

**OPINIONS**  
OF THE  
**ATTORNEY GENERAL**

OF THE  
STATE OF WISCONSIN

VOLUME 67

January 1, 1978 through December 31, 1978

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**BRONSON C. LA FOLLETTE**  
ATTORNEY GENERAL



MADISON, WISCONSIN  
1978



# 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 Nazianz .....from Oct. 8, 1974 to Nov. 25, 1974**  
**BRONSON C. La FOLLETTE, Madison.....from Nov. 25, 1974 to**

# DEPARTMENT OF JUSTICE

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RICHARD J. BOYD <sup>2</sup> .....	Assistant Attorney General
BETTY R. BROWN .....	Assistant Attorney General
MARYANN CALEF .....	Assistant Attorney General
JOHN W. CALHOUN .....	Assistant Attorney General
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LEROY L. DALTON .....	Assistant Attorney General
THOMAS DAWSON .....	Assistant Attorney General
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ROBERT W. LARSEN .....	Assistant Attorney General
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EDWARD MARION .....	Assistant Attorney General
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MICHAEL L. ZALESKI.....	Assistant Attorney General

<sup>1</sup>Resigned, 1978

<sup>2</sup>Appointed, 1978

OPINIONS  
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Volume 67

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*Compatibility; County Board; County Clerk; Officers And Offices; Salaries And Wages; Section 59.025(3)(c), Stats., does not apply to county clerk; and whereas a county board may create position of administrative services co-ordinator, transfer of duties currently performed by the county clerk would be permissible only where some other specific statute permits transfer to some other officer or prescribes that some other officer can initially be assigned such duties, or where the duties involved have not been conferred upon the county clerk by express statute and are not important duties which have been performed by the county clerk on an immemorial basis. County officer cannot be paid separate salary for performing services which are incidental to his office. OAG 1-78*

January 5, 1978.

JAMES UNGRODT, *Corporation Counsel*  
*Calumet County*

You request my opinion on a number of questions relating to a proposal to transfer certain administrative duties which have been performed by the county clerk, but which are not duties which are required to be performed by such officer by express statute, from the county clerk to a newly created office of administrative services co-ordinator.

You state:

“The Personnel Committee of the County Board, upon recommendation of the consultant, is considering a splitting of the statutory duties of the clerk, from the administrative functions as outlined in the job descriptions, for the following reasons: The County Clerk is an elected official and is not, by law, required to perform the administrative duties. The clerk might not be competent to handle said duties, or refuse to perform the administrative duties. The County Board would like to have the flexibility to assign the administrative duties to the clerk, other county official, or elsewhere, as it would see fit, not automatically keeping these duties with the position of County Clerk.

“It is the intent of the committee, if it does so, to reduce the salary of the County Clerk and create a separate salary schedule for the ‘Administrative Services Co-ordinator’, to be paid on a ‘part-time’ basis. The committee believes that in this way, adequate compensation can be given to the present clerk without the salary of the clerk’s position greatly in excess of other offices.”

The fact situation above includes certain erroneous assumptions of fact and law. There is also intimation that one of the purposes of change would be to attempt to adequately compensate the individual presently holding the office and performing the duties without attaching the extra compensation to the office. Such a plan might well discourage others from seeking election to the office of county clerk, as they would have no assurance that they would be appointed to the office of administrative services co-ordinator, if elected.

1. "Can the County Board create the position of Administrative Services Co-ordinator?"

The answer is yes. Authority is contained in sec. 59.025(3)(a), Stats.

Section 59.025(3), Stats., provides:

**"Creation of offices.** *Except for the offices of supervisor, judge, county executive and county assessor and those officers elected under section 4 of article VI of the constitution, the county board may:*

"(a) Create any county office, department, committee, board, commission, position or employment it deems necessary to administer functions authorized by the legislature.

"(b) Consolidate, abolish or reestablish any county office, department, committee, board, commission, position or employment.

"(c) Transfer some or all functions, duties, responsibilities and privileges of any county office, department, committee, board, commission, position or employment to any other agency including a committee of the board." (Emphasis added.)

2. "Can certain administrative duties presently performed by the county clerk be transferred to the administrative services co-ordinator?"

The answer is yes. However, no administrative duties presently performed by the county clerk can be transferred *solely* by reason of sec. 59.025(3)(c), Stats., since sec. 59.025(3), Stats., excepts those offices elected under Wis. Const. art. VI, sec. 4, which include the county clerk. 63 Op. Att'y Gen. 196 (1974). Transfer of duties currently performed by the county clerk would be permissible only where some other specific statute permits transfer to some other officer or prescribes that some other officer can initially be assigned such duties, or where the duties involved have not been conferred upon the county clerk by express statute, and are not important duties which have been performed by the county clerk on an immemorial basis.

I am of the opinion that powers conferred upon the county clerk by statute and those important duties which have been performed by

such officer on an immemorial basis cannot be transferred to another officer. See 63 Op. Att’y Gen. 196 (1974) and 65 Op. Att’y Gen. 132 (1976).

By reason of sec. 59.72(2), Stats., the duties of the county clerk with respect to audit can be transferred to a county auditor and therefore could be transferred to an administrative services co-ordinator by reason of sec. 59.025(3)(c), Stats. County clerks have also handled purchasing duties, but not on an immemorial basis. Since sec. 59.07(7), Stats., permits the county board to appoint a purchasing agent, and permits the county clerk to serve as agent, such duties could be transferred to an administrative services co-ordinator.

We do not propose to analyze every duty which your management consultants suggest might be transferred to an administrative services co-ordinator. You should make this analysis in light of the history of the Office of County Clerk in Calumet County and in view of the statutory duties prescribed for the county clerk in sec. 59.17 and other sections of the statutes. Note that sec. 59.17(1), Stats., requires the county clerk to “perform all duties *prescribed by law or required by the board* in connection with their meetings *and transactions.*” (Emphasis added.)

3. “Can a County Clerk hold any other position in County government?”

The answer is yes, provided that there is no incompatibility by reason of statute or under rules of the common law.

4. “Are the duties of the County Clerk incompatible with the designated functions of Administrative Services Co-ordinator?”

I do not agree that all of the duties listed for the administrative services co-ordinator can be transferred from the county clerk; however, insofar as transfer is permissible, I do not see any grounds for incompatibility.

5. “Could the salary of the County Clerk be reduced during his term of office where the individual performing the duties of County Clerk was given additional salary for performing the duties of ‘Administrative Services Co-ordinator?’”

The answer is no. The compensation as fixed under sec. 59.15(1)(a), Stats., is an incident of and attaches to the office; and the statute expressly provides that "The compensation established shall not be increased nor diminished during the officer's term and shall remain for ensuing terms unless changed by the board." By reason of sec. 66.197, Stats., the salary of the county clerk could be increased during the term of such officer.

In my opinion an individual serving as county clerk could not, during his term, also receive a separate salary for performing the duties of administrative services co-ordinator where such individual had been performing the same duties incidental to his office as county clerk.

6. "Does the statement in 20 OAG 196 that 'A public officer takes his office *cum onere*, and may not be paid for extra services rendered which are incidental to his office.' still apply in light of Section 66.197, Stats.?"

The answer is yes. Section 66.197, Stats., does not require the payment of additional compensation by reason of increase in duties by reason of change in statute, or passage of time resulting in growth of population, volume of business, etc. It permits an increase during the officer's term at the discretion of the county board. The opinion at 20 Op. Att'y Gen. 196 (1931) held that a county clerk could not be appointed as purchasing agent and receive a separate salary for such services, as such services were incidental to his office. However, since that opinion was issued, sec. 59.07(7), Stats., has been amended to provide that any county officer may be the agent. I am of the opinion that where the county clerk is appointed purchasing agent, a separate salary may be provided for and accepted by the individual serving as county clerk. However, in a case such as your county where the county clerk served as purchasing agent as an incident of his office and no separate salary was provided, he is required to perform such services without additional compensation over and above that provided for the office of county clerk.

In *Geyso v. Cudahy*, 34 Wis.2d 476, 488, 149 N.W.2d 611 (1967), it was held that the rule of *cum onere* does not extend to reimbursement for necessary expenses but that:

"... The rule of *cum onere* has only been applied to situations where a public officer attempted to gain extra compensation for

performing services encompassed within the function of his office. ...”

BCL:RJV

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*Counties; County Board; Fire Department; Municipalities; Towns;* Town having fire department must provide protection for county-owned property such as a landfill site, and in case of failure to do so shall be liable for services of any fire department responding to request to fight fire in such town. County in its discretion can reimburse town for reasonable costs of services provided to landfill site within town. OAG 2-78

January 6, 1978.

KENNETH J. BUKOWSKI, *Corporation Counsel*  
*Brown County*

You state that Brown County has established a county solid waste management board pursuant to sec. 59.07(135), Stats., and that one of two landfill sites is located in the Town of Hobart. The Town of Hobart has established a fire department pursuant to sec. 60.29(18), Stats.; however, the town board has refused to permit said fire department to respond to calls at the county landfill site even though the county has offered to pay \$100 for each call.

You inquire:

If a town has established a fire department pursuant to sec. 60.29(18), Stats., must the town provide fire protection for county-owned property in the same manner it provides services to privately owned property in the district?

It is my opinion that it must, and must perform without reimbursement from the county unless the county board in its discretion offers to pay, in part or in full, for the cost of said service. It is my further opinion that should the Town of Hobart fail to provide fire protection to the county property by its own department, by a joint department or by contract with a town or other municipalities having a fire department, or with a fire association, corporation or individual maintaining, housing and manning fire

equipment of a fire department as authorized by sec. 60.29(18), Stats., said Town would be liable for the services of any fire department in fighting fire and traveling to fight a fire at the landfill site. Also see sec. 60.29(20)(e), Stats., which provides that a town board may contract for fire protection and shall be entitled to reimbursement, not exceeding \$100 a call, for fires on county or state trunk highways. There is no separate provision for reimbursement for calls made to other county-owned property.

Section 60.29(18), Stats., provides that a town may "provide protection from fire" within the town in the various ways set forth above. Section 60.29(18m), Stats., provides:

**"Town without fire protection liable for fire fighting service.**

Any town failing to provide under subsection (18) or otherwise for a fire department and fire fighting apparatus and equipment for extinguishing fires *in such towns shall be liable for the services of any fire department in fighting fire and appearing to fight fire in such town upon request.*" (Emphasis added.)

In *Rockwood Volunteer Fire Dept. v. Kossuth*, 260 Wis. 331, 50 N.W.2d 913 (1952), the supreme court discussed the duty of a town to provide fire protection. At p. 333 it stated:

"In enacting sec. 60.29(18) and (18m), Stats., the legislature exercised its power to determine what public policy shall be with respect to fire *protection*, and *required* town boards to provide such *protection* in one of three ways: They could establish their own fire department, contract with another for such service, or pay for the services of any fire department responding to calls within their boundaries. Having thus required that fire *protection* be afforded the residents of rural communities, the legislature delegated to the town board the administrative authority to select the method of *protection* and to levy and collect taxes for the support of that method." (Emphasis added.)

*Allenton Volunteer Fire Dept. v. Soo Line Railroad Co.*, 372 F. Supp. 422 (E.D. Wis. 1974), cited *Rockwood* and held that the fire department which had a contract with the Township of Addison had a duty to provide fire protection within the town and was not entitled to payment from the railroad company for putting out a fire on its property even though the fire may have been started by trains and

even though the railroad company had made gratuitous payments to responding fire companies in the past.

Section 59.07(135), Stats., permits counties to establish solid waste management systems and contemplates that landfill sites may be established within the boundaries of municipalities with the county. Fire protection is not specifically mentioned in such section, but sec. 59.07(135), Stats., provides that the solid waste management “board *may* exercise the following powers:

“\*\*\*

“(m) *Make payments* to any municipality in which county disposal sites or facilities are located to cover the reasonable costs of services rendered to such sites or facilities.” (Emphasis added.)

In my opinion the word “may” is used in a permissive sense and does not mean “shall” make payments. In *Wauwatosa v. Milwaukee County*, 22 Wis.2d 184, 125 N.W.2d 386 (1963), it was held that the word “may” as used in sec. 59.07(52)(a), Stats. (1959), providing that Milwaukee County may reimburse municipalities in which county buildings are situated for the expense of transmission and disposal of sewage from such buildings, was discretionary. The statute was later amended to change the word “may” to “shall.” Unless and until the Legislature amends sec. 59.07(135)(m), Stats., to change the word “may” to “shall,” it must be construed as being permissive rather than mandatory.

BCL:RJV

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*Assessor's Plats; Plats And Platting; Register Of Deeds; 1.* Section 236.20(1)(a), Stats., requires that plats be submitted on the paper described therein. Plats submitted on other paper are objectionable.

2. Only the original ink-drawn plat on the required paper can be recorded with the register of deeds. OAG 3-78

January 18, 1978.

CAROL TOUSSAINT, *Secretary*

*Department of Local Affairs and Development*

Your predecessor asked several questions concerning the duties of the head of the planning function in your Department to check certain requirements of sec. 236.20, Stats.

“Question I

“May a land subdivision plat be certified as non-objectionable by this office, approved and recorded if it is prepared on both sides of double-sided, muslin backed plat paper?”

Section 236.20(1)(a), Stats., provides as follows:

“(1) **General requirements.** All plats shall be legibly prepared in the following manner:

“(a) On muslin-backed white paper 22 inches wide by 30 inches long. When more than one sheet is used for any plat, each sheet shall be numbered consecutively and shall contain a notation giving the total number of sheets in the plat and showing the relation of that sheet to the other sheets and each sheet shall bear the name of the subdivision. These sheets may be provided by the county through the register of deeds on such terms as the county board determines.”

As an aid in answering this question, you have submitted samples of the paper required by sec. 236.20(1)(a), Stats., and the new double-sided paper. The paper required by sec. 236.20(1)(a), Stats., provides a drawing surface on one side only. Its back is muslin. The new paper provides drawing surfaces on both sides. Muslin is pressed between the two drawing surfaces.

It is my opinion that the new paper must be rejected.

The obvious intent of sec. 236.20(1)(a), Stats., is contained in the statutory language itself. The Legislature intended use of a durable paper which could withstand hard use over the years. In addition, the paper was to be a certain size to standardize plat books used by registers of deeds throughout the state and to permit convenient

handling. Further, the paper required by sec. 236.20(1)(a), Stats., is flexible to permit easy opening and page turning.

The new double-surfaced paper is very stiff. It is more inflexible than high quality thin cardboard. Use of such paper in plat books kept by registers of deeds would be most difficult and would subvert not only the requirements of sec. 236.20(1)(a), Stats., but also its obvious intent.

“Question II

“Assessor’s plats are required by s. 70.27(8) to be reviewed by this office. Do all of the answers to Question I apply to assessor’s plats? If not, how do they differ?”

All of the answers given under Question I above apply to assessor’s plats.

Since Question III does not relate to your statutory duties, it will not be answered here.

“Question IV

“Section 236.20(1)(c) requires plats to be legibly ‘prepared’ with nonfading black ink; this has permitted the head of the planning function to accept plats prepared by lithography and silk screening, using nonfading black ink. However, the register of deeds may not accept a plat for record unless it is ‘drawn.’ In an opinion dated January 26, 1954 the Attorney General advised the Winnebago County District Attorney that ‘drawn’ cannot be interpreted to mean ‘printed’. Has this department correctly administered the statutes by certifying ‘printed’ plats as non-objectionable? May the register of deeds record such plats, since they are not ‘drawn’?”

Although printer’s ink may satisfy requirements, of permanence and durability, the plat actually recorded must be the original drawing, i.e., the original ink drawing.

Section 236.25(2)(a), Stats., clearly provides:

“(2) The register of deeds shall not accept a plat for record unless:

“(a) It is drawn on muslin-backed white paper 22 inches wide by 30 inches long.”

43 Op. Att'y Gen. (1954) interpreted the word "drawn" in a similar statute, sec. 236.04(3), Stats. (1953), as requiring the recording of the original drawing of the plat prepared by the draftsman. It may be presumed that the Legislature was aware of that opinion when, by ch. 570, Laws of 1955, it subsequently repealed sec. 236.04(3) and created present sec. 236.25(2)(a), which uses the same term in describing the plat which must be filed with the register of deeds.

More particularly, however, ch. 236, Stats., requires recording of the *original* plat. Section 236.02(7), Stats., provides:

"236.02 DEFINITIONS. In this chapter, unless the context or subject matter clearly requires otherwise:

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"(7) 'Recording a plat' means the filing of the original of the final plat with the register of deeds."

Further, sec. 236.12(8), Stats., provides in part:

"In order to facilitate approval of the final plat where more than one approval is required, the subdivider may file a true copy of the plat with the approving authority or authorities with which the original of the final plat has not been filed. The approval of such authorities may be based on such copy *but shall be inscribed on the original of the final plat. ...*" (Emphasis added.)

Finally, sec. 236.25(4), Stats., requires the "original" of the final plat to be bound and filed by the register of deeds. All other exact representations of the plat are designated and referred to as copies under ch. 236, Stats., whether printed, photocopied or produced by other means.

BCL:JPA

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*Blood Tests; Police; Public Records; Sheriffs; Sheriff's radio log, intradepartmental documents kept by sheriff and blood test records of deceased automobile drivers in hands of sheriff are public records subject to inspection and copying under sec. 19.21(2), Stats., and subject to limitations contained in court cases cited which place duty on custodian to withhold disclosure where substantial harmful effect upon the public interest would result. Specific reason for withholding must be given which may be tested by mandamus in the courts. Such records do not appear to be records required by law to be kept by sheriff. Where records are required by law to be kept by sheriff, right of inspection exists under sec. 59.14(1), Stats.*

That portion of 41 Op. Att'y Gen. 237 (1952) inconsistent with this opinion is repudiated. OAG 4-78

January 25, 1978.

GERALD K. ANDERSON, *District Attorney*  
*Waupaca County*

You request my opinion whether the sheriff's radio log and other intradepartmental documents kept by the sheriff are public records subject to inspection and copying by the general public.

It is my opinion that they are public records within the meaning of sec. 19.21(1), Stats., and are subject to inspection and copying by any member of the public pursuant to sec. 19.21(2), Stats., 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), even though they are not records, "books and papers required [by law] to be kept in his office" and are not subject to the statutory right of inspection and copying by any person under the provisions of sec. 59.14(1), Stats. See *State ex rel. Journal Co. v. County Court*, 43 Wis.2d 297, 168 N.W.2d 836 (1969).

Section 59.14(1), Stats., applies to county officers, including the sheriff, and provides in part:

"... All such officers shall keep such offices open during the usual business hours each day ... and with proper care shall open

to the examination of any person *all books and papers required to be kept in his office* and permit any person so examining to take notes and copies of such books, records, papers or minutes therefrom." (Emphasis added.)

I am of the opinion that the words "required to be kept" are used in the restrictive sense, that is, "required by law to be kept." If an express statute requires the sheriff to keep a certain book or document in his office, there is a clear right of inspection and copying in any person. The register of prisoners committed to jail, sheriff's docket, daily jail records and cash books are examples of books or papers required by law to be kept in his office. See sec. 59.23(2) and (8), Stats., and 41 Op. Att'y Gen. 237, 243 (1952), for definition of what is included in a "sheriff's docket." *State ex rel. Journal Co. v. County Court, supra*, holds that where documents are in the hands of a county officer covered by sec. 59.14(1), Stats., and "required to be kept in his office," there is a right of inspection in any person; that such right is subject only to the limitation in the statute itself; and that the document need not be filed to be subject to the statute. The court relied heavily on *Hanson v. Eichstaedt*, 69 Wis. 538, 35 N.W. 30 (1887), which interpreted sec. 59.14, Stats., which was adopted in 1849, and which has been substantially in its present form since the *Hanson* decision.

In 41 Op. Att'y Gen. 237 (1952), it was stated that notwithstanding secs. 18.01 [19.21], 59.14(1) and 59.23, Stats., the public enjoys no right of inspection of telephone and radio logs, criminal complaint and investigation reports or other internal documents in the office of sheriff. The opinion interpreted the language in sec. 59.14(1), Stats., "required to be kept" as "required by law to be kept." I am in agreement with that portion of the opinion. However, the portion of the opinion which implies that inspection of the documents involved can be denied, in blanket, even in view of the provisions of sec. 19.21(1) and (2), Stats., is inconsistent with later-decided cases of *Youmans*, *Beckon* and *Journal, supra*, and, in my opinion, is incorrect.

The most recent case involving county records does not mention sec. 59.14(1), Stats., but was concerned with sec. 19.21, Stats. Citing *Beckon v. Emery, supra*, the court stated: "This court has previously noted that the 'public policy, and hence the public interest, favors the

right of inspection of documents and public records.” *State ex rel. Dalton v. Mundy*, 80 Wis.2d 190, 196, 257 N.W.2d 877 (1977).

Subsections (1) and (2) of sec. 19.21, Stats., provide:

“Each and every officer of the state, or of any county, town, city, village, school district, or other municipality or district, is the legal custodian of and shall safely keep and preserve all property and things received from his predecessor or other persons and required by law to be filed, deposited, or kept in his office, or which are in the lawful possession or control of himself or his deputies, or to the possession or control of which he or they may be lawfully entitled, as such officers.

“*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 radio logs and intradepartmental documents you refer to are in the lawful possession of the sheriff or his deputies. I am unaware of any statute which would make the documents confidential or absolutely privileged. Section 349.19, Stats., makes certain accident reports confidential; however, your inquiry is not concerned with that type of document. In the absence of statutory or constitutional exception, the disclosure requirements of sec. 19.21(2), Stats., which are subject to the limitations contained in the *Youmans* and *Beckon* cases, *supra*, apply.

This does not mean, however, that the documents are subject to automatic or full disclosure. The sheriff as custodian has a right and duty to determine whether there is a public interest in withholding partial or total inspection which is paramount to the stated statutory public interest permitting inspection. In such case such officer must give specific reasons for refusal, and the person seeking inspection can then resort to a mandamus action to test the reason. 63 Op. Att’y Gen. 400, 405-406 (1974), contains a summary of the criteria to be

considered by the custodian in making a determination to permit or deny public access to records. Please refer to that opinion and to 65 Op. Att'y Gen. 31 (1976). The pendency of criminal prosecution or the investigation of incidents which might result in prosecution would in most cases justify denial of inspection on a case-by-case basis. Denial may also be appropriate where there are unsubstantiated charges which might *unduly* harm the person or persons involved, if disclosed. Care must also be taken to guarantee an accused a fair trial.

You also inquire:

Are there "... any restraints on a Sheriff or Police Department voluntarily discussing the results of blood tests taken from deceased automobile drivers, where in a specific case the investigation appears to be concluded, and there is a great curiosity in the community as to the results of the activities of the deceased driver as they relate to the cause of the fatal accident?"

Neither sec. 343.305(6), Stats., which concerns the admissibility of the test in court, nor sec. 885.235, Stats., which concerns evidentiary weight given the tests, contain any provision requiring a sheriff to keep the results of such tests from public inspection. I can find no other statutory provision which exempts such tests from public inspection.

It is my opinion that the sheriff has a duty as custodian of the test report document to determine whether there is a public interest in withholding inspection which is paramount to the provision in sec. 19.21(2), Stats., permitting inspection. If the investigation is completed and no motor vehicle ordinance or statutory violation prosecution is contemplated, there would in most cases be no valid reason for denying inspection and discussion would be likewise appropriate.

In 59 Op. Att'y Gen. 226 (1970), it was stated that blood test records in the hands of the coroner are public records subject to inspection and copying under sec. 19.21, Stats., but that the coroner could refuse public access if he determined that the harmful effect of publication would outweigh the benefit to be gained by making the information available. He would be required to state a specific reason

for nondisclosure which could be tested in the courts. The same answer applies to the sheriff.

BCL:RJV

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*County Park Commission; County Parks; Municipalities; Ordinances; Parks;* Total prohibition of all use of all Milwaukee County park buildings for political purposes is unconstitutional. Validity of regulations restricting political assemblies to certain areas of certain parks depends on whether the restrictions may be considered reasonable "time, place and manner" regulations. Current sec. 47.02, Milwaukee County Ordinances, vests unbridled discretion in permit-granting authority. To withstand constitutional attack explicit, objective standards ensuring even-handed application of the ordinance must be provided. OAG 5-78

January 26, 1978.

ROBERT P. RUSSELL, *Corporation Counsel*  
*Milwaukee County*

You have requested my opinion on two questions regarding the regulation of rallies and assemblies in Milwaukee County parks under sec. 47.02 of the Milwaukee County Ordinances. First, you ask whether the Milwaukee County Park Commission may prohibit all use of all park buildings for political purposes. Second, apparently anticipating a negative response to the first question, you ask whether the Park Commission may restrict assemblies for political purposes to designated areas of designated parks.

The relevant portion of sec. 47.02, Milwaukee County Ordinances, provides:

"47.02 Permits Required for Public Meetings, etc. (1) PUBLIC MEETINGS, ETC.; PERMIT. All public meetings, assemblies, entertainments, tournaments or public discussion on any subject, religious, social, political, or otherwise, are prohibited within the limits of any park or parkway, except when a written permit of the Park Commission has first been

granted and then only in areas designated as assembly areas by the Park Commission.

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“(3) PUBLIC SPEACHES [sic]; PUBLIC MUSIC; PERMIT REQUIRED. No person shall make any oration, or harangue, or public speech, nor use any loud speaker or other amplifying equipment; nor shall any person publicly play any music or play upon any musical instrument in any park or parkway without the written permit of the Park Commission.”

The methods by which local authorities regulate the use of their parks and other public places have been reviewed many times by many courts, including the United States Supreme Court. *Hague v. C.I.O.*, 307 U.S. 496, 59 S. Ct. 954 (1939); *Kunz v. People of State of N.Y.*, 340 U.S. 290, 71 S. Ct. 312 (1951); *Niemotko v. State of Md.*, 71 S. Ct. 328 (1951); *Schneider v. State of New Jersey*, 308 U.S. 147, 60 S. Ct. 146 (1939).

The cases emphatically affirm a municipality’s right, indeed its duty, to enact park regulations in the interest of “public safety, health, welfare or convenience.” *Schneider v. State of New Jersey*, *supra*, p. 160. However, it is equally clear that such regulations may not unreasonably restrict one’s enjoyment of the fundamental rights of freedom of speech and assembly. The often-quoted language of *Hague v. C.I.O.*, *supra*, provides an emphatic expression of this balance of public and individual interest and is a useful foundation for my examination of the regulation of assemblies for political purposes in Milwaukee County parks:

“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the

guise of regulation, be abridged or denied.” *Hague v. C.I.O.*, *supra*, at pp. 515, 516.

The leading Wisconsin case on this subject, *Milwaukee County v. Carter*, 258 Wis. 139, 45 N.W.2d 90 (1950), involved an earlier version, since amended, of sec. 47.02(6), Milwaukee County Ordinances, which totally proscribed denominational services and meetings in public parks. Our supreme court, striking down the provision, held that “to deny to the people all use of the people’s property for the public discussion of specified subjects is an unconstitutional interference of rights expressly guaranteed by both state and federal constitutions.” *Milwaukee County v. Carter, supra*, p. 146. The court further declared, however, that the “Government may, in the interests of public order, safety, and the equitable sharing of facilities, exercise reasonable control over when, where, and under what conditions public meetings may be held on public property;” *Carter, supra*, p. 146.

Prohibiting assemblies for political purposes in all park buildings or restricting them to certain areas of certain parks will not result in a total denial of all use of the people’s property for public discussion. The crucial question remains, however, whether such restrictions are “reasonable” given the fact that they “abut upon sensitive areas of basic First Amendment freedoms.” *Baggett v. Bullitt*, 377 U.S. 360, 372, 84 S. Ct. 1316 (1964).

In assessing the reasonableness of these regulations, two general principles should be kept in mind: first, “the right to use a public place for expressive activity may be restricted only for weighty reasons;” *Grayned v. City of Rockford*, 408 U.S. 104, 115, 92 S. Ct. 2294 (1972); secondly, “reasonable ‘time, place and manner’ regulations may be necessary to further significant governmental interests and are permitted.” *Grayned v. City of Rockford, supra*, p. 115.

By way of illustration, it has been suggested that it would be proper to designate specified areas in a large park or even entire small parks as areas for such activities as family picnicking or athletic endeavors, *Collin v. Chicago Park District*, 460 F.2d 746, 760 (7th Cir. 1972), and to limit the number of people who may assemble in a small park in a congested downtown area, *Blasecki v. Durham*, 456 F.2d 87 (4th Cir. 1972). In addition, the court in *Collin* indicated it

would be permissible to regulate the time at which park facilities could be used for political assemblies if such regulations were consistently observed as to all applicants, and the regulations were not so restrictive as to have a chilling effect on the exercise of the right of freedom of assembly. Likewise, it may be appropriate to deny a permit for a requested area of a park if an equally appropriate alternate site in the *same* park were made available. *Collin v. Chicago Park District, supra*. Nevertheless, the use of an admittedly appropriate place cannot be denied purely because an alternative site exists. *Collin, supra*. Such a regulation sweeps too broadly. As the Supreme Court stated in *Schneider v. N.J., supra*, p. 163:

“... one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”

With the above foundation, I turn to the questions you ask concerning the regulation of political speech and assembly in Milwaukee County parks. Regarding the prohibition of all use of all park buildings for political purposes, it is my opinion that such a regulation would be unconstitutional under both the federal and the state constitutions. Given the weather in this state and considering the obvious acoustic and convenience advantages a building provides, such a regulation, in fact, means that freedom of speech and assembly will be “so restricted as to become virtually meaningless.” *Collin, supra*, p. 752.

Your second question, whether political assemblies may be limited to certain areas of certain parks, cannot be answered without knowing the number and location of the areas and the reason for the restriction. As a general rule and for guidance in framing a specific provision, it may be said that such regulations “if narrowly tailored to further the State’s legitimate interests” may well be considered “reasonable time, place and manner” regulations and, as such, would be permissible. In this regard, I note that the court in *Collin* specifically reserved the question whether an area the size of Chicago’s Marquette Park (which covers some blocks in the south side of Chicago) could be reserved for picnic use only totally precluding use of the park for political speech and assembly purposes. Certainly it is clear that ordinances enforcing partial bans on the use of park areas are reviewed carefully by the courts.

One further point should be made concerning the regulation of political activities in Milwaukee County parks. In addition to having to fall within the guidelines set out in the first part of my opinion, such regulations must also provide explicit, objective standards for those who are to apply them in order to prevent arbitrary and discriminatory enforcement.

“It is settled by a long line of recent decisions of this Court that an ordinance which, ... makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official--as by requiring a permit or license which may be granted or withheld in the discretion of such official--is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.” *Staub v. City of Baxley*, 355 U.S. 313, 322, 78 S. Ct. 277 (1958).

See also *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 89 S. Ct. 935 (1969); *Grayned, supra*; *Niemotko, supra*; *Kunz, supra*; *Washburn v. Ellquist*, 242 Wis. 609, 9 N.W.2d 121, 10 N.W.2d 292 (1943).

Current sec. 47.02, Milwaukee County Ordinances, vests discretion in the County Park Commission with no explicit, objective guidelines or standards to prevent arbitrary application. No mention is made of the terms upon which a permit is to be granted or withheld. It is my opinion that in order to withstand constitutional attack this ordinance, or rules to administer it adopted by the Park Commission pursuant to authority given it under sec. 27.05, Stats., must provide sufficient standards for time, place, and manner of holding political events to ensure that the ordinance will be applied even-handedly to all applicants.

BCL:JJG

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*Discrimination; Interstate Commerce; Investments; Regents, Board Of; University; Section 36.29(1), Stats., which prohibits investment of University funds in companies which practice or condone discrimination is not an undue burden on interstate commerce, does not improperly interfere with foreign relations and is not impermissibly vague. OAG 6-78*

January 31, 1978.

H. EDWIN YOUNG, *President*  
*University of Wisconsin System*

In your letter of September 16, 1977, you asked me to review my May 19, 1977, informal response concerning the Board of Regents responsibilities under sec. 36.29(1), Stats. Specifically, you requested my opinion on the constitutionality of this section in light of questions about burden on interstate commerce and interference with foreign relations raised by Professor Gordon B. Baldwin.

The relevant language of sec. 36.29(1), Stats., dealing with gift and grant money invested by the Board of Regents, provides that:

“... No such investment shall knowingly be made in any company, corporation, subsidiary or affiliate which practices or condones through its actions discrimination on the basis of race, religion, color, creed or sex. ...”

Thorough analysis of the interstate commerce and foreign relations questions necessitates an inquiry into the proper scope of authority of the federal government and the State of Wisconsin as two distinct sovereignties. Insofar as the subject matter of the statute touches legitimate interests both of the nation and of the state, the task of those called upon to construe the statute is “that of harmonizing such interests without sacrificing either.” *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 64 S. Ct. 967 (1944). This sentiment was aptly expressed by the federal District Court of Washington in *U.S. v. Ahtanum Irrigation Dist.*, 124 F. Supp. 818 (E.D. Wash. S.D. 1954):

“The division of powers between the central government and the states is fundamental and is firmly established by the Constitution. ... [I]t is essential to preserve the balance of local and central governments thus established. It is as much the duty of this Court to preserve states’ rights as to [confirm the necessary authority of the federal government].” *U.S. v. Ahtanum Irrigation Dist.*, *supra*, at p. 824.

Section 36.29(1), Stats., establishing a “no discrimination” standard which the University of Wisconsin Board of Regents investments are to meet, represents an exercise of state authority over

matters of legitimate--indeed compelling--concern to this state. Its provisions reflect a legislative determination that certain state monies are not to be invested in companies which "practice or condone discrimination" and are an emphatic embodiment of the public policy of the State of Wisconsin against unlawful discrimination on the basis of race, religion, color, creed or sex.

The states' authority to regulate their own important governmental activities (*National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465 (1976) and to fix their own public policy as to intra-state matters (81A C.J.S. *States* sec. 25 (1977)) is clear. It has been suggested, however, that sec. 36.29(1) impermissibly intrudes upon the federal domain and constitutes both an unconstitutional burden on interstate commerce and an unconstitutional interference with foreign relations.

#### Interstate Commerce

It has been established beyond question that "the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. ..." *Freeman v. Hewit*, 329 U.S. 249, 252, 67 S. Ct. 274 (1946), as cited in *Great Atlantic & Pac. Tea Co., Inc. v. Cottrell*, 424 U.S. 366 (1976).

But, as the Supreme Court pointed out in *Great Atlantic & Pac. Tea Co., Inc. v. Cottrell*, *supra*, at p. 371:

"It is no less true, of course, that under our constitutional scheme the States retain 'broad power' to legislate protection for their citizens in matters of local concern ... *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 531-532, 69 S.Ct. 657, 661-662, 93 L.Ed. 865 (1949), and that not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the States. *Freeman v. Hewit, supra*, 329 U.S., at 253, 67 S.Ct. at 277; *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346, 351-352, 59 S.Ct. 528, 530-531, 83 L.Ed. 752 (1939)."

Where state legislation arguably touches the federal interest in maintaining the free flow of interstate commerce, the rule laid down in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), is the

proper gauge by which the constitutionality of the regulation is to be measured:

“Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443, 80 S.Ct. 813, 816, 4 L.Ed. 2d 852. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.”

The legitimacy of the state’s interest in determining how state finances are to be managed and in setting public policy on an issue which concerns the general welfare, fundamental rights, and individual dignity of its citizens is beyond argument. (*cf.* secs. 66.432, 101.22, 111.31, *et seq.*, for further legislative expressions of this “no discrimination” policy.)

Just what is the “burden” on interstate commerce resulting from the application of sec. 36.29(1)? The statute requires the Board of Regents to refrain from purchasing securities in companies which “practice or condone discrimination.” Suppose it does so. What percentage of the total dollars in interstate commerce available for investment is controlled by the Regents? What impact would the withholding of those dollars from certain investments have on interstate commerce? I am of the opinion that the potential burden on interstate commerce is so slight and the effect so speculative that it cannot be said to be “clearly excessive” in relation to the local interests involved, and must be considered only “indirect and incidental.” I note also that the underlying state policy expressed in sec. 36.29(1) is entirely consistent with national policy against discrimination in employment and public accommodations. *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The first two cases cited above relied on testimony that racial discrimination in public accommodations and restaurants “imposed an artificial restriction on the market and interfered with the flow of merchandise.” The court in *Katzenbach*, (*supra*, at 298),

held that discrimination on the basis of race in access to public accommodations unconstitutionally obstructed interstate commerce.

My conclusion is further supported by the principle of statutory construction that an act is to be given a construction that will avoid constitutional objections to its validity if it will bear such construction. (See cases, Callaghan's Wisconsin Digest sec. 182, *Statutes*, pp. 188-189 (pocket part).) Whether specific future applications of the "no discrimination" clause will in fact produce sufficient extraterritorial effects to outweigh the local benefits is a question which cannot be answered in the abstract. No such application has been suggested.

### Foreign Relations

Federal supremacy in the international arena is undisputed. Exclusive control over the carrying on of foreign relations and the setting of foreign policy has been explicitly vested in the federal government by the Constitution's Supremacy Clause (art. VI, cl. 2). As the Supreme Court in *U.S. v. Pink*, 315 U.S. 203 (1942), emphatically declared:

"No State can write our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively."

However, merely raising the spectre of possible interference with foreign relations is insufficient of itself to justify striking down otherwise valid state legislation. The "essential role of the states in our federal system of government" (*Usery, supra*, p. 2470) compels a thorough analysis of the issue.

Section 36.29(1) has nothing to do with setting the nation's foreign policy with respect to countries that officially practice or condone discrimination. Indeed, it would be naive, even quixotic, to suppose that sec. 36.29(1) would have a direct impact on domestic policies of countries such as South Africa. The Legislature's attention was obviously focused on legitimate, internal financial and public policy concerns. The policies the statute was intended to affect are those of the State of Wisconsin itself. To this end the statute measures the conduct of corporations in which the Regents might invest, and not the conduct of countries or governments, except in an indirect way. Thus, the question whether sec. 36.29(1)--otherwise

within the scope of authority of the Legislature--impermissibly interferes with the conduct of foreign relations and unconstitutionally trespasses on the federal domain is relatively easy to answer.

Judicial analysis in cases dealing with this question of state interference in international affairs makes it clear that every state statute that would have some effect on foreign nations is not thereby fatally flawed. Those which would have only "some incidental or indirect effect in foreign countries" do not intrude on federal authority. That fact, clearly established in *Clark v. Allen*, 331 U.S. 503, 517 (1947), was reaffirmed by the Supreme Court in *Zschernig v. Miller*, 389 U.S. 429, 433 (1968), the key case in this area:

"State courts, of course must frequently read, construe, and apply laws of foreign nations. It has never been seriously suggested that state courts are precluded from performing that function, albeit there is a remote possibility, that any holding may disturb a foreign nation--whether the matter involves commercial cases, tort cases, or some other type of controversy."

In *Zschernig* the Supreme Court was faced with the question of the constitutionality of an Oregon probate statute as applied by the Oregon courts to forbid the transfer of an inheritance to an East German citizen. The statute provided for escheat in cases of inheritance by nonresident aliens unless the person could show that a reciprocal right of U.S. citizens to inherit property on the same terms as citizens of the foreign country existed, and that the person taking the property would in fact have the use or benefit of it. The Court noted that application of the statute involved more than the "routine reading of foreign laws" upheld in *Clark v. Allen* and objected to the fact that in enforcing the provisions of the statute probate courts "launched inquiries into the type of governments that obtain in particular foreign nations." For these reasons the Court held that the Oregon statute *as applied* affected international relations "in a persistent and subtle way" and was therefore an unconstitutional encroachment on federal authority over foreign affairs.

The issue here as stated in *Zschernig* is whether sec. 36.29(1) involves no more than a "routine reading of foreign laws" with only an "incidental or indirect effect" on the foreign country as opposed to a "persistent and subtle" effect on international relations. The

answer seems obvious. The statute tests the conduct of companies, corporations, subsidiaries, or affiliates. It does *not* apply to the conduct of governments directly. The issue under the statute is the conduct of the company in which the Regents propose to invest. In the case of companies doing business in South Africa, governmental policy in South Africa is merely one item of evidence in determining corporate conduct and the inquiry into South African policy need go no further than a "routine reading" of South African law. *Clark v. Allen, supra*.

Cases since 1968 in which *Zschernig* has been interpreted are enlightening. Typical of these cases is *Shames v. State of Nebraska*, 323 F. Supp. 1321 (D. Neb. 1971), which involved an action to enjoin the enforcement of a Nebraska statute providing that no nonresident alien could inherit land more than three miles from the corporate limits of any city or town. The District Court in upholding the statute declared:

"It is thus apparent that every court which has considered *Zschernig*, has interpreted it to mean that judicial criticism of foreign governments is constitutionally impermissible, and the decision extends no further than that, at the present time.

"A careful reading of the entire *Zschernig* opinion and cases decided pursuant to that decision as cited herein, convinces this panel that the sole basis for striking down the Oregon escheat statute was the manner in which the said statute was being applied. Also, it is apparent that every court which has considered *Zschernig* has interpreted it to mean no more than judicial criticism of foreign governments is constitutionally impermissible. It is obvious to this Court that the Nebraska statutes challenged herein, are not being applied by the Nebraska Courts in such a way as to come within the prohibitions of the *Zschernig* case." *Shames v. State of Nebraska, supra*, p. 1332.

The court in *Goldstein v. Cox*, 299 F. Supp. 1389 (S.D.N.Y. 1968), reached a similar conclusion:

"We conclude that this record is inadequate to justify this court in holding, summarily, that Section 2218 is unconstitutional under the *Zschernig* rule. Without any evidence whatever as to how Section 2218 has been applied in

such a way as to interfere with the foreign relations of the United States. We interpret the Supreme Court's recent ruling denying a rehearing in *Ioannou* as at least an indication that evidence of improper application of the statute is necessary." *Goldstein, supra*, at pp. 1393-4.

This uniform reluctance to strike down state legislation under a supremacy clause attack without evidence of its operation and effects has a solid foundation in the Supreme Court's own refusal in *Zschernig* to overrule *Clark v. Allen*. Furthermore, *Zschernig*'s emphasis on the actual effect of state legislation on foreign relations is an indication that the Court may be moving "toward an approach to these problems similar to the one used under the commerce clause, which does consider the strength of the state interest involved." 82:63 Harv. L. Rev. 238-245 (1968).

Two cases decided by state courts illustrate the analysis. In *Bethlehem Steel Corporation v. Board of Com'rs of Dept. of W. & P.*, 80 Cal. Rptr. 800 (1969), the California court of appeals struck down a California "Buy American" statute containing a requirement that only material manufactured in the United States could be used in the construction of public works or supplied for public use. Recently the New Jersey Supreme Court sustained a similar New Jersey statute where the court was able to find that the law in question did not require local units of government to engage in evaluating politics of foreign governments and did not have a significant and direct impact on foreign affairs. *K.S.B. Technical Sales Corp. v. North Jersey District Water Supply Commission of New Jersey*, 46 L.W. 2359 (1977). Although the results appear to be in conflict, the New Jersey court's analysis which looks to actual effect of the statute would appear to be the emerging trend of the law.

In conclusion, based on the Supreme Court's treatment of the Oregon statute in *Zschernig* and on the careful line it drew between the statute on its face and the statute as applied--a line closely followed by lower courts in subsequent cases, and further supported by *Usery*'s emphasis on states' ability to function effectively in a federal system, it is my opinion that sec. 36.29(1) on its face does not unconstitutionally intrude on the authority over foreign affairs vested exclusively in the federal government. Furthermore, since application of this statute will involve no more than "routine reading of foreign laws" as one indicium of the conduct of corporations and need not

entail the judicial criticism of foreign governments held constitutionally impermissible in *Zschernig*, it is also my opinion that sec. 36.29(1) will not be considered unconstitutional in its operation and effect.

In addition to the foreign relations objections founded on the supremacy clause, it has also been argued that sec. 36.29(1) involves an unconstitutional interference with foreign relations by running afoul of the "Act of State" doctrine. [The meaning of "act of state" has been understood to include "not only an executive or administrative exercise of sovereign power by an independent state, or by its duly authorized agents or officers, but also legislative and administrative acts such as a statute, decree, or order." Michael Zander, *The Act of State Doctrine*, 53 Am. J. of Int'l Law 826 (1959)] There are several problems with such a contention. First, the "Act of State" doctrine, while theoretically applicable to state Legislatures and their agencies has traditionally been applied to the courts:

"Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves." *Underhill v. Hernandez*, 168 U.S. 250, 252, as cited in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964).

The Supreme Court's recent reassessment of the doctrine in *Alfred Dunhill of London v. Republic of Cuba*, 425 U.S. 682, 96 S. Ct. 1854 (1976), echoes this view:

"The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations."

Obviously, the doctrine cannot be used to insulate an individual from all consequences which flow from his choice to reside in a particular country. Allowing the doctrine to be applied to situations involving other than court adjudications would necessarily result in a disquieting extension of the doctrine at a time when the trend has

been increasingly away from sovereign immunity defenses (*cf. Dunhill, supra*, at 1867-1871).

Secondly, it should also be noted as a matter of fact that the "no discrimination" clause in sec. 36.29(1) is not at all concerned with the "legality of acts of foreign states on their own soil" but rather with the criteria by which the legality of investments made in Wisconsin is to be determined.

Even assuming the appropriateness of the application of the "Act of State" doctrine in this context, it is my opinion that any conclusion on whether sec. 36.29(1) actually violates the doctrine must be withheld until a determination on the effects of the statute as applied in a particular case can be made. Logically, a finding that the statute involved only a routine reading of foreign laws and had only an incidental effect in the foreign country forecloses any claim under this doctrine.

#### Vagueness

One further issue raised by Professor Baldwin remains. Questions have been raised concerning the vagueness of the language of sec. 36.29(1). Admittedly the phrase "practices or condones through its action discrimination on the basis of race, religion, color, creed or sex" contains terms that must be given concrete meaning. I am of the opinion that the Board in interpreting the statute should read it in *pari materia* with other state laws concerning discrimination. See secs. 66.432, 101.22, 111.31, *et seq.*, Stats. I believe it to have been the legislative intent to prohibit investment in firms which practice or condone discrimination on the basis of race, religion, color, creed or sex as these terms have been used and construed in parallel statutes, regardless of where that discrimination occurs. While as a practical matter this may create certain real problems for the Board of Regents in formulating administrative guidelines, given the Legislature's assumed awareness of the extensive content provided such terms in cases interpreting other "no discrimination" statutes, it cannot be said that this lack of precision reaches constitutional proportions despite the practical difficulties which may be encountered. The test of vagueness with respect to noncriminal statutes is whether the statute is so vague or uncertain that it is impossible to execute it or ascertain legislative intent with reasonable certainty. *HM Distributors of Milwaukee v. Dept. of Agri.*, 55 Wis.2d 261, 271, 198

N.W.2d 598 (1972); *Forest Home Dodge, Inc. v. Karns*, 29 Wis.2d 78, 94, 138 N.W.2d 214 (1965).

### Construction in Favor of Validity

In closing, one final point should be made. The members of the Board of Regents are public officers vested with considerable discretionary power. As discretionary officers who have taken an oath to uphold the Constitution (sec. 15.07(7), Stats.), they have many powers and duties which may place them “in the category of a public officer who is permitted to question the constitutionality of an ordinance or statute.” *State ex rel. Sullivan v. Boos*, 23 Wis.2d 98, 100, 126 N.W.2d 579 (1963); see also *Fulton Foundation v. Dept. of Taxation*, 13 Wis.2d 1, 108 N.W.2d 312 (1960).

Nevertheless, it cannot be forgotten that “[t]he validity of a statute must be sustained unless it palpably contravenes a provision of the state or federal constitutions.” *David Jeffrey Co. v. Milwaukee*, 267 Wis. 559, 576, 66 N.W.2d 362 (1954). For this reason, “where there are two possible constructions of the law, one under which the law would be violative of the constitution, and another under which it would not be, that construction which would save the law must be adopted.” *State ex rel. La Follette v. Reuter*, 36 Wis.2d 96, 120, 153 N.W.2d 49 (1967). See also cases, Callaghan’s Wisconsin Digest, *supra*. For this reason also, “[an] highly unreasonable purpose; [sic] one which would clearly render a legislative enactment void for uncertainty or unconstitutionality, is never to be attributed to the lawmaking power if that can reasonably be avoided.” *State ex rel. McGrael v. Phelps*, 144 Wis. 1, 9, 128 N.W. 1041 (1910).

As the preceding analysis of sec. 36.29(1) makes clear, a legitimate purpose can easily be attributed to the statute, and a construction given which would not render it in violation of the Constitution, either on its face or as applied. Therefore, in my opinion, the Board of Regents is obliged to carry out the duties imposed on it by sec. 36.29(1) and leave the ultimate determination of the constitutionality of the “no discrimination” clause to the courts.

BCL:DJH

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*Appropriations And Expenditures; Attorneys; Compatibility; Compensation; Corporation Counsel; Counties; County Board; County Corporation Counsel; District Attorney; Expenditures; Funds; Gifts; Indigent; Ordinances; Public Officials; Salaries And Wages;* 1. Corporation counsel employed on part-time basis cannot accept employment as defense counsel for those whose interests are directly adverse to the state or county.

2. Section 256.22(3), Stats., does not prohibit a district attorney from compensating his partner, out of his own funds, for assistance in prosecuting a state case.

3. County board cannot change status of office of district attorney from one in which he is permitted to practice law privately to one in which he is not, so as to be effective during the term for which such officer was elected. OAG 7-78

February 2, 1978.

DAVID D. LEEPER, *District Attorney*  
*Green County*

You request my opinion on a number of questions involving your office and the office of corporation counsel in your county.

#### I. CORPORATION COUNSEL - PRIVATE PRACTICE

You state that the corporation counsel for Green County prosecutes all juvenile actions in the county, pursues mental commitments and protective service placements and represents the state and county in many other matters. You indicate that such corporation counsel is employed by the county on a part-time basis and has acted as defense counsel with respect to county ordinance cases and state charges, both as a privately retained attorney and by appointment by the court in cases of indigency. Where appointed to represent indigent defendants, he is paid directly by the county.

You state:

“This situation seems to raise several issues of potential conflict. First, it is the Corporation Council’s [sic] obligation to advise the County Board on the approval of any costs and fees

on indigent appointments, which include his own claims for costs and fees. The second point of possible conflict involves advocating bond reductions for criminal defendants, a situation which may always result in the County having to begin an action to collect payment against his client, or a surety of his client. A third situation of possible conflict involves in his representing a defendant who may have a valid claim or defense against action taken by the County Sheriff's Department when he is also required to represent the County regarding any liability, and advises the Sheriff's Department on legal issues. Numerous other conflicts can be imagined."

For the purposes of this opinion it is assumed that the corporation counsel is not also an assistant district attorney. If he were, the restraints in secs. 59.48, 59.49 and 256.22(4), Stats., would be applicable to such officer.

1. Should a part-time corporation counsel, who has many duties of a public prosecutor and represents interests of the state and county, accept employment as defense counsel for those whose interests are directly adverse to either the state or county?

My answer to your general question is "no." This is not to say that every act of representation would result in an improper or illegal act. Recommendations as to restraint are based upon ethical considerations as well as hazard of violation of some criminal statute in the course of such employment. In my opinion such attorney could accept employment as defense counsel for defendants in criminal cases being tried in another county unless prohibited by ordinance or resolution creating his office and absent showing that he had a prosecutorial bias.

A corporation counsel has no inherent powers. His authority springs from sec. 59.07(44), Stats., and other statutes referring to such officer specifically, and from the county ordinance or resolution creating such office. Whereas duties are limited to civil matters, some counties provide that such officer shall prosecute county ordinance violations. You should review the ordinance or resolution creating the office in your county to see whether it provides any restraint concerning private practice. Certain counties have provided:

“Corporation counsel shall be permitted to engage in private practice of law but shall not represent any client in any civil matter wherein the interests of said client are adverse to the interests of \_\_\_\_\_ county.

“\*\*\*

“The corporation counsel shall be permitted to engage in the private practice of law, but shall not engage in any practice of law which will be inconsistent with the performance of his duties as corporation counsel and shall not engage in defending criminal cases.”

In *Karlin v. State*, 47 Wis.2d 452, 177 N.W.2d 318 (1970), the court warned that there was a possible conflict of interest where an attorney who represents a subdivision of the state and also maintains a private practice, represents criminal defendants.

If, as you state, it is the duty of the corporation counsel to advise the county board on the approval of any costs and fees with respect to indigent appointments, such officer would hazard violation of sec. 946.13, Stats., which prohibits certain private interests in public contracts. This office has stated that the appointment of counsel for the indigent involves a public contract. See 62 Op. Att’y Gen. 63 and 62 Op. Att’y Gen. 118 (1973).

There probably are situations where a corporation counsel could accept employment to represent persons whose interests are adverse to the county and state if such representation is not in fact inconsistent with duties as corporation counsel which are required by statute or resolution or ordinance creating such office in Green County. In *Boles v. Industrial Comm.*, 5 Wis.2d 382, 92 N.W.2d 873 (1958), the court held that an attorney who was Lieutenant Governor was not prohibited from pursuing a claim before the Industrial Commission even though he was Acting Governor on the date of the hearing. If such employment is undertaken and an apparent conflict should arise, substitution of another attorney should be made if such officer intends to continue to serve as corporation counsel.

2. If the corporation counsel is prohibited from criminal defense representation, are the members of his firm similarly prohibited?

The answer is no, except in cases where the corporation counsel is also an assistant district attorney or where contracts for the defense of indigents are concerned and such officer has a discretionary duty with respect to such contracts. I construe the prohibition contained in sec. 256.22(4), Stats., to apply to assistant district attorneys. Such section provides:

*“No law partner of any district attorney shall act as a municipal justice or court commissioner in any case in which the state may be a party or defend in any court any person charged with any offense, or appear in any civil action against the state in which it is the duty of such district attorney to prosecute or appear for the state.”* (Emphasis added.)

A corporation counsel who was a partner or shareholder in a firm would risk violation of sec. 946.13, Stats., if he had a direct or indirect interest in the contract for representation and participated in the making of such contract or performed, or had authority to perform, an act involving discretion with respect thereto.

## II. DISTRICT ATTORNEY--ASSISTANTS

Section 256.22(3), Stats., provides:

*“No practicing attorney shall have his office in the same room with any district attorney, municipal justice or court commissioner, unless he is a partner of such district attorney, municipal justice or court commissioner, in which case he shall not practice as an attorney before such municipal justice or court commissioner nor act as attorney in any case in which it is the duty of such district attorney to appear or prosecute for the state; except that the law partner of any district attorney may, at the request of the district attorney, without fee or compensation therefor, assist the district attorney in the prosecution of any case on the part of the state.”* (Emphasis added.)

3. Does this statute prohibit a district attorney who is compensated on a part-time basis from paying a partner or associate to act as assistant district attorney, or does this refer only to compensation from the county?

The statute does not prohibit a district attorney from compensating his law partner or associate. Such person does not

become an assistant district attorney and is not entitled to compensation from the county.

In counties under 200,000, assistant district attorneys are appointed pursuant to sec. 59.45, Stats., and only when authorized by the county board. Such statute expressly provides that "The assistant district attorneys so appointed may perform all the duties of the district attorney."

4. Is a partner or associate providing assistance under sec. 256.22(3), Stats., given all the powers and authority of the district attorney?

The answer is no. His authority is limited to assisting the district attorney.

The statute is an exception to the general rule which prohibits attorneys paid from private sources from assisting the district attorney in the prosecution of a criminal case. See *State v. Peterson*, 195 Wis. 351, 218 N.W. 367 (1928), as to the general rule and *Kraimer v. State*, 117 Wis. 350, 93 N.W. 1097 (1903), wherein the supreme court approved assistance provided by a partner pursuant to statute similar to sec. 256.22(3), Stats.

5. "Can money be accepted by a District Attorney, not for any specific service provided by the District Attorney's Office, but for the purpose of providing funds either for operating expenses, or for salary payments to an Assistant or Assisting District Attorney? These funds would be made by way of private contributions to continue and increase governmental action."

The answer is no, except where said funds are not solicited by such officer and are paid into the county treasury for acceptance by the county board. District attorneys and assistant district attorneys appointed pursuant to sec. 59.45, Stats., take their offices *cum onere* and are entitled to only such compensation as is provided by the county board pursuant to sec. 59.15(1), (2) and (3), Stats. Such officers are entitled to expenses as authorized under sec. 59.15(3), Stats. Special assistant district attorneys appointed by a judge of a court of record or the circuit court upon application of the county board are entitled to compensation from the county in such sums as approved by the court.

In 63 Am. Jur. 2d *Public Officers and Employees* sec. 382, it is stated:

“Contracts by public officers with private individuals or associations for additional compensation or for compensation other than that provided by law for the performance of official duties are invalid ....”

A county board has authority, under sec. 59.07(17), Stats., to “Accept donations, gifts or grants for any public governmental purpose within the powers of the county.”

Gifts, grants or donations made to a county officer for the purpose of continuing or increasing governmental action are to be considered gifts, grants or donations to the county. Section 59.73, Stats., provides that “Every county officer and employe ... that collects or receives moneys for or in behalf of the county, shall ... (3) Pay all such moneys into the county treasury.”

Section 946.12(5), Stats., provides a criminal penalty for any public officer or employe who:

“Under color of his office or employment, intentionally solicits or accepts for the performance of any service or duty anything of value which he knows is greater or less than is fixed by law.”

### III. DISTRICT ATTORNEY--CHANGE IN STATUS

6. Can the county board change the position of district attorney from part-time to full-time during the term for which such officer was elected?

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

Although certain statutes such as sec. 59.475 and sec. 59.485 refer to a district attorney being “on a full-time basis” or “who is not compensated ... on a full-time basis,” Wisconsin does not have “part-time district attorneys.” As stated in 61 Op. Att’y Gen. 443, 445 (1972):

“District attorney is an elective office. It is a full-time office in the sense that the incumbent is an officer during every hour of his term and the duties and responsibilities imposed by the legislature, if diligently pursued, would occupy most or all of the

time an officer could reasonably devote to the office even in lesser populated counties. Historically district attorneys have been permitted to practice law privately in smaller counties. This was almost a necessity in some cases in view of the low compensation provided by the county. ...”

A more accurate designation of status, rather than “full-time” or “part-time” would be, “is permitted to practice law privately” and “is not permitted to practice law privately.” These latter phrases were used in former sec. 59.471(2) and (3), Stats., which provided for a schedule of minimum salaries to be paid by various classes of counties with reimbursement to the county by the state of a portion of the total salary paid. Such section was later repealed by ch. 39, Laws of 1975.

I am of the opinion that in spite of the repeal of former sec. 59.471, Stats. (1973), the county board continues to have power to determine whether a district attorney shall be entitled to practice law in addition to his duties as district attorney. As stated in 61 Op. Att’y Gen. 443, 445 (1972):

“... Such determination should be made under sec. 59.15 (1), Stats., when the board, prior to the earliest time for the circulation of nomination papers, establishes the total annual compensation to be paid for the office. Prospective candidates are entitled to know precisely what compensation is attached to the office. *Feavel v. Appleton* (1940), 234 Wis. 483, 488-490, 291 N.W. 830; *Schultz v. Milwaukee County* (1947), 250 Wis. 18, 22, 26 N.W. 2d 260.”

Section 59.15(1)(a), Stats., provides that “The compensation established shall not be increased nor diminished during the officer’s term and shall remain for ensuing terms unless changed by the board.” Section 66.197, Stats., permits increases in the salaries of certain county elective officials during their term.

I consider the right to practice law privately as a matter of compensation. The compensation is an incident of the office and cannot be decreased during the officer’s term, but the officer’s salary can be increased during the term in accordance with sec. 66.197, Stats.

BCL:RJV

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*Administration, Department Of; Civil Service; Collective Bargaining; Employer And Employee; Labor; Salaries And Wages;* Matters within the scope of bargaining as set forth in sec. 111.91, Stats., agreed to by the Department of Administration and a state employe union are not effective until submitted as tentative agreements to and approved by the Joint Committee on Employment Relations. Action of the Secretary of the Department of Administration in agreeing to so-called non-recrimination clause was within his discretion but the clause itself is unenforceable until approved by the Joint Committee on Employment Relations. OAG 9-78

February 8, 1978.

FRED A. RISSER, *Chairman*  
*Committee on Senate Organization*

The Committee on Senate Organization has requested my opinion on the legality of the actions of the Department of Administration (DOA) in agreeing to and implementing without approval of the Joint Committee on Employment Relations (JOCER) a "\$200 loan" and a "non-recrimination clause" for employes engaging in strike activities during last summer's labor dispute between the State of Wisconsin and the Wisconsin State Employees Union (Union).

During the course of negotiations for a 1977-79 contract DOA and the Union agreed to the following provisions, the first of which is the so-called "\$200 loan" and the second of which is the so-called "non-recrimination agreement":

"Each WSEU represented employe who has less than five (5) days pay earned during the pay period ending July 16, 1977, will upon application, be eligible to receive a \$200.00 wage advance on July 28, 1977, or as soon thereafter as possible. Employes who receive such wage advance shall have \$67.00 deducted from their pay on August 11, 1977, \$67.00 deducted from their pay on August 25, 1977, and \$66.00 deducted from their pay on September 8, 1977. Employes who retire or resign or otherwise leave State service after receiving the \$200.00 advance but before the above deductions are made shall have

the \$200.00 or balance advanced deducted from their final pay check.” (The dates referred to are the regular bi-weekly pay periods; the state has adopted a bi-weekly payroll system which includes a net ten-day lag period.)

“It is agreed by and between the State as an Employer and the Wisconsin State Employees Union (Union) that all legal proceedings previously commenced by and against each of them, their officers, agents or any employee occupying a position in any bargaining unit exclusively represented by said Union relating to any job action which began on or about July 3, 1977 and which ended on or about July 17, 1977 shall be dismissed with prejudice and without costs.

“It is further agreed that any legal proceedings, in equity or law, which may arise or have arisen as a result of the negotiations, job actions or strike activity relative to a successor collective bargaining agreement to that expiring June 30, 1977, are hereby waived, forgiven and abandoned by the Union and the State.

“It is expressly agreed and understood by and between the parties hereto that the instant agreement applies to, by way of illustration rather than limitation, the litigation now pending in the Circuit Courts for Chippewa County, Dane County, and Racine County, all brought in the name of the State of Wisconsin as well as the Wisconsin Employment Relations Commission (WERC).

“Consistent with the foregoing and consistent further with the parties desire to promote amicable and peaceful labor relations the State shall not penalize, directly or indirectly, any permanent or seasonal employee represented or not represented by this Union by way of discharge, suspension, a letter of reprimand, etc., for his/her participation in any job action or strike or for any conduct indirectly associated with the foregoing, except that the State reserves the right to take appropriate disciplinary action, not to exceed five days suspension without pay, against any employee at the Wisconsin State Prison and the Ethan Allen School for Boys who engaged in any breach of security causing a threat to state or personal property or to public or personal safety. The State may suspend

with pay employees suspected of engaging in the above breaches or security during the investigation of such actions. The State also reserves the right to take appropriate disciplinary action, not subject to the limitations above, against any employee who engaged in criminal acts.

“Appeals of discipline for criminal acts shall be covered by the grievance procedure of the collective bargaining agreement; however, appeals of discipline for breaches of security shall be filed directly at Step Four of the grievance procedure and shall be submitted to an arbitrator selected by mutual agreement from a list of arbitrators provided to the parties by the American Arbitration Association.

“Inasmuch as a bona fide dispute has arisen between the parties hereto as to the applicability of the mediated non-recrimination agreement which was consummated [sic] on or about Sunday, July 17, 1977, to Limited Term Employees (LTE’s) the parties hereto shall submit the matter to Ronald W. Houghton, Wayne-State University, Detroit, Michigan, as an Arbitrator, for a final and binding determination. The submission shall be as soon as possible. The aforementioned interpretation/determination by the Arbitrator shall be reduced to writing, signed by the Arbitrator and shall be binding on the parties. The services of said Arbitrator shall be immediately requested by the parties in a joint fashion.

“The costs and expenses shall be borne equally between the parties.

“It is agreed that former Mediator Robert G. Howlett shall be used as a witness by at least one and perhaps both of the parties.”

These clauses were apparently submitted as concepts to the membership of the Union for ratification although final language was not available at the time of ratification. Neither clause was submitted to the Joint Committee on Employment Relations for approval.

The State Employment Labor Relations Act (SELRA) sets forth the duties, responsibilities and authority of DOA with respect to labor relations in state employment. Under SELRA collectively

bargained contracts replace civil service and other applicable statutes relating to wages, hours and conditions of employment for those employes who are properly included in recognized bargaining units. Sec. 111.93, Stats.

Section 111.81(16), Stats., provides in part:

“... It is the responsibility of the executive branch to negotiate collective bargaining agreements, and to administer such agreements. To coordinate the employer position in the negotiation of agreements, the executive branch shall maintain close liaison with the legislature relative to the negotiation of agreements and the fiscal ramifications thereof. The department of administration is responsible for the employer functions of the executive branch under this section, and shall coordinate its collective bargaining activities with operating agencies on matters of agency concern. It is the responsibility of the legislative branch to act upon those portions of tentative agreements negotiated by the executive branch which require legislative action.”

Section 111.91, Stats., defines those matters affecting wages, hours and conditions of employment that are subject to collective bargaining. Where agreement on such matters is reached by the state and state employes in recognized collective bargaining units, the terms may be included in a collective bargaining agreement. Sec. 111.81(2), Stats. After an agreement becomes effective, the parties are bound by the terms contained therein. If, however, after bargaining in good faith the parties fail to reach agreement on a mandatory subject, the employer may in some circumstances unilaterally take action on that matter. Sec. 111.81(2), Stats. See, e.g., *United Fire Proof Warehouse Co. v. N.L.R.B.*, 356 F.2d 494, 497 (7th Cir. 1966).

Section 111.92, Stats., sets forth the procedures required for implementation of collectively bargained agreements in the following terms:

“(1) Tentative agreements reached between the department of administration, acting for the executive branch, and any certified labor organization shall, after official ratification by the union, be submitted to the joint committee on employment relations, which shall hold a public hearing before determining

its approval or disapproval. If the committee approves the tentative agreement, it shall introduce in companion bills, to be put on the calendar, that portion of the tentative agreement which requires legislative action for implementation, such as salary and wage adjustments, changes in fringe benefits, and any proposed amendments, deletions or additions to existing law. Such bills shall not be subject to ss. 13.10 (1), 13.50 (6) (a) and (b) and 16.47 (2). The committee may, however, submit suitable portions of the tentative agreement to appropriate legislative committees for advisory recommendations on the proposed terms. The committee shall accompany the introduction of such proposed legislation with a message that informs the legislature of the committee's concurrence with the matters under consideration and which recommends the passage of such legislation without change. If the joint committee on employment relations does not approve the tentative agreement, it shall be returned to the parties for renegotiation. If the legislature does not adopt without change that portion of the tentative agreement introduced by the joint committee on employment relations, the tentative agreement shall be returned to the parties for negotiation.

*“(2) No portion of any tentative agreement shall become effective separately.” (Emphasis added.)*

Following official ratification by the Union, tentative agreements are submitted to JOCER. The tentative agreement must be approved by JOCER before any provision becomes effective. Following approval, JOCER determines what portions of the tentative agreement require legislative action for implementation, such as “salary and wage adjustments, changes in fringe benefits, and any proposed amendments, deletions or additions to existing law.” The Legislature must then enact legislation before any portion of the tentative agreement becomes effective.

#### \$200 SALARY ADVANCE

Prior to the time JOCER met to consider the tentative agreement, DOA authorized the implementation of the \$200 salary advance by personnel in each agency responsible for payroll. A DOA directive dated July 20, 1977, stated: “When a WSEU represented employe specifically requests the \$200 salary advance the agency payroll clerk

should verify the employe's eligibility to receive the advance (*i.e.*, would otherwise receive less than five days' pay on July 28, and has earned at least \$200 since July 16)."

The \$200 salary advance provision was never submitted to JOCER as part of the tentative agreement between the parties. I view the \$200 not as a loan but rather as an advance on salary earned but not paid. In analyzing whether or not DOA had authority to agree to this provision the key language is that portion of sec. 111.92, Stats., which provides that "No portion of any *tentative agreement* shall become effective separately" (emphasis added).

Under the state's bi-weekly payroll plan, striking employes who did not work during the two-week period July 3 through July 16 would not have received any wages on July 28, 1977, the date when wages for that period were paid. This was so because even though striking employes may have worked during the next two-week period (July 17 through July 30), they would not normally be paid for that period until August 11, 1977. The ten-day delay or lag in payment of wages earned is necessary in order to permit DOA to efficiently administer the state payroll. The length of this lag period is a mandatory subject of bargaining under sec. 111.91.

It has been suggested that the \$200 salary advance provision was not a portion of the "tentative agreement" because it was not submitted to JOCER. Such an interpretation would allow the Union and DOA to determine what is to become a part of the "tentative agreement." This ignores the obvious legislative intent in sec. 111.92(2) to have JOCER approve agreements reached between the state as an employer and the Union.

I construe the words "tentative agreement" broadly to include any matters within the scope of bargaining agreed to by the parties. Section 111.92(2) represents a condition precedent to the effectiveness of any provision which is "tentatively" agreed to by the Union and DOA. One can only conclude that such a term was a material portion of the overall agreement between the parties. I am therefore of the opinion that the "\$200 salary advance" was not effective or legally enforceable at any time and is not a part of the contract between the parties.

The "\$200 salary advance" was implemented by DOA and persons covered by the agreement were paid. You ask whether this

implementation is an illegal act without JOCER approval. Rather than characterize the implementation as “legal” or “illegal” it would be better to use the concepts “authorized” or “unauthorized.” For the reasons stated above I would conclude that the implementation was unauthorized. I would like to point out that in the normal collective bargaining relationship a union and an employer have flexibility in negotiating agreements and in deciding which matters will be included in the formal and binding collective bargaining agreement. Where, as here, there are conditions precedent to effectiveness and the parties wish to agree to terms which cannot await the occurrence of conditions precedent it may be desirable for the employer to have the flexibility to implement portions of the agreement in order to maintain relations with the union and avoid unfair labor practice charges. Likewise, it is common for employers to have the authority to act unilaterally during the hiatus between contracts. Normally, the fact that a union may agree with the employer’s actions during the hiatus does not give rise to a tentative agreement.<sup>1</sup> These two theories would support Secretary Torphy’s actions here absent the clearly expressed legislative desire to control the final terms of agreements reached by the state and its employe unions.

It is also interesting to consider whether such unilateral action by DOA violated other state statutes. Section 16.53(1)(d)1., Stats., provides:

“... The secretary of administration, with the approval of the joint committee on employment relations, shall fix the *time and frequency for payment* of salaries due elective and appointive officers and employes of the state government. As determined under this subdivision such salaries shall be paid either monthly, semimonthly or for each 2-week period.” (Emphasis added.)

Section 16.53(1)(d)1., Stats., requires the Secretary to secure JOCER approval in fixing the time and frequency for payment of state employes’ salaries. “Frequency” refers to how often employes will be paid, *i.e.*, monthly, semi-monthly, weekly, etc. “Time,” on the other hand, refers to *when* employes will be paid. The question of when employes are to be paid is related to wages, hours and conditions of employment within the meaning of sec. 111.93(3).

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<sup>1</sup> See discussion immediately below on the effect of sec. 16.53(1)(d)1., Stats.

Under sec. 111.93(3) no labor agreement existed at the time the "\$200 loan" agreement was made between the Secretary of DOA and the Union. Thus, sec. 16.53(1)(d)1., Stats., applies and requires JOCER approval in fixing the time for payment. Since JOCER approval was not secured for this change in the time of payment of salaries, sec. 16.53(1)(d)1. appears not to have been followed. I would also point out that sec. 16.53(1)(d)1., Stats., is ambiguous. I would invite the Legislature to look at this section in light of the provisions of the State Employment Labor Relations Act and to clarify legislative intent if not consistent with this opinion.

You also ask whether the salary advance to individual employees who had engaged in the illegal strike violates the Wisconsin Constitution. Two constitutional provisions must be considered: first, the public purpose doctrine; and second, the prohibition of Wis. Const. art. VIII, sec. 3, against the lending of state credit. It is my opinion that neither provision has been violated. Although no specific clause in the constitution establishes the "public purpose doctrine," it is a well-established constitutional tenet that expenditure of public funds for private purposes is prohibited. *Hopper v. Madison*, 79 Wis.2d 120, 128, 256 N.W.2d 139 (1977); *State ex rel. Warren v. Nusbaum*, 59 Wis.2d 391, 413-414, 208 N.W.2d 780 (1973); *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis.2d 32, 47-48, 205 N.W.2d 784 (1973). Clearly, the payment of wages to state employees who were legally entitled to receive such wages cannot be considered a violation of the public purpose doctrine. Because the salary advance amounts to payments of monies already earned, it cannot violate the provision against lending of state credit.

#### NON-RECRIMINATION AGREEMENT

As noted above, DOA has been given certain duties and responsibilities relating to employment relations in state employment. Section 111.89(1) provides that: "Upon establishing that a strike is in progress, the employer may at his option either seek an injunction or file an unfair labor practice charge with the [Wisconsin Employment Relations] commission under sec. 111.84(2)(e) or both." DOA has been given the responsibility to decide whether to seek an injunction or file an unfair labor practice charge. The choice of remedies under sec. 111.89, Stats., does not limit the state's right to take other appropriate action in a strike

situation where the public interest is at stake. Thus, for example, the state could use National Guard personnel to ensure uninterrupted delivery of essential state services during an employe strike.

Pursuant to sec. 111.81(16), Stats., the *employer functions* of the executive department of the state are vested in DOA. In addition, sec. 165.08, Stats., provides in pertinent part:

“POWER TO COMPROMISE. Any civil action prosecuted by the department [of Justice] by direction of any officer, department, board or commission, shall be compromised or discontinued when so directed by such officer, department, board or commission. ...”

For the reasons stated above with respect to the so-called “\$200 salary advance,” I am of the opinion that the non-recrimination provision is not enforceable without approval by JOCER and that implementation of the clause is unauthorized. This clause was a material portion of the overall settlement reached between the parties. I take notice of the fact that both parties would concede that the agreement to this provision facilitated settlement of the labor dispute and was treated as a key to agreement by both parties to the negotiations.

To say that this provision need not be ratified or approved by JOCER is to say that DOA and the Union can, by not forwarding certain clauses to JOCER, define certain provisions out of any “tentative agreement.” Such a construction would be absurd. If a provision as important to the overall settlement as this one can be so treated, any other provision could be similarly determined to be outside of the “tentative agreement.” Such an interpretation would thwart the obvious legislative intent to have final approval and control over the terms of labor relations settlements reached between state employes and DOA acting for the state in JOCER. Consequently, I conclude that this term is ineffective and legally unenforceable unless approved by JOCER.

At most, the so-called non-recrimination agreement represents a statement of intent by the Secretary of DOA. Taken together, the statutory provisions discussed above suggest that when state employes engage in illegal strikes, it is the responsibility of DOA (and not JOCER) to decide whether to initiate civil action for injunctive relief and when appropriate to discontinue such legal

action. Although DOA could discontinue civil actions associated with strike activity it could not terminate other legal proceedings being prosecuted by the state nor could it interfere with the authority of the courts to proceed in contempt when injunctions against strike activities have been granted. The Department of Administration could also agree not to press unfair labor practices charges based on the strike. To the extent that this limited effect was given to the clause by the parties, Secretary Torphy probably acted within his authority in agreeing to the clause although it should have been submitted as a tentative agreement.

I also doubt whether the provisions of the non-recrimination agreement, even if approved by JOCER, would be enforced by courts since the agreement could be considered inconsistent with the public policy against strikes and strike activities by state employees as declared by the Legislature in secs. 111.84(2)(e) and 111.89, Stats.

Consequently, I conclude that the non-recrimination agreement is unenforceable because it has not been approved by the process for approval of tentative agreements contained in the statutes, and is void as against public policy. To the extent that the Secretary of DOA was willing to commit himself and his Department on matters within the scope of his authority, he could do so but such agreement could not bind other departments or officers.

BCL:DJH:JDN

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*Counties; County Board; County Clerk; County Highway Committee; Highways; Insurance; Liability; County highway committee does not have power to examine, settle and pay liability claims against the county without final action by the county board.*  
OAG 11-78

February 15, 1978.

JOHN W. STEVENS, *Corporation Counsel*  
*Marathon County*

You request my opinion whether the county highway committee has power to examine, settle and pay liability claims against the county without final action by the county board.

You state that the county highway committee, elected pursuant to sec. 83.015, Stats., has a policy of examining, approving and paying out of highway department funds, claims against the highway department. If the committee determines that the highway department is at fault, and if the claim is for less than \$250.00, the claim is referred to its insurance carrier with whom it has a liability policy, separate from the other departments of the county. You state that the committee is of the opinion that the county board should not be concerning itself with claims of less than \$250.00.

