

OPINIONS
OF THE
ATTORNEY GENERAL

OF THE
STATE OF WISCONSIN

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BRONSON C. LA FOLLETTE
ATTORNEY GENERAL



MADISON, WISCONSIN
1985

THE UNIVERSITY OF CHICAGO

PH.D. THESIS

BY

THE UNIVERSITY OF CHICAGO

In Memoriam: Albert O. Harriman

The year 1985 witnessed the retirement of Assistant Attorney General Albert O. Harriman after nearly 38 years of service on the legal staff of the attorney general. Sadly, this genial and kindly lawyer, known to his colleagues as "Al," lived only a few months following his January retirement, passing away on March 28, 1985.

Those who knew Al well knew him as a person of keen intelligence. He evidenced that intelligence early in his life, being named valedictorian of his class at Madison West High School; and his fine mind served the State and its citizens well throughout his long career in the department.

Early in his career Al worked in the antitrust field and in highway condemnation litigation. Since 1967, his work consisted chiefly of representation of the Motor Vehicle Department, now the Division of Motor Vehicles of the Department of Transportation. Courts were often disposed to subject to particularly critical scrutiny governmental action in the area of motor vehicle operation and licensing. As the advocate for the regulating agency, Al took such scrutiny with good grace, and enjoyed his victories and accepted his defeats with equally good grace.

Throughout his decades of governmental service, Al showed a special talent for deft handling of the complaints of citizens. Al's pleasant voice, avuncular manner and natural kindness soothed many troubled citizens throughout the years, thereby rendering a public service low in profile; but nevertheless substantial and compassionate.

Besides being a smoother of troubled waters, Al had building skills of a high order rarely found in the legal profession. He took real pleasure in the building of a house, or even in performing the simpler task of pouring a good driveway.

There is, of course, an element of sadness in the death of a good person who has just entered the peaceful vale of retirement after years of professional life spent in the steady performance of public service, some of it involving problems of an especially difficult nature. That sadness was present in the death of Al Harriman; but it is lessened, if not completely extinguished, by remembrance of Al's long career of diverse accomplishments, covering able representation of governmental agencies, the skilled consoling of angered persons aggrieved by actions of the State, real or imagined, or

the building of a home, with Al himself at times happily participating in the carpentry. It was a career that would have been appropriately rewarded by a long and happy retirement for Al, which was not to be; but it was also a career rewarding in and of itself, enriching both Al and those numerous persons and governmental entities it benefited.

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

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GERALD S. WILCOX ²	Deputy Attorney General
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WALTRAUD A. ARTS	Assistant Attorney General
THOMAS J. BALISTRERI	Assistant Attorney General
RUSTAM A. BARBEE	Assistant Attorney General
MARY D. BATT	Assistant Attorney General
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MARY V. BOWMAN	Assistant Attorney General
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WILLIAM C. WOLFORD	Assistant Attorney General
CHRISTOPHER G. WREN	Assistant Attorney General
E. GORDON YOUNG	Assistant Attorney General
MICHAEL L. ZALESKI	Assistant Attorney General

¹Resigned, 1985

²Appointed, 1985

³Retired, 1985

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OPINIONS
OF THE
ATTORNEY GENERAL

Volume 74

Public Records; Revenue, Department Of; Access to public records by parties to civil litigation, including administrative proceedings, must be accomplished through applicable means of discovery. OAG 1-85

January 10, 1985

MICHAEL LEY, *Secretary*
Department of Revenue

You have requested my opinion regarding a situation involving litigation pending before the Tax Appeals Commission and a request under the public records law for access to records in the custody of the Department of Revenue. You state that the records would be accessible to parties to the litigation via discovery procedures available within the context of the litigation. You ask whether the public records request can be denied on the ground that the records relate to pending litigation and are available through discovery. You submit that such an outcome is in the

public interest because it allows the litigation to follow its normal and orderly course.

The framework for analyzing public records issues is concisely stated in the recent decision in *Hathaway v. Green Bay School Dist.*, 116 Wis. 2d 388, 392, 342 N.W.2d 682 (1984): "Public policy and public interest favor the public's right to inspect public records. Without an exception based upon statute, common law, or an overriding public interest in nondisclosure, there is a presumption that the public has the right to inspect public records."

An exception to the general right of access to public records must be established specifically by statute or common law limitation. Secs. 19.35(1)(a) and 19.36(1), Stats. Examples of specific statutory exemptions are those pertaining to public assistance records (section 49.53), patient health care records (section 146.82) and tax returns (section 71.11(44)(a)). An example of a common law limitation is that relating to access to documentary evidence in the hands of a district attorney. *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 680, 137 N.W.2d 470, 139 N.W.2d 241 (1965). I am not aware of any specific statute or common law limitation which generally exempts records from the public records law because they relate to pending litigation and are subject to civil discovery.

It is my opinion, however, that where specific discovery procedures apply, they are the means by which litigants are to accomplish access to public records.

Section 19.35(1)(a) codifies the general rights of access as follows:

Except as otherwise provided by law, any requester has a right to inspect any record. Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect. The exemptions to the requirement of a governmental body to meet in open session under s. 19.85 are indicative of public policy, but may be used as grounds for denying public access to a record only if the authority or legal custodian under s. 19.33 makes a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made.

Section 19.35(1)(j) provides: "Notwithstanding pars. (a) to (f), a requester shall comply with any regulations or restrictions upon

access to or use of information which are specifically prescribed by law.”

“Regulate” means to govern or direct according to rule. “Regulation” is defined as “an authoritative rule or principle dealing with details of procedure” Webster’s Third New International Dictionary 1913 (4th ed. 1976); *see* sec. 990.01(1), Stats.

It is my opinion that any discovery procedures applying specifically to administrative proceedings before your agency do constitute the “regulation” of access to public records that may be relevant in the proceedings. Thus the discovery procedures would be incorporated in the public records law through section 19.35(1)(j) as the means of accomplishing access.

For your agency, section TA 1.35 Wis. Adm. Code provides that “[p]arties may obtain discovery before the commission in the same manner and by the same method as provided under ch. 804, Stats., unless inconsistent with or prohibited by statute” Thus, access to documents would be accomplished via the procedures set forth in section 804.09.

Incorporation of applicable rules of discovery into the public records law ensures the orderly access to records in the context of litigation. It also serves to guarantee that opposing counsel will have notice of discovery thus allowing full participation in or at least monitoring of the discovery process. This is in the general public interest and serves to promote the orderly and effective administration of justice. *See State ex rel. Dudek v. Circuit Court*, 34 Wis. 2d 559, 576, 150 N.W.2d 387 (1967).

I should note that if a matter is involved in a quasi-judicial proceeding pending before an administrative agency which does not have any regulations relating to discovery, it is my opinion that a party to the proceeding would be free to use the public records law for discovery. The rules of civil procedure do not apply to administrative proceedings unless specifically made applicable by a rule like section TA 1.35. *State ex rel. Thompson v. Nash*, 27 Wis. 2d 183, 133 N.W.2d 769 (1965). Of course, as a matter of courtesy and professional practice, an attorney for the requesting litigant should coordinate access with opposing counsel.

The foregoing analysis does not resolve the question of general public access to public records that happen to be relevant to pending litigation. As mentioned earlier in this opinion, the pendency of

civil litigation involving public records does not by itself trigger any general statutory or common law exception to the public records law. Therefore, the commencement of civil litigation should not usually affect the rights of the public to have access to relevant records.

