

OPINIONS
OF THE
ATTORNEY GENERAL
OF THE
STATE OF WISCONSIN
VOLUME 69

January 1, 1980 through December 31, 1980

BRONSON C. LA FOLLETTE
ATTORNEY GENERAL



MADISON, WISCONSIN
1980

CHRONOLOGY

RETROGRADE

LAUNCHING THE ROSES

1990

EVOLUTION STATE

1990

1991, modernized digital control system

UPGRADES AND EXPANSION

LAUNCHING ROSES

UPGRADED SYSTEM

1991

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
WINFIELD 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. FINNEGAR, Milwaukee.....	from Jan. 2, 1933, to Jan. 4, 1937
ORLAND S. LOOMIS, Mauston	from Jan. 4, 1937, to Jan. 2, 1939
JOHN E. MARTIN, Milwaukee.....	from Jan. 2, 1939, to June 5, 1948
GROVER L. BROADFOOT, Mondovi	from June 5, 1948, to Nov. 15, 1948
THOMAS E. FAIRCHILD, Milwaukee.....	from Nov. 15, 1948, to Jan. 1, 1951
VERNON W. THOMSON, Richland Center.....	from Jan. 1, 1951, to Jan. 7, 1957
STEWART G. HONECK, 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, Madisonfrom Jan. 5, 1965, to Jan. 6, 1969
ROBERT W. WARREN, Green Bayfrom Jan. 6, 1969, to Oct. 8, 1974
VICTOR A. MILLER, Saint Nazianzfrom Oct. 8, 1974, to Nov. 25, 1974
BRONSON C. La FOLLETTE, Madisonfrom Nov. 25, 1974, to

DEPARTMENT OF JUSTICE

LEGAL SERVICES DIVISION

BRONSON C. LA FOLLETTE	Attorney General
DAVID J. HANSON	Deputy Attorney General
HOWARD J. KOOP	Executive Assistant
WILLIAM H. WILKER	Admin., Legal Services Division
EMILY ALBRINK FOWLER ^{1,2}	Assistant Attorney General
JAMES P. ALTMAN	Assistant Attorney General
JOHN E. ARMSTRONG	Assistant Attorney General
NANCY L. ARNOLD	Assistant Attorney General
WALTRAUD A. ARTS	Assistant Attorney General
THOMAS J. BALISTRERI	Assistant Attorney General
DAVID J. BECKER	Assistant Attorney General
CHARLES A. BLECK	Assistant Attorney General
LINDA H. BOCHERT'	Assistant Attorney General
MARY V. BOWMAN	Assistant Attorney General
RICHARD J. BOYD	Assistant Attorney General
BETTY R. BROWN	Assistant Attorney General
JOHN W. CALHOUN	Assistant Attorney General
BRUCE A. CRAIG	Assistant Attorney General
F. THOMAS CREERON III	Assistant Attorney General
LEROY L. DALTON	Assistant Attorney General
THOMAS DAWSON	Assistant Attorney General
DOROTHY DEY'	Assistant Attorney General
THOMAS L. DOSCH ²	Assistant Attorney General
STEVEN D. EBERT	Assistant Attorney General
SHARI EGGLESON	Assistant Attorney General
DANIEL S. FARWELL ²	Assistant Attorney General
WILLIAM FIELDS	Assistant Attorney General
DAVID T. FLANAGAN	Assistant Attorney General
THOMAS N. FREDERICK'	Assistant Attorney General
WILLIAM L. GANSNER ¹	Assistant Attorney General
DAVID J. GILLES	Assistant Attorney General
JOHN J. GLINSKI	Assistant Attorney General
JOHN DOUGLAS HAAG	Assistant Attorney General
ALBERT O. HARRIMAN	Assistant Attorney General
CHRIS HEIKENEN	Assistant Attorney General
CHARLES D. HOORNSTRA	Assistant Attorney General
RUBY JEFFERSON-MOORE	Assistant Attorney General
JAMES D. JEFFRIES	Assistant Attorney General
DONALD P. JOHNS	Assistant Attorney General
WARD L. JOHNSON, JR.	Assistant Attorney General
HOWARD B. KLEIN'	Assistant Attorney General
STEPHEN W. KLEINMAIER ²	Assistant Attorney General
MICHAEL R. KLOS	Assistant Attorney General
KIRBIE KNUTSON	Assistant Attorney General
JOHN E. KOFRON	Assistant Attorney General
BEATRICE LAMPERT	Assistant Attorney General
CHARLES R. LARSEN	Assistant Attorney General
ROBERT W. LARSEN	Assistant Attorney General
ALAN M. LEE	Assistant Attorney General
MICHAEL J. LOSSE ²	Assistant Attorney General
PAMELA MAGEE-HEILPRIN	Assistant Attorney General
EDWARD MARION	Assistant Attorney General
ROBERT B. McCONNELL	Assistant Attorney General
JAMES H. McDERMOTT	Assistant Attorney General
MAUREEN A. McGLYNN	Assistant Attorney General
JAMES C. MCKAY, JR.	Assistant Attorney General

DANIEL A. MILAN	Assistant Attorney General
ROY G. MITA	Assistant Attorney General
MARGUERITE M. MOELLER	Assistant Attorney General
STEPHEN L. MORGAN ¹	Assistant Attorney General
JAMES K. MUEHLBAUER	Assistant Attorney General
JOHN C. MURPHY	Assistant Attorney General
LOWELL E. NASS	Assistant Attorney General
STEPHEN J. NICKS ²	Assistant Attorney General
JOHN D. NIEMISTO	Assistant Attorney General
MICHAEL E. PERINO ¹	Assistant Attorney General
PETER A. PESHEK	Assistant Attorney General
THEODORE L. PRIEBE	Assistant Attorney General
ROBERT D. REPASKY	Assistant Attorney General
DAVID C. RICE	Assistant Attorney General
RAYMOND M. RODER	Assistant Attorney General
NADIM SAHAR	Assistant Attorney General
GORDON SAMUELSEN	Assistant Attorney General
JEROME S. SCHMIDT	Assistant Attorney General
WARREN M. SCHMIDT	Assistant Attorney General
GEORGE B. SCHWAHN	Assistant Attorney General
F. JOSEPH SENSENBRENNER, Jr.....	Assistant Attorney General
CARL A. SINDERBRAND	Assistant Attorney General
JONATHAN P. SINER	Assistant Attorney General
DONALD W. SMITH	Assistant Attorney General
MARK E. SMITH	Assistant Attorney General
STEPHEN M. SOBOTA	Assistant Attorney General
ANDREW L. SOMERS	Assistant Attorney General
DANIEL D. STIER	Assistant Attorney General
MARYANN SUMI	Assistant Attorney General
JOHN R. SWEENEY	Assistant Attorney General
BARBARA W. TUERKHEIMER	Assistant Attorney General
STEVEN C. UNDERWOOD	Assistant Attorney General
ROBERT J. VERGERONT	Assistant Attorney General
RICHARD A. VICTOR	Assistant Attorney General
PATRICK W. WALSH	Assistant Attorney General
SALLY L. WELLMAN	Assistant Attorney General
STEVEN B. WICKLAND	Assistant Attorney General
GERALD S. WILCOX	Assistant Attorney General
WILLIAM C. WOLFORD	Assistant Attorney General
E. WESTON WOOD ³	Assistant Attorney General
E. GORDON YOUNG	Assistant Attorney General
MICHAEL L. ZALESKI	Assistant Attorney General

¹Resigned, 1980

²Appointed, 1980

³Retired, 1980

OPINIONS
OF THE
ATTORNEY GENERAL

Volume 69

Compensation; County Clerk; Public Officials; Salaries And Wages; Sheriffs; The salaries of elected county officials may be increased during their terms. But any increase put into effect after the earliest time for filing nomination papers does not carry forward to the new term unless the county board again votes the increase.
OAG 1-80

January 3, 1980.

FREDERIC W. FLEISHAUER, *District Attorney*
Portage County

You request my opinion whether the present sheriff and county clerk, who were elected in November, 1978, and who took office in January, 1979, are entitled to the same salaries received by their predecessors under the following facts:

In May of 1978, the Portage County Board of Supervisors established base salaries for the 1979-80 term to comply with state law which requires that salaries for the term be established

prior to the first date that nomination papers may be filed, or in this case June 1, 1978 (see Section 59.15, Wis. Stats.). That action established the Sheriff's base pay at \$18,540 and established the County Clerk's base pay at \$13,164. At the June, 1978 meeting, the Portage County Board granted supplements to the incumbent officials salaries for the calendar year 1978. These supplements gave the incumbent Sheriff a salary of \$20,490 and the incumbent County Clerk a salary of \$13,508 for the calendar year 1978. The incumbent Sheriff and the incumbent County Clerk were not re-elected. When the current term began in January, 1979 the newly elected officials received less pay than the officials of the previous term. The newly elected Sheriff and newly elected County Clerk received the base pay which had been established in May of 1978, but they did not receive the supplement which had been granted to the incumbents in June of 1978.

In my opinion the answer is no.

Sections 59.15(1)(a) and 66.197, Stats., must be harmonized. Section 59.15(1)(a), Stats., provides:

The board shall, prior to the earliest time for filing nomination papers for any elective office ... establish the total annual compensation for services to be paid 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., provides:

The governing body of any county may, during the term of office of any elected official ... increase the salary of such elected official in such amount as the governing body determines. The power granted by this section shall take effect notwithstanding any other provision of law to the contrary.

In a similar situation, the supreme court held that, prior to the first date on which nomination papers may be circulated, a county board may set the total compensation paid "for the term to commence when the judge newly elected takes office." *State ex rel. Conway v. Elvod*, 70 Wis. 2d 448, 452, 234 N.W.2d 354 (1975). The court also has stated that the policy embodied in previous versions of sec.

59.15(1)(a), Stats., is that the salary be set at a period remote in time from the election in order to prevent the influence of partisan bias or personal feeling and that the candidates should know what compensation was attached to the office. *See, Feavel v. Appleton*, 234 Wis. 483, 488, 291 N.W. 830 (1940). At the time of *Feavel v. Appleton*, the applicable statute required the county board to fix the compensation at its annual meeting.

Section 66.197, Stats., unquestionably repeals that part of sec. 59.15(1)(a), Stats., which appears to forbid increases *during the term* of office. *See*, 45 Op. Att'y Gen. 166 (1956). Nevertheless, as shown by *State ex rel. Conway v. Elvod*, the policy to fix the compensation for an ensuing term prior to the election remains intact. The statutes can be harmonized by an interpretation which gives effect to both the provision in sec. 59.15, Stats., that increases or decreases accomplished prior to the earliest time for filing nomination papers establish the compensation for the ensuing term, and the provision in sec. 66.197, Stats., that the county board may *increase* the salary of any elected official during the term of office.

Accordingly, I conclude that sec. 59.15(1)(a), Stats., functions to cause the compensation established prior to the earliest time for filing nomination papers to be the compensation in effect at the time the new term of office begins. Section 66.197, Stats., permits increases in compensation during the term of office, but the rate in effect prior to the earliest time for filing nomination papers is the compensation which attaches to the office at the next ensuing term.

Under this interpretation an increase occurring between the earliest date for filing nomination papers and the taking of the oath by the newly elected county official applies to the incumbent only. Further action of the county board to increase the salary of the newly elected official is required even if he/she is reelected.

In 45 Op. Att'y Gen. 166 (1956), one of my predecessors used language at page 167 which may suggest that an increase in compensation carries forward to ensuing terms. That suggestion is negated in part by the use of the word "timely" in reference to the salary increase and is expressly rejected by this opinion.

BCL:DJH:CDH

Judges; Salaries And Wages; Chapter 38, Laws of 1979, is effective to every judge of a court of record and justice of the supreme court when either a supreme court justice or judge of a court of record commences a term of office. OAG 2-80

January 16, 1980.

J. DENIS MORAN, *Director of State Courts*

Supreme Court of Wisconsin

You have asked whether sec. 40.96(3), Stats., created by ch. 38, Laws of 1979, becomes effective as to the judges of the court of appeals when a judge of the circuit court commences a term.

In my opinion, the plain language of this statutory provision requires a yes answer.

Section 40.96(3), Stats., provides: "This subchapter applies to every judge of a court of record and justice of the supreme court on and after the date that any justice of the supreme court or judge of a court of record commences a term of office after the effective date of this act (1979)."

You are concerned that this provision is in conflict with sec. 20.923(3), Stats., which provides that salary adjustments for any supreme court justice or judge of the court of appeals or circuit court shall be made when any justice or judge of the same court takes the oath of office.

It is evident that the Legislature meant that the salary adjustment required by ch. 38, Laws of 1979, is effective for "every judge of a court of record *and* justice of the supreme court" as soon as any justice *or* judge commences a term. In other words, the Legislature is making ch. 38, Laws of 1979, effective as to all classes of justices and judges mentioned in sec. 20.923(3), Stats., at the same time.

Sections 40.96(3) and 20.923(3), Stats., are harmonious and each operates independently. Section 40.96(3), Stats., establishes the effective date that sec. 40.91, Stats. (wages reduced to offset retirement benefits), will be implemented. It applies only to those judges or justices who are receiving retirement benefits. Section

20.923(3), Stats., governs when salary increases are effective for all judges and justices. For example, the salaries of all circuit judges, including those receiving retirement benefits, could be changed according to sec. 20.923(3), Stats., while the salaries of circuit judges receiving retirement benefits will change according to sec. 40.96(3), Stats.

In my opinion, sec. 40.96(3), Stats., is not repugnant to Wis. Const. art. IV, sec. 26, which provides in part, that:

[W]hen any increase or decrease provided by the legislature in the compensation of the justices of the supreme court or judges of any court of record shall become effective as to any such justice or judge, it shall be effective from such date as to each of such justices or judges.

In this case, the Legislature is making the effective change as to all judges and justices at the same time. Nothing in Wis. Const. art. IV, sec. 26, prohibits the Legislature from doing this.

BCL:WMS

Judicial Commission; Orders of former Judicial Commission, which was created and abolished by supreme court order, which created temporary vacancies in the 26th Judicial Circuit Court, Walworth County, and Branch 1 of the 22nd Judicial Circuit Court in Waukesha County, are presumed valid until altered or held invalid by proper authority. Final authority is in the supreme court.

Present Judicial Commission, created by legislative act, pursuant to Wis. Const. art. VII, sec. 11, is successor to former Commission. The Commission has power to invoke its jurisdiction over the temporary vacancies, and probably has a duty pursuant to sec. 757.85(1), Stats., to "investigate any possible ... disability of a judge" and whether the disabilities, previously determined, continue. OAG 3-80

January 16, 1980.

NATALIE SMITH, *Executive Director*

Judicial Commission

You request informal advice with respect to the powers of the new Judicial Commission with respect to the abilities of The Honorable Judges William E. Gramling and Erwin C. Zastrow to perform the duties of their respective offices.

In October, 1976, the Judicial Commission, which was created pursuant to supreme court rule, 52 Wis. 2d vii (1972), acting pursuant to rules of procedure promulgated by supreme court rule, 57 Wis. 2d vii (1973), and sec. 17.026, Stats., created by ch. 332, Laws of 1975, after preliminary investigation and public hearing made a Finding and Order, which provided in part:

FINDING

That Circuit Judge Erwin C. Zastrow is incapable of performing, or materially impaired in his ability to perform, the duties of his office by reason of physical or mental infirmity, such infirmity having existed for a period of at least ninety (90) days prior to the filing of the Petition to declare a temporary vacancy, is presently existing, and will probably continue to exist for an indefinite period of time.

The Judicial Commission having considered all the facts and circumstances in this matter now makes the following

ORDER

It is the Order of the Judicial Commission that a temporary vacancy be, and it hereby is, declared in the 26th Circuit Court, Walworth County, and that such temporary vacancy shall exist in said court until further Order of the Judicial Commission or until the expiration of the present term of office of Circuit Judge Erwin C. Zastrow.

In August, 1977, acting pursuant to the same authority and procedures, the Judicial Commission made a Finding and Order which provided in part:

FINDING

That Circuit Judge William E. Gramling will be incapable of performing, or materially impaired in his ability to perform, the duties of his office by reason of physical infirmity, which infirmity will exist for a period in excess of ninety (90) days.

The Judicial Commission having considered all the facts and circumstances in this matter now makes the following

ORDER

It is the Order of the Judicial Commission that a temporary vacancy be, and it hereby is, declared in Branch No. 1 of the 22nd Judicial Circuit Court in Waukesha County, Wisconsin, and that such temporary vacancy shall exist in said court until further Order of the Judicial Commission or until the expiration of the present term of office of Circuit Judge William E. Gramling.

The term of office for each of these judges expires in January, 1982. The former Judicial Commission was abolished as of July 31, 1978, by supreme court order filed July 27, 1978, and such Commission had not theretofore rescinded or otherwise altered either of the above orders. The present Judicial Commission was established pursuant to sec. 757.83, Stats., which was created by ch. 449, Laws of 1977, which chapter also created secs. 757.81-757.99, Stats., and repealed former sec. 17.026, Stats.

You inquire:

- (1) The terms of the Order declaring a temporary vacancy for each judge states that it shall exist until "further Order of the Judicial Commission." Since said judicial commission was subsequently abolished and since the new commission has no power to issue Orders, what is the legal effect of this provision of Orders?

The supreme court has held that it had inherent power to create a judicial commission as an agency of the judicial branch of state government in aid of the administration of justice. *State ex rel. Lynch v. Dancey*, 71 Wis. 2d 287, 238 N.W.2d 81 (1976), and *In re Hon. Charles E. Kading*, 70 Wis. 2d 508, 235 N.W.2d 409, 238 N.W.2d 63, 239 N.W.2d 297 (1975). At that time and at present, Wis. Const.

art. XIII, sec. 10, provided: "The legislature may declare the cases in which any office shall be deemed vacant, and also the manner of filling the vacancy, where no provision is made for that purpose in this constitution." *See* 63 Op. Att'y Gen. 24 (1974). Chapter 332, Laws of 1975, created sec. 17.026, Stats., to provide in part that "whenever a judge of a circuit ... court is found incapable of performing, or materially impaired in his ability to perform, the duties of his office, by reason of physical or mental infirmity, a temporary vacancy exists. The determination that a temporary vacancy exists shall be made by the judicial commission." The statute also provided that the supreme court shall establish procedures, that where a temporary vacancy is found the incumbent judge shall continue to receive his salary and other benefits and that "the duties of the office shall be assumed by a reserve judge." Under the procedures established, final authority was in the supreme court. *See* Rules of Procedure in 57 Wis. 2d vii (1973), also shown in addendum to Wis. Stats. 1975 at pp. 27-31.

It is noted that the statute did not create a judicial commission but referred to "the judicial commission." The validity of the October, 1976, order which applied to Judge Erwin C. Zastrow was determined in *State ex rel. Godfrey v. Gollmar*, 76 Wis. 2d 417, 251 N.W.2d 438 (1977). The court held both the order and the statute, sec. 17.026, Stats., constitutionally valid. At p. 423, the court stated:

It is apparent, therefore, that, under the statutes, the order of the Chief Justice of November 10, 1976, inaccurately referred to the appointment of Robert H. Gollmar to the "office" of circuit judge. Such order should more properly have directed that Robert H. Gollmar be appointed to perform the duties of that office during the period of the disability of Erwin C. Zastrow.

Under the plain language of the statute, we conclude that the Constitution is not affronted, because the Judicial Commission does not declare a "vacancy" in the office in the sense that "vacancy" is used elsewhere in the statutes. "Temporary vacancy," as used in sec. 17.026, Stats., does not constitute an abdication of the office, resignation, or disqualification mandated by law, but is rather descriptive of that period of time during which a judge is incapable of performing, or is materially impaired in his ability to perform, the duties of his office. Sec. 17.026(1). The proceedings under sec. 17.026 do not result in a

vacancy in the office, nor do they result in the removal of the incumbent from office.

We accordingly conclude that this statute does not contravene art. XIII, sec. 12, art. VII, sec. 1, or art. VII, sec. 13, which, respectively, refer to the recall, impeachment, or removal of judges by address. It is, of course, beyond argument that the constitutional provisions set forth above constitute the constitutionally exclusive methods of declaring a vacancy and the method of removal from office. They are inapplicable under the procedure approved by the legislature by which the office is not vacated by the incumbent and only the duties of the position, and not the office itself, are assumed by the appointee.

The judicial amendments of April, 1977, did not affect Wis. Const. art. XIII, sec. 12, or art. VII, sec. 1, and did not materially amend art. VII, sec. 13; but, art. VII, sec. 11, was created to provide:

Each justice or judge shall be subject to reprimand, censure, suspension, removal for cause or for disability, by the supreme court pursuant to procedures established by the legislature by law. No justice or judge removed for cause shall be eligible for reappointment or temporary service. This section is alternative to, and cumulative with, the methods of removal provided in sections 1 and 13 of this article and section 12 of article XIII.

In my opinion, the present Judicial Commission is a successor in interest to the former Commission although it is created by statute rather than supreme court rule. It is a part of the judicial branch of government but has somewhat different powers than the former Commission. Under present statutes, the Commission has the power to investigate and prosecute before a jury or panel of judges and to make findings of fact and conclusions of law and recommendations as to discipline for misconduct or appropriate action for disability. The supreme court has final power as to discipline or "appropriate action" and pursuant to Wis. Const. art. VII, sec. 11, could remove for "cause or for disability." *See* secs. 757.85-757.91, Stats., as to temporary disability.

Section 757.97(1), Stats., provides that "if the supreme court determines that a judge has a temporary disability, a temporary vacancy exists." Subsections (2) and (3) provide for assumption of

duties by a reserve judge and continuance of salary and benefits to the disabled judge.

Neither ch. 449, Laws of 1977, nor the order of the supreme court abolishing the former Judicial Commission provide for a means of transition. The order of the supreme court filed July 27, 1978, appears to contemplate that the new Commission is to be successor in certain powers and functions to the former Commission. The fact that the former Judicial Commission has been abolished and the fact that the present Commission does not have final power to make orders does not mean that the Zastrow and Gramling orders no longer have force or that their terms cannot be changed by a proper authority. They were duly issued and are presumed to be valid in accordance with their terms until altered or held invalid by proper authority. In my opinion the supreme court has power to alter the terms of such orders in the event that there is petition or notice to the present Judicial Commission, investigation, hearing and recommendation, all as is provided for in secs. 757.81-757.99, Stats., and rules adopted by such Commission.

Your second question is:

(2) Does the present Commission have jurisdiction over these two temporary vacancies?

The answer is yes. Broadly speaking, the Commission has jurisdiction over all judges defined in sec. 757.81(3), Stats.

The Judicial Commission has notice of the orders of the former Commission and may possess information as to a change in the health of the two judges. It has power to invoke its jurisdiction and probably has a duty pursuant to sec. 757.85(1), Stats., to "investigate any possible ... disability of a judge."

(3) Does the present Commission have jurisdiction to file a petition of permanent disability regarding these two judges?

The answer is yes. *See* Wis. Const. art. VII, sec. 11, and secs. 757.81(2), (3), (6), (7), 757.85(1)-(6), 757.87, 757.89, and 757.91, Stats.

BCL:RJV

Relocation Assistance; Words And Phrases; The owner of rental property, regardless of its size, is engaged in "business" within the purview of sec. 32.19(2)(d), Stats. The Department of Local Affairs and Development may not create standards based on gross receipts or net earnings to determine whether an activity constitutes a "business." OAG 4-80

January 15, 1980.

WILLIAM C. PERKINS, *Administrator*
Division of Housing
Department of Local Affairs and Development

You have requested my advice on the question of whether "the rental of a residential dwelling by an absentee owner constitutes a 'business' within the meaning of s. 32.19 (2)(d)," Stats.

It is clear from your letter that you consider the owner of a large apartment complex as engaged in "business," but you question whether the owner of one (or a few) rental units is engaged in "business."

Your concern is prompted by sec. 32.19(4m), Stats., which provides for a relocation payment of *up to \$50,000* to any displaced person who is displaced from any business which the person has owned.

Section 32.19(2)(d), Stats., defines "business," in part, as:

[A]ny lawful activity ... conducted primarily:

1. For the purchase, sale, *lease or rental of* personal and *real property*, and for the manufacture, processing, or marketing of products, commodities, or any other personal property;
2. For the sale of services to the public;

Section 32.19(2)(c), Stats., defines "displaced person" in part as "any person who moves ... as the result of the acquisition for public purposes of other real property on which such person conducts a business or, who moves or discontinues his business."

It appears from the language of sec. 32.19(2)(d), Stats., that the rental of real property is a "business." It also appears that, under sec.

32.19(2)(c), Stats., if the rental property is acquired, the owner of the (rental) business is a displacee.

Section 32.19(4m), Stats. (1977), provides, in part:

In addition to amounts otherwise authorized by this chapter, the condemnor shall make a payment, not to exceed \$50,000, to any displaced person who is displaced from any business ... which the person has owned for not less than 180 days prior to the initiation of negotiations for the acquisition of the real property on which the business ... operation lies.

There is no language in the above-quoted statutes which would indicate that the Legislature intended to discriminate between a large rental business and a small rental business. Apparently, the adjustment contemplated by the Legislature, between the large and the small landlord, is found in the language of sec. 32.19(4m), Stats., which provides for a "payment, not to exceed \$50,000." Thus, the distinction between the large business and the small business is made in the amount of the relocation payment and eligibility is not, and cannot be, based on the size of the rental business.

An exception to the above would be the situation where an owner, temporarily absent, rents his home. This exception is based on the word "primarily" used in sec. 32.19(2)(d), Stats. In the described situation, the "lawful activity," i.e., the ownership of the property, is not "conducted primarily" for the purposes of rental.

You have also inquired whether to adopt the following criteria or tests in determining if an activity can or should be considered as a business:

Did the business:

- have average annual gross receipts of at least \$2,000, or
- have average annual net earnings of at least \$1,000, or
- contribute at least 33 1/3% of the operator's total income.

One of the purposes of this criteria is to help differentiate between a hobby (for example) and a bona fide business operation.

Would this criteria, in your opinion, be considered a fair and equitable method in making a determination of whether or not an activity is, in fact, a business for relocation purposes?

The answer to your second question is, no.

"Business" is not clearly defined in the Relocation Act by reference to income. Unfortunately, the statutory definition of "business" creates more ambiguity than clarity. But it appears from sec. 32.19(2)(d), Stats., that the "lawful activity" must be engaged in *primarily for the purposes set forth in the statute*. In other words, if a displacee primarily engages in clock repairing, for recreation (hobby), he is not engaged in a business. However, if the displacee is engaged in home clock repairing, "primarily" for the "sale of such services to the public," he is engaged in a business. In my opinion, it is a question of the owners (displacees) reasons for his or her activity which can only be resolved on a case-by-case basis. In making a decision, such factors as the financial circumstances of the owner and the extent of his or her time and household space devoted to the activity would be relevant. For example, if the displacee needed to engage in such activity to meet living expenses, it could be assumed that such activity was engaged in primarily for sale to the public and, thus, a business.

The legislative intent behind the Relocation Act is described in sec. 32.19(1), Stats., as being in the public interest "that persons displaced by any public project be fairly compensated."

The intent of the Legislature is the basis on which the Relocation Act must be construed and administered. Thus, when dealing with a home-business under the Relocation Act, the primary source of compensation, in most instances, would be based on the provisions of sec. 32.19(4), "REPLACEMENT HOUSING." The fact that the displacee operates a business out of his or her home does not automatically entitle him to double compensation. In my opinion, it would only be in those instances where replacement housing benefits are insufficient to fairly duplicate a comparable home-business property that additional benefits would be payable under sec. 32.19(4m), Stats.

The Relocation Act is, admittedly, a difficult law to administer because of its ambiguity.

Therefore, in the administration of the Act you must, in many instances, be guided by the legislative purpose of *fairness* and *comparability* of replacement.

In conclusion, it is my opinion that the Relocation Act is equally applicable to the small landlord, as well as to the large landlord, operation.

It is also my opinion that it would be improper to define "business" by gross receipts, net earnings, or any other mechanical criteria. While the word "primarily," used in the statutory definition, does indirectly relate to income, its relationship is not to amount but rather to the displacee's reasons for engaging in the activity. In other words, if the displacee is engaged in the activity primarily for the purpose of producing income, regardless of amount, he is operating a business.

BCL:CAB

Schools And School Districts; Votes And Voting; Decision of the Wisconsin Supreme Court upholding weighted voting on school district fiscal boards remains in full force and effect notwithstanding subsequent developments in the law of one person, one vote. OAG 5-80

January 29, 1980.

ED JACKAMONIS, *Speaker*
Wisconsin State Assembly

As chairman of the Assembly Committee on Organization you have asked whether sec. 120.50, Stats., violates the one person, one vote principle because it weights the votes of a school district fiscal board on the basis of the equalized valuation of property.

In my opinion there is no constitutional violation by the weighted voting.

The board exercises fiscal control over a school district whose jurisdiction includes component municipal units of government. Sec. 120.50(1), Stats. The fiscal board exercises responsibilities in respect to joint city school districts. *See* secs. 120.41(1) and 120.50(1)(intro.), Stats. A joint city school district comprises component municipalities. *See* sec. 120.41, Stats. At its embryonic stage, the board determines whether to abolish the city school district in

favor of a common or unified school district or whether to continue as a city school district under the control of a fiscal board. Sec. 120.50(1), Stats. Once the decision is made to continue as a joint city school district, the board has the power to approve the school budget, to levy the property tax for school purposes, and to exercise all other fiscal controls over the district. Sec. 120.50(3), Stats.

The members of the board are not elected by the voters to serve on the board. Rather, they are *ex officio* members by reason of their popular election to offices in the component municipalities, or they are designees of such elected officers. Sec. 120.50(2), Stats. The weighting of the voting rights on the board is based on the equalized valuation of property within the respective component municipalities and is set forth in sec. 120.50(2), Stats., as follows:

(am) Each town chairman or designee of the chairman and village president shall have one vote for each full \$200,000 of equalized valuation and remaining major fraction thereof of the school district within his or her town or village, but in no case may a town chairman or village president have less than one vote.

(b) Each mayor of a city having territory which lies within a city school district operated by another city shall have one vote for each full \$200,000 of equalized valuation and remaining major fraction thereof of the school district within his city, but in no case shall the mayor have less than one vote.

(c) The aldermen of the city operating the city school district shall have one vote for each full \$200,000 of equalized valuation and remaining major fraction thereof of the school district within the city. Each alderman present at a meeting of the fiscal board shall have the number of votes determined by dividing the total number of votes to which the aldermen are entitled by the total number of aldermen present at such meeting.

This method of weighting the votes was established by ch. 501, sec. 7, Laws of 1949. The Wisconsin Supreme Court sustained its constitutionality as being neither unreasonable nor arbitrary in *Zawerschnik v. Joint County School Comm.*, 271 Wis. 416, 437, 73 N.W.2d 566 (1955).

The court in *Zawerschnik* did not explain in detail the basis for its conclusion. But since the fiscal board essentially decides how much money is to be spent and imposed on the local taxpayer, it is not unreasonable to conclude that voting strength should be in proportion to the taxpayer burden.

Zawerschnik, however, preceded the evolution of the one person, one vote principle. If that principle is applicable here, two other considerations now must be examined: (1) taxpayers in more populous and poorer property areas have relatively reduced voting strength; and (2) to sustain such vote dilution the state must show that it has a compelling interest. To show that the plan is not unreasonable is insufficient.

The one person, one vote principle is embodied in the equal protection clause of the fourteenth amendment to the United States Constitution. It is based on the conception of political equality. The object is to have equal representation for equal numbers of people. *Reynolds v. Sims*, 377 U.S. 533, 558, 559-60 (1964). "Legislators represent people, not trees or acres." *Id.* at 562. To say that a vote is worth more in one district than in another runs counter to the fundamental ideas of democratic government. *Id.* at 563-64. Each and every citizen has an inalienable right to full and effective participation in the political processes of his state's legislative bodies. *Id.* at 565. The one person, one vote principle, then, protects against dilution of the weight of votes, not merely the outright denial of the right to vote. *Id.* at 566 and *City of Phoenix, Arizona v. Kolodziejksi*, 399 U.S. 204, 209 (1970).

Under this principle states may not draw lines on the basis of wealth, *see Harper v. Virginia State Board of Elections*, 383 U.S. 663, 668 (1966), or where one happens to reside. *Reynolds*, 377 U.S. at 563. Any line-drawing is subject to exacting judicial scrutiny, and the test is whether the state's action is necessary to promote a compelling interest. *Kramer v. Union Free School District*, 395 U.S. 621, 626, 627 (1969), and *Hill v. Stone*, 421 U.S. 289, 297 (1975).

If the one person, one vote principle is applicable, it is unlikely that classifications on the basis of place of residence or wealth could ever meet the required burden for the Court has compared both criteria to classifications on the basis of race. *Reynolds*, 377 U.S. at 566, and *Harper*, 383 U.S. at 668. But compare *Salyer Land Co. v. Tulare*

Lake Basin Water Stor. Dist., 410 U.S. 719 (1973) (voting may be based on wealth in special election concerning proportionate benefits and burdens on land).

The question whether the one person, one vote principle is applicable depends on whether the right to vote in an election is involved. The principle concerns "the right to vote in an election." *Hadley v. Junior College Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 54 (1970). It applies "whenever a state or local government decides to select persons by popular election to perform governmental functions." *Id.* at 56 (emphasis added). *Compare Hill v. Stone*, 421 U.S. 289, 297 (1975) ("as long as the election in question is not one of special interest"). If the fiscal board functions as a nonelected administrative agency, the one person, one vote principle does not apply. *See West Milwaukee v. Area Bd. Vocational, T. & A. Ed.*, 51 Wis. 2d 356, 380-86, 187 N.W.2d 387 (1971), appeal dismissed for want of a substantial federal question, 404 U.S. 981 (1971). On the other hand, if the state has granted the franchise over the fiscal board to the electorate, the lines must be drawn in accord with the one person, one vote principle. *See Kramer v. Union Free School District*, 395 U.S. 621, 629 (1969).

In my opinion a fiscal board is not an elected body within the meaning of the one person, one vote principle. Rather, its membership being *ex officio*, it is a statutorily appointed body not subject to the one person, one vote principle.

In *Sailors v. Board of Education of County of Kent*, 387 U.S. 105 (1967), the Court upheld the composition of county school boards. The members of these boards were not elected by the general electorate. Instead, they were chosen by the elected representatives of local school boards. "Since the choice of members of the county school board did not involve an election ..., the principle of 'one man, one vote' has no relevancy." 387 U.S. at 111.

There is a sense, of course, in which the choice of fiscal board members "involves an election" inasmuch as only those who have been popularly elected to certain offices are *ex officio* members of the fiscal board. But in that sense, an election also was "involved" in *Sailors* because the members of the county school board were chosen by the designees of persons who had been elected. Further, under sec. 120.50(2)(am), Stats., towns are represented on the fiscal board by

the chairman "or designee of the chairman," and the voting strength of absent aldermen is distributed among the aldermen present under sec. 120.50(2)(c), Stats. Thus, in Wisconsin there is no election *to* the fiscal board. The fiscal board simply is composed of certain persons elected to other offices, or their designees.

The Wisconsin Supreme Court faced a similar situation in the *West Milwaukee* case. The court upheld the composition of district boards of vocational education. These members were appointed by elected officials of the component units of government. The court said that the requirement of Wis. Const. art. XIII, sec. 9, calling for the popular election of certain officials, was met because "elected representatives ... make the appointments." *West Milwaukee*, 51 Wis. 2d at 382 (emphasis the court's). But the court found these same officials to be appointive for purposes of the one person, one vote principle by force of the holding in *Sailors*. *West Milwaukee*, 51 Wis. 2d at 383-84. I see no constitutionally significant distinction between a body appointed by elected representatives, as in *Sailors* and *West Milwaukee*, and a body statutorily composed of those same elected representatives, as here.

In contrast to cases like *Sailors* and *West Milwaukee*, where there was no election to the board in question, the one person, one vote principle was applied where trustees of a junior college district were directly elected by the people from component districts. In *Hadley* the selection of members from separate districts required that each district be established on a one person, one vote basis. 397 U.S. at 56. Here, on the other hand, there is no popular election of members to the fiscal board.

Sailors left open the question whether a popular election was required for legislative functions. 387 U.S. at 109-11. It confined its holdings to boards whose powers are "nonlegislative." *Id.* at 111. But as *West Milwaukee* points out, the powers to approve a budget and to levy a tax—powers enjoyed by the fiscal board—are regarded as administrative and not legislative for purposes of the one person, one vote principle. *West Milwaukee*, 51 Wis. 2d at 384. Further, there is no constitutional right to vote in school district boundary matters. *State ex rel. La Crosse v. Rothwell*, 25 Wis. 2d 228, 233-35, 130 N.W.2d 806, 131 N.W.2d 699 (1964).

Accordingly, it is my opinion that the one person, one vote principle is not applicable to the weighted voting of a fiscal board. As a result, the decision of the Wisconsin Supreme Court in *Zawerschnik v. Joint County School Comm.*, 271 Wis. 416, 73 N.W.2d 566 (1955), upholding this voting plan remains in full force and effect.

BCL:CDH

Freedom Of Speech; Juries; Sections 756.03 and 756.031, Stats., prohibiting a person from soliciting jury duty, are constitutional enactments. OAG 6-80

January 29, 1980.

FRED A. RISSE, President
Wisconsin State Senate

The Senate Committee on Organization has requested my opinion concerning the constitutionality of secs. 756.03(2) and 756.031, Stats. (formerly, secs. 255.03(2) and 255.031, Stats.). Section 756.03(2), Stats., requires jury commissioners to swear an oath that they will, among other things, report to the court the names of all persons who attempt to influence the commissioners in the selection of jurors. Section 756.031, Stats., provides:

Any person who asks or solicits any jury commissioner appointed under s. 756.03, or the sheriff or other officer to select him or her or any other person, or place his or her name or the name of any other person on any list as a grand or petit juror in any court, and any such jury commissioner or sheriff or other officer who selects the person or places his or her name upon any such list upon such solicitation may be fined not more than \$100 or imprisoned not more than 6 months.

The specific concern is whether these provisions violate a person's right of freedom of speech.

Freedom of speech is one of the fundamental rights guaranteed by the United States Constitution and any attempt to restrict free expression bears a heavy burden of justification. But, while free speech is a protected value, it is not absolutely protected. *Konigsberg*

v. State Bar of California, 366 U.S. 36, 49 (1961); *Near v. State of Minnesota*, 283 U.S. 697, 716 (1931); *Whitney v. People of State of California*, 274 U.S. 357, 373 (1927). Proscriptions against libel, false advertising, solicitation of crime, to mention but a few, are activities that may be restricted by statute without conflicting with the first amendment guarantee of free speech. In *Konigsberg*, the Court reaffirmed the principle that "constitutionally protected freedom of speech is narrower than an unlimited license to talk." 366 U.S. at 50. The Court has consistently recognized that:

[G]eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved.

366 U.S. at 50-51.

The "balancing" test suggested in *Konigsberg* was elaborated further in *United States v. O'Brien*, 391 U.S. 367, 377 (1968):

[W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

The fundamental question as regards secs. 756.03 and 756.031, Stats., is whether they are of such a nature as to meet the balancing test of *Konigsberg* and *O'Brien*. In my opinion, these sections meet that test.

Section 756.031, Stats., for example, prohibits asking or soliciting any of the named public officials to place an individual on a jury list. A jury commissioner may not know, in most instances, whether the person volunteering for jury duty desires to be on a panel for the purpose of corrupting deliberations. The Legislature may properly have reasoned that this legislation will enhance the integrity of jury selec-

tion. The restriction on speech is minimal and incidental to the main purpose of the statute: the prohibition of any attempt to influence a public official in the selection of jurors. The governmental interests in maintaining the integrity of the jury system and facilitating the fair administration of justice are substantial and of legitimate governmental concern. Moreover, these interests are unrelated to the suppression of free expression. A citizen remains free to express opinions in a traditional first amendment forum; only the solicitation of jury duty is prohibited.

A second consideration in applying the balancing test is whether the challenged regulation is drawn narrowly to achieve its purpose. In *Kusper v. Pontikes*, 414 U.S. 51, 59 (1973), the Court held: "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." The goal of the challenged statutes is to prevent subversion of the jury system by prohibiting attempts to influence public officials who are responsible for jury selection. It appears that sec. 756.031, Stats., is the least restrictive means of accomplishing that goal. The scope of speech restricted by the statute is minimal and not related to the expression of political opinions or other public concerns.

Finally, a recent Supreme Court case, *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447 (1978), is instructive. Ohralik, an Ohio attorney, personally solicited two victims of an auto accident and was retained by both in connection with claims arising from the accident. Subsequently, Ohralik was suspended from the practice of law by the Ohio Supreme Court after the Board of Commissioners on Grievance and Discipline found that he had violated the disciplinary rules of the Code of Professional Responsibility which prohibit a lawyer soliciting clients in person for pecuniary gain. On appeal, the Supreme Court affirmed the decision rejecting Ohralik's contention that the action violated freedom of speech. While this case deals with commercial speech and thus not accorded the degree of protection, its rationale is applicable to solicitation of jury duty. In *Ohralik*, the Court held that prohibition of solicitation per se is permissible since "[t]he Rules prohibiting solicitation are prophylactic measures whose objective is the prevention of harm before it occurs." 436 U.S. at 464. If the state's perception of the potential for harm is well founded, regula-

tion is justified. In the case of solicitation for jury duty, the potential for harm is certainly great enough to warrant regulation by the state.

In summary, secs. 756.03 and 756.031, Stats., do not unduly restrict free expression so as to render them unconstitutional. They regulate conduct of legitimate governmental concern. Moreover, the restrictions imposed on speech are narrowly limited to achieve a legitimate governmental purpose.

BCL:WHW:scj

Criminal Law; Indians; Bingo conducted on Indian Reservations by Indian tribes or Indian persons must comply with the Bingo Control Act. OAG 7-80

January 29, 1980.

PETER J. NAZE, *District Attorney*

Brown County

You ask whether Indian tribes are subject to the Bingo Control Act. Ch. 163, Stats. In the situation you have described, the Oneida Tribe has been conducting bingo games but has not applied for a bingo license under ch. 163. Furthermore, the procedures used in awarding prizes and the types of prizes awarded appear to be in violation of ch. 163. The issue is whether the state has jurisdiction over the bingo activities conducted by the Oneida Tribe.

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

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

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

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

Chapter 163, Stats., was enacted to implement the constitutional amendment. It sets forth the standards for licensing bingo operations and the criteria that must be met before the conduct of bingo is legal. Therefore, unless bingo is conducted in full compliance with ch. 163, it is not legal, and persons so engaged are subject to prosecution under secs. 163.54, 945.02, 945.03, or 945.04, Stats. See 65 Op. Att'y Gen. 80 (1976); see also *Wis. Bingo Sup. & Equip. Co. v. Bingo Control Bd.*, 88 Wis. 2d 293 276 N.W.2d 716 (1979); *State ex rel. Trampe v. Multerer*, 234 Wis. 50, 289 N.W. 600 (1940). It follows that if the State of Wisconsin has jurisdiction on Indian reservations to enforce its criminal laws against Indian persons for gambling and related conduct, the persons involved in the bingo operations you describe on the Oneida Reservation are subject to state prosecution.

As indicated in previous opinions, there are certain basic legal principles which govern the resolution of jurisdictional questions concerning Indians and Indian lands. See, e.g., 68 Op. Att'y Gen. 151 (1979); 65 Op. Att'y Gen. 276 (1976); 64 Op. Att'y Gen. 184 (1975). State law unquestionably applies to Indians on Indian reservations where there is clear congressional authorization. It is my opinion that in the situation you describe there is clear congressional authorization for the state to enforce its criminal laws relating to gambling activities.

On August 15, 1953, Pub. L. No. 280 (67 Stat. 558, 28 U.S.C. sec. 1360, 18 U.S.C. sec. 1162) was enacted. It granted limited civil and general criminal jurisdiction to the State of Wisconsin in "all Indian country within the state except the Menominee Reservation." [The Menominee subsequently were brought within the coverage of Pub. L. No. 280 but were removed again effective March 1, 1976. See 66 Op. Att'y Gen. 290 (1977).] The provision of Pub. L. No. 280 (18 U.S.C. sec. 1162(a)) relevant to the instant analysis, states:

(a) Each of the States or Territories listed in the following table shall have jurisdiction over all offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such

State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory....

(Emphasis added.)

In view of Pub. L. No. 280 and the relevant state statutes, it is my opinion that bingo, whether conducted on an Indian reservation or elsewhere, constitutes gambling which is proscribed by Wisconsin law unless conducted in compliance with ch. 163, Stats. Accordingly, your office has the authority to enforce Wisconsin laws against unauthorized bingo activities whether conducted on or off the Oneida Reservation. This conclusion also is supported by court decisions that have considered gambling activities on Indian reservations.

In *United States v. Sosseur*, 181 F.2d 873 (7th Cir. 1950), the court concluded that gambling activities on Indian reservations proscribed by state law were subject to federal prosecution under the Assimilative Crimes Act, 18 U.S.C. sec. 13, and the General Crimes Act, 18 U.S.C. sec. 1152. (This latter section extends the general laws of the United States, as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, to the Indian country, with certain exceptions not involved here.) Wisconsin's anti-gambling law thus became federal law for purposes of enforcement within Indian reservations. Although *Sosseur* had been granted a license by the tribal council to "place on Indian land ... any type of coin operated device licensed or taxed by the United States Government," the court concluded that a tribal law cannot license the violation of a federal or state criminal law. Cf. *United States v. Blackfeet Tribe of Blackfeet Ind. Res.*, 364 F. Supp. 192 (U.S. D. Mont. 1973); Compare *United States v. Wheeler*, 435 U.S. 313 (1978). It is true that *Sosseur* predated the enactment of Pub. L. No. 280. The effect of Pub. L. No. 280, however, was simply to transfer jurisdiction over such illegal activities from the federal government to the state. The Court's holding that persons on reservations who engage in gambling activities proscribed by state law are subject to prosecution, even where authorized by the Tribe, is still the law. Regardless of whether the federal government or state government, or both, have jurisdiction over gambling activities on Indian

reservations, it is clear that any form of gambling not authorized by the state is proscribed conduct subject to prosecution.

I have also considered whether the Gambling Devices Act of 1962, 15 U.S.C. sec. 1175, preempts enforcement of state criminal laws. It is my opinion that it does not. That statute prohibits the possession or use of gambling devices within Indian country. There is nothing in the legislative history of 15 U.S.C. sec. 1175 to indicate congressional intent to preempt the application of state criminal laws in this general subject area whether pursuant to Pub. L. No. 280, or in appropriate cases, to the Assimilative Crimes Act. I have found nothing in other federal statutes or in treaties with the Oneida Tribe to indicate an exception to the enforcement of laws against unauthorized gambling activities by Oneida Tribe members within the State of Wisconsin.

As I have indicated in other opinions, Indian tribes are recognized as legitimate governmental entities. *See, e.g.*, OAG 61-79; 66 Op. Att'y Gen. 115 (1977); 65 Op. Att'y Gen. 276 (1976). As such they possess the common law immunity from suit traditionally enjoyed by sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). A tribe is exempt from suit unless there is a congressional waiver unequivocally expressed. *Id.* In *California v. Quechan Tribe*, 595 F.2d 1153 (9th Cir. 1979), the court concluded that Pub. L. No. 280 was not a congressional waiver of a tribe's sovereign immunity. Although an Indian tribe is immune from suit, tribe officials who act in excess of their powers and tribe members do not enjoy the same immunity. *Santa Clara Pueblo*, 436 U.S. at 59; *Puyallup Tribe, Inc. v. Washington Dept. of Game*, 433 U.S. 165, 171-72 (1977); *State of Wis. v. Baker*, 464 F. Supp. 1377 (W. D. Wis. 1978); *cf. Ex Parte Young*, 209 U.S. 123 (1908). It is my opinion that unless the bingo operations on the Oneida Reservation can be brought into compliance with ch. 163, Stats., the persons engaged in their conduct are subject to appropriate legal action by your office.

BCL:JDN

Courts; Minors; Municipal Court; Penalty Assessment; When a municipal court adjudges a child to have violated a municipal ordinance, that court must impose court costs and should add the ten percent penalty assessment provided in sec. 165.87(2), Stats., to any forfeiture imposed for such violation. OAG 8-80

February 1, 1980.

JEROME H. CAHILL, *District Attorney*
Waukesha County

You have requested an opinion on the following questions:

- (1) Can a municipal court in assessing a forfeiture against a minor for the violation of a municipal ordinance assess any additional court costs in addition to the \$25.00 maximum penalty established by statute?
- (2) Can a municipal court levy the ten percent penalty assessment provided by sec. 165.87(2), Stats., against a juvenile in an ordinance violation case, in addition to the \$25.00 maximum penalty established by statute?

The answer to both questions is yes.

Section 48.37, Stats., states that “[n]o costs may be assessed against any child in a court assigned to exercise jurisdiction under this chapter.” The question is whether the municipal court is a “court assigned to exercise jurisdiction” under ch. 48.

In my opinion, a municipal court is not assigned to exercise jurisdiction under ch. 48. Rather, sec. 755.045(1), Stats., grants the municipal court “exclusive jurisdiction over an action in which a municipality seeks to impose forfeitures for violations of municipal ordinances.” Chapter 48 gives to the juvenile court jurisdiction over juvenile violations of the law subject to some exceptions. One of those exceptions is sec. 48.17, Stats., which provides in part that the juvenile court’s jurisdiction over juveniles who have violated municipal ordinances is concurrent with that of the civil courts when the juvenile is sixteen years of age or older. Consequently, rather than assigning jurisdiction over these matters to the municipal court, ch.

48 simply does not remove the jurisdiction. This conclusion is reinforced by the fact that the juvenile court has extensive administrative duties that the municipal court does not have. Therefore, sec. 48.37, Stats., does not bar the imposition of costs upon a juvenile, in municipal court, in an ordinance violation case.

As regards the second question whether the ten percent penalty assessment provided by sec. 165.87(2), Stats., can be levied against a juvenile in an ordinance violation case, initially it should be noted that the penalty assessment is not a "cost." Costs are defined generally by *Black's Law Dictionary* as the expenses incurred in an action that are recoverable from the losing party and the fees and charges required by law to be paid to a court for an action. This definition is consistent with the "costs and fees" set forth in ch. 814, Stats.

The ten percent penalty assessment is not an expense or fee and is treated independently. It is a levy on a fine or forfeiture and becomes part of the "law enforcement training fund." Section 300.10, Stats., covering costs and fees in municipal courts appears to recognize this distinction. Section 48.37, Stats., does not apply to a ten percent penalty assessment, therefore, since the section only bars assessing "costs" against a juvenile.

Section 48.343(2), Stats., which provides that the maximum forfeiture that may be imposed when a juvenile violates an ordinance is \$25.00, also does not bar the imposition of the ten percent penalty assessment. Section 165.87(2), Stats., clearly sets forth an assessment that is in addition to the penalties set forth in the statutes and ordinances to which it applies. Section 165.87(2), Stats., states in part that:

[W]henever a court imposes a fine or forfeiture for a violation of state law or for a violation of a municipal or county ordinance except for state laws or such ordinances involving nonmoving traffic violations, there shall be imposed in addition a penalty assessment in an amount of 10% of the fine or forfeiture imposed.

By its terms, this section applies to forfeitures imposed on juveniles who have violated municipal ordinances. When it is so applied, a \$2.50 penalty assessment must be added to a maximum forfeiture of \$25.00. The forfeiture itself, however, remains the same, and the forfeiture limitation of sec. 48.343(2), Stats., is not violated.

There is in fact nothing in the statutes to indicate that juveniles are exempt from the ten percent penalty assessment. The assessment applies to all fines and forfeitures not exempted in sec. 165.87(2), Stats. Furthermore, sec. 300.10(4), Stats., specifically provides for the handling of penalty assessments collected by municipal courts.

In my opinion a municipal court must impose costs upon a juvenile found to have violated a municipal ordinance, and should add the ten percent penalty assessment provided in sec. 165.87(2), Stats., to any forfeiture imposed for such a violation.

BCL:CH:scj

Commitments; Usury; Commitment fees which are bona fide in nature are not a part of interest under sec. 138.05, Stats., although across the board fees imposed without regard for the customer's need or desire for a bona fide commitment are unlikely to meet the lender's burden of showing that the fee represents the reasonable value of services rendered. OAG 9-80

February 4, 1980.

R. J. McMAHON, *Commissioner*

Office of the Commissioner of Savings and Loan

You have requested my opinion on whether commitment fees constitute interest for purposes of sec. 138.05, Stats. You have described a situation in which a savings and loan association has adopted a policy of charging a commitment fee to a loan applicant to which the association is willing to make a loan and in which the amount of the commitment fee charged relates directly to the amount that the association is willing to lend. The commitment fee is usually between one percent and three percent of that amount. Upon payment of the required commitment fee, the savings and loan association agrees in writing to make a loan to the applicant in a specified amount, for a specified term, and at a specified interest rate, provided that certain specified conditions are met and the loan closed within a specified period of time. You have indicated that normally the associations require such loans to be closed within one month.

Section 138.05(1), Stats., provides in part as follows:

Except as authorized by other statutes, no person shall, directly or indirectly, contract for, take or receive in money, goods or things in action, or in any other way, any greater sum or any greater value, for the loan or forbearance of money, goods or things in action, than:

(a) At the rate of \$12 upon \$100 for one year computed upon the declining principal balance of the loan or forbearance

....

As noted in previous opinions to you, the broad statutory language of sec. 138.05, Stats., indicates the Legislature's intention to limit all devices for exacting compensation for a loan regardless of the form of the transaction. 65 Op. Att'y Gen. 67, 69 (1976) and OAG 116-79 (November 30, 1979). Those opinions discuss the types of charges which must be included in the computation of interest rates under sec. 138.05, Stats.

Although the Wisconsin Supreme Court has not dealt directly with the question posed by your request, it is clear that Wisconsin courts will look through the form of the agreement to the substance of the transaction to determine whether a loan or forbearance is usurious. *State v. J. C. Penney Co.*, 48 Wis. 2d 125, 179 N.W.2d 641 (1970); *Randall v. Home Loan & Investment Co.*, 244 Wis. 623, 12 N.W.2d 915 (1944); *Friedman v. Wisconsin Acceptance Corp.*, 192 Wis. 58, 210 N.W. 831 (1927). Courts in other jurisdictions have used a similar approach in analyzing cases of alleged usury and have generally held that payment of a bona fide commitment fee for an option to borrow money in the future does not render such fee a part of interest for purposes of usury statutes. *Stedman v. Georgetown Sav. & Loan Ass'n*, 575 S.W.2d 415 (Texas Civ. App. 1978); *Financial Fed. Sav. & L. Ass'n v. Burleigh House, Inc.*, 305 So. 2d 59 (Fla. App. 1974), cert. discharged, 336 So. 2d 1145, cert. denied, 429 U.S. 1042; *Gonzales County Sav. & Loan Assoc. v. Freeman*, 534 S.W.2d 903 (Tex. 1976); *D & M Development Co. v. Sherwood & Roberts, Inc.*, 93 Idaho 200, 457 P.2d 439 (1969).

In *Gonzales*, 534 S.W.2d at 906, the court stated:

Labels put on particular charges are not controlling. A charge which is in fact compensation for the use, forbearance or deten-

tion of money is, by definition, interest regardless of the label placed upon it by the lender. ... On the other hand, a fee which commits the lender to make a loan at some future date does not fall within this definition. Instead, such a fee merely purchases an option which permits the borrower to enter into the loan in the future. ... It entitles the borrower to a distinctly separate and additional consideration apart from the lending of money. Therefore, the lender may charge extra for this consideration without violating the usury laws.

The court in *Financial*, 305 So. 2d at 62-63, observed:

A commitment fee is not a charge for the use of money but rather a purchase of the right to secure a loan of money by a prospective borrower. In other words, it is a consideration for the lender's setting aside or earmarking funds which are committed to be loaned in the future.

(Footnote omitted.)

While it is my opinion that a bona fide commitment fee does not constitute interest for purposes of sec. 138.05, Stats., the mere designation of a charge imposed on a borrower as a "commitment fee" will not avoid a finding that such charge is a part of interest under sec. 138.05, Stats., if such fee is not bona fide in nature. Recognizing this, the court in the case of *Altherr v. Wilshire Mortgage Corporation*, 104 Ariz. 59, 448 P.2d 859 (1968), stated at 864:

Under proper circumstances a reasonable commitment fee is undoubtedly legal, and is not interest. However ... it can be used as a cloak for usury, under certain conditions.

... The determination of its legality requires an ad hoc approach. Pertinent factors would be the tightness or looseness of money, the amount of the fee, the rates prevailing in the short-term money market where the lender might keep the funds while waiting for the borrower to call for the loans, etc. What would be a reasonable fee at one time might be unreasonable at another. Each case must necessarily require a decision on its own facts, and no case would be authority for another with slightly different circumstances.

In re Feldman, 259 F. Supp. 218 (D. Conn. 1966), held that a "commitment fee" which reimbursed the lender for overhead

expenses incurred in connection with the loan was interest and in *Imperial Corp. of America v. Frenchman's Creek Corp.*, 453 F.2d 1338 (5th Cir. 1972), the court recognized that a "commitment fee" deducted from the initial disbursement of construction loan proceeds was interest. In the case of *Arkansas S. & L. Ass'n v. Mack Trucks of Ark.*, 263 Ark. 264, 566 S.W.2d 128 (1978), the court examined a commitment fee which was based on a percentage of the amount of the loan and which was charged at the same rate regardless of the type of loan. In finding that such a fee was interest, the court attached particular significance to the fact that such charge was imposed across the board and that the amount of the charge was based solely on the amount of the loan rather than on other factors which would affect the value of a true commitment.

In the recent case of *Kissell Company v. Gressley*, 591 F.2d 47 (9th Cir. 1979), the court noted that if a lender imposes charges in excess of the maximum permitted by law, there is a *prima facie* showing of usury which then requires the lender to prove that such charges are not interest but rather fees for services actually rendered or reasonable commitment fees. The court in *Altherr*, 448 P.2d at 864, similarly observed: "Once it appears, *prima facie*, that the legal maximum interest rate is exceeded—as here—the burden is on the receiver of the excess to show that it represents the reasonable value of services rendered."

Also see Kamrath v. Great Southwestern Trust Corp., 27 Ariz. App. 102, 551 P.2d 92 (1976). If it is the intention of the savings and loan associations to assess a commitment fee on all loans regardless of the specific facts of each transaction and without regard for the customer's need or desire for a bona fide commitment, it would appear unlikely that the lender could meet the burden of showing that the commitment fee represents the reasonable value of services rendered. In such a situation a court would be likely to find that such an across the board fee would be considered as a part of interest under sec. 138.05, Stats.

The factors set forth above from the *Altherr* and *Arkansas* cases are appropriate for the examination of commitment fees and their proper consideration under Wisconsin's usury law. In addition, a court may likely consider the relationship between the transaction's interest rate and the usury rate, the term of the commitment, the method of computing the commitment fee, past practice of the lender

as to the assessment of commitment fees and the nature of any conditions or contingencies in the commitment granted to the borrower. While it is not possible to set forth general rules which will easily classify the fees charged in particular cases, the examination of the factors in *Altherr, Arkansas*, and these additional factors to determine whether the customer, in fact, receives something of value apart from the loan or forbearance itself by reason of the commitment, should be helpful in determining whether the commitment fee is bona fide in nature and therefore not a part of the interest charge for purposes of the usury law.

I call your attention to Pub. L. No. 96-161, sec. 105 which was signed into law by the President on December 28, 1979. This federal law provides for federal preemption of state laws regarding interest rate ceilings under certain limited circumstances and will remain in effect until March 31, 1980, for real estate loans covered by the pre-emption. Although this law does not directly answer the question posed in your opinion request, it may under some circumstances, preempt the application of sec. 138.05, Stats., and thereby temporarily moot the question you have posed. You should also be aware that the Federal Home Loan Bank Board has issued temporary regulations implementing Pub. L. No. 96-161, sec. 105. These regulations appear at 12 C.F.R. Part 590 and were also effective on December 28, 1979.

BCL:RAV

Navigable Waters; Nonresident Property Owners; Votes And Voting; Votes and Voting; Public Inland Lake Protection and Rehabilitation Districts. Voting rights at the annual meeting of inland lake protection and rehabilitation districts may be extended by the Legislature to nonresident property owners, but only pursuant to a statewide referendum under Wis. Const. art. III, sec. 1(3). OAG 10-80

February 29, 1980.

ANTHONY S. EARL, *Secretary*

Department of Natural Resources

You ask two questions relating to voting rights at the annual meeting of public inland lake protection and rehabilitation districts, under ch. 33, Stats. Specifically, you ask whether sec. 33.30(3)(d), Stats., which allows nonresident property owners to vote on approval of certain proposed projects, is consistent with constitutional provisions relating to suffrage. In the event that there are constitutional deficiencies in the current statute, you then ask whether such rights can be properly afforded under Wis. Const. art. III, sec. 1.

It is my opinion that the Legislature does not have the power to confer upon nonresident property owners the limited voting privileges described in sec. 33.30(3)(d), Stats., unless such extension of voting rights to nonresident property owners is first approved in a statewide referendum as required by Wis. Const. art. III, sec. 1.

By ch. 301, Laws of 1973, the Legislature created ch. 33, Stats., concerning public inland lake protection and rehabilitation. The purpose of this chapter, as enunciated in sec. 33.001, Stats., is to establish a program to abate the deterioration of inland lakes and to rehabilitate and preserve those public waters. To achieve these ends the Legislature adopted a scheme whereby local districts would be formed which would, with state financial and technical support and supervision, implement the objectives of the program. Because a significant portion of the properties directly affected and financially burdened by this program are owned by nonresidents, and because the cooperation of those persons is essential to the success of the program, the Legislature sought to provide nonresident property owners with substantial input and control in the formation and management of the districts. Thus, under sec. 33.25(1), Stats., nonresident landowners may petition the county for the establishment of a district. Under sec. 33.26(2), Stats., all landowners are entitled to receive notice of public hearings concerning establishment of the district. Nonresident property owners may sit on the district board of commissioners (secs. 33.27(1) and 33.28(2), Stats.) and may participate at the annual meeting of the district, pursuant to sec. 33.30, Stats.

Your questions specifically refer to sec. 33.30, Stats., which provides in pertinent part:

(3) The annual meeting shall:

....

(d) Approve or disapprove all proposed projects by the district having a cost to the district in excess of \$5000, by vote of the electors and property owners within the district.

My initial observation is that the limited extension of voting rights herein discussed does not infringe upon the local district electors' federal or state constitutional rights of equal protection. Since at least part of the financial burden incurred for a proposed project would ultimately be imposed on local property owners, the Legislature could reasonably conclude that, to the extent it is otherwise constitutionally permissible, meaningful participation in the program should be based on landowner status, as well as permanent residence. The United States Supreme Court has upheld voting classifications based on property ownership where they are reasonably related to legitimate police power goals. *See, e.g., Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973). Moreover, sec. 33.30, Stats., avoids any potential constitutional infirmity due to the fact that both nonresident property owners and electors may participate and vote at the annual meeting.

The constitutionality of this provision has been called into question because of the limitations on suffrage in Wis. Const. art. III, sec. 1, which provides:

Every person, of the age of twenty-one [now eighteen] years or upwards, belonging to either of the following classes, who shall have resided in the state for one year next preceding any election, and in the election district where he offers to vote such time as may be prescribed by the legislature, not exceeding thirty [now ten] days, shall be deemed a qualified elector at such election:

(1) Citizens of the United States.

(2) Persons of Indian blood, who have once been declared by law of congress to be citizens of the United States, any subsequent law of congress to the contrary notwithstanding.

(3) The legislature may at any time extend, by law, the right of suffrage to persons not herein enumerated; but no such law shall be in force until the same shall have been submitted to a vote of the people at a general election, and approved by a majority of all the votes cast on that question at such election; and provided further, that the legislature may provide for the registration of electors, and prescribe proper rules and regulations therefor.

See, sec. 6.02, Stats.

It is clear that under this section of the constitution, only persons who are permanent residents of this state are authorized to vote in "any election." As a caveat and limitation on this restriction, subsec. (3) authorizes the Legislature to extend suffrage to persons other than those expressly qualified to vote, but that such extensions of suffrage are valid only after they have been approved by a majority of the electorate in a statewide referendum. *See* 44 Op. Att'y Gen. 106 (1955); 50 Op. Att'y Gen. 50 (1961). In the context of the questions asked herein, sec. 33.30(3)(d), Stats., was enacted and implemented without prior approval of the electorate. Therefore, that section is valid only if it does not fall within the definition of an "election."

The term "election," as it relates to the above-enumerated constitutional provision, has never been specifically defined. However, several court cases and opinions from this office assist in determining whether the vote contemplated in sec. 33.30(3)(d), Stats., constitutes an election.

In the early case of *Brown v. Phillips*, 71 Wis. 239, 36 N.W. 242 (1888), the court was confronted with legislation extending the right of suffrage to women to participate in any "election pertaining to school matters." The court there defined election very broadly as "the act of choosing; choice; the act of selecting one or more from others." 71 Wis. at 253. It then concluded that that extension of suffrage included the right to vote for school officials, but implicitly held that "election" was not limited to only the election of officials.

In *Hall v. Madison*, 128 Wis. 132, 107 N.W. 31 (1906), the court again considered what constituted an election under Wis. Const. art. III, sec. 1. Addressing a legislative act identical in language to that in *Brown*, the court determined that a school bond referendum was as much an election as an election of public officials. The court stated,

128 Wis. at 138, that "whether it is a choice between alternative policies or a choice between persons, it is equally an election." This conclusion was later quoted with approval in *Vulcan Last Co. v. State*, 194 Wis. 636, 639-40, 217 N.W. 412 (1928), wherein the court stated: "An 'election,' within the meaning of the statutes of this state, includes a referendum vote to decide a question of policy such as the issuance of bonds, ... just as well as it includes an ordinary election to choose between candidates for public office."

Shortly after the enactment of ch. 33, Stats., the definition of "election" and application of Wis. Const. art. III, sec. 1, was extensively analyzed in 63 Op. Att'y Gen. 391 (1974). The Legislature had requested an opinion on a bill quite analogous to the statute herein discussed, where the right to participate in metropolitan sewage district and town sanitary district bond elections was to be extended to nonresident property owners. This opinion concluded that the extension of voting rights therein considered would not infringe upon the local district electors' federal and state constitutional guarantees of equal protection, but that such rights of suffrage probably could not be extended except in conformity with the procedures delineated in Wis. Const. art. III, sec. 1(3).

I am of the same opinion with respect to sec. 33.30(3)(d). The few state court cases which have sought to define "election" have used very broad, all-encompassing terminology. Quite recently, in *Town of Washington v. Altoona*, 73 Wis. 2d 250, 243 N.W.2d 404 (1976), the court reiterated its holding in *Hall* and *Vulcan*, stating at 73 Wis. 2d at 254: "[T]his court, since at least 1906, has held that ... whether a vote involves a choice of candidates or a choice of policy, a voting procedure under the statutes is an election" (emphasis added).

There can be no doubt that sec. 33.30(3)(d), Stats., is a "voting procedure." Nor can it be doubted that the right to vote therein has been extended to a class not enumerated in Wis. Const. art. III, sec. 1, i.e., nonresident property owners. Consequently, such rights may be extended by the Legislature only pursuant to a statewide referendum as described in Wis. Const. art. III, sec. 1(3).

BCL:CAS

Fees; Sheriffs; Section 71.13(3)(g), Stats., requires that the sheriff of Milwaukee County perform duties of service and filing in connection with collection of state income and franchise taxes pursuant to sec. 71.13, Stats., without advancement of fees by the Department of Revenue. OAG 11-80

March 4, 1980.