I am of the opinion that such committee is without power to finally act in the manner stated. It can be delegated power to investigate and recommend, subject to approval and final action by the county board.

Section 59.07(3), Stats., empowers the county board to:

*“Examine and settle all accounts of the county and all claims, demands or causes of action against the county and issue county orders therefor. In counties having a population of less than 50,000, the board may delegate its power in regard to current accounts against the county to a standing committee where the amount does not exceed \$2,500 and in all counties having a population of 50,000 or more, the board may delegate its power in regard to current accounts against the county to a standing committee where the amount does not exceed \$5,000.”*  
(Emphasis added.)

Claims based on alleged liability of the county grounded in tort because of claimed defects in the construction and maintenance of highways, the operation of equipment including motor vehicles or actions of officers or employes of the county or disputed claims involving construction contracts cannot be considered “current accounts” within the meaning of the above statute which are delegatable.

Section 59.77, Stats., sets forth the procedure for filing claims against the county as a prerequisite to consideration by the county board; and sec. 59.76, Stats., requires that there be presentation of a claim to the board as a prerequisite to maintenance of an action thereon. Where tort is involved, sec. 895.43, Stats., requires timely filing of notice of injury as a prerequisite to suit. Where damages are claimed by reason of the insufficiency or want of repairs of a county highway, sec. 81.15, Stats., requires timely filing of notice of injury and alleged deficiency with the county clerk as a prerequisite to suit. See *Colburn v. Ozaukee County*, 39 Wis.2d 231, 159 N.W.2d 33 (1968), as to distinction between notice of injury and notice of claim statutes.

Whereas sec. 59.07(2), Stats., permits the county board to provide liability and property damage insurance for its employes, motor vehicles and the maintenance and operation of county highways, etc., I am not aware of any statute which would authorize the county highway department to procure liability insurance without authorization of the county board.

Section 83.015(1) and (2), Stats., provides in part:

“... The committee shall be known as the ‘county highway committee,’ and shall be the only committee representing the county in the expenditure of county funds in constructing or maintaining, or aiding in constructing or maintaining highways.

...

“(2) Powers and duties. *The county highway committee shall purchase and sell county road machinery as authorized by the county board, determine whether each piece of county aid construction shall be let by contract or shall be done by day labor, enter into contracts in the name of the county, and make necessary arrangements for the proper prosecution of the construction and maintenance of highways provided for by the county board, enter private lands with their employes to remove weeds and brush and erect or remove fences that are necessary to keep highways open for travel during the winter, direct the expenditure of highway maintenance funds received from the state or provided by county tax, meet from time to time at the county seat to audit all pay rolls and material claims and vouchers resulting from the construction of highways and*

*perform other duties imposed by law or by the county board.”*  
(Emphasis added.)

In 63 Op. Att’y Gen. 136.2 (1974), it was stated that sec. 83.015, Stats., does not preclude county boards from auditing highway committee vouchers prior to payment thereof from county funds, but that the board’s audit authority is limited to determining whether the expenditure is within the scope of the committee’s statutory or delegated authority.

Even where construction and material contracts are concerned, where the county board has determined which highway projects shall be undertaken, and where the county highway committee has substantial independent power to enter into contracts for the construction of such highways, the power of such committee is limited where a dispute arises over the amounts to be paid for work and materials furnished. Whereas the highway committee has power to “audit all pay rolls and material claims and vouchers resulting from the construction of highways,” the supreme court has held that this power was not broad enough to permit the highway committee to refer a disputed claim to arbitration and settle the dispute by paying out the amount set by the arbitrator. The court stated that the contractor’s claim had to be submitted to the county board as a condition precedent to suit. *Joyce v. Sauk County*, 206 Wis. 202, 239 N.W. 439 (1931).

I conclude that a county highway committee is without power to finally audit, settle and pay claims for tort liability or disputed claims for work performed, equipment or materials furnished, growing out of the construction and maintenance of highways, and that such claims must be filed with the county clerk and finally acted upon by the county board pursuant to secs. 59.07(3), 59.76 and 59.77, Stats.

BCL:RJV

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*Agriculture, State Department Of; Compatibility; Natural Resources, Department Of; Officers And Offices; Public Officials;* Position of State Director of the Farmers Home Administration is probably an "office of profit or trust under the United States" as that term is used in Wis. Const. art. VIII, sec. 3, and a person holding such office would be ineligible to at the same time serve as a member of the Wisconsin Natural Resources Board. OAG 12-78

February 17, 1978.

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

You request my opinion whether a member of the Natural Resources Board can at the same time serve as State Director for the Farmers Home Administration.

If there is a bar it would arise, insofar as state law is concerned, from the common-law doctrine of incompatibility of offices or from the eligibility requirement of Wis. Const. art. XIII, sec. 3, which provides in material part:

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

This section, in doubtful cases, is to be construed liberally in favor of eligibility to office. 16 Op. Att'y Gen. 480 (1927).

In *Martin v. Smith*, 239 Wis. 314, 326, 1 N.W.2d 163 (1941), it was stated that Wis. Const. art. XIII, sec. 3, does not deal with incompatibility of offices, but rather with eligibility to office, and that its purpose was intended to protect the state in the exercise of its sovereign power. The case further states that the doctrine of incompatibility of offices which renders it improper from consideration of public policy to permit one person to hold two offices, at the same time, where the nature and duties of the same are in conflict, was part of the common law in force in the Territory of Wisconsin at the time of the adoption of the Wisconsin Constitution and continues by reason of Wis. Const. art. XIV, sec. 13. One who

accepts an office which is incompatible with the one held, vacates the first.

Whereas the common-law doctrine of incompatibility has generally been applied only where two offices are involved, there is a trend to apply the doctrine to positions if there are many potential conflicts of interest between the two, such as salary negotiations, supervision and control of duties and obligations to the public to exercise independent judgment. *Tarpo v. Bowman Public Sch. Dist. No. 1*, 232 N.W.2d 67 (N.D. 1975).

The Farmers Home Administration, created by order of the Secretary of Agriculture, pursuant to authority in congressional act, is part of the Department of Agriculture. See 11 Fed. Reg. 9007 (1946), and ch. 964, 60 Stat. 1062 (1946). The FmHA is headed by an administrator who is appointed by the President with the advice and consent of the Senate. 7 U.S.C. sec. 1981. In addition to the national office and a finance office located in St. Louis, there are 42 state offices, some of which serve more than one state, and approximately 1750 county offices. See 7 C.F.R. sec. 1800.1 (1977). The FmHA is responsible for administering loan and grant and other assistance programs including, among others: Rural Housing, Farm Operating, Soil and Water, Watershed, Resource Conservation and Development, Comprehensive Area Plans and Water and Waste Disposal. 7 C.F.R. sec. 1800.1.

In view of the programs administered by FmHA there are potential conflicts of interest on the basis of duties which might preclude a DNR Board member from also serving as FmHA State Director, irrespective of whether the latter is an office or a position of employment, as the Department of Natural Resources is engaged in programs involving some of the same important areas.

In *Martin v. Smith, supra*, p. 332, the court cited the following tests, taken from *State ex rel. Barney v. Hawkins*, 79 Mont. 506, 257 P. 411, 53 A.L.R. 583 (1927), with approval:

“ “[T]o constitute a position of public employment a public office of a civil nature, [1] it must be created by the constitution or through legislative act; [2] must possess a delegation of a portion of the sovereign power of government to be exercised for the benefit of the public; [3] must have some permanency and continuity, and not be only temporary or occasional; [4] and its

powers and duties must be derived from legislative authority and be performed independently and without the control of a superior power, other than the law, except in case of inferior officers specifically placed under the control of a superior officer or body, and [5] be entered upon by taking an oath and giving an official bond, and [6] be held by virtue of a commission or other written authority.” (Bracketed material supplied.)

The position of Natural Resources Board member is an office of trust, profit or honor in this state as that phrase is used in Wis. Const. art. XIII, sec. 3. See secs. 15.07(1), (7) and 15.34, Stats.

The question which must be resolved is whether the position of FmHA State Director is a federal *office* of profit or trust rather than a position of mere employment. In my opinion it probably is an office.

The federal courts have placed a very limited interpretation on the term “officer” as that term is used in the Federal Constitution. In 77 Am. Jur. 2d *United States* secs. 9 and 10, pp. 15 and 16, it is stated:

“As a general rule, an officer of the United States is one who holds his place by virtue of appointment by the President, by one of the courts of justice, *or by the heads of departments authorized by law to make such appointment*; a person in the service of the government who does not derive his position from one of these sources is not strictly, in the sense of the Constitution, ‘an officer of the United States,’ such phrase usually being taken as having a limited constitutional meaning.

...

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“[Sec. 10] The distinction between a federal officer and employee does not rest on differences in the qualifications necessary to fill the positions, or in the character of the service to be performed. Whether the incumbent is an officer or an employee is determined by the manner in which Congress has specifically provided for the creation of the several positions, their duties, and appointment thereto. The ordinary criteria may also be resorted to as a means of testing the status of a position, and the court may consider whether the incumbent is with or without tenure, continuing emolument, or continuous

duties, and whether he acts only occasionally and temporarily.

...

“It may here be noted that the term ‘officer’ may be used in an act of Congress in a sense different from that given to it in the Constitution. ...”

The Farmers Home Administration Act of 1946, ch. 964, 60 Stat. 1062 (1946), does not specifically refer to the position of state director; however, it did provide: “That the Administrator of the Farmers Home Administration shall be appointed by the President, by and with the advice and consent of the Senate. ... *The Secretary shall also have the power to appoint*, subject to the provisions of the civil-service laws, *such other officers* and employees as may be necessary,” and further that “The Secretary may administer his powers and duties under this Act through such area finance, State, and local offices in the United States ... as he determines to be necessary ....” (Emphasis added.)

7 C.F.R. sec. 1800.3 (1977) provides:

“Each State Office is under the supervision of a State Director who is responsible to the Administrator, in accordance with established policies and delegated authorities, for the Farmers Home Administration programs in one or more States. State Advisory Committees serve in an advisory capacity to the State Directors on all phases of the Farmers Home Administration programs.”

7 C.F.R. sec. 1800.22 (1977) uses the word “officials” when referring to the state director and other high-level personnel. Compare with 7 C.F.R. sec. 1800.23 (1977) which uses the phrase “officials and employees.”

7 C.F.R. sec. 1800.22 provides in part:

“National Office Staff and State Directors.

“*The following officials* of the Farmers Home Administration, in accordance with applicable laws, are severally authorized, for and on behalf of and in the name of the United States of America or the Farmers Home Administration, to do and perform all acts necessary in connection with making and insuring loans, making grants and

advances, servicing loans and other indebtedness, and obtaining, servicing, and enforcing security and other instruments related thereto: The Deputy Administrator; the Assistant Administrator (Operating Loans); the Assistant Administrator (Real Estate Loans); the Assistant Administrator (Community Services); the Director, National Finance Office; each Deputy Director and the Insured Loan Officer, National Finance Office; the Director, Operating Loan Division; the Director, Emergency Loan Division; the Director, Rural Renewal Division; the Director, Farm Ownership Loan Division; the Director, Rural Housing Loan Division; the Director, Association Loan Division; *and each State Director within the area of his jurisdiction*; and in the absence or disability of any such official, the person acting in his position; and the delegates *of any such official. ...*" (Emphasis added.)

7 C.F.R. sec. 1800.23 provides in part:

"State Office Staff and County Office employees.

"The following officials and employees of the Farmers Home Administration, in accordance with applicable laws, for and on behalf of and in the name of the United States of America or the Farmers Home Administration, are also severally authorized within the area of their respective jurisdictions to perform the acts specified in paragraphs (k) to (s), both inclusive, of sec. 1800.22: Chief, Program Operations; Chief, Real Estate Loans; Chief, Operating Loans; Program Loan Officer; Real Estate Loan Officer; Operating Loan Officer; and State Supervisor; [etc.] ...."

The state director exercises a degree of sovereign power, is appointed by the head of the department authorized by congressional act to make appointments of officials, and although not specifically referred to in such legislation, is treated as an officer in the federal regulations creating such position. It is my opinion that the position of State Director of the Farmers Home Administration is probably an "office of profit or trust under the United States" as that term is used in Wis. Const. art. XIII, sec. 3, and that a person holding such office would be ineligible to, at the same time, serve as a member of the Natural Resources Board.

I further observe that the positions of Natural Resources Board member and of FmHA State Director are both highly responsible positions, the duties of which require substantial amounts of time for satisfactory performance. Whereas this is not a factor with respect to compatibility, it is a factor with respect to practicality and efficiency in the public service. The federal appointee should also be made aware of 24 C.F.R. sec. 0.735-204(c) (1977), which provides:

“Full-time employees ... must obtain the prior approval of the appropriate deputy counselor before engaging in outside employment in the following categories:

“\*\*\*

“(2) Employment by State, local, or other governmental body.”

BCL:RJV

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*Conservation; Fees; Fish And Game; Licenses And Permits; Taxation; Assembly Bill 894 as drafted is constitutional and allows the state to contribute \$1 of the \$3 fee collected from a state waterfowl hunting stamp to private nonprofit organizations for development of waterfowl propagation areas in Canada. OAG 13-78*

February 21, 1978.

#### COMMITTEE ON ASSEMBLY ORGANIZATION

##### *Legislature*

You ask whether a portion of Assembly Bill 894 is constitutional.

Assembly Bill 894 provides for a state waterfowl hunting stamp costing \$3 which must be purchased and affixed to a hunting license before the licensee may hunt waterfowl during the designated waterfowl hunting season. Assembly Bill 894 proposes in part as follows:

“SECTION 2. 29.102 of the statutes is created to read:

“29.102 WATERFOWL HUNTING STAMP. (1) Except as otherwise provided, no person may hunt waterfowl unless he or

she has a waterfowl hunting stamp affixed by the stamp's adhesive to the hunting license permitting the hunting of small game. The waterfowl hunting stamp shall be issued by the department and its agents and by county clerks. The fee for the waterfowl hunting stamp shall be \$3. The waterfowl stamp shall be designed and produced by the department and shall expire annually on the same date each year that all hunting licenses expire. Any person who is exempt from payment or charge for a small game hunting license is also exempt from the fee under this subsection.

“(2) (a) The department shall expend \$2 of the \$3 fee received from the sale of a waterfowl stamp for developing, managing, preserving, restoring and maintaining wetland habitat and for producing waterfowl and ecologically related species of wildlife.

“(b) The department shall expend \$1 of the \$3 fee received from the sale of a waterfowl stamp for the development of waterfowl propagation areas within Canada which will provide waterfowl for this state and the Mississippi flyway. Money for the development of waterfowl propagation areas shall be provided only to nonprofit organizations. Before providing any money the department shall obtain evidence that the proposed waterfowl propagation project is acceptable to the appropriate provincial and federal governmental agencies of Canada.”

The precise question presented is whether \$1 of the \$3 waterfowl hunting stamp can be spent for the development of waterfowl propagation areas in Canada by allowing one-third of the stamp fees collected to be given to non-profit organizations devoted to such Canadian development. Assembly Bill 894 makes mandatory the expenditure of one-third of the stamp fees collected for development of Canadian propagation areas.

What is the waterfowl hunting stamp, a tax or a license? It is my opinion that said stamp is a license or a part thereof, no different than the separate hunting licenses required for deer, bear or bowhunting under secs. 29.104-29.109, Stats. The nature of such licenses is not to tax but to regulate under the police power. Further, the license fee is imposed to pay for the regulation. In *State ex rel. Atty. Gen. v.*

*Wisconsin Constructors*, 222 Wis. 279, 288-290, 268 N.W. 238 (1936), the court stated:

“... The distinction between taxes and fees is quite clear. ‘Taxes,’ it was said in *Fitch v. Wisconsin Tax Comm.* 201 Wis. 383, 230 N. W. 37, ‘are the enforced proportional contributions from persons and property, levied by the state by virtue of its sovereignty for the support of government and for all public needs. The state demands and receives them from the subjects of taxation within its jurisdiction that it may be enabled to carry into effect its mandates and perform its manifold functions, and the citizen pays from his property the portion demanded, in order that, by means thereof, he may be secured in the enjoyment of the benefits of organized society.’ Taxes must rest on a state-wide constitutional purpose and must fall within the constitutional scope of the term ‘expenses of state,’ as used in sec. 5, art. VIII, of the constitution. *State ex rel. Owen v. Donald*, 160 Wis. 21, 151 N. W. 331. Taxes are imposed for the purpose of general revenue. License and other fees are ordinarily imposed to cover the cost and expense of supervision or regulation. *Milwaukee v. Milwaukee E. R. & L. Co.* 147 Wis. 458, 133 N. W. 593. See also *Head Money Cases*, 112 U. S. 580, 5 Sup. Ct. 247; *United States v. Butler* (AAA decision), 297 U. S. 1, 56 Sup. Ct. 312. The distinction between a tax and an imposition under the police powers is well stated in 4 Cooley, Taxation (4th ed.), p. 3511:

“‘The distinction between a demand of money under the police power and one made under the power to tax is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation and the other for revenue. If the purpose is regulation the imposition ordinarily is an exercise of the police power, while if the purpose is revenue the imposition is an exercise of the taxing power and is a tax. If, therefore, the purpose is evident in any particular instance, there can be no difficulty in classifying the case and referring it to the proper power. ...

“(p. 3513) ‘Only those cases where regulation is the primary purpose can be specially referred to the police power. If revenue is the primary purpose and regulation is merely incidental the

imposition is a tax; while if regulation is the primary purpose the mere fact that incidentally a revenue is also obtained does not make the imposition a tax, although if the imposition clearly and materially exceeds the cost of regulation, inspection or police control, it is generally held to be a tax or an illegal exercise of the police power. ...

“(p. 3528) ‘The power of a state to require a license fee in the exercise of the police power is inherent, subject to the limitations upon the police power in general and to any constitutional limitations which may exist; but constitutional limitations on the power to tax have no application.’ (Citing *State v. Anderson*, 144 Tenn. 564, 234 S. W. 768, 19 A. L. R. 180.)”

The court reaffirmed the *Wisconsin Constructors* case in *State v. Jackman*, 60 Wis.2d 700, 707, 211 N.W.2d 480 (1973), where the boat license statute, sec. 30.51(1), Stats., was challenged as contrary to Wis. Const. art. IX, sec. 1. The court stated (60 Wis.2d at p. 707):

“... In respect to tax, impost or duty, it is generally recognized that charges exacted in the exercise of the police power are not taxes and are not subject to constitutional limitations which apply to the exercise of the power to tax. 1 Cooley, *Taxation* (4th ed.), p. 94, sec. 26; 4 Cooley, pp. 3509-3516, secs. 1784-1786; *Morrill v. State* (1875), 38 Wis. 428, 20 A. R. 12. This court has made a distinction between taxes and fees. A tax is one whose primary purpose is to obtain revenue, while a license fee is one made primarily for regulation and whatever fee is provided is to cover the cost and the expense of supervision or regulation. *State ex rel. Attorney General v. Wisconsin Constructors* (1936), 222 Wis. 279, 268 N. W. 238; *Fitch v. Wisconsin Tax Comm.* (1930), 201 Wis. 383, 230 N. W. 37. ...”

In accord: *State ex rel. Fairchild v. Wisconsin Auto. Trades Assn.*, 254 Wis. 398, 401, 37 N.W.2d 98 (1949). 61 Op. Att’y Gen. 180, 183-184 (1972).

In addition, it is my opinion that AB 894 does not pledge the credit of the state or create a debt contrary to the limitations imposed by Wis. Const. art. VIII, secs. 3 and 7. See *Wisconsin Solid Waste Recycling Auth. v. Earl*, 70 Wis.2d 464, 235 N.W.2d 648 (1975);

*State ex rel. Warren v. Nusbaum*, 59 Wis.2d 391, 208 N.W.2d 780 (1973); *State ex rel. Wisconsin Dev. Authority v. Dammann*, 228 Wis. 147, 277 N.W. 278, 280 N.W. 698 (1938).

A constitutional examination of AB 894 also requires evaluation under the public purpose doctrine. In *State ex rel. Warren v. Nusbaum*, *supra*, at pp. 413-415, the court discussed the public purpose doctrine:

“While no specific clause in the constitution can be acclaimed as the genesis of the public purpose doctrine, it is a ‘well-established constitutional tenet.’ Public funds may be expended for only public purposes. An expenditure of public funds for other than a public purpose would be abhorrent to the constitution of Wisconsin.

“What constitutes public purpose is in the first instance a question for the legislature to determine and its opinion should be given great weight. *Hammermill, supra*; *State ex rel. Warren v. Reuter* (1969), 44 Wis. 2d 201, 170 N. W. 2d 790; *State ex rel. Bowman v. Barczak, supra*; *David Jeffrey Co. v. Milwaukee* (1954), 267 Wis. 559, 66 N. W. 2d 362. If any public purpose can be conceived which might rationally be deemed to justify the act or serve as a basis for the instant expenditure, the test is satisfied and the court cannot further weigh the adequacy of the need or the wisdom of the method. *State ex rel. Singer v. Boos* (1969), 44 Wis. 2d 374, 171 N. W. 2d 307; *State ex rel. Zillmer v. Kreutzberg* (1902), 114 Wis. 530, 90 N. W. 1098. The court in *West Allis v. Milwaukee County* (1968), 39 Wis. 2d 356, 377, 159 N. W. 2d 36, stated:

“... Only if it is “clear and palpable” that there can be no benefit to the public is it possible for a court to conclude that no public purpose exists. ...’

“In *Hammermill, supra*, pages 48 and 49, this court stated:

““What constitutes a public purpose is in the first instance a question for the legislature to determine. This court in *State ex rel. La Follette v. Reuter, supra*, at pages 114 and 115, stated:

““““The rule for determining the public purpose for expenditure of public funds is set forth in *State ex rel. Thomson v. Giessel* (1953), 265 Wis. 207, 215, 216, 60 N. W. 2d 763:

““““The general rule as to the public purpose of the expenditure of public funds is stated in 81 C. J. S., States, p. 1149, sec. 133, as follows:

““““““Generally, in connection with the validity of the expenditure of state funds, what is ... a public purpose, is a question for the legislature to decide, with respect to which it is vested with a large discretion, which cannot be controlled by the courts unless its action is clearly evasive. ... Where a doubt exists whether the purpose of an appropriation is public or private, it will be resolved in favor of the validity of the appropriation, ...”

““““The *Thomson Case* (1953), *supra*, at page 216, cited with approval, *Carmichael v. Southern Coal & Coke Co.* (1937), 301 U. S. 495, 57 Sup. Ct. 868, 81 L. Ed. 1245, which states:

““““““... The existence of *local conditions* which, because of their nature and extent, are of concern to the public as a whole, the *modes of advancing the public interest* by correcting them or avoiding their consequences, *are peculiarly within the knowledge of the legislature*, and to it, and not to the courts, is committed the duty and responsibility of making choice of the possible methods. [Citations.] As with expenditures for the general welfare of the United States [Citations], *whether the present expenditure serves a public purpose is a practical question addressed to the lawmaking department, and it would require a plain case of departure from every public purpose which could reasonably be conceived to justify the intervention of a court.* [Citations.]””””

Waterfowl are migratory birds subject to regulation and control of the national government through treaties with Great Britain and Mexico, 16 U.S.C.A. sec. 715j. A Migratory Bird Conservation Commission, chaired by the Secretary of the Interior, administers 16 U.S.C.A. sec. 715 *et seq.* enacted pursuant to treaty obligations. Each year the Secretary of the Interior issues general regulations and quotas for each state for the taking of waterfowl by hunting in its five

designated flyways, including the Mississippi flyway. See 16 U.S.C.A. secs. 715i and 715n. Thereupon, the states determine their bag limits and quotas for the hunting season. 16 U.S.C.A. sec. 715h. A federal hunting stamp is required to hunt any waterfowl. 16 U.S.C.A. sec. 718 *et seq.*

The federal government by direct appropriation acquires and maintains waterfowl refuges. 16 U.S.C.A. secs. 715k and 721. The states receive payments from the operation of national wildlife refuges. 16 U.S.C.A. sec. 715s. The states also receive payments from the sale of the federal hunting stamp. 16 U.S.C.A. sec. 718. In addition, Wisconsin participates in the wildlife restoration program set forth in 16 U.S.C.A. sec. 669 *et seq.* by enabling legislation contained in sec. 29.174(13), Stats.

Scientific evidence has established the importance of water conditions in the prairie provinces of Canada and the North Central prairies of the United States to waterfowl population in the Mississippi flyway. In *Waterfowl Tomorrow*, U.S. Department of Interior, U.S. Government Printing Office 1964, LC #64-60084, the Secretary of the Interior reports at p. 39:

“PRAIRIE POTHOLEs are the backbone of duck production in North America. Filled with water, they constitute the most fruitful duck producing medium in the world. Given a few wet years, the prairie country can pyramid duck numbers to startling proportions. Several successive drought years bring an inevitable crash. Populations dwindle almost in direct proportion to the decline in water. For some species intimately tied to prairie habitat, it means dangerously low numbers and tightened hunting regulations.

“The prairie pothole region makes up only 10 percent of the total waterfowl breeding area of this continent, yet it produces 50 percent of the duck crop in an average year--more than that in bumper years.

“This region covers about 300 thousand square miles in south-central Canada and north-central United States. ...”

The Mississippi flyway is the most important flyway of the five designated by the Department of Interior for administrative purposes. It also is the corridor used by most of the ducks bred in the

prairie regions of the United States and Canada. The Secretary of Interior reports further in *Waterfowl Tomorrow* at pp. 185-186:

“MISSISSIPPI meant big river to the Ojibway Indians and ‘big’ is the word we can use for the waterfowl flyway that bears its name. Besides having the granddaddy of all rivers, three of the five largest lakes of the world, and the number one inland waterway, this Flyway also has other ‘king-size’ features suited to the needs of waterfowl and people.

“The Mississippi Flyway States are Minnesota, Wisconsin, Michigan, Ohio, Indiana, Illinois, Iowa, Missouri, Kentucky, Tennessee, Arkansas, Louisiana, Mississippi, and Alabama. They embrace 742 thousand square miles, one-fourth the area of the 48 adjoining States.

“These 14 States contain more than half the acreage of wetlands classified as having significant value to waterfowl in the 48 contiguous States. Their residents buy 40 percent of the duck stamps sold and kill nearly 40 percent of the total ducks taken in the United States.

“The Mississippi Flyway draws from breeding grounds that reach northward to the Mackenzie River Delta and Alaska in the west and to Hudson Bay and Baffin Island in the east. It includes most of the productive prairie pothole region. ...

“We [Mississippi Flyway] boast 11.5 million acres of wetlands of high or moderate value and 20 million acres of lesser importance. Grainfields provide additional waterfowl range. This flyway in 1960 included the four leading soybean producing States, three of the four top rice producers, and one of the four top barley producers. Two-thirds of the Nation’s corn crop is grown here. In short, the flyway is big in the things that count for the birds and for people who enjoy having them around. ...”

The national value of migratory birds was declared by the U.S. Supreme Court in *Missouri v. Holland*, 252 U.S. 416, 435 (1920), which involved a challenge to the constitutionality of the Migratory Bird Conservation Act soon after its adoption pursuant to the treaty with Great Britain. The Court stated at p. 435:

“Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject-matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. ...”

Certainly this national policy declaration applies validly to a well-established state policy to preserve and protect migratory birds and waterfowl in Wisconsin. It is entirely consistent also with the state's waterfowl conservation programs, its cooperative programs with the federal government and with scientific fact. It is my opinion that AB 894 as drafted violates no constitutional provision, policy or doctrine.

BCL:JPA

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*Attorneys; Compatibility; Courts; Marriage And Divorce; Family Court Commissioner's law partner is prohibited from serving as counsel in any divorce action in county which Commissioner holds office but may serve as counsel in divorce actions in other counties. This prohibition may not be waived by the parties to the divorce action. OAG 14-78*

February 22, 1978.

E. WAYNE WORTH, *District Attorney*  
*Adams County*

You requested my opinion on three questions regarding the extent to which the professional and business ties between a family court commissioner and his law partner or partners limit the ability of any such partners to participate in actions affecting marriage. The questions, which specifically concern the restrictions placed on them pursuant to sec. 247.16, Stats., are as follows: first, whether a law partner of the family court commissioner can serve as counsel in a divorce action when the family court commissioner is himself an active participant in the court proceeding; second, whether a partner

of the family court commissioner can serve as counsel in a divorce action when an assistant family court commissioner and not the family court commissioner takes part in the hearing; third, whether a waiver signed by the immediate parties to the action, *i.e.*, the two spouses and the guardian ad litem, if any, can operate to validate proceedings which technically violate sec. 247.16.

In my opinion, under sec. 247.16, Stats., a law partner of the family court commissioner is prohibited from serving as counsel in a divorce action in any court held in the county in which the family court commissioner holds office, regardless of whether it is the family court commissioner himself or an assistant who actually participates in the court proceeding. Further, it is my opinion that the waiver suggested in your third question could not under any circumstances operate to validate proceedings which violate sec. 247.16, and allow participation as counsel by a law partner of the family court commissioner. My reasoning follows:

Section 247.16, Stats., reads:

**“FAMILY COURT COMMISSIONER OR LAW PARTNER; WHEN INTERESTED; PROCEDURE.** Neither such family court commissioner nor his partner or partners shall appear in any action affecting marriage in any court held in the county in which he shall be acting, except when authorized to appear by s. 247.14. In case he or his partner shall be in any way interested in such action, the presiding judge shall appoint some reputable attorney to perform the services enjoined upon such family court commissioner and such attorney, so appointed, shall take and file the oath and receive the compensation provided by law.”

This statute was adopted (as sec. 2360h-3) in 1909, and has existed substantively unchanged since then. In 1925, the Attorney General addressed the question whether the family court commissioner (then “divorce counsel”) of a county could appear as a private attorney in a divorce action. Concluding that he could not, the opinion stated:

“Under [the] provisions of the statute, it seems clear that the divorce counsel is prohibited from appearing in any divorce action, except when he appears ... as authorized by [sec. 247.14]. The statute clearly provides that neither such divorce

counsel nor his partner or partners shall appear in any action for divorce, except when authorized to appear under [sec. 247.14].

“This language is clear and explicit, and I see no ambiguity in its terms. Neither does the second sentence in [sec. 247.16] throw any doubt upon its meaning. In case the divorce counsel or his partner is in any way interested in such action, then another attorney must be appointed to act as divorce counsel. The ‘interest in such action’ there referred to cannot in any way be construed to include an interest that the divorce counsel may have acquired by commencing a divorce action or by being retained as the defendant’s attorney in a divorce action, because he is expressly prohibited by the first sentence in said section, from appearing in a divorce action, except when he appears as authorized by statute, in the public capacity of divorce counsel. He cannot appear as a private attorney as attorney for either the plaintiff or defendant in any divorce action in this state.” 14 Op. Att’y Gen. 164, 165 (1925).

While it is not material to the present inquiry, it should be pointed out that the last sentence quoted above is inaccurate. The prohibition is not state-wide. In view of the provisions of the first sentence of sec. 247.16, it should read, “He cannot appear as a private attorney as attorney for either plaintiff or defendant in any divorce action in any court held *in the county in which he shall be acting.*”

Since 14 Op. Att’y Gen. 164 (1925) was issued, the Legislature has had occasion to reconsider and revise the statutes dealing with the family court commissioner, but has left the provisions of sec. 247.16 substantively unchanged. In fact, the Legislative Council Notes accompanying the revision in the statute which changed “divorce counsel” to “family court commissioner” contains a declaration that other than the minor language change for uniformity the Legislature was merely restating “the present law.” The significance of the Legislature’s failure to amend the statute subsequent to the Attorney General’s 1925 construction of it cannot be disregarded. Its effect is analogous to that of construction of a statute by the supreme court under like circumstances. The supreme court in *Zimmerman v. Wisconsin Elec. Power Co.*, 38 Wis.2d 626, 157 N.W.2d 648 (1967), gave a clear statement of the general rule:

“... Where a law passed by the legislature has been construed by the courts, legislative acquiescence in or refusal to pass a measure that would defeat the courts’ construction is not an equivocal act. The legislature is presumed to know that in absence of its changing the law, the construction put upon it by the courts will remain unchanged; .... Thus, when the legislature acquiesces or refuses to change the law, it has acknowledged that the courts’ interpretation of legislative intent is correct.” *Zimmerman, supra*, p. 633-634.

See also cases 15 Callaghan’s Wisconsin Digest, sec. 180 *Statutes*, p. 621-622 (1951), and pocket part p. 187-188 (1976).

It is clear that the 1925 Attorney General construction of sec. 247.16, Stats., continues to be valid today. That opinion dealt specifically with the statute as it related to the family court commissioner. However, sec. 247.16, by its plain language and parallel structure (“Neither such family court commissioner nor his partner or partners ....”) imposes the same restrictions on his law partners. Given this fact and in view of the continuing validity of the prior construction of this statute, the answer to your first question is obvious: the law partner or partners of a family court commissioner are expressly prohibited from appearing as counsel in a divorce action when the family court commissioner participates in the court proceeding in his public capacity.

I believe the above analysis provides an adequate basis for my answer to your second question. However, additional supporting evidence exists and should be mentioned. Section 247.16 prohibits both the family court commissioner and his law partners from appearing as private attorneys “in any action affecting marriage in any court held in the county *in which he shall be acting*.” (Emphasis added.) It has been argued that the word “acting” may be interpreted to mean “participating as commissioner in a court action.” In this way the law partners of the family court commissioner would be restricted from appearing as counsel only in those cases where the family court commissioner himself directly participates in the court proceeding. Such a construction, however, strains both the letter and the spirit of the law.

The Connecticut court in *Yudkin v. Gates*, 60 Conn. 426, 22 A. 776, 777 (1801), construed the word “act” in a similar framework as

part of a statute providing that no justice of the peace shall “act” in any cause in which he is an attorney. The court’s analysis is persuasive:

“... this precise question has been decided ... in *New Hartford v. Canaan*, 52 Conn. 166, where ... the court says: ‘This language is so exceedingly broad, embracing in terms any act and any proceeding, that we do not feel at liberty to ... restrict its application exclusively to an actual trial in court before the interested magistrate.’ ... we think, when the object of such statutes, which is, as was said in *Dodd v. Northrop*, 37 Conn. 216, to ‘secure the utmost fairness and impartiality,’ is considered, that (as is also suggested in that case) the construction which is in furtherance of that object should be most liberal.”

The Legislature’s use of the term “act” in sec. 247.13(1), is also enlightening:

“FAMILY COURT COMMISSIONER; APPOINTMENT; POWERS; OATHS; ASSISTANTS; MENOMINEE COUNTY. (1) ... Before entering upon the discharge of his duties such commissioner shall take and file the official oath. The person so appointed shall continue *to act* until his successor is appointed and qualified, except that in the event of his disability or extended absence said judges may appoint another reputable attorney *to act* as temporary family court commissioner ....” (Emphasis added.)

The words “act” and “acting” in secs. 247.13 and 247.16, are obviously used in the sense of holding the office and fulfilling all the functions of family court commissioner, and not merely in the sense of participating as commissioner in a particular court proceeding.

Adopting a broad interpretation of the word “acting” is even more understandable in light of the many other duties the family court commissioner has besides that of appearing in actions affecting marriage. A revealing description of the unique and significant role of the family court commissioner is presented in “Three Dimensions of Divorce” by former Wisconsin Supreme Court Justice Robert W. Hansen (then Circuit Judge, Family Court of Milwaukee):

“... one all-important aspect of the Family Code is not to be ignored: the duties and responsibilities of the Family Court Commissioner. The key to the success of the Code in any Wisconsin county is the Family Court Commissioner. To read the Wisconsin Family Code is to realize that a major share of the responsibility for: 1.), seeing that an attempt to reconcile the parties is made; 2.), protecting the rights of children and enforcing child support orders; and 3.), representing the public interest and public policy at the trial of divorce actions--is placed upon the shoulders of the Family Court Commissioner. It is not too much to say that, unless the Family Court Commissioner tackles his many assignments with dedication, determination and enthusiasm, the expectations of the Code drafters are not likely to be realized.

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“All pleadings and motions in a divorce action must be served upon the family court commissioner. In every action for divorce or legal separation, the family court commissioner shall cause an effort to be made to effect a reconciliation between the parties.

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“The Family Court in Wisconsin is a partnership of two disciplines--the legal and the therapeutic. ... It is the not always easy responsibility of the Family Court Commissioner to be the linchpin between the legal and therapeutic phases of family court operations in Wisconsin. He must do several jobs and do them well--and that is no easy assignment.” 50 Marquette L.R. p. 1, 12-14 (1966).

The recent changes made by the Legislature in enacting its “no-fault divorce” bill (L. 1977 ch. 105) do not affect this role in any way material to this opinion.

Section 247.16, Stats., was designed to prevent any conflict of interest in the duties of the family court commissioner. However, mere absence from a court proceeding (were his law partners allowed to appear) would not eliminate the risk of conflict of interest, in view of his many other duties which would inevitably bring him in contact with the case. Therefore, in answer to your second question, it is my

opinion that pursuant to sec. 247.16, Stats., a law partner of the family court commissioner is prohibited from appearing as counsel in a divorce action held in any court in the county in which the family court commissioner is acting even when an assistant family court commissioner and not the family court commissioner participates in the court proceeding.

Your final question on "waiver" apparently rests on the assumption that the only parties in a divorce action are those parties immediately involved in it -- the two spouses and possibly a guardian ad litem. However, in Wisconsin it is clear that the public has an interest in any action affecting the voiding or dissolving of marriage. The family court commissioner is an integral and necessary representative of the public interest in all divorce cases. *de Montigny v. de Montigny*, 70 Wis.2d 131, 141, 233 N.W.2d 463 (1975). By enacting sec. 247.16, Stats., the Legislature showed its intent that the public's interest be insulated from any personal interest, however remote, of the family court commissioner. The individual parties to a divorce action clearly do not have the power to waive the public's interest in the divorce. A signed waiver would therefore be totally ineffective under the circumstances.

In closing, while my conclusion that pursuant to sec. 247.16, Stats., the family court commissioner and his law partner or partners are disqualified from appearing as counsel in all divorce actions in the county in which the commissioner is acting needs no reinforcement, I draw your attention to the Code of Professional Responsibility, "E.C. 9-6 Every lawyer owes a solemn duty ... to strive to avoid not only professional impropriety but also the appearance of impropriety." 43 Wis.2d, xiii, lxxii (1969); see also E.C. 8-8, lxxix and E.C. 5-1, xxxix.

BCL:JEA

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*Aid; Appropriations And Expenditures; Education; Federal Aid; Funds; Religion; State Aid;* Wisconsin Constitution art. I, sec. 18, prohibiting the drawing of money from the treasury for the benefit of religious societies, or religious or theological seminaries is a proscription against using public monies for such purpose. Section 3 of 1977 Assembly Bill 500 which purports to establish a separate fund outside of the state treasury if enacted would not avoid this prohibition since the public nature of the money is not changed. OAG 16-78

February 23, 1978.

EDWARD JACKAMONIS, *Chairman*

*Assembly Committee on Organization*

You have asked me to answer several questions concerning 1977 Assembly Bill 500. You are concerned with the following section of the Bill:

“SECTION 3. 20.255 (6) of the statutes is created to read:

“20.255 (6) **Acceptance of funds.** (m) *Federal aid.* Notwithstanding s. 20.865 (4) (m), moneys received by the state under the federal elementary and secondary education act of 1965 (P.L. 89-10) shall not be paid into the state treasury and shall not be subject to the laws, rules and regulations governing payments made by the state treasury, but shall be deposited in and constitute the separate nonlapsible fund which is created and designated as the federal educational assistance trust fund. There is appropriated from the federal educational assistance trust fund to the department all federal moneys received under the federal elementary and secondary education act of 1965, as authorized by the governor under s. 16.54, to carry out the uses and purposes of that act.”

Your questions, the analysis by the Legislative Reference Bureau and the fiscal note all indicate that the purpose of this legislation is to put funds received under the Elementary and Secondary Education Act of 1965 (ESEA) beyond the effect of Wis. Const. art. I, sec. 18. This section provides:

“FREEDOM OF WORSHIP; LIBERTY OF CONSCIENCE; STATE RELIGION; PUBLIC FUNDS. **Section 18.** The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.”

A brief discussion of art. I, sec. 18 is given at this time in order to serve as background for the balance of the opinion.

A detailed interpretation of art. I, sec. 18 was first made by the Wisconsin Supreme Court in *State ex rel. Weiss v. District Board*, 76 Wis. 177, 44 N.W. 967 (1890). In this case parents of Roman Catholic faith brought suit to prevent the reading of the King James version of the Bible in public school where their children were in attendance. In holding that the reading of the Bible violated art. I, sec. 18 as well as art. X, sec. 13 the court wrote “Wisconsin ... has, in her organic law, probably furnished a more complete bar to any preference for, or discrimination against, any religious sect, organization, or society than any other state in the Union.” 76 Wis. at 207-208, 217-221. In *State ex rel. Reynolds v. Nusbaum*, 17 Wis.2d 148, 115 N.W.2d 761 (1962), the court reaffirmed the position taken in the *Weiss* case regarding the interpretation of art. I, sec. 18.

In question 1. a. you ask:

“a. Did the drafters of the Wisconsin Constitution intend that art. I, s. 18, Wis. Const., prohibit the administration and management by state officials of *any* moneys that would benefit religious societies or religious or theological seminaries? In other words, was the prohibition intended to prevent the ‘entanglement’ of the state in the affairs of such societies and seminaries or merely to prevent the use of funds drawn from the State Treasury to support such institutions?”

The answer to this question is yes. The phrase in art. I, sec. 18 "nor shall any money be drawn from the treasury" means those monies of which the state has taken possession pursuant to law. Those monies are public funds. 63 Am. Jur. 2d *Public Funds et seq.* This is true even though they are held for a special purpose. In *State ex rel. Reynolds v. Nusbaum*, 17 Wis.2d 148, 165-166 (1962), the Wisconsin Supreme Court held that a statute providing for the transportation of parochial students was unconstitutional because it was "in direct violation of that portion of sec. 18, art. I of the Wisconsin constitution, which prohibits the expenditure of *any public funds* 'for the benefit of religious societies, or religious or theological seminaries.'" (Emphasis added.) Furthermore, in *Democrat Printing Co. v. Zimmerman*, 245 Wis. 406, 414, 14 N.W.2d 428 (1944), the court stated:

"... whether the funds be granted to the board of regents, or to the university, or to the state as grantee, the state in any case becomes the owner of the fund as both the board of regents and the university are agencies of the state to whom the administration of state functions is intrusted."

Section 34.01(5), Stats., dealing with public deposits provides:

"Public moneys' shall include all moneys coming into the hands of the state treasurer or the treasurer of any county, city, village, town, drainage district, power district, school district, sewer district, or of any commission, committee, board or officer of any governmental subdivision of the state, or the clerk of any court in this state, by virtue of his office without regard to the ownership thereof."

The proscription in Wis. Const. art. I, sec. 18, against drawing money from the treasury actually amounts to a proscription against using public monies. "[N]or shall any money be drawn from the treasury" is an artful phrase stating the proscription.

In *State ex rel. Thomson v. Giessel*, 271 Wis. 15, 43, 72 N.W.2d 577 (1955), the supreme court stated:

"The relator submits that once the money is paid into the state treasury it becomes state money and can be paid out by the state treasurer only in pursuance of an appropriation by law (as provided in sec. 2, art. VIII, Const.). He contends that merely

because it is handled on a revolving basis does not change its character or give rise to any special or trust fund. We consider that the relator's position in this regard is correct. ...”

In *State ex rel. Thomson v. Giessel*, 262 Wis. 51, 53 N.W.2d 726 (1952), the court had under consideration legislation providing additional benefits for retired teachers. The court held that the legislation was subject to the constraints of art. V, sec. 26 and rejected the argument that the transfer of the funds from the general fund to the contingent fund, to the annuity reserve fund, and then to the teacher altered the public character of the money.

The proposed legislation admits of the fact that the money is public money since the proposal actually appropriates the money. The legislation states: “There is appropriated from the federal educational assistance trust fund to the state department.” If the money were not state public money, it could not be appropriated by the Legislature.

In conclusion, in answering 1. a., Wis. Const. art I, sec. 18 was intended to prohibit the administration and management by state officials of any public funds in a manner that would benefit religious societies or religious or theological seminaries. The Legislature, by appropriating and delegating further responsibility for funds to another public entity, cannot thereby insulate those funds from Wisconsin's constitutional restrictions on state intervention in religious affairs.

I am aware that courts in some other states have reached somewhat different results. See, for example, *In re Proposal C*, 384 Mich. 390, 185 N.W.2d 9 (1971). But in view of the precedent established in Wisconsin concerning Wis. Const. art I, sec. 18, I believe our supreme court would hold sec. 3 of AB 500 unconstitutional.

Question 1. b. reads:

“By stating that ESEA funds are not to be paid into the State Treasury but into the federal education assistance fund, does A.B. 500 have the effect of causing such funds not to be part of the State Treasury for the purposes of the prohibition of art. I, s. 18, Wis. Const.?”

By virtue of my answer to question 1. a., the answer to this question is no.

Questions 1. c. read:

“Who would (or could) be responsible for receiving and disbursing money from the federal education assistance fund established by A.B. 500? Who would (or could) sign the checks? To what extent can routine procedures for receiving, disbursing, investing and auditing the use of such funds be followed without violating the Wisconsin Constitution? Are there any limitations on the activities of state officials which would be necessary to avoid violating the Constitution?”

These questions assume the constitutionality of sec. 3 of 1977 AB 500. Since sec. 3 is, in my opinion, unconstitutional and because of the constitutional prohibition against the use of public funds for the purposes set forth in AB 500, it is unnecessary to answer these questions.

Additionally, some of the questions are very generally propounded and are incapable of meaningful response in the absence of an actual proposal to consider. Any proposed legislation in this field must at least comport with the following pronouncement of the United States Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971):

“Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 US 236, 243 (1968); finally, the statute must not foster an excessive government entanglement with religion. [*Walz v. Tax Commission*, 397 US 664, 674 (1970)]”

Question 1. d. reads:

“Can moneys which are outside of the State Treasury, pursuant to A.B. 500, be subject to legislative appropriations and become part of the state budget, as is done in A.B. 500?”

This question assumes sec. 3 of AB 500 would accomplish something that it does not. As already stated, the constitutional proscription is against the use of state public monies. The monies would be subject to legislative appropriation.

My answers to these questions are contrary to the opinion stated in 56 Op. Att'y Gen. 135 (1967). However, since the authorities relied on in that opinion do not support the conclusions reached, it is not controlling here. In view of this fact and my response to question 1 it would appear unnecessary to answer question 2.

I would offer here that it is highly questionable whether legislation establishing a separate fund that would still be subject to some legislative or executive control would be constitutional. Whether legislation creating a separate fund beyond governmental control to be administered by an independent entity would satisfy federal requirements in administering ESEA funds is beyond the scope of this opinion.

In your final question you ask:

“Under the present method of receiving and disbursing federal ESEA funds, is it constitutionally permissible for the Department of Public Instruction to approve the rental of space by the public school district in a nonpublic school building for the provision of programs funded with ESEA funds? Further, if such a rental program is not currently permissible under the Wisconsin Constitution, and if A.B. 500 is enacted, would it become permissible for the Department of Public Instruction to approve such rentals for programs funded from the federal education assistance fund established by A.B. 500?”

Both of these questions will be answered in an opinion to Superintendent of Public Instruction Barbara Thompson, which will be issued shortly.

BCL:JWC

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*Appropriations And Expenditures; Cities; Counties; County Board; Municipalities; Taxation; Towns; Villages; Words And Phrases;* Towns, villages and cities in counties establishing a county solid waste management system under sec. 59.07(135), Stats., may be taxed for the capital costs of the county-wide system, but not for the operating costs. OAG 17-78

February 28, 1978.

RALPH E. OSBORNE, *District Attorney*

*Monroe County*

You ask whether a town, city or village which operates its own waste collection and disposal facility may be taxed for any portion of the cost of a county solid waste management system established under sec. 59.07(135), Stats. It is my opinion that pursuant to sec. 59.07(135)(1), Stats., nonparticipating municipalities may be taxed for all costs for the countywide system of a capital nature; however, they are specifically exempted from any tax levied to cover day-to-day operating expenses.

Section 59.07(135), Stats., authorizes counties to operate and establish a solid waste management system and, in counties under 500,000 population, authorizes them to create a solid waste management board to operate the system. Section 59.07(135) specifically provides that:

“... For the purpose of operating the solid waste management system, the board may exercise the following powers:

“(1) Appropriate funds and levy taxes to provide funds for acquisition or lease of sites, easements, necessary facilities and equipment and for all other costs required for the solid waste management system except that no town, city or village which operates its own waste collection and disposal facility, or property therein, shall be subject to any tax levied hereunder to cover the *cost of operation* of these functions. Such appropriations may be treated as a revolving capital fund to be reimbursed from proceeds of the system.” (Emphasis supplied.)

The phrase “cost of operation” is not defined in ch. 59, Stats. As a general rule, where words used in a statute are not specifically defined, they should be accorded their ordinary and accepted meaning, which may be established by the definition contained in a recognized dictionary. *Town of Lafayette v. City of Chippewa Falls*, 70 Wis.2d 610, 235 N.W.2d 435 (1975). However, when words are used “which have a technical and well-established meaning universally understood in commerce or trade, that meaning must be read into and understood to be descriptive of the particular object dealt with.” *Harnischfeger Corp. v. Industrial Comm.*, 263 Wis. 76, 79, 56 N.W.2d 499 (1952).

“Cost of operation” is a well-established term of art in tax and business parlance. It is used to designate the day-to-day costs of running an enterprise, as distinguished from long-term expenditures chargeable to the capital account. According to Volume 9A *Words and Phrases*, p. 604, “‘operating expenses’ and ‘costs of operation’ are interchangeable terms ....” Regarding “operating expenses” *Bouvier’s Law Dictionary*, pp. 2416-2417 (Rev. 8th Ed.), declares “[t]hey are, broadly speaking, those which it is reasonably necessary to incur for the purpose of keeping up [an enterprise] as a going concern.”

No actual definition of “cost of operation” appears in either the Wisconsin or federal taxation statutes. However, the distinctions made in sec. 71.04, Stats., between ordinary and necessary expenses and organizational expenditures are illustrative of the kind of line the Legislature probably intended to draw by using the term “cost of operation” in sec. 59.07(135)(1), Stats. A similar distinction may be seen on the federal level. See, for example, 26 U.S.C. sec. 382, Net Operating Loss and 26 U.S.C. sec. 383, Net Capital Loss.

My opinion that “cost of operation” encompasses only those costs incurred by the county in the day-to-day running of the system is supported by an examination of sec. 59.07(135)(1), its legislative history and its legislative purpose. I provide the following analysis even though the established meaning of “cost of operation” provides an adequate basis for my conclusion and resort to other aids in statutory construction is unnecessary.

### Legislative History

The legislative history of sec. 59.07(135)(1) in ch. 130, Laws of 1971, indicates that the Legislature specifically focused its attention on the question of how the various costs of a county waste management system were to be covered and whether both users and nonusers were to be taxed.

Assembly Bill 13 as originally introduced provided for the establishment of a waste management system simply by extending sec. 59.07(52)(b), Stats., then applicable only to Milwaukee County, to all counties. This version would have given all counties the power among other things to:

“... levy a tax to create a working capital fund to maintain and operate dumpage facilities, construct, equip and operate incinerators and other structures for disposal of wastes ... levy taxes to provide funds to acquire sites and to construct and equip incinerators and other structures for disposal of wastes ....”

Assembly Substitute Amendment 1 to Assembly Bill 13 deleted “levy a tax to” and “levy taxes to” in the above phrases and specifically stipulated that nonusers were not to be taxed for costs either “to commence or maintain” a waste disposal system.

Senate Substitute Amendment 1 to Assembly Bill 13 rejected both Assembly proposals--including the one which would have made users alone liable for all costs of the system--and created present sec. 59.07(135)(1) as a separate provision. The first draft of this Amendment contained the phrase “except that no town, city or village which operates its own ... shall be subject to any tax levied hereunder *to effect* these functions” (emphasis added). This was changed in the final version to “*to cover the cost of operation* of these functions”--much narrower language.

I believe the above legislative history, while neither clear nor conclusive, tends to support the position that the Legislature by using the phrase “cost of operation” demonstrated its intent not to allow nonparticipants to escape all costs whatever for the countywide system, but only day-to-day operating expenses.

### Legislative Purpose

The view that “cost of operation” should be read broadly is not only contrary to the established meaning of the phrase and the legislative history of the statute, but it also reflects a fundamental misconception of the purpose of the Legislature in enacting sec. 59.07(135). The Legislature, in my view, did not intend merely to *allow* counties to set up countywide waste disposal management systems. In enacting this section, the Legislature actually intended to *encourage* counties to do this.

If the purpose of the Legislature was to promote a countywide solution to this problem then a broad construction of “cost of operation” in a large measure thwarts it. County boards must be able to look to the towns, cities and villages as partial sources of revenue if they are ever to receive sufficient funds to develop a countywide solid waste management system. Construing “cost of operation” to encompass capital as well as operating costs would mean that it would be in municipalities’ best interest to drag their feet, allowing those who do participate at the outset to bear the burden of the initial capital investment.

“[T]he cardinal rule in interpreting statutes is that the purpose of the whole act is to be sought and is favored over a construction which will defeat the manifest object of the act.” *Student Asso., U of Wis.-Milw. v. Baum*, 74 Wis.2d 283, 294, 295, 246 N.W.2d 622 (1976).

I must conclude then, that the most reasonable construction of the statute, one compatible with its language and purpose, is that municipalities with their own solid waste collection and disposal systems may be taxed for all costs for the system of a capital nature, but may not be taxed for day-to-day operating costs.

In closing, I note that pursuant to sec. 59.07(52), Milwaukee County is similarly authorized to levy taxes on both users and nonusers for construction of a countywide waste disposal system. Our supreme court in *West Allis v. Milwaukee County*, 39 Wis.2d 356, 368, 159 N.W.2d 36 (1967), found the scheme to be a rational approach to the fiscal realities of municipal government, even though “the practical effect is to make it financially impossible for a municipality to have its own separate refuse disposal facilities.”

BCL:DJH

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*Apportionment; Census; Wisconsin Constitution art. IV, sec. 3* requiring legislative reapportionment "after each enumeration made by the authority of the United States" does not require reapportionment after the new federal mid-decade census. OAG 18-78

March 3, 1978.

JOHN TORPHY, *Secretary*  
*Department of Administration*

Your predecessor requested my opinion on two questions concerning the impact of the recently established national mid-decade census upon Wisconsin legislative reapportionment and redistricting in the future.

"1. Under existing law and the State Constitution, will legislative reapportionment/redistricting be necessary following the 1985 federal census?"

The answer is no.

Wisconsin Constitution art. IV, sec. 3, provides:

"At their first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants, excluding soldiers, and officers of the United States army and navy."

As originally enacted, Wis. Const. art. IV, sec. 3, had provided for reapportionment based upon a state enumeration of the inhabitants of the state, "in the year 1855, and at the end of every ten years thereafter ... and also after each enumeration made by the authority of the United States." Article IV, sec. 3 was amended in 1910 to read substantially as it does at present. (See 1907 J.R. 30, 1909 J.R. 55, 1909 c. 478, vote Nov. 1910.) Provision for a state enumeration of population was dropped. Starting with the national decennial census of 1910, and at ten-year intervals thereafter, state legislative reapportionment has been accomplished based upon the national decennial censuses.

In November, 1976, Title 13 of the U.S. Code was amended by P.L. 94-521. 13 U.S.C. sec. 141 as amended provides in part:

“(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population ....

“\*\*\*

“(d) Without regard to subsections (a), (b), and (c) of this section, the Secretary, in the year 1985 and every 10 years thereafter, shall conduct a mid-decade census of population ....”

13 U.S.C. sec. 141(e)(2) specifically provides:

“Information obtained in any mid-decade census shall not be used for apportionment of Representatives in Congress among the several States, nor shall such information be used in prescribing congressional districts.”

The question is whether the mid-decade census made pursuant to 13 U.S.C. sec. 141(d), is an “enumeration” within the meaning of Wis. Const. art. IV, sec. 3, thus resulting in state legislative reapportionment every five years, based on the national mid-decade as well as on the decennial censuses.

The history of Wis. Const. art. IV, sec. 3 clearly shows that it was the intent that reapportionment occur only after decennial censuses.

As pointed out previously, the original Wisconsin constitutional provision provided for an enumeration in 1855 (and every ten years thereafter) and after each federal enumeration. Although the time of the federal enumeration was not stated in the Wisconsin Constitution, U.S. Const. art. I, sec. 2, requires an “actual enumeration ... within every ... term of ten years” for purposes of apportionment of representative and direct taxes and such enumerations have been held under the constitutional provision every ten years, without exception, from 1790 to the present. That this was the federal enumeration in the minds of the drafters of our constitution seems too obvious to argue.

There can be no doubt that the Legislature and people of this state did not want reapportionment every five years. In 1910 the voters of this state elected to amend Wis. Const. art. IV, sec. 3 to drop the mid-decade state enumeration, and reapportion only after “each enumeration made by the authority of the United States,” obviously

again referring to the decennial enumeration mandated by the Federal Constitution.

Support for the proposition that “enumeration” as used in Wis. Const. art. IV, sec. 3 refers to a *strict* enumeration is found in the fact that sec. 3 requires the apportionment to be “according to the number of inhabitants.” Additionally, in the *Laws of Wisconsin Territory Passed at the Special Session of the Legislature Assembly*, Oct. 27, 1847, p. 3, sec. 17, in discussing the mechanics of conducting an enumeration (for the ultimate purpose of attaining statehood), the Legislature afforded a glimpse of what it intended “enumeration” to mean: “The said enumeration [referred to as “census” in preceding sections] shall ... include only those who are residents of said respective counties or divisions on the first day of December aforesaid and shall be made by an *actual inquiry* by the persons taking such census at *every dwelling*, or by *personal inquiry* of the *head of every family* in their respective counties or divisions.” (Emphasis added.) See Quaife, *The Attainment of Statehood*, Wisconsin Historical Publications, 1928, p. 9. Though now obsolete, this law may be properly regarded as *in pari materia* and helpful in establishing the historical context in which Wis. Const. art. IV, sec. 3 is to be construed. Under the Wisconsin Constitution then, and the U.S. Constitution as well, “enumeration” means an actual count of people, not a sophisticated estimate, no matter how accurate the estimate may be.

It is my opinion that Wis. Const. art. IV, sec. 3 requires reapportionment only after an actual enumeration or accurate head count and that the mid-decade census does not qualify in this respect.

In taking both the decennial and the mid-decade census, the secretary of Commerce is authorized to do so “in such form and content as he may determine, including the use of sampling procedures and special surveys.” 13 U.S.C. sec. 141(a) and (d). But 13 U.S.C. sec. 195 specifically provides:

“Except for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as ‘sampling’ in carrying out the provisions of this title.”

The apportionment of representatives in Congress among the several states is based upon the decennial census, 13 U.S.C. sec. 141(b), and, as stated above, 13 U.S.C. sec. 141(e)(2) specifically provides that the mid-decade census shall not be used for such apportionment. In consequence, while the decennial census is conducted as a "head count" of population, that is, a strict enumeration of inhabitants, the mid-decade census, in contrast, may be an estimate of population rather than an exact count.

The legislative history of P.L. 94-521 supports my conclusion. As originally enacted by P.L. 85-207, 13 U.S.C. sec. 195 provided:

"Except for the determination of population for apportionment purposes, the Secretary may, where he deems it appropriate, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title."

The section was amended, according to the Senate Report on P.L. 94-521, to "[strengthen] congressional intent that, whenever possible, sampling shall be used." 1976 U.S. Code Cong. Ad. News 5898. The cost of a mid-decade census "based on a total enumeration of the American people" was estimated at \$517.5 million, whereas \$300 million was the estimated cost for "a census incorporating sampling procedures, which is clearly the intent of this committee." 1976 U.S. Code Cong. Ad. News 5901. See also p. 5904. In the House Conference Report, it is stated that in Section 141(d) of Title 13, relating to the mid-decade census, "for the dual purposes of economizing and reducing respondent burden, language is provided to express the intent that the secretary will, whenever possible, use sampling procedures and special surveys in conducting such censuses." 1976 U.S. Code Cong. Ad. News 5909.

Therefore, since Wis. Const. art. IV, sec. 3, provides for reapportionment based upon a federal "enumeration" of population and since it is clearly the intent of Congress that the national mid-decade census of population shall not be a strict enumeration, it is my opinion that under the state constitution, state legislative reapportionment will not be necessary following the 1985 federal census and following mid-decade census.

In view of my answer to your first question, your second question, whether the Legislature could enact a statute which would clarify the issue without having to amend the constitution, needs no response.

BCL:WHW

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*Administrative Procedure; Advertising; Anti-Secrecy; Constitution; Constitutionality; Criminal Law; Elections; Legislation; Legislature; Licenses And Permits; Lobbying; Public Officials; Public Records; Subpoena; Words And Phrases;* In principle, the purposes sought to be accomplished by Assembly Substitute Amendment 3 to 1977 Assembly Bill 93, revising subch. III of ch. 13, Stats., the state's lobbying law, are compatible with the rights of Wisconsin citizens to petition the government and to be secure against unreasonable searches and seizures. Some of the means selected to accomplish those purposes may, on their face or as applied violate citizens' first amendment right of petition. OAG 19-78

March 17, 1978.

THE HONORABLE, THE ASSEMBLY  
*Legislature*

You have, by resolution, requested my opinion with respect to the constitutionality of Assembly Substitute Amendment 3 to 1977 Assembly Bill 93, especially as it affects the rights of citizens to petition the government and to be secure against unreasonable searches and seizures. I have concluded that, with certain exceptions, the legislation under consideration is compatible with those constitutional rights.

Substitute Amendment 3 is a comprehensive plan to intensify the regulation of lobbying in state government. It is comprised of various provisions requiring licensing and disclosure of defined lobbying activities as well as a list of prohibited practices. The substitute amendment also establishes powers and procedures for enforcement of the several substantive provisions and sanctions for their violation.

Lobbying, as much as mass demonstration at the other extreme of subtlety, is a means of petitioning the government, and is therefore protected by the first amendment to the United States Constitution.<sup>1</sup> *Fritz v. Gorton*, 83 Wash.2d 275, 517 P.2d 911, 929, *app. dismissed*, 417 U.S. 902 (1974); *United States v. Finance Committee to Reelect the President*, 507 F.2d 1194, 1201 (D.C. Cir. 1974). See *United States v. Harriss*, 347 U.S. 612, 625, 627 (1954). The degree of protection is not diminished either because lobbying involves vigorous advocacy rather than abstract discussion, see *Buckley v. Valeo*, 424 U.S. 1, 48, 75 (1976); *NAACP v. Button*, 371 U.S. 415, 429, 437 (1963), or because in some cases the petitioner pays another to advocate his cause. *Moffett v. Killian*, 360 F. Supp. 228, 231 (D. Conn. 1973), and cases cited. See *Buckley v. Valeo*, *supra*, 16, 75.

Like other expressive activities protected by the first amendment, lobbying is a fundamental right, regulation of which can be justified only by a compelling state interest. *Advisory Opinion on the Constitutionality of 1975 PA 227*, 396 Mich. 465, 242 N.W.2d 3, 23 (1976). See *Buckley v. Valeo*, *supra*, 25; *NAACP v. Button*, *supra*, 438. Cf. *In re Kading*, 70 Wis.2d 508, 527, 235 N.W.2d 409, 238 N.W.2d 63, 239 N.W.2d 297 (1975). Any justifiable regulation must be accomplished, moreover, by precisely drawn means which narrowly achieve the legitimate end without unnecessarily abridging broader exercise of the regulated right. *Buckley v. Valeo*, *supra*, 25; *NAACP v. Alabama*, 377 U.S. 288, 307, 308 (1964), and cases cited; *In re Kading*, *supra*, 527. Neither may these means unnecessarily abridge protected exercise of other constitutional rights. See *State v. Mahaney*, 55 Wis.2d 443, 448, 198 N.W.2d 373 (1972); *State v. Zwicker*, 41 Wis.2d 497, 507, 164 N.W.2d 512 (1969).

Substitute Amendment 3 is detailed and lengthy legislation. Because it directly affects protected rights, the constitutionality of a number of its provisions are subject to question. Discussion of all the provisions of the bill would not be particularly productive, however, since there is no serious doubt about the constitutionality of many of them. Statutes, of course, are presumed to be constitutional, and will be declared constitutionally defective only if such deficiency is demonstrable beyond a reasonable doubt. *E.g. State ex rel.*

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<sup>1</sup> Presumably, lobbying is protected as well by the parallel state provision, Wis. Const. art. 1, sec. 4. See generally *Madison Joint School Dist. No. 8 v. WERC*, 69 Wis.2d 200, 210, 231 N.W.2d 206 (1975).

*Hammermill Paper Co. v. La Plante*, 58 Wis.2d 32, 47, 205 N.W.2d 784 (1973), and cases cited. Consequently, although I have considered all the provisions of the substitute amendment which are relevant to the opinion request, I will comment specifically only on those which present substantial questions concerning their possible infringement on the first and fourth amendment rights of Wisconsin citizens. The right of lobbyists to engage in that occupation will be considered only to the extent necessary to examine the effect of the substitute amendment on the rights of citizens to petition the government and to privacy.

I. Sec. 1 Corrupt Means To Influence Legislation; Disclosure Of Interest.

The first section of Substitute Amendment 3 provides:

“Any person who gives or agrees or offers to give any thing of value to any person, for the service of such person or of any other person in procuring the passage or defeat of any measure before the legislature or before either house or any committee thereof, upon the contingency or condition of the passage or defeat of the measure, or who receives, or agrees to receive any thing of value for such service, upon any such contingency or condition, or who, *having a pecuniary or other interest*, or acting as the agent or attorney of any person in procuring or attempting to procure the passage or defeat of any measure before the legislature or before either house or any committee thereof, attempts in any manner to influence any member of the legislature for or against the measure, without first making known to the member the real and true interest he or she has in the measure, either personally or as such agent or attorney, may be fined not more than \$5,000 or imprisoned in the county jail not more than one year or both.” (Emphasis added.)

The emphasized phrase raises related constitutional questions with respect to its construction.

Provisions of a penal statute are unconstitutionally vague if they fail to give reasonable notice of the prohibited conduct to persons trying to avoid their penalties. *State v. Mahaney, supra*, 448, and cases cited. This occurs when the wording of a statute is so obscure that persons of ordinary intelligence necessarily must guess at its meaning and differ about its applicability. *Ibid.* Standards of

definitive sufficiency are particularly strict when, as here, the statute affects fundamental first amendment freedoms. *Buckley v. Valeo*, *supra*, 77; *NAACP v. Button*, *supra*, 432.

It is not clear from reading the section in question whether it requires disclosure of interest by all persons having any pecuniary or other interest in any aspect of a legislative measure, or whether, in addition to agents and attorneys, only those with a pecuniary or other interest in passage or defeat of the measure *per se* must make known their interest prior to attempting to influence a legislator.

In spite of the fact that the first section of the substitute amendment simply recreates, with slight stylistic alterations and a higher fine, the corrupt influence law which has been in effect in Wisconsin for a century, no authoritative judicial construction has resolved the problem. The statute, in fact, has been considered in only one reported case, and then only cursorily in a note appended to the opinion after it had been filed. *Chippewa Valley and S. Ry. Co. v. Chicago, St. P., M. and O. Ry. Co.*, 75 Wis. 224, 253, 44 N.W. 17 (1889). There it was declared without discussion that the word "person" includes both natural and artificial entities, *i.e.*, corporations. *Ibid.*

Nevertheless, a reasonable construction may be given the section which will avoid any ambiguity. *See generally United States v. Harriss*, *supra*, 618; *State ex rel. Hammermill Paper Co. v. La Plante*, *supra*, 47.

That ambiguity is caused by the absence of any specific object of the word "interest" in the phrase under consideration, and its consequent failure to inform what the disclosable pecuniary or other interest is to be. Either of the two objects mentioned above may be supplied, depending on whether the phrase is interpreted in isolation or in the complete context of the corrupt influence statute. If the phrase is seen as an integral unit inherently defining one of two classes of required reporters, since it is internally unlimited except by the rule of *ejusdem generis*<sup>2</sup> its otherwise unrestricted words would

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<sup>2</sup> Absent any clear expression of legislative intent to the contrary, the general phrase "or other interest" following "pecuniary" must be construed in accord with the rule of *ejusdem generis* to include only interests in the same general category as the pecuniary interest enumerated. *See generally La Barge v. State*, 74 Wis.2d 327, 332, 246 N.W.2d 794 (1976).

apply universally to include any pecuniary or similar interest in a legislative measure. If, however, the phrase is observed to be but part of a statute which otherwise clearly is concerned with interests in passage or defeat of legislation, it is not unreasonable to believe that the concern of this portion is completely consistent with the overall concern of the whole statute instead of the sole exception. See 2A Sands, *Sutherland Statutory Construction*, sec. 46.05, pp. 56, 57 (4th ed. 1973).

Although there is equivocal authority to the contrary, see *Sutherland, supra*, vol. 2A, sec. 47.02, p. 71, the rule in this state is that, in construing legislation, the meaning of a section of a statute must be derived from the act as a whole. *State ex rel. B'Nai B'Rith Foundation of U.S. v. Walworth County Bd. of Adjustment*, 59 Wis.2d 296, 308, 208 N.W.2d 113, 64 A.L.R. 3d 1075 (1973), and cases cited. The propriety of contextual interpretation in this particular situation also is suggested by the punctuation of the section, which can be considered as an aid to interpretation if the intent of the Legislature is unclear. See generally *Sutherland, supra*, vol. 2A, sec. 47.15, p. 98. The entire statute is but a single sentence.

Perceiving the phrase, "pecuniary or other interest," in the context of other rules regulating lobbying reinforces the restrictive interpretation resulting from construction of the corrupt influence statute as a complete entity. All other sections of Substitute Amendment 3, with their civil penalties, apply only to persons with pecuniary interests in passage or defeat of legislation, either as lobbyists who are paid to influence or attempt to influence lawmakers, or as principals who pay lobbyists to do so. Surely it was not intended that a section with more severe criminal penalties be applicable more broadly to citizens with personal pecuniary interests in the substance of legislation. Lobbying laws, no less than any others, must be given a logical, sensible and reasonable construction. *State v. Hoebel*, 256 Wis. 549, 552, 41 N.W.2d 865 (1950).

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I would point out that the words "anything of pecuniary value" as used in sec. 16 are nowhere defined in current law or in the bill. The words "anything of value" appear and are defined in chapters 12 and 19 of the statutes and the words "pecuniary interests" are defined in sec. 13.62(7), Stats., which is unaffected by the bill. Failure to specifically define this term could lead to an argument that the law is unconstitutionally vague and thus a narrow and carefully drawn definition should be provided.

Although additional arguments may be made in favor of a construction limiting pecuniary and other interests to those in passage or defeat of legislation *per se*, and reasonable arguments can be advanced in opposition, no purpose would be served by further discussion since, if the section is to be construed in a way which will preserve its constitutionality, it must be construed in the more narrow manner in any event.

A statute which regulates fundamental constitutional rights is impermissibly broad if it restricts exercise of those rights any more than is minimally necessary to achieve the compelling purpose which justifies regulation at all. *NAACP v. Alabama, supra*, 307, 308, and cases cited; *In re Kading, supra*, 527. See *Buckley v. Valeo, supra*, 25.

The purpose of the corrupt influence law is not the same as that of the remainder of Substitute Amendment 3, as stated in the second section of the amendment. Its similar but more limited purpose, rather, as indicated in the introduction to the ancestral enactment, is "to protect the people against corrupt and secret influences in matters of legislation." Ch. 145, Laws of 1858, p. 200. There is reason to suppose that this is a sufficiently compelling purpose to justify some requirement of disclosure of those interests prior to lobbying so that legislators more readily may resist, discount, or otherwise properly assess them. See *United States v. Harriss, supra*, 625; *Advisory Opinion on the Constitutionality of 1975 PA 227, supra*, 23. Cf. *Buckley v. Valeo, supra*, 25-27.

In order to accomplish this purpose, however, not every interest in a legislative proposal need be disclosed. It is sufficient if only "corrupt and secret influences," those beyond the legitimate interests of ordinary concerned citizens, are revealed. These reasonably include pecuniary and similar interests in procuring or attempting to procure passage or defeat of a legislative measure *per se*, which provide incentive to employ bribery and other corrupt methods of persuasion, see 51 Am. Jur. 2d, *Lobbying*, sec. 4, p. 995, and the related *per se* interests of agents and attorneys, which might be masked by an affected concern for the common good. See *United States v. Harriss, supra*, 625; *Fritz v. Gorton, supra*, 931.

There is no need to compel, under the possible penalty of imprisonment, all citizens who are pecuniarily interested in the

substance of legislation as businesspersons or even taxpayers to disclose this personal interest prior to petitioning their elected representatives on their own behalf. Cf. Annot., *Lobbying-Regulations*, 42 A.L.R. 3d 1046, sec. 3, p. 1051 (1972). Such interests are neither unexpected nor improper. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961). The right of the people to inform their representatives in government of their desires cannot be made to depend on whether or not its exercise is motivated by financial interest. *Ibid.*

It is my opinion, therefore, that the corrupt influence statute should be construed to require prelobbying disclosure of interest only by agents and attorneys of others, and by persons having a pecuniary or similar interest in passage or defeat of a legislative measure *per se*. Construed in this limited manner the statute is, with the exception of the definitional problem noted, neither unconstitutionally vague nor overly broad, as far as the ordinary citizens of this state are concerned.

Additional first and fifth amendment questions raised by the statute as applied to agents and attorneys, and those with *per se* pecuniary interests, are beyond the scope of this opinion.

## II. Sec. 3 Definition Of Lobbying.

On several occasions the United States Supreme Court has expressed serious doubt about the constitutionality of laws which affect the efforts of private individuals to influence public opinion, however remote the influence of those efforts on the ultimate legislative process.

Such laws have never been expressly declared unconstitutional by the Court. But in *United States v. Rumely*, 345 U.S. 41, 45-47 (1953), a congressional investigative resolution was upheld by limiting the scope of the "lobbying activities," into which a subcommittee was authorized to inquire, to representations made directly to members of Congress. And in *United States v. Harriss, supra*, 620, 621, the Court, in order to avoid the first amendment issue which would be raised by "broader application to organizations seeking to propagandize the general public," read out of the federal lobbying law the word "indirectly." The court restricted the reach of the statute to persons and contributions, one of whose main purposes was to influence passage or defeat of legislation, when the intended

method of accomplishing this purpose was through direct communication with federal legislators.

An analogous state statute, requiring registration by anyone engaged in promoting or opposing in any manner the passage of legislation on behalf of any race or color, was struck down by a three-judge federal court in *NAACP v. Patty*, 159 F. Supp. 503 (E.D. Va. 1958). The fault found with this provision was that it imposed a duty to register "upon anyone who in concert with others merely speaks or writes on the subject, even if he has no contact of any kind with the legislative body and has neither received nor spent any money to further his purpose." *Id.*, 525. This case was vacated by the Supreme Court in *Harrison v. NAACP*, 360 U.S. 167 (1959), because the registration statute, and others also declared unconstitutional below, were susceptible to state court constructions which would avoid the necessity for federal adjudication. The Supreme Court heavily hinted that the limitations imposed in *Rumely* and *Harriss* would require a different result on the constitutional question. *Id.*, 177, 178.

Although the Supreme Court's studied avoidance of this question has left the applicable constitutional principles less than clear, the import of its opinions seems to be that the government may not regulate, as "lobbying," persuasive activities relating to legislation which involve no direct communication with lawmakers. Conversely, efforts to influence passage or defeat of legislation by means of direct communication with lawmakers, whether oral or written or a solicitation of others directly to communicate, are subject to some degree of regulation when the collection or expenditure of funds for that purpose is involved. See *United States v. Harriss*, *supra*, 629 (Douglas, J., dissenting). See also *Advisory Opinion on the Constitutionality of 1975 PA 227*, *supra*, 22 n. 44.

The applicability of Substitute Amendment 3 is established by the definition of lobbying in sec. 3. Lobbying is defined as "the practice of attempting to influence legislative or administrative action by direct oral or written communication to any elective state official, agency official or legislative official or by paid-advertising through communications media."

The first class of defined lobbying activities obviously presents no federal constitutional problem. The second class of activities, however, which makes no distinction between media advertising

aimed at simply influencing public opinion on a legislative measure, and perhaps lawmakers indirectly as a result, and advertising which seeks to solicit others to communicate directly with lawmakers, is applicable on its face to apparently impermissibly indirect, as well as permissibly direct, communication with policymaking state officials.