However, as always, it is possible that there may be factors that would justify nondisclosure of public records under the common law balancing test which has been carried forward in the statutes by virtue of section 19.35(1)(a). In the leading case of *State ex rel. Youmans v. Owens*, 28 Wis. 2d at 681, the court said:

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

The commencement of litigation and pursuit of discovery by a party to the litigation could be a factor taken into account by a custodian when confronted by an independent public records request for related relevant documents. Although it should normally be possible to satisfy both discovery and public records requests, factors like timing, the nature of the case and the nature and scope of the records could possibly justify postponing compliance with a public records request. The determination will have to be made on a case-by-case basis.

BCL:RWL

Public Records; Prosecutors' case files are not subject to access under the public records laws. OAG 2-85

January 10, 1985

BARTLEY G. MAUCH, *District Attorney*
Sauk County

In your letter of November 17, 1983, you express concern about access by the public to investigative reports in the prosecutor's office relating to alleged matricide and two counts of sororicide. In effect, your letter asks for my opinion as to the extent to which

prosecutors' files are subject to inspection under the public records law.

Section 19.35(1)(a), Stats., states:

Access to records; fees. (1) **RIGHT TO INSPECTION.** (a) Except as otherwise provided by law, any requester has a right to inspect any record. Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect. The exemptions to the requirement of a governmental body to meet in open session under s. 19.85 are indicative of public policy, but may be used as grounds for denying public access to a record only if the authority or legal custodian under s. 19.33 makes a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made.

As stated in one of our recent opinions, 73 Op. Att'y Gen. 20-21 (1984) at 1-2:

This provision recognizes three possible bases for denying access to public records: (1) express statutory exemptions; (2) exemptions under the open meetings law if the requisite demonstration is made; and (3) common law principles. The crux of the common law on public records is the "balancing test" which provides that the custodian "must balance the harm to the public interest from public examination of the records against the benefit to the public interest from opening these records to examination, giving much weight to the beneficial public interest in open public records." *State ex rel. Bilder v. Delavan Tp.*, 112 Wis. 2d 539, 553, 334 N.W.2d 252 (1983).

The common law also recognized some limitations on the public's right of access to public records. *International Union v. Gooding*, 251 Wis. 362, 372, 29 N.W.2d 730 (1947).

A. Express statutory exemptions.

Section 19.36(1), Stats., provides:

APPLICATION OF OTHER LAWS. Any record which is specifically exempted from disclosure by state or federal law or authorized to be exempted from disclosure by state law is exempt from disclosure under s. 19.35(1), except that any portion of that record which contains public information is open to public inspection as provided in sub. (6).

There is no statute specifically exempting prosecutors' files from disclosure. Therefore, section 19.36(1) is not available as a basis for generally denying access to such records under the public records law.

Section 19.36(2) establishes a categorical exemption for "investigative information obtained for law enforcement purposes ..." if secrecy is required by federal law or regulations or as a condition to receipt of aids by this state. I am not aware of any federal law that would trigger the application of this subsection.

B. Exemptions under the open meetings law.

It is probable that most papers in a prosecutor's file arguably fall within the purview of the exemptions to the open meetings law set forth in section 19.85(1)(d), (f) and (g). They authorize a closed meeting for the purpose of:

(d) Considering specific applications of probation or parole, or considering strategy for crime detection or prevention.

....

(f) Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons except where par. (b) applies which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations.

(g) Conferring with legal counsel for the governmental body who is rendering oral or written advice concerning strategy to be adopted by the body with respect to litigation in which it is or is likely to become involved.

However, the fact that a record falls within the purview of an exemption to the open meetings law is not determinative. Section 19.35(1)(a) requires in addition that the custodian make "a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made."

We have recently interpreted this statute as follows:

The statute recognizes that in the exemption provisions the Legislature has identified categories of sensitive information, but

the Legislature has not mandated that all such information be withheld all the time. In my opinion the exemptions under section 19.85 may not be used as the basis for general blanket exceptions under the public records law. When exemptions to the open meetings law are relied on, section 19.35(1)(a) requires a case-by-case determination with respect to each request as of the time of the request. Any blanket custodial policy would be contrary to this requirement.

73 Op. Att'y Gen. 20 (1984) at 3.

C. Common law principles.

Discussing the earlier *Gooding* case which construed the first general public record statute enacted in 1917, the supreme court stated the following in *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 680-81, 137 N.W.2d 470, 139 N.W.2d 241 (1965):

However, merely because the papers sought to be inspected, although not required by law to be filed or kept by defendant, were in his lawful possession, did not automatically entitle petitioner to inspect them. The inspection provisions of sec. 18.01(1) and (2), Stats., were contained in a revisor's bill and prior to that enactment there existed no statute which attempted to spell out the rights of members of the public to inspect public records. The revisor's notes to sub. (2) of sec. 18.01 stated that this subsection "is believed to give expression to the general implied right of the public to consult public records." The court in the *Gooding Case* quoted this statement and then declared:

"In view of the presumption that a revisor's bill is not intended to change the law we conclude that this is the scope of the section. While it is possible to contend that the words are so clear as not to be subject to construction *we are of the view that the common-law right of the public to examine records and papers in the hands of an officer has not been extended.*

"We shall not go into the scope of the common-law right exhaustively or attempt to document our observations upon it. It is enough to say that *there are numerous limitations* under the common law upon the right of the public to examine papers that are in the hands of an officer as such officer. *Documentary evidence in the hands of a district attorney, minutes of a grand jury, evidence in a divorce action ordered sealed by the court are typical.* The list could be expanded but the foregoing is enough to illus-

trate that in certain situations a paper may in the public interest be withheld from public inspection. *Whatever limitations existed at common law still exist under sec. 18.01(2), Stats.*"

An authoritative statement of the common-law right of inspection of public documents is that made by the Vermont court in *Clement v. Graham* as follows:

"We think it may be safely said that at common law, when not detrimental to the public interest, the right to inspect public records and public documents exists with all persons who have a sufficient interest in the subject-matter thereof to answer the requirements of the law governing that question."

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

The preservation of common law limitations is codified in the most recently enacted public records statutes. Section 19.35(1)(a) reads in part: "RIGHT TO INSPECTION. (a) Except as otherwise provided by law, any requester has a right to inspect any record. Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect."

As noted by the court in *Youmans* above, one example of a common law limitation is documentary evidence in the hands of a district attorney. 28 Wis. 2d at 680. Also, *Gooding*, 251 Wis. at 372. This limitation on the public records law was also acknowledged at 68 Op. Att'y Gen. 17, 19 (1979), although that opinion dealt with the issue of preservation of public records and not access. As examples of public records that needed to be preserved, the opinion cited "statements of witnesses, reports of scientific testing, charging documents, transcripts, motions with supporting affidavits and legal memoranda and written decisions of the court." The opinion continued:

In identifying these documents as public records I do not mean to intimate that they necessarily are open to public inspection. It long has been the rule that documentary evidence in the files of a district attorney constitutes an exception to the rule

permitting citizens to inspect papers in the possession of public officials.

The phrase "documentary evidence" could be interpreted in the very narrow evidentiary sense, *i.e.*, a document that may be admissible as evidence at trial. *See* ch. 889, Stats. Or it could be interpreted in a broader sense to cover the papers in the file which constitute the physical information available to the prosecutor or papers created by the prosecutor. The former interpretation seems too narrow. The latter would be broad enough to be coextensive with the definition of "record" in section 19.32(2).