MARK E. MUSOLF, *Secretary*
Department of Revenue

You advise that the Milwaukee County Sheriff's Department requires representatives of the Department of Revenue to advance fees for service of process connected with the collection, pursuant to sec. 71.13, Stats., of delinquent income and franchise taxes. On May 8, 1979, the Milwaukee County Board of Supervisors passed a resolution, partially supported by sec. 59.28, Stats., authorizing the Milwaukee County sheriff to "require advance payment of fees for service of process in all instances where he deems it desirable to do so." When the provision of sec. 71.13(3)(g), Stats., was called to the attention of the county corporation counsel for such county, a representative of such officer took the position that sec. 59.28, Stats., was a specific statute which controlled over sec. 71.13(3)(g), Stats., which he deemed a general statute.

You inquire whether the sheriff of Milwaukee County has a duty, pursuant to sec. 71.13(3)(g), Stats., to perform duties of service and filing in connection with collection of income and franchise taxes pursuant to the provisions of sec. 71.13, Stats., without advancement of half or all of the fees for such services.

I am of the opinion that the sheriff of Milwaukee County does have such a duty. In my opinion, sec. 71.13(3)(g), Stats., is the specific statute and prevails over the general provisions of sec. 59.28(intro.), (1), (2)(b), Stats. Further, statutes of general application do not apply to the state unless the state is explicitly included by appropriate language. *State ex rel. Martin v. Reis*, 230 Wis. 630, 687, 284 N.W. 580 (1939). Section 59.28(intro.), (1), (2), Stats., makes no specific reference to the state.

At the time of the *American Wrecking Co.* case, cited below, sec. 59.28(intro.), Stats. (1921), provided: "Every sheriff shall be entitled to receive the following fees for his services, except for services in actions or proceedings before justices of the peace, for which fees are specially provided by law."

In spite of the fact that no statute authorized the sheriff to demand prepayment, it was stated in *American Wrecking Co. v. McManus*, 174 Wis. 300, 306, 181 N.W. 235, 183 N.W. 250 (1921), that:

The fact that the sheriff is compensated by the county upon a salary basis rather than under a fee system does not affect our conclusions. His official responsibility and powers are the same. It should also be said that he has it within his power to protect himself against personal responsibility under such circumstances, as it is his privilege to demand his legal fees and charges in advance. *Carlisle v. Estate of Soule*, 44 Vt. 265; *Jones v. Gupton*, 65 N.C. 48; *Adams v. Dinkgrave*, 26 La. Ann. 626; *Atkinson v. Hulse*, 30 Ark. 760; *Alexander v. State*, 42 Ark. 41. Where, however, he undertakes the service of the writ without demanding his fees in advance he waives their prepayment. *Carlisle v. Estate of Soule, supra*.

In 24 Op. Att'y Gen. 508 (1935), it was argued that the conclusion of the supreme court in *American Wrecking Co.* was in error as the holdings in the Arkansas, Louisiana, and North Carolina cases cited were based on statutes of those states requiring or authorizing advance payment and that, by reason of a lack of such statute, the common law prevailed in Wisconsin. The opinion concluded that a sheriff could not insist upon payment of statutory fees before undertaking service of process.

Chapter 310, Laws of 1959, amended sec. 59.28(intro.), Stats., to provide: "Every sheriff shall be entitled to receive the following fees in advance for his services providing the county board approves advance payment."

In reference to such language, it was stated in 53 Op. Att'y Gen. 218, 220, 221 (1964):

This language is significant and makes it clear that in the case of the sheriff credit is the rule rather than the exception in the absence of specific action by the county board.

There are particularly strong reasons for extension of credit by the sheriff since he cannot know in advance whether or not he is going to be successful in effecting service of papers. There is a difference in fees where service is attempted but not effected and he cannot be sure of his mileage until he knows what it is going to be.

There appears accordingly to be no basis for concluding that either the clerk of court or sheriff must collect his fees when papers are offered for filing, recording, or service.

Chapter 403, Laws of 1975, amended sec. 59.28(intro.), and sub-sec. (2)(b), Stats., to its present wording:

Except as provided in subs. (2) (b) and (27), every sheriff is entitled to receive one-half of the following fees in advance for his 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.

(2)(b) In counties having a population of 500,000 or more, the charge for travel for the service or attempted service of process or pleading shall not exceed \$1 for each party to be served in each action. If there is more than one person to be served at a given address, only one charge for travel shall be imposed. For summoning grand and petit jurors, no travel expense shall be charged for more than the distance actually and necessarily traveled in summoning such jurors. *Sixty cents of the \$1 travel charge shall be paid in advance to the sheriff providing the county board approves advance payment, and 40 cents shall be deposited into the county general fund and shall not be paid to the sheriff in lieu of salary.*

The fees provided for in sec. 59.28, Stats., are, for the most part, applicable to all sheriffs in the state and are generally applicable whether the services performed are for private parties or state or federal officials. Authority to demand advance payment from any person seeking such services is contingent upon county board approval; and even where such approval is granted, such procedure is optional with a sheriff. Whereas there is some variance as to fees as between sheriffs in counties under 500,000 population and those in counties having more than 500,000 population, the statutes are general rather

than specific. No reference is made as to sheriff's fees which may arise for services in connection with the collection of delinquent income and franchise taxes, and no reference is made to sec. 71.13, Stats.

Section 71.13, Stats., is concerned with procedures to be followed in the collection of delinquent income and franchise taxes. Section 71.13(3)(a), Stats., specifically refers to the issuance of warrants by the Department to the sheriff commanding him to levy upon and sell portions of the taxpayer's real and personal property to pay such tax. Paragraph (b) of subsec. (3) provides that the sheriff shall file a copy of the warrant with the clerk of circuit court, and such subparagraph is in part concerned with the manner in which the clerk of circuit court and sheriff shall be paid fees for certain services. Some of the fees are incapable of accurate estimate in advance. Paragraph (g) of subsec. (3) was created by ch. 318, Laws of 1947, and presently provides:

All fees and compensation of officials or other persons performing any act or functions required in carrying out this section, except such as are by this section to be paid to such officials or persons by the taxpayer, shall, upon presentation to the department of revenue of an itemized and verified statement of the amount due, be paid by the state treasurer upon audit by the department of administration on the certificate of the secretary of revenue and charged to the proper appropriation for the department of revenue. *No public official shall be entitled to demand prepayment of any fee for the performance of any official act required in carrying out this section.*

Aside from changes in the department to whom the bills are to be submitted, the section has remained the same for over thirty years. See ch. 276, sec. 590, Laws of 1969.

The collection of taxes is a governmental function of the state which should not be impeded by a statute such as sec. 59.28(intro.), (1), (2)(b), which is not specifically applicable to it.

I am of the opinion that the language, "[n]o public official," includes the sheriff in every county. That would include the sheriff in a county having a population in excess of 500,000 population, and specifically, Milwaukee County. I conclude that sec. 59.28 or sec. 71.13, Stats., would have to be amended to entitle the sheriff of Mil-

waukee County to fees in advance for services rendered to the state or its agents in the collection of delinquent income and franchise taxes pursuant to sec. 71.13, Stats.

BCL:RJV

City Clerk; Referendum; Under sec. 9.20(3), Stats., a city clerk's authority to examine the "sufficiency" and "form" of an initiative petition is at least as extensive as the city council's under sec. 9.20(4), Stats. This judicially established authority should only be exercised where a substantive insufficiency clearly exists. OAG 12-80

March 6, 1980.

ED JACKAMONIS, Speaker
Wisconsin State Assembly

As chairman of the Assembly Committee on Organization, you have requested my opinion whether a city clerk may refuse to forward to the common council a petition that otherwise complies with the requirements of sec. 9.20(3), Stats., on the grounds that the petition (1) "relates to an administrative ... matter," (2) "would modify ... the statutory authority of [the city]," and (3) "would repeal action already undertaken by the city."

The direct legislation statute at issue here provides a procedure to effectuate private citizens' rights of the highest order. "Sec. 9.20 implements the legislative powers that have been reserved to the people." *State ex rel. Althouse v. Madison*, 79 Wis. 2d 97, 118, 255 N.W.2d 449 (1977). The statute is of the kind designed to "give citizens a voice on questions of public policy." *James v. Valtierra*, 402 U.S. 137, 141 (1971).

This statutory right to direct involvement in the municipal legislative process has been broadly interpreted by the Wisconsin Supreme Court where questions of the proposal's constitutionality have been raised. In *Althouse*, the court reviewed the action of the Madison Common Council refusing to place a proposed ordinance either on its agenda or before the voters in a referendum pursuant to sec. 9.20(4), Stats. The council based its action on its opinion that the ordinance

was unconstitutional. *Id.* at 104. The court rejected this basis for council refusal to act: "It seems clear that, under the preemptory statutory provisions of sec. 9.20, Stats., the common council has no authority whatsoever, in respect to direct legislation, to make an initial judgment of the constitutionality or validity of the proposed legislation." *Id.* at 110. The court acknowledged that the only exception in this regard is where "the unconstitutionality is clear from prior adjudications on the same subject matter." *Id.* (Citation omitted.)

There are, however, circumstances where, upon court review, it has been determined that a common council properly can refuse to take action on a petition in proper form because of its merits or subject matter. It has been held that a proposed initiative which concerns administrative matters is not the proper subject of direct legislation under sec. 9.20, Stats. In *Heider v. City of Wauwautosa*, 37 Wis. 2d 466, 155 N.W.2d 17 (1967), the court determined that a proposal to tailor the method of the city's expenditure of school improvement funds was "an attempt to interfere with the administrative duties of the city council and the city plan commission." *Id.* at 474. It therefore determined that the city council properly refused to act on the proposal.

A proposal otherwise in proper form may also be refused further formal consideration because it attempts to alter existing statutory authority. "[W]here a statute has conferred a procedure upon a body, electors may not demand the submission of a question which would modify the statutory authority." *Id.* at 477; *Flottum v. Cumberland*, 234 Wis. 654, 291 N.W. 777 (1940).

An additional established requirement for initiatives is that they cannot be used to repeal existing legislation. *Landt v. Wisconsin Dells*, 30 Wis. 2d 470, 476, 141 N.W.2d 245 (1966). Nor can an initiative be used to more than "incidentally" modify an existing measure. *Heider* at 479.

This brief review of authoritative interpretations of sec. 9.20, Stats., indicates that in appropriate circumstances proposed initiatives need not be either voted on by the common council or set for a referendum as otherwise required by sec. 9.20(4), Stats. This responds to the part of your request relating to grounds which may justify a petition not being acted upon which in other respects is properly prepared.

The second part of your question concerns the proper role, if any, for the city clerk to play in these matters. On this matter the courts have provided considerably less guidance.

The factual circumstances underlying all of the Wisconsin cases cited *supra*, involved the city council's refusal to act upon a petition already forwarded to it by the clerk. Thus, the precise authority of the clerk was not a matter necessary for the court's resolution in any case. This factual and legal setting is important because the court in these cases has used language that on its face appears to vest no discretion in the clerk:

The petition must be signed by a number of electors equal to not less than 15 percent of the vote cast in the city for governor at the last general election. If these statutory requirements are met, the city clerk so certifies. The ordinance or resolution must then be passed.

Heider at 473. "If a petition fulfills the statutory requirements, the clerk so certifies, and the proposed ordinance or resolution must thereupon be passed by the council." *Landt* at 473.

But this reading of the statute appears to ignore parts of the statute describing the clerk's duties and to assign a less discretionary role to the clerk than is possessed by the council. This reading is not supported by elementary rules of statutory construction which require that each word in a statute insofar as practical be given its ordinary meaning, and that where similar matters are treated differently, the differences are to be carefully considered. See generally, 2A C. Sands, *Statutes and Statutory Construction*, secs. 46.06 and 51.01 (4th Ed. 1973).

The initiative statute requires that the clerk "shall determine by careful examination whether the petition is sufficient and whether the proposed ordinance or resolution is in proper form If the petition is found to be insufficient or the proposed ordinance or resolution is not in proper form, [the clerk] shall give the particulars, stating the insufficiency or improper form." Sec. 9.20(3), Stats. This description of the analytical and formal reporting role of the clerk is explicit and extensive. It is in marked contrast to the absence of any expression of a discretionary or reviewer's role for the council. "The common council shall, without alteration, either pass the ordinance ... or submit it to the electors." Sec. 9.20(4), Stats.

I conclude that, where the authority to review and decline to further consider a petition has been found in the statutory language conferring authority on the council, at least as extensive an authority is vested in the city clerk.

Because of the seriousness of this responsibility, and the assistance that would be afforded a court should it be necessary to review such a determination, the provisions of the statute requiring the clerk to "give the particulars, stating the insufficiency" should be strictly adhered to. Further, the advice of appropriate legal counsel appears to be an essential element of making this determination and properly stating its grounds. The mere recitation of legal conclusions without adequate "particulars" may not fulfill the clerk's function assigned by the statute.

The law clearly favors direct legislation. *See Althouse*. This suggests to me that a clerk should reject petitions only where a substantive insufficiency clearly exists and that the clerk should resolve any doubt in favor of the sufficiency of the petition.

It is therefore my conclusion that, in proper circumstances, a city clerk has the authority to refuse to forward to the city council an otherwise proper ordinance based on one or more of the reasons outlined in your letter. The clerk also has the concomitant obligation to state with reasonable particularity the basis for the refusal.

BCL:FJS

County Civil Service Commission; County Medical Examiner; County board or county civil service commission, when establishing qualifications for the position of medical examiner should consider the statutorily prescribed duties of the medical examiner in sec. 59.34 and ch. 979, Stats. Legislature intends office to be occupied by an expert. OAG 13-80

March 12, 1980.

JOHN LANDA, *District Attorney*
Kenosha County

You ask, "[w]hat qualifications, if any, must be met by a prospective appointee under a county-wide medical examiner program?"

Chapter 247, Laws of 1943, created the first office of medical examiner in this state, applicable only to counties over 500,000 population. On April 4, 1972, an amendment to Wis. Const. art. VI, sec. 4, was ratified which gave the other counties of this state the option of instituting a medical examiner system. Thereafter, implementing legislation was enacted by ch. 272, Laws of 1973. As a result of that legislation, sec. 59.34(1), Stats., was amended to its present form.

You point out, quite correctly, that neither the amended constitutional provision, Wis. Const. art. VI, sec. 4, nor the statutes, directly imposes such qualifications. Neither the constitution nor the statutes even so much as impose the express requirement that a medical examiner be a licensed physician. In this regard, it is perhaps noteworthy that down near the bottom of the legislative drafting file for ch. 247, Laws of 1943, is a handwritten proposed amendment which would have added the language: "Such medical examiner shall be a licensed medical practitioner and a specialist in pathology." Whether or not that language ever found its way into a formal amendment cannot be definitely ascertained at this date. But it is obvious that the Legislature did not expressly impose such a requirement at that time, nor has it at any subsequent session.

In 1949, a bill was introduced at the request of the Wisconsin Bar Association which would have, *inter alia*, required that medical examiners be licensed to practice medicine and surgery in Wisconsin. Bill 509A, sec. 4 (Wis. 1949). That bill was never enacted. I note, parenthetically, that statutes imposing such a requirement upon the constitutional office of coroner have consistently been upheld. 18 C.J.S. *Coroner* sec. 5, n. 18, and cases there cited.

Nevertheless, the Legislature has given us some guidance in determining what qualifications should be met by medical examiners by permitting appointments under a civil service system and by enumerating certain duties to be performed by the medical examiner. Sec. 59.34(1), Stats. In counties over 500,000 population, appointments

to the office of medical examiner must be made in accordance with the pertinent civil service provisions, *i.e.*, secs. 63.01 to 63.17, Stats. The certification process is discussed in sec. 63.05, Stats., and refers to the requirement that those found eligible must have "passed an examination appropriate to the office or position in question." Sec. 63.05(1), Stats. Section 63.05(6), Stats., requires that minimum training and experience requirements for the position be "job-related." Section 63.08(1), Stats., specifies more detailed, albeit general, requirements for civil service applications and examinations. These provisions give the Civil Service Commission Board discretion in determining specific requirements for specific offices or positions. Information required in the application must bear upon the applicant's fitness for the office or position in question and the examination must "test fairly and practically the ability of each applicant to fulfill the requirements of the office or position in question." Sec. 63.08(1), Stats. In all other counties, including yours, appointment must be by the county board and may be with or without the requirements of civil service. (You have advised me that Kenosha County has adopted a civil service system only with respect to the sheriff's department.)

In any case, it is clear that the Legislature has provided the counties with extremely wide latitude in determining, through their county board or civil service commission, what they deem to be essential requirements for the office of medical examiner. Certainly, a county board or civil service commission, in selecting an appointee and establishing the requirements of the office, ought to begin by looking at all of the duties common to coroners and medical examiners as set forth in sec. 59.34, Stats., and ch. 979, Stats. More importantly, however, the appointing authority should carefully consider what the Legislature had in mind when it provided for establishing the office of medical examiner and imposing the following duties unique to that office:

Whenever requested by the court or district attorney, the medical examiner shall testify to facts and conclusions disclosed by autopsies performed by him, at his direction, or in his presence; shall make physical examinations and tests incident to any matter of a criminal nature up for consideration before either court or district attorney when requested so to do; shall testify as an expert for either such court or the state in all matters where such

examinations or tests have been made, and perform such other duties of a pathological or medicolegal nature as may be required

Sec. 59.34(1), Stats.

Clearly, the Legislature intends that the office of medical examiner be occupied by one who is able to be qualified as an expert witness in the field of pathology. A witness may be, "qualified as an expert by knowledge, skill, experience, training, or education." Sec. 907.02, Stats. Therefore, the county board or civil service commission ought to give appropriate consideration to this requirement for expertise when making the appointment.

Accordingly, it would come as no surprise if a civil service commission, in developing the specific examination for the office, or a county board, in selecting an appropriate appointee, were to determine that these functions could best be fulfilled by a licensed physician certified in pathology. On the other hand, it is quite possible that the appointing authority might adopt less stringent standards which might be better suited to the needs of the particular community. In any event, I believe those qualifications must be consistent with a legislative intent to obtain an "expert" for the job.

I trust that the observations set forth in this letter may prove to be of assistance to you and the citizens of your county.

BCL:JDH

Criminal Law; Drunk Driving; Where a person is charged under sec. 346.63(1), Stats. (operating a vehicle while under the influence of an intoxicant or controlled substance), as a second offense, the charge may not be reduced to a violation as a first offense and the court does not have discretion to sentence under sec. 346.65(2)(a)1., Stats., sentencing for first offense. At trial the burden and verdict requirements of a criminal proceeding apply. It is mandatory that the department treat this as a second offense for purposes of revocation under sec. 343.31(1)(b), Stats. OAG 14-80

March 12, 1980.

WILLIAM A. HUPY, *District Attorney*
Marinette County

You have requested my opinion on the following four questions:

- (1) When a person is charged under Section 346.63 (1) as a second offense and the charge is later reduced to a violation of Section 346.63 (1) as a first offense, and in fact the person was previously convicted of such offense within a five year period, does the court have discretion to sentence him under Section 346.65 (2)(a) 1?
- (2) In the same situation as above, is it mandatory that the department treat this as a second offense for purposes of revocation under Section 343.31 (1)(b)?
- (3) In the event your answer to number two is yes, can the court in its discretion, treat it as a first offense and prevent the department from revoking under Section 343.31 (1)(b)?
- (4) In the event the defendant proceeds to trial for a violation of Section 346.63 (1) as a first offense and was previously convicted under the same section within five years:

- A. What is the burden of proof?
- B. Does the 5/6's rule prevail, or must the jury return a unanimous verdict?

The penalty for drunk driving is set forth in sec. 346.65(2)(a)1. and 2., Stats., as follows:

1. Shall forfeit not less than \$100 nor more than \$500, except as provided in subd. 2 or 3.
2. Shall be fined not less than \$250 nor more than \$1,000 and imprisoned not less than 5 days nor more than 6 months if the total of revocations under s. 343.305 and convictions for violation of s. 346.63 (1) or local ordinances in conformity therewith equals 2 within a 5-year period, except that revocations and convictions arising out of the same incident or occurrence shall be counted as one. The 5-year period shall be measured from the dates of the refusals or violations which resulted in the revocations or convictions.

Your first question assumes that a district attorney has the authority to reduce a charge of sec. 346.63(1), Stats., as a second offense to a violation of sec. 346.63(1), Stats., as a first offense in spite of the fact that the person was previously convicted of such offense within a five-year period. In my opinion the district attorney has no such authority, nor does the court have the discretion to accept such a reduction.

Section 346.63(1), Stats., defines the offense of driving while intoxicated; it does not state the sentencing penalty and it does not state the term of revocation. The penalty provisions, sec. 346.65, Stats., are entirely independent of the provision that defines the offense. In other words, in my opinion there is no statutory lesser offense available in or contemplated by sec. 346.63(1), Stats. The district attorney may, of course, refuse to charge, or may reduce a charge from driving while intoxicated to a lesser offense, other than sec. 346.63(1), Stats. The reduction suggested by your question is really an attempt to apply different penalty provisions. The real issue, in my opinion, is whether the court has the discretion to apply the lesser penalty of a conviction on a first offense, when a second offense within the five-year period is a fact. As regards this issue, I do not believe the court has such discretion.

In fact, the courts are severely limited by the mandatory language of sec. 346.65, Stats. Both the penalty provision for the first offense, sec. 346.65(2)(a)1., Stats., and the penalty provision for the second offense, sec. 346.65(2)(a)2., Stats., use the word "shall" rather than "may" and are, therefore, mandatory on the courts. Contrast this with other provisions such as the penalty for reckless driving, sec. 346.65(1), Stats., which uses the word "may" and is, therefore, permissive in nature.

Additional support for the mandatory nature of these provisions is found in *Mollet v. Department of Transportation*, 67 Wis. 2d 574, 227 N.W.2d 663 (1975). In *Mollet*, the Wisconsin Supreme Court found that the Division of Motor Vehicles correctly refused to issue the petitioner an occupational license where he had been convicted of drunk driving a second time after attending traffic safety school on the first violation. The court had to interpret the revocation statute applicable to drunk driving offenses as that provision related to the then existing driver safety school provision. In finding the revocation mandatory, the court stated:

We conclude that conviction under sec. 346.63(1)(a), Stats., or an ordinance passed in conformity therewith, requires, under sec. 343.30(1q), the revocation of operating privileges for a period of at least ninety days, and that such revocation is mandatory. The option granted under sec. 345.60 to trial judges to send a violator to a traffic school in lieu of other penalties is not applicable. A first conviction under sec. 346.63(1)(a) requires that the offender's license be revoked. No other option is available.

The attorney general's opinion (60 Op. Atty' Gen. (1971), 261), which advised traffic authorities and judges that the provisions of sec. 345.16, Stats. 1969 (now renumbered sec. 345.60), were applicable to drunken driving is incorrect and is contrary to the plain legislative intent.

Mollet, 67 Wis. 2d at 577-78 (footnote omitted).

After an extensive review of the legislative history of the applicable statutes, the court concluded:

[I]n view of the legislative history of sec. 345.60(1), Stats., the legislative history of the license revocation statutes, and the use of the words "shall" and "may," it is clear sec. 345.60(1) cannot be used by the trial court to require traffic school attendance in lieu of license revocation under sec. 343.30(1q) for a first conviction for drunken driving. A first conviction for drunken driving is an offense which requires the revocation of the driver's license. Because *Mollet* was convicted of such an offense within eighteen months of September 18, 1973, conviction for drunken driving, the county judge was without jurisdiction to order the issuance of the occupational license. The Division of Motor Vehicles was correct in refusing to issue the occupational license as ordered by the county judge, and the circuit court judgment must be reversed.

Mollet, 67 Wis. 2d at 582.

Although *Mollet* does not deal with the specific issues raised by your inquiries, I do believe it provides some guidance as regards the probable direction of the court in interpreting the provisions of sec. 346.65(2)(a)1., Stats., and sec. 346.65(2)(a)2., Stats. The same logic in regard to the legislative history, legislative intent and use of

the word "shall" found in *Mollet* would require a finding of no discretion in regard to penalizing when the facts are as you suggest. To find otherwise would clearly violate plain legislative intent.

Your second question is whether the Department of Transportation, in the situation posed in your first inquiry, must treat the offense as a second offense for purposes of revocation. The answer is yes, consistent with my previous analysis. The trial court must penalize on the basis of a second offense. The applicable statute, sec. 343.30(1q)2.(d), Stats., requires a revocation for one year. The Department must proceed "in accordance with the order of the court" and revoke for one year. See sec. 343.31(1)(b), Stats.

Your third question is whether a court could treat this as a first offense for the purpose of revocation and thus prevent the Department from revoking under sec. 343.31(1)(b), Stats. The answer is no. The court does not have the discretion to treat the second offense as anything but a second offense. The mandatory language to the court in the revocation provision, sec. 343.30(1q)2.(d), Stats., is no different than the mandatory language in the sentencing provision, sec. 343.65(2)(a), Stats. Both explicitly use the word "shall" and, as I noted, the court in *Mollet* has construed the use of this word as mandatory to the trial court.

Your fourth question, as your first, assumes that proceeding on a first offense is appropriate and asks what standards of proof apply and whether the 5/6's rule is applicable. Since, in my opinion, the trial court has no discretion to apply the penalties for a first offense when a second offense is evident from the facts and record, it also follows that the court cannot exercise discretion to allow the prosecution to proceed on a first offense when a second offense is a fact. Thus, since a second offense is prosecuted as a criminal action, the burden of proof requirement is "beyond a reasonable doubt" and the unanimous verdict would be required.

BCL:JSS:SCJ

Prisons And Prisoners; Words And Phrases; Community-based residential facilities and child welfare agencies, facilities, or group foster homes do not necessarily become prisons or jails by reason of the placement therein of adult criminal or juvenile offenders in the custody of the state. The question whether a particular facility has become a prison or jail depends on whether the primary purpose of the facility has become penal. OAG 15-80

March 17, 1980.

**ED JACKAMONIS, Speaker
Wisconsin State Assembly**

The Assembly Committee on Organization has requested my opinion on the meaning of the terms "jail" and "prison" as used in sec. 46.03(22)(a), Stats., which provides:

"Community living arrangement" means any of the following facilities licensed or operated, or permitted under the authority of the department: child welfare agencies under s. 48.60, group homes for children under s. 48.02 (7s) [48.02 (7)] and community-based residential facilities under s. 50.01; but does not include day care centers, nursing homes, general hospitals, special hospitals, prisons and jails.

Your first inquiry is whether a community-based residential facility, as defined in sec. 50.01(1), Stats., would be considered a "jail" or "prison" if used for the placement of adult criminal offenders in the custody or control of the State Department of Health and Social Services or the county probation department and of the statuses listed below:

- a. Those placed on probation in lieu of sentence.
- b. Those placed on probation under stayed sentence.
- c. Those serving sentences, with or without work release privileges.
- d. Those in community correctional residential centers prior to parole release.
- e. Those on parole release.

- f. Those taken into custody for alleged violation of the conditions of parole release.

Your second inquiry is whether a licensed child welfare agency, facility, or group foster home under sec. 48.02(7), Stats., would be considered a "jail" or "prison" if used for the placement of juvenile offenders of the statuses listed below:

- a. [Those] taken into custody for alleged violation of a criminal statute and detained under s. 48.207 or 48.208 pending a probable cause or plea hearing;
- b. [Those] taken into custody for alleged violation of the terms of an order of supervision entered by the court in a previous delinquency proceeding against the child and detained under s. 48.207 or 48.208 pending a probable cause or plea hearing;
- c. [Those] under an informal disposition or consent decree arising out of an alleged violation of a criminal statute;
- d. [Those] adjudicated delinquent and placed under supervision by the dispositional order of the court under s. 48.34 (3) or (10), Wis. Stats.; or
- e. [Those adjudicated delinquent and placed under supervision] by the Department of Health and Social Services, if custody has been transferred to it under s. 48.34 (4m), Wis. Stats.; or
- f. [Those] on after care or field supervisor status or pending proceedings to revoke such status under s. 48.357 (4), Wis. Stats.?

Discussion

Section 46.03(22)(a), Stats., provides that prisons and jails are excluded from the definition of "community living arrangement." Although the terms "prison" and "jail" are universally used, few courts have had occasion to consider what factors cause an institution to be considered a jail or prison.

Black's Law Dictionary defines "prison" as "a building or other place for the confinement or safe custody of persons, whether as a punishment imposed by the law or otherwise in the course of the

administration of justice." *Black's Law Dictionary* 1358 (4th ed. 1951). The same source gives the following definition of "jail": "a prison; a building designated by law, or regularly used, for the confinement of persons held in lawful custody." *Id.* at 968.

The Wisconsin Supreme Court's definition of "jail" employs *situs* as a starting point. In *Grab v. Lucas*, 156 Wis. 504, 507, 146 N.W. 504 (1914), the court said:

[T]he primary function of a jail is a place of detention for persons committed thereto under sentence of a court [:] they are also the proper and usual places where persons under arrest or awaiting trial are kept till they appear in court and the charge against them is disposed of.

The traditional judicial approach, however, has used a place or building as merely a point of departure in defining "prison" and "jail": "[T]he terms *prison* or *jail* have received at law a broader meaning than the generally accepted definition as a place or building for confinement." *People v. Noble*, 207 N.Y.S.2d 467, 468-69, 26 Misc. 2d 903, 904 (1960). Thus, simply using buildings for the confinement of persons in the course of the administration of justice is not necessarily sufficient to result in the buildings becoming prisons or jails.

The necessity for a definition extending beyond place of confinement was also recognized by the California Supreme Court in *Ex Parte Gilliam*, 26 Cal. 2d 860, 161 P.2d 793 (1945). The court discussed the character of the institution, its inmates, and the goal of the institution as other factors to be examined in determining the status of an institution. Applying these factors in the present matter, results in the conclusion that community living arrangements should not be viewed as prisons or jails, when used to house persons of the statuses outlined in your inquiry. Persons in penal institutions normally are at some stage of a criminal proceeding, *see* secs. 53.31, 53.06, and 48.34(4m), Stats. By contrast, persons in community-based residential facilities are adults "who ... cannot or do not wish to live independently yet do not need the services of a nursing home or hospital," Wis. Adm. Code section HSS 3.03(3) and who possess primarily medical, social, or developmental disabilities, Wis. Adm. Code section HSS 3.05(32). Additionally, juveniles who have not been adjudged delinquent are dealt with by a subunit of the Department of

Health and Social Services distinct from the subunit administering corrections, sec. 48.345, Stats.

Moreover, the purpose of community living arrangements supports the conclusion that they are not necessarily converted to prisons or jails by the actions posed in your inquiry. Section 50.01(1), Stats., defines a community-based residential facility as "a place where [three] or more unrelated adults reside in which care, treatment or services above the level of room and board but not including nursing care are provided to persons ... as a primary function of the facility." This primary function is not necessarily changed as a result of housing persons of the categories you have cited. So long as the provision of "care, treatment or services above the level of room and board" remains the primary purpose, these institutions should not be considered "prisons" or "jails."

Similarly, the purpose of child welfare agencies, facilities, and group foster homes is to provide care, protection, wholesome mental and physical development and rehabilitation. Sec. 48.01, Stats.

This purpose has not changed significantly as a result of placing juvenile offenders in community living arrangements under the circumstances stated in your second inquiry. That the Legislature was also of this opinion is underscored by the provisions of sec. 48.34, Stats., which authorizes placement of adjudged juvenile delinquents in institutions that also house nondelinquents. Thus, so long as the statutorily defined purposes of community living arrangements do not change, they will continue to be distinguishable from penal institutions.

In Wisconsin, the primary function of a jail has long been viewed as detention of persons committed by the court. *Grab v. Lucas*, 156 Wis. 504, 146 N.W. 504 (1914). Section 53.06, Stats., designates prisons as the places to which convicted and sentenced persons are to be delivered. The primary function is confinement. These functions of prisons and jails clearly are unlike those of community living arrangements, and thus serve to prevent the latter from being viewed as penal institutions.

There is additional support for this conclusion. Section 53.01, Stats., lists several correctional institutions, and provides that they are state prisons. None of the community living arrangements about which you have inquired are designated in the list set out in sec.

53.01, Stats. In construing statutes, “[e] xpression of one thing excludes another.” K. Llewellyn, *The Common Law Tradition* at 526 (1960).

Nor are community living arrangements jails. Section 53.30, Stats., provides that “[a]s used in ss. 53.30 to 53.43, the word ‘jail’ includes municipal prisons and rehabilitation facilities established by s. 59.07(76) by whatever name they are known.” (Although the statutory sections in your inquiries do not fall between secs. 53.30 and 53.43, Stats., as the definition in sec. 53.30, Stats., envisions, the definition would nonetheless seem relevant to your inquiries. “To effect its purpose a statute may be implemented beyond its text.” K. Llewellyn, *The Common Law Tradition* at 522 (1960).) Section 59.07(76), Stats., cited in the statutory definition of “jail,” provides that county boards may:

Establish and maintain rehabilitation facilities in any part of the county under the jurisdiction of the sheriff as an extension of the jail, or separate from the jail under jurisdiction of a superintendent, to provide any person sentenced to the county jail with a program of rehabilitation for such part of his sentence or commitment as in the opinion of the court will be of rehabilitative value to such prisoner.

As I concluded in the previous paragraph, community living arrangements are not prisons, so the question becomes whether they are rehabilitation facilities under sec. 59.07(76), Stats., since this is the only other type of institution designated “jail” in sec. 53.30, Stats. The answer would seem to be no. Section 59.07(76), Stats., provides that rehabilitation facilities are under the jurisdiction of superintendents or sheriffs, and these officers are personnel of the prison and jail systems, *see, e.g.*, secs. 53.04 and 53.33, Stats. I assume that the community living arrangements about which you inquire are not under the control of superintendents or sheriffs, and this fact would further distinguish the institutions from prisons and jails.

Moreover, several Wisconsin statutes envision some mixing of persons of different types. *See, e.g.*, sec. 53.19, Stats., which provides that the Department of Health and Social Services, which has jurisdiction of the institutions and persons referred to in your inquiries, “may use any of its facilities for the temporary detention of persons in

its custody"; sec. 48.34, Stats., which authorizes the placement of adjudged juvenile delinquents in institutions housing primarily non-delinquent children. There is no apparent statutory indication that the Legislature envisioned the result of such mixing as necessarily being the conversion of community living arrangements into penal institutions.

In my opinion, for the reasons discussed above, community living arrangements need not necessarily be viewed as prisons or jails under the circumstances you pose. So long as those elements that cause institutions to be viewed as prisons and jails—the presence of a resident population most of whom are in some stage of the criminal justice system; a primarily penal rather than a welfare institutional function—are absent, an institution should be considered nonpenal.

The corollary of this conclusion, however, is that if the community living arrangements lose their primarily nonpenal characteristics, they may no longer be viewed as nonpenal. Thus, for example, while temporary placement of juvenile delinquents and adult criminal offenders in community living arrangements apparently falls under the authorization in sec. 53.19, Stats., *permanent* placement—in addition to being seemingly unauthorized—could convert a nonpenal function into a penal one, making "jail" or "prison" appear to be the appropriate label. Similarly, the presence, temporarily or permanently, of a *significant* number of the categories of persons listed in your inquiries would seem to impact on the facet of the definition of "prison" and "jail" involving the character of the institution and its inmates.

Thus, in my opinion, placement of adult criminal offenders or juvenile offenders in community-based residential facilities or child welfare agencies facilities or group foster homes, under the conditions outlined in your inquiry, would not render such facilities "prisons" or "jails." Only if the placement contravened an apparent legislative attempt to distinguish, by function and purpose, community-based residential facilities or juvenile facilities from prisons or jails would these facilities properly be viewed as penal institutions.

BCL:CDH:scj

Liens; Register Of Deeds; Registers of deeds have no obligation under law to file or record "common-law liens," or "common-law writs of attachment" because such instruments do not, as a matter of law, affect an interest in land or personal property, and are frivolous on their face. OAG 16-80

March 17, 1980.

GERALD K. ANDERSON, *District Attorney*

Waupaca County

You have inquired as to the duty of the Register of Deeds to record or file certain documents that are self-styled as "common-law liens" and "common-law writs of attachment."

The practice of filing or recording such documents has recently become a common procedure of a group of individuals who, because of identical language or style in several different documents, appear to be either members of the same organization or are associated in a common purpose. Invariably these "common-law liens" and "writs" have been recorded or filed against realty and personality belonging to public officials.

DUTIES OF REGISTER OF DEEDS

Case law is to the effect that the duties of registers of deeds are ministerial, *Annot.*, 94 A.L.R. 1303 (1935); *Youngblood v. United States*, 141 F.2d 912 (6th Cir. 1944); *State ex rel. Preston v. Shaver*, 172 Ohio St. 111, 173 N.E.2d 758 (1961), and that they may not question the validity of instruments presented for recording or filing, *People v. Mortenson*, 404 Ill. 107, 88 N.E.2d 35 (1949); *Weyrauch v. Johnson*, 201 Iowa 1197, 208 N.W. 706 (1926). Nevertheless, I am of the opinion that the register of deeds is not under compulsion to record or file every document presented and in particular, has no duty to record the "common-law liens" or to file the "common-law writs of attachment" in question. Since the duties of registers of deeds are statutory, we must look to the statutes to determine what they are required to do in a given circumstance. As the statutory duties of the registrar and the recording statutes deal with a common subject mat-

ter, they must be considered in *pari materia*. *McGraw-Edison Co. v. ILHR Dept.*, 72 Wis. 2d 99, 240 N.W.2d 148 (1976).

The principal statute concerning the duties of the register of deeds, for purposes of the present discussion, is sec. 59.51(1), Stats., which provides:

The register of deeds shall:

(1) Record or cause to be recorded in suitable books to be kept in his office, correctly and legibly all deeds, mortgages, maps, instruments and *writings authorized by law to be recorded* in his office and left with him for that purpose

In determining the duty imposed under the above-quoted language the importance of the term "writings authorized by law to be recorded" becomes obvious. The statutory language, "authorized by law," has been construed to mean allowed by statute of this state. *Musback v. Schaefer*, 115 Wis. 357, 91 N.W. 966 (1902); 66 Op. Att'y Gen. 148 (1977). Thus, the statute by its own terms, compels consideration of the recording statutes.

Section 706.05(1), Stats., provides: "Every conveyance, and every other instrument which affects title to land in this state, shall be entitled to record in the office of the register of deeds of each county in which land affected thereby may lie."

In *Appliance Buyers Credit Corp. v. Crivello*, 43 Wis. 2d 241, 168 N.W.2d 892 (1969), the court upheld the refusal by the register of deeds to record a lease that on its face did not affect an interest in land. And in *Walter Laev, Inc. v. Karns*, 40 Wis. 2d 114, 120, 161 N.W.2d 227 (1968), the court quoted with approval the following language from *Roberts v. United States ex rel. Valentine*, 176 U.S. 221 (1900), concerning ministerial duties of public officers:

"Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct [s] him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform,

then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer.”

I conclude that registers of deeds should refuse to file or record the “liens” and “writs” where he or she has been specifically advised by the Attorney General, district attorney, or county corporation counsel that such documents are not required to be filed or recorded. In doing so, the register of deeds is exercising a purely ministerial act.

COMMON-LAW LIENS

The “common-law liens” in question purport to affect title to real property. They specifically describe certain real estate, assert that “Demandant” claims anywhere from \$156 thousand to \$25 million from respondent and that “[t]he object of this action is to enable the Demandant to secure money damages, and such property will be subject to prosecution to satisfy judgments in this action.” The “lien” also states on its face that it “Supercedes All Mortgages.”

The fact is that such common-law liens do not “affect title to land in this state” within the meaning of sec. 706.05(1), Stats., nor are they “deeds, mortgages, maps, instruments and [other] writings authorized by law to be recorded ... and left with him for that purpose” within the meaning of sec. 59.51(1), Stats. Accordingly, the register of deeds may properly refuse to record them because the common-law liens in question do not apply to realty.

As stated in 53 C.J.S. *Liens* sec. 7, at 851: “A lien in its narrower sense, as understood at common law, applies only to personal property.” In *Moynihan Associates, Inc. v. Hanisch*, 56 Wis. 2d 185, 190, 201 N.W.2d 534 (1972), the court describes the nature of common-law liens:

This court has held for years that a person who has bestowed labor upon an article or done some other act in reference to it by which its value has been enhanced has the right to detain the same until he is reimbursed for his expenditures and labor; and that every bailee for hire who by his labor and skill has added value to the goods has a lien upon the property for his reasonable services or charge rendered.

Section 289.48, Stats., sets forth the manner in which common-law liens are enforced and it does not authorize the filing or recording of the documents in question. Further, it provides as to any debt claimed to be over \$100 "then such lien may be enforced against the same by action."

COMMON-LAW WRITS OF ATTACHMENT

Registers of deeds have no duty to file so-called "Common-Law Writs of Attachment" because there is no such instrument recognized at common law. As stated in 7 C.J.S. *Attachment* sec. 3, at 228:

Attachment to seize and hold the property of defendant for the payment of the debt to collect which suit is brought is a proceeding unknown to the common law; it had its origin in the civil law, and first arose in England in the form of a local custom of London merchants, out of which, as modified and extended by statute, has grown into the modern law of attachment. ... Attachment as it exists in the United States today is deemed to be a summary and extraordinary remedy in derogation of the common law and has been said to owe its existence entirely to statutory enactment, and it follows that no right or title can be acquired by its exercise unless there has been at least a substantial compliance with the provisions of the statute.

Our court has consistently required strict adherence to the statutory procedure in attachment proceedings, *Morrison v. Fake*, 1 Pin. 133 (1841) and *Pratt v. Pratt*, 2 Pin. 395, 2 Chand. 48 (1850). As stated in *Barth v. Graf and others*, 101 Wis. 27, 41, 76 N.W. 1100 (1898), "[t]he statute authorizing an attachment is in derogation of the common law, and must be substantially pursued in order to give validity to the attachment." [(*Accord, Lederer and others v. Rosenthal*, 99 Wis. 235, 74 N.W. 971 (1898); *Elliot v. Jackson*, 3 Wis. 649 (1854).]

It is quite clear then, without going into detail, that each of the so-called "common-law writs of attachment" we have examined is void on its face in that the statutory procedure outlined in ch. 811 has not been followed as required under Wisconsin law. First, sec. 811.02, Stats., requires it to be issued by a judge or other judicial officer after a summons and complaint have been filed, and be in the name of the court and under its seal. Section 811.03, Stats., requires a rather

comprehensive affidavit; sec. 811.06, Stats., requires posting of a bond "sufficient to provide adequate security to the defendant for any damages the defendant may sustain by reason of the attachment." Section 811.10, Stats., provides for enforcement of the writ by the sheriff.

Accordingly, the "writs of attachment" in question, not having followed the statutory procedure for enforcement pursuant to ch. 811, Stats., as stated above, are not entitled to be filed by the register of deeds as provided by sec. 811.11, Stats., and sec. 59.54, Stats., and should be refused.

SLANDER OF TITLE

The "liens" often range from \$15 to \$25 million, which fact by itself strains any reasonable credulity. It has been called to my attention that in one county alone "liens" in excess of \$350 million have been presented to the registrar. If all counties were considered the total of such, "liens" might approach \$1 billion.

The recent epidemic of these filings and recordings against public officials and employes and the striking similarity of the instruments make a clear showing of a conspiracy to intimidate public officials and employes and to frustrate the operation of government by mass slander of title.

In *Annot.*, 39 A.L.R.2d 840, 842 (1955), it was concluded that there is no doubt the act of wrongfully recording an unfounded claim is actionable as slander of title. These "common-law liens" on their face are frivolous and evidence unfounded claims. In *Schlytter v. Lesperance*, 62 Wis. 2d 661, 215 N.W.2d 552 (1974), it was held that the recording of a false affidavit was actionable as common-law slander of title.

The Legislature specifically has prohibited slander of title. Sec. 706.13, Stats. Since these documents on their faces evince a violation of this prohibition, it would frustrate the legislative objective to prevent such slander were I to conclude that they, nevertheless, were entitled to be recorded under the recording statutes which are contained in the same chapter.

CONCLUSION

The pattern of conduct under review in this opinion functions to subvert due process of law. Due process, in its most elemental sense, is "simply, that which must be followed in depriving any one of anything which is his to enjoy until he shall have been divested thereof by and according to the law of his country." *Ekern v. McGovern*, 154 Wis. 157, 240, 142 N.W. 595 (1913). Rather than follow established laws, the participants put a cloud on property titles by filing and recording documents which in fact are unknown to the law and are void *ab initio*. They seek to confuse registers of deeds by styling these fugitive instruments as "liens" or "wrists." The victims sustain a cloud on their title without the benefit of compliance with statutorily provided procedures.

In conclusion, it is my opinion that registers of deeds have no obligation under law to accept these "common-law liens" or the "common-law writs of attachment" for recording or filing and should refuse to do so.

It is also my opinion that these documents, whether denominated as "common-law liens," "common-law writs," or by any other description, are not a security interest in or an encumbrance on property, real or personal. These instruments are void *ab initio* and possess no legal significance.

BCL

Clerk Of Courts; Original Records; Public Defenders; Clerks of court are not authorized to send the original records of criminal cases to the public defender prior to the time an appeal has been taken unless an order signed by a judge of the court authorizes such release.
OAG 17-80

March 24, 1980.

ROGER L. HARTMAN, *District Attorney*
Buffalo County

You have asked whether clerks of court may relinquish the entire original record of a criminal case to the public defender for his review

prior to appeal. It is my opinion that they may not, absent a court order pursuant to sec. 807.08, Stats.

Section 807.08, Stats., provides as follows:

The clerk shall not permit any paper filed in his office to be taken therefrom unless upon written order of a judge of the court. The clerk shall take a written receipt for all papers so taken and preserve the same until such papers are returned. Papers so taken shall be returned at once upon request of the clerk or presiding judge, and no paper shall be kept longer than 10 days.

The above statute is consistent with sec. 59.39(1), Stats., which provides in part that "the clerk of circuit court shall: (1) File and keep all papers properly deposited with him in every action or proceeding unless required to transmit such papers." Read together, these statutes require clerks of court to retain possession of all papers filed with them with two exceptions: (1) where a court order permits the removal of papers from the clerk's office; or (2) where the clerk is otherwise required to transmit such papers.

In the statutes, the term "transmit" denotes the transfer of documents from the clerk of one court to the clerk of another court. Thus, court records are "transmitted" when there is a change of venue (sec. 801.61, Stats.), or when an appeal has been filed (sec. 809.15(4), Stats.). Because the transfer of original records to the public defender prior to an appeal is not a "transmittal" as that term is used in the statutes, it is my opinion that clerks of court may release original records of a criminal case to the public defender only when presented with an order signed by a judge of the court. Even with such an order, the records may be removed for no longer than ten days. Sec. 807.08, Stats.

Such an interpretation of the clerk's duty is consistent with the clerk's other statutorily mandated functions. As stated by the supreme court in *State ex rel. Journal Co. v. County Court*, 43 Wis. 2d 297, 309-10, 168 N.W.2d 836 (1969): "[T]he clerk of court is, under the statutory scheme, the custodian of the records of the county court." As the custodian, the clerk must authenticate and certify the records in his custody. The clerk of court's ability to certify the authenticity of these records is seriously hampered if the original records leave his possession and are transmitted to a party in interest.

Consequently, the statutes only allow clerks of court to transmit the original records to other clerks of court upon changes of venue or when an appeal has been filed. The clerk who receives the records then becomes the custodian of the records and assumes the responsibility of ensuring their integrity.

This interpretation of the clerk's statutory obligations is also consistent with the clerk of court's duty under sec. 19.21(1) and (2), Stats.:

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

(2) Except as expressly provided otherwise, any person may with proper care, during office hours and subject to such orders or regulations as the custodian thereof prescribes, examine or copy any of the property or things mentioned in sub. (1). Any person may, at his own expense and under such reasonable regulations as the custodian prescribes, copy or duplicate any materials, including but not limited to blueprints, slides, photographs and drawings. Duplication of university expansion materials may be performed away from the office of the custodian if necessary.

As interpreted by the supreme court in *Journal Co.*, sec. 19.21(2), Stats., requires the clerk of court to make court records available to any person who is interested in examining them. Obviously, if the records are in the public defender's possession, the clerk cannot produce the records for other interested persons. Therefore, in order to fulfill his statutory obligation of making the records accessible to the public, the clerk of court cannot transmit the original records to the public defender, but must instead retain these records in his possession.

In reaching my conclusion, I have examined secs. 967.06, 757.65(2), 757.57(2), 973.08 and 809.30(1)(c) and (e), Stats., all of which have been cited by the public defender as authorization for

the release of the original record by the clerk of court prior to an appeal being taken. In my opinion, none of these statutes requires the clerk of court to transmit the original record to the public defender.

Thus, in answer to your question, the clerk of court cannot relinquish the original record of a criminal case to the public defender prior to appeal unless an order signed by a judge of the court authorizes such release.

BCL:MM

Circuit Judge; Firearms; Words And Phrases; Although judges are conservators of the peace, they are not peace officers who are allowed to carry concealed weapons. OAG 18-80

March 24, 1980.

J. DENIS MORAN, *Director of State Courts*
Supreme Court of Wisconsin

You have requested my opinion as to the right of a circuit judge in this state to carry a concealed weapon. Accompanying your letter is a memorandum from Judge Jon B. Skow of Racine County expressing some anxiety about his personal safety and requesting an opinion as to whether a circuit judge "has the right to protect himself from physical harm to the extent that he may actually carry a concealed weapon if he deems it necessary." It is my opinion that he legally cannot.

The prohibition against carrying a concealed weapon is set forth in sec. 941.23, Stats., as follows: "Any person except a peace officer who goes armed with a concealed and dangerous weapon is guilty of a Class A misdemeanor."

The term "peace officer" is defined in sec. 939.22(22), Stats., as "any person vested by law with a duty to maintain public order or to make arrests for crime, whether that duty extends to all crimes or is limited to specific crimes."

Although, for the reasons set forth in the balance of this opinion, I do not believe a circuit judge is a "peace officer" for purposes of the

carrying concealed weapon statute, I recognize that a contrary argument could be made based upon sec. 757.02(3), Stats., which reads: "The judges of ... [circuit] courts shall be conservators of the peace, and have power to administer oaths and take the acknowledgements of deeds and other written instruments throughout the state."

Black's Law Dictionary 378 (4th Ed. Rev. 1968), defines conservators of the peace as follows:

Officers authorized to preserve and maintain the public peace. In England, these officers were locally elected by the people until the reign of Edward III, when their appointment was vested in the king. Their duties were to prevent and arrest for breaches of the peace, but they had no power to arraign and try the offender until about 1360, when this authority was given to them by act of parliament, and "then they acquired the more honorable appellation of justice of the peace." 1 Bl. Comm. 351.

(A detailed history of the evolution of this office is set forth in *In re Sanderson*, 289 Mich. 165, 286 N.W. 198, 200, 201 (1939).)

There is some authority for equating the term "conservators of the peace" with the term "peace officers." *Ex parte Levy*, 204 Ark. 657, 163 S.W.2d 529, 532 (1942); *Jones v. State*, 65 S.W. 92 (Tex. 1901); *Tippett v. State*, 80 Tex. Crim. 373, 189 S.W. 485, 486 (1916); *Patton v. State*, 129 Tex. Crim. 269, 86 S.W.2d 774, 776 (1935); but, see, *Satterwhite v. State*, 112 Tex. Crim. 574, 17 S.W.2d 823, 825 (1929) (not a peace officer for certain other purposes).

The most cited case for the proposition that judges, as conservators of the peace, are thereby authorized to carry concealed weapons is *Jones v. State*, 65 S.W. 92 (Tex. 1901). The Texas Court of Criminal Appeals reversed the conviction of a county judge for carrying a concealed weapon. The pertinent statute provided an exception for "peace officers" but defined them as "sheriffs, deputies, marshals, constables, policemen, and any private person appointed to execute criminal process." The Texas Constitution expressly provided that county judges shall be "conservators of the peace," and certain statutes imposed specific duties upon them to preserve the peace, prevent injury and suppress riots, etc. Therefore, the court found them to be peace officers within the exception to the concealed weapon law. *Id.* at 92. Fifteen years later this precedent was held to be binding upon

an obviously reluctant court in reversing a similar conviction. *Tippett.*

Were this an original proposition, the writer would hold that the Legislature, in exempting peace officers from the provisions of [the concealed weapon statute] intended and in fact did exempt only such officers as it (the Legislature) had defined as peace officers in article 43 of the Code of Criminal Procedures. It defines as peace officers sheriffs, and their deputies, constables, marshals, or policemen of incorporated cities or towns, and the private citizens specially appointed to execute criminal process. We think this is the class intended to be exempted by the Legislature and that judges, being judicial and civil officers, would only be exempt when in the discharge of their duties.

Id. at 486.

Although the Texas courts continued to feel bound by *stare decisis*, in Wisconsin there is no such frontier precedent to impair present day judgment.

Illinois has come to a conclusion contrary to that arrived at by the Texas Court of Criminal Appeals in *Jones. People v. Boa*, 143 Ill. App. 356 (1908). The Illinois case involved a conviction of one Andrew Boa for a violation of the Illinois statute prohibiting the carrying of a concealed weapon. That statute exempted "sheriffs, coroners, constables, policemen, or other peace officers." *Id.* at 358. Another statute provided:

All judges of courts of record within their respective jurisdictions, and justices of the peace in their respective counties, are conservators of the peace and shall cause to be kept all laws made for the preservation of the peace, and may require persons to give security to keep the peace or for their good behavior or both as provided by this act.

Id. at 359.

Boa had argued that he should be exempted from the provisions of the concealed weapon statute because, *inter alia*, he was a justice of the peace and, thereby, a conservator of the peace which office, he argued, was the equivalent of a "peace officer." The Illinois court disagreed.

While it is true that by the section of the statute last above set forth, the judges of courts of record and justices of the peace, within the limits therein named, are made conservators of the peace, which gives them large latitude and power in doing those things necessary to preserve the peace, yet after all the authority given them is that which pertains to judicial, not executive, officers.

In our opinion the section of the statute above referred to, which exempts "other peace officers" from the law against carrying concealed weapons, refers to and intends to include only those officers whose duties and powers are similar to the duties and powers of the officers named in said section just before the words "other peace officers," namely, sheriffs, coroners, constables and policemen, that is, to executive officers and not to judicial officers and that therefore plaintiff in error did not simply by virtue of his office as justice of the peace, come within the exemption.

Id. at 359.

The provision in the Wisconsin Statutes making judges conservators of the peace has been on the books since the inception of our statehood. "The judges of the circuit courts shall be conservators of the peace throughout the state and shall have the same powers to preserve the peace as have heretofore been conferred upon the judges of the district court of the territory of Wisconsin." Ch. 21, sec. 6, Laws of 1848. Nevertheless, this term has never been defined in Wisconsin law. A similar dearth of authority was encountered by the Iowa Supreme Court in discussing that state's constitutional provision making certain judges conservators of the peace. *Newby v. District Court of Woodbury County*, 259 Iowa 1330, 147 N.W.2d 886, 892 (1967). Although the facts of that case do not relate to the issue of carrying a concealed weapon, it is interesting to note that the Iowa court, taking into account the historical perspective of the office, did not find the term to be synonymous with "peace officer."

Even after ... [they acquired the title of justice of the peace] many public officers were styled conservators of the peace, not as a distinct office but by virtue of the duties pertaining to their office. In this sense, the term might include the king himself, the

lord chancellor, justice of the King's bench and master of the roles *as well as peace officers.*

Id. at 892 (emphasis supplied).

The Wisconsin carrying concealed weapon prohibition had its origin in ch. 7, sec. 1, Laws of 1872. From then until 1955 the exemption from its provisions applied to "any policeman or officer authorized to serve process." Clearly, this did not include those judicial officers who had, since 1848, been deemed "conservators of the peace." In the rewrite of our Criminal Code in 1955, the term "peace officer" was used for the first time in the statute. Ch. 696, sec. 1, Laws of 1955. This same law created the present definition of the term "peace officer" as set forth above. There is nothing in the history of that legislation which would indicate that the Legislature intended for the first time to exempt judicial officers of this state from the provisions of the carrying concealed weapon statute. The Legislative Council comment to this section emphasized the fact that a person must have a *duty* and not merely a power to maintain public order or to arrest for crime. Judiciary Committee Report on the Criminal Code, Wisconsin Legislative Council, Vol. 5, February 1953.

In a leading Wisconsin case involving the carrying concealed weapon statute, our supreme court enumerated sixteen offices which could come under the statutory definition of "peace officer." It is noteworthy that the court made no reference whatsoever to any judicial office or conservator of the peace. *State v. Williamson*, 58 Wis. 2d 514, 523, 206 N.W.2d 613 (1973). Although that list was *dicta* and not necessarily exhaustive, I find it to be significant and probative of the question here at hand.

In designating judges of this state as conservators of the peace, the Legislature has simply recognized the historical common law backdrop from which the office of justice of the peace emerged. A conservator of the peace was "a common law officer whose duties, as such, were to prevent and arrest for breaches of the peace in his presence." 12 C.J.S. *Conservator of the Peace*, at 522. Considering the historically limited scope of police power of this office together with the total lack of statutorily imposed duties upon the office in this state, it is my opinion that a conservator of the peace is not a peace officer under the law of this state.

Moreover, the incompatibility between the duties of circuit judge and peace officer is manifest. This office has consistently held similar relationships to involve clear conflicts of interest. *See, e.g.*, 11 Op. Att'y Gen. 242 (1922) (justice of the peace and undersheriff incompatible); 17 Op. Att'y Gen. 327 (1928) (mayor and justice of the peace incompatible); and 36 Op. Att'y Gen. 483 (1947) (clerk of municipal court and deputy sheriff incompatible).

I am aware of no authority which would support a proposition that a judge has any inherent power to carry a concealed weapon. Recently our supreme court has indicated that a primary feature of the inherent power of courts is that "the power must be such that it is related to the existence of the court and to the orderly and efficient exercise of its jurisdiction." *Jacobson v. Avestruz*, 81 Wis. 2d 240, 247, 260 N.W.2d 267 (1977). Even those jurisdictions which have upheld the right of a judicial officer to carry a concealed weapon have done so on the basis of constitutional and statutory provisions and not according to any theory of inherent power of judges or courts.

Similarly, the carrying concealed weapon prohibition does not violate the separation of powers. In this respect, our court has stated that in examining into the power of the Legislature to act, the inquiry is not whether there is a grant of power but whether there is a restriction. *Buse v. Smith*, 74 Wis. 2d 550, 564, 247 N.W.2d 141 (1976). As stated above, there is no inherent constitutional power possessed by a judge authorizing him to carry a concealed weapon. In view of this, there can be no question but that the legislative prohibition contained in sec. 941.23, Stats., is not vulnerable to attack as a violation of separation of powers. A violation of the separation of powers comes about when one department of government denies to another its appropriate power and attempts to assume such power itself. *In re Kemp*, 16 Wis. 359 (1863); *Goodland v. Zimmerman*, 243 Wis. 459, 10 N.W.2d 180 (1943). Prohibitions against carrying concealed weapons containing exemptions for peace officers are among the most common provisions in the criminal codes of the various states. *See*, 94 C.J.S. *Weapons* sec. 9. Yet, never has such a statute been demonstrated to be vulnerable to attack on the basis of a constitutional separation of powers theory.

By this opinion it should not be inferred that judges of this state are powerless to protect themselves from actual personal danger. Obviously, judges have the same rights of self-defense as do all other

citizens of this state. Sec. 939.48, Stats. More importantly, however, I believe that a member of the judiciary of this state probably has a constitutional right to physical protection "when there is just reason to believe that he will be in personal danger while executing the duties of his office." *In re Neagle*, 135 U.S. 1, 2, 58-68 (1890). Obviously, it is impossible to delineate all situations which would require such protection. It is a matter involving reason and common sense and calling for good faith cooperation between executive officers, including that of sheriff, and members of the judiciary.

BCL:JDH

Fish And Game; Indians; Stockbridge-Munsee Reservation; The Stockbridge-Munsee Indian Tribe has the exclusive right to hunt and fish on tribal lands and has the right to regulate such activities by both Indian and non-Indian persons upon such lands. Current and former Stockbridge-Munsee Reservation boundaries discussed.
OAG 19-80

April 1, 1980.

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

Your predecessor requested my opinion on a number of issues pertaining to the Stockbridge-Munsee Indian Tribe. The request indicated that the Tribe was in the process of establishing hunting and fishing regulations which are to apply to all persons within the exterior boundary of the reservation. As you know, most but not all of the questions contained in that request are currently in litigation.

In *State v. Baker, et al.*, 76-C-356 (W.D. Wis.), (see related case, *State of Wis. v. Baker*, 464 F. Supp. 1377 (W.D. Wis. 1978)), the state requested a declaratory ruling on the authority of the Lac Courte Oreilles Tribe to promulgate and enforce hunting and fishing regulations on navigable waters within the exterior boundaries of the Lac Courte Oreilles Reservation. It is the policy of this office, when directly involved, not to comment on issues in litigation. Consequently, the questions relating to the jurisdiction of the Stockbridge-Munsee Tribe to promulgate and enforce hunting and fishing regula-

tions against Indians and non-Indians on navigable waters within reservation boundaries will not be addressed here. Thus, "land" as used herein does not include the bed of lakes or streams. This opinion is limited to consideration of the following questions:

1. What are the boundaries of the Stockbridge Indian lands? Do these boundaries include the Towns of Bartelme and Red Spring in Shawano County?
2. What "treaty rights" or *other* rights do the Stockbridge Indians have with regard to hunting, fishing and trapping?
3. Do the Stockbridge Indians have any hunting, fishing and trapping rights in the Towns of Bartelme and Red Spring?
4. Can the Stockbridge Indians legally establish hunting, fishing and trapping seasons of their own? If so, on what lands? To whom would these seasons apply?
5. What, if any, enforcement authority do the Stockbridge Indians have to enforce hunting, fishing, and trapping laws against both Indians and non-Indians?

I. Stockbridge-Munsee Reservation Boundary

A determination of the current Stockbridge-Munsee Reservation boundary requires consideration of several treaties and federal statutes. Before considering in detail the relevant treaties and legislation, it would perhaps be helpful to set forth in general the events that caused the Stockbridge-Munsee to settle at their present location in Wisconsin. Such historical accounts provide a backdrop against which to read the relevant treaties and legislation as they affect reservation boundary questions.

The Stockbridge and Munsee Indians originally resided in the eastern part of the United States. As a result of the settlement of their land in the east, they were forced to move, eventually relocating in Wisconsin in the early 1800's. Pursuant to an amendment to the 1831 Treaty with the Menominees (7 Stat. 342), the United States Government acquired approximately 46,000 acres of land on the east side of Lake Winnebago in a locality then known as Stockbridge, Wisconsin, for the use of the Stockbridge and Munsee Tribes.

Between 1831 and 1856 the Stockbridge and Munsee gave up or lost all their land located at Stockbridge, Wisconsin, through a series

of treaties and legislative enactments. In the Treaty of February 5, 1856 (11 Stat. 663), the last treaty between the United States and Stockbridge and Munsee, the remaining tribal land at Stockbridge, Wisconsin (together with seventy-two sections of land in Minnesota), was ceded to the United States. Article II provided in part:

In consideration of such cession and relinquishment by said Stockbridges and Munsees, the United States agree to select as soon as practicable and to give them a tract of land in the State of Wisconsin, near the southern boundary of the Menominee reservation, of sufficient extent to provide for each head of a family and others lots of land of eighty and forty acres, as hereinafter provided, every such lot to contain at least one-half of arable land.

By treaty dated February 11, 1856 (11 Stat. 679), the United States acquired two towns of land from the Menominee Tribe "for the purpose of locating thereon the Stockbridge and Munsee Indians." Thus, Town 28 North, Range 13 East (Bartelme), and Town 28 North, Range 14 East (Red Spring), in Shawano County, Wisconsin, were acquired by the United States Government as a federal reserve for the use of the Stockbridge and Munsee Tribes.

The 1856 Treaty with the Stockbridge-Munsee provided for the allotment of reservation land among tribal members. This allotment policy was designed to transfer ownership of a particular parcel of land to each tribal member. The individual allottee was prohibited from transferring or selling the allotment by virtue of a restriction on alienation contained in the patent from the federal government. Not all land was to be allotted, however. Article III obligated the United States to reserve sufficient land for the "rising generation." Article IV authorized the expenditure of tribal moneys held by the United States in trust for the "building of roads leading to, and through said lands, to the erection of a school house, and such other improvements of a public character, as will be deemed necessary by the said Stockbridge and Munsee council."

Based on the 1856 Treaty and the historical events noted, it is my opinion that a reservation for the use of the Stockbridge and Munsee Indians coterminous with the present towns of Bartelme and Red Spring was thus created. It is also my opinion that subsequent early congressional legislation completely terminated the reservation sta-

tus of the tribal land thus set apart for the Stockbridge-Munsee in the 1856 Treaty but that later legislation reestablished the much smaller present reservation. I believe the following examination of such legislation, in view of the historical relationship between the United States and the Stockbridge-Munsee Tribe as reflected by court decisions that considered the effect of similar legislation, compels that conclusion.

A. Termination of the 1856 Reservation

By the Act of February 6, 1871 (16 Stat. 404), Congress provided “[t]hat the two townships of land ... set apart for the use of the Stockbridge and Munsee tribe of Indians” were to be appraised and sold at public auction under direction of the Secretary of the Interior. The Secretary was also authorized “to reserve from sale a quantity of said lands not exceeding eighteen contiguous sections, embracing such as are now actually occupied and improved, and are best adapted to agricultural purposes, subject to allotment to members of the Indian party of said tribe.”

The 1871 legislation was the first congressional enactment specifically directed toward reducing the size of the reservation as created by the 1856 Treaty. Virtually every section of the Act was concerned with dividing tribal assets in a manner which would accommodate the interest of the then two rival tribal factions, the “Indian” party and the “citizens” party.

The citizens party had consistently argued for the sale of tribal land and a per capita distribution of the proceeds therefrom, whereas the Indian party had consistently argued for the right to maintain tribal relations and to retain ownership of reservation land. (*See, e.g.*, Senate Miscellaneous Documents, Report No. 1108, Vol. 5, 1891-92.)

To accommodate the interests of both groups, the 1871 legislation thus provided for the sale of all reservation land except eighteen sections which were reserved for the Indian party, thereafter to be known as the “Stockbridge Tribe of Indians,” with part of the proceeds from such land sale to be distributed to members of the citizens party and the remaining funds deposited in a tribal account. Upon receiving their per capita payments, members of the citizens party would forever lose membership in the Tribe and all rights that flow therefrom.

Title to the entire eighteen sections, whether allotted or not, was to be held in trust by the United States for the Stockbridge Tribe. The reservation set apart for the use of the Stockbridge-Munsee in the 1856 Treaty was thus reduced to eighteen sections in the southern part of Town 28 North, Range 14 East (Red Spring), and the remaining eighteen sections in the north part, together with Town 28 North, Range 13 East (Bartelme), were placed upon the market and sold.

Clearly, the eighteen sections reserved for the Indian party continued to be a reservation, *albeit* diminished in size, which reservation status was recognized by both the United States and the courts. *See United States v. Gardner*, 189 F. 690 (E.D. Wis. 1911). Legislation in 1893 (27 Stat. 744) and 1906 (27 Stat. 745), however, made further provisions for the allotment of the remaining eighteen sections of reservation lands. The effect of that legislation on continued reservation status is less clear, but it nevertheless indicates, in my opinion, congressional intent to completely dissolve the reservation status of all remaining Stockbridge-Munsee land.

The 1893 legislation provided that all tribal members:

[W]ho entered into possession of land under the allotment of 1856 [the Treaty] and of 1871, and who by themselves or by their lawful heirs have resided on said lands continuously since, are hereby declared to be owners of such lands in fee simple, in severalty, and the government shall issue patents to them therefor.