Section 32 of the substitute amendment exempts from the subchapter's application lobbyists, officers or employes of government agencies, and working members of the press whose lobbying activities are limited, *inter alia*, solely to public persuasion through communications media. This section reduces, but does not remove, the constitutional objections to the proposed law. Its provisions still are applicable to indirect communicative activities if a lobbyist, government officer or employe, or reporter engages in both direct and indirect communicative activities.

It is my opinion, therefore, that the definition of lobbying, insofar as it includes indirectly communicative paid advertising through communications media, is probably unconstitutionally broad.

An additional difficulty could be presented by the extension of the definition of lobbying, and therefore lobbying regulations, to "administrative action," defined in sec. 4 of the substitute amendment as "the proposal, drafting, development, consideration, promulgation, amendment, repeal or rejection by any agency of any rule promulgated under ch. 227."

Administrative agencies are public tribunals which possess, not only this limited power to legislate, but also the quasi-judicial power and authority to determine the rights of particular persons according to law. *See State ex rel. Thompson v. Nash*, 27 Wis.2d 183, 195, 133 N.W.2d 769 (1965); secs. 227.01(2) and (9), 227.014 and 227.07, Stats. In some cases the power to make rules and the power to determine individual rights may be involved in the same administrative proceeding. *See Ashwaubenon v. State Highway Comm.*, 17 Wis.2d 120, 127, 115 N.W.2d 498 (1962). Representation of an affected person in such a proceeding may require inextricably intertwined efforts to influence the broad rule under consideration, as well as assertive advocacy of the client's legal rights in order to assist in the proper interpretation and enforcement of the law. These activities conceivably could simultaneously constitute both lobbying, under the proposed definition, and the

practice of law, as defined by the Wisconsin Supreme Court in *State ex rel. State Bar v. Keller*, 16 Wis.2d 377, 388, 114 N.W.2d 796, 116 N.W.2d 141 (1962), *vacated on other grounds* 374 U.S. 102 (1963), *on remand* 21 Wis.2d 100, 123 N.W.2d 905 (1963), *cert. denied* 377 U.S. 964 (1964).

It is beyond the scope of this opinion to analyze the range of activities that would constitute both the practice of law and lobbying before administrative agencies under the proposed definition. Some of these questions are presently under consideration by the Unauthorized Practice of Law Committee of the Wisconsin State Bar Association.

The Legislature, as indicated previously, has authority properly to regulate lobbying. The practice of law, however, may be regulated in this state only by the judiciary, ultimately the State Supreme Court. *State ex rel. State Bar v. Keller, supra*, 386; *State ex rel. Reynolds v. Dinger*, 14 Wis.2d 193, 202, 203, 109 N.W.2d 685 (1961). The Legislature may aid but not thwart the courts in the exercise of this state constitutional power. *State ex rel. Reynolds v. Dinger, supra*, 203. The Legislature may not forbid a practice of law not forbidden by the courts. *Ibid.*

The regulation of lobbying in administrative proceedings pursuant to Substitute Amendment 3 ultimately includes prohibition of its practice if the conditions imposed are not complied with. Substitute Amendment 3, sec. 19, amending sec. 13.63(3), Stats. In those cases in which conduct might constitute both lobbying and the practice of law, the amendment could be intruding into an area constitutionally reserved exclusively to another branch of government. *Cf. In re. Cannon*, 206 Wis. 374, 240 N.W. 441 (1932).

### III. Sec. 5 Definition Of Lobbyist.

Section 5 of the substitute amendment defines a lobbyist as "any person who is paid a salary, fee or retainer by a principal and whose regular duties include lobbying." There is some question about the meaning of the phrase "regular duties."

Generally, words and phrases in Wisconsin laws are to be construed according to common and approved usage. Sec. 990.01(1), Stats. Such usage may be established by the definition given in a recognized dictionary. *Estate of Nottingham*, 46 Wis.2d

580, 588, 175 N.W.2d 640 (1970). *Webster's Third New International Dictionary*, p. 1913, offers a number of definitions of the word "regular."

The largest group of meanings has a chronological connotation, involving, essentially, repetition of events at certain temporal intervals. It was with this meaning that the word "regular" was used in Senate Substitute Amendment 1 to 1977 Senate Bill 286. I pointed out in my opinion on the Senate bill that the slightly, but critically, different definition of lobbyist was unconstitutionally vague because the precise point in time when lobbying activities become regular rather than occasional is a matter of opinion about which there may be considerable difference among reasonable persons.

"Regular," however, also may mean conducted or done in conformity with established or prescribed usages or rules. *Webster's Dictionary, supra*. In this sense the word is somewhat synonymous with normal or ordinary. It seems to be in this second sense that "regular" is used in the Assembly's definition of lobbyist. "Regular duties" reasonably appear to be those which are agreed, expected or anticipated to be performed, in execution of an employment contract. They are those duties which would be found in a job description.

Although there still may be individual instances in which it is questionable whether lobbying is a regular duty of a particular employe or agent, the existence of borderline cases does not make a regulatory statute unconstitutionally vague. *Roth v. United States*, 354 U.S. 490, 491, 492 (1957). In my opinion, the definition of lobbyist in Substitute Amendment 3, if construed as I believe it should be, is sufficiently definite to give reasonable persons adequate notice of the conduct regulated. *Cf. United States v. Harriss, supra*, 622, 623. *See generally State v. Mahaney, supra*, 448 and cases cited. I would, nevertheless, suggest some clarification of meaning in the manner I have outlined so that questions of definition can be avoided in actual application of the law.

#### IV. Sec. 16 Prohibited Practices.

Section 16 of the substitute amendment prohibits professional lobbyists from engaging in certain specified practices. The constitutionality of this list, as it pertains to such lobbyists, is beyond the scope of the present opinion. The section, however, next prohibits

principals, earlier defined as any person who engages a lobbyist, from engaging in two of the listed practices.

First, principals may not furnish lodging, transportation, food, meals, beverages, money, or any other thing of pecuniary value to any officer or employe of the state, or to any elective state official or candidate for elective state office, except the Governor when acting in an official capacity. Conversely, no candidate for an elective state office, elective state official, or other officer or employe of the state may solicit or accept anything of pecuniary value from a principal, except campaign contributions at specified times and, in the case of legislators, reimbursed expenses, speaking fees and compensation for published works.<sup>3</sup>

Generally, there does not appear to be any recognized constitutional right to furnish things of pecuniary value to state government personnel, nor any reciprocal right of state government personnel to solicit or accept such things. However, a problem exists when one spouse is a state elective official or other officer or employe and the other spouse is a principal. The first amendment right to associate includes the right to associate with a spouse in marriage. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). This reasonably includes the right to share lodging, food, and myriad other things of pecuniary value ordinarily given and received in the marital relationship. *Cf., Ibid. See also Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

The prohibited practices section does not discriminate in its application between persons who are married and those who are not. It prohibits the furnishing of food, clothing and shelter to a spouse, who also happens to be associated with state government, as well as to unrelated state government personnel. The section thereby regulates a fundamental right.

The patent purpose of prohibiting the exchange of pecuniarily valuable things between those involved in lobbying and those involved in government is to prevent the purchase of official favors, and the appearance of such purchases as well. Both are compelling state

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<sup>3</sup> One effect of these proscriptions is to distinguish between the Governor and other state officials in certain areas and legislators and other officers and employes in other areas. The propriety of these distinctions under an equal protection analysis is questionable.

interests justifying some regulation of fundamental rights. *Buckley v. Valeo, supra*, 26, 27.

The initial problem is that the restrictions imposed on the marital relationship do not really accomplish this purpose. Any appearance of impropriety is given simply by the intimacy of the marital relationship itself, which implies the sharing of both affections and possessions. More important, since an officer, employe, shareholder or partner of an association, corporation or partnership is not personally a principal, Substitute Amendment 3, sec. 8, p. 4, almost anyone bent on evading the restrictions can do so, by forming an organization to engage a lobbyist. No substantial societal interest is served by restrictions designed to prevent corruption which still permit unscrupulous persons to spend unlimited sums of money to obtain improper influence over government personnel. *Buckley v. Valeo, supra*, 45.

These restrictions excessively burden the protected marital relationship. It hardly can be suggested seriously that a spouse is likely to misuse a public position for those simple niceties and necessities which are expected to be exchanged in any marriage. Nor is there any appearance of misuse, in excess of whatever appearance inherently is created by the marital relationship itself, given by such simple exchanges.

Equally troublesome is the overreach of the restrictions to any state employed spouse, even those laboring at the most menial civil service tasks, who are without any ability whatever to influence legislative or administrative decision making in their own bureaus, much less in the upper levels of other departments of state government. These persons present no greater danger of corruption, in reality, than those outside the governmental structure, and there is no reason to impose any restrictions on their marriages. *Cf., Advisory Opinion on the Constitutionality of 1975 PA 227, supra*, 20, 21.

It is no answer to these excesses that they may be evaded. If protected expression is made impossible by the threat to the marital relationship the law exacts too heavy a price.

The prohibition of the practice of furnishing things of pecuniary value to state personnel is unconstitutionally overbroad, as applied to principals, because its unrestrained sweep unnecessarily burdens first

amendment marital rights without accordingly serving any substantial state interest.<sup>4</sup> See generally *Buckley v. Valeo*, *supra*, 25, 47, 48; *NAACP v. Alabama*, *supra*, 307, 308; *In re Kading*, *supra*, 527.

The second practice prohibited to principals is that of making campaign contributions to candidates for state offices to be filled at the general election, except between June 1st and the day of the election. Contributions may not be made to legislative candidates even during this five-month time unless the Legislature is not in session or has recessed.

This prohibition restricts an aspect of the contributor's right of political association, again a fundamental right protected by the first amendment. *Buckley v. Valeo*, *supra*, 24, 25. Some restriction is justified by the danger of contributions being made to secure political favors from current and potential office holders, and by the appearance of corruption coming from public awareness of the opportunity for abuse when an official's campaign has been financed by a few large contributions. *Id.*, 25. But the restrictions on contributions in sec. 16, like the restrictions on supporting spouses, go beyond those necessary to protect the integrity of our system of representative democracy.

The restrictions, as a practical matter, do not prevent principals from influencing, or attempting to influence, candidates with contributions to their campaigns. A principal, again, need only form an organization for the retention of a lobbyist to remain free to lavish contributions when, and on whom, he chooses. And if the principal should find this evasion too troublesome, he still is free to promise when, and to whom, he wishes to make a contribution during the next permitted period. A candidate, if he is susceptible to financial influence, will be as easily influenced by contributions made within the permitted period as without.

The restrictions on timing, but not size, of contributions do not dispel any appearance of impropriety either. That appearance is created merely by the making of a large contribution at a time proximate to that at which legislative or administrative action of

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<sup>4</sup> These arguments appear to apply with similar vigor to the relationship between a principal and the children under the principal's control. Cf. *Pierce v. Society of Sisters*, 268 U.S. 510, 534, 535 (1925); *Meyer v. Nebraska*, *supra*, 399.

concern to the contributor occurs, especially if the elected official's position is favorable to the contributor. Seldom are governmental decisions made instanter; more likely they are finally reached only after discussion for months or years during which many pressures are applied to the deciders.

Finally, the contribution restrictions are unconstitutionally excessive. They not only limit, but totally prohibit, one aspect of political association with any candidate in the primary campaign, which in many cases may be *the* election, *Cf. United States v. Classic*, 313 U.S. 299 (1941), and may prohibit such association with legislative candidates in the general election if the Legislature remains in session all through the permitted contribution period. The same state purposes which prompt such drastic abridgement of first amendment freedoms can be achieved, however, perhaps more effectively, by the less restrictive and constitutionally permissible means of ceilings on the amount of contributions which may be made to a candidate in a political campaign. *See Buckley v. Valeo, supra*, 26-29. This unnecessary excess constitutes an impermissible burden, for reasons discussed previously, even though the restrictions may be evaded.

The restrictions on campaign contributions are overly broad as applied to principals because they, too, unnecessarily burden first amendment rights without thereby serving any substantial state interest. *See generally Buckley v. Valeo, supra*, 25, 47, 48; *NAACP v. Alabama, supra*, 307, 308; *In re Kading, supra*, 527.

#### V. Secs. 17 And 22 Licensing Of Lobbyists.

Section 22 of Substitute Amendment 3 prohibits principals from permitting lobbyists to act on their behalf until the lobbyists are duly licensed. Section 17 establishes the procedure for license application. It provides further that no application may be disapproved by the board on elections and lobbying without affording the applicant a hearing. Denial of a license may be reviewed pursuant to the procedures provided in ch. 227, Stats.

Inherent in the latter provisions of sec. 17 is the assumption that the board may deny a lobbying license, thereby stifling, for a time at least, the ability of a principal to petition the government in a constitutionally protected manner. No criteria are set forth, though, to guide the board in deciding when to deny a license.

“[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional.” *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-151 (1969), and many cases cited. See also *Mutual Fed. Savings and Loan Assn. v. Savings and Loan Adv. Comm.*, 38 Wis.2d 381, 389, 157 N.W.2d 609 (1968).

Both secs. 17 and 22, since they totally lack standards for denial of a license to engage in lobbying, are unconstitutional.

#### VI. Sec. 18 Suspension Of License For Failure Timely To File A Complete Expense Statement.

Section 18 authorizes the board on elections and lobbying to suspend the privilege of any lobbyist to lobby on behalf of a principal if the principal fails to file a complete expense statement on time. Provision is made for mailing notice of the alleged delinquency and anticipated termination of privileges to the delinquent principal and any lobbyist registered to act on his behalf. The principal is given a 10 day period of grace, after which, if he still has not filed a complete expense statement, no lobbyist is permitted to act on his behalf. Lobbying privileges are restored immediately on filing the delinquent statement. This section, unlike analogous sections of the substitute amendment authorizing denial and revocation of lobbying licenses, does not provide for a hearing prior to suspension of lobbying privileges.

The lack of opportunity for a hearing is a serious defect in the law and raises constitutional problems. A right, privilege or license, once granted by the government, cannot be suspended for failure to comply with continuing licensing requirements without affording the licensee a hearing. *Bell v. Burson*, 402 U.S. 535, 539 (1971), and cases cited; *Chicago and Northwestern Transportation Co. v. Pedersen*, 80 Wis.2d 566, 571, 259 N.W.2d 316 (1978). In some cases, when immediate harm to the public is threatened and the private interest infringed is reasonably deemed to be of less importance, a post suspension hearing is sufficient. *Goldberg v. Kelly*, 397 U.S. 259, 263 n. 10 (1970). When first amendment rights are infringed, however, an adversary hearing must be held prior to suppression of the right to engage in speech related activities

ordinarily protected by that provision of the constitution. *Compare Ibid. with State v. I, A Woman - Part II*, 53 Wis.2d 102, 112, 113, 191 N.W.2d 897 (1971), and cases cited. In my opinion, failure to provide for a presuspension hearing would violate the first and fourteenth amendment rights of both principals and lobbyists.

At a presuspension hearing the licensee is entitled to at least the minimum procedures mandated by notions of due process, including notice of the nature of the complaint against him and an opportunity to contest the assertion that he has failed to comply with the pertinent regulations. *Bell v. Burson, supra*, 540-542; *Chicago and Northwestern Transportation Co. v. Pedersen, supra*, 571, 572.

Other provisions of Substitute Amendment 3 make the failure to provide for a presuspension hearing particularly puzzling.

If a lobbyist or principal actually makes prohibited expenditures he is subject to revocation of lobbying privileges for a maximum of three years. Substitute Amendment 3, sec. 30, creating sec. 13.69(7), Stats. Such person is entitled to a judicial hearing on the issue of his liability. Substitute Amendment 3, sec. 28, creating sec. 13.685(5), Stats. And the board is authorized to compromise and settle such a case if, in the board's opinion, it constitutes a minor violation caused by excusable neglect or should not be prosecuted in the public interest for other good cause shown. *Ibid.*

If a lobbyist or principal merely fails to report expenditures, which may or may not have been prohibited, he is subject to an indefinite suspension of lobbying privileges. No hearing of any kind is provided for. The gravity and causes of the violation appear to be irrelevant where the question is or may be permanent deprivation of the right to petition the government by lobbying. One can think of numerous examples of excusable neglect, such as failure of the mails, illness, vacations, etc. which might be the reason for a principal's failure to file. No opportunity is provided, as in the instance of other violations, for the Board to consider these matters.

Although I have been asked to give my opinion only on first and fourth amendment problems possibly created by this pending legislation, I feel obliged to point out that an unexplained distinction may violate the equal protection provision of the fourteenth amendment unless there is an explanation of which I am not now aware. *Cf. State v. Asfoor*, 75 Wis.2d 411, 440, 441, 249 N.W.2d 529

(1976); *State ex rel. Kovach v. Schubert*, 64 Wis.2d 612, 616-622, 219 N.W.2d 341 (1974); *State v. Johnson*, 74 Wis.2d 169, 173, 174, 246 N.W.2d 503 (1976).

VII. Secs. 18, 20, 21, 27 And 32 Disclosure Requirements.

Several sections of Substitute Amendment 3 require principals who spend more than \$250 per year for lobbying activities not limited to public presentations to file reports with the board on elections and lobbying. The reports are required to contain detailed information which fits into the following categories: 1) identity of the lobbyist, 2) identity of the principal, 3) area of attempted influence, 4) nature and interests of the principal, 5) expenditures for lobbying activities, and 6) exchanges of things of value with state officials and closely related persons or organizations.

Compelled disclosure, in itself, can seriously infringe on the privacy of association and belief guaranteed by the first amendment. *Buckley v. Valeo*, *supra*, 64. The invasion of privacy may be as great when the information sought concerns the expenditure of money as when it deals with beliefs directly, for financial transactions reveal much about a person's activities, associations and beliefs. *Id.*, 66.

But there are governmental interests sufficient to outweigh the possibility of infringement, especially when the free functioning of representative institutions is involved. *Ibid*. Disclosure facilitates the ability of public officials properly to assess the pressures put on them. *United States v. Harriss*, *supra*, 625. Similarly, disclosure provides voters with information about the sources and magnitude of financial and persuasional influences on the government, enabling the electorate to evaluate the performance of public officials with respect to the interests, public or special, to which they are responsive. *Fritz v. Gorton*, *supra*, 931. *Cf. Buckley v. Valeo*, *supra*, 66, 67. Exposure to the light of publicity discourages corrupt influences and avoids the appearance of corruption. *Buckely v. Valeo*, *supra*, 67. Finally, recordkeeping, reporting and disclosure requirements are an essential means of gathering the data necessary to detect violations of lobbying laws. *Id.*, 68.

For these reasons the Legislature is not constitutionally forbidden to require the disclosure of lobbying activities, either by persons hired to influence governmental action, or by those paying others to act on their behalf. *United States v. Harriss*, *supra*, 625; *Advisory Opinion*

on the Constitutionality of 1975 PA 227, *supra*, 23; *Fritz v. Gorton*, *supra*, 930. See *State v. Decker*, 258 Wis. 177, 181, 45 N.W.2d 98 (1950). See generally Note: *Improving the Legislative Process*, 56 Yale L.J. 304, 313-316 (1947). Those particular activities required to be disclosed, however, must be restricted to those which are substantially related to the significant governmental interests they are supposed to serve. *Buckley v. Valeo*, *supra*, 64; *NAACP v. Alabama*, *supra*, 463. See *United States v. Harriss*, *supra*, 626.

Information identifying both lobbyist and principal obviously is indispensable to implementation of all these interests. See *United States v. Harriss*, *supra*, 625; *Fritz v. Gorton*, *supra*, 931.

Knowledge of the area of attempted influence is necessary to enable public officials to assess the pressures on them, and to enable the public to assess the success of pressures on their officials. Before an official intelligently can evaluate what he is being told by a lobbyist, he must understand why it is being told. See *United States v. Harriss*, *supra*, 625; *Fritz v. Gorton*, *supra*, 931. Before the public can judge the effect of influence on its officials, it must be made aware of the areas where influence has been applied. See *Fritz v. Gorton*, *supra*, 931.

Disclosure of the nature and interests of the principal<sup>5</sup> certainly is essential to official evaluation of lobbyist pressures. It prevents the voice of the people from being drowned out by the cries of special interest groups seeking favored treatment while masquerading as proponents of the public good. *United States v. Harriss*, *supra*, 625. Such disclosure, moreover, directly provides voters information about the sources of the influences on their government. See *Fritz v. Gorton*, *supra*, 931. And clearly those with corrupt interests will be discouraged from seeking government support for them if state officials and the people they serve are aware of their purposes. As Mr. Justice Brandeis advised:

“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”  
Quoted in *Buckley v. Valeo*, *supra*, 67.

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<sup>5</sup> For general comment on the right to require disclosure of the purpose and nature of activities of organizations see *Bates v. Little Rock*, 361 U.S. 516 (1960); *NAACP v. Alabama*, *supra*.

Itemization of expenditures for lobbying activities enables both state officials and their constituents to assess the magnitude of the monetary pressures on their government, providing a proper perspective of the role that financial influence plays in official decision making. *Fritz v. Gorton, supra*, 930, 931. Exposure of individual expenditures also aids in avoiding corruption and its appearance by inhibiting spending for improper purposes, and by demonstrating the propriety of most expenditures. *Cf. In re Kading, supra*, 527, 528. The data provided unquestionably assists in detecting violations of lobbying laws.

Expenditures for advertising and public information are, in my opinion, however, improperly required to be itemized. As discussed earlier, persuasive efforts aimed at indirect communication with lawmakers by influencing public opinion cannot be subjected to regulation by the government. The required itemization of expenditures for public information directly violates this immunity. And since the requirement for itemization of expenditures for advertising does not distinguish between advertising which attempts to influence public opinion and advertising which seeks to solicit direct communication with lawmakers, it too infringes on the exercise of activities immune from lobbying regulations.

Disclosure of exchanges of things of value with public officials and those persons or organizations closely related to public officials inhibits the flow of secret money from inappropriate special interest sources to government officials for inappropriate purposes. *Fritz v. Gorton, supra*, 931. It also enables the public and their guardians in government to detect abuses by other public officials.

With the single exception noted above, the disclosure requirements of the proposed legislation meet the first amendment's standard of substantial relation to a compelling governmental purpose. In meeting this stringent standard they surpass the requirements imposed by the fourth amendment on forced disclosure.

It is well settled that the fourth amendment's prohibition of unreasonable searches and seizures does not forbid an administrative agency to require the submission of reports regarding regulated activity. *SEC v. Kaplan*, 397 F. Supp. 564, 568 (E.D. N.Y. 1975), citing *Davis, Administrative Law Text*, 55 (3rd ed. 1972); *Dixon v. Pennsylvania Crime Commission*, 347 F. Supp. 138 (M.D. Pa.

1972). See *California Bankers Assn. v. Shultz*, 416 U.S. 21, 59-62 (1974), and cases cited. The fourth amendment demands only that the disclosure required not be unreasonable. *California Bankers Assn. v. Shultz*, *supra*, 67, and cases cited. If the information is sufficiently described and limited in nature, and is reasonably relevant to an inquiry which the agency has authority to make, it can be compelled, consistent with constitutional protection against unreasonable searches and seizures. *Ibid.* See *Advisory Opinion on the Constitutionality of 1975 PA 227*, *supra*, 21.

The information sought by Substitute Amendment 3 certainly is specific, and, as discussed above, is limited, not simply to matters which are reasonably related to an authorized inquiry, but to information which is substantially related to an inquiry serving a compelling state interest.

No questions respecting self-incrimination under the fifth amendment privilege are presented since disclosure is demanded of a broad group, operating in an essentially noncriminal and regulatory area, rather than of a highly select group, inherently suspected of criminal activities, operating in an area permeated with criminal statutes. See generally *California v. Byers*, 402 U.S. 424, 430 (1971), and cases cited.

Identical, substantially similar or even more detailed disclosure requirements have been approved as constitutionally permissible lobbying regulations in *Harriss*, pp. 614, 615, nn. 1, 2; the Michigan Supreme Court's *Advisory Opinion*, p. 22; and *Fritz*, pp. 927, 928, n. 4, as well as in a few other cases.<sup>6</sup> No authority has been found, which has not been overruled on appeal, which declares any similar provisions, except the itemization of expenditures for advertising and public information, to be unconstitutional. In my opinion, therefore, all but one of the disclosure requirements of Substitute Amendment 3 are a constitutionally valid exercise of the Legislature's power to regulate lobbying activities.

#### VIII. Sec. 34 Auditing

<sup>6</sup> Analogous financial disclosure requirements for candidates for elective office and public officials have been approved in numerous cases. See, e.g., *Buckley v. Valeo*, *supra*, *In re Kading*, *supra*, and cases cited.

Section 34 mandates random audits by the board on elections and lobbying of the statements filed by principals, and gives the board permission to inspect all accounts and financial records relating to them required to be kept by principals and lobbyists. The board is empowered to subpoena persons to appear before it and to "require the production of any papers, books or other records relevant to an investigation." Records kept by financial institutions need not be subpoenaed, but may be inspected and copied at the institution if a circuit court so orders upon a showing of probable cause to believe that there has been a violation of the lobbying laws.

Inspection of records kept in connection with the expense statements discussed previously is permitted under the required records doctrine of *Shapiro v. United States*, 335 U.S. 1 (1948). *Accord, Marchetti v. United States*, 390 U.S. 39 (1968). Records required to be kept by law in order that there may be suitable information of transactions which are an appropriate subject of government regulation, and enforcement of validly established restrictions, are not privileged like private papers. *Marchetti v. United States, supra*, 55, quoting *Shapiro v. United States, supra*, 33. They may be inspected without warrant or other legal process when they are of the kind customarily kept, there is a public aspect to them, and they relate to an essentially non-criminal and regulatory area of inquiry. *Marchetti v. United States, supra*, 57. The records required to be kept by principals and lobbyists are the kind customarily kept by those who employ or are employed in any venture involving persuasive activities. There is a plain public aspect to records of attempts to influence the decisions of state government. And lobbying is essentially a regulatory area of inquiry with few criminal provisions.

In the exercise of their investigative powers, administrative bodies may be authorized to issue both simple subpoenas, requiring persons to appear and testify personally, and subpoenas duces tecum, requiring persons to produce relevant documents. 73 C.J.S., *Public Administrative Bodies and Procedure*, sec. 86, pp. 408, 409. *See also Davis, Administrative Law Treatise*, ch. 3, p. 78, *et seq.* (1970 Supp.). The power to subpoena, however, must be exercised within the limits of the first, fourth and fifth amendments of the constitution. *United States v. Dionisio*, 410 U.S. 1, 11, 12 (1973).

The first amendment prevents use of the power to investigate, enforced by the power of contempt, oppressively to probe at will and without relation to existing need. *De Gregory v. Attorney General*, 383 U.S. 825, 829 (1966); *Watkins v. United States*, 354 U.S. 178, 197-200 (1957). Intrusion into the realm of protected political privacy by demanding disclosure from an unwilling witness may be justified only when a substantial state purpose is served by compulsion of information substantially related to that purpose. *De Gregory v. Attorney General*, *supra*, 829; *Gibson v. Florida Investigating Committee*, 372 U.S. 539, 545, 546 (1963); *Watkins v. United States*, *supra*, 199, 200. The interests which justify compulsion of information and the information which can be compelled under the first amendment were discussed in the preceding section.

A subpoena to testify is not the kind of state intrusion on privacy against which the fourth amendment offers protection, once the fifth amendment privilege against self-incrimination is satisfied. *United States v. Dionisio*, *supra*, 10. The fourth amendment provides protection against a subpoena duces tecum only insofar as it is too sweeping in its terms to be regarded as reasonable. *Id.*, 11, and cases cited. Again, the same sorts of information which the first amendment permits to be produced under subpoena are permitted by the fourth's lesser degree of protection.

The protection of the privilege against self-incrimination is limited to compulsion of incriminating live testimony from the mouth of the subpoenaed witness, and to production of private books and records in the witness' possession that would incriminate him. *United States v. Dionisio*, *supra*, 11. The privilege does not apply to books and records in the hands of a third person, *Fisher v. United States*, 425 U.S. 391, 397, 398 (1976); *Couch v. United States*, 409 U.S. 322, 329 (1973), or to the records of a partnership, *Bellis v. United States*, 417 U.S. 85 (1974), or corporation. *California Bankers Assn. v. Shultz*, *supra*, 71; *Hale v. Henkel*, 201 U.S. 43 (1906).

Although sec. 34 does not by its own terms incorporate all these constitutional guarantees, the subpoenas it authorizes, like those issued by any other board, are enforced by contempt proceedings before a court of law. Sec. 885.12, Stats. In such proceedings constitutional objections to the compulsion of testimony or documents can be raised and, if raised correctly, vindicated. *See*,

*United States v. Miller*, 425 U.S. 435, 444, n. 6 (1976); *State v. Balistrieri*, 55 Wis.2d 513, 522-524, 201 N.W.2d 18 (1972); *State ex rel. St. Mary's Hospital v. Industrial Comm.*, 250 Wis. 516, 520, 27 N.W.2d 478 (1947); sec. 885.12, Stats. Because of this judicial check on the broad language of the subpoena provision, which unchecked would be unconstitutional, I am of the opinion that, in theory at least, the provision meets constitutional standards for compulsion of information by subpoena.

I cannot ignore the possibility, though, that in practice even judicial review of the board's subpoena power may not be sufficient to save this provision from being unconstitutional as applied.

Since contempt proceedings and the papers which initiate them are public, the public may inspect, and the press may publish, the accusations that those associated with lobbying are hiding records which will reveal information about their activities that the state has a right and a reason to know. See generally *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 495 (1975).

Such accusations alone, even though erroneous, might in many cases discredit, in the eyes of citizens and statesmen alike, lobbyists or principals who resist unwarranted intrusion into their protected private affairs.

"The finger of government leveled against the [lobbyist] is ominous." *United States v. Rumely*, *supra*, 57 (Douglas, J., dissenting).

As was pointed out in *Watkins v. United States*, *supra*, 197: "Abuses of the investigative process may imperceptibly lead to abridgement of protected freedoms." Discrediting a lobbyist or principal simply by instituting unwarranted contempt proceedings could effectively nullify their right to petition the government by means of lobbying, at least until they could vindicate themselves at a later adversary hearing, and perhaps not even then. The whole purpose of the lobbying law, after all, is to separate the forthright lobbyists and principals from those who have something to hide about their persuasive activities. The subpoena provisions, in these circumstances, could impose the equivalent of constitutionally impermissible prior censorship on lobbying activities. Cf. *United States v. Rumely*, *supra*, 57 (Douglas, J., dissenting). See generally, *State v. I, A Woman - Part II*, *supra*, 112, 113, and cases cited.

In a somewhat analogous situation the United States Supreme Court upheld the issuance of grand jury subpoenas to news reporters in part because the secrecy of grand jury proceedings provided protection against invasion of first amendment rights by exposure. *Branzburg v. Hayes*, 408 U.S. 691, 695 (1972). No such protective secrecy is provided for in Substitute Amendment 3.

I am thus unable to say with absolute certainty that sec. 34 as applied to all situations would be constitutional. There is some very limited support in the cases for an argument along the lines suggested above that the section would be unconstitutional as applied where a lobbyist who properly resisted unwarranted intrusion could show evidence of damage to reputation, loss of livelihood, and harm to other property or liberty interests by the necessity to defend against the subpoena in contempt proceedings. In other words, the claim would have to be that the defense of the right to resist carried an impossible cost. On balance, however, I think this section probably would withstand constitutional attack.

No comparable safeguards are provided, regrettably, with respect to accounts and deposit and loan records at any financial institution. Section 34 permits unrestricted inspection of such records simply on judicial showing of probable cause to believe that there has been a violation of the lobbying laws. There is no requirement, as in the case of a search warrant, that the would be inspector demonstrate probable cause to believe that particular evidence of the violation will be found in these records, or that the inspection order specify the places to be searched and the records to be inspected or copied. Since the application for an inspection order may be made *ex parte*, the person whose records are inspected has no opportunity to challenge the propriety of the inspection in an adversary proceeding, such as a contempt proceeding in the case of compulsion by subpoena.

This deficiency poses no problems under the fourth amendment, since inspection does not intrude into an area where the institution's customer has an interest protected by that amendment, there being no reasonable expectation of privacy in records exposed to bank employes in the ordinary course of business. *United States v. Miller*, *supra*, 442, 443. Nor does it pose any problem under the fifth amendment, since no compulsion is exerted against the person who may be incriminated by what the bank's records reveal. *Fisher v. United States*, *supra*, 397; *Couch v. United States*, *supra*, 328.

From what has been discussed previously, however, it is plain that *ex parte* permission to inspect records simply on a showing of probable cause to believe that the customer has violated lobbying laws violates the first amendment rights of the customer. To comport with the protection afforded by the first amendment it is necessary that the inspection be limited to information which is substantially related to a compelling state interest. The existence of such an interest arguably is shown by probable cause to believe that the lobbying laws which serve a substantial state interest have been violated. But this showing alone does not necessarily demonstrate as well that any or all financial records will contain information substantially related to the violation.

As presently written the proposed legislation would permit the state, through essentially “unreviewed executive discretion” to make a wide ranging inquiry that unnecessarily touches on intimate areas of an individual’s personal affairs. *See United States v. Miller, supra*, 444 n. 6, *citing California Bankers Assn. v. Shultz, supra*, 77, 78 (Powell, J., concurring). Without some provision limiting the scope of the inspection to financial records which have a substantial relation to violation of the lobbying laws, this particular provision of Substitute Amendment 3 is unconstitutionally overbroad.

#### IX. Conclusion

In principle, the purposes sought to be accomplished by Substitute Amendment 3 are compatible with the rights of Wisconsin citizens to petition the government and to be secure against unreasonable searches and seizures. Some of the means selected to accomplish those purposes may, on their face or as applied, violate citizens’ first amendment right of petition.

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*Marketing And Trade Practices; Trade Practices; Trade Regulations; Trading Stamps;* A plan in which a record of a customer’s purchases is maintained by a merchant without delivery to the customer and in which the customer can obtain merchandise premiums in return for a specified dollar volume of purchases does not violate sec. 100.15, Stats. OAG 20-78

April 3, 1978.

ARTHUR R. KURTZ, *Deputy Secretary*

*Department of Agriculture, Trade & Consumer Protection*

You have requested my opinion as to the applicability of sec. 100.15, Stats., the trading stamp law, to promotional plans in which no trading stamps or other similar devices are physically issued or delivered to a purchaser in connection with a sale although the purchaser may procure merchandise premiums, privileges or a thing of value after making a sufficient dollar volume of purchases.

The plans which you have described involve a customer identification card or number which is retained by the merchant for the purpose of recording the customer's purchases. The card or number provides the basis for the granting of premiums after the purchaser has reached a given dollar total of purchases.

One such plan involved the giving of small kitchen appliances to any person purchasing \$300 worth of merchandise during a period of several months. In order to participate in the program, purchasers were required to register their name and address at the check-out counter. The check-out person would then fill out a store control card and give the purchaser a program card and identification number. The store would retain a store reference card. Each time the registered purchaser made a purchase the check-out person at the check-out counter would record on a piece of paper the amount of the purchase, the date of the purchase, and either the purchaser's identification number or name and address. The purchaser was not required to show the identification card, but could verbally give the identification number to the check-out person. The merchant then transferred the purchase information to the store control card. When purchases totaled \$300, the purchaser could obtain one of the small appliances. Purchases had to be recorded at the check-out counter. No purchaser was allowed to return with a register tape or other evidence of purchase and have the amount recorded. If the purchaser passed through the check-out point without registering the purchase, the purchaser could no longer register that purchase. When the purchaser received the gift, the merchant noted on the store control card what was given and the date it was given. The purchaser was not required to sign anything in order to obtain the merchandise premium or gift.

You have also indicated that a different merchant plans to implement a similar promotional plan in the near future. A purchaser in this program will either receive a free gift or be entitled to purchase other goods, such as small household appliances at a reduced price, depending on the total amount of purchases. Purchasers, after registering and receiving their identification cards and numbers, must either show the identification card to the check-out person at the check-out counter at the time of purchase, or verbally tell the check-out person what their identification number is. If purchasers do not have the cards with them, or forget their numbers, they must reregister and receive a new identification number. Under this plan, if the purchaser fails to register a purchase at the cash register, the purchaser may return at a later date and verbally inform the merchant of the amount of the purchase. This amount will then be recorded without the purchaser having to present a cash register receipt or any other evidence of the purchase. The merchant would, in effect, be taking the customer's word for it. You have advised that there could be a number of variants of this program, but that each would be conducted in a manner which would avoid the use of a cash register receipt as a trading stamp, or the in-hand issuance of any other trading stamp or device in return for which the customer would obtain merchandise privileges or premiums.

You have indicated that there are two prior opinions by this office which have dealt with this issue and that it is your opinion that there exists a conflict between such opinions. The opinions are found at 14 Op. Att'y Gen. 336 (1925) and 15 Op. Att'y Gen. 536 (1926).

Section 100.15, Stats., provides as follows:

*"100.15 Regulation of trading stamps. (1) No person, firm, corporation, or association within this state shall use, give, offer, issue, transfer, furnish, deliver, or cause or authorize to be furnished or delivered to any other person, firm, corporation, or association within this state, in connection with the sale of any goods, wares or merchandise, any trading stamp, token, ticket, bond, or other similar device, which shall entitle the purchaser receiving the same to procure any goods, wares, merchandise privilege, or thing of value in exchange for any such trading stamp, token, ticket, bond, or other similar device, except that any manufacturer, packer, or dealer may issue any slip, ticket,*

or check with the sale of any goods, wares or merchandise, which slip, ticket or check shall bear upon its face a stated cash value and shall be redeemable only in cash for the amount stated thereon, upon presentation in amounts aggregating twenty-five cents or over of redemption value, and only by the person, firm or corporation issuing the same; provided, that the publication by or distribution through newspapers, or other publications, of coupons in advertisements other than their own, shall not be considered a violation of this section; and provided further, that this section shall not apply to any coupon, certificate or similar device, which is within, attached to, or a part of any package or container as packed by the original manufacturer and is directly redeemed by such manufacturer." (Emphasis added.)

It is my opinion that the determinative language in sec. 100.15, Stats., is the portion which has been emphasized above. In order for a violation of this section to occur, it is necessary that the purchaser receive the trading stamp, token, ticket, bond, or other similar device. Since under sec. 100.26(3), Stats., the section in question is penal in nature, strict construction is appropriate.

8 Op. Att'y Gen. 14 (1919) stated that a program in which customers were given goods, wares, or merchandise by way of premium or rebate, or as an extra value, and in connection with the actual sale of other goods, wares and merchandise was not affected by the trading stamp law. In that opinion it was stated as follows:

"Trading stamps have a rather well defined meaning and the statute is intended to cover the various trading stamp devices in the issuing of trading stamps. It goes no farther than the trading stamp field." at p. 14.

The opinion which you have noted at 14 Op. Att'y Gen. 336 (1925) deals with a fact situation in which the merchant retains a punched card and does not manually deliver it to the customer. This opinion indicated that the plan was in violation of the trading stamp law and based this opinion on a theory which might be described as "constructive receipt." In light of the penal nature of sec. 100.15, Stats., and the resulting strict reading of the language of the statute itself, I am inclined to disagree with the holding of this opinion.

In 15 Op. Att’y Gen. 536 (1926) the fact situation described is virtually identical to that described in 14 Op. Att’y Gen. 336 (1925) and the opinion reads in relevant part as follows:

“The use of this card in the opinion of this department does not violate the above mentioned statute. Since the card is not delivered to the purchaser but is retained by the merchant and merely constitutes a record of sales made to the purchaser, similar in that respect to a ledger account, the card is not such an article as comes within the purview of the trading stamp act.” at p. 536.

Unfortunately, this opinion makes no reference to 14 Op. Att’y Gen. 336 (1925) although it appears to reverse the previous opinion. The opinion at 15 Op. Att’y Gen. 405 (1926) supports the proposition that delivery to the customer is necessary in order to create a violation of the trading stamp law. In that opinion it was stated:

“The use of card ‘D’ does not violate the trading stamp law, for it is never delivered to the purchaser.” at p. 407.

The opinion in 15 Op. Att’y Gen. 536 (1926) is cited with approval in 16 Op. Att’y Gen. 494 (1927).

In light of the language of the statute itself, and the prior opinions of this department, it is my opinion that a plan in which purchases are recorded on a device maintained by a merchant and never delivered to the customer does not violate sec. 100.15, Stats. 14 Op. Att’y Gen. 336 (1925) is repudiated.

BCL:RV

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*Deeds; Microfilm; Mortgages; Real Estate; Register Of Deeds; Vital Statistics;* Although register of deeds can utilize microfilm and photocopies with county board approval, use of a photocopy of writs of attachments and certificates of sale of real estate would not, even with index, be a substitute for the separate indexed book or register of “abstracts” of such documents required by sec. 59.54, Stats. OAG 23-78

April 20, 1978.

MATTHEW F. ANICH, *District Attorney*  
*Ashland County*

You request my opinion on the following question:

Would the register of deeds comply with the duties of office set forth in sec. 59.54, Stats., if such officer made a photocopy of each writ of attachment, certificate of sale of real estate, etc., in which all the different types of information set forth in sec. 59.54, Stats., appeared and kept such photocopy in a separate book with an appropriate index?

The answer to your question is no.

Section 59.54, Stats., requires the officer to "file and carefully preserve in his office every such paper received." The photocopy would contain the same information which appears on the original, but would not in itself, or with index, serve the four-fold purpose of the statute.

Section 59.54, Stats., provides:

"RECORD OF ATTACHMENTS, LIS PENDENS, ETC. He shall keep a separate book or register divided into columns with appropriate headings, in which he shall enter an abstract of every writ of attachment or copy thereof and certificate of real estate attached, of every certificate of sale of real estate, and of every notice of the pendency of any action affecting real estate, which may be filed pursuant to law in his office, specifying the day, hour and minute of his reception thereof, the names of the several parties mentioned therein, designating separately plaintiffs and defendants; the names of the attorneys of the respective parties; the date when the land was sold; the description of all such real estate mentioned, and the amount of indebtedness claimed in any such writ, and the amount for which any such land was sold; and he shall keep for each such book an index, showing in alphabetical order, separately, the names of each party plaintiff and each party defendant, and the page on which such name is found, and shall file and carefully preserve in his office every such paper received. When a notice of the pendency of an action for the foreclosure of a mortgage is

filed *he shall enter upon the margin* of the record of such mortgage a memorandum of the filing of such notice and of the date thereof." (Emphasis added.)

The statute requires maintenance of (1) a separate book or register in which such officer shall enter an "abstract," *i.e.*, a summary limited to required specified information and details as to time of filing; (2) a specially arranged alphabetical index to such book or register of "abstracts"; (3) preservation of the originals left for "filing"; and (4) a duty to note on margin of separate mortgage books the date and fact of filing a notice of pendency affecting the specific mortgage.

One of the main purposes of the statute is to provide a ready index to "abstracts" of the documents involved so that the searcher need not have to initially read the whole document on file. Resort to such entire document may be necessary, and the statute and secs. 59.512, 228.07 and 889.30, Stats., make provision for preservation of the original or photographic copy.

This does not mean that such officer cannot, with county board approval, utilize microfilm or photographic copies pursuant to provisions of sec. 59.512, Stats. Even where authorization pursuant to sec. 59.512, Stats., is present and in a case where the county has not elected to be covered by ch. 228, Stats., the original document would have to be retained in an authorized storage place with the microfilm or photocopy being kept in the office of such officer. See secs. 59.512 and 59.54, Stats. In 60 Op. Att'y Gen. 459 (1971), it was stated that registers of deeds in counties under 500,000 cannot utilize microfilming or photocopying to comply with the initial duty to record or file documents unless the county board has elected to be controlled by ch. 228, Stats., as permitted by sec. 228.07, Stats., although secs. 59.512 and 889.30, Stats., authorize such officers, with county board approval, to make microfilm or photographic copies of original records. Also see sec. 910.05, Stats.

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*Collective Bargaining; Open Meeting; Public Records; Public Utilities; Salaries And Wages;* Where Water and Light Commission has power to fix compensation of employes, it may meet in closed session to discuss and vote upon increases for non-union employes. A record must be made of motions and roll-call votes at open and closed meetings. Such record is open to inspection and copying subject to sec. 19.21, Stats., and common-law limitations with respect thereto. OAG 24-78

April 21, 1978.

WILLIAM R. HEATH, *Editor*  
*The Marshfield News-Herald*  
*City of Marshfield*

Pursuant to sec. 19.98, Stats., you request advice with respect to the Wisconsin open meeting law.

You state that the Marshfield Water and Light Commission held a duly noticed meeting on January 9, 1978, and voted to go into closed session "to discuss union negotiations and non-union and supervisory wage increases." Wage increases for non-union personnel were approved at the closed session, but the record of such approval was not made public until nearly 24 hours after the vote was taken when the minutes of the Commission were approved by the Marshfield Common Council at its regular meeting.

In 65 Op. Att'y Gen. 243 (1976), it was stated that a municipal public utility commission managing a city-owned public utility pursuant to sec. 66.068, Stats., was a governmental body under sec. 19.82(1), Stats., and that its meetings were subject to sec. 19.81-19.98, Stats.

Part of the difficulty in handling your questions is the extent to which the Common Council of the City of Marshfield has delegated power to the Water and Light Commission to fix the salaries and wages of employes of the utility. For the purposes of this opinion, it is assumed that such Commission has the power to "employ and fix the compensation of such subordinates as shall be necessary" in accordance with the provisions of sec. 66.068(3), Stats.

Your first question is whether the Commission, when duly convened in closed session for the purpose of considering wage increases for non-union employees, can vote to approve increases in closed session.

I am of the opinion that it can vote in the closed session. Pursuant to sec. 19.85(1)(c), Stats., a governmental body which has given the required notice can convene in closed session for the purpose of:

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

Whereas the singular of public employe is used, the singular includes the plural. See sec. 990.001(1), Stats. Increases in the compensation of more than one employe could therefore be “considered” in closed session. We are not concerned with the final ratification or approval of a collective bargaining agreement. Where such an agreement is involved, final ratification or approval must be accomplished in open session by reason of sec. 19.85(3), Stats. A governmental body generally may take final action and vote in closed session where the vote is an integral part of the deliberation process. In *State ex rel. Cities S. O. Co. v. Bd. of Appeals*, 21 Wis.2d 516, 124 N.W.2d 809 (1963), the court was dealing with former sec. 14.90, Stats. (1959), which provided in part:

“(2) ... No formal action of any kind shall be introduced, deliberated upon or adopted at any closed executive session or closed meeting of any such body.

“(3) Nothing herein contained shall prevent executive or closed sessions for purposes of:

“(a) Deliberating after judicial or quasi-judicial trial or hearing.”

The court held that after hearing a zoning appeal in public, the board of appeals could convene in closed session to “deliberate” and could vote in closed session, as it was an integral part of the deliberation process, and that the Board need not reconvene in open session to announce its result.

I am of the opinion that if the utility Commission has power to increase compensation of non-union employes, a court would hold that it could consider increases in closed session and could vote in closed session to finalize its action.

Your second question is whether the vote should be available immediately after the meeting.

Whereas I am of the opinion that the result in most cases should be announced as soon as possible, there may be grounds for withholding for some period of time.

*State ex rel. Cities S. O. Co., supra*, indicates that under prior law no immediate announcement or reconvening into open session was required. Under present law a body could not reconvene into open session after closed session within twelve hours unless notice of such intention to reconvene in open session was given at the same time and in the same manner as the public notice of the meeting convened prior to the closed session. Sec. 19.85(2), Stats. This would not preclude the presiding officer from making an announcement to anyone present or from issuing a news release after the closed session terminated.

Whether there must be disclosure of the vote depends in part on whether the reason for convening into closed session continues. Section 19.88(3), Stats., is applicable to open and closed sessions and provides:

“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.”  
(Emphasis added.)

Under sec. 19.21(2), Stats., the right to inspect and copy is limited in certain respects, including “with proper care, *during office hours* and subject to such orders or regulations as the custodian thereof prescribes.” (Emphasis added.)

Your letter does not disclose whether there was a deliberate withholding of the record of the motions and votes or whether there was a mere delay in disclosure because of a lack of a demand to see the record. If it was the former, I am not aware of any sufficient reason to justify a 24-hour delay. In other situations where competitive or bargaining reasons may continue or where detection of

crime is currently involved or where disclosure of financial, medical, social histories or disciplinary data of specific persons would have substantial adverse effect upon the reputation of any person referred to, the custodian may refuse disclosure where specific reason is given. The person seeking inspection may then institute an action in mandamus to test the reason. See 63 Op. Att'y Gen. 400 (1974).

BCL:RJV

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*Counties; County Board; Court Commissioner; Employer And Employee; Retirement Systems;* Either the county board as employer or the judges of the county as appointing authority has the authority under sec. 41.11(1), Stats., to extend the employment of a family court commissioner beyond normal retirement date. OAG 25-78

April 21, 1978.

RAYMOND L. PAYNE, *District Attorney*  
*Douglas County*

You have requested my opinion as to whether the Douglas County Board of Supervisors can compel the family court commissioner, over the age of 65, to retire prior to the completion of his term of appointment. The facts that you have provided to me are as follows:

The family court commissioner for Douglas County was reappointed, by the judges of Douglas County, on June 22, 1977, for a term of one year or until his successor is qualified. Douglas County has not placed the position of family court commissioner under civil service as authorized by sec. 247.13, Stats., but has an ordinance which requires the retirement of all county employes at age 65 unless extended by the county board. The present family court commissioner reached age 65 on October 15, 1977.

In my opinion, the family court commissioner must retire at age 65 under sec. 41.11(1), Stats., unless his employment is continued by his employer or appointing authority. Either the county board as employer or the Douglas County judges collectively, as the appointing authority, may relieve the family court commissioner from the requirement to retire by continuing him in employment.

Section 41.11(1), Stats., reads in part:

“... any participating employe ... who reaches his normal retirement date shall be retired at the end of the calendar quarter year in which such date occurs, unless ... his employment is continued by his employer or appointing authority.”

The family court commissioner is a participating employe, sec. 41.02(7), Stats., with normal retirement date of 65 years. Sec. 41.02(23), Stats. The calendar quarter year in which the subject family court commissioner reached 65 years ended on December 31, 1977. Sec. 41.02(33), Stats. Thus, under the provisions of sec. 41.11(1), Stats., he was subject to retirement unless his employment was continued by his “employer” or “appointing authority.”

The family court commissioner is a county employe, thus the county board is the “employer” as such term is used in sec. 41.11(1), Stats. *State ex rel. Sheets v. Fay*, 54 Wis.2d 642, 650, 196 N.W.2d 651 (1972). Section 247.13(1), Stats., however, specifies the judges of the county as the “appointing authority” for family court commissioners. I conclude, therefore, that either the county board or the judges have the authority under sec. 41.11(1), Stats., to extend the employment of the family court commissioner beyond age 65.

BCL:WMS

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*Land; Ordinances; Plats And Platting:* Chapter 236, Stats., discussed in reference to the platting, replatting and division of lots within a recorded subdivision. OAG 26-78

April 24, 1978.

ALEXANDER HOPP, *Corporation Counsel*  
*Sheboygan County*

You request my opinion with respect to how the replat provisions of ch. 236, Stats., apply to division of lots within a recorded subdivision. Apparently, some confusion has arisen from statements made in earlier opinions, 63 Op. Att’y Gen. 193 (1974) and 64 Op. Att’y Gen. 80 (1975).

The problem concerns the sale of part of a lot within a subdivision platted pursuant to ch. 236. As I understand your question, it is in effect this: When such a sale creates or contributes to a new lot or lots with boundaries that do not correspond to the subdivision's platted lot lines, is a "replat" as defined by sec. 236.02(13), Stats., required? I assume that the newly created lot or lots fulfill all other requirements provided by statute or ordinance (minimum lot size, etc.) and that the transaction is not prohibited by any restriction attached to the land by private covenant.

My conclusion is that ch. 236 does not require a replat when the division of a lot or the redivision of more than one lot does not result in "subdivision" as defined by sec. 236.02(8)(a), 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 ...."

But, the chapter does enable a municipality, town or other local authority to enact ordinances with platting requirements more stringent than those provided by statute. Therefore, in any particular situation, whether a plat or replat is in fact required, largely depends on local ordinances controlling land use.

Much of the confusion regarding platting requirements undoubtedly stems from the use of the word "replat" in the chapter. Section 236.02(13), Stats., states:

"'Replat' is the process of changing, or the map or plat which changes, the boundaries of a recorded subdivision plat or part thereof. The legal dividing of a large block, lot or outlot within a recorded subdivision plat without changing exterior boundaries of said block, lot or outlot is not a replat."

This section is purely definitional. It states what a "replat" is, but in itself does not state when a "replat" is required.

The only other section in the chapter using the word "replat," sec. 236.36, Stats., merely places a requirement of court action on certain types of replatting. It, too, fails to indicate when replatting is required.

“Except as provided in s. 70.27 (1), replat of all or any part of a recorded subdivision, if it alters areas dedicated to the public, may not be made or recorded except after proper court action, in the county in which the subdivision is located, has been taken to vacate the original plat or the specific part thereof.”

Although it appears that no section in ch. 236 specifically states when a “replat” shall be required, since a “replat” is by definition a kind of plat, it is required in any situation where a plat generally is required. The only section in the chapter which makes a plat a statutory requirement is sec. 236.03(1), which states:

“Any division of land which results in a subdivision as defined in s. 236.02 (8) (a) shall be, and any other division may be, surveyed and a plat thereof approved and recorded as required by this chapter. No map or survey purporting to create divisions of land or intending to clarify metes and bounds descriptions may be recorded except as provided by this chapter.”

Thus, the statutory requirement for a “replat” applies only to “subdivision” under sec. 236.02(8)(a), Stats., a division for the purpose of sale or of building development which “creates 5 or more parcels or building sites of 1 1/2 acres each or less in area.” While this chapter does not require a plat for other types of division, a governmental body may be empowered to enact such a requirement under sec. 236.45(2), Stats.

That a plat generally is required before this type of land division will be permitted squares with the purpose of the chapter as declared in sec. 236.01, Stats., “to regulate the subdivision of land.” Here the advantage of the plat is that it provides an easy means for the various local governmental bodies and state agencies to review the developer’s often complex scheme to determine whether or not the plan complies with applicable ordinances and regulations. The precise layout requirements of the chapter insure that the plat will be an accurate basis for these determinations.

It certainly would be possible for the governmental bodies and state agencies to review any subdivider’s scheme without the use of a plat, but in the case of a large and complex subdivision this would involve working with cumbersome descriptions and admit a high

probability of error. The Legislature in defining "subdivision" has in effect arbitrarily determined the point at which descriptions would so increase the likelihood of irregular development and error as to make a plat necessary. The Legislature has left it largely to the discretion of the reviewing authority whether or not in other types of land division plats are needed to gauge or promote compliance with land use restrictions.

While the "replat" requirement is limited to instances of "subdivision," a broader question remains whether ch. 236 contains any other restrictions against land transactions resulting in parcels departing from a subdivision's platted lot lines. I have concluded that it does not.

One could argue that permitting such division is inconsistent with a policy underlying ch. 236. Section 236.01, Stats., states that one of the purposes of the regulation of subdivision of land is "to promote proper monumenting of land subdivided and conveyancing by accurate legal description." Toward this policy sec. 236.28, Stats., requires that all lots in a subdivision plat "be described by the name of the plat and the lot and block in the plat."

But there is no reason to assume that a parcel with boundaries which do not trace lines drawn on the subdivision plat could not be identified by plat, lot and block. This same section foresees the eventuality of a kind of alternate description. In one instance:

"... Any conveyance containing such a description shall be construed to convey to the grantee all portions of vacated streets and alleys abutting such lots and belonging to the grantor unless the grantor by appropriate language indicates an intention to reserve or except them from the conveyance."

It is possible to describe land as a specific portion of a platted parcel or parcels.

The statute placing additional restrictions on the conveyance of land within cities of the first class, sec. 236.33, is another indication that the Legislature did not intend to restrict land sales in subdivisions to parcels with platted boundaries. It states in part:

"... This section shall not prohibit the dividing or subdividing of any lot or parcel of land in any such city where the divided or subdivided parts thereof which become joined in ownership with

any other lot or parcel of land comply with the requirements of this section, if the remaining portion of such lot or parcel so divided or subdivided complies. ...”

While a plat is required when this sort of transaction results in “subdivision,” under the general provision of sec. 236.03(1), here there is no additional statutory plat requirement when such parcel rearrangements do not result in “subdivision.” When land sales in city subdivisions do not result in “subdivision,” a plat is only needed if the local authority requires one pursuant to sec. 236.45(2).

If the ordinances of the local authority establish no requirements more stringent than those found in ch. 236, the subdivider or individual lot owner is at liberty to split and regroup lots as long as the result is no new subdivision as defined in sec. 236.02(8) and as long as the resulting lots conform to the basic requirements of ch. 236, as set forth in sec. 236.16 and sec. 236.33.

But governmental bodies may be authorized to impose additional regulations on land transactions under sec. 236.45(2). Should the local authority, through an ordinance requiring strict conformance to a so-called master plan for the area, the subdivider or lot owner desiring to deviate from the approved plat may be prohibited from doing so or may be required to go through a procedure such as replatting.

To the extent that earlier opinions of the Attorney General conflict with this one, they are hereby modified.

BCL:JEA

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*Open Meeting; Towns;* Whereas it is preferable to hold meetings of a town board in a public building such as a town hall, fire station or school building, such meeting can be legally held at the home of a town officer if proper notice is given and if the home is, in fact, reasonably accessible to members of the public during all times the meeting is in progress. OAG 28-78

April 26, 1978.

RONALD W. DAMP, *Attorney*  
*City of Plymouth*

Pursuant to sec. 19.98, Stats., you request advice whether a meeting of a town board can be held at the home of the town clerk where the town hall is available for such meeting.

I am of the opinion that a legal meeting can be held at the home of the town clerk or other board member if the meeting is properly noticed and if the place, the home, is in fact reasonably accessible to members of the public.

The policy declaration in the open meetings law is in part set forth in sec. 19.81(2), Stats., which provides:

“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.”

The substantive provision involved is found in the definition of the term “open meeting.” Section 19.82(3), Stats., provides:

“‘Open session’ means a meeting which is held in a place reasonably accessible to members of the public and open to all citizens at all times.”

The statute does not require that all meetings be held in publicly owned places but rather in places “reasonably accessible to members of the public.” There is no requirement that the place which has the greatest accessibility be utilized or that it be owned by the public. Public meetings are often held in privately owned hotels, theaters, etc.

Meetings of town boards have traditionally been held in homes of the various officers. Many town halls are not adequately heated, lighted or equipped to hold meetings during all seasons of the year. In certain towns in midwinter, a town officer’s house might be more “accessible” than an unheated town hall. The test to be utilized is whether the meeting place is “reasonably accessible,” and that is a factual question to be determined in each case.

Public policy favors the holding of meetings of governmental bodies in public places, such as a town hall, fire station or schoolhouse, rather than a private home. In certain cases the nature of the business to be transacted, such as a hearing, the size of the governmental body or the anticipated attendance, would require the meeting to be held at some other place than a private home in order that the meeting place be "reasonably accessible to members of the public." Meetings held in private homes should be the exception, not the common practice; and where so held, responsible officials should take such steps as may be necessary to insure that adequate notice to the public and members of the press has been given and that there is an open invitation and ready admittance to members of the public who seek admission to the meeting place.

BCL:RJV

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*Intoxicating Liquors; Licenses And Permits; Malt Beverages; The tied-house prohibitions of sec. 66.054(4)(a), Stats., apply to holders of temporary Class "B" beer licenses for picnics or similar gatherings issued pursuant to sec. 66.054(8)(b), Stats., unless the holder of the temporary license involved falls within the exemption contained in sec. 66.054(4)(a)8., Stats. OAG 29-78*

April 26, 1978.

DANIEL G. SMITH, *Administrator*  
*Income, Sales, Inheritance and Excise Tax Division*  
*Department of Revenue*

You have requested my opinion regarding interpretation of the fermented malt beverage tied-house laws as they may affect holders of so-called temporary or picnic beer licenses. Specifically, you ask the following:

"does the prohibition in s. 66.054(4)(a)(intro.) apply to holders of temporary Class "B" licenses for picnics or similar gatherings issued under s. 66.054(8)(b), Wis. Stats.?"

The answer is yes.

Section 66.054(8)(b), Stats., provides for the issuance of temporary retail Class "B" beer licenses to certain types of groups and organizations enumerated within the statute which licenses authorize the group or organization to sell beer at a particular picnic, gathering or meeting.

Section 66.054(4)(a), Stats., the specific tied-house provision about which you inquire provides, in part, that:

"No brewer, bottler or wholesaler shall furnish, give, lend, lease or sell any furniture, fixtures, fittings, equipment, money or other thing of value, directly or indirectly, or through a subsidiary or affiliate corporation, or by any officer, director, stockholder or partner thereof, to *any* Class "B" licensee, or to *any* person for the use, benefit or relief of *any* Class "B" licensee ...." (Emphasis supplied.)

Note there is no distinction made between "regular," "picnic" or other types of Class "B" licenses and licensees.

Subparagraphs 1 through 7 make exceptions to the general proscription, none of which relate to the classification of retailers. These exceptions, together with exception eight discussed next, must be strictly construed. See *Sutherland Statutory Construction*, (3rd Edition 1943), sec. 4830.

Chapter 14, Laws of 1977, effective June 1, 1977, created the eighth exception to the tied-house provisions. It provides that brewers, bottlers and wholesalers may:

"Contribute money or other things of value to or for the benefit of a nonprofit corporation, exempt under sec. 501(c)(3) of the U.S. Internal Revenue Code of 1954 and conducting festivals of limited duration in a city of the first class, if the festivals are sponsored and endorsed in whole or in part by a municipal corporation."

If the tied-house prohibitions had not been intended from the beginning to apply to holders of temporary retail Class "B" beer licenses which are issued pursuant to sec. 66.054(8)(b), Stats., the Legislature would have seen no need whatsoever to create a new exception involving those kinds of licenses issued in cities of the first class to one category of licensee. A ninth exception to cover the situation about which you inquire may not be grafted upon the

statute by implication. To do so would avoid the legislative intent and purpose of total separation between wholesalers and retailers except for specific and express exceptions. C.J.S. *Intoxicating Liquor* sec. 191.

Therefore, except for those relationships which fall within sec. 66.054(4)(a)8., Stats., the prohibitions contained in 66.054 (4)(a) (intro.), Stats., apply to holders of temporary Class "B" licenses for picnics or similar gatherings issued under sec. 66.054(8)(b), Stats.

BCL:JM

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*Education; Holidays; Schools And School Districts; State Aid;*  
There is no statutory requirement that schools be closed on the Mondays succeeding the holidays listed in sec. 115.01(10)(a)1., Stats., when those holidays fall on Sunday. OAG 30-78

April 27, 1978.

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

You have asked my opinion on whether public school districts which have designated Monday, January 2, 1978, as a school day on which school is to be held, and have so contracted with their teachers, may hold school on that day, despite certain provisions of sec. 256.17, Stats.

Section 121.17(2)(a), Stats., provides that in order to comply with the requirements for state aid, a district must "Hold school for at least 180 days each year, the days to be computed in accordance with s. 115.01(10)." Section 115.01(10), Stats., which is specifically applicable to schools, provides in part:

"(a) School days are days on which school is actually taught and the following days on which school is not taught:

"1. Labor Day, Thanksgiving, Christmas, New Year's Day and Memorial Day, if within the scheduled school term and not within a scheduled vacation period."

The effect of sec. 115.01(10)(a)1., Stats., is to make certain days like Christmas and New Year's Day "school days" which are included in the 180-day statutory requirement, even though school is not taught on those days.

Section 256.17, Stats., lists January 1 among the listed legal holidays and further provides that whenever a holiday falls on a Sunday, the succeeding Monday shall be the legal holiday. January 1, 1978, falls on a Sunday. But, although such holidays are declared in sec. 256.17, the effect of the declaration is not to automatically make such days "a day off." For example, some election days are declared to be legal holidays in sec. 256.17.

It is to be noted that no provision is made in ch. 115 similar to that in sec. 256.17, Stats. No specific statute makes a Monday following a holiday a day on which school is not taught. It is my opinion, therefore, that there is no *statutory* requirement that schools be closed on the Mondays succeeding the holidays listed in sec. 115.01(10)(a)1., Stats., when those holidays fall on Sunday. It also follows from these statutory provisions that if schools are closed on Monday, January 2, that day does not count toward the 180-day requirement.

BCL:JWC

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*County Court; Incompetents; Public Records; Register In Probate;* Section 880.33(6), Stats., requires closing only of documents filed with the register in probate with respect to ch. 880 proceedings while sec. 55.06(17), Stats., requires the closing of all records filed with respect to ch. 55 proceedings including index, docket and files maintained by the register in probate. OAG 31-78

April 28, 1978.

ROBERT P. RUSSELL, *Corporation Counsel*  
*Milwaukee County*

You have asked my opinion as to what records maintained in the office of the register in probate are closed to public inspection by virtue of secs. 880.33(6) and 55.06(17), Stats., as amended by ch.

393, Laws of 1975. For the reasons given below, sec. 880.33(6) closes access by the public only to records containing actual documents filed with respect to ch. 880 proceedings. Section 55.06(17) requires closing of public access to all records including index, docket and documents filed with respect to ch. 55 proceedings.

I. Sec. 880.33(6), Stats.

In general, ch. 880 provides for the possible appointment of a guardian for minors, incompetents and spendthrifts upon the filing of a petition and a court hearing. Section 880.33(6), Stats., provides:

“All court records pertinent to the finding of incompetency are closed but subject to access as provided in s. 55.06 (17).”

Different counties in the state may have slightly different methods of maintaining court records of proceedings pursuant to ch. 880. However, pursuant to sec. 253.32, Stats., such records generally include: (1) an alphabetical index of names of proposed wards, (2) a docket containing a list of all documents filed with the register of probate and (3) a file containing the documents themselves.

In my opinion, only the file containing the documents themselves are “records pertinent to the finding of incompetency.” Only the documents themselves provide information which the court uses to find that an individual is “substantially incapable of managing his property or caring for himself by reason of infirmities of aging, developmental disabilities, or other like incapacities” (sec. 880.01(4), Stats.). The index and docket are not pertinent to the court’s consideration.

I believe such a strict interpretation of sec. 880.33, Stats., is consistent with the public policy expressed in sec. 19.21, *et seq.*, Stats., as described in *Beckon v. Emery*, 36 Wis.2d 510, 518, 153 N.W.2d 501 (1967):

“... there is an absolute right to inspect a public document in the absence of specifically stated sufficient reasons to the contrary. ...”

II. Sec. 55.06(17), Stats.

In general ch. 55, Stats., provides for protective service for those who because of the infirmities of age, mental retardation or other developmental disabilities or like incapacities are impaired in their

ability to adequately provide for their own care or custody. Such protective service may include protective placement which is accomplished pursuant to sec. 55.06, Stats. In pertinent part, sec. 55.06 provides:

“(1) ... No protective placement may be ordered unless there is a determination of incompetency in accordance with ch. 880, except in the case of a minor who is alleged to be developmentally disabled, and there is a finding of a need for protective placement in accordance with sub. (2) ...

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“(2) The department, an agency, a guardian or any interested person may petition the county court to provide protective placement for an individual who:”

In common practice, findings of incompetency under ch. 880 and a need for protective placement under sec. 55.06, Stats., are made at one court hearing.

Finally sec. 55.06(17), Stats., provides:

“Any records of the department, court or other agency pertaining to a person who is protected under this chapter or for whom application has ever been made for such protection are not open to public inspection. Information contained in such records may not be disclosed publicly in such a manner as to identify individuals, but the record shall be available on application for cause to persons approved by the court or at the request of a guardian, ward or attorney of a ward. Reports under sub. (8) (c) shall be provided to the guardian or proposed ward, the guardian ad litem and the attorney of a ward upon request.”

The language used in sec. 55.06(17) is different than that used in sec. 880.33(6). Section 55.06(17) forbids the disclosure of any record “*pertaining to a person* who is protected under this chapter or for whom application has ever been made for such protection” (emphasis supplied). By contrast, sec. 880.33(6), Stats., forbids disclosure of records pertinent to the finding of incompetency.

In my opinion sec. 55.06(17), Stats., requires the closing of all three types of records outlined above: the index, the docket and the

documents file. All three pertain to the individual by identifying him in the index, by listing documents filed with reference to the court's determination of his needs and dates of court action and by preserving the documents filed with respect to his hearing.

Although I have opined that the index and docket of hearings conducted pursuant to ch. 880 may be open to the public, if such records also include information pertaining to hearings conducted pursuant to ch. 55, the index and docket must then be closed.

In *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 681, 137 N.W.2d 470 (1965), the court commented on the public's right to open records as reflected in common law:

"... the right to inspect public documents and records at common law is not absolute. There may be situations where the harm done to the public interest may outweigh the right of a member of the public to have access to particular public records or documents. Thus, the one must be balanced against the other in determining whether to permit inspection. ..."

It is my opinion that the Legislature has balanced these interests and, in closing all court records, has given more weight to the interest of the individual protected under ch. 55 than to the interest of the public.

### III. Date of effectiveness of secs. 880.33(6) and 55.06(17), Stats.

The general rule of statutory construction with respect to the retroactive or prospective operation of statutes was stated in *Swanke v. Oneida County*, 265 Wis. 92, 99, 60 N.W.2d 756, 62 N.W.2d 7 (1953):

"... a law will not be construed as retroactive unless the act clearly, by express language or necessary implication, indicates that the legislature intended a retroactive application. The rule is the converse of the general principle that statutes are to operate prospectively. ..."

Section 55.06(17), Stats., provides for the closing of:

"Any records of the department, court or other agency pertaining to a person who is protected under this chapter or for whom application *has ever been* made for such protection ...." (Emphasis supplied.)

In my opinion, the reference to persons for whom application has ever been made is express language indicating a legislative intent that the statute be given retroactive effect to the effective date of ch. 284, Laws of 1973, which created ch. 55, Protective Services.

Section 880.33(6), Stats., contains no such similar language. Therefore, it is my opinion that sec. 880.33(6) should be given prospective effect only. Changes in recording required by this section need only be made with respect to proceedings commenced on or after June 9, 1976.

I am troubled by the practical effect of this opinion on bondsmen and title examiners for abstract and title insurance companies. While the conclusion stated seems inescapable, the harsh result on bondsmen and title examiners who need access to the index and docket of ch. 55 proceedings could be alleviated by having the court give blanket approval under sec. 55.06(17), Stats., to title examiners and bondsmen. The clerks of court could be instructed to treat requests for access by these persons as "applications for cause." I would hope that the Legislature would reconsider both sec. 880.33(6) and sec. 55.06(17) at the next opportunity.

BCL:WHW

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*Annuity; Court Commissioner; Judges; Public Officials; Retirement Systems;* If sec. 356 of 1977 Senate Bill 720 or the amendment to sec. 356 contained in Senate Amendment 3 to Senate Bill 720 were enacted into law, either would be constitutionally invalid. OAG 32-78

April 28, 1978.

SENATE COMMITTEE ON ORGANIZATION

*Legislature*

You request my opinion as to the constitutionality of sec. 356 of Senate Bill 720 (1977) and the amendment to sec. 356 contained in Senate Amendment 3 to Senate Bill 720. Senate Bill 720 would merge the two trial courts of record in this state into a single level trial court. Section 356 of such Bill would preclude a member having

received retirement credit from service as a justice, judge or court commissioner from receiving annuity payments from the Wisconsin Retirement Fund (WRF) or Milwaukee County Retirement System (MCRS) while serving as a justice, judge or court commissioner.

Section 757.225, Stats., which would be created by sec. 356 of Senate Bill 720 states as follows:

“ANNUITY RESTRICTIONS. Any public employe retirement system to which the state or any political subdivision of the state has contributed on behalf of a person for service as a justice, judge or court commissioner shall temporarily suspend any annuity payments being made to the person during the time the person is serving as a justice, judge or court commissioner, and any annuity payments which are affected by this section shall be permanently forfeited without any right to payment at a later date. Annuity payments which have been temporarily suspended under this section shall be reinstated after a person ceases to serve as a justice, judge or court commissioner. The homerule provisions for the retirement system created by chapter 201, laws of 1937, as established by chapter 405, laws of 1965, do not apply to this section.”

The section applies to members of the WRF and MCRS who have service credit as a justice, judge or court commissioner regardless of the period of such service. All annuity payments are forfeited (without right of recovery) during later service as a justice, judge or court commissioner even though the majority of annuity could result from service credits as an employe or elected official other than a justice, judge or court commissioner. Annuity payments are forfeited only as a result of service as a justice, judge or court commissioner.

It is my opinion that proposed sec. 757.225, Stats., as set forth in sec. 356 of Senate Bill 720 would, if enacted, violate the rights of those whose annuity payments were suspended to equal protection of the laws as guaranteed by the fourteenth amendment to the U.S. Constitution and Wis. Const. art. I, sec. 1.

The standard of review and burden of proof falling upon a challenger of a statute are set forth at pp. 146-147 of *Weiner v. J. C. Penney Co.*, 65 Wis.2d 139, 222 N.W.2d 149 (1974), in these words:

“Before evaluating these contentions it is first necessary to set forth the standard of review applicable to equal protection claims arising under the fourteenth amendment to the United States Constitution and art. I, sec. 1, of the Wisconsin Constitution. As this court has stated many times, both amendments guarantee the same individual rights and impose the same restrictions on the legislature.

“Legislation regulating economic and fiscal affairs enjoys a presumption of constitutionality. As stated in *Simanco, Inc. v. Department of Revenue*:

“Only if a challenger can show that the classification is arbitrary and has no reasonable purpose or relationship to the facts or a justifiable and proper state policy will a legislative classification fall on the grounds of a denial of equal protection. [Citations omitted.]’

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“In *State ex rel. Ford Hopkins Co. v. Mayor*, as noted by plaintiffs, the court enumerated five standards pertaining to statutes attacked on equal protection grounds:

“(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.

“However, in *State ex rel. La Follette v. Reuter* the court held that before a statute will be held unconstitutional for

violating these standards, the attacker must meet a very heavy burden of proof and persuasion:

“... to declare an act of the legislature as to a classification violative of the equal-protection clause, it is first necessary to prove that the legislature has abused its discretion beyond a reasonable doubt.”

In *State ex rel. La Follette v. Reuter*, 36 Wis.2d 96, 109, 153 N.W.2d 49 (1967), the court quoted from an earlier case which considered the matter of legislative classification, *Kiley v. Chicago, M. & St. P. Ry. Co.*, 142 Wis. 154, 159, 125 N.W. 464 (1910):

“... no court is justified in declaring classification baseless unless it can say without doubt that no one could reasonably conclude that there is any substantial difference justifying different legislative treatment. ...” (Emphasis by the court.)

The classification embodied in proposed sec. 757.225, which limits the effect to justices, judges or court commissioners, in my view lacks any legitimate basis.

The apparent purpose of sec. 757.225, Stats., is to prevent a sitting judge from receiving a state or municipal retirement annuity at the same time as he receives a salary. While this clearly constitutes regulation of an area of legitimate legislative concern, I find no rational basis for applying the prohibition solely to judges as a class. A former district attorney, for example, is not precluded from receiving a public retirement benefit while sitting as a justice, judge or court commissioner. Nor is a justice, judge or court commissioner precluded from receiving the retirement annuity while serving as a state appointed or elected official or employe other than a justice, judge or court commissioner.

I can perceive of no fact situation which would cause the courts to conclude that application of the prohibition solely to justices, judges and court commissioners constitutes other than an arbitrary classification prohibited by the equal protection clauses of the U.S. and Wisconsin Constitutions. Proposed sec. 757.225 violates four out of the five standards set forth in *State ex rel. Ford Hopkins Co. v. Mayor*, 226 Wis. 215, 276 N.W. 311 (1937), as quoted in *Weiner v. J. C. Penney, supra*. Applying standard (1), I see no substantial distinction between justices, judges and court commissioners in

comparison with other elected officials which would support the classification. Standard (2) specifies that "classifications adopted must be germane to the purpose of the law." Limiting the application of the prohibition to justices, judges and court commissioners seems to be the antithesis to such purpose. The proposed statute is violative of standard (4) which requires that the law apply equally to each member of the class. For example, consider two judges at retirement age with credit in a covered retirement system—one who retires commences receiving a retirement benefit based on his then age and thereafter becomes a sitting judge and the other who doesn't elect to retire before again becoming a sitting judge. The first judge upon again becoming a sitting judge would under sec. 757.225 "permanently forfeit" his annuity benefit during the period of his service "without any right to payment at a later date." The second judge not having started on annuity would lose nothing since when he finally retires, he will have his benefit computed on his age at that time. The proposed law does not apply equally to the two judges since the first judge loses the value of the annuity payments withheld during the period he again served as a judge. Finally, standard (5) requires that the characteristics of each class must be different from those of the other classes so as to suggest the propriety of different legislation. Here the intended evil to be suppressed does not suggest that the public interest is in any way served by singling out judges as the only class subjected to the limitation. I conceive of no valid distinction between judges and other state officers and employes which would support the distinction in treatment of proposed sec. 757.225, Stats.