I think the answer is best arrived at somewhat indirectly by evaluating the rights of a defendant with respect to the prosecutor's file.

One commentator found that:

Wisconsin has consistently held to the common law doctrine that the defendant is not entitled to inspect the evidence and other information which the prosecution has gathered. The statement of the supreme court whenever the issue was raised has been, "One accused of crime enjoys no right to an inspection of evidence relied upon by the public authorities for his conviction."

49 Marq. L. Rev. 736, 746 (1965-66), with the following footnote to the quoted material:

State ex rel. Spencer v. Freedy, 198 Wis. 388, 392; 223 N.W. 861, 862 (1929). This same statement is repeated in *State ex rel. Schroeder v. Page*, 206 Wis. 611, 240 N.W. 173 (1932); *Steenland v. Hoppmann*, 213 Wis. 593, 252 N.W. 146 (1934); *State v. Herman*, 219 Wis. 267, 262 N.W. 718 (1935). A similar statement is found in *Santry v. State*, 67 Wis. 65, 30 N.W. 226 (1886).

Now we could add *State v. Miller*, 35 Wis. 2d 454, 474, 151 N.W.2d 157 (1967).

The commentator found Wisconsin to be a conservative adherent to this common law restriction (49 Marq. L. Rev. at 749) and supposed that any statutory departure would be strictly construed (49 Marq. L. Rev. at 748).

The United States Supreme Court has created a qualification to this general rule. It requires prosecutors to divulge evidence that is material either to guilt or to punishment as a matter of constitu-

tional "due process." *Brady v. State of Maryland*, 373 U.S. 83, 86 (1963). However, even so, in this state the defense does not have access to the prosecutor's file prior to the preliminary examination unless it can show a particularized need. *Matter of State ex rel. Lynch v. County Ct.*, 82 Wis. 2d 454, 468, 262 N.W.2d 773 (1978). The prosecutor may deny inspection, and if it is eventually established that evidence was wrongfully withheld, the remedy is a new trial. 82 Wis. 2d at 468.

In my opinion, logic compels the conclusion that if at common law a defendant could not have access to a prosecutor's file in his own case prior to trial, neither could the general public. Certainly the defendant's interest in his own file exceeds that of the general public. The defendant's interest is to know the accusations and evidence for and against him so he can evaluate his exposure and prepare his defense. Yet the defendant was denied access under the common law. It would be perverse to then allow access by everyone but the defendant by way of the public records law. Also it is obvious that the clear limitations on discovery could be circumvented easily if the same information could be obtained by the defendant by way of a public records request.

In my opinion, this logic amplifies the meaning of the more general statements at common law acknowledging limitations on access to documentary evidence in prosecutors' files. I believe that at common law any right of access under the public records law could not surpass the defendant's rights to discovery. Given the very limited purposes for which and circumstances under which a defendant could have any discovery of a prosecutor's file under common law, it must follow that the common law limitations on access are a complete bar to access to the prosecutor's file.

This issue has been considered with mixed results in the appellate courts of New York. One view is that material that is exempt from discovery in the context of litigation is exempt from disclosure under their public records law. A leading case is *Westchester Rockland, Etc. v. Moczydlowski*, 396 N.Y.S.2d 857, 58 A.D.2d 234 (1977). Contrapuntal is the decision in *Lawler, Matusky & Skelly Engineers v. Abrams*, 443 N.Y.S.2d 973, 111 Misc. 2d 356 (1981).

In my opinion the logic in favor of transferring common law limitations on discovery in criminal cases to the public records law is more persuasive. Therefore, it is my opinion that there is a

general common law limitation against access to prosecutor's files prior to completion of a trial.

The overriding interests that justify this limitation on the public's general "right to know" will often coincide with the interests recognized as justifying the secrecy of John Doe proceedings, to wit:

(1) keeping a John Doe target from fleeing, or an arrested defendant from knowledge which might cause him to flee;

(2) preventing defendants from collecting perjured testimony for the trial;

(3) preventing those interested in thwarting the inquiry and tampering with prospective testimony or secreting evidence;

(4) freeing witnesses from the threat of immediate retaliation; and

(5) preventing testimony which may be mistaken or untrue or irrelevant from becoming public.

In re Wis. Family Counseling Services v. State, 95 Wis. 2d 670, 677, 291 N.W.2d 63 (Ct. App. 1980).

One could also add the concern for pretrial publicity.

Also present to support the secrecy of prosecutors' files, although not available to justify the blanket exemption by itself, is the doctrine of attorney work product which protects papers prepared by an attorney with respect to particular pending or imminent litigation. *Youmans*, 28 Wis. 2d at 684. The United States Supreme Court has held recently that the protection of attorney's work product continues even after the litigation is over. *FTC v. Grolier, Inc.*, 103 S.Ct. 2209, 2215 (1983).

As stated in section 19.31, "it is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." See *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 433-38, 279 N.W.2d 179 (1979). The public interest to be served is not so much the "curiosity" interest in what accusations have been made and what evidence has been gathered against an individual. The public interest underlying the public records law is the interest in monitoring and evaluating how public officials discharge their responsibilities.

With respect to the performance of a prosecutor in a particular case, this evaluation will be much more knowledgeable and objective once the trial is over. It would likely unnecessarily interfere with the administration of justice if the public were allowed to look over the prosecutor's shoulder and proclaim what it sees while a prosecutor is preparing or presenting a case. At least, it is my opinion that the public's right to know and the interest in effective administration of the criminal justice system are harmonized and adequately served if prosecutors' files are exempt from disclosure during the investigative, pretrial and trial stages.

The next question then is whether prosecutors' files are open to public inspection after the trial. Employing the logic used above, it is appropriate to explore the extent to which a defendant has access to the state's file following the trial. We find once again that a defendant's rights are very limited.

The common law in this state is that subsequent to a trial a defendant has no right to inspect relevant portions of the state's files to determine whether they contained evidence in any way useful or helpful to him. Access would be constitutionally required only if there were a specific allegation that the prosecution had suppressed evidence which due process would require it to disclose. *Britton v. State*, 44 Wis. 2d 109, 118-19, 170 N.W.2d 785 (1969). Again, following the rationale used above, if a defendant has only a severely limited right to inspect the state's file for the defendant's case, it necessarily follows that the public at large cannot have a greater right by way of the public records law.

I am aware that our state statutes do now provide for an expanded right of discovery in criminal cases. Section 971.23 was created by chapter 255, Laws of 1969. The first paragraph of the accompanying Note states:

NOTE: This section is the first Wisconsin statute attempting to afford pretrial discovery to both the State and the defendant. Based primarily upon F.R.Cr.P. 16, it is believed that the section represents an improvement in the existing pretrial procedures while protecting the basic rights of the parties. Limited pretrial discovery should increase the efficient administration of criminal justice in this state by speeding up the disposition of cases, improving the performance of counsel, eliminating the increasing number of pretrial motions and increasing the number of

guilty pleas. The section contemplates that most of the discovery provisions are to be implemented without the necessity for motions or court hearings.

This statutory liberalization of the common law regarding discovery in criminal cases does not affect the companion common law regarding access to public records. If the common law in the latter area is to be modified, that too requires a specific statutory modification.