The Act also declared that certain individuals who had been excluded from membership in the Tribe by the 1871 legislation were in fact members of the Tribe and the Secretary of the Interior was directed to prepare a new enrollment of the Tribe to include such individuals.

The Act of June 21, 1906, provided for the allotment of all the remaining lands within the Stockbridge-Munsee Reservation to tribal members in fee simple without condition. The Act also authorized the Secretary of the Interior to acquire additional lands, if necessary, to complete the allotment provision with the proviso that those tribal members who were to receive allotments from such land had the option of accepting a cash payment instead of the allotment.

In *Gardner*, the Federal District Court for the Eastern District of Wisconsin considered whether the reservation survived the Act of June 21, 1906. The court construed the 1906 legislation as directing the Secretary of the Interior to proceed in the usual way to make allotments to tribal members and thereafter issue patents in fee simple to the individual allottees. The court concluded:

Up to the time this crime is alleged to have been committed, the reservation remained as a physical and legal fact, notwithstanding the promise of Congress to grant patents in fee simple. There was no change of occupancy. The defendant still lived within the limits of the reservation under the charge of an Indian agent, and to a certain extent the tribal relations were continued. So that the relation between the defendant and the government would not seem to have been changed until the allotments had been approved, or perhaps until the patents had been actually issued. It is not necessary in this case to determine at which of these dates the reservation expired.

189 F. at 696. The court observed, however, that such allotments had been made and were approved by the Secretary of the Interior on January 1, 1910. Patents were delivered on April 4, 1910. Since the alleged crime had occurred in 1909 when the reservation still clearly existed, the court concluded it had jurisdiction.

In *United States v. Anderson*, 225 F. 825 (E.D. Wis. 1915), the same court again considered the effect of the 1906 legislation on reservation status. The court observed:

When this act is read in the light of the treaty, the successive congressional and executive steps affecting the government's relation to this tribe, its opening declaration, that the enrolled members who have *not heretofore* received patents "*in their own right, shall be given allotments of land, and patents therefor in fee simple,*" evinces conclusively, so it seems to me, the legislative purpose to surrender, finally, any reserved discretionary power of the government over lands to be given to these Indians.

225 F. at 830.

In support of its conclusion, the court noted that prior to 1900, the Stockbridge Tribe petitioned the United States Government, acting through its Indian office, for a final dissolution of the Tribe and a

distribution of the tribal property, the latter to include the patenting of the lands in fee simple. Based on that petition, the Tribe and the United States apparently entered into an agreement, signed by a majority of the adult male members, entitled "Proposed Plan of Settlement with the Stockbridge and Munsee Tribe of Indians." That agreement, the court concluded, was the basis of the Act of June 21, 1906, which incorporated almost verbatim, major portions of the agreement. (*See* discussion at 225 F. 828-29.) Agreements, such as the agreement with the Stockbridge, which produce legislation are considered significant by courts in determining congressional intent. For example, the Court in *DeCoteau v. District County Court*, 420 U.S. 425 (1975), considered the effect of similar legislation and surrounding circumstances on the Lake Traverse Reservation.

The issue in *DeCoteau* was whether the Lake Traverse Reservation, created by an 1867 treaty between the United States and the Sisseton and Wahpeton Band of Sioux Indians, was terminated and returned to the public domain by the Act of March 3, 1891 (26 Stat. 1035). The 1891 Act ratified a previously negotiated agreement to which a tribal majority consented, in which the Tribe agreed to cede, sell, relinquish and convey to the United States all the land within the reservation remaining after additional allotments had been made. The Court observed that the 1891 Act which incorporated that agreement did not merely open the reservation lands to settlement, it also appropriated and vested in the Tribe a sum certain—\$2.50 per acre—in payment for the express cession and relinquishment of "all" of the Tribe's "claim, right, title and interest" in the unallotted land.

To determine the effect of the 1891 Act on reservation status, the Court considered the guidelines it had established in earlier cases.

This Court does not lightly conclude that an Indian reservation has been terminated. "[W]hen Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress." ... The congressional intent must be clear, to overcome "the general rule that '[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith.'" ... Accordingly, the Court requires that the "congressional determination to terminate ... be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." ... In

particular, we have stressed that reservation status may survive the mere opening of a reservation to settlement, even when the moneys paid for the land by the settlers are placed in trust by the Government for the Indians' benefit.

420 U.S. at 444 (citations omitted).

The Court held that the 1891 Act together with its legislative history and the surrounding circumstances all pointed unmistakably to the conclusion that the original Lake Traverse Reservation was partially terminated in 1891.

The negotiations leading to the Lake Traverse agreement, which was ratified by the 1891 Act, together with the unqualified return of unallotted land to the public domain, were major factors in the Court's determination. The Court cited various materials, including debates regarding congressional reaction to the proposed agreement, in support of its finding that both the Tribe and the federal government were satisfied that retention of allotments would provide an adequate fulcrum for tribal affairs.

As *United States v. Gardner*, 189 F. 690 (E.D. Wis. 1911), and *United States v. Anderson*, 225 F. 825 (E.D. Wis. 1915), indicate, essentially the same circumstances surrounded the complete termination of the reservation status of Stockbridge-Munsee land as were found to be controlling in *DeCoteau*. The only significant difference is that only part of the Lake Traverse Reservation was terminated.

Based on a consideration of these cases and the entire history of the legislative and executive action with respect to the Stockbridge-Munsee Reservation, it is my opinion that Congress intended to abolish the reservation status of the remaining eighteen sections of Stockbridge-Munsee land when the land was finally allotted and patents in fee simple were delivered to members of the Tribe in 1910. This conclusion finds further support in the fact that after 1910 the federal government, through the Bureau of Indian Affairs, apparently ceased to consider the allotted land a reservation. After 1910 the only consistent reference to the Stockbridge-Munsee in the Commissioner of Indian Affairs' reports to the Secretary of Interior concern educational benefits provided to individual tribe members.

B. Reestablishment of the Reservation

By the mid 1930's less than 200 acres of the eighteen sections allotted remained in Stockbridge-Munsee ownership. In 1934, in response to the apparent failure of the allotment policy which had reduced Indian landholdings nationally to less than 40 million acres, Congress enacted the Indian Reorganization Act (48 Stat. 984, 25 U.S.C. sec. 461, *et seq.*). This Act provided a statutory basis for the reestablishment of Indian reservations and the reorganization of Indian tribes as governmental entities. Specifically, it gave the Secretary of the Interior the authority to purchase lands for the purpose of providing an expanded land base for Indian tribes (25 U.S.C. sec. 465), and to proclaim new Indian reservations where none existed previously (25 U.S.C. sec. 467). Pursuant to this Act, approximately 2200 acres of former Stockbridge Reservation lands within the original 1856 reservation boundaries were reacquired for the use and benefit of the Tribe. In addition, pursuant to Title II of the National Industrial Recovery Act of June 16, 1933 (48 Stat. 300), the Emergency Relief Appropriation Act of April 8, 1835 (49 Stat. 115) and sec. 55 of the Act of August 24, 1935 (49 Stat. 750, 781), approximately 13,077 acres of submarginal land also located within the original 1856 reservation boundaries were purchased by the United States Government for the use of the Stockbridge-Munsee Indians. In 1972, Congress declared that the submarginal lands were to be held in trust for the Stockbridge-Munsee Tribe and were to be part of their reservation (86 Stat. 795).

The present reservation thus includes approximately 13,077 acres of submarginal land plus the 2200 acres of land purchased pursuant to the 1934 Indian Reorganization Act. These reservation lands are not contiguous and are located in both the Town of Red Spring and the Town of Bartelme. A map showing the location of the present reservation lands is attached hereto as Appendix A.

II. *Stockbridge-Munsee Hunting and Fishing Rights*

Whether a tribe has the right to hunt and fish free of state regulation depends upon whether the treaty, legislation, or executive order which established the reservation guaranteed the Tribe such rights. In my opinion, the creation of the Stockbridge-Munsee Reservation in 1856, which included all of the Towns of Bartelme and Red Spring, guaranteed the Tribe hunting and fishing rights. It is also my opinion,

however, that termination of Stockbridge-Munsee Reservation land status in 1910 effectively terminated the Tribe's hunting and fishing rights on such lands but that the Tribe reacquired the exclusive right to hunt and fish free of state regulation on present tribal land when the reservation was reestablished.

Tribal hunting and fishing rights are property rights owned collectively by the Tribe; individual rights are derived from membership in the Tribe. *Washington v. Washington State, Etc.*, 99 S. Ct. 3055, 3071 (1979); *Whitefoot v. United States*, 293 F.2d 658 (Ct. Cl., 1961), cert. denied 369 U.S. 818 (1962). See also Cohen, *Handbook of Federal Indian Law*, at 37, 285, 366 (1942 ed.) and Department of Interior *Federal Indian Law*, at 440, 496, 588-89, 750 note 21 (1958). It has been held that such a right is a *profit à prendre*¹ and, as such, an interest in real property. *Van Camp v. Menominee Enterprises, Inc.*, 68 Wis. 2d 332, 343, 228 N.W.2d 664 (1975). The sale of tribal land without reserving hunting and fishing rights on such land terminates exclusive rights thereon. *Id.* See *South Dakota v. Hero*, ____ S.D. ____, 282 N.W.2d 70 (1979), and *United States v. State of Minn.*, 466 F. Supp. 1382 (D. Minn. 1979).

The court in *Van Camp* intimated that purchasers of tribal lands would have the right to hunt on their own land, subject presumably to governmental regulation. The court, however, did not consider whether the state or the tribe or both would have jurisdiction to regulate hunting and fishing activities on such property. Nor did the court consider whether such land sales terminated all tribal hunting and fishing rights on such land or only exclusive rights and thus left open the question of whether a tribe would continue to enjoy rights in common with the purchasers of such land. Since it is my opinion that the Stockbridge-Munsee Tribe did not retain the right to hunt and fish free of state regulation on the land that originally composed the 1856 reservation, it is not necessary to address these questions here.

¹ Called also "right of common." A right exercised by one man in the soil of another, accompanied with participation in the profits of the soil thereof. A right to take a part of the soil or produce of the land. *Gadow v. Hunholtz*, 160 Wis. 293, 151 N.W. 810, 811, Ann.Cas. 1917D, 91.

Black's Law Dictionary, 1376 (4th ed. 1951).

In concluding that the Tribe did not retain any special hunting and fishing rights on the 1856 reservation lands, I am mindful of the Supreme Court's reluctance to find termination of treaty-protected rights where reservation land status is only partially terminated.

In *Menominee Tribe v. United States*, 391 U.S. 404, and *Antoine v. Washington*, 420 U.S. 194 (1975), the Court made clear that the termination of reservation status alone will not necessarily be considered an abrogation of rights secured to Indian tribes through treaty or legislation. The facts in *Menominee Tribe* are substantially different, however, than the facts surrounding the termination of the Stockbridge-Munsee Reservation. When Menominee termination became effective in 1961, title to the Menominee tribal land base was transferred from the United States to a Wisconsin corporation. Not only did the land base remain substantially intact following termination, but the Tribe's government structure and intra-tribal relations also remained substantially unaffected by the termination legislation.

In contrast, following the issuance of patents to Stockbridge-Munsee tribe members in fee simple in 1910, virtually all tribal relations ended. The communal ownership of tribal land was effectively ended and the Stockbridge-Munsee tribal government effectively ceased to function until reorganization. With the termination of reservation status, the sale of Stockbridge-Munsee land by the United States, and the allotment of remaining land to Tribe members in severalty with patents in fee simple, any *exclusive* tribal right to hunt upon such lands was lost. *Van Camp*. Fee simple ownership of all reservation land, together with the termination of reservation status, also caused such land and its owners to become subject to the general civil and criminal laws of Wisconsin. See 25 U.S.C. sec. 349; *Gardner* at 695; compare, however, *Mattz v. Arnett*, 412 U.S. 481 (1973) with *McGeehan v. Ashland County*, 192 Wis. 177, 212 N.W. 283 (1927). Thereafter, but only until the Stockbridge-Munsee Reservation was reestablished in 1934, Tribe members were subject to the same state regulation of hunting and fishing activities as were other persons.

As already discussed, the 1934 Indian Reorganization Act (48 Stat. 984, 25 U.S.C. sec. 461, *et seq.*) provided a statutory basis for the reestablishment of Indian reservations and the reorganization of Indian tribes. The Act authorized the Secretary of the Interior to acquire any interest in lands, water rights or surface rights to lands, within or without existing reservations, for the purpose of providing

lands for Indians (25 U.S.C. sec. 465). The Act also authorized the Secretary to proclaim new Indian reservations on lands thus acquired or to add such lands to existing reservations.

It is my opinion that the land acquired by purchase for the use and benefit of the Stockbridge-Munsee Tribe pursuant to the 1934 Indian Reorganization Act and proclaimed by the Secretary of the Interior to be an Indian Reservation, together with the federal surplus land added to that reservation by the Act of October 9, 1972, reestablished the Tribe's exclusive right to hunt and fish on such land. The 1934 Act provides that "lands added to existing reservations shall be designated *for the exclusive use* of Indians entitled to enrollment or by tribal membership to residence at such reservations." (25 U.S.C. sec. 467.)

In 56 Op. Att'y Gen. 11, 19 (1967), it is stated that:

There can be no distinction between lands occupied by Indian tribes which were later recognized by the federal government as being Indian lands, and the lands which were specifically granted to the Indians by the federal government. When the United States established Indian reservations, whether by treaty or otherwise, the rights of occupancy conveyed to the Indians included the right to hunt, fish and trap free from state conservation laws.

See also Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918); *Antoine; Mattz; United States v. John*, 437 U.S. 478, (1978); *United States v. Walker River Irr. Dist.*, 104 F. 2d 334 (9th Cir. 1934). Compare *State v. Shepard*, 239 Wis. 345, 300 N.W. 905 (1941) with *Sac & Fox Tribe of Mississippi in Iowa v. Licklider*, 576 F. 2d 145 (8th Cir. 1978).

It follows that members of the Stockbridge-Munsee Tribe have the exclusive right to hunt and fish on land held in trust for the Tribe which constitutes the present reservation. As already noted, the question of whether Wisconsin tribes have exclusive rights on navigable waters located within or adjacent to reservations in Wisconsin is currently in litigation. Consequently, this opinion will not address the issues related to navigable waters. Nor does this opinion address any issue involving state or tribal regulation of hunting and fishing activities on lands located within reservations that are owned in fee by non-tribe members.

III. *Tribal Regulation of Hunting and Fishing Activities*

The exclusive right to hunt and fish on tribal trust land strongly implies the right to regulate such activities by the Tribe and the United States. Whether the state also has jurisdiction to regulate hunting and fishing on such land is unsettled.

A tribe's governmental powers provide a basis for regulation within reservation boundaries. For a general discussion of tribal governmental powers, see *Mc Clanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973); *United States v. Mazurie*, 419 U.S. 544 (1975); *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Res.*, 231 F.2d 89 (8th Cir. 1956).

As I have indicated in other opinions, Indian tribes are recognized as legitimate governmental entities. See, e.g., OAG 61-79; 66 Op. Att'y Gen. 115 (1977); 65 Op. Att'y Gen. 276 (1976). As such, "Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). Clearly, the governmental power of Indian tribes to exercise jurisdiction over communal hunting and fishing rights was not withdrawn by implication when Indian tribes became dependent nations. See *Wheeler*, 435 U.S. at 326. Although Congress has the power to strip tribes of their remaining sovereignty, until Congress acts to do so, Indians "remain a separate people, with the power of regulating their internal and social relations." *Id.* at 322 (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886)).

Recognizing inherent tribal sovereignty, the 1934 Indian Reorganization Act included a provision for the reorganization of Indian tribes as governmental entities. Section 16 of the Act (25 U.S.C. 476), provides:

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. ...

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: ... to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State and local Governments.

Pursuant thereto, the Stockbridge-Munsee Tribe adopted a constitution and bylaws which set forth the basic organization for the exercise of tribal governmental power. Article VII, sec. 1, subsec. (f) of the Tribe's constitution, provides in pertinent part:

Enumerated Powers—The Tribal Council of the Stockbridge Munsee Community shall exercise the following powers

....

(f) To promulgate and enforce ordinances, subject to the approval of the Secretary of the Interior, ... providing for the licensing of nonmembers coming upon the reservation for purposes of hunting, fishing, trading, or other business, and for the exclusion from the territory of the Community of persons not so licensed.

The tribal constitution was approved by the Secretary of the Interior in compliance with 25 U.S.C. sec. 476.

It is also significant that the Act of July 12, 1960 (74 Stat. 469, 18 U.S.C. sec. 1165) was enacted for the purpose of assisting tribes in their exercise of jurisdiction over hunting, trapping and fishing activities on tribal lands. That statute provides in pertinent part:

Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined not more than [sic] \$200 or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited.

It should also be noted that provisions in Pub. L. No. 280, 28 U.S.C. sec. 1360 and 18 U.S.C. sec. 1162, the legislation that authorized the state to exercise general criminal and limited civil jurisdiction over all Indian country in Wisconsin except the Menominee Reservation specifically exclude state regulation of protected hunting and fishing by Tribe members. 18 U.S.C. sec. 1162(b) provides: "Nothing in this section shall ... deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof."

Based on the Stockbridge-Munsee Tribe's government status, the provisions in the tribal constitution, and the relevant federal statutes, it is my opinion that the Tribe has jurisdiction over hunting and fishing activities on the Stockbridge-Munsee Reservation. *See Eastern Band of Cherokee Indians v. N.C. Wildlife*, 588 F.2d 75 (4th Cir. 1978); *United States v. State of Washington*, 520 F.2d 676 (9th Cir. 1975); and *Settler v. LaMeer*, 507 F.2d 231 (9th Cir. 1974). It is not settled, however, whether such authority is exclusive or concurrent with a state's authority to manage fish and game and resources within its borders.

State jurisdiction to regulate non-Indian hunting and fishing within reservations has been upheld under some circumstances. *See United States v. State of Mont.*, 457 F. Supp. 599 (D. Mont. 1978); *Confederated Tribes, Etc. v. State of Wash.*, 591 F.2d 89 (9th Cir. 1979). *See also United States v. Sanford*, 547 F.2d 1085 (9th Cir. 1976). These cases hold that a state has jurisdiction to enforce its fish and game regulations on Indian reservations located within its boundaries against nontribe members unless precluded from doing so by an act of Congress or unless such enforcement would interfere with self-government on the reservation. *See also Williams v. Lee*, 358 U.S. 217 (1959); *Washington v. Confederated Bands and Tribes of the Yakama Indian Nation*, 439 U.S. 463 (1979).

In *Eastern Band of Cherokee Indians*, the Fourth Circuit Court of Appeals concluded that enforcement of North Carolina's fishing license requirements against non-Indian fishers on the Tribe's reservation violated federal preemption principles. The court found significant the strong federal policy supporting the Tribe's resource management program which demonstrated an intention to preclude any

state regulation. The Cherokee and the federal government were jointly working toward the development of the Tribe's fishing resource as a commercial enterprise for the Tribe. The state's licensing requirement, the court concluded, would adversely affect those efforts.

Eastern Band of Cherokee Indians has been appealed to the United States Supreme Court. The Court's decision should help clarify the jurisdictional relationship between the states and tribes regarding enforcement of hunting and fishing regulations within reservation boundaries.

I am not aware of any preemptive factors involving the Stockbridge-Munsee that would preclude the state and the Tribe from exercising concurrent jurisdiction over non-Indians on the Stockbridge-Munsee Reservation pending a Supreme Court decision in this jurisdictional area.

It is, therefore, my opinion, that the Stockbridge-Munsee Tribe has the exclusive authority to regulate hunting and fishing activities on tribal land by Tribe members and has concurrent jurisdiction with the state to regulate nonmembers who either reside there or go onto the reservation for such purposes.

As I indicated at the outset, the question of whether the Tribe has exclusive hunting and fishing rights on navigable waters and whether it has the exclusive right to regulate hunting and fishing activities on such waters is currently an issue in the *State v. Baker* litigation, and consequently, this opinion will not address those issues.

BCL:JN

Highways; Right Of Way; Rights-of-way boundaries of nondedicated roads created by affirmative act are determined by the order laying out the road, not by the location of the road's centerline. The rights-of-way boundaries of roads created by adverse users are only those portions of land adjacent to the traveled track reasonably necessary for highway purposes, unless the road has also been worked pursuant to sec. 80.01(2), Stats. OAG 20-80

April 2, 1980.

FREDERIC W. FLEISHAUER, *District Attorney*
Portage County

You ask what legal standards apply to determine rights-of-way boundaries of "non-dedicated" town roads. Specifically, you ask:

In the event a non-dedicated town road presently lies outside the boundaries of the right of way of such road as determined by customary survey procedures, and such road has been used and maintained in that location for more than the prescriptive period, is the prescriptive right obtained by the use and maintenance limited to the actual amount of land used for highway and shoulder purposes, or does it extend to cover a strip of land 33 feet in width on either side of the center line of said highway?

You state that it is customary survey procedure to show right-of-way lines of nondedicated roads as straddling government land survey lines, or section lines, with each abutting owner sharing an equal portion of the right-of-way. You state further that a local township has recently adopted the position that the location of the right-of-way of such nondedicated town roads is determined by the actual physical location of the centerline of such roads and that right-of-way is deemed by the township to constitute a strip of land thirty-three feet in width on either side of the line.

It is my opinion that neither customary survey procedures nor the township's position comport with the law on this question. Although it is probably true that the rights-of-way of most nondedicated roads straddle government survey or section lines, the boundaries of such rights-of-way may be altered when other factors are present; and the right-of-way width is not necessarily four rods. Further, although it is possible that rights-of-way follow the actual centerlines of town roads, that is not invariably the case; and only in exceptional circumstances will such rights-of-way extend to thirty-three feet either side of the centerline.

A town is a subdivision of the state and may exercise only those powers delegated to it by statute, as interpreted by case law. *Pugnier v. Ramharter*, 275 Wis. 70, 73, 81 N.W.2d 38 (1957).

Nondedicated town roads may be created by an affirmative act of the town board in conformity with ch. 80, Stats. They may also be created by adverse users without the aid of a statute. *City of Chippewa Falls v. Hopkins*, 109 Wis. 611, 85 N.W. 553 (1901); *Jacobosky v. Ahnapee*, 244 Wis. 640, 13 N.W.2d 72 (1944).

I. Town Roads created by affirmative act.

Where roads are created by affirmative act of the town board under sec. 80.07(1), Stats., the boundaries of the rights-of-way are presumed by sec. 80.08, Stats., to be four rods unless the order laying out the road specifies otherwise, but in no case are rights-of-way to be less than three rods. The description of the highway as contained in the order determines the location of the right-of-way boundaries. *Walker v. Green Lake County*, 269 Wis. 103, 69 N.W.2d 252 (1955); *Barrows v. Kenosha County*, 8 Wis. 2d 58, 98 N.W.2d 461 (1959). Sections 80.01(2), (4), 80.07(1), and 80.37, Stats., all provide town boards with methods of reconstructing lost records, validating insufficient records, and particularizing incomplete records in such manners that the boundaries of rights-of-way may be determined. See *Lowenstein v. Land O'Lakes*, 11 Wis. 2d 500, 105 N.W.2d 837 (1960); *Muehrcke v. Behrens*, 43 Wis. 2d 1, 169 N.W.2d 86 (1969).

Courts have recognized, however, that the actual physical location of the centerline of a town road may not coincide with the centerline of the right-of-way as described in the town board's order. A town road may deviate from the described centerline but remain within the laid-out right-of-way. The roadway may also wander outside the described right-of-way. Where the whole of the road lies within the laid-out right-of-way boundaries, the public acquires no rights in any adjoining lands by virtue of a deviation of the actual centerline of the roadway from the described centerline of the right-of-way. *Konkel v. Pella*, 122 Wis. 143, 148, 99 N.W. 453 (1904); *Town of Randall v. Rovelstad and another*, 105 Wis. 410, 81 N.W. 819 (1900). To hold otherwise would be to sanction a taking of property without due process of law. Section 80.07(1), Stats., requires damage awards or waivers.

Where the roadway wanders outside the described right-of-way, the court looks to other factors in determining whether the course of the actual roadway or the limits of the described right-of-way take

precedence. In *Christianson v. Caldwell*, 152 Wis. 135, 139 N.W. 751 (1913), the court held that a roadway, which lay wholly outside the boundaries of an unreliably described right-of-way for the greater part of its length and which was traveled generally and continuously by the public for more than fifty years, established a new set of right-of-way boundaries of four rods width. *Contrast Town of Randall*, where the court found that a relatively small deviation from the laid-out right-of-way, not used continuously for any definite length of time and which could reasonably be explained by the presence of a slough in the described right-of-way, did not give the public any rights in the portion outside the laid-out right-of-way.

The court held:

The public welfare does not demand that highways should be broadened by the acts of those who travel over them; and any mere deviation beyond their bounds, which may be accounted for by topographical difficulties, or by carelessness of travelers as to the true line, will be presumed to be not adverse and not accompanied by a claim of right, more strenuously than acts within such limits, especially when such deviations have not been sanctioned by the making of repairs. [Citations omitted.] This court has repeatedly held that travel tends only to establish the existence of a highway of the ordinary width or as laid out, although it may cover only a part. [Citations omitted.] Also, that deviation of travel from the laid-out course of a highway has no effect to change it.

Town of Randall, 105 Wis. at 430. Additional research into the cases might disclose other facts relevant in a more extensive treatise on the topic of town roads created by affirmative acts or relevant to particular cases being litigated.

II. Town roads created by adverse users.

Where town roads are created by general, continuous, long-term, and adverse use by the public, without being worked as public highways, the presumptive and minimum widths contained in secs. 80.01(2) and 80.08, Stats., do not apply.

The general rule regarding the width of highways created by users is stated by the court in *Nicolai v. Wisconsin Power & Light Co.*, 227 Wis. 83, 89-90, 277 N.W. 674 (1938):

The width or limits of a highway by user are determined by the limits of the user. *Stricker v. Reedsburg*, 101 Wis. 457, 77 N. W. 897; *Neale v. State*, 138 Wis. 484, 120 N. W. 345. However, this does not mean that the traveled track necessarily determines the limits of the user. It includes such portion as goes with the traveled track for the purposes of the highway. See *Konkel v. Pella*, 122 Wis. 143, 147, 99 N. W. 453; *Bartlett v. Beardmore*, 77 Wis. 356, 46 N. W. 494.

Subsequent to *Nicolai*, sec. 80.01(2), Stats., was amended to provide that unrecorded highways which have been worked as public highways ten years or more are presumed to be four rods wide. Ch. 380, Laws of 1951.

In summary, town roads created by affirmative acts are subject to the rebuttable presumptions favoring four-rod rights-of-way found in secs. 80.01, 80.07, and 80.08, Stats. Town roads created by adverse users which have also been "worked as public highways 10 years or more" have the four-rod width presumption of sec. 80.01(2), Stats., which applies to all unrecorded highways without reference to the method of their creation. Town roads created by adverse users which have not been so worked are subject to no presumed minimum width, although the statutory widths arguably are relevant as some evidence of a legislative judgment that such widths are reasonably needed for highway purposes.

Thus, when a town board widens or improves a town road, town records must be checked carefully to determine if such road was laid out originally and properly as a four-rod right-of-way. If town road records have been lost or destroyed, sec. 80.37, Stats., provides a method for restoring such records. If a town road developed by use alone or was laid out as a three-rod right-of-way and the town wishes to widen the road to a four-rod right-of-way, it must award damages or secure waivers from adjacent landowners, just as it must when laying out a road from the beginning.

Hence, when a town board wants to change the configuration of a town road right-of-way, its surveyor must check carefully all available records to determine the proper location, width, and origin of said road right-of-way and report his findings to the town board. The town board, thereupon, changes the road right-of-way pursuant to

law as the facts found by the surveyor demand. Legal advice also should be sought by the town board in most cases.

BCL:CDH:BAO

County Board; Ordinances; County board has authority under sec. 59.07(64), Stats., to enact a county ordinance prohibiting trespass to land that is similar to and consistent with sec. 943.13, Stats. OAG 21-80

April 2, 1980.

JAMES L. THOMAS, *District Attorney*
Waushara County

You have asked my opinion on a specific inquiry, which you state as follows: "Does a County have the authority to enact a valid ordinance prohibiting trespass to land similar to and not in conflict with sec. 943.13, Wisconsin Statutes under the authority vested in the Counties under sec. 59.07(64), Wisconsin Statutes?" My opinion is that a county does possess such authority.

Your opinion request letter has set forth in detail your county's reasons for desiring to enact such an ordinance. I need not restate those reasons; it is enough to note that they demonstrate your belief that the availability of a county ordinance prohibiting trespass, in lieu of or in addition to the statutory criminal prohibition, will provide considerable assistance to your county's law enforcement efforts during the annual deer hunting season when Waushara County is visited by some 5,000 hunters, many of whom apparently trespass with impunity on private posted land. For the sake of dealing with the specific legal question you pose, I will assume that these problems are real and substantial, and that your county board could provide a strong public interest justification for enacting the desired ordinance.

In ch. 651, Laws of 1955, the Wisconsin Legislature revised sec. 59.07, Stats., by creating an opening paragraph and subsec. (64) to read as follows:

The board of each county may exercise the following powers, which shall be broadly and liberally construed and limited only by express language:

....

(64) **Peace and order.** Enact ordinances to preserve the public peace and good order within the county.

Prior to this statutory revision, there existed a considerable body of case law in Wisconsin that required a narrow and strict construction of county powers. This conservative view of county board powers was exemplified by such statements of judicial principle as: "The county board has only such powers as are expressly conferred upon it or necessarily implied from those expressly given." *Dodge County v. Kaiser*, 243 Wis. 551, 557, 11 N.W.2d 348 (1943); and: "It has been held that if there be a fair and reasonable doubt as to an implied power [of a county board] it is fatal to its being." *Spaulding v. Wood County*, 218 Wis. 224, 229, 260 N.W. 473 (1936).

If this view of county board powers were still vital, it would be difficult, and perhaps impossible, to interpret the broad general language of sec. 59.07(64), Stats., as authorizing the enactment of an ordinance prohibiting trespass to land. It is my view, however, that this old view of county board powers did not survive the 1955 revision of sec. 59.07, Stats. As stated in a previous opinion of this office, it is apparent that the statutory revision was "intended to broaden the county board's powers." 46 Op. Att'y Gen. 12 (1967).

The first step in any analysis is to seek a basis for the claimed power of the county board to act. It remains true, even after the revisions to ch. 59, that county boards only exercise such powers as are expressly granted or necessarily implied. Subsection (64) creates a broad police power residing in the county board. Under the revised statute, a county board has power to "enact ordinances to preserve the public peace and good order." This language is broad enough to include a grant of power to enact a county ordinance prohibiting trespass which would have the effect of preserving order within the county. Section 59.07(intro.), Stats., directs us to interpret the power broadly and liberally. Giving fair play to the plainly expressed words of the statute, I am of the opinion that subsec. (64) should be broadly construed to grant to a county the authority to enact an ordinance of the type you have described, unless that power is limited by express

language elsewhere in the Wisconsin Statutes. I am aware of no "express language" enacted by the Legislature that would so limit a county board's exercise of its power under sec. 59.07(64), Stats., to enact an ordinance paralleling the provisions of sec. 943.13, Stats.

My opinion in this respect is buttressed by the discussion of the Wisconsin Supreme Court in *Maier v. Racine County*, 1 Wis. 2d 384, 84 N.W.2d 76 (1957), and by opinions issued earlier by this office.

In *Maier*, the supreme court considered the validity of a Racine County ordinance, enacted under the provisions of sec. 59.07(64), Stats., which prohibited the sale of beer to any person under twenty-one years of age. The supreme court acknowledged the recent revision of sec. 59.07, Stats., and noted the following argument pressed upon it by Racine County:

It is argued that the opening paragraph and subsec. (64) of sec. 59.07 disclose so clearly a legislative purpose to grant broad powers to the county board to legislate generally for the preservation of public peace and good order, that the old rule of conservatism in implying county powers not expressly and specifically conferred should no longer prevail.

Maier, 1 Wis. 2d at 386.

This argument did not prevail in *Maier*, but only because the supreme court found other statutory provisions granting an express power to cities, villages, and towns to act in the area of setting age limits for purchase and sale of beer:

While the argument based on sec. 59.07 (64), Stats., might be persuasive if that legislation stood alone, we think other statutory provisions negative legislative purpose to authorize county boards to enact the type of ordinance now in question.

....

The express delegation of power to cities, villages, and towns ... is in our opinion inconsistent with a legislative purpose to confer like powers on county boards by the broad language of sec. 59.07(64), Stats.

Id. at 386, 387 (emphasis added). With respect to Waushara County's desired enactment of an ordinance prohibiting trespass to land, I am aware of no other conflicting or inconsistent delegation of

power to another governmental jurisdiction that would limit the board's power under sec. 59.07(64), Stats.

In 46 Op. Att'y Gen. 12 (1967), one of my predecessors, while cautioning that it was "impossible to foretell exactly how far the county board's powers under recently revised sec. 59.07, Stats., extend, until specific ordinances are presented to the courts for adjudication," *id.* at 13, nonetheless found that statutes such as sec. 59.07(64), Stats., were generally viewed as authorizations for enactment of local ordinances prohibiting disorderly conduct and public drunkenness, similar to the provisions of state criminal statutes. *Id.*

Furthermore, in 56 Op. Att'y Gen. 126 (1967), I noted that sec. 59.07(64), Stats., might well be interpreted to give a county power to prohibit loitering, parallel to and consistent with the statutory criminal prohibition of the same conduct.

Finally, it should be obvious that a county ordinance prohibiting conduct also proscribed by a state criminal statute may not conflict with the terms and provisions of the state statute. Your inquiry appears to recognize this limitation. Assuming, therefore, that your county's desired ordinance is in fact "similar to and not in conflict with sec. 943.13, Wisconsin Statutes," I am of the opinion that the enactment of the ordinance is authorized by the statutory police power granted the county under sec. 59.07(64), Stats.

BCL:WLG

Public Assistance; Public Records; Because records concerning AFDC recipients are confidential, only the amounts of monthly payments made to AFDC recipients, together with their names and addresses, may be released to the Department of Revenue by the Department of Health and Social Services. AFDC recipients must be notified when such information is released. OAG 22-80

April 2, 1980.

DONALD E. PERCY, *Secretary*

Department of Health and Social Services

You indicate that it is the desire of the Department of Health and Social Services and the Department of Revenue to engage in an information-sharing program whereby your Department would receive information which would help enable it to determine whether AFDC applicants have failed to inform it of income that was reported on their Homestead Tax Credit applications. The Department of Revenue, in turn, would receive information which would help enable it to determine whether AFDC recipients have filed fraudulent Homestead Tax Credit applications. This information would be exchanged through a computer match.

Information provided by the Department of Revenue to your Department would consist of income information contained on Homestead Tax Credit applications. You raise no question concerning the legality of the release of this information. Federal and state welfare statutes and regulations do not prohibit the Department of Health and Social Services from attempting to obtain such information.

Information provided by the Department of Health and Social Services to the Department of Revenue would include the name and address of the person receiving AFDC and of that person's spouse, their social security numbers, the date when the person was first found eligible to receive AFDC, the amount of assistance granted, and the county granting assistance.

You ask whether release of such information concerning AFDC recipients to the Department of Revenue is permissible under sec. 49.53, Stats., which provides in material part that:

(1) Except as provided under sub. (2), no person may use or disclose information concerning applicants and recipients of ... aid to families with dependent children ... for any purpose not connected with the administration of the [various listed welfare] programs....

(2)(a) Each county agency administering aid to families with dependent children and each official or agency administer-

ing general relief shall maintain a monthly report at its office showing the names and addresses of all persons receiving such aids together with the amount paid during the preceding month....

(b) Such report shall be open to public inspection at all times during regular office hours.... Within 72 hours after any such record has been inspected, the agency shall mail to each person whose record was inspected a notification of that fact and the name and address of the person making such inspection. The agency shall keep a record of such requests.

(c) It is unlawful to use any information obtained through access to such report for political or commercial purposes.

For the reasons which follow, it is my opinion that only the amounts of monthly payments made to AFDC recipients together with their names and addresses may be released to the Department of Revenue.

In order to release additional information, it would be necessary to secure an amendment to sec. 49.53, Stats., or to the state plan for the administration of one of the welfare programs (including the AFDC program) listed in 45 C.F.R. sec. 205.50(a)(1)(i)(A) (1979).

An analysis of related federal enactments provides a useful starting point from which to respond to your inquiry. Prior to August 9, 1975, 42 U.S.C. sec. 602(a)(9) would have permitted release of this information, since release was authorized to: "(A) public officials who require such information in connection with their official duties, or (B) other persons for purposes directly connected with the administration of aid to families with dependent children." *See* Pub. L. No. 93-647.

Senate Report No. 93-1356, which accompanies Pub. L. No. 93-647, seems to indicate that the phrase "directly connected with the administration of" is to be construed broadly:

As a further aid in location efforts, welfare information now withheld from public officials under regulations concerning confidentiality would be made available by the Committee bill: this information would also be available for other official purposes. The current regulations are based on a provision in the Social Security Act which since 1939 has required State pro-

grams of Aid to Families with Dependent Children to "provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of Aid to Families with Dependent Children." This provision was designed to prevent harassment of welfare recipients. The Committee bill would make it clear that this requirement may not be used to prevent a court, prosecuting attorney, *tax authority*, law enforcement officer, legislative body or other public official from obtaining information required in connection with his official duties such as obtaining support payments or prosecuting fraud or other criminal or civil violations.

[1974] U.S. Code Cong. & Ad News 8152. (Emphasis added.)

Congress again amended the statute almost immediately after Pub. L. No. 93-647 had been enacted. 42 U.S.C. sec. 602 now provides that:

(a) A state plan for aid and services to needy families with children must

....

(9) provide safeguards which restrict the use of disclosure of information concerning applicants or recipients to purposes directly connected with (A) the administration of the plan of the State approved under this part ... [or other listed federal welfare statutes], (B) any investigation, prosecution, or criminal or civil proceeding, conducted in connection with the administration of any such plan or program, and (C) the administration of any other Federal or federally assisted program which provides assistance, in cash or in kind, or services, directly to individuals on the basis of need; and the safeguards so provided shall prohibit disclosure, to any committee or a legislative body, of any information which identifies by name or address any such applicant or recipient.

See Pub. L. No. 94-88.

The legislative history accompanying Pub. L. No. 94-88 contains no indication as to why Congress removed the statutory provisions granting public officials access to information concerning AFDC recipients. But since 42 U.S.C. sec. 602(a)(9) was enacted in its

present form, the federal regulations which accompany it have placed stringent requirements on granting access to information concerning AFDC recipients. 45 C.F.R. sec. 205.50(a)(1)(i) (1979) mandates that information concerning AFDC recipients be released only directly in connection with:

(A) The administration of the plan of the State approved under title IV-A, [or] the plan or program of the State under ... [various listed federal welfare statutes]. Such purposes include establishing eligibility, determining amount of assistance, and providing services for applicants and recipients.

(B) Any investigation, prosecution, or criminal or civil proceeding conducted in connection with the administration of any such plans or programs; and

(C) The administration of any other Federal or federally assisted program which provides assistance, in cash or in kind, or services, directly to individuals on the basis of need. Under the requirements of this paragraph (a)(1)(i), disclosure to any committee or legislative body (Federal, State, or local) of any information that identifies by name and address any such applicant or recipient shall be prohibited; and certification of receipt of AFDC to an employer for purposes of claiming tax credit under Pub. L. 94-12, the Tax Reduction Act of 1975 (see sec. 235.40 of this chapter) shall be considered to be for a purpose directly connected with the administration of the plan.

45 C.F.R. sec. 205.50(a)(2) (1979) emphasizes that access to AFDC records is to be carefully safeguarded since it requires that:

(iii) The family or individual is informed whenever possible of a request for information from an outside source, and permission is obtained to meet the request. In an emergency situation when the individual's consent for the release of information cannot be obtained, he will be notified immediately.

(iv) In the event of the issuance of a subpoena for the case record or for any agency representative to testify concerning an applicant or recipient, the court's attention is called, through proper channels to the statutory provisions and the policies or rules and regulations against disclosure of information.

(v) The same policies are applied to requests for information from a governmental authority, the courts, or a law enforcement official as from any other outside source.

Section 49.53, Stats., must be construed in a manner consistent with the federal legislation and attendant regulations from which it emanates. See *Triplet v. Board of Social Protection*, 19 Or. App. 408, 528 P.2d 563, 567-68 (1974); *Finance Committee v. Falmouth Bd. of Pub. Welfare*, 345 Mass. 579, 188 N.E.2d 848, 851-52 (1963). As to the general relevance of federal regulations, the Wisconsin Supreme Court long ago said: "[I]t is the policy of this court to construe the law of this state so that it will conform as nearly as possible to the federal law and federal practice when applicable to the same subject matter." *Nekoosa-Edwards Paper Co. v. Railroad Comm.*, 193 Wis. 538, 548, 213 N.W. 633 (1927). Subsection (C) of 45 C.F.R. sec. 205.50(a)(1) (1979) contains no language which would authorize the release of the information which you describe. Subsections (A) and (B) authorize release of information only in connection with the administration of various welfare programs. I have previously stated that county boards of supervisors and committees which are advisory to county welfare boards are not involved in the administration of welfare programs and consequently are not authorized to obtain records concerning AFDC recipients under the provisions of sec. 49.53(2), Stats. 59 Op. Att'y Gen. 240, 245 (1970). The same restrictions apply to the Wisconsin Department of Revenue since it does not administer welfare programs. 45 C.F.R. sec. 205.50(a)(1)(A) and (B) (1979) also authorizes the release of information in order to determine amounts to be paid from and eligibility for various welfare programs, including the AFDC program. If it were necessary for your Department to make a determination with regard to welfare eligibility or the amount of welfare to be paid, then release of this information to the Department of Revenue would be permissible. But section III-C of the DHSS-DFS Income Maintenance Manual currently provides at pages nineteen and twenty that homestead relief payments are to be disregarded in determining the amount of assistance which should be paid under the AFDC program. Since Homestead Relief payments are not to be considered when AFDC determinations are made, release of this information cannot possibly aid your Department in making eligibility determinations.

Because applicable federal regulations list only a very narrow set of circumstances under which information concerning AFDC recipients may be released, it is my conclusion that the release of information by the Department of Health and Social Services to the Department of Revenue cannot fairly be said to be for a purpose connected with the administration of the AFDC program, even though such information would be useful to the Department of Revenue in determining whether an individual has filed a fraudulent Homestead Tax Credit return. *See sec. 71.09(7)(p), Stats., as amended by ch. 34, Laws of 1979.* In reaching this conclusion, I am not unmindful of the language appearing at 29 Op. Att'y Gen. 467, 469 (1940), which would tend to lead to a different result. That opinion was issued long before the passage of Pub. L. No. 94-88, and it therefore does not purport to construe sec. 49.53, Stats., in light of the wording now contained in 42 U.S.C. sec. 602(a)(9) or in light of the federal regulations accompanying that statute. Present federal regulations flatly prohibit the release of information concerning AFDC recipients to governmental authorities, the courts, or law enforcement officials, even though the release of information to those authorities would have been permissible prior to the passage of the statute in its present form. 45 C.F.R. secs. 205.50(a)(2)(iii) and (v) (1979). This prohibition applies to the Department of Revenue because it is a governmental authority.

In general, then, information concerning AFDC recipients cannot be released to the Department of Revenue. An exception is contained in sec. 49.53(2), Stats., as authorized by 45 C.F.R. sec. 205.50 (1979), which provides:

Safeguarding information for the financial assistance and social services programs.

(a) *State plan requirements.* A State plan under title IV-A of the Social Security Act, except as provided in paragraph (e) of this section, must provide that:

....

(2) The agency will have clearly defined criteria which govern the types of information that are safeguarded and the conditions under which such information may be released or used. Under this requirement:

(i) Types of information to be safeguarded include but are not limited to:

(A) The names and addresses of applicants and recipients and amounts of assistance provided (unless excepted under paragraph (e) of this section);

(B) Information related to the social and economic conditions or circumstances of a particular individual;

(C) Agency evaluation of information about a particular individual;

(D) Medical data, including diagnosis and past history of disease or disability, concerning a particular individual.

....

(e) *Exception.* In respect to a State plan under title I, IV-A, X, XIV, or XVI of the Social Security Act, exception to the requirements of paragraph (a)(1)(iii) of this section may be made by reason of the enactment or enforcement of State legislation, prescribing any conditions under which public access may be had to records of the disbursement of funds or payments under such titles within the State, if such legislation prohibits the use of any list or names obtained through such access to such records for commercial or political purposes.

45 C.F.R. sec. 205.50(e) (1979), does not specify what information may be contained within AFDC disbursement records which are available to the general public, but sec. 49.53(2)(a), Stats., provides that a monthly report showing the names and addresses of all persons receiving aid together with the amount paid is to be maintained by each county agency. Under that statute, nothing other than the same information which is available to the general public may be released to the Department of Revenue.

In addition to the foregoing considerations, failure to comply with applicable federal requirements could conceivably result in a cutoff of federal funding for the AFDC program. *See State of Indiana v. Ewing*, 99 F. Supp. 734 (D.D.C. 1951). Any doubt as to whether AFDC records should be released must therefore be resolved in favor of maintaining the confidentiality of this information. The state plan for the administration of the AFDC program would have to be

amended to provide for the release of additional information to the Department of Revenue and then reapproved by federal officials before release of the information you describe would be permissible under federal law. Until such approval is obtained, only the names and addresses of AFDC recipients and the amounts of monthly payments made to them may be released to the Department of Revenue.

You also ask whether sec. 49.53(2)(b), Stats., requires that AFDC recipients be notified when information which is also available to the public under sec. 49.53(2)(a), Stats., is released to the Department of Revenue. Section 49.53(2)(b), Stats., does not exempt government agencies from complying with its notice requirements. If it desired to do so, the Legislature could eliminate those notice requirements merely by deleting the last two sentences from sec. 49.53(2)(b), Stats. Such a deletion would be permissible because notice need not be given with respect to the release of information which is available to the general public pursuant to state statute, as long as any list or names obtained from such records cannot be used for commercial or political purposes. *See* 45 C.F.R. sec. 205.50(e) (1979).

BCL:FTC

Counties; Words And Phrases; The state, its political subdivisions, and counties are not employers under sec. 103.37, Stats., and, therefore, are not subject to this statute which prohibits employers from requiring any employe or applicant for employment to pay the cost of a medical examination required by the employer as a condition of employment. OAG 24-80

April 9, 1980.

JOSEPH N. NOLL, *Secretary*

Department of Industry, Labor and Human Relations

You have asked whether sec. 103.37, Stats., applies to the state, its political subdivisions or counties. It is my opinion that it does not apply to these governmental units.

Section 103.37, Stats., provides as follows:

(1) It shall be unlawful for any employer, as defined in subsection (2) to require any employe or applicant for employment to pay the cost of a medical examination required by the employer as a condition of employment.

(2) "Employer", as used in this section means an individual, a partnership, an association, a corporation, a legal representative, trustee, receiver, trustee in bankruptcy, and any common carrier by rail, motor, water or air doing business in or operating within the state.

It is a firmly established tenet of statutory construction that statutes of general application "do not apply to the state unless the state is explicitly included by appropriate language." *State ex rel. Martin v. Reis*, 230 Wis. 683, 687, 284 N.W. 580, 582 (1939); accord, *State ex rel. Department of Public Instruction v. ILHR Department*, 68 Wis. 2d 677, 681, 229 N.W.2d 591, 593-94 (1975); *Kenosha v. State*, 35 Wis. 2d 317, 323, 151 N.W.2d 36, 39 (1967); *Konrad v. State*, 4 Wis. 2d 532, 538-39, 91 N.W.2d 203, 206 (1958). This rule of explicit inclusion, as it has come to be known, is derived from the presumption that "the legislature does not intend to deprive the crown of any prerogatives, rights or property unless it expresses its intention to do so in explicit terms." *State v. Milwaukee*, 145 Wis. 131, 135, 129 N.W. 1101, 1102 (1911).

Applying this rule of explicit inclusion to sec. 103.37, Stats., I can only conclude that this statute does not apply to the state, or its political subdivisions, because the state is not explicitly included in its definition of employer. My opinion is confirmed by *Department of Public Instruction*, 68 Wis. 2d at 681, 229 N.W.2d at 594, where the court held that the Department of Industry, Labor and Human Relations did not have jurisdiction to entertain a sex discrimination complaint filed against the Department of Public Instruction, because the Fair Employment Act did not explicitly include the state and its agencies within the meaning of the term employer.

The explicit inclusion rule also applies to counties as political subdivisions of the state. *Necedah Manufacturing Corp. v. Juneau County*, 206 Wis. 316, 322-23, 237 N.W. 277, 279, rev'd on rehearing, 206 Wis. 336, 240 N.W. 405 (1932); see *Crowley v. Clark County*, 219 Wis. 76, 82, 261 N.W. 221, 223 (1935); 41 Op. Att'y Gen. 65, 68 (1952). Although the judgment in *Necedah* was reversed

on rehearing, the court adhered to its view that the statute involved was inapplicable to the county, because it was a statute of general application with no specific provision bringing the state and its political subdivisions within its coverage. *Necedah*, 206 Wis. at 336, 240 N.W. at 405. Logically, one would expect the explicit inclusion rule to apply to counties, as well as the state, since a county is an arm or political subdivision of the state primarily performing functions of the state at the local level. *E.g., Kyncl v. Kenosha County*, 37 Wis. 2d 547, 555, 155 N.W.2d 583, 587 (1968). It follows then that sec. 103.37, Stats., does not apply to counties, because counties are not explicitly included in its definition of employer.

You ask whether a county might be considered a corporation within the definition of employer in sec. 103.37(2), Stats., and thereby subject to sec. 103.37(1), Stats. Although sec. 59.01(1), Stats., provides that "[e]ach county in this state is a body corporate," this does not mean that a county is a corporation within the meaning of sec. 103.37(2), Stats. There is a well-settled and widely-recognized distinction between a corporation and a municipal or quasi-municipal corporation. 62 C.J.S. *Municipal Corporations* sec. 4; *e.g., Thompson v. Municipal Electric Authority*, 231 S.E.2d 720, 725, 238 Ga. 19 (1976); *State v. Canova*, 365 A.2d 988, 995-96, 278 Md. 483 (1976); *Bender v. Jamaica Hospital*, 356 N.E.2d 1228, 1229, 40 N.Y.2d 560, 388 N.Y.S.2d 269 (1976). As a general rule, the word corporation is construed to apply only to private corporations and does not include municipal or quasi-municipal corporations such as a town, city or county, unless the statute expressly so provides. 62 C.J.S. *Municipal Corporations* sec. 4; *e.g., Attorney General v. City of Woburn*, 79 N.E.2d 187, 188-89, 322 Mass. 634 (1948); *State v. Central Power & Light Co.*, 161 S.W.2d 766, 768, 139 Tex. 51 (1942). It is my opinion, therefore, that a county is not a corporation within the meaning of sec. 103.37(2), Stats.

Under Wisconsin's anti-trust law, it has been held that a county is a corporation within the definition of person in sec. 133.04, Stats., and thereby entitled to sue for treble damages. *City of Madison v. Hyland, Hall & Co.*, 73 Wis. 2d 364, 371, 243 N.W.2d 422, 426 (1976). Nevertheless, this holding does not change my opinion that a county is not a corporation within the definition of employer in sec. 103.37(2), Stats., because that case is distinguishable on several grounds.

First, the explicit inclusion rule did not apply in that case, and the court expressly recognized this fact, *id.* at 375, 243 N.W.2d at 428, because the issue there concerned the power of a county or city to sue for treble damages in an anti-trust action. This is in line with the principle that the explicit inclusion rule generally does not apply to statutes which benefit the state and its political subdivisions or augment their powers. 82 C.J.S. *Statutes* sec. 317; see *Milwaukee v. McGregor*, 140 Wis. 35, 38, 121 N.W. 642, 643 (1909). Unlike the situation in *Hyland* and the treble damages provision of the anti-trust law, however, sec. 103.37, Stats., might burden counties, and, therefore, the explicit inclusion rule comes into play.

Second, Wisconsin's anti-trust act was modeled after the Sherman Act of the United States, and the Legislature, in enacting the state law, intended that the construction given to the federal law be followed in construing the state law. *Hyland*, 73 Wis. 2d at 375, 243 N.W.2d at 428. Since the United States Supreme Court had already held that the civil remedy of treble damages was available to a municipality under the Sherman Act, *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, 396 (1906), the court in *Hyland* was disposed to hold that a county was a corporation, and thus a person, entitled to sue for treble damages. Construction of sec. 103.37(2), Stats., to determine whether a county is a corporation under that section, however, is not affected by such a compulsion or constraint.

Third, the holding in *Hyland* was affected by important public policy considerations favoring the right of governmental entities to sue for treble damages in furtherance of the anti-trust law's remedial objectives. *Hyland*, 73 Wis. 2d at 377, 243 N.W.2d at 429. Such weighty public policy considerations are not present with respect to sec. 103.37, Stats.

In summary, then, I believe that the holding in *Hyland* is limited to its particular facts and must be read in the context of the Wisconsin anti-trust law. Because it is distinguishable from the situation you have presented, it does not lead to the conclusion that a county is a corporation, and thus an employer, under sec. 103.37(2), Stats.

An examination of the major employment statutes casts some light on the questions you have asked. Looking at these statutes, it appears that where the Legislature intended the term employer to include the

state, its political subdivisions or counties, it took care to specifically include language bringing these governmental units within the statute's coverage. For example, see the safe-place statute (sec. 101.01(2)(c), Stats.); the worker's compensation law (sec. 102.04(1)(a), Stats.); employment regulations (sec. 103.01(3), Stats., read in conjunction with sec. 990.01(26), Stats.); the unemployment compensation law (sec. 108.02(4)(a), Stats.); wage claims (sec. 109.01(2), Stats.); and the fair employment law (sec. 111.32(3), Stats., read in conjunction with sec. 41.02(4), Stats.). In contrast with the definitions of employer in these employment statutes, the absence of an express reference to the state or counties in sec. 103.37(2), Stats., is significant. The fact that the definition of employer in sec. 103.37(2), Stats., does not specifically mention the state or counties raises a strong inference that the Legislature did not intend them to be governed by the statute.

My opinion herein is consistent with opinions of my predecessors. In 62 Op. Att'y Gen. 47 (1973), the Attorney General, by application of the explicit inclusion rule, concluded that the state and its political subdivisions were not employers as defined in sec. 104.01(1), Stats., and, therefore, were not subject to the minimum wage law. In 41 Op. Att'y Gen. 65 (1952), the Attorney General also relied upon the explicit inclusion rule to conclude that a county was not a person within the meaning of sec. 85.10(40), Stats., and, therefore, its sand and gravel trucks were not subject to the weight limitations fixed by sec. 85.47, Stats.

Finally, I would note that *Joint School v. Wisconsin Rapids Ed. Assn.*, 70 Wis. 2d 292, 306-07, 234 N.W.2d 289 (1979), held that sec. 103.56(1), Stats., relating to the issuance of injunctions in labor disputes, does not apply to public employers.

Accordingly, I conclude that the state, its political subdivisions and counties are not employers as defined in sec. 103.37(2), Stats., and, therefore, these governmental units are not subject to the prohibitions of sec. 103.37(1), Stats.

BCL:NS

Compatibility; Towns; Offices of commissioner of town sanitary district having territory within three towns, and supervisor of the town board of town having largest assessed valuation of taxable property of such district, are incompatible where the town board also serves as the appointing authority for commissioners of the town sanitary district. OAG 25-80

April 10, 1980.

JOHN J. HOGAN, *District Attorney*
Oneida County

You state that a person was appointed to the Lakeland Sanitary District Commission by the town board of the Town of Minocqua. Thereafter he was appointed to fill a vacancy on the Minocqua Town Board and was later elected as a supervisor on such Board and has continued to serve in both offices. You further state that the sanitary district has territory located in three towns but that the Town of Minocqua has the largest assessed valuation of taxable property of such district.

You request my opinion whether the offices of commissioner of a town sanitary district situated in territory lying within three towns, and supervisor of the town board of the town having the largest assessed valuation of taxable property of such district, are compatible where the town board also serves as the appointing authority for commissioners of the town sanitary district.

I am of the opinion that the offices are not compatible.

Section 66.11(2), Stats., provides in part:

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 offices are clearly incompatible because the town board of the Town of Minocqua establishes the compensation for and has power of

appointment over the town sanitary district commissioners by reason of sec. 60.305(1)(a), Stats., as amended by ch. 110, Laws of 1979. Additionally, there may be other areas of potential conflict where territory of a sanitary district lies in two or more towns.

BCL:RJV

Establishment Clause, U.S. Constitution; National School Lunch Act; United States Constitution art. I, and Wisconsin Constitution art. I, sec. 18, do not prohibit the state from disbursing state matching funds under National School Lunch Act (Pub. L. 79-396) to private as well as public schools. Sections 115.34, and 20.255(1)(fe), Stats., must be amended to permit such disbursal to private schools.

OAG 27-80

May 1, 1980.

MARCEL DANDENEAU, *Chief Clerk*
Wisconsin State Assembly

The Assembly Committee on Organization has requested my opinion on a matter relating to the constitutionality under the Wisconsin Constitution of distributing state aids for school lunches to private schools.

Documents accompanying your request for my opinion disclose the following circumstances. The National School Lunch Act (Pub. L. No. 79-396), as amended, provides for a nonprofit school lunch program to be utilized by both public and private schools. These programs are administered at the federal level by the United States Department of Agriculture (USDA) and at the state level by the Department of Public Instruction (DPI). All schools in the state are eligible for these federal programs which include school lunch, school breakfast, and special milk and donated food distribution. The federal program requires state matching funds which in the 1977-79 biennium equaled about twenty-eight percent of the federal aids received by the state for this purpose. DPI distributes the federal aids to both public and private schools eligible for such aids under the federal law but distributes state matching funds only to public schools.

Your basic question is whether, under the Wisconsin Constitution, there is any prohibition against the state's distribution of these state matching funds to both public and private schools on the same basis and in the same manner that the state distributes the federal funds.

On October 4, 1974, in an opinion to Dr. Barbara Thompson, State Superintendent, Department of Public Instruction, one of my predecessors considered a number of questions dealing with the constitutionality of the state's receipt and distribution of federal funds under the National School Lunch Act. The constitutional provisions involved were the religion clauses of the first amendment of the United States Constitution and Wisconsin Constitution art. I, sec. 18. That opinion concluded that DPI could implement and distribute funds under the National School Lunch Act without violating those constitutional provisions relating to aid to parochial organizations. 63 Op. Att'y Gen. 473, 487 (1974).

In a very real sense the distinction you raise between the federal aid on the one hand and the state matching funds on the other is artificial. In 63 Op. Att'y Gen. 473, 478 (1974) we said clearly that for the purposes of the application of Wis. Const. art. I, sec. 18 there is no difference between "federal funds" and "state funds" if funds are actually received and then drawn from the state treasury.

In my October 5, 1979, opinion to you, I noted that the Wisconsin Supreme Court, in examining a statute providing for the advancement of the dental health of the citizens of the state, in light of Wisconsin Constitution art. I, sec. 18, said that the statutory health-oriented effect was secular and the benefit that the religious institution would enjoy as a result of the legislation was merely incidental, and therefore not unconstitutional.

Similarly, the federal school lunch program is health-oriented, *i.e.*, aimed at improving the health of school children and thus secular. With respect to reimbursement for the expense of lunches provided children attending a private or parochial school, any benefit that the religious institution would enjoy as a result of such reimbursement would be incidental, and therefore not unconstitutional.

For this reason and for other reasons set forth in more detail in the opinions referred to above, it is my conclusion that there is no prohibition in the state or federal constitutions which would prevent the

state's distributing its so-called matching funds to both public and private schools eligible for such aids under the federal law.¹

Enabling legislation, however, would probably be required in order to accomplish this distribution of state matching funds. Section 115.34, Stats., provides:

(1) The department may contract for the operation and maintenance of school lunch programs and for the distribution, transportation, warehousing, processing and insuring of food products provided by the federal government. The form and specifications of such contracts shall be determined by the department. Amounts remaining unpaid for 60 days or more after they become payable under the terms of such contracts shall be deemed past due and shall be certified to the department of administration on October 1 of each year and included in the next apportionment of state special charges to local units of government as special charges against the school districts and municipalities charged therewith.

(2) The department shall make payments to school districts for school lunches served to children in the prior year as determined by the state superintendent from the appropriation under s. 20.255 (1) (fe). Payments to school districts shall equal the state's matching obligation under the national school lunch act, P.L. 79-396, as amended. Payments in the current year shall be determined by prorating the state's matching obligation based on the number of school lunches served to children in the prior year.

Subsection (2) of sec. 115.34, Stats., was created essentially in its present form by ch. 224, sec. 107, Laws of 1975, effective May 5, 1976. The phrase "from the appropriation under s. 20.255(1)(fe)" was added by ch. 29, sec. 1068m, Laws of 1977, effective July 1, 1977. Since its creation, the statute has been interpreted and administered by DPI as only authorizing the payment of these matching funds to "school districts" and that the term "school districts" includes only the public schools and not private schools. This inter-

¹ *Also see Committee for Public Education and Religious Liberty et al. v. Edward V. Regan*, 48 LW 4168, decided February 20, 1980.

pretation is not inconsistent with the definition of school district found in sec. 115.01(3), Stats., which provides:

The school district is the territorial unit for school administration. School districts are classed as common school districts, union high school districts, unified school districts, city school districts and school systems organized pursuant to ch. 119. A joint school district is a school district whose territory is not wholly in one municipality.

It is consistent with sec. 115.01(5), Stats., dealing with the name of a school district and other uses of the phrase in Title XIV. This interpretation also is not inconsistent with definitions used by the Wisconsin Supreme Court. For example, in *Zawerschnik v. Joint County School Comm.*, 271 Wis. 416, 429, 73 N.W.2d 566 (1955), the court said: "A school district is a quasi-municipal corporation. It is an agent of the state for the purpose of administering the state's system of public education."

It could be argued that sec. 115.34(2), Stats., is broad enough to permit DPI to determine which private schools receiving federal reimbursement are located in which public school districts, and then make distribution of the private school's share of state matching funds to the school district, directing the school district to pass such funds on to the particular private school indicated. Although this is a possible construction, it seems somewhat improbable that the Legislature would have intended such a result. The federal funds handled by DPI are transmitted directly by DPI to the private schools entitled thereto. They are not passed through the public school districts to the private schools. Thus, it can scarcely be said that the interpretation accorded sec. 115.34(2), Stats., by DPI is an unreasonable one, in light of the manner in which the federal funds are distributed and the improbability that the Legislature, without more specific language, would have intended a different result, one which would likely involve additional administrative expense, delay, chance for error, and unnecessary duplication of effort.

It has been said that courts sometimes defer to the practical construction accorded an ambiguous statute by the administering agency where the Legislature has acquiesced in that construction. That argument, however, has much less weight when the construction is of recent origin. *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 504,

261 N.W.2d 434 (1978). In *Strykowski*, the court found that the Legislature specifically had not acquiesced, by reason of subsequent amendments. That is not the situation here. At least the argument can be made that the practical construction of the administering agency, acquiesced in by the Legislature, is entitled to some weight. However, that weight is lessened because of its relatively recent origin. See *Wisconsin Axle Division v. Industrial Comm.*, 263 Wis. 529, 537b, 57 N.W.2d 696, 60 N.W.2d 383 (1953). Thus, even assuming the statute may be construed in two different ways, I cannot conclude that the interpretation adopted by DPI is unreasonable or would work an absurd result. *Braun v. Wisconsin Electric Power Co.*, 6 Wis. 2d 262, 268, 94 N.W.2d 593 (1959).

It is my further opinion, therefore, that in order for the state (DPI) to disburse the state's matching funds to private as well as public schools, there must be an appropriate amendment of sec. 115.34(2), Stats., and an amendment of sec. 20.255(1)(fe), Stats., which currently appropriates money only "for the payment of school lunch aids to school districts."

BCL:JEA

Collection Agencies; Words And Phrases; Section 218.04, Stats., requirement that a foreign collection agency maintain a Wisconsin office with records may not violate the commerce clause, U.S. Const. art. I, sec. 8. OAG 28-80

May 9, 1980.

ERICH MILDENBERG, *Commissioner*
Office of Commissioner of Banking

You ask two questions concerning the regulation of nonresident collection agencies under the Wisconsin Collection Agency Law. Section 218.04(4)(a), Stats., authorizes a nonresident to secure a collection agency license provided that an "active office" is maintained in this state. Your first question relates to the proper interpretation of the "active office" requirement. Your second question concerns whether such requirement constitutes an undue burden on

interstate commerce in violation of the commerce clause, U.S. Const. art. I, sec. 8.

It is my opinion that the "active office" requirement properly may be interpreted to mean that a nonresident collection agency must maintain a state office at which its records are open to inspection and examination by the commissioner of banking. Sec. 218.04(7)(b), Stats. It further is my opinion that if the active office requirement is so interpreted, it does not constitute an undue burden on interstate commerce.

Interpretation of Active Office Requirement

You suggest three possible interpretations of the "active office" requirement. The first interpretation would require a nonresident collection agency to operate a state office with regular hours of business each week, section Bkg 74.01(2) Wis. Adm. Code, to conduct its Wisconsin solicitation and collection activities from such office, and to maintain records of all Wisconsin solicitation and collection activity at such office. The second interpretation would require a nonresident collection agency to maintain records at a state office for inspection and examination by the commissioner of banking, and to designate a representative for service of process. The third interpretation would require a nonresident collection agency to maintain an office for service of process and for inspection and examination of records, but such records only would be made available at such office at the request of the commissioner of banking.

It is my opinion that all three interpretations of the "active office" requirement which you suggest constitute a plausible interpretation of the requirement, but that delay in obtaining records and inability to enforce subpoenas in other states may make the third interpretation inconsistent with legislative efforts to regulate nonresident collection agencies.

The "active office" requirement of sec. 218.04(4)(a), Stats., has remained unchanged since enactment of the original Wisconsin Collection Agency Law in 1937. Ch. 358, Laws of 1937. The law was designed to deal with perceived abuses in credit and collection transactions. *Meyers v. Matthews*, 270 Wis. 453, 459, 71 N.W.2d 368 (1955), *appeal dismissed*, 350 U.S. 927 (1956); Holz, *The Regulation of Consumer Credit*, 1943 Wis. L. Rev. 449, 463-78. Although the "active office" requirement evidently was intended to give the

commissioner of banking nearly equal control over resident and non-resident collection agencies, the degree of control envisioned is not expressly defined.

Section 218.04(10)(b), Stats., however, does require all licensed collection agencies to "keep such books and records in ... [its] place of business as will enable the commissioner to determine whether the provisions of this section are being complied with." Similarly, sec. 218.04(7)(b), Stats., requires that the "place of business, books of accounts, records, safes and vaults of said licensee shall be open to inspection and examination by the commissioner." These sections suggest a legislative judgment that adequate protection for both debtors and assignors of collection claims depends upon the availability of collection agency records for inspection and examination. To the extent that such inspection and examination would be impaired or impeded by the delay needed to transport records from nonresident offices or by the inability to enforce administrative agency subpoenas across state lines, sec. 885.01, Stats., the third suggested interpretation would be inconsistent with the purpose of the "active office" requirement.

*The Burden of the Active Office Requirement
on Interstate Commerce*

Your second question concerns whether the "active office" requirement, as interpreted in the three ways you suggest, constitutes an undue and unconstitutional burden on interstate commerce. The test for determining whether a state regulation unduly burdens interstate commerce was set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

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, 4 L. Ed. 2d 852, 856, 80 S. Ct. 813, 78 A.L.R. 2d 1294. 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.

