel upon the probative force of evidence adduced and upon the law applicable thereto.

BCL:RJV

Automobiles And Motor Vehicles; Intoxicating Liquors; Malt Beverages; Minors; Motor Vehicles; Section 346.93, Stats., contains two prohibitions: first, an absolute ban on a minor's possession of intoxicating liquor in a motor vehicle; second, a ban on a minor's possession of any malt beverage in a motor vehicle while any person under 18 years of age is a passenger or present in such motor vehicle. In order for a violation of that second prohibition to occur, a person under the age of 18 years in addition to the violator of the statute must be present in the vehicle. OAG 61-77

July 21, 1977.

DAVID T. PROSSER, JR., *District Attorney*
Outagamie County

Your predecessor, Mr. Kenneth F. Rottier, requested my opinion regarding the proper interpretation of sec. 346.93, Stats.:

“346.93 Intoxicants in vehicle carrying minor. No person under the age of 18 years, unless he is a parent, guardian or spouse of the minor, may knowingly possess, transport or have under his control any intoxicating liquor in any motor vehicle, or knowingly possess, transport or have under his control any malt beverage in any motor vehicle while any person under 18 years of age is a passenger or present in such motor vehicle unless such person is employed by a liquor licensee, wholesaler, retailer, distributor, manufacturer or rectifier and is possessing, transporting or having such beverage in a motor vehicle under his control during the regular working hours and in the course of his employment.”

He stated that there are two different interpretations that have been accorded the statute. It was his view that the statute means “a minor is proscribed from possessing, transporting or controlling intoxicating liquor or beer in a motor vehicle while *another person*, who is also a minor, is present in that motor vehicle.” (Emphasis yours.) He described the opposing view as follows:

“Other municipalities in this county, however, interpret the statute to mean that a juvenile who possesses, transports, or controls intoxicating liquor or beer in a motor vehicle may be

the same person as the 'person under 18 years of age (who) is a passenger or present in such motor vehicle.' In other words, even a juvenile driver alone in a motor vehicle is considered to be guilty of this offense."

I believe that your predecessor was correct in concluding that the person violating the statute and the "person under 18 years of age [who] is a passenger or present in [the] motor vehicle" must be two different individuals. I reach that conclusion by the application of the fundamental canon of statutory construction that "[i]n construing a statute we attempt to find the common sense meaning and purpose of the words employed." *State ex rel. Lynch v. Conta*, 71 Wis.2d 662, 677, 239 N.W.2d 313 (1976). As the Wisconsin Supreme Court has stated, "[t]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or hidden sense." *A. O. Smith Corp. v. Department of Revenue*, 43 Wis.2d 420, 429, 168 N.W.2d 887 (1969), quoting from *State Bank of Drummond v. Nuesse*, 13 Wis.2d 74, 78, 108 N.W.2d 283 (1961). A "common sense" reading of sec. 346.93 as a whole can only lead to the conclusion that the person violating the statute and the "person under 18 years of age [who] is a passenger or present in [the] motor vehicle" must be two separate individuals. In particular, the language creating an exception to liability, viz., "unless he is a parent, guardian or spouse of the minor," leaves no doubt that is what the Legislature contemplated. To impute to the Legislature an intent to permit conviction on the theory that the violator and the passenger could be one and the same person would require a most curious reading of the statute indeed.

Your predecessor indicated in his letter "that the differing interpretations have arisen from the revision of the statute" contained in ch. 213, Laws of 1971, which lowered the age of a potential violator of sec. 346.93 from "under the age of 21 years" to "under the age of 18 years." That change in the statute was part of a general revision of the Wisconsin Statutes which lowered the age of majority from 21 to 18. While there might be some question whether sec. 346.93 was appropriately included in that general revision of the statutes, there can be no doubt that the purpose of the Legislature in making that change was simply to reduce the age of a potential violator from 21 to 18 years. That amendment provides no grounds for concluding that the Legislature intended any change in what I perceive to be the clear and obvious meaning of the statute, both

before and after its amendment, namely, that the violator of the statute and the "person under the age of 18 years [who] is a passenger or present in [the] motor vehicle" must be two separate and distinct individuals.

While I have little difficulty in concluding that your predecessor was correct in rejecting the view that the violator of the statute and the "person under the age of 18 years [who] is a passenger or present in [the] motor vehicle" may be one and the same individual, I find more troublesome another issue which must be resolved in determining the proper interpretation of sec. 346.93 -- namely, whether the phrase "while any person under 18 years of age is a passenger or present in [the] motor vehicle" relates both to the prohibition in the statute regarding intoxicating liquor and to the prohibition regarding malt beverages, or only to the latter prohibition. For the reasons that follow, I conclude that such phrase relates only to the prohibition regarding malt beverages.

First, it is a rule of statutory construction "that qualifying or limiting words or clauses in a statute are to be referred to the next preceding antecedent, unless the context or the evident meaning of the enactment requires a different construction." *Jorgenson v. Superior*, 111 Wis. 561, 566, 87 N.W. 565 (1901); accord, *Fuller v. Spieker*, 265 Wis. 601, 605, 62 N.W.2d 713 (1954). Application of that rule here results in the conclusion that the words, "while any person, etc.," relate only to the immediately preceding prohibition on the possession of malt beverages.

Second, it is also a rule of statutory construction "that a law should be so construed that no word or clause shall be rendered surplusage." *Mulvaney v. Tri State Truck and Auto Body, Inc.*, 70 Wis.2d 760, 764, 235 N.W.2d 460 (1975). If the phrase, "while any person, etc.," were deemed to relate to both the prohibition regarding intoxicating liquor and the prohibition regarding malt beverages, the repeated words, "knowingly possess, transport or have under his control ... in any motor vehicle," would serve no purpose. They would simply constitute repetitious surplusage. Consequently, such a reading of the statute should be avoided.

Third, while the punctuation of a statute is not entitled to a great deal of weight in determining legislative intent, *Morrill v. The State*, 38 Wis. 428, 434 (1875), the Supreme Court has on occasion looked to the punctuation of a statute in determining to which of the

preceding matter a modifying clause relates. *See, e.g., Service Investment Co. v. Dorst*, 232 Wis. 574, 577, 288 N.W. 169 (1939); *Drinkwater v. State*, 69 Wis.2d 60, 72-74, 230 N.W.2d 126 (1975). Here, the insertion of a comma after the first "motor vehicle," and the omission of any comma between the second "motor vehicle" and the word "while," is clearly indicative of an intent that the phrase, "while any person, etc.," should modify only the prohibition relating to malt beverages. *Cf. Service Investment Co. v. Dorst, supra*, 232 Wis. at 577.

Fourth, the conclusion that the phrase, "while any person, etc.," relates solely to the prohibition regarding malt beverages is also supported by the legislative history of sec. 346.93, Stats. That section was originally created by ch. 674, sec. 36, Laws of 1957. A note to that legislation found in the files of the Legislative Reference Bureau reveals that sec. 346.93 was created in order to "incorporate into the vehicle code a part of s. 85.08(24)(e), created by ch. 390, laws of 1957."

Chapter 390, Laws of 1957, as originally introduced, read, in relevant part, as follows: "No person under the age of 21 years may knowingly possess, transport or have under his control in any motor vehicle any alcoholic liquor or fermented malt beverage."

A substitute amendment to that legislation was introduced, which provided, in relevant part, as follows:

"No person under the age of 21 years may knowingly possess, transport or have under his control any intoxicating liquor in any motor vehicle, or knowingly possess, transport or have under his control any malt beverage in any motor vehicle while any person under 18 years of age is a passenger or present in such motor vehicle"

That substitute amendment, further amended by the addition of the clause, "unless he is a parent, guardian or spouse of the minor," was ultimately passed by the Legislature as ch. 390, Laws of 1957. The statutory provision created by ch. 390, Laws of 1957, was identical to present sec. 346.93 with the exception of the recent change in the first line from "21" to "18" years, discussed above.

Thus, the history of sec. 346.93 reveals that the Legislature moved from the absolute ban contained in the initial draft of the legislation on a minor's possession of either alcoholic liquor or malt beverages in

a motor vehicle to the ban, contained in the final enactment, on the possession of alcoholic liquor whether or not there was a person under 18 in the car, but on the possession of malt beverages only when a person under 18 was a passenger in the vehicle. That history leaves little doubt that the Legislature intended the phrase, "while any person under 18 years of age is a passenger or present in [the] motor vehicle," to relate only to the prohibition against possession of malt beverages.

In summary, then, sec. 346.93 contains two prohibitions: first, an absolute ban on a minor's possession of intoxicating liquor in a motor vehicle; second, a ban on a minor's possession of any malt beverage in a motor vehicle while any person under 18 years of age is a passenger or present in such motor vehicle. In order for a violation of that second prohibition to occur, a person under the age of 18 years *in addition to the violator of the statute* must be present in the vehicle.

BCL:DJB

Ballots; Counties; County Board; County Clerk; Elections; Votes And Voting: Failure to publish notices of an election on the last Tuesday in May, the first Tuesday in June, and the second Monday preceding an election on the question of removal of a county seat and failure by the county clerk to distribute the ballots will not invalidate the election where it appears that the voters were well informed of the time, place, and manner of the election and the issue involved, and a majority of the qualified voters who went to the polls, excluding those who had an opportunity to vote on the question of removal but chose not to, voted in favor of removal. OAG 62-77

July 29, 1977.

JAMES H. TAYLOR, *District Attorney*
Burnett County

You have requested my opinion on several questions relating to the referendum election held in Burnett County on November 2, 1976, on whether the county seat should be removed from Grantsburg to the Town of Siren.

My opinion is based on the following facts supplied with your request:

A petition seeking a change of the county seat from Grantsburg to the Town of Siren was presented to the Burnett County Board in November, 1975. In the spring of 1976, before the first petition was acted upon, three more petitions were presented to the Board. The Board consolidated the petitions and, on October 21, 1976, having determined that the petitions had been signed by at least one-half of the resident freeholders of the county, decided to submit the question of removal of the county seat to a vote of the qualified voters of the county on November 2, 1976, the day of the general election. Notice of the election and several other articles indicating that the question would appear on the November 2, 1976, ballot were published on October 27, 1976, in the *Burnett County Sentinel*, which is the official Burnett County newspaper, and in the *Inter-County Leader*, which has a large circulation in the county. Since October, 1975, and particularly for several months immediately preceding the election, the question of removal of the county seat received considerable coverage in the newspapers, resulting in the voters of the county being well informed on the issue. The county clerk, because notice of the election was not published on the last Tuesday in May, 1976, and the first Tuesday in June, 1976, refused to distribute the ballots for the election. The County Board, therefore, appointed a committee to distribute the ballots. However, ballots were distributed to the voters in only 16 wards because the municipal clerks in 8 wards refused to distribute the ballots. The total number of voters who went to the polls in the 24 wards of the county was 6,557, which was a greater than normal turnout of voters. The total number of votes on the removal question in the 16 wards where the ballots were distributed was 3,845, with 3,257 voting in favor of removal and 588 voting against removal, with 134 voters not voting on the question. In the 8 wards where ballots were not distributed, 2,578 voters were not given an opportunity to vote on the question.

You first ask:

“Is it proper to consolidate the petitions and consider them as one petition?”

This question was answered by *State ex rel. Hawley v. Board of Supervisors of Polk County*, 88 Wis. 355, 60 N.W. 266 (1894), which also involved petitions seeking a change of the county seat. The

court held that two petitions having signatures of different qualified signers should be considered and acted upon by the County Board as one petition although the second petition was presented while the first one was under consideration. Therefore, the answer to your first question is "Yes."

You next ask:

"Was the election valid?"

This question is neither so easily nor definitively answered. The facts indicate that certain election statutes regulating the conduct of elections were not observed, and the answer to the question depends on whether the statutes which were violated were mandatory or directory.

The rule for the construction of election statutes as to whether mandatory or directory, adopted by the Wisconsin Supreme Court, is as follows:

""The difference between mandatory and directory provisions of election statutes lies in the consequence of nonobservance: An act done in violation of a mandatory provision is void, whereas an act done in violation of a directory provision, while improper, may nevertheless be valid. Deviations from directory provisions of election statutes are usually termed "irregularities," and, as has been shown in the preceding subdivision, such irregularities do not vitiate an election. Statutes giving directions as to mode and manner of conducting elections will be construed by the courts as directory, unless a noncompliance with their terms is expressly declared to be fatal, or will change or render doubtful the result, as where the statute merely provides that certain things shall be done in a given manner and time without declaring that conformity to such provisions is essential to the validity of the election."" *Lanser v. Koconis*, 62 Wis.2d 86, 91, 214 N.W.2d 425 (1974).

In addition, sec. 5.01(1), Stats., in directing the type of construction that should be given to the election statutes, states:

"Title II shall give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of its provisions."

In keeping with sec. 5.01(1), Stats., the Wisconsin Supreme Court has quite consistently held that where there is substantial compliance with, but a deviation from, a provision in an election statute, thereby giving rise to the question whether the requirement is directory or mandatory, the provision will be construed as directory so as to preserve the will of the electors. *Lanser v. Koconis, supra*.

As regards the election in question, there were a number of provisions of the election statutes which were not observed: sec. 10.06(2)(h), which requires that notice of the election be published on the last Tuesday in May and the first Tuesday in June preceding the general election; sec. 10.06(2)(m), which requires that notice of the election be published on the second Monday preceding the general election; sec. 7.10(3), which requires the county clerk to distribute the ballots to the municipal clerks three weeks before the election; sec. 7.50(1)(a), which requires that only ballots provided by the person authorized to have them printed shall be cast and counted in an election; and, in 8 of the 24 wards of the county, sec. 7.15(1)(c), which requires the municipal clerks to provide the ballots for the election to the ballot clerks.

It should be noted that the only provision which declares that noncompliance with its terms might be fatal is sec. 7.50(1)(a), Stats. Hence, under the rule set forth in *Lanser v. Koconis, supra*, secs. 10.06(2)(h), 10.06(2)(m), 7.10(3), and 7.15(1)(c), Stats., would be construed as directory unless, under the circumstances in this case, noncompliance therewith has changed or rendered doubtful the result of the election.

There have been a number of cases decided by the Wisconsin Supreme Court involving the failure to give proper notice of an election which give us some guidance in the present situation.

As you point out, the rule of this state is that where there is in fact an election at the time and place designated by law, such election is valid although the statutory notice is not given. *State ex rel. Kleist v. Donald*, 164 Wis. 545, 160 N.W. 1067 (1917); *Janesville Water Co. v. Janesville*, 156 Wis. 655, 146 N.W. 784 (1914). However, such a rule cannot be applied to special elections or special questions submitted at a general election, for there is no presumption that the voters knew anything about the matter. *Janesville Water Co. v. Janesville, id.* Hence, in the *Janesville* case, the court held that where the statutes and the city charter required that ten days' notice be

given of an election upon the question of the acquisition of a public utility by the City of Janesville, but the first publication was nine days before the election, and it did not satisfactorily appear that the voters had adequate time to investigate, consider, and discuss the subject voted on, the election was invalid. However, in *State ex rel. Oaks v. Brown*, 211 Wis. 571, 249 N.W. 50 (1933), the court held that an election on the question of whether the City of Oshkosh should change from a commission form of government to an aldermanic form was valid although the notice given was not in compliance with the requirements of the applicable statutes. The court pointed out that while it would have had great difficulty in declaring the election valid if it relied on the rule announced in *Janesville Water Co. v. Janesville*, *supra*, sec. 5.01(1), Stats., which was enacted shortly after the *Janesville* case, indicated the Legislature's intention that if the will of the electors has been in fact ascertained, that will must be given effect notwithstanding the informality of procedure or failure to comply with all the requirements of the statutes. And, in *Commonwealth Telephone Co. v. Public Service Comm.*, 219 Wis. 607, 263 N.W. 665 (1935), the court held that a special election on whether the City of Darlington should acquire the property of a privately-owned public utility was valid notwithstanding a failure to give the statutory ten days' notice of the election. The court pointed out that the notice and information actually given to the electors by the notices that were published, and in other unofficial publications and circulars, were as widespread and ample as the electors would have received from notices published in strict compliance with the statute.

In the present situation, the voters appear to have been as well informed of the time, place, and manner of the election and the issue involved as they would have been had notices been published in strict compliance with the statutes. Moreover, it appears that a majority of all the qualified voters in the county who went to the polls on November 2, 1976, excluding those who had an opportunity to vote on the question of removal but chose not to, voted in the affirmative. The facts show that the statutory purpose of notice was fully met and that the results could not have been otherwise.

In view of this, it is my opinion that the election would not be invalidated because of the failure to comply with the notice requirements of the statutes or because of the failure of the municipal

clerks in 8 wards to provide ballots to the voters, since the vote in the 8 wards could not have affected the result of the election.

As regards the failure of the county clerk to distribute the ballots to the municipal clerks and the failure to observe the provisions of sec. 7.50(1)(a), Stats., which expressly declares that only ballots provided by the person authorized to have them printed, in this case the county clerk, shall be cast and counted in any election, it must be remembered that the purpose of statutes in reference to official ballots is to prevent fraud. 26 Am. Jur. 2d, *Elections* sec. 224. In this case, there is no evidence of fraud, and fraud should not be presumed. *Ollmann v. Kowalewski*, 238 Wis. 574, 300 N.W. 183 (1941). Furthermore, it is a well settled legal proposition that a voter is not to be deprived of his constitutional right of suffrage through the failure of election officials to perform their duties where the elector himself is not delinquent in the duty which the law imposes upon him. *State ex rel. Symmonds v. Barnett*, 182 Wis. 114, 195 N.W. 707 (1923); *State ex rel. Wood v. Baker*, 38 Wis. 71 (1875).

In *Ollmann v. Kowalewski*, *supra*, a number of ballots cast at the voting place the day of the election were initialed by only one ballot clerk who affixed his own initials and those of the other ballot clerk to the ballots. The court held that despite the existence of what was then sec. 6.41, Stats., which provided that any ballot which was not endorsed by the signatures or autograph initials of both ballot clerks shall be void and not counted, the ballots were properly counted. The court reasoned:

“... The voter would not knowingly be doing wrong. And not to count his vote for no fault of his own would deprive him of his constitutional right to vote. Any statute that purported to authorize refusal to count ballots cast under the instant circumstance would be unconstitutional. A statute purporting so to operate would be void, rather than the ballots. And the ballots not being void, should be counted notwithstanding the statute. Voting is a constitutional right, sec. 1, art. III, Const., and any statute that denies a qualified elector the right to vote is unconstitutional and void. ...” P. 578.

The court also pointed out that “‘Nonfeasance or malfeasance of public officers could have no effect to impair a personal, vested, constitutional right’” and that “‘the voters’ constitutional right to vote ‘cannot be baffled by latent official failure or defect.’” P. 579.

The principle of law relied on and the reasoning of the court in the *Ollmann* case are, in my opinion, fully applicable to the present situation.

In *Lanser v. Koconis, supra*, a number of absentee ballots cast by residents of a nursing home were delivered by a city courier rather than mailed or delivered personally to the respective electors as required by sec. 6.87(3), Stats. The court held that despite sec. 6.87(6), Stats., which provided that any ballot not mailed or delivered as provided in sec. 6.87(3), Stats., shall not be counted, the ballots were properly counted. The court stated:

“We are fully cognizant of possible abuses of the absentee voter’s law and share the concern of the legislature in preventing any such abuse. If the record in this case indicated the slightest evidence of any fraud, connivance or attempted undue influence, we would have no hesitancy in declaring the absentee voters’ ballots invalid. However, we are not inclined to disenfranchise these voters who acted in conformance with the statutory requirements. There is absolutely no evidence from which it could be inferred that the method of delivery by the municipal clerk in any way affected their vote.

“In *Sommerfeld v. Board of Canvassers, supra*, pages 303, 304, it was stated:

“... We have held that the word “shall” can be construed to mean “may.” *George Williams College v. Williams Bay*, 242 Wis. 311, 7 N. W. (2d) 891. In passing upon statutes regulating absentee voting, the court should look to the whole and every part of the election laws, the intent of the entire plan, the reasons and spirit for their adoption, and try to give effect to every portion thereof.’

“Considering all the facts of this case, we are of the opinion that the mandate of sec. 5.01, Stats., requires the conclusion that these absentee voters’ ballots be counted.” Pp. 93-94.

While the *Lanser* case involved absentee ballots, the principle of law relied on and the reasoning of the court are, in my opinion, also applicable to the present situation; indeed, even more so since absentee voting is a privilege, not an absolute right. *Clapp v. Joint School District*, 21 Wis.2d 473, 124 N.W.2d 678 (1963). The facts in this case do not indicate any evidence of fraud, connivance, or

attempted undue influence, nor is there any evidence from which it could be inferred that the distribution of the ballots by the committee appointed by the Burnett County Board in any way affected the vote.

Therefore, it is my opinion that under the circumstances of this case, sec. 7.50(1)(a), Stats., would be held to be directory and not mandatory and that the election would not be declared invalid because of the failure of the county clerk to distribute the ballots.

Having indicated that in my opinion the petitions were properly considered and acted upon as one and that the election was valid, there is no need to answer any of the remaining questions. However, before closing, I wish to commend you for observing the requirements set forth in 62 Op. Att'y Gen. Preface (1973) in requesting this opinion and for providing me with such detailed information regarding the relevant facts in this matter. On questions involving the validity of an election, the accuracy of my opinion is dependent upon my being as fully informed as possible about the circumstances surrounding the election.

BCL:JJG

Cities; Forfeitures; Liability; Municipalities; Open Meeting; Public Officials; Reimbursement; Pursuant to sec. 895.35, Stats., a city council can, in limited circumstances, reimburse a council member for reasonable attorneys' fees incurred in defending an alleged violation of the open meeting law, but cannot reimburse such member for any forfeiture imposed. Section 895.46(1), Stats., is not applicable to forfeiture actions. Such member could not be reimbursed, indirectly, under liability insurance policy procured by a municipality, for any forfeiture imposed. OAG 63-77

July 29, 1977.

DOUGLAS E. BREISCH, *News Director*
WIZM, La Crosse

Pursuant to sec. 19.98, Stats., you request my advice whether a city council can reimburse a council member for legal expenses incurred in defending an action in which such member has been charged with a violation of the open meeting law.

I am of the opinion that no reimbursement can be made where a judgment of forfeiture is entered except in a case where the certificate of the trial judge states that the action invokes the constitutionality of a statute, not theretofore construed by a court of record, which relates to the performance of the official duties of such officer. In such latter case, payment is at the discretion of the council. Where action for forfeiture has been commenced and discontinued or dismissed or determined favorably to such officer, the city council may in its discretion pay all reasonable expenses of such officer in defense of said officer. I am of the opinion that sec. 895.35, Stats., would be applicable to a forfeiture action brought under sec. 19.96, Stats., but that sec. 895.46, Stats., would not be applicable. By reason of the *express* language of sec. 19.96, Stats., I am of the opinion that a city council could not directly pay a forfeiture incurred by a member for violation of such section and could not reimburse such member for any forfeiture incurred. The specific statute governs over the general reimbursement statute, sec. 895.35, Stats., and would govern over the other general reimbursement statute, sec. 895.46(1), Stats., even if the latter were applicable to forfeiture actions; and I conclude it is not.

Section 19.96, Stats., provides in material part:

“19.96 Penalty. Any member of a governmental body who knowingly attends a meeting of such body held in violation of this subchapter, or who, in his or her official capacity, otherwise violates this subchapter by some act or omission *shall forfeit without reimbursement* not less than \$25 nor more than \$300 for each such violation. ...” (Emphasis added.)

Section 19.97(1) and (4), Stats., provides in material part:

“(1) ... In actions brought by the attorney general, the court shall award any *forfeiture recovered together with reasonable costs to the state*; and in actions brought by the district attorney, the court shall award any *forfeiture recovered together with reasonable costs to the county.*”

“(4) If the district attorney refuses or otherwise fails to commence an action to enforce this subchapter within 20 days after receiving a verified complaint, the person making such complaint may bring an action under subs. (1) to (3) on his or her relation in the name, and on behalf, of the state. In such

actions, the court may award *actual and necessary costs of prosecution, including reasonable attorney fees to the relator if he or she prevails, but any forfeiture recovered shall be paid to the state.*" (Emphasis added.)

A suit to compel payment of a forfeiture is a civil action. Where not set forth in sec. 19.97(1) and (4), Stats., procedure is controlled by ch. 288, Stats. *Also see State v. Roggensack*, 15 Wis.2d 625, 113 N.W.2d 389 (1962).

Section 895.35, Stats., would be applicable to an action against a council member for violation of the open meeting law, and provides:

"895.35 Expenses in actions against municipal and other officers. Whenever in any city, town, village, school district, vocational, technical and adult education district or county charges of any kind are filed or an action is brought against any officer thereof in his official capacity, or to subject any such officer, whether or not he is being compensated on a salary basis, to a personal liability growing out of the performance of official duties, and such charges or such action is discontinued or dismissed or such matter is determined favorably to such officer, or such officer is reinstated, or in case such officer, without fault on his part, is subjected to a personal liability as aforesaid, such city, town, village, school district, vocational, technical and adult education district or county may pay all reasonable expenses which such officer necessarily expended by reason thereof. Such expenses may likewise be paid, even though decided adversely to such officer, where it appears from the certificate of the trial judge that the action involved the constitutionality of a statute, not theretofore construed, relating to the performance of the official duties of said officer."

It is my opinion that the provision of sec. 895.46(1), Stats., would not require or authorize a city council to reimburse a member for the forfeiture or reasonable expenses incurred in the defense of a forfeiture action brought pursuant to sec. 19.96, Stats.

Section 895.46(1), Stats., is only applicable where the action or special proceeding is brought for the purpose of securing a judgment for *damages*. Section 895.46(1), Stats., was formerly sec. 270.58, Stats. (1973).

In *Cords v. Ehly*, 62 Wis.2d 31, 37, 38, 214 N.W.2d 432 (1974), it was stated:

“... it is clear that in enacting sec. 270.58, Stats., the legislature contemplated that state employees were subject to suit in tort under the law of Wisconsin and wished gratuitously to shield them from monetary loss in such suits.

“***

“... Sec. 270.58 does not become applicable until after a judgment of liability is entered.”

By the latter statement the court meant that any liability on the part of the state to pay a claim for *damages* did not arise until after entrance of a judgment of liability on the part of the officer or employes.

A judgment imposing a forfeiture is not a judgment of damages as that term is used in sec. 895.46(1), Stats. A forfeiture does not constitute damages any more than does a criminal fine. A forfeiture, as used in sec. 19.96, Stats., and a criminal fine are both in the nature of a penalty. Any forfeiture recovered under sec. 19.96, Stats., is payable, by reason of sec. 19.97(1) and (4), Stats., to the state or county. It never goes to a private person who may sue to enforce its collection.

Section 288.01, Stats., provides:

“Where a forfeiture imposed by statute shall be incurred it may be recovered in a civil action unless the act or omission is punishable by fine and imprisonment or by fine or imprisonment. *The word forfeiture*, as used in this chapter, includes any *penalty*, in money or goods.” (Emphasis added.)

In *State v. Mando Enterprises, Inc.*, 56 Wis.2d 801, 203 N.W.2d 64 (1973), it was stated that this definition of forfeiture applies only to ch. 288, Stats.; however, that is the chapter with which we are concerned.

Section 895.46(1), Stats., does not refer to forfeiture actions, directly or indirectly. I am of the opinion that the Legislature could not have intended that it apply to forfeiture actions which involve state, county or municipal officers or employes. Statutes should be construed to avoid an absurd result. Where the district attorney

prosecutes a forfeiture action under sec. 19.97(1), Stats., the forfeiture is payable to the county which also bears the cost of prosecution. Construction of sec. 895.46(1), Stats., to require the county to also pay the judgment of forfeiture, costs, and attorneys' fees of a county official adjudged to be in violation of the open meeting law would lead to an absurd result. Similar absurdity would result if sec. 895.46(1), Stats., were construed to require a city to pay the judgment of forfeiture, costs, and attorneys' fees of a city official adjudged to be in violation of the open meeting law even where such official had timely requested and had been denied legal representation. A city may directly provide its officials with legal representation to defend alleged violations of the open meeting law, and may, insofar as sec. 895.35, Stats., permits, reimburse such officials for reasonable expenses incurred, but cannot reimburse for any forfeiture imposed, and cannot utilize the provisions of sec. 895.46(1), Stats., with respect to the payment of judgments for forfeitures, costs or attorneys' fees.

You also inquire whether a council member can have legal fees incurred in defending an action, in which such member has been charged with a violation of the open meeting law, paid by a liability insurance policy covering city officials.

Section 66.18, Stats., empowers municipalities to procure liability insurance to cover their officers, agents and employes. If a policy were available it is my opinion that the same tests as given above would apply as to the payment of legal costs or forfeiture. It is my opinion that such officer could not be reimbursed, indirectly, for payment of the "forfeiture," from a policy purchased by the municipality. Section 19.96, Stats., prohibits the municipality from direct reimbursement of any forfeiture imposed, and that which is prohibited directly cannot be accomplished by indirect means involving payment of public funds by the municipality.

BCL:RJV

Newspapers; Open Meeting; Requirements of notice given to newspapers under sec. 19.84(1)(b) and (3), Stats., discussed. OAG 65-77

August 3, 1977.

JOSEPH A. SCHACKELMAN, *Publisher and General Manager*
Union Co-operative Publishing Company

You ask what duties are imposed on a newspaper to publish notice when given to the newspaper by a governmental body as provided by sec. 19.84(1)(b), Stats.

Section 19.84, Stats., provides in part as follows:

“(1) 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, 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.”

A governmental body, thus, must give notice to the public (by posting in the courthouse or other place frequented by the public), to the requesting news media, to the official newspaper (daily or weekly), but if none exists, to a news medium (newspaper, radio, television) “likely to give notice in the area.”

As to the newspaper, official or otherwise, the governmental body has satisfied the statutory requirement by giving timely notice of its meeting to the newspaper. When the governmental body transmits a meeting notice to the newspaper, the newspaper is not obliged to publish the notice. Further, the governmental body is not obliged to pay for publication of such notice as in the case of an official legal notice. The governmental body would be required to publish legal notice in a newspaper only if required by another statute. Sec. 19.84(1)(a), Stats.

The publishing schedule of a particular newspaper does not dictate the giving of notice. The statute governs notice. Section 19.84(3), Stats., provides:

“(3) Public notice of every meeting of a governmental body shall be given at least 24 hours prior to the commencement of

such meeting unless for good cause such notice is impossible or impractical, in which case shorter notice may be given, but in no case may the notice be provided less than 2 hours in advance of the meeting.”

Where a newspaper or other news media publish notices of meetings of governmental bodies as a public service, however, a governmental body is well advised to submit notices of meetings, or better yet notices of meetings plus agenda thereof, well in advance of the minimum 24-hour requirement in order to take advantage of the news media’s public service policy, especially when the news media publishes only weekly.

Upon receipt of a notice of a meeting of a governmental body not required to be published as a legal notice, the newspaper, thereupon, may publish notice of the meeting as a public service, dispatch a reporter to cover the meeting or possibly answer inquiries by the public about the meeting.

BCL:JPA

Articles Of Incorporation; Charitable Organizations; Corporations; Housing; Taxation; Standards for determining whether a nonprofit corporation qualifies for tax exempt status as a retirement home under sec. 70.11(4) discussed. OAG 66-77

August 10, 1977.

CAROL TOUSSAINT, *Secretary*

Department of Local Affairs and Development

Your predecessor asked whether certain apartment buildings, owned and operated by private, nonprofit corporations, and occupied to a certain extent by elderly tenants, qualify for general property tax exemption under sec. 70.11(4), Stats. The pertinent portion of that statute, which exempts certain property from general property taxes, provides:

“Property owned and used exclusively by educational institutions offering regular courses 6 months in the year; or by churches or religious, educational or benevolent associations,

including benevolent nursing homes and retirement homes for the aged" (Emphasis supplied.)

The underscored language was added to the statute by ch. 64, Laws of 1967.

Your predecessor stated that this question is one of increasing concern to local government, to your Department, to the Wisconsin Housing Finance Authority, and to the Federal Department of Housing and Urban Development and Farmers Home Administration. Some private nonprofit housing corporations have applied to your Department and to the Wisconsin Housing Finance Authority for approval of the use of certain federal subsidy funds, on the assumption that their apartment buildings will enjoy a tax exempt status. Your Department and the Wisconsin Housing Finance Authority have taken the position that such applications cannot be approved on a tax exempt basis. Your predecessor pointed out that a person need not be retired to rent one of these apartments, but priority must be given to persons over 62 years of age. To achieve a desired occupancy rate, apartments may be rented to persons under 62 years of age, who may, upon notice, be required to vacate in favor of an eligible person over 62 years of age. These buildings must contain certain design features, such as handrails in the corridors, which make the buildings more suitable for elderly residents. Services such as meals, housekeeping, or nursing care are not provided, and the occupant must be capable of living independent of such support services.