What then of the public's right to have access to public records so it may monitor and evaluate the conduct and performance of public prosecutors? Surely they are not exempt from scrutiny and, indeed, the elected district attorneys should not be. The answer is that there is typically enough information available without access to the prosecutor's file. It starts in the police station. We know that the daily arrest log is absolutely open to public inspection. *Breier*, 89 Wis. 2d 417. This makes "possible public oversight of the charging discretion of the prosecutor." 89 Wis. 2d at 437. From checking court records, one may determine whether charges have been pressed and what they are. With few exceptions such as provided in section 970.03(4), criminal pretrial hearings are open to the public. The trial is always open to the public. Documents relating to the litigation are available for public inspection if they have been filed or admitted in evidence and are not subject to a specific protective order of the court. These all can be evaluated by the press and the electorate. If the information is deemed inadequate, or an explanation is desired, the district attorney can be confronted directly. The sufficiency of his response may be evaluated and taken into account at the next election. The burden is on the district attorney to keep the public sufficiently informed so confidence in his performance is maintained. Lack of confidence will presumably result in failure to be reelected. It is this risk and burden a district attorney must bear in exchange for having his prosecutorial files closed to general public inspection.

It must be emphasized that this opinion has considered only those files which relate directly to a possible, pending or completed prosecution. Administrative files and other non-case related records in a prosecutor's office are public records fully subject to the provisions in subchapter II of chapter 19. As such there is a presumption

in favor of public access and nondisclosure will have to be evaluated on a case-by-case basis.

BCL:RWL

Confidential Reports; Public Records; Relationship between the public records law and pledges of confidentiality in settlement agreements discussed. OAG 3-85

January 30, 1985

THOMAS LOFTUS, *Chairperson*
Committee on Assembly Organization

The Committee on Assembly Organization has asked me to address several questions pertaining to the relationship between this state's public records law and a pledge of confidentiality made as part of a settlement agreement. You also ask about related rights and obligations of the Legislative Audit Bureau.

Apparently the questions are prompted by a recent personnel dispute where the matter was resolved by settlement with one of the terms being that all records regarding the matter would be kept confidential. The controversy involves the Mid-State Vocational, Technical and Adult Education District and one of its employees. The record custodian involved has declined to provide access to the records in honor of the settlement agreement.

You present the following questions:

1. Under what circumstances, if any, may a contractual pledge of confidentiality authorize an authority under s. 19.35, Stats., to withhold the disclosure of a record?
2. If the party to whom a contractual pledge of confidentiality is made rejects the need for confidentiality after the contract has been signed, may the authority continue to prohibit public access to a record?
3. If the Legislative Audit Bureau were directed to conduct an audit of the authority in the fact situation described above, would the Bureau be entitled to review a record of the authority otherwise withheld from public access?

4. If the Legislative Audit Bureau were entitled to review a record of an authority withheld from public access and if the Legislative Audit Bureau were to obtain a copy of the record, would the Bureau be required to withhold the record from public access or would the Bureau act as a new authority for purposes of a record request under s. 19.35, Stats.?

Earlier opinions of this office relating to pledges of confidentiality have acknowledged that such pledges may constitute an exception to the right of public access, but the test for establishing a valid pledge is demanding:

First, there must have been a clear pledge made. Second, the pledge should have been made in order to obtain the information. Third, the pledge must have been necessary to obtain the information.

Finally, even if a pledge of confidentiality fulfills these criteria, thus making the record containing the information obtained clearly within the exception, the custodian must still make an additional determination in each instance that the harm to the public interest that would result from permitting inspection outweighs the great public interest in full inspection of public records.

60 Op. Att'y Gen. 284, 289 (1971).

In the settlement situation involved here, I assume that the pledge of confidentiality is made to obtain the settlement not to obtain the underlying information. Therefore, the second and third elements of the foregoing test would not be satisfied. It is my opinion that nondisclosure of the documents cannot properly be based solely on the pledge of confidentiality.

The current public records law expressly embraces prior common law. Sec. 19.35(1)(a), Stats. Under the common law a custodian could properly deny access to a public record only if the interests to be protected by nondisclosure outweigh the general presumption in favor of public access. This is called the balancing test. *State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 681, 137 N.W.2d 470, 139 N.W.2d 241 (1965).

It is possible that some of the information involved in a personnel dispute may properly be kept confidential. The Legislature has indicated a sensitivity to personnel related information by the ex-

emptions to the open meetings law. Secs. 19.35(1)(a) and 19.85(1)(b), (c) and (f), Stats. This expression of public policy is also present in section 230.13, Stats., which authorizes the State Department of Employment Relations to keep confidential information regarding certain personnel matters. In applying the balancing test these indications of public policy would weigh heavily. Also a possible factor in this case is the general desirability of resolving disputes by agreement rather than litigation.

On the other hand, the main purpose of the public records law is to enable the citizenry to monitor and evaluate the performance of public officials and employees. If information relating to a settlement and the underlying personnel dispute are kept confidential, the public is deprived of this ability. For this reason the pledge of confidentiality itself is troublesome because the custodian making the pledge is purporting to grant an exception to the public records law. This is particularly troublesome when the settlement involves the payment of money by the government. The public's interest in such information is generally great.

It is my opinion that the making of a pledge of confidentiality as part of a settlement agreement does not guarantee that the pledge will be enforced against a public records request. In applying the balancing test a court may take the pledge as an element of a desirable settlement, and thus the pledge would be just one of the elements that would be considered in applying the balancing test. However, for the pledge to hold up the custodian must make a showing that there are independent and adequate bases for supporting nondisclosure of the requested information. This is consonant with the fourth precondition to a valid pledge of confidentiality cited earlier, *i.e.*, that in addition to having made a pledge the custodian must determine that "the harm to the public interest that would result from permitting inspection outweighs the great public interest in full inspection of public records." 60 Op. Att'y Gen. at 289. If such a showing is not made, I believe the custodian will be found to have made a pledge that cannot be kept.

Remember:

It is not the trial court's or this court's role to hypothesize reasons or to consider reasons for not allowing inspection which were not asserted by the custodian. If the custodian gives no reasons or gives insufficient reasons for withholding a public

record, a writ of mandamus compelling the production of the records must issue. *Beckon, supra* at 518, states, “[T]here is an absolute right to inspect a public document in the absence of *specifically stated sufficient* reasons to the contrary.” (Emphasis supplied.)

Newspapers, Inc. v. Breier, 89 Wis. 2d 417, 427, 279 N.W.2d 179 (1979).

As to your second question it is my opinion that a pledge of confidentiality is like a privilege in that it is specific to the person in whose favor it is made. Like a privilege then, a pledge of confidentiality may be waived. If waived, the custodian could not properly continue to use the pledge as a basis for denying access.

As to your third question, section 13.94(intro.) provides the following with respect to the pertinent power of the Legislative Audit Bureau headed by the state auditor:

Subject to s. 230.35(4)(a) and (f), the state auditor or designated employes shall at all times with or without notice have access to all departments and to any books, records or other documents maintained by the departments and relating to their expenditures, revenues, operations and structure except as provided in sub. (4).

The limited exceptions mentioned would have no bearing here.

The state auditor’s right of access to records is independent of the public records law. The nature of the state auditor’s role is such that he or she must have access to all pertinent records including those that may otherwise be confidential. It is my opinion that the Legislature intended the state auditor to have access to records even though they might not be available to the public under the public records law. This authority extends to records of a vocational, technical and adult education district board, as involved here, by virtue of section 13.94(4).