It is clear that Wisconsin has a legitimate state interest in passing "regulatory laws to protect its residents from fraud and unconscionable conduct by out-of-state collection agencies who maintain representatives within the borders of the state." *Meyers*, 270 Wis. at 461. Absent the ability to license nonresident collection agencies and to examine their records, it is impossible to protect Wisconsin creditors who assign debts to them. For example, the nonresident agency may be undercapitalized, or may be bonded inadequately, or may remit collected funds slowly or not at all. In addition, regulation is necessary to protect business and consumer debtors from harsh and deceptive collection practices.

Congress has recognized the legitimacy of state regulation of collection agencies in the Fair Debt Collection Practices Act. 15 U.S.C. sec. 1692. The Act provides for concurrent jurisdiction and specifically gives precedence to state laws which provide greater protection. 15 U.S.C. sec. 1692(n)-(o). Although the Act applies only to consumer debt collections, the concept of congressional deference to state regulation would apply equally to commercial debt collection.

You have forwarded a memorandum of authorities given to you by an interested group supporting the position that Wisconsin may not require an active office of, and otherwise regulate, foreign collection agencies doing certain business in this state. That memorandum erroneously relies upon the long line of "drummer" cases from the United States Supreme Court listed in a footnote in *Memphis Steam Laundry v. Stone*, 342 U.S. 389, 392 (1952).

Reliance upon the "drummer" line of cases in this situation fails to recognize the special nature of the practices sought to be regulated here. Of concern here is not regulating the sale of picture frames, laundry, or ladies' garments etc., but serious financial matters and collection practices. The United States Supreme Court appropriately discussed this distinction in *Robertson v. California*, 328 U.S. 440, 458-59 (1946), when it stated:

But we are far beyond the time when, if ever, the word "license" per se was a condemnation of state regulation of interstate business done within the state's borders. The commerce involved here is not transportation. Nor is it of a sort which touches the state and its people so lightly that local regulation is inappropriate or interferes unreasonably with the commerce of other

states. Not the mere fact or form of licensing, but what the license stands for by way of regulation is important. So also, it is not simply the fact of prohibition, but what is forbidden and for the protection of what interest, that is determinative. For the commerce clause is not a guaranty of the right to import into a state whatever one may please, absent a prohibition by Congress, regardless of the effects of the importation upon the local community. That is true whether what is brought in consists of diseased cattle or fraudulent or unsound insurance.

Since the Wisconsin Collection Agency Law embodies a legitimate local purpose, it will be determined to be an undue burden on interstate commerce only if the burden is clearly excessive in relation to the local benefits, or if the Law's purpose could be promoted as well with a lesser impact on interstate commerce. *Pike*, 397 U.S. at 142. This determination was made in *Meyers*, 270 Wis. at 460-61, where the court stated:

After requiring a license and fixing fees, the statute in its remaining provisions aims to safeguard the interests of the public and protect it "from oppressive or deceptive practices." The provisions with respect to maintaining a place of business, keeping books and records which shall be open for inspection, and submitting reports are similar to provisions considered in numerous United States supreme court cases which have upheld the right of the state to control persons working within its borders, even though these persons are engaged in interstate commerce. ...

The Wisconsin Collection Agency Law does not impede the flow of interstate commerce by placing upon it an undue burden either as to discriminatory or prohibitive fees or by other discriminatory provisions.

In that case three nonresident solicitors for a foreign corporate collection agency came into Wisconsin "for extended periods in accordance with the business available, to solicit offers of assignments of accounts from merchants, doctors, hospitals, and other creditors" to be subsequently collected entirely by mail. *Id.* at 455-56. The amended complaint and affidavit of one of the plaintiffs indicates that the actual time spent by him in Wisconsin soliciting collection accounts could *not* have been extensive because he was a nonresi-

dent "traveling manufacturer's agent selling various goods, wares and merchandise for various concerns" *in addition to* his collection account solicitations for the foreign collection agency and that he divided his time among the states of Illinois, Wisconsin, Missouri and Kansas (Vol. 521 of *Cases and Briefs*, A-Ap. 111, 126, 130). Therefore, the actual time spent in this state by the nonresident solicitor need not be extensive to bring such solicitor and his/her collection agency within the regulation of sec. 218.04, Stats.

Our state supreme court, in *Meyers*, 270 Wis. at 460, 462, relied upon such United States Supreme Court decisions as *Union Brokerage Co. v. Jensen*, 322 U.S. 202 (1944), *California v. Thompson*, 313 U.S. 109 (1941), and *Robertson v. California*, 328 U.S. 440 (1946). In *Thompson*, the Court upheld the constitutionality of a statute requiring the licensing and bonding of transportation agents negotiating for the transportation of passengers over California highways. That statute required the keeping of exact and permanent records of all transactions and that such records "at all times be open to inspection by any officer or agent of the State, county, or city and county *within the State*" (emphasis supplied). 1933 Cal. Stats., ch. 390, sec. 11.

The decision in *Robertson* upheld the constitutionality of a California statute, regulating the business of insurance, from the attack that it was an undue burden upon interstate commerce. *Robertson* was convicted of misdemeanor violations of Cal. (Insurance) Code, secs. 703 and 1642 (Deering), which required that a person be generally licensed and also licensed as a surplus line broker when acting as an agent for a nonadmitted insurer in the transaction of insurance business in the State of California. In that case an Arizona insurance corporation, which was not licensed in California, advertised by radio and United States mail in California. Following the mailing of a reply postcard by a California resident, *Robertson* sold insurance in person to that resident in Ventura, California. The conviction, as well as the constitutionality of the statute, was upheld by the court, which held that the California statute (the effect of which was to prevent anyone from acting as an agent for a foreign insurer operating on other than a legal reserve basis, with the exception of companies engaged in doing such business in California prior to a certain date) did not violate the commerce clause of the United States Constitution where such conditions applied alike to domestic and foreign insurers.

Most important to this discussion are the "interwoven provisions (of the California statute) regulating activities of surplus line brokers" eventually determined by the United States Supreme Court not to violate the commerce clause. *Id.* at 452-53. Those additional "interwoven provisions" in the California statute are discussed by the United States Supreme Court in n. 14 at 453 and include the requirements that the surplus line broker maintain an office in that regulating state as well as keeping records and making reports.

Although *Meyers* generally concludes that the Wisconsin Collection Agency Law does not constitute an undue burden on interstate commerce, it does not undertake the balancing test required by *Pike* to determine specifically whether the "active office" requirement of the law might be interpreted and applied so as to impose an undue burden on interstate commerce. Accordingly, the balancing test must be applied to each of your suggested interpretations of the "active office" requirement.

The first interpretation would require a nonresident collection agency to operate a state office with regular business hours each week, to conduct its Wisconsin solicitation and collection activities from such office and to maintain records of all Wisconsin solicitation and collection activities at that office. These requirements would apply regardless of the volume of Wisconsin business conducted by the agency and regardless of economies of scale which might result through more centralized operations. Although the state's legitimate purpose of protecting Wisconsin creditors and debtors would be fulfilled by this interpretation of the "active office" requirement, the burden on nonresident collection agencies and on interstate commerce appear to be excessive in relation to the state's interest. Such state interest could be promoted just as well with a lesser impact on the interstate activities of the nonresident collection agencies.

The third interpretation would require a nonresident collection agency to maintain an office for service of process and for inspection and examination of records, but such records would be made available at such office only at the request of the commissioner of banking. As discussed earlier, this interpretation of the "active office" requirement might be inconsistent with the state's legitimate purpose in enacting the Wisconsin Collection Agency Law. To the extent that it constitutes a proper interpretation of the statute, however, the application of such a requirement would not impose an undue burden on

interstate commerce. It is difficult to envision how the state's legitimate interest could be promoted with any lesser impact on the interstate activities of nonresident collection agencies unless the agencies merely had to present the records at the office of the commissioner of banking rather than maintaining *any* office in Wisconsin.

The second interpretation would require a nonresident collection agency to maintain records at a state office for inspection and examination by the commissioner of banking. In determining whether such interpretation of the "active office" requirement would impose an undue burden on interstate commerce, it is necessary to balance the state's interest in having nonresident collection agency records available for inspection, without any delay and subject to the state's subpoena powers, against the expense to the agencies of maintaining multiple offices and perhaps multiple records in more than one state. Also, it would be necessary to determine whether the state's legitimate interest might be promoted just as well by an interpretation which has a lesser impact on interstate activities. Perhaps such a lesser alternative would be the third interpretation. Under that interpretation, the agency's records would not have to be maintained at an office in Wisconsin, provided that the records would be made available in a state office for examination by the commissioner of banking at his or her request.

The Attorney General of Michigan has concluded that a Michigan law which requires that books and records be kept at a local office in Michigan, under the supervision of a Michigan resident, constitutes an undue burden on interstate commerce. Op. No. 5038 (July 27, 1976). Such opinion, however, fails to undertake the factual inquiry necessary to strike the balance under *Pike*. I have been unable to find any opinion or decision discussing the constitutionality of requirements in eight other states (Arizona, Colorado, Maine, New Mexico, North Carolina, Oregon, Washington, and West Virginia) which compel recordkeeping at an office maintained in such states. While I can conclude that compelling a nonresident collection agency to *present* records for inspection and examination by the commissioner of banking at a state office does not impose an undue burden on interstate commerce. I am not able to say conclusively whether requiring that these records be *maintained* in the state constitutes such a burden.

Section 218.04(7)(d), Stats., empowers the commissioner of banking “[t]o make all necessary or proper orders, rules and regulations for the administration and enforcement of this section.” Thus, the commissioner has the authority to interpret the term “active office” in a manner believed to be appropriate given the intent of the statute and the characteristics of the collection agency business. As I have indicated it is my opinion that the first interpretation, requiring the maintenance of an office which keeps hours in accordance with section Bkg 74.01(2) Wis. Adm. Code and the presence of all records pertaining to Wisconsin solicitation and collection activities in the state probably imposes an undue burden on interstate commerce. The commissioner, nevertheless, retains the authority to adopt rules which are not subject to this defect and which are necessary for the implementation of the law.

BCL:LEN

Bids And Bidders; State Office Building; Subject to certain limitations, the lease of state office building space to a restaurant or other commercial enterprise serving both state employes and the general public is constitutionally permissible. Such leases do not require competitive bidding. OAG 29-80

May 20, 1980.

FRED A. RISER, *President*
Wisconsin State Senate

You ask two questions concerning the constitutionality of the potential development of “mixed use” facilities on the ground floors of state office buildings General Executive Facilities II and III (GEF II and GEF III respectively). First, you ask whether a restaurant serving both state employes and the general public in a state office building is constitutionally permissible. Second, you ask whether any other private establishments in a state office building would be constitutionally permissible. My answer to both questions is “yes,” subject to the qualifications discussed below.

Finally, you ask whether the state is required to bid leases for a restaurant or other use in a state office building. My answer is “no.”

The Legislature has vested the Building Commission with authority to determine which facilities are necessary and desirable to permit state agencies and departments to conduct public business. Secs. 13.48 and 13.488, Stats. Contained within a broad delegation of authority are specific provisions reading as follows:

The building commission may lease space in state office buildings for commercial use, including without limitation because of enumeration, retail, service and office uses. In doing so the commission shall consider the cost and fair market value of the space as well as the desirability of the proposed use. Such leases may be negotiated or awarded by competitive bid procedures. All such leases of space in state office buildings shall provide for payments in lieu of property taxes.

Sec. 13.48(23), Stats. It is my understanding that your reference to the development of "mixed uses" means the rental of state office space to commercial enterprises under sec. 13.48(23), Stats.

All acts of the Legislature are entitled to a strong presumption of constitutionality and will not be overturned unless unconstitutional-
ity is established beyond a reasonable doubt. *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973). Generally speaking, great leeway is given to the Legislature to accomplish its goals, and courts will not challenge the wisdom of the methods chosen by the Legislature. *Wisconsin Solid Waste Recycling Auth. v. Earl*, 70 Wis. 2d 464, 478, 235 N.W.2d 648 (1975). Further if there is any conceivable public purpose, the statute will be upheld. *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 414, 208 N.W.2d 780 (1973).

It is a well-established principle of constitutional law that state funds may only be spent for a public purpose of statewide concern. *State ex rel. Wisconsin Dev. Authority v. Dammann*, 228 Wis. 147, 183, 277 N.W. 278, 280 N.W. 698 (1938). Provision of facilities for the conduct of state business is unquestionably a public purpose. It follows that restaurant facilities, provided in a state office building for the convenience of state employes and citizens transacting business with the state, serve a public purpose. In fact, many state buildings, not only in Wisconsin, but around the country, have for years provided restaurant facilities for the use of state employes and citizens. *Hopper v. Madison*, 79 Wis. 2d 120, 130, 256 N.W.2d 139

(1977), held that important factors to be considered in making a determination of public purpose include "the objects for which taxes have been customarily levied," and "the objects which have been considered necessary for the support and proper use of government." In the only reported court case to consider the question you raise, the South Carolina Supreme Court, in holding that a cafeteria for state employes in a state office building was constitutional, noted that:

Private enterprise has long realized that it is to its advantage to provide proper eating facilities for its employees and for many years various governmental agencies have done likewise, yet counsel has not cited and we know of no case where the right to do so has heretofore been questioned in the Courts.

Caldwell v. McMillan, 224 S.C. 150, 77 S.E.2d 798, 803 (1953).

This is not to say, however, that there are no limitations on the extent to which the state may provide restaurant facilities for the benefit of the public generally. In *Hopper*, the court also said that, in deciding whether the public purpose doctrine is complied with, consideration should among other things be given to "the extent to which the expenditure results in competition with private enterprise, the presence or absence of a general economic benefit, the number of citizens benefited, and the necessity and infeasibility of private performance." 79 Wis. 2d at 130.

In the development of restaurant facilities in GEF II and GEF III, the Commission should be mindful of secs. 47.08 and 47.09, Stats., which provide for operation of concession stands in state office buildings by blind persons. Pursuant to sec. 47.09, Stats., the Department of Administration has adopted a rule, requiring that:

The establishment of concession stands and the granting of vending franchises in the several state office buildings and facilities rests with services to the blind, division of public assistance, department of health and social services as specified in s. 47.09, Stats. No other concession stands or vending machines shall be operated in the state office buildings and facilities.

Section Adm. 2.12(1) Wis. Adm. Code.

You further ask whether any other private establishments in a state office building would be constitutionally permissible. The broad nature of the question renders it impossible for me to specifically dis-

cuss all potential private establishments. My response will therefore only set forth general guidelines.

To the extent that the private establishments to which you refer would be geared specifically to the use and convenience of state employes and citizens transacting state business, there would be no constitutional problems. Beyond those immediate public needs, it is reasonable to expect that additional needs will arise as a result of the construction and occupancy of the new buildings. Keeping in mind the factors set forth in *Hopper*, it is for the Commission to determine the type of facilities necessary to meet those public needs. Briefly summarized, *Hopper* states that the benefit to the public generally, or a substantial number of citizens, and the ability of private enterprise to meet the public needs are factors to be considered in making such determination.

I also consider it necessary to discuss Wis. Const. art. VIII, sec. 10, which prohibits the state from engaging in "works of internal improvement." The term has been defined by the Wisconsin Supreme Court as follows:

"‘Works of internal improvement,’ as used in the constitution, means, not merely the construction or improvement of channels of trade and commerce, but any kind of public works, except those used by and for the state in performance of its governmental functions, such as a state capitol, state university, penitentiaries, reformatories, asylums, quarantine buildings, and the like, for the purposes of education, the prevention of crime, charity, the preservation of public health, furnishing accommodations for the transaction of public business by state officers, and other like recognized functions of state government."

State ex rel. Owen v. Donald, 160 Wis. 21, 79, 151 N.W. 331 (1915) (quoting from *Rippe v. Becker*, 56 Minn. 100, 117, 57 N.W. 331 (1894)). State office buildings fall clearly within the stated exception to the definition of "works of internal improvement."

The supreme court has resolved "internal improvements" questions by looking to the dominant purpose of the law at issue. In *Wisconsin Solid Waste Recycling Auth. v. Earl*, 70 Wis. 2d 464, 492, 235 N.W.2d 648 (1975), the court held that, "[i]f a law is predominantly public in its aim, it will not be held to violate the internal

improvements provision, in spite of the fact that the state carries on internal improvements incident to the main public purpose of the law." The primary purpose of the law in question here is to provide facilities for the conduct of state business. Any state activity along these lines which might be construed as engaging in works of internal improvement would be merely incidental to the achievement of the dominant public purpose and would, therefore, not violate the internal improvements clause. *See generally Caldwell v. McMillan*, 224 S.C. 150, 77 S.E.2d 798 (1953).

Finally, you ask whether the state is required to bid leases for a restaurant or other use in a state office building. Section 13.48(23), Stats., provides that "[s]uch leases may be negotiated or awarded by competitive bid procedures."

I assume that you raise the question in view of the state's general requirement that purchases be made from the lowest responsible bidder. Section 16.75(1), Stats., requires that "contractual services" shall be purchased by the Department of Administration from the lowest responsible bidder. Section 16.70(4), Stats., specifies that the term "contractual services" includes "all materials and services." I discussed in 65 Op. Att'y Gen. 251, 254-56 (1976), the term "all ... services" as used in ch. 16, Stats., and concluded that the all-inclusive nature of the language, plus the legislative history of the act, required broad application of the section.

In this instance, however, the Legislature clearly declared in sec. 13.48(23), Stats., that leases of state office building space may be negotiated or competitively bid. In doing so, it can safely be assumed that the Legislature was fully aware of the "lowest bidder requirement" and the definition of "contractual services," which were enacted prior to sec. 13.48(23), Stats. 2A C. Sands, *Statutes and Statutory Construction*, sec. 51.02, 290 (4th Ed. 1973). Where the Legislature has unambiguously stated the law, it is not proper to go back to the earlier legislative acts and create an ambiguity. *Commercial Credit Corp. v. Schneider*, 265 Wis. 264, 61 N.W.2d 499 (1953). It is therefore my opinion that the state is not required to bid leases for a restaurant or other use in a state office building.

BCL:DDS

Nonresident Property Owners; Words And Phrases; Exploration and mining rights constitute interests in land, and ownership of such interests are subject to the provisions of sec. 710.02, Stats., limiting nonresident ownership of land in Wisconsin. OAG '0-80

May 20, 1980.

ROBERT C. BRUNNER, *Secretary*
Department of Business Development

You have requested my opinion on the question of whether exploration and mining leases constitute an interest in land within the meaning of sec. 710.02, Stats.

In my opinion such leases do constitute an interest in land and are subject to the provisions of sec. 710.02, Stats.

Section 710.02, Stats., provides in part:

It shall be unlawful for any alien not a resident of this state, of some state or territory of the United States or of the District of Columbia, or for any corporation not created by or under the laws of the United States or of some state or territory thereof, to hereafter acquire, hold *or own more than 640 acres of land in this state or any interest therein* except such as may be acquired by devise, inheritance or in good faith in the collection of debts by due process of law.

It is recognized that the ownership of land comprises a bundle of rights in the land. For example, ownership in land includes such rights as possession, enjoyment, use, and profits. In sec. 990.01(18), Stats., land is defined in reference to the aggregate of interests in land. Specifically, sec. 990.01(18), Stats., provides: "Land' includes lands, tenements and hereditaments and all rights thereto and interests therein."

In *Weber v. Sunset Ridge*, 269 Wis. 120, 68 N.W.2d 706 (1955), it was held that an "interest in land" comprehends every kind of claim to land which can form the basis of a property right.

Interests in lands are subject to conveyance. For example, the right to possession is an interest in land that is commonly conveyed by an

instrument described as a lease. Possession for limited use is also commonly conveyed by an instrument which is often referred to as an easement. In these situations the owner of the land has conveyed some of the rights in the land and has retained some of the rights or interests in land.

In 14 Op. Att'y Gen. 263 (1925), this office was concerned with the question of whether one who deals in mining leases was required to be licensed as a real estate broker. The opinion concluded that mining leases did constitute an interest in land and, accordingly, one who deals in such leases must be a licensed real estate broker.

Generally, mining and exploration rights are recognized as interests in land. In 58 C.J.S. *Mines and Minerals* sec. 132 at 211, it is stated: "A mine or mining claiming is 'land' as that term is used in the law of property; hence a mine, as distinct from the surface is subject to the same rights of ownership, possession, and conveyance as other lands."

Wisconsin is in accord. In *Chicago & N. W. Transp. Co. v. Pedersen*, 80 Wis. 2d 566, 571, 259 N.W.2d 316 (1977), it was stated that mineral rights are an interest in land which may be created or transferred as any other estate in land.

Section 107.001, Stats., is consistent because it describes instruments granting exploration and mining rights as "leases" and generally refers to them as "conveyances."

Under sec. 706.01, Stats., leases are recognized as instruments which create and convey interests in land.

Section 706.01(1), Stats., provides: "Subject to the exclusions in sub. (2), this chapter shall govern every transaction *by which any interest in land* is created, aliened, mortgaged, assigned or may be otherwise affected in law or in equity."

Section 706.01(8), Stats., provides:

"Conveyance of mineral interests" means any transaction under sub. (1) entered into for the purpose of determining the presence, location, quality or quantity of metalliferous minerals or for the purpose of mining, developing or extracting metalliferous minerals, or both. Any transaction under sub. (1) entered

into by a mining company is rebuttably presumed to be a conveyance of mineral interests.

Under secs. 107.001, 706.01(1) and (8), Stats., it appears that any transaction involving the creation of exploration and mining rights constitutes the creation and transfer of interests in land.

The limitation on nonresident alien and corporate ownership of land or interests in land as set forth in sec. 710.02, Stats., is a limitation which encompasses exploration and mining leases, contracts, agreements, or any instrument purporting to create and convey such rights.

BCL:CAB

County Board; 51.42 Board; The county board of supervisors may require its approval of contracts for purchase of services by the community services board if so specified in its Coordinated Plan and Budget. Otherwise it may not. OAG 32-80

May 21, 1980.

GERARD S. PARADOWSKI, *Acting Corporation Counsel*

Milwaukee County

Former Corporation Counsel Robert P. Russell asked my opinion on the following question:

Does the Combined Community Services Board (51.42/.437 Board) have the authority to execute a contract to purchase services described in the Coordinated Plan and Budget (CPB) without separate or individual authorization ... of the County Board of Supervisors?

"The general rule in Wisconsin is that administrative agencies have only those powers that are expressly granted to them or which are necessarily implied from the statutes setting forth their responsibilities." *Wis. Soc. Wkrs. 1976 Campaign Committee v. McCann*, 433 F. Supp. 540, 543 (E.D. Wis. 1977). *Accord, State ex rel. Farrell v. Schubert*, 52 Wis. 2d 351, 190 N.W.2d 529 (1971), and

Nekoosa-Edwards P. Co. v. Public Serv. Comm., 8 Wis. 2d 582, 99 N.W.2d 821 (1959).

Sections 51.42(5)(h)7., 8., and 51.437(9), Stats., provide as follows:

51.42(5) Powers and duties of boards. Subject to this section, the rules promulgated thereunder, and within the limits of state and county appropriations and maximum available funding from other sources, boards shall provide for:

....

(h) Continuous planning, development and evaluation of programs and services for all population groups; and shall:

....

7. Enter into contracts to render services to or secure services from other agencies or resources including out-of-state agencies or resources; and

8. Enter into contracts for the use of any facility as an approved public treatment facility under s. 51.45 for the treatment of alcoholics if the board deems it to be an effective and economical course to follow.

(i) The submission of a coordinated plan and budget as provided in s. 46.031 (2).

51.437(9) Duties of the board. The community developmental disabilities services board shall:

(a) Establish a community developmental disabilities services program, appoint the director of the program, establish salaries and personnel policies for the program and arrange and promote local financial support for the program. The first step in the establishment of a program shall be the preparation of a local plan which includes an inventory of all existing resources, identifies needed new resources and services and contains a plan for meeting the needs of developmentally disabled individuals based upon the services designated under sub. (1). The plan shall also include the establishment of long-range goals and intermediate-range plans, detailing priorities and estimated

costs and providing for coordination of local services and continuity of care.

(b) Assist in arranging cooperative working agreements with other health, educational, vocational and welfare services, public or private, and with other related agencies.

(c) Enter into contracts to provide or secure services from other agencies or resources including out-of-state agencies or resources.

(d) Comply with the state requirements for the program.

The above statutes indicate that a community board enjoys somewhat of an autonomous status. One might reasonably conclude that a community board is insulated from the county board of supervisors as to contracts it chooses to enter into. This conclusion, however, overlooks pertinent amendments of the 1977 legislative session which placed fiscal control of the 51.42/51.437 programs in the county board of supervisors.

Chapter 29, Laws of 1977, amended the introductory paragraph of sec. 51.42(5), Stats., relating to the powers and duties of the community board by adding the emphasized language as follows: "*Subject to this section and, the rules promulgated thereunder, and within the limits of state and county appropriations and maximum available funding from other sources, boards shall provide for.*"

Chapter 29, Laws of 1977, also amended sec. 51.437(11), Stats., relating to program budgeting of developmental disabilities boards which may be established in counties having a population of less than 500,000 by adding the emphasized language as follows: "*Boards established under this section shall be funded pursuant to s. 51.42(8). Plans and budgets shall be submitted and approved under s. 46.031.*"

Finally, ch. 27, Laws of 1977, created sec. 46.031(2)(b)1., Stats., which mandates plan and budget approval by the county board of supervisors. Pertinent portions of this statutory paragraph read:

A coordinated plan and budget shall be submitted to the county board of supervisors or its designated agent for review and preliminary approval for submission to the department. ... After the department's review and approval of the coordinated plan and

budget, the department shall return the coordinated plan and budget to the county board of supervisors or combination of county boards for its final review and approval.

Thus, the enactments of the 1977 Legislature evince a strong policy of vesting greater fiscal control of human services programs in the county board of supervisors. That control is exercised through the Coordinated Plan and Budget. The express statutory authority of the combined community services board to enter into contracts under sec. 51.42(5)(h)8., Stats., has not been repealed. Since repeals by implication are not favored in the law, *Jendrzejewski v. Fire and Police Commissioners*, 257 Wis. 536, 538, 44 N.W.2d 270 (1950), it is obvious that said authority remains, but that it is now circumscribed by the Coordinated Plan and Budget under the 1977 legislative enactments.

Once the Coordinated Plan and Budget has been approved by the Department, it becomes a contract under sec. 46.031(2)(b), Stats., which may be changed if "mutually agreed upon" between the county board and the Department. The role of the combined board is to implement the plan according to the terms and conditions specified in the plan. Where a particular mode of contract making is specified, such as calling for prior authorization on certain types of transactions, the plan must be followed. Conversely, if the plan is silent in this respect, sec. 51.42(5)(h)7. and 8., Stats., controls, and the combined board may enter into contracts without prior approval of the county board if such contracts are otherwise lawful. As noted above, a county board can change its plan upon mutual agreement with the Department.

Accordingly, the answer to your question depends on the terms specified in the Coordinated Plan and Budget. Assuming the plan is silent as to a specific mode of making contracts, the combined services board has the statutory authority to execute a contract to purchase services without separate or individual authorization of the county board of supervisors.

BCL:WLJ

Cemeteries; Cemetery association voters must be lot owners under sec. 157.03(4), Stats. The ownership interest of a deceased lot owner passes to his or her heirs, who as owners, are entitled to vote in cemetery association elections. OAG 33-80

May 27, 1980.

MARCEL DANDNEAU, *Chief Clerk*
Wisconsin State Assembly

At the direction of the Assembly Committee on Organization, you ask whether cemetery association voters must be lot owners under sec. 157.03(4), Stats. The answer is yes. Your question apparently arises out of a concern that family members of a deceased owner should be permitted to vote in association elections. As discussed below, family members may qualify as "owners," as that term is used in sec. 157.03(4), Stats., and thus be permitted to vote in association elections.

Section 157.03(4)(a), Stats., reads as follows:

Annual election shall be held at such place in the county as the trustees direct upon such public notice as the by-laws prescribe. Trustees chosen after the first shall be proprietors of lots in the cemetery, residents of the state, and hold office for three years. Election shall be by ballot, and a plurality shall elect. Each owner of one or more lots shall be entitled to one vote, and such one of several owners of a lot as the majority of them designate shall cast the vote.

One must therefore be a lot owner to be entitled to vote at an association election.

Section 157.10, Stats., provides in relevant part as follows: "While any person is buried therein a lot shall be inalienable without the consent of a majority of the board and on the death of the owner shall descend to his heirs; but any one or more of such heirs may convey to any other heir his interest therein." Interpreting the provisions of sec. 157.10, Stats., the supreme court has held that, upon the death of a cemetery lot owner, the owner's interest in the lot descended to the

owner's heirs,¹ subject to the rights of the owners and members of their families to be buried in the lot so long as space was available.² *Ryan v. Schmit*, 1 Wis. 2d 215, 83 N.W.2d 685 (1957). Therefore, family members, provided they are heirs of the deceased owner, become owners of the lot upon the death of the original owner. As owners, they are entitled to vote under sec. 157.03(4), Stats. In the case of multiple owners of a lot or lots, sec. 157.03(4)(a), Stats., directs that those owners are entitled to one vote to be cast by the owner selected by majority vote of the owners of the lot or lots.

Section 851.09, Stats., defines an "heir" as "any person, including the surviving spouse, who is entitled under the statutes of intestate succession to an interest in property of a decedent." Section 852.01, Stats., sets forth the rules on intestate succession, and specific determinations of heirship must be made on the basis of that statute. Subject to the order of priority provided in sec. 852.01, Stats., such persons generally may include spouses, children, grandchildren, parents, brothers and sisters, children of brothers and sisters, and grandparents.

In conclusion, any family member of a deceased lot owner who is an heir, as defined in secs. 851.09 and 852.01, Stats., is entitled as an owner to vote in cemetery association elections.

BCL:DDS

Insurance; Judges; A county's obligation to continue life insurance for those judges who have exercised the sec. 753.07(4), Stats., option does not terminate when the county salary supplements end on July 1, 1980. OAG 35-80

¹ The form of ownership passing to the heirs depends on the type of interest held by the original owner. In this case, the original owner held the lot as a tenant in common with her sisters, and the court therefore ruled that the heirs took the property as tenants in common with the sisters.

² As tenants in common, the court explained that each owner held an undivided interest in the lot, with no right to exclude any other owner or to appropriate a particular portion of the lot to his or her exclusive use. The court noted that when the lot became fully occupied, the remaining owners would of necessity be excluded from burial in the lot.

June 17, 1980.

MARK S. GEMPELER, *Corporation Counsel*
Waukesha County

You request my opinion as to the obligation of Waukesha County to provide continued life insurance coverage under sec. 753.07(4), Stats. Section 753.07(4) states in part:

As state employees, county court judges ... who are denominated or become circuit court judges ... on August 1, 1978 ... shall have the option of remaining as participants under county life and health insurance programs to the extent of their participation in such programs on February 1, 1978. The state treasurer shall semiannually pay to the county treasurer, pursuant to a voucher submitted by the clerk of circuit court to the administrative director of courts, an amount equal to the state contribution for life and health insurance for other comparable state employes. The county shall pay the cost of any premiums for life and health insurance exceeding the sum of the state contribution and the employe contribution as required under the county programs.

Specifically you ask whether the county's obligation to provide life insurance is indefinite or whether the obligation terminates when the county salary supplements terminate, namely, July 1, 1980, under sec. 753.071(2), Stats.

It is my opinion that the county's obligation to continue life insurance for those judges who have exercised the sec. 753.07(4), Stats., option does not terminate when the county salary supplements end, but continues while the judge serves as a circuit judge for Waukesha County. The specific portion of sec. 753.07(4), Stats., to be construed does limit the "option of remaining as participants under county life and health insurance programs to the extent of their participation in such programs on February 1, 1978." Nothing is said, however, in subsec. (4) that limits participation in the county insurance plan to any specific period of time.

The primary source to use in construing a statute is the language of the statute itself: *Milwaukee Police Asso. v. Milwaukee*, 92 Wis. 2d 175, 180, 285 N.W.2d 133 (1979). Section 753.07(4), Stats., by clear language gives the subject judges the option to participate in

county life insurance programs "to the extent of their participation in such programs on February 1, 1978." Generally, a statute must be ambiguous before resort is properly made to matters outside of the statutory language to determine the meaning intended. *State v. Tolleson*, 85 Wis. 2d 162, 167, 270 N.W.2d 201 (1978). I do not consider sec. 753.07(4), Stats., to be ambiguous even though it does not specify July 1, 1980 (the county supplement termination date), or any other such date, as an ending date. The transitional benefit provided in such statutory section is self-limiting in that it provides a benefit limited to participation on February 1, 1978. While there is the probability that the county life insurance coverage will be excess coverage over the full coverage provided under the state life insurance program after July 1, 1980, action by the court to reduce its coverage is not provided by law. See *State ex rel. Conway v. Elvod*, 70 Wis. 2d 448, 452-53, 234 N.W.2d 354 (1975). The Legislature has given the county no authority to alter the "extent of participation in such programs on February 1, 1978."

You are further concerned that the private insurance company providing the Waukesha County group life insurance plan will no longer insure the judges as county employes, under the group policy, after the county salary subsidy ends on July 1, 1980. The county group life insurance contract apparently limits coverage to county employes. You question, therefore, whether sec. 753.07(4), Stats., has the effect of changing the existing contract between the county and a private insurer. It is my opinion that sec. 753.07(4), Stats., does not alter the existing group contract to make the subject judges county employes for life insurance purposes. Such statutory section merely requires the county to provide a specific life insurance benefit to a state employe. The language of sec. 753.07(4), Stats., specifically begins with the statement "as state employes" and further provides a state contribution based upon the contribution made for "other comparable state employes." Clearly, then, the subject judges are considered to be state employes for all purposes.

Interpretation of sec. 753.07(4), Stats., in a manner to alter the existing insurance contract between the county and private insurer could infringe upon the Wis. Const. art. I, sec. 12 prohibition against passing "any law impairing the obligation of contracts." When there is a choice of statutory interpretations, it is appropriate to select that interpretation which avoids unnecessary constitutional interpreta-

tion. *State ex rel. Strykowski v. Wilkie*, 81 Wis. 2d 491, 526, 261 N.W.2d 434 (1978). Correspondence you have provided indicates that, while there is no impossibility of providing coverage, group policy conversion privileges may have to be used, resulting in higher premium costs to the county. Notwithstanding the fact that sec. 753.07(4), Stats., may not perfectly fit within the terms of the county group life insurance policy, I see no intent in such section to effect a change in the wording of the policy.

BCL:WMS

Public Officials; Public Service Commission: Provisional appointees under sec. 17.20(2), Stats., need not be confirmed by the Senate before they can begin to serve but can serve pending Senate confirmation or rejection or appointment withdrawal by the Governor.
OAG 36-80

June 17, 1980.

FRED A. RISSEK, President
Wisconsin State Senate

On behalf of the Senate Organization Committee, you have requested my opinion regarding the appointment of Willie J. Nunnery to the Public Service Commission. Specifically you ask "whether such an appointment must be confirmed by the State Senate before one can begin to serve, or whether one can serve pending Senate Confirmation or rejection, or nomination withdrawal by the Governor."

Charles J. Cicchetti resigned as a Public Service Commissioner prior to the expiration of his term. On April 3, 1980, Governor Dreyfus appointed Mr. Nunnery to the Public Service Commission to succeed Mr. Cicchetti.

Section 17.20(2), Stats., states:

Vacancies occurring in the office of any officer normally nominated by the governor, and with the advice and consent of the senate appointed, may be filled by a provisional appointment by the governor for the residue of the unexpired term, if any, sub-

ject to confirmation by the senate. Any such appointment shall be in full force until acted upon by the senate, and when confirmed by the senate shall continue for the residue of the unexpired term, if any, or until a successor is chosen and qualifies. A provisional appointee may exercise all of the powers and duties of the office to which such person is appointed during the time in which the appointee qualifies. Any appointment made under this subsection which is withdrawn or rejected by the senate shall lapse. When a provisional appointment lapses, a vacancy occurs. Whenever a new legislature is organized, any appointments then pending before the senate shall be referred by the president to the appropriate standing committee of the newly organized senate.

A resignation creates a vacancy. Sec. 17.03(2), Stats. Public Service Commissioners are nominated by the Governor. Sec. 15.06(1)(a), Stats. A provisional appointee qualifies for office upon filing the required oath of office. Sec. 17.01(13), Stats. Therefore, an appointee such as Mr. Nunnery need not be confirmed by the Senate before he can begin to serve but can serve pending Senate confirmation or rejection or appointment withdrawal by the Governor.

BCL:JJG

Counties; Insurance; Liability of self-insured county performing state highway maintenance is not increased by virtue of maintenance contract with state. OAG 37-80

June 17, 1980.

FRANK VOLPINTESTA, *Corporation Counsel*
Kenosha County

You have requested my opinion with respect to whether the liability exposure of a self-insured county is increased by virtue of a clause contained in the standard Wisconsin Department of Transportation, Division of Highways, machinery agreement contract. The clause referred to in your letter provides "that all activities carried on on behalf of the state under any approved agreements between the

county and the state are covered under the terms of the county's self-insurance plan."

It is my opinion that this language does not increase the liability of a county for the negligence of its employes beyond that which it has in the absence of such language. You should be aware, however, that the issue of the constitutionality of the liability limits contained in secs. 81.15 and 895.43, Stats., is presently pending before the Wisconsin Supreme Court in the third appeal of *Sambs v. City of Brookfield*, 95 Wis. 2d 1, 289 N.W.2d 308 (Ct. App. 1980).

It is my further opinion that a county's liability limits are not increased by performing maintenance on a state highway pursuant to a contract with the state. The limit of liability of a county for the negligence of its employes is not changed by the nature of the highway on which they are working. The county is liable for the negligence of its employes whether they are working on a county highway or under contract with the state on a state highway. I am not aware of any legal basis for suggesting that the state is primarily liable for the negligence of county employes when they are working on a state highway. Such employes are engaged in working for the county as an independent contractor. As you point out, the state compensates the county for such work, including a pro rata payment to cover insurance. If the county sees fit to become self-insured rather than to use such funds to purchase liability insurance, its liability exposure does not change.

Thus, the county is not asked to "insure the state for liability" as you suggest, but only to be responsible for its own employes in the performance of work undertaken pursuant to contract, and within the monetary limits set forth in the statutes. The county is not required to nor is it being requested to insure the state or its employes against liability which may be incurred by negligence of state employes.

BCL:TLP

Schools And School Districts; Tuition; Vocational, Technical And Adult Education, Board Of; Section 38.24(3)(b), Stats., making the district board of a student's district of residence liable for payment of nonresident fees when attending another district VTAE school is not a denial of equal protection. VTAE districts cannot enter into agreements with each other to waive the nonresident tuition provided for in sec. 38.24(3)(b), Stats. OAG 38-80

June 17, 1980.

FRED A. RISSE, *President*
Wisconsin State Senate

As Chairman of the Senate Committee on Organization, you request my opinion on two questions which relate to the power and duty of a district vocational, technical, and adult education (VTAE) board to charge tuition and fees.

Your first question is:

Is Section 38.24(3)(b) Wisconsin Statutes making the District Board of a student's district of residence liable for payment of non-resident fees when attending another district VTAE school unconstitutional as a denial of equal protection?

Under sec. 38.24(1), Stats., each VTAE student is charged a uniform fee based on the type of program or course in which they are enrolled. These fees are set by the state board for students enrolled in liberal arts college transfer programs, postsecondary and vocational-adult programs and programs for inmates. A materials' fee is also set. The state VTAE board also establishes nonresident fees which apply generally to nonresidents of a particular VTAE district. Each VTAE district program is supported by local property tax levies. This local funding feature makes nonresident tuition for Wisconsin residents from outside the district a desirable policy. This nonresident tuition is set by sec. 38.24(3)(a)1., Stats., at "37.5% of the statewide property tax funded cost per full-time equivalent student for operating these programs." Normally, the student pays this tuition.

Section 38.24(3)(b), Stats., provides an exception to student payment as follows:

The district board of a student's district of residence is liable for the nonresident fee under par. (a) 1 only if the program in which the student enrolled is not offered by the district of residence and the district board of attendance files notice of enrollment under s. 38.22 (2). In the case of any disagreement between district boards as to liability under this paragraph, the state board shall make the final determination.

I am of the opinion that there is no denial of equal protection.

I do not believe my conclusion is contrary to *Buse v. Smith*, 74 Wis. 2d 550, 579, 247 N.W.2d 141 (1976). There, the court struck as violative of the uniformity clause, Wis. Const. art. VIII, sec. 1, a requirement that certain elementary and secondary educational districts deliver tax monies for redelivery to other such districts, although the court upheld this plan against an equal protection challenge. In respect to the uniformity clause, the court found the plan offensive because one school district was compelled to levy and collect a tax "for the direct benefit of other school districts." 74 Wis. 2d at 579.

Buse is inapplicable because here the taxpayers of the nonoffering district receive benefits, not only because their own residents enjoy the availability of training but also because taxes are saved by avoiding unnecessary duplication of programs. Acting under sec. 38.001, Stats., the VTAE state board determines whether local districts may offer certain programs. The obvious purpose is to reduce the overall tax burden by discouraging unnecessary duplication of services between vocational school districts. This case, therefore, is unlike the situation in *Buse* where the plan violated the rule that "the purpose of the tax must be one which pertains to the public purpose of the district within which the tax is to be levied and raised." *Id.* at 577. See *Sigma Tau Gamma Fraternity House v. Menomonie*, 93 Wis. 2d 392, 413, 288 N.W.2d 85 (1980).

The situation you raise is far closer to the issues the court treated in *Manitowoc v. Manitowoc Rapids*, 231 Wis. 94, 285 N.W. 403 (1939), and *West Milwaukee v. Area Bd. Vocational, T. & A. Ed.*, 51 Wis. 2d 356, 187 N.W.2d 387 (1971), *appeal dismissed*, 404 U.S. 981 (1971). In *Manitowoc* the court upheld over equal protection objections a statutory requirement that a nonoffering vocational district pay the tuition charged in the nonresident district. The court

noted that all persons within the age limits were equally entitled to take advantage of the facilities. 231 Wis. at 100.

The court in *Manitowoc* also noted that the resident districts had the choice whether to offer the instruction. *Id.* I do not believe that fact, however, was necessarily dispositive in the court's thinking. The court's later decision in *West Milwaukee* supports this inference. There, the court upheld the state's method of financing vocational education in part through area boards. Relying on an earlier decision, the court in part reasoned:

The court noted that the statute in issue was enacted "as a part of the general policy to establish an efficient state highway system, and must be interpreted in the light of such legislative purpose." Hence the court recognized that the bridge was a part of a *state* highway system, just as appellants contend a *state* vocational system is here involved.

51 Wis. 2d at 379 (emphasis the court's).

In evaluating the reasonableness of legislative classifications, then, it is necessary to look first to the overall, state legislative objective. That objective includes avoidance of undue duplication of vocational instruction by foreclosing some districts from providing certain instruction. It is rational to require these nonoffering districts to pay the tuition costs of its residents who take courses in other districts. This plan simply requires the taxpayers to fulfill their responsibility for vocational education either by providing the instruction or, if that method is denied in the interest of avoiding costly duplication, by paying the tuition costs of another district.

Your second question is:

Can VTAE districts legally enter into agreements with other VTAE districts to waive the nonresident tuition requirement provided in sec. 38.24(3)(b), Stats., which do not involve vocational-adult courses?

In my opinion the answer is no.

Section 38.24(3)(c), Stats., provides that district boards may enter interdistrict contractual agreements to waive "nonresident tuition charges to Wisconsin residents in vocational-adult courses."

There is no similar provision permitting agreements to waive for other than vocational-adult courses. It is a rule of statutory construction that the express mention of one item impliedly excludes another. *Appleton v. ILHR Department*, 67 Wis. 2d 162, 172-73, 226 N.W.2d 497 (1975). Having expressly authorized waivers in vocational-adult courses, it follows by implication that there is no authority for waivers in other situations.

Moreover, agencies created by the Legislature have only such powers as expressly are granted to them or necessarily are implied, and any power must be found within the four corners of the statutes under which they proceed. *State ex rel. Farrell v. Schubert*, 52 Wis. 2d 351, 357, 190 N.W.2d 529 (1971). There being no express provision for waiver except for vocational-adult courses, there is no authority for waivers in other situations.

This result is consistent with sec. 66.30(2), Stats., which provides that municipalities may contract with each other "for the receipt or furnishing of services." Each municipality, however, can act only "to the extent of its lawful powers." *Id.* As noted above, the Legislature has taken in hand the question of waiver, has limited it to vocational-adult education, and has not otherwise empowered waivers in additional areas.

Similarly, it follows that the power under sec. 38.24(3)(c), Stats., to contract with other district boards for instructional services cannot imply the power to contract for the services at any price. The Legislature itself has limited the circumstances in which tuition costs can be waived.

In reliance upon 31 Op. Att'y Gen. 155 (1942), it has been suggested that the power of the district boards to charge tuition is discretionary and that, therefore, the power to contract away the nonresident tuition requirements is implied from the discretionary power. 31 Op. Att'y Gen. 155 (1942) discusses an earlier statute relating to charging nonresident tuition. Section 41.19, Stats. (1941), provided that the local VTAE board "is authorized to charge tuition for nonresident pupils." The opinion concluded that the term "is authorized" is permissive rather than mandatory. In contrast to the statute then in effect, however, sec. 38.24(3)(a), Stats., now provides that the VTAE state board "shall establish" nonresident tuition fees which "shall be the liability of the student," except as provided in sec.

38.24(3)(c), Stats. Thus, the language under the current statute is mandatory rather than permissive.

BCL:CDH

Emergency Number Systems Board; Open Meeting: A telephone conference call involving members of a governmental body is a meeting which must be reasonably accessible to the public and the required public notice must be given. OAG 39-80

June 17, 1980.

KENNETH E. LINDNER, *Secretary*
Department of Administration

You note that on May 21, 1979, the Governor issued a memorandum to all state agencies to conserve energy by limiting travel and in part suggested “[t]here should be maximum usage of the telephone and telephone conferencing capabilities, the mails, and other available communication networks in lieu of travel.” You state that the Emergency Number Systems Board, which is created by sec. 15.105(9), Stats., and is composed of eleven members, many of whom reside in areas distant from Madison, would like to conduct certain business by telephone for a number of reasons including the conservation of energy.

You inquire “[w]hether telephone conference calls between members of a public body is permissible or whether it constitutes a ‘meeting’ under Wisconsin’s Open Meeting Laws.”

The alternatives you present in your question are not necessarily mutually exclusive. Rather, there are two distinct questions. 1. Does a telephone conference call among members of a governmental body constitute a meeting for the purpose of the open meetings law? 2. If it does, is such a meeting permissible?

As to the first question, it is my opinion that a telephone conference call among members of a governmental body, and especially a majority thereof, does constitute a “meeting” as the term is defined in sec. 19.82(2), Stats.:

"Meeting" means the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. If one-half or more of the members of a governmental body are present, the meeting is rebuttably presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The term does not include any social or chance gathering or conference which is not intended to avoid this subchapter.

It is true that in a telephone conference call participants do not convene in the traditional sense because they are not physically gathered together. But they are convened in the sense that they can effectively communicate and exercise the authority vested in the body. To hold otherwise would allow the intent and purpose of the law to be frustrated by resort to any one of a number of modern communication techniques that permit communication without the participants being physically gathered together.

The second question is whether a telephone conference meeting may be conducted in a manner that satisfies the open meetings law. It is my opinion that it can.

The legislative policy underlying the open meetings law is stated in sec. 19.81(2), Stats.: "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."

As stated in 67 Op. Att'y Gen. 126 (1978):

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.

... 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.

(Emphasis added.)

A telephone conference meeting may be considered "reasonably accessible" if the public and news media may effectively monitor it. This can be accomplished by the use of a speaker that broadcasts the telephone conference located at one or more sites to which the public and news media have access. In such a situation the public and the media have the same "access" to the discussions as each member of the body who is on the line.

Conversely, a telephone conference meeting that was conducted in such a manner that would deny the public and news media an opportunity to effectively monitor would not comply with the open meetings law.

I might point out that by using more than one public listening site, there is the potential for making a meeting accessible to more people at more locations than the traditional single meeting where the members of a governmental body physically gather.

There are several types of public business which I would consider inappropriate for a conference call meeting. As an example, many public bodies conduct business in a manner which encourages, and in some instances requires, public participation or comment at the meeting. While current technology would allow members of the public to "plug in" or participate through a speaker phone, the process would likely be cumbersome and discouraging to participants. Similarly, many bodies routinely conduct hearings or inquiries where the demeanor of witnesses or participants is valuable in assessing both the weight and credibility of the presentation. Finally, there are meetings where complex plans, engineering drawings, charts, and the like need to be displayed and explained. In my view each of the above situations and like situations would not be "reasonably accessible to the public" because important parts of the deliberations could not or would not be communicated to the public or the media.

As you know, the open meetings law applies to all governmental bodies in the state. Your concern for energy savings and convenience should not in most instances be an excuse for holding telephone con-

ference meetings at the local level where distances are smaller. In principle, the public should be getting the most open and accessible government possible. This opinion holds only that telephone conference calls are an acceptable method of convening a meeting. They are probably not the most desirable method of doing so and should be used sparingly and with the spirit of the law in mind.

Finally, any meeting conducted via a telephone conference call is subject to all the provisions of the open meetings law, secs. 19.81-19.89, Stats., including the public notice requirements under sec. 19.84, Stats.

BCL:DJH:RWL

County Board Of Adjustment; County Planning And Zoning Committee; Zoning: The extent to which sec. 59.99, Stats., authorizes the County Board of Adjustment to grant zoning variances and review decisions of the County Planning and Zoning Committee, discussed. OAG 40-80

June 24, 1980.

JAMES T. BARR, *Corporation Counsel*

Waushara County

You advise that questions have arisen concerning the responsibilities of your County Zoning Board of Adjustment, created under sec. 59.99, Stats. Your first inquiries are in reference to the criteria which it must use in granting zoning variances. You cite several instances where you, the County Planning and Zoning Committee created under sec. 59.97(2)(a), Stats., and the County Zoning Administrator apparently feel that the grant of particular zoning variances by the Board of Adjustment constituted an abuse of discretion.

Before answering your specific questions, I point out that judicial review of decisions of the County Board of Adjustment may be obtained by writ of certiorari upon a proper petition specifying the grounds upon which it is asserted such decisions are illegal. Sec. 59.99(10), (11), (12), (13), Stats. Our supreme court has long held that where a zoning board of appeals has acted arbitrarily and in

abuse of its discretion, its decision will be reversed upon appeal. *State ex rel. Schleck v. Zoning Board of Appeals*, 254 Wis. 42, 35 N.W.2d 312 (1948).

You first ask whether it is proper for a county zoning board of adjustment to grant more than one variance if more than one variance is necessary to allow a structure on a particular lot. In my opinion the answer is yes.

The criteria for granting county zoning variances is set forth in sec. 59.99(7)(c), Stats., as follows:

(7) **Powers of board.** The board of adjustment shall have the following powers:

....

(c) To authorize *upon appeal* in specific cases *such variance* from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of the ordinance will result in *unnecessary hardship*, and so that the spirit of the ordinance shall be observed and substantial justice done.

The word "variance" as used in this provision may be viewed as including the plural as well as the singular. Sec. 990.001(1), Stats. Thus, the validity of the variances granted does not necessarily depend on their number but rather upon whether, upon a full review of the facts, the grounds cited to justify such variances fall within the standards established by sec. 59.99(7)(c), Stats., particularly the requirement that there be "unnecessary hardship." These requirements were most recently discussed and explained in *Snyder v. Waukesha County Zoning Board*, 74 Wis. 2d 468, 479, 247 N.W.2d 98 (1976), where our supreme court sustained a variance denial, holding that the hardship there relied upon by the appellant was "either self-created or no more than personal inconvenience."

In the course of discussing the grant or denial of both use and area zoning variances, the court set forth the following general guidelines:

In *State ex rel. Markdale Corp. v. Board of Appeals*, 27 Wis. 2d 154, 133 N.W.2d 795 (1965), the court considered, in relation to an appeal for a *use* variance, the definition of unnec-

essary hardship.¹ The court first took note of the New York rule that to justify a finding of unnecessary hardship, it must appear that the property cannot yield a reasonable return when used for the permitted purposes. *Id.* at 162, n. 2, 133 N.W.2d at 799, n. 2; *See Otto v. Steinhilber*, 282 N.Y. 71, 24 N.E.2d 851 (1939). The court then stated:

"A note entitled 'Zoning Variances,' 74 Harvard Law Review (1961), 1396, 1401, suggest the following definition of 'unnecessary hardship' as used in zoning statutes and ordinances with respect to the power of appeals boards to grant variances:

"Since the main purpose of allowing variances is to prevent land from being rendered useless, "unnecessary hardship" can best be defined as a situation where in the absence of a variance no feasible use can be made of the land." 27 Wis. 2d at 163, 133 N.W.2d at 799.

When considering an *area* variance, the question of whether unnecessary hardship or practical difficulty exists is best explained as "[w]hether compliance with the strict letter of the restrictions governing area, set backs, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome." 2 Rathkopf, *The Law of Zoning and Planning* 45-28 (3d ed. 1972).

74 Wis. 2d at 474-75 (emphasis added).

Second, you ask whether a county zoning board of adjustment could grant a variance allowing the placement of a substandard mobile home on a parcel where the only hardship involved was the fact that the applicant owned a substandard unit. In my opinion the answer is a qualified no.

In the absence of more specific and complete details, it is only possible to provide a general response to this question. Nevertheless, to

¹ In *Markdale*, the court noted that *State ex rel. Tingley v. Gurda*, 209 Wis. 63, 67, 243 N.W. 317 (1932), "casts doubt upon the power of the board to grant a variance which changes the use classification of the ... premises even if this were not a case of self-created hardship." *Markdale*, 27 Wis. 2d at 154, 158 n. 1.

the extent your question suggests that the hardship involved is self-created or involves conditions personal to the applicant which are unrelated to the parcel involved, *Snyder* indicates that such inconvenience alone is insufficient to support the grant of a variance. It is there pointed out, 74 Wis. 2d at 479, that:

Practical difficulties or unnecessary hardship do not include conditions personal to the owner of the land, but rather to the conditions especially affecting the lot in question. “[I]t is not the uniqueness of the plight of the owner, but uniqueness of the land causing the plight, which is the criterion.” 8 McQuillin, *Municipal Corporations*, sec. 25.167, at 544 (3d ed. 1965); *See Karasik v. City of Highland*, 130 Ill. App.2d 566, 572-73, 264 N.E.2d 215, 219 (1970).

Finally, you ask:

Can the Board of Adjustments hear an appeal of a decision of the Zoning and Planning Committee? I fully understand that a decision of the Zoning Administrator can be appealed to the Board of Adjustments, but, do they have the same authority over the Zoning and Planning Committee and their decisions on conditional uses and rezonings?

You conclude that this question must be answered in the negative, because the Board only hears appeals from decisions of “administrative officers” and you do not view the planning and zoning committee, created under sec. 59.97(2)(a), Stats., as consisting of “administrative officers.” I feel, however, the question is not so easily resolved. In my opinion, the authority of the Board to review determinations of the committee differs, depending upon whether the determination involves a conditional use, rezoning, or enforcement decision.

Section 59.99(4), (7)(a), Stats., provides in part as follows:

(4) **Appeals to board.** *Appeals* to the board of adjustment may be taken by any person aggrieved or by any officer, department, board or bureau of the municipality affected by any decision of the *building inspector or other administrative officer*....

....

(7) **Powers of board.** The board of adjustment shall have the following powers:

(a) To hear and decide *appeals* where it is alleged there is error in any order, requirement, decision or determination made by an *administrative official in the enforcement* of section 59.97 or of any ordinance adopted pursuant thereto.

In a broad and general sense, the members of administrative bodies such as county zoning boards of adjustment and county planning and zoning committees, as well as the various other county officers and officials involved in the implementation of the county zoning ordinances, are all administrative officers or officials. 8A McQuillin, *Municipal Corporations*, sec. 25.213. More specifically, the words "administrative officer" and "administrative official," while expressing the singular, include the plural, and may include within their meaning zoning boards and committees of administrative officials. See sec. 990.001(1), Stats; *Royal Atlanta Development Corp. v. Staffieri*, 236 Ga. 143, 223 S.E.2d 128, 130 (1976).

In *Nodell Inv. Corp. v. Glendale*, 78 Wis. 2d 416, 254 N.W.2d 310 (1977), the court considered whether a decision of a city plan commission to withhold a building permit must be appealed to the city zoning board of appeals by the affected property owner, under provisions of sec. 62.23(7)(e), Stats., which read substantially the same as sec. 59.99, Stats. Referring to the language of the city zoning authority, including provisions virtually identical to sec. 59.99(4), (7)(a), Stats., the court held that the property owner was required, under the doctrine of exhaustion of administrative remedies, to appeal the subject decision to the city zoning board of appeals, quoting *Jefferson County v. Timmel*, 261 Wis. 39, 63-64, 51 N.W.2d 518 (1952), as follows:

[I]f a zoning ordinance provides for an appeal to a board of adjustment created pursuant to a statute similar to sec. 59.99 from an adverse ruling of an administrative officer or board in administering the ordinance, and court review of the decision or order of the board of adjustment is specifically provided for by statute, such remedy is exclusive of all other remedies and must be exhausted before a party can resort to the courts for other relief except in cases where the validity of the ordinance itself is attacked.

In so holding, *Nodell* obviously treated the particular decision of the city plan commission under review as that of administrative officers or officials under the subject zoning laws. In addition, however, the withholding of a building permit by a building inspector or other administrative officer or official was also clearly an "enforcement decision" under the zoning laws. It is not apparent, under *Nodell* or otherwise, that determinations of the county planning and zoning committee, which do not constitute "enforcement decisions," are reviewable by the county zoning board of adjustment under sec. 59.99, Stats. See sec. 59.97(10)(d), (11), Stats.

In *Staffieri*, just as in *Nodell*, the issue was whether a decision of a county zoning commission, a body similar to the county planning and zoning committee, was appealable to a board of appeals such as the county zoning board of adjustment. Again, the statutory provisions applied by the court were almost identical to those set forth in sec. 59.99(4), (7)(a), Stats. In *Staffieri*, however, the court held that since the specific determination of the county planning commission under consideration was intended "merely to inform the governing authority," it was not an enforcement decision appealable to the zoning board of appeals: "We do not disagree that the Planning Commission may, in some instances, be considered an administrative official. However, we cannot agree that the approval of a planned unit development scheme by the Planning Commission is an enforcement decision." 223 S.E.2d at 130.

The holding of the court in *Staffieri* seems particularly applicable to that part of your inquiry which relates to the "rezoning decisions" of the County Planning and Zoning Committee. I assume that the rezoning determinations to which you make reference are those which are made by the Committee in considering proposed amendments to the county zoning ordinance, and in reporting its recommendations thereon to the County Board, under the provisions of sec. 59.97(5)(e)1.-5., Stats. Such recommendations are clearly preliminary and *advisory* only and do not constitute a "decision," within the meaning of sec. 59.99(4), Stats., or an "order, requirement, decision or determination made ... in the *enforcement* of section 59.97 or of any ordinance adopted pursuant thereto," as that phrase is used in sec. 59.99(7)(a), Stats. As in *Staffieri*, such rezoning determinations of the County Planning and Zoning Committee are "merely to inform the governing authority," and the County Zoning Board of

Adjustment lacks jurisdiction under sec. 59.99, Stats., to review such determinations. *See 8A McQuillin, Municipal Corporations*, sec. 25.305.

That portion of your final question which relates to the authority of a county zoning board of adjustment over decisions of a county planning and zoning committee involving conditional uses, *i.e.*, special exceptions, presents yet a different situation.

Section 59.99(7)(b), Stats., provides as follows:

(7) **Powers of board.** The board of adjustment shall have the following powers:

....

(b) To hear and decide special exceptions to the terms of the ordinance upon which such board is required to pass under such ordinance.

I note at the outset that under sec. 59.99(7)(a), Stats., the zoning board of appeals is empowered to hear and decide "appeals" of adverse zoning rulings, and under sec. 59.99(7)(c), Stats., it is empowered to authorize zoning variances "upon appeal," while its authority to "hear and decide special exceptions" makes no reference to the exercise of appellate jurisdiction under the statute.

In addition, sec. 59.99(1), Stats., provides that the county board may authorize the county board of adjustment to "make special exceptions to the terms of the [county zoning] ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained." Similar language in the city zoning statute, sec. 62.23(7)(e), Stats., was held to vest "exclusive authority in the board of zoning appeals to pass upon conditional uses or special exceptions." *State ex rel. Skelly Oil Co. v. Common Council*, 58 Wis. 2d 695, 703, 207 N.W.2d 585 (1973). But, by ch. 60, Laws of 1973, the Legislature promptly amended the zoning statutes to provide, in the case of sec. 59.99(1), Stats., that: "Nothing in this subsection shall preclude the granting of special exceptions by the county zoning agency designated under s. 59.97(2)(a) or the county board in accordance with regulations and restrictions adopted pursuant to s. 59.97 which were in effect on July 7, 1973 or adopted after that date."

In conclusion, there is no statutory requirement or right to appeal a decision of the County Planning and Zoning Committee, in reference to a special exception, to the County Zoning Board of Adjustment. However, in some counties the right to appeal such a decision may now exist under local zoning regulations adopted under the authority of sec. 59.99(1), Stats. In addition, the extent to which such a determination would be subject to the review procedures of ch. 68, Stats., the Municipal Administrative Procedure Act, would largely depend on the specific provisions of the local zoning or municipal administrative procedure ordinances involved.

BCL:JCM

Citizens Utility Board; Corporations; The creation of a corporation, the Citizens Utility Board, under ch. 199, Stats., is constitutional. OAG 41-80

July 3, 1980.

THE WISCONSIN LEGISLATURE
State Capitol

Chapter 72, Laws of 1979, the Citizens Utility Board Act, became effective on November 29, 1979. Section 1m of that chapter requests the Attorney General to give his opinion on the constitutionality of the state creating a corporation under that chapter, particularly in light of Wis. Const. art. XI, sec. 1.

Chapter 72, Laws of 1979, creates ch. 199, Stats. A "nonprofit public body corporate and politic," known as the "Citizens Utility Board" (CUB), is created under sec. 199.04(1), Stats. The purpose of the Board is to represent the interests of residential utility consumers in matters concerning electric, water, natural gas and telephone utilities in all levels of government, including advocacy as a party in the proceedings of state and local regulatory agencies such as the Public Service Commission. The state provides no funding to CUB under the act. Any residential utility consumer at least eighteen years old who has contributed at least \$3 but not more than \$100 to the Board in the preceding twelve months shall be a member of the corporation. CUB must have at least 1,000 members and at least \$10,000

in contributions within five years or it shall be dissolved. CUB is managed by a board of directors. Two directors represent each congressional district and are elected by members in the district.

The constitutionality of ch. 199, Stats., like any other statute, is presumed. The Wisconsin Supreme Court will find a legislative enactment unconstitutional only in the event that violation of a specific constitutional provision can be shown beyond a reasonable doubt, with all doubts to be resolved in favor of constitutionality. *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973).

The request for an attorney general's opinion regarding the constitutionality of ch. 199, Stats., makes specific reference to Wis. Const. art. XI, sec. 1. This section provides:

Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage.

Two related constitutional provisions are Wis. Const. art. IV, secs. 31 and 32. Wisconsin Constitution art. IV, sec. 31, provides in pertinent part:

The legislature is prohibited from enacting any special or private laws in the following cases:

....

7th. For granting corporate powers or privileges, except to cities.

Wisconsin Constitution art. IV, sec. 32, provides: "The legislature shall provide general laws for the transaction of any business that may be prohibited by section thirty-one of this article, and all such laws shall be uniform in their operation throughout the state."

In *Attorney General v. Railroad Companies*, 35 Wis. 425 (1874), the Wisconsin Supreme Court stated that Wis. Const. art. IV, secs. 31 and 32, acted upon the first clause of Wis. Const. art. XI, sec. 1, by removing the legislative discretion available to form corporations, for

other than municipal purposes, by special act, thus making it mandatory that the Legislature grant corporate powers except to cities only by general laws rather than by special laws. Therefore, if the creation of a corporation by the Legislature complies with Wis. Const. art. IV, secs. 31 and 32, it will also comply with the first clause of Wis. Const. art. XI, sec. 1.

The purpose of Wis. Const. art. IV, sec. 31, was discussed by the Wisconsin Supreme Court in *State ex rel. La Follette v. Reuter*, 36 Wis. 2d 96, 153 N.W.2d 49 (1967). After reviewing the background of the original constitutional amendment of 1871, which became Wis. Const. art. IV, sec. 31, the court stated: "The purpose of this constitutional provision is to insure that legislation will promote the general welfare and further statewide interests, as opposed to private concerns." 36 Wis. 2d at 113.

Since, unlike most corporations, CUB is specifically created by statute and specific powers are granted to it by statute, the question arises whether corporate powers or privileges are granted by special or private law in violation of Wis. Const. art. IV, sec. 31. Recent cases in which the Wisconsin Supreme Court has upheld the constitutionality of statutes specifically creating two corporate entities, the Wisconsin Housing Finance Authority and the Wisconsin Solid Waste Recycling Authority, suggest that ch. 199, Stats., is not a special or private law.

In *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 208 N.W.2d 780 (1973), the court considered the constitutionality of ch. 234, Stats., which created the Wisconsin Housing Finance Authority. The Authority was designed to issue notes and bonds and in turn was to make money available to the housing industry at reduced rates. The developers could then sell or rent housing to low and moderate income families, thereby tending to eliminate substandard housing conditions in the state and accomplish other objectives set forth in the enabling legislation. The court stated:

The Authority, denominated a public body corporate and politic, is granted only those powers "necessary or convenient" to implement the purposes of ch. 234, Stats. It was not the intention of the legislature to create a corporation in the ordinary sense. Ch. 234 grants to the Authority those corporate powers

essential to its performance in improving and otherwise promoting the health, welfare and prosperity of the people of this state.

59 Wis. 2d at 446. The court further stated that Wis. Const. art. IV, sec. 31, was not meant to deny the Legislature the authority to grant limited corporate powers to the entities it creates to promote a public and state purpose. The court held that ch. 234, Stats., was neither a special nor private law since it promoted a legitimate governmental and statewide purpose as declared by the Legislature rather than the promotion of private or local interests.

In *Wisconsin Solid Waste Recycling Auth. v. Earl*, 70 Wis. 2d 464, 235 N.W.2d 648 (1975), the court considered the constitutional validity of ch. 305, Laws of 1973, which created the Wisconsin Solid Waste Recycling Authority. The court found that the Authority involved a legitimate governmental and statewide purpose to assist local units of government and the private solid waste management industry in providing the necessary systems, facilities, technology and services for solid waste management and resources recovery. Relying on *Nusbaum*, the court concluded that the statute did not violate Wis. Const. art. IV, sec. 31.

Like the Wisconsin Housing Finance Authority, CUB was not intended by the Legislature to be a corporation in the ordinary sense. As previously noted, CUB is designated in sec. 199.04(1), Stats., as a public body corporate and politic. The corporation is provided, under sec. 199.05(2), Stats., with "all the powers necessary or convenient for the effective representation and protection of the interests of residential utility consumers and to implement this chapter." Also, sec. 199.02, Stats., expressly declares that CUB is created to promote public purposes, not private ones:

The purpose of this chapter is to promote the health, welfare and prosperity of all the citizens of this state by ensuring effective and democratic representation of individual farmers and other individual residential utility consumers before regulatory agencies, the legislature and other public bodies and by providing for consumer education on utility service costs and on benefits and methods of energy conservation. Such purpose shall be deemed a statewide interest and not a private or special concern.