A leading case on this subject is *Milwaukee Protestant Home v. Milwaukee*, 41 Wis.2d 284, 164 N.W.2d 289 (1969). The Milwaukee Protestant Home for the Aged brought an action to have its real and personal property declared exempt from property taxation by the City of Milwaukee. The home was a nonstock, nonprofit, membership corporation organized solely for charitable purposes. The specific purpose, as set forth in its charter, was "'specifically, to own and operate a residence and nursing home for aged persons and to do and perform any and all acts as may be necessary to the furtherance of such purposes.'" 41 Wis.2d at 288. The articles of incorporation provided that no part of the home's net earnings should inure to the benefit of or be distributable to its members, directors, officers, or any private shareholder or individual. Since it was founded in 1884, the home had grown from a small

rented house to a complex of buildings and over the years had added several wings. It was the most recent addition, the Bradford Terrace addition, which became the subject of the controversy as to tax exemption. A convalescent center occupied the top two floors of this addition and offered to residents and nonresident patients 34 private and semiprivate rooms, plus modern facilities and nursing care. A physical therapy department occupied the basement and part of the first floor. These facilities were open to all residents of the home. Initial residents of this addition were required to pay a founder's fee, ranging from \$8,000 to \$15,500 depending on the size of the unit, plus a monthly occupancy charge of from \$150 to \$160. All income from these fees and charges were to be paid into the endowment fund of the home. Over a million dollars had been borrowed from this endowment fund to build this addition, and it was contemplated that this loan would be repaid, with interest, over a 25-year period. The court explained that Wisconsin law has exempted from taxation, property of a benevolent association used exclusively for benevolent purposes and not used for profit. It pointed out that the 1967 amendment to sec. 70.11(4), Stats., merely clarified the legislative intent, making it clear that the operation of a retirement home for the aged is a proper function of a benevolent institution. The court laid down three requirements for determining whether such institutions would qualify for exempt status. The court said:

“In order for a retirement home for the aged or a nursing home or a hospital to qualify for exempt status under sec. 70.11, Stats., ‘... it must appear that, (1) appellant is a benevolent association; (2) the personal property is used exclusively for the purposes of such association; (3) the real and personal property is not used for pecuniary profit.’ In examining the organizational structure and method of operation, ‘The facts of each case must be regarded *as a whole*’ (Emphasis supplied.)” 41 Wis.2d at 293.

The court had no difficulty determining that the home was a benevolent association within the meaning of the statute. It had always operated at a deficit which had to be made up by donors' gifts, withdrawals from its endowment fund, and on occasion, by help from the local community fund. The property of the home was exclusively used for the purposes of the association, and this was not tainted by any paralleling gain or profit to any person or persons. The articles of incorporation prohibited any payments to officers, members, or any

individual, and the fact was that no one had received any such profit since the home was founded in 1884. Further, members, directors, or officers never even received reimbursement for their actual expenses. The court said "In this state a benevolent association must be completely free from the fact or even possibility of profits accruing to its founders, officers, directors or members." 41 Wis.2d at 294. And it found the home 100 percent free of such possibility. 41 Wis.2d at 294, 295.

These, then, are the tests to be applied to determine whether or not a particular nonstock, nonprofit, membership corporation is tax exempt. Its charter and articles of incorporation must be examined to determine whether or not it is really a benevolent association. See *Bethel Convalescent Home v. Richfield*, 15 Wis.2d 1, 5, 6, 111 N.W.2d 913 (1961). If the articles and charter indicate that it is a benevolent association, then a determination must be made as to whether the property of the association is being exclusively used for the purposes of the association and whether the association is completely free from the fact or even the possibility of profits accruing to its founders, officers, directors, or members. According to the majority of the court, a benevolent association may operate so as to make a gain or profit, and this does not take away the benevolent nature of the institution as long as the profit does not go to someone other than the benevolent association itself. When the profit or net income is devoted exclusively to carry on the benevolent purposes of the institution, the association is not operating "for pecuniary profit." A further question may arise if a benevolent association operates only part of its activities at a profit. Then it may be necessary to determine whether there is a "functional relatedness" between these activities and the activities of the enterprise as a whole.

As can be seen from the foregoing, any determination as to tax exempt status must be based upon the specific facts applicable to the private, nonprofit corporation under consideration, using the standards set forth above. A determination must be made as to whether it is a benevolent association, whether its personal property is used exclusively for the purposes of the corporation, and whether its real and personal property are used for pecuniary profit.

Tax exemption statutes are usually strictly construed against exemption. 41 Wis.2d at 303. In reaching a conclusion as to whether a particular corporation is tax exempt, one must first determine

whether the corporation has the purpose of owning or operating a benevolent retirement home for the aged. In order to qualify as "benevolent," the persons to be benefitted need not be "objects of charity," but the classification must have some limits, *i.e.*, "[t]o help retired persons of moderate means live out their remaining years." 41 Wis.2d at 300. Further, all phases of the operation of any such retirement home should have the common denominator of serving aged and retired persons. 41 Wis.2d at 301. Also, there must be a significant age limitation as to occupant eligibility. It has been said that the age of 65 is generally considered the "threshold to old age." *State ex rel. Harvey v. Morgan*, 30 Wis.2d 1, 9, 139 N.W.2d 585 (1966). Although it is difficult to say at what age a person becomes "aged," and an occupancy eligibility limited to persons over 62 years of age would probably not be subject to question, there must be some further limitation to ensure that these apartments are not occupied by persons who are neither retired nor aged. And, as stated before, it must always clearly appear that the corporation is completely free from even the possibility of profits accruing to its founders, officers, directors or members.

Finally, notwithstanding your significant responsibilities in this area, recognition must be given to the fact that local officials, particularly local assessors, are the ones primarily responsible for allowing or disallowing tax exemptions after an examination of the facts on a case-by-case basis.

BCL:JEA

Newspapers; Open Meeting; Towns; A town board is a “governmental body” within the meaning of the open meetings law and is subject to its provisions, including the notice requirements of secs. 19.83 and 19.84, Stats.

An annual town meeting is a meeting of the electorate. It is not a “governmental body” within the meaning of the open meetings law, and therefore, notice under subch. IV, ch. 19, Stats., is not required. If an annual town meeting is held at a time other than on the first Tuesday in April, notice must be given as required by secs. 60.07(2) and 60.13, Stats.

Other open meetings law notice requirements discussed. OAG 67-77

July 15, 1977.

CLOYD A. PORTER, *State Representative*
Burlington

You ask three questions about the application of subch. IV of ch. 19, Stats., entitled “Open Meetings of Governmental Bodies,” to town meetings.

1. As I understand the law (and in this case using a township as the example) a township scheduling a meeting does not have to have an ad or a press release. Is this correct?

The town board is the “governmental body” as defined by sec. 19.82(1), Stats. Regular town board meetings require public notice under secs. 19.83 and 19.84, Stats. However, as pointed out in 65 Op. Att’y Gen. 250 (1976), such notice can be, but is not required to be, by publication in a newspaper.

An annual town meeting of the electorate does not fall within the definition of “governmental body” and requires no notice if held on the first Tuesday in April. Sec. 60.07(1), Stats. However, if another date is selected for the annual town meeting of the electorate, compliance with the provisions of sec. 60.07(2), Stats., including the notice provisions therein, is required.

2. If the township has to make public a notice, how is it decided where the notice of the meeting should be placed?

Section 19.84(1)(a) and (b), Stats., provides that public notice of meetings be given as is required by other statutes and further requires notice to the public, to the news media who have filed a written request for notice and to the official newspaper designated under secs. 985.04, 985.05 and 985.06, Stats. Notice to the public can be accomplished by posting. The chairperson of the board should determine where and how many posted notices will most likely give adequate notice. If sec. 60.07(2), Stats., is involved, notice must be given as provided by sec. 60.13, Stats.

3. For a public notice to be within the law does it require any other information besides the time, date, place and subject matter of the meeting?

Section 19.84(2), Stats., requires notice to include the time, date, place and subject matter of the meeting "in such form as is reasonably likely to apprise members of the public and the news media thereof." The quoted language modifies the term "subject matter," requiring more specific statements as to the business to be conducted. Publishing a properly prepared agenda of items to come before a meeting would satisfy this requirement.

BCL:JPA

Land; Plats And Platting; Sales; A proposed plat under ch. 236, Stats., may not consist solely of outlots, whether or not the proposed outlots are intended for the purpose of sale or building development. Other questions concerning outlots answered. OAG 68-77

August 16, 1977.

CAROL TOUSSAINT, *Secretary*
Department of Local Affairs and Development

Your predecessor asked me several questions concerning the term "outlot" as used in ch. 236, Stats.

The general purpose of ch. 236, Stats., is to "regulate the subdivision of land." Sec. 236.01, Stats. A "subdivision" is defined as

a "division of a lot, parcel or tract of land ... for the purpose of sale or of building development," and a "plat" is "a map of a subdivision." Sec. 236.02(5) and (8), Stats.

Section 236.02(4), Stats., defines "outlot" as follows:

"An 'outlot' is a parcel of land, *other than a lot* or block, so designated on the plat." (Emphasis added.)

Under ch. 236, Stats., a "lot" is normally, if not invariably, the division of land which is intended for the purpose of sale or of building development. The term is repeatedly used throughout the chapter in that context, and in practice subdivisions normally consist principally of groupings of such parcels. While subdivision "lots" are often associated with certain other subdivision parcels not normally intended for sale or building development, such as streets, alleys and other public ways, and parks, public grounds and easements, the latter parcels are normally required to be specifically so designated or identified on the plat. See secs. 236.02(10), 236.20(4), 236.29, and 236.293, Stats.

Since the main purpose of the costly process of land subdivision is sale or building development, and since the principal attribute and purpose of a "lot" is as a parcel of land intended for sale or building development, and since an "outlot" is not a "lot," it would appear to follow that one attribute of an outlot is that it is not a parcel of land divided for the purpose of sale or building development.

Describing the word "outlot" in more positive terms, then, such a parcel appears intended for purposes other than or peripheral to the main purpose for which the subdivision is created. See 30A Words and Phrases, "Outlot." Since the obvious main purpose of any subdivision is sale or building development, "outlots" must be extra, remnant or special purpose parcels which, because of their physical nature, size or intended disposition, cannot or may not be utilized for that main purpose.

Your predecessor's specific questions now can be examined.

1. "Can a plat of all outlots be prepared, approved and recorded under the provisions of Chapter 236, for the purpose of sale?"

Based on the foregoing analysis of the terms "lot" and "outlot," as used in ch. 236, Stats., the answer to this question must be no. If the

division of land is made for the purpose of sale or building development, those parcels which are intended for sale or building development are and should be treated as lots, as that term is used in the balance of ch. 236, Stats. I am not aware of any reason for calling such parcels "outlots" other than to attempt to avoid the various requirements of that chapter which would otherwise be applicable to those parcels, as subdivision "lots." It would clearly be inconsistent with the intent and purpose of ch. 236, Stats., if a subdivider could circumvent those statutory requirements solely on the basis of a name difference rather than on the basis of some truly substantive difference.

2. "Can a plat of lots and outlots be prepared, approved and recorded under the provisions of Chapter 236 for the purpose of sale and/or building development?"

It is not unusual for plats developed for the purpose of sale and/or building development, to include outlots such as those described in answer to question 1 above. However, as pointed out in response to that question, the nature and purpose of lots and outlots differ markedly and there must be some legitimate reason for designating a parcel as an "outlot" rather than as a "lot." Parcels developed for the purpose of sale or building development may not be arbitrarily designated as outlots.

3. "Can a plat of all outlots be prepared, approved and recorded under the provisions of Chapter 236 if the proposed outlots are not for the purpose of sale or building development?"

If a division of land is not undertaken for the purpose of sale or building development, no plat is required under ch. 236, Stats. However, generally speaking, any division of land may be surveyed and a plat thereof approved and recorded as required by that chapter. Sec. 236.03, Stats. Even if such land division is not for the purpose of sale or building development, it will invariably have some other principal or central purpose. The land divisions serving such a central purpose may not properly be considered as outlots since they are, by their very nature, neither peripheral nor ancillary to the main purpose of the land division.

4. "If a plat of outlots or a plat of outlots and lots can be prepared, approved and recorded under the provisions of

Chapter 236, are the outlots subject to the layout provisions of ss. 236.16 and 236.20 (4) (d), Wis. Stats.?"

Since outlots are not lots, they are not subject to those layout requirements of secs. 236.16 and 236.20(4)(d), Stats., which apply only to lots. Thus, an outlot need not comply with the lot width and area requirements of sec. 236.16(1), Stats., and need not have access to a public or private street, which is otherwise required of lots, under sec. 236.20(4)(d), Stats.

5. "Should land subdivision plats having lots and outlots show separate numbering systems for lots and outlots, or should the numbering be consecutive in each block without reference to lot or outlot, i.e., should 10 lots and 3 outlots in a block be numbered lots 1-10 and outlots 1-3, or as lots and outlots, lots 1-10 and outlots 11-13 [see ss. 236.20 (2) (d) and (e)]."

Section 236.20, Stats., provides in part:

"(2) The final plat shall show ...

"(d) Blocks, if designated, shall be consecutively numbered, or lettered in alphabetical order. The blocks in numbered additions to subdivisions bearing the same name shall be numbered or lettered consecutively through the several additions.

"(e) All lots in each block consecutively numbered."

Although not specifically mentioned in sec. 236.20, Stats., the original plat should designate outlots as outlots and number them consecutively. 55 Op. Att'y Gen. 14, 16 (1966).

6. "Can outlots be used for building purposes, including outbuildings?"

I assume that this question refers to the unusual situation where, for some reason, the circumstances which required certain parcels to be designated as outlots no longer exist. The answer to your predecessor's question is yes, in such a case, if the outlots involved otherwise in fact comply with all the requirements of ch. 236, Stats.,

including those relating to lots, and meet all other legal requirements which may be applicable.

BCL:JCM

Appeals; Courts; Criminal Law; Minors; Judgments of commitment under the Youthful Offenders Act must be appealed within 90 days. OAG 69-77

August 17, 1977.

HOWARD B. EISENBERG

State Public Defender

You have requested my opinion on whether the civil or criminal appeal time applies where an appeal is taken to the Wisconsin Supreme Court from a judgment of commitment under the state's Youthful Offenders Act, ch. 54 of the Wisconsin Statutes. It is my opinion that the 90-day appeal time applicable in criminal cases also applies to appeals under the Youthful Offenders Act.

The intent of the Youthful Offenders Act is set forth in sec. 54.01(2), Stats.:

“(2) **Intent.** The intent of this chapter is to provide a specialized correctional program for youthful offenders who are found guilty in the criminal courts. The program grows out of the increasing public concern with the disproportionately high incidence of criminality and recidivism among youthful offenders. Recognizing that these individuals are in their formative years, with an adult lifetime ahead of them, it is to the advantage of society to concentrate on specialized treatment efforts. *It is the intent of this chapter to provide an alternative to procedures in the criminal code relating to conviction and sentencing.* This chapter is to be liberally construed to effect its objectives.” (Emphasis added.)

I believe that the italicized language indicates that the Legislature only intended to provide noncriminal alternatives to the conviction and sentencing of youthful offenders; in all other respects, a commitment under the Act remains an essentially criminal disposition. The Act has no effect on the judicial proceedings which occur prior to disposition. Thus, persons eventually adjudged youthful offenders are initially charged with a felony (sec. 54.03(1),

Stats., makes the Act applicable only to felons) and are entitled to all the constitutional protections afforded criminal defendants, which is precisely what they are.

The Legislature apparently created the youthful offender disposition to avoid the stigma usually associated with criminal convictions. This intention is manifested in sec. 54.03(4)(b), Stats., which provides:

“(b) A youthful offender disposition shall not disqualify the youthful offender from entering public or private employment, or securing occupational and professional licenses. A youthful offender disposition shall not disqualify a person from voting or holding public office after discharge from probation or discharge from commitment to the department.”

Furthermore, newly enacted sec. 973.015(1), Stats., which is not physically part of the Youthful Offenders Act but which is obviously directed at misdemeanants who would otherwise qualify for youthful offender treatment, provides as follows:

“When a person under the age of 21 at the time of the commission of an offense for which the person has been found guilty in a court for violation of a law for which the maximum penalty is imprisonment for one year or less in the county jail, the court may order at the time of sentencing that the record be expunged upon successful completion of the sentence if the court determines the person will benefit and society will not be harmed by this disposition.”

These provisions support my view that the Act was intended to offer noncriminal alternatives only in the area of conviction and sentencing of youthful offenders; in all other respects, a youthful offender disposition retains its criminal nature.

It therefore follows that the criminal appeal time should apply to dispositions under ch. 54. The choice of the criminal over the civil appeal time cannot seriously be regarded as having a stigmatizing effect on the youthful offender. In fact, employing the criminal appeal time is totally consistent with the spirit of the Act. The avowed purpose of ch. 54 is “to provide a specialized correctional program” for youthful offenders. Sec. 54.01(2), Stats. One of the primary goals of correctional programs is the rehabilitation of the participants. Finality of disposition is generally regarded as an aid to

rehabilitation; once a person found guilty of crime has exhausted all available appeals, he is (theoretically, at least) more amenable to efforts to rehabilitate him. Since it is probable that dispositions under the Youthful Offenders Act will normally be for shorter periods of time than sentences imposed pursuant to the usual criminal procedures, the interest in finality is even greater under the Act than it is for criminal convictions. It therefore follows that the Legislature, by its silence, did not intend to change the appeal time for youthful offenders to the 180 days provided for in civil cases, for this would be incompatible with the manifest purpose of ch. 54. I therefore conclude that the criminal appeal time applies to youthful offender dispositions.

In so concluding, I have considered and rejected the argument that there is no appeal whatsoever from a judgment of commitment under the Youthful Offenders Act. Such an argument is based on *State v. Ryback*, 64 Wis.2d 574, 578-581, 219 N.W.2d 263 (1974), which involved sec. 161.47, Stats., which provides that a first-time offender found guilty of possessing certain controlled substances may have the proceedings against him dismissed after a period of probation, thereby avoiding both conviction and penalty. In *Ryback*, the court held that a disposition under sec. 161.47, Stats., was not appealable because the statute provided that the court may defer further proceedings “*without entering a judgment of guilt.*” (Emphasis added.)

There is some similarity between sec. 161.47, Stats., and certain provisions of the Youthful Offenders Act, such as sec. 54.03(4)(b), Stats., which is intended to eliminate the collateral effects of a criminal conviction. I believe, however, that it is possible to successfully distinguish sec. 161.47, Stats., from the Youthful Offenders Act. Contrary to the procedure specified in sec. 161.47, Stats., under the Youthful Offenders Act an adjudication of guilt is made, see sec. 54.03(1), Stats., and a judgment is entered, see sec. 54.04(4)(a), Stats. and 972.13(1), Stats. Furthermore, a judgment under the Youthful Offenders Act is never expunged, whereas under sec. 161.47, Stats., proceedings against a person are dismissed if he completes a successful probationary period. Therefore, although a disposition under sec. 161.47, Stats., deferring further proceedings and putting the defendant on probation, is neither a final judgment nor an order in the nature of a final judgment, *State v. Ryback*, *supra*, at 579, I conclude that a disposition under ch. 54 does

constitute a final judgment and should therefore be appealable. Preventing youthful offenders from appealing their dispositions may well be contrary to Wis. Const. art. I, sec. 21, which provides that “Writs of error shall never be prohibited by law.” In *Scheid v. State*, 60 Wis.2d 575, 583a, 211 N.W.2d 458 (1973), this provision was held to create a constitutional right to appeal in criminal cases of the nature that were appealable at the time the state constitution was adopted.

In so concluding, I have also not overlooked the possible arguments favoring a civil appeal time for youthful offender dispositions. In particular, sec. 974.03, Stats., which governs the time for appeal in criminal cases, refers to appeals from the “judgment of conviction.” The language of the Youthful Offenders Act, however, indicates that a judgment of conviction and a youthful offender disposition are mutually exclusive. Section 54.03(4)(c), Stats., provides:

“If the court does *not* find the person to be a youthful offender it shall enter a judgment of conviction and proceed under chs. 972 and 973.” (Emphasis added.)

Likewise, sec. 972.13(1), Stats., provides in part that:

“... if the defendant is found to be a youthful offender under that section, a judgment of conviction shall not be entered but rather the judgment shall be for disposition as a youthful offender.”

Assuming that sec. 974.03, Stats., only applies to appeals from judgments of conviction, it could be argued that appeals from ch. 54 dispositions, which do not constitute judgments of conviction, are not subject to the 90-day appeal period.

It is my opinion that such an argument would fail. Labeling a youthful offender disposition a judgment of commitment rather than a judgment of conviction should not thwart the application of the 90-day criminal appeal time to appeals under ch. 54. At the time sec. 974.03, Stats., was enacted, there was no such thing as a judgment of commitment for a criminal offense. Under the Youth Service Act, the forerunner of the Youthful Offenders Act, youthful offenders were regarded as having been convicted of criminal offenses. See ch. 54, Stats. (1973).

Since formerly the only judgments appealable under sec. 974.03, Stats., were judgments of conviction, the language in that statute should not be given much weight in determining whether it applies to the new Youthful Offenders Act. Instead, I believe that the Legislature's silence on the question of appeal time under ch. 54 indicates that it did not wish to alter the appeal time for youthful offenders who would otherwise be subject to the 90-day period specified in sec. 974.03, Stats.

BCL:MM

Counties; Deeds; Fees; Forest Crop Law; Natural Resources, Department Of; Register Of Deeds; Taxation; A county register of deeds must record Department of Natural Resources' orders under the forest croplands program, sec. 77.02(3), Stats., and the woodland tax law, sec. 77.16(3), Stats., notwithstanding sec. 59.57(12), which requires that recording fees be paid in advance of recordation. OAG 70-77

August 18, 1977.

ROBERT W. WING, *District Attorney*
Pierce County

You request my opinion whether the Register of Deeds in Pierce County is required to collect recording fees in accordance with sec. 59.57(12), Stats., prior to recording orders issued by the Department of Natural Resources (DNR) pursuant to the forest croplands law, sec. 77.02(3), Stats., and the woodland tax law, sec. 77.16(3), Stats. You state that the practice in Pierce County is for the Register of Deeds to hold such DNR orders until the recording fee is paid by the owner of the property in question. It is my opinion that such orders must be recorded upon receipt from the DNR notwithstanding the general requirement in sec. 59.57(12), Stats., that such fees be paid in advance of filing.

The pertinent language of sec. 77.02(3), Stats., reads as follows:

“Decision, copies. After receiving all the evidence offered at any hearing held on the petition [for entry into the forest crop program] and after making such independent investigation as it

sees fit the department shall make its findings of fact and make and enter an order accordingly. ... If the request of the petitioner is granted, a copy of such order shall be filed with the department of revenue, the supervisor of assessments, the clerk of each town and the *register of deeds* of each county in which any of the lands affected by the order are located. *The register of deeds shall record the entry, transfer or withdrawal of all forest croplands in a suitable manner on the county records. The register of deeds may collect recording fees under s. 59.57 from the owner. ...* (Emphasis supplied.)

Section 77.16(3), Stats., reads:

“Upon filing of such application [for placement of property under the woodland tax law] the department shall examine the land, and if it finds that the facts give reasonable assurance that the woodland is suitable for the growing of timber and other forest products and the lands are not more useful for other purposes and the landowner agrees to follow an approved management plan the department shall enter an order approving the application. A copy of such order shall be forwarded to the owner of the land, to the supervisor of property assessments of the district wherein the land is located, to the clerk and the assessor of the town and to the clerk and *register of deeds* of the county wherein the land is located. *The register of deeds shall record the entry and declassification of woodland tax lands in a suitable manner on the county record. The register of deeds may collect recording fees under s. 59.57 from the owner.*” (Emphasis supplied.)

Finally, sec. 59.57, Stats., says in relevant part:

“Every register of deeds shall receive the following fees:

“(1)(a) For recording any instrument entitled to be recorded in the office of the register of deeds, \$2 for one page (first page) and \$1 for each additional page. One ‘page’ is one side of a single sheet of paper not larger than 8-1/2 by 14 inches using type not smaller than 6-point type. Each rider attached to a document shall be considered an additional page.

“***

“(12) *All the foregoing fees to be payable in advance by the party procuring such services, except that the fees for such services performed for a state department, board or commission shall be invoiced monthly to such department, board or commission.*” (Emphasis supplied.)

There is an apparent conflict between the similar provisions of secs. 77.02(3) and 77.16(3), Stats., and the provision in sec. 59.57(12), Stats. However, the first two statutes deal exclusively with the recordation of DNR orders issued under the forest croplands program and the woodland tax law, while sec. 59.57(12), Stats., is applicable to all recording fees incurred for services rendered by registers of deeds. It is a basic rule of statutory construction that when there is conflict between a statute of general application and one that is specific, the latter prevails. *Schlosser v. Allis-Chalmers Corp.*, 65 Wis.2d 153, 161, 222 N.W.2d 156 (1974); *Luedtke v. Shedivy*, 51 Wis.2d 110, 118, 186 N.W.2d 220 (1971); *Estate of Zeller*, 39 Wis.2d 695, 700-701, 159 N.W.2d 599 (1968). Both sec. 77.02(3) and sec. 77.16(3), Stats., were enacted long after secs. 59.57(1)(a) and (12), Stats. This fact buttresses the specific-general dichotomy as *Martineau v. State Conservation Commission*, 46 Wis.2d 443, 449, 175 N.W.2d 206 (1970) points out:

“It is a cardinal rule of statutory construction that when a general and a specific statute relate to the same subject matter, the specific statute controls and *this is especially true when the specific statute is enacted after the enactment of the general statute.* [Cases cited.]” (Emphasis supplied.)

You will note that in both secs. 77.02(3) and 77.16(3), Stats., the word “shall” appears in connection with the recording of the DNR’s order, while the word “may” appears with respect to the collection of recording fees. This language is not without significance since “shall” is generally construed as mandatory and “may” is generally construed as permissive. *State v. Camera*, 28 Wis.2d 365, 371, 137 N.W.2d 1 (1965). That the word “may” is permissive “is especially true where the word ‘shall’ appears in close juxtaposition in other parts of the same statute.” *Scanlon v. Menasha*, 16 Wis.2d 437, 443, 114 N.W.2d 791 (1962). See also *Wisconsin’s Environmental Decade, Inc. v. Wisconsin Power and Light Company*, 395 F. Supp. 313 (W.D. Wis. 1975). This is precisely the case in secs. 77.02(3) and 77.16(3), Stats., which fortifies my opinion that the register of

deeds must record DNR orders under those sections even though the recording fee has not first been collected from the owner of the property in question.

BCL:RJB

Counties; County Board; County Supervisor; Foster Homes; Funds; Health And Social Services, Department Of; Insane; Nursing Homes; Public Health; Public Welfare; Public Welfare, Department Of; The responsibility for providing and funding facilities for protective placements under ch. 55, Stats., is primarily on the county. The statute does not require a county nursing home to accept such a placement. OAG 71-77

August 23, 1977.

GLENN L. HENRY, *Corporation Counsel*
Dane County

You present a number of problems which had arisen in making protective placements under sec. 55.06, Stats.

Your first question is:

1. When the evaluation and evidence disclose that an individual in need of placement has a continuing history of violent behavior, which agency bears the ultimate responsibility for a) locating, b) providing, and c) funding an appropriate facility?

I assume you use the term "ultimate" in the sense of basic or fundamental, which is one of the definitions appearing in *Websters 3rd New International Dictionary, Unabridged*. The same dictionary also gives "basic or fundamental" as a definition for "primary."

Section 55.06(8), Stats., directs that the "board designated under s. 55.02 or an agency designated by it shall cooperate with the court in securing available resources." You indicate that the board so designated in your county is the board of public welfare so that its obligation to cooperate in securing resources is broad enough to cover both locating and providing, at least when read in connection with sec. 51.42(1)(b), Stats., which provides:

“(b) *Responsibility of county government.* The county boards of supervisors have the primary responsibility for the well-being, treatment and care of the mentally ill, developmentally disabled, alcoholic and other drug dependent citizens residing within their respective counties and for ensuring that those individuals in need of such emergency services found within their respective counties receive immediate emergency services. ...”

True, sec. 55.04(1)(b), Stats., provides that the Department shall have responsibilities in administration of ch. 55 including “[e]valuation, monitoring and provision of protective placements.”

Section 55.05(1) provides that the Department shall provide “protective services” only if “no other suitable agency is available.” Your county board of public welfare is a suitable agency.

While some provisions of ch. 55 deal separately with protective services and protective placements, the Legislature designated “Protective Services” as the title of ch. 55, Stats. (ch. 284, Laws of 1973), which includes placements as well as other protective services.

65 Op. Att’y Gen. 49 (1976) stated that the county may not refuse care to a person eligible under the statutes even though the state has not provided the wherewithal. At pp. 53-54 of that opinion I stated:

“... 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.

“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.”

In the *Columbia County* case cited in the above opinion the court said:

“... There are many instances where the legislature imposes new duties involving financial obligations upon counties without providing any appropriation therefor. This is done on the theory the county is a political subdivision or agency of the state.” (*Ibid.*, p. 325.)

The situation which gave rise to your question appears to have been a commitment proceeding under sec. 51.20(1)2., Stats. If so, sec. 51.22(1) provides that the commitment shall be to “the board established under sec. 51.42 or 51.437” - in your case the board of public welfare. The commitment is to the state Department only in the case of nonresidents.

If the county does not operate its own appropriate facility, the statutes authorize furnishing such a facility through contract with other agencies. See, for example, sec. 51.42(9), Stats.

Your second question is:

2. When neither the 51.42 Board nor the lead agency has been able to successfully carry out those three functions prior to an order of the court requiring protective placement, under what circumstances, if any, does it become the obligation of the Wisconsin Department of Health and Social Services to perform any or all of these three functions pursuant to either Section 55.04 (b) or Section 55.05? If such obligations do exist on the part of the Department, what procedure is to be followed in requesting that the Department fulfill those obligations?

Section 46.03(19), Stats., provides that the Department shall “[a]dminister the statewide program of protective services under ch. 55.” Section 51.42(1)(b), Stats., gives counties the primary responsibility for “well-being, treatment and care” for individuals in need of such services.

In *Department of Taxation v. Pabst*, 15 Wis.2d 195, 201-202, 112 N.W.2d 161 (1961), the court defined the term administer as follows:

“‘Administer’ is defined in Webster’s New International Dictionary (3d ed., unabridged), as ‘... to manage the affairs of

... to direct or superintend the execution, use, or conduct of ... to manage or conduct affairs ...”

The Legislature has used different terminology with respect to supervision and delivery of services. Section 51.22(1), for example, provides for commitment of mentally ill nonresidents to the state Department, in which case its responsibility is direct. Section 51.05(3) provides for admission to state mental health institutes, administered by the Department, of a person without a county responsible for his care. See, also, sec. 51.06, Stats.

Under certain circumstances a person with residence in a county may be placed in a state mental health institute operated by the Department, as provided in sec. 51.05(2); but such placement would probably be appropriate only in rare cases.

The legislative pattern appears to be to make the Department responsible for direct delivery of services only in state institutions and for nonresidents; and to make counties responsible for delivery of services to their residents under state supervision.

You also ask:

3. The Dane County Home is a licensed nursing home under Section 50.02, Wis. Stats. It is operated by the Dane County Hospital and Home Commission and is not controlled in any way by the Dane County Board of Public Welfare or the 51.42 Board. The population of the Home consists primarily of elderly patients, and it has no contracts or working agreements with either the lead agency or the 51.42 Board.

Under the circumstances outlined above, has the County, by establishing such a facility for the elderly, subjected the Home to court-ordered protective placement of other types of individuals for whom no suitable facilities can be found despite the provisions contained in H 32.06 (4), H 32.27 (1) and (5) (g) and H 32.29 (16) (d) of the Administrative Code?

Wis. Adm. Code section H 32.06(4) referred to above provides:

“A nursing home shall not accept or keep patients who are destructive of property or themselves, who continually disturb others, who are physically or mentally abusive to others or who

show any suicidal tendencies, unless the nursing home can demonstrate to the satisfaction of the department that it possesses and utilizes the appropriate physical and professional resources to manage and care for such patients in a way that does not jeopardize the health, safety, and welfare of such patients themselves or of other patients in the nursing home. ...”