As to your fourth question, the state auditor’s access to an otherwise confidential record does not change the record’s status. As stated in 57 Op. Att’y Gen. 187, 191 (1968), “[t]he law seems clear that information of a confidential nature gained by one administrative branch of the government from another may be used in

preparation for proper internal matters, but should not be disclosed to the public.”

BCL:RWL

Criminal Justice, Wisconsin Council On; Juvenile Court; Minors;
The Wisconsin Council on Criminal Justice may have access to the law enforcement and social service files of Wisconsin juveniles without a court order. It may not have access to juvenile court records without a court order. OAG 4-85

February 7, 1985

RICHARD FLINTROP, *Executive Director*
Council on Criminal Justice

You have requested my opinion as to whether the Wisconsin Council on Criminal Justice (WCCJ) and its staff can have legal access, without a court order, to the juvenile records maintained by county courts, law enforcement and social service agencies to research juvenile justice issues and policies.

In evaluating your request, this office has considered the statutory duties of the WCCJ and statutes and case law dealing with juvenile records in Wisconsin. In light of this analysis, I conclude that the legislative intent is fulfilled if WCCJ is permitted access to the law enforcement and social service files of Wisconsin juveniles without a court order. However, in view of the more stringent requirements attached to juvenile court records and the policies behind keeping them sealed, it is my opinion that the WCCJ may not have access to juvenile court records without a court order.

In answering your question, we have relied on the following facts stated in your request for an opinion. WCCJ requests access to personal and identifying information to determine appropriate research subjects. Once these subjects are identified, WCCJ will collect research data but will not disseminate or publish any information which could lead to the identification of individual subjects in the study. The WCCJ staff believes it needs access to these juvenile records to undertake legislatively mandated studies, evaluations, and analyses. It has been the WCCJ's experience that courts generally grant requests for orders providing their staff with access to juvenile records; however, the process of obtaining orders from the

judge of each county is cumbersome and time consuming. Because the WCCJ's current study requires access to the juvenile records of thirty-five counties, it wishes to improve efficiency by bypassing the requirement of a court order granting access in every county.

The duties of the WCCJ are defined in section 16.969, Stats. (1983), created by 1983 Wisconsin Act 27, section 111, as follows:

(1) **GENERAL DUTIES AND FUNCTIONS.** The council on criminal justice shall:

(a) Serve as the state planning agency under the juvenile justice and delinquency prevention act of 1974, P.L. 93-415.

(b) Collect from any state or local governmental entity information, data, reports, statistics or other material which is necessary to perform the council's duties and functions.

(c) Prepare a state comprehensive juvenile justice improvement plan on behalf of the governor. The plan shall be submitted to the joint committee on finance in accordance with s. 16.54 and to the appropriate standing committees of each house of the legislature as determined by the presiding officer of each house. The plan shall be updated periodically and shall be based on an analysis of the state's juvenile justice needs and problems.

(d) Recommend appropriate legislation in the criminal justice field to the governor and the legislature.

(e) Conduct evaluation studies involving programs and projects funded in whole or in part by the state aimed at reducing crime and delinquency and improving the administration of justice.

(f) Conduct other studies, evaluations, crime data analyses and reports to be submitted to the governor or the legislature as requested by the governor.

(2) **CRIMINAL STATISTICS.** (a) In this subsection:

1. "Law enforcement agency" means a governmental unit of one or more persons employed full time by the state or a political subdivision of the state for the purpose of preventing and detecting crime and enforcing state laws or local ordinances, employes of which unit are authorized to make arrests for crimes while acting within the scope of their authority.

2. "Offense" means an act which is a felony, a misdemeanor or a violation of a city, county, village or town ordinance.

(b) The council on criminal justice shall:

1. Collect information concerning the number and nature of offenses known to have been committed in this state and such other information as may be useful in the study of crime and the administration of justice. The council may determine any other information to be obtained regarding crime statistics. The information shall include such data as may be requested by the federal bureau of investigation under its system of uniform crime reports for the United States.

2. Furnish all reporting officials with forms and instructions which specify the nature of the information required under subd. 1, the time it is to be forwarded, the method of classifying and any other matters which facilitate collection and compilation.

3. Make available all statistical information obtained to the governor and the legislature.

4. Prepare and publish reports and releases, at least once a year, containing the statistical information gathered under this paragraph and presenting an accurate picture of crime in this state.

5. Cooperate with other agencies of this state, the crime information agencies of other states and the uniform crime reports system of the federal bureau of investigation in developing and conducting an interstate, national and international system of criminal statistics.

(c) All persons in charge of law enforcement agencies shall supply the council with the information described in par. (b) 1 on the basis of the forms and instructions to be supplied by the council under par. (b) 2.

(3) EXECUTIVE DIRECTOR AND STAFF. The governor shall appoint an executive director who shall serve at the pleasure of the governor. The executive director shall appoint all other staff. To the extent possible, staff vacancies shall be filled by persons with recall rights from layoff from the council in existence prior to the effective date of this section (1983).

Section 16.969(1) (1983) is essentially a renumbering of former section 14.27 (1981-82) with no substantive changes. Section

16.969(2), however, creates an entirely new subsection and directs the council to collect data and conduct studies. It does not specifically address the issue of access to confidential material. You have asked about access to three different types of juvenile records: law enforcement agency records, social service agency records and court records. Each category of record is governed by a different statute and I therefore will address each separately.

Section 48.396(1), the statutory provision regarding the confidentiality of law enforcement agencies' juvenile records, provides as follows:

Records

(1) 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.

Under this statute, law enforcement agencies may provide the confidential exchange of their records to WCCJ, if WCCJ is considered to be an "other law enforcement or social welfare agency." These terms are not defined in section 48.396(1) itself nor in section 48.02, the definition section. In addition, the Wisconsin statutes provide no general definition of "law enforcement agencies."

To ascertain the meaning of the terms, it is permissible to look to the legislative intent of the statute, as indicated by its language, scope, history, context, subject matter and the object intended to be accomplished. *State ex rel. Arnold v. County Court*, 51 Wis. 2d 434, 439-40, 187 N.W.2d 354 (1971) (citation omitted). The Wisconsin Supreme Court has enunciated the purpose behind the confidentiality provision regarding juvenile police records:

Confidentiality is essential to the goal of rehabilitation, which is in turn the major purpose of the separate juvenile justice system. In theory, the role of the juvenile court is not to determine guilt or to assign fault, but to diagnose the cause of the

child's problems and help resolve those problems. The juvenile court operates on a "family" rather than a "due process" model. Confidentiality is promised 'to encourage the juvenile, parents, social workers and others to furnish information which they might not otherwise disclose in an admittedly adversary or open proceeding. Confidentiality also reduces the stigma to the youth resulting from the misdeed, an arrest record and a juvenile court adjudication.

State ex rel. Herget v. Circuit Court for Waukesha County, 84 Wis. 2d 435, 451, 267 N.W.2d 309 (1978) (footnotes omitted). *Accord: State ex rel. State Public Defender v. Percy*, 97 Wis. 2d 627, 634-35, 294 N.W.2d 528 (Ct. App. 1980).

The Wisconsin Legislature has designated WCCJ as the state planning agency under the federal juvenile justice and delinquency prevention act and has specified its duties relating to the criminal justice system, including the duty to recommend legislation in the criminal justice field and evaluate programs aimed at reducing crime and delinquency. The purpose of the council is entirely consistent with the rehabilitative goals of the juvenile confidentiality statute. Therefore, I believe the WCCJ could be construed as a law enforcement agency within the meaning of section 48.396(1) so that it could have access to law enforcement records on juveniles without a court order.