Certainly the cost and distribution of public utility service is a public concern. This was recognized by the Wisconsin Supreme

Court over forty years ago in *State ex rel. Wisconsin Dev. Authority v. Dammann*, 228 Wis. 147, 277 N.W. 278 (1938). In considering whether the use by the Wisconsin Development Authority of a statutorily authorized appropriation was for a public purpose, the Wisconsin Supreme Court stated:

The use of electric energy and other services named [utility services] has become so essential in the industrial, commercial, agricultural, transportation, and domestic activities of everyday life, and to the economic well-being and general welfare of the people of this state, that it has come into the category of public necessities and the state-wide distribution thereof at the lowest possible reasonable cost can rightly be considered a matter of public concern and clothed with a public interest.

228 Wis. at 183-84.

Chapter 199, Stats., clearly promotes statewide interests as opposed to purely local ones. It applies uniformly statewide to residential utility consumers. The fact that only residential utility consumers may be members of CUB does not in my opinion make ch. 199, Stats., a special law rather than a general law. As the Wisconsin Supreme Court stated in *Johnson v. The City of Milwaukee*, 88 Wis. 383, 390, 60 N.W. 270 (1894):

It is not required that all general laws shall be equally general. A law legislating for a class is a general law when it is for a class "requiring legislation peculiar to itself in the matter covered by the law." A law relating to particular persons or things *as a class* is said to be general; while a law relating to particular persons or things *of a class* is deemed special and private. Whether such laws are to be deemed general laws or special laws depends very much upon whether the classification is appropriate.

(Emphasis supplied.)

The court in *Johnson* listed four rules for determining the propriety of a classification: 1) all classifications must be based on substantial distinctions which make one class really different from another; 2) the classification must be germane to the purpose of the law; 3) the classification must not be based on only existing circumstances; and 4) the law must apply equally to each member of the class. 88 Wis. at 390-92. CUB would seem to satisfy these tests. Significant

distinctions can be made between residential utility consumers and other consumers of utility services, in terms both of interests and representation before legislative and regulatory bodies. The interests of all residential utility consumers are to be represented by CUB and inclusion in the class is not limited to circumstances existing at the time ch. 199, Stats., became effective.

In summary, I believe the Wisconsin Supreme Court would find that the creation of CUB by ch. 199, Stats., promotes a legitimate public and statewide purpose as declared by the Legislature, and that ch. 199, Stats., is a general law rather than a special or private one. It is therefore my opinion that ch. 199, Stats., does not violate Wis. Const. art. XI, sec. 1, art. IV, sec. 31, or art. IV, sec. 32.

BCL:WCW

Bonds; Municipalities; A city may avoid the referendum procedures normally attendant to the issuance of general obligation bonds, by using alternative methods of financing which do not require referenda, such as borrowing on promissory notes under sec. 67.12(12), Stats. OAG 42-80

July 3, 1980.

FRED A. RISER, *President*
Wisconsin State Senate

As chairman of the Senate Committee on Organization, you have requested my opinion on the following question: "Do the electors of a fourth class city lose their right to petition for a referendum when the Common Council borrows money on long terms by means of bank notes rather than raising money through general obligation bonds?"

Generally speaking, a city may avoid the referendum procedures which are normally attendant to the issuance of its general obligation bonds, by utilizing alternative methods to borrow needed municipal funds. One typical alternative is borrowing on promissory notes under sec. 67.12(12), Stats.

General obligation bonds are issued by cities under the general authority of ch. 67, Stats., which imposes limitations on the powers of

municipalities to issue such obligations, and sets forth the purposes for which and the procedures by which such bonds may be issued. *See* secs. 67.03, 67.04(2), 67.05, Stats.

Section 67.03(1), Stats., states that, except for the few categories of municipal borrowing exempted from ch. 67, Stats., by sec. 67.01(8), Stats., "municipalities may borrow money and issue municipal obligations therefor only for the purposes and by the procedure specified in this chapter."

Except where the statutes specifically provide otherwise, the question as to whether municipal bonds should be issued is subject either to a mandatory referendum of the electorate or to a petition procedure which may require such submission, depending on the purpose for which the bonds are proposed to be issued. Sec. 67.05(5)(b), (7)(b), Stats. Nevertheless, the provisions of sec. 67.05, Stats., which authorize or require referendums on the question of the issuance of bonds, are not applicable to the issuance of promissory notes under the provisions of sec. 67.12(12), Stats. Section 67.05(14), Stats., specifically provides as follows:

Referendum not required for certain temporary borrowing.

This section shall not be construed to require, or at any time before July 9, 1955, to have required, the submission to the electors for approval of any borrowing under s. 67.12, the provisions of said s. 67.12 being controlling as to such borrowing.

The power to borrow on promissory notes for the general municipal purposes set forth in sec. 67.12(12)(a), Stats., is clearly in addition to the power to borrow through the issuance of bonds. In fact, although such a note must be payable within ten years, it may be extended or refunded by a refunding note which may also be for a term not exceeding ten years. Furthermore, under sec. 67.125, Stats., a city may borrow an amount not exceeding its uncollected delinquent taxes to pay off promissory notes issued under sec. 67.12(12), Stats., as well as to pay current and ordinary expenses, by the issuance of bonds or other evidences of indebtedness payable within five years. The question of the issuance of bonds under that statute need not be submitted to the electors for approval. Sec. 67.125(1), (2), Stats.

Where the statutes have conferred a procedure upon a city, its electors may not demand the submission of a question which would

modify the statutory authority. *Heider v. Wauwatosa*, 37 Wis. 2d 466, 477, 155 N.W.2d 17 (1967). But if the electors of the city desire that indebtedness created by past city borrowing through bank notes be refunded through the issuance of general obligation bonds, the electors may adopt an initial resolution for that purpose by the initiative and referendum procedure set forth in sec. 9.20, Stats., and the question of bonding for refunding such indebtedness will be submitted to the electors. Secs. 67.04(2)(r), 67.05(2)(b), (5)(b), Stats.

BCL:JCM

County Surveyor; Surveys; Duties of county and other land surveyors and minimum standards for property surveys discussed. OAG 43-80

July 8, 1980.

RALPH E. SHARP, *Corporation Counsel*

Dodge County

You ask six questions concerning the duties of the county surveyor, especially with respect to "mortgage surveys" performed within the county by other licensed land surveyors. You define a "mortgage survey" as an inexpensive, perfunctory land survey performed by a licensed land surveyor, usually at the request of a property owner, broker or lending institution, to roughly establish boundary lines and the general location of structures on the property. You also point out that Chapter A-E 5.01 Wis. Adm. Code, prescribes minimum standards for property surveys with specifications for boundary location, descriptions, maps, and measurement accuracy.

Your first question is:

Is it legal for a licensed land surveyor to make such a "mortgage survey" and to publish it labeled "plat of survey" or describe it in any manner as a "survey"?

Although I am not sure what you mean by "publish," your question seems to be whether land surveyors must comply with the mini-

mum standards of performance for any survey, regardless of its purpose.¹

To practice land surveying in this state, a person must be authorized to practice by the engineering section of the Examining Board of Architects and Professional Engineers, sec. 443.02(1), Stats. He or she must also comply with rules of the Examining Board of Architects, Professional Engineers, Designers, and Land Surveyors. Section A-E 5.01(2) Wis. Adm. Code, defines "property survey" as "any land surveying performed for the principal purpose of describing, monumenting or mapping one or more parcels of land." Section A-E 5.01 Wis. Adm. Code provides as follows:

Minimum standards for property surveys. (1) SCOPE. The minimum standards of this section apply to every property survey performed in this state except that,

- (a) Where other standards for property surveys are prescribed by statute, administrative rule or ordinance, then such standards shall govern; and
- (b) The land surveyor and his client or employer may agree to exclude any land surveying work from the requirements of this section providing such agreement is set forth in writing and is signed by the client or employer and specifically refers to this section.

By its terms, then, the rule recognizes three categories of property surveys: those which meet minimum standards, those surveys for which standards are set in a separate statutory or administrative provision,² and surveys which do not meet minimum standards. For this third category, however, the land surveyor's client must expressly waive the minimum standards of Chapter A-E 5 Wis. Adm. Code. This rule provides consumer protection by requiring either compliance with standards or an intelligent waiver of those standards by the consumer.

¹ Note that "plat of survey" is a misnomer in the context you describe. A "plat" is defined as a map of a subdivision, sec. 236.02(6), Stats.

² Examples of surveys in the second category are "final plats of subdivided land," sec. 236.20, Stats.; "certified surveys," which may be used for conveyancing, sec. 236.34, Stats.; surveys performed for towns, secs. 60.37-.38, Stats., and condominium plats, sec. 703.11, Stats.

The typical "mortgage survey" you describe would probably fall into the first or third category. If the mortgage survey meets the minimum standards, it is indeed a "survey" and may be described as such. If the mortgage survey is not intended to meet minimum standards, the surveyor must obtain the client's written waiver of the minimum requirements before he or she performs the survey.

Your second question is:

Is the licensed land surveyor preparing such "mortgage survey" required by 59.60(2) to present such survey to the county surveyor's office for recording and indexing in the county surveyor's office?

Section 59.60, Stats., sets forth the duties of the county surveyor. One of those duties is to keep records and an index of all surveys performed within the county by any land surveyor, sec. 59.60(2), Stats. The purpose of the statute is to provide "a central depository for the records and files of the county surveyor and for all surveys made within the county, that such records and field notes be county property, and that said depository be at the office of the county surveyor in offices furnished by the county and open during usual business hours." 60 Op. Att'y Gen. 134, 137 (1971). Section 59.60(6), Stats., requires all land surveyors to file (not record) surveys as follows:

Surveys for individuals or corporations may be performed by any land surveyor who is employed by the parties requiring his services, providing that within 60 days after completing any survey he files a true and correct copy of the survey in the office of the county surveyor. In counties having a population of 500,000 or more the copy shall be filed in the office of the register of deeds.

Since the statute requires the filing of *any* survey, I cannot read in an exception for surveys that do not meet the minimum standards of Chapter A-E 5 Wis. Adm. Code. I do suggest, however, that if a mortgage survey does not meet minimum standards, the land surveyor may want to protect his own interest by filing the client's written waiver of minimum standards along with the survey or by stating on the face of the survey that it does not meet minimum standards.

Your third question is:

Does the county surveyor have the right to refuse to record or list such survey if he feels that the "survey" is so inaccurate that it is of no value?

The answer to this question is no.

The county surveyor has no statutory discretionary authority to evaluate or refuse surveys brought to him by registered land surveyors for filing. The county surveyor may, however, report "any gross negligence, incompetence or misconduct in the practice of land surveying" to the Examining Board of Architects, Professional Engineers, Designers and Land Surveyors for consideration of disciplinary action against the surveyor under sec. 443.02(8), Stats.

Your fourth question is:

Does the county surveyor have the authority to investigate to see if Chapter A-E 5.01(b) of the Administrative Code is being complied with as to the agreement set forth in writing between the client or employer and the surveyor?

The answer to this question is no.

The county surveyor's duties as set forth in sec. 59.60, Stats., are to perform surveys as the county or a court directs and to keep records of all surveys performed within the county. The county surveyor does not have the authority to investigate other surveyors' work. As pointed out in my response to the previous question, however, anyone—including the county surveyor or a client—may report apparent deficiencies to the examining board. Moreover, disputes between land surveyors and their clients concerning errors or omissions in the making of any survey may be resolved in court by private lawsuit. *See* sec. 59.665, Stats.

You also ask whether the county surveyor or the district attorney has the duty to collect fines against land surveyors for failure to perform duties required by law.

Section 59.66, Stats., provides: "Any county surveyor, city or village engineer, or any land surveyor who fails or refuses to perform any duty required of him by law shall be fined not less than \$25 nor more than \$50 for each such failure or refusal."

Under the authority of sec. 59.47(1), Stats., and upon the complaint of any person, the district attorney may bring action to fine a surveyor who fails or refuses to perform required duties.

Finally, you ask whether land surveyors must file surveys in the county where the surveyed land is located, or whether it is permissible for them to file surveys in the county of their principal place of business.

Copies of all surveys performed must be filed with the county surveyor in the county where the land is located. Sec. 59.60, Stats. To allow filing in another county would defeat the legislative intent “[t]hat there be a central depository for ... all surveys made within the county” and that these surveys be accessible to the citizens of the county. 60 Op. Att'y Gen. 134, 137 (1971). Failure to file a survey in the county in which the land is located is nonfeasance actionable under sec. 59.66, Stats., as discussed above.

BCL:JPA:MS

Bail; Constitutionality; Criminal Law; Chapter 112, section 10, Laws of 1979 which allows courts to revoke bail for violating judicially imposed conditions of bail does not violate Wis. Const. art. I, sec. 8. OAG 44-80

July 8, 1980.

E. MICHAEL McCANN, *District Attorney*
Milwaukee County

You have asked my opinion whether ch. 112, sec. 10, Laws of 1979, the recently enacted bail reform statute, violates the second sentence of Wis. Const. art. I, sec. 8. I have concluded that this legislation probably does not violate the constitution.

Chapter 112, Laws of 1979, has the following intended effects:

- 1) Specifies that a violation of a bail condition constitutes a ground for a court's increasing the amount of bail or in some other respect altering bail conditions.

- 2) Requires as a condition of all bail releases that commission of a crime may result in an increase of the bail amount or alteration of bail conditions.
- 3) Further provides that violation of the no-crime condition of bail constitutes a ground for revocation of bail where the new crime and the previous offense are both "serious crimes" as defined by the act.

Clearly, the enactment of legislation resulting in the first two effects is within the discretion of the Legislature and presents no constitutional difficulties. The third intended effect poses a potential conflict with Wis. Const. art. I, sec. 8, which provides "[a] ll persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great."

The United States Constitution does not have a comparable provision to Wis. Const. art. I, sec. 8. Numerous states do, however, and have dealt with issues similar to those raised by your request. Had the Legislature enacted a statute providing for the denial of bail when the likelihood existed that the accused would commit additional crimes while out on bail, such a preventive detention law would probably be in violation of Wis. Const. art. I, sec. 8. *Commonwealth v. Truesdale*, 449 Pa. 325, 296 A.2d 829 (1972); *In re Underwood*, 107 Cal. Rptr. 401, 508 P.2d 721 (1973); *State v. Pray*, 133 Vt. 537, 346 A.2d 227 (1975) and *Martin v. Alaska*, 517 P.2d 1389 (Alaska 1974).

The Legislature, however, wisely chose another course which avoids the constitutional hurdle presented by preventive detention laws. Instead of providing for detention when the public safety may be threatened by the accused, the Legislature chose to impose as a condition of bail that the accused not commit any specified crime. If this condition is violated, a hearing is held at which the state has the burden of proving by clear and convincing evidence that the defendant committed the offense while on bail. A full panoply of rights and constitutional safeguards are afforded the accused at the bail revocation hearing.

The courts have uniformly held that conditions can be imposed on bail. The question then arises of what remedies are available to the court for violating these conditions. When the conduct of an accused interferes with the orderly administration of justice, bail can be revoked in spite of constitutional or legislative declarations to the

contrary. In *State v. Dodson*, 556 S.W.2d 938 (Mo. App. 1977), the court upheld the denial of bail to an individual charged with multiple counts of murder after a hearing in which evidence was adduced showing that the accused would be a threat to prospective witnesses even though Missouri had a constitutional provision identical to Wis. Const. art. I, sec. 8.

In *United States v. Smith*, 444 F.2d 61, 62 (8th Cir. 1971), *cert. denied*, 405 U.S. 977 (1972), the court discussed the concept of bail in general: "While bail is favored and is granted in the ordinary course of events, an accused by his actions can forfeit the right to bail and the court is under a duty to protect prospective witnesses." See generally, *United States v. Kirk*, 534 F.2d 1262, 1280-81 (8th Cir. 1976), which upheld the inherent power of a court to revoke bail and which reaffirmed the holding in *Smith*.

As mentioned above, the United States Constitution does not have a provision comparable to our Wis. Const. art. I, sec. 8. Similar wording does exist in Rule 46(a)(1) of the Federal Rules of Criminal Procedure which incorporates 18 U.S.C. sec. 3146, *et al.* Under these provisions, an individual in a noncapital case *shall* be admitted to bail. In *Fernandez et al. v. United States*, 81 S. Ct. 642 (1961), multiple defendants applied to a Supreme Court justice for release on bail. Their bail had been revoked during trial, and they alleged this revocation violated the above-stated rule. Mr. Justice Harlan specifically refuted their argument that the mandatory language of the federal rule gave an absolute right to bail prior to conviction. He stated:

I agree with the reasoning of the Rice Case, and believe that, on principle, District Courts have authority, as an incident of their inherent powers to manage the conduct of proceedings before them, to revoke bail during the course of a criminal trial, when such action is appropriate to the orderly progress of the trial and the fair administration of justice.

Fernandez et al., 81 S. Ct. at 644.

The Wisconsin Supreme Court has ruled in a similar manner on two occasions. See, *Beverly v. State*, 47 Wis. 2d 725, 177 N.W.2d 870 (1970) and *Mulkovich v. State*, 73 Wis. 2d 464, 243 N.W.2d 198 (1976). Neither of these cases discussed Wis. Const. art. I, sec. 8, but in both instances the court upheld the right to revoke bail after a hearing.

The State of Illinois also has a constitutional provision identical to Wis. Const. art. I, sec. 8. In *People ex rel. Hemingway v. Elrod*, 60 Ill. 2d 74, 322 N.E.2d 837 (1975), the petitioner, who was charged with a noncapital offense and denied bail prior to trial, challenged the trial court's action in light of the Illinois constitutional provision which seemingly made the right to bail absolute. In denying that this provision made bail absolute, the court stated: "In our opinion the constitutional right to bail must be qualified by the authority of the courts, as an incident of their power to manage the conduct of proceedings before them, to deny or revoke bail when such action is appropriate to preserve the orderly process of criminal procedure." *People ex rel. Hemingway*, 322 N.E.2d at 840. The court then discussed the work of the advisory committee on pretrial proceedings of the American Bar Association Project on Minimum Standards for Criminal Justice and noted that Standard 5.8 of the American Bar Association Standards Relating to Pretrial Release (1968) specifically upholds the right of a court to revoke bail in situations where probable cause have been shown that the accused committed a serious crime while on bail. The court in discussing their bail law dealing with breaches of the conditions of bail stated:

The court has the inherent authority to enforce its orders and to require reasonable conduct from those over whom it has jurisdiction. To this end the court has the authority to impose sanctions for the violation of conditions imposed upon a defendant's release and for the commission of a felony by a defendant while released on bail or recognizance, including the revocation of his release in the manner provided in Standards 5.6, 5.7 and 5.8.

The seemingly absolute right to bail which constitutional provisions such as Wis. Const. art. I, sec. 8, appear to give is thus anything but absolute. See, *Tijerina v. Baker*, 78 N.M. 770, 438 P.2d 514 (1968). In *Rendel v. Mummert*, 106 Ariz. 233, 474 P.2d 824 (1970), the court faced a constitutional provision appearing to grant an absolute right to bail. The court upheld the right to revoke bail prior to trial under circumstances like those set forth in ch. 112, sec. 10, Laws of 1979, relying upon the American Bar Association Standards Relating to Pretrial Release (1968). The law which you question complies with these American Bar Association Standards.

The revocation of bail prior to trial has the same result as preventive detention—the denial of liberty to a presumably innocent person.

Yet the former can be distinguished from the latter on many policy grounds. Revocation is not mandatory under Wisconsin's new bail law while often it is under preventive detention schemes. One of the major difficulties with preventive detention is that it calls upon the court to prognosticate potential criminal behavior. The judge must decide if the accused poses a threat to society. Under the Wisconsin proposal, such is not the case for the keys to the jail house are placed in the hands of the defendant. If that person avoids all criminal conduct, freedom will be continued. If serious crimes are probably committed as demonstrated through a constitutional procedure before the court, incarceration may result. As long as the pretrial detention is not absolute and as long as it is invoked for violating lawful orders of the court issued as condition of bail, ch. 112, sec. 10, Laws of 1979, is not in violation of Wis. Const. art. I, sec. 8.

BCL:MLZ

Intoxicating Liquors; Words And Phrases; It is not illegal, under sec. 176.07, Stats., to allow the carry-out of an intoxicating liquor from a "Class B" licensed premises between 12 midnight and 8 a.m. if the sale of the liquor occurred before 12 midnight. "Sale" defined. OAG 45-80

July 9, 1980.

FRED A. RISSEK, President
Wisconsin State Senate

The Senate Committee on Organization requests an opinion on sec. 176.07, Stats., created by ch. 331, Laws of 1979, relating to sale and use of alcoholic beverages.

It specifically asks:

1. Under s. 176.07, created by Chapter 331, section 45, Laws of 1979, is it illegal for a person between 12:00 midnight and 8:00 a.m. to carry out of a "Class B" licensed premises an intoxicating liquor in an original package, container or bottle, if it was sold before 12:00 midnight, for consumption away from the premises?

2. What constitutes a sale within the meaning of this statute?

Section 176.07(1), Stats., created by ch. 331, Laws of 1979, states: "Between 12 midnight and 8 a.m. no person may sell intoxicating liquor on "Class B" licensed premises in an original unopened package, container or bottle or for consumption away from the premises."

The definition of a sale is provided in sec. 402.106(1), Stats., which states in part, "[a] 'sale' consists in the passing of title from the seller to the buyer for a price."

Section 402.401, Stats., discusses the passing of title. Section 402.401(1), Stats., provides:

Title to goods cannot pass under a contract for sale prior to their identification to the contract (s. 402.501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this code. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of ch. 409, title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

Section 402.105(1), Stats., provides in part: "'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale."

Section 402.105(2), Stats., provides: "Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are 'future' goods. A purported present sale of future goods or of any interest therein operates as a contract to sell."

The language of sec. 402.105(2), Stats., is consistent with the definition of sale contained in sec. 176.01(4), Stats.: "The term 'sell' or 'sold' or 'sale' includes the transfer, gift, barter, trade or exchange, or any shift, device, scheme or transaction whatever whereby intoxicating liquors may be obtained, but does not include the solicitation of orders for, or the sale for future delivery of, intoxicating liquors."

Intoxicating liquor in an original package, container or bottle, or for consumption away from the premises, would be "goods" within the meaning of sec. 402.105(1), Stats. While these goods are existing and movable, they must also be identified before an interest (title to the goods) in them can pass.

Section 402.501, Stats., deals with the manner of identification of goods. Section 402.501(1), Stats., provides that identification may generally be made in any manner "explicitly agreed to" by the parties. Thus, if an individual asks an owner or employe of a "Class B" licensed premises for a bottle of liquor, the bottle would be identified as goods for the purchaser if, for example, they had agreed that the bottle, placed in a bag and into a cooler, was the purchaser's.

Can there be identification in the absence of explicit agreement? Section 402.501(1)(a), Stats., provides:

In the absence of explicit agreement identification occurs:

- (a) When the contract is made if it is for the sale of goods already existing and identified.

The Legislative Council's comment to this subsection provides a most useful explanation of sec. 402.501(1)(a), Stats. The comment provides in part:

5. Undivided shares in an identified fungible bulk, such as grain in an elevator or oil in a storage tank, can be sold. The mere making of the contract with reference to an undivided share in an identified fungible bulk is enough under subsection (a) to effect an identification if there is no explicit agreement otherwise.

Wisconsin Legislative Council—1961 Report.

Thus, if an individual orders a bottle of intoxicating liquor and the bottle is stored with others on a shelf, the identification of the shelf and brand would effect an identification so that the identification requirement of sec. 402.105(2), Stats., would be met.

If the goods exist and are identified, there still must be a passing of title before a sale can occur. Sec. 402.106(1), Stats. Passing of title is discussed in sec. 402.401, Stats. Within that section subsec. (3)(b) bears directly on the issue:

(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods:

....

(b) If the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

The sale is completed, then, (1) at the time and place of contracting if the goods already exist and are identified (sec. 402.401(3)(b), Stats.), or (2) (subject to provisions of sec. 402.401(1), Stats., and ch. 409, Stats.), where buyer and seller, in any manner and on any conditions explicitly agreed on by them for the passing of title, pass the title of goods already existing and identified. (Sec. 402.401(1), Stats.)

We now turn to the first question. Section 176.07(1), Stats., makes the sale of intoxicating liquor between 12 midnight and 8:00 a.m. illegal. If the sale, as previously discussed, occurred before the proscribed time, carrying out the intoxicating liquor after 12 midnight would not result in a conviction. The law prohibits sale, not carrying out.

The sale of goods is not dependent upon the carrying away of goods. A sale can be consummated even before the delivery of the goods to the purchaser. "It seems clear that, if there is a sale and the buyer has obtained title to the goods, his status as a buyer in ordinary course will not be defeated merely because he has not taken possession." *Chrysler Corp. v. Adamatic, Inc.*, 59 Wis. 2d 219, 239, 208 N.W.2d 97, 107 (1973). Where delivery is not an integral part of the transaction, a sale can occur without concurrent delivery. Thus, if a person purchases intoxicating liquor before 12 midnight, the sale will be completed even if the purchaser requests that the seller store the goods in a cooler and the purchaser carries out the already purchased liquor after 12 midnight. But even if delivery were required for the completion of a sale, the concept of constructive delivery would probably fulfill the delivery requirement and provide a defense to prosecutions. "Constructive delivery is a general term comprehending all those acts which, although not truly conferring a real possession on the vendee, have been held by construction of law equivalent to acts of real delivery." *Lakeview Gardens v. State ex rel. Schneider*, 221

Kan. 211, 557 P.2d 1286, 1290 (1976). In *Lakeview*, the court reiterated holdings of previous authority by stating:

There may be a completed delivery although goods remain in the possession of the seller if the seller's possession is as an agent or at the request of the buyer under an agreement to store or care for the property, and nothing further remains to be done by either party to complete the sale.

557 P.2d at 1290-91.

In conclusion, it appears that the only way a person could be convicted for a violation of sec. 176.07(1), Stats., created by ch. 331, Laws of 1979, would be by proof that that person was involved in a sale of liquor after 12 midnight. A sale of liquor before 12 midnight would not disallow the carry out of that liquor after 12 midnight.

Although the Committee was not requested to ask my advice concerning sec. 66.054(10)(d), Stats., which contains identical prohibitions concerning fermented malt beverages, it is my advice that the same reasoning and conclusions apply to situations under that statute regarding the sale of beer as are stated above regarding the sale of intoxicating liquor.

While secs. 28 and 45 of ch. 331, Laws of 1979, were commonly referred to as the carry-out law and it may have been the intent of the drafter to prevent the carrying out of intoxicating liquor and fermented beverages between 12 midnight and 8 a.m., the foregoing conclusions suggest that it may be difficult to obtain a conviction if the only proof is the fact of the carry-out after 12 midnight. Violation of sec. 66.054 and ch. 176, Stats., can result in a fine of not more than \$500 or county jail imprisonment of not more than ninety days. We are thus dealing with statutes of a penal nature and must therefore construe them strictly against the state. *State v. Wrobel*, 24 Wis. 2d 270, 128 N.W.2d 629 (1964). I would suggest that if further amendments are contemplated, specific language be used to spell out exactly what is proscribed.

BCL:WHW:NB

Courts; Probation And Parole; Probation—consecutive terms. Under sec. 973.09(1), Stats., a court may not impose consecutive probation terms. OAG 46-80

July 23, 1980.

DONALD E. PERCY, *Secretary*
Department of Health and Social Services

You have requested my opinion on the following questions:

1. May a court impose consecutive probation terms for convictions of either felonies or misdemeanors under sec. 973.09(1), Stats.?
2. May a court place a revoked probationer back on probation when the probationer is returned to court for sentencing pursuant to sec. 973.10(2)(a), Stats.?

Section 973.09(1), Stats., provides:

When a person is convicted of a crime, the court may, by order, withhold sentence or impose sentence and stay its execution, and in either case place him on probation to the department for a stated period, stating in the order the reasons therefor, and may impose any conditions which appear to be reasonable and appropriate. The period of probation may be made consecutive to a sentence on a different charge, whether imposed at the same time or previously.

It is noted that you have specifically used the terms "felonies" and "misdemeanors" in your first question regarding consecutive probation terms. In that regard, sec. 973.09(1), Stats., authorizes the court to impose probation whenever a person is convicted of "a crime." In view of the definitional provisions of sec. 939.60, Stats., the distinction between felonies and misdemeanors is not dispositive of the issue concerning consecutive probation terms in that both are crimes.

Ordinarily, where a statute is clear and unambiguous interpretation is unnecessary and it is improper to review matters outside the statutory language, including the legislative history, to determine the meaning intended. *Harris v. Kelly*, 70 Wis. 2d 242, 234 N.W.2d 628

(1975). While it might appear that sec. 973.09(1), Stats., is unambiguous on its face, issues raised in the case of *Prue v. State*, 63 Wis. 2d 109, 216 N.W.2d 43 (1974), suggests that the terms "sentence" and "probation" are less than unambiguous.

In connection with issues which differ from that raised in your first question, the supreme court concluded in *Prue*, that the word "sentence" is a legal term and that probation and sentence involve different concepts. Recognizing this distinction, the Legislature amended sec. 973.10(1), Stats., which deals with the control and supervision of probationers so that there is no longer a statutory reference to a "sentence of probation." See, ch. 157, Laws of 1975. Consequently, whether or not the imposition of probation constitutes a sentence has been laid to rest in this state.

Probation consecutive to an executed sentence imposed on a different charge is specifically authorized by sec. 973.09(1), Stats., and so recognized in *Garski v. State*, 75 Wis. 2d 62, 68, 248 N.W.2d 425 (1977). Nevertheless, other questions arise because the statute authorizing probation is silent with respect to consecutive periods of probation. As pointed out above, while sec. 973.09(1), Stats., provides that a period of probation may be made consecutive to "a sentence," it does not expressly state that a period of probation may be made consecutive to another period of probation.

A review of the legislative history reveals that the predecessor statute to sec. 973.09(1), Stats., sec. 57.01, Stats. (1967), provided in pertinent part: "*Consecutive periods of probation may be imposed. In case the conditions of probation are violated, the current probation and all subsequent consecutive probations shall be revoked.*"

By 1969 Assembly Bill 603, later ch. 255, sec. 63, Laws of 1969, effective July 1, 1969, the above language was deleted from the general probation statute, now renumbered as sec. 973.09(1), Stats. The only relevant language which remains, appears in the present statute exactly as it did in the predecessor statute, and provides: "The period of probation may be made consecutive to a sentence on a different charge, whether imposed at the same time or previously." The word "sentence" in this statute has been interpreted to mean a term of confinement and not to include the disposition of probation under a general definition of sentence. *Prue*.

It is clear from cases such as *State v. Sittig*, 75 Wis. 2d 497, 500, 249 N.W.2d 770 (1977); *Drinkwater v. State*, 69 Wis. 2d 60, 65, 230 N.W.2d 126 (1975); and *Drewniak v. State ex rel. Jacquest*, 239 Wis. 475, 488, 1 N.W.2d 899 (1942), that the supreme court has repeatedly committed itself to the doctrine that courts have no inherent power to stay or suspend execution of a sentence in a criminal case in the absence of statutory authority. In 60 Op. Att'y Gen. 271 (1971), it was pointed out that a court may grant probation only as authorized in sec. 973.09(1), Stats.

Unlike some jurisdictions, trial courts in Wisconsin have no inherent power to defer the execution of a sentence in a criminal case. *Drinkwater*, 69 Wis. 2d at 65, 66; *Drewniak*, 239 Wis. at 484. This also includes a stay of execution of a sentence for the purpose of probation. *Drinkwater; Ex parte United States*, 242 U.S. 27 (1916); *State ex rel. Zabel v. Municipal Court*, 179 Wis. 195, 201, 190 N.W. 121, 191 N.W. 565 (1923). Thus, any such action must be specifically authorized by statute. *Drinkwater; Guyton v. State*, 69 Wis. 2d 663, 230 N.W.2d 726 (1975).

Since the authority to grant probation is a power given to trial courts by the Legislature, first granted by ch. 541, Laws of 1909, and not a power inherent in the courts, it follows that a grant of probation and the courts, it follows that a grant of probation and the authority to defer execution of terms of probation can only be ordered as permitted by statute. *Guyton*, 69 Wis. 2d at 665.

In conclusion, because Wisconsin trial courts have only the authority granted them by statute because the Legislature specifically deleted the prior statutory authority to impose consecutive periods of probation and because it is clear that under Wisconsin case law a period of probation is not a "sentence" with respect to secs. 973.09 and 973.10, Stats., it is my opinion that trial courts presently do not have the authority to impose consecutive terms of probation.

Your second question asks whether a court may place a revoked probationer back on probation when the probationer is returned to the court for sentencing.

While this issue is, at your request, presently pending before the Wisconsin Court of Appeals, Branch III, in the case of *State v. Brian Young*, Case No. 80-367-CR, the Wisconsin Supreme Court has

already answered the question in *State v. Baglie*, 76 Wis. 2d 206, 251 N.W.2d 36 (1977), where, at 208-09 it held:

Since sec. 973.10(2) mandates that the defendant brought again before the trial court after probation revocation be sentenced, there can be no allowance for the imposition of probation. In *Prue v. State*, 63 Wis. 2d 109, 216 N.W.2d 43 (1974), this court stated, "Certainly in this subsection [973.10(2)] 'sentence' does not include probation." *Id.* at 116, 216 N.W.2d at 46.

It follows, therefore, that the trial judge exceeded his authority under sec. 973.10(2) when ... he extended defendant's term of probation.

Consistent with this decision, I am, therefore, of the opinion that the answer to your second question is, no.

BCL:MEP

Appropriations And Expenditures; Constitutionality; Navigable Waters; Dredging a navigable waterway to alleviate periodic flooding is not a prohibited "work of internal improvement" within the meaning of Wis. Const. art. VIII, sec. 10. OAG 49-80

August 7, 1980.

ED JACKAMONIS, *Speaker*
Wisconsin State Assembly

On behalf of the Assembly Committee on Organization, you ask whether the Wisconsin Constitution's prohibition on the expenditure of state funds for "works of internal improvement" applies to the use of state funds to dredge the bed of a navigable river to alleviate periodic flooding.

Wisconsin Constitution art. VIII, sec. 10, provides in part that "[t]he state shall never contract any debt for works of internal improvement, or be a party in carrying on such works."

The Wisconsin Supreme Court in 1915 adopted the following definition of internal improvements:

"Works of internal improvement," as used in the constitution, means, not merely the construction or improvement of channels of trade and commerce, but any kind of public works, *except those used by and for the state in performance of its governmental functions*, such as a state capitol, state university, penitentiaries, reformatories, asylums, quarantine buildings, and the like, for the purposes of education, the prevention of crime, charity, the preservation of public health, furnishing accommodations for the transaction of public business by state officers, and other like recognized functions of state government."

State ex rel. Owen v. Donald, 160 Wis. 21, 79, 15 N.W. 331 (1915) (emphasis supplied).

Since 1915 both the Wisconsin Supreme Court and my predecessors have often been asked to determine whether specific state expenditures are exempt from the constitutional prohibition because they perform a governmental function. See Eich, *A New Look at the Internal Improvements and Public Purpose Rules*, 1970 Wis. L. Rev. 1113. Although the answers to these questions have sometimes conflicted, two central concepts govern the resolution of the issue. First, constitutional rules are not immutable: times change, and courts have an obligation to interpret constitutional provisions in the light of present-day conditions that could not possibly have been foreseen by the drafters of the constitution. *Wisconsin Solid Waste Recycling Auth. v. Earl*, 70 Wis. 2d 464, 490, 235 N.W.2d 648 (1975). Moreover,

The impact of civilization upon the social structure may well be such that by mere passage of time, an activity once deemed within this constitutional ban becomes an activity which can no longer be said to be within it. ... Experience may well show that if the problem is to be met at all it must be met by the government.

30 Op. Att'y Gen. 343, 345-46 (1941).

The second key concept concerns the purpose of the state expenditure in question. In determining whether an expenditure is for a work of internal improvement, focus should be less on the end result or object of the expenditure than on the reason *why* state funds are being used—the "governmental function." This distinction between

the product and the purpose of the expenditure was sharply drawn in 58 Op. Att'y Gen. 120, 135 (1969), which advised that state financial participation in the construction of the Milwaukee Convention Center would have to be limited to "the clearly identifiable portion of the center allocated to use as a state-operated tourist center or some similar state governmental function." The product-purpose distinction is likewise relevant to the question you pose about dredging activities in the Manitowoc River. The expenditure of state funds for dredging, damming or any other project can only be sanctioned if the primary purpose of the work is to fulfill a governmental function, and not to provide a private benefit.

You state that the purpose of the proposed dredging would be to alleviate periodic river flooding. In 57 Op. Att'y Gen. 228 (1968), I advised the Legislative Council that the appropriation of state funds to municipalities to construct dams for flood control purposes did not violate the internal improvements clause. In so advising, I departed from earlier opinions to the effect that state-constructed dams and levees were prohibited works of internal improvement. This departure was made in recognition of both the changing needs of our society and the Wisconsin Supreme Court's decision in *State ex rel. La Follette v. Reuter*, 33 Wis. 2d 384, 403, 147 N.W.2d 304 (1967), that water pollution abatement is a governmental function under the internal improvements clause. I concluded:

In my opinion there can be little doubt that construction of a flood control dam must today be viewed as furthering a governmental function. We need look no further than the public health functions relied upon in *State ex rel. La Follette v. Reuter*. Not only is a direct threat to the public health found in flood damage to life and property, but it is also well known that floods create significant dangers to public health by such indirect effects as pollution of the water supply.

Flood control dams also protect *public safety*. The definition of works of internal improvement adopted in *La Follette v. Reuter* does not expressly include protection of public safety as a governmental function outside the scope of the internal improvement prohibition. It does, however, include "other like recognized functions of state government." I know of no more universally recognized function of government at any level than the protection of public safety and I must conclude that it is

within the governmental roles anticipated by the court in the above definition.

57 Op. Att'y Gen. at 230 (emphasis supplied).

I find nothing in subsequent court decisions to cause a change in my 1968 opinion. Perhaps your concern in asking this question is that dredging a navigable river for flood control is not as tangible a "work" of internal improvement as building a dam or a pollution abatement facility. As discussed above, however, it is the purpose—flood control—that governs, not the end product. Moreover, it could even be argued that dredging is mere maintenance of the status quo instead of a work of internal improvement. *See* 55 Op. Att'y Gen. 61 (1966); 30 Op. Att'y Gen. 343 (1941).

Since my 1968 opinion, the Wisconsin Supreme Court has found a "governmental function" exempting state expenditures from the internal improvements clause for purposes as broad and diverse as providing housing and recycling solid waste. *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 208 N.W.2d 780 (1973); *Wisconsin Solid Waste Recycling Auth. v. Earl*, 70 Wis. 2d 464, 235 N.W.2d 648 (1975). I see no reason to change my 1968 opinion that the construction of dams to control flooding does not violate the internal improvements clause, and that opinion directly controls the fact situation you presented.

BCL:MS

Confidential Reports; Minors; Juvenile officers are not required to provide information in their possession concerning a juvenile to officials of the school attended by the juvenile when requested to do so. The school does not violate the confidential exchange provisions of sec. 48.396(1), Stats., by using the information obtained from a police officer to take disciplinary action against a student as long as the school does not reveal the reason for the disciplinary action to parties not authorized to receive such information. To the extent that 56 Op. Att'y Gen. 211 (1967) is in conflict with this opinion, it is modified. OAG 50-80

August 19, 1980.

MICHAEL RAJECK, *District Attorney*

Pierce County

Your predecessor requested an opinion regarding the construction of sec. 48.396(1), Stats. Specifically, he asked two questions concerning the confidential exchange of juvenile records between juvenile officers and school officials:

1. Does the juvenile officer have to provide information in his or her possession concerning a juvenile to officials of the school attended by the juvenile when requested to do so by school officials?
2. Is the school violating the confidential exchange provisions of sec. 48.396(1), Stats., by using the information exchanged between a juvenile officer and school officials to take disciplinary action against a student?

For the reasons discussed below, my opinion is that the confidential exchange provision of sec. 48.396(1), Stats., does not require a juvenile officer to provide officials of the school attended by a child with information in the officer's possession concerning the child. Furthermore, in my opinion, school officials do not necessarily violate the confidential exchange provision by using the information exchanged to take disciplinary action against the child if the confidentiality of that information is properly preserved by school officials.

Section 48.396(1), Stats., provides as follows:

Peace officers' records of children shall be kept separate from records of persons 18 or older and shall not be open to inspection or their contents disclosed except by order of the court or according to s. 48.293. This subsection shall not apply to the representatives of newspapers or other reporters of news who wish to obtain information for the purpose of reporting news without revealing the identity of the child involved or to the confidential exchange of information between the police and officials of the school attended by the child or other law enforcement or social welfare agencies or to children 16 or older who are transferred to the criminal courts.

While sec. 48.396(1), Stats., provides a qualified exception to the prohibition of public inspection or disclosure of juvenile records except by order of the court or to permit the confidential exchange of information between juvenile officers and school officials, it certainly does not *require* an officer to provide such information whenever requested to do so by school officials. In my opinion, sec. 48.396(1), Stats., merely allows for disclosure of this information. By its language this provision is an exception to confidentiality; it does not affirmatively require disclosure. What is unclear is the scope of the exception. To what extent, if any, is a juvenile officer's discretion to disclose information to school officials limited? The juvenile officer would have the general right to withhold information unless disclosure was required by another statute. I find no such statutory requirement. For an answer to this question resort must be had to the legislative purposes of the Children's Code, set forth in sec. 48.01, Stats., which provides, in part, that "[T]he best interests of the child shall always be of paramount consideration." Sec. 48.01(2), Stats. In addition, sec. 48.01, Stats., expresses a policy choice of supervision, care and rehabilitation over punishment and stigmatization. Sec. 48.01(1)(c), Stats. The Code also reflects the policy decision to protect the constitutional due process rights of children. Sec. 48.01(1)(a), Stats.

Thus, in my opinion, a juvenile officer should not disclose information concerning a child when there is reason to believe that the information sought will not or could not practically be kept confidential as required by sec. 48.396(1), Stats. Further support for the discretionary nature of a juvenile officer's duty to exchange confidential information with school officials is found in *Winburn v. State*, 32 Wis. 2d 152, 162, 145 N.W.2d 178 (1966), where the court stated, "[i]t is common knowledge also that juvenile records do not, in fact, have a confidential status. Peace officers' records may be communicated to school authorities and to other law-enforcement agencies."

The above discussion to some extent foreshadows my analysis of your second inquiry concerning the use to which school officials may put confidential information provided by a juvenile officer. In my opinion, if such confidential information is released to school officials it should be used prospectively rather than retrospectively. That is, I believe that the information can be used to promote an awareness of the child's problems among appropriate school staff for purposes of

future counseling and guidance, or for purposes of avoiding placing that child or classmates in situations that would be harmful to their mutual welfare. The Children's Code clearly indicates a strong public policy to prevent any proceedings, whether formal or informal, from being utilized in any manner to further harass or exact retribution for a juvenile's misdeeds.

I believe that sec. 48.396(1), Stats., permits information released to school officials to be used by them to take disciplinary action against a student if such disciplinary action is provided for under the terms of the informal disposition agreed to by the juvenile officer.

When an officer does disclose information to the officials of a child's school, such information must remain confidential under the express provisions of sec. 48.396(1), Stats., and the requirements of sec. 118.125(2), Stats., concerning the confidentiality of pupil records. In addition, certain due process safeguards, including notice and a hearing, must be observed where sanctions such as temporary suspension from school are imposed as a result of confidential information received from juvenile authorities. *See Goss v. Lopez*, 419 U.S. 565 (1975). In light of this hearing requirement, I seriously question whether school officials can ever use "confidential information" received from a juvenile officer to suspend, expel or otherwise seriously discipline a student without disclosing that information to persons not authorized to receive it.

If a situation arises in which school officials believe that the interest of the school in obtaining such information outweighs the child's interest in nondisclosure, but the juvenile officer disagrees, then school officials may seek the release of such information by court order as provided in sec. 48.396(1) and (2), Stats. The juvenile court will then have to balance the interests of the school in discovering the contents of a juvenile's police records against the juvenile's interest in nondisclosure and against the interests of the administration of juvenile justice in exercising discretion in the release of juvenile records. Secs. 48.01(2) and 48.35(2), Stats.; *Banas v. State*, 34 Wis. 2d 468, 474, 149 N.W.2d 571, *cert. denied*, 389 U.S. 962 (1967).

I realize that in a former opinion of this office, it was said that police officers should give "free access" to their records to educational, welfare, and law enforcement agencies specified in former sec. 48.26(1), Stats., as exceptions to the rule against disclosure or

inspection of juvenile records without court order. 56 Op. Att'y Gen. 211, 212 (1967). This conclusion was based on the erroneous inference that because the Wisconsin Legislature gave these agencies limited access to information contained in police officer's reports, such records and reports were no longer confidential with regard to those specified persons and agencies. There is simply no support for such a conclusion. On the contrary, I believe that all indications are that the Legislature made and intended juvenile records to be and remain confidential, whether in the possession of police officers who have been given the discretion and authority to disclose them to school officials, or in the possession of school officials as part of the student's confidential pupil records. Insofar as the former opinion implied that school officials should have free access to the records and reports of police officers concerning juveniles, that opinion must be modified in accordance with the conclusions reached herein.

BCL:MM:SCJ

Indians; Intoxicating Liquors; Licenses And Permits; The State of Wisconsin has no jurisdiction to require the Sokaogon (Mole Lake) Indian Tribe to secure a liquor license from the Town of Nashville in order to sell alcoholic beverages on the Mole Lake Indian Reservation during its annual Bluegrass Festival. OAG 51-80

August 26, 1980.

KEVIN J. KELLEY, *District Attorney*
Forest County

You ask whether the Sokaogon (Mole Lake) Indian Tribe must secure a liquor license from the Town of Nashville in order to sell alcoholic beverages on the Mole Lake Indian Reservation during its annual Bluegrass Festival. For the following reasons it is my opinion that the Tribe need not secure a state license.

As I have indicated in previous opinions (*see., e.g.*, 65 Op. Att'y Gen. 276 (1976); 64 Op. Att'y Gen. 184 (1975)), there are certain basic legal principles which govern the resolution of jurisdictional questions concerning Indians and Indian lands. First, a federally recognized Indian tribe such as the Mole Lake Tribe is a legitimate gov-

ernmental entity possessing attributes of sovereignty over both its members and its territory, and as such has the power to regulate its internal and social relations. Second, the federal government has authority to qualify this power. Third, state law can have no role to play within a reservation's boundaries except with the consent of the tribe itself or in conformity with treaties and acts of Congress or where the courts have determined that state law shall apply.

The Sokaogon Chippewa Tribe is a federally recognized Indian tribe. As such, it possesses the power to regulate its internal relations to the extent this power has not been qualified by federal law or affected by the unique relationship between Indian tribes and the United States. One aspect of its internal sovereignty which has been qualified by the federal government is the power to regulate liquor transactions within the exterior boundaries of its reservation. Congress qualified that power pursuant to its authority to regulate commerce with Indian tribes (U.S. Const. art. I, sec. 8), and completely preempted the field of liquor transactions involving Indians and "Indian country" by enacting a series of federal Indian liquor laws (codified at 18 U.S.C. secs. 1154, 1156, 3113, 3488 and 3618) which prohibit the introduction, possession or sale of alcoholic beverages within "Indian country," or to Indians anywhere. *See United States v. Mazurie*, 419 U.S. 544 (1975). *See also Perrin v. United States*, 232 U.S. 478 (1914).

In 1953, by enacting Pub. L. No. 83-277, 18 U.S.C. sec. 1161 ("Pub. L. No. 277"), Congress made the federal Indian liquor laws inapplicable to:

[A]ny act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register. Added Aug. 15, 1953, c. 502, sec. 2, 67 Stat. 586.

In enacting this law, Congress did not delegate, nor did it intend to delegate, any regulatory authority to the states. Rather, Congress merely required that state law be used as a guide or standard of measurement for determining what acts or transactions may be legalized within Indian country by tribal ordinance. *E.P.A. v. Cal. ex rel.*

Water Res. Control Bd., 426 U.S. 200 (1976), makes the point very clear that Congress can require federal entities to adhere to state substantive law without giving states the actual authority to issue, revoke, and enforce permits. *Id.* at 209-28. The policy of state laws regarding matters such as hours for sale of liquor and legal age limits for sale must be followed. An offender of such state laws would be subject to prosecution for violation of the federal Indian liquor laws because the act or transaction would not be in the language of Pub. L. No. 277, "in conformity ... with the laws of the State." However, as will be shown, the phrase "in conformity with the laws of the State," as used in Pub. L. No. 277, was not meant to include regulatory laws such as a liquor licensing requirement.

Before beginning this analysis, it should first be noted that Pub. L. No. 277 rendered the federal Indian liquor laws inapplicable to those legally conforming acts or transactions taking place "*within any area of Indian country*" (emphasis supplied). Unquestionably, the matter at issue concerns an act or transaction occurring within Indian country. 18 U.S.C. sec. 1151 defines "Indian country":

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same. June 25, 1948, c. 645, 62 Stat. 757; May 24, 1949, c. 139, sec. 25, 63 Stat. 94.

18 U.S.C. secs. 1154(c) and 1156 qualify the sec. 1151 definition, for purposes of the Indian liquor laws, by excluding "fee patented lands in non-Indian communities or rights-of-way through Indian reservations ... in the absence of a treaty or statute extending the Indian liquor laws thereto. June 25, 1948, c. 645, 62 Stat. 758; May 24, 1949, c. 139, sec. 27, 63 Stat. 94."

In *Mazurie*, the Court noted that "Indian country," as used in Pub. L. No. 277, includes the sec. 1154(c) exception, but that this exception "is available for fee-patented lands which *are* in *non-Indian* communities, rather than for those which *are not* in *Indian* communities." *Mazurie*, 419 U.S. at 552 n. 10. Thus, fee-patented land within reservation boundaries is "Indian country" under 18 U.S.C. sec. 1161 unless it is located in an identifiable *non-Indian* community.

There are no non-Indian communities within the Mole Lake Reservation. The entire reservation is "Indian country" within the above mentioned meaning of that term and is under the jurisdiction of the Sokaogon Chippewa Tribe as it relates to liquor. On April 28, 1977, the Tribe adopted an ordinance repealing prohibition and authorizing the Tribe, or individuals licensed by the Tribe, to sell alcoholic beverages within the reservation in conformity with state law. (Ordinance No. 4-28A-77, approved by the Secretary of the Interior and published in the Federal Register on July 29, 1977 [42 Fed. Reg. 38653]).

Both Pub. L. No. 277 and tribal Ordinance No. 4-28A-77 require liquor transactions within the reservation to conform with state law. Nevertheless, neither the federal law nor the tribal ordinance expressly confers any jurisdiction on the State of Wisconsin to impose its liquor laws on the Tribe or to enforce them within reservation boundaries. There is ample authority which supports this proposition of tribal independence from a regulatory law such as a liquor licensing requirement by the state.

In *United States v. State of New Mexico*, 590 F.2d 323 (10th Cir. 1978), *cert. denied*, 100 S. Ct. 63 (1979), the court concluded that the State of New Mexico did not acquire jurisdiction under 18 U.S.C. sec. 1161 to enforce her liquor laws on the Mescalero Apache Reservation. Noting federal preemption in this subject area, the court adhered to the requirement that delegation of authority to a state be effected through unequivocal language. See *Bryan v. Itasca Cty., Minnesota*, 426 U.S. 373 (1976); *Moe v. Confederated Salish & Kootenai Tribes, Etc.*, 425 U.S. 463 (1976); *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164 (1973); and *Warren Trad. Post Co. v. Arizona State Tax Com'n*, 380 U.S. 685 (1965). 18 U.S.C. sec. 1161, the court held, does not delegate this authority to the states either expressly or impliedly. 590 F.2d at 328. See also

Muckleshoot Indian Tribe v. State of Washington, et al., No. C78-783V (W.D. Wash., March 9, 1979).

To date, *Mazurie* is the only United States Supreme Court case dealing with Pub. L. No. 277. In *Mazurie*, the Supreme Court unanimously affirmed Congress' authority to delegate to individual Indian tribes a part of its plenary power to regulate liquor transactions within Indian country. Although the question of state regulation was not considered, there was no doubt or exception expressed concerning the authority of Congress to delegate regulatory authority over liquor transactions to the Tribe. The issue in *Mazurie* was whether the Tribe could impose tribal licensing requirements on non-Indians. The Court, in holding that the Tribe was so empowered by Pub. L. No. 277, found significant the Tribe's independent governmental status. Justice Rehnquist, writing for a unanimous Court stated:

Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory, *Worcester v. Georgia*, 6 Pet 515, 557, 8 L Ed 483 (1832); they are "a separate people" possessing "the power of regulating their internal and social relations ...," *United States v. Kagama*, 118 US 375, 381-382, 30 L Ed 228, 6 S Ct 1109 (1886); *McClanahan v. Arizona State Tax Comm'n*, 411 US 164, 173, 36 L Ed 2d 129, 93 S Ct 1257 (1973).

Cases such as *Worcester*, *supra*, and *Kagama*, *supra*, ... make clear that when Congress delegated its authority to control the introduction of alcoholic beverages into Indian country, it did so to entities which possess a certain degree of independent authority over matters that affect the internal and social relations of tribal life. Clearly the distribution and use of intoxicants is just such a matter.

419 U.S. at 557. The Court in *Mazurie* also referred to Pub. L. No. 277 as "local-option legislation allowing Indian tribes, with approval of the Secretary of the Interior, to regulate the introduction of liquor into Indian country, so long as state law is not violated." 419 U.S. at 547. This right of the Tribe to determine what, if any, liquor transactions are to be allowed within the areas of Indian country under its jurisdiction would be meaningless if a state could require that such tribe first be issued a state liquor license.

Based on the authority cited, the reasoning provided in this analysis, and on the fact that "present federal policy appears to be returning to a focus upon strengthening tribal self-government" (*Bryan*, 426 U.S. at 388 n. 14), it is my opinion that Pub. L. No. 277 does not confer on the state or its subsidiary governments any jurisdictional authority with regard to the regulation of alcoholic beverages within "Indian country." The Supreme Court has neither expressed nor implied any other construction of the statute. Accordingly, I interpret the phrase "in conformity ... with the laws of the state" (18 U.S.C. sec. 1161) to mean that the Tribe must exercise its regulatory authority in a manner consistent with the public policy of the state as reflected in state liquor laws; not that the state may impose its regulatory authority on the Tribe.

An alternative argument might be made that Pub. L. No. 83-280 ("Pub. L. No. 280") conferred jurisdiction on the states to regulate liquor transactions within Indian country.

Pub. L. No. 280 (Act of Aug. 15, 1953, 67 Stat. 588, codified at 18 U.S.C. sec 1162 and 28 U.S.C. sec. 1360) provides, *inter alia*, that Wisconsin's criminal and civil laws of general application shall apply within the areas of Indian country located within the state, subject to certain exceptions and qualifications, and that the state shall have jurisdiction over criminal and civil causes of action arising within such areas.

It is my opinion that this legislation does not confer jurisdiction on the states which would allow states to require Indians within Indian country to secure a state-issued liquor license before alcoholic beverages could be sold within that Indian country. An analysis of case law, the legislative history of Pub. L. No. 280, and current federal Indian policy regarding jurisdictional issues between states and tribal Indians in Indian country clearly supports this opinion.

As a first step, it should be understood that "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945). This fundamental policy is a response to the unique relationship between the federal government and the Indian people, "who are the wards of the nation, dependent upon its protection and good faith." *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930). The policy of supporting the right of tribal self-government goes hand-in-hand with the policy of

leaving Indians free from state jurisdiction and control. In *Williams v. Lee*, 358 U.S. 217 (1959), the United States Supreme Court underscored "the right of [Indian nations] to make their own laws and be ruled by them," 358 U.S. at 220. This right was emphatically reaffirmed in *United States v. Wheeler*, 435 U.S. 313, 322-30 (1978). The Indian sovereignty doctrine has not, however, remained absolute. Notions of Indian sovereignty have been adjusted to take account of the state's legitimate interests "in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized." *Williams*, 358 U.S. at 219. But, the states may not encroach upon an Indian nation's internal self-government until Congress has unequivocally sanctioned their presence within a reservation. See *Wheeler*, 435 U.S. at 323; *McClanahan*, 411 U.S. at 168-69, 172-73. Such unequivocal sanction was not granted by Congress in Pub. L. No. 280.

A most instructive case illustrating the limitations of state jurisdiction over Indian matters is *Bryan*. In that case, the United States Supreme Court held that the state does not have authority to impose a personal property tax on a mobile home located on the Leech Lake Indian Reservation in Minnesota. In discussing the meaning of Pub. L. No. 280, the Court maintained that the congressional grant of jurisdiction to the states through Pub. L. No. 280 was not authorization to the states to subordinate reservation Indians "to the full panoply of civil regulatory powers, including taxation, of state and local governments" because Congress did not clearly express such an intent. *Bryan*, 426 U.S. at 388. In writing the opinion for a unanimous Court Justice Brennan stated:

Congress knew well how to express its intent directly when that intent was to subject reservation Indians to the full sweep of state laws [I]f Congress in enacting Pub L 280 had intended to confer upon the States general civil regulatory powers ... over reservation Indians, it would have expressly said so.

Id. at 389-90. He concluded that:

What we recently said of a claim that Congress had terminated an Indian reservation by means of an ambiguous statute is equally applicable here ...:

"Congress was fully aware of the means by which termination could be effected. But clear termination language was not

employed in the ... Act. This being so, we are not inclined to infer an intent to terminate A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history."

Id. at 392-93 (quoting *Mattz v. Arnett*, 412 U.S. 481, 504-05 (1973)).

Thus, the Supreme Court refused to construe Pub. L. No. 280 as conferring any civil regulatory jurisdiction upon the states by implication.

Likewise, Congress knew how to express its intent directly when that intent was to make federal laws inapplicable to the Pub. L. No. 280 states. As evidence of this, Congress expressly made two federal statutes (the General Crimes Act, 18 U.S.C. sec. 1152 and the Major Crimes Act, 18 U.S.C. sec. 1153) inapplicable within the areas of Indian country affected by Pub. L. No. 280. *See* 18 U.S.C. sec. 1162(c). None of the federal Indian liquor laws, however, are expressly made inapplicable. It is therefore reasonable to assume that if, in enacting Pub. L. No. 280, Congress had intended to make any federal Indian liquor laws inapplicable within Indian country, it would have expressly said so. It is thus clear that Congress did not intend to repeal continued federal preemption in the area of liquor transactions affecting Indians or Indian country, and that the federal Indian liquor laws were intended to remain in full force and effect in all areas of Indian country, including those affected by Pub. L. No. 280. The legislative history of Pub. L. No. 280 indicates that Congress intentionally excluded the Indian liquor laws from the list of federal laws which would be affected by the proposed legislation, choosing instead to deal with these laws in separate legislation (Pub. L. No. 277) applicable to the entire country. *See* 99 Cong. Rec. 10783-84 (1953) (statement of Senator Barrett).

In concluding without qualification that Pub. L. No. 280 does not confer general state regulatory control over Indian reservations, the *Bryan* Court, 426 U.S. at 388 stated: "[N]othing in its legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments." (Citing *Mazurie*, 419 U.S. at 557).

The overriding principle to be derived from this is that state jurisdiction must not interfere with Indian self-government, absent some compelling state interest. Requiring an Indian tribe to secure a state liquor license in order to sell alcoholic beverages within its own Indian country would interfere with Indian self-government and constitute an undermining of the authority of the tribal government. There exists no state interest compelling enough to outweigh the integrity of tribal self-government in this instance.

There is yet another indication from legislative history as evidence that Indian tribes were intended by Congress to be free from such regulatory constraints as state liquor licenses. The Court in *Bryan* stated that:

The primary concern of Congress in enacting Pub L 280 that emerges from its sparse legislative history was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement. See Goldberg, Public Law 280: The Limits of State Jurisdiction over Reservation Indians, 22 UCLA L Rev 535, 541-542 (1975). The House Report states:

"These States lack jurisdiction to prosecute Indians for most offenses committed on Indian reservations or other Indian country, with limited exceptions. The applicability of Federal criminal laws in States having Indian reservations is also limited. The United States district courts have a measure of jurisdiction over offenses committed on Indian reservations or other Indian country by or against Indians, but in cases of offenses committed by Indians against Indians that jurisdiction is limited to the so-called 10 major crimes: murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny.

"As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many States, tribes are not adequately organized to perform that function; consequently, there has been created a hiatus in law-enforcement authority that could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility." H R Rep No. 848, 83d Cong, 1st Sess, 5-6

(1953) [U.S. Code Cong. & Admin. News 1953, at 2409, 2411-12].

Thus, provision for state criminal jurisdiction over offenses committed by or against Indians on the reservations was the central focus of Pub L 280 and is embodied in sec. 2 of the Act, 18 USC sec. 1162.

In marked contrast in the legislative history is the virtual absence of expression of congressional policy or intent respecting sec. 4's grant of civil jurisdiction to the States. Of special significance for our purposes, however, is the total absence of mention or discussion regarding a congressional intent to confer upon the States an authority to tax Indians or Indian property on reservations. Neither the Committee Reports nor the floor discussion in either House mentions such authority. This omission has significance in the application of the canons of construction applicable to statutes affecting Indian immunities, as some mention would normally be expected if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress.

426 U.S. at 379-81 (emphasis added; footnotes omitted).

Wisconsin's liquor licensing laws are basically regulatory in nature (although criminal penalties may be imposed for some violations) and thus, under the Court's reasoning in *Bryan*, do not apply to Indian tribes. Licenses are granted or denied at the option of local municipalities and liquor transactions are locally regulated, subject to statutory guidelines. *See* secs. 66.054(5) and 176.05(1), Stats. This type of local option to authorize and regulate liquor transactions subject to state statutory guidelines, is precisely what Congress delegated to the tribes on reservations, in Pub. L. No. 277. *See Mazurie*, 419 U.S. at 557. Pub. L. No. 280 clearly does not affect the applicability of Pub. L. No. 277, nor does it extend the liquor licensing authority of municipalities to reservation Indians.

The final step of this analysis reveals that the current federal Indian policy recognizing and encouraging the right of tribal self-government supports the opinion that a state liquor license is not required by Indians in Indian country. The federal government has long been recognized to hold, along with its plenary power to regulate Indian affairs, a trust status towards the Indian—a status accompa-

nied by fiduciary obligations. See *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); *United States v. Kagama*, 118 U.S. 375 (1886); *Beecher v. Wetherby*, 95 U.S. 517, 525 (1877). Just one manifestation of this special status is the policy that "statutes passed for the benefit of dependent Indian tribes ... are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918). See *Antoine v. Washington*, 420 U.S. 194, 199-200 (1975). This principle of statutory construction has particular force in examining and interpreting statutes such as those discussed in this opinion.

The federal position with regard to the liquor licensing requirement for Indians is quite clear. In response to a request by the Bureau of Indian Affairs for comments about the Solicitor's 1971 Opinion regarding this very issue, the Department of Justice stated that it would not prosecute Indians for selling liquor in conformity with state law and tribal regulations, but without a state liquor license. *Solicitor's Opinion, January 22, 1976*, in *Indian Law Reporter*, January-June, 1976, at i-1.

The policy encouraging the right of greater tribal self-government is also espoused by the highest court in our land. The Supreme Court noted in *Bryan*, 426 U.S. at 388-89, that Congress, in enacting Pub. L. No. 280, did not intend to undermine or destroy tribal governments, but rather contemplated their continuing vitality. The Court also recognized that present federal policy favors strengthening, rather than weakening, tribal self-government. 426 U.S. at 388-89. See also *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975).

This entire philosophy toward the Indian tribes militates against the imposition of state liquor licensing requirements on Indian tribes or their members within Indian country.

In any case, even under state law the Tribe would arguably be exempt from municipal licensing requirements by virtue of its status as a sovereign entity. Tribal sovereign status was strongly reaffirmed by the United States Supreme Court in two recent cases, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and *United States v. Wheeler*, 435 U.S. 313 (1978). In *Santa Clara Pueblo*, the Court declared that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sover-

eign powers" and that this immunity has not been abrogated by Congress. 436 U.S. at 58. Similarly, in *Wheeler*, the Court recognized that "[t]he powers of Indian tribes are, in general, '*inherent powers of a limited sovereignty which has never been extinguished.*'" 435 U.S. at 322 (quoting F. Cohen, *Handbook of Federal Indian Law*, 122 [1945]) (emphasis in original).

It is my opinion, therefore, that the Supreme Court's interpretation of Pub. L. No. 277 and Pub. L. No. 280, the legislative histories of those two laws and current federal policy favoring the strengthening of internal tribal sovereignty strongly indicate that neither the state nor its political subdivisions have authority to impose local liquor licensing requirements on Indian tribes or their members where the Tribe has adopted its own ordinance in conformance with state law. Thus, the Mole Lake Tribe may validly sell alcoholic beverages within its reservation without a Town of Nashville liquor license.

BCL:JN:NB

Police; Traffic; Where not acting pursuant to mutual assistance statutes, Clark County officers do not have authority to conduct police operations in each and every territory in which a traffic offense triable in Clark County Circuit Court may arise. OAG 53-80

September 10, 1980.

DARWIN L. ZWIEG, *District Attorney*
Clark County

You request advice regarding the territorial limits of police traffic operations. Specifically, you ask "whether the territory for Clark County police operations is co-extensive with venue of the Clark County [Circuit] Court." This inquiry is prompted by the dilemma of highways whose center lines form the boundary between counties and the resultant question of whether traffic officers from one county may ticket motorists traveling on that part of the highway outside the officers' county and whether the officers may park their patrol vehicles in the other county.

The answer to your specific inquiry is no, partly because you incorrectly assume that circuit courts have "venue," which actually relates to the place where an action is tried. *State v. Dombrowski*, 44 Wis. 2d 486, 501-02, 171 N.W.2d 349 (1969). Thus, your inquiry more appropriately could be phrased as "whether Clark County officers have authority to conduct police operations in each and every territory in which a traffic offense triable in Clark County Circuit Court may arise." For the following reasons, the answer is no.

The statute governing venue in traffic regulation actions is sec. 345.31, Stats., which provides as follows:

Section 971.19 on place of trial in criminal actions applies to actions for the violation of traffic regulations except that, in the case of a violation of an ordinance of a municipality which is located in more than one county, the action may be brought in any court sitting in that municipality even though in another county. As an alternative, the plaintiff may bring the action in the county where the defendant resides.

Section 971.19, Stats., in turn, provides in pertinent part as follows:

(1) Criminal actions shall be tried in the county where the crime was committed, except as otherwise provided.

....

(3) Where an offense is committed on or within one-fourth of a mile of the boundary of 2 or more counties, the defendant may be tried in any of such counties.

(4) If a crime is committed in, on or against any vehicle passing through or within this state, and it cannot readily be determined in which county the crime was committed, the defendant may be tried in any county through which such vehicle has passed or in the county where his travel commenced or terminated.

Pursuant to the above two statutes, there are five situations in which a traffic regulation action can be tried in Clark County Circuit Court: (1) where the traffic offense occurs in Clark County; (2) where the traffic offense occurs outside Clark County but within a quarter of a mile from the county line; (3) where it cannot readily be determined in which county the traffic offense was committed, and

the vehicle has passed through Clark County or the defendant has begun or ended his travel in Clark County; (4) where the traffic offense occurs outside Clark County but violates an ordinance of a municipality which lies partly in Clark County and partly in another county; and (5) where the offense occurs outside Clark County but the defendant is a Clark County resident. Thus, by virtue of secs. 345.31 and 971.19, Stats., there are four situations in which traffic regulation actions can be tried in Clark County Circuit Court even though the offense did not occur within the county limits.