According to *Verbeten v. Huettle*, 253 Wis. 510, 34 N.W.2d 803 (1948), and *Thomson v. Racine*, 242 Wis. 591, 9 N.W.2d 91 (1943), a valid administrative rule has the force of law.

Section 55.06(9)(a), Stats., provides that placement *may* be made to such facilities as “nursing homes, public medical institutions, centers for the developmentally disabled, foster care services and other home placements or to other appropriate facilities.” The foregoing does not require the designated facilities to accept a placement. In *State v. Ramsay*, 16 Wis.2d 154, 167, 114 N.W.2d 118 (1962), the supreme court held that a court could not require a public agency to accept custody of a person unless there is a statute authorizing the court to do so or a statute requiring the agency to accept such a placement.

“Sec. 247.23 (1), Stats., which authorizes the court during the pendency of a divorce action to provide by order for the temporary custody of children of the parties, unlike sec. 247.24, does not spell out the persons and agencies to whom the court may award such custody. It merely authorizes the court to make such a temporary custody order ‘as in its discretion shall be deemed just and reasonable.’ While sec. 247.23 (1) may grant broader custody powers to the court than sec. 247.24, the court cannot compel any agency, public or private, to accept such awarded custody against the will of those charged with the administration of the agency, absent some specific statute so requiring.”

BCL:BL

Newspapers; Open Meeting; Schools And School Districts; The presence of more than one-half of the members of a governmental body in one place presumptively creates a meeting within the meaning of the open meeting law, but the presumption is rebuttable and it is necessary to look to the facts in each case, including whether the members are convening for the purpose of exercising responsibilities, authority, power or duties delegated in the body. OAG 72-77

August 24, 1977.

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

You request my advice pursuant to sec. 19.98, Stats., on a number of questions which arose in the City of Kenosha with respect to compliance with the open meeting law. The open meeting law consists of secs. 19.81-19.98, Stats., and was created by ch. 426, Laws of 1975. For the purposes of this opinion it is assumed that the Kenosha School Board is comprised of seven members and that no notice of a school board meeting had been given by the chief presiding officer of the board, to the public, to the board's official newspaper or to members of the news media who had requested notice.

Section 19.82(2), Stats., provides:

“(2) ‘Meeting’ means the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. *If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body.* The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter.” (Emphasis added.)

1. Could an individual school board member attend a meeting of school parents, whether it be PTA or PTO, if invited, and participate as a member of the audience, as a member of a panel, or as a speaker without violating the open meeting law?

The answer in each case is yes. There would not be a convening of a meeting of the school board or of a formally constituted subunit thereof. Since less than one-half of the members of the school board would be present, there would be no presumption that a meeting of the school board was involved.

2. Would there be a violation of the open meeting law if four or more members attended a parents' meeting, *individually* discussed school-related problems with various parents and *individually* asked questions of the parents' organization, officers or of panelists?

In my opinion the answer is no. Even though more than one-half of the members of the school board were present, the facts rebut the presumption of a school board meeting. The board members are acting as individual members of the board and there appears to be no convening of a meeting of the school board.

3. Would there be a violation if one school board member participated in a panel and three or more other members observed from the audience?

In my opinion the answer is no. The facts rebut any presumption of a meeting of the school board created by the unplanned attendance at the meeting of another body of more than one-half of the members of the school board.

4. Would there be a violation if four or more members participated in a panel by themselves or with other panelists and discussed responsibilities, authority, powers, or duties vested in the school board?

I cannot answer this question without further information.

A "meeting" is defined in sec. 19.82(2), Stats., in terms of the purpose for which it is convened, *i.e.*, "exercising the responsibilities, authority, power or duties delegated to or vested in the body." It is my opinion, therefore, that an assembly of more than a quorum of school board members at which it was intended that specific problems of the specific school district would be discussed by and between members of the board, or by and between members and members of the public within such district, would be a "meeting" within the meaning of sec. 19.82(2), Stats.

On the other hand, the term "meeting" does not include "any social or chance gathering or conference which is not intended to

avoid" the open meeting law. Sec. 19.82(2), Stats. Any attempt to distinguish by definition between "meeting" and "conference" for purposes of this opinion would be futile, as a "conference" in which members of a governmental body participate, convened for the purpose of exercising the responsibilities, etc., of that body would be a "meeting" within the meaning of sec. 19.82(2), Stats., whereas a meeting, convened for some other purpose, is not a "meeting" as defined in that section, whatever it may be called. In other words, in order to determine whether a violation of the open meeting law has occurred, it is necessary to focus on the purpose and intent for which an assembly of a quorum of a governmental body is convened and not on such other factors as the number of non-member participants, the label placed on the meeting, or the person by whom the meeting is convened.

The presumption that the members of the school board are meeting for the purpose of exercising the responsibilities, etc., vested in the board will of course apply in your example. Whether or not it can be rebutted, however, will depend upon the facts as they appear in a particular case in light of the discussion above.

5. Would there be a violation if one member participated on a panel and three or more other members who were in the audience asked questions of or responded to questions from panel members with respect to school district business?

No, because the convening of the members is not "for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body."

BCL:RJV

Assessments; County Board; County Clerk; Elections; Indians; Land; Residence, Domicile And Legal Settlement; Taxation; Towns; Indians residing on nontaxable land are electors of the town of residence.

Where new towns are created by division, each such town must be 36 sections in area, unless each such town, after division, has 75 electors and taxable real estate of \$200,000 or more. OAG 73-77

August 26, 1977.

RICHARD STADELMAN, *District Attorney*
Shawano and Menominee Counties

You have submitted a number of questions arising from the filing of a petition signed by 66 taxpayers in the Town of Bartelme, Shawano County, with the county clerk requesting the division of the town pursuant to sec. 60.05, Stats. The proposed division would divide the Town of Bartelme into one new township which would include the taxable lands of the present town and another new township which would include the nontaxable Stockbridge-Munsee Reservation land also located in the present town.

Chapter 60 of the Wisconsin Statutes sets forth procedures for the organization of new towns as well as procedures for the division and dissolution of existing towns.

Section 60.05(1), Stats., provides:

“When fifty or more freeholders, residents of any town, and at least one-third of the electors thereof, shall petition the county board to divide, or to dissolve such town, and shall, at least twenty days before the next annual meeting, file a copy of such petition with the town clerk, he shall, at least ten days before such town meeting, give notice that the question of division, or of dissolution, as the case may be, of such town will be voted upon by ballot at such meeting”

Section 60.05(3)(a) provides:

“No town shall be divided so as to constitute or leave any town of less than 36 sections in area unless each such town after division has 75 electors and real estate valued at the last preceding assessment at \$200,000 or more.”

The specific questions you ask can be answered primarily by reference to these statutory provisions and the Wisconsin Constitution. Following is a brief discussion of each specific question you ask:

“1. Are Indians residing on non-taxable land considered electors of a town?”

The answer is “yes.”

Wisconsin Constitution art. III, sec. 1, defines electors:

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

“(1) Citizens of the United States.

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

The twenty-sixth amendment to the United States Constitution defines elector as anyone over eighteen years of age. Section 6.02(1), Stats., conforms with the twenty-sixth amendment.

By the Act of June 2, 1924 (43 Stat. 253), all Indians born within the territorial limits of the United States who had not theretofore acquired citizenship were declared to be citizens. That Act provides in part:

“That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: *provided*, that the granting of such citizenship shall not in any manner impair or otherwise affect the rights of any Indian to tribal or other property.” See 8 U.S.C. sec. 1401.

Clearly, members of the Stockbridge-Munsee Tribe who reside on nontaxable land within the Town of Bartelme are electors of the town. See also 24 Op. Att’y Gen. 207 (1935); 16 Op. Att’y Gen. 272 (1927).

“2. May a special town meeting under Section 60.12 of Wisconsin Statutes and election be used rather than an annual meeting for the town vote on the question of division?”

The answer is “yes.”

Section 60.05, Stats., provides that petitioner shall:

“... at least twenty days before the *next annual meeting*, file a copy of such petition with the town clerk, he shall, at least ten

days before such town meeting, give notice that the question of division, or of dissolution, as the case may be, of such town will be voted upon by ballot at such meeting” (Emphasis added.)

At first glance, it might appear that the requirement set forth in sec. 60.05, Stats., that the division question be voted upon by ballot at the “next annual meeting,” conflicts with sec. 60.12, Stats. Section 60.12 provides *inter alia* that “Special town meetings may be held for the purpose of transacting any lawful business which might be done at the annual meeting.”

The principle of statutory interpretation that governs here is that statutes relating to the same subject matter “should be read together and harmonized, if possible.” *Czaicki v. Czaicki*, 73 Wis.2d 9, 17, 242 N.W.2d 214 (1976); *City of Milwaukee v. Milwaukee County*, 27 Wis.2d 53, 56, 133 N.W.2d 393 (1965). This was done in *Lewis v. Eagle*, 135 Wis. 141, 115 N.W. 361 (1908), where the court found no irreconcilable conflict between sec. 788, Stats. (1898), the “special town meetings” statute and the specific “annual town meeting” provisions of sec. 776, Stats. (1898). The issue was whether the matter of building a town hall could be considered at a special town meeting when this was specifically enumerated in sec. 776(10), as a power to be exercised at any annual town meeting. The court interpreted sec. 788 as being in conformity with the specific provisions of sec. 776, thus permitting the matter of building a town hall to be considered at a special town meeting. *Lewis* is still valid law in Wisconsin.

Section 60.05(1), Stats., mentions the annual town meeting as an appropriate time for the election, but it does not specifically exclude the use of a special town meeting for this purpose. Section 60.12 provides that “any lawful business which might be done at the annual meeting” may also be done at a special town meeting. Since there is no irreconcilable conflict between these statutes, it is my opinion that the election may be held at a special town meeting.

“3. May the last preceding assessment referred to in Sub. (3) of 60.05 be an assessment made when the property was last taxable?”

The answer is “no.” It means the last preceding assessment of lands which are currently taxable.

You state that under the proposed division of the Town of Bartelme a new town consisting of all currently taxable land would be created and a second town consisting of Stockbridge-Munsee Reservation lands which are not currently taxable would also be created. Each new town would be less than 36 sections in area, and therefore, sec. 60.05(3)(a), Stats., would prohibit the division of the town unless each such town after division *has* 75 electors and real estate valued at the last preceding assessment at \$200,000 or more.

Section 60.05(3)(a) prohibits the creation of a new town unless it contains "real estate valued at the last preceding assessment at \$200,000 or more." The apparent purpose of this requirement is to ensure that each new town after division has a sufficient revenue source to support its government and provide services for its residents. I believe this requirement refers to the assessment by the town and not by the state because similar references, for example, in sec. 60.06, Stats., make clear that it is "assessed valuation" that is required. Although ch. 60 of the statutes does not specifically define "assessed valuation," the frame of reference for all statutes using the term "assessed value" or "total value" or "value of taxable property" (which terms are synonymous, see 63 Op. Att'y Gen. 465 (1974)) is property subject to taxation. A definition of "assessed value" is contained in ch. 66, Stats. Section 66.021(1)(b) defines "assessed value," to mean "The value for general tax purposes as shown on the tax roll." Based on such definition, property exempt from taxation under the statute or property otherwise not taxable cannot be considered in determining whether the terms of sec. 60.05(3)(a) have been met. See *State ex rel. Marinette, T. & W.R. Co. v. Tomahawk Common Council*, 96 Wis. 73, 91-93, 71 N.W. 86 (1897); *School District v. First Wisconsin Co.*, 187 Wis. 150, 152, 203 N.W.2d 939 (1925); and 62 Op. Att'y Gen. 49 (1973).

The present Stockbridge-Munsee Reservation lands were purchased by the federal government for the use and benefit of the Stockbridge-Munsee Tribe. Such purchases were authorized and made pursuant to the Indian Reorganization Act (48 Stat. 984, 25 U.S.C. sec. 461, et seq.) and other federal enabling legislation. That legislation specifically exempts Stockbridge-Munsee land from taxation by the state. Since the Stockbridge-Munsee Reservation lands are not taxable and since assessed valuation is limited to taxable property, it follows that a new town established under sec.

60.05, Stats., would not have at least \$200,000 in taxable real estate as a revenue base.

“4. Or in the alternative to question number 3, may the County Board consider what would be a fair assessment if the land were not a reservation and thus taxable?”

Based on the analysis set forth in response to question number 3, such procedure is not permissible. The clear intent of the Legislature is to ensure that each new town after division has a sufficient revenue source to support its government and provide services for its residents.

“5. May a division under Section 60.05 of Wisconsin Statutes create taxable islands within the reservation nontaxable portion?”

This question becomes academic in view of the answer to questions 3 and 4. Consequently, it is unnecessary at this time to comment on this question.

I trust that this information will be helpful to you in your consultation with the Shawano County Board regarding the taxpayers' petition.

BCL:JN

Boundaries; County Surveyor; Natural Resources, Department Of; Navigable Waters; Plats And Platting; Public Lands; Surveying; Surveys; Methods discussed for establishing or reestablishing an E-W 1/4 line and the center 1/4 corner when the E 1/4 corner falls in a meandered lake. OAG 74-77

August 29, 1977.

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

You ask how an E-W 1/4 line and the center 1/4 corner are determined when the E 1/4 corner falls in a meandered lake.

Your request has required several telephone and personal conferences to delineate the questions involved. Section 36, T39N,

R10E, Oneida County (hereinafter referred to as section 36), gives rise to the questions submitted. The DNR owns both the SW 1/4 of the NW 1/4 and the SW 1/4 of section 36 and wishes to survey and monument the parcels properly. Such a survey will require placing or replacing the center 1/4 corner.

Introduction

Sections 59.62, 59.635(8) and 60.38, Stats., require that resurveys of the public lands follow the rules established by the federal government. These rules are contained in the *Manual of Instructions for the Survey of the Public Lands of the United States 1973*, published by the Department of the Interior, Bureau of Land Management (hereinafter referred to as the *Manual*).

Corners established in the survey of the public lands were town, section, 1/4 section and meander corners. *Manual*, ch. 5:4. You state that dependent resurveys have reestablished all the original corners of section 36, T39N, R10E, Oneida County pursuant to the *Manual*. See *Manual*, ch. 6:4, 25-32.

The subdivision of the section interiors was left to the local or county surveyor. Federal rules, however, govern the subdivision of section interiors. *Manual*, ch. 3:47-76; sec. 59.62, Stats.

Section 36 herein is considered a fractional section. That is, Range Line Lake occupies a portion of the section. Beds of lakes were not part of the public land system and were not subject to disposal by the United States. Sovereignty over lake beds lies with the states. *Manual*, ch. 1:12. *Illinois Steel Co. v. Bilot and wife*, 109 Wis. 418, 426, 84 N.W. 855 (1901). Range Line Lake was meandered by the original surveyors and lies astride the E section line of section 36 (also a town line). Range Line Lake covers about 125 acres.

As required, the original surveyors established meander corners on the North and South edges of Range Line Lake where the E section line intersected the edges of the lakeshore. These meander corners have been reestablished in section 36. The E 1/4 corner never was established by the original surveyors because it fell in the lake bed of Range Line Lake. Since the existence of all four 1/4 corners of a section is the key to the subdivision of a section, missing 1/4 corners, like the E 1/4 corner in sec. 36 herein, provide and have provided problems for surveyors. Solutions vary somewhat. Stated in a better way, the rules are fairly clear but applying them in the field

sometimes is difficult. These difficulties pale, however, when compared to those endured by some of the first surveyors. Surveyor Harry A. Wiltse reported an original public land survey in Wisconsin in the year 1847 as follows:

“The aggregate amount of swamp traversed by the two lines was about one hundred and seventy-five miles, a considerable portion of which might be termed windfall. (Fallen trees, etc.)

“During four consecutive weeks there was not a dry garment in the party, day or night.

“Consider a situation like the above, connected with the dreadful swamps through which we waded, and the great extent of windfalls over which we clumb and clambered; the deep and rapid creeks and rivers that we crossed, all at the highest stage of water; that we were constantly surrounded and as constantly excoriated by swarms or rather clouds of mosquitoes, and still more troublesome insects; and consider further that we were all the while confined to a line, and consequently had no choice of ground ... and you can form some idea of our suffering condition.

“Our principal suffering, however, grew out of exhaustion of our provisions, coarse as they were.... Worn out by fatigue and hardship, and nearly destitute of clothes, they had now to make a forced march of three days for the lake in search of provisions, of which, during that three days, they had had not a mouthful.

“I contracted to execute this work at ten dollars per mile ... but would not again, after a lifetime of experience in the field, and a great fondness for camp life, enter upon the same, or a similar survey, at any price whatever.” Reports to U.S. General Land Office as reprinted in *Public Land Surveys*, Lowell O. Stewart, p. 84.

Jurisdictions

You state that surveyors are concerned because they “must conduct their surveys in such a manner so as to protect their client’s property rights as well as their own reputations as professionals.” For the purposes of this opinion, the duties of the surveyor are as follows: The surveyor examines all the evidence available to locate or relocate lines and corners and interprets such evidence to form a professional

opinion concerning locations of such lines and corners. The convincing power of his opinion depends on many factors, some of which are as follows: skill in the use of instruments; training and experience; knowledge of legal presumptions and rules; knowledge of possible sources of information; detective, research and interpretative abilities; and patience. In his resurvey, the surveyor also must note disparities between possession and title lines and corners. In *Beduhn v. Kolar*, 56 Wis.2d 471, 476, 202 N.W.2d 272 (1972), the court stated:

“A survey of a description does not determine title to land but seeks to find and identify the land embraced within the description. ...”

The courts hold the authority to declare property rights. That is, the courts ultimately declare, based on evidence presented, the location of lines and corners and whether possession or title lines and corners control in particular boundary disputes. See *Manual*, ch. 6:11-18.

State courts hold final authority over land within their boundaries which is privately owned, state owned and federally owned now, but once privately owned. The best example of the latter ownership in Wisconsin is federal forest lands like the Nicolet and Chequamegon National Forests. Federal courts hold final authority over boundary disputes between the states, control of navigation, and submerged lands beyond the 3-mile limit. The Wisconsin Supreme Court is the final authority for questions presented in this opinion. C. Brown, *Boundary Control and Legal Principles* (2nd ed. 1969), pp. 197-198.

Meander Corners and Lines

The significance of a meander line is stated in the *Manual*, ch. 3:115, as follows:

“... The general rule is that meander lines are run not as boundaries, but to define the sinuosities of the banks of the stream or other body of water, and as a means of ascertaining the quantity of land embraced in the survey; the stream, or other body of water, and not the meander line as actually run on the ground, is the boundary. ...”

In accord, *Wisconsin Realty Co. v. Lull*, 177 Wis. 53, 59, 187 N.W. 978 (1922); *Wright v. Day and another*, 33 Wis. 260, 263-264 (1873).

Meander corners established by the original surveyors marked the direction of section or town lines to a meandered body of water. That is, the meander post itself usually was set a certain distance back from the water's edge. See *Wright v. Day, supra*. The setback minimized destruction of the meander post by high water, waves and ice. Setback of meander posts is required by federal rule. *Manual*, ch. 3:117.

The true property corner is the ordinary high watermark, not the meander corner. See, *Mayer v. Grueber*, 29 Wis.2d 168, 173-175, 138 N.W.2d 197 (1965); *Diana Shooting Club v. Hustings*, 156 Wis. 261, 272, 145 N.W. 816 (1914). The meander corner only controls the direction of a line to its intersection with the water and such intersection is the property corner. The meander corner is not used as a measuring point. In *Underwood and another v. Smith and another*, 109 Wis. 334, 340, 85 N.W. 384 (1901), the court stated:

“... the meander post is not a corner nor the meander line a boundary. The lake ... is the boundary, and not the meander line or meander post. ...”

In *Thunder Lake L. Co. v. Carpenter*, 184 Wis. 580, 583, 200 N.W. 302 (1924), the court stated:

“... The so-called meander corner *is not a fixed point for measurements*, as are established section corners and quarter corners, but is a marker for courses. ...” (Emphasis supplied.)

(Note: Meander corners and lines sometimes become property corners and lines in fraudulent surveys. *Manual*, ch. 7:77-93; *Kind v. Vilas County*, 56 Wis.2d 269, 201 N.W.2d 881 (1972); *Schultz v. Winther*, 10 Wis.2d 1, 101 N.W.2d 631 (1960); *Lakelands, Inc. v. Chippewa & Flambeau Imp. Co.*, 237 Wis. 326, 295 N.W. 919 (1941); *Brothertown Realty Corporation v. Reedal*, 200 Wis. 465, 227 N.W. 390 (1930); sec. 30.10(4)(b), Stats.)

Surveying Section 1/4 Lines and the Center 1/4 Corner.

Section 59.62, Stats., provides in part as follows:

“Subdividing sections. Whenever a surveyor is required to subdivide a section or smaller subdivision of land established by the United States survey he shall proceed according to the statutes of the United States and the rules and regulations made by the secretary of the interior in conformity thereto. ...”

When opposite 1/4 corners have been found or reestablished, a line is run between such opposite 1/4 corners to establish the 1/4 line. *Manual*, ch. 3:77. When opposite 1/4 corners cannot be fixed, 1/4 lines are run in a cardinal direction or more often on a mean bearing of the corresponding section lines. The *Manual*, ch. 3:88, provides as follows:

“The law provides that where opposite corresponding quarter-section corners have not been or cannot be fixed, the subdivision-of-section lines shall be ascertained by running from the established corners north, south, east, or west, as the case may be, to the water course, reservation line, or other boundary of such fractional section, as represented upon the official plat.

“In this the law presumes that the section lines are due north and south, or east and west lines, but usually this is not the case. Hence, in order to carry out the spirit of the law, it will be necessary in running the center lines through fractional sections to adopt mean courses where the section lines are not on due cardinal, or to run parallel to the east, south, west, or north boundary of the section, as conditions may require, where there is no opposite section line.”

The intersection of the 1/4 lines run establishes the center 1/4 corner and it becomes “the corner common to the several quarter sections, or the legal center of the section.” *Manual*, ch. 3:87.

Survey of Section 36, T39N, R10E, Oneida County, if previously not subdivided.

The original plat and field notes must be consulted on a survey like that herein. The Bureau of Land Management pamphlet *Restoration of Lost or Obliterated Corners and Subdivision of Sections, a Guide for Surveyors 1973* provides that original town, section and 1/4 corners must stand as the true corners which they represent whether or not they are in the places shown by the field notes. Further, a grant of the public lands includes the official plat and field notes. In *Cragin v. Powell*, 128 U.S. 691, 696 (1888), the Court stated:

“... It is a well settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions and landmarks, becomes as much a part of the grant or deed by which they are conveyed, and controls so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself.”

Copies of the original plat and field notes may be obtained from the Commissioners of Public Lands, State of Wisconsin, Madison, Wisconsin.

Town lines which form the E and S lines of section 36 herein were surveyed by H. C. Fellows in July, 1859. The W and N section lines were surveyed by William E. Daugherty in October of 1863. The plat and the field notes from which the plat was prepared indicate that the section was surveyed properly.

Daugherty's survey of the N section line is subject to suspicion, however. His field notes indicate that he ran a random line east 79.80 chains from the NW section corner (Variation 5° E) to “Intersect Range line 21 links South of Post,” or 21 links south of the post marking the NE corner of section 36 set by Fellows in 1859. Daugherty's notes then show that he returned westward setting the N 1/4 post at 39.90 chains, or the midpoint of the N section line.

Resurvey of the N section line has established two lines of markedly different bearings, rather than one straight line as indicated on the original plat. Resurvey has established a bearing of S 87° 58' E for the line between the NW section corner and the N 1/4 corner, and a bearing of S 65° 17' E for the line from the N 1/4 corner to the NE section corner.

If Daugherty actually had run the random line east to intersect the range line in the direction he recorded, the random line would have fallen about 8 chains north of the NE section corner rather than 21 links south thereof as reported in his field notes. The excess or falling allowed for such lines in 1863 was 50 links. The disparity between Daugherty's notes and resurvey findings indicate that Daugherty probably only ran the N section line from the NW section corner to the N 1/4 corner and never actually ran the random line east to the NE corner, then returning to set the N 1/4 corner.

Resurveys by local surveyors over the years have revealed this pattern of "shortcutting" employed by Daugherty. In many surveys in the area, Daugherty ran northward on a meridional line and only extended lines east and west from the section corners one-half mile, setting 1/4 corners. He made up notes for the survey of last 1/2 mile in his field book. Since contract surveyors like Daugherty were paid by the mile, he apparently doubled his mileage rate on some surveys.

A survey of the interior of section 36, if previously not subdivided, would require adoption of a mean course to establish the E-W 1/4 line. That is, a mean course would be calculated between the NW and NE corner of section 36 on a straight line. (One Method: The sum of the bearings of each line times the distance of each line; divided by the total length of the lines.) The E-W 1/4 line then would be run to the west shore of Range Line Lake on a mean course between that established for the N line of the section and that of the S line of the section. As an example, if the N line were found to be S 79° E and if the S line were S 86° E the E-W 1/4 line would be S 82° 30' E and a meander corner would be set on that line at the west edge of Range Line Lake. The N-S 1/4 line then would be run between the established N 1/4 and S 1/4 corners and the legal center of the section would be monumented at the intersection of the N-S, E-W 1/4 lines.

The Wisconsin "equidistant" rule probably now invalid.

Section 59.62, Stats., requires application of the federal rules for section subdivision. Section 59.62, Stats., became effective in its present form March 26, 1970. Ch. 499, Laws of 1969. The "equidistant" rule was adopted in *Thunder Lake L. Co. v. Carpenter*, 184 Wis. 580, 583, 200 N.W. 302 (1924), and affirmed in *Gahan v. Lymer*, 196 Wis. 313, 317-318, 220 N.W. 532 (1928).

Both of the above cases arose out of disputes in sections 27 and 28, Town 39 N, R 11 East, Oneida County, over locations of N-S, E-W 1/4 lines because some 1/4 corners and section corners fell in meandered lakes. The government surveyors, never set section or 1/4 corners in meandered lakes. Both sections contained so much lake area that almost all the land area was designated government lots on the original plat. Establishment of the N-S, E-W 1/4 lines affected the size, waterfronts or ownership of several lots in both cases. The rule enunciated in the *Thunder Lake* case was stated as follows at 184 Wis. 583:

“... the west quarter corner never having been located and fixed by the government so as to become a permanent standard [because it fell in a meandered lake], the trial court properly determined that the true east-and-west quarter line should be placed equidistant between the north and south lines of the section, thus distributing the conceded deficiency in this section equitably and ratably over the entire section. ...”

If the *Thunder Lake* rule were applied in section 36 herein the E-W 1/4 line would have two bearings corresponding to the N section line in order to satisfy the requirement that the E-W 1/4 line “be placed equidistant from the north and south lines of the section.” By definition quarter lines are straight lines. *Manual*, ch. 3:87. The course of such a line must be a mean. *Manual*, ch. 3:88. The *Thunder Lake* rule conflicts with the requirements of the rules adopted by sec. 59.62, Stats., and therefore should yield.

Resurvey of Section 36, T39N, R10E, Oneida County, if previously subdivided.

You have submitted copies of Surveyor D. H. Vaughn’s notes for April, 1901, and May, 1915. Vaughn was the first person to survey the interior of section 36 herein.

On April 3, 1901, Vaughn established the E 1/4 corner on the ice at 40.43 36/100 chains from the SE section corner by single proportionate measure between the meander corners. Proportioning between meander corners is improper. *Manual*, 5:34, *Underwood* and *Thunder Lake* cases, *supra*. Then he ran a line west 80 chains to establish a temporary W 1/4 corner. The original W 1/4 corner could not be found. On April 4 and 5, 1901, he found the SW and NW section corners and reestablished the W 1/4 corner equidistant between the NW and SW section corners at 44.41 chains. On April 5, 1901, Vaughn then corrected the E-W, N-S 1/4 lines and set the center section corner. He recorded the directions of the N-S, E-W 1/4 lines and the distances from the center 1/4 corner as follows:

“Course of NS 1/4 line 6.33 W
 EW 1/4 line 2.54 W
 Distance to N 1/4 line 47.47
 S 1/4 line 42.88
 E 1/4 line 34.60
 W 1/4 line 40.99”

On April 5, 7 and 10, 1901, Vaughn set some further corners as follows in the NE 1/4 of sec. 36:

- 23.73 Chains N of Center 1/4 Corner set 1/8 post;
- 17.30 Chains E of Center 1/4 Corner (on ice) set 1/8 post;
- 14.03 Chains E of N 1/4 Corner set 1/8 post;
- E 31.33 Chains from N 1/8 Post on N-S 1/4 line set 1/16 post.

Meander Corners:

Corrected E-W 1/4 line E from center 1/4 section corner to lake and set meander post 25.84 chains W of E 1/4 post (on ice).

N from E 1/8 post (on ice) 43.50 Chains to E 1/8 post on N section line then corrected back setting meander corner 11.00 chains N of E 1/8 post (on ice)

Reset meander corner on N side of Range Line Lake on E section (town) line.

In 1915, Vaughn established more 1/8 corners in the NW 1/4 of section 36, but the copy of his notes submitted is very difficult to read. In any event, for purposes herein, Vaughn did establish a center 1/4 corner in section 36 herein and a meander corner at the W edge of Range Line Lake on the E-W 1/4 line.

At the present time, Vaughn's center quarter corner has not been recovered. You state, however, that Vaughn's meander corner at the W edge of Range Line Lake on his E-W 1/4 line can be recovered by competent witnesses although physically it has disappeared because of erosion of the west bank of the lake. Thus, Vaughn's E-W 1/4 line and the center 1/4 corner can be reestablished by running a course from the W 1/4 corner to the replaced meander corner on the W edge of Range Line Lake and where such line intersects the N-S 1/4 line, Vaughn's center 1/4 corner can be reestablished.

Is the DNR bound by Vaughn's survey? That is, must the DNR reestablish Vaughn's improperly placed center 1/4 corner, or must DNR follow the mandate of sec. 59.62, Stats., and place the center 1/4 corner as provided in the *Manual*?

A center 1/4 corner is not subject to any statute like the federal statute which declares that exterior section corners as originally

placed are unchangeable even if incorrectly placed. *Manual*, ch. 1:20. If, however, property rights have accrued in reliance on Vaughn's interior lines and corners by possession, adverse possession, prescription, estoppel or otherwise the courts are reluctant to disturb such lines and corners. In *Nagel v. Philipsen*, 4 Wis.2d 104, 110, 90 N.W.2d 151 (1958), the court stated:

“We deem the case of *Baldwin v. Harrelson* (1934), 229 Ala. 469, 470, 158 So. 416, to be directly in point on this issue. We quote from the opinion in that case as follows:

“It is firmly settled, in our decisions, that a survey of lands intended to locate the boundary between adjoining lands, followed by acquiescence and possession by both adjoining owners to the line thus located, is evidence of the verity of such line; and *prima facie* establishes same as a true line, without regard to the statute of limitations. *Chambless v. Jones*, 196 Ala. 175, 71 So. 987; *Cooper et al. v. Slaughter*, 175 Ala. 211, 57 So. 477; *Oliver v. Oliver*, 187 Ala. 340, 65 So. 373; *Smith v. Rachus et al.*, 195 Ala. 8, 70 So. 261; *Wragg v. Cook*, 220 Ala. 111, 124 So. 228.”

See also, *Seybold v. Burke*, 14 Wis.2d 397, 400-403, 111 N.W.2d 143 (1961); *Grell v. Ganser*, 255 Wis. 381, 383-384, 39 N.W.2d 397 (1949); *Neff v. Paddock and others*, 26 Wis. 546, 550-551 (1870).

It is therefore my opinion that the DNR properly can establish the E-W 1/4 line and the center quarter corner of section 36 herein pursuant to the *Manual* if property rights are not disturbed. However, it is my opinion that a court probably would declare that property rights have accrued over the last 80 years in reliance on Vaughn's E-W 1/4 line and center 1/4 corner so that his E-W 1/4 line and center 1/4 corner have, in fact, become the title line and corner.