This interpretation is complicated, however, by the fact that new subsection 16.969(2)(a)1. specifically defines the term "law enforcement agency" as a governmental unit whose employes have enforcement and arrest powers. This definition by its own terms does not include the council. One might argue, therefore, that the council is not a law enforcement agency. I find this argument unpersuasive because of the general rule that when a statute defines a term, it is understood that the definition controls only as to that particular statute, and that it is not controlling in other contexts. 2A Sands *Sutherland Statutory Construction* sec. 47.07 (1973). Thus, the definition of law enforcement agency found in section 16.969(2)(a)1. does not define that term as it is used in section 48.396(1). The more sensible way to interpret the statute is to focus on the intent of the Legislature in limiting access to juvenile police records. That intent is served by allowing WCCJ access to the records under section 48.396(1).

It should also be noted that WCCJ may have access to some law enforcement agency records on juveniles under the terms of sections 16.969(2)(b)1. and (2)(c). Those subsections provide that such agencies must provide requested information to the WCCJ on the number and nature of the offenses known to have been committed in the state and such other information as may be useful in the study of crime and the administration of justice. The information WCCJ requires for its studies may, in many instances, fall within the terms of this statute and, to the extent that they do, the council would have access to that information without a court order.

Section 48.78 (1981-82), regarding the confidentiality of social service agency records, provides as follows:

Confidentiality of records. Records kept or information received by the department, county agencies specified in s. 48.56, licensed child welfare agencies, licensed day care centers and licensed maternity hospitals regarding individuals in their care or legal custody shall not be open to inspection or their contents disclosed except as provided under ss. 48.432 and 48.433 or by order of the court. This section does not apply to the confidential exchange of information between these agencies or other social welfare or law enforcement agencies regarding individuals in the care or legal custody of one of the agencies. This section does not prohibit the department or a county department of public welfare or social services from using in the media a picture or description of a child in the guardianship of the department or a county department of public welfare or social services for the purpose of finding adoptive parents for that child.

Because WCCJ may be considered a law enforcement agency for the purpose of obtaining certain records, as discussed above, I believe this statute would permit the confidential exchange of information to WCCJ from a social service agency without a court order. The terms of the statute, however, apply only to information regarding individuals in the care or legal custody of one of the agencies. Information regarding individuals who are no longer in the care or custody of the agencies would not be available.

Section 48.396(2) (1983), which governs the confidentiality of juvenile court records, as amended by 1983 Wisconsin Act 487 provides as follows:

(2) Records of the court assigned to exercise jurisdiction under this chapter and of courts exercising jurisdiction under s. 48.17(2) shall be entered in books or deposited in files kept for that purpose only. They shall not be open to inspection or their contents disclosed except by order of the court assigned to exercise jurisdiction under this chapter. Upon request of the department to review court records for the purpose of monitoring and conducting periodic evaluations of activities as required by and implemented under 45 CFR 1355, 1356, 1357 and 1392, the court shall open those records for inspection by authorized representatives of the department. Upon request of the federal government to review court records for the purpose of monitoring and conducting periodic evaluations of activities as required by and implemented under 45 CFR 1355, 1356, 1357 and 1392, the court shall open those records for inspection by authorized representatives of the federal agency.

This section was recently amended to add specific exceptions allowing representatives of the Department of Health and Social Services and federal government access to records for specific purposes. This section provides no exception allowing law enforcement agencies access to the records without a court order. There is no specific exception for studies done by the council. Section 16.969 (1983), makes no mention of court records. Therefore, I conclude that access to court records by WCCJ may not be obtained absent a court order.

Although the WCCJ's need for access to the records may be the same whether the records are police or court records, the Legislature has chosen to provide more strict confidentiality for court records. I find no authority which would allow WCCJ to circumvent the requirement of a court order for access to juvenile court records.

It should be emphasized that the issue you have raised regarding court records is not whether WCCJ may ultimately have access to the records, but is only whether it may have access without obtaining a court order. The requirement of a court order is to allow the court, rather than the requesting party, to determine which records shall be made available. This ensures the greatest protection of the juveniles' right to confidentiality without prohibiting access entirely. Section 48.01(2) (1981-82), provides that in interpreting and applying the Children's Code, the best interest of the

child shall always be of paramount consideration, but the court must also consider the interests of the public. The Wisconsin Supreme Court has emphasized that the Children's Code expresses the Legislature's determination that the best interests of the child and the administration of the juvenile justice system require the protection of confidentiality of juvenile records. *Herget*, 84 Wis. 2d at 450-51. Although *Herget* involved an earlier version of the Children's Code, the policy it expresses is still very applicable to the current statutes. In light of this state's strong policy of protecting the confidentiality of juvenile records, as evinced by section 48.396(2) which provides no exceptions to the requirement of a court order for disclosure of juvenile court records, I must conclude that WCCJ cannot have access to juvenile court records without a court order.

Therefore, I conclude that WCCJ has access to law enforcement agency and social service agency records, to the extent provided by sections 48.396(1) and 48.78 (1981-82), without a court order because the council is a law enforcement agency within the meaning of those statutes. I conclude, however, that the council does not have access to juvenile court records without a court order because of the strict provision of section 48.396(2) (1983).

Finally, I must remind you that the access you have to confidential records, either obtained with or without a court order, does not destroy the confidential nature of the records. In conducting any study dealing with children, WCCJ should remain mindful of Wisconsin's strong policy in favor of confidentiality where children are concerned. All efforts should be made to maintain the confidentiality of the information you receive. *See, e.g.*, 57 Op. Att'y Gen. 187 (1968).

BCL:SLW

Bonds; Building Commission, State; Public Purpose Doctrine; Wisconsin Farmers Fund Program; The Farmers Fund Program, as set out in section 92.32, Stats., does not violate article VIII, sections 3 or 10 of the Wisconsin Constitution, nor are its terms contrary to the public purpose doctrine. OAG 5-85

February 20, 1985

PAUL L. BROWN, *Secretary*
State Building Commission

You ask whether the State Building Commission may constitutionally issue general obligation bonds to fund the Wisconsin Farmers Fund Program (hereinafter "Program") established in section 92.32, Stats. My answer is yes.

Section 92.15 was created pursuant to 1983 Wisconsin Act 27, section 1364m (renumbered and hereinafter referred to as section 92.32 by 1983 Wisconsin Act 410, section 24K), and the related borrowing authority set forth in section 20.866(2) and (2p) was created pursuant to 1983 Wisconsin Act 27, section 563m (collectively the "Act"). Pursuant to the Act, the Department of Agriculture, Trade and Consumer Protection may make payments from general obligation bond proceeds to counties that participate in the Program, provided that the counties comply with criteria set forth in the Act and further comply with the rules promulgated by the Department. Chapter AG 165 Wis. Adm. Code. The participating counties are then required to distribute these funds to individual owners and/or operators of animal feeding operations (hereinafter "individual") in the form of grants for the development of facilities and structures to treat, store or control runoff of animal waste.