I have concentrated upon the equal protection question as the basis for this opinion since equal protection involves the total spectrum of justices, judges and court commissioners, present and future. The proposed legislation does, however, in the case of specific individual justices, judges and court commissioners also offend the prohibition against impairment of contracts of Wis. Const. art. I, sec. 12. Elected officials and employes have vested or contractual rights in the statutory retirement systems. See sec. 41.21(2), Stats., as to the WRF and sec. 6 of ch. 326, Laws of 1957, as to the MCRS. Withholding or diminishing the retirement annuity after retirement as set forth in proposed sec. 757.225, Stats., would probably in a number of specific cases impair the member's vested or contractual rights.

Senate Amendment 3 to Senate Bill 720 would delete the original proposed sec. 757.225, Stats., and substitute therefor the following language:

**“SALARY RESTRICTIONS.** Any person commencing a new term of office on or after the effective date of this act (1977) who receives compensation for service as a justice, judge or court commissioner under s. 20.923, and who is also receiving annuity payments from a public employe retirement system to which the state or a political subdivision of the state has contributed in behalf of the person for service as a justice, judge or court commissioner, shall have the compensation authorized under s. 20.923 reduced by the amount of such annuity payments received. This section does not apply to compensation for reserve judges authorized under s. 753.075.”

This new proposed sec. 757.225, Stats., would require the reduction of the salary of the justice, judge or court commissioner by the amount of the annuity received. Other conditions are basically the same. The salary reduction is applicable only to a justice, judge or court commissioner and is conditioned upon annuity payments based upon service as a justice, judge or court commissioner. No reduction is required while serving in any other state office nor is the reduction required if the annuity resulted solely from service other than as a justice, judge or court commissioner. The proposed section singles out the judiciary and applies a penalty to persons whose service is related to the judicial function of government while exempting from the penalty other non-judicial officials of similar stature. While there is a strong presumption of constitutionality which attaches to an act of the legislature, such presumption is rebutted if no facts can reasonably be conceived that would sustain the presumption. *Weiner, supra*, p. 147. I conceive of no legitimate basis which would support the singling out of the judiciary in this manner. It is, therefore, my opinion that the classification in the latter proposed sec. 757.225, Stats., is violative of the equal protection guarantees of the U.S. and Wisconsin Constitutions.

BCL:WMS

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*Executions; Fees; Mileage; Sheriffs; Travel Expense:* A sheriff who is unsuccessful in serving an execution on a judgment is not entitled to a fee allowed under sec. 59.28, Stats., unless he has in some manner demanded payment on an execution on the judgment under sec. 59.28(6), Stats. OAG 33-78

May 1, 1978.

JAMES L. CARLSON, *District Attorney*  
*Walworth County*

You have inquired as to whether the sheriff of your county is entitled to the mileage fee allowed under sec. 59.28, Stats., for serving an execution against property, where he is unsuccessful in making a levy because he is unable to locate any property of the judgment debtor upon which he can levy.

Section 59.28, Stats., reads in part as follows:

“SHERIFF; FEES. Except as provided in subs. (2) (b) and (27), every sheriff is entitled to receive one-half of the following fees in advance for services providing the county board approves advance payment. The remaining one-half shall be deposited into the county general fund and shall not be paid to the sheriff in lieu of salary.

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“(2) (a) Except in counties having a population of 500,000 or more, *traveling in making service of any summons, writ or other process*, except upon criminal warrants, 15 cents per mile for each mile actually traveled going and returning. ...

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“(6) *Serving an execution on a judgment, demanding payment thereof or other writ not provided for, \$4.*” (Emphasis added.)

This office has previously indicated that a sheriff is entitled to only those fees and mileage charges which are specifically provided for by the statutes. 21 Op. Att’y Gen. 39 (1932), 53 Op. Att’y Gen. 44

(1964). The latter opinion advised that under sec. 59.28(2)(a), Stats., a sheriff, in other than a county having a population of 500,000 or more, can charge for *mileage* while serving civil process only when he is successful in making *service*.

An execution is "the process of the court." Sec. 815.03, Stats. See also *Russell v. Lawton*, 14 Wis. 202 (1861). Section 815.06, Stats., also provides that the return on the execution shall state how the officer "executed the writ." Mileage is due under sec. 59.28(2)(a), Stats., if there is "service" of the execution.

The logical starting point for determining the meaning of "service of execution" is ch. 815, Stats. This chapter deals exclusively with executions; it outlines the procedures involved in issuing executions, levying upon personal and real property and so on. It recognizes three types of executions: those against the property of the judgment debtor, those against the person of the debtor and those for the delivery of property. Secs. 815.03 and 815.05, Stats. The chapter, however, neither defines nor mentions "service" of an execution.

Historically, it appears that "serving an execution" was the equivalent of "executing an execution," *i.e.*, carrying out its terms by levy, etc. See sec. 10, ch. 131, Rev. Wis. Stats. (1849). Shortly thereafter, when the statutes took a form more similar to that of present day sec. 59.28, Stats., the predecessor to the present sec. 59.28(6), Stats., was created to provide a fee for:

*"Serving an execution on a judgment for the recovery of real estate, or other writ not provided for, one dollar."* (Emphasis added.) See sec. 1, ch. 133, Rev. Wis. Stats. (1858).

Since any overt act by which the sheriff unequivocally showed a formal intent to appropriate real estate was a satisfactory method for levying upon real estate under an execution, *Hyman v. Landry*, 135 Wis. 598, 603, 116 N.W. 236 (1908), notice of such seizure by service of the execution may have been considered such an overt act.

Thus, 3 Op. Att'y Gen. 745 (1914) advised that a sheriff who travels to serve an execution but fails to find property is not entitled to mileage, because "service" of an execution requires the actual performance of the duty commanded by it. This opinion is still accurate insofar as it defines service of an execution. An execution is an order of a court directing the sheriff to take steps necessary to

carry into effect the decree or judgment. See 33 C.J.S. *Executions* sec. 1. Such steps may include seizure and sale of property, sale of real estate, and so on. The sheriff must, in Wisconsin, within 60 days advise the issuing court of how he has executed the writ. Sec. 815.06, Stats. Thus, an execution, depending upon its express terms, may be "executed" in a number of ways. If the execution is returned even partially satisfied, then I believe that the sheriff is entitled to the full fee. In my opinion, the Legislature used "serving an execution" in sec. 59.28(6), Stats., as the equivalent of "executing an execution" in ch. 815, Stats. In a slightly different context than that posed in your question, the United States Supreme Court stated that service of an execution includes "every act and proceeding necessary to be taken by the sheriff to make the money." *Fallows v. Continental Savings Bank*, 235 U.S. 300, 307 (1914). It follows that if the sheriff can find no property upon which to levy to satisfy the judgment, then the writ has not been executed and there is unsuccessful service.

Section 59.28(6), Stats., was amended by sec. 1, ch. 618, Laws of 1957, and presently provides for payment of the fee thereunder not only for "serving" an execution, but also for "demanding payment thereof." Such language indicates that the sheriff is entitled to a fee for his services in demanding payment on an execution on a judgment, even if the sheriff's efforts do not result in successful service of the execution.

Although sec. 59.30 provides that the sheriff's fees "upon the service of an execution" shall be collected by virtue of the execution in the same manner as the sum directed to be collected, in the case of unsuccessful service where a fee is nevertheless due, the party who requested the execution is liable to the sheriff for the fee. In *American Wrecking Co. v. McManus*, 174 Wis. 300, 318, 181 N.W. 235 (1921), the court stated:

"... One who delivers a writ to a sheriff for service and execution is liable to the sheriff for the amount of his lawful fees and charges therefor. ..."

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*Civil Service; Counties; County Board; Employer And Employee; Ordinances; Salaries And Wages;* Where a county board has established a civil service ordinance applicable to all county personnel other than the exceptions provided in sec. 59.07(20), Stats., the director of the 51.42 board does not have authority to grant vacation with pay to a 51.42 board employe which is not authorized under the county civil service ordinance. OAG 34-78

May 2, 1978.

ROBERT RUSCH, *District Attorney*  
*Taylor County*

Assistant District Attorney Arthur Thexton has requested my opinion on the following question:

Does a county civil service ordinance apply to the staffs of single-county sec. 51.42 or sec. 51.437 boards?

The answer is that it can. Whether the Taylor County civil service ordinance applies to the staffs of these boards depends upon whether the county board included such employes in adopting the ordinance. Adoption of an ordinance to include such employes is permissible under sec. 59.07(20) and secs. 63.01-63.17, Stats. Inclusion could have been intended even though the civil service ordinance was enacted prior to the creation of the 51.42/51.437 boards. You state that such employes were not explicitly excluded in the ordinance. If the ordinance includes language of inclusion, I am of the opinion that the provisions therein which relate to the earning and granting of vacation would be applicable to such personnel. The dispute you are concerned with arose from the attempted action of the director of the 51.42 board to grant vacation with pay to an employe on a schedule other than that permitted by the county civil service ordinance. Your question, restated, is:

Where a county board has adopted a civil service ordinance applicable to all county personnel other than the exceptions provided in sec. 59.07(20), Stats., does the director of the sec. 51.42 board have authority to grant vacation with pay to a sec.

51.42 board employe which is not authorized under the county civil service ordinance?

The question assumes that the current county civil service ordinance is applicable to the staffs of the sec. 51.42 and sec. 51.437 boards. The answer to this question is no.

Section 59.07(20), Stats., empowers the county board to:

“Establish a civil service system of selection, tenure and status, and *the system may be made applicable to all county personnel, except the members of the board, constitutional officers, members of boards and commissions and judges.* The system *may include also uniform provisions* in respect to classification of positions and salary ranges, payroll certification, *attendance, vacations, sick leave,* competitive examinations, hours of work, tours of duty or assignments according to earned seniority, employe grievance procedure, disciplinary actions, layoffs and separations for cause subject to approval of a civil service commission or the board. The board may request the assistance of the department of local affairs and development and pay for such services, under s. 22.13 (2) (o).” (Emphasis added.)

Staff employes of 51.42 or 51.437 boards are not within excluded classes.

In 65 Op. Att’y Gen. 105 (1976), it was stated that the authority to establish salaries for the staff employed by the county’s 51.42/51.437 board lies with such board and not with the county board, but such authority is subject to the general budgetary control of the county board. Section 51.42(3)(b), Stats., provides:

“The county board or boards of supervisors shall review and approve the overall plan, program and budgets proposed by the board.”

A director of a 51.42 or 51.437 board only has power to make recommendations to the specific board for “Personnel and the salaries of employes.” Secs. 51.42(6)(c)1. and 51.437(10)(b)1., Stats. The 51.42 board has power to “Fix the salaries of personnel employed to administer the program.” Sec. 51.42(5)(h)5., Stats. A 51.437 board has a somewhat broader power, including power to “establish salaries and personnel policies for the program.” Sec.

51.437(9)(a), Stats. However, even though vacation with pay is a fringe benefit and part of compensation in the broad sense, it is my opinion that the Legislature did not intend to permit 51.42 or 51.437 boards to grant additional vacation with pay to employes where the county board had acted under secs. 59.07(20) and 59.15(2)(c), Stats., to establish such benefits on a uniform provision basis. The staff involved is not within the classes excluded from sec. 59.15(2)(c), Stats., which, in part, authorizes the county board to "establish regulations of employment for any person paid from the county treasury." That section appears to separate the power to fix or change the salary or compensation for the persons covered from the power to establish regulations for employment. I view attendance and leave provisions to be included within regulations of employment as that term is used in sec. 59.15(2)(c), Stats. In my opinion the Legislature did not intend that the director of a 51.42 board, or the board itself, could establish regulations for employment as an incident to fixing salaries of personnel.

BCL:RJV

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*Automobiles And Motor Vehicles; Health And Social Services, Department Of; Liability; Licenses And Permits; Medical Aid; Public Health; Public Officials; The Department of Health and Social Services has authority to establish standards for ambulance attendants under sec. 146.50, Stats. Discussion of malpractice liability of state officers and employes. OAG 35-78*

May 3, 1978.

DONALD E. PERCY, *Secretary*  
*Department of Health and Social Services*

Your first question is:

1. Does the Department of Health and Social Services have the authority to establish training standards and license those ambulance attendants for those medical services above the EMT--Basic level but below the Paramedic level under Section 146.50 of the Statutes?"

I believe the answer is yes.

Section 146.35, Stats., relating to emergency medical service by persons licensed as "emergency medical technician--advanced (paramedic)" was created in the 1973 legislative session as was sec. 146.50, relating to ambulance service providers and ambulance attendants.

It may be that the reason the Legislature provided less specific training standards in sec. 146.50 than in sec. 146.35, is that the former was intended to take advantage of a grant from the Highway Traffic Safety Administration. Chapter 321, Laws of 1973, which created sec. 146.50, Stats., was enacted from AB 538, to which was appended a fiscal note containing the following:

"Other expenses are assumed covered by the federally funded grant."

The bill presumably was drafted to exclude details which might run counter to federal regulation. It left to the Department, however, considerable authority to fill in details.

Section 146.50(3), Stats., as amended by sec. 1217m of ch. 29, Laws of 1977, authorizes the secretary "to adopt rules necessary for administration" of the section. Subsection (6)(b) requires that applicants have "completed a course of instruction and training prescribed by the department or have presented evidence satisfactory to the department of sufficient education and training in the field of emergency care."

Subsection (6)(c), as amended by sec. 1219 of ch. 29, Laws of 1977, requires that applicants have "passed an examination approved by the department."

Subsection (6)(d) provides that they have "such additional qualifications as may be required by the department." Also see ch. 167, Laws of 1977.

These statutory provisions give you ample authority to establish the standards set out in your first question.

The National Highway Safety Program Standard 4.4.11 provides in part:

“Each State, in cooperation with its local political subdivisions, shall have a program to ensure that persons involved in highway accidents receive prompt emergency medical care under the range of emergency conditions encountered. The program shall provide, as a minimum, that:

“1. There are training, licensing, and related requirements (as appropriate) for ambulance and rescue vehicle operators, attendants, drivers, and dispatchers.”

The program for providing safe ambulance service is in the field of what the United States Supreme Court terms a “scheme of cooperative federalism,” where “coordinate state and federal efforts exist within a complementary administrative framework, in the pursuit of common purposes.” *New York State Dept. of Social Services v. Dublino*, 413 U.S. 411, 413, 421 (1973).

Your second question is:

“2. Does the Department have the authority to establish training standards and license those ambulance attendants mentioned in 1. above under the authority of Section 146.50 of the Statutes with the attendant Administrative Rule H 20 as it presently reads?”

Since your first question dealt with your statutory authority, I assume your second question is whether your Rule H 20 is a valid exercise of that authority.

Your Rule H 20 contains numerous provisions. Since it is possible for a rule which is generally valid to be applied in a particular case so as to be invalid, a court would probably decline to give a sweeping approval or disapproval in the absence of a specific situation.

Generally speaking, however, your Rule H 20 appears to me to be within the scope of your statutory authority. Any portion of your rules in conflict with the statute is void. Compare H 20.03(1)(b) with sec. 146.50(4), Stats. (1977).

Whether there is any question of conformity with federal standards can best be determined from the National Highway Safety Bureau.

Your third question is:

“3. Dependent upon the answers to 1. and 2., to what extent is the Department exposed to be included as a defendant in a malpractice suit as a result of not having established training standards and licensure.”

The Supreme Court of Wisconsin recently laid down a set of guidelines relative to liability of public officers and employees. They appear in *Lister v. Board of Regents.*, 72 Wis.2d 282, 300-301, 301-302, 240 N.W.2d 610 (1976).

“The general rule is that a public officer is not personally liable to one injured as a result of an act performed within the scope of his official authority and in the line of his official duty. The various exceptions to this rule are determined by a judicial balancing of the need of public officers to perform their functions freely against the right of an aggrieved party to seek redress.

“The most generally recognized exception to the rule of immunity is that an officer is liable for damages resulting from his negligent performance of a purely ministerial duty. A public officer’s duty is ministerial only when it is absolute, certain and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode and occasion for its performance with such certainty that nothing remains for judgment or discretion.

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“Beyond the question of liability for the negligent performance of purely ministerial duties, the most generally favored principle is that public officers are immune from liability for damages resulting from their negligence or unintentional fault in the performance of discretionary functions. Otherwise stated, there is no substantive liability for damages resulting from mistakes in judgment where the officer is specifically empowered to exercise such judgment. It must be conceded that an officer charged with the administration and application of the standards set forth in sec. 36.16, Stats., could make mistakes in judgment which would result in an erroneous classification. However, at least in the absence of some malicious, wilful and intentional misconduct, the policy considerations underlying the immunity principle require that

the officer be free from the threat of personal liability for damages resulting from mistakes of judgment. The complaint contains no allegation of malicious or intentional misconduct on the part of Hoover which could subject him to personal liability.”

Under the quoted rules, your Department, its officers and employes would not be held liable for errors of judgment in making and administering rules within the scope of statutory authority. The Department is immune from an action in tort.

An officer or employe who wilfully and maliciously issues a license to an ambulance attendant, who does not meet established standards, might be held liable for injuries caused by the attendant.

If an employe should refuse to perform the ministerial duty of delivering possession of a license which had been duly authorized, such employe might be held responsible for damage resulting from the withholding.

The recent cases of *Lifer v. Raymond*, 80 Wis.2d 503, 259 N.W.2d 537 (1977), and *Cords v. Anderson*, 80 Wis.2d 525, 259 N.W.2d 672 (1977), illustrate that it is not always easy to determine whether a public employe’s duty is “absolute, certain and imperative” so as to subject him for damages for negligence as in *Cords*; or whether it is “discretionary” so that he is immune from liability as in *Lifer*.

It is impossible to predict a court’s decision on one of the innumerable sets of facts which might arise. Generally speaking, it seems more difficult to envision situations in which officers and employes would be liable for malpractice than the contrary. That is not to say that suits might not be brought against them in which the discretionary character of their acts would be the issue for a court to determine.

You have not asked about liability for penalties under sec. 946.12, Stats., with which I assume you are familiar. Liability under that statute has similar limitations.

BCL:BL

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*Cities; Counties; County Board; County Treasurer; Ordinances; Real Estate; Taxation;* An ordinance enacted by a city council to purchase lands sold for taxes under sec. 74.43(3), Stats., only becomes operative where the county board has not acted to purchase such lands under sec. 74.44(1), Stats. Advertising and bidding requirements of sec. 75.69(1), Stats., are not applicable to a sale to a city under sec. 75.69(2), Stats., but are applicable to a subsequent sale by a city, unless the transfer still falls within the exemptions in sec. 75.69(2). OAG 36-78

May 10, 1978.

RAYMOND L. PAYNE, *District Attorney*  
*Douglas County*

You state:

“Since about 1956, Douglas County has by resolution directed the County Treasurer to purchase all tax certificates on tax delinquent lands lying within the County’s boundaries. The County understands that this procedure is permitted under Wis. Stat. 74.44(1). Recently, the City of Superior has, under Wis. Stat. 74.43(3), by resolution authorized its City Treasurer to purchase tax certificates for all property lying within the City. The City asserts that Wis. Stat. 74.43(3) requires the County to strike off to the City all tax delinquent land lying within the City for taxes and interest. If the City’s interpretation of s. 74.43(3) is accurate, the County would no longer be able to purchase tax certificates for land lying in the City, but would turn over these certificates to the City. The County’s authority under Wis. Stat. 74.44(1) would be limited to lands lying outside municipal boundaries.”

You ask:

“Under Wisconsin Statutes 74.43(3) does a city have the right to purchase for taxes plus interest all tax certificates for tax delinquent land lying within said city?”

The answer is that a city does have such a right to purchase, but its right is subordinate to the right of the county.

Section 74.44(1), Stats., provides in part:

“The county board of any county may authorize and direct the county treasurer to bid in and become the purchaser of all lands sold for taxes for the amount of taxes, interest and charges remaining unpaid thereon. ...”

When the county board decides to exercise this authority, it becomes the exclusive bidder. This is apparent from reading that part of sec. 74.33(2)(c), Stats., which deals with the notice of sale and which provides in part:

“THIS SALE IS NOT OPEN TO THE PUBLIC.

“THE COUNTY WILL PURCHASE THESE DELINQUENT TAXES.”

Also see sec. 75.32, Stats., as amended by ch. 83, sec. 12, Laws of 1977.

The provisions of sec. 74.43(3), Stats., which enable the common council of a city to authorize and direct the city treasurer to bid in and become the purchaser of all lands sold for taxes must be construed so as not to conflict with the above-mentioned provisions which enable the county treasurer to bid in and become the purchaser of all lands sold for taxes. The obvious way to do this is to construe the city's power as being subject to that of the county because the county has specific powers under secs. 74.33(2)(c) and 75.32 whereas there are no express statutory provisions granting similar powers to cities. Therefore, an ordinance enacted by a city council under the provisions of sec. 74.43(3) would only become operative where the county board has not authorized and directed the county treasurer to bid in and become the purchaser of all lands sold for taxes under sec. 74.44(1). 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). Section 74.43(1), Stats., provides in part:

“If, at any sale in any city ... no bid shall be made for any parcel of land ... the same shall be struck off to the city ... Whenever such city shall hold any certificate of sale for any land sold for the nonpayment of city taxes, the common council ... may authorize and direct the city treasurer to bid in and to become exclusive purchaser ... of such lands at any sale ... by the

*county treasurer for the county and state taxes ... provided that such city shall, before becoming the exclusive purchaser for said lands for said county taxes, purchase any outstanding county certificates of sale held by the county which are subsequent to the city certificates of sale ....*" (Emphasis added.)

The underscored language provides a further indication of a legislative intent that the city's role be subordinate to the county. It is the county treasurer who has jurisdiction over tax delinquent land; he keeps the records, publishes notices, conducts the sale, accepts bids, requires payments and bids off land for the county. Secs. 74.33-74.42, Stats. There is no language in secs. 74.43 or 74.44 to suggest that tax delinquent land should be classified or treated differently based upon municipal boundaries. Further, sec. 74.33(2)(a), Stats., contains the statement: "If the county is the *exclusive bidder* under s. 74.44, he [the county treasurer] shall so state in a separate notice." (Emphasis added.)

You further state that the county understands that sec. 75.69(2), Stats., permits the county to sell or exchange its tax deeded land to the city without advertising or taking bids for the property.<sup>1</sup> You then say that a question arises as to whether or not a city must then advertise and bid the land, presumably in connection with a resale of the land by the city. You ask, "When a municipality purchases tax-deeded land from a county, must the city put the land up for bids

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<sup>1</sup> Section 75.69, Stats., provides:

"Sale of tax delinquent real estate. (1) Except in counties having a population of 500,000 or more, no tax delinquent real estate acquired by a municipality as defined in s. 75.35 (1) (a), shall be sold unless the sale and appraised value of such real estate has first been advertised by publication of a class 3 notice, under ch. 985. Any such municipality may accept the bid most advantageous to it but every bid less than the appraised value of the property shall be rejected. Any such municipality is authorized to sell for an amount equal to or above the appraised value, without re-advertising, any land previously advertised for sale.

"(2) This section shall not apply to exchange of property under s. 59.97 (8), to withdrawal and sale of county forest lands, nor to the sale or exchange of lands to or between municipalities or to the state.

"(3) This section shall apply to all tax delinquent lands regardless of the date of acquisition by the municipality.

"(4) No tax delinquent real estate shall be sold by a county under this section unless notice of such sale is mailed to the clerk of the municipality in which the real estate is located at least 3 weeks prior to the time of the sale."

under Wis. Stat. 75.69?" You note that 42 Op. Att'y Gen. 73 (1953) deals with a similar situation although there the municipality took title to the property from the county in exchange for real estate tax credit which it had with the county on an excess delinquent tax roll.<sup>2</sup> You suggest that a different result should obtain where the municipality furnishes consideration to the county in the form of a negotiated dollar price or an exchange of property instead of the exchange of real estate tax credit. I agree with that part of your conclusion with respect to sec. 75.69(2) to the effect that when the county enters into a sale or exchange of tax delinquent real estate with a municipality or with the state, the advertising and bidding requirements of sec. 75.69(1), Stats., are not applicable. With respect to a subsequent sale by the city, it is my opinion that if such a transfer does not fall within the statutory exemptions of sec. 75.69(2), it must comply with the requirements of sec. 75.69(1). See 60 Op. Att'y Gen. 425, 428 (1971).

BCL:JEA

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*Cities; Collective Bargaining; Contracts; Counties; Employer And Employee; Home Rule; Legislature; Municipalities; Pensions; Retirement Fund; Retirement Systems; Salaries And Wages; Schools And School Districts; Teachers Retirement Fund; Towns; Villages; Authority of a state or governmental subdivision to provide a retirement plan in lieu of or supplemental to existing statutory plans discussed. The Milwaukee School Board is authorized by sec. 111.70, Stats., to contract for a retirement system supplementary to the existing statutory system. OAG 37-78*

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<sup>2</sup> That opinion concluded at p. 76:

"It is my opinion that this property was 'tax delinquent real estate' within the meaning of sec. 75.69 when it was acquired by Florence county and that it continued to be such when it was conveyed by the county to the town of Tipler in exchange for real estate tax credit. Since the town of Tipler was a municipality within the meaning of sec. 75.69 (1), and sec. 75.69 (3) says that the section shall apply to all tax delinquent lands regardless of the date of acquisition by the municipality, it is my opinion that the conveyance by the town of Tipler to the private individual was invalid because the provisions of sec. 75.69 relating to appraisal and advertising were not followed by the town."

May 22, 1978.

## ASSEMBLY ORGANIZATION COMMITTEE

*Legislature*

You request my opinion generally upon the authority of the state or a governmental subdivision thereof to provide a retirement plan for employes supplemental to or in lieu of the retirement systems established by the statutes. Specifically, you ask whether the Milwaukee Board of School Directors may establish such a retirement plan.

You state one of your two questions as follows:

“Can the State or any governmental subdivision including counties, school districts, cities, towns, villages, and other public agencies provide for a separate retirement plan which is in addition to or in lieu of the retirement systems now established by statute by either a unilateral or contractual process because of the State Constitution or statutory provisions governing the determination in conditions of employment?”

Since the authority of the governmental entities specified differs markedly, each type of entity will be treated separately.

**State**

The state may, through legislation, change or establish retirement plans subject, however, to constitutional limitations. The constitutional limitations are set forth in Wis. Const. art. I, sec. 12 (prohibition of impairment of the obligation of contract), and Wis. Const. art. XI, sec. 3 (home rule authority for cities and villages). I will discuss the limitations in that order.

Wisconsin Constitution art. I, sec. 12, states, in part:

“No bill of attainder, *ex post facto* law, *nor any law impairing the obligation of contracts, shall ever be passed ....*”  
(Emphasis added.)

This section limits the authority of the state to unilaterally change the terms of an existing contract unless the change is a necessary exercise of the police power, *i.e.*, an exercise of sovereign power to protect the health and general welfare of the people. *State Medical*

*Society v. Comm. of Insurance*, 70 Wis.2d 144, 159, 233 N.W.2d 470 (1975).

Employees generally have vested contractual rights in the statutory retirement systems, which rights may not, except as stated above, be abrogated by the Legislature. *State Teachers' Retirement Board v. Giessel*, 12 Wis.2d 5, 9, 106 N.W.2d 301 (1960), and cases cited therein at page 9.

Retirement benefits are "fringe benefits" subject to collective bargaining under sec. 111.91(1)(c), Stats. Thus, the state may by contract with a state employees' union under secs. 111.80 thru 111.97, Stats., provide an alternative or additional retirement plan for represented employees, subject to the legislative action required under sec. 111.92, Stats.

The Legislature can, via passage of new legislation, unilaterally change "fringe benefits" or any other term of employment not preserved by a collective bargaining agreement. Wisconsin Constitution art. I, sec. 12, and U.S. Const. art. I, sec. 10, however, preclude the Legislature from passing a law which impairs the obligation of such an existing contract. While I stated in 64 Op. Att'y Gen. 18, 19 (1975), that "the legislature can unilaterally increase pension benefits and costs to state employees in collective bargaining units with impunity," such statement was solely related to the question as to whether the Legislature could commit an unfair labor practice. Thereafter in the opinion I stated at pages 19 and 20:

"... The legislature may not, however, impair the obligations of contracts. See Art. I, sec. 10, U.S. Const.; Art. I, sec. 12, Wis. Const. See also *State ex rel. O'Neil v. Blied* (1925), 188 Wis. 442, 446, 206 N.W. 213. Whether the legislature acted unconstitutionally as to a particular contract depends on the facts and circumstances of a specific case. See *State ex rel. Bldg. Owners v. Adamany* (1974), 64 Wis. 2d 280, 294, 297, 219 N.W. 2d 274."

Thus, the Legislature is limited in its alteration of retirement systems since a unilateral change of terms may constitute an impairment of the obligation of an existing contract.

Another limitation upon legislative action is the "home rule" authority granted to cities and villages by Wis. Const. art. XI, sec. 3. Such section states in part:

"Cities and villages organized pursuant to state law are hereby empowered, to determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village. The method of such determination shall be prescribed by the legislature. ..."

Is the area of retirement systems a matter of statewide or of local concern? The Wisconsin Supreme Court has declared that the subject of pensions for teachers, policemen and firemen and county employes is a matter of statewide concern. *State ex rel. Dudgeon v. Levitan*, 181 Wis. 326, 193 N.W. 499 (1923); *Barth v. Shorewood*, 229 Wis. 151, 282 N.W. 89 (1938); *Columbia County v. Wisconsin Retirement Fund*, 17 Wis.2d 310, 116 N.W.2d 142 (1962). To the contrary, however, in *State ex rel. Brelsford v. Retirement Board*, 41 Wis.2d 77, 163 N.W.2d 153 (1968), the Wisconsin court held that certain modifications to the Milwaukee police pension program were a matter of local concern. The court stated at pages 86-87:

"So here, it appears that although the broad area of police regulation is predominately a matter of statewide concern, nevertheless, the modification of the police pension program for cities of the first class--particularly where that modification merely enables retired policemen to receive their pensions while employed as schoolteachers or in other noncivil service jobs in Milwaukee--seems overwhelmingly to be a matter of predominate local concern. It would seem that the state would have little interest in whether a retired policeman taught school in Milwaukee or in some other municipality. This is a matter of unique interest to Milwaukee.

"Appellant cites *Columbia County v. Wisconsin Retirement Fund* and *Barth v. Shorewood* to support the view that police pensions are a matter of statewide concern. However, in *Barth* this court was dealing with police and fire pensions for villages of 5,000 or more under sec. 61.65, Stats. The need for uniformity among such villages on such pension matters is

apparent; so, too, in *Columbia* was the need for uniformity in establishing county pension systems.”

A declaration by the Legislature that an area is a matter of statewide concern is entitled to great weight because matters of public policy are primarily for the Legislature. But, the ultimate power to determine the matter is in the court. *Van Gilder v. Madison*, 222 Wis. 58, 267 N.W. 25, 268 N.W. 108 (1936), pp. 73-74; *State ex rel. Brelsford v. Retirement Board*, *supra*, p. 82, 86. Thus, whether the subject of a proposed change in a retirement plan is a matter of local or of statewide concern can only be determined upon the facts and circumstances of a specific case.

#### Counties, Towns And School Districts

Counties, towns and school districts have only such powers as are expressly granted in the statutes or reasonably implied from the terms of the statute. See *Dodge County v. Kaiser*, 243 Wis. 551, 11 N.W. 348 (1943), as to counties; *Adamczyk v. Caledonia*, 52 Wis.2d 270, 190 N.W.2d 137 (1971), as to towns; and *State ex rel. Van Straten v. Milquet*, 180 Wis. 109, 192 N.W. 392 (1923), as to school districts. The scope of power of these municipalities is synonymous with the general rule stated in *State ex rel. Farrell v. Schubert*, 52 Wis.2d 351, 190 N.W.2d 529 (1971). The court in *Farrell* set forth, at page 358, the scope of an administrative agency's implied power in these words:

“This court has not had the occasion to determine the scope of an administrative agency's implied power under a statute. The rule in other jurisdictions is that “... a power which is not expressed must be reasonably implied from the express terms of the statute; or, as otherwise stated, it must be such as is by fair implication and intendment incident to and included in the authority expressly conferred.” Consistent with this rule is the proposition that any reasonable doubt of the existence of an implied power of an administrative body should be resolved against the exercise of such authority.”

See also *Dodge County v. Kaiser*, *supra*, p. 557; and *Spaulding v. Wood County*, 218 Wis. 224, 229, 260 N.W. 473 (1935).

The Wisconsin Constitution at art. IV, sec. 22, authorizes the Legislature to delegate certain "home rule" powers to counties. Such section reads:

"POWERS OF COUNTY BOARDS. **Section 22.** The legislature may confer upon the boards of supervisors of the several counties of the state such powers of a local, legislative and administrative character as they shall from time to time prescribe."

The Legislature has provided limited "home rule" authority to Milwaukee County regarding its retirement system. See ch. 405, Laws of 1965, sec. 2, and 61 Op. Att'y Gen. 177 (1972). No such authority has been provided for counties other than Milwaukee.

Chapter 41 of the statutes establishes the Wisconsin Retirement Fund (WRF), the retirement program for state and local employes, except for teachers and employes of the city or county of Milwaukee. Chapter 42 of the statutes establishes the State Teachers Retirement System (STRS) covering teachers in the state except for those of the Milwaukee School District, and the Milwaukee Teachers Retirement System (MTRS) covering the Milwaukee teachers. Milwaukee County employes are covered by a separate retirement plan established by ch. 201, Laws of 1937.

Section 41.02(4), Stats., defines "employer" to include a town, county or school district. Section 41.02(5), Stats., defines "participating employer" as "any employer included within the provisions" of the fund. Section 41.05, Stats., sets forth those employers that are included within the fund either automatically or by election of the governing body. Counties, other than Milwaukee, are required to be "participating employers" of the WRF. Sec. 41.05(9)(a)1., Stats. Towns and school districts (for nonteaching personnel), can elect to be under WRF. Sec. 41.05(1), Stats. Teachers are mandatorily under either the STRS or MTRS. Ch. 42, Stats.

The Legislature has, therefore, provided a means by which counties, towns and school districts can provide pension plan membership for its officers and employes. Thus, the authority to provide an alternative or additional retirement plan cannot be said to exist "by fair implication and intendment" within the scope of the implied power of these governmental entities relating to hiring and

fixing of salaries, etc. See 39 Op. Att’y Gen. 314 (1950), and OAG 68-76 (unpublished opinion to Dr. Barbara Thompson, State Superintendent of Public Instruction, dated September 21, 1976).

Does the authority to provide an alternative or supplemental system arise through the statutes relating to “collective bargaining?” Subchapter IV of ch. 111, Stats., establishes the right of municipal employes and employers to confer and negotiate concerning “wages, hours and conditions of employment” and to reduce such negotiations to a binding contract. Subsection 111.70(2), Stats., provides:

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

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

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

63 Op. Att’y Gen. 16, 20 (1974) stated:

“... school boards have authority to include in contracts with teachers an increment in return for choosing early retirement. Such authority exists regardless of whether the contract is or is not the result of collective bargaining.”

This result was based largely upon the duty of the school board, under sec. 118.21, Stats., to “contract in writing with qualified teachers.” 63 Op. Att’y Gen. 16 (1974), at p. 18. Since the duty to bargain collectively imposes on municipal employers the obligation, and therefore the power, to bargain over retirement systems, municipal employers may do so in a way which modifies existing statutory schemes except where those statutory schemes by their own terms are mandatory and not subject to waiver through bargaining. Cf. *Joint School Dist. No. 8 v. Wis. E.R. Board*, 37 Wis.2d 483, 492, 155

N.W.2d 78 (1967) (“These items determined by statute, of course, cannot be changed by negotiation. But what is left to the school boards ... is subject to compulsory discussion and negotiation.”). Also see *Board of Education v. WERC*, 52 Wis.2d 625, 640, 191 N.W.2d 242 (1971).

Retirement plans, their management and administration, and employer and employe contributions to such plans have long been held to be mandatory subjects of collective bargaining as coming within the terms of “wages” and “conditions of employment.” *Inland Steel Co. v. National Labor Relations Board*, 170 F.2d 247 (7th Cir. 1948). Retirement plans are proper subjects for bargaining under sec. 111.70, Stats., within the broad interpretation of “wages, hours and conditions of employment” set forth in *Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B.*, 35 Wis.2d 540, 151 N.W.2d 617 (1967), and *Joint School Dist. No. 8 v. Wis. E.R. Board*, 37 Wis.2d 483, 155 N.W.2d 78 (1967). The conclusion follows then that a supplemental retirement plan is a proper subject of collective bargaining under sec. 111.70, Stats., and thus a proper element of the resulting contract unless prohibited by statute. *Beloit Education Asso. v. WERC*, 73 Wis.2d 43, 242 N.W.2d 231 (1976). I find no statutory prohibition against bargaining and contracting for a supplemental retirement plan.

### Cities And Villages

A city or village (except the City of Milwaukee), becomes a participant in the WRF by electing to be included in the fund. Sec. 41.05, Stats. The only city and village employes mandatorily under the fund are police officers and fire fighters. Secs. 61.65(6) and (7), 62.13(9)(e), (9a), (10)(f) and (g), Stats. The City of Milwaukee, excluded from the WRF by sec. 41.05(1), Stats., has a separate retirement system under ch. 396, Laws of 1937. Once a city elects, under sec. 41.05, Stats., to participate in the WRF, such election is irrevocable since there is nothing in ch. 41 authorizing a participant to discontinue. Where a city or village has elected participation in the WRF, its authority to provide a supplemental plan arises from “home rule” or the duty to bargain collectively under subch. IV of ch. 111, Stats.

Cities and villages have “home rule” power under Wis. Const. art. XI, sec. 3, in matters of local concern. Whether a subject of

legislation is of a predominate statewide or local concern is a policy area to be weighed and initially declared by the Legislature. This declaration of policy is then given great weight by the court if the court is required to make the ultimate determination as to whether the matter is of statewide or of local concern. See *State ex rel. Brelsford v. Retirement Board*, *supra*, p. 86. *Brelsford* further indicates to me that the local or statewide concern question should only be handled on the basis of a fact situation brought into being by a specific retirement plan or legislation.

You ask in your other question:

“Can the Milwaukee Board of School Directors and/or the Administrators and Supervisors Council establish a new retirement fund which is in addition or in lieu of coverage under the Milwaukee Teachers Retirement Fund by either a unilateral action or by contractual process?”

The Milwaukee School Board is an independent public body charged with the management, control or supervision of the public schools in the city. *State ex rel. Roelvink v. Zeidler*, 268 Wis. 34, 37, 66 N.W.2d 652 (1954). Sec. 119.04, Stats., provides:

“... The board and the schools in cities of the 1st class shall be governed in all matters by the general laws of the state, except as altered or modified by express amendments.”

The independence of the school board from the city is, however, not complete. The city provides the money and owns the physical property of the school system. Secs. 119.16(3)(b) and 119.46, Stats. Section 119.12(2), Stats., provides for an action against the board, but sec. 119.68, Stats., provides that any such claims arising out of the operation of the schools are brought as claims against the city. The city attorney is *ex officio* the attorney for the board. Sec. 119.10(b), Stats. All contracts are required to be made in the name of the city. Sec. 119.52(5)(a), Stats.

The Milwaukee School Board is, however, independent of the city in the area of hiring and compensation of employes eligible for the Milwaukee Teachers Retirement Fund (MTRF). Secs. 119.18(1) and (10) and 119.40, Stats. Thus, at least in this respect, the general rules as to the authority of school districts apply.

It has long been established in this state that school districts are quasi-municipal corporations acting as the state's agent for the purpose of administering the state's system of public education. *Zawerschnik v. Joint County School Comm.*, 271 Wis. 416, 429, 73 N.W.2d 566 (1955). A district has only those powers expressly given to it by statute or implied as necessary to execute those powers expressly given. *State ex rel. Van Straten v. Milquet, supra*; 29 Op. Att'y Gen. 96 (1940). This statement of the scope of the school district's power is in accord with the general rule stated in *State ex rel. Farrell v. Schubert, supra*, holding that state agencies have only those powers expressly granted or necessarily implied within the statutes under which the agency proceeds.

Section 119.18(10), Stats., specifically authorizes and requires utilization of the MTRF for teaching personnel. Such section states:

**“Employees.** (a) The board may determine the qualifications of all persons in its employ who are eligible to membership in the teachers retirement fund established and maintained in the city.”

The Milwaukee Teachers Retirement Fund, created and covered by secs. 42.70 through 42.96, Stats., is the only teachers retirement fund specifically authorized for teaching personnel in Milwaukee. “Teacher” is therein broadly defined to include superintendents, principals, supervisors, etc. Sec. 42.70(2)(q)1., Stats.

The Legislature has thus provided a specific retirement plan for Milwaukee “teachers” and required the school board to implement membership of such teachers in the retirement plan, the MTRF. I find no other statute authorizing the Milwaukee School Board to provide retirement participation or an alternative retirement plan for “teachers.” There is no indication of legislative intent to authorize an alternative plan. Moreover, the fact that the Legislature has provided an exclusive plan for Milwaukee “teachers” negates any argument that there is implied authority to establish a different retirement system.

One question then remains. Does the Milwaukee School Board have the authority to provide a retirement system supplementary to the MTRF by virtue of a collective bargaining agreement authorized by subch. IV of ch. 111, Stats.? It is my opinion that the Milwaukee School Board does have the duty and authority under ch. 111, Stats.,

to bargain on the subject of a supplementary retirement system and the similar authority to implement such supplementary retirement system if it becomes part of a collective bargaining agreement. What I said above concerning the duty of counties, towns and school districts to bargain on retirement plans is applicable here.

Section 42.70(1), Stats., states in part:

“... A teachers retirement fund is created in each city of the 1st class. ...”

Section 42.80, Stats., requires the deduction of employe contributions from the salary of “teachers” as defined in sec. 42.70(2)(q)1., Stats. The Milwaukee School Board is authorized by sec. 119.18(10)(a), Stats., to determine, within the statutory definition of “teacher,” those persons eligible to membership. All persons so determined to be eligible for participation in the MTRF are required to be members. Secs. 42.70 and 42.80, Stats. Do the statutes providing this mandatory MTRF coverage constitute a prohibition against bargaining and contracting for a supplementary retirement benefit? In my opinion they do not. The statutes do not by plain language prohibit such a supplemental retirement system, nor do I see a prohibition by implication. The basic legislative purpose for establishing the MTRF was to provide an adequate retirement for teachers in cities of the first class. This purpose is not clearly inconsistent with establishment of supplemental benefits through collective bargaining. It is, therefore, my opinion that sec. 111.70, Stats., authorizes the Milwaukee School Board to negotiate and contract for a retirement system supplementary to that established under subch. II of ch. 42, Stats.

BCL:WMS

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*Counties; County Board; County Clerk; Ordinances; Public Officials; Public Records;* Questions concerning proposed county code of ethics ordinance answered.

1. A county board may provide for a forfeiture but not a fine for violations of an ordinance. 66 Op. Att’y Gen. 148 (1977).

2. A county board lacks the authority to prohibit county clerk (election commission in Milwaukee County) from placing on ballot candidates who have not complied with code of ethics ordinance.

3. County board lacks the authority to order the withholding of salary of elected officials who fail to comply with a code of ethics ordinance.

4. The county board lacks authority to prohibit county officers from acting as agent or attorney for an entity other than the county in connection with any transaction involving the county in which such officers participate during the course of their service for a period of 12 months after leaving county service.

5. A board created by the county board, unless it is a committee of the county board, lacks authority to issue subpoenas or administer oaths.

6. A county ordinance cannot provide for blanket nondisclosure of county ethics board opinions contrary to the public records law. OAG 39-78

May 24, 1978.

ROBERT P. RUSSELL, *Corporation Counsel*  
*Milwaukee County*

You request my opinion with respect to six questions relating to the validity of certain portions of a proposed code of ethics for county officials and employees.

You state that the only authority granted to counties to adopt a code of ethics is found in sec. 19.45(11)(c), Stats., which provides:

“Counties and municipalities may and should establish a code of ethics for local public officials.”

Whereas this is the only express reference to a code of ethics, and although counties have only those legislative powers expressly granted by statute or necessarily implied, it is my opinion that counties have, by the above statute and by implication from other statutes, necessary power to adopt and enforce a reasonable code of ethics. By implication a county could include in such code, requirements for financial disclosure and prohibitions similar to those provided in secs. 19.41-19.45, Stats. By reason of sec. 59.025, Stats., a county board could create an office or commission charged with administrative and limited enforcement powers with respect to such code.

1. Can a county board provide that violation of its ordinance is punishable by fine?

I am of the opinion that it cannot. However, it can provide for a forfeiture. This subject is discussed in 66 Op. Att’y Gen. 148 (1977), a copy of which is attached.

2. “Does the county board have the authority to direct the county clerk or in the case of Milwaukee County, the election commission, not to place on the ballot the name of a candidate for an elective county office who has not filed a financial disclosure statement as required by the ordinance? [See s. 9.03 (5)]”

I am of the opinion that it does not have such authority. This subject is discussed in 66 Op. Att’y Gen. 148 (1977) referred to above.

3. “Does the county board have the authority to direct the county treasurer to withhold the payment of salary or compensation to an elective county officer who has failed to file the statement of economic interest as required by the code of ethics? [See s. 9.03 (6)]”

I am of the opinion that it does not. A duly elected and qualified county officer is entitled, as an incident of the office, to the salary established in accordance with sec. 59.15(1)(a), Stats., which cannot be diminished during the officer’s term. Right to salary would terminate in case of resignation, death, or removal for cause as provided in secs. 17.09 and 17.16, Stats. See *Schultz v. Milwaukee*

*County*, 250 Wis. 18, 22, 26 N.W.2d 260 (1947), and 65 Op. Att'y Gen. 62 (1976).

4. "Does the county board have the authority to prohibit any officer of the county, including an elected officer, from acting as an agent or attorney for any one other than the county in connection with any transaction involving the county in which such officer participated during the course of his or her service for the county for a period of 12 months after leaving the service of the county? [See s. 9.05 (9)]"

There is no statute which expressly or by implication grants the county board such authority; and I am of the opinion that it does not have such power. It could not apply to any elected officer and would probably result in a denial of equal protection of the laws as to other officers and employes unless it were a part of the original employment contract.

5. "Would the provisions of s. 9.10 (1), (2), (3) and (4), as adopted by the county board, be sufficient to enable the board of ethics to administer oaths; to issue subpoenas, to require any person or organization to submit in writing such reports and answers to questions relative to proceedings before the board and to order testimony to be taken by deposition before any person designated by the board? In other words, does the county board have the authority to grant these powers to the board of ethics?"

I am of the opinion that the board of ethics as presently proposed would not have the power to administer oaths or issue subpoenas. If the board were a committee of the county board, it would have power to issue subpoenas by reason of sec. 885.01(3), Stats. Whereas a county board has power to take testimony under oath in certain special circumstances, such as removal proceedings, it is my opinion that it cannot delegate a general power to an officer or commission it creates to administer a code of ethics. In order for the provisions of sec. 885.01(4), Stats., to apply to a county commission, there must be some other statute authorizing such commission to take testimony. The Legislature deemed it necessary to expressly provide that the State Ethics Board have power to compel the attendance of witnesses. See sec. 19.48(4), Stats. I am of the opinion that it cannot be implied

from sec. 19.48, Stats., or other statutes, that a county board can authorize a county board of ethics to perform the duties granted by sec. 19.48, Stats.

6. "Are the provisions of s. 9.15 [9.14] (2) (a) and (b) sufficient authority for the board to refuse public inspection of records obtained in connection with a request for an advisory opinion, or obtained or prepared by the board in connection with an investigation of the violation of the code of ethics?"

I am of the opinion that such provisions could not be used by the board or its custodian of records as a form of *blanket* refusal to permit inspection and copying as permitted by secs. 19.21(2) and 59.14(1), Stats. See *State ex rel. Youmans v. Owens*, 28 Wis.2d 672, 137 N.W.2d 470 (1965), 139 N.W.2d 241 (1966); *Beckon v. Emery*, 36 Wis.2d 510, 153 N.W.2d 501 (1967); *State ex rel. Journal Co. v. County Court*, 43 Wis.2d 297, 168 N.W.2d 836 (1969); and 67 Op. Att'y Gen. 12 (1978), a copy of which is enclosed. Whereas the Legislature has provided that certain records of the State Ethics Board are confidential and not open to inspection (see sec. 19.48(10), Stats.), such statute does not apply to a county ethics board and the Legislature has not authorized counties to adopt similar restrictions on access to public records.

Proposed sec. 9.14(1) and (2), provides:

"(1) Except as provided in paragraph (2), all records in the possession of the board are open to public inspection at all reasonable times. The board shall require a person wishing to examine a statement of economic interests to establish his or her identity and, if representing another person or organization, the person or organization he or she represents. No person may use a fictitious name or address or fail to identify a principal in making any request for inspection.

"(2) Notwithstanding s. 19.21, Wis. Stats., the following records in the board's possession are not open for public inspection:

"(a) Records obtained in connection with a request for an advisory opinion other than summaries of advisory opinions that do not disclose the identity of persons requesting advisory

opinions; except that the board may make such records public with the consent of the officer who requests the advisory opinion. A person or organization who makes or purports to make public the substance of or any portion of an advisory opinion given to such person or organization by the board is deemed to have waived the confidentiality of the request for an advisory opinion and of any records obtained or prepared by the board in connection with such request.

“(b) Records obtained or prepared by the board in connection with an investigation, except that the board shall permit inspection of an order for hearing under section 9.11(1) and records that are made public in the course of a hearing by the board to determine if a violation of this section has occurred and except that the board may, in its discretion make such records public following the conclusion of its investigation.”

Even if it were necessary to give a pledge of confidence to receive the records, and in my opinion it would not be necessary, the passage of time or nature of the information on the record itself might require permission to inspect and copy. In any event, it is my opinion that the custodian must in each case determine whether there is a public interest in denying inspection and copying which is paramount to the right granted by the statute. If it is initially determined that inspection should be refused, an express reason must be given, and the party seeking inspection can resort to mandamus to test the reason.

Section 19.21, Stats., is to be construed in *pari materia* with the open meeting law. See 60 Op. Att’y Gen. 284 (1971). Section 19.85(1)(f) and (h), Stats., allow closed sessions for the following purposes:

“(f) Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons except where par. (b) applies which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations.

“(h) Consideration of requests for confidential written advice from the ethics board under s. 19.46 (2), or from any local government ethics board.”

I am of the opinion that provisions such as sec. 9.14(1) and (2) of the proposed ordinance could, in view of the provisions in sec. 19.85(1)(f) and (h), Stats., be relied upon in a given case as sufficient reasons why the custodian could initially refuse a request to inspect and copy the records in question. But, if the records involved are “books and papers required to be kept in his office,” access to inspection would be required by reason of sec. 59.14(1), Stats., and the rule of *State ex rel. Journal Co. v. County Court, supra*. Section 59.14(1), Stats., is applicable to officers, in addition to those specifically set forth, who are required to keep their offices at the county seat in offices provided by the county.

BCL:RJV

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*County Judge; Discrimination; Employer And Employee; Public Officials; Register In Probate; A register in probate is protected by the Fair Employment Act, which protection is not affected by a defect in the appointment. OAG 40-78*

June 1, 1978.

MICHAEL T. SOLOVEY, *District Attorney*

*Juneau County*

You requested my opinion on the following two questions:

“1. Whether a register in probate (sec. 253.31, Stats.) is entitled to the protection of the Fair Employment Act (sec. 111.31-37 Stats.)?”

“2. Whether a defect in the appointment of a register in probate (sec. 253.31 Stats.) has any bearing upon the application of the Fair Employment Act (sec. 111.31-37 Stats.) to this position?”

You indicate that Juneau County has a population of approximately 18,000 people and its employes are not covered by union contract or civil service.

Your questions are based on the following factual setting. The judge of the Juneau County Court appointed a woman as register in probate pursuant to sec. 253.31, Stats. Her job is listed in the county salary schedule and she received county benefits. The register in probate, who was unmarried, became pregnant and was dismissed by the judge.

**A Register In Probate Is Protected By  
The Fair Employment Act.**

The Fair Employment Act, subch. II of ch. 111, Stats., makes it “unlawful for *any employer*, labor organization, licensing agency or *person to discriminate against any employe* or any applicant for employment or licensing.” Sec. 111.325, Stats.

Section 111.32, Stats., defines “discrimination” and “discrimination because of sex.”

“(5)(a) ‘Discrimination’ means discrimination because of age, race, color, handicap, sex, creed, national origin or ancestry, by an employer ... against any employe ... in regard to his hire, tenure or term, condition or privilege of employment ...

“\*\*\*

“(g) It is discrimination because of sex:

“1. For an employer ... on the basis of sex where sex is not a bona fide occupational qualification, to refuse to hire, employ, admit or license, or to bar or to terminate from employment or licensing any individual;”

Prohibition of sex discrimination in employment and activities affecting the employment process is thus the declared public policy. Virtually all employers (and employes) are covered by the Act.

The Act’s definitions of “employer” and “employe” are extremely broad.

“The term ‘employer’ shall include this state and any employer as defined in s. 41.02(4), but shall not include a social

club, fraternal or religious association not organized for private profit." Sec. 111.32(3), Stats.

By reference to sec. 41.02(4), Stats., "any city, village, town, county, common school district ... or any other unit of government" is included within the definition of employer.

Section 111.32(2), Stats., states: "The term 'employes' shall not include any individual employed by his parents, spouse or child." Failure to define "employe" directly creates no ambiguity, and in the absence of ambiguity, language normally is to be given its ordinary and accepted meaning. *See Vigil v. State*, 76 Wis.2d 133, 142, 250 N.W.2d 378 (1977).

Under sec. 990.01(1), Stats., however, "employe" 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 New World Dictionary*, Second College Edition, defines "employe" to mean "a person hired by another, or by a business firm, etc., to work for wages or salary." Although a register in probate clearly qualifies under this dictionary definition of employe, it is equally clear that a register in probate enjoys a status different from the status associated generally with the ordinary and accepted meaning of the word employe. That is, the register in probate is not only an employe of the county but the person appointed register in probate also is a county official.

The leading case in Wisconsin establishing criteria to determine whether one is a public officer or an employe is *Martin v. Smith*, 239 Wis. 314, 1 N.W.2d 163 (1941). The court stated at page 332:

“ [T]o constitute a position of public employment a public office of a civil nature, it must be created by the constitution or through legislative act; must possess a delegation of a portion of the sovereign power of government to be exercised for the benefit of the public; must have some permanency and continuity, and not be only temporary or occasional; and its powers and duties must be derived from legislative authority and be performed independently and without the control of a superior power, other than the law, except in case of inferior officers specifically placed under the control of a superior officer or body, and be entered upon by taking an oath and giving an

official bond, and be held by virtue of a commission or other written authority.”

The office of register in probate as created by legislative act requires taking of the official oath. Section 253.31(1), Stats. See Wis. Const. art. IV, sec. 28. Register in probate is a permanent office even though any individual holding such office serves for an undefined term. See *Burton v. State Appeal Board*, 38 Wis.2d 294, 302, 156 N.W.2d 386 (1968). The statutory duties and powers of registers in probate, secs. 253.32 *et seq.*, Stats., clearly involve the exercise of some sovereign powers of the state free from the control of a superior power except that the judge can direct performance of general administrative duties. Sec. 253.32(6), Stats. Such persons are appointed by the county judges. Sec. 253.31(1), Stats. County judges also are county officials. *State ex rel. Sachtjen v. Festge*, 25 Wis.2d 128, 130 N.W.2d 457 (1964).

While registers in probate exercise some of the sovereign powers of the state, they are primarily local officers carrying out statutorily defined duties and exercising statutorily defined powers under the general supervision of the county judge. It is, therefore, my opinion that registers in probate should be considered county officers rather than county employees. Although the status of registers in probate as county officers suggest exclusion from the common and approved definition of employe above cited it is, nevertheless, also my opinion that the register in probate comes within the meaning of “employe” in the Fair Employment Act.

Although sec. 253.31, Stats., vests in the county judge authority to appoint and remove a register in probate, such person, nevertheless, is “employed” by the county. The salary of the register in probate is fixed by the county board and paid by the county. Sec. 253.31(3), Stats. The position is included in the county salary schedule and the person appointed receives other county benefits. The county board has the power to set or change the salaries of county employes generally. See, *e.g.*, secs. 59.15, 59.16, 59.19 and 59.38, Stats. Included within the county’s general powers enumerated in ch. 59, Stats., is the power to establish a county civil service system for the selection, tenure and status of county personnel. Sec. 59.07(20), Stats. In 35 Op. Att’y Gen. 69 (1946) it was stated that civil service rules can apply to all county personnel not expressly excluded from sec. 59.07(20), Stats. Registers in probate are not specifically

excluded. *See also* 63 Op. Att’y Gen. 147 (1974); 41 Op. Att’y Gen. 105 (1952) and 38 Op. Att’y Gen. 21 (1949).

Status as an officer, therefore, does not necessarily disqualify an individual as an employe as that word is used or defined in any particular statute. *State ex rel. Sheets v. Fay*, 54 Wis.2d 642, 646, 196 N.W.2d 651 (1972). *See also* 62 Op. Att’y Gen. 20 (1973). As previously noted, the manifest intent of the Legislature as stated in the act is to prohibit discrimination by any employer or person. Sec. 111.325, Stats.

The Legislature’s extension of the Act’s coverage to virtually all employers and employes evinced comprehensive and equal treatment. The declared public policy is “to encourage and foster to the fullest extent practicable the employment of all properly qualified persons regardless of their age, race, creed, color, handicap, sex, national origin or ancestry.” Sec. 111.31(3), Stats. Our supreme court has declared that it will liberally construe the Act in order to foster full employment without discrimination. *See Chicago, M., St. P. & P. R.R. v. ILHR Dept.*, 62 Wis.2d 392, 397, 215 N.W.2d 443 (1974).

The Act’s legislative history supports the comprehensive coverage intended. In *State ex rel. Dept. of Pub. Instruction v. ILHR*, 68 Wis.2d 677, 684, 229 N.W.2d 591 (1975), before sec. 111.32(3) of the Act was amended to include the state as an employer, the court urgently suggested that the Legislature make the Act applicable to *all* employers.

“... The legislative purpose or public policy as set forth in the Fair Employment Act should apply to all employees whether hired by the state or others. If the legislature does not include them, questions of constitutional equal protection could be raised. A simple amendment to the act could include the state and its agencies as an employer or person *so that all employees (with stated exceptions) may enjoy the protection of our antidiscrimination statutes.*” (Emphasis added.)

The Act was amended by ch. 31, Laws of 1975, to include the state as an employer and all state employes without exception. In view of the manifest broad coverage it is my opinion that “employe” includes such appointed officials as registers in probate. To construe employe narrowly to exclude such persons would frustrate legislative intent.

A further question remains, however. Is the Fair Employment Act applicable to the discretionary authority of the county judge to appoint and remove registers in probate? I believe it is applicable.

The general rule is that an employer or appointing authority, *see Moses v. Board of Veterans Affairs*, 80 Wis.2d 411, 259 N.W.2d 102 (1977), may discharge for any reason or no reason in the absence of contrary statutory or contract provisions. *Yanta v. Montgomery Ward & Co., Inc.*, 66 Wis.2d 53, 63, 224 N.W.2d 389 (1974). The statutory appointive powers in sec. 253.31, Stats., were in existence when the Legislature adopted the Fair Employment Act. It is presumed that the Legislature was aware of the appointive powers when the Act was adopted and amended, and those powers are subject to modification by subsequently passed statutes. *Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B.*, 35 Wis.2d 540, 556-558, 151 N.W.2d 617 (1967). The reason is that, even where there is an otherwise absolute statutory power to hire and fire, the “[m]odification of statutes is a question of legislative policy,” *id.*, and the Fair Employment Act constitutes a modification of the otherwise discretionary power to hire and fire.

As already noted the Act prohibits discrimination by any “employer” or “person.” Sec. 111.325, Stats. Delegating to county judges the authority to appoint and remove is no more significant than similar delegation to persons in other areas of government employment. *Compare, e.g.,* sec. 62.13(4)(a), Stats. (police chief’s statutory power to appoint and promote subordinates) and sec. 17.07, Stats. (removal by appointing authority of legislative and appointive state officers). *Cf. Glendale Professional Policemen’s Association v. City of Glendale*, 83 Wis.2d 90, 264 N.W.2d 594 (1978), and *Moses v. Board of Veterans Affairs, supra*.

In stating the public policy against discrimination in employment, the Legislature made no exception for appointed positions. Nothing in the Act’s legislative history suggests that county judges are to be exempt from the Act’s prohibitions when making statutory appointments. In this regard, a county judge enjoys no special status and is bound by the law as is any other person. Sec. 111.325, Stats.

It is important to keep in mind that the removal from office in the instant case does not involve the exercise of inherent powers of a court or the principle of separation of powers. *See In re Appointment of*

*Revisor*, 141 Wis. 592, 612, 613, 124 N.W. 670 (1910). The office of register in probate was created by statute as are the duties and powers of the office. As already noted, they are subject to legislative modification. Cf. 62 Op. Att'y Gen. 269 (1973); 30 Op. Att'y Gen. 148 (1941); *State ex rel. Sachtjen v. Festge*, *supra*. Assuming, however, one considers removal an inherent power of the court under a theory that it may be necessary to protect the judicial system and the integrity of the court, the Legislature, by prohibiting discrimination, has imposed a reasonable qualification on the county judge's exercise of such power. *State v. King, et al.*, 82 Wis.2d 124, 262 N.W.2d 80 (1978); *Upper Lakes Shipping v. Seafarer's I. Union*, 22 Wis.2d 7, 125 N.W.2d 324 (1963); *Jos. Schlitz Brewing Co. v. Washburn Brewing Asso.*, 122 Wis. 515, 100 N.W. 832 (1904); *State ex rel. Attorney General v. Circuit Court for Eau Claire County*, 97 Wis. 1, 72 N.W. 193 (1897).

Consequently, a county judge may remove the register in probate but not for reasons proscribed by the Fair Employment Act.

Although it is my opinion that the Fair Employment Act applies to the appointment and removal of a register in probate, the Department of Industry, Labor and Human Relations has been given primary responsibility for determining whether actual discrimination has occurred, sec. 111.33, Stats. Because dismissal in the instant case may involve disputed questions of fact, such matters should be resolved by the Department of Industry, Labor and Human Relations. I therefore express no opinion on whether removal in the instant case violated the Act's proscription against sex discrimination. Cf. *Ray-O-Vac v. ILHR Department*, 70 Wis.2d 919, 236 N.W.2d 209 (1975); *Wisconsin Telephone Co. v. ILHR Dept.*, 68 Wis.2d 345, 228 N.W.2d 649 (1975).

A Defect In The Appointment Of A Register  
In Probate Has Limited Bearing Upon The  
Application Of The Act.

In your second question you ask whether a defect in the appointment of a register in probate has any bearing upon the application of the Fair Employment Act to the position. In my opinion such defect has only incidental effect upon the application of the Act.

Section 253.31(1), Stats., provides in part that before entering upon his or her duties a register in probate “shall take and subscribe the constitutional oath of office and file it, together with the order of appointment, in the office of the clerk of circuit court.” Unintentional failure to comply with these statutory requirements renders the office vacant (sec. 17.03(7), Stats.), but would not prevent a person from assuming office. See 1908 Op. Att’y Gen. 736 (1907); see also *Burton v. State Appeal Board*, *supra*, at 304. It would mean, however, that the person appointed is a *de facto* rather than a *de jure* register in probate.

“... 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).

It is well established that the official acts of a *de facto* officer, as to third persons, are valid and cannot be questioned collaterally. *In re Burke*, 76 Wis. 357, 362, 45 N.W. 24 (1890). See also *Burton v. State Appeal Board*, *supra*, at 304; *Walberg v. State*, 73 Wis.2d 448, 463, 464, 243 N.W.2d 190 (1976).

Where there is no *de jure* officer claiming the office, a *de facto* officer is entitled to the salary of the office when the *de facto* officer has entered upon the duties of the office in good faith and pursuant to apparent authority. *State ex rel. Reynolds v. Smith*, *supra*, at 522, 523. In the instant case any defect would likely be corrected promptly by the appointing authority through reappointment, thereby making that person a *de jure* officer. Obviously the county judge could simply withdraw the appointment of a register in probate if that person refuses to take and subscribe the constitutional oath of office.

As already noted the policy of making discrimination unlawful extends to all employes and prospective employes including, in my opinion, *de facto* employes. See secs. 111.325 and 111.31, Stats. Therefore, when a person is a *de facto* employe, he or she is entitled to the protection of the Act.

BCL:JN

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*Cities; Compatibility; Public Officials; Teachers; Compatibility of the office of alderperson with positions of city employe, teacher in city school district and firefighter discussed in general terms. OAG 42-78*

June 6, 1978.

EVERETT E. BOLLE, *Assembly Chief Clerk*  
*Committee on Assembly Organization*

The Committee on Assembly Organization has requested my opinion on four questions involving the authority of a city employe to contemporaneously serve as alderperson.

1. May a city employe contemporaneously serve as alderperson?

The answer to your general question is no. But there may be exceptions which will depend in part on the nature, responsibilities and duties of the specific position of employment involved; whether the council is the appointing authority; the degree of supervisory power exercisable by the council over the position; whether the position was created during the term of such alderperson; the amount of compensation for such position; and whether the council has power to establish, increase or decrease such compensation.

Where there are substantial potential areas of conflict between two offices or an office, such as alderperson, and a position of employment, the rule of common-law incompatibility would preclude the same person from holding both. See general rules as to incompatibility in 58 Op. Att'y Gen. 247 (1969), and 67 C.J.S. *Officers* sec. 23a, at 133. An employe who was also an alderperson would also have to be careful to avoid criminal liability imposed by sec. 946.13, Stats., as amended by ch. 166, Laws of 1977.

This statute prohibits municipal officers and employes from having a private interest in certain public contracts, but is not applicable where the interest is in contracts which involve receipts and disbursements by the political subdivision aggregating less than \$5,000 in any year.

Section 66.11(2), Stats., provides:

**“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.”

In *Martin v. Smith*, 239 Wis. 314, 1 N.W.2d 163 (1941), it was stated that the doctrine of incompatibility of offices, which renders it improper from considerations of public policy to permit one person to hold two offices at the same time where the nature and duties are in conflict, was part of the common law in force in the Territory of Wisconsin at the time of the adoption of the Wisconsin Constitution and continues by reason of Wis. Const. art. XIV, sec. 13. The case further states that one who accepts an office which is incompatible with the one held vacates the first.

Whereas the common-law doctrine of incompatibility has generally been applied only where two offices are involved, there is a trend to apply the doctrine to positions, or an office and a position if there are many potential conflicts of interest between the two, such as salary negotiations, supervision and control of duties and obligations to the public to exercise independent judgment. In *Tarpo v. Bowman Public Sch. Dist. No. 1*, 232 N.W.2d 67 (N.D. 1975), it was held that a teacher serving in a school district could not at the same time serve as school board member. The court held that there was not automatic ouster but that such person could choose which position he desired to continue to serve in. At p. 71 the court stated:

“The court in Wyoming recently had before it the question which confronts us in this case. In a well-documented decision, *Haskins v. State ex rel. Harrington*, 516 P.2d 1171 (Wyo. 1973), it was concluded that “\*\*\* employment as teacher and office as member of the board of trustees of the school district

are incompatible within the meaning and intent of the common-law rule.’ We agree that this is equally applicable in North Dakota.

“Following *Haskins*, we conclude that there is no constitutionally protected right to hold incompatible offices or employments and that the rule against holding incompatible offices (or positions) does not result in an unconstitutional infringement of personal and political rights.

“Two offices or positions are incompatible when one has the power of appointment to the other or the power to remove the other, and if there are many potential conflicts of interest between the two, such as salary negotiations, supervision and control of duties and obligations to the public to exercise independent judgment.

“We hold that the adoption of a conflict-of-interest statute (sec. 15-49-02, N.D.C.C.) in no way abrogated the common law rule against the holding of incompatible positions. ...”

2. May a teacher employed in a city or joint city school district serve as an alderperson?

I am of the opinion that such person probably can but would have to avoid violation of sec. 946.13, Stats.

In 26 Op. Att’y Gen. 582 (1937), it was stated that a teacher in a city school district could not also at the same time serve as alderperson. However, the statute therein relied upon, sec. 62.09(2)(c), Stats. (1937), is no longer in force. It provided that a city office would become vacant if such officer acquired a pecuniary interest in certain contracts. Under present law, teachers in a city school district and joint city school district are appointed, and salaries are established by the school board. The degree of control exercised by the city council over the teacher is limited and indirect. Where there is a fiscal board, such board rather than the city council has power “to approve the school budget, to levy the general property tax for school purposes and to exercise all other fiscal controls over the city school district which were exercised by the common council prior to the establishment of the fiscal board.” Sec. 120.50(3), Stats.

3. May a city firefighter serve as alderperson?

4. May a city firefighter serving in emergency situations as an assistant fire chief also serve as an alderperson?

I am of the opinion that such dual service is prohibited under common-law rules of incompatibility. A fire chief in a city is appointed by the board of police and fire commissioners, and the chief appoints subordinates subject to approval of such board. Section 62.13(7), Stats., provides that "The salaries of chiefs and subordinates shall be fixed by the council"; and subsecs. (7m), (7n), (8), (10m), (11) and (11a) grant the common council substantial power over the fixing of rest days, hours of labor, type of department and rules for permission to leave the city. These are important areas of concern and would in my opinion preclude the holding of the office of alderperson and the position of firefighter at the same time.

BCL:RJV

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*Capitol; Churches; Public Buildings; Public Property; Religion;*  
The described Christmas pageant presented by the Madison Civic Music Association, Inc., in the Capitol building does not involve governmental advancement or inhibition of religion or governmental entanglement with religion as contemplated and prohibited by Wis. Const. art. I, sec. 18. OAG 43-78

June 7, 1978.

FRED A. RISSER, *President Pro Tempore*  
*Wisconsin State Senate*

You ask whether use of the State Capitol building by the Madison Civic Music Association, Inc., to present a Christmas pageant is prohibited.

The Madison Civic Music Association is a nonstock, nonprofit corporation organized under ch. 181, Stats., espousing no religious doctrine, which exists, as set forth in its Restated Articles of Incorporation dated May 4, 1970, for the following reasons:

"The purpose of this Association is to encourage and assist in the preservation of all forms of musical expression for the

education, benefit and enjoyment of residents of the city of Madison and adjacent communities. ...”

Section 16.845(1), Stats., permits use of state facilities “for free discussion of public questions, or for civic, social, recreational or athletic activities” at the discretion of the managing authority. Wisconsin Administrative Code section Adm 2.04 establishes the requirements for use of state buildings for the above activities. Under the statute and administrative rule, it is my opinion that the Madison Civic Music Association, Inc., may use the State Capitol building for its Christmas pageant. The only question remaining is whether use of the State Capitol building to present such a pageant violates the religious proscription of Wis. Const. art. I, sec. 18.

Wisconsin Constitution art. I, sec. 18 provides:

“[1] The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; [2] nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.”

U.S. Const. amend. I provides in part:

“Congress shall make no law [2] respecting an establishment of religion, or [1] prohibiting the free exercise thereof ....”

Wisconsin Constitution art. I, sec. 18, contains the same two elements as amendment I of the U.S. Constitution. Both elements in both constitutions are identified by the bracketed numbers.

An examination of decisions under U.S. Const. amend. I, the establishment clause bracketed [2] above, is helpful in analyzing the instant question under Wis. Const. art. I, sec. 18.

In 1802 President Thomas Jefferson wrote that the purpose of the religious clause of the first amendment was to build “a wall of separation between Church and State.” 16 *The Writings of Thomas*

*Jefferson*, A. Libscomb ed. (Washington: Library ed. 1904), p. 281. The metaphor, in effect, was adopted in *Reynolds v. U.S.*, 98 U.S. 145, 164 (1879). Recently, however, the Court has stated in *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971), as follows:

“... the line of separation, far from being a ‘wall,’ is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.”

A three-fold test has evolved to test for a violation of the Establishment Clause: (1) the practice must have a clearly secular purpose; (2) its primary effect must neither advance nor inhibit religion; and (3) the practice must not foster an excessive governmental entanglement with religion. *Committee for Public Education v. Nyquist*, 413 U.S. 756, 773 (1973).

### **Purpose**

The purpose must clearly be secular. A practice may clearly be secular although it also has major religious connotations. Thus, in *McGowan v. Maryland*, 366 U.S. 420 (1961), the Court upheld Sunday closing laws, notwithstanding their genesis in religion and the continuing advantage thereby provided for religious persons, especially those whose Sabbath is Sunday, since the purpose of providing a day of rest served the health, safety and well being of the citizenry. Similarly, the academic study of the Bible and religions properly informs a public educational curriculum. *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968); *Abington School District v. Schempp*, 374 U.S. 203, 225 (1963); 55 Op. Att’y Gen. 262 (1966). Once the academic study of the Bible is converted into a religious exercise, however, the Establishment Clause is violated. *Schempp, id.*, at p. 224.

As further examples, the erection of a statue of a Catholic nun in a city park was permissible since it primarily commemorated her charitable works. *State ex rel. Singlemann v. Morrison*, 57 So.2d 238 (La. App. 1952), *cert. denied*, 57 So.2d 238 (La. 1952). *Also see Meyer v. Oklahoma City*, 496 P.2d 789 (Okla. 1972), *cert. denied*, 409 U.S. 980 (1972). An illuminated granite monolith with the Ten Commandments inscribed could be placed on courthouse grounds, since the Decalogue, despite its religious character, also is “an affirmation of at least a precedent legal code.” *Anderson v. Salt Lake City Corporation*, 475 F.2d 29, 33 (10th Cir. 1973), *cert.*

*denied*, 414 U.S. 879 (1973). On the other hand, the permanent erection of a lighted 51 foot concrete cross on a city owned hilltop visible for several miles was invalid as exhibiting a religious symbol. *Lowe v. City of Eugene*, 254 Ore. 518, 459 P.2d 222 (1969), *appeal denied*, 397 U.S. 591 (1970), *cert. denied*, 397 U.S. 1042 (1970), *reh. denied*, 398 U.S. 944 (1970). See Note, "Constitutional Law--Religious Artifacts on Public Property," 1970 Wis. L. Rev. 1229. Also see, Annotation, "Erection, Maintenance, or Display of Religious Structures or Symbols on Public Property as Violation of Religious Freedom," 36 A.L.R.3d 1256.

Finally, the placing of a creche on federal parkland along with a Christmas tree, reindeer pen, yule log and fire area met the secular purpose test as being part of the expression of the nation's aspirations to foster peace and understanding, as well as its celebration of Christmas as a national holiday, by depicting the traditional aspects of our history. *Allen v. Morton*, 495 F.2d 65 (D.C. Cir. 1973).

Under *Allen* the instant pageant and the singing of Christmas music, including music originating in and continuing in religious worship, serves clearly secular purposes when placed in the context of the Capitol. The Christmas story is part of our national heritage. Music appreciation itself has a secular purpose. The Christmas songs, whether or not one listens to the words, evoke hopes for peace among men, religious and nonreligious alike. In the context of the Capitol, the singing has aesthetic value to be appreciated as art for its own sake, as does the other pageantry, and is not for the sake of a religious exercise or devotion.

There is no more reason to deny the secular value of Handel's Messiah as performed by a University choir, whether on campus or in the Capitol, much less a private group like the association, because it also is sung in churches for religious purposes, than to deny the University Band's playing "When The Saints Go Marching In" at a football game because of its religious connotations.

### **Effect**

The "effect" criterion is that the practice must neither advance nor inhibit religion.

The fact that religion somehow is benefited is not the point. Thus, the exemption of church property from taxation has been upheld.

*State ex rel. Reynolds v. Nusbaum*, 17 Wis.2d 148, 115 N.W.2d 761 (1962); *Walz v. Tax Commission*, 397 U.S. 664 (1970). "The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion." *Tilton v. Richardson*, 403 U.S. 672, 679 (1971). Consequently, the government may provide buses to transport parochial students although church schools thereby enjoy the saved resources for their religious purposes. *Everson v. Board of Education*, 330 U.S. 1 (1947); *State ex rel. Vanko v. Kahl*, 52 Wis.2d 206, 188 N.W.2d 460 (1971).

The Court refined its "effects" test in *Hunt v. McNair*, 413 U.S. 734, 743 (1973), as follows:

"Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting. ..."

The first prong of this test is whether the sectarian and the secular have become inseparable. *Tilton v. Richardson*, *supra*, at p. 680. Permitting the pageant by a private group does not infuse a religious institution with anything. The sectarian mission does not so subsume the secular purpose that they become inseparable. Singing Christmas songs in the Capitol and erecting a nativity scene there will not merge music appreciation and enjoyment of a national heritage tradition with religious institutions, any more than will playing Puccini's Mass in the University's Music School, or by the University at a recital, or the display of Michaelangelo's Basilica ceiling in a state owned art center.