CONCLUSION

The surveyor, thus, faces a mix of legal and surveying principles in determining the location of original lines and corners and title and possession lines and corners. Whether his opinion prevails as to locations of such lines and corners depends on his ability to find and evaluate evidence and convince the court of its soundness. In *Rosen v.*

Ihler, 267 Wis. 220, 225, 64 N.W.2d 845 (1954), *cert. denied*, 348 U.S. 972 (1955), the Wisconsin Supreme Court stated:

“The testimony of the surveyors clearly indicates that there was no unanimity of opinion between them as to correct survey practice that was to be employed under conditions as here in the ascertainment of the location of the section line. Mr. Corbett looked for lost corners and used the ‘proportionate method.’ Mr. Hall and Mr. Grimmer, while considering the notes of the government survey, allowed specially for variation between the magnetic bearing and the true bearing. Mr. Rollman agreed that the method employed by Hall and Grimmer was in conformity with recognized surveying practice. Mr. Corbett testified that instead of using magnetic variations, he ran the line from points--although the known points were not designated by markers.

“In the absence of a showing that the method employed by Mr. Corbett was the only one recognized in surveying practice and that his was the only result possible, it was clearly within the province of the court to determine the weight and credibility of the testimony of these witnesses.”

BCL:JPA

Cities; Common Council Education; Municipalities; Real Estate; Sales; Schools And School Districts; Subject to approval of the fiscal board or the city council, a city school district has the authority to sell real and personal property no longer used for school purposes. Under sec. 120.56(2), Stats., money received from such sales must be placed in a sinking fund under the control of the fiscal board to be used for educational purposes. Municipalities may enter into an agreement with a joint school district to provide for the sale or transfer of property being used by the school district for educational purposes. Such agreement may provide for the payment of the purchase price in services, materials or property provided that the value of such purchase price constitutes the fair market value. OAG 77-77

September 13, 1977.

DR. BARBARA THOMPSON, *State Superintendent*

Department of Public Instruction

You have requested my opinion with respect to the following questions:

“Upon the sale of school district property (includes a school building) which governmental body, the Joint City School District or the City, should be entitled to the proceeds received from such sale?

“Further, if the Joint City School District property is not sold and is claimed by the City for a park or other city purpose, would the Joint City District be entitled to proceeds from the city for the fair market value of the real estate?”

A city school district has boundaries which are coterminous with that of the city. A joint city district is created when an order of reorganization of a city school district is made pursuant to secs. 117.02 or 117.03, Stats., attaching territory to the city school district for school purposes only (see sec. 115.01(3), Stats.).

Joint city districts are subject to fiscal control by a fiscal control board constituted under sec. 120.50(1), (2), Stats.

In addition, sec. 120.56(2), Stats., provides:

“In the case of a joint city school district, the proceeds from sale of school property shall be deposited in the sinking fund authorized by sub. (1) to be used and expended as provided in sub. (1).”

Therefore, in answer to your first question, the money received from the sale of joint school district property must be deposited in a sinking fund to be used by the joint school district for educational purposes.

In answer to your second question, the city, even though it has legal title (see sec. 120.09(4), Stats.), could not claim a right to beneficial use of the property in question without payment to the school district for its interest.

In *West Milwaukee v. West Allis*, 31 Wis.2d 397, 412, 143 N.W.2d 19 (1966), a case relating to a joint city school district and the fiscal control board, the court wrote:

“Under the present statutes, a city like West Allis not only has a wider territory for school purposes than it does for ordinary municipal purposes, but it also has a body with control of tax and fiscal matters (the fiscal board) which is representative of the wider territory and which is different from the body with control of ordinary municipal tax and fiscal matters, the common council. ... [We] conclude as did the circuit court that it is equitable that interest on school funds should augment the funds under the control of the fiscal board rather than the funds under the control of the common council.” (Bracketed material supplied.)

It is my opinion based on this case that the joint school district has an equitable interest in the real estate and personal property used by it for educational purposes.

The value of the interest of the joint city school district is a fair market value of the property. Anything less than a fair market value basis for purposes of sale would, without legal justification, diminish the equity of the school district taxpayers.

Section 120.49(4)(a), Stats., gives the school board of a city school district the authority to “purchase sites for school buildings or other school uses and construct buildings.” In my opinion authority of a school district to sell property may be implied from this section. In *S. D. Realty Co. v. Sewerage Comm.*, 15 Wis.2d 15, 27, 112 N.W.2d 177 (1961), the court noted that the sewerage commissions had the statutory power to acquire real estate and the court concluded that they possessed the implied power to alienate or lease property. Purchase and sale of property, however, are subject to approval of the fiscal board in case of a joint city district or the city council in case of a city district. Secs. 120.49(4)(a) and 120.50(3), Stats.

If a municipality is the vendee, an agreement may be made with the school district pursuant to sec. 66.30, Stats. Because of its equitable property interest, the school district is a “municipality” for purposes of entering into a 66.30 agreement. *Compare Joint School v. Wisconsin Rapids Ed. Asso.*, 70 Wis.2d 292, 234 N.W.2d 289

(1975). In addition, circumstances may permit the use of an agreement provided for in sec. 120.13(3), Stats.

Such agreements should provide for the payment of the consideration on the basis of fair market value, either in cash or its agreed equivalent such as services, materials and/or real and personal property. The consideration received should be used for educational purposes. *See West Milwaukee v. West Allis* at p. 408-410.

BCL:JWC

Circuit Court; County Court; Courts; Documents; Words And Phrases; A circuit or county court may use as its official seal on documents an ink seal printed by a rubber stamp. OAG 78-77

September 14, 1977.

FRANK VOLTPIRESTA, *Acting Corporation Counsel*
Kenosha County

Corporation Counsel Salituro asked whether the circuit and county courts in Kenosha County can use seals in the form of a rubber stamp. My answer is "yes."

Section 990.01(37), Stats., in defining "seal" states:

"... If the seal of any court or public officer is required to be affixed to any paper issuing from such court or officer 'seal' includes an impression of such official seal made upon the paper alone."

The key word in this definition is "impression." Section 990.01(1), Stats., provides that words and phrases contained in the statutes "shall be construed according to common and approved usage." In looking to *Webster's Seventh New Collegiate Dictionary*, one finds that the definition of "impression" includes "an affecting by stamping or pressing" and "the effect produced by impressing: as...a stamp, form or figure resulting from physical contact." Similarly, "impress" means "to mark by or as if by pressure or stamping." Nothing in these definitions indicates that an ink print left upon the

paper by a rubber stamp is any less an “impression” than is a physical indentation in the paper left by a mechanical sealing device.

The words “impression upon the paper alone” are words of art used by courts in the development of the common law pertaining to seals to allow latitude in what may constitute a proper seal. By the early twentieth century, various jurisdictions rejected the notion that special substances such as wax, mucilage, or wafers were needed to effect a proper seal. See *Swink v. Thompson*, 31 Mo. 336, 339 (1861); *Bradley v. Northern Bank of Alabama*, 60 Ala. 252, 253 (1877); and *Pillow v. Roberts*, 54 U.S. 472, 473 (1851). The Legislature has through its use of these words indicated that the official seal of a court is not technically limited to particular substances traditionally used in sealing documents.

In *Oelbermann and another v. Ide*, 93 Wis. 669, 673 (1896), the court stated that “A design printed in ink is not a seal of office.” Since the issue in that case was whether a handwritten alteration of a seal could constitute an official seal, however, the quoted statement is mere dicta, and not controlling here.

The obvious purpose of a seal is to help ensure the authenticity of a document. In order to serve that purpose, the seal must be durable, distinctive, and not easily forged. While a “seal” drawn with pen and ink would not satisfy those requirements, an ink seal printed by a rubber stamp *would*, and is, therefore, perfectly acceptable.

BCL:WHW

Charitable Organizations; Gifts; Intoxicating Liquors; Licenses And Permits; A gift of intoxicating liquors, made by a liquor manufacturer, rectifier or wholesaler to a liquor retailer, does not violate the “tied-house” prohibitions of ch. 176, Stats., when the liquor is dispensed by the licensed retailer, free of charge, at a wine-tasting party or similar event held for the sole benefit of a charitable organization or institution. OAG 82-77

September 23, 1977.

DENNIS J. CONTA, *Secretary*
Department of Revenue

Last year the Exchange Club of Madison, a nonprofit association, brought suit against one of your employes because of his interference in a wine-tasting event held by the Exchange Club in 1976 for the sole benefit of the Wisconsin Mental Health Association and the Madison Scouts Drum and Bugle Corps. It was alleged that the wine-tasting event was held in a licensed liquor establishment where there were licensed bartenders on the premises and all regulations relating to the dispensing of wine were observed. Solicitations for the benefit of the charities involved were made but admission was not refused to those who did not donate. The wine was supplied free of charge by licensed wholesalers and was dispensed under the license of the establishment where the event was held.

In the action in the Circuit Court of Dane County, the Exchange Club sought a declaratory judgment that the holding of the event for the benefit of charities did not violate the laws controlling the sale of wine. Judge P. Charles Jones concluded that he could not properly grant a declaratory judgment because all of the parties who would be affected by a declaratory ruling were not before the court. In the final paragraph of his memorandum decision, Judge Jones requested that the Attorney General render a formal opinion in the matter. I feel, therefore, that it is incumbent upon me to state to you and your Department my official opinion in regard to the questions presented in the lawsuit brought by the Exchange Club so that you and the members of your staff can be guided accordingly in future similar matters which may arise.

Section 176.04(1), Stats., prohibits the unlicensed sale of intoxicating liquors, or the gift of such liquors, if made with intent to evade any law of the state. It is my opinion that under the facts as stated in the complaint of the Exchange Club, this statute would not be violated since a Class B licensee would be responsible for his own premises and for the dispensing of the wine. Since such licensee is fully authorized under sec. 176.05(2), Stats., to "sell, deal and traffic" in intoxicating liquors, it makes no difference whether the wine is sold or given away.

Nor does sec. 176.17(2), Stats., make the above-described event illegal. This statutory provision, known as the “tied house” law, contains various restrictions, in substance prohibiting manufacturers, rectifiers and wholesalers of intoxicating liquors from furnishing, giving or lending anything of value, directly or indirectly, to “any person engaged in selling products of the industry for consumption on the premises where sold, or to any person for the use, benefit, or relief of said person engaged in selling as above.”

A brief examination of the legislative history of “tied house” laws reveals that such statutes were “designed to prevent or limit the control of retail liquor dealers by manufacturers, wholesalers, and importers.” 45 Am. Jur. 2d, *Intoxicating Liquors* sec. 123. The Wisconsin Supreme Court has never dealt with the question presented here, but the court in *Neel v. Texas Liquor Control Board*, 259 S.W.2d 312, 316-317 (Tex. Civ. App. 1953), included in its opinion a particularly clear explanation of the purpose of “tied house” legislation:

“We need not dwell upon the evils of the ‘tied house.’ It is obvious that one result of such control could be the creation of a monopoly for certain brands of liquors as well as dictating prices. The importance of preventing such control is reflected by a report of the United States Department of Commerce in 1941 titled *State Liquor Legislation* wherein on page 20 it is stated:

“‘The liquor control legislation enacted in the several states since the repeal of the Eighteenth Amendment to the Federal Constitution has uniformly attempted to prevent a recurrence of the evils that were prevalent before prohibition when the large liquor interests controlled, through vertical and horizontal integration, the productive and distributive channels of the industry.’

“That our own State is in accord with this legislative policy see: *Texas Liquor Control Board v. Continental Distilling Sales Co.*, Tex.Civ.App., 199 S.W.2d 1009, 1014 ... where the Court in referring to various provisions of our regulatory statutes concluded that:

“‘The Legislature, in enacting the Texas Liquor Law ... expressly determined that the liquor traffic in this State would

be best controlled by keeping the various levels of the liquor industry independent of each other”

It is thus apparent that “tied house” laws were enacted for a very definite and narrow purpose, and that the Legislature certainly did not intend to restrict the gift of liquors from wholesalers to licensees where neither receives any financial benefit from the transfer and where the gift in no way operates to give the wholesaler any sort of control over the licensee. It is well established that statutes enacted as a legitimate exercise of the police power ought not to be given a construction which is “unnecessary to the furtherance of the main purpose of the statute.” *Enos v. Hanff*, 98 Neb. 245, 152 N.W. 397, 400 (1915). I am of the opinion that a reasonable construction of sec. 176.17(2), Stats., is that gifts from liquor manufacturers, rectifiers or wholesalers to liquor licensees are prohibited only where some benefit results to one of the parties to the transfer which could be interpreted as constituting a tie-in in violation of the “tied house” law. This is not so where all benefits go to a third-party charity.

One last possibly relevant statute is sec. 176.37(1), Stats. This section provides in part that:

“The giving away of intoxicating liquors or other shift or device to evade the provisions of any law of this state relating to the sale of such liquors shall be deemed and held to be an unlawful selling”

Before a violation of this provision can be established it must be shown that the conduct complained of, that is, the giving away of intoxicating liquors, is for the purpose of evading a law of the state. Here, it is uncontested that the retailer is licensed and need not attempt to evade any provisions of law relating to the disbursement of intoxicating liquors. And the wholesaler is not attempting to evade the “tied house” law because that statute is simply not applicable to this situation.

Neither the spirit nor the letter of the state’s liquor regulation statutes is violated by events such as that conducted by the Exchange Club. The wholesaler has simply not given anything of value to the retail licensee; the wine is not for its keeping.

Amendment; Appropriations And Expenditures; Compensation; Constitution; Legislation; Legislature; Public Officials; Salaries And Wages; Current statutes require that members of both houses of the Legislature receive the same basic salary.

Amendment to sec. 20.923, subsecs. (1) and (2), Stats., is required to change this requirement. OAG 83-77

September 26, 1977.

FRED A. RISSER, *Chairman*

Committee on Senate Organization

The 1977 Committee on Senate Organization has requested my opinion as to whether members of both houses of the Legislature must receive the same basic salary. The Committee also requests an opinion concerning the procedure for changing the present salary scheme in the event that the basic salary is not required to be the same.

It is my opinion that until sec. 20.923, subsecs. (1) and (2), Stats., are amended, senators and representatives to the Assembly must be salaried at the same level. Amendment or repeal of this statutory provision and any subsequent appropriation can only be made with the concurrence of the Assembly. Furthermore, it is my opinion that any amendment or repeal of sec. 20.923(2)(b) could not affect the salary of any member of the Legislature for his or her current term of office.

In the past, several statutory procedures were used, including direct appropriation. With appropriate legislation, these or others could be used in the future.

Since the repeal in 1929 of Wis. Const. art. IV, sec. 21, the only constitutional provisions which limit the power of the Legislature to determine the level of compensation for its members are: art. IV, sec. 26; art. VIII, sec. 2; art. IV, secs. 1 and 17. The first named, as it applies to members of the Legislature, prohibits changes in compensation during the term of office of any member. (See 55 Op. Att'y Gen. 159 (1966), and references contained therein.)

Article VIII, sec. 2, states: "No money shall be paid out of the treasury except in pursuance of an appropriation by law." Article IV, sec. 17, provides: "no law shall be enacted except by bill." Finally, art. IV, sec. 1, makes it clear that no bill can be passed without the concurrence of both houses of the Legislature: "The legislative power shall be vested in a senate and assembly." Thus any appropriation, including the salaries of legislators, requires the joint action of both houses of the Legislature.

The two statutory provisions which control the level of compensation to legislative members are secs. 20.923 and 20.002, Stats. The former sets the level of compensation, the latter controls the time during which that level remains in effect.

Section 20.923, Stats., reads in pertinent part:

"**20.923 Statutory salaries.** It is the finding of the legislature that the current wide diversity of salary-setting authority has resulted in inequitable and disparate relationships between and among administrative positions in the several branches of government, and that a consistent and equitable salary setting mechanism should be established for these positions. To effectuate this finding, all elected officials ... unless specifically excepted by law, shall be assigned to the appropriate executive salary group ... and all such included positions shall be subject to the same basic salary establishment, implementation, modification, administrative control and application procedures. The salary-setting mechanism contained in this section shall be directed to establishing salaries that are determined on a comprehensive systematic basis, bear equitable relationship to each other ... and be reviewed and established with the same frequency as those of state employees in the classified service.

"(1) **Establishment of executive salary groups.** ... The dollar value of the salary range minimum and maximum for each executive salary group shall be reviewed and established in the same manner as that provided for positions in the classified service under s. 16.086 (3). The salary-setting authority of ... elective and appointive officials elsewhere provided by law is subject to and limited by this section, and the salary rate for these positions upon appointment and subsequent thereto shall be set by the appointing authority pursuant to this section,

unless the position is subject to article IV, section 26 of the state constitution.”

Section 20.923, Stats., further provides:

“(2) **Constitutional officers and other elected state officials.**

(a) The annual salary for each of the following positions shall be set at the midpoint of the assigned salary range for its respective executive salary group in effect at the time of taking the oath of office, except as provided in pars. (b) ... shall become effective immediately for all ... elected state officials, subject to article IV, section 26 of the Wisconsin constitution and for any subsequently elected official who takes his or her oath following August 5, 1973

“***

“5. Legislature, member: executive salary group 2.

“***

“(b) The annual salary of each state senator and representative elected to the assembly shall be set at 65% of the midpoint of the salary range for executive salary group 2.”

Thus, the clearly expressed intent and the statutory schedule, sec. 20.923(2)(b), Stats., require equality in the basic salary for state senators and representatives to the Assembly. This equality in basic salary has deep historic roots beginning with Wis. Const. art. IV, sec. 21, and continuing to the present.

In this regard the history of art. IV, sec. 21, and its statutory successors is instructive. The original version of sec. 21 read:

“*Compensation of members.* SECTION 21. Each member of the legislature shall receive for his services two dollars and fifty cents for each day’s attendance during the session, and ten cents for every mile he shall travel in going to and returning from the place of the meeting of the legislature, on the most usual route.”

As amended in November of 1867, it read:

“*Compensation of members.* SECTION 21. Each member of the legislature shall receive [a yearly salary plus mileage].”

The section was amended again in 1881 and read:

“Compensation of members. Each member of the legislature shall receive [an annual sum greater than that specified in the 1867 amendment]. ... No stationery, newspapers, postage or other prerequisite except the salary and mileage ... shall be received from the state ... by any member of the legislature”

Finally, in 1929 the section was repealed in its entirety. The successive amendments suggest, however, that the purpose of the repeal was to eliminate the need for amending the constitution every time a salary change is needed, not to eliminate the need for the same basic salary for senators and representatives to the Assembly. In addition, the repeal made it possible to compensate members for expenses other than salary or mileage.

The constitutional provision was replaced by a series of statutory appropriations: 20.01 (1929); 20.01 (1931-1943); 20.01(1) (1945-1953); 20.530(1) (1955-1963); 20.530(1)1. (1955); 20.765(1)(a) (1967); and 16.09 (1969-1973). The operative language for the first and last of these is “member of the legislature.” For all the rest it is: “compensation ... for each member of the legislature.”

Hence, the long-standing practice has been equal compensation even though no constitutional language presently exists to require that result.

Section 13.121, Stats., is also instructive. First, it too speaks of “each member.” Second, it makes it clear what type of appropriation the Legislature intended for its members.

“13.121 **Legislators’ salaries.** (1) Current Member. From the appropriation under s. 20.765(1)(a), each member of the legislature shall be paid ... the salary provided under s. 20.923.”

The appropriation under sec. 20.765(1)(a), Stats., is not limited with respect to time, for example, as an annual or biennial expenditure; it is qualified only as being a sum sufficient. As a consequence, legislative salaries fall under the heading, general appropriations, in the sense that that phrase is used in sec. 20.002, Stats.

“20.002 **General appropriation provisions.** (1) *Effective period of appropriations.* ... If the legislature does not amend or eliminate any existing appropriation on or before July 1 of the odd-numbered years, such existing appropriations provided for

the previous fiscal year shall be in effect in the new fiscal year and all subsequent fiscal years until amended or eliminated by the legislature. ...”

Hence, the present scheme remains in force until appropriate legislative action is taken.

BCL:RR

Advertising; Automobiles And Motor Vehicles; Bids And Bidders; Charters; Contracts; Counties; Municipalities; Ordinances; Public Works; Towns; Towns must let “public contracts” pursuant to the competitive bidding procedures of secs. 60.29(1m) and 66.29, Stats.

Contracts which are not “public contracts” are not subject to either advertising or competitive bidding procedures. The definition of public contract includes “supplies” and “materials,” but does not include “equipment.”

Police cars need not be purchased by competitive bid under secs. 60.29 and 66.29, since they are “equipment” and not “supplies [or] material.” OAG 86-77

October 11, 1977.

JOHN P. LANDA, *District Attorney*
Kenosha County

Your predecessor asked me whether a town is required by statute to advertise for proposals and to accept bids for town contracts involving public work of a nonconstruction nature, specifically contracts of purchase of material items for town use, such as special police vehicles and the like in excess of \$2500.00. For the reasons given below, it is my opinion that, pursuant to sec. 60.29(1m), Stats., and sec. 66.29, Stats., a town has an obligation to advertise for proposals and to accept competitive bids only for those contracts which fall within the definition of “public contract” in sec. 66.29(1)(c), Stats.

COMPETITIVE BIDDING

It is undisputed that a primary purpose of statutes, charters, and ordinances requiring competitive bidding in the letting of municipal contracts is to protect taxpayers and property holders from

“favoritism, improvidence, extravagance, fraud and corruption, and to secure the best work or supplies at the lowest price practicable.” 10 McQuillin, *Municipal Corporations*, sec. 29.29. However, it is equally clear that absent any such legal restrictions or given a contract which falls outside such legal restrictions as have been enacted, a municipality is free to let its contracts without notice and competitive bidding constraints. This was made clear by the Wisconsin Supreme Court in *Cullen v. Rock County*, 244 Wis. 237, 12 N.W.2d 38 (1943). The court’s subsequent holding in *Menzl v. Milwaukee*, 32 Wis.2d 266, 271, 145 N.W.2d 198 (1966), reaffirming the proposition, is representative of a long and consistent line of Wisconsin cases:

“If the contract in question is not subject to the provisions of the bid section, the city is not bound by that type of procedure and ... may contract on the basis of reasonable business judgment with one who is not the low bidder. *Cullen v. Rock County*, 244 Wis. 237, 240, 12 N.W.2d 38 (1943).”

See also 10 McQuillin, *Municipal Corporations*, sec. 29.31; *Consolidated School Dist. v. Frey*, 11 Wis.2d 434, 105 N.W.2d 841 (1960); *Pembar, Inc. v. Knapp*, 14 Wis.2d 527 (1961); *Akin v. Kewaskum Community Schools*, 64 Wis.2d 154 (1973).

Thus towns are required to use competitive bidding procedures only if, or to the extent that, the language of the statutes indicates a legislative intent to impose such a duty upon towns.¹

Section 60.29(1m), as amended by ch. 188, Laws of 1975, provides that a town board is empowered and required:

“To let pursuant to s. 66.29 all public contracts, as defined in s. 66.29 (1) (c), the estimated cost or amount involved of which shall exceed \$2,500, except that the town board may determine that any class of public work or any part thereof shall be done directly by the town without submitting the same for bids. The

¹ Whether any independent legal restrictions have been placed on town contracts in Pleasant Prairie township either by town charter or by local ordinance is outside the scope of this opinion.

town board may also enter into arrangements with its county to do any type of work without the requirement of competitive bidding regardless of the amount involved. County highway departments are authorized to enter into such agreements on a cost basis.”

Since, as sec. 60.29(1m) indicates, the provisions of sec. 66.29 shall apply only if the contract in question complies with the definition of sec. 66.29(1)(c), which provides:

“The term ‘public contract’ shall mean and include any contract for the construction, execution, repair, remodeling, improvement of any public work, building, furnishing of supplies, material of any kind whatsoever, *proposals for which are required to be advertised for by law.*” (Emphasis added.)

Statutes are not, however, automatically considered ambiguous.

“The first general maxim of interpretation is, when the words of an act are clear and precise terms--when its meaning is evident and leads to no absurd conclusions, there can be no reason for refusing to admit the meaning the words naturally present, and go elsewhere in search of conjecture in order to restrict or extend the act.” *Brightman v. Kirner*, 22 Wis. 54 (1867).

The language of sec. 60.29(1m) is clear and precise: the only town contracts required to be let in conformance with the competitive bidding procedures of sec. 66.29 are “public contracts, as defined in sec. 66.29(1)(c).” In like manner, the definition of “public contracts” in sec. 66.29(1)(c), specifically incorporated into 60.29(1m), is also clear and precise: it encompasses only those contracts involving certain kinds of work on purchases “*proposals for which are required to be advertised for by law.*”

Based on the plain meaning of the language of both statutes, therefore, it would seem that towns are not subject to any competitive bidding restraints at all, absent some separate legal requirement that bidding proposals be advertised.

While I sympathize with those who would argue that sec. 60.29(1m) may not, in fact, reflect a proper balancing of the interests involved, the fact that a statute “has outworn its usefulness or is no longer compatible with the realities of life” is a matter for the

Legislature not for the Executive or the Judiciary. *Rupp v. Traveler's Indemnity Co.*, 17 Wis.2d 16, 23, 115 N.W.2d 612 (1962).

Therefore, it is my opinion that, pursuant to the plain meaning of sec. 60.29(1m) and sec. 66.29(1)(c), competitive bidding is not required for any town contracts unless there exists a separate legal requirement that bidding proposals be advertised for. Present Wisconsin statutes contain no such independent requirement. However, the wording of town charters and local ordinances would trigger the requirement for bidding should they require advertisement. If charters or local ordinances contain no provision requiring that proposals for contracts be advertised for, a town is free to make any sort of contract it deems provident, following the rule laid down by the court in *Cullen, supra*.

Section 60.29(1m) directs that the competitive bidding procedures in sec. 66.29 be followed when a town is engaged in making "public contracts" as defined in sec. 66.29(1)(c). Obviously, there is no advertising requirement for contracts which are not public contracts. Is there an advertising requirement for "public contracts"? The language of these sections is unfortunately inconsistent. Section 66.29(1)(c) provides the only arguable basis for imposing a bidding requirement. That section defines "public contracts" as contracts "... proposals for which are required to be advertised for by law." Thus, it could be argued that use of the term "public contract" in sec. 60.29(1m) implies an advertising requirement. Since sec. 60.29(1m) requires letting all "public contracts" over \$2,500 by the competitive bidding process the argument would be that sec. 60.29(1m) necessarily requires advertising.

Were I not constrained by court decision I would accept this argument because I firmly believe that this is what the Legislature probably intended and that imposing an advertising requirement is sound public policy. However, the court in *Cullen v. Rock County* stated its view of the definition contained in sec. 66.29(1)(c) as follows:

"It will be noticed that the test of a public contract is whether proposals are required to be advertised for by law implying, of course, that in some instances there is no requirement." *Cullen, supra*, p. 241.

Cullen is still good law. *Menzl v. Milwaukee*, 32 Wis.2d 266 (1966), *Akin v. Kewaskum Community Schools, et al.*, 64 Wis.2d 154 (1974). The language quoted above can only be interpreted to mean that an express advertising requirement must be found *outside* of the definition in sec. 66.29(1)(c) if it is to be found at all. No such express advertising requirement exists in sec. 60.29(1m) or sec. 66.29, Stats. Consequently, I am of the opinion that there is no requirement for towns to advertise for “public contracts” over \$2,500.

PUBLIC CONTRACTS-SPECIFIC PURCHASES

Not all contracts entered into between a town and private parties are “public contracts” as defined in sec. 66.29(1)(c). Only those involving the enumerated kinds of public work are included, i.e., contracts “for the construction, execution, repair, remodeling, improvement of any public work, building, furnishing of supplies, material of any kind whatsoever.” Your specific concern involves contracts for purchase of items such as police cars which do not involve construction. The part of the definition of public contract in sec. 66.29(1)(c), which provides for nonconstruction items refers to contracts for “the furnishing of supplies [and] materials of any kind whatsoever.”

35 Op. Att’y Gen. 88 (1946) attempted to define “supplies and materials.” It was determined that a contract to buy an FM radio to be used in aiding the highway committee in snow removal work could not be classified as a contract for the furnishing of supplies or material. The opinion reasoned:

“... Words of a statute are required to be construed according to the common and approved usage of the language. Sec. 370.01 (1); *Wisconsin B. & I. Co. v. Ind. Comm.*, (1940) 233 Wis. 467 at 478. The word ‘supplies’ is ordinarily considered to mean something that is used or consumed or which is capable of such use. See *United States Rubber Co. v. Washington E. Co.*, (1915) 86 Wash. 180, 149 P. 706, L. R. A. 1915 F 951. The word ‘materials’ is usually understood to mean something that enters into or forms part of a finished structure or which is capable of such use. *United States Rubber Co. v. Washington E. Co.*, *supra*. See also *Southern Surety Co. v. Metropolitan S. Comm.*, (1925) 187 Wis. 206 at 216. There are, of course, numerous cases involving the question of whether a particular

commodity or article is included within the words 'supplies' or 'materials' or both. So far as we can determine none has gone so far as to hold that an FM radio or anything comparable to it is included within either. Such authority as there is, most nearly in point, supports the view that an FM radio would not ordinarily be considered as falling within the designation 'supplies' or 'materials.' *Peter's Garage, Inc. v. City of Burlington*, (1939) 121 N. J. L. 523, 3 A. (2d) 634 ... affirmed 123 N. J. L. 227, 8 A. (2d) 910. ..."

The court in *Peter's Garage, Inc.* held that a contract to purchase a dump truck does not fall within a statute requiring a city to award contracts for furnishing of "materials, supplies or labor" to the lowest bidder. A dump truck is an "apparatus," not "materials" or "supplies." The court also cited cases where contracts for the purchase of a combination pumper, chemical and hose wagon, a fire truck and miscellaneous fire equipment, a chemical engine, a truck chassis, an oil burner and voting machines were held not within the purview of the statute.

The reasoning in 35 Op. Att'y Gen. 88 (1946) was reiterated in 47 Op. Att'y Gen. 69 (1958) where it was determined that a contract to purchase farm machinery by a county for use in limited farming operations conducted at the county hospital was also not subject to the competitive bidding requirements of sec. 66.29. The farming machinery was considered "equipment," not "supplies" or "material." In 66 OAG 198 (1977) (July 1, 1977) I decided that a diesel engine was not "supplies" or "materials" but constituted equipment and therefore outside the competitive bidding requirements.

Based on these cases and opinions it is my opinion that a police car is an apparatus or equipment, not "supplies" or "material." Therefore, a contract for the purchase of a police car need not comply with the provisions of sec. 60.29(lm), Stats. With respect to any other items for which your town may contract to purchase, an individual determination must be made whether such items are comprehended within the terms "supplies" or "material."

In closing, I would point out as I did in 66 OAG 198 (1977), that the narrow statutory distinctions discussed in this opinion are only a few of the many inconsistencies which contribute to the current unfortunate lack of uniformity in our local bidding laws. I again

invite the Legislature to seriously consider a major overhaul of our laws relating to local bidding.

BCL:WHW

Counties; Indians; Land; Law Enforcement; Mobile Homes; Right Of Way; Taxation; Towns; Trusts; Property held in trust by the federal government for the Menominee Tribe and tribal members pursuant to the Menominee Restoration Act (25 U.S.C. sec. 903, *et seq.*) is not subject to state taxation. Tribal members residing and working in Menominee County and the Menominee Tribe are not subject to state income tax.

Government services to be provided by Menominee County and the town of Menominee discussed. OAG 87-77

October 24, 1977.

RICHARD STADELMAN, *District Attorney*
Shawano and Menominee Counties

You requested my advice regarding a number of questions involving taxation within Menominee County. The focus of your inquiry is the recent United States Supreme Court decision in *Bryan v. Itasca County*, 426 U.S. 373, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976).

In *Bryan*, the Court held that P.L. 280 (28 U.S.C. sec. 1360a), was not intended by Congress to confer authority upon Minnesota to extend her general civil laws to Indian persons and Indian land within the Leech Lake Reservation. The Court held invalid the state personal property tax as applied to a mobile home of an enrolled Chippewa Indian where such mobile home was located on land held in trust for tribal members. *Bryan*, however, has limited effect on taxation of Menominee Indians and Menominee property because the Menominee termination and restoration legislation, rather than P.L. 280, has been the basis upon which Wisconsin has exercised taxation jurisdiction over Menominee persons and land within Menominee County.

You will recall that the Menominee Termination Act of June 17, 1954 (68 Stat. 250, 25 U.S.C. secs. 891-902, repealed), was intended, in part, to discontinue the reservation status of Menominee tribal land. Section 9 of that Act (25 U.S.C. sec. 898) authorized the state to begin taxing Menominee land and other assets, together with income derived therefrom, on the effective date of termination, April 30, 1961.