Just because a particular traffic offense is triable in Clark County Circuit Court, however, does not mean that traffic officers from Clark County can lawfully patrol territories outside Clark County or make arrests outside county lines. For example, as a general rule, Clark County traffic officers do not have authority to conduct police operations in areas lying a quarter of a mile into an adjoining county, such as Jackson County, nor could such officers arrest motorists violating traffic regulations while in the adjoining county. *See State v. Barrett*, 96 Wis. 2d 174, 280 N.W.2d 114 (1980). Similarly, it is clear that Clark County officers have no authority to arrest every Clark County resident who violates a traffic offense in one of the other seventy-one Wisconsin counties. Yet, under sec. 345.31, Stats., such actions could be tried in Clark County Circuit Court.

Sections 66.305 and 66.315, Stats., are concerned with mutual assistance between law enforcement agencies including county law enforcement agencies as provided in sec. 59.24(2), Stats. Such statutes would empower police and peace maintenance duties outside territorial limits of their county. Your situation does not contemplate use of this type of law enforcement. *Also see* 63 Op. Att'y Gen. 596 (1974) with respect to cooperation agreements.

While the answer to your specific question is no, the decision in *Barrett* establishes that extraterritorial exercise of police powers by sheriffs and county traffic officers is primarily a matter for legislative clarification and sets forth some of the considerations in determining when county officers can make arrests outside of county boundaries. Thus, you may want to examine *Barrett* to gain a fuller understanding of this problem.

BCL:MMM:RJV

Dwelling Codes; Municipalities; Liability of local units of government in adopting and enforcing the One- and Two-Family Dwelling Code discussed. OAG 54-80

September 15, 1980.

JOSEPH N. NOLL, *Secretary*

Department of Industry, Labor & Human Relations

You have requested my opinion with regard to the potential liability of governmental bodies who hire building inspectors or contract with independent building inspectors or inspecting corporations to enforce the One- and Two-Family Dwelling Code, subch. II, ch. 101, Stats. You have further asked what effect new legislation, namely ch. 221, sec. 2025, Laws of 1979, will have on small municipalities who choose not to provide inspections.

You first inquire into the potential liability to the state, county, or municipality for the torts of inspectors who enforce the code.

The state would not be liable for the tortious acts of certified inspectors working for a county or municipality for two reasons. First, since the state would not be the employing entity, it would not be the principal. The county or municipality would be the principal as the controlling body. Second, the state is protected from liability by the doctrine of sovereign immunity. *Lister v. Board of Regents*, 72 Wis. 2d 282, 291, 240 N.W.2d 610 (1976).

The second question then becomes whether the municipality is liable for the torts of employed inspectors.

Cities, counties, and other local units of government, hereinafter referred to as municipalities, have no governmental immunity from torts. They are liable for the torts of their officers, agents, and employes under the doctrine of *respondeat superior*. *Holytz v. Milwaukee*, 17 Wis. 2d 26, 40, 115 N.W.2d 618 (1962). There could be no municipal liability for failure to adopt the code inasmuch as it is discretionary with the municipality whether to exercise jurisdiction. See sec. 101.65(1)(a), Stats., which provides that cities, villages, towns, and counties "[m]ay ... [e]xercise jurisdiction ... by passage of ordinances." Also see section Ind 20.06(1) Wis. Adm. Code. If the

local unit of government chooses to adopt the code, it must adopt the code in its entirety, including the performance of inspections. "Municipalities intending to exercise jurisdiction shall adopt the ... Code in its entirety." *Id.* Section Ind 20.10(1)(intro.) provides: "Inspections shall be conducted by the department or the municipality administering and enforcing this code."

If the municipality adopts the code, liability for torts occurring during its enforcement will depend on whether the inspection duties are found to be discretionary or ministerial. *Lister*, 72 Wis. 2d at 300.

The definition of ministerial duties was provided in *Meyer v. Carman*, 271 Wis. 329, 332, 73 N.W.2d 514 (1955), "Official action ... is ministerial when it is absolute, certain, and imperative, involving merely the execution of a set task, and when the law ... defines the time, mode, and occasion for its performance with such certainty that nothing remains for judgment or discretion." The enforcement of a building code has been found to be ministerial since there is a duty to inspect that is not discretionary under the statute. *Coffey v. Milwaukee*, 74 Wis. 2d 526, 534-35, 247 N.W.2d 132 (1976).

I believe it would be correct to state that since *Coffey* finds building inspections a ministerial duty, and *Holytz* removes the immunity of municipalities, municipalities would be held liable under the doctrine of *respondeat superior* for the torts of their building inspectors.

Whether or not the municipality is liable under the doctrine of *respondeat superior*, the inspector, be s/he an employe or an independent contractor, is still liable for his or her own torts. If the inspector is an agent or employe of the municipality, however, the Legislature has imposed a limit of \$25,000 under sec. 895.43, Stats. (1977), changed to sec. 893.80 by ch. 323, sec. 29, Laws of 1979, on the amount recoverable against the agent or employe and the municipality.

There is an exception to municipal liability in the case of torts by independent contractors. Municipalities are not liable under the doctrine of *respondeat superior* for the torts of independent contractors. See *Snider v. Northern States Power Co.*, 81 Wis. 2d 224, 232, 260 N.W.2d 260 (1977). The third question, then, is whether building inspectors are independent contractors.

The categorization of a building inspector as an independent contractor will rely on several factors, the primary factor being control. When a municipality exercises control over an independent contractor, the contractor is no longer independent but is an agent of the municipality. In *Strohmaier v. Wisconsin Gas & Electric Co.*, 214 Wis. 564, 570, 253 N.W. 798 (1934), the independent contractor was a general contractor laying water and sewer pipes and digging trenches for a village. The plaintiff was harmed when there was an explosion due to a gas leak. The court found the general contractor to be an independent contractor because the village did not have control over the conduct of the work. "The progress and management of the work remained at all times within the direct control of the contractor. The village might, under certain circumstances, direct the method by which joints should be made ... but in such case the contractor retained control of the workmen and of the operations."

Included in the primary test of control of an independent contractor are several factors used in determining control. The degree of control is what sets an independent contractor apart from an agent. An independent contractor is free from the control of the employer with regard to the details of the work. *Boehck Construction Equipment Corp. v. Voigt*, 17 Wis. 2d 62, 68, 115 N.W.2d 627 (1962). Some control may be exercised by the employer, such as the result of the labor, but not the details, means, or mode of accomplishment. *Fidelity & Casualty Co. v. Industrial Acc. Commission*, 191 Cal. 404, 216 P. 578, 580 (1923). The right of an owner to supervise and inspect work to determine whether the work is completed as agreed upon is not enough to pierce the armor of an independent contractor. *Smith v. Milwaukee Builders' & Traders' Exchange*, 91 Wis. 360, 365, 64 N.W. 1041 (1895). Persons in business for themselves are generally found to be independent contractors unless the employer exercises significant control. *Burns v. Michigan Paint Co.*, 152 Mich. 613, 116 N.W. 182 (1908).

Other noteworthy factors evidencing an independent contractor status are method of payment (a specific sum paid for the work performed), *Hayes v. Board of Trustees of Elon College*, 224 N.C. 11, 29 S.E.2d 137, 141 (1944); contractor's right to delegate responsibility or hire others to perform work, *Farmer v. St. Croix Power Co.*, 117 Wis. 76, 84, 93 N.W. 830 (1903); and whether the independent contractor is obliged by contract to be responsible for any loss or

damage, *Chicago, R.I. & P.R. Co. v. Bond*, 240 U.S. 449, 451 (1916).

Factors tending to disprove an independent contractor status include regularity of employment, *Kablitz v. Hoeft*, 25 Wis. 2d 518, 521, 131 N.W.2d 346 (1964); the employer's right to terminate a contract or discharge the contractor, *Singer Manufacturing Co. v. Rahn*, 132 U.S. 518, 623 (1889); provision of medical benefits, *Corrigan, Lee & Halpin v. Heubler*, 167 S.W. 159, 161 (Tex. Civ. App. 1914); employer carrying liability or indemnity insurance on the contractor, *Sempier v. Goemann*, 165 Wis. 103, 107, 161 N.W. 354 (1917); and employer withholding federal income tax and social security and paying state unemployment tax on the contractor, *Smith v. West Lake Quarry & Material Co.*, 231 Ark. 294, 329 S.W.2d 167, 169 (1959).

If the building inspectors are neither independent contractors nor employes of the municipalities, the law will treat them as agents whose torts are imputable to the municipality under the doctrine of *respondeat superior*. See *Hollingsworth v. American Finance Corp.*, 86 Wis. 2d 172, 181, 271 N.W.2d 872 (1978).

The result of the lengthy discussion above is that for each municipality a determination of whether the contracted building inspectors are independent contractors or agents will depend solely upon the facts in each individual situation. There is no foolproof method to determine whether the inspectors are or are not independent. Any municipality desiring to contract with an inspector will have to weigh all of the above factors in establishing the business relationship based upon whether the municipality favors an independent contractor or an agent. Even then there can be no guarantee that a court would not disagree with the municipality's determination.

Turning to the fourth question, you ask whether a group of inspectors can limit their liability by incorporating. In my opinion, the answer is no. The corporation's liability may be limited to the extent of its assets, but the inspectors still would be individually liable for their own torts. See *Oxmans' Erwin Meat Co. v. Blacketer*, 86 Wis. 2d 683, 693, 273 N.W.2d 285 (1979).

Your fifth and final question is whether under the new law, ch. 221, sec. 2025, Laws of 1979, municipalities of under 2,500 could be held liable for any harm due to the lack of inspection or negligence of

its inspectors. The problem arises where a municipality adopts the Code, but then does not perform the inspections. The new law reads: "A county or the department of industry, labor and human relations may not provide or require inspection services under (the Code) ... in a village or town with a population of 2,500 or less unless the municipality consents." Ch. 221, sec. 2025(12), Laws of 1979.

The new law, therefore, eliminates the requirement for inspections even where the code has been adopted. The statute supercedes the administrative code. Since no inspection is required by law, the municipality can not be held liable for not performing inspections even if it chooses to adopt the code.

BCL:CDH

Fish And Game; Natural Resources, Department Of; The Department of Natural Resources is not prohibited from approving federal enforcement of federal steel shot regulations by federal agents on lands under their jurisdiction in the state during the 1980 waterfowl hunting season. OAG 56-80

September 19, 1980.

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

You have asked whether your agency is prohibited from approving federal enforcement of federal steel shot regulations by federal agents on lands under their jurisdiction in the state during the 1980 waterfowl hunting season. Those regulations forbid the taking of migratory game birds with shot other than steel shot after September 1, 1980. 50 C.F.R. sec. 20, as adopted on August 27, 1976. Your question arises because the Legislature in this last session approved a restriction on the authority of the Department of Natural Resources relating to steel shot as a part of the annual budget review bill. Chapter 221, sec. 2039(38), Laws of 1979 provides in part: "The Department of Natural Resources may not prohibit or restrict the possession or use of shotgun loaded with lead shot or any other metal shot to hunt, take, kill, catch or pursue migratory game birds until after January 1, 1981." We have been assured that the so-called "Stevens

Amendment" (Pub. L. No. 96-126, sec. 305) to the federal appropriations bill will be passed prior to the time that the 1980 hunting season opens. That amendment provides:

No funds appropriated by this Act shall be available for the implementation or enforcement of any rule or regulation of the U.S. Fish and Wildlife Service, Department of the Interior requiring the use of steel shot in connection with the hunting of waterfowl in any state of the United States unless the appropriate state regulatory authority approves such implementation and enforcement.

In the past, approval has been accomplished by a letter from the Secretary of the Department of Natural Resources to the United States Fish and Wildlife Service. You asked whether the language quoted above from ch. 221, sec. 2039(38), Laws of 1979, prohibits you from granting approval to the federal government to enforce non-toxic shot restrictions. In my opinion the answer to this question is no. I am persuaded of this by the language of the section, its legislative history, and the practical effect of such a decision.

The Department's powers to make rules for taking of fish and game in both inland and interstate boundary waters are expressed in secs. 29.174 and 29.085, Stats., respectively. The Department is also granted additional supervisory powers over fish and game and other outdoor resources in sec. 23.09, Stats., the Conservation Act. One of the powers specifically granted is to "enter into cooperative agreements with persons or governmental agencies for purposes consistent with the purposes and provisions of this act," sec. 23.09(2)(h), Stats. The United States Fish and Wildlife Service is a "governmental agency," and steel shot regulations, designed to protect aquatic birds from lead poisoning and death from ingestion of lead shotgun pellets, *National Rifle Ass'n of America, Inc. v. Kleppe*, 425 F. Supp. 1101, 1104 (D.C.D.C. 1976), *aff'd.* 471 F.2d 674, 187 U.S. App. D.C. 240, are consistent with the purposes of the state's Conservation Act.

While ch. 221, sec. 2039(38) clearly prevents the Department from adopting and enforcing administrative rules pursuant to ch. 29, Stats., requiring use of steel shot, I conclude it does not affect its more general ability expressed in ch. 23, Stats., to cooperate with and consent to federal enforcement authority.

First, the key words in ch. 221, sec. 2039(38) are "prohibit or restrict the possession or use of a shotgun loaded with lead shot or any other metal shot." The words "prohibit" and "restrict" are not ambiguous in context. The Department "prohibits or restricts" the use of lead shot by passing administrative rules pursuant to authority granted in ch. 29, Stats. The Department can further "prohibit or restrict" the use of lead shot by having its wardens enforce such administrative rules in the field. Chapter 221, sec. 2039(38) was designed to thwart efforts of the Department of Natural Resources Board to adopt rules prohibiting the use of lead or other toxic shot in guns of all gauges for the 1980 hunting season.

There is no indication in the language or legislative history of ch. 221, sec. 2039(38), that the Legislature intended to affect the Department's ability to cooperate with any federal agency. Accordingly, in my view the words "prohibit or restrict" must be used as relating to actions of the Department of Natural Resources in the form of rules or department enforcement policy which deals with lead shot.

Moreover, enforcement agents of the United States Fish and Wildlife Service are not agents of the Department of Natural Resources. The language of the section prohibits only the Department of Natural Resources from "prohibit [ing] or restrict [ing]" lead shot. Obviously, the Wisconsin Legislature cannot take an action which prohibits or restricts federal enforcement activity.

In general, I have concluded for the reasons stated above that the words "prohibit or restrict" would not preclude your granting approval to federal agents to prohibit or restrict use of lead shot on federal lands in Wisconsin during the 1980 hunting season. I am further persuaded in this conclusion by the practical effect of a contrary conclusion. An interpretation of ch. 221, sec. 2039(38) restricting your ability to grant such approval would effectively close a large portion of lands under federal jurisdiction along the Mississippi River to waterfowl hunting during the 1980 season. An interpretation of a regulation designed to prevent restrictions on lead shot which would have the effect of prohibiting waterfowl hunting altogether on some of the most productive federal lands in Wisconsin would be an absurd result.

For all the reasons stated above, I believe you do have the discretion to approve the implementation and enforcement of the federal restrictions on the use of steel shot to the extent that they will be enforced by federal agents on lands under their jurisdiction. Chapter 221, sec. 2039(38) would absolutely prohibit any Department of Natural Resources' employe or agent from enforcing such restrictions.

BCL:DJH:NLA

Mineral Rights; Railroads; Section 192.71, Stats., does not give the state a beneficial ownership interest in mineral estates reserved by railroad corporations from lands received from the public domain to aid in the construction of railroads under federal land grants of 1856 and 1864. OAG 57-80

September 29, 1980.

WISCONSIN STATE ASSEMBLY

Legislature

By Assembly Resolution No. 25 my opinion has been requested on a series of questions regarding ownership and transfer of mineral rights by railroads. The first question is:

- (1) Is a railroad corporation authorized to own mineral rights to property which is not necessary for the operation of the railroad under section 190.02 (3) and other relevant sections of the statutes and *Case v. Kelly*, 133 U.S. 21 (1889), *Waldo v. Chicago, St. Paul & Fond du Lac Railroad*, 14 Wis. 625 (1861) and other relevant cases?

The answer to this question is no.

The statutes referred to in the question pertain to the acquisition of lands, not ownership. This distinction is important in answering the question, for mineral rights constitute but one interest in the bundle of rights which make up the fee interest in real estate.

There is no statutory authority that I am aware of that specifically authorizes railroads to own mineral rights in Wisconsin. But this does

not mean that a railroad corporation can never be the legal owner of mineral rights in land which is acquired for legitimate railroad purposes. If a railroad corporation acquires land for legitimate purposes as authorized by law, it becomes the lawful owner of any mineral rights in that land as an incident of the ownership of the fee. The legitimate purposes authorized by law are specified in ch. 190, Stats. But a railroad corporation cannot acquire land for purposes not authorized by law. The acquisition by a railroad corporation of mineral rights to property which is not necessary for the operation of the railroad is not authorized by law. Thus, a railroad corporation, in my opinion, may not acquire lands in this state for the purpose of mining or mineral speculation under ch. 190, Stats.

It becomes apparent that the answer as a general proposition is not at all complicated. However, if the answer is to be given in respect to a particular parcel, it becomes complex, for it requires a factual determination as to why the land was acquired and whether such purpose was authorized by law when the acquisition was made.

Section 190.02, Stats.

Particular subsections under sec. 190.02, Stats., expressly set forth the purposes for which railroads may acquire real estate. For example, under subsec. (3), railroads may acquire property necessary for the construction and operation of the railroad, including lands for depots, stations, yards and so forth. Under subsec. (4), lands may be acquired for purposes of cuts, embankments, gravel, etc., as may be necessary for the proper construction and security of the road.

Why would the Legislature specifically list railroad powers in regard to land acquisition unless it meant to limit the railroad corporation to those circumstances enumerated? The fact that the Legislature went to such great lengths in specifically describing the purposes for which railroads could acquire lands strongly suggests the applicability of the principle of statutory construction *expressio unius est exclusio alterius*. *Appleton v. ILHR Department*, 67 Wis. 2d 162, 226 N.W.2d 497 (1975). But this principle of statutory construction is not necessarily dispositive in the resolution of a statutory inquisition. It was held in *Columbia Hospital Asso. v. Milwaukee*, 35 Wis. 2d 660, 669, 151 N.W.2d 750 (1967), that this rule of statutory construction:

[I]s not a "Procrustean standard to which all statutory language must be made to conform." *State ex rel. West Allis v. Milwaukee Light, Heat & Tractor Co.* (1917), 166 Wis. 178, 182, 164 N.W. 837, 839, quoting Black on the Interpretation of Laws (2d ed.), 219. Factually, there should be some evidence the legislature intended its application lest it prevail as a rule of construction despite the reason for and the spirit of the enactment.

Accordingly, is there some evidence to indicate that the Legislature, when it enacted the predecessor to sec. 190.02, Stats. (ch. 119, Laws of 1872), intended that railroad corporations could acquire lands only for those purposes specifically set forth in the statute and no other?

Prior to 1872, railroad corporations were incorporated by private acts of the Legislature. For example, the Legislature incorporated the Winnebago and Lake Superior Railroad Company by enacting ch. 314, Private and Local Laws of 1866. Chapter 314 was replete with purposes for which railroads could acquire lands, even specifying woodland could be acquired for the purpose of fencing and operations (ch. 314, sec. 1, Laws of 1866). In discussing a similar act, the Court in *Case v. Kelly*, 133 U.S. 21, 26 (1889), noted: "This enumeration of the purposes for which the corporation could acquire title to real estate must necessarily be held exclusive of all other purposes."

This act was not unique in expressly limiting the purposes for which railroads could acquire and hold lands. Other such provisions may be seen in almost every Wisconsin railroad charter granted by the Legislature between 1836 and 1853. Significantly, railroad charters granted by the Legislature as late as 1870 and 1871, immediately prior to the enactment of the general railroad corporation act, contained similar restrictions on the acquisition and use of real property.

Therefore, ch. 119, Laws of 1872, continued the legislative precedent of placing restrictions on the acquisition and use of lands by railroads. In view of the restrictions in the special charter laws, the Court's construction pertaining to charter provisions in *Kelly*, and the similarity of the restrictions found in ch. 119, Laws of 1872, the only reasonable conclusion is that ch. 119, Laws of 1872, was intended to restrict the railroads in the acquisition and use of lands.

This intent is manifested today in the language of subsecs. (3) and (4) of sec. 190.02, Stats.

Chapter 180, Stats.

Section 190.02, Stats., provides in part: "Every public railroad corporation shall have the powers conferred on corporations in ch. 180."

Section 180.04 and (4), Stats., provides:

Each corporation, when no inconsistent provision is made by law or by its articles of incorporation, shall have power:

....

(4) To purchase, take, receive, lease, take by gift, devise or bequest, or otherwise acquire, and to own, hold, improve, use and otherwise deal in and with real or personal property, or any interest therein, wherever situated.

From the above-quoted language, it is apparent that corporations have unrestricted authority when no inconsistent provision is made by law or by its articles of incorporation to acquire and use real estate. Thus, this unrestricted authority does not exist in the case of railroad corporations if the provisions of sec. 190.02(3) and (4), Stats., are deemed to be inconsistent with sec. 180.04(4), Stats.

The argument could be advanced that the provisions are not inconsistent, for they are both grants of power and sec. 180.04(4), Stats., merely enlarges on the authority of sec. 190.02(3) and (4), Stats. This argument, however, ignores the legislative intent to restrict land acquisition by railroads which underlies sec. 190.02(3) and (4), Stats.

The theory also ignores the intent behind the grant of general corporate powers to railroads in ch. 119, sec. 11, Laws of 1872. Section 11, predecessor of sec. 190.02, Stats., provided: "Every corporation formed under this act shall, in addition to the powers conferred on corporations in chapter seventy-eight of the revised statutes, have power." The Revised Statutes of 1858 did not give corporations unlimited authority to acquire and use real property, but specifically provided that: "Every such corporation may hold land to an amount authorized by law." Ch. 78, sec. 7, Revised Stats., 1858.

The present language in sec. 180.04, Stats., which states, "when no inconsistent provision is made by law" is synonymous to the language "to an amount authorized by law," found in ch. 78, sec. 7, Revised Stats., 1858. Therefore, sec. 190.02, Stats., is inconsistent with sec. 180.04(4), Stats. The reference to the general corporate law did not eliminate the restrictions of the railroad statute, for ch. 78 of the Revised Statutes of 1858 referred to ch. 119, sec. 11, Laws of 1872.

Charter Powers

Section 190.04, Stats., provides: "All railroad corporations shall have all peculiar rights and privileges granted to them respectively by their charters or any special law, not inconsistent with these statutes."

At first blush, it seems unnecessary to consider powers granted by a railroad charter, for if the charter authorized the railroad to acquire and use lands beyond those authorized in ch. 190, sec. 190.04, Stats., would be a repeal of such charter authority. However, sec. 190.04, Stats., first appeared in ch. 119, sec. 55, Laws of 1872, and provided that all existing railroads were to be "subject to all the duties and liabilities" of the act. This language is not as clear as the modern language, "not inconsistent with these statutes," which first appeared in sec. 1829, Revised Statutes of 1878. Repeal by implication is not favored. *State v. Dairyland Power Cooperative*, 52 Wis. 2d 45, 187 N.W.2d 878 (1971). Accordingly, before the Revised Statutes of 1878, railroad land acquisition was controlled by individual special charters, rather than by ch. 119, Laws of 1872. Any land or interest in land acquired outside these specific charter provisions was not legally acquired.

In *Waldo v. Chicago, St. Paul and Fond du Lac R. R. Co.*, 14 Wis. 625 (1861), the railroad was attempting to take land as payment for a stock subscription. The land was not adjacent to the line and did not have wood, timber or stone that might be useful to the railroad. In holding that a railroad was not entitled to acquire such property under its charter, the court said:

But when a corporation created for the purpose of building and operating a railroad, goes into the business of banking, or manufacturing and selling goods, or dealing and speculating in real estate, because its corporators or board of directors think such

adventures may be profitable, ... the corporation is attempting to transact business which, under its organic act, it has no right or power to do.

14 Wis. at 632.

This case illustrates the policy of holding a corporation to its charter and to what is proper and necessary to implement the purpose of the charter. But more importantly, it shows a clear enforcement of charter restrictions on a railroad seeking to acquire property "not for railroad purposes."

It is my opinion that the provisions of sec. 190.02, Stats., pertain to foreign railroad corporations as well as to domestic railroad corporations organized under ch. 190, Stats. This conclusion is based on the introductory language of sec. 190.02, Stats., which provides that "every public railroad corporation" shall be subject to the terms of the statute. The phrase "every public railroad corporation" surely includes foreign corporations. This intent is evidenced by the fact that in other statutory provisions found in ch. 190, Stats., the Legislature differentiates between domestic and foreign railroad corporations. (*See*, for example, secs. 190.03, 190.05, and 190.06, Stats.)

Further, the initial general railroad incorporation act contained the introductory language, "every corporation formed under this act." Thus, it is clear that the Legislature, in changing the language, intended to control the land practices of *all* railroads conducting business in this state. However, this language change did not occur until 1930, *see* ch. 504, sec. 13, Laws of 1929. Therefore, prior to January 1, 1930, the land activities of foreign railroad corporations were not governed by the provisions of sec. 190.02, Stats., but were controlled by the law of the states in which they were organized.

Based on this discussion, my conclusions are:

1. Section 190.02(3) and (4), Stats., limit the purposes for which railroads (domestic or foreign) may acquire lands in the State of Wisconsin.
2. Section 180.04(4), Stats., does not enlarge upon the authority granted in sec. 190.02(3) and (4), Stats., nor does such section remove the restrictions of sec. 190.02(3) and (4), Stats.

3. Section 190.04, Stats., repealed any special laws that authorized railroad corporations to acquire lands for purposes other than as prescribed in sec. 190.02(3) and (4), Stats. But, any lands acquired by railroads prior to the effective date of the Revised Statutes of 1878 pursuant to charter authority, were legally acquired.
4. The land acquisition practices of foreign railroad corporations were not controlled by state law prior to January 1, 1930. Since 1930, foreign railroad corporations may only acquire lands in the State of Wisconsin for those purposes set forth in ch. 190, Stats.
5. Ownership of mineral rights is distinct from acquisition of mineral rights.
6. From 1878 to the present, domestic railroad corporations did not and still do not have authority to acquire lands or interests in lands for purposes of mineral exploitation or speculation.
7. It is doubtful that any railroad charter, which would have been controlling prior to 1878, authorized the acquisition of lands or interests in lands for their mineral content.
8. The answer to whether foreign corporations could acquire lands or interests in lands for their mineral or potential mineral content prior to 1930 depends on the laws of the state under which they were organized.
9. Since 1930, foreign railroad corporations may not acquire lands or interests in lands for mineral exploitation or speculation.
10. Lands lawfully acquired by railroads in fee include lawful ownership of the mineral rights in such lands, unless they were expressly reserved.

The second question is:

(2) Were railroad corporations authorized to retain mineral rights to property granted to the corporations under chapter 137 of the laws of 1856 and similar acts, considering the circumstances surrounding the grants which are explained in a report issued under chapter 69 of the laws of 1858 and considering sec-

tion 192.71, 1927 statutes, section 190.02(2) and other relevant sections of the statutes and cases?

The answer to this question is no.

Land Grants In Aid Of Railroad Construction.

This question refers to the three million plus acres granted by the federal government through the state, acting as trustee, to railroads. *Schulenberg v. Harriman*, 88 U.S. 44 (1874).

Grants in aid of railroads are to be construed so as to accomplish the intent of Congress. Intent may be determined by reference to the condition of the country at the time the acts were passed. *Winona & St. Peter R. R. Co. v. Barney*, 113 U.S. 618 (1885); *United States v. Denver & Railway*, 150 U.S. 1 (1893).

Prior to the first federal grant, the Wisconsin Legislature adopted Memorial No. 31, Laws of Wisconsin 1854, which was addressed to the Congress of the United States. The significance of this act is that it linked the state request for federal land grants to aid in financing of the construction of railroads to Congress' intent. That intent as evidenced in the Memorial, was to open the land to the settlers:

The Legislature of the State of Wisconsin respectfully represents;

That they have observed with interest the progress and final passage through the House of Representatives, of the bill known throughout the nation as the "Homestead bill," and will hail its adoption as the the [sic] true national policy for the disposition of the public lands, believing it to be the duty of every government, so to legislate, as to secure alike to every citizen so far as practicable, a homestead for himself and family, thereby equalizing wealth, and giving labor its just reward.

... [T]hat sufficient of the public lands may be donated to this State to aid in the construction of railways [sic] therein, so that the whole State may be thereby benefitted, and the public domain speedily settled. *Provided always;* That such donation shall be under the control of the state, with full power to direct the price, and manner of selling the lands so donated.

....

... That any lands granted shall be constantly open to entry by actual settlers, at a rate not exceeding one dollar and twenty-five cents per acre, and in quantities not exceeding one hundred and sixty acres to any single individual.

Subsequent legislative activity confirmed this intent.

The Grants Of 1856 And 1864

Following the state's petition in 1854, Congress made two grants of lands to aid in the construction of railroads. Both grants, 11 Stats. 20 (1856) and 13 Stats. 66 (1864), left to the state the responsibility of distributing the lands to private railroad companies. Few lands were released under the grant of 1856 because the Panic of 1857 ensued and little railroad construction occurred.

The 1864 grant was actually a renewal of the 1856 grant. Both grants contained restrictions consonant with Congress' intent to provide the railroads' land for constructing necessary lines and selling the remainder to settlers. The restrictions in the 1864 grant in essence provided as follows:

1. That the lands or proceeds of lands were to be exclusively applied to the construction of the road for which granted.
2. That a quantity of land not exceeding one hundred and twenty sections could be sold on the completion of each twenty miles of road.
3. That if the roads were not completed in ten years, no further sales would be allowed and lands unsold were to revert to the United States.

Further, in sec. 8, the granting legislation provided: "That the said lands hereby granted shall, when patented as provided in section seven of this act, be subject to the disposal of the companies respectively entitled thereto, for the purposes aforesaid, and no other." 13 Stats. 68 (1864).

Examples of *Wisconsin enabling legislation* creating railroad charters can be found in chs. 122, 137 and 413, Laws of 1856, and in ch. 314, Laws of 1866. Although the language of the charters differ, they reflect the intent of Congress and the policy expressed by the state in Memorial No. 31, that the lands, except for such small

amounts as needed for actual construction, were to be expeditiously sold to the public with the proceeds being used to finance construction of the railroad lines.

As far as could be ascertained, railroad companies holding grant lands in Wisconsin can trace their grants to this 1864 grant or one of its extensions or amendments. None of the amendments ever mentions a change in the restrictions imposed by Congress.

The similarity in the charter provisions, as well as the identical provisions in the grants of 1856 and 1864, conclusively show, in my opinion, that there was no change in legislative intent. The primary intent of the federal and state legislation was to open and settle the land. Railroads were merely the instrumentality to accomplish this legislative policy.

Act Of 1890

In 1890, Congress passed an Act that resumed title to grant lands from those railroads that had failed to build, complete, or operate a railroad in compliance with the grant provisions. 26 Stats. 496 (1890). The Act provided, in part:

That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any state or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed, and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain.

The Act had provisions to preserve the rights of purchasers and actual settlers in possession. 26 Stats. 496, secs. 2 and 3 (1890). Its intent, apparently, was to remedy gross violations by railroad corporations of their land grants while still showing the preference for getting the land settled.

*The Federal Land Grant Legislation Did Not
Authorize Reservation Of Mineral Rights Either
Expressly Or By Implication*

In my opinion, there is no language in the grants of 1856 and 1864 that either expressly or impliedly authorizes the reservation of min-

eral rights. The reservation of mineral rights can only be characterized as speculation. The withholding of these interests in lands for future sale would certainly have the potential of frustrating the intent of Congress that the proceeds from the sale of grant lands were to be used for the construction of the railroad and no other purpose whatsoever. None of the Wisconsin railroad charters I investigated authorized the reservation of any interest in grant lands that was not directly related to the operation of the line. In discussing the authority granted under a railroad charter, the court in the early case of *Blunt v. Walker and others*, 11 Wis. 349, 362 (1860), noted: "The legislature meant only to confine the company to the true objects of its charter, and to forbid its diverting its capital and investing it in real property, and engaging in land speculations."

In any event, if a state charter authorized land speculation, such authority would have been incompatible with the federal grants and void on such ground. *Lake Superior & Co. v. Cunningham*, 155 U.S. 354 (1894).

Further, there is nothing in ch. 190, Stats., that would authorize the reservation of mineral rights, but to the contrary, sec. 190.02(2), Stats., requires compliance with the term of the grants.

The grants of 1856, 1864 and the Act of 1890 are *in pari materia* and must be interpreted together. Such acts are to be strictly construed in favor of the government. *Rice v. Railroad Company*, 66 U.S. 358 (1861). Therefore, the term "land" or "lands" as used in these acts, would be construed to include all rights and interests therein. *Kneeland-McLurg L. Co. v. Lillie*, 156 Wis. 428, 145 N.W. 1093 (1914); sec. 990.01(18), Stats. Under this construction, reserved mineral rights as "lands" would have been returned to the United States by the Forfeiture Act of 1890. This conclusion is not only logical under the law, but is the most equitable result considering the respective positions or interests of the settlers, the railroads and the public.

In summary, railroad corporations in Wisconsin receiving grants of land from the public domain to aid in the construction of railroads had no authority in federal or state legislation to reserve the mineral rights where the lands were conveyed. If the railroads failed to build, complete and operate a line, their interest reverted to the federal government under the Act of 1890. If they did build, complete and oper-

ate their lines, and were therefore not affected by the Act of 1890, the corporation was still prevented from legally retaining mineral rights by the terms of the grant acts and the state enabling legislation.

The third question is:

(3) What restrictions apply to the transfer of mineral rights by a railroad corporation under section 192.71, 1927 statutes, and other relevant statutes and cases?

Section 192.71, Stats., had its inception in ch. 160, Laws of 1872. It subsequently appeared as sec. 1858 in the Revised Statutes of 1878. The statute has not changed substantially since 1872, and it provides that a railroad corporation could transfer, sell or assign grant lands to another railroad. Any such transferred lands were to remain subject to the initial conditions imposed on the use of such lands.

I am of the opinion that sec. 192.71, Stats., is not significant to this discussion. That is, even in the absence of sec. 192.71, Stats., transferred or sold grant lands or interest in grant lands would have nevertheless remained subject to the original conditions of the grant. Accordingly, neither the presence nor the absence of the section has any bearing on the legitimacy or invalidity of the reservation, transfer or sale of mineral rights. Nor does it affect the legal position of the railroads, the public, or the property owners to such rights.

Section 1358, Revised Statutes of 1878, was amended by ch. 266, Laws of 1882. This amendment added the present provision in sec. 192.71, Stats., which authorizes this office to commence an action in the supreme court to forfeit the grant lands of those railroads that failed to comply with the terms of the grant.

This provision is best discussed under the fourth question, which is:

(4) What rights do the owners of the surface rights and the state have to the mineral rights currently or formerly owned by railroad corporations considering section 192.71, 1927 statutes, and other relevant sections of the statutes and cases?

This question is extremely difficult to answer for it requires the application of unsettled law to unknown fact situations, and for that reason, no definite conclusion can be reached. I feel it inappropriate

to comment directly on the legal status of private parties and will confine my remarks to the legal interest of the state.

Interest Of The State

It should be clear from the discussion of question two that the state never acquired title to the grant lands except as trustee for the federal government. Notwithstanding the provisions of sec. 192.71, Stats., the state Legislature cannot enlarge upon the land grant of Congress, nor was it the intent of the state Legislature to do so. The forfeiture provision of sec. 192.71, Stats., which was intended to return the lands to the state, was adopted in ch. 266, Laws of 1882, or approximately eight years before Congress adopted the Forfeiture Act of 1890. Accordingly, the state act returned the lands to the state as trustee for the United States.

The state's rights and responsibilities as trustee were limited. If a railroad corporation had complied with the terms of the grant to the extent of constructing and operating the railroad line, the lands or retained mineral rights would not have been forfeited under the terms of the Act of 1890. The retention and possible subsequent sale of mineral rights, however, would be in violation of the railroad charter, ch. 190, Stats., and the grant itself.

The state, as trustee, may have standing to bring an action based on breach of the grant conditions, but it is difficult to see what beneficial interest the state could acquire as the result of such an action.

The state's duty as trustee under the terms of the grants seems to have been limited to the conveyance of the grant lands to the railroads upon proof of satisfactory compliance with the terms of the grant. The state did not appear to have any responsibility to insure, for example, that the railroads sell the lands and use the proceeds as contemplated in the grant. The state may also have standing to claim violation of state law, *i.e.*, engaging in unauthorized activity, but successful prosecution would not give rise to a claim for the mineral rights or proceeds derived from the sale of such rights.

Criminal Law; Hotels, Boarding Houses And Restaurants; The temporary detention provision of the shoplifting statute, sec. 943.50, Stats., cannot be used by hotel proprietors to detain guests who take hotel property without authorization. Sections 943.13(1)(b) and 943.21, Stats., do not appear to apply to a hotel guest who overstays the agreed-upon visit without obtaining an extended reservation. Rights of hotel proprietors in such situations discussed. OAG 59-80

October 23, 1980.

GERARD S. PARADOWSKI, *Acting Corporation Counsel*
Milwaukee County

You have requested my opinion concerning the remedies available to a hotel proprietor when a registered guest takes hotel property without authorization or overstays the agreed-upon visit without an extension of his or her reservation.

1. *Theft of Hotel-Motel Property.* You first ask whether the temporary detention provision of the shoplifting statute, sec. 943.50, Stats., can be used by innkeepers. Section 943.50(1), Stats., specifically refers to the conversion of "merchandise held for resale by a merchant." Clearly, an innkeeper does not hold goods for resale; hence this section is not applicable. The general theft statute, sec. 943.20, Stats., applies in the absence of an appropriate specific provision, but that statute does not provide for temporary detention of lodgers who are caught stealing inn property. The innkeeper is accordingly limited to a common law right to make a private arrest.

Generally, innkeepers are faced with the theft of small, concealable articles taken from lodging rooms; usually such thefts are misdemeanors. Restatement (Second) of Torts sec. 119 (1965) states the common law rule for private arrest of persons committing misdemeanors as follows:

[A] private person is privileged to arrest another without a warrant for a criminal offense

....

(c) if the other, in the presence of the actor, is committing a breach of the peace or, having so committed a breach of the peace, he is reasonably believed by the actor to be about to renew it

See also Radloff v. National Food Stores, Inc., 20 Wis. 2d 224, 121 N.W.2d 865, 123 N.W.2d 570 (1963).

It appears that except in extremely rare circumstances innkeepers will not be able to use the common law right to make a private arrest. First, it is not probable that theft of room articles will be made in the presence of inn employees. Comment m to Restatement (Second) of Torts sec. 119 (1965) states:

The phrase "in the presence of the actor" means that the actor by the use of his senses knows that the other is committing the act which constitutes the breach of the peace or the attempt to commit a felony. It is not enough that the act is done in the immediate neighborhood of the actor; he must be aware of its commission. On the other hand, it is not necessary that the act be done in the actor's immediate neighborhood. If the actor, by the use of any of his senses, perceives that an act is being done, and forthwith investigates and finds that the act constitutes a breach of the peace, he is privileged to arrest under the statement in Clause (c).

Second, the innkeeper will not be able to make a private arrest unless the act of theft itself amounts to a breach of peace. Prior to the enactment of sec. 943.50(3), Stats., the court in *Radloff* stated:

We conclude that as a matter of policy the authority of a person not an officer to arrest for a misdemeanor committed in his presence should be limited to instances where the public security requires it, that is to acts which involve, threaten, or incite violence. We do not consider the misdemeanor, theft, a breach of the peace in this sense.

Id. 20 Wis. 2d at 237b. Although this conclusion was reached before temporary detention was permitted for shoplifting, this passage states the law for thefts other than shoplifting. It is possible, of course, that an attempt to flee dangerously after being caught with stolen goods might amount to a breach of peace. *Moll v. United States*, 413 F.2d 1233 (5th Cir. 1969). In any event, some element of danger or vio-

lence must accompany the act of theft before an innkeeper may legitimately detain a lodger who has stolen room articles.

2. *Guest Overstaying Without Extension of Reservation.* Under common law, innkeepers have traditionally been required to accommodate all who are willing to pay the asked price. *Hull Hospital v. Wheeler*, 216 Iowa 1394, 250 N.W. 637 (1933). 43A C.J.S. *Inns, Hotels, and Eating Places* sec. 14a. In the case of a hotel or inn, a person becomes a guest once he or she has sought the status of guest and has been received as such by the host. *Freudenheim v. Eppley*, 88 F.2d 280 (3rd Cir. 1937); *Jalie v. Cardinal*, 35 Wis. 118 (1874). Certain reasons have been held to justify the rejection or ouster of a person as a guest. Two are relevant here. First, the proprietor may exclude a person if accommodations are exhausted. *Jackson v. Virginia Hot Springs Co.*, 209 F. 979 (W.D. Va. 1913). And second, once the status of a person who has been received as a guest changes to that of resident (and analogous to that of a boarder or lodger), that person may be lawfully excluded by the innkeeper. *Raider v. Dixie Inn*, 198 Ky. 152, 248 S.W. 229 (1923). Hence, the common law right of every person to enter and be accommodated at an inn is not absolute, nor does it extend indefinitely. It extends, rather, for a reasonable time. *Vansant v. Kowalewski*, 28 Del. 92, 90 A. 421 (1914).

Where the parties have agreed to a specified term by reservation, that term is the best evidence as to the period during which the guest's right exists. When that period expires, the guest status ends, and the person who has not timely extended the reservation has a right no greater than that of any other person who has not yet become a guest. A problem of particular concern is where the guest has overstayed the agreed-upon period of time and the hotel keeper has already rented the room for use by others. When an individual's guest status terminates, his or her rights become subordinate to those held by a new guest whose reservation period has already begun. The determining factor, then, is whether a person has achieved and maintained guest status, since one without guest status has no legal right to remain in an inn against the will of the innkeeper. *People on Complaint of DuBois v. Thorpe*, 101 N.Y.S. 2d 986, 198 Misc. 462 (1950).

There remains the question as to what recourse an innkeeper has to effect a vacating of premises wrongfully occupied. It is arguable that the applicable penal statute for this conduct is sec.

943.13(1)(b), Stats., trespass to land, and not sec. 943.21, Stats., fraud on an innkeeper. As you point out, it is not likely that sec. 943.21, Stats., would be applicable to this type of conduct, unless it could be construed as a "transaction" arising out of the relationship as guest. Section 943.13(1)(b), Stats., appears broad enough to encompass an overstaying hotel guest. Difficulties may arise, however, in reading this subsection in context. In particular, I have some reservation as to the applicability of sec. 943.13(1)(b), Stats., to the matter of hotel overstays, since the thrust of sec. 943.13, Stats., is directed toward criminal trespass of "land" and not "property" in the sense of buildings and other structures. Should sec. 943.13(1)(b), Stats., be applicable, the person who insists upon remaining without right to do so would be guilty of criminal trespass, a class C misdemeanor under sec. 943.13(1)(b), Stats., and the hotel keeper could rightfully enlist the aid of the police to remove such a person.

BCL:JDJ

Constitutionality; Taxation; 1977 amendment to sec. 70.511(2), Stats., which allows municipalities to pass on part of delayed refund claims to other taxing districts for which taxes were collected, does not violate the uniformity provision of Wis. Const. art. VIII, sec. 1. For purposes of the amendment, "taxing districts" includes school and VTAE districts. OAG 60-80

October 27, 1980.

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

You have requested my opinion as to the application and constitutionality of ch. 29, sec. 758, Laws of 1977, effective July 1, 1977. This law amended sec. 70.511, Stats., as follows:

SECTION 758. 70.511 of the statutes is amended to read:

- (1) VALUE TO BE USED IN SETTING TAX RATE. If the local board of review, or manufacturing property district board of review, or both, have reviewing authority has not completed their its work prior to the time set by a municipality for

establishing its current tax rate, the municipality shall use the total value, including contested values, shown in the assessment roll in setting its tax rate.

(2) TAX LEVIES, REFUNDS. If the ~~local board of review, or manufacturing property district board of review, or both, have reviewing authority has~~ not made a determination prior to the time of the tax levy with respect to a particular objection to value, the tax levy on such the property or person shall be based on the contested assessed value of the property. A tax bill shall be sent to, and paid by, the person subject to such the tax levy as though there had been no objection filed, except that the payment shall be considered to be made under protest. The entire tax bill shall be paid even though the ~~local or district board of review reviewing authority has~~ reduced the assessment prior to the time for full payment of the tax billed. If the ~~local or district board of review reviewing authority reduces~~ the value of the property in question, the taxpayer may file a claim for refund of taxes resulting from the reduction in value. Such The claim for refund shall be filed with the clerk of the municipality on or before November 1 and. The clerk of the municipality may charge each taxing district for which taxes were collected from the taxpayer its proportionate share of the claim for refund. The claim shall be payable to the taxpayer from the municipality no later than January of the succeeding year, plus interest thereon at the rate of eight tenths of one percent 0.8% per month. If the ~~local or district board of review reviewing authority increases~~ the value of the property in question, such the increase in value shall in the case of manufacturing property assessed by the department of revenue under s. 70.995 be assessed as omitted property as prescribed under s. 70.995(12). In the case of all other property s. 70.44 shall apply.

Prior to the amendment, municipalities absorbed all reductions in tax revenues resulting from delayed board of review reductions in property valuations. The amendment permits the municipalities to pass on part of these reductions to each "taxing district." Since the amendment, municipalities have been charging back proportionate amounts to various governmental entities such as the state, counties, school districts, vocational, technical, and adult education (VTAE) districts, etc.

There are three parts to your question:

1. Does the statutory phrase "taxing districts" include public school districts and VTAE districts?
2. If so, would the practice of passing on apportioned refund charges directly to the taxing districts violate the uniformity provision of Wis. Const. art. VIII, sec. 1, due to the fact that a tardy decision by the Board of Review of a municipality means that an adjustment to the tax base has been made which bypasses the equalization process of the Department of Revenue?
3. If the provision is constitutional, can it be applied retroactively to school budgets which were voted and levied prior to the effective date of the amendment?

You have suggested that the term "taxing district" should be viewed as synonymous with "taxation district" which is defined in sec. 70.045, Stats. (1977): "The term 'taxation district' is used in this chapter to designate a municipality, either the town, village or city, in which general property taxes are levied and collected." This definition, by specifying "municipality" and then further limiting that term to "either the town, village or city," would appear to exclude areas such as a school district, VTAE district, or a sewerage district. Therefore, you suggest that the 1977 amendment to sec. 70.511(2), Stats., does not apply to school districts.

This interpretation must be rejected. If "taxing district" is synonymous with "municipality," then the amendment has the meaningless effect of allowing a municipality to collect from itself. This cannot be a correct interpretation since one must assume that the Legislature intends to achieve an effective and operative result and not a futile one. Sands, *Sutherland Statutory Construction*, sec. 45.12 (4th ed. 1973). Wisconsin courts have a firm rule that absurd results or interpretations of a statute are to be avoided. *State v. Gould*, 56 Wis. 2d 808, 202 N.W.2d 903 (1973). Therefore, in my opinion, the term "taxing district," as used in sec. 70.511(2), Stats., was intended to include each of those governmental units for which taxes were collected, e.g., public school districts and VTAE districts.

You have also suggested that the application of sec. 70.511(2), Stats., as amended, is unconstitutional because it violates the uni-

formity provision contained in Wis. Const. art. VIII, sec. 1, which provides in part that "[t]he rule of taxation shall be uniform." In evaluating this particular statute, I must keep in mind that the cardinal rule of statutory construction is to preserve a statute and find it constitutional if it is at all possible to do so. *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 47, 205 N.W.2d 784 (1973). On the other hand, the Wisconsin Supreme Court has also emphasized that the uniformity clause is to be rigorously enforced since its purpose is to "protect the citizen against unequal, and consequently unjust, taxation." *Gottlieb v. Milwaukee*, 33 Wis. 2d 408, 147 N.W.2d 633 (1967).

The uniformity provision has been the subject of frequent litigation. In *Gottlieb*, the supreme court summarized this history and articulated six principles to be applied in testing the uniformity of a tax law. The principles relevant to this situation include:

1. For direct taxation of property, under the uniformity rule there can be but one constitutional class.
2. All within that class must be taxed on a basis of equality so far as practicable and all property taxed must bear its burden equally on an *ad valorem* basis.
....
6. There can be variations in the mechanics of property assessment or tax imposition so long as the resulting taxation shall be borne with as nearly as practicable equality on an *ad valorem* basis with other taxable property.

33 Wis. 2d at 424.

The uniformity provision essentially provides that there be uniformity of rate based on substantial uniformity of value assessment. To that end, each assessing authority is required to insure uniformity of assessment and rates for its own area. The Department of Revenue helps to insure uniformity by its equalization process by carrying out its authority "to have and exercise general supervision ... to the end that all assessments of property be made relatively just and equal at full value." Sec. 70.57(1), Stats. (1977). The Legislature cannot create a class of property owners exempt from taxation nor declare that certain property will be taxed at a different rate. *State ex rel. La Follette v. Torphy*, 85 Wis. 2d 94, 270 N.W.2d 187 (1978).

In my opinion, sec. 70.511(2), Stats., facially does not violate the uniformity provision. The section has two purposes and effects: (1) to provide, in cases of delayed action by a reviewing board, the method by which a taxpayer receives a tax refund so that his tax burden is uniform with that of other taxpayers in the area; and (2) to distribute the resulting decrease in funds throughout all the taxing districts which originally benefited from the funds.

This section does not create a *class* of exempt persons, nor a class of individuals who receive tax benefits. Nor is any single municipality treated as a tax exempt or tax favored entity. Section 70.511(2), Stats., applies to delayed adjustments by any reviewing board of any municipality, and each municipality is allowed to charge back these adjustments. In addition, under normal circumstances it is not a municipality's entire tax base that may avoid the equalization process within the constitutional requirement of equality as far as practicable, but only a relatively minute portion of property whose revised assessment is finalized too late to be reevaluated in the Department of Revenue's final equalization process.

In stating that sec. 70.511(2), Stats., is constitutional on its face, I am not unmindful that under certain circumstances not presented herein the statute might be constitutionally vulnerable in its application. But, in resolving the constitutional question we must consider the law in its usual application wherein only a small portion of the property owners in each municipality will receive adjustments which in total will involve a very small percentage of the municipality's tax collections.

In considering the treatment of delayed assessment reductions, the Legislature had to decide whether the taxpayers of a municipality or the taxpayers of all the taxing districts, *including* the municipality, should absorb the revenue loss resulting from a late decision. Since all taxpayers of a school district are presumed to benefit from the public schools, it is reasonable that a portion of the loss be distributed among them and that the subsequent year's budget be increased to make up the shortfall. While this allows a municipality to pass along to other participating governmental entities these adjustments which presumably have resulted from faulty assessment, this in itself is not a constitutional objection, but goes only to the practical wisdom of the legislative decision, which it is not my prerogative to review.

The principles outlined in *Gottlieb* require uniformity "as far as practicable." Section 70.511(2), Stats., appears to satisfy those requirements. It does not attempt to establish a separate class which is relieved of its tax burden, but rather is aimed at providing that all property taxpayers be taxed on a basis of equality so far as is practicable.

You also ask whether sec. 70.511(2), Stats., may be applied retroactively to school budgets which were "voted and levied" prior to the effective date of the amendment. This question does not focus on the relevant transaction and consequently misapplies the term "retroactive." The amendment does not affect the process by which school budgets are approved and the consequential tax levies; it only confers a right upon the municipal clerk to pass on a portion of the refund claims to the respective taxing districts. Therefore, it is in relation to this transaction that the validity of the application of the law is to be judged.

In the drafting of this statute and its amendment, the Legislature was concerned with the effect, on both the taxpayer and the municipality, of delayed action by a reviewing authority. The Legislature did not place any statutory limitation on the extent of that delay, although it is common knowledge that the administrative and judicial review procedure require time and occasionally take several years. I am of the opinion that *any* claim for refund which is received by a municipal clerk on or after July 1, 1977, is covered by the amendment and may therefore be passed on proportionately to the taxing districts.

In summary, it is my opinion that sec. 70.511(2), Stats., as amended, does not violate the uniformity provision of the Wisconsin constitution and that a municipal clerk may charge each taxing district for which taxes were collected, including school districts and VTAE districts, its proportionate share of any claim for refund received after July 1, 1977.

BCL:JEA

Police; Security Guards; Police officers working as private security persons are subject to the same licensing provisions in sec. 440.26, Stats., as are non-police officers. OAG 62-80

October 31, 1980.

ANN J. HANEY, *Secretary*

Department of Regulation and Licensing

You request my opinion on a number of matters regarding police officers who work part-time as security guards.

In your letter you refer my attention to a letter from a Wisconsin-based security agency, wherein it is stated: "We are requesting that your legal department make a firm ruling on the legality of police officers working as security officers without first obtaining a guard permit, which then requires them to be with an agency."

I refer you to sec. 440.26(1), Stats., which states, among other things, that no person may act as a private security person or perform any other type of service or investigation as a private security person, without first filing an application and the necessary bond or liability policy with the department and being issued a license or a permit under this section. Section 440.26(8), Stats., provides penalties for a violation of this section. Exemptions to sec. 440.26, Stats., are provided in that section and in the Wisconsin Administrative Code. Section 440.26(5), Stats., reads in pertinent part:

(5) Exemptions; Private Security Permit. This section does not apply to any person employed, directly or indirectly by the state or municipality as defined in s. 345.05(1)(a), or to any employe of a railroad company under s. 192.47, or employes of commercial establishments, who operate exclusively on their premises. An employe of any licensed agency doing business in this state as a supplier of uniformed security personnel to patrol exclusively on the private property of industrial plants, business establishments, schools, colleges, hospitals, sports stadiums, exhibits and similar activities are [sic] exempt from the licensing requirements of this section while engaged in such employ-

ment, if the person obtains a private security permit under this section.

Section RL 3.01(8)(b) Wis. Adm. Code reads:

(b) The following are not private detectives within the meaning of these rules:

1. A person who, by virtue of his occupation, is explicitly exempted by law from having to obtain a private detective license;

2. A person who is employed exclusively and regularly by one employer, in connection with the affairs of such employer only, where there exists an employer-employe relationship, unless the employer is required by law to obtain an agency license.

Under these sections, no person may work as a private security person unless he obtains either a private detective license or a private security permit, or falls under one of the above exemptions.

There is no exemption from the licensing requirements of sec. 440.26, Stats., for police officers who work second jobs as security persons in the private sector. In sec. 440.26(5), Stats., the Legislature has exempted publicly employed investigative and security personnel, while working in their public capacities, from private licensing requirements. Therefore, state and municipal employes may work as investigative and security personnel for the state or municipality, in connection with public matters and in the discharge of their official public duties, without regard to sec. 440.26, Stats., requirements.

The answer to your questions is, therefore, that police officers working in the private sector as security personnel are to be treated no differently than other persons, and therefore must comply with the licensing requirements of sec. 440.26, Stats.

You also ask five specific numbered questions, the first of which reads:

Question 1 - Does a police officer working full time for a governmental agency, and taking a second job on his own as a security officer in the private sector, fall within the parameters of "exclusively and regularly" of this section? [Section RL 3.01(8)(b)2. Wis. Adm. Code.]

Since I have concluded that police officers working in the private sector must comply with the requirements of sec. 440.26, Stats., and therefore also with the concomitant code regulations, the answer to this question is the same whether or not the person in your hypothetical situation is a police officer. Section RL 3.01(8)(b)2. Wis. Adm. Code, when read together with the relevant portion of sec. 440.26(5), Stats., means that a person is not a "private detective" under the rules if he works, as an employe, exclusively on the premises of and regularly for one employer, who is not in the private security industry. Therefore, any person may take a second job as a security officer in the private sector, and not become a "private detective" under the rules, if that person works exclusively and regularly on his part-time employer's premises.

Question 2 - If the answer to Question 1 is yes, can he then be employed in his security officer's job within the area he is sworn to protect in his primary job as a police officer?

Private detectives and detective agencies and their agents, licensed pursuant to sec. 440.26, Stats., are not restricted geographically within the boundaries of the state. Certain employes of such agencies, under sec. 440.26(5), Stats., are, pursuant to guard permits, limited to patrol work on certain designated property. 61 Op. Att'y Gen. 421 (1972). Therefore, private detectives may work anywhere within the state, and private security persons, holding permits under sec. 440.26(5), Stats., may work on any such designated private property within the state. Within the section RL 3.01(8)(b)2. Wis. Adm. Code exemption, there is no geographic restriction, if that section is strictly complied with.

Question 3 - Can a police officer, or any other person who works as a security officer in the private sector, work for more than one employer, either full or part time, as a security officer? (Example: police officer works for Company A as a security officer, and will also on occasions work for Company B and Company C.)

The answer is yes, since neither the Wisconsin Statutes nor the Wisconsin Administrative Code restricts the number of employers a private security employe, within the sec. 440.26(5), Stats., exemption, may work for, either consecutively or concurrently. When a person holds more than one security job, however, the Department may

require individual permits as to each employer. Furthermore, in such a situation, the section RL 3.01(8)(b)2. Wis. Adm. Code exemption, would not apply. It should also be noted that private detectives, under section RL 3.28 Wis. Adm. Code, may not be licensed to more than one agency at the same time.

Question 4 - If your answer to Question 1 is yes, can the police officer working in the private sector as a security officer legally carry a weapon?

Question 5 - If your answer to Question 4 is yes, what are the requirements, if any, for the police officer to work in the private sector as a security officer, while armed, in an area that is outside the area of the municipality where he is employed?

Section RL 3.40 Wis. Adm. Code prescribes requirements for principals or employees of agencies to carry firearms or dangerous weapons while on duty. This includes compliance with sections RL 3.41, RL 3.42 and RL 3.43 Wis. Adm. Code. Compliance must also be had with Wisconsin law prohibiting the carrying of a concealed weapon, sec. 941.23, Stats., and any local ordinance of the specific municipality involved. Those persons who work within the section RL 3.01(8)(b)2. Wis. Adm. Code exemption, while they do not fall within the purview of section RL 3.40, *et seq.*, must also comply with Wisconsin and local law.

If a police officer is a principal or agent of an agency, he must adhere to the requirements in chapter RL 3 Wis. Adm. Code. If a police officer, or any other person, falls under the section RL 3.01(8)(b)2. Wis. Adm. Code exemption, chapter RL 3 restrictions do not apply, but local ordinances may govern. Subject to some particular restrictions, including municipal ordinances, mere possession of a non-concealed weapon is not a crime in Wisconsin.

The answer to questions four and five may vary, therefore, depending upon the circumstances of the situation and the local ordinances. Since there is no geographic restriction on those persons working within the section RL 3.01(8)(b)2. Wis. Adm. Code exemption, those persons who qualify thereunder, whether police officers or otherwise, must look to local authorities within the area they wish to work for guidance on specific local weapons restrictions.

BCL:MMM

Indigent; Medical Aid; Prisons And Prisoners; Public Assistance;
Section 53.38, Stats., is exclusively applicable in providing relief
from medical and hospital care costs incurred by an indigent prisoner
while receiving emergency medical treatment in a hospital. OAG 63-
80

November 4, 1980.

GERARD S. PARADOWSKI, *Acting Corporation Counsel*

Milwaukee County

As a follow-up to 67 Op. Att'y Gen. 245 (1978), you pose the following question:

Is Section 49.02(5), Wis. Stats., applicable in the case of a prisoner incarcerated on a city charge taken by the keeper of the jail to a hospital for emergency medical treatment or is Section 53.38, Wis. Stats., exclusively applicable?

It is my opinion that sec. 53.38, Stats., is exclusively applicable to the fact situation you have described.

Section 53.38, Stats., provides, in part:

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.

Your question concerns whether sec. 49.02(5), Stats., provides an alternative means of relief for hospitalization costs provided to an indigent prisoner.

Section 49.02(5), Stats., provides in 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, and prior authorization therefor cannot be obtained without delay likely to injure the patient.

Whereas sec. 49.02(5), Stats., provides relief for hospitalization and medical care costs to all eligible dependent persons, sec. 53.38, Stats., specifically provides for such relief specifically to indigent prisoners. The general statutory rule of construction is that, "Where a general statute and a specific statute relate to the same subject matter, the specific statute controls." *Maier v. Racine County*, 1 Wis. 2d 384, 388, 84 N.W.2d 76 (1957). Thus, sec. 53.38, Stats., is the appropriate statute to apply to your fact situation.

Beyond using rules of statutory construction in making this determination, the fact that relief is available to a prisoner under sec. 53.38, Stats., provides the prisoner with such means of coverage as to destroy eligibility and preclude entitlement under sec. 49.02(5), Stats. Relief under sec. 49.02(5), Stats., is furnished "only to all eligible dependent persons." Section 49.02(1) and (2), Stats. A prisoner is not a "dependent person" as that term is statutorily defined. Section 49.01(4), Stats., provides: "'Dependent person' or 'dependent' means a person without the present available money or income or property or credit, or other means by which the same can be presently obtained, sufficient to provide the necessary commodities and services specified in subsection (1)." The necessary commodities and services specified in sec. 49.01(1), Stats., basically comprise reasonable and adequate provision for food, shelter, clothing, and medical care. Such commodities and services are already provided or available to prisoners. Food, shelter, and clothing are provided to prisoners under sec. 53.37(1) and (3), Stats. Medical or hospital care costs are provided to prisoners under sec. 53.38, Stats. Thus, a prisoner is not entitled to relief under sec. 49.02(5), Stats., because a prisoner has such "other means" which provide for his or her basic necessities. Among such "other means" are relief from medical and hospital care costs as provided in sec. 53.38, Stats.

BCL:WHW:NB

Fire Department; Milwaukee, City Of; Ordinances; Police; Retirement Systems; The City of Milwaukee has the authority to set a mandatory retirement age for its police and fire chiefs by charter ordinance within the guidelines of the United States Age Discrimination in Employment Act. Such mandatory retirement can apply to the incumbent chiefs. OAG 64-80

November 14, 1980.

ED JACKAMONIS, Speaker
Wisconsin State Assembly

On behalf of the Assembly Committee on Organization, you request my opinion on three questions relating to the authority of the City of Milwaukee to set a mandatory retirement age for its police and fire chiefs.

The first question you ask is:

1. Does the City of Milwaukee currently have the authority to set a mandatory retirement age for its fire and police chiefs?

In my opinion the city does have such authority. The exercise of such authority, however, is subject to the prohibition against age discrimination contained in the Federal Age Discrimination in Employment Act, 29 U.S.C. sec. 621 *et seq.*

It must be first noted that a mandatory retirement date is already in effect for Milwaukee police and fire chiefs if they were first employed on or after July 30, 1947, by virtue of the terms of the Employees Retirement System of the City of Milwaukee (ERSCM). This retirement system created by ch. 396, Laws of 1937, has since July 30, 1947, covered both the police and fire chiefs (if members of the system). Ch. 441, Laws of 1947. By virtue of the home rule provisions of Wis. Const. art. XI, sec. 3, and the specific declaration by the Legislature in ch. 704, sec. 3, Laws of 1951, that the ERSCM is a matter of local concern, such system is incorporated in ch. 36 of the Milwaukee City Charter. Future references to the ERSCM are as it appears in the Milwaukee City Charter (1977) unless otherwise specified.

The Milwaukee City Charter states in material part:

36.02 Definitions. Except where the context plainly requires different meaning, the following words and phrases shall have the following meanings:

....

BOARD shall mean the "annuity and pension board" provided for in Section 36.15 of this act. [Ch. 396, Laws of 1937] to administer the retirement system.

....

FIREMAN shall mean a person first employed on or after July 30, 1947, in the fire department whose duty it is to extinguish fires and to protect property and life therefrom, *including the chief* and all other firemen officers.

....

POLICEMAN for the purposes of this act shall mean a person first employed on or after July 30, 1947, in the police department whose duty it is to preserve peace and good order of the city, having the power of arrest without warrant, *including the chief* and all other policemen officers and police aides.

36.03 Membership. (1) **ELIGIBILITY.** The following shall be eligible to membership in the system:

....

(b) Any person who becomes an employe after January 1, 1938, and who is eligible under the provisions of this act [ch. 396, Laws of 1937] and who shall satisfy the following conditions:

1. Who is a full time employe, or

36.05(1) Benefits.

....

(c) *Age limit.* A member in active service, except firemen and policemen, who has attained the age of seventy (70), and *in the case of firemen and policemen the age of sixty-three (63)*, shall be retired at the end of the month at which such age is

attained, except that elected officials and their deputies attaining such age shall be retired at the end of the term for which they have been elected. Whenever facts are in dispute concerning the retirement age of a member, the decision of the board shall be final. The board may permit an employe to continue in the service if a request has been made to the board by the head of the city department or city agency employing such member, but such further employment shall be for a period of time not exceeding two (2) years next following such request or renewal thereof.

(Emphasis supplied.) Thus the ERSCM requires the police and fire chief participants in that fund to retire at age 63 unless extended. Since the above quoted sections are, in all material respects, provided by ch. 441, Laws of 1947, we need not at this point concern ourselves with the question of exercise of home rule authority. Since election to not participate in the ERSCM as authorized by Milwaukee City Charter sec. 36.03(2), requires one to waive "all present and prospective benefits which would otherwise inure to him by his participation in the system," such possibility is not worthy of discussion except in the instance of participants in the Firemen's Annuity and Benefit Fund of Milwaukee (FABFM) and Policemen's Annuity and Benefit Fund of Milwaukee (PABFM).

The FABFM established by ch. 423, Laws of 1923 and PABFM established by ch. 589, Laws of 1921, predate the ERSCM. These former two funds were closed to new members on July 30, 1947. Ch. 589, Laws of 1921. I am informed that the incumbent chief of police and chief engineer of the fire department are both members of these predecessor funds rather than the ERSCM. Neither the PABFM nor the FABFM requires retirement at a mandated maximum age. The question which necessarily then arises is "can the terms of the FABFM and PABFM be changed to include a mandatory retirement age?" It is my opinion that the "home rule" authority granted to the City of Milwaukee is sufficient to insert a maximum retirement age into the FABFM and PABFM.

Wisconsin Constitution art. XI, sec. 3, reads in part:

SECTION 3. 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 enact-

ments of the legislature of statewide concern as shall with uniformity affect every city or every village. The method of such determination shall be prescribed by the legislature.

Relevant declarations by the Legislature are entitled to great weight in determining the scope of home rule. *State ex rel. Brelsford v. Retirement Board*, 41 Wis. 2d 77, 85, 163 N.W.2d 153 (1968). Section 62.13(12), Stats., specifically provides that the provisions of ch. 589, Laws of 1921 (PABFM) and ch. 423, Laws of 1923 (FABFM) "shall be construed as an enactment of statewide concern for the purpose of providing a uniform regulation of police and fire departments." *See also* sec. 66.01(15), Stats., which contains identical provisions. These statutory sections had their genesis in ch. 193, Laws of 1935. More recently, however, the Legislature, by ch. 704, sec. 3, Laws of 1951 (PABFM) and ch. 279, sec. 3, Laws of 1953 (FABFM), determined that the narrow area of firemen's and policemen's pension funds for the City of Milwaukee were to be construed as matters of local affairs and government. Chapter 279, sec. 3, Laws of 1953, relating to the FABFM states:

SECTION 3. Chapter 423, laws of 1923, section 1 (69) and (70) are created to read: (Chapter 423, laws of 1923) Section 1. (69) For the purpose of giving to cities of the first class the largest measure of self-government with respect to pension annuity and retirement systems compatible with the constitution and general law, it is hereby declared to be the legislative policy that all future amendments and alterations to this section are matters of local affair and government and shall not be construed as an enactment of statewide concern. Cities of the first class are hereby empowered to amend or alter the provisions of this section in the manner prescribed by s. 66.01 of the statutes; provided that no such amendment or alteration shall modify the annuities, benefits or other rights of any person who is a member of the system prior to the effective date of such amendment or alteration. For the further purpose of safeguarding the stability of pension systems in cities of the first class the provisions of chapter 396, laws of 1937, section 15(2), as created by chapter 441, laws of 1947, shall apply to this chapter.