It follows that the second prong of the effects test is no barrier. A specifically religious activity is not funded.

### **Entanglement**

The criterion of excessive governmental entanglement with religion is hardly apposite. This criterion only compels avoidance of governmental surveillance, otherwise needed, to protect against state subsidy of religious ventures. *State ex rel. Warren v. Nusbaum*, 55

Wis.2d 316, 330, 198 N.W.2d 650 (1972); *Tilton v. Richardson*, *supra*, at p. 688. There is no such threat here.

It is, therefore, my opinion that the described Christmas pageant presented by the Madison Civic Music Association, Inc., in the Capitol building does not involve governmental advancement or inhibition of religion or governmental entanglement with religion as contemplated and prohibited by Wis. Const. art. I, sec. 18.

BCL:JPA

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*Blood Tests; Implied Consent Law; Intoxicating Liquors; Municipal Court; Municipalities; Ordinances; Traffic; Section 343.305, Stats., as repealed and recreated by ch. 193, Laws of 1977, does not vest in municipal courts the power to conduct hearings to determine the reasonableness of a refusal to submit to chemical tests to determine blood alcohol levels, since a municipal court has only those powers expressly conferred on it by statute, and such statute contains no express language conferring the hearing power above-mentioned on a municipal court. The power of a municipal court to preside over ordinance matters would not include such hearings, since local government lacks authority to enact the provisions of sec. 343.305 as an ordinance. OAG 46-78*

June 28, 1978.

DALE CATTANACH, *Secretary*  
*Department of Transportation*

You have asked whether ch. 193, Laws of 1977, which repealed and recreated sec. 343.305, Stats., establishing the hearing procedures to determine the reasonableness of a refusal to submit to chemical tests to determine blood alcohol levels, confers jurisdiction upon municipal courts to hold such hearings.

Former sec. 343.305 specifically referred to "a court of record" while present sec. 343.305 refers only to "a court" or "the court."

It is my opinion that municipal courts do not have such jurisdiction.

In 57 Op. Att'y Gen. 11, 14 (1968), I said:

"It was determined early in the history of the state that justice courts are *vested only with the jurisdiction expressly conferred upon them by statute* and have no common law powers. *Cox v. Groshong*, 1 Pin. 307 (1843). The *Cox* case is cited with approval in the more recent case of *State v. Kriegbaum*, (1927) 194 Wis. 229 where the court said:

"Art. VII, sec. 15, of the constitution of Wisconsin provides that justices of the peace "shall have such civil and criminal jurisdiction as shall be prescribed by law." It was the law of Wisconsin before this provision of the constitution was adopted and it has uniformly been held under this constitutional provision that "justices" courts are not courts of record, and do not proceed accordingly to the course of the common law, and so far as their powers are concerned, they are confined strictly to the authority given them by the statute. *They can take nothing by implication, but must show the power which they exercise to be expressly given them in every instance.*" *Cox v. Groshong*, 1 Pin. 307, 311, 312; *DeLaval S. Co. v. Hofberger*, 161 Wis. 344, 346, 154 N.W. 387.'

*"The municipal court created by the legislature is analogous to the justice court in that it has jurisdiction limited to that specifically granted by the legislature. Thus such courts can assume no power or jurisdiction by implication. ..."*

My position taken a decade ago remains unchanged.

Wisconsin Constitution art. VII in its present version and in the amended version effective August 1, 1978, provides that the municipal court derives its jurisdiction from the Legislature. Nowhere has the Legislature expressly granted the municipal court jurisdiction over hearings under sec. 343.305, Stats.

Currently, the Legislature has granted the municipal court jurisdiction to preside at actions arising under local ordinances. Sec. 254.045, Stats. Article VII, sec. 14 as amended, which becomes effective August 1, 1978, provides:

**"MUNICIPAL COURT. Section 14.** The legislature by law may authorize each city, village and town to establish a municipal court. All municipal courts shall have uniform jurisdiction

limited to actions and proceedings arising under ordinances of the municipality in which established. Judges of municipal courts may receive such compensation as provided by the municipality in which established, but may not receive fees of office.”

Under this provision the Legislature will lose the power to extend the municipal court’s jurisdiction *beyond* ordinances. Article VII, sec. 14 is a limitation on the jurisdiction of the municipal court.

This raises the question whether a municipality may enact an ordinance incorporating the state’s “implied consent” law, sec. 343.305. I have concluded that it may not.

Under certain conditions a municipality may enact a traffic regulation as an ordinance. Secs. 349.03 and 349.06(1). Section 345.20(1)(a) provides:

“‘Traffic regulation’ means a provision of chs. 341 to 349 for which the penalty for violation is a forfeiture, or an ordinance enacted in accordance with s. 349.06.”

Section 349.06(1) provides:

“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.”

In *State v. Mordeszewski*, 68 Wis.2d 649, 657, 229 N.W.2d 642 (1974), the supreme court ruled that a traffic offense punishable by fine or imprisonment could not be a traffic regulation as defined in sec. 345.20(1), Stats.

The penalty for violation of the “implied consent” law, sec. 343.305, is suspension of driving privileges. Since sec. 343.305 is not a “traffic regulation,” involving a forfeiture as a penalty, a municipality may not enact it as an ordinance.

A municipality also has been granted authority to enact certain state criminal laws as ordinances under sec. 66.051. Section 343.305 does not describe a “crime” which is defined in sec. 939.12 as “conduct ... punishable by fine or imprisonment or both.”

I find no other grant of local legislative authority that would cover the "implied consent" provisions.

BCL:WHW

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*Licenses And Permits; Pharmacy, State Board Of;* A letter of reprimand properly may be imposed only after affording opportunity for hearing as provided for in a class 2 contested case. Sec. 227.01(2)(b).

If no objection was made by licensees appearing before the Board on previous reprimand hearings and if there was substantial compliance with sec. 227.07, Stats., irregularities in procedure may be considered waived. OAG 47-78

July 14, 1978.

KARL W. MARQUARDT, *Executive Secretary*  
*Pharmacy Examining Board*

You indicate that the Pharmacy Examining Board has issued "reprimand letters to licensees for minor infractions." You further indicate that such action is taken only after an "informal appearance" of the licensee before the Board at which time the licensee has admitted the facts alleged in the complaint.

In light of the enactment of ch. 414, Laws of 1975, amending ch. 227, establishing classes of contested cases, you have asked the following questions:

- (1) "Does a reprimand letter constitute a sanction or penalty within the definition of a 'class 2 proceeding' so that a contested case hearing as provided in Sec. 227.07, Stats. is required?"
- (2) "If the answer to question (1) is affirmative, must the Board rescind any letters of reprimand issued since the effective date of Chap. 414, Laws of 1975, i.e. September 22, 1976, by expunging them from the record and notifying the licensee by letter of this action?"

A threshold question is whether sec. 450.02(7)(a), Stats., which gives the Pharmacy Examining Board authority to suspend or revoke a pharmacist's license upon notice and hearing also gives the Board the power to reprimand. It is my opinion that this power to suspend or revoke includes the power to reprimand. *Klatt v. Columbia Casualty Co.*, 213 Wis. 12, 24, 250 N.W. 825 (1933). Since the greater includes the lesser, the power to revoke and suspend also includes the imposition of discipline by means of reprimand. *State Board of Dental Examiners v. Savelle*, 90 Colo. 177, 8 P.2d 693, 698 (1932). But, the procedures included in the answers to your questions must be followed when imposing a reprimand as well as when imposing more stern disciplinary measures.

The answer to your first question is yes.

Section 227.01(2), Stats., defines a contested case in the following terms:

“‘Contested case’ means a proceeding before an agency in which, after hearing required by law, substantial interests of any party to such proceeding are determined or adversely affected by a decision or order in such proceeding and in which the assertion by one party of any such substantial interest is denied or controverted by another party to such proceeding. ...”

It is my opinion that before reprimanding a licensee, an opportunity must be given for a hearing because substantial interests of the licensee are affected. “‘Reprimand’ ... means ‘to reprove severely; ... to censure formally, especially with authority.’” *Federal Labor Union 23393 v. American Can Co.*, 28 N.J. Super. 306, 100 A.2d 693, 695 (1953). The formal censure of a licensee by the licensing authority affects liberty and property interests of the licensee which are protected by the due process clause of the fourteenth amendment. See *Board of Regents v. Roth*, 408 U.S. 564 (1972).

A disciplinary proceeding is a class 2 proceeding. Class 2 proceedings include those resulting in imposition of a reprimand because the section provides that “Class 2 proceedings include, but are not restricted to, suspensions of, revocations of, and refusals to renew licenses because of an alleged violation of law.” Sec. 227.01(2)(b), Stats. This conclusion is reached by application of the rule of *ejusdem generis*. This rule “‘... accomplishes the

purpose of giving effect to both the particular and the general words, by treating the particular words as indicating the class, and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words.”” *National Amusement Co. v. Dept. of Revenue*, 41 Wis.2d 261, 272, 163 N.W.2d 625 (1969). See also 2A Sutherland, *Statutory Construction* (4th ed.), p. 104, sec. 47.17. In this particular case the class consists of the various kinds of discipline imposed in a class 2 proceeding and includes reprimand.

This view is reinforced by consideration of the scope of the terms “penalty” and “sanction.” In my opinion a reprimand is a penalty or a sanction as that term is used in sec. 227.01(2)(b), Stats. This section provides in part:

“A ‘class 2 proceeding’ is a proceeding in which an agency determines whether to impose a sanction or penalty against one or more parties. ...”

*In Re Levy Motor Vehicle Operator’s License Case*, 194 Pa. Super. Ct. 390, 169 A.2d 596, 597 (1961), the court wrote:

“... ‘Penalty’ has many different shades of meaning; it is among the most elastic terms known to the law. It is sometimes loosely used to include all actions involving hurtful or disadvantageous consequences, but in its more restricted use it refers only to a deprivation of property or some right. ...”

A reprimand as used in connection with sec. 227.01(2)(b), falls within the ambit of these definitions.

Furthermore, the term “sanction” has been construed as having the same meaning as penalty. *Bouldin v. City of Homewood*, 277 Ala. 665, 174 So.2d 306, 312 (1965).

In summary, the licensee is entitled to notice and opportunity for hearing on a proposal to reprimand him, and the proceeding is a class 2 proceeding because it involves a penalty or sanction.

In response to your second question it appears that the rudiments of due process were present despite the failure of the Board to comply strictly with the provisions of sec. 227.07, Stats. In any event, if I assume correctly that no objection was raised by the licensees based on the failure to comply with the provisions of sec. 227.07, Stats., I

am of the opinion that under the circumstances related by you their appearance constituted a waiver of the notice and other procedural requirements of sec. 227.07, Stats., or was a disposition by consent under sec. 227.07(5), Stats. See 2 Am. Jur. 2d, *Administrative Law*, sec. 404. Therefore, the answer to your second question is no.

BCL:JWC

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*Housing; Industry, Labor And Human Relations, Department Of;*  
The one- and two-family dwelling code is applicable to additions of any buildings initially constructed after the effective date of the one- and two-family dwelling code act and the Department of Industry, Labor and Human Relations can exempt certain dwellings from aspects of code. OAG 50-78

July 28, 1978.

ZEL S. RICE II, *Secretary*

*Department of Industry, Labor and Human Relations*

You have requested my opinion with respect to your Department's implementation of secs. 101.60-101.66, Stats. You indicate that if the uniform statewide dwelling code does not apply to all structural construction relating to one- and two-family dwellings, the result may well be the retention or development of local standards in conflict with the state code, subverting the legislative intent "to establish statewide construction standards and inspection procedures for one- and 2-family dwellings." Sec. 101.60, Stats. With regard to this concern, you pose two questions.

The first question is "Does the department have the authority to require the new addition of any part of an existing dwelling to comply with the uniform dwelling code?" For reasons that follow the answer is yes for additions to buildings initially constructed after the effective date of the act, and no for additions to buildings initially constructed before that date. Since subch. 101.60, Stats., is inapplicable to buildings constructed before the effective date of the act existing local laws still apply.

Section 101.63, Stats., provides in part:

“The department shall:

“(1) Adopt rules which establish standards for the construction and inspection of one- and 2-family dwellings and components thereof. ...”

The *Random House Dictionary of the English Language* defines component as “being or serving as an element [in something larger].” *Webster’s New Collegiate Dictionary* defines component as “a constituent part: ingredient.” Section 101.61(1) defines “dwelling” as:

“... any building the initial construction of which was commenced on or after the effective date of this act, which contains one or 2 dwelling units. ...”

The subchapter does not contain a definition of building. The *Random House Dictionary of the English Language* defines building as a noun which can mean “the act, business, or practice of constructing houses, office buildings, etc.” *Webster’s* also gives a definition of building as a noun, which among other things means “the art or business of assembling materials into a structure.”

Section 101.63(1), Stats., provides that the Department is to adopt rules to establish standards with regard to the construction of certain dwellings and components thereof. It could be argued that sec. 101.61(1), Stats., provides that the *act of constructing* “which was commenced on or after the effective date of this act” is within the purview of this subchapter when it is related to a structure containing one- or two-dwelling units.

The word building is generally taken to mean a type of structure and in the context of the sentence used to define “dwelling” it is clearly used as a noun and not as a verb. To hold that building meant the act of constructing would lead to the absurd result of saying: “any [act of constructing] the initial construction of which was commenced on or after the effective date of this act.” Had the Legislature intended the dwelling code to apply to *all* additions including buildings initially constructed prior to the act, it could have said so directly.

Your second question asks “whether the department has the authority to exempt seasonal homes from coverage by this statute.”

The applicable language contained in sec. 101.63(1), Stats., provides:

“... No set of rules shall be adopted which has not taken into account the conservation of energy in construction and maintenance of dwellings and *the costs of specific code provisions to home buyers in relationship to the benefits derived from such provisions.*” (Emphasis added.)

You ask whether this subsection applies to those dwellings using a form of fuel which is not subject to current energy conservation concerns. Section 101.63(1), Stats., does require the Department to reach conclusions with respect to provisions of the code on “the costs of specific code provisions to home buyers in relationship to the benefits derived from such provisions.” Therefore, if the facts warrant, the Department could conclude that certain code provisions should not apply to construction of certain types of dwellings.

BCL:RK

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*Appropriations And Expenditures; Associations; Corporations; Elections; Funds; Reports; Wisconsin Administrative Code section E1 Bd 1.06, and the forms developed to effectuate that rule, EB-11 and EB-12, which require corporations and associations to register and twice yearly report their expenditures for the establishment and administration of a political fund and for solicitation of political contributions to such fund, improperly impose substantive requirements in addition to those reasonably within the intentment of sec. 11.38(1)(a)2., Stats., and are therefore unenforceable. OAG 52-78*

August 1, 1978.

DAVID G. WALSH, *Chairman*  
*Elections Board*

You request my opinion on whether the promulgation of Wis. Adm. Code section E1 Bd 1.06 and the forms developed to effectuate that rule, EB-11 and EB-12, are within the scope of the Elections Board's authority under secs. 11.38 and 227.014(2), Stats.

Section 11.38, Stats., imposes a general prohibition against direct or indirect contributions or disbursements for political purposes by a foreign or domestic corporation, or association organized under ch. 185, Stats., but the statute does allow corporations to engage in a few related activities. Some of those activities are spelled out in sec. 11.38(1)(a)2., Stats., which provides:

“Notwithstanding subd. 1, any such corporation or association may establish and administer a separate segregated fund and solicit contributions from individuals to such fund to be utilized for political purposes by such corporation or association, but the corporation or association may not make any contribution to such fund. *Such fund shall appoint a single treasurer and shall register as a political committee or group under s. 11.05.* The corporation or association may not expend more than \$500 annually for solicitation of contributions to such fund.”

This statutory provision is the motivation for the adoption of Wis. Adm. Code section E1 Bd 1.06, and the forms developed to effectuate that rule, EB-11 and EB-12, which require corporations and associations to register and twice yearly report their expenditures for solicitation of contributions and for establishment and administration of a fund.

Wisconsin Administrative Code section E1 Bd 1.06 reads as follows:

“*Corporate registration and reporting.* (1) Every foreign or domestic corporation or association organized under chapter 185, Wis. Stats., which establishes a separate segregated fund pursuant to section 11.38 (1) (a) 2., Wis. Stats., shall register with the appropriate filing officer on a form prescribed by the board.

“(2) Every foreign or domestic corporation or association organized under chapter 185, Wis. Stats., which is required to register pursuant to subsection (1), shall file financial disclosure reports with the appropriate filing officer in accordance with

section 11.20 (4), Wis. Stats., on a form prescribed by the board.”<sup>1</sup>

Section 227.014(2)(a), Stats., authorizes agencies to adopt rules interpreting statutes enforced or administered by them. Section 227.014(2)(b), Stats., also provides:

“Each agency is authorized to prescribe such forms and procedures in connection with statutes to be enforced or *administered by it* as it considers to be *necessary* to effectuate the purpose of the statutes, but nothing in this paragraph authorizes the imposition of substantive requirements in connection with such forms or procedures.”

The Elections Board has the responsibility for the “administration” of the elections laws under the provisions of sec. 5.05(1), Stats. Therefore, the Elections Board may promulgate proper rules prescribing forms and procedures required and necessary to implement sec. 11.38(1)(a)2., Stats. In fact, I understand that the Elections Board does presently require registration and filing, other than that here under discussion, directly by such *funds* under that statute.

As recently stated in 64 Op. Att’y Gen. 49, 51 (1975):

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

Wisconsin Administrative Code section E1 Bd 1.06 and the forms promulgated to effectuate that rule, EB-11 and EB-12, are in addition to those provisions of law which impose registration and filing requirements on *funds*. They require that the *corporation or association* involved in creating and administering the fund register

<sup>1</sup> Section 11.20(4), Stats., establishes the dates for filing the twice-annual continuing, cumulative reports of contributions, disbursements and obligations, required of individuals, political and personal campaign committees or political groups by sec. 11.06, Stats.

and twice yearly report its expenditures for solicitation of contributions and for establishment and administration of the fund. In my view, such a rule and such forms impose substantive requirements in addition to those reasonably within the intendment of sec. 11.38(1)(a)2., Stats.

Wisconsin Administrative Code section E1 Bd 1.06 must be viewed in the light of the ruling legal principle requiring that every administrative agency must conform precisely to the statutes from which it derives its power. *Mid-Plains Telephone v. Public Serv. Comm.*, 56 Wis.2d 780, 786, 202 N.W.2d 907 (1973). In addition, of course, violation of sec. 11.38, Stats., is punishable not only by forfeiture under sec. 11.60, Stats., but also by fine or imprisonment under sec. 11.61(1)(c), Stats., and statutes penal in nature are to be strictly construed. *Capt. Soma Boat Line, Inc. v. Wisconsin Dells*, 56 Wis.2d 838, 845, 203 N.W.2d 369 (1973).

Section 5.05(1)(c), Stats., provides in part that "Actions brought by the board may concern only violations with respect to *reports or statements required by law* to be filed with it, and other violations arising under elections for state office or statewide referenda." Section 11.21(1), Stats., only directs that the Board "Prescribe forms for making the reports, statements and notices *required by this chapter.*"

Therefore, the only language of sec. 11.38(1)(a)2., Stats., which reasonably infers the necessity of the adoption of forms or procedures is the language of the second sentence of that statute, emphasized above, which imposes registration and filing requirements on the *fund*, as a political committee or group. The statute nowhere requires or implies the necessity of registration or reporting by the corporations or associations involved. Accordingly, I conclude that the courts would probably hold the provisions of Wis. Adm. Code section E1 Bd 1.06 invalid, if the rule were challenged.

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*Counties; County Board; Ordinances; Towns; Zoning:* A county which has enacted a countywide comprehensive zoning ordinance under sec. 59.97, Stats., may not enact any zoning provision authorizing withdrawal of town approval of such ordinance or otherwise specifically excluding or exempting any town from the operation of such ordinance. OAG 53-78

August 2, 1978.

JAMES UNGRODT, *Corporation Counsel*  
*Calumet County*

You request my opinion on four questions relating to the withdrawal or exemption of towns from coverage under county comprehensive zoning ordinances enacted pursuant to sec. 59.97, Stats. Your questions together with my responses follow.

“1. Can a county enact a provision in its zoning ordinance adopting a procedure for towns to withdraw from coverage by a zoning ordinance?”

“2. If so, would the procedure for town withdrawal have to be by the consent of the county board, or could the county ordinance merely allow towns to withdraw on their own volition?”

Section 59.97, Stats., the basic legislative grant of power to counties to enact a comprehensive zoning ordinance for the unincorporated area within their boundaries, is to be liberally construed in favor of the exercise of such power. Sec. 59.97(13), Stats. But, under the provisions of that statute, the comprehensive county zoning ordinance is not effective in any town until it is approved by the town board, sec. 59.97(5)(c) and (d), Stats.; and the Legislature has made no provision authorizing withdrawal of such town approval once it is given. As our court noted in *Jefferson County v. Timmel*, 261 Wis. 39, 54-55, 51 N.W.2d 518 (1952):

“Sec. 59.97, Stats. 1947, which covers the subject of county zoning ordinances contains no provision permitting a town board which has once approved a county zoning ordinance to later withdraw such approval. In the absence of such an

expressed statutory provision permitting a town to withdraw or rescind a prior approval once given to a county zoning ordinance, it is our conclusion that neither the town nor the town board possesses such power of withdrawal or rescission, and that the attempted withdrawal or rescission by the special town meeting of the town of Farmington on April 16, 1951, was therefore a nullity. ...”

Likewise, there is no express statutory provision authorizing the county to permit a town to withdraw or rescind its prior approval of the county zoning ordinance nor is there any provision from which such authority could be reasonably implied. Thus, it is apparent on the face of the statute that a county lacks the authority to enact a provision such as you suggest. As previously indicated in 48 Op. Att’y Gen. 65 (1959):

“It is fundamental that a county has no inherent police power and it follows that it has no inherent zoning powers. Accordingly, power to zone exists in a county solely by virtue of the delegation of that power from the state. ...”

You point out that sec. 59.97(6), Stats., reads in part as follows:

“**Optional additional procedures.** Nothing in this section shall be construed to prohibit the zoning agency or the county board or a town board from adopting any procedures, formal or informal, *in addition to* those prescribed in this section *and not in conflict* therewith. ...”

You suggest that this subsection may provide the authority for a county to establish a procedure for towns to withdraw from the county zoning ordinance. But, sec. 59.97(5)(c) provides that the county zoning ordinance shall be effective in each town from and after the filing of the town board’s approving resolution with the county clerks. This is not a procedural requirement which can be altered by each county board as it may choose, and any county zoning ordinance provision which would purport to authorize a town to terminate the effectiveness of the county zoning in a town by allowing it to rescind its prior approval would be an invalid attempt to create a substantive requirement in direct conflict with the statute.

“3. If the county cannot adopt a procedure in its zoning ordinance for town withdrawal, can the preamble to the

ordinance which would normally state, 'This ordinance shall be in effect upon approval by the towns under Sec. 59.97(5)(c)', be thereafter amended to provide that the ordinance would be in effect '... except in the Town of \_\_\_\_\_?'

A full and fair reading of sec. 59.97 can only lead to the conclusion that the intent of the Legislature is for the county board to enact a county zoning ordinance which is comprehensive in nature and countywide in scope. As subsec. (4) states, the ordinance is to be "effective within the areas within such county outside the limits of incorporated villages and cities." The provision you propose would be inconsistent with that statutory mandate.

More specifically, as emphasized previously, sec. 59.97(5)(b), (c) and (d), Stats., specifically authorizes each individual town to make the determination whether or not it will become subject to the county zoning ordinance. The Legislature clearly has not delegated that authority to the county board, either expressly or by necessary implication.

"4. If allowing town withdrawal from a county zoning ordinance is not possible under questions 1, 2 and 3, could the county zoning map be amended to create an 'unzoned' town, allowing the town to adopt its own exclusive ordinance, having adopted village powers?"

The answer to this question is no. "Unzoned" towns and "exclusive" town zoning ordinances are concepts which are foreign to and inconsistent with the statutory zoning scheme established for counties which have enacted countywide zoning ordinances.

You indicate that Calumet County adopted a comprehensive revision of its county zoning ordinance in November, 1976. Under the provisions of sec. 59.97(5)(d), Stats., towns which have not adopted the comprehensive revision to date are not subject to its provisions nor would they be subject, since November, 1977, to the provisions of the county zoning ordinance which it replaced. Obviously, such towns are currently "unzoned" and no action to amend the county zoning map is necessary to "unzone" them.

Town boards in those towns within the county which adopt village powers and also are authorized by their electorate to exercise the zoning power may enact town zoning ordinances and amendments

thereto, subject to county board approval. Secs. 60.18(12), 60.29(13) and 60.74(7), Stats. Even in such instances the need for or the propriety of an amendment to the county zoning ordinance as suggested in your question is not apparent. In fact, a county which took such action might well void itself of any standards or criteria upon which to base its statutory review of a town zoning proposal submitted for approval under sec. 60.74(7), Stats. Similarly, the town itself, as it developed its ordinance, would be without guidelines regarding what zoning would be compatible with the county plan and acceptable to the county board. Such totally separated, insular planning by a town would be inconsistent with the broad, area-wide purposes of zoning enumerated in sec. 59.97(1), Stats.

BCL:JCM

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*Amusement Tax; Historical Society, State; Taxation; Admission fees collected by Circus World Museum in Baraboo are subject to sales tax under sec. 77.52(2)(a)2., Stats. OAG 54-78*

August 4, 1978.

DANIEL G. SMITH, *Administrator*  
*Income, Sales, Inheritance and Excise Taxes*  
*Department of Revenue*

You ask whether the admission fees collected by the Circus World Museum in Baraboo are subject to the sales tax. The answer is yes.

You point out that sec. 77.52(2)(a)2., Stats., as amended by ch. 142, sec. 21, Laws of 1977, imposes a sales tax on:

“The sale of admissions to 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 basic question is whether the Circus World Museum is an amusement, athletic entertainment or recreational event or place.

You state that the Circus World Museum is a nonprofit corporation owned by the State Historical Society of Wisconsin. It is open daily from mid-May through mid-September. Its primary attraction consists of daily circus acts during these months. In addition, visitors can view over 100 restored circus wagons, several display buildings, including many of the Ringling Brothers' original winter quarters, and a library and archive. The Circus World Museum takes the position that it is a museum and that the admission fees are paid for admission to an educational place. You state that although the Museum may have some historical and educational significance, this does not change its character as a place or event of amusement, entertainment or recreation. You have enclosed correspondence showing that in 1969 the Secretary of the Department of Revenue determined that these admission fees were subject to the sales tax and then reversed his position and determined that the fees were not subject to the tax. The Department of Revenue consistently maintained this position until November of 1977 when it again reversed itself, relying upon 66 Op. Att'y Gen. 205 (1977) and a 1976 New York case, *In the Matter of Fort William Henry Corp. v. State Tax Com'n*, 52 A.D.2d 664, 381 N.Y.S.2d 907 (1976).

The Attorney General's opinion referred to is not in point because it concerned the meaning of the word "admission" in sec. 77.52(2)(a)2., Stats.

The *Fort William Henry* case, *supra*, is not particularly helpful here because the New York statute imposed a tax on profit-making organizations while exempting nonprofit-making organizations. The question was whether the Museum came within an exemption, not whether the Museum was an amusement place or event.

In light of the breadth of the statutory language, "amusement events or places," and giving that language its ordinary meaning, it is my opinion that the admission fees collected by the Circus World Museum in Baraboo are subject to the sales tax imposed by sec. 77.52(2)(a)2., Stats., on amusement events or places.

The supreme court has said that the burden is on the taxpayer to show he comes within the exemption, and tax exemptions are strictly construed against the taxpayer. *Three Lions Supper Club v.*

*Department of Revenue*, 72 Wis.2d 546, 548, 241 N.W.2d 190 (1976). I have concluded that there is no statutory language which could be construed as exempting the taxpayer from the sales tax under the circumstances you have described.

I find no basis for allowing an exception to or exemption from the sales tax imposed by sec. 77.52(2)(a)2. for persons or entities, public or private, engaged in historic or educational activities. If the place or event for which an admission fee is charged is one of amusement, athletic entertainment or is recreational, it is taxable even though the event may have a significant historic or educational aspect.

I conclude that the Circus World Museum is an amusement event or place, and the admission fees collected by the Circus World Museum in Baraboo are subject to sales tax under sec. 77.52(2)(a)2.

BCL:JEA

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*Bonds; Building Commission, State;* The anticipated sale of \$75,000,000 of revenue bonds in accordance with subch. II of ch. 18, Stats., and related statutes, for the guaranteed student loan program will not result in additional public debt to the State of Wisconsin. OAG 55-78

May 22, 1978.

PAUL L. BROWN, *Secretary*  
*State Building Commission*

You have requested my opinion, in my capacity as bond counsel to the State Building Commission, as to whether the anticipated sale of \$75,000,000 of revenue bonds in accordance with subch. II of ch. 18, Stats., and related statutes, for the student loan program as authorized by sec. 39.37, Stats., and related statutes, will result in additional public debt to the State of Wisconsin. These statutes creating the authority to issue revenue bonds and the authority to use their proceeds for the student loan program are found in secs. 104 and 511 of ch. 29, Laws of 1977, published on June 29, 1977.

Revenue bonds are not debts of the state. Revenue bonds are paid for from revenues generated by the program being financed by the

bonds, rather than from the state's general revenues. Revenue bonds are not absolute obligations of the state to pay; their payment by the state is subject to a sufficiency of the revenues generated by the program.

Student loan revenue bonds are payable from and secured by a pledge of the revenues generated by the repayment of loans financed by and reserves created from the proceeds from the bonds. There also are certain loan guarantees from nonstate entities: namely, the federal government and the Wisconsin Higher Education Corporation.

The state has adopted a policy that those who benefit from the program shall pay for its cost. No assets of the state are pledged to the payment of the bonds other than those assets acquired from the bond proceeds. In the unlikely event of a default the state would not be in a worse position than it was prior to entering into the financing. It would have no obligation to pay for the bonds from its general funds, and it would not lose any property other than that acquired from the bond proceeds. The moral obligation the Legislature may provide under sec. 18.61(5) would not be sufficiently binding to create debt, since such an obligation is not absolute. The state is not compelled to recognize moral obligations. *State ex rel. Warren v. Nusbaum*, 59 Wis.2d 391, 431, 208 N.W.2d 780 (1973).

Wisconsin Constitution art. VIII, sec. 4, provides:

“The state shall never contract any public debt except in the cases and manner herein provided.”

Constitutional debt was defined by the Wisconsin Supreme Court in *State ex rel. Owen v. Donald*, 160 Wis. 21, 59, 151 N.W. 331 (1915), as follows:

“There is nothing particularly technical about the meaning of the word ‘debt’ as used in the constitution. It includes all absolute obligations to pay money, or its equivalent, from funds to be provided, as distinguished from money presently available or in process of collection and so treatable as in hand. *Earles v. Wells*, 94 Wis. 285, 68 N. W. 964; *Doon Tp. v. Cummins*, 142 U.S. 366, 376, 12 Sup. Ct. 320.”

More recently the court defined constitutional debt to mean "absolute obligations to pay money or its equivalent." *State ex rel. Warren v. Nusbaum, supra*, at 427.

Following the *Owen* decision are cases involving attempts by the state to finance the construction of public improvements without creating "public debt," such as *State ex rel. Thomson v. Giessel*, 267 Wis. 331, 65 N.W.2d 529 (1954), and *Glendale Development v. Board of Regents*, 12 Wis.2d 120, 106 N.W.2d 430 (1960). These cases were governed by the earlier cases of *State ex rel. Morgan v. Portage*, 174 Wis. 588, 184 N.W. 376 (1921), and *Morris v. Ellis*, 221 Wis. 307, 266 N.W. 921 (1936). From these cases emerged authority that:

1. The terms "debt" and "indebtedness" as used in Wis. Const. art. XI, sec. 3 (municipal debt), and art. VIII, sec. 4 (state debt), have the same meaning. 267 Wis. at p. 352.
2. No state debt is created unless the state itself is under a legally enforceable obligation to pay. 12 Wis.2d at p. 135.
3. Debt is not created by a pledge of security only in the property to be acquired from the proceeds of the bonds. 174 Wis. at pp. 593-594; 221 Wis. at pp. 318-319.
4. A municipality does not create debt by obtaining property to be paid for wholly out of the income from the property. 221 Wis. at p. 319.

More recently, in *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis.2d 32, 205 N.W.2d 784 (1973), while approving the constitutionality of Wisconsin's industrial development revenue bond law, the court summarized at p. 67:

"Where the purchase price for property to be acquired by a municipality is payable exclusively from income or profits to be derived from the property purchased and a mortgage or lien attaches only to the property purchased, no debt is created within the meaning of art. XI, sec. 3. However, where a mortgage is imposed on property existing or already owned by the municipality to secure the purchase price, municipal debt is created within the meaning of art. XI, sec. 3.

“The purpose of the debt limitation placed upon municipal corporations by art. XI, sec. 3 is to prevent municipal bankruptcy which would result from the creation of a fiscal burden beyond the financial capacity of local taxpayers, *State ex rel. La Follette v. Reuter* (1967), 33 Wis. 2d 384, 404, 147 N. W. 2d 304. Pursuant to sec. 66.521, Stats., and the resolution of the common council of the city of Kaukauna, the bonds issued by the city are payable solely out of the rentals or revenues to be derived from the project. While a lien is placed upon the revenues and the property to be acquired, no lien is imposed upon city property owned prior to the issuance of the bonds. Upon default and in the event of sale of the project, the municipality would be placed in the same position as it had been prior to the issuance of the bonds. No municipal debt is created within the meaning of art. XI, sec. 3.”

There are two statutory definitions of public debt in ch. 18 of the Wisconsin Statutes.

Section 18.01(4), Stats., defines the term as follows:

“Public debt’ or ‘debt’ means every voluntary, unconditional undertaking by the state to repay a certain amount of borrowed money:

“(a) Out of the state treasury, except a loan or advance by any state agency or fund to any other state agency or fund; or

“(b) For which any existing asset of the state is pledged, except the pledge of an outstanding evidence of indebtedness without recourse.”

The newly created sec. 18.52(4), Stats., defines the term as follows:

“Public debt’ means every voluntary, unconditional undertaking by the state to repay a certain amount of borrowed money:

“(a) Out of the state treasury, except a loan or advance by any state agency or fund to any other state agency or fund; or

“(b) For which any existing asset of the state is pledged, except the pledge of an outstanding evidence of indebtedness without recourse.”

The two definitions of public debt are identical and consistent with the definition which has emerged from the case law.

Other provisions in the newly created subch. II of ch. 18 of the Wisconsin Statutes particularly germane to this discussion include:

1. Section 18.52(5)(c), which provides that a revenue obligation is not public debt under sec. 18.01(4).
2. Section 18.56(1), which provides that revenue bonds shall be payable only out of the redemption fund.
3. Section 18.56(2), which provides that there shall be a security interest in the income and property of each revenue-producing enterprise or program to the holders of the related bonds.
4. Section 18.61(1), which provides that the state shall not be generally liable on revenue obligations, and revenue obligations shall not be a debt of the state for any purpose whatsoever.

The revenue bonds are secured by a pledge of the revenues out of which the bonds are payable and by a security interest in the program acquisitions from related bond proceeds. Revenue bonds are not general obligations. The revenue bond law expressly negates the state's power to create a legally enforceable debt against it. In *State ex rel. Bowman v. Barczak*, 34 Wis.2d 57, 73, 148 N.W.2d 683 (1967), the court said:

“The express negation of an industrial development corporation's power to pledge the credit of the state or municipality also protects the enactment from the alleged violation of sec. 3, art. VIII, Wisconsin constitution. There can be no clash with such constitutional provision unless the giving of credit results in a legally enforceable obligation against the state. *State ex rel. La Follette v. Reuter, supra*; *State ex rel. Thomson v. Giessel* (1955), 271 Wis. 15, 72 N. W. (2d) 577; *State ex rel. Wisconsin Development Authority v. Dammann* (1938), 228 Wis. 147, 197, 277 N. W. 278, 280 N. W. 698.”

These revenue bonds create no absolute obligations of the state which must be satisfied or discharged out of future appropriations by the State Legislature. Any security for their payment by the state is

limited to the program acquisitions made with related bond proceeds. The bonds cast no additional burden upon state taxpayers and do not create constitutional or statutory debt of the State of Wisconsin.

BCL:APH

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*Accidents; Aid; Counties; County Board; Liability; Public Officials; Taxation; Transportation; Veterans;* A county veterans' service officer does not have the duty under ch. 45, Stats., to transport disabled veterans to a veterans' hospital when such transportation is not readily available unless authorized by his county.

The county would be liable to the injured veteran in an automobile accident while being transported by the veterans' service officer if the officer were authorized and performing within the scope of his employment.

If he were authorized and an accident occurred, sec. 895.43(3), Stats., limits the recovery to \$25,000. OAG 56-78

August 9, 1978.

JOHN A. LANG, *District Attorney*  
*Oconto County*

You have asked me whether the county veterans' service officer has a duty under sec. 45.43(5), Stats., to transport disabled veterans to a veterans' hospital when such transportation is not readily available, and whether in transporting such veteran in his privately owned car, the county would be liable to such veteran in an automobile accident.

Section 45.43(5) and (6), Stats., reads:

“(5) **Duties.** The county veterans' service officer shall advise with veterans of all wars residing in the county who were engaged in the service of the United States, relative to any complaint or problem arising out of war service and shall render to them and their dependents all possible assistance. The county board shall provide him with office space, clerical assistance and such other needs as will enable him to perform his duties and may appoint such assistant county service officers as are

necessary, who shall be honorably discharged veterans who served the United States in time of war. The service officer shall make such reports as the board may require.

“(6) **Co-operation.** The county veterans service officer shall co-operate with the several federal and state agencies which render services or grant aids or benefits to veterans and their dependents, and shall furnish information relative to the burial places within the state of persons, as required by s. 45.42 (2).”

It is my opinion that the county veterans' service officer may be authorized by the county veterans' service commission and the town board to transport disabled veterans to a veterans' hospital, but in the absence of such authorization has no duty to do so.

The following relevant statutory provisions must also be considered:

“45.10 **COUNTY TAX FOR NEEDY VETERANS.** Every county board shall annually levy, in addition to all other taxes, a tax sufficient to carry out the purposes of this section, such tax to be levied and collected as other county taxes for the purpose of providing aid to needy veterans, the needy spouses, surviving spouses, minor and dependent children of such veterans and the needy parents of such veterans entitled to aid under ss. 45.10 to 45.15, and to carry out the purposes of ss. 45.16 to 45.185. Aid may not be denied solely on the basis that a person otherwise eligible therefor owns a homestead which the person occupies as such.

“45.11 **ESTIMATE OF AMOUNT NEEDED.** The county veterans' service commission shall estimate the probable amount required under s. 45.10 and shall file such estimate with the county board prior to the adoption of the budget at the November session.

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“45.14 **COMMISSION, EXAMINATION, AID.** Such commission shall meet at the courthouse or at such other place as the county board shall designate on or before the first Monday of January in each year and at such other times as may be necessary. The commission may furnish aid to any person within s. 45.10 if the right of such person to aid shall be established to its satisfaction. The secretary of the commission shall make and deposit with

the county clerk a list containing the name, place of residence and the amount to be paid each such person, which shall be signed by the chairman and secretary. *The total disbursements made by the commission shall not exceed the amount collected from the tax levied.* When such lists are filed the county clerk shall issue an order upon the county treasurer for the sum designated therein in each case and deliver it to the person entitled thereto. The commission may furnish aid in a different manner than by supplying money. The commission may request the county clerk to issue an order upon the county treasurer to a purveyor of services or commodities for the purchase of such services or commodities or the commission may furnish such supplies as it deems best. The commission shall make a detailed report to the county board at each annual session thereof showing the amount expended.”

Chapter 45, Stats., provides two forms of assistance to veterans and their dependents. One form of assistance is financial assistance or services or supplies in lieu of financial assistance. The other form of assistance consists of advice, counseling, information gathering. The kind of assistance which the county veterans’ service officer must provide pursuant to sec. 45.43(5) consists of advice, counseling, information gathering and generally acting as a resource person for veterans and their dependents. It is my opinion that the county veterans’ service officer is not authorized to provide financial assistance or its equivalent in the form of services and supplies, including transportation, without specific authorization from the county commission.

Section 45.43 does not grant the county veterans’ service officer any authority to make disbursements or to create financial obligations on behalf of the county. Rather, subsec. (5) speaks of advice to veterans. Subsection (6) speaks of cooperation with state and federal agencies which render services or grant aids or benefits to veterans and their dependents. Reading sec. 45.43 as a whole, it supports the view that the county veterans’ service officer is to act as a resource person for veterans and their dependents.

At the county level, ch. 45 requires each county to annually levy a tax, in addition to all other taxes, to provide aid to needy veterans. This assistance is in addition to any other forms of public assistance veterans may be receiving. The collection of this tax is a mandatory

obligation on the county. 29 Op. Att'y Gen. 240 (1940) and 21 Op. Att'y Gen. 1035 (1932). Section 45.14 permits the county to furnish aid in a different manner than by supplying money by purchasing services.

Under ch. 45 the county must provide aid for veterans. The county must raise the money to pay for this aid. The county is not under an open-ended obligation to provide any and all kinds of assistance to veterans. The county has the authority to determine what kinds of aid it will provide. The county can place a limit on the tax it will levy. The county can in its discretion set aside a portion of its budget for veteran services for transportation. Such decision is within the discretion of the county board. The county veterans' service officer helps execute the veterans' aid program formulated by the county, but he is bound by the budget of the county. If the county does not make outlays for transportation, the county veterans' service officer has no authority to create such an obligation.

Your second question is whether in transporting such veteran in the county veterans' service officer's privately owned automobile, would the county be liable to such veteran in an automobile accident?

If the county veterans' service officer was not authorized to transport the injured veteran in his privately owned automobile, the county would not be liable to such veteran. The county veterans' service officer should provide his own liability coverage if he transports veterans to a veterans hospital without authorization.

But if the county veterans' service officer were authorized to provide the transportation and if the service officer were acting within the scope of his employment when an accident occurred the county would be liable for the service officer's negligence. *Holytz v. Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618 (1962); *Anderson v. Green Bay Hockey, Inc.*, 56 Wis.2d 763, 203 N.W.2d 79 (1973); *Coffey v. Milwaukee*, 74 Wis.2d 526, 247 N.W.2d 132 (1976); and *Lange v. Town of Norway*, 77 Wis.2d 313, 253 N.W.2d 240 (1977). See also, 61 Op. Att'y Gen. 218 (1972).

The county would be liable for the negligence of its servants on a theory of *respondet superior*, limited under sec. 895.46(1), Stats., to judgments in excess of any insurance applicable to this officer. Since the insurance required by sec. 344.33(2), Stats., must provide coverage in the amount of \$15,000 per person, \$30,000 per

occurrence for bodily injury or death and \$10,000 for property damage, and since sec. 895.43(3) provides for a \$25,000 limit on recovery against a county employe, it would appear that the county's exposure would be effectively limited to \$10,000 in the case of a single plaintiff for personal injury, and \$15,000 for property damage.

BCL:RGM

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*Corporations; Elections;* The statutory prohibition against political contributions and disbursements by corporations or cooperatives in support or opposition to any referendum to be submitted to the voters, set forth in sec. 11.38(1)(a)1., Stats., is unconstitutional. To the extent spending for that purpose is now allowable under sec. 11.38(1)(a)1., Stats., it is fully subject to the requirements and limitations otherwise set forth in ch. 11, Stats., including those requiring registration and filing. OAG 57-78

August 9, 1978.

GERALD J. FERWERDA, *Executive Secretary*  
*Elections Board*

You have requested my opinion concerning the constitutionality of the ban on corporate financing of election campaigns imposed by sec. 11.38, Stats., in light of the recent United States Supreme Court opinion in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407 (1978). You also seek directions as to what action the Elections Board should take if it is determined that the statutory ban cannot be constitutionally applied in whole or in part.

The *Bellotti* decision held that a Massachusetts law that limited corporate expenditures aimed at influencing referendum votes was unconstitutional under the first and fourteenth amendments to the United States Constitution. Although your request presents a number of questions concerning the effect of *Bellotti* on sec. 11.38, Stats., this opinion will only address whether the similar prohibition against corporate spending in referendum elections, as set forth in sec. 11.38, Stats., is made unconstitutional as a result of that decision. The balance of your questions will be treated in a subsequent opinion.

Section 11.38(1)(a)1., Stats., sets forth a general prohibition against direct or indirect contributions or disbursements for political purposes by a foreign corporation, a domestic corporation (normally organized as a business corporation under ch. 180, Stats., or as a nonstock corporation under ch. 181, Stats.) or an association incorporated as a cooperative under ch. 185, Stats., in the following terms:

“No foreign or domestic corporation, or association organized under ch. 185, may make any contribution or disbursement, directly or indirectly, to any political party, committee, group, candidate or individual for any political purpose or to promote or defeat *the candidacy* of any person for nomination or election to any public office or any referendum to be submitted to the voters.”

Section 11.38, Stats., does allow such corporations and associations to engage in a few related activities, such as the establishment and administration of a separate segregated fund, to be utilized for political purposes, for which it can solicit funds, but to which it cannot contribute. Sec. 11.38(1)(a)2., Stats. *See* 67 Op. Att’y Gen. 193(1978). Likewise, they may also publish periodicals in the regular course of their affairs which advise their members, shareholders or subscribers of the disadvantages or advantages to their interests of voting in a particular manner at any election. Sec. 11.38(2)(b), Stats.

Violation of sec. 11.38, Stats., is punishable not only by forfeiture under sec. 11.60, Stats., but also by fine or imprisonment under sec. 11.61(1)(c), Stats. The statute is therefore penal in nature and must be strictly construed. *Capt. Soma Boat Line, Inc. v. Wisconsin Dells*, 56 Wis.2d 838, 845, 203 N.W.2d 369 (1973). *See also* 65 Op. Att’y Gen. 10, 12 (1976).

The *Bellotti* case involved a Massachusetts law somewhat similar to sec. 11.38, Stats., in that it contained a broad prohibition against certain corporations and companies making contributions or expenditures

“... for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting or antagonizing the interests of any political party, or influencing or affecting the vote on any question submitted to

the voters, other than one materially affecting any of the property, business or assets of the corporation. ..." Mass. Gen. Laws Ann. ch. 55, sec. 8 (West. Supp. 1977-1978).

The constitutionality of the law was challenged by a number of banks and business corporations which had wanted to spend money to publicize their position on a constitutional amendment proposed as a ballot question at the November, 1976, general election. Massachusetts advanced two principal justifications for the prohibition of corporate speech, *i.e.*, the state's interest in sustaining the role of the individual in the electoral process by preventing undue corporate influence on the outcome of the referendum vote and its interest in protecting corporate shareholders whose views differ from those expressed by the corporation. Indicating that the first amendment question posed by the Massachusetts law was "whether the corporate identity of the speaker deprives this proposed speech of what otherwise would be its clear entitlement to protection," 98 S. Ct. 1416, the Supreme Court stated the test to be applied, as follows:

"The constitutionality of sec. 8's prohibition of the 'exposition of ideas' by corporations turns on whether it can survive the exacting scrutiny necessitated by a state-imposed restriction of freedom of speech. Especially where, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, 'the State may prevail only upon showing a subordinating interest which is compelling,' ... 'and the burden is on the Government to show the existence of such an interest.' ... Even then, the State must employ means 'closely drawn to avoid unnecessary abridgment ...' ...." 98 S. Ct. 1421.

In its 5-4 decision the Court held that the statutory prohibition at issue failed to meet these standards under the first amendment, as made applicable to the states by the fourteenth amendment, stating at 98 S. Ct. 1422:

"... However weighty these interests may be in the context of partisan candidate elections, they either are not implicated in this case or are not served at all, or in other than a random manner, by the prohibition in sec. 8."

Wisconsin Constitution art. I, secs. 3 and 4, guarantee the same freedom of speech and right of petition as do the first and fourteenth

amendments to the United States Constitution. *Lawson v. Housing Authority*, 270 Wis. 269, 70 N.W.2d 605 (1955), *cert. denied*, 350 U.S. 882.

The reasoning and the conclusions reached in *Bellotti* are clearly applicable to the provisions of sec. 11.38, Stats., which prohibit corporate or cooperative contributions or disbursements in support or opposition to any referendum to be submitted to the voters, and such prohibition must be considered unconstitutional under both the federal and state constitutions.

Having concluded that the sec. 11.38(1)(a)1., Stats., ban on corporate spending on referendum questions is unconstitutional, it is necessary to consider the application of the campaign finance registration and reporting requirements to such spending.

Corporations and cooperatives may be treated as "persons" under the provisions of ch. 11, Stats., *see* sec. 990.01(26), Stats., and to the extent that corporate spending for referendum elections is now allowable under sec. 11.38(1)(a)1., Stats., spending for such purpose is fully subject to the requirements and limitations otherwise set forth in that chapter, including those requiring registration and filing. *See* secs. 11.05, 11.06, 11.20 and 11.23, Stats.

Any prior opinions of this office construing sec. 11.38, Stats., including those reported in 65 Op. Att'y Gen. 10 (1976) and 65 Op. Att'y Gen. 145, 158 (1976), are modified to the extent they may be inconsistent with this opinion.

BCL:JCM

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*Industry, Labor And Human Relations, Department Of; Public Property; Public Records; Plans and specifications filed with DILHR under sec. 101.12, Stats., are public records under secs. 16.61 and 19.21, Stats., and are available for public inspection. OAG 58-78*

August 10, 1978.

FRED A. RISSER, *Chairman*  
*Committee on Senate Organization*

On behalf of the Committee on Senate Organization, you have requested my opinion with respect to whether certain plans and related documents filed with the Department of Industry, Labor and Human Relations (DILHR) are available to the public within the scope of sec. 19.21, Stats. Correspondence attached to your request indicates that there is a concern whether certain building plans and specifications, including those prepared by architects, submitted to DILHR for approval should be considered confidential as trade or manufacturing secrets so as not to be available to possible business competitors.

The documents under consideration are "essential drawings, calculations and specifications for public buildings, public structures and places of employment" required by sec. 101.12, Stats. Plans for public buildings, public structures and places of employment must be approved by DILHR before construction is started.

Section 16.61(2)(a), Stats., defines public records of a state agency as:

"Public records' means all books, papers, maps, photographs, films, recordings, or other documentary materials or any copy thereof, regardless of physical form or characteristics, made, or received by any agency of the state or its officers or employes in connection with the transaction of public business and retained by that agency or its successor as evidence of its activities or functions because of the information contained therein; except the records and correspondence of any member of the state legislature."

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.*”

The plans and specifications involved are required by law to be filed with DILHR, so they qualify as “property or things” under this statute. I am unaware of any statute or constitutional provision which would make these plans and specifications confidential or privileged and which would therefore 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. *See* 63 Op. Att’y Gen. 400, 405-406 (1974), for a discussion and summary of criteria for permitting or denying public access to records.

In some states, architects’ plans are protected by common-law copyright as a property interest, at least until publication. In a somewhat analogous area the Wisconsin Supreme Court has recognized a common-law cause of action in unfair competition involving pirated tape recordings. *Mercury Record v. Economic Consultants*, 64 Wis.2d 163, 183, 187, 218 N.W.2d 705 (1974).

Even if the Wisconsin court were to later recognize that architects have a similar common-law right or cause of action with respect to their drawings and specifications, it is my opinion that this would not necessarily bestow any blanket confidential status to such plans or specifications filed with a state agency such as DILHR under the statutes mentioned above. Whether or not the filing requirement serves the limited purpose of assuring safety in construction and therefore is not a publication or waiver of trade secrets or other similar legal rights, *see* 18 Am. Jur. 2d *Copyright and Literary Property* sec. 79, p. 369, the right to inspect and copy does not itself

imply the right to use the material for unfair competition or other similarly actionable purposes. *See Mercury Record v. Economic Consultants*, 64 Wis.2d 163, 175, 218 N.W.2d 705 (1974).

Therefore, it is my opinion that since the filing of the plans and specifications in question is required by law in order to obtain DILHR's approval to construct a public building, they are public records and in most cases subject to inspection and copying under such reasonable regulations as the custodian prescribes. It is difficult to conceive of circumstances where the kinds of plans which are required to be submitted for approval here would be of such a nature as to support a claim that they contained trade secrets. *See* sec. 905.08, Stats., and 63 Op. Att'y Gen. at p. 408. Nevertheless, in the unusual circumstance where such a claim is made or when it appears to the custodian that such a claim could plausibly be maintained, this would be a factor that the custodian should take into account in performing the so-called balancing of interests test and making a determination whether "permitting inspection would result in harm to the public interest which outweighs any benefit that would result from granting inspection." 63 Op. Att'y Gen. at p. 406. As the Wisconsin Supreme Court said in *Beckon v. Emery*, 36 Wis.2d 510, 516, 153 N.W.2d 501 (1967):

"... 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. ..."

Thus, even a decision not to disclose must be limited only to that portion of the plans and related documents which would disclose the trade secret.

In view of the likelihood that the application of some of the general principles stated above, particularly with respect to trade secrets, may result in the custodian being obliged to make such determinations on a case-by-case basis without legislative guidance, I respectfully suggest that this may be a matter where public policy should be expressed by legislative enactment.

BCL:JEA

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*Health Officers; Liability; Licenses And Permits; Medical Aid; Public Health;* Interpretation of new law rendering "good Samaritans" immune from civil liability for good faith acts or omissions in giving emergency care at the scene of an emergency or accident. Statute excludes from protection health care practitioners who make their living or who specifically are paid for providing emergency care at the scene of an emergency or accident. OAG 59-78

August 11, 1978.

DONALD E. PERCY, *Secretary*

*Department of Health and Social Services*

You request my opinion as to the correct interpretation of sec. 895.48, Stats., created by ch. 164, Laws of 1977, establishing a general "good Samaritan" law applicable to all persons rendering emergency medical care. Section 895.48, Stats., states:

**"CIVIL LIABILITY EXEMPTION: EMERGENCY CARE.** Any person who renders emergency care at the scene of any emergency or accident in good faith shall be immune from civil liability for his or her acts or omissions in rendering such emergency care. This immunity does not extend when employees trained in health care or health care professionals render emergency care for compensation and within the scope of their usual and customary employment or practice at a hospital or other institution equipped with hospital facilities, at the scene of any emergency or accident, enroute to a hospital or other institution equipped with hospital facilities or at a physician's office."

Initially, it must be noted that by ch. 164, Laws of 1977, the Legislature repealed prior sec. 441.06(5), Stats., and amended sec. 448.03(2)(i) and (4), Stats., under which licensed physical therapists, physician's assistants and registered nurses were rendered immune from civil liability for any good faith acts or omissions in giving emergency care at the scene of an emergency or accident. Under the new law, in contrast, the special "good Samaritan" immunity for such professionals is supplanted by a general "good

Samaritan” law applicable to all persons rendering on-the-scene emergency care in good faith, with certain exceptions. The questions you raise concern the scope of the stated exceptions.

The statute in broad terms first establishes a general civil immunity for persons rendering emergency care. A person does not receive the benefit of this statutory immunity:

- (1) If he or she is an employe trained in health care or is a health care professional; and
- (2) If he or she is rendering emergency care for compensation; and
- (3) If such rendering of care is within the scope of his or her usual and customary employment or practice,

whether such emergency care is given at the scene of an emergency, en route to a hospital or other institution equipped with hospital facilities, at a hospital or other such institution or at a physician’s office.

As a prefatory matter, I should note that in construing a statute resort may not be had to extrinsic aids unless the statute is ambiguous. Ambiguity exists when a statute “is capable of being understood by reasonably well-informed persons in either of two or more senses.” *Recht-Goldin-Siegal Const. v. Dept. of Revenue*, 64 Wis.2d 303, 306, 219 N.W.2d 379 (1974).

Certain portions of sec. 895.48, Stats., are plainly ambiguous. For example, the phrase “health care professional” is neither self-defining nor defined in the statute. The scope of the phrase “usual and customary employment or practice” is similarly uncertain. Accordingly, I am of the view that the plain meaning rule is inapplicable here and that resort may be had to various extrinsic aids to statutory construction, such as the purpose of the statute, other related statutes and legislative history.

The first problem concerns the scope of the phrase “employes trained in health care or health care professionals,” for it is only such individuals, under the circumstances described, who do not partake of the statutory immunity granted all other persons. It is my opinion that the Legislature, in qualifying immunity for “employes trained in health care or health care professionals,” intended to underscore its

intention to encompass *any* person who is engaged in the business of providing health care. I believe the language, rather than setting up two distinct classes, merely points up the Legislature's intention that the scope of the exception is not dependent upon whether the individual is an employe or an independent practitioner or upon whether the individual provides health care as a full-time occupation or as partial completion of his or her duties.

In many cases an individual who provides assistance may be considered both an employe trained in health care and a health care professional. But to demonstrate the scope of the statute I have attempted to define the two classes separately.

The term "health care professionals," though potentially encompassing a wide range of individuals in the health care field, is capable of being defined with some precision, so it will be addressed first.

Although neither sec. 895.48, Stats., nor any other section of the statutes defines the phrase "health care professionals," ch. 655, Stats., entitled "Health Care Liability And Patient Compensation," does define the related phrase "health care provider." Section 655.001(8), Stats., states that:

**"DEFINITIONS.** In this chapter:

**"(8) 'Health care provider' means a medical or osteopathic physician licensed under ch. 448; a nurse anesthetist licensed under ch. 441; a partnership comprised of such physicians or nurse anesthetists; a corporation owned by such physicians or nurse anesthetists and operated for the purposes of providing medical services; an operational cooperative sickness care plan organized under ss. 185.981 to 185.985 which directly provides services through salaried employes in its own facility; or a hospital as defined by s. 140.24 (1) (a) and (c); but excluding state, county or municipal employes or federal employes covered under the federal tort claims act, as amended, while acting within the scope of their employment, and those facilities exempted by s. 140.29 (3) or operated by any governmental agency."**

In addition, ch. 448, Stats., entitled "Medical Practices," deals with the licensing of medical practitioners. Section 448.03(1), Stats., provides that:

"(1) **License required to practice.** No person may practice medicine and surgery, podiatry or physical therapy, or attempt to do so or make a representation as authorized to do so, without a license granted by the board."

Section 448.03(2), Stats., provides that:

"(2) **Exceptions.** Nothing in this chapter shall be construed either to prohibit, or to require a license or certificate under this chapter for any of the following:

"(a) Any person lawfully practicing within the scope of a license, permit, registration, certificate or certification granted to practice professional or practical nursing under ch. 441, to practice chiropractic under ch. 446, to practice dentistry or dental hygiene under ch. 447, to practice optometry under ch. 449 or under any other statutory provision, or as otherwise provided by statute."

Section 448.03(3)(b), Stats., provides that:

"(b) No person not possessing the degree of doctor of osteopathy may use or assume the title 'doctor of osteopathy' or append to the person's name the letters 'D.O.'"

And sec. 448.03(3)(e), Stats., provides that:

"(e) No person may designate himself or herself as a 'physician's assistant' or use or assume the title 'physician's assistant' or append to the person's name the words or letters 'physician's assistant' or 'P.A.' or any other titles, letters or designation which represents or may tend to represent the person as a physician's assistant unless certified as a physician's assistant by the board."

In my opinion, the above statutory definitions and proscriptions are illustrative of the scope of the term "health care professional" as used in sec. 895.48, Stats. Thus, a person is a health care professional if he or she is licensed, permitted, registered or certified under the laws of this state to practice as a medical doctor, surgeon, podiatrist, osteopath, physician's assistant, physical therapist, professional or

practical nurse, chiropractor, dentist, dental hygienist or optometrist within this state.

In addition, I am of the opinion that a person who is licensed under sec. 146.35, Stats., as an "emergency medical technician-advanced (paramedic)," and who practices emergency medical care as his or her profession, is to be considered a "health care professional" within the meaning of sec. 895.48, Stats. Section 146.35(3), Stats., deals with state approval of programs:

"... utilizing emergency medical technicians -- advanced (paramedics) for the delivery of *emergency medical care to the sick and injured* at the scene of an emergency and during transport to a hospital, while in the hospital emergency department, and until care responsibility is assumed by the regular hospital staff. ..."

In my view, "emergency medical care to the sick and injured" constitutes a form of "health care."

Moreover, I am of the opinion that a person who is licensed under sec. 146.50, Stats., as an "ambulance attendant" and who practices ambulance attendance as his or her profession is to be considered a "health care professional" for the purpose of sec. 895.48, Stats. Section 146.50(1)(c), Stats., defines "ambulance attendant" as:

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

A somewhat different question is who are to be considered "employees trained in health care."

Chapter 111 of the Wisconsin Statutes is entitled "Employment Relations." Section 111.02(3) of that chapter defines the term "employee" as including "any person, other than an independent contractor, working for another for hire."

An example of an "employee trained in health care" is a paramedic hired by a county or municipality to deliver emergency medical services. Section 146.35(1), Stats., refers to the training a person must receive in order to be licensed as a paramedic by the Department of Health and Social Services:

**“(1) Emergency medical technician -- advanced (paramedic) defined.** As used in this section, ‘emergency medical technician - - advanced (paramedic)’ means a person who is specially trained in emergency cardiac, trauma and other lifesaving or emergency procedures in a training program or course of instruction prescribed by the department ....”

Section 146.35(5)(b), Stats., adds that:

**“(5) Qualifications for licensure.** To be eligible for an emergency medical technician -- advanced (paramedic) license a person shall:

“\*\*\*

**“(b)** Satisfactorily complete a course of instruction prescribed by the department or present evidence satisfactory to the department of sufficient education and training in the field of emergency medical care.”

Ambulance attendants are defined as persons “responsible for the administration of emergency care procedures,” sec. 146.50(1)(c), Stats., and are required to be licensed. To be eligible for a license a person must complete a prescribed course of training or present satisfactory evidence of emergency care training, sec. 146.50(6)(b), Stats.

Given these statutory provisions, I am of the opinion that the phrase “employees trained in health care” includes those persons working for another for hire who:

1. Are licensed, permitted, registered or certified under the laws of this state to practice medicine, surgery, podiatry, osteopathy, physician’s assistantship, physical therapy, professional or practical nursing, chiropractic, dentistry, dental hygiene or optometry; and/or
2. Are licensed paramedics; and/or
3. Are licensed ambulance attendants.

In addition, it has been suggested that the statutory phrase “trained in health care” may include not only the type of training undergone by the persons discussed above but also formal, first aid-type training. The dictionary definition of “first aid” makes it clear that it is a form of health care:

“first aid: emergency care or treatment given to an ill or injured person before regular medical aid can be obtained.”  
*Webster’s Seventh New Collegiate Dictionary*, (1970, G. and C. Merriam Co.).

An example of a person who has received formal, first aid-type training is a person with Red Cross first aid certification.

I am not convinced, however, that all persons with the typical first aid training or Red Cross certification are meant to be excluded from the benefits of the immunity conferred by sec. 895.48, Stats. First, the statute requires not only that one have medical training, but that one be an *employee* trained in health care. Conceivably, the statutory language is capable of including employes of every variety, from the stagehand at a ballet company to the head cashier at a savings and loan association. Fortunately, an alternative construction suggests itself--that only health care trained employes whose specific, paid duties include the rendering of emergency aid are exempted from the immunity conferred. Such a construction is not only more reasonable in light of the statutory language, but also more compatible with the apparent purpose of the statute, that is, to encourage persons to come to the aid of emergency victims. This purpose could be largely frustrated by exempting from “good Samaritan” immunity the great number of people who have acquired basic first aid skills but whose employment is in no way connected with these skills.

The fact that one is an employe trained in health care or a health care professional does not in itself suffice to take one out of the immunity generally conferred to those rendering emergency care. One must, in addition, be rendering such care for compensation and be within the scope of one’s usual and customary employment or practice.

In determining what constitutes rendering health care “for compensation,” one naturally first considers wages and salary. Section 409.104(4), Stats., defines wages and salary as a form of compensation. Section 16.086, Stats., is entitled “Compensation.” Section 16.086(1)(e), Stats., has reference to allowances for meals and laundry as examples of compensation, and sec. 16.086(3), Stats., deals with benefits.

In my opinion, a person has rendered emergency care "for compensation" if he or she has been or will be paid in money or something else of material value for rendering the care.

It is my further opinion that one is within the scope of one's usual or customary employment or practice in rendering emergency care if one is doing the kind of act one would normally be expected to do in the course of earning one's livelihood.

In sum, the statute gives immunity to all "good Samaritans" who render aid in an emergency situation, with certain exceptions. There is no immunity when a health care trained employe whose duties include the rendering of emergency care or a health care professional, as defined above, gives aid for compensation, which aid is of the kind the employe or professional usually renders in the course of his or her employment or practice, whether the emergency care is performed at the scene of an emergency, en route to a hospital or similarly equipped facility, at such a facility or at a physician's office. In short, the statute generally excludes from protection those health care practitioners who make their living or who specifically are paid for providing emergency care at the scene of an emergency or accident.

It is difficult to draw a precise line between all situations in which the immunity exists and those where it does not. Nevertheless, since you express particular concern about potential liability for certain classes of individuals, including ambulance personnel, firefighters and police officers, I will attempt to illustrate those circumstances where, in my opinion, the statutory immunity would not apply.

The statute provides no immunity where persons employed by an ambulance service, whether salaried or paid by the call, render emergency aid of a type that they would normally be expected to give, whether at the scene of an emergency, en route to a hospital facility or at the hospital facility pending transfer of care to hospital personnel. If the above conditions exist, the fact that one were so employed only on a part-time basis, or additionally employed elsewhere, would make no difference. Additionally, there is no immunity for police officers or firefighters assigned to ambulance work, assuming such assignment was made following instruction in the care of emergency victims and assuming compensation for these services. Police and fire personnel assigned to ambulance duty are performing a customary function when they render aid to accident

and fire victims. The fact that victims may not be charged a fee does not change the result.

In my opinion, volunteer ambulance personnel do not fall within the intended scope of the exception to sec. 895.48 immunity. Volunteers are neither paid for the care they render nor employed by the ambulance service. They freely give their services for altruistic, not pecuniary, reasons. Withholding the benefits of civil immunity from unpaid emergency volunteers would be antithetical to any concept of encouraging people to come to the aid of accident victims. Volunteer ambulance personnel paid by the call, however, though not salaried employes, are, like regular employes, compensated by the ambulance service for their work and thus should not be treated differently from regular employes. That the "employer" may have arranged his business in such a way that paid volunteers are not on his payroll, but expected to receive their compensation directly from the victim, should make no difference.

BCL:NLA

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*Administrative Procedure; Industry, Labor And Human Relations, Department Of; The Department of Industry, Labor and Human Relations may not reopen and reconsider a decision after the time specified in sec. 108.09(6), Stats. OAG 60-78*

August 25, 1978.

ZEL S. RICE II, *Secretary*

*Department of Industry, Labor and Human Relations*

You submit a question based upon the following factual situation:

"During an investigation conducted by this agency during the past several months, some hearing examiners have stated that a number of decisions issued by them were the result of direction or pressure by a supervisor and contrary to their own determinations of the facts and/or law."

You ask whether your agency has authority after the time specified in sec. 108.09(6)(a), Stats. (*i.e.*, "before a deputy's determination or an appeal tribunal's decision is mailed to the

parties”), to reopen and reconsider those otherwise final decisions on the ground of fraud.

I do not think that this situation involves fraud. The cases you have cited which permitted reconsideration because of fraud involved misrepresentation by one of the parties, not errors committed by the administrative agencies.

In my opinion current statutes prevent the decisions from being reopened by the department. The statutes expressly provide the circumstances upon which, and the time within which, the commission may reopen decisions upon its own motion.

Subsection (d) of sec. 108.09(6), Stats., reads:

“The commission may on its own motion, for reasons it deems sufficient, set aside any final deputy’s determination or appeal tribunal or commission decision within one year from the date thereof upon grounds of mistake or newly discovered evidence, and may make new findings and a decision, after affording reasonable opportunity for hearing, or it may reinstate the previous findings and decision.”

There are cases in other jurisdictions where courts have permitted reconsideration of final administrative decisions where there was no statutory authority to reopen decisions. These cases are inapplicable since the Legislature has already provided a procedure to deal with such errors and in the interest of finality has specifically limited the procedure to one year. I have been unable to find any authority in this or any other jurisdiction which would support reopening after a legislatively imposed time limit. Indeed, those few cases which have considered the issue come to the conclusion that decisions cannot be reopened under these circumstances. *Handlon v. Belleville*, 4 N.J. 99, 71 A.2d 624, 627 (1950); *State v. Ohio Stove Co.*, 154 Ohio St. 27, 93 N.E.2d 291 (1950); *Suryan v. Alaska Industrial Board*, 12 Alaska 571 (D.C. 1950). I am of the opinion that our courts would follow these cases and the apparent legislative intent in sec. 108.09(6)(d), Stats., to provide finality.

Other statutory provisions may permit some reconsideration of these decisions. First, sec. 108.09(7)(a), Stats., provides for judicial review brought by either party. The section reads:

“Either party may commence judicial action for the review of a decision of the commission under this chapter if the party after exhausting the remedies provided under this section has commenced such judicial action in accordance with s. 102.23, 1971 stats., within 30 days after a decision of the commission was mailed to his last-known address.”

Although I note that this section likewise contains a thirty day time limitation I think that in the interest of fairness the Department should notify the parties involved so that they may consider action even if the options are limited.

Second, there is a procedure under sec. 16.007(3), Stats., for bringing matters of this sort before the Claims Board. If claimants are notified they can consider pursuing this remedy.

I am also of the opinion that the Legislature could amend the statute retroactively to cover this situation. Statutes which are remedial or procedural in nature can be applied retroactively if they do not disturb absolute vested rights. *Steffen v. Little*, 2 Wis.2d 350, 357, 86 N.W.2d 622 (1957). A legislative enactment permitting reconsideration of these decisions would not disturb a vested right. It would protect the integrity of the decision-making process and go to matters of remedy. See *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) (statutes of limitation go to matters of remedy, not to destruction of fundamental rights). Moreover, even those statutes which do affect vested rights may be applied retroactively if the Legislature clearly intended such application. *Niesen v. State*, 30 Wis.2d 490, 141 N.W.2d 194 (1966).

BCL:BL

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*Employer And Employee; Industry, Labor And Human Relations, Department Of; Unemployment Compensation; Although unemployment benefits erroneously paid constitute overpayments which the individual recipients should be required to repay, the Department of Industry, Labor and Human Relations has discretion whether to seek recovery of such overpayments. OAG 61-78*

August 28, 1978.

ZEL S. RICE II, *Secretary*

*Department of Industry, Labor and Human Relations*

You have informed me that certain individuals erroneously were paid unemployment benefits and you request my opinion concerning whether such payments constitute overpayments which those individuals should be required to repay. The erroneous payments resulted solely from your Department's incorrect determination of the average weekly wage and benefit rates under sec. 108.05(2), Stats. As a consequence, minimum weekly benefits were paid to approximately 814 individuals whose average weekly wages would have been insufficient to qualify for minimum benefits under a correct determination.

You indicate that your Department takes the position that the benefits paid should stand as paid and need not be repaid. It is my opinion that the erroneously paid benefits constitute overpayments which the individual recipients should be required to repay, but that your Department has discretion whether to seek recovery of such overpayments.

Section 108.16(2)(b), Stats., provides that each employer's account in the Unemployment Reserve Fund shall be charged for all benefits paid to its employees based on their past employment with that employer. Where the Department finds, however, that any benefits which have been charged to the employer's account have been erroneously paid to an individual, without fault by the employer, both the individual and the employer must be notified as to the erroneous payment. Sec. 108.16(2m), Stats.

If benefits currently are payable to such individual from the employer's account, the Department may correct the error by adjusting benefits accordingly. If not, the treasurer of the Unemployment Reserve Fund, with certain exceptions, must restore the proper amount to the employer's account and charge such amount to the fund's balancing account. Thereafter, the treasurer may reimburse the balancing account by crediting to it benefits which otherwise would be payable to, or cash received from, the individual. Sec. 108.16(2m), Stats.

Section 108.22(8), Stats., which applies to the recovery of such erroneous payments, and which equates such erroneous payments with "overpayments," provides:

"(a) In case benefits have been erroneously paid to an individual, the individual's liability to reimburse the fund for such overpayment may be set forth in a determination or decision issued under s. 108.09.

"(b) To recover any overpayment which is not otherwise repaid or recovery of which has not been waived, the department may offset the amount of the overpayment against benefits the individual would otherwise be eligible to receive, or file a warrant against the liable individual in the same manner as is provided in this section for collecting delinquent payments from employers ...."

The treasurer of the fund must waive recovery of overpayments where the claimant's liability first has been established under sec. 108.22(8)(a), Stats., and where (1) the claimant has been duly discharged of such liability by a federal bankruptcy court, (2) the claimant has died and reasonable efforts have been made to recover the overpayment from the claimant's estate, or (3) the overpayment has been outstanding six years or more after the liability was established and reasonable efforts have been made to recover it. Sec. 108.16(3)(a), Stats.

Reading secs. 108.16(2m) and 108.22(8), Stats., together, it is evident that the Legislature intended that erroneous benefit payments to individuals without employer fault should be recovered. There is nothing inequitable about requiring repayment since the individual recipients would not have qualified for benefits under a correct determination and, therefore, were not entitled to the benefits received. Moreover, it does not appear that the balancing account, which the Department maintains as trustee, was intended to permanently reimburse employer accounts where erroneous payments have resulted from departmental error. Sec. 108.16(6), (6m), (7)(a) and (b), Stats.

Although I believe that the individual recipients should be required to repay the erroneously paid benefits, the use of the word "may" in secs. 108.16(2m) and 108.22(8), Stats., gives the Department discretion whether to seek recovery of such

overpayments. Generally, the word "may" is permissive when used in a statute, and this 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). Thus, while the treasurer of the fund *shall* transfer amounts from the balancing account to the employer's account, and *shall* waive recovery of overpayments in certain situations, the treasurer *may* reimburse the balancing account and the Department *may* offset overpayments against amounts payable, *may* establish an individual's liability under sec. 108.09, Stats., or *may* file a warrant against a liable individual. Accordingly, your Department is authorized, although not required, to seek recovery of benefits paid erroneously because of departmental error.

BCL:DCR

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*Compatibility; County Board; Officers And Offices; Ordinances;* County board in county over 500,000 can provide that members of transit board, created by ordinance pursuant to sec. 59.025(3)(a), Stats., be appointed by county board chairman and confirmed by county board. However, supervisor would be ineligible to serve on such transit board by reason of secs. 59.03(4) and 66.11(2), Stats. OAG 62-78<sup>1</sup>

August 29, 1978.

ROBERT P. RUSSELL, *Corporation Counsel*  
*Milwaukee County*

You advise that Milwaukee County has acquired a public transportation system under authority granted in sec. 59.968, Stats., and has created a transit board to operate and maintain the system. The county ordinance provides that three board members are appointed by the county executive and confirmed by the county board. An amendment to the ordinance would provide that one member be a county supervisor to be appointed by the chairman of the county board and confirmed by the county board.

You inquire whether a county board which has created a board to administer a county transit system under powers granted in secs.

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<sup>1</sup> A portion of this opinion was later withdrawn. See addendum on page 343.

59.025(3), (4) and 59.968(7)(c), Stats., can designate the chairman of the county board as the appointing authority for members of such board.

The language of the cited statutory provisions requires a yes answer.

A second question which must be answered is whether a county board member may be appointed to and serve on such transit board.

I am of the opinion that such member cannot serve on such board and continue to serve as county board supervisor. But, the county board could create a committee composed solely of county board members pursuant to sec. 59.06, Stats., and could, pursuant to sec. 59.025(3)(c), Stats., transfer all of the duties of the transit board to such committee. The power of appointment would be in the county board chairman without right of confirmation by the county board.

Section 59.968, Stats., provides, in part, that:

“Any county board may:

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“(7) Upon the acquisition of a transportation system:

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“(c) Delegate responsibility for the operation and maintenance of the system to any appropriate administrative officer, board or commission of the county notwithstanding s. 59.965 or any other section of the statutes.”

Section 59.965(2), Stats., provides, in counties over 500,000, for a county expressway and transportation commission composed of four members appointed by the Governor and one by the county executive. Subsections (1) and (4) of sec. 59.967, Stats., provide that any county may have a transit commission of not less than “7 members to be appointed by the county board ... except that in any county having a county executive, he shall make said appointments”; and sec. 59.967(5)(b), Stats., provides, “No transit commissioner shall hold any other public office.” In view of the express exception set forth in sec. 59.968(7)(c), Stats., neither sec. 59.965(2), Stats., nor subsecs. (1) and (4) of sec. 59.967, Stats., would prevent the county board chairman from being the appointing power or prohibit county board

members from serving on the transit board. However, secs. 59.03(4) and 66.11(2), Stats., would make county board members ineligible to concurrently serve on the transit board. See 61 Op. Att’y Gen. 424 (1972) and 65 Op. Att’y Gen. 303 (1976).