In addition, section 10 of the Termination Act (25 U.S.C. sec. 899) provided that after title to tribal property had been transferred from the United States to Menominee Enterprises, Inc., "the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." It is my opinion that after the land was transferred on April 30, 1961, members of the Tribe became subject to all state and local taxes which theretofore were only applicable to nonIndian persons within the territory which became Menominee County. I realize that rights protected by treaty were not affected by the termination legislation but a review of the relevant treaties has not revealed any treaty-protected rights relating to taxation. Thus, it is my opinion that on April 30, 1961, the Termination Act authorized the state to begin imposing state and local taxes upon Menominee persons and Menominee property.

On December 22, 1973, the Menominee Restoration Act (87 Stat. 770, 25 U.S.C. sec. 903 *et seq.*) repealed the Termination Act and reinstated all rights and privileges of the Tribe and its members under federal treaty, statute, or otherwise, which may have been diminished or lost pursuant to termination. See 64 Op. Att'y Gen. 184 (1975).

In 66 OAG 115 (1977) it was stated that "When the termination and restoration legislation are read against the backdrop of tribal sovereignty, I believe it is clear that Congress intended to restore to the Tribe the full rights of tribal self government which the Tribe enjoyed prior to the passage of the Menominee Termination Act, including the fundamental right to govern its internal affairs within the same territory that constituted the Reservation prior to termination." The territory referred to is Menominee County and the Town of Menominee. It is my opinion that Menominee County is coterminous with the present Menominee Reservation for purposes of resolving the jurisdictional questions considered herein.

The Restoration Act contains several provisions that relate to taxation. Section 3(d) (25 U.S.C. sec. 903a(d)) provides: "Except as specifically provided in this Act, nothing contained in this Act shall alter any property rights or obligations, ... or any obligations for taxes already levied."

Section 6 is concerned with the transfer of assets owned by Menominee Enterprises, Inc., to the United States in trust for the Menominee Tribe. Subsection (b) (25 U.S.C. sec. 903d(b)) provides that assets transferred into trust status "shall be subject to all valid existing rights, including, but not limited to, liens, outstanding taxes (local, State, and Federal), ... and any other obligations *** All assets transferred under this section shall, as of the date of transfer, be exempt from all local, State, and Federal taxation." On April 22, 1975, all assets owned by Menominee Enterprises, Inc., which included most real property located within Menominee County, were placed into trust. Thereafter, the state and its local political subdivisions were no longer authorized to assess and collect new taxes from such property. Property taxes levied prior to April 22, 1975, however, would be a legal obligation of Menominee Enterprises, Inc.

Subsection (c) (25 U.S.C. sec. 903d(c)) provides for the transfer of real property owned by members of the Menominee Tribe into trust status. As with tribal property, this property would also be subject to all valid existing rights including outstanding taxes. All assets so transferred shall, as of the date of transfer, be exempt from all local, state and federal taxation. Because property owned by members of the Tribe has been transferred into trust at various dates, it is necessary for the county to consider each such transfer to determine the effective date for tax exemption on such property.

Congress did not, in the Restoration Act, expressly deal with other taxation matters relating to the Menominee Tribe and tribal members. For the most part the problem is not whether the Tribe and tribal members are subject to other forms of taxation; rather, the problem is to determine the effective date for tax exemption. Recent Supreme Court decisions make clear that a state's authority to impose taxes on Indian tribes, tribal members, or tribal property within reservation boundaries depends on clear congressional authorization. See, e.g., *Byran v. Itasca County*, *supra*; *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 93 S. Ct. 1257, 36 L. Ed.

2d 129 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976).

In 64 Op. Att’y Gen. 184 (1975), I concluded that the Restoration Act provided clear authority for the state to continue to exercise jurisdiction over the Menominee Tribe and land until such time as the federal government, pursuant to implementation of the Restoration Act, officially notified the state that it, together with the Menominee Tribe, had assumed such jurisdiction. In that opinion I deferred comment concerning what transitional jurisdiction the state acquired by virtue of the Restoration Act.

Section 3(b) (25 U.S.C. sec. 903a(b)) provides: “The [Termination] Act, is hereby repealed and there are hereby reinstated all rights and privileges of the tribe or its members under Federal treaty, statute, or otherwise which may have been diminished or lost pursuant to such Act.” It is my opinion that this provision reestablished the tax immunities that the Menominee Tribe and tribal members enjoyed prior to termination. Under this analysis the only taxation jurisdiction authorized by the Restoration Act is taxation upon real property owned by members of the Tribe which has not been placed into trust status.

In summary, the following dates referred to herein are significant for taxation purposes:

1. April 30, 1961 (The effective date of the Menominee Termination Act) The state commenced exercising general civil and regulatory jurisdiction including the power to impose all types of taxes on Indians and Indian property within Menominee County.

2. December 22, 1973 (The Menominee Restoration Act enacted) The state was authorized to continue to tax real property until placed into trust status but lost its authority to tax the Menominee Tribe and tribal members.

3. April 22, 1975 Real property and other assets owned by Menominee Enterprises, Inc., were placed into trust status and were no longer taxable by the state. Some real property owned by tribal members was also placed into trust status on this date and at various dates thereafter which also removed such land from taxable status.

To the extent that the state or county relied on Public Law 280 as the basis for taxation of Menominees or Menominee property after December 22, 1973, but before the retrocession of jurisdiction, which was effective March 1, 1976, *Bryan v. Itasca County* makes clear that such reliance was misplaced. If the state continued to collect personal income taxes from Menominees who work and reside within Menominee County after December 22, 1973, such individuals may be eligible for refunds of such taxes withheld from wages. I would suggest that you advise those individuals to contact the Wisconsin Department of Revenue for procedures to follow in claiming any refunds. In any case, any further withholding should be immediately stopped.

I have enclosed for your information recent guidelines which were prepared by the Wisconsin Department of Revenue shortly after the *Bryan* decision was rendered regarding taxation of Indians in Wisconsin. Those guidelines reflect the Revenue Department's interpretation of the law as it applies to Indians and reservations generally. I understand, however, that those guidelines may have been modified in some instances to accommodate the unique status of the Menominees with respect to certain taxation matters. Detailed information can be secured directly from the Department of Revenue.

You also request advice concerning the definition of "Indian" for purposes of taxation. You will recall that by letter dated February 27, 1976, I advised you concerning this question as well as other jurisdictional questions involving the Menominee Reservation. There, I suggested that you rely on tribal membership to determine who is an Indian where jurisdiction depends on such information. Membership in the Tribe as evidenced by either a name on the tribal roll or confirmation of such fact by the Tribe would probably be considered authoritative evidence that the state does not have jurisdiction over that person for taxation purposes.

You also requested my advice concerning the level of services to be provided by Menominee County and the Town of Menominee in view of the reduced tax base caused by the return of most property to trust status. Although jurisdiction within the county has been affected by restoration, the legal status of the county and town as political subdivisions of the state has not been affected by restoration. Consequently, the county and town continue to be responsible for

services within the county, albeit in most cases at a reduced level. For example, primary responsibility for law enforcement has shifted from the state to the Tribe and federal government. I assume this shift in responsibility has permitted the county to reduce its law enforcement budget. With respect to law enforcement you specifically ask whether the county remains responsible for patrolling public rights-of-way within the county. As stated in 66 OAG 115 (1977), the county's responsibility includes the protection and preservation of all public rights-of-way within Menominee County regardless of where such rights-of-way are located.

With respect to services generally, it should be noted that Congress anticipated that restoration would require ongoing cooperation among the various governmental entities responsible for delivery of services within Menominee County. Pursuant thereto the Menominee Tribe and the county, town and state governments have entered into cooperative agreements effecting the delivery of many governmental services. Continued cooperation could result in the sharing of costs among the various governmental entities with the result that essential governmental services will not be impaired as a result of restoration. I believe the restoration legislation authorizes intergovernmental agreements for the delivery of services. If, however, there is any question regarding the authority of the county to enter into a specific agreement with the Tribe or federal government, you may wish to request clarification from this office.

I trust that this information will be helpful to you in carrying out your responsibilities as corporation counsel for Menominee County. If additional information is needed, please do not hesitate to call upon this office for assistance.

BCL:JDN

Administrative Code; Advertising; Federal Aid; Highway Commission, State; Licenses And Permits; Statutes; Words And Phrases; Persons in the business of erecting on-premise signs are subject to the licensing requirement of sec. 84.30(10)(a), Stats. OAG 89-77

October 27, 1977.

FRED A. RISSER, *Chairman*
Senate Organization Committee

On behalf of the Senate Organization Committee, you have requested my opinion as to whether sec. 84.30(10)(a), Stats., authorizes the Highway Commission to impose a licensing requirement on persons who fabricate and erect signs advertising activities conducted on the property where the sign is located. Section 84.30(10)(a), Stats., provides in part:

“On or after January 1, 1972, no person shall engage or continue to engage in the business of outdoor advertising in areas subject to this section without first obtaining a license therefor from the highway commission. ...”

In 1976, pursuant to the authority granted under sec. 84.30(14), Stats., to “promulgate rules deemed necessary to implement and enforce the provisions of this section” and in accordance with the requirements of sec. 227.018, Stats., after proper notice and hearing the Highway Commission adopted and revised certain rules regarding the regulation of outdoor advertising. Among the new rules was Wis. Adm. Code section Hy 19.006 which contains the following language:

“The licensing requirement under section 84.30 (10), Wis. Stats., applies to persons who erect or maintain on-property signage as well as to persons who erect or maintain off-premise advertising signs. Persons who erect or maintain signs for the purpose of advertising their own business are not subject to the licensing requirement. The licensing requirement does not apply to persons who erect 2 or less signs during the calendar year. ...”

The Highway Commission has thus interpreted sec. 84.30(10)(a), Stats., to require that all persons who erect and maintain on-premise as well as off-premise signage be licensed. Those who erect or maintain signs for the purpose of advertising their own business are clearly exempted by Wis. Adm. Code section Hy 19.006, quoted above, and are not affected by an interpretation of sec. 84.30(10)(a), Stats. Representatives of various aspects of the sign industry assert that the Legislature intended that the licensing requirement apply only to persons who erect and maintain off-

premise advertising signs for rental purposes and that the Highway Commission's rule is therefore void insofar as it seeks to regulate on-premise signage.

A preliminary discussion of my role is in order. As you know, the interpretation given a statute by the agency responsible for its administration is, as a general rule, entitled to great weight. *Trczymiewski v. Milwaukee*, 15 Wis.2d 236, 112 N.W.2d 725 (1961); see also Vol. 15 Callaghan's Wisconsin Digest sec. 194, *Statutes*, pp. 191-193 (pocket part). When the interpretation of a statute is at issue and administrative interpretation has been made, the role of the Attorney General is to first determine whether the administrative interpretation is a reasonable one. If the interpretation is reasonable and consistent with the statute that ends the inquiry even though the Attorney General might independently have reached a different conclusion. The analysis of sec. 84.30(10)(a), Stats., which follows is restricted by this principle to determining whether the interpretation given to sec. 84.30(10)(a), Stats., in Wis. Adm. Code section Hy 19.006 by the Highway Commission is reasonable.

The words "engage in the business of outdoor advertising" used in sec. 84.30(10)(a), Stats., are not defined in that subsection, nor does a definition appear elsewhere in sec. 84.30, Stats. The phrase is broad and admittedly capable of several different meanings. Consequently, I conclude that the statute is ambiguous and subject to construction. *Kindy v. Hayes*, 44 Wis.2d 301, 171 N.W.2d 324 (1969). In analyzing whether the Highway Commission's interpretation of this phrase is a reasonable one, one is obliged therefore to look beyond the words themselves. An examination of the statute itself, its legislative history, and the language of the Federal Highway Beautification Act which originally spurred legislative initiatives to revise sec. 84.30, Stats., provides some revealing information. The goal of statutory construction is to arrive at the intent of the Legislature. *Kindy, supra*; *State ex rel. Mitchell v. Superior Court*, 14 Wis.2d 77, 109 N.W.2d 522 (1961).

1. *The Statute As A Whole*

The intent of a given section of a statute is to be derived from the whole act. *State ex rel. B'nai B'rith F. v. Walworth County*, 59 Wis.2d 296, 208 N.W.2d 113 (1973). Thus, whether the Highway Commission's interpretation of sec. 84.30(10)(a), Stats., is in

keeping with the legislative intent in enacting that particular subsection may become apparent by examining other parts of the statute.

Section 84.30(1) sets forth the legislative findings and purpose as follows:

“Legislative findings and purpose. To promote the safety, convenience and enjoyment of public travel, to preserve the natural beauty of Wisconsin, to aid in the free flow of interstate commerce, to protect the public investment in highways, and to conform to the expressed intent of congress to control the erection and maintenance of outdoor advertising signs, displays and devices adjacent to the national system of interstate and defense highways, *it is hereby declared to be necessary in the public interest to control the erection and maintenance of billboards and other outdoor advertising devices adjacent to said system of interstate and federal-aid primary highways.*”
(Emphasis added.)

The above-emphasized language in sec. 84.30(1), Stats., is indicative of a general legislative intent to provide extensive control over the whole area of erection and maintenance of outdoor advertising devices. The definition of “erect” in sec. 84.30(2)(e) with its long list of the physical processes by which such advertising devices may be brought into being echoes this comprehensive tone. The definition provides in part:

“‘Erect’ means to construct, build, raise, assemble, place, affix, attach, create, paint, draw, or in any other way bring into being or establish; ...”

In addition, sec. 84.30(3), Stats., which sets out the prohibited signs, the excepted signs, and the standards of size and location which are to be maintained for excepted signs clearly demonstrates that both on-premise and off-premise advertising signs fall within the scope of the statute and are to be regulated.

In view of the above material, one could certainly conclude that the Highway Commission’s reading of sec. 84.30(10)(a) to include both on-premise and off-premise signage within the licensing requirement accurately mirrors an obvious legislative intent to provide a broad regulatory system which would cover all outdoor advertising devices.

2. *Legislative History*

The legislative history of the revisions of and amendments to sec. 84.30 is long. Many bills were introduced both in the Senate and in the Assembly--some were defeated, others died at the end of the session--before the substitute amendment to Assembly Bill 1411 was passed in 1971 (L 1971, ch. 197, sec. 3). Most of the variations in the bills are immaterial to our present purpose; however one item which was proposed and ultimately rejected is enlightening.

In 1969 Assembly Bill 829 was introduced. Like the present sec. 84.30, this bill declared in sec. 3 that:

“... no person shall engage or continue to engage in the business of outdoor advertising in areas subject to this section without first obtaining a license therefor”

Subsection 7.2 of the bill provided an explicit exception for on-premise signage. It contained the following emphatic language:

“None of the provisions of sec. 3 (licensing), sec. 4 (permits), or subsec. 6.2 (general size and position regulations) shall apply to posting, erection or maintenance of any advertising device used solely to advertise a commercial establishment located on, or farm produce, merchandise, or other article of commerce, services or entertainments, sold, produced, extracted, processed, manufactured or furnished on the property on which such device is located or within 250 ft. of such property.”

It is difficult to construct an affirmative argument based on specific language contained in a bill which was ultimately rejected as a whole by the Legislature. It can at least be said that nothing in the legislative history of sec. 84.30, Stats., contradicts or compromises the Highway Commission's interpretation. Indeed, as the above-quoted proposed and defeated version of the present statute illustrates, the legislative history tends to further support the reasonableness of the Highway Commission's conclusion that “engage in the business of outdoor advertising” in sec. 84.30(10)(a), Stats., was meant to include all persons who erect or maintain advertising signage, not merely those who erect off-premise advertising signs for rental purposes.

3. *Federal Highway Beautification Act*

The Federal Highway Beautification Act of 1965 (23 U.S.C. 131) which originally prompted the Legislature's efforts to revise sec. 84.30 and thereby to provide for more effective outdoor advertising control does not require states to establish licensing procedures. In addition, the regulations issued by the Federal Highway Administration to implement the Highway Beautification Act contain language which indicates that for federal purposes the phrase "engage in the business of outdoor advertising" relates only to off-premise signage. Title 23 C.F.R. sec. 750.709 (1976).

However, the Federal Highway Beautification Act, by its own terms, is clearly non-preemptive:

"(k) Nothing in this section shall prohibit a State from establishing standards imposing stricter limitations with respect to signs, displays, and devices on the Federal-aid highway systems than those established under this section." 23 U.S.C. 131.

Therefore, I conclude that in view of the non-preemptive nature of the federal law and although sec. 84.30 was "initially adopted to bring the state into harmony with the federal act so as to ensure future eligibility for federal highway aids and grants" (63 Op. Att'y Gen. 285 (1974)), the expansive language and legislative history of Wisconsin's outdoor advertising regulations provide a strong indication that the Legislature did in fact intend to go beyond the federal minimum requirements. The Highway Commission's broad interpretation of "engaged in the business of outdoor advertising" itself exceeding the federal standards on this subject can thus be seen as an accurate reflection of this legislative intent and, consequently, a reasonable interpretation of the statute.

One further observation remains to be made. In effect, the Highway Commission's interpretation of sec. 84.30(10)(a) in Wis. Adm. Code section Hy 19.006 implicitly involves a classification of those who erect signs into two groups: owners who erect on-premise signs themselves on their own property; and others, i.e., those who erect and maintain off-premise signs and those who erect on-premise signs, but are not the owners of the property on which the signs are erected. It has been suggested that this interpretation results in an irrational classification. Thus, some attention should be given to the logic of this interpretation based on the purposes of the outdoor

advertising statute, the evils it proposed to remedy, and the nature of the different classes involved.

The legislative findings and purpose of sec. 84.30(1), Stats., quoted above, details the significant public concerns understood by the Legislature to be at issue. The experience of travel on roads with endless scenery-spoiling billboards provides universal exposure to the evils the Legislature intended to remedy. I find no lack of logic in the conclusion that the fulfillment of such purposes as the promotion of safety, convenience and enjoyment of public travel and the preservation of the natural beauty of Wisconsin supports enforcement of the licensing requirement on those who erect and maintain on-property signage as well as those who erect and maintain off-premise signs. If anything, a classification which exempted all on-premise signs would also raise questions of reasonable classification.

The fact that persons who erect or maintain signs for the purpose of advertising their own business have not been included in the phrase "engage in the business of outdoor advertising," according to the interpretation given the phrase by the Highway Commission, requires little analysis. The "difference between doing in self-interest and doing for hire" has long been recognized. *Railway Express Agency v. New York*, 336 U.S. 106, 115-117, 69 S. Ct. 463, 93 L. Ed. 533 (1949). The determination that the sensibilities of neighbors and customers may offer a restraint on the owner which is not felt by others is unquestionably a valid one. *United Advertising Corp. v. Metuchen*, 198 A.2d 447, 450 (1964).

In conclusion, it is my opinion that the Highway Commission's interpretation of sec. 84.30(10)(a) in Wis. Adm. Code section Hy 19.006 is a reasonable interpretation of that subsection. The language of the statute as a whole, its legislative history, its purpose, the classifications which result from the Highway Commission's interpretation, all support the Highway Commission's determination expressed in the rule that "the licensing requirement under sec. 84.30(10), Stats., applies to persons who erect or maintain on-property signage as well as persons who erect or maintain off-premise advertising signs."

Automobiles And Motor Vehicles; Confidential Reports; Licenses And Permits; Motor Vehicle Department; Motor Vehicles; Open Meeting; Public Records; Salvage Dealers; Financial statements required by law to be filed with Department of Transportation in connection with applications for motor vehicle dealers' and motor vehicle salvage dealers' licenses are public records and are subject to inspection and copying under sec. 19.21(2), Stats., subject to limitations contained in court cases cited. OAG 91-77

November 8, 1977.

DALE CATTANACH, *Secretary*
Department of Transportation

Your predecessor requested my opinion concerning the applicability of the Wisconsin public records statute, sec. 19.21, Stats., to certain records received and maintained by the Division of Motor Vehicles. He stated that under ch. 218, applicants for motor vehicle dealers' licenses and applicants for motor vehicle salvage dealer licenses must submit certain financial information to the Division. Your question is whether such financial information is confidential and therefore not subject to inspection and copying by the general public.

In my opinion, such statements are public records, are not automatically confidential and are available for public inspection and copying subject to the limitations contained in *State ex rel. Youmans v. Owens*, 28 Wis.2d 672, 137 N.W.2d 470 (1965), 139 N.W.2d 241 (1966), and *Beckon v. Emery*, 36 Wis.2d 510, 153 N.W.2d 501 (1967).

Section 16.61(2)(a), Stats., defines public records of a state agency as:

“(a) ‘Public records’ means all books, papers, maps, photographs, films, recordings, or other documentary materials or any copy thereof, regardless of physical form or characteristics, made, or received by any agency of the state or its officers or employees in connection with the transaction of public business and retained by that agency or its successor as evidence of its activities or functions because of the information

contained therein; except the records and correspondence of any member of the state legislature.”

Section 19.21(1) and (2), Stats., provides:

“(1) Each and every officer of the state ... is the legal custodian of and shall safely keep and preserve all property and things received from his predecessor or other persons and required by law to be filed, deposited, or kept in his office, or which are in the lawful possession or control of himself or his deputies, or to the possession or control of which he or they may be lawfully entitled, as such officers.

“(2) *Except as expressly provided otherwise, any person may with proper care, during office hours and subject to such orders or regulations as the custodian thereof prescribes, examine or copy any of the property or things mentioned in sub. (1). Any person may, at his own expense and under such reasonable regulations as the custodian prescribes, copy or duplicate any materials, including but not limited to blueprints, slides, photographs and drawings. Duplication of university expansion materials may be performed away from the office of the custodian if necessary.*” (Emphasis added.)

The financial statements involved are required by law to be filed with the division, so they qualify as “property or things” under this statute. I am unaware of any statute or constitutional provision which would make the financial statements confidential or absolutely privileged and which therefore would exclude them from the disclosure requirement of sec. 19.21(2). In the absence of statutory or constitutional exception, the disclosure requirements of sec. 19.21(2) apply.

This does not mean, however, that the financial statements are subject to automatic disclosure. In a 1974 opinion from this office, we commented at length on the criteria for permitting or denying public access to records. That opinion, 63 Op. Att’y Gen. 400, 405-406 (1974), contains the following summary:

“The leading Wisconsin cases governing the right to public access are *State ex rel. Youmans v. Owens* (1965), 28 Wis. 2d 672, 137 N.W. 2d 470 and *Beckon v. Emery* (1967), 36 Wis. 2d 510, 153 N.W. 2d 501.

“These cases essentially hold, as elaborated in 58 OAG 67 (1969), 60 OAG 9 (1971), 60 OAG 43 (1971), 60 OAG 284 (1971), 60 OAG 470 (1971), 61 OAG 12 (1972), 61 OAG 361 (1972), that:

“1. The public right to full access to all public records provided for in sec. 19.21 (2), Stats., is qualified in the following respects:

“a. The right to inspect is subject to such reasonable regulations with respect to hours, procedure, etc., that the custodian may prescribe to limit unreasonable interference with the ordinary operations of his office.

“b. The right may be limited or denied by express statutory provision.

“c. The custodian may and has a duty to deny inspection where he determines that permitting inspection would result in harm to the public interest which outweighs any benefit that would result from granting inspection. Specific reasons must be given when inspection is withheld and the person seeking the same can then resort to court action to test the sufficiency of such reasons. Statements that the records are ‘confidential’ or that permitting inspection would be ‘contrary to the public interest’ are merely legal conclusions and are not a substitute for the specific reasons which must be given in each case. In testing the sufficiency of a stated specific reason, the trial judge would examine the record or document *in camera* and would determine ‘whether or not the harm likely to result to the public interest by permitting the inspection outweighs the benefit to be gained by granting inspection.’ *State ex rel. Youmans, supra*, p. 682. Where no specific reason was given for withholding inspection ‘the writ of mandamus compelling its production should issue as a matter of course.’ *Beckon v. Emery, supra*, p. 518.

“2. Any member of the public, regardless of his motives, has a right to inspect any public record, subject

to the three limitations stated above. This does not mean that the custodian or court cannot consider the claimed or stated purpose for which the record is to be used in balancing the interests. See *United States v. Richard M. Nixon* [418 U.S. 683 (1974)].

“3. ‘... public policy, and hence the public interest, favors the right of inspection of documents and public records. It is only in the unusual or exceptional case, where the harm to the public interest that would be done by divulging matters of record would be more damaging than the harm that is done to public policy by maintaining secrecy, that the inspection should be denied.’ *Beckon v. Emery, supra*, p. 516.

“4. The custodian should make his determination on a case-by-case basis in view of the record involved and the circumstances then and there existing. In *Youmans* the court declined to catalog the situations which might justify refusal but stated that sec. 19.21, Stats., will be construed *in pari materia* with sec. 66.77, Stats., the Wisconsin open meeting law, and that the policy guidelines for holding closed meetings contained in sec. 66.77 (4), Stats., as recreated by ch. 297, Laws of 1973, will be applicable to the question of sufficiency of stated reason for withholding inspection under sec. 19.21, Stats. We will not set forth the detailed provisions of sec. 66.77 (4), Stats., here. ... The *Youmans* case did point out that other common law exceptions may justify withholding of access; including documentary evidence in the hands of a district attorney, minutes of a grand jury, evidence in a divorce action sealed by the court and information gathered under a pledge of confidentiality. ...”

In *State ex rel. Joan Dalton v. Mundy, Director of Institutions and Depts. of Milw. Co., et al.*, 80 Wis.2d 190, 257 N.W.2d 877 (October 4, 1977), the court reaffirmed its holding in *Beckon* that the public interest favors the right of inspection of documents and public records.

The *Youmans* case makes the exceptions under the open meeting law (now revised and renumbered subch. IV of ch. 19 by ch. 426, Laws of 1975) relevant in determining whether, in individual cases,

to disclose public records. The determination must be case-by-case; so although an exception under the open meeting law may justify a particular withholding, it cannot be used as the basis for a blanket rule prohibiting the disclosure of certain documents. In each case, the custodian must determine whether the harm to the public interest outweighs any benefit that would result from granting inspection, while keeping in mind that public policy favors inspection.

In my opinion neither the exemption set forth in sec. 19.85(1)(b), Stats., permitting a closed session where licensing is involved, nor the exemption in sec. 19.85(1)(f), Stats., permitting a closed session when "Considering financial, medical, social or personal histories ... which, if discussed in public, would be likely to have a *substantial adverse effect upon the reputation of any person referred to*" (emphasis added), would justify refusal to permit examination and copying of the records involved, except in a most unusual case. See 60 Op. Att'y Gen. 470, 479 (1971), as to exemption in sec. 19.85(1)(f).

With respect to motor vehicle dealers, sec. 218.01(2)(b), Stats., provides in part that:

"... The licensor may require in such application, or otherwise, information relating to the applicant's solvency, his financial standing or other pertinent matter commensurate with the safeguarding of the public interest in the locality in which said applicant proposes to engage in business, all of which may be considered by said licensor in determining the fitness of said applicant to engage in business as set forth in this section."

With respect to motor vehicle salvage dealers, sec. 218.21(1), Stats., contains language similar to that in sec. 218.01(2)(b), Stats., above, and in addition, sec. 218.21(4), Stats., provides:

"Every application shall be accompanied by a current financial statement to determine the applicant's solvency as required under sub. (1)."

The Department may require a bond when there is reasonable doubt as to the financial ability of the licensee. Secs. 218.01(2)(h) and 218.21(6), Stats. Section 218.22(1), Stats., provides that the licensor shall only issue a motor vehicle salvage dealer's license when it is "satisfied that the applicant is financially solvent and of good character." Among numerous grounds for denial, suspension or revocation of either type of license are: "Proof of unfitness" and

“Material misstatement in application for license.” See secs. 218.01(3) and 218.22(3), Stats.

The filing of the financial data and information as to solvency is for the purpose of “safeguarding of the public interest.” The licensor and licensee are not parties which have exclusive interest in access to such public records. Members of the public who have done or contemplated doing business with the applicant have an interest. Other members of the public, including competitors of the applicant, may well be in a position to alert the licensor to material misstatements in the information filed. Under sec. 19.21(2), Stats., no showing of interest is required as a prerequisite to inspection. See 63 Op. Att’y Gen. 400, 406 (1974).

The exemption in the open meeting statute permitting closed sessions where open discussion of financial data “would be likely to have a substantial adverse effect upon the reputation of any person referred to” is not designed as a protection from competition. The somewhat similar provision in former sec. 14.90(3)(e), Stats. (1965), used the phrase “which may unduly damage reputations.” In *State ex rel. Youmans, supra*, p. 685, the court placed great emphasis on the word “unduly” and held that as applied to public records, it did not bar all inspection of public records which might in some degree damage reputations. Under present secs. 19.21(2) and 19.85(1)(f), Stats., denial of inspection would not be justified in every case where disclosure might have an adverse effect upon the reputation of the person, but is proper only where inspection of the financial data “*would be likely to have a substantial adverse effect upon the reputation of any person referred to.*” (Emphasis added.)

Since the financial statements are required by law as a condition for issuance of the licenses, the Department cannot pledge to keep the information confidential.

BCL:RJV

Assessments; Automobiles And Motor Vehicles; Fines; Forfeitures; Motor Vehicles; Ordinances; Parking; Traffic; As used in sec. 165.87(2), Stats., the words “nonmoving traffic violations” apply only to violations of ordinances adopted under secs. 349.13 and 349.14, Stats., and violations of secs. 346.50 through 346.55, Stats. OAG 92-77

November 14, 1977.

RICHARD R. MALMGREN, *Executive Secretary*
Judicial Council

Section 165.87(2), Stats., created by ch. 29, sec. 1253, Laws of 1977, provides, in part:

“... On or after January 1, 1978, whenever a court imposes a fine or forfeiture for a violation of state law or for a violation of a municipal or county ordinance except for state laws or such ordinances involving nonmoving traffic violations, there shall be imposed in addition a penalty assessment in an amount of 10% of the fine or forfeiture imposed. ...”

You ask which offenses listed in the present uniform state deposit schedule are nonmoving traffic violations within the meaning of this statute.

Obvious examples of moving violations are speeding, failure to stop at a stop sign, illegal turns, failure to yield right of way, operating after revocation and drunk driving. In addition, an offense such as a muffler violation would be a moving traffic violation, because sec. 347.39(1), Stats., says that no person shall operate on a highway any motor vehicle subject to registration without an adequate muffler. “No driver’s license” is a moving violation because sec. 343.05(1), Stats., provides that no person shall operate a motor vehicle upon a highway without a driver’s license. Similarly, “failure to register vehicle” is a moving violation because sec. 341.04(1), Stats., provides that it is unlawful for any person to operate on any highway any motor vehicle which is not registered or exempt. Most traffic violations are of this moving type.

Section 345.11(1), Stats., provides that the uniform traffic citation shall be used in the case of moving traffic violations and may be used in the case of parking violations. This implies that parking violations are nonmoving traffic violations. Section 345.28(1), Stats., states in part:

“... A nonmoving traffic violation is any parking of a vehicle in violation of a statute or an ordinance.”

This definition is the key to understanding the term “nonmoving traffic violation.” The definition is not complete. The word “parking” is not specifically defined in the statutes.

Thus, the question arises as to what offenses are “parking” violations. There may be certain types of violations which do not have operation of a motor vehicle as an element (e.g. failure to report change of name or address, sec. 341.335, Stats.) and thus could be considered “nonmoving violations.” But, I am of the opinion that nonmoving violations apply only to parking offenses such as illegal parking or overtime parking. Other “parking violations” would be violation of ordinances, authorized by secs. 349.13 and 349.14, Stats., regulating stopping, standing or parking, and violations of secs. 346.50 through 346.55, Stats., regulating stopping, standing or parking. These are the parking statutes. They include specific references to “stopping” and “standing” in addition to parking. While these three words may have slightly different connotations, they all involve a motionless motor vehicle. A close reading of the statutes indicates that the Legislature has used the three words interchangeably. See e.g. secs. 346.53 and 346.54, Stats. The words “nonmoving traffic violations” thus include all three terms.

It would serve no useful purpose to try to distinguish which of the stopping or standing violations might conceivably be considered moving violations. The penalties for nonmoving violations are usually small. Also, parking citations do not have to be processed through the court clerk’s office. See sec. 345.28(1), Stats. It is likely that the Legislature felt that attempting to collect the ten percent assessment against such violations would not be practical. You are therefore advised that the only violations exempt from the ten percent penalty assessment are violations of ordinances adopted under secs. 349.13 and 349.14, Stats., and violations of secs. 346.50 through 346.55, Stats.

BCL:AH

On April 5, 1978, the Supreme Court rendered its decision in *State ex rel. Gerald D. Kleczka v. Dennis J. Conta, et al.*, holding the Governor's partial veto of the campaign financing bill to be a valid partial veto. Thus, portions of the following opinion should be considered incorrect and not relied on.