Chapter 704, sec. 3, Laws of 1951 relating to the PABFM is identical in effect. Does the authority to "amend or alter" the system include the authority to impose a maximum retirement age on members of

the fund? In my opinion it does. Retirement plans commonly have provisions which require or permit the retirement of an employe at a given age. *See, e.g.*, ERSCM, ch. 396, sec. 5(1)(a), Laws of 1937; Wisconsin Municipal Retirement Fund, sec. 66.90(9), Stats. (1943); Wisconsin Retirement Fund, sec. 41.11(1), Stats., as amended, ch. 221, sec. 318, Laws of 1979. The legislative intent to allow and authorize home rule in matters concerning the PABFM and FABFM includes the right to establish a mandatory retirement date since that is an accepted element of retirement plans. We must further inquire at this point, however, whether amendment of the subject funds to insert a mandatory retirement age is a matter of local concern under Wis. Const. art. XI, sec. 3. Notwithstanding the statement of intent of the Legislature that the subject retirement fund modifications should be matters of local concern, that determination is for the courts. Wisconsin Constitution art. XI, sec. 3 does not leave it to the municipality or Legislature to define what is a local affair or what is a matter of statewide concern but requires such ultimate determination be made by the courts. *Brelsford*, 41 Wis. 2d at 82. In *Brelsford* a retired Milwaukee policeman brought an action to compel the PABFM Board to pay him his monthly pension even though he was then employed by the Milwaukee School Board. The PABFM as created by the Legislature prohibited payment of an annuity to one who "shall be employed upon salary or wages in any branch of the service of such city." Ch. 589, sec. 1(40), Laws of 1921. The Board interpreted this prohibition to apply to employes of the Milwaukee Public School system. By charter ordinance no. 22 enacted in 1927, Milwaukee amended the prohibition to apply only to an annuitant "employed by the city of Milwaukee in any service under the jurisdiction of the city service commission or the fire and police commission." The prohibition as amended did not include Milwaukee Public Schools. The court held that the terms of the PABFM concerned were a matter of local concern in the following words:

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.

Brelsford, 41 Wis. 2d at 86-87. It is my view that, if presented with the question, the courts would determine that insertion of a mandatory retirement age into the PABFM and FABFM is a matter of local concern appropriate for home rule.

It must be noted before concluding that all mandatory age requirements are subject to the United States Age Discrimination in Employment Act. In 1978, Congress amended the Age Discrimination in Employment Act (ADEA), 29 U.S.C. sec. 621 *et seq.* The Act makes it unlawful for employers, including the state, its subdivisions and cities, to discharge an employe because of the employe's age. 29 U.S.C. sec. 623(a)(1). Originally, the Act protected persons who were at least 40 but less than 65 years of age. 29 U.S.C. sec. 631. The 1978 amendments extended the protection of the Act, effective January 1, 1979, to persons who are at least 40 but less than 70 years of age. 29 U.S.C. sec. 631(a).

Prior to the 1978 amendments, it was not unlawful to discharge an employe because of age if (1) age was a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or (2) the discharge was pursuant to the terms of a bona fide employe benefit plan, such as a retirement, pension or insurance plan, which was not a subterfuge to evade the purposes of the Act. 29 U.S.C. sec. 623(f)(1) and (2). Thus, in 63 Op. Att'y Gen. 530 (1974), I stated that compulsory retirement of protective occupation participants at age 55, pursuant to secs. 41.02(11)(a) and (23), and 41.11, Stats., came within the ADEA exception for bona fide employe retirement plans.

The 1978 ADEA amendments, however, eliminated the second exception. Consequently, effective April 6, 1978, an employe benefit plan no longer could require or permit the involuntary retirement of any employe protected by the Act. 29 U.S.C. sec. 623(f)(2).

In order to establish a bona fide occupational qualification (BFOQ) defense to a complaint of discrimination under the ADEA, an employer must have a reasonable factual basis to believe and must demonstrate:

- (1) that all or substantially all of a class of employes would be unable to perform a job safely and efficiently, and that the BFOQ is reasonably necessary to the essence of the employer's business, *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 591 (5th Cir. 1978); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 863 (7th Cir. 1974), cert. denied, 419 U.S. 1122 (1975); or
- (2) that it is impracticable to deal with persons on an individualized basis because some members of the class possess a trait precluding safe and efficient job performance which cannot be ascertained by means other than knowledge of the person's class membership. *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 235 (5th Cir. 1976).

In *Aaron v. Davis*, 414 F. Supp. 453, 461 (E.D. Ark. 1976), where the court held unlawful the mandatory retirement of two assistant fire chiefs at age 62, the court emphasized:

[T]he quantum of the showing required of the employer is inversely proportional to the degree and unavoidability of the risk to the public or fellow employees inherent in the requirements and duties of the particular job. Stated another way, where the degree of such risks is high and methods of avoiding same (alternative to the method of a mandatory retirement age) are inadequate or unsure, then the more arbitrary may be the fixing of the mandatory retirement age. *But at no point will the law permit, within the age bracket designated by the statute, the fixing of a mandatory retirement age based entirely on hunch, intuition or stereo-typing, i.e., without any empirical justification.*

(Emphasis added.) The employer has the burden of establishing that its mandatory retirement program falls within the BFOQ qualification exemption under the ADEA. Such BFOQ determination need not relate to the position of chief but may be applied to the "generic class" of policemen or firemen generally, *Equal Employment Opportunity Commission v. City of Janesville*, No. 79-2523, slip op. at 6-7 (7th Cir. Sept. 23, 1980).

Normally, it will be necessary to consider evidence such as the nature of the job duties, medical evidence relating to the aging process and to the ability of medical tests to distinguish functional from chronological age, and statistical evidence concerning accident rates. *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 563-64 (8th Cir. 1977), cert. denied, 434 U.S. 966 (1977); *Hodgson*, 499 F.2d at 863. A mandatory retirement age prior to age 70 is therefore precluded unless it is determined that the lower age is a bona fide occupational qualification.

Your second question is:

2. If the answer to Question #1 is yes, what procedure must the city use to implement such authority and put it into effect: charter ordinance, regular ordinance, etc.?

Wisconsin Constitution art. XI, sec. 3, empowers cities to exercise "home rule" in matters of local concern and specifically provides that "[t]he method of such determination shall be prescribed by the legislature." Section 66.01, Stats., entitled "Home rule; manner of exercise" specifically requires that change be by "charter ordinance." Section 66.01(4), Stats., provides:

Any city or village may elect in the manner prescribed in this section that the whole or any part of any laws relating to the local affairs and government of such city or village other than such enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village shall not apply to such city or village, and thereupon such laws or parts thereof shall cease to be in effect in such city or village.

The charter ordinance method was clearly intended to apply to the three retirement systems herein discussed since the following language was made applicable to all three by the Legislature: "Cities of the first class are hereby empowered to amend or alter the provisions

of this act in the manner prescribed by section 66.01 of the statutes." See ch. 441, sec. 31, Laws of 1947, relating to the ERSCM, ch. 279, sec. 3, Laws of 1953, relating to the FABFM and ch. 704, sec. 3, Laws of 1951 relating to the PABFM. It therefore appears that the Legislature has designated the charter ordinance amendment method as the vehicle to use in changing any of the three discussed retirement systems in cities of the first class.

Your third question is:

3. If the answer to Question #1 is yes, can such a mandatory retirement age be applied to the incumbent holding that office at the time the mandatory retirement age policy is adopted?

It is my opinion that a mandatory retirement age can be established to apply to the incumbent fire and police chiefs.

As I stated in answer to question 1, I view the establishment of a mandatory retirement age as a matter of local concern, already contained in ERSCM and which may by charter ordinance amendment be inserted into the FABFM and PABFM. Is the implementation of a mandatory retirement age under home rule powers an infringement of contractual rights to members of the systems who are still employed by the city? In my opinion there is no such infringement.

Two basic principles prevail throughout the law covering public employes' pension rights. The first established principle is that no rights inure to the benefit of an employe by the fact that the employe is required to make a contribution to a pension fund out of his salary. No contractual rights are created by the employe's contribution. In fact, the deduction from the employe's pay check is not construed to be a payment by the employe or construed to be a removal of funds from the employe's possession. Contribution to the fund is made by the public out of public money. *State ex rel. Risch v. Trustees*, 121 Wis. 44, 49, 98 N.W. 954 (1904). A pension fund member's employment is accepted,

with knowledge that certain amounts will be deducted each month and placed in the pension fund; such are not first segregated from the public funds so as to become the private property of the officers and then turned over to the pension fund, but are set aside or transferred from one public fund to another, and remain public money to be dispensed or withdrawn at will and

over which the officer from whose salary they are deducted has no control and in which he has no right.

Blough v. Ekstrom, 14 Ill. App. 2d 153, 144 N.E.2d 436, 440 (1957). Member's contributions to the fund create no vested rights to the terms of the PABFM or FABFM in the absence of a specific statutory or contractual provision creating such vested rights. *State ex rel. McCarty v. Ganter*, 240 Wis. 548, 555, 4 N.W.2d 153 (1942). Does the language of ch. 279, sec. 3, Laws of 1953 and ch. 704, sec. 3, Laws of 1951 provide such a contractual right in the words:

Cities of the first class are hereby empowered to amend or alter the provisions of this section in the manner prescribed by section 66.01 of the statutes: provided that no such amendment or alteration *shall modify* the annuities, benefits or other rights of any person who is a member of the system prior to the effective date of such amendment or alteration.

(Emphasis supplied.) I think not, for to interpret this language to preclude any modification in the systems affecting existing members of the system would render the home rule language a nullity. By virtue of ch. 441, secs. 32 and 33, Laws of 1947, the PABFM and FABFM were closed to new members. Thus when the home rule authority was authorized over these systems by the Legislature, by ch. 279, Laws of 1953 and ch. 704, Laws of 1951, the systems were already closed to new members. A literal reading of the prohibition against modifying "annuities, benefits *or other rights*" of a person who is a member of the system would effectively prevent any changes whatsoever in these two retirement systems via the intended home rule delegation. I therefore construe the language just previously quoted to refer to rights vested at retirement.

The second established principle relative to the law governing public employees' pension rights is that any rights an employe may have to a pension are determined at retirement regardless of whether such rights had become vested previously by statute or contract. "[T]he right of a retired ... officer to a pension ... is governed entirely by the rules adopted and in force at the date of his retirement." *State ex rel. Lemperle v. McIntosh*, 75 Ohio App. 164, 60 N.E.2d 486, 489 (1944) (citations omitted); *Kleiner v. Milwaukee*, 270 Wis. 152, 155, 70 N.W.2d 662 (1955). The rights, while established contractu-

ally and by ordinance, are determined under the provisions of the PABFM or FABFM only as they exist at the time of retirement. *See State ex rel. Smith v. Annuity & Pension Board*, 241 Wis. 625, 629, 6 N.W.2d 676 (1942). I do not perceive in this situation any vested or contractual rights that alter the general rule. Moreover, since home rule is granted, not by statute, but by the constitution, an area appropriate for exercise under constitutional home rule is not subject to limitation by statutory law.

Is there, however, some tenure or property right in the offices of chief that precludes imposition of a mandatory retirement age upon the incumbents?

Wisconsin has long recognized that there is a personal property interest in the right to retain public office. The property interest is a limited one, however, and where the office is a creation of statute, the right to retain the office must be determined from the statute. No statute is beyond repeal so no office created by statute can be considered permanent. The right to hold statutory office can be no more permanent than the office itself so that property interest could never be a permanent or vested right. *Ekern v. McGovern*, 154 Wis. 157, 142 N.W. 595 (1913). Just as the right to retain office must be derived from statute, the property right in public employment, the right to be removed only for cause can only exist if it is authorized by state law. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Section 62.50(6), Stats., relating solely to cities of the first class provides:

APPOINTMENT OF CHIEFS. *If a vacancy exists* in the office of chief of police or in the office of chief engineer of the fire department, the board by a majority vote shall appoint proper persons to fill such offices respectively, *subject to suspension and removal as provided in this section*. When filling a vacancy in the office of chief of police or in the office of chief engineer of the fire department *occurring after June 15, 1977*, the board shall appoint the person to a term of office the number of years and commencement date of which shall be set by the city of the 1st class by ordinance and which may not exceed 10 years, or for the remainder of an unexpired term.

(Emphasis supplied.)

This section had its beginning in ch. 856, Laws of 1911 and continued in substantially the same form (except for the ten-year term limitation) to the present time. It could be thus argued that since sec. 62.50(6), Stats., provides for appointment only "if a vacancy exists" and since the sec. 17.03, Stats., definition of what causes a vacancy does not include mandatory retirement, the chiefs can only be removed for cause and have tenure for life. While I find no court-made law interpreting sec. 62.50(6), Stats., there is a case interpreting sec. 62.13(3), Stats., applying to cities of the second, third and fourth classes. Section 62.13(3), Stats., states: "CHIEFS. The board shall appoint the chief of police and the chief of the fire department, who shall hold their offices during good behavior, subject to suspension or removal by the board for cause." In *State ex rel. Monty v. Tilleson*, 231 Wis. 110, 285 N.W. 501 (1939), one J.J. Monty who had been elected Chief of Police of Clintonville by its City Council on April 19, 1910, and on June 16, 1910, appointed Chief by the city's police and fire commission, was replaced on April 18, 1938, when the mayor appointed another person chief. No charges were ever made against Monty, and there never was a hearing for his removal. The Wisconsin Supreme Court in holding that Monty's tenure of office was during good behavior subject only to suspension or removal for cause stated:

When the police and fire commission appointed Monty ... Laws of 1909 ... made applicable to all such appointments the provision of Sec. 959-45(1), Stats [now Section 62.13(3)] that chiefs "shall hold their respective offices during good behavior, subject, however, to suspension or removal as herein provided for cause." Consequently, by virtue of the latter provision, Monty's appointment by the police and fire commission on June 16, 1910, was not for any definite period of time, but his tenure of office was to hold "during good behavior, subject ... to suspension or removal ... at any time for cause."

....

It follows that regardless of whether the city of Clintonville has effectively abolished its police and fire commission, or whether the authority to appoint, suspend, or remove its police chief was or is vested in its mayor, the common council, or a police and fire commission, Monty's tenure of office since July 1, 1910, has been to hold during good behavior subject

only to suspension or removal for cause found upon a proper hearing pursuant to charges duly filed against him.

Monty, 231 Wis. at 113, 116. This case did not involve mandatory retirement and the court did not therefore consider the mandatory retirement provisions in the same section of the statutes. See sec. 62.13(7)(c)3., Stats. (1937).

The ERSCM requires police and fire chiefs (if employed by the department after July 30, 1947) to retire at age 63 unless extended. This conflicts with a literal reading of sec. 62.50(6), Stats., which provides for appointment of a chief only "if a vacancy exists." Since the Supreme Court has not had the occasion to construe these statutes together we must use those general rules of construction previously set down by the court. Three rules appear to apply. In *Pruitt v. State*, 16 Wis. 2d 169, 114 N.W.2d 148 (1962), the court stated: "Statutes must be construed together and harmonized." The court in *Raisanen v. Milwaukee*, 35 Wis. 2d 504, 151 N.W.2d 129 (1967), stated: "Conflict between different statutes are not favored and will not be held to exist if they may otherwise be reasonably construed." In *Brunette v. Bierke*, 271 Wis. 190, 72 N.W.2d 702 (1955), the court stated: "In interpreting these statutes we must, if it is possible to do so harmonize and reconcile them. We should avoid a construction which creates an inconsistency if a reasonable interpretation can be adopted which will not do violence to the words of the provisions."

An interpretation of sec. 62.50(6), Stats., and ch. 396, sec. 5, Laws of 1937 as created by ch. 441, Laws of 1947 that a chief holds office without regard to length of service, age, or tenure would give meaning to sec. 62.50(6) but would give no meaning to and in fact would contradict ch. 396. Such statutory construction is not in conformance with the above cases. On the other hand the two provisions can be construed together and harmonized as the court has indicated is the rule, by construing the meaning of the two sections to be that a chief holds office during good behavior, subject to suspension or removal for cause except that a chief who has reached the mandatory retirement age specified in his respective retirement system may be retired at that age. Such a construction is logical and avoids conflict between the two stated laws.

I am not unmindful of the fact that the two incumbent chiefs are members of retirement systems, the FABFM or PABFM, neither of

which systems contains a mandatory retirement age. It is clear, however, that mandatory retirement where required by statute creates a vacancy within the meaning of sec. 17.03, Stats. *State ex rel. Thompson v. Gibson*, 22 Wis. 2d 275, 295, 125 N.W.2d 636 (1964). Since I have concluded above in answer to question 1 that mandatory retirement is a matter of local concern, that conclusion is not altered by the language of sec. 62.50(6), Stats., which authorizes appointment of a chief "if a vacancy exists." I find nothing in the history of the FABFM, PABFM and ERSCM which indicates that sec. 62.50(6), Stats., was intended to be operative under the FABFM and PABFM but not operative under the ERSCM. I therefore conclude that sec. 62.50(6), Stats., would not be in conflict with a charter ordinance amendment requiring mandatory retirement at a specific age.

BCL:WMS

Elections; Municipalities; Plumbing; Where town sanitary district consists of territory wholly within one town and town board has not designated its members as commissioners but has appointed commissioners, town board is not required to call special election to elect commissioners if petition signed by at least twenty percent of the qualified electors of the district is filed. OAG 65-80

November 28, 1980.

ED JACKAMONIS, *Speaker*
Wisconsin State Assembly

Pursuant to sec. 165.015(1), Stats., the Assembly Committee on Organization requests my opinion on the following question:

Where a town sanitary district consists of territory located wholly within a single town and the town board has appointed the commissioners for such district, is the town board required to call an election to elect commissioners pursuant to sec. 60.305(1)(a), Stats., if a petition signed by at least twenty percent of the qualified electors of the district is filed?

It is my opinion that the town board is not required to call such an election.

A town sanitary district may be created so as to embrace only part of a town, the whole town or territory within more than one town. The town board having primary jurisdiction has substantial power as to whether a district shall be created, the territory to be included, which may include lands within one or more other towns, and over the method of selection of commissioners. *See Fort Howard Paper Co. v. Fox River Heights S. Dist.*, 250 Wis. 145, 26 N.W.2d 661 (1947); *Fort Howard Paper Co. v. Town Board*, 266 Wis. 191, 63 N.W.2d 122 (1954); *Fort Howard Paper Co. v. Ashwaubenon*, 9 Wis. 2d 329, 100 N.W.2d 915 (1960).

Section 60.301, Stats., provides that the determination of the need for and territory to be included within a town sanitary district is within the jurisdiction, power, and authority of the town board. When the district encompasses more than one town, the town containing the largest assessed valuation of taxable property has jurisdiction.

Section 60.305(1)(a), Stats., has grown to its present length through years of amendment, repeal, and re-creation which was intended, in part, to permit district commissioners to be elected rather than appointed.

Section 60.305, Stats., was created by chs. 12, 522, Laws of 1935, and did not provide for the election of commissioners. As originally enacted the statute required that commissioners be appointed where the district embraced territory in more than one town. There was no provision for permissive or mandatory election. Where the territory of the district did not extend beyond the town boundaries, the members of the town board could designate themselves as "ex officio the commissioners," or could "appoint three ... commissioners as provided in this section." There was no provision for permissive or mandatory election.

Chapter 564, Laws of 1945, repealed and recreated sec. 60.305, Stats., to provide:

When a town sanitary district shall have been established in territory lying within 2 or more towns, the town board of the town containing the largest assessed valuation of taxable property of the district therein, shall within 60 days after the effective date of this section appoint or provide for an election for the purpose of selecting 3 town sanitary district commissioners.

Commissioners shall be appointed or elected for a term of 2 years and shall be reappointed by the town board or elected at the regular town election. *If the commissioners have been appointed and a change to election of the commissioners be requested by a petition submitted to the town board of the town containing the largest assessed valuation of taxable property in the district,* the petition to be signed by at least 10 per cent of the qualified electors of the district, *the designated town board shall call* a special election for the proposed election of commissioners within 60 days from the date of receipt of the petition. Any vacancy may be filled by appointment for the remainder of the unexpired term. The salary, if any, of the commissioners shall be fixed by the town board. Where all the territory of a town sanitary district lies within one town, the town board may by a two-thirds vote constitute itself as ex officio the commissioners of the town sanitary district. *In the event the town board does not constitute itself as ex officio the commissioners of the town sanitary district, then such town shall at once provide for appointment or election of 3 sanitary commissioners as provided in this section.* All sanitary district commissioners shall be property owners and residents of the sanitary district.

The drafting record for 1945 Assembly Bill 598 which became ch. 564, Laws of 1945, contains no indication whether the Legislature intended to establish different procedures for election in single-town districts and multi-town districts.

Under current statutes, commissioners in a multi-town district could be appointed *or* elected. But where they were appointed, the electors, by petition, signed by at least ten percent of the qualified electors of the district, could force the responsible town board to call a special election for election of the commissioners. In a single-town district, the town board had the option of action as "ex officio ... commissioners." In such case no commissioners could be appointed, nor could an election be held or compelled. But where the town board did not elect to act as the commissioners they were required to "provide for appointment or election of 3 sanitary commissioners *as provided in this section.*" The portion of the statute dealing with single-town districts is silent on the question of special election by petition.

In my opinion the language "election ... as provided in this section" refers to the procedure for an election *if* the town board in a

single-town district does not itself act as an ex-officio commission and does not choose to appoint commissioners. Once commissioners are appointed, however, I do not believe that the language compels an election when a petition is lodged with the town board. Having explicitly provided for election by petition in multi-town districts the absence of such an explicit provision in the single-town district portion of the statute forces me to conclude that the Legislature probably did not intend such a result in single-town districts.

This is an issue which is not entirely free from doubt. The decision here will allow the Legislature an opportunity to consider this question which may have been overlooked.

BCL:DJH

Intoxicating Liquors; Licenses And Permits; Country clubs opening any part of their facilities to the general public lose their eligibility for "country club" liquor or beer licenses issued by the Secretary of the Department of Revenue pursuant to secs. 176.05(4a) and 66.054(23), Stats. OAG 66-80

December 1, 1980.

ED JACKAMONIS, *Speaker*
Wisconsin State Assembly

You have requested my opinion on whether the fact that a country club proposes to open its golf course to the general public upon payment of a greens fee, but will continue to restrict the use of the clubhouse including bar facilities to members and their guests, would operate to disqualify the club from obtaining class "B" liquor and beer licenses from the Secretary of the Department of Revenue.

The answer to your question is yes.

These licenses, commonly known as country club licenses, are issued by the Secretary pursuant to secs. 176.05(4a) and 66.054(23), Stats., for liquor and beer respectively.

Section 176.05(4a), Stats., provides that: "All 'Class A' and 'Class B' licenses issued to clubs, as defined in s. 176.01 (8), ...

which are commonly known as country clubs, ... shall be issued by the secretary of revenue." Section 66.054(23), Stats., states that: "All Class 'B' licenses issued to clubs, as defined in s. 176.01 (8), ... which are commonly known as country clubs, and are not open to the general public, ... shall be issued by the secretary of revenue if no such licenses are issued by the governing body."

Both statutes refer specifically to sec. 176.01(8), Stats., for the definition of club which definition states in pertinent part as follows: "'Club' means an organization, whether incorporated or not, which is the owner, lessee or occupant of a building used exclusively for club purposes, and which is operated solely for a recreational ... or athletic purpose but not for pecuniary gain."

In view of the definitions and terms used in these three statutes, the resolution to your question is found in the following analysis. Do the terms "club," "country club," and "not open to the general public" refer only to the clubhouse proper or do they refer to all of the facilities including the golf course?

A country club has been defined as follows: "A social club, usually in the outskirts of a city, equipped with a clubhouse, *golf course*, etc." See *Webster's New World Dictionary* 325 (2d College ed. 1974) (emphasis supplied). The term country club has also been defined as follows: "'country club' as permitted use under residence 'A' zoning ordinance contemplates a golf course as a *principal* if not a necessary adjunct." See *Amberley Swim & Country Club v. Zoning Bd. of App.*, 117 Ohio App. 466, 191 N.E.2d 364 (1963) (emphasis supplied).

Emerging from these definitions is the concept that the term "country club" embraces *all* of the facilities of the club and not just the barroom or lounge which may be contained in the clubhouse building.

Another valuable source of analytical assistance is contemporaneous and practical interpretation of the particular statutes by the agencies and executive officers which are charged with enforcement of the statutory provisions. "Long-continued contemporaneous and practical interpretation of a statute by the executive officers charged with its administration and enforcement, the courts, and the public constitutes an invaluable aid in determining the meaning of a doubt-

ful statute." 2A Sands, *Sutherland Statutory Construction*, sec. 49.03 at 233 (4th ed. 1973).

Further, as pointed out in *Sutherland*, "Interpretive regulations by officers, administrative agencies, departmental heads and others officially charged with the duty of administering and enforcing a statute, and their practices which reflect the understanding they have of provisions they are charged to carry out, have *great weight* in determining the operation of a statute." *Id.*, sec. 49.05 at 238 (emphasis supplied).

I have been advised that the departments of state government charged with enforcement of the provisions here involved, which have from time to time been the Department of Justice and the Department of Revenue and is now the Department of Revenue, have in fact interpreted these provisions. Since 1950 the statutes have been continuously interpreted and applied to require exclusion of the general public from all facilities, including golf courses, of a club in order for that club to qualify for the "country club" liquor licenses issued pursuant to the instant statutes. If the club allows its golf course, its dining room or bar facilities, or any other facilities to be used by the general public, that club loses its status as a "country club" under the pertinent statutes and is disqualified from obtaining country club liquor licenses. There has therefore been thirty years of contemporaneous and practical interpretation of these statutes by the agencies involved in, and charged with, their enforcement.

It may also be interesting to note that the Legislature apparently gave recognition to this long-standing construction in 1969 by virtue of 1969 Assembly Bill 75. That bill attempted to amend that statute by adding the following language: "Neither status of patrons as to whether or not they are club members, guests or members of the general public nor source or amount of income of the club shall be considered in determining whether any country club is entitled to any license under this chapter." On August 29, 1969, the Governor vetoed that bill. The Legislature failed to override that veto on October 22, 1969, and the Legislature has apparently never attempted again to amend that statute.

It should also be noted that it has been said in this regard that to interpret a statute in a way which would overtax enforcement

machinery is considered to be unreasonable and is therefore disfavored. *See United States v. Del Toro*, 513 F.2d 656 (2d Cir. 1975).

It would appear reasonable to conclude further that to interpret these statutes so as to allow the general public to use part of the facilities, but not other parts, would result in overtaxing the enforcement machinery in checking to see whether or not any members of the general public who have been using the golf course have entered and are using the clubhouse bar facilities thereby resulting in violation of the liquor and beer laws. Such an interpretation would therefore be unreasonable and should be disfavored.

Therefore, based upon the approximate thirty years of contemporaneous and practical interpretation of the statutes involved, together with the Legislature's apparent recognition of that interpretation and failure to change the law, I conclude that if a country club opens any of its facilities to the use of the general public it becomes ineligible to receive a "country club" liquor or beer license from the Secretary pursuant to secs. 176.05(4a) and 66.054(23), Stats. In addition, to conclude otherwise would unreasonably overtax the enforcement machinery.

BCL:JCM

Open Meeting: State governmental bodies are required to hold meetings in places which are accessible, without assistance, to persons with disabilities. Local governmental bodies are required to hold meetings in places which are accessible with or without assistance to persons with disabilities. OAG 67-80

December 4, 1980.

LEE SHERMAN DREYFUS, *Governor*
State of Wisconsin

At the request of the Governor's Committee for People with Disabilities you ask my opinion on three questions which relate to the open meetings law.

1. Does s. 19.81, Wisconsin Statutes, mean that governmental bodies including local governmental bodies are limited in

their discretion in deciding whether to conduct the meetings in places that are physically accessible to persons with disabilities?

The answer is yes. Section 19.81(2), Stats., 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 statute is applicable to both state and local governmental bodies and to meeting places for open as well as closed sessions. A meeting cannot be initially convened in closed session. An open session must precede a closed session for the purposes of taking a vote and making announcement as required by sec. 19.85(1), Stats., even though notice of the contemplated closed session has been given pursuant to sec. 19.84(2), Stats. See sec. 19.83, Stats. The words in sec. 19.81(2), Stats., "shall be publicly held in places reasonably accessible to members of the public" when read in conjunction with the words "open to *all citizens* at all times unless otherwise expressly provided by law" mean that meeting places must be reasonably accessible to all citizens, including those with disabilities.

A local governmental body has greater leeway in the selection of a meeting place than does a state governmental body. The Legislature has defined what standards are applicable to state governmental bodies. Sections 19.82(3) and 101.13(1), Stats., provide:

(3) "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. In the case of a *state governmental body*, it means a meeting which is *held in a building and room thereof which enables access by persons with functional limitations, as defined in s. 101.13 (1)*.

101.13(1) In this section, "access" means the physical characteristics of a place which allow persons with functional limitations caused by impairments of sight, hearing, coordination or perception or persons with semiambulatory or nonambulatory disabilities to enter, circulate within and leave a place of employment or public building and to use the public toilet facilities and passenger elevators in the place of employment or public building without assistance.

In my opinion local governmental bodies can utilize meeting places reasonably accessible, *with assistance*, to persons with disabilities.

2. If a reasonable opportunity exists to conduct such meetings in accessible rooms of comparable size, is there discretion to choose a non-accessible location on the basis of convenience (i.e. immediate access to records or files) or tradition?

The answer is no. The statutory provisions set forth above indicate a legislative intent that reasonable access to all members of the public is to be accorded a higher priority than access of members to records and files or tradition.

3. If an accessible room for such meeting is not available and a person with physical limitations expresses a desire to attend, does the governmental body have a duty to make special arrangements to enable the person to attend?

As noted above, state governmental bodies must schedule meetings for and meet in a building and room which enables access by persons with functional limitations as defined in sec. 101.13(1), Stats. That provision would be violated if a meeting were held in a building or room which did not meet the standards set forth in sec. 101.13(1), Stats., even if assistance were given to a disabled person. Local governmental bodies should attempt to schedule and hold meetings in buildings and rooms which meet the standards set forth in sec. 101.13(1), Stats. Where a local governmental body is involved, a place which would not qualify under sec. 101.13(1), Stats., might still be reasonably accessible to persons with disabilities if some assistance were furnished to such persons. The governmental body would have a duty to furnish reasonable assistance to make the building and room reasonably accessible, or in the alternative, would have to adjourn the meeting until a reasonably accessible meeting place were available.

You also request my opinion on five questions which relate to obligations of counties to deliver services to mentally and physically disabled persons in a county other than that of residence and under various, and sometimes disputed, residency conditions. The underlying theme of the five questions is a delineation of state versus county responsibility for the individuals in the various hypothetical situations. It would be improper for me to offer an opinion on these five

questions at this time since these matters are presently in litigation in which our office is serving as counsel for state interests. We will respond to the five questions when the litigation is completed if the litigation does not answer the questions.

BCL:RJV

Courts; Criminal Law; Law enforcement officials may require a person appearing pursuant to a summons to be fingerprinted and photographed. A court may condition a person's release from custody on bail upon the taking of fingerprints and photographs. OAG 68-80

December 10, 1980.

JOHN R. WAGNER, *Circuit Judge*
Grant County

This is in response to your inquiry as to whether a person may be fingerprinted and photographed when he or she appears at an initial appearance as a result of a summons. You also ask if a person's release from custody on bail may be conditioned upon the taking of fingerprints and photographs.

It is my opinion that a person may be fingerprinted and photographed when he or she appears at an initial appearance as a result of a summons for offenses embraced in sec. 165.83(2)(a), Stats.¹ It is also my opinion that a court may require fingerprinting and

¹ Section 165.83(2)(a), Stats., reads in material part:

1. For an offense which is a felony.
2. For an offense which is a misdemeanor or a violation of an ordinance involving burglary tools, commercial gambling, dealing in gambling devices, contributing to the delinquency of a child, dealing in stolen property, controlled substances under ch. 161, firearms, dangerous weapons, explosives, pandering, prostitution, sex offenses where children are victims, or worthless checks.
3. For an offense charged as disorderly conduct but which relates to an act connected with one or more of the offenses under subd. 2.
4. As a fugitive from justice.
5. For any other offense designated by the attorney general.

photographing as a condition to be fulfilled prior to release from custody on bail.

Section 165.84(1), Stats., requires law enforcement agencies to obtain fingerprints and photographs "of each person arrested or taken into custody for an offense of a type designated in sec. 165.83(2)(a)." The offenses for which a person may be subject to fingerprinting and photographing are not limited to felonies. Fingerprints and photographs may be required of those charged or taken into custody for certain misdemeanors as well. Section 165.83(2)(a)2, Stats. While it is clear, under sec. 165.84(1), Stats., that a person may be fingerprinted and photographed when arrested, the question here is whether a person who is appearing pursuant to a summons is one who is "taken into custody" and therefore subject to fingerprinting and photographing.

A person is in custody when appearing pursuant to a summons, because a summons duly served is a mandate requiring the individual to appear. There is no doubt that an individual appearing pursuant to a summons is "in custody," and therefore subject to having fingerprints and photographs taken because failure to appear pursuant to the summons would result in a warrant for arrest. *United States v. Laub Baking Co.*, 283 F. Supp. 217 (N.D. Ohio 1968).

In answering your second question, it is my opinion that a judge, although not required to do so, may impose a fingerprinting and photographing requirement as a condition of bail.

A defendant has both a statutory and constitutional right to bail. Section 969.01(1), Stats.; *Whitty v. State*, 34 Wis. 2d 278, 149 N.W.2d 557 (1967). The court can, however, condition release on bail on the defendant's compliance with certain conditions. The conditions imposed must be authorized, explicitly or impliedly, by law.

Section 969.03(1)(e), Stats., as amended by ch. 112, Laws of 1979 (effective March 1, 1980), provides that the court can impose a bail condition deemed reasonably necessary to assure appearance or deemed reasonably necessary to protect public or individual safety. Requiring a defendant to submit to fingerprinting and photographing appears reasonably necessary both to assure appearance and to protect public or individual safety.

Since the historic purpose of bail is to secure the appearance and submission of the defendant to the jurisdiction and judgment of the court, the primary inquiry in answering your question is whether fingerprinting and photographing requirements effect that end. I believe they do. The recording of identifying data provides a strong reminder to any person on bail that he or she can be easily and quickly identified. Awareness of the greatly increased possibility of being apprehended may suppress any temptation to jump bail. Fingerprinting and photographing provide a strong assurance that the defendant will appear as required.

Conditioning bail upon fingerprinting and photographing also protects public and individual safety, a consideration authorized by sec. 969.03(1)(e), Stats. If a jurisdiction is serious about reducing recidivism and absconcence by defendants on bail, then it should make serious efforts through prerelease screening and information gathering to control the problem. Just one device which could be employed to protect public and individual safety is the collection and recording of identifying data of defendants before being released on bail. Without such data, it may be difficult for law enforcement agencies to identify persons in custody. Without such data, it would also be much more difficult for law enforcement agencies to locate individuals who have absconded while released on bail. Lack of such information would certainly constitute an increased threat to the public and perhaps be of particular concern to individuals who may be relying on law enforcement agencies to have reasonable control over the defendant's actions or whereabouts.

Fingerprinting and photographing serve the purpose of bail as provided in our law. The requirement is not unreasonable and "as a physical invasion it amounts to almost nothing." *Bridges v. State*, 247 Wis. 350, 373, 19 N.W.2d 529 (1945).

Finally, a court enjoys certain inherent powers. These powers spring not from legislative grant or specific constitutional provision, but from the very fact that the court has been created and charged with certain responsibilities, the most important of which is the proper and efficient administration of justice. As a result, a court has certain inherent powers which it may call upon to aid in the administration of justice. A judge has every right to know who is standing before the court. Positive identification can be established by requiring such person to be fingerprinted and photographed. Thus, by vir-

tue of its inherent judicial power, a court has the authority to order fingerprinting and photographing of people held in its custody, and may condition bail upon compliance with such order.

BCL:WHW:NB

Apprentices; Vocational, Technical And Adult Education, Board Of; A vocational, technical and adult education district which provides apprenticeship training may contract with other districts for payment of the costs of training persons who are residents of the other districts. Such district may not refuse, however, to admit nonresident Wisconsin students to an approved apprenticeship program, because the district of the student's residence fails to reimburse the district providing the instruction, *unless* the state board of vocational, technical and adult education adopts rules sanctioning such refusal. OAG 69-80

December 11, 1980.

ROBERT P. SORENSEN, *State Director
Board of Vocational, Technical & Adult Education*

You ask two questions concerning apprenticeship training provided by a vocational, technical and adult education district to persons who are not residents of the district. First, you ask whether a district which provides apprenticeship training may contract with other districts for payment of the costs of training persons who are residents of the other districts. In my opinion, the answer is yes. Section 38.14(3), Stats., expressly authorizes a "district board ... [to] contract with ... other district boards for instructional services."

As you point out, however, students in approved apprenticeship programs are exempt under sec. 38.24(3)(a)1., Stats., from payment of nonresident tuition fees. Section 38.24(3)(b), Stats., provides that "[t]he district board of a student's district of residence is liable for the nonresident fee ... [established by the state board of vocational, technical and adult education] only if the program in which the student enrolled is not offered by the district of residence." Section 38.24(3)(c), Stats., provides that "[d]istrict boards may enter into interdistrict contractual agreements to ... establish

interdistrict payments for, nonresident tuition charges to Wisconsin residents in vocational-adult courses." Although it could be argued that the authority of a district board to contract with other districts for instructional services, as conferred by sec. 38.14(3), Stats., is limited to the reimbursement of nonresident fees under sec. 38.24(3)(b) and (c), Stats., it is my opinion that one district may contract with other districts to provide instructional services for residents of the other districts even when, as in the case of approved apprenticeship programs, no nonresident fee is involved. It is reasonable to require taxpayers in the other districts to fulfill their responsibility for vocational education either by providing apprenticeship training in those districts or, in the interest of avoiding costly duplication, by paying the instructional costs of the district that provides such training. Cf. 69 Op. Att'y Gen. 139 (1980); *Manitowoc v. Manitowoc Rapids*, 231 Wis. 94, 100, 285 N.W. 403 (1939).

Your second question is whether a district may refuse to admit nonresident apprenticeship students whose districts of residence refuse to enter into contracts to reimburse the district for the costs of instructing the students. In my opinion, the answer is no.

Although district boards have exclusive control of district schools, "[e]xcept as otherwise provided by statute," sec. 38.12(1), Stats., "[e]very person ... is eligible to attend the schools of a district if the person is ... [a] nonresident of the district who desires to take specific courses which are offered in the schools of such district but not offered in the schools of the district in which he or she resides." Sec. 38.22(1)(c), Stats. This is especially important in the case of apprenticeship training since sec. 106.01(10), Stats., makes it "the duty of all school officers ... to furnish, in ... any school supported in whole or in part by public moneys, such instruction as may be required to be given to apprentices."

Such eligibility to receive apprenticeship training in a district, however, is not absolute. Eligibility to receive instruction is subject to rules established by the state board of vocational, technical and adult education. Secs. 38.02 and 38.22(1)(c), Stats. The state board is "responsible for the initiation, development, maintenance, and supervision of programs with specific occupational orientations below the baccalaureate level, including ... training of apprentices." Sec. 38.001, Stats. Specifically, it is the authority of the state board, not that of district boards, to "adopt rules for admission of nonresident

students, who are Wisconsin residents, in ... vocational-adult education programs which are not offered statewide." Sec. 38.22(5), Stats. The only limitation is that the state board "may not require that any district reserve places in any program for such nonresident students in excess of the percentage of nonfederal operating costs of ... vocational-adult programs." Sec. 38.22(5), Stats.

Legislative history supports the conclusion that only the state board, and not district boards, may establish rules restricting admission of nonresident students who are Wisconsin residents. Section 38.18, Stats. (1969), required that district schools "be open to all persons ... who reside in ... districts ... in which the specific courses desired by such persons are not given if such courses are given in the ... district in which such persons elect to attend *and the local board of such ... district agrees to admit them.*" That section was repealed effective July 1, 1972, ch. 154, Laws of 1971, and recreated as sec. 38.22, Stats. The only residual authority of a district board to approve or disapprove enrollment of a nonresident student is in the case of persons who are not residents of Wisconsin. Sec. 38.22(1)(d), Stats.

Consequently, it is my opinion that a district may not refuse to admit nonresident Wisconsin students to an approved apprenticeship program, because the district of the student's residence fails to reimburse the district providing the instruction, *unless* the state board adopts rules sanctioning such refusal to admit nonresident students. Sec. 38.22(1)(c) and (5), Stats. Since the state board has yet to adopt such rules, the districts presently are powerless to refuse admission to nonresident students.

BCL:DCR

Elections; Funds; Public Officials; Section 11.33, Stats., applies to persons elected to state office who are seeking reelection or election to a different office and to the use of public funds for political purposes.

OAG 70-80

December 11, 1980.

ED JACKAMONIS, Speaker
Wisconsin State Assembly

On behalf of the Assembly Organization Committee, you have requested my opinion concerning secs. 11.06, 11.09 and 11.33, Stats.

Regarding sec. 11.06, Stats., you ask whether the campaign financing reports required to be filed no earlier than July 1 and no later than July 10 of this year need be notarized.

Section 11.06(1), Stats., was amended by ch. 328, Laws of 1979, to eliminate the requirement that these reports be verified. Since the amendment took effect on July 1, 1980, the answer to your question is no.

Regarding sec. 11.09, Stats., you state:

Prior to the effective date of Chapter 328, *Laws of 1979*, section 11.09 (2) required candidates for certain state offices, where the district is wholly contained in a single county, to file a duplicate financial report with his or her County Clerk or Board of Election Commissioners. Chapter 328 repealed section 11.09 (2) effective July 1, 1980, and repealed and recreated section 11.09 (1) to require the Elections Board to transmit a certified duplicate copy of each candidate's financial report to the County Clerk or Board of Election Commissioners for the county or counties included in the candidate's district.

The most recent financial report filing date was July 10, 1980—10 days after the effective date of Chapter 328. The Elections Board has apparently decided not to send the certified duplicate reports required by s. 11.09 (1) as amended. The Committee's ... question, thus, is: Must candidates whose districts are wholly contained within a single county file their July 10, 1980, reports with their County Clerk or Board of Election Commissioners, or must the Elections Board do so?

The Elections Board has informed me by letter dated September 30, 1980, that it:

[H]as taken the position that if a candidate whose district is wholly contained within a single county does not file his or her

July 10, 1980 continuing report covering financial activity for January 1, 1980 through June 30, 1980, with the county clerk or board of election commissioners, the State Elections Board will provide a copy to the appropriate clerk or board.

This being the case, your question concerning sec. 11.09, Stats., now appears to be moot.

Regarding sec. 11.33, Stats., you state:

It has also been called to our attention that Mr. Gerald Ferwerda, Executive Secretary of the Elections Board, has interpreted the changes in s. 11.33, *Wis. Stats.*, resulting from the enactment of Ch. 328, *Laws of 1979*, as prohibiting any person elected to state office from using public funds for the cost of materials or distribution of 50 or more pieces of substantially identical material after the date for circulating nomination papers for any primary election, *regardless of whether this elected state official is a candidate for reelection or election to a different office*. This interpretation flies in the face of the plain meaning of this statute as amended by Ch. 328, is contrary to the clear intent of this statute prior to, and as affected by, Ch. 328, and is inconsistent with the description of changes in election laws which was contained in a memorandum from Mr. Ferwerda to all election officials and Elections Board registrants, dated May 12, 1980.

....

Because of the confusion that has resulted from Mr. Ferwerda's statements as to the effect of the change in the law as a result of the enactment of Ch. 328, *Laws of 1979*, the Committee is requesting a formal opinion of the Attorney General on whether section 11.33 applies only to candidates for office or to all state elected officials during any campaign periods for state or local offices.

The Elections Board has informed me by the letter dated September 30, 1980, that:

The Election Board's position, including that of the Executive Secretary, has consistently been that this statute only applies to state officials who are currently seeking re-election or election to a different office. The Board expressed this view at its August

20, 1980 meeting and at the September 17, 1980 meeting. In addition, the Board has issued a formal opinion interpreting an earlier version of sec. 11.33, Stats., which makes it clear that it is the Board's view that this statute applies only to elected state officials who are seeking re-election or election to a different office. El. Bd. Op. 78-12.

Section 11.33, Stats., as amended by ch. 328, Laws of 1979, reads:

No person elected to state office may use public funds for the cost of materials or distribution for 50 or more pieces of substantially identical material after the first day for circulation of nomination papers as a candidate for national, state or local office, until after the date of the election or after the date of the primary election if such person is not nominated. This section does not apply to answers to communications of constituents.

The construction of a statute by an agency charged with the task of applying it is entitled to great weight and will not be set aside unless it can be said that the construction is clearly contrary to the legislative intent. *A. O. Smith Corp. v. ILHR Department*, 88 Wis. 2d 262, 267, 276 N.W.2d 279 (1979). And, as you point out, the legislative intent appears, if anything, to be in accord with the construction of sec. 11.33, Stats., by the Elections Board. It is my opinion, therefore, that sec. 11.33, Stats., applies only to persons elected to state office who are seeking reelection or election to a different office.

Finally, you state that questions may arise regarding the types of materials covered by sec. 11.33, Stats., and ask specifically whether the following would come within the statute's proscription:

* Memos from an elected official holding an office with administrative responsibilities (e.g. Governor, Lt. Governor, Treasurer, Secretary of State, Attorney General, Chief Justice, Speaker, or President of the Senate) regarding administrative matters or policy matters;

* Notification by a committee chairperson to members of the public announcing Committee hearings if those persons have asked to be notified of Committee hearings or the Chairperson may reasonably assume that they wish to be notified;

- * "Dear Colleague" letters from a legislator to other members of the Legislature on issues that may be before the Legislature such as administrative rules;
- * Circulation of bill drafts for comments to legislators and interested citizens in anticipation of a special or extraordinary session by the Legislature;
- * Paychecks to 50 or more state employes drawing the same salary signed by the State Treasurer;
- * Announcements to district attorneys and county sheriffs, for instance, by the Attorney General, as the state's chief law enforcement officer, that are of a ministerial nature.

In my opinion, none of the above would necessarily fall within the proscription of sec. 11.33, Stats. The Elections Board has interpreted sec. 11.33, Stats., as aimed at the prevention of the use of public funds for political purposes during the prescribed period. *See Op. El. Bd. 78-12.* And, as above, the legislative intent appears, if anything, to be in accord with such construction. It is my opinion, therefore, that sec. 11.33, Stats., applies to the use of public funds for political purposes. Since the specified uses of public funds do not appear to be for political purposes, they would not fall within the prohibition of sec. 11.33, Stats.

BCL:JJG

Relocation Act; Wisconsin Relocation Act; Words And Phrases;
Owners of rental property who do not physically occupy real property taken for public use are not eligible for business replacement payments under sec. 32.19(4m), Stats., as affected by chs. 221 and 358, Laws of 1979. OAG 71-80

December 18, 1980.

LOWELL B. JACKSON, *Secretary*

Department of Transportation

You have asked for my opinion on this question:

What is sufficient occupancy of a business operation to make an owner eligible for a business replacement payment under [the Wisconsin Relocation Act] s. 32.19(4m)(a)(intro.), Stats. [as affected by chs. 221 and 358, Laws of 1979]?

Section 32.19(4m)(a)(intro.), Stats., as amended effective July 17, 1980, reads in pertinent part:

In addition to amounts otherwise authorized by this chapter, the condemnor shall make a payment, not to exceed \$50,000, to *any owner displaced person who has owned and occupied the business operation*, or owned the farm operation, for not less than one year prior to the initiation of negotiations for the acquisition of the real property on which the business or farm operation lies, and who actually purchases a comparable replacement business or farm operation for the acquired property within 2 years after the date the person vacates the acquired property or receives payment from the condemnor, whichever is later.

The business replacement payments under sec. 32.19(4m)(a), Stats., include the amount over the acquisition price of the business property which is required to purchase a comparable replacement, additional financing costs, and reasonable expenses incurred in the purchase of the replacement property for evidence of title, recording fees and closing costs. Tenant businesses are also eligible for replacement payments but the maximum payment is limited to \$30,000. Sec. 32.19(4m)(b), Stats.

Several terms used in subsec. (4m)(a)(intro.) are specifically defined for purposes of sec. 32.19, Stats.

“Displaced person” means any person who moves from real property or who moves his personal property from real property ... as a result of the acquisition of such real property, in whole or in part or subsequent to the issuance of a jurisdictional offer under this chapter, for public purposes or, as the result of the acquisition for public purposes of other real property on which such person conducts a business or farm operation

Sec. 32.19(2)(c), Stats.

“Business” means any lawful activity, excepting a farm operation, conducted primarily:

1. For the purchase, sale, lease or rental of personal and real property

Sec. 32.19(2)(d)1., Stats.

"Owner displaced person" means a displaced person who owned the real property being acquired and also owned the business or farm operation conducted on the real property being acquired.

Section 32.19(2)(i), Stats., as amended by ch. 358, Laws of 1979.

The circumstances in which this law might apply are many and varied. The hypothetical examples you have cited to illustrate your inquiry involve situations in which tenants have used real estate for business operations and the landlords have not had exclusive possession of the premises. Restating your question in light of those examples, is an absentee landlord eligible for business relocation payments under sec. 32.19(4m), Stats? In my opinion, the answer is no.

The term "occupied" as used in sec. 32.19(4m)(a), Stats., is not defined in the statute and its meaning is not readily apparent when the subsection in which it is found is read in conjunction with other provisions of the section. Generally, owners of rental property are engaged in business as defined in the Relocation Assistance Act. When their rental property is acquired by a condemnor, landlords may be required to move their personal property from the premises and may also suffer loss of business income for which the Relocation Act provides compensation under specifically prescribed circumstances. Sec. 32.19(3), Stats. Such payments may be made regardless of whether the displaced landlords actually relocate their businesses elsewhere. Moreover, these payments are in addition to whatever amount is awarded as just compensation for the taking of the property itself. If displaced landlords choose to continue in the business of renting property, they must acquire replacement property in the same manner as displaced owners of grocery stores, drug stores, or filling stations. Therefore, in light of the benefits conferred on displaced landlords under prior law and the ambiguity inherent in the recently enacted amendment to that statute, it is appropriate to resort to the rules of statutory construction to determine what limitations, if any, the Legislature intended to impose on eligibility for business replacement payments. *Aero Auto Parts, Inc. v. Dept. of Transp.*, 78 Wis. 2d 235, 241, 253 N.W.2d 896 (1977).

As noted above, the preconditions for eligibility for business relocation payments under sec. 32.19(3), Stats., do not include occupancy of the premises taken by the condemnor. Nevertheless, sec. 32.19(4m)(a), Stats., as amended, adds that condition. Section 990.01(1), Stats., requires that all words and phrases in the statutes must be construed according to their common and approved usage. According to *Webster's*, "occupy" means to "take or hold possession of ... to reside in as an owner or tenant." *Webster's New Collegiate Dictionary* 787 (1979). *Black's Law Dictionary* defines "occupancy" as "taking possession of property and use of the same" and "occupant" as the "[p]erson in possession ... having possessory rights, who can control what goes on the premises." *Black's Law Dictionary* 973 (5th ed. 1979). Thus, it would appear a person who owns rental property also would have to physically occupy it in order to be eligible for business replacement payments. Moreover, since the lease itself is an interest in the property, the tenant, in a sense, becomes the owner of the leased property insofar as the tenant has clearly defined legal rights of possession and use. *Holcomb v. Szymczyk*, 186 Wis. 99, 102, 202 N.W. 188 (1925); 68 Op. Att'y Gen. 114, 116 (1979). Therefore, under present landlord-tenant law, it is difficult to perceive how a landlord can both own and occupy a leasehold estate at the same time.

If the word "occupied" in subsec. (4m)(a) is not construed to mean something more than mere ownership and maintenance of rental property, then that term is surplusage. Statutes must be interpreted so that no word is rendered surplusage and every word is given effect. *Donaldson v. State*, 93 Wis. 2d 306, 315, 286 N.W.2d 817 (1980). The clear inference to be drawn from the conjunction of both ownership and occupancy in sec. 32.19(4m)(a), Stats., is that the Legislature intended to exclude real property rental from the category of business eligible for replacement payments under the Relocation Act.

The legislative history of the amendment to sec. 32.19(4m), Stats., also supports this conclusion. The "occupancy" condition on eligibility was included initially in 1979 Assembly Bill 1180 (the Annual Budget Review Bill, ch. 221, Laws of 1979), but was removed by a partial veto which the governor explained in his veto message to the Legislature:

There is an apparent inconsistency between existing law and these changes because these sections [283e, 283m and 283s, 1979 Assembly Bill 1180] use the word "occupied" instead of "operated." This would prohibit absentee owners from being eligible for replacement business and farm assistance under the revised definition. This treatment is inconsistent with other sections that give absentee owners the benefits of a business.

Assembly Journal, 1979 Session, April 30, 1980, at 3440-41.

The Legislature failed to override the governor's partial veto. But, the "owner-occupant" language reappeared in the June, 1980, Special Session Assembly Bill 9, introduced on June 3, 1980. The bill's author requested a bill draft to "reverse partial veto of 'and occupied' for business [but] ... leave farms as is." (Drafting file on ch. 358, Laws of 1979, Wisconsin Legislative Reference Bureau.) The Legislative Reference Bureau's analysis, printed with the bill, stated: "This bill requires the owner of a displaced business operation to occupy the property on which the displaced business is located in order to qualify for a replacement payment." The bill was eventually enacted into law in almost the identical form as originally introduced and became ch. 358, Laws of 1979.

In accord with this result is the holding in *Redevelop. Author. of Allegheny Cty. v. Stepanik*, 25 Pa. Commw. Ct. 180, 360 A.2d 300 (1976), involving a relocation assistance statute similar, but not identical, to the Wisconsin Relocation Act. The Pennsylvania statute, as interpreted by administrative rule, limited certain assistance payments to "owner-occupants." The plaintiff owned, but did not occupy a residential apartment building in which she rented living spaces to others. In deciding that the plaintiff was not eligible under the Pennsylvania statute, the appellate court said, 360 A.2d at 302:

It is clear that an owner who conducts a business primarily for the lease or rental of his real property is not an "occupant" of such property. "Occupant" is defined as "one who has the *actual* use, possession or control of a thing." Black's Law Dictionary 1230 (4th ed. rev. 1968). (Emphasis added.) "Occupancy", with respect to realty, is defined variously as *actual* possession or the "act of *taking* and *holding* possession." *Id.* 1229. (Emphasis added.) Therefore, "occupancy" requires more than the mere right to possess or control property—the right to pos-

sess or control must actually be exercised. Thus, while an owner who conducts a business primarily for the lease or rental of his real property may have the right to possess or control the leased premises, he does not have the actual possession or control to be an *owner-occupant*.

Further, the Pennsylvania Supreme Court in affirming the lower appellate court's decision, observed:

The Legislature's careful limitation of eligible recipients to "person[s] ... displaced from [their] place of businesses" reveals its intent to deny special dislocation damages to landlords such as appellant not physically occupying the premises condemned. Neither appellant nor her business physically occupied the premises. Hence, neither she nor her business was displaced from the premises in the common, everyday sense of those terms

Redevelopment Authority, Etc. v. Stepanik, 479 Pa. 199, 387 A.2d 1292, 1294 (1978).

As indicated in one of your illustrative examples, it is highly likely that some cases will involve property owners who use a portion of their premises for business purposes, for example, a bar or restaurant, and lease the remainder to tenants. In those cases, those property owners may be entitled to business replacement payment for that portion of the premises which they occupied for their own businesses but may not receive replacement payments for the leased portions. See *Redevelopment Auth. of Luzerne Cty. v. Legosh*, 39 Pa. Commw. Ct. 90, 394 A.2d 1089 (1978).

The Wisconsin Supreme Court has recognized that the Legislature has the power to impose conditions and limitations on relocation assistance as long as those limitations do not impair a condemnee's constitutional right to just compensation for the property actually taken for public use. *Luber v. Milwaukee County*, 47 Wis. 2d 271, 276-77, 177 N.W.2d 380 (1970); *Aero Auto Parts, Inc.*, 78 Wis. 2d at 246. Business replacement payments represent amounts of money over and above the fair market value of the real and personal property taken by the condemning authority. The Legislature has determined that certain classes of persons, owners and tenants alike, may suffer economic consequences as a result of public acquisition that cannot be adequately compensated under ordinary rules of valuation appli-

cable to eminent domain cases. Thus, special consideration is given to business operators who lose their business establishments and their established clientele and who must seek comparable facilities in order to continue in business. It is not clearly unreasonable that the Legislature has chosen to exclude nonoccupying rental owners from the class of intended beneficiaries. Displaced landlords receive full value for the property taken and are eligible for moving and loss of business payments even if they choose not to remain in the rental business. Also, the Legislature may have determined that such displaced landlords do not face the difficulties, both in kind and degree, that operators of other kinds of businesses, which may have special location and facility needs, face when suddenly uprooted to make way for a public project.

Accordingly, it is my opinion that owners of rental property who do not physically occupy the real property taken for public use are not eligible for business replacement payments under sec. 32.19(4m), Stats., as affected by chs. 221 and 358, Laws of 1979.

BCL:DF

Assessments; State; State Street Mall-Capitol Concourse; State property is not subject to assessment of special charges under sec. 66.60(16), Stats., for maintenance of State Street Mall-Capitol Concourse project as proposed by the City of Madison. Section 66.64, Stats., is limited to special assessments for improvements. OAG 72-80

December 23, 1980.

KENNETH E. LINDNER, *Secretary*
Department of Administration

You request my opinion whether state property is subject to assessment of special charges for maintenance of the State Street Mall-Capitol Concourse project as proposed by the City of Madison.

I am of the opinion that it is not.

Section 66.298, Stats., enables a city or village to designate, by ordinance, any street or right-of-way as a pedestrian mall. The City

of Madison has acted pursuant to this and other statutes to provide for the State Street Mall-Capitol Concourse improvements. You state that the city intends to impose special maintenance charges on property owners "benefiting" in reliance upon sec. 66.610(10), Stats. That statute, however, is applicable only to cities of the first class, and although Madison exceeds the population requirement in sec. 62.05(1)(a), Stats., to qualify as a city of the first class, it has not elected to complete the steps set forth in sub. (2) of the statute to effectively change its status and remains a city of the second class. *In re The Incorporation of The Town of Fitchburg, Dane County, Wisconsin, as a City: Town of Fitchburg, et al. v. City of Madison* No. 80-980 (Wis., filed Nov. 4, 1980). The provisions of sec. 66.610, Stats., are, therefore, not available to the City of Madison. It should be noted that such statute would not, of itself, apply as against property of the state.

I am advised that the City of Madison does not intend to rely on sec. 66.610, Stats., but rather on sec. 66.60(16), Stats.

The proposal of the "Sub-Committee on Specially Assessing State Street Mall-Capitol Concourse Maintenance Costs" does not propose to include what it calls normal maintenance functions such as snow plowing of vehicular ways, maintenance of primary street lighting system, traffic signalization system, street signing, painting and stripping, storm and sanitary sewer maintenance, or trash pick-up from private property, in assessing special charges. Such functions would continue to be provided and funded from the general fund. It proposes that one-third of the cost of the following items be assessed or charged against adjacent benefiting properties:

General Maintenance - Code 160

Maintenance tasks not specifically identifiable with the remaining codes.

- a. Cleaning of structures and fixtures
- b. Washing and repairing lamps
- c. Cleaning tree grates
- d. Painting benches
- e. Replace light bulbs (Glitter Lights & Bus Shelters)
- f. Cleaning glass
- g. Wash trash cans (Trash Receptacles)

Debris Removal - Code 161

- a. Sweeping and cleaning sidewalks
- b. Daily debris pick-up (from Trash Receptacles)

Snow and Ice Removal - Code 162

- a. Shoveling walks, crosswalks, etc.
- b. Sanding
- c. Salting

Summer Maintenance - Code 163

- a. Mowing
- b. Raking
- c. Tree and plantings watering
- d. Mulching and fertilization
- e. Cleaning fountains
- f. Washing sidewalks

Section 66.60(16), Stats., provides in part:

(a) In addition to all other methods provided by law, *special charges for current services rendered* may be imposed by the governing body by allocating all or part of the cost to the property served. Such may include, without limitation because of enumeration, snow and ice removal, weed elimination, street sprinkling, oiling and tarring, repair of sidewalks or curb and gutter, garbage and refuse disposal, sewer service and tree care.

...

(b) Such special charges shall not be payable in instalments. If not paid within the period fixed by the governing body, such a delinquent *special charge* shall become a lien as provided in sub. (15) as of the date of such delinquency.

This language of special charges for current services is to be compared with language in subsecs. (1), (3), (4), (5), (6a), (7), (8), (9), (11), (12)(c), (18), of sec. 66.60, Stats., which permits a city to levy and collect *special assessments* upon property specially benefited by any municipal "work or improvement."

In 69 Op. Att'y Gen. 103 (1980), it was stated:

It is a firmly established tenet of statutory construction that statutes of general application "do not apply to the state unless

the state is explicitly included by appropriate language." *State ex rel. Martin v. Reis*, 230 Wis. 683, 687, 284 N.W. 580, 582 (1939); *accord, State ex rel. Department of Public Instruction v. ILHR Department*, 68 Wis. 2d 677, 681, 229 N.W.2d 591, 593-94 (1975); *Kenosha v. State*, 35 Wis. 2d 317, 323, 151 N.W.2d 36, 39 (1967); *Konrad v. State*, 4 Wis. 2d 532, 538-39, 91 N.W.2d 203, 206 (1958).

Section 66.60, Stats., is in large part a statute of general application. Subsection (16) which relates to "special charges for current services" does not mention the state. There is no provision of sec. 66.60, Stats., which, of itself, makes state property subject to special assessments. Subsection (4) does refer to property of the state and provides a procedure for state review and approval "if property of the state may be subject to assessment under s. 66.64."

Section 66.64, Stats., provides in material part:

(1) The property of the state, except that held for highway right-of-way purposes, and the property of ... or any public board or commission within this state ... shall be in all respects subject to *all special assessments for local improvements.* ...

(2)(a) In this subsection, "assessment" means a special assessment on property of the state and "project" means any continuous improvement within overall project limits regardless of whether small exterior segments are left unimproved. The board of commissioners of public lands shall determine if an assessment is just and legal.

General maintenance does not constitute a construction project or a project of continuous improvement. Under sec. 66.60, Stats., special charges relate to items which may be classified as maintenance. There is an important difference between general maintenance and construction projects. Section 66.60, Stats., recognizes this difference and prescribes different procedures for items of maintenance and construction projects. Under sec. 66.64, Stats., the state is liable for construction projects, but not for maintenance.

In my opinion the proposed assessment of special charges for a portion of the special items of maintenance referred to above would not constitute a special assessment for local improvements or for a

project in the nature of a continuous improvement within the meaning of secs. 66.60(4), 66.64, Stats.

Section 70.119(1), (2), Stats., provides that the state shall make reasonable payments at established rates "for water, sewer, and electrical services and all other services *directly provided* to state facilities ... including garbage and trash disposal and collection, which are financed in whole or in part by special charges or fees" and "for other municipal services as defined in sub. (3)(d), *directly provided* to state facilities ... pursuant to the procedures specified in subs. (4), (5) and (6)." Few if any of the maintenance services proposed to be subject to special charges by the city would be included within sec. 70.119, Stats., partially for the reason that they do not appear to be directly provided to state facilities.

I conclude that state property is not subject to assessment of special charges for maintenance of the State Street Mall-Capitol Concourse project as proposed by the City of Madison.

BCL:RJV

Confidential Reports; Counties; Public Health: Before client information is released to another division within a county community human services department, a written and informed consent is necessary. The community human services board and the director may view client information without a written and informed consent for any purpose related to their powers and duties. OAG 73-80

December 29, 1980.

FREDERIC W. FLEISHAUER, *District Attorney*
Portage County

You have requested my opinion concerning client confidentiality as it pertains to an integrated community human services department and provided the following background information.

In 1979, the Portage County Board of Supervisors voted to consolidate three county agencies pursuant to sec. 46.23, Stats. The three previously existing agencies were the Portage County Department of Social Services, the Portage County Unified Board, and the Portage

County Health Department. These three agencies were combined to become the Portage County Community Human Services Department.

The Portage County Community Human Services Department consists of a central administrative structure and four major divisions. Each division contains a number of sections which are responsible for various program areas. The Portage County Board has authorized the newly consolidated Department to carry on the duties, activities, and responsibilities charged to the three previous departments.

As a part of this consolidation, the Portage County Community Human Services Department has sought to develop a policy regarding the sharing of confidential client information between staff members. The problem with which that Department is confronted is that the statutes dealing with confidentiality seemingly assume that there are separate departments, as previously existed in Portage County, rather than a consolidated agency.

You specifically ask whether, under the various statutes governing the confidentiality of client information, such a consolidated agency can freely exchange client information within the agency without obtaining the client's written consent. You have cited and discussed a number of statutes which address a question of confidentiality of client information, but which need not be discussed further in this opinion. It is sufficient to note that none of the statutes directly answers how the confidentiality provisions are to operate in the setting which you have described.

These statutes relating to confidentiality were enacted when the respective program responsibilities were carried out by separate agencies. Unless and until the Legislature addresses this issue, you have recommended that the Portage County Community Human Services Department adopt a policy which allows for a free exchange of client information only within each of the particular divisions of the Department. If client information is to be released to another division of the Department, it is your opinion that a written and informed consent by the client would be necessary.

I fully agree with your recommended approach and with your reasoning. I have considered secs. 146.81 to 146.83, Stats., which were created by ch. 221, Laws of 1979, and have concluded that these new

provisions relating to confidentiality of patient health care records do not affect the answer to the specific question which you have raised.

However, sec. 46.23(5), Stats., provides that the Community Human Services Board, as opposed to the Department, "shall possess all the powers and duties so assigned by law to boards organized under ss. 46.21, 46.22, 51.42, 51.437, 59.025(3)(a), 140.09 and 141.01, except as otherwise specified in this section or as specified by action of the county boards establishing such board." The director appointed by the Board is vested with all of the administrative and executive powers and duties of managing, operating, maintaining, and improving these programs. Sec. 46.23(6), Stats. Therefore, although a written and informed consent by a client is necessary before client information is exchanged between divisions, it is my opinion that the Board and the director are not subject to the same limitation and that they have a right to view client information without a written and informed consent for any purpose related to their powers and duties.

I wish to commend you and your staff for complying fully with the guidelines set forth for district attorneys and county corporation counsels when requesting an opinion from this office. Although the problem that your request poses is both serious and complex, resolution of the issue was made easier by the thorough analysis which you provided consistent with the guidelines set forth in the preface to 62 Op. Att'y Gen. (1973).