Subsections (2), (3) and (4) of sec. 59.025, Stats., provide, in material part:

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

“(3) **Creation of offices.** Except for the offices of supervisor, judge, county executive and county assessor and those officers elected under section 4 of article VI of the constitution, the county board may:

“(a) *Create any county office, department, committee, board, commission, position or employment it deems necessary to administer functions authorized by the legislature.*

“(b) Consolidate, abolish or reestablish any county office, department, committee, board, commission, position or employment.

“(c) *Transfer some or all functions, duties, responsibilities and privileges of any county office, department, committee, board, commission, position or employment to any other agency including a committee of the board.*

“(4) **Selection process for offices.** *The county board may determine the method of selection of any county offices except for the offices of supervisors, judges, county clerk, county treasurer, clerk of courts, county executive and county assessor and those officers elected under section 4 of article VI of the constitution. The method may be by election or by appointment and, if by appointment, the county board shall determine the appointing authority, subject to ss. 59.031 and 59.032.”*

I am of the opinion that the position of county transit member would constitute an office within the meaning of sec. 59.025(4), Stats., and that neither the transit board nor a transit board member would constitute a head of department as that term is used in sec. 59.031(2)(b), Stats.

Section 59.025(4), Stats., requires that where the method of selection is by appointment, as here, "the county board shall determine the appointing authority, subject to ss. 59.031 and 59.032."

Section 59.031(2)(c), Stats., which is applicable to counties over 500,000, provides that the county executive shall:

*"Appoint the members of all boards and commissions where such appointments are required after August 27, 1959 and where the statutes provide that such appointment shall be made by the county board or the chairman of the county board. All appointments to boards and commissions by the county executive shall be subject to the confirmation of the county board."*

The *statutes* do not expressly provide for a transit board of the type established in Milwaukee County and hence do not provide that such appointment shall be made by the county board or chairman of the board. Appointment by the chairman of the county board is proposed to be authorized by *an ordinance* of the county board.

Section 59.032(2)(c), Stats., which is applicable to counties under 500,000, provides that the county executive shall "Appoint the members of all boards and commissions *where the law* provides that such appointment shall be made by the county board or the chairman of the county board." Section 59.033(2)(c), Stats., which applies to county administrators in counties under 500,000, uses the "*where the statutes* provide that such appointment shall be made by the county board or the chairman of the county board" phrase, which is similar to that used in sec. 59.031(2)(c), Stats.

Whereas it can be argued that a county ordinance would constitute a law as that term is used in sec. 59.032(2)(c), Stats., I am of the opinion that it would not; and I am of the opinion that an ordinance enacted under sec. 59.025(4), Stats., does not constitute a statute as that term is used in sec. 59.031(2)(c), Stats. In *Werner v.*

*Pioneer Cooperage Co.*, 155 S.W.2d 319 (Mo. 1941), and *Baker v. White*, 251 Ky. 691, 65 S.W.2d 1022 (1933), it was held that the word "statute" does not include a county ordinance.

Since the statutes do not provide that the appointment to the transit board shall be made by the county board or the county board chairman, a county over 500,000 which has created a transit board under sec. 59.025(3)(a), Stats., can, pursuant to sec. 59.025(4), Stats., determine that appointment of members shall be by the chairman of the county board with confirmation by the board and thus exclude the county executive from exercising the appointing power.

However, whether appointment is by the chairman of the county board, county board or county executive, subject to confirmation by the county board, a member of the county board cannot be appointed to such board and continue to serve as supervisor. There is no statute which expressly permits a county board supervisor to serve on a transit board of the type contemplated by Milwaukee County; the board is not a committee of the county board appointed pursuant to sec. 59.06, Stats., membership of which must be limited to county board members, and membership on the transit board constitutes an office separate and apart from that of supervisor.

Section 59.03(4), Stats., provides:

**"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."

Whereas the proposed ordinance contemplates appointment by the county board chairman and confirmation by the county board, confirmation is a part of the appointment process, and a supervisor would be ineligible under sec. 66.11(2), Stats., which provides:

**"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."*

The office is proposed to be created during the term of the supervisor, and the county board is to be a part of the selection process.

BCL:RJV

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*Counties; County Board; Land; Mineral Rights; Public Lands;* Counties may not transfer county owned mineral rights, acquired through nonpayment of taxes, to private persons without following the appraisal and public sale provisions of sec. 75.69, Stats. Under sec. 59.07(1)(c), Stats., counties may make gifts of land or interests in lands only to enumerated public entities. OAG 63-78

August 30, 1978.

JOHN S. MCCABE, *District Attorney*  
*Florence County*

You have requested my opinion on several questions regarding the authority of the county to reserve and convey mineral rights.

You first ask whether gravel is considered a mineral under state law. Gravel, as well as sand and stone, is a mineral. Whether they constitute minerals within the meaning of state law depends on the state statute in question. The State Metallic Mining Reclamation Act (secs. 144.80 to 144.94, Stats.), for example, specifically excludes sand, gravel and stone from the definition of the term "minerals." If they are not specifically excluded, then under the rule of statutory construction prescribed in sec. 990.01(1), they would be included within the meaning of the word "minerals."

You state in the sale of county lands, much of which was acquired through the nonpayment of taxes, the county had been reserving

mineral rights, and that it is now releasing a fifty percent interest in those mineral rights to the present owners. You ask whether the county, for the purpose of encouraging exploration, may grant a fifty percent interest in mineral rights without consideration.

General authority to reserve and separately transfer mineral rights is found in sec. 59.07(1)(c). Under this same subsection county property may be sold or conveyed on such terms as the county board approves.

Counties may only exercise those powers granted to them by the Legislature. *State ex rel. Conway v. Elvod*, 70 Wis.2d 448, 234 N.W.2d 354 (1975). Under sec. 59.07(1)(c) counties may make gifts of lands to the United States, the state, any other county, municipality or school district. There is no authority to make a gift of lands or interests in lands to private persons, and such authority, if it existed, would probably be unconstitutional. In my opinion the possible encouragement of mineral exploration does not constitute legal consideration to the county for the release.

Specifically, in respect to retained mineral interests in lands acquired through the nonpayment of taxes, I direct your attention to sec. 75.68. This section provides that counties may sell lands acquired through the nonpayment of taxes if not needed for a public purpose. The term "lands" includes interests in lands such as mineral rights. Sec. 990.01(18).

The sale of these (tax deed) "lands" is subject to the procedures of sec. 75.69 which requires that the "lands" be appraised and publicly sold.

In conclusion, it is my opinion that county mineral rights cannot be given away. Further, in the sale of mineral rights which were retained in lands acquired by tax deed or certificate, the sale must follow the procedures of sec. 75.69.

BCL:CAB

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*Boundaries; Cities; Ordinances; Villages; Zoning;* 1. An extraterritorial zoning ordinance may utilize interior section lines.

2. Interim extraterritorial zoning ordinances need not be based on a land use survey.

3. Amendment of interim extraterritorial zoning ordinances discussed.

4. Appeals under an interim extraterritorial zoning ordinance are handled by the city or village.

5. Administration of extraterritorial zoning is by the city or village.

6. The joint extraterritorial zoning committee continues to exist after adoption of the comprehensive extraterritorial zoning ordinance. OAG 64-78

September 5, 1978.

COMMITTEE ON ASSEMBLY ORGANIZATION

*Legislature*

You request my opinion on a number of questions relating to sec. 62.23(7a), Stats., which sets forth the procedures by which cities and villages zone certain unincorporated areas immediately adjacent to but outside of their corporate limits.

Section 62.23(7a), Stats., as amended by ch. 205, sec. 13, Laws of 1977, provides in part as follows:

“(7a) **Extraterritorial zoning.** The governing body of any city which has created a city plan commission under sub. (1) and has adopted a zoning ordinance under sub. (7) may exercise extraterritorial zoning power as set forth in this subsection. Insofar as applicable sub. (7)(a), (b), (c), (ea), (h) and (i) shall apply to extraterritorial zoning ordinances enacted under this subsection. This subsection shall also apply to the governing body of any village.

“(a) ... The governing body of the city shall specify by resolution the description of the area to be zoned within its

extraterritorial zoning jurisdiction sufficiently accurate to determine its location and such area shall be contiguous to the city. The boundary line of such area shall follow government lot or survey section or fractional section lines or public roads, but need not extend to the limits of the extraterritorial zoning jurisdiction. ...

“(b) The governing body may enact, without referring the matter to the plan commission, an interim zoning ordinance to preserve existing zoning or uses in all or part of the extraterritorial zoning jurisdiction while the comprehensive zoning plan is being prepared. Such ordinance may be enacted as is an ordinary ordinance but shall be effective for no longer than 2 years after its enactment, unless extended as provided in this paragraph. ... While the interim zoning ordinance is in effect, the governing body of the city may amend the districts and regulations of the ordinance according to the procedure set forth in par. (f).

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“(f) The governing body of the city may amend the districts and regulations of the extraterritorial zoning ordinance after first submitting the proposed amendment to the joint committee for recommendation and report. The procedure set forth in pars. (c), (d) and (e) shall apply to amendments to the extraterritorial zoning ordinance. In the case of a protest against an amendment the applicable provisions under sub. (7)(d) shall be followed.

“(g) Insofar as applicable the provisions of subs. (7)(e), (f), (8) and (9) shall apply. The governing body of a city which adopts an extraterritorial zoning ordinance under this subsection may specifically provide in the ordinance for the enforcement and administration of this subsection. A town which has been issuing building permits may continue to do so, but the city building inspector shall approve such permits as to zoning prior to their issuance.”

Your questions and my responses follow.

“1. What fractional section lines may be used as boundary lines for extraterritorial zoning ordinances?”

Section 62.23(7a)(a), Stats., provides that the boundary line of the extraterritorial zoning area "shall follow government lot or survey section or fractional section lines or public roads." In my opinion, an extraterritorial zoning ordinance may utilize quarter section lines, quarter quarter lines, and other appropriate interior sectional descriptions. Although a strict interpretation of "fractional section lines" would limit that phrase to irregular sections, *see, e.g., State v. Aucoin*, 206 La. 787, 20 So. 2d 136, 142 (1944), and *South Florida Farms Co. v. Goodno*, 84 Fla. 532, 94 So. 672, 675 (1922), and a strict interpretation of "survey section" would preclude use of interior section lines, such strict interpretation would be inconsistent with the overall legislative purposes to enable cities and villages to exercise their extraterritorial powers fully or in part only.

"2.A. Is a land use survey necessary when developing an interim ordinance?

"2.B. Is an interim ordinance based on a land use survey?"

The legislative council, which introduced and sponsored the 1963 assembly bill creating sec. 62.23(7a), Stats., indicated in Vol. III, p. 134, of the 1963 general report which discussed its proposal that "It is generally agreed that such an inventory [an exhaustive inventory of land uses] is a prerequisite to drafting the provisions of a comprehensive zoning ordinance." Thus, sec. 62.23(7)(c), Stats., which provides that zoning "shall be made in accordance with a comprehensive plan," is expressly incorporated by reference, insofar as applicable, under the provisions of the preamble of sec. 62.23(7a).

But, as indicated in the first sentence of sec. 62.23(7a)(b), Stats., the purpose of an interim zoning ordinance is "to preserve existing zoning or uses" in the extraterritorial zoning jurisdiction pending development of a "comprehensive zoning plan" and adoption of the final extraterritorial zoning ordinance. Under this language, land uses previously established by county or town ordinance, or actual usage, can be temporarily "frozen" for as long as two or three years, pending the development of the final comprehensive zoning. *See Walworth County v. Elkhorn*, 27 Wis.2d 30, 133 N.W.2d 257 (1965). Such an interim ordinance would not require a "land use survey," though such a survey probably would be part of the comprehensive plan upon which the final extraterritorial zoning ordinance would be based.

If an interim zoning ordinance enacted under sec. 62.23(7a) is subject to any "development," it is only in a limited sense. The last sentence of paragraph (b) does authorize the governing body to "amend the districts and regulations" of the interim ordinance. But, such language must be considered in its context within the statute as a whole, *Falkner v. Northern States Power Co.*, 75 Wis.2d 116, 124, 248 N.W.2d 885 (1977), and construed to give effect to the evident purpose of the Legislature. There can be no doubt that the purpose of the interim ordinance under sec. 62.23(7a)(b) is to preserve the status quo while the proposed zoning ordinance is being developed or to prevent a course of development which could later frustrate and compromise the comprehensive plan. Amendments supportive of those goals can reasonably be inferred as being authorized under the provisions of paragraph (b), even though no land use survey exists.

"3.A. How does one handle amendments to the interim extraterritorial zoning ordinance?"

As provided in sec. 62.23(7a)(b), Stats., the procedure for amendment of the interim zoning ordinance is set forth in sec. 62.23(7a)(f), Stats. Paragraph (f), in turn, provides that amendments must be considered by the joint extraterritorial zoning committee established under paragraph (c), and the hearing, notice and voting requirements are the same as those relating to the preparation and adoption of the final extraterritorial zoning ordinance under paragraphs (c), (d) and (e).

"3.B. Who handles appeals during the time the interim zoning is in effect?"

It is my opinion that the city or village board of zoning appeals handles appeals while the interim ordinance is in effect as well as when the final comprehensive extraterritorial zoning ordinance is in effect. Paragraph (g) of sec. 62.23(7a) reads in part, "Insofar as applicable the provisions of subs. (7)(e), (f), (8) and (9) shall apply." Paragraphs (e) and (f) of subsection (7) deal with the city board of appeals and with enforcement procedures. Section 61.35, Stats., makes the provisions of sec. 62.23, Stats., applicable to villages. Although sec. 62.23(7a)(g), Stats., does not specifically refer to interim ordinances, I believe it may be fairly inferred that the Legislature intended the city or village to handle appeals in all extraterritorial zoning matters.

“4. Who administers the extraterritorial zoning?”

The procedure for administration and enforcement of extraterritorial zoning closely follows the general city zoning law on the subject, and under the terms of the introductory paragraph and paragraph (g) of sec. 62.23(7a) the city or village administers the extraterritorial zoning law.

“5. Does the joint extraterritorial zoning committee stay in existence after the comprehensive extraterritorial zoning ordinance has been adopted?”

“6. If no to Question 5, does the joint committee have to be called back into existence if zoning is to be amended?”

Section 62.23(7a)(f) specifically requires that the joint extraterritorial zoning committee participate in the development of all amendments to the extraterritorial zoning ordinance. Further, the three-year terms established for the town members on the committee bear no relation to the date the final extraterritorial zoning ordinance is adopted. Therefore, the joint extraterritorial zoning committee continues in existence after the comprehensive extraterritorial zoning ordinance has been adopted.

“7. If zoning has to be amended, who handles appeals?”

As previously indicated, the procedure for amendment of extraterritorial zoning ordinances is described in sec. 62.23(7a)(f). The city or village board of zoning appeals handles all administrative appeals stemming from interpretation or implementation of extraterritorial zoning by zoning officials. See the answer to Question 4. Protest against a proposed amendment may be made to the governing body of the city or village under the procedure set forth in sec. 62.23(7)(d), Stats.

BCL:JCM

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*Health And Social Services, Department Of; Prisons And Prisoners; Statistics; Department of Health and Social Services has power to compel cooperation of county and local officers in obtaining jail information. Sec. 46.16, Stats. OAG 66-78*

September 15, 1978.

DONALD E. PERCY, *Secretary*  
*Division of Corrections*  
*Department of Health and Social Services*

You inquire about the authority of the Wisconsin Department of Health and Social Services (hereafter Department) with respect to statistical data and information obtainable from county and municipal jails and other places of confinement. You state:

"I am advised that certain county sheriffs and other county and municipal jail administrators have refused to furnish the data and complete statistical data forms furnished them by the Department's Division of Corrections for the purpose of implementing Section 46.16, Statutes. These refusals appear to be based upon the opinion of the counties involved that the Department lacks the authority to require and compel their cooperation and reporting in the manner specified ...."

I have no difficulty concluding that sec. 46.16, Stats., expressly grants to the Department the authority to collect statistical and other information from county and municipal jails and other places of confinement.

Section 46.16, Stats., reads in material part:

"GENERAL SUPERVISION AND INSPECTION BY DEPARTMENT.  
(1) **Generally.** The department shall investigate and supervise all the charitable, curative, reformatory and penal institutions, including county infirmaries of every county and municipality (except tuberculosis sanatoriums); all detention homes and shelter care facilities for children and all industrial schools, hospitals, asylums and institutions, organized for the purpose set forth in s. 58.01, and familiarize itself with all the circumstances affecting their management and usefulness.

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"(4) **Prisons.** *It shall visit all places in which persons convicted or suspected of crime or mentally ill persons are confined, and ascertain their arrangement for the separation of the hardened criminals from juvenile offenders and persons suspected of crime or detained as witnesses; collect statistics*

*concerning the inmates, their treatment, employment and reformation; and collect information of other facts and considerations affecting the increase or decrease of crime and mental illness.*

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**“(8) Opportunity to inspect.** All trustees, managers, directors, superintendents and other officers or employes of such institutions shall at all times afford to every member of the department and its agents, unrestrained facility for inspection of and free access to all parts of the buildings and grounds and to all books and papers of such institutions; *and shall give, either verbally or in writing, such information as the department requires;* and if any person offends against this requirement he shall forfeit not less than \$10 nor more than \$100.

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**“(10) Statistics to be furnished.** Wherever the department is required to collect statistics, the person or agency shall furnish the required statistics on request.”

Implicit in this express grant of authority to collect statistics and other information is the authority to devise a form on which to record statistics and information sought. Devising the form is implied as incidental to carrying out the powers expressly granted in sec. 46.16, Stats.

Further, I find none of the information sought in the multipart State of Wisconsin Standard Adult Jail Register form objectionable as being outside the scope of the express statutory authority to collect statistical and other information. Not only does the Department have the authority to collect, but the municipal and county jail units have a duty to supply what the Department requires. As stated in sec. 46.16(8), Stats., “All trustees, managers, directors, superintendents and other officers or employes of such institutions shall ... give, either verbally or in writing, such information as the department requires.”

Therefore, I am of the opinion that the Department has the authority to compel the cooperation of county and municipal units and their officers in obtaining, furnishing and providing the statistics and other information sought by the Department in the exercise of its

statutory functions. In case any governmental unit should refuse to cooperate, the proper course of action for the Department would be to make an appropriate request to the district attorney of the proper county, or to this office, under the provisions of sec. 46.16(7), Stats.

BCL:JEA

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*Counties; Indigent; Legal Settlement; Medical Aid; Prisons And Prisoners; Public Assistance; Law relating to liability for cost of providing hospital and medical care to indigent person under arrest discussed. Secs. 53.38 and 49.02(5), Stats. OAG 68-78*

September 22, 1978.

WILLIS J. ZICK, *Corporation Counsel*  
*Waukesha County*

You have asked whether a county is liable under sec. 53.38, Stats., for the cost of hospital care given an indigent offender in the following situation:

The indigent offender is arrested by city police and taken directly to the hospital for treatment of serious injuries received during the commission of a crime. After his release from the hospital, the offender is removed to the county jail and charged with violation of a state criminal statute.

It is my opinion that sec. 53.38, Stats., is not applicable to the fact situation you have described. The county may be liable, however, under Wisconsin's public assistance law.

Section 53.38, Stats., provides as follows:

“If a prisoner needs medical or hospital care or is intoxicated or incapacitated by alcohol the sheriff or other keeper of the jail shall provide appropriate care or treatment and may transfer him to a hospital or to an approved treatment facility under s. 51.45 (2) (b) and (c), making provision for the security of the prisoner. The costs of medical and hospital care outside of the jail shall (if the prisoner is unable to pay for it) in the case of persons held under the state criminal laws or for contempt of

court, be borne by the county and in the case of persons held under municipal ordinance by the municipality. The governmental unit paying such costs of medical or hospital care may collect the value of the same from him or his estate as provided for in s. 49.08.”

The first sentence of the statute imposes a duty upon a jail superintendent, in the person of either the “sheriff or other keeper of the jail,” to provide for the medical care of prisoners. It also vests that individual with a discretionary power to transfer a prisoner to a hospital in order to meet this duty of care. The second sentence of sec. 53.38, Stats., provides for the apportionment of costs, between city and county, for medical and hospital care given “outside the jail.”

The word “prisoner” is defined in sec. 46.011(2), Stats., as “any person who is either arrested, incarcerated, imprisoned or otherwise detained in excess of 12 hours by any law enforcement agency of this state, except when detention is pursuant to s. 51.15, 51.20, 51.45(11)(b) or 55.06(11)(a).” The indigent offender described in your fact situation is plainly a “prisoner” under this definition.

Section 53.38, Stats., however, clearly refers to a prisoner who is “transfer [red] ... to a hospital or to an approved treatment facility.” Moreover, the statutory scheme for apportioning the cost of the prisoner’s hospital and medical care between city and county is applicable only to the cost of treatment given “outside the jail.” The word “prisoner,” therefore, has a more limited meaning when used in sec. 53.38, Stats., than when defined in sec. 46.011(2). As used in sec. 53.38, “prisoner” refers to a person who has been admitted to a jail and is then transferred from it, by “the sheriff or other keeper of the jail,” for medical treatment “outside the jail.” Thus, an arrestee of the city police who has not yet been admitted to a jail is not a “prisoner” within the meaning of sec. 53.38, Stats., and its medical cost apportionment scheme.

The Legislature simply has not addressed the specific situation you have presented. The fact that the indigent arrestee is later charged with a state criminal offense is irrelevant because at the time treatment was given, the arrestee was not a “prisoner” within the meaning of sec. 53.38, Stats.

In the absence of any specific statutory provision for payment of the costs of medical care provided to indigent arrestees who have not yet been admitted to a jail, coverage for medical services in such circumstances would appear to exist generally under sec. 49.02(5), Stats., of Wisconsin's public assistance law. That section provides, in pertinent part:

"The municipality or county shall be liable for the hospitalization of and care rendered by a physician and surgeon to a person entitled to relief under this chapter, without previously authorizing the same, when, in the reasonable opinion of a physician, immediate and indispensable care or hospitalization is required .... Any municipality giving care or hospitalization as provided in this section to a person who has settlement in some other municipality may recover from such other municipality as provided in s. 49.11."

The payment of the arrestee's expenses would be determined, at the time such care is provided, by the arrestee's legal settlement. Legal settlement is discussed in secs. 49.10, 49.105 and 49.11, Stats. The arrestee's status as a dependent person and his eligibility for relief would be governed by sec. 49.01(4) and (7), Stats. It should be noted that there is no indication from the statutes that the legal settlement of an arrestee is altered by the fact of arrest.

In answer to your question, liability for payment of costs for medical care under the circumstances you have described would depend upon the legal settlement of the arrestee. The cost of medical care, therefore, would fall upon the county if, at the time of the arrest and subsequent treatment, the individual had legal settlement within that county.

BCL:WLG

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*Counties; County Board; County Clerk; Section 59.72, Stats., as amended by ch. 265, Laws of 1977, does not authorize the county board to transfer powers to keep books and accounts from the county clerk to the county auditor where express statute provides that the clerk perform such duties or where they have been performed on an immemorial basis, but does provide that the power of supervision as to the manner in which books and accounts are kept by the county clerk or other officer shall lie with the county auditor. OAG 71-78*

October 3, 1978.

KEN BUKOWSKI, *Corporation Counsel*  
*Brown County*

You request my opinion concerning sec. 59.72, Stats., as amended by ch. 265, Laws of 1977, relating to county auditor positions. Your specific questions are:

- “1. Is new Sec. 59.72 a legislative authorization for a transfer of duties from the county clerk to the new position of county auditor?”
- “2. If new Sec. 59.72 does authorize a transfer of duties from the office of county clerk to the office of county auditor, what specific duties are transferred to the county auditor?”

The answer to your first question is yes.

Section 59.025(3), Stats., grants the county board broad powers to create offices and transfer duties. Nevertheless, county offices, such as that of county clerk, elected under the provisions of Wis. Const. art. VI, sec. 4, are expressly excepted from those powers. Legislative authorization for a transfer of duties therefore exists, provided the duties transferred are not those expressly given by statute to the county clerk. As stated in 24 Op. Att’y Gen. 787 (1935), the county board can appoint an auditor but cannot transfer to him or her any of the principal statutory duties of the county clerk. Both former sec. 59.72, Stats., and that section as amended by ch. 265, Laws of 1977, authorize the county board to transfer powers of the county clerk to act *as auditor* to a county auditor.

Before answering your second question, a distinction must be made between the duty to *keep books and accounts*, the duty to *prescribe or direct the manner* in which they are kept and the duty to *audit*. These functions as they relate to the county clerk and county auditor were discussed in 65 Op. Att'y Gen. 132 (1976), and 67 Op. Att'y Gen. 1 (1978). I have reviewed those opinions and affirm what was said there as to the transfer of duties from the county clerk to another officer. It can be said that the primary effect of the change in the law, insofar as the relationship between the county clerk and auditor is concerned, is that where a county auditor's office is created, "The auditor shall direct the keeping of all of the accounts of such county, in all of its offices, departments and institutions." Sec. 59.72(3), Stats. I construe this as power to direct *the manner* in which such books of account are kept, where the manner is not prescribed by statute, and that such power extends to accounts kept by the county clerk by reason of express statute or at the direction of the county board as authorized by sec. 59.17(8), Stats. A county auditor in counties over 300,000 population possessed such power under former sec. 59.72(3), Stats. It should be noted, moreover, that "directing the manner" of keeping the books implies or is the same thing as "supervising" the process.

Section 59.72, Stats., as amended by ch. 265, Laws of 1977, does not transfer power to *keep accounts* or to *keep books* from the county clerk to the county auditor. Moreover, the county clerk, not the finance director, should be *keeping* the books. Therefore, the part of the finance director's job that legally belongs to the county clerk cannot and should not be, or have been, transferred to the county auditor. The new office of county auditor can include the other duties performed by the finance director since 1971.

The county auditor does have authority to "keep such books of account as may be necessary to properly perform the duties of his or her office," sec. 59.72(3), Stats., and the county board could, pursuant to sec. 59.72(2), Stats., direct the auditor to "perform such additional duties and ... have such additional powers as are imposed and conferred upon him or her from time to time by resolution adopted by the board." As stated in 65 Op. Att'y Gen. 132, 136, 137 (1976), and OAG 1-78, a county board could transfer duties of keeping certain accounts and books of account from the county clerk to an auditor or finance officer where an express statute did not

require the county clerk to perform the duties and where such duties are not important duties which have been performed by the county clerk on an immemorial basis.

BCL:RJV

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*Anti-Secrecy; Coroner; Open Meeting; Tape Recordings; Television;* The open meeting law does not apply to a coroner's inquest. OAG 75-78

October 17, 1978.

ED HINSHAW, *Media Coordinator*  
*4th Judicial District*  
*WTMJ AM-TV, WKTI TELTRON*

You ask my opinion on two questions. First, does the open meeting law, subch. IV, ch. 19, Stats., apply to coroner's inquests? Second, if a coroner's inquest is an open meeting, may the broadcast media cover the inquest using camera and recording equipment?

The coroner is a county officer provided for in Wis. Const. art. VI, sec. 4. The office of coroner is not a "governmental body" as defined by sec. 19.82(1), Stats. Therefore, the open meeting law does not apply to the office of coroner or to inquests taken by the coroner.

Moreover, a coroner's inquest is not covered by the Wisconsin Supreme Court's recent authorization of television and radio coverage in judicial proceedings. Although an inquest is a quasi-judicial proceeding, *Mohrhusen v. McCann*, 62 Wis.2d 509, 512, 215 N.W.2d 560 (1974), the coroner is not a judicial officer, and the court's authorization is explicitly confined to proceedings in courtrooms. See *In re Code of Ethics*, 83 Wis.2d XIX.

It follows that a coroner's inquest is not required to be open under current law and that there is no duty on the part of a coroner to permit radio and television news coverage by electronic or other means. The decision whether to close an inquest rests in the sound discretion of the coroner.

BCL:CDH

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*Ordinances; State; Zoning:* Under sec. 13.48(13), Stats., the state is subject to local governmental zoning regulations when remodeling a newly acquired or leased facility. OAG 76-78

October 19, 1978.

DONALD PERCY, *Secretary*

*Department of Health and Social Services*

Your predecessor requested my opinion on two questions, the first of which is:

“Does sec. 13.48 (13), Wis. Stats., which makes ‘any building, structure or facility ... constructed for the benefit or use of the state of any state agency, board, commission, or department’ subject to local zoning ordinances, apply to the acquisition and use of existing facilities which will be remodeled for state use? Does sec. 13.48 (13), Wis. Stats., include within the term ‘constructed’ reconstruction, remodeling, or additions to buildings or do those terms have separate meanings as in sec. 13.48 (10), Wis. Stats.?”

Your question is somewhat hypothetical. The only specific facts given are that “the Department is considering the purchase or lease and remodeling of certain facilities in the City of Milwaukee.” Accordingly, my opinion will be restricted to circumstances where your Department remodels a newly acquired or leased facility for the purpose of converting it into a state facility.

For the reasons hereinafter discussed, it is my opinion the state is subject to local zoning regulations in the specific situation of remodeling a newly acquired or leased facility.

My opinion is based on the provisions of sec. 13.48(13), Stats., which read:

**“Exemption from local ordinances and regulations. *Where any building, structure or facility is constructed for the benefit of or use of the state or any state agency, board, commission or department, such construction shall be in compliance with all applicable state laws, codes and regulations but such***

*construction shall not be subject to the ordinances or regulations of the municipality in which the construction takes place except zoning, including without limitation because of enumeration, ordinances or regulations relating to materials used, permits, supervision of construction or installation, payment of permit fees, or other restrictions of any nature whatsoever. This subsection applies to any construction hereafter commenced."*

Under the common law the state was not subject to local zoning requirements. *City of Milwaukee v. McGregor*, 140 Wis. 35, 121 N.W. 642 (1909); *Green County v. Monroe*, 3 Wis.2d 196, 87 N.W.2d 827 (1958). In my opinion, the subsection is in derogation of this common law principle. It has been held that statutes are not to be construed as changing the common law unless that purpose is clearly expressed in the statute. *Wisconsin Bridge & Iron Co., v. Industrial Comm.*, 233 Wis. 467, 290 N.W. 199 (1940). I believe such intent is clearly expressed in the underlined language in sec. 13.48(13), Stats., above.

At least two arguments could be advanced to support the conclusion that local zoning regulations do not apply to your proposed project. The first argument is that the statute is not in derogation of the common law since its language does not refer to construction by the state, but only refers to construction "for the benefit or use of the state." The second argument is that the term "construction" does not include reconstruction, remodeling or additions to buildings. In order to address each of these arguments it is necessary to examine the legislative history and purpose of the statute.

First, sec. 13.48(13), prior to its amendment in 1973, provided private nonprofit building corporations engaged in constructing facilities for the benefit or use of the state with the same immunity from local regulations which the state enjoyed under the common law. These corporations had been widely utilized by the state in the construction of state facilities prior to the amendment of Wis. Const. art. VIII, sec. 7, in April of 1969, which allowed direct state debt and, therefore, construction, and eliminated the use of these private entities. When the Legislature amended sec. 13.48(13), Stats., in 1973, the use of the nonprofit building corporations had been phased out and the Legislature dropped the unnecessary reference in the

statute to such entities since the state itself was directly involved in the construction of state facilities. The removal of any reference to the building corporations in sec. 13.48(13) leads only to the conclusion that the Legislature intended the state, the entity engaged in construction, to be covered by the provisions of the statute, as amended. So construed, the statute abrogates the state's common law immunity to local zoning regulations.

Second, even though statutes in derogation of the common law are to be strictly construed, *State ex rel. Chain O'Lakes Protective Ass'n v. Moses*, 53 Wis.2d 579, 193 N.W.2d 708 (1972), an examination of legislative history evinces the Legislature's intent to interpret the term "construction" broadly to include reconstruction, remodeling and additions to buildings. The purpose of the original statute was to grant to private building corporations the same immunity from local regulations which the state enjoyed. A narrow interpretation of "construction" would have produced the irrational result of extending common law immunity to private building corporations only when they were engaged in original fabrication for the benefit or use of the state, leaving them unprotected when remodeling or expanding state facilities. Such a construction would in large measure thwart the Legislature's purpose in enacting the statute in the first place. Statutes are to be construed so as to avoid such absurd results. *State ex rel. Reynolds v. Nusbaum*, 17 Wis.2d 148, 115 N.W.2d 761 (1962).

Nothing in the history or purpose of the 1973 amendment of sec. 13.48(13), Stats., suggests that the Legislature intended to put a new, restrictive gloss on the term "construction." Furthermore, to conclude that under the present statute the state is subject to local zoning only in the situation of new construction would violate the principle that statutes are to be interpreted with reference to their purposes and to advance and promote such ends. *Fort Howard Paper Co. v. Town of Ashwaubenon*, 9 Wis.2d 329, 100 N.W.2d 915 (1960).

The purpose of zoning is to establish limitations upon the use of property. *State ex rel. Schleck v. Zoning Board of Appeals, City of Madison*, 254 Wis. 42, 35 N.W.2d 312 (1948). With this basic purpose of zoning in mind the intent of the amendment to protect the neighborhoods from state uses which would be offensive to local land use patterns is evident. To conclude that the state is only subject to

local zoning for new construction would clearly frustrate the fundamental principle of land use regulation embodied in zoning.

In my opinion, the word "construction," employed in sec. 13.48(13), is generic and applies equally to new construction, remodeling, reconstruction, or the construction of an addition.

I am aware that the terms "reconstruction," "remodeling" and "addition" are arguably differentiated from "construction" in subsec. 10 of sec. 13.48, Stats. In *State ex rel. City C. Co. v. Kotecki*, 156 Wis.278, 146 N.W. 528 (1914), the court defined the same words differently in different sections of a statute. "The meaning of the words of an act ... is to be ascertained from the subject to which it refers, so that the same words receive a very different construction in different statutes." *Id.* at 282, quoting *McCaul v. Thayer*, 70 Wis. 138, 149, 35 N.W. 353 (1887). Thus, my opinion is unaffected by sec. 13.48(10).

In conclusion, it is my opinion that your proposal, to acquire or lease an existing building or facility and to convert such facility into a state facility for the housing of inmates by the remodeling of the same, will be subject to local zoning regulations.

Your predecessor also asked:

"If sec. 13.48 (13), Wis. Stats., does not act to subject to local zoning ordinances the use of existing facilities by the Department for housing inmates of the Correctional Camp System, is there any other law or statutes which would subject such use to zoning ordinances?"

In view of my answer to your first question, it is not necessary to answer this question.

BCL:DJH:CAB

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*Schools And School Districts; Vocational And Adult Education;* Secondary schools may not legally provide a vocational, technical and adult education district with the names of high school dropout students. OAG 77-78

October 24, 1978.

EUGENE LEHRMANN, *State Director*

*Board of Vocational, Technical and Adult Education*

You ask whether secondary schools may legally furnish a vocational, technical and adult education district with the names of high school dropouts.

In my opinion the answer is no.

Section 118.125(2), Stats., provides that:

“**Confidentiality.** All pupil records maintained by a public school shall be confidential, except as provided in pars. (a) to (g). The school board shall adopt regulations to maintain the confidentiality of such records.”

With exception not material to this analysis, pupil records are defined in sec. 118.125(1)(a) as “all records relating to individual pupils maintained by an elementary or high school.”

Thus, assuming that the school board has adopted the required regulations to maintain the confidentiality of these records, the all-encompassing definition of pupil records would prevent a secondary school from releasing any information pertaining to any student or former student without the consent of the student, or if the student is under 18, his or her parents.

BCL:WHW

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*Charitable Organizations; Corporations; Licenses And Permits; Taxation;* The loss of tax exempt status for income tax purposes does not necessarily imply that an organization is no longer nonprofit. The Bingo Control Board does not have statutory authority to revoke the bingo license of an otherwise eligible organization because of its membership policies regarding race. OAG 78-78

October 25, 1978.

ROBERT HOSKINS, *Executive Secretary*  
*Bingo Control Board*

You ask whether the loss of tax exempt status for income tax purposes affects the nonprofit status of a fraternal organization, the Fraternal Order of Eagles Aerie 137, and whether the loss of tax exempt status affects its eligibility for a bingo license.

Section 163.11, Stats., provides:

“(1) Any bona fide religious, charitable, service, fraternal or veterans’ organization or any organization, other than the state or any political subdivision thereof, to which contributions are deductible for federal or state income tax purposes, may apply to the board for a license to conduct bingo.

“(2) Prior to applying for a license, an organization listed under sub. (1) shall:

“(a) Be incorporated in this state as a nonprofit corporation or organized in this state as a religious or nonprofit organization.

“\*\*\*\*”

Under these subsections, the Eagles qualifies for a bingo license if: 1) contributions to it are deductible for federal or state income tax purposes; and 2) it is incorporated in this state as a nonprofit corporation or otherwise is a nonprofit organization.

The Eagles meets the first test. Contributions to fraternal societies are deductible for federal and state income tax purposes. *See* 26 U.S.C. sec. 170(c)(4) and sec. 71.02(2)(f), Stats. The loss of tax exempt status would not itself prevent contributions from being deductible. For example, were the Legislature to remove the tax exempt status of churches, contributions to them still would remain deductible as having been given to a charitable organization.

The Eagles also meets the second test. It qualifies as a corporation by force of sec. 188.02, Stats., which provides that such organizations “for all purposes for which they are authorized to act shall be deemed a corporation.” Even if it were not a corporation, the information you

have given me does not indicate that it no longer is a nonprofit organization.

The loss of tax exempt status does not necessarily imply that an organization no longer is nonprofit. Tax exempt status can be lost on grounds unrelated to nonprofit status. If the Eagles' loss of tax exempt status is due to a finding by the Department of Revenue or other agency that it is not a nonprofit organization, then the Bingo Control Board would be justified in investigating into the matter to make its own determination as to whether it continues as a nonprofit organization.

It would appear, however, that you have no information suggesting that the Eagles no longer is a nonprofit organization and that its loss of tax exempt status is due to other considerations, namely, its membership policies in respect to race. The question becomes whether it is within the Board's authority to revoke a bingo license on the basis of such membership policies. The Board's authority must be found expressly stated in the statutes or contained therein by necessary implication. *See Racine Fire and Police Comm. v. Stanfield*, 70 Wis.2d 395, 399, 234 N.W.2d 307 (1975). Nothing in the applicable statutes authorizes the Board to revoke a bingo license of an otherwise eligible organization because of its racial policies in respect to membership.

Accordingly, it is my opinion, on the facts you have given me, that the Board may not revoke the bingo license of the Fraternal Order of Eagles Aerie 137.

BCL:CDH

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*Authority; Civil Service; Compensation; Governor; Public Officials; Salaries And Wages; Veterans Affairs, Department Of; The Governor as the appointing authority for the incumbent Secretary of Veterans Affairs has power to set his salary subject to statutory restraints. OAG 79-78*

November 3, 1978.

ITALO BENSONI, *Chairman*  
*Board of Veterans Affairs*

You request my opinion on three questions relating to the proper authority to establish the salary level of the Secretary of Veterans Affairs. Your specific questions are:

- “1. Who has the authority to set the salary level of the Secretary, The Board of Veterans Affairs or the Governor?
- “2. Can the salary raise of the Secretary exceed the 5% salary supplement of the 1977-78 Executive Pay Plan?
- “3. Can a salary increase be retroactive to the date of the illegal firing of the incumbent secretary, the date that the interim secretary was hired or the date of the Supreme Court Opinion reinstating the incumbent secretary or can it be prospective only?”

In answer to your first question, the Governor has the authority to set the salary level of the incumbent Secretary of Veterans Affairs. The Legislature has provided in sec. 20.923(1)(a), Stats., that:

“... The salary-setting authority of individual boards, commissions, elective and appointive officials elsewhere provided by law is subject to and limited by this section, 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.”

The Governor is the appointing authority for the incumbent Secretary Moses. *Moses v. Board of Veterans Affairs*, 80 Wis.2d 411, 415-416, 259 N.W.2d 102 (1977). The Governor and not the Board of Veterans Affairs has the authority to set the salary level of the incumbent subject to statutory restraints.

In my opinion the incumbent Secretary is not subject to Wis. Const. art. IV, sec. 26. That section, as material here, provides that the compensation of a public officer shall not be “increased or diminished during his term of office.”

The Secretary serves for an "indefinite term." Section 15.05(1)(b), Stats. (1975). In my opinion the constitutional prohibition on changes in compensation apply only to officers serving fixed terms. This conclusion warrants an extended discussion since one of my predecessors stated that "a serious question might be presented" whether the Legislature could alter the compensation of an officer serving a lifetime tenure, 6 Op. Att'y Gen. 143, 144 (1917).

It is beyond cavil that the framers of the constitution were addressing themselves to elective officers who serve fixed terms. The constitution of 1846 set two-year terms for governor, lieutenant governor, secretary of state, treasurer and attorney general. Brown, *The Making of the Constitution, Part I*, 1949 Wis. L. Rev. 648, 665 (1949). In fact, it was said the officers would "come in and go out of office at the same time." Quaife, *The Attainment of Statehood*, Wisconsin Historical Society Collection, vol. XXIX, p. 28. The officers would have "short terms of office." *Id.* at 76. Although the salaries of certain officers were set by the constitution itself, other officers could receive no "extra compensation under any pretense, or in any form whatever." Brown, *supra*, p. 665. Quaife, *The Convention of 1846*, Wisconsin Historical Society Collection, vol. XXVII, p. 327.

The voters rejected the constitution of 1846. But at the subsequent convention the provision against extra compensation was retained. In addition, that convention added the provision against salary changes "during his term of office." There was no debate. Brown, *The Making of the Wisconsin Constitution, Part II*, 1952 Wis. L. Rev. 23, 32 (1952).

Thus, the framers of the constitution conceived as officers those who serve limited and fixed terms. They did not conceive of the instant situation of an officer serving an indefinite term.

Subsequently, the opinions of the court and of this office consistently have construed this constitutional provision as applying only to officers serving fixed terms. In *State ex rel. Bashford v. Frear*, 138 Wis. 536, 539, 120 N.W. 216 (1909), the court said:

"The general trend of authority is this way. The constitution or other written law creates the office and fixes the term thereof and gives thereto the incident of a specific salary. The office, the term, and the incident may exist for any period of time without

the office being filled or without there being any method provided for filling it. Upon such method being provided and the office being filled the incumbent takes it with its fixed term and incident. If he goes out during such term and another steps in the latter does not take a new term but takes a part of the same term prior thereto enjoyed by his predecessor. The term continues during its fixed period with its incident for such period regardless of how many incumbents there may be, each succeeding the other. Where another incumbent goes in at the commencement of the full term prescribed by law, such full term becomes his term, within the meaning of language in the fundamental law prohibiting any change in an officer's salary during his term of office, and in case of his going out during such term and being succeeded by another such other succeeds to the same term as that held by his predecessor, so that, during his incumbency, the full term, so far as not yet run, becomes his term in the constitutional sense."

Thus, the "term" an officer has is one to which another might succeed. This, of course, would be impossible in the case of an indefinite term where the term lasts only so long as the office is held by a particular office holder.

The court explicitly has stated that the officer covered by Wis. Const. art. IV, sec. 26, ordinarily is one who holds a definite as opposed to an indefinite term. In *Sieb v. Racine*, 176 Wis. 617, 624, 187 N.W. 989 (1922), the court held that a superintendent of schools, who had a fixed term contract under a statute calling for his election for a "term not to exceed three years," was not a public officer in part because he did not have a "definite term." Relying on this holding, in *State ex rel. Zimmerman v. Dammann*, 201 Wis. 84, 99, 228 N.W. 593 (1930), the court held that legislators are covered by Wis. Const. art. IV, sec. 26, saying:

*"Members of the legislature are chosen for a definite term; they exercise a part of the sovereign power of the state; their duties are definite and specific; they are paid from the public treasury and answer every call of any recognized definition of a public officer. ..."*

At 8 Op. Att'y Gen. 186 (1919), one of my predecessors said legislative employes are not within the provision, notwithstanding

they were subject to hire and dismissal by legislative officers with two-year terms, because the employes themselves did not serve fixed terms. Instead, those employes were "subject to the same rules as other state employes under the civil service act." *Id.*, at 188. At 1912 Op. Att'y Gen. 117, 118-119 (1911), the Attorney General said a public official could not receive a salary increase because he received a salary from the state treasury "and held a definite term of office fixed by law." Accordingly, at 8 Op. Att'y Gen. 138, 140 (1919), the Attorney General said officers serving at the pleasure of another were not within Wis. Const. art. IV, sec. 26, because they had no "fixed term."

Thus, the framers of the constitution and the authoritative constructions of Wis. Const. art. IV, sec. 26, have limited its reach to those serving fixed or definite terms.

Unquestionably, the Secretary does not serve a fixed or definite term. His term is "indefinite." Sec. 15.05(1)(b), Stats. (1975). "[A] term of office, as well as any term, implies the existence of a definite boundary." 6 Op. Att'y Gen. 143, 145 (1917). *See also* 41 Words & Phrases, *Term of Office*, pp. 621, 624-626. *Accord: Haack v. Banish*, 287 Mich. 592, 283 N.W. 700, 702 (1939). (A person holding office "during good behavior" has an indefinite term and is not within the prohibition against salary changes "during his term of office.")

Accordingly, I conclude that the incumbent Secretary is not covered by the prohibition in Wis. Const. art. IV, sec. 26, against salary changes during a term of office and that the Governor is the appointing authority with power to make such changes subject to statutory restraints.

As to your second and third questions, I have this day issued an opinion to the Governor as the appointing authority dealing with these issues. I enclose a copy of that opinion.

BCL:CDH

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*Authority; Civil Service; Governor; Public Officials; Salaries And Wages; Veterans Affairs, Department Of; Salary adjustments for the incumbent Secretary of Veterans Affairs discussed. OAG 80-78*

November 3, 1978.

MARTIN J. SCHREIBER

*Governor*

You have asked for my opinion on two questions. First, who has the authority to determine the salary increase of the incumbent Secretary of the Department of Veterans Affairs? Second, what legal restraints limit the amount of a salary increase which may be awarded to the incumbent?

In my opinion, you as the appointing authority have the authority to determine the salary of the incumbent, subject to statutory restrictions. I have this day issued an opinion to the Chairman of the Board of Veterans Affairs in which I give my reasons for arriving at this conclusion. A copy of that opinion is enclosed.

Despite the fact that the appointing authority ordinarily determines the pay increase for his subordinates, it also is my opinion that, by virtue of the action of the Joint Committee On Employment Relations, the incumbent is entitled to an across-the-board salary increase of 5% for the year 1977-1978 and an increase of 5.5% for the year 1978-1979.

The background facts are that on September 28, 1977, the Joint Committee modified the proposed salary adjustments of the Director of the Bureau of Personnel as it related to officials in the executive group covered by sec. 20.923(4)(d), Stats., which includes the incumbent Secretary. As proposed by the Director, the incumbent automatically would receive a 3.5% across-the-board increase the first year and a 3.75% across-the-board increase the second year. In addition, the incumbent would have been eligible for discretionary merit of 3.5% and 3.75% in each of the two years, respectively. As modified by the Joint Committee, however, the incumbent receives only across-the-board increases of 5% and 5.5% for the years 1977-

1978 and 1978-1979, respectively, but may receive no discretionary merit.

It is my opinion that the Joint Committee had power to modify the Director's plan so as to limit the incumbent Secretary's increase to the across-the-board amounts of 5% and 5.5%.

Section 16.086(3)(a), Stats. (1975), required the Director to submit proposed changes in the compensation plan to the Personnel Board. Those proposals could "include across the board pay adjustments for positions in the classified service." *Id.* After receiving the advice and counsel of the Board, the Director had to submit the proposed changes to the Joint Committee, and the Committee's action determined the compensation plan "for positions in the classified service" except as disapproved by the Governor within ten days. Sec. 16.086(3)(b), Stats. (1975). I am advised that you did not disapprove of the Joint Committee's action within the ten-day period.

Both paragraphs (a) and (b) of subsec. 16.086(3), Stats., define the Director's and the Joint Committee's powers in terms of the classified service. The incumbent Secretary is not within the classified service. Standing alone, therefore, these paragraphs would not authorize the Joint Committee's action in respect to the incumbent's salary. Nevertheless, on consideration of other statutes discussed below, it is my opinion that the Legislature has authorized the Joint Committee's action in respect to the Secretary.

Prior to the 1973 legislative session, the appointing authority had discretion in setting the salary rate. Sec. 20.923(2), Stats. (1971). Chapter 90, sec. 152, Laws of 1973, removed the discretion by repealing and recreating sec. 20.923(intro.) of the statutes to provide that:

"... all such included positions shall be subject to the same basic salary establishment, implementation, modification, administrative control and application procedures. ..."

The declared purpose of this legislative change was to establish a salary adjustment mechanism which produced an equitable and comprehensive whole between the executives and administrators themselves and between them as a group and the classified service as well. *Id. See also* sec. 20.923(15), Stats. (1977), sec. 76m., ch. 196,

Laws of 1977. Moreover, the Legislature specifically subordinated the salary-setting authority of all appointing authorities to these procedures.

“... The salary-setting authority of individual boards, commissions, elective and appointive officials elsewhere provided by law is subject to and limited by this section, and the salary rate for these positions upon appointment and subsequent thereto shall be set by the appointing authority pursuant to this section ....” Sec. 20.923(1)(a), Stats., as repealed and recreated by ch. 90, sec. 152, Laws of 1973, now sec. 20.923(1), Stats. (1977).

Finally, the 1973 amendments extended the classified compensation plan to include unclassified personnel. *Id.*

Consequently, by removing the discretionary salary-setting powers of elective appointing authorities with a purpose to place the executive compensation plan within the same comprehensive framework as the plan for classified employees, and by including the plan for unclassified personnel within the plan for classified personnel, the Legislature empowered the Joint Committee to modify the Director’s plan in respect to the incumbent Secretary. It follows that the incumbent’s increases for the years 1977-1978 and 1978-1979 are limited to 5% and 5.5%, respectively, and that he is eligible for no discretionary merit during the current biennium.

As to the effective dates of the salary increase, the across-the-board increases, by force of the Joint Committee’s action (*see sec. 16.086(8), Stats. (1975)*), became effective as to the Secretary on October 23, 1977, and July 2, 1978, in the amounts of 5% and 5.5%, respectively.

BCL:CDH

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*Criminal Law; Licenses And Permits; Natural Resources, Department Of; Navigable Waters; State; Streams;* In order to obtain a conviction for violating sec. 30.195, Stats., the state must show that the defendant changed the course of a navigable stream and that no permit to change the stream's course had been granted to the defendant. The state need not show that the changed portion of the stream was navigable, nor a specific intent to change the stream's course. OAG 81-78

November 9, 1978.

JAMES A. WENDLAND, *District Attorney*  
*Dunn County*

You have requested my opinion on several questions "related to the elements of proof required to obtain a criminal conviction under" sec. 30.195, Stats., particularly sub. (1) of the statute, which provides:

**"Permit required.** No person shall change the course of or straighten a navigable stream without a permit therefor having been granted pursuant to this section or without otherwise being expressly authorized by statute to do so. Any person violating this section shall be fined not more than \$1,000 or imprisoned not more than 6 months, or both."

First, you ask:

"Does the state have the burden of coming forward and affirmatively showing that there was not a permit granted for the changing of the course of the stream in question or does the defendant have the duty to show by an affirmative defense that he had a permit?"

It is my opinion the state has the burden of proving no permit was granted.

Traditionally, "the state always bears the burden of proof in a criminal trial, and any such shift renders the trial fundamentally unfair." *Johnson v. Wright*, 509 F.2d 828, 831 (5th Cir. 1975). In state criminal prosecutions, "the Due Process Clause [U.S. Const.

amend. XIV, sec. 1] protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068 (1970). *See also*, 22A C.J.S. *Criminal Law*, sec. 566, p. 308 (1961). Even where "an offense is grounded on a negative, or when the negative is an essential element of the crime, the burden is on the state to prove it, at least by a prima facie showing." 22A C.J.S. *Criminal Law*, *supra*, at 311.

The United States Supreme Court recognized the burden of proving negatives "is often a heavy burden for the prosecution to satisfy. ... But this is the traditional burden which our system of criminal justice deems essential .... Nor is the requirement of proving a negative unique in our system of criminal jurisprudence." *Mullaney v. Wilbur*, 421 U.S. 684, 701-702, 95 S. Ct. 1881 (1975) [footnote omitted]. Thus, under the traditional rule, the state would have to prove the accused acted "without a permit having been granted" in order to obtain a conviction under sec. 30.195(1), Stats.

To the traditional rule the Wisconsin Supreme Court recognizes one well established exception. Citing *Kreutzer v. Westfahl*, 187 Wis. 463, 478, 204 N.W.2d 595 (1925), the court said:

"It is undoubtedly the general rule that the state must prove all the essential facts entering into the description of the offense. But it has been held in many cases that when a negation of a fact lies peculiarly within the knowledge of the defendant it is incumbent on him to establish that fact ...." *State v. Williamson*, 58 Wis.2d 514, 524, 206 N.W.2d 613 (1973).

In *Williamson* the defendant was convicted under sec. 941.23(1), Stats., which provides:

"Any person except a peace officer who goes armed with a concealed and dangerous weapon shall be imprisoned not more than one year in the county jail."

The defendant argued it was incumbent upon the state to establish that the defendant was not a "peace officer." Recognizing the difficult burden on the state to prove defendant was not one of thousands of "peace officers" throughout the state the court held the burden of proving whether defendant was a peace officer under the criminal

statute fell on the defendant as being peculiarly within his knowledge. 58 Wis.2d at 524.

In *State v. Mc Farren*, 62 Wis.2d 492, 215 N.W.2d 459 (1974), the Wisconsin Supreme Court faced a similar issue to the one we now face. In *Mc Farren* the state sought to enforce an order of the Department of Natural Resources pursuant to sec. 30.03(4), Stats., requiring respondent to remove a fill he allegedly deposited on the bed of a lake. Respondent was alleged to have violated sec. 30.12(1), Stats., which provides:

**“General prohibition.** Unless a permit has been granted by the department pursuant to statute or the legislature has otherwise authorized structures or deposits in navigable waters, it is unlawful:

“(a) To deposit any material or to place any structure upon the bed of any navigable water where no bulkhead line has been established; or

“(b) To deposit any material or to place any structure upon the bed of any navigable water beyond a lawfully established bulkhead line.”

The controlling issue before the court was “on whom does the burden of proof lie in establishing whether or not a bulkhead line exists.” 62 Wis.2d at 499.

In addressing the issue, the court looked to five factors in *McFarren* as determinative of the burden. The first factor is the natural tendency to place the burdens on the party desiring change and who should be expected to bear the risk of failure of proof or persuasion. Second, are “special policy considerations,” such as those disfavoring certain defenses. Third, is “convenience,” where the facts with regard to an issue lie peculiarly within the knowledge of a party, such as in criminal cases where the accused has the burden of proving that he possesses a license. Fourth, is “fairness.” *McFarren* includes within this area proof of exceptions and proof of negatives. Generally, an accused has the burden of proving, as a matter of defense, that he is within an exception in a statute preventing an act otherwise included in the statute from being a crime. The prosecution would owe no duty to prove an accused is not within the exception. The same rule applies to proof of negatives. The party

asserting the negative has the burden to prove it unless the facts are peculiarly within the other party's knowledge. Fifth, is the matter of "judicial estimate of probabilities." The risk of failure of proof may be placed on the party who contends that the more unusual event has occurred. *State v. McFarren, supra*, 62 Wis.2d at 499-503.

Application of the first, third and fourth factors in *McFarren* tended to place the burden of proving nonexistence of the bulkhead line on the state. The second did not apply and the fifth tended toward placing the burden on respondent. *Id.* The court concluded:

"... as the burden of proof should be on the party desiring the change except where it may be much easier for the other party to prove the fact in question, the burden of proving the nonexistence of a bulkhead line ... should be left on the state." *Id.*, 62 Wis.2d at 503.

Applying the *McFarren* factors to our own case in point: first, the "natural tendency" of placing the burden lies with the state.

Second, I see no special policy considerations for placing the burden on the accused.

Third, although it would appear more "fair" as between the parties to place the burden on the accused to prove he holds a sec. 30.195 permit or "license," in my opinion this factor does not work to put the burden on the defendant in light of the relative ease by which the state may meet its prima facie burden of proving the non-issuance of a permit to the accused. Section 889.09(2), Stats., provides:

"The certificate of the legal custodian of the records of any public licensing officer, board or body that he has made diligent examination of the files and records of his office and that he can find no record of a license issued to a named person or that none has been issued to such person, specifying the kind of license in question, shall be evidence that none has been issued."

Because in a criminal case, the state may rest its case upon evidence sufficient to make out a prima facie case, 22A C.J.S. *Criminal Law*, sec. 571, fn. 18.6 (1977 Pocket Part), proof that no permit was issued to the accused pursuant to sec. 30.195, Stats., is a matter of merely evidencing a certificate from the Department of Natural Resources custodian of records pursuant to sec. 889.09(2), Stats. See *McFarren, supra*, 62 Wis.2d at 501.

The fourth consideration includes the factors of “proof of exceptions” and “proof of negatives.” As the supreme court concluded that part of sec. 30.12, Stats., dealing with bulkhead lines is not phrased as an exception but rather as part of the description of the violation, *McFarren, supra*, 62 Wis.2d at 502, I too must conclude that part of sec. 30.195(1), Stats., dealing with permits is not an exception, but an element of the violation. Even if the language was an exception, I conclude the burden of proving that no permit was granted to an accused violator of sec. 30.195(1) is not so “difficult to meet” by the state, under *Williamson, supra*, 58 Wis.2d at 524, to warrant placing the burden on defendant. *See* sec. 889.09(2), Stats.

With respect to the fifth “judicial estimate of probabilities” factor, I do not know how frequently the Department of Natural Resources grants permits under sec. 30.195, Stats., and like the court in *McFarren, supra*, 62 Wis.2d at 503, agree that this factor, if it is to be considered at all, might tend to favor placing the burden on the defendant.

I conclude the burden of proof lies on the state to show no permit was issued to an alleged violator of sec. 30.195(1), Stats. Especially in light of the provisions of sec. 889.09(2), Stats., it is not so much easier for the defendant to prove he has a permit than for the state to prove he has none to justify placing the burden on the defendant. *State v. McFarren, supra; State v. Williamson, supra*. I “discern no unique hardship on the prosecution that would justify requiring the defendant to carry the burden of proving a fact so critical to criminal culpability.” *Mullaney v. Wilbur, supra*, 421 U.S. at 702.

Your second question is:

“Does the state have to prove that the changed or new course of the stream is also navigable in addition to proving that the original course of the stream was navigable?”

It is my opinion the state need not prove navigability of the changed portion of a stream. The pertinent part of sec. 30.195(1), Stats., provides:

“**Permit required.** No person shall change the course of or straighten a navigable stream without a permit therefor having

been granted pursuant to this section or without otherwise being expressly authorized by statute to do so. ...”

I am of the opinion the statutory language in sec. 30.195(1), Stats., is plainly clear and unambiguous on its face as to what part of the stream in question must be shown to be navigable. It is not an element of the crime of illegally changing the course of a stream that the changed portion of the stream be navigable. It is an element for the state to prove that the stream that was changed was a navigable stream at the time of the change under the guidelines in *De Gaynor & Co. v. DNR*, 70 Wis.2d 936, 236 N.W.2d 217 (1975).

If the statute “standing by itself, without resort to rules of interpretation, conveys a definite and clear impression when applied to the subject matter regulated thereby, this is the best evidence of the meaning of the statute.” *Nordean v. Minneapolis St. P. & S.S.M.R. Co.*, 148 Wis. 627, 634, 135 N.W. 150 (1912). As in *State ex rel. Milwaukee County v. WCCJ*, 73 Wis.2d 237, 241, 243 N.W.2d 485 (1976), “[t]he language of this statute is clear and unambiguous. When the statutory language is clear and unambiguous no judicial rules of construction are permitted, and [we] must arrive at the intention of the legislature by giving the language its ordinary and accepted meaning.” *See also Vigil v. State*, 76 Wis.2d 133, 142, 250 N.W.2d 378 (1977).

I am convinced the language of sec. 30.195(1), Stats., is clear and that the ordinary and accepted meaning of the statute does not require a showing that the changed portion of an altered stream is navigable.

Your third question is:

“If it is required that the new or changed course of the stream be proven to be navigable, at what point in time does the statute of limitations on this misdemeanor, which is three years, begin to run? Does the act that eventually causes the new or changed course to become navigable have to occur within the three years proceeding the date the new or changed course becomes navigable?”

Because the state need not prove navigability of the new or changed courses of the stream, your third question is irrelevant.

Your last question is:

“[W]hether or not the state is required to prove specific intent, that is, must the state prove that the person who acted such as to change the course of the navigable stream intend at the time he acted that the result would be to change the course of a navigable stream?”

My opinion is the state need not prove that the person who changed the course of a stream specifically intended to change the stream course or had reason to believe he was violating sec. 30.195, Stats.

Although “the element of scienter is the rule rather than the exception in our criminal jurisprudence,” *State v. Alfonsi*, 33 Wis.2d 469, 476, 147 N.W.2d 550 (1967), “[a] legislature may create a crime which requires no specific intent,” *State v. Gould*, 56 Wis.2d 808, 810, 202 N.W.2d 903 (1973). In fact, the Wisconsin Supreme Court “has long recognized the existence of and, as a general matter, the propriety of legislative definitions of crime that omit any element respecting mental state beyond the requirement that the accused intended to do the act which is made a crime.” *State v. Collova*, 79 Wis.2d 473, 480, 255 N.W.2d 581 (1977). “Wisconsin has abolished all common-law crimes, and the element of intent of the statutory crimes is only necessary when specified by statute.” *Flowers v. State*, 43 Wis.2d 352, 360, 168 N.W.2d 843 (1969).

In *State v. Dried Milk Products Co-op.*, 16 Wis.2d 357, 114 N.W.2d 413 (1962), the supreme court upheld the constitutionality of sec. 348.15(2)(c), Stats., which imposed a \$400 fine on the corporate owner of a truck which had been loaded in excess of axle weight limitations, in spite of the absence of any actual knowledge of the violation on the owner’s part. The court described the purpose of such enactments as being the enforcement of a high standard of care:

“This section is part of a welfare statute which generally creates a crime *malum prohibitum* for the doing of an act without requirement of intent. ...

“Statutes of this nature, imposing criminal penalty irrespective of any intent to violate them, have for their purpose the requirement of a degree of diligence for the protection of the public which shall render a violation thereof impossible. ... These statutes are examples of situations where a person must at his peril see to it that the regulations are not violated by his

acts or by the acts of another acting in his behalf." *Id.*, 16 Wis.2d at 359, 362-363.

*See also, West Allis v. Megna*, 26 Wis.2d 545, 548, 133 N.W.2d 252 (1965), where the court held proof of knowledge on the part of a tavern keeper that a patron is actually under age is not required in order to obtain a conviction under sec. 176.32(1), Stats. That statute imposes "strict liability on tavernkeepers for permitting minors to be on the premises," and subjects violators to fine or imprisonment. *Id.*, 26 Wis.2d at 548.

Recently, however, the Wisconsin Supreme Court construed a so-called "regulatory criminal statute" holding that the state must prove the defendant had cause to believe he was violating the statute under which he was charged. In *State v. Collova, supra*, the defendant was convicted of operating a motor vehicle after revocation of his operating privilege in violation of sec. 343.44(1), Stats. Under the statute "[r]efusal to accept or failure to receive an order of revocation or suspension mailed by first class mail to such person's last-known address shall not be a defense." Sec. 343.44(2), Stats. "If convicted, a defendant *must* be sentenced to at least ten days in county jail and may be sentenced to as long as a one-year term; the defendant may, in addition, be fined from \$100 to \$400." *Collova, supra*, 79 Wis.2d at 485-486 (Emphasis in original.)

The court in *Collova* rejected the defendant's contention that non-receipt of a notice of revocation is a complete defense to the crime. The court held the Legislature intended the state must prove as an element of the offense the defendant had cause to believe his license might be revoked or suspended, *id.* at 488, even though "the definition of the offense here involved does not contain any express words requiring or negating any particular mental element, or requiring or negating any specific state of mind." *Id.* at 480.

The court considered several factors for "determining where the Legislature intended to draw the line between offenses which do and do not require scienter." *Id.* at 482. The court observed:

"These regulatory statutes are concerned primarily with the protection of social and public interests, with the prevention of direct and widespread social injury. They are more concerned with the injurious conduct than with the question of individual guilt or moral culpability. The penalties imposed are generally

light. The usual rationale for strict liability statutes is that the public interest is so great as to warrant the imposition of an absolute standard of care -- the defendant can have no excuse for disobeying the law. Because of the multitude of cases arising under these regulatory statutes, there is a need for quick, simple trials unhindered by examinations of the subjective intent of each defendant." *Id.*

Although several of these factors were present in the case before it, which suggested scienter be disregarded, the court saw "the severe consequences attached to a violation of sec. 343.44, Stats., to be the dispositive factor here." *Id.* at 485. Noting the mandatory ten-day jail sentence without probation, accompanied by possible fines and mandatory revocation of a violator's driving privileges for one year, the court held, "We do not believe the legislature intended to impose such a severe penalty without some requirement of guilty knowledge as an element of the offense." *Id.* at 486. (Footnote omitted.)

Based on the facts presented in *Collova* it is my opinion the holding in that case does not apply to require the state to prove a defendant had specific intent to change the course of a stream under sec. 30.195(1), Stats. In fact, the principles enunciated in *Collova* require a contrary conclusion.

The factors considered by the court in *Collova* point to the conclusion that scienter is not an element of an offense under sec. 30.195(1), Stats. First, although substantial fines and imprisonment may be imposed for violation, sec. 30.195(1), Stats., does not impose a mandatory jail term, "the dispositive factor" in *Collova, supra*, 79 Wis.2d at 485. Nor does the statute revoke for a mandatory term a privilege that is as usual and commonplace to a large segment of our society as driving an automobile. *Id.* at 484-485. Thus, on the inquiry "whether the statute appears on balance to be designed to punish wrongdoers or to implement a high standard of care on the part of the public," *id.* at 486, I believe sec. 30.195(1), Stats., is "more concerned with the injurious conduct than with the question of individual guilt or moral culpability." *Id.* at 482.

Several other factors are present in this matter that suggest scienter be disregarded. Section 30.195(1), Stats., is obviously a police regulation designed to function with the rest of the navigable waters protection laws (chs. 30 and 31, Stats.) in regulating the

social order, and by actively protecting the public trust in those waters. See secs. 33.001, 144.26(1), Stats.; *Madison v. Tolzmann*, 7 Wis.2d 570, 574, 97 N.W.2d 513 (1959); *Milwaukee v. State*, 193 Wis. 423, 449, 214 N.W. 820 (1927); *In re Crawford County L & D District*, 182 Wis. 404, 408, 196 N.W. 874 (1924). If the state were to lose effective control over the privilege of changing stream courses or conducting other activities affecting the nature and quality of the waters of the state, the rate of injury to those waters might very well rise. The seriousness of harm to public rights and interests resulting from unlicensed and unregulated activity in state waters is generally conceded.

Moreover, for the many cases arising under our navigable water protection statutes, there is a need for quick and simple trials unhindered by examinations of the subjective intent of the defendant. *Collova, supra*, 79 Wis.2d at 482. Protective regulation of our navigable waterways is not unknown to the public, and especially to those who seek to use them for private purposes. I am of the opinion that if sufficient care is exercised by those wishing to alter the character of a stream the proscribed conduct in sec. 30.195(1) can be avoided in all but the exceptional instance. *Id.* at 485. "The persons to whom the regulations are directed are generally in a position to exercise such high degree of care; they will be encouraged to do so by the imposition of strict penal liability, and the penalties usually involved are such as to make the occasional punishment of one who has done everything that could have been done to avoid the violation a reasonable price to pay for the public benefit of the high standard of care that has been induced." *Id.*

Although in my opinion the state need not prove an accused had specific intent to change a navigable stream course or that he had reason to believe he was violating sec. 30.195(1), Stats., the state of course must prove the accused intended to do the act which is made a crime. *Collova, supra*, 79 Wis.2d at 480. Speaking to another similarly worded regulatory criminal statute in ch. 30, Stats., the Wisconsin Supreme Court said of sec. 30.12, Stats., although "this statute no longer requires wilfulness in the deposit of deleterious substances into water and that the negligent deposit may bring a violator's conduct within the proscriptions of this statute," *State v. Deetz*, 66 Wis.2d 1, 23, 224 N.W.2d 407 (1974), "[t]he provisions of sec. 30.12 show that, to be prohibited, there must be a

consciousness of depositing material in a navigable water .... [T]he statute was designed to prohibit only deliberate fills.” *Id.* at 22. In *Deetz*, the supreme court drew the line of proscribed conduct in sec. 30.12, Stats., at direct actions of filling or depositing materials in navigable waters, while holding the Legislature did not intend to punish conduct that indirectly resulted in “silting caused by surface water runoff.” *Id.* at 23-24.

While my opinion is that the state has to prove an intent to do the act that is made a crime by sec. 30.195(1), Stats., I do not believe an extraordinary burden is placed on the state to obtain a conviction. *State v. Gould, supra*, 56 Wis.2d at 813-814, is instructive:

“A person need not foresee or intend the specific consequences of his act in order to possess the requisite criminal intent. ... In addition, an accused is presumed to intend the natural and probable consequences of his acts voluntarily and knowingly performed. ...

“... The presumption is based upon moral certitude, *i.e.*, the customary ways, actions, and intentions of mankind in given circumstances. Thus a person is presumed to intend the natural and probable consequences of his acts voluntarily and knowingly performed, whether they are of a criminal nature or not. The criminality of the act has nothing to do with the validity of the presumption, the basis upon which it rests, or its application.” (Citations omitted.)

Thus, in order for the state to make a *prima facie* showing of the requisite intent for conviction under sec. 30.195(1), Stats., the state need only prove the accused did the act of directly changing a stream course. “Of course, since the presumption is a working tool, evidence of a contrary intent may be introduced to rebut the presumption.” *Id.* at 814. *See also, Gibson v. State*, 55 Wis.2d 110, 115, 197 N.W.2d 813 (1972); *Boyd v. State*, 217 Wis. 149, 163, 258 N.W. 330 (1935).

BCL:TD

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*Collective Bargaining; Common Council; Grievance Procedures; Open Meeting:* Where common council hears a grievance under a procedure established under a signed contract, the council is engaged in collective bargaining within the meaning of sec. 111.70(1)(d), Stats., and is therefore, for that purpose, not a “governmental body” within the meaning of sec. 19.82(1), Stats., of the open meeting law. OAG 83-78

November 28, 1978.

TED FISCHER, *City Attorney*  
*City of Eau Claire*

Pursuant to sec. 19.98, Stats., you request my opinion whether the common council is “formed for or meeting for the purpose of collective bargaining under subch. IV or V of ch. 111,” and is therefore not a “governmental body” within the meaning of sec. 19.82(1), Stats., when it hears a grievance under the procedure established under the signed contract, which grievance involves a dispute as to the change of work hours of mechanics at the city shops. The contract provides that when the council fails to determine the grievance within a given time or renders an opinion unfavorable to the union, the matter may be taken before an arbitrator.

You indicate that the council has taken a position that the hearing should be open to the public and that the union has taken the position that the council is not a governmental body within the meaning of sec. 19.82(1), Stats., and that the hearing should be closed unless the employe or union agrees to have it open.

I am of the opinion, however, that under the facts stated, the common council is engaged in collective bargaining when it hears and decides the type of dispute referred to and hence is not a “governmental body” when meeting for that purpose and that most portions of the open meeting law are not applicable to that given situation.

Section 19.82(1), Stats., provides:

“Governmental body” means a state or local agency, board, commission, committee, council, department or public body

corporate and politic created by constitution, statute, ordinance, rule or order; a governmental or quasi-governmental corporation; or a formally constituted subunit of any of the foregoing, *but excludes any such body or committee or subunit of such body which is formed for or meeting for the purpose of collective bargaining under subch. IV or V of ch. 111.*

Since the above section specifically refers to "collective bargaining under subch. IV or V of ch. 111," Stats., the definition in sec. 111.70(1)(d), Stats., is applicable and provides in material part:

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

The statute contemplates that collective bargaining does not terminate when a contract is reduced to writing and is signed but may be utilized to resolve questions arising under the agreement, even where the procedure to resolve such questions is, at least in part, controlled by the agreement.

The advice herein given does not express an opinion whether the hearings should be open or closed, but only that the treatment of grievances under a collective bargaining agreement constitutes collective bargaining which is exempt from the open meeting law.

BCL:RJV

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*Appropriations And Expenditures; Counties; Federal Aid; Forests; Highways; Schools And School Districts; Taxation; Section 59.20(13), Stats., does not control the distribution of monies received from the federal government under 31 U.S.C. sec. 1601, et seq. OAG 45-78, issued June 9, 1978, is withdrawn. OAG 85-78*

December 7, 1978.

DENNIS J. CONTA, *Secretary*  
*Department of Revenue*

You have asked that I reconsider my opinion issued on June 9, 1978, OAG 45-78. That opinion concluded that sec. 59.20(13), Stats., controls the distribution of monies received under 31 U.S.C. secs. 1601, *et seq.* I have reconsidered OAG 45-78 and have concluded that while its conclusion is supportable, a stronger case can be made for the opposite conclusion. Thus, I am withdrawing that opinion.

In my opinion sec. 59.20(13) concerns the distribution of national forest income under 16 U.S.C. secs. 471, *et seq.*, but does not concern the payments under Title 31.

Title 16 U.S.C. sec. 500 provides:

“PAYMENT AND EVALUATION OF RECEIPTS TO STATE FOR  
SCHOOLS AND ROADS; MONEYS RECEIVED; PROJECTIONS OF  
REVENUES AND ESTIMATED PAYMENTS

“Twenty-five per centum of all moneys received during any fiscal year from each national forest shall be paid, at the end of such year, by the Secretary of the Treasury to the State in which such national forest is situated, to be expended as the State legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated: *Provided*, That when any national forest is in more than one State or county the distributive share to each from the proceeds of such forest shall be proportional to its area therein. In sales of logs, ties, poles, posts, cordwood, pulpwood, and other forest products the amounts made available for schools and roads by this section shall be based upon the stumpage value of the timber. ...”

This statute has been in force since 1908 in all material respects. 35 Stat. 251, 260 (1908). It should be noted (1) that it provides that the payment shall be made “to the State,” and (2) that the state is to use the monies for roads and schools of the counties in which the forests are situated.

The files of the Legislative Reference Bureau (LRB) contain a memorandum dated April 10, 1935, reporting that only small amounts had been received under Title 16 and that there was no state legislation authorizing its distribution to counties. The Legislature responded by passing ch. 400, Laws of 1935, "relating to the distribution of national forest income for county school and road benefit pursuant to federal statute, and making an appropriation." Sections 20.07(10) and 59.07(22), Stats., as then created, provided:

"... (20.07)(10) **Distribution of national forest income.** All sums of money heretofore received or which may hereafter be received from the United States government for allotment to counties containing national forest lands and designated for the benefit of public schools and public roads in such counties, shall be distributed in proportion to the national forest acreage in each as certified by the United States Forest Service. Such distribution shall be made annually within sixty days after receipt of the money from the federal government."

"(59.07)(22) **Allotment of national forest income.** In any year when the national forest income to any county is less than five hundred dollars, the entire sum shall be used toward payment of county school aid required under paragraph (a) of subsection (4) of section 40.87 to school districts included within national forest boundaries, but when such annual income shall exceed five hundred dollars, then seventy-five per cent shall be used for such school aid and the remainder shall be allotted to the county highway committee for construction and maintenance of highways within or leading to national forests."

These statutes subsequently have been amended and renumbered. Section 20.370(1)(m), Stats., now provides that "national forest income" refers to:

"... All moneys received from the U.S. government for allotments to counties containing national forest lands, and designated for the benefit of public roads in such counties ...."

Section 59.20(13), Stats., now provides:

"If the treasurer's county receives national forest income, [the treasurer shall] make distribution thereof to the towns in the county wherein national forest lands are situated, each town

to receive such proportion thereof as the area of national forest lands therein bears to the area of such lands in the entire county. Fifty percent of the amount received by it shall be expended by the town exclusively for the benefit of roads therein.”

This legislative history persuades me that “national forest income” within the meaning of sec. 59.20(13), Stats., refers to the monies received under Title 16. It is necessary to read sec. 59.20(13) and sec. 20.370(1)(m), Stats., *in pari materia*. Further, these statutes together must be read against the federal backdrop to which they have responded to determine the scope of their meaning. *See Will v. H & SS Department*, 44 Wis.2d 507, 515, 171 N.W.2d 378 (1969).