Appropriations And Expenditures; Constitutionality; Elections; Governor; Legislation; Taxation; Expenditures; Certain of the Governor's partial vetoes to ch. 107, Laws of 1977, were invalid. The entire bill should be returned to the originating house for reconsideration. OAG 94-77

November 21, 1977.

FRED A. RISSER, *Chairman*

Senate Organization Committee

The Senate Organization Committee has requested my opinion on the constitutionality of the action taken by Governor Schreiber in exercising the partial veto on Assembly Bill 664, which became ch. 107, Laws of 1977, relating to campaign financing.

Correspondence attached to the opinion request indicates that there are four grounds for challenging the constitutionality of the Governor's partial vetoes:

1. That the proposal was not an appropriation measure within the meaning of the constitution.
2. That the vetoes constituted affirmative legislation in contravention of the legislative power granted solely to the Legislature.
3. That the vetoes concerning the source of the money and the applicable effective date were conditions placed upon the appropriation and thus not subject to the partial veto according to the constitution.
4. That the vetoes change the source of the funding from an "additional" to a "check-off" and had the effect of increasing the appropriation and thus were an invalid exercise of the partial veto.

Chapter 107, Laws of 1977, amended certain statutes relating to elections, including statutes relating to campaign financing, created an election campaign fund and made appropriations. Those portions

of the chapter dealing with appropriations are secs. 46, 47, 48, 50 and 53.

State ex rel. Finnegan v. Dammann, 220 Wis. 143, 148, 264 N.W. 622 (1936), has several approved definitions of an appropriation including, ““An appropriation in the sense of the constitution means the setting apart a portion of the public funds for a public purpose.”” Section 47 of ch. 107, Laws of 1977, creates sec. 20.510(1)(q) of the statutes to read:

“Wisconsin election campaign fund. As a continuing appropriation, from the Wisconsin election campaign fund, the moneys certified under s. 71.095 (2) to provide for payments to candidates under s. 11.50.”

Other parts of the law direct the manner in which these funds are to be collected and expended. In my opinion, ch. 107, Laws of 1977, is an appropriation measure within the meaning of the constitution.

With respect to the claim that the partial vetoes constituted affirmative legislation, the supreme court has recognized that the Governor has a constitutional role in legislation. In *State ex rel. Sundby v. Adamany*, 71 Wis.2d 118, 134, 237 N.W.2d 910 (1976), the court said:

“Some argument is advanced that in the exercise of the item veto the governor can negative what the legislature has done but not bring about an affirmative change in the result intended by the legislature. We are not impressed by this argued distinction. Every veto has both a negative and affirmative ring about it. There is always a change of policy involved. We think the constitutional requisites of art. V, sec. 10, fully anticipate that the governor’s action may alter the policy as written in the bill sent to the governor by the legislature.”

In light of this decision, it is my opinion that even though the effect of the vetoes may be affirmative legislation, altering the policy as written by the Legislature, this is still within the Governor’s constitutional powers.

The claim that the vetoes concerning the source of the money and the applicable effective date were conditions placed by the Legislature on the appropriation and thus not subject to the partial veto is not so easily answered. This challenge undoubtedly stems from

conclusions reached in two Attorney General opinions, i.e., 62 Op. Att’y Gen. 238 (1973) and 63 Op. Att’y Gen. 313 (1974). These opinions were mentioned but not “considered” by the court in *State ex rel. Sundby v. Adamany, supra*, p. 131. The court said:

“Petitioner argues that recent opinions of the attorney general indicate that a governor cannot veto a portion of an appropriation bill altering an appropriation figure, or striking down a condition imposed on the amount appropriated. We do not need to consider these opinions or the propositions they stand for because there is no question in this case that the governor *neither altered an appropriation nor removed a contingency or condition on the amount appropriated*. Thus this controversy is controlled by the law as stated in *Henry, Martin, and Finnegan*.” (Emphasis added.)

But here, however, by the partial veto the Governor has altered an appropriation and has removed a contingency or condition on the amount appropriated. The effect of the partial veto of sec. 51 is to increase the amount appropriated. Assembly Bill 664, as enacted by the Legislature, provided that all individuals filing income tax statements may designate that “their income tax liability be increased by \$1 for deposit into the Wisconsin Election Campaign Fund for the use of eligible candidates under s. 11.50.” After the partial veto, that portion of the law provided that every individual filing an income tax statement may designate \$1 for the Wisconsin Election Campaign Fund for the use of eligible candidates under sec. 11.50. This is a change of significant magnitude. Under the Legislature’s version, normal income tax revenues would not be reduced but could be increased by \$1 at the option of every individual filing a return, and any such increase was to be deposited (appropriated) into the Wisconsin Election Campaign Fund. Under the Governor’s version the general income tax revenues would effectively be reduced to the extent that individuals would designate \$1 of their income tax liability for the Wisconsin Election Campaign Fund. For convenience, the Legislature’s method of providing the funds may be called a tax surcharge program, and the Governor’s method may be called a check-off program.¹

¹ The Governor’s veto message states in part:

In 63 Op. Att'y Gen. 313 (1974) at p. 315, my predecessor said:

“Section 3, as passed by the legislature, would appropriate for enforcement purposes the lesser of \$130,000 or the amount of interest earned from snowmobile registration fees. The effect of the veto would be to appropriate, in any year, \$130,000 for enforcement regardless of the amount of interest earned on registration fees, assuming those fees total more than \$130,000. Thus, a *contingency or condition on the amount appropriated* in any year was removed by the partial veto. Therefore, such a partial veto was not authorized by Art. V, sec. 10, Wis. Const., and was invalid.” (Emphasis added.)

In *State ex rel. Sundby v. Adamany, supra*, at p. 135, the court said:

“We conclude the action taken by the governor was valid, in that the portions vetoed, although not actually items of appropriation, were separable provisions, *not constituting provisos or conditions to an item of appropriation*, and the remaining portions constitute a complete and workable law. ...” (Emphasis added.)

Since the court did not need to determine whether there were any provisos or conditions to an item of appropriation, and had previously so stated, it is my opinion that the inclusion of the language

“As amended, Assembly Bill 664 requires taxpayers to add \$1 to their tax liabilities. I have exercised my partial veto within S. 71.095(1) to restore the check-off provision that existed in the original bill.

“A tax surcharge program would be totally unworkable.

“Three states have tax surcharge programs. These programs are failures because of the minimal amount of revenue which the additional tax generates. If a surcharge program were implemented in Wisconsin, it would provide a very small percentage of the money necessary to run a campaign. It is estimated that only 1 to 3 per cent of the taxpayers would utilize this program. The dollars available to candidates under a surcharge program would not be sufficient to significantly reduce special interest contributions or entice candidates to subject themselves to spending limits.

“In most of the states using the check-off program, about one-fifth of the taxpayers utilize the check-off. The estimated \$1/2 million a check-off will annually raise in Wisconsin is sufficient to provide credible funding levels.”

Using the Governor's three percent estimate, the Legislature's version would have produced about \$75,000 per year (based on an estimate of 2 1/2 million eligible taxpayers) while the Governor's version would have produced an estimated one-half million dollars annually.

underscored above was an approval by dicta, of the “provisos or conditions to an item of appropriation” test mentioned in 63 Op. Att’y Gen. 313 (1974). The Legislature had imposed a condition upon the appropriation, i.e., that the funds to be appropriated were to be derived from a voluntary, additional income tax (surcharge).² The Governor’s partial veto of sec. 51 of ch. 107, Laws of 1977, not only affected a proviso or condition to an item of appropriation but removed it and substituted another. Further, this partial veto had the probable effect of increasing the amount appropriated for this particular purpose in any year. Thus, the Governor’s partial veto of sec. 51, of ch. 107, Laws of 1977, was contrary to the purpose of the partial veto power, was not authorized by Wis. Const. art. V, sec. 10, and was invalid as a partial veto.

With respect to the other sections of ch. 107, Laws of 1977, that were subject to the Governor’s partial veto, namely, secs. 9, 14 and 44, it is my opinion that these were separable provisions, that the remaining portions constitute a complete and workable law and the portions partially vetoed did not constitute provisos or conditions to an item of appropriation and thus were valid vetoes.

With respect to sec. 53 which dealt with the effective date of the application of the newly created sec. 71.095 of the statutes, I have concluded that the effect of the partial veto was to accelerate the effective date of the statute, particularly that part dealing with the deriving and appropriating of funds. In simple terms, the Governor’s version would have caused the deriving and appropriating of funds to commence with individual income tax returns for the calendar year 1977, and filed in 1978; the Legislature’s version would have caused the deriving and appropriating of funds one year later, commencing with individual income tax returns for the calendar year 1978, filed in 1979. It is my opinion that the acceleration of the effective date of an appropriation, can be in certain cases, and is in this case, the altering of a condition to the appropriation and further, was the equivalent of an increase in the appropriation. Therefore, I conclude that the Governor’s partial veto of sec. 53 was contrary to the purpose of the partial veto power, and is likewise invalid as a partial veto.

² This appears all the more clearly from the legislative history which shows that Assembly Bill 664, as originally introduced, contained the check-off feature, which, by amendment, the Legislature rejected.

The foregoing necessarily leads us to the more difficult question which is the effect of the invalid partial vetoes. The supreme court has said "This question [the effect of an invalid partial veto] is not to be answered by conjecture or speculation whether the governor would or would not have signed the act had he correctly determined the extent of his powers partially to veto it." *State ex rel. Finnegan v. Dammann, supra*, at p. 150. Since the Governor here partially vetoed secs. 51 and 53, which I have concluded were beyond his veto powers, and since the ascertaining of the Governor's reaction to secs. 51 and 53 had he correctly determined the extent of his powers partially to veto them would require speculation, I must conclude that the Governor objected to all of secs. 51 and 53. However, since the Governor's veto of all of those sections has the effect of eliminating the appropriations, it is necessary to consider whether the remaining portions of ch. 107, Laws of 1977, constitute a complete and workable law. Although some of the remaining portions of the chapter could survive without an appropriation, a number of them could not. Since I cannot speculate as to how the Governor might have exercised his veto powers with respect to separable or inseparable parts of ch. 107, Laws of 1977, had he correctly determined the extent of his powers partially to veto them, I must conclude that the Governor objected to all of ch. 107, Laws of 1977 (more accurately, Assembly Bill 664). Therefore, the entire bill should be returned "to that house in which it shall have originated," and that house (the Assembly) should proceed to reconsider it. Wis. Const. art. V, sec. 10.

BCL:JEA

Civil Service; Counties; Ordinances; Public Officials; Residence, Domicile And Legal Settlement; Sheriffs; Deputy sheriff appointed under sec. 59.21(2) and (8)(a), Stats., must be a resident of the state and must, before qualifying and serving, be a resident of the county and must continue to maintain residency therein. OAG 95-77

November 21, 1977.

DAVID T. PROSSER, JR., *District Attorney*
Outagamie County

You request my opinion whether a person who is a nonresident of Outagamie County may be appointed and serve as full-time deputy sheriff. I am advised that Outagamie County does not have a civil service system for deputy sheriffs pursuant to sec. 59.21(8), Stats.

I am of the opinion that a person appointed deputy sheriff pursuant to sec. 59.21(1), Stats., must be a resident of the county and of the respective city, village or assembly district for which such deputy is appointed. Where appointment is made under sec. 59.21(2), Stats., or pursuant to a civil service ordinance adopted under sec. 59.21(8)(a), Stats., I am of the opinion that such person must be a resident of the state and must, before qualifying and serving, be a resident of the county and must continue to maintain such residency within the county during his or her service.

I have reviewed 45 Op. Att'y Gen. 267 (1956), which comes to a somewhat similar conclusion. When that opinion was written, sec. 59.21(8)(a), Stats. (1955), provided that in counties having a civil service system for deputies, "positions shall be filled by appointment ... from a list ... of the 3 candidates who shall receive the highest rating in a competitive examination of persons residing in such county." Chapter 107, Laws of 1969, amended sec. 59.21(8)(a), Stats., to change the phrase "examination of persons residing in such county" to "examination of persons residing in this state." Legislative history of the bill involved leads me to believe that the change was intended to open the examination to state residents who did not reside in the county at the time and was not intended to alter any requirement of county residency after appointment and qualification.

The 1956 opinion concluded that a deputy sheriff was a public officer, in part because sec. 59.13, Stats., requires an oath; sec. 59.22(2), Stats., provides that the sheriff may require a bond. In addition, the opinion stated that the office of deputy sheriff was a local office and that continuing residency within the county was implied from and required by sec. 17.03(4), Stats., which provides in part:

“... Any public office ... shall become or be deemed vacant upon the happening of any of the following events:

“***

“(4) His ceasing to be an inhabitant of this state; or *if the office is local*, his ceasing to be an inhabitant of the district, county, city, village, town, aldermanic district or school district for which he was elected or *within which the duties of his office are required to be discharged*” (Emphasis added.)

A deputy sheriff is a county officer rather than a county employe. See 3 Op. Att’y Gen. 672 (1914) and 65 Op. Att’y Gen. 292 (1976).

A deputy sheriff, just as a sheriff, primarily performs his duties within his given county, although he may go outside the county without departing from duty in case of pursuit, delivery of prisoners and to assist other law enforcement agencies. See secs. 59.24, 66.305, 66.315 and *Andreski v. Industrial Comm.*, 261 Wis. 234, 241, 52 N.W.2d 135 (1952). It would be unreasonable to conclude that a deputy sheriff appointed for Outagamie County could reside in distant Dane County merely because such officer might on rare occasions deliver persons in his custody to a state institution in Dane County.

You also inquire whether a person can be appointed as a deputy sheriff in more than one county.

This question was answered no in 62 Op. Att’y Gen. 250 (1973), which reconsidered and reaffirmed the opinion in 45 Op. Att’y Gen. 267 (1956), but which stated that secs. 59.24(2), 66.30, 66.305 and 66.315, Stats., would permit a deputy appointed in the county of residence to serve in an adjacent county upon request for mutual assistance.

Even if residency in the county were not required by statute, it is my opinion that the county board of supervisors could require residency by ordinance under the provisions of sec. 59.15(2)(c) or 59.21(8)(a), Stats. See 54 Op. Att’y Gen. 107 (1965).

The United States Supreme Court has held that a municipal ordinance requiring firemen to live within the city did not violate constitutional provisions as to the right to interstate travel, the due process clause or equal protection clause of the fourteenth amendment. *McCarthy v. Philadelphia Civil Service Comm.*, 424

U.S. 645 (1976). Also see *Detroit Police Officers Ass'n. v. City of Detroit*, 405 U.S. 950 (1972).

BCL:RJV

Dental Examiners, Board Of; Open Meeting; Tape Recordings; A member of the Dentistry Examining Board has a right to tape-record an open meeting of the Board, providing he does so in a manner that does not interfere with such meeting; and the board cannot lawfully deny such right.

A board member does not have a right to tape-record a closed meeting of the Board. OAG 97-77

November 25, 1977.

JOHN F. LUECK D.D.S., *Secretary*
Dentistry Examining Board

The Dentistry Examining Board has requested my opinion on two questions:

1. Does a member of the Dentistry Examining Board (hereinafter "the Board") have a right to record the oral proceedings constituting a meeting of such Board?

2. If he has such a right, can it lawfully be denied him by board action, as, e.g., by the adoption of a board administrative rule prohibiting a board member from recording a board meeting, or by a vote of the majority of the board members present at a meeting, prohibiting a recording thereof by any member?

In answering these questions, I will deal with them as relating to a situation where the Board is holding its meeting "in open session," as required by sec. 19.83, Stats. I will also consider the questions of whether, in a meeting of the Board convened "in closed session," pursuant to sec. 19.85(1), Stats., a board member has the "right" described in Question No. 1, and whether, if he has such right where the board meeting is so convened, it may be denied him by board action.

It is my opinion that the board member has a right to tape-record a meeting of the Board held "in open session" (hereinafter called "open meeting"); and it is my further opinion that such right cannot be denied him unless the process of tape recording used physically interferes with the Board's deliberative process.

While there are no helpful Wisconsin decisions on these two questions there are four cases from other jurisdictions which address the issues raised in your questions. Two of these cases provide strong support for my opinion.

In *Davidson v. Common Council of City of White Plains*, 40 Misc.2d 1053, 244 N.Y.S.2d 385 (1963), a New York lower court held that the Common Council of White Plains had the authority to regulate its own proceedings and therefore was acting within the scope of its legislative powers in forbidding the use of a mechanical recording device at its public meetings. In so holding, the court said:

"The fact that Legislative halls or courtrooms are open to the public does not give the public a vested right to televise, photograph or use recording devices. ... If in the judgment of the legislative body the recording distracts from the true deliberative process of the body it is within their power to forbid the use of mechanical recording devices." (Emphasis supplied; 244 N.Y.S.2d at p. 388.)

In *Nevens v. City of Chino*, 233 Cal.App. 2d 775, 44 Cal.Rptr. 50 (1965), a reporter sued for an injunction to prevent the City of Chino and its city council from enforcing a measure adopted by it which provided: "That from and after this date [July 18, 1961], no tape recorder or mechanical device for the purpose of obtaining tapes or recordings of Council proceedings be permitted in the Council chamber." On appeal from dismissal of the suit, it was held that such council measure was "too arbitrary and capricious, too restrictive and unreasonable. [Authorities cited.] It bars what clearly should be permitted in making an accurate record of what takes place at such meetings." 44 Cal.Rptr. at p. 52.

In so holding, the court reasoned:

"... The plaintiff seeks permission to use a noiseless and self-operated mechanical device, as an aid to his profession as a newspaper reporter; this silent tape recorder, an invention of recent years, operates without any disturbance and, as alleged,

is presently as much a part of plaintiff's professional equipment as a pen, or pencil, and a sheet of paper used to be in trying to keep an accurate record of what takes place at public meetings.

...

"... The court can take judicial notice that there have been developed during recent years more than one variety of noiseless tape recorder. *The action of the city council is too arbitrary and capricious, too restrictive and unreasonable.* (Wollam v. City of Palm Springs, 59 Cal.2d 276, 29 Cal.Rptr. 1, 379 P.2d 481; Alves v. Justice Court, etc., 148 Cal.App.2d 419, 306 P.2d 601; 35 Cal.Jur.2d Municipal Corporations, sec. 228, pp. 48-49.) *It bars what clearly should be permitted in making an accurate record of what takes place at such meetings.*

"Accuracy in reporting the transactions of a public governing body should never be penalized, particularly in a democracy, where truth is often said to be supreme. ... If a shorthand record of such a meeting is more accurate than long hand notes, then the use of shorthand is to be approved (Wrather-Alvarez Broadcasting, Inc. v. Hewicker, 147 Cal.App.2d 509, 514, 305 P.2d 236); and if the making of a tape record is a still better method of memorializing the acts of a public body it should be encouraged.

"As no one is harmed, the use of a silent tape recorder operated exclusively by the person interested in making such a record must be permitted. ..." (Emphasis supplied; 44 Cal.Rptr. at pp. 51, 52.)

It should be observed that *Nevens* dealt with open or public meetings of a city council, as did *Davidson*; but *Nevens* makes no mention at all of *Davidson*.

Sigma Delta Chi v. Speaker, Maryland House of Del., 270 Md. 1, 310 A.2d 156 (1973), involved a challenge to rules of the Maryland Legislature preventing attendance at the sessions of its respective houses by news reporters or others in the possession of tape recording devices. In rejecting such challenge raised by news reporters and a national journalism fraternity, the Court of Appeals of Maryland held that such rules did not constitute a restraint on reporters' rights to freedom of the press and an abridgement of their first amendment rights, and that such rules did not violate due process by interfering

with the right of reporters to pursue their profession. In so holding, the court said:

“Appellants base their argument principally on the case of *Nevens v. City of Chino*, 233 Cal.App.2d 775, 44 Cal.Rptr. 50 (1965), where a news reporter sought to enjoin a city council from enforcing a measure that provided: ‘That from and after this date, no tape recorder or mechanical device for the purpose of obtaining tapes or recordings of Council proceedings be permitted in the Council chamber,’ 44 Cal.Rptr. at 50. ...

“The California court held that the action of the city council was ‘too arbitrary and capricious, too restrictive and unreasonable,’ 44 Cal.Rptr. 52. In so holding, it reasoned that since tape recorders are ‘silent and unobtrusive,’ their exclusion unreasonably deprived reporters ‘of the means to make an accurate record of what transpires in a public meeting.’ *Id.* at 52. The court then conjectured:

“‘Suppose, for example, that the Chino City Council had attempted to prohibit the use of pen, or pencil and paper, at the session held by them.’ *Id.* at 52.

“This statement is clearly inapposite here. While the removal of pen and paper might frustrate *all* effective communication, the prohibition against tape recorders is *a mere inconvenience*. *Therefore, we think the reasoning of the California decision is unsound, and we decline to follow it.* Cf. *Davidson v. Common Council of City of White Plains*, 40 Misc.2d 1053, 244 N.Y.S.2d 385 (Sup.Ct.1963).” (Emphasis supplied; 310 A.2d at p. 160.)

The most recent case involving the tape recording issue is *Sudol v. Borough of North Arlington*, 135 N.J. Super. 149, 348 A.2d 216 (1975). In *Sudol*, a taxpayer recorded a meeting of the council of the defendant Borough. After the meeting, the council discovered that she had recorded it and would not let her leave until she had surrendered the tape. The council had no rule or ordinance prohibiting tape recordings, and it was stipulated that the Borough had permitted and would permit note-taking, including *verbatim* shorthand.

The court in *Sudol* held that the taxpayer was “*entitled* to record the proceedings of the public meetings of North Arlington *for the*

reasons and logic expressed in Chino [Nevens]." (Bracketed material and emphasis supplied; 348 A.2d, p. 219.) It found *Davidson* and *Sigma Delta Chi* unpersuasive. It pointed out that *Davidson* had held "that a legislative body has the power to forbid the use of a mechanical recording device if, in the body's judgment, the recording of legislative process distracts from [the] true deliberative process of [the] body," but that "The testimony in the instant case clearly establishes beyond any question that Mrs. Sudol's recording device in no way disturbed anybody. As a matter of fact, no one even knew it was being done until after the meeting was over." 348 A.2d at p. 217. As for *Sigma Delta Chi*, the *Sudol* court viewed it as inapplicable because, "The North Arlington council had no ordinance or resolution which in any way restricted this plaintiff from recording the proceedings of the public meeting." *Ibid.* at p. 218. Had North Arlington, however, possessed an ordinance or resolution of such type, it is plain that it would have been highly suspect in the eyes of the court deciding *Sudol*, in view of its explicit adoption of the *Nevens* rationale in reaching its decision. Under such rationale, any prohibition of a silent tape recording of a public meeting is invalid, whether or not it is in the form of a public body's rule, resolution, or ordinance.

I find the rationale of *Nevens* convincing, and believe that Wisconsin courts would follow it. *Nevens* recognizes the right of individuals, whether news reporters or not, to tape-record public or open meetings of governmental bodies so long as such tape recording does not create a disturbance which will interfere with the conduct of the meeting, and with the right of others present to listen. While *Nevens* does not specifically refer to such right as a "right," it recognizes such a right when it says, "As no one is harmed, the use of a silent tape recorder operated exclusively by the person interested in making such a record *must* be permitted" (emphasis supplied; 44 Cal.Rptr. p. 52); and *Nevens* also recognizes a right to record a public meeting with a silent tape recorder when it cites, in support of its holding, the "general rule approved in *Wrather-Alvarez Broadcasting, Inc. v. Hewicker* ... 147 Cal.App.2d 509, 514, 305 P.2d 236, 239" that, "'We conclude that petitioner or his assistant is *authorized* at any public hearing in the court where he is rightfully in attendance to take such notes as he may desire concerning the proceedings in any form selected by him so long as it does not interfere with the orderly conduct of the proceedings.'" (Emphasis

supplied; *ibid.*) *Sudol*, holding that the taxpayer involved, under the rationale of *Nevens*, was "entitled" to tape-record the public meeting, correctly viewed *Nevens* as declaring the existence of a right.

The California "open meetings" law apparently assisted the court in reaching its decision in *Nevens*. The California "open meetings" law requires "public hearings by city councils and other similar governmental bodies within the state." 44 Cal.Rptr. p. 51. A very natural concomitant of the "right to know" conferred by and recognized in an "open meetings" law is the right, recognized in *Nevens*, to make "an accurate record of what takes place" at public meetings, by any means, including the tape recorder not physically disruptive of the meeting. The "right to know" also exists in Wisconsin under our own "open meetings" law, secs. 19.81-19.98, Stats. Thus, I view *Nevens* more in point in discussing Wisconsin law, although I would find such case persuasive even if Wisconsin did not have its "open meetings" law. (*Sudol*, it should be noted, in finding that *Nevens* "is most closely in point and its logic persuasive" pointed out the fact that New Jersey, in common with California, had "right-to-know" provisions (348 A.2d p. 218); and it is obvious that the *Sudol* court found *Nevens* easier to follow because New Jersey, as well as California, had such statutes.)

As I find *Nevens* and *Sudol* convincing, I find *Davidson* and *Sigma Delta Chi* unconvincing. *Davidson* would permit a public body to prohibit a tape recording of its public or open meeting merely because a member or members of such body, no matter how silent and orderly the operation of the tape-recording process, would feel it "distracts from [the] true deliberative process of [the] body," with such feeling arising out of a dislike for or uneasiness with the idea of having one's words, or the words of one's colleagues, or both, accurately tape-recorded, for whatever the reason. Such a subjective reason for denying a right to tape-record a public or open meeting in a physically nondisruptive manner is, in my judgment, not a good or sound reason for the denial of such right. I find *Sigma Delta Chi* particularly unconvincing because of its unrealistic appraisal of the prohibition of tape recorders as "a mere inconvenience." 310 A.2d at p. 160. The Maryland court apparently came to such conclusion with the thought that so long as reporters had "pen and paper," the prohibition against tape recorders produced no more than "a mere inconvenience." See 310 A.2d at p. 160. Such a prohibition is much more than that, and must be viewed as constituting a real and

substantial infringement upon the right to obtain a complete and accurate record of a public meeting by any means not physically disruptive of it, including the tape-recording process currently most suitable and likely to obtain such record.

I would read Wisconsin's "open meetings" law, absent any support from decisions such as *Nevens* and *Sudol*, to allow for recording open meetings.

Section 19.81, Stats., reads in part:

"(1) In recognition of the fact that a representative government of the American type is dependent upon an informed electorate, it is declared to be the policy of this state that the public is entitled to the *fullest and most complete information* regarding the affairs of government as is compatible with the conduct of governmental business.

"(2) To implement and ensure the public policy herein expressed, all meetings of all state and local governmental bodies shall be publicly held in places reasonably accessible to members of the public and shall be open to all citizens at all times unless otherwise expressly provided by law." (Emphasis supplied.)

This language, and the provision of sec. 19.83, Stats., that "Every meeting of a governmental body ... shall be held in open session," though qualified by the "closed session" exemptions of sec. 19.85, Stats., make it plain that any member of the public has a right to attend an open meeting of a governmental body in Wisconsin, as such body is defined in sec. 19.82, Stats. I believe that it was well within the intendment of the Legislature, in enacting our "open meetings" law, that a member of the public has not only a right to attend, but also a concomitant right to take notes at such meeting, or to do other nondisruptive acts, in order to obtain and preserve "the fullest and most complete information" of what occurred. It seems clear to me that a "right to record completely and accurately," if not within the letter of the "open meetings" law of Wisconsin, is clearly within its spirit. Few persons, if any, have a power of total recall. In order to obtain a complete and accurate record of a public meeting of any length or consequence, it may well be necessary to mechanically record what goes on at such meeting.

It is my opinion, based on *Nevens, Sudol*, and the Wisconsin open meetings law that any member of the public has the right to record an open or public meeting of a governmental body by use of a tape recorder so long as its use is not physically disruptive of the meeting. By the same reasoning, a member of such governmental body possesses such right, since his interest in a complete and accurate record of an open meeting of such body is presumably greater than that of the average person attendant at such meeting, and at least as great as that of any person attending who possesses a special and logical interest in the accuracy and completeness of such record, or any part thereof. A member of the Dentistry Examining Board has such right.

While it is my opinion that a Dentistry Examining Board member has a right to tape-record an *open* meeting of the Board in a nondisruptive fashion, I do not believe he has such right as to a meeting of the Board convened "in closed session" under sec. 19.85(1), Stats. The Legislature, in conferring on governmental bodies the power to hold closed meetings for certain carefully defined purposes, clearly intended that no one should have the right to report a closed meeting under circumstances that might mean that its private and secret nature could be violated. If a board member, or anyone else lawfully attending a closed meeting of the Dentistry Examining Board, could tape-record a closed meeting and retain the tape thereof in his own possession and for his own uses, there would always exist the possibility, and perhaps in some situations even a probability that the contents of such tape would be disclosed to the public, by design or by accident. Such a disclosure defeats the purpose of sec. 19.85(1), Stats.

It may be that a governmental body will believe it desirable to record its closed meetings, but it should then arrange to keep the records thereof under security to prevent their improper disclosure. The tape recording could be made by the Board itself, perhaps with its administrative secretary handling the task. The Board might permit one of its members to use his tape recorder to record a closed meeting, but the record produced should go into the Board's custody, rather than the custody of such member. Under such an arrangement, of course, a board member would not be tape-recording the closed meeting as a matter of right.

BCL:JHM

Assessments; Conservation; Taxation; Section 70.11(24), Stats., is unconstitutional as violative of the uniformity clause in Wis. Const. art. VIII, sec. 1. OAG 101-77

December 12, 1977.

EVERETT E. BOLLE, *Director of Legislative Services*
Wisconsin State Assembly

By 1977 Assembly Resolution 26, the Wisconsin State Assembly has requested my opinion concerning the constitutionality of sec. 70.11(24), Stats.,¹ relating to a property tax assessment exclusion for improvements for property in a "conservation area."

¹ Section 70.11(24), Stats., provides:

"**Property in conservation area.** (a) Any city, town or village may establish a conservation area (hereafter in this subsection referred to as 'area') by resolution of its governing board. Such resolution shall state:

"1. The boundaries of the area;

"2. The substandard, outworn or outmoded condition of the industrial, commercial or residential buildings in the area;

"3. That such conditions impair the economic value of the area;

"4. That the continuation of such conditions depreciates values, impairs investments and reduces the capacity to pay taxes;

"5. That it is necessary to create with proper safeguards inducements and opportunities for the employment of private investment and equity capital in the replanning, rehabilitation and conservation of the area;

"6. That through rehabilitation, conservation or replanning the area may improve the general welfare of the city, town or village and protect its tax base;

"7. That by virtue of additions, betterments or alterations made to the structures in the area, the health, safety, morals, welfare and reasonable comfort of the citizens will be protected and enhanced.

"(b) Any improvement made by an owner commenced after the adoption of a local ordinance or resolution, through private investment to any existing completed structure in the area shall be deemed to be made for the purposes and objectives of the area and shall be excluded by the assessor of such locality in arriving at the assessment of the real estate, but not to exceed the maximum amount established by the municipality in the exemption period specified in par. (c), provided that the actual cost of such additions, betterments or alterations to the owner of the property is \$200 or greater.

"(c) The assessment exemption granted by this subsection may continue for 5 assessment years and shall not be extended beyond that time. The maximum value of any assessment exclusion for said 5-year period shall be either \$1,000 or 10% of the value of the improved property. The governing body of a municipality coming under this subsection shall determine which statutory maximum shall apply to the municipality and then shall set the maximum for the municipality, which shall be equal to or lower than the chosen statutory maximum.

"(d) Whenever an owner of property within the area has made such improvements, alterations or additions for the purpose of enhancing the value of the real estate and to

The statute in question provides that any city, town or village may establish a conservation area by resolution of its governing board. The statute provides that such resolution shall state, among other things, the boundaries of the area, the substandard, outworn or outmoded condition of the buildings in the area, that these conditions depreciate values, impair investments and reduce the capacity to pay taxes, and that it is necessary to create inducements and opportunities for employment of private investment and capital in the rehabilitation and conservation of the area. The statute provides that any improvement made by an owner after the adoption of such a resolution, through private investment to any existing completed structure in the area, shall be excluded by the assessor in arriving at the assessment of the real estate, but not to exceed a certain maximum. This assessment exemption may continue for five assessment years, and the maximum value of any assessment exclusion for said five-year period shall either be \$1,000 or ten percent of the value of the improved property, as determined by the governing body of the municipality. The statute contains other provisions with respect to how an owner may apply for such an

comply with the requirements of the resolution creating the area, such owner may apply to the assessor, or to the tax commissioner in any city, town or village having such official, requesting that an exemption be granted from that part of the tax assessment against his property which would otherwise be levied except for such exemption, but in no event shall an exemption be granted in excess of the maximum amount established under par. (c). Such owner shall file an affidavit in the form approved by the assessor or tax commissioner, setting forth the date when such improvements, additions or betterments were completed, their actual cost, their nature and description, and the manner in which the real estate will be improved as a result of such additions, betterments or improvements, together with such other information as the assessor or tax commissioner requires. Within 90 days from the date such affidavit is filed, the assessor or commissioner shall communicate his decision to the owner as to whether or not the exemption is granted. If the exemption is refused a review of the determination of the assessor or commissioner shall be had before the board of review at the earliest time the board is in regular session. The determination of the board of review shall be final and conclusive and no appeal shall lie with respect thereto.