The State Building Commission has never before issued general obligation bonds for this purpose. Since the funds raised by the general obligation bonds could be construed as directly aiding private individuals, you fear that by issuing general obligation bonds as requested, several provisions of Wisconsin Constitution article VIII may be violated. Specifically, your first concern is whether the facilities to be financed under the Program satisfy the "public purpose" test as it has been variously defined. The second area of your concern is whether the facilities built under the Program will satisfy the "governmental function" test exception to the internal improvement prohibition expressed in Wisconsin Constitution article VIII, section 10. Your final concern involves whether the issuance of the general obligation bonds constitutes a giving or lending of state credit "in aid" of individuals, corporations or associations in contravention of Wisconsin Constitution article VIII, section 3. Each area of concern will be separately addressed.

Preliminary to the separate discussion of each concern, I wish to briefly consider your observation that the Act contains no preamble with an explicit statement of *legislative* purpose. Oftentimes the Legislature will include, as a preamble to an act, the *legislative* purpose of that act. At other times, however, the Legislature fails to include such a statement of the *legislative* purpose. When faced with the latter situation, one may derive the *legislative* purpose of an act by either considering the language of the act as a whole or by considering the legislative purpose of related statutes. *Nekoosa-Edwards P. Co. v. Public Serv. Comm.*, 8 Wis. 2d 582, 591-92, 99 N.W.2d 821 (1959); *McGraw-Edison Co. v. ILHR Dept.*, 72 Wis. 2d 99, 105, 240 N.W.2d 148 (1976).

Though not explicitly stated, I believe the *legislative* purpose of the Act is to reduce water pollution caused by animal waste runoff from farms. First, an examination of the language of the Act supports this conclusion. For example, section 92.32(2)(c)1. limits grants "to animal waste treatment or permanent runoff check control structures or storage facilities which are necessary to meet water quality objectives." Second, the Act comports with the legislative purpose articulated in section 144.025—"to protect, maintain and improve the quality and management of the waters of the state, ground and surface, public and private." *See also*, ch. 147, Stats.

Let me now address your specific concerns.

I. Public Purpose Doctrine.

The origin of the Public Purpose Doctrine has been traced to the due process and equal protection clauses of the state and federal constitutions as well as Wisconsin Constitution article VIII, section 2. Eich, *A New Look at the Internal Improvements and Public Purpose Rules*, 1970 Wis. L. Rev. 1113, 1115. The Wisconsin Supreme Court, in discussing the several origins of the doctrine, explained that it does have clear constitutional underpinnings: "Although no constitutional provision specifically directs the expenditure of public funds for public purposes only, such limitation is a 'well-established constitutional tenet.'" *Wisconsin Solid Waste Recycling Auth. v. Earl*, 70 Wis. 2d 464, 478, 235 N.W.2d 648 (1975).

Although the doctrine's history is admittedly confused, its present day meaning is quite clear: public funds may be spent only for public purposes. Moreover, where state funds are concerned, the purpose must also be of statewide concern. *State ex rel. La*

Follette v. Reuter, 33 Wis. 2d 384, 397, 147 N.W.2d 304 (1967); *State ex rel. Wisconsin Dev. Authority v. Dammann*, 228 Wis. 147, 183, 277 N.W. 278, 280 N.W.2d 698 (1938).

In determining exactly what constitutes a statewide public purpose, the Wisconsin Supreme Court has forged several important guidelines and presumptions. First, it is a fundamental principle of the doctrine that the Legislature has the power to decide what constitutes a public purpose. *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 44, 47, 205 N.W.2d 784 (1973); *State ex rel. Warren v. Reuter*, 44 Wis. 2d 201, 212, 170 N.W.2d 790 (1969); *David Jeffrey Co. v. Milwaukee*, 267 Wis. 559, 571, 66 N.W.2d 362 (1954). In fact, “[i]f any public purpose can be conceived which might rationally be deemed to justify the act or serve as a basis for the instant expenditure, the test is satisfied” *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 414, 208 N.W.2d 780 (1973). Moreover, every act of the Legislature, including this one, is entitled to a strong presumption of constitutionality and will not be overturned unless the act’s unconstitutionality is established beyond a reasonable doubt. *Hammermill*, 58 Wis. 2d at 46.

Unquestionably, the expenditure of funds for the construction of facilities and structures designed to curb water pollution clearly serves a public statewide purpose. See sec. 147.011, Stats. The funds will be used to combat water pollution, which is a concern not only to farmers, but to all citizens of this state. In fact, the supreme court has held that water pollution abatement is a statewide public purpose. *La Follette*, 33 Wis. 2d 384. In *La Follette*, 33 Wis. 2d at 396-97, the court, in upholding the constitutionality of a statute which provided state financial assistance to municipalities for the construction of water pollution abatement facilities, stated: “The statewide importance of water pollution abatement in any given locality of the state is obvious since our rivers, streams, lakes and tributaries are not confined by municipal boundaries. The abatement of water pollution is essential to the health and welfare of all of the people of the state.” Moreover, the court has long held that the promotion and protection of public health is a matter of statewide concern. *La Follette*, 33 Wis. 2d at 397 (citing *State ex rel. Martin v. Juneau*, 238 Wis. 564, 570-71, 300 N.W. 187 (1941)). Thus, it is clear that the purpose of the Program, which is to collect, store and treat animal waste in order to abate water pollution, constitutes a statewide public purpose.

You suggest that because state money will ultimately be channeled to private individuals to construct the facilities and structures, it may be difficult to extrapolate a statewide public purpose. For several reasons, however, this suggestion is unfounded.

First, it is clear that the fact that a grant may incidentally benefit a private individual does not diminish the public nature of the grants. Long ago the supreme court stated that "the fact that an expenditure of public funds benefits certain individuals or one class more immediately than it does other individuals or another class does not necessarily deprive the expenditure of its public character." *Dammann*, 228 Wis. at 178, 182, 183; *State ex rel. American Legion 1941 Conv. Corp. v. Smith*, 235 Wis. 443, 451, 293 N.W. 161 (1940). More recently, the supreme court has concluded that "[i]f an appropriation is designed in its principle parts to promote a public purpose so that its accomplishment is a reasonable probability, private benefits which are necessary and reasonable to the main purpose are permissible." *Hopper v. Madison*, 79 Wis. 2d 120, 129, 256 N.W.2d 139 (1977).

The supreme court has also considered this issue of private benefit/public purpose in a most important public purpose doctrine case. In *Warren v. Reuter*, state funds were budgeted for the operation of what was formerly Marquette Medical School. The state's proposed financing was challenged in part as a violation of the public purpose doctrine. Opponents argued that the appropriation benefited a private school, and therefore constituted a private purpose. The court, in its opinion, recognized that a private purpose would indeed be enhanced. However, the court drew a distinction between incidental private benefit and dominant public purpose:

This argument confuses the means with the end. An act is constitutional if it is designed in its principal parts to promote a public purpose so that the attainment of the public purpose is a reasonable probability. ... This law is no frivolous pretext for giving money to a private school but the using of a private school to attain a public purpose. What benefit is derived by the medical school is necessary and incidental to the main purpose.

Warren v. Reuter, 44 Wis. 2d at 214.

Several important similarities exist between the circumstances in *Warren v. Reuter* and the program here considered. In both instances, state funds were given to a private entity (or individual).

However, as the court in *Warren v. Reuter* noted, this fact alone does not overcome the overriding public purpose. In *Warren v. Reuter*, a private school was utilized to attain a public purpose; in the instant case, private farmers will be used to attain the legislative or judicially defined public purpose of protecting state waters from water pollution. The message is clear: if a public purpose exists, as it does with the Program, the use of private entities to attain that public purpose will not in any way diminish the purpose.