Title 31 monies, in contrast to Title 16 national forest income, are not payable to the states; are not restricted to school and highway purposes; and represent payments in lieu of taxes lost by the tax-exempt status of national forests.

Title 31 U.S.C. sec. 1601 provides:

“PAYMENTS TO LOCAL GOVERNMENT UNITS; AUTHORIZATION OF SECRETARY; USE OF FUNDS

“Effective for fiscal years beginning on and after October 1, 1976, the Secretary is authorized and directed to make payments on a fiscal year basis to each unit of local government in which entitlement lands (as defined in section 1606 of this title) are located. Such payments may be used by such unit for any governmental purpose. ...”

The legislative history shows that Congress consciously intended that local units of government rather than states should receive these monies. The Interior and Insular Affairs Committee reported:

“Under existing programs for sharing public land revenues, the Federal government returns a percentage of revenues to the States, which are then distributed to State and local governments according to state law ....

“... [T]he Committee believes that payments under [Title 31 U.S.C. secs. 1601, *et seq.*] should go directly to units of local government since the local governments are the entities which assume the burden for the tax immunity of these lands. ...” Sen.

Rep. No. 94-1262, 94th Cong., 2nd Sess., reprinted in 1976 U.S. Code Cong. & Ad. News, pp. 5968, 5978.

In fashioning administrative rules, the Department of Interior commented:

“It was commented that to make all payments to the States and have them pass the money through would be a good system to handle the payments.

“This system of handling payments would not be consistent with the Act.” 42 Fed. Reg. 51,581 (1977).

The Department then made a specific ruling that in Wisconsin the appropriate unit of local government to receive these payments was county government, *id.*, and that payment to the states is precluded by the Title 31 program. *Id.* at 51,581.

Further, national forest income under Title 16 is earmarked for roads and schools, whereas Title 31 payments in lieu of taxes are to be paid to the county with no strings attached. Title 31 U.S.C. sec. 1601 provides that, “Such payments may be used by such unit for *any governmental purpose.*” (Emphasis added.)

Again, the legislative history of 31 U.S.C. secs. 1601, *et seq.*, provides a clue as to why Congress felt a no strings attached approach was desirable. In Sen. Rep. No. 94-1262, *supra* at 5972, the following paragraphs appear:

“Even in the few instances when a local government’s share of the various revenues and fees is sufficient to meet service demands arising from the Federal lands and to approximate the loss of ad valorem tax revenues which would otherwise be generated by those lands, too many of the revenue sharing provisions restrict the use of funds to only a few governmental services--most often the construction and maintenance of roads and schools. Yet, local governments are called upon to provide many other services to the Federal lands or as a direct or indirect result of activities on the Federal lands. These services include law enforcement; search, rescue and emergency; public health; sewage disposal; library; hospital; recreation; and other general local government services. It is only the most fortunate of local governments which is able to juggle its budget to make

use of those earmarked funds in a manner which will accurately correspond to its community's service and facility needs.

“Many of the revenue sharing provisions permit the States to make the decisions on how the funds will be distributed. In far too many States, the result has been that the funds are either kept at the State level and not distributed to local governments at all or are parcelled out in a manner which provides shares to local governments other than those in which the Federal lands are situated and where the impacts of the revenue and fee generating activities are felt.”

Additionally, when the Department of Interior was in the process of promulgating rules for administration of the program, citizens inquired as to whether the funds could be earmarked by new regulations for other purposes. The Department's response was that this was not the case. “Any payments authorized to be made under this Act are new revenues to be used for any governmental purposes.” 42 Fed. Reg. 51,581 (1977). *See id.* at 51,582 (1881.2).

Thus, Title 31 payments are made to the local governmental units, rather than to the states, as payments in lieu of taxes, and these payments are neither income, revenues nor receipts of national forest lands. Title 16 monies, however, are not in lieu of taxes because they are paid to the states, are not required to be distributed to the municipalities in which national forest lands are located, and bear no relation to the local tax revenues lost by such municipalities because of the tax-exempt status of national forest lands. *Also see Anderson Union High School Dist. v. Schreder*, 56 Cal. App. 3rd 453, 128 Cal. Rptr. 529 (1976).

It is evident that sec. 59.20(13), Stats., was intended to distribute national forest income for the purposes specified in Title 16. I must conclude that the distribution of payments received from the federal government under 31 U.S.C. sec. 1601, *et seq.*, is not governed by sec. 59.20(13), Stats., but rather is paid directly to the counties for any governmental purpose and should be received under the general authority contained in sec. 59.20(1), Stats.

BCL:CDH

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*Education; Leases; Religion; Schools And School Districts; Transportation;* The establishment clause of the first amendment to the U.S. Constitution and Wis. Const. art. I, sec. 18, prohibit public schools leasing classrooms from parochial schools in order to provide educational programs for parochial school students. OAG 86-78

December 12, 1978.

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

You requested my opinion regarding the leasing of rooms from parochial schools by the Milwaukee school district. The purpose of the lease arrangement is to provide Title I Elementary Secondary Education Act (ESEA) programs to children attending those schools. Title I of the ESEA, 20 U.S.C. sec. 241, *et seq.*, as amended, provides for grants to state education agencies (SEA), in this case the Wisconsin Department of Public Instruction. The Act further provides that upon approval of local educational school district (LEA) programs, grants are to be made by the SEA to the LEAs that have a high concentration of low income families. The purpose of the grants to LEAs is to expand and improve the education of economically deprived children. 20 U.S.C. secs. 241a, 241b and 241c as amended. Significantly, 20 U.S.C. 241e-1(a), created by Pub. L. 93-380, provides in part:

“(a) To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate ....”

20 U.S.C. sec. 1806 (Title IV sec. 406 ESEA) makes similar provisions providing “for [the] benefit of children” attending nonpublic schools “secular, neutral, and nonideological services, materials, and equipment ... as will assure equitable participation of such children in the purposes and benefits of this subchapter.”

Having in mind the foregoing, you specifically ask whether you may approve instruction for Title I students in rooms leased in parochial schools under the following circumstances:

“The services will be provided in rooms leased for that purpose from the non-public schools. This arrangement was determined after consultation with the non-public representative, non-public school administrators, and the Milwaukee City Attorney’s Office. Because of problems such as the distance between the non-public and the Title I public schools, the minimal space available in the public schools, and the disruptive nature of excusing pupils from their regular classrooms to travel to another building to participate in a Title I Program, and to travel back to the non-public school; it would be most difficult to assure that comparable and equitable services could be provided to non-public pupils in the public schools.

“The Milwaukee Public Schools would assure that strict limitations would be imposed upon the Title I staff assigned to the leased facilities which would insure that their secular teaching duties were not intertwined with the teaching of religious doctrine. The supervisory and administrative staff of the Title I Program will provide continuous surveillance of the activities of the Title I staff to insure that these limitations are being followed. The lease arrangements with the non-public schools will clearly spell out the limitations being imposed and the safeguards being established.

“Your opinion of whether this proposed plan for providing Title I services is permissible under the laws of Wisconsin and the United States is necessary in order for me to consider Milwaukee’s Title I application. ...”

You also have informed me that assurances have been given by the representative for the parochial school Title I program that equitable services were being given to nonpublic school children. But this assurance was subject to the provision that “Title I services are offered on the premises of non-public schools as well as public schools.”

I am also informed that in Milwaukee there are 100 parochial schools participating in the Title I program. Nineteen of these

parochial schools are proposed for the lease arrangement. It is estimated that the number of participants in these schools would be 476. The Milwaukee public school district is asking that two remedial reading and two mathematics teachers be funded to provide educational programs in the leased portion of the parochial schools.

It appears that the lease arrangement is felt to be necessary because of the disruption and inconvenience that would be caused the children, teachers and administrators in the parochial schools if the children were to be transported from the parochial school to the public school and back again. It also appears that the leased space will be an integral part of the parochial school. You do not state whether the lease arrangement provides for the attendance of public school children in the nonpublic school. Nor do you provide in detail the terms of the lease, such as the amount of rent to be paid and the restrictions on the furnishings in the rooms that may be imposed. Even though specific details concerning the lease agreement are lacking, I feel that the question broadly stated can be answered. This question is whether a public school district may, in order to implement a public educational program, lease space from a parochial school for the primary purpose of providing educational programs to the children attending the parochial school. Lease arrangements such as this one would not be confined to Title I programs nor to the Milwaukee public school district. Thus, I view the question as having applicability beyond the Milwaukee school system.

In 64 Op. Att'y Gen. 136 (1975), I concluded that funds made available to the Wisconsin Department of Public Instruction under Title I of the ESEA could not be used in Wisconsin to pay teaching personnel in parochial schools. I also concluded in 64 Op. Att'y Gen. 139 (1975) that services and materials could not be provided on parochial school premises. The proposed distinction here is that the space leased from the parochial school, while still an integral part of the premises, would, by virtue of the lease, be under the control of the public school administration.

For substantially the same reasons given in previous opinions, and for the reasons which follow, I conclude that an arrangement whereby a public school district would lease from the parochial schools school rooms to provide ESEA educational programs to parochial school children would confer a benefit to parochial schools

which would violate Wis. Const. art. I, sec. 18. The relevant part of this section provides “nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.”

In *State ex rel. Reynolds v. Nusbaum*, 17 Wis.2d 148, 165, 115 N.W.2d 761 (1962), the Wisconsin Supreme Court held that a statute providing for transportation of parochial school children to the nearest public school that they were entitled to attend violated that part of art. I, sec. 18, quoted above. In reaching this conclusion, the court stated that the establishment clause of the first amendment of the U.S. Constitution “lends itself to more flexibility of interpretation” than art. I, sec. 18. Article I, sec. 18 has since been amended to permit the use of public funds to transport parochial school children. However, it is my opinion that the reasoning of the court in *State ex rel. Reynolds v. Nusbaum* applies with equal force to a public school leasing classrooms from parochial schools for the primary purpose of providing educational programs for parochial students. This is so regardless of the subjects taught in the leased space or whether or not the control of the premises resides in the landlord or the tenant. Payment of the cost of this program with public funds clearly would provide a benefit to the parochial schools and therefore would violate art. I, sec. 18.

We are not in this opinion concerned with whether art. I, sec. 18, would prohibit the lease of space from parochial schools where the purpose is to provide space for children attending public schools. That was the situation that existed in *Dorner v. School District*, 137 Wis. 147, 118 N.W. 353 (1908). There, rent of parochial space for public school students was necessary because of lack of space in the public school. The court in *Dorner* had no occasion to consider whether the payment of rent amounted to drawing money from the treasury for the benefit of religious societies. Because of the narrow issues involved in that case and in view of subsequent development of case law involving church-state relationships, I do not regard that case as having value as a precedent with respect to the issue now under consideration. Compare *Thomas v. Schmidt*, 397 F. Supp. 203 (D.R.I. 1975). Nor are we dealing with a situation which requires the use of private facilities for the education of handicapped children as provided by sec. 115.85(2)(d), Stats. *State ex rel. Warren v. Nusbaum*, 64 Wis.2d 314, 219 N.W.2d 577 (1974). Furthermore, I

would not regard as controlling in this situation the fact that the lease may provide for attendance in the leased space of children attending public schools as well as those attending parochial schools. Thus, in *Americans United for Sep. of Church & State v. Paire*, 359 F. Supp. 505 (D. N.H. 1973), a three-judge federal district court held that an arrangement whereby both public and parochial pupils could attend classes held in rooms of a parochial school leased by the public school system promoted excessive governmental entanglement. See also *Americans U. for Sep. of Church & State v. Board of Ed.*, 369 F. Supp. 1059 (E.D. Ky. 1974).

If a constitutional amendment to art. I, sec. 18, was required to permit public funds to be spent to transport students to parochial schools, then certainly a constitutional amendment would be required to permit the use of public funds to provide classrooms for parochial school students in lieu of transportation to public schools. *State ex rel. Reynolds v. Nusbaum, supra*.

In addition, in *State ex rel. Warren v. Nusbaum*, 55 Wis.2d 316, 332-333, 198 N.W.2d 650 (1972), the court stated:

“... While words used may differ, both the federal and state constitutional provisions relating to freedom of religion are intended and operate to serve the same dual purpose of prohibiting the ‘establishment’ of religion and protecting the ‘free exercise’ of religion. So our holding that the statute involved violates the first amendment is a holding that, in these particulars, it also violated art. I, sec. 18, Wisconsin Constitution.” See also *State ex rel. Weiss v. District Board*, 76 Wis. 177, 209, *et seq.*, 44 N.W. 967 (1890).

This language from *Nusbaum* means that the cases decided by the federal courts, including the U.S. Supreme Court, have value as precedent with respect to interpretation of Wis. Const. art. I, sec. 18.

In *Wolman v. Walter*, 433 U.S. 229, 53 L. Ed. 2d 714, 97 S. Ct. 2593 (1977), the Court held that to use public funds to provide instructional materials and equipment on the premises of parochial schools would violate the establishment clause. To the same effect, see *Meek v. Pittenger*, 421 U.S. 349 (1975). In the *Wolman* case, 53 L. Ed. 2d at 733-734, the Court stated:

“Appellees seek to avoid Meek by emphasizing that it involved a program of direct loans to nonpublic schools. In contrast, the material and equipment at issue under the Ohio statute are loaned to the pupil or his parent. In our view, however, it would exalt form over substance if this distinction were found to justify a result different from that in Meek.”

Similarly, in the present case I do not believe that our state supreme court would approve the lease arrangement which is so clearly designed to avoid the ruling in *State ex rel. Reynolds v. Nusbaum, supra*, and *Wolman v. Walter, supra*. Despite a technical change in tenants, the lease is simply a device to place teachers, materials and equipment funded with public money on the premises of parochial schools. This arrangement would inevitably create a flow of assistance to support the sectarian enterprise. This is true even though the space rented and the materials used cannot be diverted to religious use. Nonsectarian space, like nonsectarian materials and equipment paid for with public funds, cannot be provided on the premises of parochial schools without violating the establishment clause of the U.S. Constitution and Wis. Const. art. I, sec. 18.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the U.S. Supreme Court noted that the establishment clause prohibited any law *respecting* the establishment of religion. Action by the state might not establish a state religion but nevertheless be one “respecting that end.” The Court concluded that the following three-part test should be administered to determine whether action by the state was one respecting the establishment of religion: (1) the statute or other state action must have a secular purpose; (2) the primary effect must neither advance nor inhibit religion; and (3) the state action must not foster excessive governmental entanglement. This test has since been applied on numerous occasions by both the U.S. Supreme Court and the Wisconsin Supreme Court, the latest being *Wolman v. Walter, supra*, and *State ex rel. Warren v. Nusbaum, supra*. In *Wolman* the Court held that the loaning of certain instructional materials and equipment to the parents or student on individual request, even though the material was “incapable of diversion to religious use,” had the primary effect of providing a direct and substantial advancement of the “sectarian enterprise.”

I am aware that the state supreme court in Nebraska, *State ex rel. School District v. Nebraska State Bd. of Ed.*, 188 Neb. 1, 195

N.W.2d 161, *cert. denied*, 409 U.S. 921 (1972), and the court of appeals of Michigan, *Citizens to Advance Public Education v. Porter*, 65 Mich. App. 168, 237 N.W.2d 232 (1975), considered the issue of leased space and held under the U.S. Constitution and their respective state constitutions that a lease of space was constitutional. The Nebraska decision specifically involved the lease of space for Title I programs. Nebraska's constitution contains a provision similar to, although not identical with, Wisconsin's. The Nebraska decision is a split decision with strong dissents both on state and federal constitutional grounds. Several key factors exist which lead me to believe that our court would follow *State ex rel. Reynolds v. Nusbaum, supra*, and *Paire, supra*. First, Milwaukee itself assures you that the school district will impose restrictions on the use of the space by lease and then engage in continuing surveillance to insure that the restrictions designed to prevent sectarian influence were being followed. Such an arrangement involves substantial entanglement problems. Second, Wis. Const. art I, sec. 18 has been strictly interpreted in the past. If bus transportation was unconstitutional it is hard to conceive that a lease of space with consideration flowing to the parochial school would not also be unconstitutional. Third, the U.S. Supreme Court's decision in *Wolman v. Walter, supra*, which approved *off-premises* provision of therapeutic guidance and remedial programs to parochial students appears to be as far as the Court is likely to go. There is no indication in the various opinions that the court would have approved lease arrangements of the type discussed here. In fact, Justice Blackman, joined by three other justices in delivering the opinion of the court, took pains to point out that the statute authorized the services to be performed at sites "neither physically or educationally identified with the functions of the nonpublic school." *Wolman, supra*, p. 2605.

It is my opinion, therefore, that the lease arrangement of space in parochial schools as previously described would not only violate Wis. Const. art. I, sec. 18, but would probably also violate the establishment clause of the first amendment for the reasons advanced in *Wolman v. Walter, supra*; *Meek v. Pittenger, supra*, and *Committee For Public Education v. Nyquist*, 413 U.S. 756 (1973). You are therefore advised that you should not approve the teaching of Title I students in classrooms rented from parochial schools.

BCL:JWC

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*Agriculture; Counties; County Board; Ordinances; Towns; Zoning;* The extent to which sec. 91.73(4), Stats., as created by ch. 29, Laws of 1977, and amended by ch. 169, Laws of 1977, alters the procedures applicable for the amendment of county comprehensive zoning ordinances under sec. 59.97(5)(e), Stats., is discussed. OAG 87-78

December 13, 1978.

FRED A. RISSER, *Chairperson*  
*Senate Organization Committee*

You have requested my opinion on a number of questions which seek to clarify the procedure to be used by a county zoning committee under sec. 91.73(4), Stats., as created by ch. 29, sec. 982m, and amended by ch. 169, sec. 14, Laws of 1977, when making recommendations to a county board concerning proposed "exclusive agricultural use" amendments to county zoning ordinances.

Chapter 91, Stats., which establishes a program designed to preserve Wisconsin farmland through tax credits, farmland preservation agreements and exclusive agricultural zoning, was originally created by ch. 29, Laws of 1977. Section 91.73 as subsequently amended by ch. 169, Laws of 1977, establishes the procedures which are to be followed in enacting exclusive agricultural use ordinances and provides in part as follows:

PROCEDURES. (1) Except as otherwise provided, exclusive agricultural zoning ordinances shall be adopted and administered in accordance with ss. 59.97 to 59.99, 60.74 and 60.75, 61.35 or 62.23.

....

(4) Amendments to the texts of existing county zoning ordinances to bring the ordinances into compliance with this chapter, which are adopted by the county board, shall be effective in any town which does not file a certified copy of a resolution disapproving of the amendment pursuant to s. 59.97 (5) (e) 3m or 6. In those towns which disapprove of the

amendment the former agricultural zoning remains in effect and shall be so designated on the official zoning map.

You first ask:

1. If a majority of towns file resolutions disapproving of a proposed amendment creating an exclusive Agriculture District under Wis. Stats. 91.73 (4), what procedure should be followed by the Zoning Committee in making a recommendation to the County Board? This section refers to both the procedures of Chapter 59.97(5)(e) 3m and 6. Since the provisions of chapters 91 and 59 appear to be in conflict, which prevails?

Section 59.97(5), Stats., sets forth the procedure to be followed in formulating comprehensive county zoning ordinance provisions. Since sec. 91.73(1), Stats., expressly provides that exclusive agriculture zoning ordinances shall be adopted in accordance with sec. 59.97, Stats., “[e]xcept as otherwise provided,” and since sec. 91.73(4), Stats., does provide otherwise, in part, in reference to amendments to the texts of existing county zoning ordinances, the latter provisions control to the extent they alter the procedure otherwise applicable to the amendment of ordinances under sec. 59.97(5)(e), Stats. Thus, even if a majority of towns file resolutions disapproving the creation of an exclusive agricultural use district by amendment to an existing ordinance, the amendment may become effective in those towns which do not adopt and file resolutions of disapproval.

In responding to the remainder of your questions, I assume that they also refer to a proposed exclusive agricultural zoning district amendment to the “text” of an existing zoning ordinance which has been initially disapproved by a majority of the towns in a county.

Your second and third questions are related and will be answered together.

2. Can the Zoning Committee recommend the proposed amendment for adoption by the County Board and if adopted can this become effective in those towns that did not file resolutions of disapproval within the ten day period and in those which file statements of approval?

3. Can the Committee only modify the amendment and if adopted by the County Board as modified return the modified ordinance to the towns for approval? Would this be effective in those towns that did not file resolutions of disapproval within the forty days as provided for in Wis. Stats. 59.97(5)(e)6.?

The procedures for the adoption of amendments to comprehensive county zoning ordinances are set forth in sec. 59.97(5)(e)1. through 7., Stats. Paragraph 3m. authorizes towns affected by proposed amendments to indicate their disapproval prior to, at or within ten days after the public hearing thereon before the county zoning agency (committee) and further states that:

If the town board of the town affected in the case of an ordinance relating to the location of boundaries of districts files such a resolution, or the town boards of a majority of the towns affected in the case of all other amendatory ordinances file such resolutions, the agency may not recommend approval of the petition without change, but may only recommend approval with change or recommend disapproval.

Paragraph 4. further provides, in part, that "If the agency after its public hearing shall recommend denial of the petition it shall report its recommendation directly to the county board with its reasons for such action."

The immediate practical effect of town resolutions disapproving of the petition is that the agency may not recommend approval of the petition "as is" if the required resolutions are filed. Under such circumstances the agency may, however, recommend approval of the change requested in the petition with such modification as it determines to be consistent with good zoning practice under the existing county zoning ordinance or may, in the alternative, recommend disapproval of the petition. Such disapproval may be based upon a belief that the zoning changes requested by the petition should be disapproved or because the agency does not believe that the zoning change requested by the petition should or could be modified, and the agency cannot recommend approval of the petition without change due to the filing of the requisite resolutions by the towns involved.

In the foregoing context, then, the agency's report to the board of supervisors is not merely a device to transmit town board disapproval to the board of supervisors, and the agency need not propose changes to meet the criticism of the town board if the agency is not convinced that the zoning request should be so modified. When proper resolutions disapproving of the petition have been filed, however, the agency may not make an independent recommendation that the petition be approved without change. Under such circumstances, however, if the agency is not disposed to approving a modified version of the requested zoning change, it may indicate that one of the reasons, or the only reason, for recommending denial of the petition is that the filing of resolutions disapproving of the petition under sec. 59.97(5)(e)3m. requires such action.

If such a zoning committee report recommends disapproval of the amendment petition, the county board may nevertheless re-refer the same to the committee with instructions to draft an ordinance to effectuate the petition and may thereafter adopt the ordinance. If the committee approves the petition, with modification, it must forward a proposed ordinance effectuating said determination with its recommendations, whereupon, the county board may adopt the ordinance as drafted or with amendment. Sec. 59.97(5)(e)4. and 5., Stats.

In either event, the operative provisions of sec. 59.97(5)(e)6., Stats., apply. Section 59.97(5)(e)6., Stats., normally provides, in effect, that whether a county zoning ordinance amendment intended to have general or broad application becomes effective is controlled by the majority of the towns affected by the amendment. The apparent intent of sec. 91.73(4), Stats., is to alter that concept of "majority rule" and allow each town to approve or disapprove of the amendment on an individual basis. Reading sec. 59.97(5)(e)6. with sec. 91.73(4), therefore, I conclude that if the amendatory ordinance makes only the change sought in the petition, and the petition was not disapproved by the town board under paragraph 3m., the ordinance becomes effective in that town on passage. Any other amendatory ordinance will be effective in a town affected by the ordinance 40 days from adoption of the ordinance, or earlier, unless the affected town board files a resolution disapproving such amendment within said 40 days.

BCL:JCM

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*Land; Municipalities; Ordinances; Plats And Platting; Surveys;* Certified survey maps under sec. 236.34, Stats., cannot be used as a substitute for subdivision surveys as defined by sec. 236.02(8), Stats. Penalties under sec. 236.31, Stats., applicable to improper use of certified surveys. OAG 88-78

December 14, 1978.

KENNETH J. BUKOWSKI, *Corporation Counsel*  
*Brown County*

You ask two questions concerning the use of certified survey maps under sec. 236.34, Stats.

You ask if the following situation is permitted:

“The first question concerns the situation where a landowner owns a sizeable parcel of property and creates a plat for part of the parcel which includes more than 4 lots, each of which is 1 1/2 acres, or less, in size. Then the owner comes in with a certified survey map to cover a different part of the same parcel. ...”

Surveyors consistently have pushed the use of certified survey maps to their limits from the time ch. 236, Stats., was adopted by ch. 570, Laws of 1955. Their popularity is understandable. Certified survey maps are an inexpensive and efficient tool for small surveys. Nevertheless, certified surveys are limited to small, isolated surveys and cannot be used as a substitute for subdivision surveys. The interpretive commentary published with ch. 570, Laws of 1955, made a clear statement on the use of certified survey maps as follows:

“The purpose of this section is to permit the recording of an accurate map for a land division which does not involve a sufficient number of parcels to constitute a ‘subdivision’ within 236.02(7). [Present 236.02(8).] Description of land by reference to such a map has obvious conveyancing advantages. Even more important, an accurate map permits easy location of the boundaries on the land.

“Originally the certified survey map could be used for no more than 2 parcels. Wis.Stats.1955 sec. 236.34(1). But in

1957 by chapter 88 use for as many as 4 parcels was permitted. This has somehow resulted in the impression in some quarters that a landowner who desires to sell numerous lots from a tract can have a series of certified survey maps prepared, each for 4 lots, and thus avoid compliance with the subdivision regulatory provisions of this chapter. This is clearly wrong and such a landowner runs the risk of the serious penalties provided by 236.30 and 236.31. In addition where a certified survey map for 4 parcels has been prepared and filed and then, within the requisite 5 year period, a fifth parcel is divided from the same tract, a subdivision has been created under 236.02(7) (b). [Present 236.02(8).]

Subdivisions are defined by sec. 236.02(8), Stats., as follows:

“(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 interpretive commentary published with ch. 570, Laws of 1955, again is helpful in understanding the definition of the term “subdivision.”

“... The present definition includes divisions for the purpose of building development as well as sale. Thus, for example, where, in order to build rental housing or other rental structures, land is divided into more than 4 parcels which meet the 1 1/2 acre limitation, a ‘subdivision’ is apparently created and the provisions of chapter 236 apply. ...

“... To illustrate the operation of 236.02 (7) (b) in such a usual situation, assume that Landowner sells from the same tract 1 parcel a year for each of 4 years. Each parcel is 1 1/2 acres or less in area. If Landowner now sells a 5th such parcel and does this within 5 years from the time he divided off the 1st parcel, a ‘subdivision’ has been created. ...”

Your circumstance involves an owner who already has created a subdivision as defined by sec. 236.02(8), Stats., on his parcel of land. Creation of more lots on such a parcel will be additions to the existing subdivisions and will require subdivision approvals under ch. 236, Stats. The purpose and intent of ch. 236, Stats., is violated where part of a parcel is subdivided as required by ch. 236, Stats., and the remainder of the parcel is divided piecemeal by use of a series of certified survey maps.

You ask further as follows:

“The second question is also somewhat perplexing. Section 236.31 contains penalties for violating the platting statutes but does not seem to provide penalties for violating a certified survey ordinance, unless subsection 2 would also be applicable to violations of certified survey map ordinances.”

Section 236.31, Stats., provides in part:

“(1) Any subdivider or his agent who offers or contracts to convey, or conveys, any subdivision as defined in s. 236.02 (8) or lot or parcel which lies in a subdivision as defined in s. 236.02 (8) knowing that the final plat thereof has not been recorded may be fined not more than \$500 or imprisoned not more than 6 months or both ....

“(2) Any municipality, town, county or state agency with subdivision review authority may institute injunction or other appropriate action or proceeding to enjoin a violation of *any provision of this chapter*, ordinance or rule adopted pursuant to this chapter. Any such municipality, town or county may impose a forfeiture for violation of any such ordinance, and order an assessor’s plat to be made under s. 70.27 at the expense of the subdivider or his agent when a subdivision is created under s. 236.02 (8) (b) by successive divisions.”

Section 236.31(1), Stats., is applicable to the situation you described in your first question, and as interpreted herein sec. 236.31(2), Stats., allows injunctive relief for violations of “any provision” of ch. 236, Stats. Section 236.31(2), Stats., also allows municipal forfeiture ordinances and assessor’s plats. Thus, at the very least you may seek injunctive relief to prevent the use of a certified survey map in the situation you described.

BCL:JPA

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*Appropriations And Expenditures; Charitable Organizations; Corporations; Counties; County Board;* A county may, through its boards and commissions, purchase services from various nonprofit organizations within the scope of such board or commission's authority.

Where county board has created community relations-social development commission pursuant to sec. 66.433, Stats., it cannot, through such commission, fund community-wide nonprofit corporations it deems worthy, by setting forth in the commission's budget, the amount of money to go to a specific nonprofit agency.

Where a county board creates a sec. 66.433 commission, it cannot by reason of sec. 59.025(3)(c), Stats., transfer all the duties and functions of such commission to another board or commission or committee of the county board. OAG 89-78

December 14, 1978.

GLENN L. HENRY, *Corporation Counsel*

*Dane County*

You request my opinion as to the authority of Dane County to fund private nonprofit corporations which render services to persons within the entire Dane County community, rather than directly and solely to the clients of statutory county agencies such as the County Board of Public Welfare and secs. 51.42 and 51.437 boards. You state that thirty-eight voluntary nonprofit agencies have applied for county funding for 1979 in the aggregate amount of about \$940,000. Thirty-five such organizations were listed on the sheet attached to your letter. You have advised the county executive that any funding of nonprofit corporations, in the absence of specific statutory authority, must be done through the purchase of service contracts through the Human Services Board and other boards which have authority to expend money for the purpose requested by the nonprofit corporations.

I am generally in agreement with your conclusion.

You indicate that Dane County has considered the creation of a county community relations-social development commission pursuant to sec. 66.433, Stats. You specifically inquire:

1. Can the county board, through such commission, fund certain community-wide nonprofit corporations by setting forth in the commission's budget the amount of money to go to a specific nonprofit agency?

In my opinion it cannot.

2. If a sec. 66.433 commission is created, would sec. 59.025(3)(c), Stats., permit the county board to transfer all of the duties and functions of such commission to another board, commission or committee of the county board?

I conclude that such duties and functions cannot be so transferred.

In my opinion the county board could not set forth in the commission's budget the amount of money which it intended to go to a specific nonprofit agency. Whether the sec. 66.433 commission is to cooperate with any specific nonprofit agency is a matter for such commission. Section 66.433(3), Stats., expressly grants certain powers to the commissions, and in my opinion, whereas the county board can abolish the commission, it cannot take those powers from the commission or transfer them to a committee of the county board. The county board need not designate the commission as the agency to accept federal funds under sec. 66.433(7), Stats.

The power of a county board to reorganize and transfer functions between certain offices and departments under sec. 59.025, Stats., is broad; but as sec. 59.025(2), Stats., provides, "The powers hereby conferred shall be in addition to all other grants and shall be limited only by express language *but shall be subject* to the constitution and *such enactments of the legislature of statewide concern as shall with uniformity affect every county.*"

In 63 Op. Att'y Gen. 182 (1974), it was stated that functions of a community relations-social development commission authorized under sec. 66.433, Stats., are not limited to study, analysis and planning; but such commissions have authority to carry out limited human relations programs which provide services directly to citizens. The primary powers of such a commission are in the areas of study, analysis and planning. Although sec. 66.433(3)(c)2., Stats.,

permits such commission to cooperate with state and federal agencies "and nongovernmental organizations having similar or related functions," and subsec. (8) permits county boards to "appropriate county funds for the operation of community relations-social development commissions ... including those participated in on an equal basis by nonprofit corporations located in the county and comprised primarily of public and private welfare agencies devoted to any of the purposes set forth in this section," I find no specific authority for the county board directly or indirectly to appropriate county funds to such nonprofit corporations. Participation on an equal basis does not mean that county funds shall pay the costs of operations performed by the cooperating agency. County appropriations are limited under sec. 66.433(8), Stats., for the operation of the commission.

In my opinion the Legislature intended that the public funds appropriated to such commission be expended by it under the *direction and control* of the commission as composed under sec. 66.433(4), Stats. Insofar as those functions involve the exercise of judgment and discretion, they are not delegable. *Steele v. Gray*, 64 Wis. 2d 422, 430, 219 N.W.2d 312, 223 N.W.2d 614 (1974). The requirements as to qualifications and nonpartisan nature of commissioners and the fact that they are to serve without compensation appear to constitute express statutory language which would preclude transfer of functions and duties to a committee of the county board. *See* sec. 66.433(4) and (5), Stats. Also *see* sec. 66.433(7), Stats., which provides for a check and balance system as between the commission and the county board with respect to the acceptance of federal funds. In my opinion the statute is one of "statewide concern as shall with uniformity affect every county." Therefore, it is my opinion that sec. 59.025(3)(c), Stats., would not authorize transfer of some or all of its functions to another board, commission or committee of the county board. *See* discussion of "statewide concern" and "uniformity" in *Thompson v. Kenosha County*, 64 Wis. 2d 673, 221 N.W.2d 845 (1974).

There are only a few statutes which permit a county board to appropriate funds directly to a private, nonprofit corporation. *See* sec. 59.07(93), (95) and (96), Stats. A county is simply the arm of the state and 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); *Dane County v. H & SS Dept.*, 79 Wis. 2d 323, 255 N.W.2d 539 (1977); *State ex rel. Conway v. Elvod*, 70 Wis. 2d 448, 234 N.W.2d 354 (1975); 63 Op. Att'y Gen. 297 (1974); and 64 Op. Att'y Gen. 106 (1975). Although counties have somewhat broader powers than do towns, that is largely the result of a more comprehensive scheme of statutes, and I do not find any statute which would permit the county board to appropriate funds directly to each of the thirty-eight agencies you refer to. In 64 Op. Att'y Gen. 208 (1975), it was stated that a county board was without power to appropriate funds to a voluntary agency which provides information to the public of services offered by various public and private agencies, but that where the statute permitted a county agency to furnish service within a given area also permitted such county agency to contract with others for the furnishing of such services, such agency would have power to contract with a voluntary agency for the furnishing of such service. At page 209 it was stated:

Undoubtedly, the legislature could authorize counties to expend money for such purpose, and it would in that case be a proper public purpose. However, the mere fact that certain benefits to the public would accrue does not justify the appropriation. In *Pugnier v. Ramharter* (1957), 275 Wis. 70, 81 N.W. 2d 38, the court held that unless expressly authorized by statute, a town could not appropriate money to charitable organizations even though the causes promoted were generally recognized as good ones. At p. 74, the court stated:

“In the absence of legislative authorization, a municipality cannot apply its public funds to the payment of claims or obligations which are founded upon mere moral or equitable considerations, and are not enforceable against the municipality by legal process...”

See sec. 46.036, Stats., as one example of a statute under which the Legislature has expressly regulated county agencies, to-wit, the county board of public welfare or a board established under secs. 51.42 or 51.437, Stats., with respect to the purchase of care and services.

In conclusion, I suggest that the county and its various boards and commissions should primarily be interested in determining how they

can most efficiently and economically carry out the programs mandated by statute. In cases where the statutes permit the purchase of services from private or nonprofit corporations, consideration should be given to whether paid staff can fulfill the assigned mission or whether purchase of services should be utilized. Where purchase is to be utilized, care should be taken in the selection of the supplier to assure that clients and the general public are being served properly and efficiently. The emphasis, insofar as the county board or responsible board or commission is concerned, should not be "how we can directly or indirectly fund" some worthy nonprofit agency which may have volunteered its services in an area of public concern and now wants public funding, but rather on how the public shall best be served in view of the limitations of authority and funds.

BCL:RJV

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*Criminal Law; Public Records; Words And Phrases; Section 973.015, Stats., requires, in cases where ordered by the court, that the clerk of court upon receipt of the certificate of discharge strike or obliterate from the record all references to the name and identity of the defendant. OAG 90-78*

December 18, 1978.

JAMES L. CARLSON, *District Attorney*  
*Walworth County*

You have requested my opinion on the meaning of the word "expunged" as used in sec. 973.015, Stats., which reads:

"(1) 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.

“(2) A person has successfully completed the sentence if the person has not been convicted of a subsequent offense and, if on probation, such probation has not been revoked. Upon successful completion of the sentence the detaining or probationary authority shall issue a certificate of discharge which shall be forwarded to the court of record and which shall have the effect of expunging the record.”

In your letter you state:

“Presently in this County, expungement is being interpreted to mean placing the record in a sealed envelope and stamping it ‘expunged.’ The record is not being ordered destroyed or annihilated.”

The practice employed in your county is practical, but in my opinion it does not comply with the common and ordinary meaning of the word “expunge” nor does it comply with the requirements of the act.

The general rule is that words in a statute are to be construed according to their popular, common and approved usage, sec. 990.01(1), Stats.; *Hochgurtel v. San Felippo*, 78 Wis.2d 70, 253 N.W.2d 526 (1977).

In *Webster’s Seventh New Collegiate Dictionary*, “expunge” is defined as:

“1: to strike out, obliterate, or mark for deletion 2: annihilate.”

*Black’s Law Dictionary*, Rev. 4th Ed. (1972), defines “expunge” in a similar manner:

“EXPUNGE. Means to destroy or obliterate; it implies not a legal act, but a physical annihilation ... to blot out; to efface designedly; to obliterate; to strike out wholly.”

The practice of placing the record in a sealed envelope or, in other words, sealing the record does not fall within the concept of expunging the record.

Section 973.015, Stats., was created by ch. 39, Laws of 1975. Our court has not yet construed the statute. Those jurisdictions that have had the occasion to consider the meaning and intent of the word

“expunge” have generally held to the dictionary definition. *Thornbrough v. Barnhart*, 232 Ark. 826, 340 S.W.2d 569 (1960); *Andrews v. Police Court of City of Stockton*, Cal. App., 123 P.2d 128, 129 (1942); *Application of Brandon*, 131 N.Y.S.2d 204 (1954). In *State ex rel. M. B., Relator v. Brown*, 532 S.W.2d 893 (1976), the court was concerned with a statute and court practice similar to the situation in question. In this case, the Missouri court of appeals held:

“In considering the intent of the legislature when it used the term ‘expunge’ in sec. 195.290, *supra*, we follow the primary rule of statutory construction to ascertain intent from the language used, to give effect to that intent if possible, and to consider words used in the statute in their plain and ordinary meaning. *State v. Kraus, supra*, 530 S.W.2d 684, No. 59,135 (Mo.banc 1975). Our statute provides that a youthful offender who has successfully completed his period of probation may apply to the court which sentenced him ‘for an order to expunge from all official records \*\*\* all recordations of his arrest, trial and conviction.’ By use of the word ‘from’, it is evident that the legislature intended ‘expunge’ to mean ‘to strike out, blot, obliterate, delete or cancel’ that part of the record which identifies it with the offender. It does not call for destruction or annihilation of the records themselves. On the other hand, the requirements of the statute are not met by placing the records in an envelope, sealing them, and retaining them in protective custody.” (532 S.W.2d at p. 896)

It might be argued that a distinction may be drawn between an “order ... that the record be expunged” and an “order to expunge *from* all official records ...”, the latter requiring the destruction of the records and the former requiring only that the records be sealed in an envelope marked “expunged.” Such a distinction, however, renders the statute inconsistent with the ordinary usage of the word “expunge.” Consequently, “expunging” the record by placing it in a sealed envelope and stamping it “expunged” neither comports with the common usage of the word or the requirements of sec. 973.015, Stats.

It is a rule of statutory construction that the meaning of a section of a statute must be derived from consideration of the statute as a whole. *State v. Wachsmuth*, 73 Wis.2d 318, 243 N.W.2d 410

(1976). In subsec. (1) of sec. 973.015, Stats., the court may order expunction at the time of sentencing on the condition of successful completion of the sentence. As stated previously, "expunction" is the striking out or obliteration of the record and has been generally held to be not a legal act but a physical annihilation. *Dubnoff v. Goldstein*, 385 F.2d 717 (1967); *Application of Brandon, supra*.

Subsection (2) provides that the filing of the certificate of discharge "shall have the effect of expunging the record." One reading of subsec. (2) could be that no physical act of striking or obliterating the name and identity of the defendant is required. The mere filing of the certificate of discharge, by operation of law, expunges the record. Such an interpretation, however, renders the statute unreasonable and absurd in light of the common meaning of "expunge." Therefore, considering the statute as a whole, I am of the opinion that the phrase "which shall have the effect of expunging the record" in subsec. (2) must be construed to mean that the filing of a certificate of discharge will give notice to the clerk of courts to physically strike from the record all references to the name and identity of the defendant.

BCL:CAB

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*Contracts; Counties; Highways; Public Purpose Doctrine; Snow Removal; Section 86.105, Stats., does not authorize counties to contract to plow private parking lots. Because of increased availability of private sector alternatives any activity engaged in pursuant to said statute should meet the stringent restrictions set forth in 50 Op. Att'y Gen. 98 (1961), in an analogous context. OAG 91-78*

December 18, 1978.

PATRICK H. STIEHM, *District Attorney*  
*Washburn County*

You have asked me to clarify the county's authority to remove snow from private roads and driveways under the authority of sec. 86.105, Stats. Specifically, you ask whether this authority would permit the county to contract to plow private parking lots or private

driveways. I conclude, for the reasons discussed below, that the statute must be construed extremely narrowly to include several restrictions not explicitly set forth in the statute and, as so construed, would not authorize the plowing of parking lots. Only in exceptional circumstances would the plowing of private driveways be permissible.

Section 86.105, Stats., provides:

“The governing body of any county, town, city or village may enter into contracts to remove snow from private roads and driveways.”

In order to place the interpretation of this section in proper context, a review of the controversies surrounding efforts to authorize local units of government to construct or repair private roads and driveways is necessary.

In February, 1947, one of my predecessors determined that there was no statutory authority for a county to “do highway work for private individuals.” 36 Op. Att’y Gen. 69 (1947). Counties have only such legislative powers as are expressly granted by statute or necessarily implied. *Maier v. Racine Co.*, 1 Wis.2d 384, 84 N.W.2d 76 (1957). To remedy this perceived deficiency in the law, the Legislature passed, over the Acting Governor’s veto, ch. 457, Laws of 1947, which provided:

“PRIVATE ROAD WORK BY MUNICIPALITIES AND COUNTIES. Any town, city, or village, by its governing body, may enter into contracts to build, grade, drain, surface, and gravel private roads and driveways. Any county, by its governing body, may enter into agreements with a municipality to perform for it any such work.”

The constitutionality of this statute was challenged when the Ozaukee County Board relied on its provisions the following year. *Heimerl v. Ozaukee County*, 256 Wis. 151, 40 N.W.2d 564 (1949). In declaring the statute to be unconstitutional, the court began its analysis by finding that the building of private roads is not a public purpose. It further found that the methods to be used in implementing the statute were not sufficiently narrowly defined to ensure against additional elements of impermissible private advantage. Specifically, the court listed three areas where the statute was too broad in its authorization and by implication suggested

minimum provisions to ensure: 1) the road's necessity for ingress and egress, 2) accounting procedures to protect taxpayers and 3) avoidance of competition with private operators. The court, in finding that there were insufficient safeguards to protect taxpayers, reasoned in part:

“Even if the county highway department required payment of every item properly chargeable for work done by authority of the resolution and without any ultimate cost to the county (which sec. 86.106, Stats., does not provide), until it received compensation from the city, village, or town, it would have the taxpayers' money invested in the work, money raised by a tax levy. ...” *Id.* at 158.

The court, in the course of the opinion, found other deficiencies in the legislation, including a conferring of powers upon county boards which are not local, legislative or administrative in character in contravention of Wis. Const. art. IV, sec. 22. *Id.* at 159.

Early in the next session of the Legislature, another bill was drafted which authorized operation or lease of county equipment on privately owned lands only under narrowly drawn circumstances. Under the bill, Substitute Amendment 1, A., to Bill No. 291, A., 1951 Session, county work was authorized only if other state work was not prejudiced and other equipment was not available in the county, if there was full prepayment at rates comparable to the charges made to the state, and if the road connected the main building to a public road.

These provisions were found not sufficient in 40 Op. Att'y Gen. 59 (1951), to overcome the three objections specifically made by the supreme court in that the private roads might not be necessary, the actual cost of construction might exceed the estimated cost which had been paid and private equipment might be available in a neighboring county, but a short distance away.

Shortly thereafter, another bill, Substitute Amendment No. 1, S., to Senate Bill 614, was introduced to accomplish the same purposes as the legislation discussed, *supra*. Although upon review it was found apparently to have met the objections enumerated by the supreme court in *Heimerl*, it was concluded that:

“... There remains a distinct possibility that the proposed law might still be declared unconstitutional upon the grounds that the power granted is not local, legislative and administrative in character, that there is no direct advantage to the health, safety and welfare of the community as a whole, and that it authorizes the county to engage in private business. The language of the court in the *Heimerl* case is quite broad in this regard, and therefore it cannot be said that the constitutionality of the proposed statute is free from doubt.” 40 Op. Att’y Gen. 151, 153 (1951).

In 1961, almost *verbatim*, the process was repeated. 50 Op. Att’y Gen. 98, 102 (1961).

This brief review suggests the difficulties inherent in properly circumscribing local governmental activity in this area. In this context, I believe that for activity under sec. 86.105, Stats., to be constitutional, it must address the problem areas recognized in *Heimerl* as discussed in prior opinions of the Attorney General. My conclusion is based on historical considerations as well as established doctrine related to the definition of public purpose.

At the outset, it is relevant to note that secs. 86.105 and 86.106 were enacted within weeks of each other, are in substantially the same form and concern similar governmental activity. Further, the process whereby the court in *Heimerl* was provided the occasion to review sec. 86.106, Stats., may have only accidentally prevented it from reviewing sec. 86.105, Stats.<sup>1</sup> Confronted by such a limitation in the record, the court nevertheless may have intended its discussion of limitations on the means to accomplish a proper end would apply to the companion statutory provision as well, although not technically before it.

This reading is consistent with the analytical process used by the court in *Heimerl*. The court first analyzed whether the purpose of the activity authorized by sec. 86.106 was essentially public or private. It

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<sup>1</sup> There is evidence to suggest that this limitation may have been the result of a clerical error. The challenged Board resolution purported to authorize county activity by setting forth *verbatim* the language of sec. 86.106, Stats., denominating it as such, and also setting forth the *verbatim* language of sec. 86.105, Stats., but denominating it sec. 86.106, Stats. Thus, the resolution authorized action under both sections, but only referenced sec. 86.106. This discrepancy is nowhere referenced in the appellate briefs or by the court.

concluded that the activity was essentially private. That conclusion, once reached, provided sufficient analysis. The court, however, proceeded to examine additional problems related to method of finance, competition with private business and other matters that would only be relevant to defining the means to accomplish a proper purpose.

In the course of its opinion in *Heimerl*, the court proposed a proper purpose for sec. 86.105, Stats., considerably narrower than the plain words of the statute:

“... It is common knowledge that when public highways are snowplowed, large amounts of snow are piled into private driveways, thereby creating a greater obstruction than already existed. Then, too, this section is distinguished from sec. 86.106, for the removal of snow is an emergency situation and the public safety of the community in general is directly affected.” *Heimerl*, at 156.

The similarities between secs. 86.105 and 86.106, and the likely application of the narrow standards proposed in *Heimerl* to sec. 86.105, have been noted:

“... sec. 86.105 ... authorizes the governing body of any county, town, city or village to enter into contracts to remove snow from private roads and driveways. *Obiter dicta* found in the *Heimerl* case, at page 156, would indicate that this statute might survive a constitutional test in our supreme court; yet the same statute has many of those defects which led the court, in the *Heimerl* case, to declare sec. 86.106, ‘too broad in its powers’. See pages 160, 161. It permits snow removal by the governing bodies therein mentioned without regard to any connection between such removal and the necessity of getting to and from the public road; it sets up no structure for charges and disbursements so that all taxpayers may be equally protected; and it makes no restriction as to those counties or towns where private road builders are equipped to operate. ...” 50 Op. Att’y Gen. 98, 101 (1961).

Further caution in implementing sec. 86.105, Stats., is warranted because the recognition of the existence of a public purpose in a specific activity is dependent on contemporary public opinion as well as the ability of the private sector to meet the needs existing in the

community at large.<sup>2</sup> As noted in *State ex rel. Bowman v. Barczak*, 34 Wis.2d 57, 64-65, 148 N.W.2d 683 (1967), approving language in *State ex rel. Wisconsin Dev. Authority v. Dammann*, 228 Wis. 147, 180, 277 N.W. 278, 280 N.W. 698 (1938):

““Times change. The wants and necessities of the people change. The opportunity to satisfy those wants and necessities by individual efforts may vary. ... [The] two tests [of a public use] are: First, the subject matter, or commodity, must be one of ‘public necessity, convenience or welfare.’ ... The second test is the difficulty which individuals have in providing it for themselves.”” *Laughlin v. City of Portland*, 111 Me. 486, 90 A. 318, 320, 323 (1914).

While the definition of public purpose is generally acknowledged as becoming more inclusive, *Bowman, supra*, at 64-65, *State ex rel. Wisconsin Dev. Authority v. Dammann, supra*, at 180, the increased availability of snow removal equipment and related technologies in the private sector<sup>3</sup> suggests a narrowing of the term in the present circumstances.

Because the supreme court has, by implication, upheld the constitutionality of sec. 86.105, Stats., but in the course of doing so established stringent guidelines for accomplishing such an apparently proper goal, and because I concur with my predecessors’ close examination of subsequent efforts to narrowly define proper means to such a goal, I conclude that the county may not, pursuant to sec. 86.105, Stats., plow private parking lots. I further conclude that local governmental activity in this area, including plowing private driveways, should be undertaken only when necessary with proper payment mechanisms and respecting available private alternatives.

BCL:JFS

<sup>2</sup> See generally, *Mills*, “The Public Purpose Doctrine in Wisconsin,” 1957 Wis. L. Rev. 282; *Eich*, “A New Look at the Internal Improvements and Public Purpose Rules,” 1970 Wis. L. Rev. 1113.

<sup>3</sup> “The legislature apparently had in mind that there were few persons or companies with the necessary heavy equipment to properly plow driveways in the winter time. Obviously, as the county has the machinery to plow public highways, they should be permitted to plow snow on private property.” Appellant Ozaukee County’s supreme court brief at 15.

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*Attorneys; Judges; Legislature; Public Officials; Section 2 of 1977 Senate Resolution 14 which, if adopted, would create senate rule 73(1)(b), prohibiting members who are attorneys from voting on bills creating additional judgeships or pay raises or retirement benefits for judges, would unconstitutionally deny equal protection of the laws to those citizens represented in the Senate by members who are also attorneys. OAG 92-78*

December 20, 1978.

FRED A. RISSER, *Chairperson*  
*Senate Organization Committee*

You have requested my opinion of the constitutionality of section 2 of 1977 Senate Resolution 14, which, if adopted, would create senate rule 73(1)(b), providing that:

“No member who is an attorney may vote on any bill providing for the creation of additional judgeships or dealing with pay raises or retirement benefits for judges. Nothing in this paragraph shall excuse a member who is an attorney from voting on a budget or budget review bill introduced under section 16.47 or 16.475 of the statutes. Nothing in this paragraph shall excuse a member who is an attorney from voting on any bill pertaining both to the matters specified and to other aspects of the judicial branch of state government, but as to such bills any member who is an attorney may be excused under par. (a) at the member’s request.”

Because the Wisconsin Constitution grants to each house of the Legislature the authority to determine the rules of its own proceedings, Wis. Const. art. IV, sec. 8, those rules for the most part are immune from scrutiny by other branches of government. *See State ex rel. Lynch v. Conta*, 71 Wis.2d 662, 694, 695, 239 N.W.2d 313 (1976). Rules of legislative procedure are not supreme, however, and cannot contravene provisions of the state constitution or provisions of the United States Constitution. 81A C.J.S. *States* sec. 52, at 399, 400. *See State ex rel. Lynch v. Conta*, 71 Wis.2d at 695, 697; *Integration of the Bar Case*, 244 Wis. 8, 34, 11 N.W.2d 604 (1943). *Cf. Bond v. Floyd*, 385 U.S. 116, 131 (1966); *State ex rel.*

*Elfers v. Olson*, 26 Wis.2d 422, 426, 132 N.W.2d 526 (1965). Consequently, to the extent that procedural rules might be unconstitutional, they are subject to review like substantive acts of the Legislature. *State ex rel. Lynch v. Conta*, 71 Wis.2d at 695. See *State ex rel. Elfers v. Olson*, 26 Wis.2d at 426; cf. *Bond v. Floyd*, 385 U.S. at 131.

I have concluded that the proposed rule would be unconstitutional because it would deny equal protection of the laws to those citizens represented in the Senate by members who are attorneys.

Meaningful analysis of this issue must begin with recognition of the following fundamental principle:

“[R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State’s legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them.” *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). See also *Bond v. Floyd*, *supra*, at 136, 137.

The proposed rule would affect not only the lawyer-legislators at whom it is aimed; it would affect their constituents as well. It would create two classes of citizens in Wisconsin, those whose elected representatives could participate fully in the legislative process, and those whose representatives could participate only partially on their behalf. Cf. *Ammond v. McGahn*, 390 F. Supp. 655, 660 (D. N.J. 1975), *rev’d. on other grounds*, 532 F.2d 325 (3rd Cir. 1976).

The authority of the Legislature to make classifications is great, of course, and any class it creates is presumed to be valid. *E.g.*, *State ex rel. Hammervill Paper Co. v. La Plante*, 58 Wis.2d 32, 74, 205 N.W.2d 784 (1973). When an irrational or arbitrary classification is made, however, *i.e.*, when no state of facts can be conceived which would justify the different treatment each class would receive, the members of the disadvantaged class are denied their constitutional right to equal protection of the laws. *Id.* at 74, 75. I cannot imagine any realistic state of facts that would justify treating citizens represented by members of the Senate who also happen to be members of the legal profession differently from citizens represented

by senators who pursue other professions, trades, occupations or callings.

It may be the purpose of the proposed rule "to prevent persons, while possessed of the prestige and influence of official power, from using that power for their personal advantage" by creating offices outside the Legislature to which they anticipate appointment or election, and afterwards payment of salary and retirement benefits. *Cf. State ex rel. Zimmerman v. Dammann*, 201 Wis. 84, 96, 228 N.W. 593 (1930). There is no valid reason, however, to suppose that lawyer-legislators are more inclined than other legislators to use their legislative power to further their own career interests outside that branch of government. Physician-legislators, for instance, might seek to increase the number and emoluments of medical staff positions in the state hospitals; educator-legislators, the professorial positions in the state schools; career public servant-legislators, the administrative positions in the state bureaucracy. The list could be nearly as extensive as the number of occupations engaged in by those elected to the Senate.

The same is true if the purpose of the proposed rule is to prevent senators from bestowing personal or political favors on occupational colleagues. There is no reason to suppose, moreover, that senators who are not attorneys would not seek to create additional judgeships, or to increase the pay and retirement benefits of judges, as a personal or political favor for relatives or friends in the legal profession.

I can discern no substantial difference between the two classes of citizens and senators the proposed rule would create that would justify the different treatment each would receive. The proposed rule, therefore, would deny equal protection of the laws to that class whose participation in the legislative process would be diluted solely because of the profession of the person chosen by the people to represent them.

Even if some rational basis for this classification could be conceived, however, the proposed rule would still be constitutionally offensive.

Abridgement of a fundamental right, such as that of any citizen or class of citizens to participate in the legislative process through elected representatives, *Reynolds v. Sims*, 377 U.S. at 561, 562, 565, can be justified only by a compelling governmental interest, and must

be accomplished by means, rationally related to that interest, which are the least restrictive of the fundamental right. *E.g. Elrod v. Burns*, 427 U.S. 347, 362, 363 (1976), and cases cited.

“[A] State may not choose means that unnecessarily restrict constitutionally protected liberty. “Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.” If the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.” *Id.* at 363, *quoting Kusper v. Pontikes*, 414 U.S. 51, 59 (1973) (citations in original omitted).

Preventing legislators from abusing their public offices for personal advantage appears to be a significant governmental interest. *See State ex rel. Zimmerman v. Dammann*, 201 Wis. at 96. This interest, however, can be, and is, satisfied by means which do not restrict the rights of the legislator’s constituents. Article IV, sec. 12, of the state constitution prohibits any legislator from being appointed or elected, during the term for which that person was elected to the Legislature, to any civil office in the state which was created, or the emoluments of which were increased, during that term. The duration of this prohibition could be increased by constitutional amendment if it is deemed insufficient.

Assuming the state has a constitutionally valid compelling interest in preventing legislators from using their public offices for the private benefit of others, *see generally State ex rel. Reuss v. Giessel*, 260 Wis. 524, 531, 51 N.W.2d 547 (1952), such a compelling interest could be similarly satisfied by prohibiting particular persons, such as relatives and close associates of legislators, from assuming civil offices during the same period that legislators are prohibited from doing so.

Because the proposed rule would unnecessarily abridge the fundamental right of Wisconsin citizens to participate in their government, it would violate the equal protection clause of the fourteenth amendment to the United States Constitution.

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*Arrest; Automobiles And Motor Vehicles; Implied Consent Law; Law Enforcement; Motor Vehicles; Traffic;* A driver of a motor vehicle cannot be asked to take a test to determine alcoholic intoxication pursuant to sec. 343.305(2)(am), Stats., unless there has been a lawful arrest. OAG 93-78

December 27, 1978.

DON GEHRMANN, *Coordinator*  
*Division of Highway Safety Coordination*  
*Office of the Governor*

You ask several questions under the Implied Consent Law as revised by ch. 193, Laws of 1977. Each of your questions will be answered in turn:

(1) "Section 343.305(2)(am) states, 'a law enforcement officer shall request any person who was the operator of a motor vehicle involved in an accident resulting in great bodily harm or death to any person to take a test as provided under par. (b) or (c) for the purpose specified in sub.(1).' In the case where an operator of a motor vehicle is involved in a crash where there is a fatality or a very serious injury and this operator is not given a citation for 'operating while intoxicated' or any other traffic violation, would the law enforcement officer have to request that person to submit to a test? ..."

The law enforcement officer could *not*, in the absence of a validly issued citation, request that an operator of a motor vehicle involved in a crash when there is a fatality or a very serious injury submit to a test. The statutory scheme under secs. 343.305(b) and (c), Stats., contemplates that a lawful arrest be made prior to a request for submission to a test.

(2) "... If the law enforcement officer does request a test and the operator refuses, that operator would have no means of a refusal hearing if no citation had been issued, s.343.305(3)(b)4. If there is no means for a refusal hearing, are we denying that operator his or her due process of the law?"

Only an arrest triggers the revocation mechanism. Without an arrest, an individual's license cannot be revoked; thus, there is no due process problem. *See* secs. 343.305(3)(b), (3)(b)4. and (8)(a) and (b). In short, revocation cannot occur without a hearing; a hearing cannot occur without a citation and a citation cannot occur without an arrest. An individual who has not been arrested cannot have his or her license revoked for failure to submit to a test and, therefore, has no need for a refusal hearing.

(3) "... Section 343.305(6)(b) states, 'no person acting under par. (a) nor the employe of any such person, nor any hospital where blood is withdrawn may incur any civil or criminal liability for the act if requested by a law enforcement officer to perform it, except for civil liability for negligence in the performance of the act.' Since paragraph (6)(a) states, 'blood may be withdrawn from the person arrested for the purpose of determining the presence or quantity of alcohol or controlled substance in the blood...', would a physician, registered nurse, medical technologist, physician's assistant or person acting under the direction of a physician not be covered under this liability if asked by a law enforcement officer to draw blood under s.343.305(2)(am) if no arrest had been made?"

Since an arrest must be made before a law enforcement officer can request that an individual submit to a test, a physician, registered nurse, medical technologist, physician's assistant or person acting under the direction of a physician need not worry about liability incurred for drawing blood in the absence of an arrest. In short, the statutory requirements preclude such a situation from arising.

BCL:AOH:WHW

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*Civil Service; Elections; Industry, Labor And Human Relations, Department Of; Discussion of restrictions on political activities of state employes under federal and state law. OAG 94-78*

December 27, 1978.

ZEL S. RICE II, *Secretary*

*Department of Industry, Labor and Human Relations*

You ask the following questions relative to restriction of political activities of your employes under federal and state legislation:

"It is my understanding that all DILHR employes, regardless of the source of their funding, whether they are totally funded by federal funds, or totally funded by state funds, are subject to the federal Hatch Act, and to the state laws. Is this correct?"

"The types of activity an employe might engage in include:

"Running for nonpartisan office

"Working on the campaign of a person running for nonpartisan office

"Running for partisan political office

"Working off normal work hours in the campaign of a candidate for pay

"Working off normal work hours in the campaign of a candidate on a voluntary basis

"Using signs or buttons supporting a candidate in the work area

"Using signs supporting a candidate on an automobile parked in a state parking lot

"Buying advertising supporting a candidate

"Which of these are not permitted under state law? Which of these are not permitted under federal law? Which law prevails if they are in conflict?"

#### Federal Law

The Federal Hatch Act, 5 U.S.C. sec. 1501, *et seq.*, applies to:

"... an individual employed by a State or local agency whose principal employment is in connection with an activity which is financed in whole or in part by loans or grants made by the United States or a Federal agency, but does not include--

"(A) an individual who exercises no functions in connection with that activity. ..."

With respect to state or local officers to whom the federal law is applicable the following activities are prohibited by 5 U.S.C. sec. 1502:

“(a) A state or local officer or employee may not--

“(1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office;

“(2) directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, contribute anything of value to a party, committee, organization, agency, or person for political purposes; or

“(3) be a candidate for elective office.”

There are probably employes in your Department whose “principal employment” is not connected with a federally supported activity; and others, such as members of a maintenance staff, who perform no functions connected with such activity. Such employes are subject only to the state law.

As to those who are included in the definition, however, the Hatch Act has been liberalized since its original enactment. It formerly prohibited an employe subject to the Act from taking an “active part in political management or in political campaigns,” but that provision was changed to prohibit only being “a candidate for elective office.” See *Brown v. United States Civil Service Commission*, 553 F.2d 531 (7th Cir. 1977).

The prohibition against being a candidate for office now relates only to partisan elections, since 5 U.S.C. sec. 1503 provides that the statute:

“... does not prohibit any State or local officer from being a candidate in any election if none of the candidates is to be nominated or elected at such election as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected.”

In answer to your specific questions with respect to Hatch Act prohibitions which apply to those whose principal employment is in connection with federally supported programs:

1. Such an employe may run for a nonpartisan office.
2. He may work on the campaign of a person running for nonpartisan office either as a volunteer or for pay.
3. He may not run for partisan office.
4. Since 5 U.S.C. sec. 1502 prohibits an employe from using "his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office," the answer in a given case may depend upon whether the employe's official position has an effect upon the election. I believe the safer course would be for an employe subject to the Act to refrain from participation if any of the candidate's issues involves an activity in which the influence of the employe's position may affect a vote. If his position is unrelated to issues involved in the campaign, it is my opinion that he may participate for pay during off-duty hours.

The U.S. Supreme Court indicated in *Elrod v. Burns*, 427 U.S. 347, 370-371 (1976), that "political campaigning and management" are "activities themselves protected by the first amendment." The Constitution, however, protects the use but not the abuse of guaranteed rights.

5. The same tests apply to an employe's working without pay as with pay. He may not participate if his position is such that a vote will be affected by his position rather than by him as an individual.
6. Display of signs and buttons supporting a candidate in the work area is inadvisable for supervisory personnel. I can find no cases or materials directly on point. In the work area, it is difficult to separate the influence of the individual from the position the individual occupies. I believe such display could be construed as using a supervisor's official influence to affect the result of an election as prohibited by 5 U.S.C. sec. 1502(a). This section could not, however, be applied to nonsupervisory personnel wearing buttons or displaying signs in the work area.
7. The Hatch Act does not apply to all state employes, but only to those whose "principal employment is in connection with a federally supported activity." From the mere display of a sign favoring a candidate on an automobile in a state parking lot, without more, it cannot be determined that there is use of official authority or influence to interfere with or to affect the result of an election. If the

parking lot were limited to an agency receiving federal funds, it might be found to be the use of official authority or influence to affect an election; or there might be additional circumstances which would modify the result. Generally speaking, I do not believe the display of a sign supporting a candidate on a car in a state parking lot is a violation of the Hatch Act.

8. Buying advertising which does not identify the purchaser as supporting a candidate is not subject to any limitations. If the advertisement deals with an issue connected with the federally supported activity and identifies the purchaser, it would be a use of official authority contrary to the Hatch Act as I discussed in paragraphs 4 and 5. If, however, it merely declares the individual's support of the candidate on the basis of competence rather than on his stand on the activity in which the employe is involved, I do not believe it would be classified as a use of official authority.

#### State Law

The state regulations relating to political activities were revised by ch. 334, sec. 44, Laws of 1973. Section 16.35 now prohibits political activities by a classified civil service employe only "while on state time or engaged in his official duties as an employe" or when not on duty "to such extent that his efficiency during working hours will be impaired or that he will be tardy or absent from his work."

1. An employe may run for a nonpartisan political office if it does not involve use of state time nor interfere with his work.

2. He may work on the campaign of a candidate for such office with the same limitations.

3. Under sec. 16.35(2), Stats., a civil service employe may run for partisan office only by obtaining leave from state service for the duration of the campaign.

4. State law does not prohibit an employe from working in a political campaign for pay if it is not done on state time or while engaged in his official duties, nor to such an extent as to impair his efficiency or cause him to be tardy or absent from his work.

5. He may work in a campaign without pay subject to the same restrictions.

6. Displaying signs or buttons supporting a partisan candidate in the work area would be contrary to the following provision of sec. 16.35(1), Stats.:

“No person holding any position in the classified civil service may during the hours when he is on duty engage in any form of political activity calculated to favor or improve the chances of any political party or any person seeking or attempting to hold partisan political office. ...”

Signs or buttons supporting nonpartisan candidates are not forbidden.

7. The question whether leaving a sign on a car in a state parking lot is engaging in a “form of political activity” during the hours when he is “on duty” is more difficult.

If the mere display of a sign away from the place of duty were held to constitute engaging in a form of political activity during working hours, a question might arise with respect to displaying a sign on one’s home or in one’s yard while the employe is on duty. Presumably the car is parked before the employe goes on duty, and removed after his duty is completed.

Since the statute is penal in the sense that it can subject a violator to dismissal from his job, it is subject to the rule of strict construction. It is my opinion that leaving a sign on a car parked in a state lot, while the owner is on duty elsewhere, does not violate the statute.

8. Buying advertising supporting a candidate is subject to the same restriction as in questions 4 and 5, but is not prohibited when it does not interfere with performance of the employe’s duties.

You also ask which law prevails in the event of conflict between the state law and the federal law. The federal law applies if the principal employment is in connection with a federally funded activity. Where both are applicable, the more stringent must be observed.

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*Elections*; The provisions of sec. 11.50, Stats., created by ch. 107, Laws of 1977, which impose limits on the primary election campaign expenditures of candidates seeking public financing of their spring and general election campaigns are constitutional. OAG 95-78

December 28, 1978.

GERALD J. FERWERDA, *Executive Secretary*  
*State Elections Board*

You point out that the newly established plan for the public financing of statewide election campaigns contained in sec. 11.50, Stats., as created by ch. 107, Laws of 1977, requires, in part, that candidates desiring grants from the Wisconsin election campaign fund created by the statute must agree to limit their total disbursements, in the primary as well as in the spring or general election, to the maximums authorized for each election under sec. 11.31, Stats., even though any public grant available from the fund can only be utilized in the spring or general election. Sec. 11.50(2) and (11)(a), Stats. (1977). On behalf of the Elections Board, you request my opinion on the constitutionality of the imposition of limits on the primary election campaign expenditures of candidates seeking public financing of their spring or general election campaigns.

A proper response to your question may be gleaned from the guidelines set forth in *Buckley v. Valeo*, 424 U.S. 1 (1976), which invalidated much of the Federal Election Campaign Act of 1971, as amended in 1974. This case has been previously discussed in reference to various provisions of Wisconsin's campaign finance law in 65 Op. Att'y Gen. 145 and 237 (1976).

Although the court in *Buckley* held that the federal Act's expenditure limits were unconstitutional because such provisions placed "substantial and direct restrictions on the ability of candidates, citizens, and associations to engage in protected political expression, restrictions that the First Amendment cannot tolerate," 424 U.S. at 58-59, the Court nevertheless upheld expenditure limitations voluntarily accepted by a candidate as a condition of the receipt of public financing of his campaign, saying, at 424 U.S. 57, footnote 65:

“For the reasons discussed in Part III, *infra*, Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo private fundraising and accept public funding.”

*See also* 424 U.S. at 85-109.

The comprehensive funding plan for the public financing of presidential election campaigns treated in *Buckley* provided separately for the funding of party nominating conventions, primary election campaigns and general election campaigns and established corresponding expenditure limitations in reference to each phase of the election process. 424 U.S. at 85-90. But, I find no basis in that case nor can I conceive of any good reason for concluding that campaign expenditure limitations may only relate to those portions of the total election process for which funding is made available.

The aims of the Wisconsin Legislature in creating sec. 11.50, Stats., and its related statutory provisions appear similar to those which apparently motivated Congress to tie expenditure limits to the receipt of public funding for campaigns. Among those motivations recognized by the *Buckley* Court was an intent “to reduce the deleterious influence of large contributions on our political process, to facilitate communication by candidates with the electorate, and to free candidates from the rigors of fundraising,” 424 U.S. at 91, to require “some preliminary showing of a significant modicum of support” of candidates seeking funding, 424 U.S. at 96, and “to reduce financial barriers and to enhance the importance of smaller contributions,” 424 U.S. at 107. These aims are just as meritorious applied to the primary as when applied to the final election. The primary is, after all, an integral part of the election process. *State ex rel. Wettengel v. Zimmerman*, 249 Wis. 237, 243, 24 N.W.2d 504 (1946). In fact, it is doubtful whether these aims could be effectively realized if those who wished public financing of their spring or general election campaigns were free of any spending constraints whatsoever prior to those final campaigns.

Some candidates who have applied for spring or general election funding under sec. 11.50, Stats., and have complied with the primary

election disbursement limitations as a precondition to receipt of a grant under that section, may not be finally approved as an "eligible candidate" for participation in the fund. That result, however, does not cause sec. 11.50 to be constitutionally infirm.

The decision to accept the conditions attached to public funding of spring and general election campaigns entails a voluntary choice on the part of each applicant. It is neither unreasonable as a matter of legislative choice nor unfair to the individual applicants for aid to require that they compete for such funding on the basis of some semblance of financial equality. Those who prefer to avoid any limitations on the level of their campaign spending are in no way hindered by the provisions of sec. 11.50, Stats., while even those who apply and fail to qualify for such funding are likewise free from further disbursement limitations.

In conclusion, it is my opinion that the provisions of sec. 11.50, Stats., which impose limits on the primary election campaign expenditures of candidates seeking public financing of their spring or general election campaigns do not unconstitutionally burden or disadvantage any candidate for any public office covered by the statute.

BCL:JCM

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*Licenses And Permits; Taxation; Words And Phrases;* If they satisfy other conditions under sec. 163.90, Stats., and other raffle requirements, political organizations are eligible for a raffle license because contributions to such organizations are deductible for federal or state income tax purposes within the meaning of the statute. Political subdivisions of the state also are eligible for raffle licenses under the same conditions and for the same reasons. OAG 96-78

December 28, 1978.

FRED A. RISSER, *Chairperson*  
*Senate Organization Committee*

You ask whether a political organization is eligible for a raffle license.

Section 163.90, Stats., as created by ch. 426, Laws of 1977, provides in part that "any organization to which contributions are deductible for federal or state income tax purposes" may conduct a raffle upon receiving a license for the raffle event from the Bingo Control Board. For reasons hereafter set forth and subject to the conditions discussed, it is my opinion that political organizations are eligible for a raffle license under sec. 163.90, Stats.

Some concern has been expressed over the proper definition of the word "organization" within the meaning of the applicable statute. The introductory passage to sec. 990.01, Stats., provides that in the construction of Wisconsin laws, the words and phrases which follow shall be construed as indicated unless such construction would produce a result inconsistent with the manifest intent of the Legislature. Subsection (1) provides that all words and phrases shall be construed according to common and approved usage except for technical words and phrases and others that have a peculiar meaning in the law. According to its common and approved usage, the word "organization" is a "group of people that has a more or less constant membership, a body of officers, a purpose and usually a set of regulations." *Webster's Third New International Dictionary* 1590 (3rd ed. 1961). It also is defined as a body of administrative officials or, more specifically, a professional and full-time body of officials directing the affairs of a political party. *Id.* Thus, although each application must be examined on its own merits, generally a political party or a political campaign committee would qualify as an "organization" under sec. 163.90, Stats.

The statute refers to contributions which are deductible for federal or state income tax purposes and does not refer to charitable contributions alone. Moreover, if any part of the contribution is deductible for federal or state income tax purposes, the conditions of the statute are satisfied. Section 218(a) of the Internal Revenue Code provides:

- (a) Allowance of deduction.--In the case of an individual, there shall be allowed as a deduction any political contribution (as defined in section 41(c)(1)) or newsletter fund contribution (as defined in section 41(c)(5)) payment of which is made by such individual within the taxable year.

Section 41(c) of the Internal Revenue Code provides in part:

(1) Political contribution.--The term "political contribution" means a contribution or gift of money to--

(A) an individual who is a candidate for nomination or election to any Federal, State, or local elective public office in any primary, general, or special election, for use by such individual to further his candidacy for nomination or election to such office;

(B) any committee, association, or organization (whether or not incorporated) organized and operated exclusively for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals who are candidates for nomination or election to any Federal, State, or local elective public office, for use by such committee, association, or organization to further the candidacy of such individual or individuals for nomination or election to such office;

(C) the national committee of a national political party;

(D) the State committee of a national political party as designated by the national committee of such party; or

(E) a local committee of a national political party as designated by the State committee of such party designated under subparagraph (D).

....

(5) Newsletter fund contribution.--The term "newsletter fund contribution" means a contribution or gift of money to a fund established and maintained by an individual who holds, has been elected to, or is a candidate for nomination or election to, any Federal, State, or local elective public office for use by such individual exclusively for the preparation and circulation of a newsletter.

Although the above quoted passages from the Internal Revenue Code answer the question which you have raised, I invite your attention to the remaining portions of secs. 41 and 218 of the Code. These sections might prove helpful in determining whether a license

should be issued when an organization's entitlement to one is not clear.

Section 71.02(2)(f), Stats., as herein material, defines "Itemized deductions" as "deductions from federal adjusted gross income allowable under the internal revenue code in determining federal taxable income." Our state income tax laws at no point specifically allow for the deduction of any political contributions other than those allowed under the Internal Revenue Code and, therefore, sec. 71.02(2)(f), Stats., adopts by reference the Code provisions discussed above.

It is conceivable that not all political organizations will qualify for a raffle license because of an additional condition contained in sec. 163.90, Stats. The organization must have been in existence for one year immediately preceding its application for a license or must be chartered by a state or national organization which has been in existence for at least three years. Although these alternative requirements obviously are satisfied by most political organizations such as established county political parties, the entitlement of a political campaign committee is not always so clear. I make this observation because the Bingo Control Board has received applications from personal campaign committees which have not been in existence for one year immediately preceding application for a license. On the other hand, other personal campaign committees which have applied for licenses have been in existence for at least one year.

The Legislature has provided that the profits from bingo not be used for "any activities consisting of an attempt to ... participate in any political campaign on behalf of any elected official or ... candidate for public office." Secs. 163.02(2) and 163.03(8)(b), Stats. However, the Legislature carefully excluded raffles from this prohibition inasmuch as the amendments in ch. 426, sec. 3, Laws of 1977, restrict only "the profits of bingo ... [to] the lawful purposes specified in this chapter."

Although not directly related to your question, the Bingo Control Board also has asked whether a village, city, township, county, school district, etc., is eligible for a raffle license since contributions to these political subdivisions of the state are deductible under sec. 170 of the Internal Revenue Code. Subsection (b)(1)(A)(v) of sec. 170

provides, in effect, that charitable contributions are deductible for federal income tax purposes when made to a governmental unit referred to in subsec. (c)(1). Subsection (c)(1) states that the term "charitable contribution" means a contribution or gift to or for the use of a state or any political subdivision thereof but only if the contribution or gift is made for exclusively public purposes.

As sec. 163.90, Stats., covers *any* organization to which contributions are deductible for federal or state income tax purposes, it is my opinion that these political subdivisions would be so eligible. They would qualify under the definition of "organization" discussed above and other commonly approved usages of that term. It is not essential that these organizations have "members" in any technical sense because the residents of the political subdivision would constitute "a group of people that has a more or less constant membership."