“(c) The commissioner, or the assessor, shall in the event an exemption is granted in accordance with this subsection certify to the governing body of such city, town or village that the exemption has been granted and shall specify assessment dates on which such exemption shall operate and shall state briefly the reasons why the exemption is accorded. The commissioner, or the assessor as the case may be, shall then enter such exemption upon the assessment roll opposite the property affected by the exemption.

“(g) The governing body of any city, town or village may by ordinance or resolution establish procedures for giving effect to this subsection not in conflict therewith.

“(h) The improvements herein contemplated must be done pursuant to a permit from the local building inspector if a permit is required for the particular type of improvement.”

assessment exemption and how such exemption shall be determined and reviewed.

The statute is intended to give certain property owners a partial exemption from taxation by use of the assessment exemption related to certain improvements made upon the property.

It is my opinion that sec. 70.11 (24), Stats., is unconstitutional as a violation of the requirement of uniformity contained in Wis. Const. art. VIII, sec. 1.

In *Gottlieb v. Milwaukee*, 33 Wis.2d 408, 147 N.W.2d 633 (1967), the Wisconsin Supreme Court struck down as being violative of the uniformity clause the "urban redevelopment law" set forth in sec. 66.405 to sec. 66.425, Stats., inclusive. That law authorized local governing bodies of Wisconsin cities to enter into contracts with persons who had formed redevelopment corporations. These contracts required the erection of buildings or improvements according to an approved plan in an area of the city found to be substandard or insanitary in exchange for the privilege of a partial tax freeze. This meant that the redevelopment corporation could be exempt for a period of not more than 30 years from paying anything more than the "maximum local tax" which was defined as the tax that would have been payable if computed on the last assessed valuation of the parcel of real estate prior to the transfer of the property to the redevelopment corporation. The court went into considerable detail explaining the standards for tax uniformity required by the Wisconsin Constitution. 33 Wis.2d at 416-426. The court said:

"... It is apparent that the property of the redevelopment corporation is subject to a portion of the property tax, but by a statutory concession it is not subject to all of the tax that would fall on other property of equal current value. It is partially exempt.

"For reasons that the legislature considers sufficient, the property of the redevelopment corporation is given preferential treatment and bears less of its tax burden on the true *ad valorem* basis than does other property. This law accomplishes its intended, but constitutionally prohibited, purpose--the unequal taxation of property. Property taxes where such a freeze is in force are not uniform in their impact on property

owners. Such lack of uniformity is accomplished by a prohibited partial exemption from taxation. ..." 33 Wis.2d at 429.

Section 70.11(24), Stats., suffers from this same infirmity. Even though this statute, like the one in *Gottlieb*, has the laudable purpose of contributing to the public welfare by the encouragement of worthwhile private enterprise, it is apparent that the property of owners who have made certain improvements is subject to a portion of the property tax; but by sec. 70.11(24), Stats., it is not subject to all of the tax that would fall on other property of equal current value; it is thus partially exempt. These owners who have made these improvements are given preferential treatment, and their property bears less of its tax burden on the true *ad valorem* basis than does other property. Other taxpayers holding equally valuable property will be paying a disproportionately higher share of local property taxes.

I have taken into account the strong presumption of constitutionality enjoyed by every statute. However, because of the strong similarity between this statute and the urban redevelopment law struck down by the court in the *Gottlieb* case, I am of the opinion that sec. 70.11(24), Stats., is unconstitutional as violative of Wis. Const. art. VIII, sec. 1.

BCL:JEA

Benefits; County Board; Public Officials; Salaries And Wages; Workmen's Compensation; County board does not have power to establish number of days elected officials may utilize for vacation or sick leave or to grant longevity pay to elected officials, but can pay premiums for individual or group hospital, surgical and life insurance for them. OAG 103-77

December 14, 1977.

FREDERICK R. SCHWERTFEGER, *Corporation Counsel*
Dodge County

Mr. Steve Schmitz, Assistant Corporation Counsel, has requested my opinion on a number of questions relating to the power of the county board to grant "fringe" benefits to *elected* county officials.

1. Does the board have power to establish the number of sick-leave days which elective officials may take with pay, and pay for accumulated, unused sick leave?
2. Does the board have power to establish the days an elected official may take as vacation with pay, and pay for accumulated, unused vacation?

The answer to both questions is no for the reasons fully discussed in 65 Op. Att'y Gen. 62 (1976).

3. If such benefits had been established in the past and certain officials had been accumulating these benefits, may the county board increase the salaries of the elected officials during their term of office in an amount equal to the accumulated benefits?

Since the county board was not empowered to grant or regulate sick leave and vacation leave of elected officials, no officer would have legally accumulated unused sick leave or vacation leave.

4. Does the county board have power to grant longevity pay to elected officials by means of an automatic increase in salary based on years of service of the incumbent?

I am of the opinion that it does not have such power. The compensation established under sec. 59.15(1)(a), Stats., is for the office, and the incumbent is entitled to it as an incident of office. See 61 Op. Att'y Gen. 165 and 61 Op. Att'y Gen. 403 (1972). Under sec. 59.15(1)(a), Stats., the board could establish the annual compensation for the office at a given figure for the first year of the term and at a higher figure for the second year of the term, but any occupant of the office would be entitled to the fixed amounts in the given years regardless of his personal longevity.

5. Can the county board grant elected officials fringe benefits in the nature of hospital, surgical and life insurance?

The answer is yes. Section 59.07(2)(c), Stats., provides that the board may:

“Employe insurance. Provide for individual or group hospital, surgical and life insurance for county officers and

employees and for payment of premiums therefor.” (Emphasis added.)

6. Are elected county officials entitled to worker’s compensation benefits?

Yes, where the conditions of sec. 102.03, Stats., are met. The county is an employer under the definition in sec. 102.04(1)(a), Stats., and a county elected official is an employe under the definition in sec. 102.07(1), Stats.

7. Are elected county officials entitled to participate in the Wisconsin Retirement Fund?

Participation in the fund extends to elected officials of all counties under 500,000 population pursuant to sec. 41.05(9)(a)1., Stats., if such official qualifies as an employe under sec. 41.02(6), Stats., and is not excepted under sec. 41.02(12), Stats. Please refer to the election required under sec. 41.02(12)(i), Stats., and the inclusion of certain elected officials by reason of sec. 41.02(13), Stats. For special provisions as to county judges, see sec. 41.07(3), Stats.

I wish to commend Mr. Schmitz for furnishing this office with an in-depth memorandum of authorities in connection with the opinion request.

BCL:RJV

Constitutionality; Taxation; Discussion of constitutional and policy considerations associated with federalization of state income tax laws. OAG 104-77

December 15, 1977.

EVERETT E. BOLLE, *Assembly Chief Clerk*
Wisconsin Legislature

Upon the direction of the Wisconsin State Assembly you have requested my opinion regarding the constitutionality of federalizing the Wisconsin income tax. Assembly Resolution 11 states in full:

“Resolved by the assembly, That the attorney general is requested to provide an opinion as to the constitutionality of

federalizing the Wisconsin income tax by establishing the tax as a percentage of the federal income tax owed by the taxpayer, without any modifications, adjustments or deductions.”

There is no specific proposed legislation before me to examine.

Wisconsin “federalized” its individual income tax some time ago by adopting ch. 163, Laws of 1965. This was accomplished by incorporating definitions into the Wisconsin law identical to those found in the federal internal revenue code. However, certain differences remained, including, among other things, nonrecognition of preferential capital gain treatment, treatment of deductions, separate filing requirements for spouses, inclusion of interest on state and municipal obligations, exclusion of interest on federal obligations, and special treatment for numerous problems arising out of residency status. Many of these differences are reflected by the modifications in sec. 71.05, Stats. Some of these differences are required to satisfy constitutional requirements, such as the exclusion of interest on federal obligations and the treatment of income received while a nonresident of Wisconsin.

Accordingly, it would not be constitutional to establish the state income tax as a percentage of the federal income tax, as the resolution provides, without any modifications to satisfy such constitutional requirements.

Another constitutional question raised is whether such a scheme of taxation constitutes an unconstitutional delegation of state legislative powers to the federal government. Wisconsin Constitution art. IV, sec. 1, provides that “The legislative power shall be vested in a senate and assembly.” No one of the three branches of government can effectively delegate any of the powers which peculiarly and intrinsically belong to that branch. *State v. Wakeen*, 263 Wis. 401, 407, 57 N.W.2d 364, 367 (1953); *Rules of Court Case*, 204 Wis. 501, 503, 236 N.W. 717, 718 (1931).

The following quotations from 50 Op. Att’y Gen. 107 (1961) place the delegation issue into its proper perspective:

“The general rule is that a state legislature has no power to delegate any of its legislative powers to any outside agency such as the Congress of the United States. * * * A state legislature does not invalidly delegate its legislative authority by adopting the law or rule of Congress, if such law is already in existence or

operative.' 11 Am. Jur. 930, 931, 16 C.J.S. 563. 'It is generally held that the adoption by or under authority of a state statute of prospective Federal legislation, or Federal administrative rules thereafter to be passed, constitutes an unconstitutional delegation of legislative power. In some cases, however, it has been held that there was no unconstitutional delegation of authority by a state statute which provided that prospective Federal legislation should control.' 11 Am. Jur. Sec. 219, 1961 supplement p. 141, 16 C.J.S. 564.

“* * *

“In *George Williams College v. Williams Bay* (1943) 242 Wis. 311, 316, 7 N.W. 2d 891, it is stated:

““* * * By this doctrine [legislation by reference] when a statute adopts the general law on a given subject, the reference is construed to mean that the law is as it reads thereafter at any given time including amendments subsequent to the time of adoption. This is to be contrasted with adoption by reference of limited and particular provisions of another statute, in which case the reference does not include subsequent amendments. * * *”

Alaska's territorial income tax law which was based on a percentage of the federal tax paid had its constitutionality upheld in *Alaska Steamship Co. v. Mullaney*, 180 F.2d 805, 815 (9th Cir. 1950). The court found it would be appropriate to incorporate by reference specific provisions of the federal law such as was done by ch. 163, Laws of 1965.

The problem of incorporating provisions into enactments by reference to future acts of other legislative bodies is avoided by the periodic updating of Wisconsin's reference to the federal law. Chapter 29, Laws of 1977, for instance, updated the reference to the federal internal revenue code to December 31, 1976, by amending sec. 71.02(2)(b)2 and creating sec. 71.02(2)(b)3, Stats. Thus, for the 1977 taxable year and thereafter, taxpayers will use the federal internal revenue code in effect on December 31, 1976, in computing adjusted gross income and itemized deductions, with two exceptions in the areas of child care expenses and special tax treatment of certain pollution control facilities. These two exceptions demonstrate that periodic updating and strict scrutiny by the state Legislature of

the federal internal revenue code, which the Constitution was intended to insure, may result in the adoption of differences between the federal and state tax systems, inconsistent with the objectives of "simplification," but apparently in response to more compelling policy considerations.

Any attempt to federalize corporate income taxes must keep in mind that corporations must have their incomes apportioned between the states in which they are doing business. Apportionment of corporate income between states, of course, is not necessary for federal income tax purposes. An unapportioned tax, by its very nature, makes interstate commerce bear more than its fair share of taxation. See 71 Am. Jur. 2d *State and Local Taxation* sec. 456.

The essential difference between the present proposal suggested by Assembly Resolution 11 and the current law is that the basis for the individual income tax would be the federal tax due instead of federal taxable income. This difference is not dramatic, nor does it lead to any more "simplification" or "federalization" than is possible under the present scheme of taxation. Some state and federal differences, such as those related to capital gains treatment and reporting of combined incomes by spouses, could be eliminated under our present simplified federalized income tax law as policy considerations may dictate. Other differences, such as those related to interest on government obligations and residency, are constitutionally mandated, and would be just as necessary under a state law based on federal tax due as a state law based on federal taxable income.

BCL:APH

Indians; Indigent; Public Defenders; Wisconsin Indian Legal Services Center, Inc., is not a "local public defender organization," and the Public Defender Board has no authority to contract with such nonstock corporation for the furnishing of legal services to indigents pursuant to sec. 977.03, Stats. OAG 105-77

December 16, 1977.

HOWARD B. EISENBERG

State Public Defender

You have asked whether the Public Defender Board may, in its discretion, contract with Wisconsin Indian Legal Services Center, Inc. (WILS), for the provision of legal services under ch. 977, Stats., as created by sec. 1600, ch. 29, Laws of 1977. In my opinion it may not.

Newly created sec. 977.03, Stats., provides in part:

“The board may enter into contracts with federal governmental agencies and *local public defender organizations* for the provision of legal services under this chapter.” (Emphasis added.)

Two questions are therefore involved:

- 1) Is Wisconsin Indian Legal Services Center, Inc., a public defender organization? and
- 2) If so, is it a “local” public defender organization?

I have no doubt that WILS is a public defender organization. It was created in 1971 as a nonstock corporation whose purpose is “To provide legal services to the Indian Communities in Wisconsin.” The current director of legal services of the corporation informs me that representation is provided to Wisconsin Indians who claim indigency and who are charged with violating criminal statutes in any of the Wisconsin counties. The principal office of the corporation is in Dane County.

Because it operates statewide, however, WILS is not a “local” public defender organization. The word “local” is not defined in ch. 977, Stats. Therefore, under sec. 990.01(1), Stats., it is to be construed according to its common and approved usage unless such construction would produce a result inconsistent with the manifest intent of the Legislature. *Webster's Third New International Dictionary* defines “local” as “primarily serving the needs of a particular limited district, often a community or minor political subdivision.”

Legislative definitions of “local” found elsewhere in the statutes, as well as judicial definitions of the term, comport with the dictionary definition. For example, in the area of urban redevelopment, sec. 66.405(3)(h), Stats., defines “local governing body” as “the board of aldermen, common council, council, commission or other board or body vested by the charter of the city or other law with jurisdiction to adopt or enact ordinances or local laws.” In the motor vehicle code, sec. 340.01(26), Stats., defines “local authorities” as “every county board, city council, town or village board or other local agency having authority under the constitution and laws of this state to adopt traffic regulations.”

Likewise, it is clear from reviewing the case law that the Wisconsin Supreme Court has consistently construed “local” to mean something other than statewide. See *Columbia County v. Wisconsin Retirement Fund*, 17 Wis.2d 310, 116 N.W.2d 142 (1962); *State ex rel. Teweles v. Public Schools Teachers' Annuity and Retirement Fund*, 235 Wis. 385, 291 N.W. 775 (1940); and *Milwaukee County v. Isenring*, 109 Wis. 9, 85 N.W. 131 (1901).

The legislative and judicial definitions referred to above clearly demonstrate that “local” connotes a classification which embraces less than the entire state and benefits one specific geographical area. Wisconsin Indian Legal Services Center, Inc., clearly provides legal aid to indigents throughout the state. Although the organization maintains local offices staffed by local counsel, this fact does not alter its statewide character. It is not like some national or statewide organization with chartered local chapters, each capable of entering into contracts. Any contract with WILS would be with the statewide organization, and not with some local office that it might maintain. Thus, I do not believe that it qualifies as a local organization under ch. 977, Stats.

Because a legislatively created board has only those powers which are either expressly conferred or necessarily implied from the four corners of the statute under which it operates, *Racine Fire & Police Commission v. Stanfield*, 70 Wis.2d 395, 399, 234 N.W.2d 307 (1975), it is my opinion that the Public Defender Board has no authority to contract with WILS, a statewide organization, for the provision of legal services under ch. 977, Stats.

BCL:MM

Agriculture; Constitutionality; Homestead; Public Purpose Doctrine; Taxation; Proposals for exemptions of “homestead property” from local property taxation probably are unconstitutional under the equal protection clause of the state and federal constitutions and the tax uniformity clause of the state constitution. OAG 106-77

December 19, 1977.

EVERETT E. BOLLE, *Director of Legislative Services*

Wisconsin State Assembly

At the request of the Assembly Organization Committee you have asked for my opinion on the constitutionality of a property tax exemption under the following two proposals:

1. A proposal to exempt from all property taxation “homestead property” owned by Wisconsin residents.
2. A proposal to exempt from property taxation that portion of property taxes levied for school purposes on “homestead property” owned by Wisconsin residents.

The term “homestead property” would include the dwelling used by the taxpayer as his principal residence and all attached farmland, and all attached nonfarmland not to exceed 40 acres.

The stated public purpose of these proposals is to enable Wisconsin citizens to retain ownership of their homesteads, which ownership is being threatened by the financial burdens imposed by such taxation.

Our first concern is whether the proposals fulfill a valid public purpose of a statewide concern. What constitutes a public purpose is in the first instance a question for the Legislature to determine. Although the supreme court will not be bound by legislative expressions of public purpose, it will give such expressions great weight and afford very wide discretion to legislative declarations of public purpose. *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis.2d 32, 50, 205 N.W.2d 784 (1973).

The public purpose here is to allow Wisconsin residents to retain home ownership, which allegedly is being threatened by burdens of high property taxation. The stated public purpose is suspect in the absence of any facts to support it, even though it enjoys the presumption. What indication is there that home ownership is being threatened because of property taxation? The high cost of new and existing dwellings may be a greater threat to persons desiring home ownership than property taxation. There may be some evidence that farm ownership is being threatened because of property tax burdens, but the proposals extend far beyond this concern. At any rate, if the stated purpose is not supported by the facts, its validity will not be upheld simply because the Legislature has so declared. No facts have been presented to justify the validity of the stated public purpose. Home ownership remains very popular in Wisconsin, even with the property tax burdens placed upon homesteads.

Further, assuming such a threat to home ownership exists, one must consider the alternative to home ownership, which is to rent a dwelling place. No matter how virtuous the benefits of home ownership may be, some persons prefer to rent property and others could not afford home ownership even if not subject to property taxation. The elimination of the property tax on homestead property would result in an onerous burden upon remaining property taxpayers. Those who could not afford to own homes would be paying higher rents increased by landlords who would have to make their tenants absorb the greater property taxes imposed upon their rental properties.

At this point the reasonableness of the classification must be considered. In the City of Madison the total property tax assessment for May 1, 1976, was \$2,046,468,300. Of this total, \$1,231,518,950 can be attributed to "residential" properties, which includes about 2500 vacant lots, about 4500 two-to-four unit apartment buildings, and about 30,000 single-family residences. Taking into account that this "residential" figure goes beyond the definition of "homestead property" as defined in the proposals, nevertheless, the impact of the proposals would appear to shift the burden of almost 50 percent of the total from "homestead property" owners to the others whose property would remain taxable.

There is concern as to whether both proposals would be declared to be in violation of the equal protection clause of the fourteenth

amendment to the Federal Constitution, and Wis. Const. art. I, sec. 1. This section of the Wisconsin Constitution is equivalent to the fourteenth amendment to the Federal Constitution. *State ex rel. Sonneborn v. Sylvester*, 26 Wis.2d 43, 132 N.W.2d 249 (1965).

It must be observed that there is a strong presumption of constitutionality which would attach to a legislative enactment. Only if a classification is arbitrary and has no reasonable purpose or reflects no justifiable public policy will it be held violative of constitutional guarantees of equal protection. Moreover, where a tax measure is involved, the presumption of constitutionality is strongest. *Simanco, Inc. v. Department of Revenue*, 57 Wis.2d 47, 54-57, 203 N.W.2d 648 (1973).

The five standards necessary for a proper classification not violative of the equal protection clause are set forth in *Hortonville Ed. Asso. v. Joint Sch. Dist. No. 1*, 66 Wis.2d 469, 484, 225 N.W.2d 658 (1975), as follows:

“(1) All classifications must be based upon substantial distinctions which make one class really different from another.

“(2) The classifications adopted must be germane to the purpose of the law.

“(3) The classifications must not be based upon existing circumstances only. They must not be so constituted as to preclude additions to the numbers included within a class.

“(4) To whatever class a law may apply, it must apply equally to each member thereof.

“(5) The characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.’ *See also: Dane County v. McManus* (1972), 55 Wis. 2d 413, 423, 198 N. W. 2d 667; *State ex rel. Ford Hopkins Co. v. Mayor* (1937), 226 Wis. 215, 222, 276 N. W. 311.”

However, in spite of these strong presumptions, a most serious problem remains as to whether Wisconsin residents owning “homestead property” represent a classification so separate and apart from other residents who do not own their principal dwelling places that the propriety of the classification can be upheld.

In *State ex rel. Harvey v. Morgan*, 30 Wis.2d 1, 139 N.W.2d 585 (1966), the supreme court upheld the constitutionality of a relief measure afforded to certain persons 65 years of age and over who owned or rented their homesteads. There was no opportunity in that case to attack the reasonableness of the classification for failure to treat owners and renters alike.

The proposals appear to meet three of the tests enumerated above. But, it is much more questionable whether the second and fifth tests can be met.

There are further distinctions in the definition of "homestead property" which should be considered. The term differentiates between "attached farmland" and "attached nonfarmland" by exempting all of the former and only up to 40 acres of the latter. In addition, some farmland would remain to be taxed if it were not "attached" to the dwelling or if the dwelling were occupied by a nonowner or by an owner who had a different principal residence.

Is there a reasonable basis for making these distinctions which is germane to the purpose of the law? Are the characteristics of each classification so different from other classes to reasonably suggest at least the propriety of substantially different legislation?

Any evidence of a need to preserve farmland cannot justify the classification *per se*. The proposals are not designed to simply preserve farmland. Any farmland which is not attached to the dwelling place of an owner who used that dwelling place as his principal residence would continue to be subject to taxation. Thus, the proposals have a more limited purpose. They are intended to encourage the retention of ownership of only that farmland which happens to be attached to a principal dwelling of a resident owner. The facts upon which to base the reasonableness of such a classification have not been presented. Why is it a matter of statewide concern that this limited classification is being threatened by the burdens of property taxation?

Since the proposals involve *ad valorem* taxation, the tax uniformity clause under Wis. Const. art. VIII, sec. 1, also should be considered.

This clause was recently amended in April, 1974, to permit the taxation of agricultural land on a different basis than the taxation of other real property. This proposal does not exempt all agricultural

land. It exempts only a certain kind of agricultural land, leaving the remaining agricultural land which would not qualify under the "homestead property" exemption as being subject to taxation. Although the uniformity clause now permits the taxation of agricultural land on a different basis, there is serious doubt as to whether it allows for nonuniformity of treatment within the classification for agricultural land. In other words, even though agricultural land does not have to be taxed on a uniform basis with nonagricultural land, nevertheless, all agricultural land must be taxed alike. As a class, all agricultural land could be exempt. These proposals, however, provide for the exemption of only a certain kind of agricultural land, not all agricultural land.

There is an excellent discussion of the test under the tax uniformity clause in the case of *Gottlieb v. Milwaukee*, 33 Wis.2d 408, 147 N.W.2d 633 (1967). The supreme court adopted the following standards of tax uniformity at p. 424:

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

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

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

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

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

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

The amendment of Wis. Const. art. VIII, sec. 1, so as to allow the tax treatment of agricultural and undeveloped lands to differ from the tax treatment of other real property, was adopted in April, 1974,

after *Gottlieb*. With this exception, the *Gottlieb* standards still are applicable.

It appears that the proposals violate the requirements enumerated under items 2, 3 and 5 above.

Although I have discussed both proposals together, it should be pointed out that there are even greater problems with the second proposal than the first because the second proposal creates only a partial exemption from property taxation within the limited classification.

Under the circumstances, the inherent difficulties of the proposals prevent me from issuing an opinion which would conclude that the proposals are constitutionally sound and capable of withstanding a test of judicial scrutiny.

BCL:APH

Foster Homes; Residence, Domicile And Legal Settlement; Zoning; A local zoning ordinance which limits occupation of single family dwellings to one or more persons related by blood, adoption or marriage or not more than two unrelated persons while valid on its face, is unenforceable against a licensed foster home. Said license, whether granted directly or indirectly by the state, is an exercise of the sovereign power of the state and is immune from local zoning regulations. OAG 108-77

December 19, 1977.

ROBERT P. RUSSELL, *Corporation Counsel*
Milwaukee County

Your letter and attachments inform me that a man and wife rent a single family home in the City of Brookfield in an area zoned "R-3." Evidently, the permitted uses in an "R-3" district include "one-family dwellings, accessory buildings and uses." Section 17.02(14), of the Municipal Code defines "one-family dwelling" as a building "designed for and occupied exclusively by one family." Section 17.02(17), defines "family" as follows:

“FAMILY. One or more persons related by blood, adoption or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living together as a single housekeeping unit though not related by blood, adoption or marriage shall be deemed to constitute a family.”

The couple are licensed foster parents in accordance with sec. 48.62, Stats. After moving into the home in question, an unwed mother and her infant were placed with the couple for foster care. Apparently, the city regards such a living arrangement to be in violation of the zoning ordinances as an improper use of a one-family dwelling in an area zoned “R-3.”

In this context, you have requested my opinion on the following questions:

- “1. Does the definition of the word ‘family’ in the amended Brookfield City Zoning Ordinance encompass a foster family consisting of a husband and wife, together with a 16 year old girl and the girl’s new born baby, both living with them though unrelated, pursuant to the above-mentioned state foster home license?
- “2. If, in your opinion, the Brookfield City Ordinance excludes the above described living arrangement, is the ordinance constitutionally valid in this respect?”

Question I

In *Missionaries of La Salette v. Whitefish Bay*, 267 Wis. 609, 66 N.W.2d 627 (1954), our court considered whether the definition of family in the Whitefish Bay zoning code precluded a number of unrelated priests from occupying a home situated in a single family dwelling use district. The ordinance declared that “a family is one or more individuals living, sleeping, cooking, or eating on premises as a single housekeeping unit.” It was silent as to whether the individuals need be related by blood or marriage.

The court decided that the manner in which the six priests occupied the property violated neither the letter nor the spirit of the single family dwelling restriction. The decision is bottomed on the rule that:

“Restrictions contained in a zoning ordinance must be strictly construed. A violation of such ordinance occurs only when there is a plain disregard of its limitations imposed by its *express words*. ...” 267 Wis., at p. 614. (Emphasis supplied.)

The absence of express language regarding relatedness caused the court to hold:

“For the purposes of its zoning code the legislative body of Whitefish Bay has in precise language defined the term ‘family.’ ... Had it been the pleasure of the legislative body when defining the word ‘family,’ to have excluded in the district any dwelling use of premises there situated, by a group of individuals not related to one another by blood or marriage, it might have done so. Since there is complete absence of any such limitation, it seems clear that it was not the legislative intent to restrict the use and occupancy to members of a single family related within degrees of consanguinity or affinity.

“***

“It is not within the court’s province to add or detract from the clear meaning that the village board has expressed in its own definition of the word ‘family.’ ...” 267 Wis. 614-616.

The standards of construction of *Missionaries, supra*, were recently reiterated in *Browndale International v. Board of Adjustment*, 60 Wis.2d 182, 208 N.W.2d 121 (1973). Applying these principles to the definition in question forces me to conclude that its language does not encompass (i.e., permit) the foster home situation you relate.

The Brookfield definition deals with relatedness in express words. Related and nonrelated families are separately defined. Families composed of unrelated persons are expressly limited to two persons. In my opinion, the two sentences clearly manifest the intent that a family can be composed of either related *or* two unrelated persons as opposed to the meaning which would result if “and/or” were interjected between the sentences. Moreover, the fact it was adopted because of the decision in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), indicates that the intent was to place strict limitations on unrelated occupancy of single family dwellings. Thus, both the letter and spirit of the ordinance cause me to conclude that the four persons

now in the home constitute two families of the type described in the definition's first sentence.

Question II

Having concluded that the language of the ordinance precludes the above described living arrangement, we reach your second question regarding the constitutional validity of such a prohibition.

The second question is more easily answered if it is divided into the two issues of: (1) is it constitutionally permissible to premise zoning laws on relationship, and (2) if such laws are constitutional, do they control state action.

Zoning laws based on relationship are valid. In *Village of Belle Terre v. Borass, supra*, the Court was concerned with an ordinance that defined family as:

“... ‘[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family.’” 416 U.S. at p. 2.

The village sought to apply the definition to preclude six unrelated college students from occupying a single family dwelling. Since the ordinance only restricts the number of unrelated persons who may occupy a single family residence, the students challenged enforcement against them as a denial of equal protection which abridged their fundamental rights to travel, associate freely and have privacy. It was argued that the ordinance was aimed at prohibiting alternative life styles, rather than achieving proper zoning objectives.

The Supreme Court rejected the students' fundamental rights infringement argument. It applied the traditional rational basis standard and upheld enforcement of the ordinance against the students. Writing for the majority, Justice Douglas concluded:

“The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.

“A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker*, supra [348 U.S. 26 (1954)]. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area of sanctuary for people.” 416 U.S. at p. 9.

The Court in *Moore v. East Cleveland*, 431 U.S. 494, 97 S. Ct. 1932 (1977), voided an ordinance that attempted to prescribe categories of relationship that could and could not live together. Justice Powell’s opinion noted, in part:

“But one overriding factor sets this case apart from *Belle Terre*. The ordinance there affected only *unrelated* individuals. It expressly allowed all who were related by ‘blood, adoption, or marriage’ to live together, *and in sustaining the ordinance we were careful to note that it promoted ‘family needs’ and ‘family values.’* 416 U.S., at 9. *East Cleveland*, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself. This is no mere incidental result of the ordinance. On its face it selects certain categories of relatives who may live together and declares that others may not. In particular, it makes a crime of a grandmother’s choice to live with her grandson in circumstances like those presented here.

“When a city undertakes such intrusive regulation of the family, neither *Belle Terre* nor *Euclid* governs; the usual judicial deference to the legislature is inappropriate. ...” 97 S. Ct. at p. 1935. (Emphasis supplied.)

The decision in *Moore v. East Cleveland*, supra, in enlarging on the holding of the Court in *Village of Belle Terre v. Borass*, supra, makes it clear that such ordinances are to be judged as to whether they promote “family needs.”

Accordingly, distinctions between related and unrelated persons in zoning ordinances are not inherently unconstitutional. This conclusion raises the second issue of whether state action is subject to such ordinance.

The term “foster” is defined in *Webster’s Seventh New Collegiate Dictionary* as:

“... parental care though not related by blood or legal ties.”

The foster home is licensed by the state or one of its instrumentalities under sec. 48.62, Stats., so that children may be placed in a home to receive the parental care they have been deemed to be in need of. The Children’s Code, ch. 48, Stats., manifests a strong public interest in providing care for delinquent, dependent and neglected children in noninstitutional settings designed to afford a healthy family environment. Widespread adoption and enforcement of the *Belle Terre* definition of family would keep foster homes out of the very neighborhoods they need to be in.

There is a clear distinction between foster homes and other unrelated living arrangements. A foster home is not an *ad hoc* living arrangement borne of sheer social convenience or economic advantage. The process of placing foster children is the antithesis of a casual decision of friends to live together. A child is placed in a home only after careful screening reveals the prospective foster parents and physical environment to be exemplary. Placement is an addition to a preexisting biological family or family-type arrangement, rather than a creation of a new household. In essence, foster homes do not pose the problems which concerned the Supreme Court in *Belle Terre*.

The ordinance under consideration would seriously frustrate state action in the placement and care of foster children if the licensing of a foster home is rendered, in actuality, a nullity by local zoning regulations.

In *City of Milwaukee v. McGregor*, 140 Wis. 35, 121 N.W. 642 (1909), the city brought an action against the Board of Regents, its contractors and architect to prevent continued construction of a school building without a city building permit. In this leading case, it was concluded that neither the state nor its agents were subject to local control. The court has reiterated this principle on several occasions prior to its decision in *Hartford Union High School v. Hartford*, 51 Wis.2d 591, 187 N.W.2d 203 (1970). In this later case, the court turned from what it described as the “mechanistic approach of classification into sovereign immunity” and gave consideration to the question of whether the state had preempted the field of regulation (51 Wis.2d at p. 591). Significantly, in the *Hartford*

Union High School case, the court was concerned with the situation where the state and local unit of government had adopted building codes. In deciding the case on the theory of preemption, all that was involved was mere inconvenience, not prohibition. In the instant matter, we are not concerned with two levels of legislation on the identical subject matter and the question of preemption is not involved. It is problematical how the court would rule when faced with a situation such as this where the principle of preemption could not be easily applied.