BCL:DPJ

**STATUTES AND CONSTITUTIONAL PROVISIONS,
SESSION LAWS, LEGISLATIVE BILLS,
OPINIONS OF THE ATTORNEY GENERAL, AND
RESOLUTIONS REFERRED TO AND CONSTRUED**

U.S. CODE	Page
15 U.S.C. 1692.....	116
15 U.S.C. 1692(n)-(o).....	116
15 U.S.C. 1175.....	25
18 U.S.C. 13.....	24
18 U.S.C. 1151.....	185
18 U.S.C. 1152.....	24, 190
18 U.S.C. 1153.....	190
18 U.S.C. 1154.....	184
18 U.S.C. 1154(c).....	185
18 U.S.C. 1156.....	184
18 U.S.C. 1161.....	184
18 U.S.C. 1162.....	23, 86, 188
18 U.S.C. 1162(a).....	23
18 U.S.C. 1162(b).....	86
18 U.S.C. 1162(c).....	190
18 U.S.C. 1165.....	85
18 U.S.C. 3113.....	184
18 U.S.C. 3146.....	166
18 U.S.C. 3488.....	184
18 U.S.C. 3618.....	184
25 U.S.C. 349.....	82
25 U.S.C. 461.....	80
25 U.S.C. 465.....	80
25 U.S.C. 467.....	80
25 U.S.C. 476.....	84
28 U.S.C. 1360.....	23, 86, 188
29 U.S.C. 621.....	232
29 U.S.C. 623(a)(1).....	237
29 U.S.C. 623(f)(1) & (2).....	237
29 U.S.C. 631.....	237
29 U.S.C. 631(a).....	237
42 U.S.C. 602.....	98
42 U.S.C. 602(a)(9).....	97
 UNITED STATES CONSTITUTION	
Art. I.....	109
I, sec. 8.....	113, 184
1st Amend.....	20, 110
14th Amend.....	16, 20
 WISCONSIN CONSTITUTION	
Art. I, sec. 8.....	164
I, sec. 12.....	135
I, sec. 18.....	109
III, sec. 1	33
III, sec. 1(3)	32
IV, sec. 24	22
IV, sec. 26	5
IV, sec. 31	154
IV, sec. 32	154
VI, sec. 4	45
VII, sec. 1	9
VII, sec. 11	5
VII, sec. 13	9
VIII, sec. 1	220
VIII, sec. 10	124, 176
XI, sec. 1	153
XI, sec. 3	232
XIII, sec. 9	18
XIII, sec. 10	8
XIII, sec. 12	9
 RESOLUTIONS	
Res. 25 A.....	204
 BILLS	
1945, No. 598 A.....	247
1949, No. 509 A.....	45
1969, No. 75 A.....	250
1969, No. 603 A.....	174
1979, No. 1180 A.....	266
1980, No. 9 A.....	267
 SESSION LAWS	
1848, Ch. 21.....	69
1856, Ch. 122.....	212
Ch. 137.....	210
Ch. 413.....	212
1858, Ch. 69.....	210
Ch. 78.....	207
1866, Ch. 314.....	206
1872, Ch. 7.....	70
Ch. 119.....	206
Ch. 160.....	215
1882, Ch. 266.....	215
1909, Ch. 541.....	175
1911, Ch. 856.....	243
1921, Ch. 589.....	234
1923, Ch. 423.....	234
1929, Ch. 504.....	209
1935, Ch. 12.....	246

Ch. 193.....	235	53 OAG 218, 220, 221 (1964)	38
Ch. 522.....	246	55 OAG 61 (1966)	179
1937, Ch. 358.....	114	56 OAG 11, 19 (1967)	83
Ch. 396.....	232	56 OAG 126 (1967)	95
1943, Ch. 247.....	45	56 OAG 211, 212 (1967)	179
1945, Ch. 564.....	246	57 OAG 228 (1968)	178
1947, Ch. 318.....	40	57 OAG 230 (1968)	179
Ch. 441.....	232	58 OAG 120, 135 (1969)	178
1949, Ch. 501.....	15	59 OAG 240, 245 (1970)	100
1951, Ch. 380.....	91	60 OAG 134, 137 (1971)	162
Ch. 704.....	232	60 OAG 261 (1971)	50
1953, Ch. 279.....	235	60 OAG 271 (1971)	175
1955, Ch. 651.....	92	61 OAG 421 (1972)	228
Ch. 696.....	70	62 OAG Preface (1973)	275
1959, Ch. 310.....	38	62 OAG 47 (1973)	107
1969, Ch. 255.....	174	63 OAG 24 (1974)	8
Ch. 276.....	40	63 OAG 391 (1974)	36
1971, Ch. 154.....	259	63 OAG 473, 478 (1974)	110
1973, Ch. 60.....	152	63 OAG 473, 487 (1974)	110
Ch. 272.....	45	63 OAG 530 (1974)	237
Ch. 301.....	33	63 OAG 596 (1974)	196
Ch. 305.....	156	64 OAG 184 (1975)	23, 183
1975, Ch. 157.....	174	65 OAG 67, 69 (1976)	29
Ch. 224.....	111	65 OAG 80 (1976)	23
Ch. 332.....	6	65 OAG 251, 254-256 (1976)	125
Ch. 403.....	39	65 OAG 276 (1976)	23, 84, 183
1977, Ch. 27.....	130	66 OAG 115 (1977)	25, 84
Ch. 29.....	111, 130, 220	66 OAG 148 (1977)	59
Ch. 449.....	7	66 OAG 290 (1977)	23
1979, Ch. 34.....	101	67 OAG 126 (1978)	144
Ch. 38.....	4	67 OAG 245 (1978)	230
Ch. 72.....	153	68 OAG 114, 116 (1979)	266
Ch. 110.....	109	68 OAG 151 (1979)	23
Ch. 112.....	164, 255	69 OAG 103 (1980)	271
Ch. 221... 197, 201, 236, 263, 274		69 OAG 139 (1980)	258
Ch. 323.....	198		
Ch. 328.....	260		
Ch. 331.....	168		
Ch. 358.....	263		

OPINIONS

11 OAG 242 (1922)	71	48.....	26
14 OAG 263 (1925)	127	59.....	93
17 OAG 327 (1928)	71	67.....	158
24 OAG 508 (1935)	38	68.....	153
29 OAG 467, 469 (1940)	101	80.....	89
30 OAG 343, 345-46 (1941)	177	101.....	197
31 OAG 155 (1942)	142	161.....	254
36 OAG 483 (1947)	71	163.....	22
41 OAG 65, 68 (1952)	104	176.....	172
44 OAG 106 (1955)	35	180.....	207
45 OAG 166 (1956)	3	190.....	205
46 OAG 12 (1957)	95	199.....	153
50 OAG 50 (1961)	35	234.....	155

STATUTES

Ch. 16.....	125
23.....	202
29.....	202
33.....	33

OPINIONS OF THE ATTORNEY GENERAL

314.....	206	32.19(4m)(b).....	264
409.....	169	33.001.....	33
811.....	61	33.25(1).....	33
814.....	27	33.26(2).....	33
979.....	44	33.27(1).....	33
Sec. 6.02.....	35	33.28(2).....	33
9.20.....	41, 160	33.30.....	33
9.20(3).....	41	33.30(3)(d).....	33
9.20(4).....	41	38.001.....	140, 258
11.06.....	260	38.02.....	258
11.06(1).....	260	38.12(1).....	258
11.09.....	260	38.14(3).....	257
11.09(1).....	260	38.18.....	259
11.09(2).....	260	38.22.....	259
11.33.....	259	38.22(1)(c).....	258
13.48.....	122	38.22(1)(d).....	259
13.48(23).....	122	38.22(2).....	140
13.488.....	122	38.22(5).....	259
15.06(1)(a).....	137	38.24(1).....	139
15.105(9).....	143	38.24(3)(a).....	142
16.70(4).....	125	38.24(3)(a)1.....	139, 257
16.75(1).....	125	38.24(3)(b).....	139, 257
17.01(13).....	137	38.24(3)(c).....	141, 257
17.026.....	6	40.91.....	4
17.026(1).....	8	40.96(3).....	4
17.03.....	243	41.02(4).....	107
17.03(2).....	137	41.02(11)(a) & (23).....	237
17.20(2).....	136	41.11.....	237
19.21(1).....	65	41.11(1).....	236
19.21(2).....	65	41.19.....	142
19.81-19.89.....	146	46.03(22)(a).....	52
19.81.....	251	46.031.....	130
19.81(2).....	144, 252	46.031(2).....	129
19.82(2).....	143	46.031(2)(b).....	131
19.82(3).....	252	46.031(2)(b)(1).....	130
19.83.....	252	46.21.....	275
19.84.....	146	46.22.....	275
19.84(2).....	252	46.23.....	273
19.85(1).....	252	46.23(5).....	275
20.255(1)(fe).....	109	46.23(6).....	275
20.923(3).....	4	47.08.....	123
23.09.....	202	47.09.....	123
23.09(2)(h).....	202	48.01.....	55, 181
29.085.....	202	48.01(1)(a).....	181
29.174.....	202	48.01(1)(c).....	181
32.19.....	264	48.01(2).....	181
32.19(1).....	13	48.02(7).....	52
32.19(2)(c).....	11, 264	48.02(7s).....	52
32.19(2)(d).....	11	48.17.....	26
32.19(2)(d)1.....	265	48.207.....	53
32.19(2)(i).....	265	48.208.....	53
32.19(3).....	265	48.26(1).....	182
32.19(4).....	13	48.293.....	180
32.19(4m).....	11, 263	48.34.....	55
32.19(4m)(a).....	264	48.34(3).....	53

48.34(4m).....	53	59.24(2).....	196
48.34(10).....	53	59.28.....	37
48.343(2).....	27	59.28(1).....	37
48.345.....	55	59.28(2).....	37
48.35(2).....	182	59.28(2)(b).....	37
48.357(4).....	53	59.34.....	44
48.37.....	26	59.34(1).....	45
48.396(1).....	179	59.39(1).....	64
48.396(2).....	182	59.47(1).....	164
48.60.....	52	59.51(1).....	59
49.01(1).....	231	59.54.....	62
49.01(4).....	231	59.60.....	162
49.02(1) & (2).....	231	59.60(2).....	162
49.02(5).....	230	59.60(6).....	162
49.53.....	96	59.66.....	163
49.53(1).....	96	59.665.....	163
49.53(2).....	96	59.97.....	151
49.53(2)(a).....	96	59.97(2)(a).....	146
49.53(2)(b).....	97	59.97(5)(c)1-5.....	151
49.53(2)(c).....	97	59.97(10)(d).....	151
50.01.....	52	59.97(11).....	151
50.01(1).....	52	59.99.....	146
51.42.....	128, 275	59.99(1).....	152
51.42(5).....	129	59.99(4).....	149
51.42(5)(h)7.....	129	59.99(7)(a).....	149
51.42(5)(h)8.....	129	59.99(7)(b).....	152
51.42(8).....	130	59.99(7)(c).....	147
51.437.....	129, 275	59.99(10), (11), (12), (13).....	146
51.437(9).....	129	60.301.....	246
51.437(9)(a).....	129	60.305.....	246
51.437(9)(b).....	130	60.305(1)(a).....	109, 245
51.437(9)(c).....	130	60.37-60.38.....	161
51.437(9)(d).....	130	61.65.....	237
51.437(11).....	130	62.05(1)(a).....	270
51.45(2)(b) & (c).....	230	62.05(2).....	270
53.01.....	55	62.13(3).....	243
53.04.....	56	62.13(7)(c)3.....	244
53.06.....	54	62.13(12).....	235
53.19.....	56	62.23(7)(e).....	150
53.30-53.43.....	56	62.50(6).....	243
53.30.....	56	63.01-63.17.....	46
53.31.....	54	63.05.....	46
53.33.....	56	63.05(1).....	46
53.37(1) & (3).....	231	63.05(6).....	46
53.38.....	230	63.08(1).....	46
53.43.....	56	66.01.....	235
57.01.....	174	66.01(4).....	239
59.01(1).....	105	66.01(15).....	235
59.025(3)(a).....	275	66.054.....	172
59.07.....	92	66.054(5).....	192
59.07(64).....	92	66.054(10)(d).....	172
59.07(76).....	56	66.054(23).....	248
59.15.....	2	66.11(2).....	108
59.15(1)(a).....	2		

OPINIONS OF THE ATTORNEY GENERAL

66.197.....	2
66.298.....	269
66.30(2).....	142
66.305.....	196
66.315.....	196
66.60.....	272
66.60(1), (3), (4), (5), (6a), (7), (8), (9), (11), (12)(c), (18).....	271
66.60(15).....	271
66.60(16).....	269
66.60(16)(a), (b).....	271
66.610.....	270
66.610(10).....	270
66.64.....	269
66.64(1), (2)(a).....	272
66.90(9).....	236
67.01(8).....	159
67.03.....	159
67.03(1).....	159
67.04(2).....	159
67.04(2)(r).....	160
67.05.....	159
67.05(2)(b).....	160
67.05(5)(b), (7)(b).....	159
67.05(14).....	159
67.12.....	159
67.12(12).....	158
67.12(12)(a).....	159
67.125.....	159
67.125(1), (2).....	159
70.045.....	222
70.119.....	273
70.119(1), (2), (3)(d), (4), (5) & (6).....	273
70.44.....	221
70.511.....	220
70.511(2).....	222
70.57(1).....	223
70.995.....	221
70.995(12).....	221
71.09(7)(p).....	101
71.13.....	37
71.13(3)(a).....	40
71.13(3)(b).....	40
71.13(3)(g).....	37
80.01.....	91
80.01(2).....	87
80.01(4).....	89
80.07.....	91
80.07(1).....	89
80.08.....	89
80.37.....	89
81.15.....	138
85.10(40).....	107
85.47.....	107
101.01(2)(c).....	107
101.13(1).....	252
101.65(1)(a).....	197
102.04(1)(a).....	107
103.01(3).....	107
103.37.....	103
103.37(1).....	105
103.37(2).....	105
103.56(1).....	107
104.01(1).....	107
106.01(10).....	258
107.001.....	127
108.02(4)(a).....	107
109.01(2).....	107
111.32(3).....	107
115.01(3).....	112
115.01(5).....	112
115.34.....	109
115.34(2).....	111
118.125(2).....	182
120.41.....	14
120.41(1).....	14
120.50.....	14
120.50(1).....	14
120.50(2).....	15
120.50(2)(am).....	15
120.50(2)(b), (c).....	15
120.50(3).....	15
133.04.....	105
138.05.....	28
138.05(1).....	29
138.05(1)(a).....	29
140.09.....	275
141.01.....	275
146.81 - 146.83	274
157.03(4).....	132
157.03(4)(a).....	132
157.10.....	132
163.03(1).....	23
163.54.....	23
165.015(1).....	245
165.83(2)(a).....	254
165.83(2)(a)2.....	255
165.84(1).....	255
165.87(2).....	26
176.01(4).....	169
176.01(8).....	248
176.05(1).....	192
176.05(4a).....	248
176.07.....	168
176.07(1).....	169
180.04.....	207
180.04(4).....	207
190.02.....	205

190.02(2).....	211	443.02(1).....	161
190.02(3) & (4).....	205	443.02(8).....	163
190.03.....	209	703.11.....	161
190.04.....	208	706.01.....	127
190.05.....	209	706.01(1).....	127
190.06.....	209	706.01(2).....	127
192.47.....	226	706.01(8).....	127
192.71.....	204	706.05(1).....	59
199.02.....	156	706.13.....	62
199.04(1).....	153	710.02.....	126
199.05(2).....	156	753.07(4).....	133
218.04.....	113	753.071(2).....	134
218.04(4)(a).....	113	755.045(1).....	26
218.04(7)(b).....	114	756.03.....	19
218.04(7)(d).....	121	756.03(2).....	19
218.04(10)(b).....	115	756.031.....	19
236.02(6).....	161	757.02(3).....	67
236.20.....	161	757.57(2).....	65
236.34.....	161	757.65(2).....	65
255.03(2).....	19	757.81-757.99.....	7
255.031.....	19	757.81(2).....	10
289.48.....	61	757.81(3).....	10
300.10.....	27	757.81(6), (7).....	10
300.10(4).....	28	757.83.....	7
343.30(1q).....	50	757.85-757.91.....	9
343.30(1q)2(d).....	51	757.85(1).....	5
343.305.....	48	757.85(2), (3), (4), (5), (6).....	10
343.31(1)(b).....	47	757.87.....	10
343.65(2)(a).....	51	757.89.....	10
345.05(1)(a).....	226	757.91.....	10
345.16.....	50	757.97(1), (2), (3).....	9
345.31.....	195	801.61.....	64
345.60.....	50	807.08.....	64
345.60(1).....	50	809.15(4).....	64
346.63(1).....	47	809.30(1)(c) & (e).....	65
346.63(1)(a).....	50	811.02.....	61
346.65.....	49	811.03.....	61
346.65(1).....	49	811.06.....	62
346.65(2)(a)1.....	47	811.10.....	62
346.65(2)(a)2.....	48	811.11.....	62
402.105(1).....	169	851.09.....	133
402.105(2).....	169	852.01.....	133
402.106(1).....	169	885.01.....	115
402.401.....	169	893.80.....	198
402.401(1).....	169	895.43.....	138, 198
402.401(3)(b).....	170	907.02.....	47
402.501.....	169	939.22(22).....	66
402.501(1).....	170	939.48.....	72
402.501(1)(a).....	170	939.60.....	173
439.48.....	72	941.23.....	66, 229
440.26.....	226	943.13.....	92, 220
440.26(1).....	226	943.13(1)(b).....	217
440.26(5).....	226	943.20.....	217
440.26(8).....	226		

OPINIONS OF THE ATTORNEY GENERAL

943.21	217	971.19	195
943.50	217	973.08	65
943.50(1)	217	973.09	175
943.50(3)	218	973.09(1)	173
945.01(2)	23	973.10	175
945.01(2)(am)	23	973.10(1)	174
945.02	22	973.10(2)	176
945.03	23	973.10(2)(a)	173
945.03(4)	22	990.001(1)	147
945.04	23	990.01(1)	266
967.06	65	990.01(18)	126
969.01(1)	255	990.01(26)	107
969.03(1)(e)	255		

INDEX

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.

	Page
Apprentices	
<i>Apprentices; Vocational, Technical And Adult Education, Board Of;</i> A vocational, technical and adult education district which provides apprenticeship training may contract with other districts for payment of the costs of training persons who are residents of the other districts. Such district may not refuse, however, to admit nonresident Wisconsin students to an approved apprenticeship program, because the district of the student's residence fails to reimburse the district providing the instruction, <i>unless</i> the state board of vocational, technical and adult education adopts rules sanctioning such refusal. OAG 69-80	257
Appropriations And Expenditures	
<i>Appropriations And Expenditures; Constitutionality; Navigable Waters;</i> Dredging a navigable waterway to alleviate periodic flooding is not a prohibited "work of internal improvement" within the meaning of Wis. Const. art. VIII, sec. 10. OAG 49-80.....	176
<i>Appropriations And Expenditures; Towns;</i> Revenue sharing monies may be expended by a town board to operate a senior citizen center under state law. (Unpublished Opinion) OAG 23-80	
Assessments	
<i>Assessments; State; State Street Mall-Capitol Concourse;</i> State property is not subject to assessment of special charges under sec. 66.60(16), Stats., for maintenance of State Street Mall-Capitol Concourse project as proposed by the City of Madison. Section 66.64, Stats., is limited to special assessments for improvements. OAG 72-80	269
Bail	
<i>Bail; Constitutionality; Criminal Law;</i> Chapter 112, section 10, Laws of 1979 which allows courts to revoke bail for violating judicially imposed conditions of bail does not violate Wis. Const. art. I, sec. 8. OAG 44-80	164
Banks And Banking	
<i>Banks And Banking; Loans; Mortgages; Veterans;</i> The recent amendment to sec. 45.80(2)(c), Stats., exempts a weatherization improvement loan supplement from the "maximum primary financing" requirement only in the case of a home purchase loan. Home improvement loans made under sec. 45.76(2)(a), Stats., are therefore not exempt from such requirement. (Unpublished Opinion) OAG 52-80	
Bids And Bidders	
<i>Bids And Bidders; State Office Building;</i> Subject to certain limitations, the lease of state office building space to a restaurant or other commercial enterprise serving both state employes and the general public is constitutionally permissible. Such leases do not require competitive bidding. OAG 29-80.....	121

	Page
Bonds	
<i>Bonds; Municipalities;</i> A city may avoid the referendum procedures normally attendant to the issuance of general obligation bonds, by using alternative methods of financing which do not require referenda, such as borrowing on promissory notes under sec. 67.12(12), Stats. OAG 42-80.....	158
Cemeteries	
<i>Cemeteries;</i> Cemetery association voters must be lot owners under sec. 157.03(4), Stats. The ownership interest of a deceased lot owner passes to his or her heirs, who as owners, are entitled to vote in cemetery association elections. OAG 33-80	132
Circuit Judge	
<i>Circuit Judge; Firearms; Words And Phrases;</i> Although judges are conservators of the peace, they are not peace officers who are allowed to carry concealed weapons. OAG 18-80.....	66
Citizens Utility Board	
<i>Citizens Utility Board; Corporations;</i> The creation of a corporation, the Citizens Utility Board, under ch. 199, Stats., is constitutional. OAG 41-80	153
City Clerk	
<i>City Clerk; Referendum;</i> Under sec. 9.20(3), Stats., a city clerk's authority to examine the "sufficiency" and "form" of an initiative petition is at least as extensive as the city council's under sec. 9.20(4), Stats. This judicially established authority should only be exercised where a substantive insufficiency clearly exists. OAG 12-80.....	41
Clerk Of Courts	
<i>Clerk Of Courts; Original Records; Public Defenders;</i> Clerks of court are not authorized to send the original records of criminal cases to the public defender prior to the time an appeal has been taken unless an order signed by a judge of the court authorizes such release. OAG 17-80	63
Collection Agencies	
<i>Collection Agencies; Words And Phrases;</i> Section 218.04, Stats., requirement that a foreign collection agency maintain a Wisconsin office with records may not violate the commerce clause, U.S. Const. art. I, sec. 8. OAG 28-80.....	113
Commitments	
<i>Commitments; Usury;</i> Commitment fees which are bona fide in nature are not a part of interest under sec. 138.05, Stats., although across the board fees imposed without regard for the customer's need or desire for a bona fide commitment are unlikely to meet the lender's burden of showing that the fee represents the reasonable value of services rendered. OAG 9-80.....	28
Compatibility	
<i>Compatibility; Medical Examining Board; Wisconsin Psychiatric Association; Words And Phrases;</i> By reason of sec. 15.08(1), Stats., as amended by ch. 221, Laws of 1979, a person is ineligible to continue to serve on the Medical Examining Board while also serving as an officer of the Wisconsin Psychiatric Association, Inc., because such association promotes or furthers the profession of medicine. "Substantial interest" under sec.	

INDEX

	285
	Page
19.46(1)(e)2., Stats., also discussed. (Unpublished Opinion) OAG 58-80	
<i>Compatibility; Towns;</i> Offices of commissioner of town sanitary district having territory within three towns, and supervisor of the town board of town having largest assessed valuation of taxable property of such district, are incompatible where the town board also serves as the appointing authority for commissioners of the town sanitary district. OAG 25-80	108
Compensation	
<i>Compensation; County Clerk; Public Officials; Salaries And Wages; Sheriffs;</i> The salaries of elected county officials may be increased during their terms. But any increase put into effect after the earliest time for filing nomination papers does not carry forward to the new term unless the county board again votes the increase. OAG 1-80.....	1
Confidential Reports	
<i>Confidential Reports; Counties; Public Health;</i> Before client information is released to another division within a county community human services department, a written and informed consent is necessary. The community human services board and the director may view client information without a written and informed consent for any purpose related to their powers and duties. OAG 73-80.....	273
<i>Confidential Reports; Minors;</i> Juvenile officers are not required to provide information in their possession concerning a juvenile to officials of the school attended by the juvenile when requested to do so. The school does not violate the confidential exchange provisions of sec. 48.396(1), Stats., by using the information obtained from a police officer to take disciplinary action against a student as long as the school does not reveal the reason for the disciplinary action to parties not authorized to receive such information. To the extent that 56 Op. Att'y Gen. 211 (1967) is in conflict with this opinion, it is modified. OAG 50-80.....	179
Constitutionality	
<i>Appropriations And Expenditures; Constitutionality; Navigable Waters;</i> Dredging a navigable waterway to alleviate periodic flooding is not a prohibited "work of internal improvement" within the meaning of Wis. Const. art. VIII, sec. 10. OAG 49-80.....	176
<i>Bail; Constitutionality; Criminal Law;</i> Chapter 112, section 10, Laws of 1979 which allows courts to revoke bail for violating judicially imposed conditions of bail does not violate Wis. Const. art. I, sec. 8. OAG 44-80	164
<i>Constitutionality; Taxation;</i> 1977 amendment to sec. 70.511(2), Stats., which allows municipalities to pass on part of delayed refund claims to other taxing districts for which taxes were collected, does not violate the uniformity provision of Wis. Const. art. VIII, sec. 1. For purposes of the amendment, "taxing districts" includes school and VTAE districts. OAG 60-80.....	220
Corporations	
<i>Citizens Utility Board; Corporations;</i> The creation of a corporation, the Citizens Utility Board, under ch. 199, Stats., is constitutional. OAG 41-80	153

Counties

<i>Confidential Reports; Counties; Public Health;</i> Before client information is released to another division within a county community human services department, a written and informed consent is necessary. The community human services board and the director may view client information without a written and informed consent for any purpose related to their powers and duties. OAG 73-80.....	273
<i>Counties; Insurance;</i> Liability of self-insured county performing state highway maintenance is not increased by virtue of maintenance contract with state. OAG 37-80.....	137
<i>Counties; Words And Phrases;</i> The state, its political subdivisions, and counties are not employers under sec. 103.37, Stats., and, therefore, are not subject to this statute which prohibits employers from requiring any employee or applicant for employment to pay the cost of a medical examination required by the employer as a condition of employment. OAG 24-80.....	103

County Board

<i>County Board; Ordinances;</i> County board has authority under sec. 59.07(64), Stats., to enact a county ordinance prohibiting trespass to land that is similar to and consistent with sec. 943.13, Stats. OAG 21-80.....	92
<i>County Board; 51.42 Board;</i> The county board of supervisors may require its approval of contracts for purchase of services by the community services board if so specified in its Coordinated Plan and Budget. Otherwise it may not. OAG 32-80	128

County Board Of Adjustment

<i>County Board Of Adjustment; County Planning And Zoning Committee; Zoning;</i> The extent to which sec. 59.99, Stats., authorizes the County Board of Adjustment to grant zoning variances and review decisions of the County Planning and Zoning Committee, discussed. OAG 40-80	146
---	-----

County Civil Service Commission

<i>County Civil Service Commission; County Medical Examiner;</i> County board or county civil service commission, when establishing qualifications for the position of medical examiner should consider the statutorily prescribed duties of the medical examiner in sec. 59.34 and ch. 979, Stats. Legislature intends office to be occupied by an expert. OAG 13-80	44
---	----

County Clerk

<i>Compensation; County Clerk; Public Officials; Salaries And Wages; Sheriffs;</i> The salaries of elected county officials may be increased during their terms. But any increase put into effect after the earliest time for filing nomination papers does not carry forward to the new term unless the county board again votes the increase. OAG 1-80	1
--	---

County Medical Examiner

<i>County Civil Service Commission; County Medical Examiner;</i> County board or county civil service commission, when establishing qualifications for the position of medical examiner should consider the statutorily prescribed duties of the medical examiner in sec. 59.34 and ch. 979, Stats. Legislature intends office to be occupied by an expert. OAG 13-80	44
---	----

INDEX

287

Page

County Planning And Zoning Committee

County Board Of Adjustment; County Planning And Zoning Committee; Zoning; The extent to which sec. 59.99, Stats., authorizes the County Board of Adjustment to grant zoning variances and review decisions of the County Planning and Zoning Committee, discussed. OAG 40-80

146

County Surveyor

County Surveyor; Surveys; Duties of county and other land surveyors and minimum standards for property surveys discussed. OAG 43-80.....

160

Courts

Courts; Criminal Law; Law enforcement officials may require a person appearing pursuant to a summons to be fingerprinted and photographed. A court may condition a person's release from custody on bail upon the taking of fingerprints and photographs. OAG 68-80

254

Courts; Minors; Municipal Court; Penalty Assessment; When a municipal court adjudges a child to have violated a municipal ordinance, that court must impose court costs and should add the ten percent penalty assessment provided in sec. 165.87(2), Stats., to any forfeiture imposed for such violation. OAG 8-80

26

Courts; Probation And Parole; Probation—consecutive terms. Under sec. 973.09(1), Stats., a court may not impose consecutive probation terms. OAG 46-80.....

173

Criminal Law

Bail; Constitutionality; Criminal Law; Chapter 112, section 10, Laws of 1979 which allows courts to revoke bail for violating judicially imposed conditions of bail does not violate Wis. Const. art. I, sec. 8. OAG 44-80

164

Courts; Criminal Law; Law enforcement officials may require a person appearing pursuant to a summons to be fingerprinted and photographed. A court may condition a person's release from custody on bail upon the taking of fingerprints and photographs. OAG 68-80

254

Criminal Law; Drunk Driving; Where a person is charged under sec. 346.63(1), Stats. (operating a vehicle while under the influence of an intoxicant or controlled substance), as a second offense, the charge may not be reduced to a violation as a first offense and the court does not have discretion to sentence under sec. 346.65(2)(a)1., Stats., sentencing for first offense. At trial the burden and verdict requirements of a criminal proceeding apply. It is mandatory that the department treat this as a second offense for purposes of revocation under sec. 343.31(1)(b), Stats. OAG 14-80.....

47

Criminal Law; Hotels, Boarding Houses And Restaurants; The temporary detention provision of the shoplifting statute, sec. 943.50, Stats., cannot be used by hotel proprietors to detain guests who take hotel property without authorization. Sections 943.13(1)(b) and 943.21, Stats., do not appear to apply to a hotel guest who overstays the agreed-upon visit without obtaining an extended reservation. Rights of hotel proprietors in such situations discussed. OAG 59-80

217

Criminal Law; Indians; Bingo conducted on Indian Reservations by Indian tribes or Indian persons must comply with the Bingo Control Act. OAG 7-80.....

22

Development, Department Of

Development, Department Of; Housing; The Department of Development is authorized to act as a public housing agency for the purpose of participating in the federal lower-income housing assistance program set forth in 42 U.S.C. sec. 1437f (Section 8). The Department is not required to obtain local approval prior to participating in the Section 8 program. (Unpublished Opinion) OAG 61-80

Drunk Driving

Criminal Law; Drunk Driving; Where a person is charged under sec. 346.63(1), Stats. (operating a vehicle while under the influence of an intoxicant or controlled substance), as a second offense, the charge may not be reduced to a violation as a first offense and the court does not have discretion to sentence under sec. 346.65(2)(a)1., Stats., sentencing for first offense. At trial the burden and verdict requirements of a criminal proceeding apply. It is mandatory that the department treat this as a second offense for purposes of revocation under sec. 343.31(1)(b), Stats. OAG 14-80.....

47

Dwelling Codes

Dwelling Codes; Municipalities; Liability of local units of government in adopting and enforcing the One- and Two-Family Dwelling Code discussed. OAG 54-80.....

197

Elections

Elections; Under certain specified conditions, Wisconsin constitutionally cannot prevent the substitution of persons as independent candidates for the office of Vice-President of the United States. (Unpublished Opinion) OAG 55-80

Elections; Funds; Public Officials; Section 11.33, Stats., applies to persons elected to state office who are seeking reelection or election to a different office and to the use of public funds for political purposes. OAG 70-80.....

259

Elections; Municipalities; Plumbing; Where town sanitary district consists of territory wholly within one town and town board has not designated its members as commissioners but has appointed commissioners, town board is not required to call special election to elect commissioners if petition signed by at least twenty percent of the qualified electors of the district is filed. OAG 65-80

245

Emergency Number Systems Board

Emergency Number Systems Board; Open Meeting; A telephone conference call involving members of a governmental body is a meeting which must be reasonably accessible to the public and the required public notice must be given. OAG 39-80.....

143

Employee Trust Funds Board

Employee Trust Funds Board; Statutes; Employment of an actuary by the Employee Trust Funds Board under sec. 40.02, Stats., is not subject to the general contracting procedures set forth in secs. 16.70 through 16.76, Stats. (Unpublished Opinion) OAG 34-80

Establishment Clause, U.S. Constitution

Establishment Clause, U.S. Constitution; National School Lunch Act; United States Constitution art. I, and Wisconsin Constitution art. I, sec.

INDEX

	289
	Page
18, do not prohibit the state from disbursing state matching funds under National School Lunch Act (Pub. L. 79-396) to private as well as public schools. Sections 115.34, and 20.255(1)(fe), Stats., must be amended to permit such disbursal to private schools. OAG 27-80.....	109
Fees	
<i>Fees; Sheriffs;</i> Section 71.13(3)(g), Stats., requires that the sheriff of Milwaukee County perform duties of service and filing in connection with collection of state income and franchise taxes pursuant to sec. 71.13, Stats., without advancement of fees by the Department of Revenue. OAG 11-80.....	37
Fire Department	
<i>Fire Department; Milwaukee, City Of; Ordinances; Police; Retirement Systems;</i> The City of Milwaukee has the authority to set a mandatory retirement age for its police and fire chiefs by charter ordinance within the guidelines of the United States Age Discrimination in Employment Act. Such mandatory retirement can apply to the incumbent chiefs. OAG 64-80.....	232
Firearms	
<i>Circuit Judge; Firearms; Words And Phrases;</i> Although judges are conservators of the peace, they are not peace officers who are allowed to carry concealed weapons. OAG 18-80.....	66
Fish And Game	
<i>Fish And Game; Indians; Stockbridge-Munsee Reservation;</i> The Stockbridge-Munsee Indian Tribe has the exclusive right to hunt and fish on tribal lands and has the right to regulate such activities by both Indian and non-Indian persons upon such lands. Current and former Stockbridge-Munsee Reservation boundaries discussed. OAG 19-80.....	72
<i>Fish And Game; Natural Resources, Department Of;</i> The Department of Natural Resources is not prohibited from approving federal enforcement of federal steel shot regulations by federal agents on lands under their jurisdiction in the state during the 1980 waterfowl hunting season. OAG 56-80.....	201
Freedom Of Speech	
<i>Freedom Of Speech; Juries;</i> Sections 756.03 and 756.031, Stats., prohibiting a person from soliciting jury duty, are constitutional enactments. OAG 6-80.....	19
Funds	
<i>Elections; Funds; Public Officials;</i> Section 11.33, Stats., applies to persons elected to state office who are seeking reelection or election to a different office and to the use of public funds for political purposes. OAG 70-80.....	259
Highways	
<i>Highways; Right Of Way;</i> Rights-of-way boundaries of nondedicated roads created by affirmative act are determined by the order laying out the road, not by the location of the road's centerline. The rights-of-way boundaries of roads created by adverse users are only those portions of land adjacent to the traveled track reasonably necessary for highway purposes, unless the road has also been worked pursuant to sec. 80.01(2), Stats. OAG 20-80.....	87

Hotels, Boarding Houses And Restaurants

Criminal Law; Hotels, Boarding Houses And Restaurants; The temporary detention provision of the shoplifting statute, sec. 943.50, Stats., cannot be used by hotel proprietors to detain guests who take hotel property without authorization. Sections 943.13(1)(b) and 943.21, Stats., do not appear to apply to a hotel guest who overstays the agreed-upon visit without obtaining an extended reservation. Rights of hotel proprietors in such situations discussed. OAG 59-80

217

Housing

Development, Department Of; Housing; The Department of Development is authorized to act as a public housing agency for the purpose of participating in the federal lower-income housing assistance program set forth in 42 U.S.C. sec. 1437f (Section 8). The Department is not required to obtain local approval prior to participating in the Section 8 program. (Unpublished Opinion) OAG 61-80

Indians

Criminal Law; Indians; Bingo conducted on Indian Reservations by Indian tribes or Indian persons must comply with the Bingo Control Act. OAG 7-80

22

Fish And Game; Indians; Stockbridge-Munsee Reservation; The Stockbridge-Munsee Indian Tribe has the exclusive right to hunt and fish on tribal lands and has the right to regulate such activities by both Indian and non-Indian persons upon such lands. Current and former Stockbridge-Munsee Reservation boundaries discussed. OAG 19-80

72

Indians; Intoxicating Liquors; Licenses And Permits; The State of Wisconsin has no jurisdiction to require the Sokaogon (Mole Lake) Indian Tribe to secure a liquor license from the Town of Nashville in order to sell alcoholic beverages on the Mole Lake Indian Reservation during its annual Bluegrass Festival. OAG 51-80

183

Indigent

Indigent; Medical Aid; Prisons And Prisoners; Public Assistance; Section 53.38, Stats., is exclusively applicable in providing relief from medical and hospital care costs incurred by an indigent prisoner while receiving emergency medical treatment in a hospital. OAG 63-80

230

Insurance

Counties; Insurance; Liability of self-insured county performing state highway maintenance is not increased by virtue of maintenance contract with state. OAG 37-80

137

Insurance; Judges; A county's obligation to continue life insurance for those judges who have exercised the sec. 753.07(4), Stats., option does not terminate when the county salary supplements end on July 1, 1980. OAG 35-80

133

Interest

Interest; Veterans Affairs, Board Of; The interest to be set by the Board of Veterans Affairs on loans funded from prepayments on loans funded with general obligation bonds under sec. 45.79(4)(a), Stats., as amended by ch. 155, Laws of 1979, is the rate charged on loans under the most recent general obligation bond issue. (Unpublished Opinion) OAG 26-80

INDEX

291
Page

Intoxicating Liquors

<i>Indians; Intoxicating Liquors; Licenses And Permits;</i> The State of Wisconsin has no jurisdiction to require the Sokaogon (Mole Lake) Indian Tribe to secure a liquor license from the Town of Nashville in order to sell alcoholic beverages on the Mole Lake Indian Reservation during its annual Bluegrass Festival. OAG 51-80	183
<i>Intoxicating Liquors; Licenses And Permits;</i> Country clubs opening any part of their facilities to the general public lose their eligibility for "country club" liquor or beer licenses issued by the Secretary of the Department of Revenue pursuant to secs. 176.05(4a) and 66.054(23), Stats. OAG 66-80.....	248
<i>Intoxicating Liquors; Words And Phrases;</i> It is not illegal, under sec. 176.07, Stats., to allow the carry-out of an intoxicating liquor from a "Class B" licensed premises between 12 midnight and 8 a.m. if the sale of the liquor occurred before 12 midnight. "Sale" defined. OAG 45-80	168

Judges

<i>Insurance; Judges;</i> A county's obligation to continue life insurance for those judges who have exercised the sec. 753.07(4), Stats., option does not terminate when the county salary supplements end on July 1, 1980. OAG 35-80	133
<i>Judges; Salaries And Wages;</i> Chapter 38, Laws of 1979, is effective to every judge of a court of record and justice of the supreme court when either a supreme court justice or judge of a court of record commences a term of office. OAG 2-80	4

Judicial Commission

<i>Judicial Commission;</i> Orders of former Judicial Commission, which was created and abolished by supreme court order, which created temporary vacancies in the 26th Judicial Circuit Court, Walworth County, and Branch 1 of the 22nd Judicial Circuit Court in Waukesha County, are presumed valid until altered or held invalid by proper authority. Final authority is in the supreme court.	
Present Judicial Commission, created by legislative act, pursuant to Wis. Const. art. VII, sec. 11, is successor to former Commission. The Commission has power to invoke its jurisdiction over the temporary vacancies, and probably has a duty pursuant to sec. 757.85(1), Stats., to "investigate any possible ... disability of a judge" and whether the disabilities, previously determined, continue. OAG 3-80	5

Juries

<i>Freedom Of Speech; Juries;</i> Sections 756.03 and 756.031, Stats., prohibiting a person from soliciting jury duty, are constitutional enactments. OAG 6-80	19
--	----

Licenses And Permits

<i>Indians; Intoxicating Liquors; Licenses And Permits;</i> The State of Wisconsin has no jurisdiction to require the Sokaogon (Mole Lake) Indian Tribe to secure a liquor license from the Town of Nashville in order to sell alcoholic beverages on the Mole Lake Indian Reservation during its annual Bluegrass Festival. OAG 51-80	183
<i>Intoxicating Liquors; Licenses And Permits;</i> Country clubs opening any part of their facilities to the general public lose their eligibility for "country	

club" liquor or beer licenses issued by the Secretary of the Department of Revenue pursuant to secs. 176.05(4a) and 66.054(23), Stats. OAG 66-80.....	248
Liens	
<i>Liens; Register Of Deeds;</i> Registers of deeds have no obligation under law to file or record "common-law liens," or "common-law writs of attachment" because such instruments do not, as a matter of law, affect an interest in land or personal property, and are frivolous on their face. OAG 16-80	58
Loans	
<i>Banks And Banking; Loans; Mortgages; Veterans;</i> The recent amendment to sec. 45.80(2)(c), Stats., exempts a weatherization improvement loan supplement from the "maximum primary financing" requirement only in the case of a home purchase loan. Home improvement loans made under sec. 45.76(2)(a), Stats., are therefore not exempt from such requirement. (Unpublished Opinion) OAG 52-80	
Medical Aid	
<i>Indigent; Medical Aid; Prisons And Prisoners; Public Assistance;</i> Section 53.38, Stats., is exclusively applicable in providing relief from medical and hospital care costs incurred by an indigent prisoner while receiving emergency medical treatment in a hospital. OAG 63-80.....	230
Medical Examining Board	
<i>Compatibility; Medical Examining Board; Wisconsin Psychiatric Association; Words And Phrases;</i> By reason of sec. 15.08(1), Stats., as amended by ch. 221, Laws of 1979, a person is ineligible to continue to serve on the Medical Examining Board while also serving as an officer of the Wisconsin Psychiatric Association, Inc., because such association promotes or furthers the profession of medicine. "Substantial interest" under sec. 19.46(1)(e)2., Stats., also discussed. (Unpublished Opinion) OAG 58-80	
Military Personnel	
<i>Military Personnel; Wills; Wisconsin Veterans Home;</i> A will made by a person prior to entering the Wisconsin Veterans Home and prior to July 31, 1975, is invalid. A will made by a person who entered the Home before July 31, 1975, but who made the will on or after July 31, 1975, is valid. (Unpublished Opinion) OAG 48-80	
Milwaukee, City Of	
<i>Fire Department; Milwaukee, City Of; Ordinances; Police; Retirement Systems;</i> The City of Milwaukee has the authority to set a mandatory retirement age for its police and fire chiefs by charter ordinance within the guidelines of the United States Age Discrimination in Employment Act. Such mandatory retirement can apply to the incumbent chiefs. OAG 64-80.....	232
Mineral Rights	
<i>Mineral Rights; Railroads;</i> Section 192.71, Stats., does not give the state a beneficial ownership interest in mineral estates reserved by railroad corporations from lands received from the public domain to aid in the construction of railroads under federal land grants of 1856 and 1864. OAG 57-80....	204

INDEX

	293
	Page
Minors	
<i>Confidential Reports; Minors;</i> Juvenile officers are not required to provide information in their possession concerning a juvenile to officials of the school attended by the juvenile when requested to do so. The school does not violate the confidential exchange provisions of sec. 48.396(1), Stats., by using the information obtained from a police officer to take disciplinary action against a student as long as the school does not reveal the reason for the disciplinary action to parties not authorized to receive such information. To the extent that 56 Op. Att'y Gen. 211 (1967) is in conflict with this opinion, it is modified. OAG 50-80	179
<i>Courts; Minors; Municipal Court; Penalty Assessment;</i> When a municipal court adjudges a child to have violated a municipal ordinance, that court must impose court costs and should add the ten percent penalty assessment provided in sec. 165.87(2), Stats., to any forfeiture imposed for such violation. OAG 8-80	26
Mortgages	
<i>Banks And Banking; Loans; Mortgages; Veterans;</i> The recent amendment to sec. 45.80(2)(c), Stats., exempts a weatherization improvement loan supplement from the "maximum primary financing" requirement only in the case of a home purchase loan. Home improvement loans made under sec. 45.76(2)(a), Stats., are therefore not exempt from such requirement. (Unpublished Opinion) OAG 52-80	
Municipal Court	
<i>Courts; Minors; Municipal Court; Penalty Assessment;</i> When a municipal court adjudges a child to have violated a municipal ordinance, that court must impose court costs and should add the ten percent penalty assessment provided in sec. 165.87(2), Stats., to any forfeiture imposed for such violation. OAG 8-80	26
Municipalities	
<i>Bonds; Municipalities;</i> A city may avoid the referendum procedures normally attendant to the issuance of general obligation bonds, by using alternative methods of financing which do not require referenda, such as borrowing on promissory notes under sec. 67.12(12), Stats. OAG 42-80	158
<i>Dwelling Codes; Municipalities;</i> Liability of local units of government in adopting and enforcing the One- and Two-Family Dwelling Code discussed. OAG 54-80	197
<i>Elections; Municipalities; Plumbing;</i> Where town sanitary district consists of territory wholly within one town and town board has not designated its members as commissioners but has appointed commissioners, town board is not required to call special election to elect commissioners if petition signed by at least twenty percent of the qualified electors of the district is filed. OAG 65-80	245
National School Lunch Act	
<i>Establishment Clause, U.S. Constitution; National School Lunch Act;</i> United States Constitution art. I, and Wisconsin Constitution art. I, sec. 18, do not prohibit the state from disbursing state matching funds under National School Lunch Act (Pub. L. 79-396) to private as well as public schools. Sections 115.34, and 20.255(1)(fe), Stats., must be amended to permit such disbursal to private schools. OAG 27-80	109

Natural Resources, Department Of

Fish And Game; Natural Resources, Department Of; The Department of Natural Resources is not prohibited from approving federal enforcement of federal steel shot regulations by federal agents on lands under their jurisdiction in the state during the 1980 waterfowl hunting season. OAG 56-80.....

201

Natural Resources, Department Of; Water Pollution; The Department of Natural Resources must consider the effect on water pollution before it may issue a permit pursuant to sec. 30.12, Stats. (Unpublished Opinion) OAG 31-80

Navigable Waters

Appropriations And Expenditures; Constitutionality; Navigable Waters; Dredging a navigable waterway to alleviate periodic flooding is not a prohibited "work of internal improvement" within the meaning of Wis. Const. art. VIII, sec. 10. OAG 49-80.....

176

Navigable Waters; Nonresident Property Owners; Votes And Voting; Votes and Voting; Public Inland Lake Protection and Rehabilitation Districts. Voting rights at the annual meeting of inland lake protection and rehabilitation districts may be extended by the Legislature to nonresident property owners, but only pursuant to a statewide referendum under Wis. Const. art. III, sec. 1(3). OAG 10-80.....

32

Nonresident Property Owners

Navigable Waters; Nonresident Property Owners; Votes And Voting; Votes and Voting; Public Inland Lake Protection and Rehabilitation Districts. Voting rights at the annual meeting of inland lake protection and rehabilitation districts may be extended by the Legislature to nonresident property owners, but only pursuant to a statewide referendum under Wis. Const. art. III, sec. 1(3). OAG 10-80.....

32

Nonresident Property Owners; Words And Phrases; Exploration and mining rights constitute interests in land, and ownership of such interests are subject to the provisions of sec. 710.02, Stats., limiting nonresident ownership of land in Wisconsin. OAG 30-80.....

126

Open Meeting

Emergency Number Systems Board; Open Meeting; A telephone conference call involving members of a governmental body is a meeting which must be reasonably accessible to the public and the required public notice must be given. OAG 39-80.....

143

Open Meeting; State governmental bodies are required to hold meetings in places which are accessible, without assistance, to persons with disabilities. Local governmental bodies are required to hold meetings in places which are accessible with or without assistance to persons with disabilities. OAG 67-80.....

251

Ordinances

County Board; Ordinances; County board has authority under sec. 59.07(64), Stats., to enact a county ordinance prohibiting trespass to land that is similar to and consistent with sec. 943.13, Stats. OAG 21-80.....

92

Fire Department; Milwaukee, City Of; Ordinances; Police; Retirement Systems; The City of Milwaukee has the authority to set a mandatory retirement age for its police and fire chiefs by charter ordinance within the

INDEX	295
	Page
guidelines of the United States Age Discrimination in Employment Act. Such mandatory retirement can apply to the incumbent chiefs. OAG 64-80.....	232
Original Records	
<i>Clerk Of Courts; Original Records; Public Defenders;</i> Clerks of court are not authorized to send the original records of criminal cases to the public defender prior to the time an appeal has been taken unless an order signed by a judge of the court authorizes such release. OAG 17-80	63
Penalty Assessment	
<i>Courts; Minors; Municipal Court; Penalty Assessment;</i> When a municipal court adjudges a child to have violated a municipal ordinance, that court must impose court costs and should add the ten percent penalty assessment provided in sec. 165.87(2), Stats., to any forfeiture imposed for such violation. OAG 8-80	26
Plumbing	
<i>Elections; Municipalities; Plumbing;</i> Where town sanitary district consists of territory wholly within one town and town board has not designated its members as commissioners but has appointed commissioners, town board is not required to call special election to elect commissioners if petition signed by at least twenty percent of the qualified electors of the district is filed. OAG 65-80	245
Police	
<i>Fire Department; Milwaukee, City Of; Ordinances; Police; Retirement Systems;</i> The City of Milwaukee has the authority to set a mandatory retirement age for its police and fire chiefs by charter ordinance within the guidelines of the United States Age Discrimination in Employment Act. Such mandatory retirement can apply to the incumbent chiefs. OAG 64-80	232
<i>Police; Security Guards;</i> Police officers working as private security persons are subject to the same licensing provisions in sec. 440.26, Stats., as are non-police officers. OAG 62-80	226
<i>Police; Traffic;</i> Where not acting pursuant to mutual assistance statutes, Clark County officers do not have authority to conduct police operations in each and every territory in which a traffic offense triable in Clark County Circuit Court may arise. OAG 53-80	194
Prisons And Prisoners	
<i>Indigent; Medical Aid; Prisons And Prisoners; Public Assistance;</i> Section 53.38, Stats., is exclusively applicable in providing relief from medical and hospital care costs incurred by an indigent prisoner while receiving emergency medical treatment in a hospital. OAG 63-80.....	230
<i>Prisons And Prisoners; Words And Phrases;</i> Community-based residential facilities and child welfare agencies, facilities, or group foster homes do not necessarily become prisons or jails by reason of the placement therein of adult criminal or juvenile offenders in the custody of the state. The question whether a particular facility has become a prison or jail depends on whether the primary purpose of the facility has become penal. OAG 15-80.....	52

	Page
Probation And Parole	
<i>Courts; Probation And Parole;</i> Probation—consecutive terms. Under sec. 973.09(1), Stats., a court may not impose consecutive probation terms. OAG 46-80.....	173
Public Assistance	
<i>Indigent; Medical Aid; Prisons And Prisoners; Public Assistance;</i> Section 53.38, Stats., is exclusively applicable in providing relief from medical and hospital care costs incurred by an indigent prisoner while receiving emergency medical treatment in a hospital. OAG 63-80.....	230
<i>Public Assistance; Public Records;</i> Because records concerning AFDC recipients are confidential, only the amounts of monthly payments made to AFDC recipients, together with their names and addresses, may be released to the Department of Revenue by the Department of Health and Social Services. AFDC recipients must be notified when such information is released. OAG 22-80	95
Public Defenders	
<i>Clerk Of Courts; Original Records; Public Defenders;</i> Clerks of court are not authorized to send the original records of criminal cases to the public defender prior to the time an appeal has been taken unless an order signed by a judge of the court authorizes such release. OAG 17-80.....	63
Public Health	
<i>Confidential Reports; Counties; Public Health;</i> Before client information is released to another division within a county community human services department, a written and informed consent is necessary. The community human services board and the director may view client information without a written and informed consent for any purpose related to their powers and duties. OAG 73-80.....	273
Public Officials	
<i>Compensation; County Clerk; Public Officials; Salaries And Wages; Sheriffs;</i> The salaries of elected county officials may be increased during their terms. But any increase put into effect after the earliest time for filing nomination papers does not carry forward to the new term unless the county board again votes the increase. OAG 1-80.....	1
<i>Elections; Funds; Public Officials;</i> Section 11.33, Stats., applies to persons elected to state office who are seeking reelection or election to a different office and to the use of public funds for political purposes. OAG 70-80.....	259
<i>Public Officials; Public Service Commission;</i> Provisional appointees under sec. 17.20(2), Stats., need not be confirmed by the Senate before they can begin to serve but can serve pending Senate confirmation or rejection or appointment withdrawal by the Governor. OAG 36-80.....	136
Public Records	
<i>Public Assistance; Public Records;</i> Because records concerning AFDC recipients are confidential, only the amounts of monthly payments made to AFDC recipients, together with their names and addresses, may be released to the Department of Revenue by the Department of Health and Social Services. AFDC recipients must be notified when such information is released. OAG 22-80	95

INDEX

297

Page

Public Service Commission

Public Officials; Public Service Commission; Provisional appointees under sec. 17.20(2), Stats., need not be confirmed by the Senate before they can begin to serve but can serve pending Senate confirmation or rejection or appointment withdrawal by the Governor. OAG 36-80.....

136

Railroads

Mineral Rights; Railroads; Section 192.71, Stats., does not give the state a beneficial ownership interest in mineral estates reserved by railroad corporations from lands received from the public domain to aid in the construction of railroads under federal land grants of 1856 and 1864. OAG 57-80.....

204

Referendum

City Clerk; Referendum; Under sec. 9.20(3), Stats., a city clerk's authority to examine the "sufficiency" and "form" of an initiative petition is at least as extensive as the city council's under sec. 9.20(4), Stats. This judicially established authority should only be exercised where a substantive insufficiency clearly exists. OAG 12-80.....

41

Register Of Deeds

Liens; Register Of Deeds; Registers of deeds have no obligation under law to file or record "common-law liens," or "common-law writs of attachment" because such instruments do not, as a matter of law, affect an interest in land or personal property, and are frivolous on their face. OAG 16-80

58

Relocation Act

Relocation Act; Wisconsin Relocation Act; Words And Phrases; Owners of rental property who do not physically occupy real property taken for public use are not eligible for business replacement payments under sec. 32.19(4m), Stats., as affected by chs. 221 and 358, Laws of 1979. OAG 71-80.....

263

Relocation Assistance

Relocation Assistance; Words And Phrases; The owner of rental property, regardless of its size, is engaged in "business" within the purview of sec. 32.19(2)(d), Stats. The Department of Local Affairs and Development may not create standards based on gross receipts or net earnings to determine whether an activity constitutes a "business." OAG 4-80

11

Retirement Systems

Fire Department; Milwaukee, City Of; Ordinances; Police; Retirement Systems; The City of Milwaukee has the authority to set a mandatory retirement age for its police and fire chiefs by charter ordinance within the guidelines of the United States Age Discrimination in Employment Act. Such mandatory retirement can apply to the incumbent chiefs. OAG 64-80.....

232

Right Of Way

Highways; Right Of Way; Rights-of-way boundaries of nondedicated roads created by affirmative act are determined by the order laying out the road, not by the location of the road's centerline. The rights-of-way boundaries of roads created by adverse users are only those portions of land adjacent to the traveled track reasonably necessary for highway purposes, unless the road has also been worked pursuant to sec. 80.01(2), Stats. OAG 20-80.....

87

Salaries And Wages

- Compensation; County Clerk; Public Officials; Salaries And Wages; Sheriffs;* The salaries of elected county officials may be increased during their terms. But any increase put into effect after the earliest time for filing nomination papers does not carry forward to the new term unless the county board again votes the increase. OAG 1-80.....
Judges; Salaries And Wages; Chapter 38, Laws of 1979, is effective to every judge of a court of record and justice of the supreme court when either a supreme court justice or judge of a court of record commences a term of office. OAG 2-80

1

4

Schools And School Districts

- Schools And School Districts; Tuition; Vocational, Technical And Adult Education, Board Of;* Section 38.24(3)(b), Stats., making the district board of a student's district of residence liable for payment of nonresident fees when attending another district VTAE school is not a denial of equal protection. VTAE districts cannot enter into agreements with each other to waive the nonresident tuition provided for in sec. 38.24(3)(b), Stats. OAG 38-80.....
Schools And School Districts; Votes And Voting; Decision of the Wisconsin Supreme Court upholding weighted voting on school district fiscal boards remains in full force and effect notwithstanding subsequent developments in the law of one person, one vote. OAG 5-80.....

139

14

Security Guards

- Police; Security Guards;* Police officers working as private security persons are subject to the same licensing provisions in sec. 440.26, Stats., as are non-police officers. OAG 62-80

226

Sheriffs

- Compensation; County Clerk; Public Officials; Salaries And Wages; Sheriffs;* The salaries of elected county officials may be increased during their terms. But any increase put into effect after the earliest time for filing nomination papers does not carry forward to the new term unless the county board again votes the increase. OAG 1-80.....
Fees; Sheriffs; Section 71.13(3)(g), Stats., requires that the sheriff of Milwaukee County perform duties of service and filing in connection with collection of state income and franchise taxes pursuant to sec. 71.13, Stats., without advancement of fees by the Department of Revenue. OAG 11-80.....

1

37

State

- Assessments; State; State Street Mall-Capitol Concourse;* State property is not subject to assessment of special charges under sec. 66.60(16), Stats., for maintenance of State Street Mall-Capitol Concourse project as proposed by the City of Madison. Section 66.64, Stats., is limited to special assessments for improvements. OAG 72-80

269

State Office Building

- Bids And Bidders; State Office Building;* Subject to certain limitations, the lease of state office building space to a restaurant or other commercial enterprise serving both state employees and the general public is constitutionally permissible. Such leases do not require competitive bidding. OAG 29-80.....

121

	Page
<i>Compatibility; Medical Examining Board; Wisconsin Psychiatric Association; Words And Phrases;</i> By reason of sec. 15.08(1), Stats., as amended by ch. 221, Laws of 1979, a person is ineligible to continue to serve on the Medical Examining Board while also serving as an officer of the Wisconsin Psychiatric Association, Inc., because such association promotes or furthers the profession of medicine. "Substantial interest" under sec. 19.46(1)(e)2., Stats., also discussed. (Unpublished Opinion) OAG 58-80
<i>Counties; Words And Phrases;</i> The state, its political subdivisions, and counties are not employers under sec. 103.37, Stats., and, therefore, are not subject to this statute which prohibits employers from requiring any employee or applicant for employment to pay the cost of a medical examination required by the employer as a condition of employment. OAG 24-80.....	103
<i>Intoxicating Liquors; Words And Phrases;</i> It is not illegal, under sec. 176.07, Stats., to allow the carry-out of an intoxicating liquor from a "Class B" licensed premises between 12 midnight and 8 a.m. if the sale of the liquor occurred before 12 midnight. "Sale" defined. OAG 45-80	168
<i>Nonresident Property Owners; Words And Phrases;</i> Exploration and mining rights constitute interests in land, and ownership of such interests are subject to the provisions of sec. 710.02, Stats., limiting nonresident ownership of land in Wisconsin. OAG 30-80	126
<i>Prisons And Prisoners; Words And Phrases;</i> Community-based residential facilities and child welfare agencies, facilities, or group foster homes do not necessarily become prisons or jails by reason of the placement therein of adult criminal or juvenile offenders in the custody of the state. The question whether a particular facility has become a prison or jail depends on whether the primary purpose of the facility has become penal. OAG 15-80....	52
<i>Relocation Act; Wisconsin Relocation Act; Words And Phrases;</i> Owners of rental property who do not physically occupy real property taken for public use are not eligible for business replacement payments under sec. 32.19(4m), Stats., as affected by chs. 221 and 358, Laws of 1979. OAG 71-80.....	263
<i>Relocation Assistance; Words And Phrases;</i> The owner of rental property, regardless of its size, is engaged in "business" within the purview of sec. 32.19(2)(d), Stats. The Department of Local Affairs and Development may not create standards based on gross receipts or net earnings to determine whether an activity constitutes a "business." OAG 4-80	11
<i>Wisconsin Student Association; Words And Phrases;</i> The Wisconsin Student Association is not a "state agency" within the meaning of such term as employed in sec. 20.918, Stats. (Unpublished Opinion) OAG 47-80
Zoning	
<i>County Board Of Adjustment; County Planning And Zoning Committee; Zoning;</i> The extent to which sec. 59.99, Stats., authorizes the County Board of Adjustment to grant zoning variances and review decisions of the County Planning and Zoning Committee, discussed. OAG 40-80	146
51.42 Board	
<i>County Board; 51.42 Board;</i> The county board of supervisors may require its approval of contracts for purchase of services by the community services board if so specified in its Coordinated Plan and Budget. Otherwise it may not. OAG 32-80.....	128

INDEX

	301
	Page
remains in full force and effect notwithstanding subsequent developments in the law of one person, one vote. OAG 5-80.....	14
Water Pollution	
<i>Natural Resources, Department Of; Water Pollution;</i> The Department of Natural Resources must consider the effect on water pollution before it may issue a permit pursuant to sec. 30.12, Stats. (Unpublished Opinion) OAG 31-80	
Wills	
<i>Military Personnel; Wills; Wisconsin Veterans Home;</i> A will made by a person prior to entering the Wisconsin Veterans Home and prior to July 31, 1975, is invalid. A will made by a person who entered the Home before July 31, 1975, but who made the will on or after July 31, 1975, is valid. (Unpublished Opinion) OAG 48-80	
Wisconsin Psychiatric Association	
<i>Compatibility; Medical Examining Board; Wisconsin Psychiatric Association; Words And Phrases;</i> By reason of sec. 15.08(1), Stats., as amended by ch. 221, Laws of 1979, a person is ineligible to continue to serve on the Medical Examining Board while also serving as an officer of the Wisconsin Psychiatric Association, Inc., because such association promotes or furthers the profession of medicine. "Substantial interest" under sec. 19.46(1)(e)2., Stats., also discussed. (Unpublished Opinion) OAG 58-80	
Wisconsin Relocation Act	
<i>Relocation Act; Wisconsin Relocation Act; Words And Phrases;</i> Owners of rental property who do not physically occupy real property taken for public use are not eligible for business replacement payments under sec. 32.19(4m), Stats., as affected by chs. 221 and 358, Laws of 1979. OAG 71-80.....	263
Wisconsin Student Association	
<i>Wisconsin Student Association; Words And Phrases;</i> The Wisconsin Student Association is not a "state agency" within the meaning of such term as employed in sec. 20.918, Stats. (Unpublished Opinion) OAG 47-80	
Wisconsin Veterans Home	
<i>Military Personnel; Wills; Wisconsin Veterans Home;</i> A will made by a person prior to entering the Wisconsin Veterans Home and prior to July 31, 1975, is invalid. A will made by a person who entered the Home before July 31, 1975, but who made the will on or after July 31, 1975, is valid. (Unpublished Opinion) OAG 48-80	
Words And Phrases	
<i>Circuit Judge; Firearms; Words And Phrases;</i> Although judges are conservators of the peace, they are not peace officers who are allowed to carry concealed weapons. OAG 18-80.....	66
<i>Collection Agencies; Words And Phrases;</i> Section 218.04, Stats., requirement that a foreign collection agency maintain a Wisconsin office with records may not violate the commerce clause, U.S. Const. art. I, sec. 8. OAG 28-80.....	113

	Page
<i>to waive the nonresident tuition provided for in sec. 38.24(3)(b), Stats. OAG 38-80.....</i>	139
Usury	
<i>Commitments; Usury; Commitment fees which are bona fide in nature are not a part of interest under sec. 138.05, Stats., although across the board fees imposed without regard for the customer's need or desire for a bona fide commitment are unlikely to meet the lender's burden of showing that the fee represents the reasonable value of services rendered. OAG 9-80.....</i>	28
Veterans	
<i>Banks And Banking; Loans; Mortgages; Veterans; The recent amendment to sec. 45.80(2)(c), Stats., exempts a weatherization improvement loan sup- plement from the "maximum primary financing" requirement only in the case of a home purchase loan. Home improvement loans made under sec. 45.76(2)(a), Stats., are therefore not exempt from such requirement. (Unpublished Opinion) OAG 52-80</i>	
Veterans Affairs, Board Of	
<i>Interest; Veterans Affairs, Board Of; The interest to be set by the Board of Veterans Affairs on loans funded from prepayments on loans funded with general obligation bonds under sec. 45.79(4)(a), Stats., as amended by ch. 155, Laws of 1979, is the rate charged on loans under the most recent general obligation bond issue. (Unpublished Opinion) OAG 26-80</i>	
Vocational, Technical And Adult Education, Board Of	
<i>Apprentices; Vocational, Technical And Adult Education, Board Of; A voca- tional, technical and adult education district which provides apprenticeship training may contract with other districts for payment of the costs of training persons who are residents of the other districts. Such district may not refuse, however, to admit nonresident Wisconsin students to an approved apprenticeship program, because the district of the student's resi- dence fails to reimburse the district providing the instruction, unless the state board of vocational, technical and adult education adopts rules sanc- tioning such refusal. OAG 69-80</i>	257
<i>Schools And School Districts; Tuition; Vocational, Technical And Adult Education, Board Of; Section 38.24(3)(b), Stats., making the district board of a student's district of residence liable for payment of nonresident fees when attending another district VTAE school is not a denial of equal protection. VTAE districts cannot enter into agreements with each other to waive the nonresident tuition provided for in sec. 38.24(3)(b), Stats. OAG 38-80.....</i>	139
Votes And Voting	
<i>Navigable Waters; Nonresident Property Owners; Votes And Voting; Votes and Voting; Public Inland Lake Protection and Rehabilitation Districts. Voting rights at the annual meeting of inland lake protection and rehabili- tation districts may be extended by the Legislature to nonresident property owners, but only pursuant to a statewide referendum under Wis. Const. art. III, sec. 1(3). OAG 10-80.....</i>	32
<i>Schools And School Districts; Votes And Voting; Decision of the Wisconsin Supreme Court upholding weighted voting on school district fiscal boards</i>	

INDEX

	299
	Page
State Street Mall-Capitol Concourse	
<i>Assessments; State; State Street Mall-Capitol Concourse;</i> State property is not subject to assessment of special charges under sec. 66.60(16), Stats., for maintenance of State Street Mall-Capitol Concourse project as proposed by the City of Madison. Section 66.64, Stats., is limited to special assessments for improvements. OAG 72-80	269
Statutes	
<i>Employe Trust Funds Board; Statutes;</i> Employment of an actuary by the Employe Trust Funds Board under sec. 40.02, Stats., is not subject to the general contracting procedures set forth in secs. 16.70 through 16.76, Stats. (Unpublished Opinion) OAG 34-80	
Stockbridge-Munsee Reservation	
<i>Fish And Game; Indians; Stockbridge-Munsee Reservation;</i> The Stockbridge-Munsee Indian Tribe has the exclusive right to hunt and fish on tribal lands and has the right to regulate such activities by both Indian and non-Indian persons upon such lands. Current and former Stockbridge-Munsee Reservation boundaries discussed. OAG 19-80.....	72
Surveys	
<i>County Surveyor; Surveys;</i> Duties of county and other land surveyors and minimum standards for property surveys discussed. OAG 43-80.....	160
Taxation	
<i>Constitutionality; Taxation;</i> 1977 amendment to sec. 70.511(2), Stats., which allows municipalities to pass on part of delayed refund claims to other taxing districts for which taxes were collected, does not violate the uniformity provision of Wis. Const. art. VIII, sec. 1. For purposes of the amendment, "taxing districts" includes school and VTAE districts. OAG 60-80.....	220
Towns	
<i>Appropriations And Expenditures; Towns;</i> Revenue sharing monies may be expended by a town board to operate a senior citizen center under state law. (Unpublished Opinion) OAG 23-80	
<i>Compatibility; Towns;</i> Offices of commissioner of town sanitary district having territory within three towns, and supervisor of the town board of town having largest assessed valuation of taxable property of such district, are incompatible where the town board also serves as the appointing authority for commissioners of the town sanitary district. OAG 25-80	108
Traffic	
<i>Police; Traffic;</i> Where not acting pursuant to mutual assistance statutes, Clark County officers do not have authority to conduct police operations in each and every territory in which a traffic offense triable in Clark County Circuit Court may arise. OAG 53-80	194
Tuition	
<i>Schools And School Districts; Tuition; Vocational, Technical And Adult Education, Board Of;</i> Section 38.24(3)(b), Stats., making the district board of a student's district of residence liable for payment of nonresident fees when attending another district VTAE school is not a denial of equal protection. VTAE districts cannot enter into agreements with each other	