Moreover, sec. 163.11(1), Stats., expressly provides that "any organization, *other than the state or any political subdivision thereof*, to which contributions are deductible for federal or state income tax purposes, may apply to the board for a license to conduct bingo." This specific exclusion of the state or any political subdivision thereof under the bingo provisions and the absence of such exclusion relative to raffles under sec. 163.90, Stats., which was enacted after the bingo provisions, clearly shows the legislative intent even though resort to legislative intent is unnecessary because of the clear and unambiguous language of sec. 163.90, Stats., and the applicable provisions of the Internal Revenue Code.

BCL:DPJ

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*Arrest; Discrimination; Employer And Employee; Labor; Licenses And Permits; Nurses; 1.* A licensing agency may not ask an applicant about juvenile delinquency records.

2. A licensing agency may request information from an applicant regarding conviction records under sec. 111.32(5)(h), Stats. OAG 97-78

December 28, 1978.

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

You ask whether the following three questions on your applications for licenses of registered and practical nurses under secs. 441.04 and 441.10, Stats., would conflict with the recently enacted ch. 125, Laws of 1977:

- (1) "Have you ever been found delinquent by a juvenile court?"
- (2) "Have you ever been convicted of a crime, excluding minor traffic violations?"
- (3) "Have you ever been convicted of violating a municipal ordinance, excluding minor traffic violations?"

You indicate that you do not necessarily deny a license because of a conviction record, but ask the applicant to provide the following information:

- Age at time of conviction.
- Date on which convicted.
- Findings of court.
- Location of the court in which convicted.
- If possible, the name of the judge.
- If given a suspended sentence and/or placed on probation, the name and address of the social worker or probation officer.
- A brief resume of the facts leading to the conviction.

The decision of the Board relative to the applicant is then made considering:

- The nature of the crime.
- The proximity of time (to the present).
- The success of rehabilitation (if any has been indicated).
- The record since conviction.

It is my opinion that you may ask the second and third questions without violating provisions of ch. 125, Laws of 1977. I do not believe the first question is permissible because of conflict with a different legislative policy.

By ch. 125, Laws of 1977, the Legislature has added to the unfair practices to be prevented under subch. II of ch. 111, Stats., discrimination because of arrest and conviction records. The Legislature has provided for prevention of such practices through administrative proceedings before the Department of Industry, Labor and Human Relations and the Labor and Industry Review Commission.

Section 111.325, Stats., makes it unlawful for any licensing agency to discriminate against an applicant; and the definition of discrimination in sec. 111.32(5)(a), Stats., now includes discrimination because of arrest record or conviction record. More detailed definition of what constitutes such discrimination is given in the newly created sec. 111.32(5)(h), Stats., which reads:

“The term ‘arrest record’ includes, but is not limited to, information indicating that a person has been questioned, apprehended, taken into custody or detention, held for investigation, arrested, charged with, indicted or tried for any felony, misdemeanor or other offense pursuant to any law enforcement or military authority. The term ‘conviction record’ includes, but is not limited to, information indicating that a person has been convicted of any felony, misdemeanor or other offense, placed on probation, fined, imprisoned or paroled pursuant to any law enforcement or military authority. It is discrimination because of arrest record or conviction record:

“1. For any employer, labor organization, licensing agency or employment agency to request an applicant, employe, member, licensee or any other person, on an application form or otherwise, to supply information regarding any arrest record, except a record of a pending charge, of the applicant, employe, member or licensee except that it shall not be discrimination to request such information when employment depends on the bondability of the employe or prospective employe under a standard fidelity bond or an equivalent bond is required by state or federal law, administrative regulation or established business practice of the employer and the employe may not be bondable due to an arrest record;

“2. For any employer, labor organization, licensing agency or employment agency to refuse to hire, employ, admit or

license any person, or to bar or terminate any person from employment, membership or licensing, or to discriminate against any person in promotion, compensation, terms, conditions or privileges of employment, membership or licensing, or otherwise to discriminate against any person because such person has an arrest record or a conviction record; provided, however, that it shall not be unlawful:

“a. For an employer or licensing agency to refuse to employ or license, or to suspend from employment or licensing, any person who is subject to a pending criminal charge if the circumstances of the charge substantially relate to the circumstances of the particular job or licensed activity.

“b. For an employer or licensing agency to refuse to employ or license, or to bar or terminate from employment or licensing, any person who has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity.

“c. For an employer or licensing agency to refuse to employ or license, or to bar or terminate from employment or licensing, any person who is not bondable under a standard fidelity bond or an equivalent bond where such bondability is required by state or federal law, administrative regulation or established business practice of the employer.”

Paragraph one, precluding request for information, applies only to arrest records. Paragraph two prescribes the conditions in which an agency may or may not consider such records and conviction records in connection with denial, revocation or conditions of licenses. One of the permissible considerations is whether the circumstances of the offense relate substantially to the licensed activity.

Under secs. 441.04 and 441.10, Stats., you are obligated to give nurses examinations only to persons “of good moral character.” The term is flexible enough to allow some discretion in administration; and along with the exceptions in the new unfair practice provisions, provides authority for you to consider the circumstances of the offenses involved. You can determine the relation of the offense to nursing only if you have information about it. The necessary implication of the excepting provisions is that the licensing agency can request information about conviction records.

Such information may also be available to you from the Division of Law Enforcement Services under sec. 165.83(2)(n) which reads in part:

“... Such information may also be made available to any other agency of this state ... upon assurance by the agency concerned that the information is to be used for official purposes only.”

If a license is to be denied on the basis of a conviction record, it better accords with due process requirements for an applicant to know the record is being considered. It is my opinion that the Legislature intended that a licensing agency may request of applicants information about conviction records.

I believe your first question about juvenile delinquency findings is contrary to legislative policy. Under sec. 48.26, Stats. (renumbered 48.396(c) by ch. 354, Laws of 1977), contents of juvenile records shall not be disclosed except by order of the court.

Section 48.01(1), as created by ch. 354, Laws of 1977, effective November 17, 1978, expresses the following legislative purpose:

“(c) Consistent with the protection of the public interest, to remove from children committing delinquent acts the consequences of criminal behavior and to substitute therefore a program of supervision, care and rehabilitation.”

*See also, State ex rel. Herget v. Waukesha Co. Cir. Ct.*, 84 Wis. 2d 435, 450-451, 267 N.W.2d 309 (1978), where the statutory policy was discussed:

“Sections 48.26, 48.38 and 48.78, Stats., which mandate confidentiality of records as the general principle and disclosure as the exception, express the legislature’s determination that the best interests of the child and the administration of the juvenile justice system require protecting the confidentiality of police, court and social agency records relating to juveniles.”

BCL:BL

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*Leases; Schools And School Districts;* Common school districts have the authority to lease property that they own if such property is not currently needed for school purposes and if the lease is authorized by the annual meeting of the common school district. The answer is not free from doubt and it is recommended that the Legislature specifically grant to school boards, if authorized by the annual meeting, the authority to lease school property not currently needed for school purposes. OAG 98-78

December 29, 1978.

EVERETT E. BOLLE, *Assembly Chief Clerk*  
*Assembly Committee on Organization*

The Assembly Committee on Organization has asked a series of questions relating to the authority of a common school district to lease property that it owns.

A problem exists in some school districts where there are many empty classrooms due to the declining enrollments. In some instances, the school district does not wish to sell buildings or property because they may again be needed in the future for school purposes. The empty classrooms or school buildings are a current financial drain on the school districts involved.

It is my opinion that common school districts probably have the authority to lease property not currently needed for school purposes if authorized by the annual meeting pursuant to sec. 120.10(12), Stats., which provides that the annual meeting of a common school district may "[a]uthorize the sale of any property belonging to and not needed by the school district."

Since the lease of property is a limited sale, in the sense that it is a conveyance of property limited either in terms of duration, territorial extent or rights conveyed, I am of the opinion that the authority to sell probably includes the authority to lease.

In *Bell and Another v. The City of Platteville*, 71 Wis. 139, 36 N.W. 831 (1888), where the common council of the city was given "the management and control of the finances and of all property of the city" and the power to "receive, purchase, and hold for the use of

the city any estate, real or personal, to sell and convey the same," but no specific grant of authority to lease property, the court held that the city was authorized to lease property not needed for a public purpose.

Public school districts have been held to be quasi-municipal corporations. See *Iverson v. Union Free High School Dist.*, 186 Wis. 342, 202 N.W. 788 (1925), and *Schaut v. Joint School District*, 191 Wis. 104, 210 N.W. 270 (1926). Since school districts are quasi-municipal corporations it is my opinion that if the matter were litigated, our Wisconsin Supreme Court would apply *Bell v. the City of Platteville* and rule that a common school district has the authority to lease property under its general authority to own and sell property.

But this conclusion is not free from doubt. While a lease may properly be considered to be a limited sale of real estate and thus within the power to sell, there are aspects of a lease that are not present in a full sale of real estate, such as a continuing contractual relationship and the potential for further negotiation or the possibility of a dispute. Additionally, I cannot forecast with certainty that our supreme court would apply *Bell v. The City of Platteville* to a quasi-municipal corporation.

These considerations lead me to recommend to the Legislature that it remove the question from doubt.

Your specific questions and my answers are:

1. Whether a school board may lease that portion of a building not needed for school purposes;
2. Whether a school board may lease an entire building not needed for school purposes;
3. Whether the school board may lease to a private non-profit making public purpose organization;
4. Whether a school board may lease to a private profit making business organization;

Following the stated reasoning but with the caveat that the conclusion is not free from doubt, the answer to these questions is yes if the lease is authorized by the annual meeting pursuant to sec. 120.10(12), Stats.

5. Whether a school board must lease on a bidding or priority based procedure;
6. Whether a school board may lease the property at a rental rate sufficient to provide a profit for the school district; and
7. Whether a school board may lease the property at a rental rate sufficient only to defray maintenance and depreciation costs to the district.

Section 120.12, Stats., gives to the school board of a common school district broad powers with respect to running the school district and managing its property and affairs. Nevertheless, as the supreme court held in *Iverson, supra* at 354:

The powers conferred upon school districts, whether to be exercised by the electors in their district meetings or by the school board, are powers germane to and appropriate for the promotion of the cause of education, and they must be used and exercised for the purpose of accomplishing rather than defeating that object ....

Thus, assuming that it has the power to lease, the school board would have discretion in the manner of how it leased property but the school board must act responsibly to the end that it must carry out its trust. It should obtain the most favorable terms it deems reasonable and if there is a profit from the lease of property, the profit must be used for school purposes. It is for the school board to determine whether it can obtain the best terms on a negotiated deal or by putting the matter out on bids.

The opinion request also asks that I discuss what terms must be included in the lease agreement.

The specific terms of the agreement are to be determined by the school board, or if negotiated, as determined by the school board and the lessee. It is impossible in a general opinion as is the case here to specify what terms should be in such a lease, but it should certainly contain the standard provisions that protect lessors and their property. Additionally, school districts may wish to consider language that would permit them to terminate leases upon appropriate notice if it becomes apparent that the leased premises are

again needed for school purposes. Specific situations will suggest provisions in the lease agreement.

BCL:WHW

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*Counties; County Highway Commissioner; Highways; Sheriffs; Traffic;* Where county has contract to maintain state trunk highways, county highway commissioner can temporarily close state trunk highway in case of emergency. Sec. 86.06(1), Stats. Sheriff has power to temporarily close any highway in county in case of emergency and to divert traffic. Secs. 59.24(1) and 349.02, Stats. OAG 99-78

December 29, 1978.

ROBERT RUSCH, *District Attorney*  
*Taylor County*

You request my opinion whether a county highway commissioner, in a county which has a contract with the state to perform maintenance on state trunk highways, has authority to close a state trunk highway in case of an emergency caused by a bridge washing out, fire, tornado or extraordinary snow conditions.

I am of the opinion that such commissioner does have authority to temporarily close a state trunk highway and to erect barricades in connection with such closure. See 47 Op. Att'y Gen. 82 (1958), wherein it was stated that sec. 86.06(1), Stats., gave highway maintenance personnel authority to hold up and reroute traffic where a highway was impassable or unsafe for travel.

Section 86.06(1), Stats., provides:

*“Whenever any highway is impassable or unsafe for travel or during the construction or repair of any such highway and until it is ready for traffic the authorities in charge of the maintenance or construction thereof may keep it closed by maintaining barriers at each end of the closed portion. The barriers shall be of such material and construction and so placed as to indicate that the highway is closed and shall be lighted at night.”*

In *Fenske v. Kramp Construction Co.*, 207 Wis. 397, 401, 241 N.W. 349 (1932), it was held that under then sec. 82.04(6), Stats. (1929), both the county highway commissioner and the contractor had discretion "to stop travel on any highway in process of construction or repair, by posting notices forbidding said travel at each end of such highway," and that such power extended to a state trunk highway where a bridge was out and construction was in progress.

Former sec. 81.10(1), Stats. (1929), provided that whenever any highway under the charge of a town board was "impassable or unsafe for travel or during the construction or repair," the town board could close such highway by erecting barriers which were to be lighted at night.

The 1943 Legislature substantially revised chs. 80, 81, 82, 83, 84, 86 and 87, Stats. Section 146 of ch. 334, Laws of 1943, consolidated secs. 81.10 and 82.04(6) into revised sec. 86.06 and thus created sec. 86.06(1) to its present form.

Section 84.07(1), Stats., permits the State Department of Transportation to contract with any county highway committee to maintain the state trunk highways within or beyond the limits of its county. Although not specifically mandated by statute, it would be more in keeping with the overall legislative intent for the county commissioner promptly to notify the Department of Transportation that it has become necessary to close a state trunk highway because of emergency. Compare sec. 84.07(4), as amended by ch. 29, sec. 1654, Laws of 1977, which recognizes rights of cities and villages to temporarily close streets over which state trunk highways are marked. Such section provides: "*Except in case of emergency*, no city or village shall obstruct any street over which any state trunk highway is marked unless it first makes arrangements with the department [of transportation] for marking a detour."

You also inquire whether a sheriff has authority to close any highway during an emergency.

I am of the opinion that such officer does, pursuant to sec. 59.24(1), Stats., which requires such officer to "keep and preserve the peace in their respective counties," and sec. 349.02, Stats., which is discussed in 47 Op. Att'y Gen. 82 (1958), and which provides in part:

“... Police officers, sheriffs, deputy sheriffs and traffic officers are authorized to direct all traffic within their respective jurisdictions .... In the event of fire or other *emergency*, police officers, *sheriffs*, deputy sheriffs and traffic officers and officers of the fire department may direct traffic *as conditions may require* notwithstanding the provisions of chs. 346 to 348 and 350.”

BCL:RJV

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*Contracts; Creditors' Actions; Interest; Intoxicating Liquors; Malt Beverages;* Imposition of monthly interest charge as part of sales agreement between liquor and beer wholesalers and retailers upon accounts which have become overdue violate credit restriction provisions and tied-house provisions of statutes relating to intoxicating liquors and fermented malt beverages.

Collection of interest or penalty in connection with collection of delinquent, settled and liquidated account involving no forbearance and no illegal extension of credit is not prohibited. OAG 100-78

December 29, 1978.

JAMES E. DOYLE, JR., *District Attorney*  
*Dane County*

You have asked my opinion as to whether liquor and beer wholesalers may charge interest on retail accounts which remain unpaid past the statutory credit limits, those being thirty days in the case of intoxicating liquor and fifteen days in the case of fermented malt beverages.

The following statutes are pertinent to your question.

Section 66.054(8a)(a), Stats., provides that:

“No retail licensee under sub. (7) or (8) shall receive, purchase or acquire fermented malt beverages directly or indirectly from any licensee except upon terms of cash or *credit for not exceeding fifteen days.*”

Section 176.05(23)(a), Stats., contains language virtually identical to the statute just quoted with respect to intoxicating liquor

except that the maximum term of credit allowed is thirty days as opposed to fifteen days.

Section 176.17(2), Stats., provides in part as follows:

“No manufacturer, rectifier or wholesaler [of intoxicating liquors] shall furnish, give, or lend any money *or other thing of value*, directly or indirectly, or through a subsidiary or affiliate, or by any officer, director, or firm member of the industry, to any person engaged in selling products of the industry for consumption on the premises where sold, ...”

Section 66.054(4)(a), Stats., provides substantially the same restriction on relationships between wholesalers and retailers in the beer industry.

In an informal Attorney General’s opinion, dated July 25, 1961, it was concluded that:

“The object and intent of sec. 176.17 (as well as 66.054(4) relating to fermented malt beverages) is to prevent manufacturers and wholesalers from acquiring complete or partial control of specific class B retailers, directly by owning them or *indirectly by creating financial or moral obligations*. The purpose is clearly to assure the freest competition in the industry by preventing monopolistic practice, and to divorce entirely the wholesaler from the class B retailer.

“*Other provisions generally manifesting this intent are ... 176.05(23) restricting the extension of credit by wholesaler to retailers.*” (Emphasis supplied.)

You do not indicate how such interest charge would be imposed. It is my understanding that at times in the past, within the industry, such interest charges have been imposed by specific and explicit terms of the sales agreement between the wholesaler and retailer. Such terms state that accounts which exceed the fifteen or thirty-day limit would then be carried with interest at one percent per month on the unpaid balance until paid. The parties in effect would then be contemplating that the account would not in fact be paid in full on or before the expiration of the statutory credit limits and would be agreeing that the wholesaler would thereby carry the retailer beyond the pertinent limit.

I conclude that such an agreement would constitute a contract to extend credit beyond the statutory maximum. It would therefore violate sec. 66.054(8a)(a), Stats., in the case of beer and sec. 176.05(23)(a), Stats., in the case of intoxicating liquor.

One of the elementary rules in contract law is that parties may not contract in violation of the law. The contracts discussed above are in violation of the credit restriction laws, which are penal statutes, and as such would be void. See *Washington County v. Groth*, 198 Wis. 56, 223 N.W. 575 (1929); *Metz v. Medford Fur Foods, Inc.*, 4 Wis.2d 96, 90 N.W.2d 106 (1958). See also annotation in 55 A.L.R.2d 481, 482 to the effect that courts are in substantial agreement that such contracts in violation of criminal or penal statutes are void even though the statutes do not expressly by their terms so provide.

Such an agreement for the imposition of an interest charge may also constitute a violation of sec. 66.054(4)(a), Stats., or sec. 176.17(2), Stats., the tied-house provisions relating to beer and intoxicating liquor respectively. In part these statutes prohibit wholesalers from furnishing anything of value, directly or indirectly, to Class "B" retailers. By entering into such an agreement, thereby carrying the retailer and extending credit beyond the statutorily allowed limit, the wholesaler has committed an act of forbearance in regard to the retailer. Forbearance is defined as follows:

"Act by which creditor waits for payment of debt due him by debtor after it becomes due. ... Indulgence granted to a debtor. ..." *Black's Law Dictionary*, revised 4th edition, p. 773.

See also the discussion in *State v. J. C. Penney Co.*, 48 Wis.2d 125, 179 N.W.2d 641 (1970), to the effect that the obligation to pay for goods sold arises upon their purchase, and if payment is not made contemporaneously with delivery of the goods both a debt and a debtor-creditor relationship are created, and further that the act on the part of the creditor in restraining from collecting that debt, when it becomes due, constitutes a forbearance.

The position that extension of credit beyond the time limits stated in the relevant statutes may violate the tied-house provisions, as discussed above, is further strengthened as to intoxicating liquor by the following provision in the intoxicating liquor tied-house statute, sec. 176.17(2), Stats.:

“Nothing herein contained shall affect the extension of commercial credits for the products of the industry sold and delivered in compliance with s. 176.05(23).”

The obvious implication is that extension of credits not in compliance with sec. 176.05(23), Stats., would violate the prohibitions contained in sec. 176.17(2), Stats.

In my opinion such forbearance is something of value furnished the retailer by the wholesaler. One of the effects which I perceive from the selected use of forbearance is the acquisition of at least partial control of Class “B” retailers by creating financial or moral obligations. This is one of the very evils the tied-house laws were enacted to prevent.

As a corollary to the discussion of your main question the following issue may be raised. If liquor and beer wholesalers are prohibited from imposing such interest charges as stated in the above discussion, are they not being deprived of some of the equal protection guarantees contained in the United States Constitution since other types of commercial creditors may charge interest? The answer is that they are not because of the unique nature of the state’s power to regulate the liquor industry.

The unique nature of the state’s power is well set forth in an annotation to be found at 34 L. Ed. 2d 805, Comment Note - *Extent of State Regulatory Power Under 21st Amendment*, sec. 2, pp. 807, 808, wherein it is stated that:

“It is settled that under the twenty-first amendment the states have the power to absolutely prohibit or to limit and regulate traffic in intoxicating liquors within their borders, and that such power is not generally limited by the commerce clause of the federal constitution, insofar as such regulations discriminate against or impose special burdens on activities of persons involved in such traffic.”

Our supreme court, in *Vieau v. Common Council*, 235 Wis. 122, 292 N.W. 297 (1940), stated as follows:

“The regulation of the sale of intoxicating liquors does not come within the equality provisions of the United States Constitution.”

*See also City of Kenosha v. Bruno*, 412 U.S. 507, 515 (1973) and *Moedern v. McGinnis*, 70 Wis.2d 1056, 236 N.W.2d 240 (1975).

I therefore conclude that the imposition of interest charges under the facts and circumstances stated above is contrary to law, violates the stated provisions of the statutes relating to intoxicating liquor and fermented malt beverages and is therefore prohibited.

Not every imposition of interest or penalty upon the collection of delinquent accounts will violate the tied-house or credit restriction statutes cited above, however.

The first portion of this opinion was directed solely at the described type of specific agreement which imposed interest at a stated rate per month on overdue accounts until the account was paid, thereby extending credit beyond the statutorily allowed limit and resulting in the furnishing of something of value to the retailer. This portion is directed at the imposition of interest or a penalty upon the collection of delinquent accounts owed to the wholesaler by the retailer, said interest or penalty not being imposed as the product of a continuing agreement between the wholesaler and retailer.

Generally speaking, where money belonging to another was not paid at the time when it should have been paid, interest is generally allowed to be added to the principal amount due, the theory being that nonpayment benefits the debtor and injures the creditor. *See* 47 C.J.S. *Interest* sec. 13. Interest is generally allowable on accounts which have become settled and liquidated (although generally not allowable on running, open and unliquidated accounts). 47 C.J.S. *Interest* sec. 16. *See also DeToro v. DI-LA-CH, Inc.*, 31 Wis.2d 29, 142 N.W.2d 192 (1966).

The types of accounts which we are discussing are settled and liquidated once they exceed the legal credit period, the credit restriction statutes prohibiting such accounts from being open, running and unliquidated.

It would appear that one of the purposes to be accomplished by the statutes is that retailers pay the accounts within the stated time periods to avoid control, either direct or indirect, by the wholesaler over the retailer. The imposition of a penalty or interest upon the collection of delinquent, settled and liquidated accounts by the wholesaler would result in furthering that purpose. This type of

imposition would not appear to constitute forbearance nor does it appear to result in the extension of further credit beyond the allowable limit in violation of the credit restriction statutes.

For additional guidance I refer you to the following section of the Wisconsin Administrative Code which may be of use as an aid, although not directly applicable to the liquor and beer statutes, in determining whether an interest or penalty charge is in fact a finance charge and therefore impermissible. Wisconsin Administrative Code section Bkg. 80.07 provides as follows:

“GENERAL DEFINITIONS; FINANCE CHARGE. A delinquency or default charge is not a finance charge within the meaning of section 421.301(20), Wis. Stats. if imposed for actual unanticipated late payment, delinquency, default or other such occurrence. However, when a merchant’s billings are not paid in full within a stipulated time period and under such circumstances the merchant does not, in fact, regard such accounts in default (For example, by customarily failing to institute collection activity or by continuing to extend credit) and imposes charges periodically for delaying payment of such accounts from time to time until paid, the charge so imposed comes within the definition of a finance charge and the credit so extended comes within the definition of open-end credit.”

I therefore conclude that the collection of a penalty or interest in connection with the collection of delinquent, settled and liquidated accounts which involves no forbearance and no illegal extension of credit is not prohibited. Section 138.04, Stats., provides:

“LEGAL RATE. The rate of interest upon the loan or forbearance of any money, goods or things in action shall be \$5 upon the \$100 for one year and according to that rate for a greater or less sum or for a longer or a shorter time; but parties may contract for the payment and receipt of a rate of interest not exceeding the rate allowed in s. 138.05, in which case such rate shall be clearly expressed in writing.”

I also conclude that said interest or penalty is limited to the five percent per annum provided for in sec. 138.04, Stats., in light of my conclusion that an agreement for a higher rate is prohibited.

BCL:JM

## ADDENDUM

September 20, 1978

Mr. Robert P. Russell  
Corporation Counsel  
Milwaukee County Courthouse  
901 North 9th Street  
Milwaukee, Wisconsin 53233

Dear Mr. Russell:

On August 29, 1978, this office issued an opinion, OAG 62-78, which stated in part that a county board which has created a board to administer a county transit system under powers granted in secs. 59.025(3) and (4) and 59.968(7) (c), Stats., can designate the chairman of the county board as the appointing authority for members of such board.

In a memorandum decision dated December 14, 1977, in Case No. 452-859, *William F. O'Donnell, Milwaukee County Executive, Plaintiff v. F. Thomas Ament, Chairman of the Board of Supervisors for Milwaukee County, Defendant*, Circuit Judge Leander J. Foley, Jr., ruled that that part of the Milwaukee County ordinance which purported to grant the county board power to appoint members to the Milwaukee County Transit Board was invalid and that the appointing power resided in the county executive. Declaratory judgment to that effect was entered June 2, 1978, and notice of entry was served on the same date. We are not advised that any appeal was taken.

Guideline 7 of the requirements to be observed by district attorneys and county corporation counsels in requesting opinions reads:

"7. An opinion normally should not be requested on an issue that is the subject of current or reasonably imminent litigation. Presumably, the answer to the issue will be furnished by the court's decision and opinions of the Attorney General should not be utilized for the purpose of briefing current litigation." See 62 Op. Att'y Gen. Preface (1973).

This guideline reflects our deference to the courts and is strictly observed by this office.

Your request was dated February 17, 1977, and the court action referred to above was commenced in April of that year. We regret that we were not timely advised that the question involved was in litigation or that declaratory judgment had been in fact entered. Had we been so advised we would not have issued that portion of the opinion.

We hereby withdraw all of that portion of the opinion which states or supports the conclusion that the chairman of the county board can be designated as the appointing authority for the board created under secs. 59.025(3) and (4) and 59.68(7) (c), Stats.

Sincerely yours,  
Bronson C. La Follette  
Attorney General

BCL:aag

**STATUTES AND CONSTITUTIONAL PROVISIONS,  
SESSION LAWS, LEGISLATIVE BILLS,  
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*N. B. The texts of Unpublished Opinions appearing in this Index without page references are available on request from the Office of the Attorney General.*

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<p><i>Accidents; Aid; Counties; County Board; Liability; Public Officials; Taxation; Transportation; Veterans;</i> A county veterans' service officer does not have the duty under ch. 45, Stats., to transport disabled veterans to a veterans' hospital when such transportation is not readily available unless authorized by his county.</p> <p>The county would be liable to the injured veteran in an automobile accident while being transported by the veterans' service officer if the officer were authorized and performing within the scope of his employment.</p> <p>If he were authorized and an accident occurred, sec. 895.43(3), Stats., limits the recovery to \$25,000. OAG 56-78 .....</p>	207
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<p><i>Administration, Department Of; Appropriations And Expenditures; Collection Of Account; Industry, Labor And Human Relations, Department Of; Liability;</i> The Department of Industry, Labor and Human Relations lost discretionary authority to make expenditures from the unemployment compensation "interest and penalties" fund when the Legislature reenacted sec. 20.445(1)(v), Stats., in 1977, but the Department remains responsible for collection of credit extended under the old law.</p> <p>A decision by the Department to discontinue collection efforts is subject to review by the Department of Administration, since it has been entrusted with authority under ch. 16, Stats., to superintend collection of amounts owed the state. (Unpublished Opinion) OAG 49-78.</p> <p><i>Administration, Department Of; Civil Service; Collective Bargaining; Employer And Employee; Labor; Salaries And Wages;</i> Matters within the scope of bargaining as set forth in sec. 111.91, Stats., agreed to by the Department of Administration and a state employe union are not effective until submitted as tentative agreements to and approved by the Joint Committee on Employment Relations. Action of the Secretary of the Department of Administration in agreeing to so-called non-recrimination clause was within his discretion but the clause itself is unenforceable until approved by the Joint Committee on Employment Relations. OAG 9-78.....</p> <p><i>Administration, Department Of; Classified; Employer And Employee; Industry, Labor And Human Relations, Department Of; Officers And Offices; Public Officials;</i> Section 15.05(2), Stats., does not authorize appointment of an employe not within the department. <i>De facto</i> status discussed. <i>Quo warranto</i> and sec. 946.12, Stats., action discussed. Corrective action requested of officers involved. (Unpublished Opinion) OAG 8-78.</p>	38

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*Administrative Procedure; Advertising; Anti-Secrecy; Constitution; Constitutionality; Criminal Law; Elections; Legislation; Legislature; Licenses And Permits; Lobbying; Public Officials; Public Records; Subpoena; Words And Phrases;* In principle, the purposes sought to be accomplished by Assembly Substitute Amendment 3 to 1977 Assembly Bill 93, revising subch. III of ch. 13, Stats., the state's lobbying law, are compatible with the rights of Wisconsin citizens to petition the government and to be secure against unreasonable searches and seizures. Some of the means selected to accomplish those purposes may, on their face or as applied violate citizens' first amendment right of petition. OAG 19-78..... 85

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*Administrative Procedure; Advertising; Anti-Secrecy; Constitution; Constitutionality; Criminal Law; Elections; Legislation; Legislature; Licenses And Permits; Lobbying; Public Officials; Public Records; Subpoena; Words And Phrases;* In principle, the purposes sought to be accomplished by Assembly Substitute Amendment 3 to 1977 Assembly Bill 93, revising subch. III of ch. 13, Stats., the state's lobbying law, are compatible with the rights of Wisconsin citizens to petition the government and to be secure against unreasonable searches and seizures. Some of the means selected to accomplish those purposes may, on their face or as applied violate citizens' first amendment right of petition. OAG 19-78..... 85

*Advertising; Anti-Secrecy; Constitution; Constitutionality; Criminal Law; Elections; Legislation; Legislature; Licenses And Permits; Lobbying; Public Officials; Public Records; Subpoena;* Certain provisions of Substitute Amendment 1 to 1977 Senate Bill 286, revising subch. III of ch. 13, Stats., the state's lobbying law, are incompatible with the rights of Wisconsin citizens to petition the government and to be secure against unreasonable searches and seizures and are therefore probably unconstitutional. The major portion of the bill is constitutional. (Unpublished Opinion) OAG 15-78.

**Agriculture**

*Agriculture; Counties; County Board; Ordinances; Towns; Zoning;* The extent to which sec. 91.73(4), Stats., as created by ch. 29, Laws of 1977, and amended by ch. 169, Laws of 1977, alters the procedures applicable for the amendment of county comprehensive zoning ordinances under sec. 59.97(5)(e). Stats., is discussed. OAG 87-78 ..... 290

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 The county would be liable to the injured veteran in an automobile accident while being transported by the veterans' service officer if the officer were authorized and performing within the scope of his employment.  
 If he were authorized and an accident occurred, sec. 895.43(3), Stats., limits the recovery to \$25,000. OAG 56-78 ..... 207

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*Administrative Procedure; Advertising; Anti-Secrecy; Constitution; Constitutionality; Criminal Law; Elections; Legislation; Legislature; Licenses And Permits; Lobbying; Public Officials; Public Records; Subpoena; Words And Phrases;* In principle, the purposes sought to be accomplished by Assembly Substitute Amendment 3 to 1977 Assembly Bill 93, revising subch. III of ch. 13, Stats., the state's lobbying law, are compatible with the rights of Wisconsin citizens to petition the government and to be secure against unreasonable searches and seizures. Some of the means selected to accomplish those purposes may, on their face or as applied violate citizens' first amendment right of petition. OAG 19-78 ..... 85

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*Public Officials; Public Records; Subpoena;* Certain provisions of Substitute Amendment 1 to 1977 Senate Bill 286, revising subch. III of ch. 13, Stats., the state's lobbying law, are incompatible with the rights of Wisconsin citizens to petition the government and to be secure against unreasonable searches and seizures and are therefore probably unconstitutional. The major portion of the bill is constitutional. (Unpublished Opinion) OAG 15-78.

*Anti-Secrecy; Coroner; Open Meeting; Tape Recordings; Television;* The open meeting law does not apply to a coroner's inquest. OAG 75-78..... 250

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*Apportionment; Census;* Wisconsin Constitution art. IV, sec. 3 requiring legislative reapportionment "after each enumeration made by the authority of the United States" does not require reapportionment after the new federal mid-decade census. OAG 18-78..... 81

**Appropriations And Expenditures**

*Administration, Department Of; Appropriations And Expenditures; Collection Of Account; Industry, Labor And Human Relations, Department Of; Liability;* The Department of Industry, Labor and Human Relations lost discretionary authority to make expenditures from the unemployment compensation "interest and penalties" fund when the Legislature reenacted sec. 20.445(1)(v), Stats., in 1977, but the Department remains responsible for collection of credit extended under the old law.

A decision by the Department to discontinue collection efforts is subject to review by the Department of Administration, since it has been entrusted with authority under ch. 16, Stats., to superintend collection of amounts owed the state. (Unpublished Opinion) OAG 49-78.

*Aid; Appropriations And Expenditures; Education; Federal Aid; Funds; Religion; State Aid;* Wisconsin Constitution art. I, sec. 18, prohibiting the drawing of money from the treasury for the benefit of religious societies, or religious or theological seminaries is a proscription against using public monies for such purpose. Section 3 of 1977 Assembly Bill 500 which purports to establish a separate fund outside of the state treasury if enacted would not avoid this prohibition since the public nature of the money is not changed. OAG 16-78..... 71

*Appropriations And Expenditures; Associations; Corporations; Elections; Funds; Reports;* Wisconsin Administrative Code section E1 Bd 1.06, and the forms developed to effectuate that rule, EB-11 and EB-12, which require corporations and associations to register and twice yearly report their expenditures for the establishment and administration of a political fund and for solicitation of political contributions to such fund, improperly impose substantive requirements in addition to those reasonably within the intendment of sec. 11.38(1)(a)2., Stats., and are therefore unenforceable. OAG 52-78..... 193

*Appropriations And Expenditures; Attorneys; Compatibility; Compensation; Corporation Counsel; Counties; County Board; County Corporation Counsel; District Attorney; Expenditures; Funds; Gifts; Indigent; Ordinances; Public Officials; Salaries And Wages;* 1. Corporation counsel employed on part-time basis cannot accept employment as defense counsel for those whose interests are directly adverse to the state or county.

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2. Section 256.22(3), Stats., does not prohibit a district attorney from compensating his partner, out of his own funds, for assistance in prosecuting a state case.

3. County board cannot change status of office of district attorney from one in which he is permitted to practice law privately to one in which he is not, so as to be effective during the term for which such officer was elected.

OAG 7-78..... 31

*Appropriations And Expenditures; Charitable Organizations; Corporations; Counties; County Board;* A county may, through its boards and commissions, purchase services from various nonprofit organizations within the scope of such board or commission's authority.

Where county board has created community relations-social development commission pursuant to sec. 66.433, Stats., it cannot, through such commission, fund community-wide nonprofit corporations it deems worthy, by setting forth in the commission's budget, the amount of money to go to a specific nonprofit agency.

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*Appropriations And Expenditures; Counties; Federal Aid; Forests; Highways; Schools And School Districts; Taxation;* Section 59.20(13), Stats., does not control the distribution of monies received from the federal government under 31 U.S.C. sec. 1601, *et seq.* OAG 45-78, issued June 9, 1978, is withdrawn. OAG 85-78 ..... 277

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*Blood Tests; Implied Consent Law; Intoxicating Liquors; Municipal Court; Municipalities; Ordinances; Traffic; Section 343.305, Stats., as repealed and recreated by ch. 193, Laws of 1977, does not vest in municipal courts the power to conduct hearings to determine the reasonableness of a refusal to submit to chemical tests to determine blood alcohol levels, since a municipal court has only those powers expressly conferred on it by statute, and such statute contains no express language conferring the hearing power above-mentioned on a municipal court. The power of a municipal court to preside over ordinance matters would not include such hearings, since local government lacks authority to enact the provisions of sec. 343.305 as an ordinance. OAG 46-78 ..... 185*

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may be tested by mandamus in the courts. Such records do not appear to be records required by law to be kept by sheriff. Where records are required by law to be kept by sheriff, right of inspection exists under sec. 59.14(1), Stats.

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3. Amendment of interim extraterritorial zoning ordinances discussed.  
4. Appeals under an interim extraterritorial zoning ordinance are handled by the city or village.  
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*Children; Corporation Counsel; Counties; County Board; County Corporation Counsel; District Attorney; Minors; Officers And Offices; Paternity;* Duties of corporation counsel in county over 500,000 concerning paternity matters under secs. 52.21-52.45, Stats., cannot be transferred to legal counsel employed in a separate department created pursuant to powers in sec. 59.025, Stats. (Unpublished Opinion) OAG 22-78.

**Churches**

*Capitol; Churches; Public Buildings; Public Property; Religion;* The described Christmas pageant presented by the Madison Civic Music Association, Inc., in the Capitol building does not involve governmental advancement or inhibition of religion or governmental entanglement with religion as contemplated and prohibited by Wis. Const. art. I, sec. 18. OAG 43-78.....

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**Circuit Judge**

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*Appropriations And Expenditures; Cities; Counties; County Board; Municipalities; Taxation; Towns; Villages; Words And Phrases;* Towns, villages and cities in counties establishing a county solid waste management system under sec. 59.07(135), Stats., may be taxed for the capital costs of the county-wide system, but not for the operating costs. OAG 17-78.....

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*Benefits; Cities; Home Rule; Pensions; Retirement Systems;* The City of Milwaukee cannot terminate a CETA employe's membership in the Retirement System on grounds not in effect by the time membership was

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<i>Boundaries; Cities; Ordinances; Villages; Zoning;</i> 1. An extraterritorial zoning ordinance may utilize interior section lines.	
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Division of Personnel pursuant to Wis. Adm. Code section Pers 5.02(1) and (2) are primarily matters of compensation and wage rates related to salary-schedule adjustments and are subject to collective bargaining in some degree under sec. 111.91(1), Stats. (Unpublished Opinion) OAG 65-78.

- Civil Service; Counties; County Board; Employer And Employee; Ordinances; Salaries And Wages;* Where a county board has established a civil service ordinance applicable to all county personnel other than the exceptions provided in sec. 59.07(20), Stats., the director of the 51.42 board does not have authority to grant vacation with pay to a 51.42 board employe which is not authorized under the county civil service ordinance. OAG 34-78..... 143
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*Administration, Department Of; Appropriations And Expenditures; Collection Of Account; Industry, Labor And Human Relations, Department Of; Liability;* The Department of Industry, Labor and Human Relations lost discretionary authority to make expenditures from the unemployment compensation "interest and penalties" fund when the Legislature reenacted sec. 20.445(1)(v), Stats., in 1977, but the Department remains responsible for collection of credit extended under the old law.

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- Administration, Department Of; Civil Service; Collective Bargaining; Employer And Employee; Labor; Salaries And Wages;* Matters within the scope of bargaining as set forth in sec. 111.91, Stats., agreed to by the Department of Administration and a state employe union are not effective until submitted as tentative agreements to and approved by the Joint Committee on Employment Relations. Action of the Secretary of the Department of Administration in agreeing to so-called non-recrimination clause was within his discretion but the clause itself is unenforceable until approved by the Joint Committee on Employment Relations. OAG 9-78..... 38
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*Civil Service; Collective Bargaining; Employer And Employee; Labor; Personnel, Bureau Of; Salaries And Wages;* "Raised hiring rate" and "hiring above the minimum" practices utilized by administrator of Division of Personnel pursuant to Wis. Adm. Code section Pers 5.02(1) and (2) are primarily matters of compensation and wage rates related to salary-schedule adjustments and are subject to collective bargaining in some degree under sec. 111.91(1), Stats. (Unpublished Opinion) OAG 65-78.

*Collective Bargaining; Common Council; Grievance Procedures; Open Meeting;* Where common council hears a grievance under a procedure established under a signed contract, the council is engaged in collective bargaining within the meaning of sec. 111.70(1)(d), Stats., and is therefore, for that purpose, not a "governmental body" within the meaning of sec. 19.82(1), Stats., of the open meeting law. OAG 83-78..... 276

*Collective Bargaining; Open Meeting; Public Records; Public Utilities; Salaries And Wages;* Where Water and Light Commission has power to fix compensation of employes, it may meet in closed session to discuss and vote upon increases for non-union employes. A record must be made of motions and roll-call votes at open and closed meetings. Such record is open to inspection and copying subject to sec. 19.21, Stats., and common-law limitations with respect thereto. OAG 24-78 ..... 117

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*Collective Bargaining; Common Council; Grievance Procedures; Open Meeting;* Where common council hears a grievance under a procedure established under a signed contract, the council is engaged in collective bargaining within the meaning of sec. 111.70(1)(d), Stats., and is therefore, for that purpose, not a "governmental body" within the meaning of sec. 19.82(1), Stats., of the open meeting law. OAG 83-78..... 276

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*Agriculture, State Department Of; Compatibility; Natural Resources, Department Of; Officers And Offices; Public Officials;* Position of State Director of the Farmers Home Administration is probably an "office of profit or trust under the United States" as that term is used in Wis. Const. art. XIII, sec. 3, and a person holding such office would be ineligible to at the same time serve as a member of the Wisconsin Natural Resources Board. OAG 12-78 ..... 51

*Appropriations And Expenditures; Attorneys; Compatibility; Compensation; Corporation Counsel; Counties; County Board; County Corporation Counsel; District Attorney; Expenditures; Funds; Gifts; Indigent; Ordinances; Public Officials; Salaries And Wages;*

1. Corporation counsel employed on part-time basis cannot accept employment as defense counsel for those whose interests are directly adverse to the state or county.
2. Section 256.22(3), Stats., does not prohibit a district attorney from compensating his partner, out of his own funds, for assistance in prosecuting a state case.
3. County board cannot change status of office of district attorney from one in which he is permitted to practice law privately to one in which he is

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not, so as to be effective during the term for which such officer was elected. OAG 7-78..... 31

*Attorneys; Compatibility; Courts; Marriage And Divorce; Family Court Commissioner's law partner is prohibited from serving as counsel in any divorce action in county which Commissioner holds office but may serve as counsel in divorce actions in other counties. This prohibition may not be waived by the parties to the divorce action. OAG 14-78..... 64*

*Cities; Compatibility; Public Officials; Teachers; Compatibility of the office of alderperson with positions of city employe, teacher in city school district and firefighter discussed in general terms. OAG 42-78 ..... 177*

*Compatibility; County Board; County Clerk; Officers And Offices; Salaries And Wages; Section 59.025(3)(c), Stats., does not apply to county clerk; and whereas a county board may create position of administrative services co-ordinator, transfer of duties currently performed by the county clerk would be permissible only where some other specific statute permits transfer to some other officer or prescribes that some other officer can initially be assigned such duties, or where the duties involved have not been conferred upon the county clerk by express statute and are not important duties which have been performed by the county clerk on an immemorial basis. County officer cannot be paid separate salary for performing services which are incidental to his office. OAG 1-78..... 1*

*Compatibility; County Board; Officers And Offices; Ordinances; County board in county over 500,000 can provide that members of transit board, created by ordinance pursuant to sec. 59.025(3)(a), Stats., be appointed by county board chairman and confirmed by county board. However, supervisor would be ineligible to serve on such transit board by reason of secs. 59.03(4) and 66.11(2), Stats. OAG 62-78..... 231*

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*Appropriations And Expenditures; Attorneys; Compatibility; Compensation; Corporation Counsel; Counties; County Board; County Corporation Counsel; District Attorney; Expenditures; Funds; Gifts; Indigent; Ordinances; Public Officials; Salaries And Wages; 1. Corporation counsel employed on part-time basis cannot accept employment as defense counsel for those whose interests are directly adverse to the state or county.*

*2. Section 256.22(3), Stats., does not prohibit a district attorney from compensating his partner, out of his own funds, for assistance in prosecuting a state case.*

*3. County board cannot change status of office of district attorney from one in which he is permitted to practice law privately to one in which he is not, so as to be effective during the term for which such officer was elected. OAG 7-78..... 31*

*Authority; Civil Service; Compensation; Governor; Public Officials; Salaries And Wages; Veterans Affairs, Department Of; The Governor as the appointing authority for the incumbent Secretary of Veterans Affairs has power to set his salary subject to statutory restraints. OAG 79-78 ..... 257*

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*Conservation; Fees; Fish And Game; Licenses And Permits; Taxation; Assembly Bill 894 as drafted is constitutional and allows the state to contribute \$1 of the \$3 fee collected from a state waterfowl hunting stamp to private nonprofit organizations for development of waterfowl propagation areas in Canada. OAG 13-78..... 56*

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*Administrative Procedure; Advertising; Anti-Secrecy; Constitution; Constitutionality; Criminal Law; Elections; Legislation; Legislature; Licenses And Permits; Lobbying; Public Officials; Public Records; Subpoena; Words And Phrases;* In principle, the purposes sought to be accomplished by Assembly Substitute Amendment 3 to 1977 Assembly Bill 93, revising subch. III of ch. 13, Stats., the state's lobbying law, are compatible with the rights of Wisconsin citizens to petition the government and to be secure against unreasonable searches and seizures. Some of the means selected to accomplish those purposes may, on their face or as applied violate citizens' first amendment right of petition. OAG 19-78.....

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*Advertising; Anti-Secrecy; Constitution; Constitutionality; Criminal Law; Elections; Legislation; Legislature; Licenses And Permits; Lobbying; Public Officials; Public Records; Subpoena;* Certain provisions of Substitute Amendment 1 to 1977 Senate Bill 286, revising subch. III of ch. 13, Stats., the state's lobbying law, are incompatible with the rights of Wisconsin citizens to petition the government and to be secure against unreasonable searches and seizures and are therefore probably unconstitutional. The major portion of the bill is constitutional. (Unpublished Opinion) OAG 15-78.

**Constitutionality**

*Administrative Procedure; Advertising; Anti-Secrecy; Constitution; Constitutionality; Criminal Law; Elections; Legislation; Legislature; Licenses And Permits; Lobbying; Public Officials; Public Records; Subpoena; Words And Phrases;* In principle, the purposes sought to be accomplished by Assembly Substitute Amendment 3 to 1977 Assembly Bill 93, revising subch. III of ch. 13, Stats., the state's lobbying law, are compatible with the rights of Wisconsin citizens to petition the government and to be secure against unreasonable searches and seizures. Some of the means selected to accomplish those purposes may, on their face or as applied violate citizens' first amendment right of petition. OAG 19-78.....

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*Advertising; Anti-Secrecy; Constitution; Constitutionality; Criminal Law; Elections; Legislation; Legislature; Licenses And Permits; Lobbying; Public Officials; Public Records; Subpoena;* Certain provisions of Substitute Amendment 1 to 1977 Senate Bill 286, revising subch. III of ch. 13, Stats., the state's lobbying law, are incompatible with the rights of Wisconsin citizens to petition the government and to be secure against unreasonable searches and seizures and are therefore probably unconstitutional. The major portion of the bill is constitutional. (Unpublished Opinion) OAG 15-78.

**Contracts**

*Bids And Bidders; Contracts; Investment Board, Wisconsin;* Employment of investment or legal counsel by Investment Board under sec. 25.18(1)(a), Stats., is subject to competitive bidding requirements of subch. IV of ch. 16, Stats. (Unpublished Opinion) OAG 82-78.

*Cities; Collective Bargaining; Contracts; Counties; Employer And Employee; Home Rule; Legislature; Municipalities; Pensions; Retirement Fund; Retirement Systems; Salaries And Wages; Schools And School Districts; Teachers Retirement Fund; Towns; Villages;* Authority of a state or

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<i>Children; Corporation Counsel; Counties; County Board; County Corporation Counsel; District Attorney; Minors; Officers And Offices; Paternity; Duties of corporation counsel in county over 500,000 concerning paternity matters under secs. 52.21-52.45, Stats., cannot be transferred to legal counsel employed in a separate department created pursuant to powers in sec. 59.025, Stats. (Unpublished Opinion) OAG 22-78.</i>	
<b>Corporations</b> <i>Appropriations And Expenditures; Associations; Corporations; Elections; Funds; Reports; Wisconsin Administrative Code section E1 Bd 1.06, and the forms developed to effectuate that rule, EB-11 and EB-12, which require corporations and associations to register and twice yearly report their expenditures for the establishment and administration of a political fund and for solicitation of political contributions to such fund, improperly</i>	

impose substantive requirements in addition to those reasonably within the  
intendment of sec. 11.38(1)(a)2., Stats., and are therefore unenforceable.  
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*Appropriations And Expenditures; Charitable Organizations; Corporations;  
Counties; County Board;* A county may, through its boards and  
commissions, purchase services from various nonprofit organizations  
within the scope of such board or commission's authority.  
Where county board has created community relations-social development  
commission pursuant to sec. 66.433, Stats., it cannot, through such  
commission, fund community-wide nonprofit corporations it deems  
worthy, by setting forth in the commission's budget, the amount of money  
to go to a specific nonprofit agency.  
Where a county board creates a sec. 66.433 commission, it cannot by  
reason of sec. 59.025(3)(c), Stats., transfer all the duties and functions of  
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*Charitable Organizations; Corporations; Licenses And Permits; Taxation;*  
The loss of tax exempt status for income tax purposes does not necessarily  
imply that an organization is no longer nonprofit. The Bingo Control  
Board does not have statutory authority to revoke the bingo license of an  
otherwise eligible organization because of its membership policies  
regarding race. OAG 78-78 ..... 255

*Corporations; Elections;* The statutory prohibition against political  
contributions and disbursements by corporations or cooperatives in  
support or opposition to any referendum to be submitted to the voters, set  
forth in sec. 11.38(1)(a)1., Stats., is unconstitutional. To the extent  
spending for that purpose is now allowable under sec. 11.38(1)(a)1.,  
Stats., it is fully subject to the requirements and limitations otherwise set  
forth in ch. 11, Stats., including those requiring registration and filing.  
OAG 57-78..... 211

**Cosmetic Art**  
*Cosmetic Art; Licenses And Permits;* An individual who regularly fixes the  
hair of one or only a few next-door neighbors on a private basis without  
compensation or expectation of compensation for services rendered,  
probably does not fall within the scope of the practice of cosmetology as  
defined in ch. 159, Stats. (Unpublished Opinion) OAG 67-78.

**Counties**  
*Accidents; Aid; Counties; County Board; Liability; Public Officials;  
Taxation; Transportation; Veterans;* A county veterans' service officer  
does not have the duty under ch. 45, Stats., to transport disabled veterans  
to a veterans' hospital when such transportation is not readily available  
unless authorized by his county.  
The county would be liable to the injured veteran in an automobile  
accident while being transported by the veterans' service officer if the  
officer were authorized and performing within the scope of his  
employment.  
If he were authorized and an accident occurred, sec. 895.43(3), Stats.,  
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*Agriculture; Counties; County Board; Ordinances; Towns; Zoning;* The  
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for the amendment of county comprehensive zoning ordinances under sec. 59.97(5)(e), Stats., is discussed. OAG 87-78 ..... 290

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2. Section 256.22(3), Stats., does not prohibit a district attorney from compensating his partner, out of his own funds, for assistance in prosecuting a state case.

3. County board cannot change status of office of district attorney from one in which he is permitted to practice law privately to one in which he is not, so as to be effective during the term for which such officer was elected. OAG 7-78..... 31

*Appropriations And Expenditures; Charitable Organizations; Corporations; Counties; County Board; A county may, through its boards and commissions, purchase services from various nonprofit organizations within the scope of such board or commission's authority.*

Where county board has created community relations-social development commission pursuant to sec. 66.433, Stats., it cannot, through such commission, fund community-wide nonprofit corporations it deems worthy, by setting forth in the commission's budget, the amount of money to go to a specific nonprofit agency.

Where a county board creates a sec. 66.433 commission, it cannot by reason of sec. 59.025(3)(c), Stats., transfer all the duties and functions of such commission to another board or commission or committee of the county board. OAG 89-78..... 297

*Appropriations And Expenditures; Cities; Counties; County Board; Municipalities; Taxation; Towns; Villages; Words And Phrases; Towns, villages and cities in counties establishing a county solid waste management system under sec. 59.07(135), Stats., may be taxed for the capital costs of the county-wide system, but not for the operating costs. OAG 17-78..... 77*

*Appropriations And Expenditures; Counties; County Treasurer; Forests; Towns; Section 59.20(13), Stats., controls the distribution of national forest income by county treasurers derived from 16 U.S.C. sec. 471, et seq., and 31 U.S.C. sec. 1601, et seq. (Unpublished Opinion) OAG 45-78.*

*Appropriations And Expenditures; Counties; Federal Aid; Forests; Highways; Schools And School Districts; Taxation; Section 59.20(13), Stats., does not control the distribution of monies received from the federal government under 31 U.S.C. sec. 1601, et seq. OAG 45-78, issued June 9, 1978, is withdrawn. OAG 85-78..... 277*

*Children; Corporation Counsel; Counties; County Board; County Corporation Counsel; District Attorney; Minors; Officers And Offices; Paternity; Duties of corporation counsel in county over 500,000 concerning paternity matters under secs. 52.21-52.45, Stats., cannot be transferred to legal counsel employed in a separate department created pursuant to powers in sec. 59.025, Stats. (Unpublished Opinion) OAG 22-78.*

<i>Cities; Collective Bargaining; Contracts; Counties; Employer And Employee; Home Rule; Legislature; Municipalities; Pensions; Retirement Fund; Retirement Systems; Salaries And Wages; Schools And School Districts; Teachers Retirement Fund; Towns; Villages; Authority of a state or governmental subdivision to provide a retirement plan in lieu of or supplemental to existing statutory plans discussed. The Milwaukee School Board is authorized by sec. 111.70, Stats., to contract for a retirement system supplementary to the existing statutory system. OAG 37-78.....</i>	153
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<i>Civil Service; Counties; County Board; Employer And Employee; Ordinances; Salaries And Wages; Where a county board has established a civil service ordinance applicable to all county personnel other than the exceptions provided in sec. 59.07(20), Stats., the director of the 51.42 board does not have authority to grant vacation with pay to a 51.42 board employe which is not authorized under the county civil service ordinance. OAG 34-78.....</i>	143
<i>Contracts; Counties; Highways; Public Purpose Doctrine; Snow Removal; Section 86.105, Stats., does not authorize counties to contract to plow private parking lots. Because of increased availability of private sector alternatives any activity engaged in pursuant to said statute should meet the stringent restrictions set forth in 50 Op. Att'y Gen. 98 (1961), in an analogous context. OAG 91-78.....</i>	304
<i>Counties; County Board; County Clerk; Section 59.72, Stats., as amended by ch. 265, Laws of 1977, does not authorize the county board to transfer powers to keep books and accounts from the county clerk to the county auditor where express statute provides that the clerk perform such duties or where they have been performed on an immemorial basis, but does provide that the power of supervision as to the manner in which books and accounts are kept by the county clerk or other officer shall lie with the county auditor. OAG 71-78.....</i>	248
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any transaction involving the county in which such officers participate during the course of their service for a period of 12 months after leaving county service.

5. A board created by the county board, unless it is a committee of the county board, lacks authority to issue subpoenas or administer oaths.

6. A county ordinance cannot provide for blanket nondisclosure of county ethics board opinions contrary to the public records law. OAG 39-78 ..... 164

*Counties; County Board; Court Commissioner; Employer And Employee; Retirement Systems;* Either the county board as employer or the judges of the county as appointing authority has the authority under sec. 41.11(1), Stats., to extend the employment of a family court commissioner beyond normal retirement date. OAG 25-78 ..... 120

*Counties; County Board; Fire Department; Municipalities; Towns;* Town having fire department must provide protection for county-owned property such as a landfill site, and in case of failure to do so shall be liable for services of any fire department responding to request to fight fire in such town. County in its discretion can reimburse town for reasonable costs of services provided to landfill site within town. OAG 2-78..... 6

*Counties; County Board; Land; Mineral Rights; Public Lands;* Counties may not transfer county owned mineral rights, acquired through nonpayment of taxes, to private persons without following the appraisal and public sale provisions of sec. 75.69, Stats. Under sec. 59.07(1)(c), Stats., counties may make gifts of land or interests in lands only to enumerated public entities. OAG 63-78 ..... 236

*Counties; County Board; Ordinances; Towns; Zoning;* A county which has enacted a countywide comprehensive zoning ordinance under sec. 59.97, Stats., may not enact any zoning provision authorizing withdrawal of town approval of such ordinance or otherwise specifically excluding or exempting any town from the operation of such ordinance. OAG 53-78 ..... 197

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*Accidents; Aid; Counties; County Board; Liability; Public Officials; Taxation; Transportation; Veterans;* A county veterans' service officer does not have the duty under ch. 45, Stats., to transport disabled veterans to a veterans' hospital when such transportation is not readily available unless authorized by his county.

The county would be liable to the injured veteran in an automobile accident while being transported by the veterans' service officer if the officer were authorized and performing within the scope of his employment.

If he were authorized and an accident occurred, sec. 895.43(3), Stats., limits the recovery to \$25,000. OAG 56-78 ..... 207

*Agriculture; Counties; County Board; Ordinances; Towns; Zoning; The extent to which sec. 91.73(4), Stats., as created by ch. 29, Laws of 1977, and amended by ch. 169, Laws of 1977, alters the procedures applicable for the amendment of county comprehensive zoning ordinances under sec. 59.97(5)(e), Stats., is discussed. OAG 87-78 ..... 290*

*Appropriations And Expenditures; Attorneys; Compatibility; Compensation; Corporation Counsel; Counties; County Board; County Corporation Counsel; District Attorney; Expenditures; Funds; Gifts; Indigent; Ordinances; Public Officials; Salaries And Wages; 1. Corporation counsel employed on part-time basis cannot accept employment as defense counsel for those whose interests are directly adverse to the state or county.*

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*Where a county board creates a sec. 66.433 commission, it cannot by reason of sec. 59.025(3)(c), Stats., transfer all the duties and functions of such commission to another board or commission or committee of the county board. OAG 89-78..... 297*

*Appropriations And Expenditures; Cities; Counties; County Board; Municipalities; Taxation; Towns; Villages; Words And Phrases; Towns, villages and cities in counties establishing a county solid waste management system under sec. 59.07(135), Stats., may be taxed for the capital costs of the county-wide system, but not for the operating costs. OAG 17-78..... 77*

*Children; Corporation Counsel; Counties; County Board; County Corporation Counsel; District Attorney; Minors; Officers And Offices; Paternity; Duties of corporation counsel in county over 500,000 concerning paternity matters under secs. 52.21-52.45, Stats., cannot be transferred to legal counsel employed in a separate department created pursuant to powers in sec. 59.025, Stats. (Unpublished Opinion) OAG 22-78.*

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*Compatibility; County Board; County Clerk; Officers And Offices; Salaries And Wages;* Section 59.025(3)(c), Stats., does not apply to county clerk; and whereas a county board may create position of administrative services co-ordinator, transfer of duties currently performed by the county clerk would be permissible only where some other specific statute permits transfer to some other officer or prescribes that some other officer can initially be assigned such duties, or where the duties involved have not been conferred upon the county clerk by express statute and are not important duties which have been performed by the county clerk on an immemorial basis. County officer cannot be paid separate salary for performing services which are incidental to his office. OAG 1-78..... 1

*Compatibility; County Board; Officers And Offices; Ordinances;* County board in county over 500,000 can provide that members of transit board, created by ordinance pursuant to sec. 59.025(3)(a), Stats., be appointed by county board chairman and confirmed by county board. However, supervisor would be ineligible to serve on such transit board by reason of secs. 59.03(4) and 66.11(2), Stats. OAG 62-78 ..... 231

*Counties; County Board; County Clerk;* Section 59.72, Stats., as amended by ch. 265, Laws of 1977, does not authorize the county board to transfer powers to keep books and accounts from the county clerk to the county auditor where express statute provides that the clerk perform such duties or where they have been performed on an immemorial basis, but does provide that the power of supervision as to the manner in which books and accounts are kept by the county clerk or other officer shall lie with the county auditor. OAG 71-78 ..... 248

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1. A county board may provide for a forfeiture but not a fine for violations of an ordinance. 66 Op. Att'y Gen. 148 (1977).
2. A county board lacks the authority to prohibit county clerk (election commission in Milwaukee County) from placing on ballot candidates who have not complied with code of ethics ordinance.
3. County board lacks the authority to order the withholding of salary of elected officials who fail to comply with a code of ethics ordinance.
4. The county board lacks authority to prohibit county officers from acting as agent or attorney for an entity other than the county in connection with any transaction involving the county in which such officers participate during the course of their service for a period of 12 months after leaving county service.
5. A board created by the county board, unless it is a committee of the county board, lacks authority to issue subpoenas or administer oaths.

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<i>Counties; County Board; Fire Department; Municipalities; Towns; Town having fire department must provide protection for county-owned property such as a landfill site, and in case of failure to do so shall be liable for services of any fire department responding to request to fight fire in such town. County in its discretion can reimburse town for reasonable costs of services provided to landfill site within town. OAG 2-78.....</i>	6
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<i>Counties; County Board; County Clerk; Section 59.72, Stats., as amended by ch. 265, Laws of 1977, does not authorize the county board to transfer powers to keep books and accounts from the county clerk to the county auditor where express statute provides that the clerk perform such duties or where they have been performed on an immemorial basis, but does provide that the power of supervision as to the manner in which books and accounts are kept by the county clerk or other officer shall lie with the county auditor. OAG 71-78 .....</i>	248
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*Appropriations And Expenditures; Attorneys; Compatibility; Compensation; Corporation Counsel; Counties; County Board; County Corporation Counsel; District Attorney; Expenditures; Funds; Gifts; Indigent; Ordinances; Public Officials; Salaries And Wages;* 1. Corporation counsel employed on part-time basis cannot accept employment as defense counsel for those whose interests are directly adverse to the state or county.  
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*Counties; County Highway Commissioner; Highways; Sheriffs; Traffic;* Where county has contract to maintain state trunk highways, county highway commissioner can temporarily close state trunk highway in case of emergency. Sec. 86.06(1), Stats. Sheriff has power to temporarily

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<i>Appropriations And Expenditures; Counties; County Treasurer; Forests; Towns; Section 59.20(13), Stats., controls the distribution of national forest income by county treasurers derived from 16 U.S.C. sec. 471, et seq., and 31 U.S.C. sec. 1601, et seq. (Unpublished Opinion) OAG 45- 78.</i>	
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<i>Court Commissioner; Traffic; A court commissioner lacks authority in traffic cases to accept pleas of no contest from defendants who do not appear but make a deposit, to accept pleas of no contest and guilty from defendants who appear, and to assess penalties against these defendants, since a court commissioner has only those powers conferred by statute and since the statutes do not authorize court commissioners to conduct such activities. (Unpublished Opinion) OAG 21-78.</i>	
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*Advertising; Anti-Secrecy; Constitution; Constitutionality; Criminal Law; Elections; Legislation; Legislature; Licenses And Permits; Lobbying; Public Officials; Public Records; Subpoena;* Certain provisions of Substitute Amendment 1 to 1977 Senate Bill 286, revising subch. III of ch. 13, Stats., the state's lobbying law, are incompatible with the rights of Wisconsin citizens to petition the government and to be secure against unreasonable searches and seizures and are therefore probably unconstitutional. The major portion of the bill is constitutional. (Unpublished Opinion) OAG 15-78.

*Criminal Law; Licenses And Permits; Natural Resources, Department Of; Navigable Waters; State; Streams;* In order to obtain a conviction for violating sec. 30.195, Stats., the state must show that the defendant changed the course of a navigable stream and that no permit to change the stream's course had been granted to the defendant. The state need not show that the changed portion of the stream was navigable, nor a specific intent to change the stream's course. OAG 81-78 ..... 265

*Criminal Law; Public Records; Words And Phrases;* Section 973.015, Stats., requires, in cases where ordered by the court, that the clerk of court upon receipt of the certificate of discharge strike or obliterate from the record all references to the name and identity of the defendant. OAG 90-78 ..... 301

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*Public Health; Dairy, Food And Drugs;* Heating hot dogs is not food preparation. Use of dry ice is not wet storage. (Unpublished Opinion) OAG 70-78.

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*Deeds; Microfilm; Mortgages; Real Estate; Register Of Deeds; Vital Statistics;* Although register of deeds can utilize microfilm and photocopies with county board approval, use of a photocopy of writs of attachments and certificates of sale of real estate would not, even with index, be a substitute for the separate indexed book or register of "abstracts" of such documents required by sec. 59.54, Stats. OAG 23-78..... 114

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2. Section 256.22(3), Stats., does not prohibit a district attorney from compensating his partner, out of his own funds, for assistance in prosecuting a state case.

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*Circuit Judge; Judges; Public Officials; Salaries And Wages; Chapter 114, Laws of 1977, provided for a 5.5% increase to the dollar value of the salary range minimum and maximum for the salary schedule applicable to circuit judges as of July 1, 1978; however, as sec. 20.923(2), Stats., provides that the salary of a circuit judge is set at the midpoint of the salary group in effect "at the time of taking the oath of office" subject to Wis. Const. art. IV, sec. 26, such increase is not applicable to circuit judges during current terms until some person, on or after July 1, 1978, who was elected or appointed, qualifies as judge and takes an oath for a new term. (Unpublished Opinion) OAG 74-78.*

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*Administration, Department Of; Civil Service; Collective Bargaining; Employer And Employee; Labor; Salaries And Wages; Matters within the scope of bargaining as set forth in sec. 111.91, Stats., agreed to by the Department of Administration and a state employe union are not effective until submitted as tentative agreements to and approved by the Joint Committee on Employment Relations. Action of the Secretary of the Department of Administration in agreeing to so-called non-recrimination clause was within his discretion but the clause itself is unenforceable until approved by the Joint Committee on Employment Relations. OAG 9-78..... 38*

*Arrest; Discrimination; Employer And Employee; Labor; Licenses And Permits; Nurses; 1. A licensing agency may not ask an applicant about juvenile delinquency records.  
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*Employer And Employee; Labor;* Public ski resorts and amusement parks which make a charge for enjoyment of their facilities are subject to rules relating to employment made under secs. 103.01 to 103.03, Stats. (Unpublished Opinion) OAG 72-78.

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*Counties; County Board; Land; Mineral Rights; Public Lands;* Counties may not transfer county owned mineral rights, acquired through nonpayment of taxes, to private persons without following the appraisal and public sale provisions of sec. 75.69, Stats. Under sec. 59.07(1)(c), Stats., counties may make gifts of land or interests in lands only to enumerated public entities. OAG 63-78 ..... 236

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*Leases; School And School Districts;* Common school districts have the authority to lease property that they own if such property is not currently needed for school purposes and if the lease is authorized by the annual meeting of the common school district. The answer is not free from doubt and it is recommended that the Legislature specifically grant to school boards, if authorized by the annual meeting, the authority to lease school property not currently needed for school purposes. OAG 98-78 ..... 332

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*Advertising; Anti-Secrecy; Constitution; Constitutionality; Criminal Law; Elections; Legislation; Legislature; Licenses And Permits; Lobbying; Public Officials; Public Records; Subpoena;* Certain provisions of Substitute Amendment 1 to 1977 Senate Bill 286, revising subch. III of ch. 13, Stats., the state's lobbying law, are incompatible with the rights of Wisconsin citizens to petition the government and to be secure against unreasonable searches and seizures and are therefore probably unconstitutional. The major portion of the bill is constitutional. (Unpublished Opinion) OAG 15-78.

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*Administrative Procedure; Advertising; Anti-Secrecy; Constitution; Constitutionality; Criminal Law; Elections; Legislation; Legislature; Licenses And Permits; Lobbying; Public Officials; Public Records; Subpoena; Words And Phrases;* In principle, the purposes sought to be accomplished by Assembly Substitute Amendment 3 to 1977 Assembly Bill 93, revising subch. III of ch. 13, Stats., the state's lobbying law, are compatible with the rights of Wisconsin citizens to petition the government and to be secure against unreasonable searches and seizures. Some of the means selected to accomplish those purposes may, on their face or as applied violate citizens' first amendment right of petition. OAG 19-78..... 85

*Advertising; Anti-Secrecy; Constitution; Constitutionality; Criminal Law; Elections; Legislation; Legislature; Licenses And Permits; Lobbying; Public Officials; Public Records; Subpoena;* Certain provisions of Substitute Amendment 1 to 1977 Senate Bill 286, revising subch. III of ch. 13, Stats., the state's lobbying law, are incompatible with the rights of Wisconsin citizens to petition the government and to be secure against unreasonable searches and seizures and are therefore probably unconstitutional. The major portion of the bill is constitutional. (Unpublished Opinion) OAG 15-78.

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*Collective Bargaining; Common Council; Grievance Procedures; Open Meeting; Where common council hears a grievance under a procedure established under a signed contract, the council is engaged in collective bargaining within the meaning of sec. 111.70(1)(d), Stats., and is therefore, for that purpose, not a "governmental body" within the meaning of sec. 19.82(1), Stats., of the open meeting law. OAG 83-78*..... 276

*Collective Bargaining; Open Meeting; Public Records; Public Utilities; Salaries And Wages; Where Water and Light Commission has power to fix compensation of employes, it may meet in closed session to discuss and vote upon increases for non-union employes. A record must be made of motions and roll-call votes at open and closed meetings. Such record is open to inspection and copying subject to sec. 19.21, Stats., and common-law limitations with respect thereto. OAG 24-78* ..... 117

*Open Meeting; Towns; Whereas it is preferable to hold meetings of a town board in a public building such as a town hall, fire station or school building, such meeting can be legally held at the home of a town officer if proper notice is given and if the home is, in fact, reasonably accessible to members of the public during all times the meeting is in progress. OAG 28-78.....* 125

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*Agriculture; Counties; County Board; Ordinances; Towns; Zoning; The extent to which sec. 91.73(4), Stats., as created by ch. 29, Laws of 1977, and amended by ch. 169, Laws of 1977, alters the procedures applicable for the amendment of county comprehensive zoning ordinances under sec. 59.97(5)(e), Stats., is discussed. OAG 87-78 .....* 290

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2. Section 256.22(3), Stats., does not prohibit a district attorney from compensating his partner, out of his own funds, for assistance in prosecuting a state case.

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*The county would be liable to the injured veteran in an automobile accident while being transported by the veterans' service officer if the officer were authorized and performing within the scope of his employment.*

*If he were authorized and an accident occurred, sec. 895.43(3), Stats., limits the recovery to \$25,000. OAG 56-78 .....* 207

**Veterans Affairs, Department Of**

*Authority; Civil Service; Compensation; Governor; Public Officials; Salaries And Wages; Veterans Affairs, Department Of; The Governor as the appointing authority for the incumbent Secretary of Veterans Affairs has power to set his salary subject to statutory restraints. OAG 79-78 .....* 257

*Authority; Civil Service; Governor; Public Officials; Salaries And Wages; Veterans Affairs, Department Of; Salary adjustments for the incumbent Secretary of Veterans Affairs discussed. OAG 80-78.....* 262

**Villages**

*Appropriations And Expenditures; Cities; Counties; County Board; Municipalities; Taxation; Towns; Villages; Words And Phrases; Towns, villages and cities in counties establishing a county solid waste management system under sec. 59.07(135), Stats., may be taxed for the capital costs of the county-wide system, but not for the operating costs. OAG 17-78.....* 77

*Boundaries; Cities; Ordinances; Villages; Zoning; 1. An extraterritorial zoning ordinance may utilize interior section lines.*

*2. Interim extraterritorial zoning ordinances need not be based on a land use survey.*

3. Amendment of interim extraterritorial zoning ordinances discussed.	
4. Appeals under an interim extraterritorial zoning ordinance are handled by the city or village.	
5. Administration of extraterritorial zoning is by the city or village.	
6. The joint extraterritorial zoning committee continues to exist after adoption of the comprehensive extraterritorial zoning ordinance. OAG 64-78.....	238
<i>Cities; Collective Bargaining; Contracts; Counties; Employer And Employee; Home Rule; Legislature; Municipalities; Pensions; Retirement Fund; Retirement Systems; Salaries And Wages; Schools And School Districts; Teachers Retirement Fund; Towns; Villages; Authority of a state or governmental subdivision to provide a retirement plan in lieu of or supplemental to existing statutory plans discussed. The Milwaukee School Board is authorized by sec. 111.70, Stats., to contract for a retirement system supplementary to the existing statutory system. OAG 37-78.....</i>	153
<b>Vital Statistics</b>	
<i>Deeds; Microfilm; Mortgages; Real Estate; Register Of Deeds; Vital Statistics; Although register of deeds can utilize microfilm and photocopies with county board approval, use of a photocopy of writs of attachments and certificates of sale of real estate would not, even with index, be a substitute for the separate indexed book or register of "abstracts" of such documents required by sec. 59.54, Stats. OAG 23-78.....</i>	114
<b>Vocational And Adult Education</b>	
<i>Schools And School Districts; Vocational And Adult Education; Secondary schools may not legally provide a vocational, technical and adult education district with the names of high school dropout students. OAG 77-78 .....</i>	254
<b>Waters</b>	
<i>Indians; Municipalities; Natural Resources, Department Of; Pollution; Waters; Chapter 147, relating to water pollution control, did not authorize DNR to regulate Indian reservations and lands since the Legislature, in adopting provisions fashioned after federal law, intentionally omitted Indian tribal organizations from the scope of coverage while charged with knowledge that the state generally lacks power to regulate within sovereign Indian territory. (Unpublished Opinion) OAG 51-78.</i>	
<b>Words And Phrases</b>	
<i>Administrative Procedure; Advertising; Anti-Secrecy; Constitution; Constitutionality; Criminal Law; Elections; Legislation; Legislature; Licenses And Permits; Lobbying; Public Officials; Public Records; Subpoena; Words And Phrases; In principle, the purposes sought to be accomplished by Assembly Substitute Amendment 3 to 1977 Assembly Bill 93, revising subch. III of ch. 13, Stats., the state's lobbying law, are compatible with the rights of Wisconsin citizens to petition the government and to be secure against unreasonable searches and seizures. Some of the means selected to accomplish those purposes may, on their face or as applied violate citizens' first amendment right of petition. OAG 19-78.....</i>	85
<i>Appropriations And Expenditures; Cities; Counties; County Board; Municipalities; Taxation; Towns; Villages; Words And Phrases; Towns, villages and cities in counties establishing a county solid waste</i>	

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management system under sec. 59.07(135), Stats., may be taxed for the capital costs of the county-wide system, but not for the operating costs. OAG 17-78..... 77

*Criminal Law; Public Records; Words And Phrases*; Section 973.015, Stats., requires, in cases where ordered by the court, that the clerk of court upon receipt of the certificate of discharge strike or obliterate from the record all references to the name and identity of the defendant. OAG 90-78 ..... 301

*Licenses And Permits; Taxation; Words And Phrases*; If they satisfy other conditions under sec. 163.90, Stats., and other raffle requirements, political organizations are eligible for a raffle license because contributions to such organizations are deductible for federal or state income tax purposes within the meaning of the statute. Political subdivisions of the state also are eligible for raffle licenses under the same conditions and for the same reasons. OAG 96-78 ..... 323

**Zoning**

*Agriculture; Counties; County Board; Ordinances; Towns; Zoning*; The extent to which sec. 91.73(4), Stats., as created by ch. 29, Laws of 1977, and amended by ch. 169, Laws of 1977, alters the procedures applicable for the amendment of county comprehensive zoning ordinances under sec. 59.97(5)(e), Stats., is discussed. OAG 87-78 ..... 290

*Boundaries; Cities; Ordinances; Villages; Zoning*; 1. An extraterritorial zoning ordinance may utilize interior section lines.  
 2. Interim extraterritorial zoning ordinances need not be based on a land use survey.  
 3. Amendment of interim extraterritorial zoning ordinances discussed.  
 4. Appeals under an interim extraterritorial zoning ordinance are handled by the city or village.  
 5. Administration of extraterritorial zoning is by the city or village.  
 6. The joint extraterritorial zoning committee continues to exist after adoption of the comprehensive extraterritorial zoning ordinance. OAG 64-78 ..... 238

*Counties; County Board; Ordinances; Towns; Zoning*; A county which has enacted a countywide comprehensive zoning ordinance under sec. 59.97, Stats., may not enact any zoning provision authorizing withdrawal of town approval of such ordinance or otherwise specifically excluding or exempting any town from the operation of such ordinance. OAG 53-78 ..... 197

*Ordinances; State; Zoning*; Under sec. 13.48(13), Stats., the state is subject to local governmental zoning regulations when remodeling a newly acquired or leased facility. OAG 76-78 ..... 251