In attempting to predict how the court would decide this issue, the attitude of the court towards the foster home is important. In the *Browndale* case, *supra*, the court in discussing foster homes, stated:

“... therapeutic homes are not substitutes for the biological parent or home. Foster parents and foster homes are an attempt to be almost a complete substitution. The foster parents’ role is ‘*in loco parentis*.’ ... Foster homes try to duplicate the biological family ... *Lastly, from the above differences it can be reasonably said that foster homes constitute a ‘family’ under zoning laws even before any child is placed with the foster parent.* As appellants correctly point out, ‘... The residential character of a foster home does NOT depend upon the foster child. ...’ ...” 60 Wis.2d at pp. 204-206. (Emphasis supplied.)

However, it should be noted that in *Browndale International v. Board of Adjustment*, *supra*, the zoning restriction which precluded therapeutic homes was upheld. Nevertheless, in upholding the ordinance, it was carefully observed that *Browndale International*:

“... is not the corporation engaged in the direct care and maintenance of these emotionally disturbed children; nor is it licensed by the state of Wisconsin as a child welfare agency. ...” 60 Wis.2d at p. 187.

Arguably, the decision would have been otherwise if *Browndale* had been licensed by the state.

Thus, in the present situation, we find a state licensed activity, which activity is favored by the court, but is in direct conflict with local zoning regulations. Under these circumstances, I am of the opinion that the court probably would return to the principle established in the early case of *City of Milwaukee v. McGregor*, *supra*, and hold that this state licensed activity is immune from local

regulations. I am of the opinion that faced with this situation, the court would probably rely on the immunity theory or a similar theory, for if the foster home program can be prohibited or largely restricted by local governments, then through artful drafting of local laws, many state programs could be similarly frustrated. In my opinion, the court would seek to avoid such consequences.

In conclusion, it is my opinion that a license to operate a foster home, whether granted directly or indirectly by the state, is an exercise of the sovereign power of the state and is immune from local zoning regulations. The argument that the zoning regulation restricts private activity, i.e., the licensees or foster parents rather than state action is without merit, for the state often acts through private parties. The court was well aware of this fact in *City of Milwaukee v. McGregor, supra*.

With the exception of state construction, which has been made subject to local zoning by act of the Legislature (see sec. 13.48(13), Stats.), any opinions to the contrary in 63 Op. Att'y Gen. 34 (1974), and 65 Op. Att'y Gen. 93 (1976), are superseded by this opinion.

BCL:PRS

Appropriations And Expenditures; Constitutionality; County Board; Elections; Vocational, Technical And Adult Education, Board Of; Votes And Voting; That part of sec. 67.12(12)(e)5., Stats., requiring the petition requesting that a referendum be held on a vocational, technical and adult education district board's resolution to incur indebtedness to contain the signatures of electors from each county in the district equal to at least 2.5% of the population of the county is unconstitutional as applied to the Moraine Park District. Equal protection of the laws is denied to electors in certain counties of the district in that their signatures on the petition, because of the wide disparity in population among the counties, are accorded greatly disproportionate weight as compared to the signatures of electors in other counties. OAG 109-77

December 20, 1977.

EVERETT E. BOLLE, *Director of Legislative Services*
Wisconsin State Assembly

You have requested my opinion regarding "the constitutionality of the territorial distribution requirement for signatures collected in a vocational, technical and adult education district petition drive." Your reference is to that part of sec. 67.12(12)(e)5., Stats., which provides that a vocational, technical and adult education district board need not submit a resolution to incur indebtedness by borrowing on promissory notes to a vote of the people in the district unless within a specified time there is filed with the secretary of the district board a petition requesting a referendum thereon at a special election.

The statute provides as follows:

"... The district board need not submit the resolution to the electors for approval unless within 30 days after the publication or posting there is filed with the secretary of the district board a petition requesting a referendum thereon at a special election. Such petition shall be signed by electors from each county lying wholly or partially within the district. The number of electors from each county shall equal at least 2.5% of the population of the county as determined under s. 16.96(2)(c) If a county lies in more than one district, the board of vocational, technical and adult education shall apportion the county's population as determined under s. 16.96(2)(c) to the districts involved and the petition shall be signed by electors equal to the appropriate percentage of the apportioned population. ..."

You point out that in the Moraine Park District the resident populations of the counties or parts of counties contained in the district are estimated, as of January 1, 1976, by the Department of Administration acting under sec. 16.96(2), Stats., as follows: Dodge County, 59,158; Fond du Lac County, 88,125; Green Lake County, 17,414; Washington County, 64,978; Winnebago County, 1,326; Waushara County, 2,437; Calumet County, 5,093; Marquette County, 99; Columbia County, 30; and Sheboygan County, 165.

In my opinion, that part of sec. 67.12(12)(e)5., Stats., requiring that the petition for referendum be signed by electors from each

county equal to at least 2.5% of the population of the county, in its application to the Moraine Park District, is unconstitutional as violative of the equal protection clause, U. S. Const. amend. XIV, and Wis. Const. art. I, sec. 1, which is to be equated with the fourteenth amendment. *State ex rel. Sonneborn v. Sylvester*, 26 Wis.2d 43, 132 N.W.2d 249 (1965).

The constitutional guaranty of equal protection of the laws requires that a statute granting rights or privileges to one class of persons must grant the same rights and privileges to other classes of persons similarly situated, *Christoph v. Chilton*, 205 Wis. 418, 237 N.W. 134 (1931), and that all persons shall be treated alike under like circumstances and conditions, both in privileges conferred and in liabilities imposed. 16 Am. Jur. 2d, *Constitutional Law* sec. 488.

Application of that part of the statute requiring the petition to be signed by electors from each county equal to at least 2.5% of the population of the county to the Moraine Park District results in unequal treatment of the electors in each of the counties or parts thereof that lie within the boundaries of the district in their statutory right to sign the petition demanding that a referendum be held. The weight accorded the signature of an elector in Columbia County, for example, is 2,203 times the weight awarded the signature of an elector in Fond du Lac County. In effect, that part of the statute referred to above, in its application to the particular circumstances you mention, results in an unlawful classification. Since electors in one county of the district would be affected in the same way as electors in other counties in the district as a result of an indebtedness incurred by the district, there can be no valid basis for treating any of them differently or according the signature of an elector in one part of the district more weight than a signature of an elector in another part of the district in exercising the statutory right to petition for a referendum on the district board's resolution to incur an indebtedness.

While you mention the "one man, one vote" principle in your request, it should be noted that the United States Supreme Court has only applied the concept of "one man, one vote" to the selection of persons by popular election to perform governmental functions, *In re Natural Resources Development Bond Act*, 47 Ill.2d 81, 264 N.E.2d 129 (1970), although at least one state has also applied it in dealing

with voting rights relating to an amendment of a state constitution. *State v. State Canvassing Board*, 78 N.M. 682, 437 P.2d 143 (1968).

Nevertheless, in my opinion, the rationale of the “one man, one vote” principle, as it reflects a particular application of the equal protection clause, U.S. Const. amend. XIV, and Wis. Const. art. I, sec. 1, is also applicable to the present situation wherein the electors of a political subdivision of the state are granted the statutory right to petition to demand that a referendum be held on an issue which will affect all the electors in the district in exactly the same way.

It was in the so-called reapportionment cases, starting with *Baker v. Carr*, 369 U.S. 186 (1962), followed by *Gray v. Sanders*, 372 U.S. 368 (1963), and then by *Reynolds v. Sims*, 377 U.S. 533 (1964), and others, that the principle of equal representation, or as it is commonly called, the “one man, one vote” principle, emerged and was developed.

In *Gray, supra*, the Georgia county unit system was held unconstitutional in a statewide primary election because that system resulted in a dilution of the weight of the votes of certain Georgia voters merely because of where they resided. The Court stated:

“... If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable. ... How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote--whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. ...” *Id.* at 379.

In *Reynolds, supra*, concerning the right to give votes of residents of geographical areas of widely varying population equivalently disproportionate weight, the Court had the following to say:

“We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a

bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State. ..." *Id.* at 568.

In *State v. State Canvassing Board*, *supra*, the court was faced with a provision in the New Mexico Constitution providing that no amendment affecting provisions as to elective franchise shall be valid unless ratified by vote with at least two-thirds of those voting in each county in the state voting for such amendment. In holding that the constitutional requirement was unconstitutional under the "one person, one vote" principle and equal protection clause of the fourteenth amendment because of the wide disparity in population among counties resulting in greatly disproportionate values to votes in the different counties, the court found that no rational distinction could or should be drawn between voting on representatives in the Legislature and voting on constitutional amendments.

In *State ex rel. Sonneborn v. Sylvester*, *supra*, then sec. 59.03(2), Stats., provided that the composition of boards of supervisors in all but two counties shall consist of the chairman of each town board, a supervisor from each city ward or part thereof in the county, and a supervisor from each village or part thereof in the county. The court found that since the statute on its face did not purport to apportion the representative districts on the basis of population, and since there was a great disparity in the weight of votes in different districts caused by the statutory method of selecting county board supervisors, the statute was violative of both the equal protection clause, U.S. Const. amend. XIV, and Wis. Const. art. I, sec. 1.

The court pointed out that "It is true these cases [reapportionment cases] dealt with a right to vote preserved in a constitution and for an office created by the constitution; but the rationale of the decisions applies equally as well to a statutory right to vote." *Id.* at 55. The court reasoned that:

"Although the legislative power of a county may in fact be limited by the statutes, nevertheless the constitution by sec. 22, art. IV empowers the legislature to confer on the board of supervisors such powers of a local, legislative and administrative character as it shall from time to time prescribe. Under this authorization the legislature in ch. 59, Stats., has granted a

substantial bundle of legislative powers to county boards and may grant additional substantial powers. Such powers are not to be confused with the powers of administrative boards and commissions to enact rules and regulations even though the latter have the effect of law. Since the composition of the legislature must conform to the principle of equal representation, it is logical that the arm or political subdivision of such legislature enacting legislation should be governed by the same principle of equal representation," *id.* at 56-57,

and held that the principle of equal representation applies to a county board of supervisors when that board is given legislative power and is composed of elective members.

Hence, just as the court in *State v. State Canvassing Board, supra*, could see no rational distinction between voting on representatives in the Legislature and voting on constitutional amendments, I can see no rational distinction between voting on representatives on a county board and voting on referenda which affect the substantial rights of the people in a vocational, technical and adult education district.

In *Moore v. Ogilvie*, 394 U.S. 814 (1969), an Illinois statute providing that the 25,000 or more signatures of qualified voters prescribed for nominating petitions of independent candidates for offices to be filled by voters at large must include the signatures of 200 qualified voters from each of at least 50 of the 102 counties in the state, notwithstanding that it was designed to require statewide support for launching a new political party rather than support from a few localities, was declared unconstitutional as violative of the equal protection clause of the fourteenth amendment since the fact that the Illinois population was highly concentrated in a few counties admitted of the possibility that voters in sparsely populated counties might block access to the ballot by large numbers of the state's voters who supported an independent or new party candidate.

The Court, in extending the "one man, one vote" principle to the situation presented, held that the use of nominating petitions by independents to obtain a place on the Illinois ballot was an integral part of the Illinois elective system and that all procedures used by a state as an integral part of the election process must pass muster against charges of discrimination or of abridgement of the right to vote.

The Court reasoned:

“It is no answer to the argument under the Equal Protection Clause that this law was designed to require statewide support for launching a new political party rather than support from a few localities. This law applies a rigid, arbitrary formula to sparsely settled counties and populous counties alike, contrary to the constitutional theme of equality among citizens in the exercise of their political rights. The idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.

“Under this Illinois law the electorate in 49 of the counties which contain 93.4% of the registered voters may not form a new political party and place its candidates on the ballot. Yet 25,000 of the remaining 6.6% of registered voters properly distributed among the 53 remaining counties may form a new party to elect candidates to office. This law thus discriminates against the residents of the populous counties of the State in favor of rural sections. It, therefore, lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment.” *Id.* at 818-819.

In my opinion, the use of a petition to require that a referendum be held on a district board's resolution to incur an indebtedness is an integral part of the statutory right to vote at such a referendum. See 63 Op. Att'y Gen. 391 (1974). Hence, just as the right to petition for the nomination of candidates, as an integral part of the elective system, is afforded protection under the equal protection clause of the fourteenth amendment, so also must be the right to petition for a referendum on a district board's resolution to incur an indebtedness.

Equal protection in its guaranty of like treatment to all similarly situated only permits classification which is reasonable and founded on material differences and substantial distinctions which bear a proper relation to matters or persons dealt with by legislation and to the purposes sought to be accomplished. *Brennan v. Milwaukee*, 265 Wis. 52, 60 N.W.2d 704 (1953). All of the electors in the Moraine Park District are equally affected as regards the tax effect that may result from the district incurring an indebtedness and, therefore, their right to petition for a referendum must be equally protected by the law by having their signatures accorded equal weight in petitioning for a referendum on the issue of indebtedness.

It is true, of course, that statutes are presumed constitutional, *WKBH Television, Inc. v. Dept. of Revenue*, 75 Wis.2d 557, 250 N.W.2d 290 (1977), and that they will be held unconstitutional only when it so appears beyond a reasonable doubt. *White House Milk Co. v. Reynolds*, 12 Wis.2d 143, 106 N.W.2d 441 (1960). However, in this instance, there can be no doubt that the signatures of electors in certain counties are accorded greatly disproportionate weight as compared with the signatures of electors in other counties since this is a mathematical certainty given the present composition of the Moraine Park District.

Having concluded that that portion of sec. 67.12(12)(e)5., Stats., which requires that in order to require the district board to hold a referendum a petition must be signed by electors from each county lying wholly or partially within the school district equal to at least 2.5% of the population of that county or portion thereof lying in the district is unconstitutional in its application to the Moraine Park District, the question arises whether the invalid portion of sec. 67.12(12)(e)5., Stats., also renders the remaining valid provisions ineffective.

Section 990.001(11), Stats., provides as follows:

“The provisions of the statutes are severable. The provisions of any session law are severable. If any provision of the statutes or of a session law is invalid, or if the application of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.”

It has been held that where a part of a statute is declared unconstitutional, the determining factor as to whether the remainder of the statute is invalid by reason thereof is the intention of the Legislature. *Madison v. Nickel*, 66 Wis.2d 71, 223 N.W.2d 865 (1974); *State ex rel. Broughton v. Zimmerman*, 261 Wis. 398, 52 N.W.2d 903 (1952). An entire act is not invalidated because of the unconstitutionality of a part thereof if the part upheld constitutes independently of the invalid portion a complete law in some reasonable aspect, unless the Legislature intended it to be effective only as an entirety and would not have enacted the valid part alone. *Burke v. Madison*, 17 Wis.2d 623, 117 N.W.2d 580 (1962), *rehearing denied*, 17 Wis.2d 623, 638a, 118 N.W.2d 898 (1963);

State ex rel. Milwaukee County v. Boos, 8 Wis.2d 215, 99 N.W.2d 139 (1959).

In my opinion, the unconstitutionality of that part of sec. 67.12(12)(e)5., Stats., requiring the obtainment of the signatures of electors in each county equal to at least 2.5% of the population of the county as applied to the Moraine Park District, can be eliminated from the statute with the remainder constituting, independently of the invalid portion, a complete law in some reasonable aspect without violating the intention of the Legislature.

Section 67.12(12)(e)5., Stats., is the result of a compromise between the Assembly and Senate versions of Assembly Bill 857. Originally, Assembly Bill 857, which, as amended, became the present sec. 67.12(12)(e)5., Stats., required that the petition for referendum be signed by 1,000 electors of the district. Senate Substitute Amendment 1 to Assembly Bill 857 required that the petition be signed by electors in the district equal to at least 10% of the persons voting for governor at the last election in the district. Hence, it seems reasonable to conclude that what was intended was that, in order to require a vocational, technical and adult education district board to submit its resolution to incur indebtedness to a referendum, there must be a showing of a certain amount of support in the district for such a referendum as evidenced by the signatures on the petition.

Therefore, in my opinion, only that part of sec. 67.12(12)(e)5., Stats., requiring that the petition for referendum contain the signatures of electors from each county in the district equal to at least 2.5% of the population in each such county is unconstitutional as violative of the equal protection clause of U.S. Const. amend. XIV, and Wis. Const. art. I, sec. 1, and, said section, in its application to the Moraine Park District, should be read as requiring that the petition for referendum be signed by electors equal to at least 2.5% of the population of the district as a whole.

BCL:JJG

Clerk Of Circuit Court; Clerk Of Courts; County Board; County Treasurer; Liability; Public Officials; A county board cannot require the clerk of circuit court and county treasurer to search their records and sign certificate for abstracters to judgments, liens, state tax warrants and property taxes, because such board lacks the requisite statutory power to impose such requirements.

For reasons stated, it is unnecessary and inadvisable to provide an answer to the "liability" question presented. OAG 111-77

December 27, 1977.

ROGER L. HARTMAN, *District Attorney*
Buffalo County

You advise that the Buffalo County clerk of court and the county treasurer have been ordered by a Buffalo County board resolution to make search of their records and then to sign certificates for abstractors to the effect that there are no outstanding judgments, liens or state tax warrants on the property. Apparently the officers involved were signing such certificates at the time of the adoption of such resolution. The board's resolution requires that the officer charge the abstractor one dollar for the search and the certificate.

You specifically ask whether the clerk of court and the county treasurer must search their records and, if so, where the liability lies if the officers mistakenly certify that the land is not encumbered.

In my opinion, the county board is not empowered to require that either officer search records or certify the results of those searches.

I. COUNTY TREASURER

The county treasurer is a county officer subject only to the statutes and to the authority given by the statutes to the governing board of the county. 37 Op. Att'y Gen. 624, 625 (1948).

34 Op. Att'y Gen. 13 (1945), addressing the question whether a county treasurer was required, upon request of a bank, to certify as to the state of tax payments on particular real estate stated:

"We are of the view that the only duty the treasurer has in the matter of certifying with respect to taxes is to certify with

respect to any records in his possession relating to taxes imposed upon any particular parcel of land. That is an entirely different matter than a certification in the nature of a conclusion as to what his records disclose.”

The relevant statutes have not substantively changed since the 1945 opinion. The county treasurer is under no statutory duty to search his records or to certify the results of that search.

The question remains as to whether the county board may require the search and certification here involved. In my opinion, it may not. County boards have only those legislative powers conferred upon them by statute, expressly or by clear implication. *Maier v. Racine County*, 1 Wis.2d 384, 84 N.W.2d 76 (1957). If there is any doubt as to an implied power, the court will find that there is no power. *Dodge County v. Kaiser*, 243 Wis. 551, 11 N.W. 348 (1943). Moreover, in *Reichert v. Milwaukee County*, 159 Wis. 25, 35, 150 N.W. 401 (1914), it is stated:

“... Within the scope of the authority conferred by the legislature the county, through its board of supervisors, may by its acts arouse official action and official duties upon the part of other county officers, *but the powers of the latter derived from the state legislature may not be taken away or narrowed by action of the county board nor enlarged except in cases in which the legislature has authorized such limitation or enlargement.* ...” (Emphasis supplied.)

See also 63 Op. Att’y Gen. 220, 225 (1974).

In reading through the statutory powers of the county board, one can find no reference to record searches, certifications, fees payable to the county treasurer, or any other topic related to certifying the results of a record search for a fee. The county board is given general authority under sec. 59.07(5), Stats., to represent the county, to have the management of the county business and concerns where no other provision is made, and to levy taxes and appropriate money; but the resolution of the county board ordering record searches and certifications does not fall within even a broad interpretation of this statute.

From what has been said above, it is clear that the county treasurer of Buffalo County cannot be required by the county board to make the record search in question and sign the above-described

certificate. The county board simply lacks the power to impose such a requirement on the county treasurer, and its effort to do so by resolution, absent such power, is plainly a nullity.

II. CLERK OF COURT

The “clerk of court” referred to in your letter to me is, I understand, the clerk of circuit court, hereinafter called the “circuit court clerk.”

As a public officer, the circuit court clerk has only those powers expressly conferred on him by statute, or those additional implied powers that are necessary for the due and efficient exercise of the powers expressly granted him, or powers that may be fairly inferred from such expressed powers. *Kasik v. Janssen*, 158 Wis. 606, 609, 610, 149 N.W. 398 (1914). Under current Wisconsin statutes, such clerk has numerous and varied powers, but he possesses neither an express nor implied power to make the search and execute the certificate here in question. Does the county board resolution here involved give him such power? In my opinion, no, because the county board has been given no power authorizing it to require the circuit court clerk to make the search and execute the certificate here involved. Under case law cited in Part I hereof, it is clear that the county board resolution here involved, issued absent any statutory power in the county board to require performance of the acts therein specified, is a nullity as to the circuit court clerk, just as it is to the county treasurer. It imposes no duty on either of them.

III. LIABILITY

You have also asked what liability attaches if the officers mistakenly certify that the land is not encumbered. Assuming a mistake as a result of negligence on the part of county officers, the officers and/or the county may very well be financially responsible for consequent damage. Liability questions are decided on specific facts; generalizations are impossible. Because it appears that the issue is speculative and no such claim confronts the county at present it is impossible to be more specific. I call your attention to the following cases and materials which deal with scope of employment: *Meyer v. Carman*, 271 Wis. 329, 73 N.W.2d 514 (1955), *Chart v. Dvorak*, 57 Wis.2d 92, 203 N.W.2d 673 (1973), *Cords v. Ehly*, 62 Wis.2d 31, 214 N.W.2d 432 (1974), and *Lister v. Board of Regents*, 72 Wis.2d 282, 240 N.W.2d 610 (1976) and liability for *ultra vires* acts: *Lister*,

supra, *Humboldt v. Schoen*, 168 Wis. 414, 170 N.W. 250 (1919) and 63 Am. Jur. 2d *Public Officers and Employees* sec. 288, 67 C.J.S. *Officers* sec. 126.

BCL:JHM

**STATUTES AND CONSTITUTIONAL PROVISIONS,
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Counties; Indians; Land; Law Enforcement; Mobile Homes; Right Of Way; Taxation; Towns; Trusts; Property held in trust by the federal government for the Menominee Tribe and tribal members pursuant to the Menominee Restoration Act (25 U.S.C. sec. 903, et seq.) is not subject to state taxation. Tribal members residing and working in Menominee County and the Menominee Tribe are not subject to state income tax. Government services to be provided by Menominee County and the town of Menominee discussed. OAG 87-77 290

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Leases; Licenses And Permits; Mineral Rights; Real Estate; Real Estate Brokers; Real Estate Examining Board; A person who for a fee files applications for others in federal mineral lottery with respect to securing oil or mining lease rights on federal lands, and who for further fee offers to negotiate with lease brokers for sale of such rights, is required to be licensed as a real estate broker if such leases constitute an interest in real estate in state where located. (Unpublished Opinion) OAG 107-77

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Amendment to sec. 20.923, subsecs. (1) and (2), Stats. is required to change this requirement. OAG 83-77 280

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Amendment to sec. 20.923, subsecs. (1) and (2), Stats., is required to change this requirement. OAG 83-77 280

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property taxes, because such board lacks the requisite statutory power to impose such requirements.

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Legislation; Licenses And Permits; Schools And School Districts; Statutes; Words And Phrases; Senate Bill 370 would create a new category of licensure, that of school psychologist. Only those licensed could privately practice school psychology. The definition of school psychology could be by administrative rule promulgated by the Psychology Examining Board. (Unpublished Opinion) OAG 98-77

Licenses And Permits; Marriage And Divorce; Vital Statistics; Names; Real Estate Examining Board; Real Estate Brokers; Real Estate Examining Board cannot prescribe the name to be used on an application for real estate broker's license. Under sec. 296.36, Stats., the Board should routinely accept name changes of licensed brokers, unless detriment to the public, another professional or the profession is shown. Sex and marital status of the new or renewal license applicant do not justify special procedures or requirements as to names. Use of two names discussed. OAG 7-77 21

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Automobiles And Motor Vehicles; Intoxicating Liquors; Malt Beverages; Minors; Motor Vehicles; Section 346.93, Stats., contains two prohibitions: first, an absolute ban on a minor's possession of intoxicating liquor in a motor vehicle; second, a ban on a minor's possession of any malt beverage in a motor vehicle while any person under 18 years of age is a passenger or present in such motor vehicle. In order for a violation of that second prohibition to occur, a person under the age of 18 years *in addition to the violator of the statute* must be present in the vehicle. OAG 61-77 215

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Leases; Licenses And Permits; Mineral Rights; Real Estate; Real Estate Brokers; Real Estate Examining Board; A person who for a fee files applications for others in federal mineral lottery with respect to securing oil or mining lease rights on federal lands, and who for further fee offers to negotiate with lease brokers for sale of such rights, is required to be licensed as a real estate broker if such leases constitute an interest in real estate in state where located. (Unpublished Opinion) OAG 107-77

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Children; Foster Homes; Guardian; Minors; Parental Rights; Public Welfare; The potential liability of placement agencies and foster parents for the torts of foster children is the same as natural parents' liability. They are only liable for property damage or physical injury which results from a failure to provide reasonable supervision. The greater exposure falls on the foster parent. Section 895.035, Stats., does not apply to placement agencies or foster parents. OAG 45-77..... 164

Juvenile Court; Minors; Courts; Licenses And Permits; Counties; County Children's Home; Public Welfare; Foster Homes; Section 48.31 provides counties with express authority to establish and operate juvenile detention homes and shelter care facilities. Detention homes and shelter care facilities established and operated pursuant to sec. 48.31 do not require a ch. 48 license from the Department of Health and Social Services. Counties may lease property for detention home or shelter care use. OAG 13-77..... 50

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<i>Automobiles And Motor Vehicles; Criminal Law; Highways; Indians; Land; Law Enforcement; Licenses And Permits; Motor Vehicle Department; Motor Vehicles; Public Lands; Right Of Way; Transportation; The state has jurisdiction over members of the Menominee Tribe on public roads and highways within the Menominee Reservation in respect to the enforcement of state traffic laws that are necessary to protect the highways against depredation or that would impair their use as a public right-of-way. State law enforcement officers can arrest any person who commits a federal offense in their presence. OAG 33-77</i>	115
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Cities; Forfeitures; Liability; Municipalities; Open Meeting; Public Officials; Reimbursement; Pursuant to sec. 895.35, Stats., a city council can, in limited circumstances, reimburse a council member for reasonable attorneys' fees incurred in defending an alleged violation of the open meeting law, but cannot reimburse such member for any forfeiture imposed. Section 895.46(1), Stats., is not applicable to forfeiture actions. Such member could not be reimbursed, indirectly, under liability insurance policy procured by a municipality, for any forfeiture imposed. OAG 63-77..... 226

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Counties; County Board; Forests; Land; Natural Resources, Department Of; Public Lands; County boards cannot sell or exchange county forest lands without first withdrawing them from the county forest program under sec. 28.11(11), Stats. The term "exchange" does not include a sale for valuable consideration. OAG 30-77..... 108

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Land; Navigable Waters; Plats And Platting; Surveys; The duties of the head of the planning function in the Department of Local Affairs and Development in administering and coordinating plat proposal reviews under sec. 236.12, Stats., in checking for compliance with the minimum survey layout and format requirements set forth in secs. 236.15, 236.16,

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The Department of Local Affairs and Development and the Department of Natural Resources are not required to undertake an environmental assessment in instances where a variance in the public access to navigable waters requirements of sec. 236.16(3), Stats., is proposed since such a review is impossible. (Unpublished Opinion) OAG 93-77

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Cosmetic Art; Fees; Refunds; Tuition; Vocational And Adult Education; Vocational, Technical And Adult Education, Board Of; The VTAE Board has the statutory duty under sec. 38.24(3)(b), Stats., to establish tuition refund policies at schools under its jurisdiction and such power cannot be circumscribed by a rule of the Cosmetology Examining Board. (Unpublished Opinion) OAG 102-77

Vocational And Adult Education

Cosmetic Art; Fees; Refunds; Tuition; Vocational And Adult Education; Vocational, Technical And Adult Education, Board Of; The VTAE Board has the statutory duty under sec. 38.24(3)(b), Stats., to establish tuition refund policies at schools under its jurisdiction and such power cannot be circumscribed by a rule of the Cosmetology Examining Board. (Unpublished Opinion) OAG 102-77

Education; Schools And School Districts; Students; Tuition; Vocational And Adult Education; Students who attend state vocational, technical and adult institutions are eligible for tuition grants under sec. 39.30, Stats. OAG 49-77..... 182

Votes And Voting

Anti-Secrecy; Ballots; Collective Bargaining; Elections; Open Meeting; Public Officials; Regents, Board Of; Salaries And Wages; State University System; University; Votes And Voting; University subunit may discuss promotions not relating to tenure, merit increases and property purchase recommendations in closed session. OAG 17-77 60

Appropriations And Expenditures; Constitutionality; County Board; Elections; Vocational, Technical And Adult Education, Board Of; Votes And Voting; That part of sec. 67.12(12)(e)5., Stats., requiring the petition requesting that a referendum be held on a vocational, technical and adult education district board's resolution to incur indebtedness to contain the signatures of electors from each county in the district equal to at least 2.5% of the population of the county is unconstitutional as applied to the Moraine Park District. Equal protection of the laws is denied to electors in certain counties of the district in that their signatures on the petition, because of the wide disparity in population among the counties, are accorded greatly disproportionate weight as compared to the signatures of electors in other counties. OAG 109-77 349

Ballots; Counties; County Board; County Clerk; Elections; Votes And Voting; Failure to publish notices of an election on the last Tuesday in May, the first Tuesday in June, and the second Monday preceding an election on the question of removal of a county seat and failure by the county clerk to distribute the ballots will not invalidate the election where it appears that the voters were well informed of the time, place, and manner of the election and the issue involved, and a majority of the qualified voters who went to the polls, excluding those who had an opportunity to vote on the question of removal but chose not to, voted in favor of removal. OAG 62-77 219

Delegates; Elections; Secretary Of State; Votes And Voting; Those provisions of state law relating to campaign financing which conflict with the federal election campaign act are invalid. The Secretary of State must retain and make available for public inspection, not later than the end of the day of receipt, the federal election campaign reports and statements required to be filed with him. The Elections Board cannot be designated as the agent of the Secretary of State for purposes of compliance by this state with the federal law. (Unpublished Opinion) OAG 24-77

Wisconsin Retirement Fund

Annuity; Benefits; Pensions; Retirement Fund; Retirement Systems; Teachers Retirement Fund; Trust Funds; Wisconsin Retirement Fund; Discussion of authority of Employe Trust Funds Board to change the form of payment to members of retirement benefits resulting from additional deposits in the Wisconsin Retirement Fund, State Teachers Retirement System and Milwaukee Teachers Retirement Fund. (Unpublished Opinion) OAG 80-77

Words And Phrases

Administrative Code; Advertising; Federal Aid; Highway Commission, State; Licenses And Permits; Statutes; Words And Phrases; Persons in the business of erecting on premise signs are subject to the licensing requirement of sec. 84.30(10)(a), Stats. OAG 89-77..... 295

Circuit Court; County Court; Courts; Documents; Words And Phrases; A circuit or county court may use as its official seal on documents an ink seal printed by a rubber stamp. OAG 78-77 275

Legislation; Licenses And Permits; Schools And School Districts; Statutes; Words And Phrases; Senate Bill 370 would create a new category of licensure, that of school psychologist. Only those licensed could privately practice school psychology. The definition of school psychology could be by administrative rule promulgated by the Psychology Examining Board. (Unpublished Opinion) OAG 98-77

Workmen's Compensation

Benefits; County Board; Public Officials; Salaries And Wages; Workmen's Compensation; County board does not have power to establish number of days elected officials may utilize for vacation or sick leave or to grant longevity pay to elected officials, but can pay premiums for individual or group hospital, surgical and life insurance for them. OAG 103-77 329

Zoning

Foster Homes; Residence, Domicile And Legal Settlement; Zoning; A local zoning ordinance which limits occupation of single family dwellings to one or more persons related by blood, adoption or marriage or not more than two unrelated persons while valid on its face, is unenforceable against a licensed foster home. Said license, whether granted directly or indirectly by the state, is an exercise of the sovereign power of the state and is immune from local zoning regulations. OAG 108-77 342