Furthermore, in another closely related factual situation, I opined that the Mining Investment and Local Impact Fund Board (Mining Board) could, without violating the public purpose doctrine, make grants to municipalities for mining-related losses incurred by private landowners. 70 Op. Att'y Gen. 48 (1981). The grants under that program were to be distributed to farmers whose wells were contaminated by mine closings as well as to private property owners required to fence in abandoned mine shafts situated on their property. I noted the fact that the adverse problems created by mining activities, primarily contamination of water supplies and mine shaft cave-ins, occurring on private land did "not abrogate the underlying public scope of the problem and public purpose in providing a remedy for them." 70 Op. Att'y Gen. at 53. The opinion concluded that the curing of the defects on private land was certainly "necessary and reasonable to the main purpose of the fund" 70 Op. Att'y Gen. at 53.

Again, as with *Warren v. Reuter* the comparisons between that attorney general's opinion and the instant case abound. In the former, the Mining Board distributed funds to municipalities, which in turn distributed them to farmers. The same system of distribution of grants exists in the Program. In both, individuals ultimately receive state funds to be used on their private property.

The expenditure of state funds to a private individual obviously provides some benefit, even if only minimal, to the individual. However, just as a stream or lake does not necessarily stop at an individual's property line, the benefits do not flow only to the individual. Rather, the benefits flow to the public as a whole. The statutes are replete with examples of legislative policies aiding what would otherwise be entirely a private purpose but for its public benefit aspects. See 56 Op. Att'y Gen. 233, 241-42 (1967).

Furthermore, the local nature of any project does not diminish the public purpose of the Program:

“... The existence of *local conditions* which, because of their nature and extent, are of concern to the public as a whole, *the modes of advancing the public interest* by correcting them or avoiding their consequences, *are peculiarly within the knowledge of the legislature*, and to it, and not to the courts, is committed the duty and responsibility of making choice of the possible methods.”

State ex rel. Thomson v. Giessel, 265 Wis. 207, 216, 60 N.W.2d 763 (1953); see 70 Op. Att’y Gen. at 51-52.

As a final note, it should be recognized that the Public Purpose Doctrine is not a static doctrine; it evolves to meet the needs of the public. The supreme court has recognized that “[t]he trend of both legislative enactments and judicial decisions is to extend the concept of public purposes” *Hammermill*, 58 Wis. 2d at 55. Moreover, the court has stated that “the legislature is not restricted to the concept of public purpose as it had been understood in years gone by.” *State ex rel. Bowman v. Barczak*, 34 Wis. 2d 57, 64, 148 N.W.2d 683 (1967).

It is my opinion that the issuance of state general obligation bonds under section 92.32 to provide funds for the design and construction of animal waste treatment or storage facilities or permanent runoff control structures does not violate the public purpose doctrine.

II. Article VIII, Section 10: Internal Improvement Prohibition.

Article VIII, section 10 of the Wisconsin Constitution provides in part: “The state shall never contract any debt for works of internal improvement, or be a party in carrying on such works”

The term “internal improvement” has proven difficult to define. *Eich*, 1970 Wis. L. Rev. at 1173. At an early date, in *State ex rel. Jones v. Froehlich*, 115 Wis. 32, 38 (1902), the Wisconsin Supreme Court provided the following problematic definition: “[t]hose things which ordinarily might, in human experience, be expected to be undertaken for profit ...” but excluding “those other things which primarily and preponderantly merely facilitate the essential functions of government.” Commenting on this definition at a later date, the court admitted “[t]he intervening years have proved, if

nothing else, that the application of an abstract definition of the term has proved difficult." *Warren v. Nusbaum*, 59 Wis. 2d at 435.

Subsequently, despite the failure of its earliest attempt to define the term, in *State ex rel. Owen v. Donald*, 160 Wis. 21, 151 N.W. 331 (1915), the Wisconsin Supreme Court adopted the following definition of "internal improvement":

"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.

Owen, 160 Wis. 2d at 79. This definition of "internal improvement" was approved and adopted by the court in *State ex rel. Thomson v. Giessel*, 267 Wis. 331, 343, 65 N.W.2d 529 (1954), and has endured to the present.

While adopting the above definition, the court has at the same time recognized, as it did with the Public Purpose Doctrine, that the definition is not static. Reflecting upon the doctrine's evolution, the court commented: "An examination of the cases coming before this court over the last seventy years leads to the conclusion that both this court and the legislature have been cognizant of changing times and the ever-changing needs of the state and its people." *Warren v. Nusbaum*, 59 Wis. 2d at 435-36. In one of the most significant cases of that period, *La Follette*, 33 Wis. 2d at 402, the court had stated that the constitution must be interpreted "in light of existing conditions" and given "that meaning which would have been expressed when adopted if the present conditions ... had then existed or had been within the contemplation of those who drafted the instrument."

As evident from the judicial definition of the term "internal improvement," several recognized activities of state government are excluded from the prohibitions of that clause. Two of the stated exceptions are of significance to your inquiry—state activities con-

cerning the "preservation of public health" and "other like recognized functions of state government."

In *La Follette*, 33 Wis. 2d at 304, the Wisconsin Supreme Court considered the question of whether a law providing state aid to municipalities for the financing and construction of sewage treatment plants violated article VIII, section 10. The court stated that prohibited works of internal improvement did not include those works which had the *dominant purpose of preserving public health*. After arriving at that determination, the court concluded: "[M]atters pertaining to the abatement of water pollution are governmental functions of the state of Wisconsin and ... water pollution prevention and abatement facilities are not works of internal improvement within the prohibition of sec. 10, art. VIII, Const." *La Follette*, 33 Wis. 2d at 403. *Accord*, *Wisconsin Solid Waste*, 70 Wis. 2d at 492; *Warren v. Nusbaum*, 59 Wis. 2d at 436-38.

It is my opinion that the funding and construction of animal waste treatment or storage facilities or permanent runoff control structures has as its dominant purpose the furtherance of public health. Applying the dominant purpose rationale of *Wisconsin Solid Waste*, *Warren v. Nusbaum* and *La Follette*, I believe the Act is furthering a governmental function and, therefore, it is exempted from the prohibition of the "internal improvements" clause. I specifically rely on the court's conclusion in *La Follette*, 33 Wis. 2d at 403, wherein it was stated that "matters pertaining to the abatement of water pollution are governmental functions"

Moreover, the decrease in water pollution resulting from the treatment, control and storage of animal waste will most certainly protect public safety. In 57 Op. Att'y Gen. 227, 230 (1968), I recognized that although the definition of a governmental function does not expressly include public safety, it does include "'other like recognized functions of state government.'" Based on that phrase, I stated the following conclusion: "I know of no more universally recognized function of government at any level than the protection of public safety"

It is my opinion that the Program established pursuant to section 92.32 is a proper governmental function and, therefore, the Program does not violate article VIII, section 10 of the Wisconsin Constitution.

III. Article VIII, Section 3.

Your last area of concern involves article VIII, section 3 of the Wisconsin Constitution. That provision provides that “the credit of the state shall never be given, or loaned, in aid of any individual, association or corporation.”

While article VIII, section 3 has not been as exhaustively treated in the decisions of the Wisconsin Supreme Court, the court has had occasion to clarify its meaning. Whenever it has done so, however, the court has focused on the meaning of the phrase “giving or loaning” of the state’s credit. *Warren v. Nusbaum*, 59 Wis. 2d at 431, 432; *Hammermill*, 58 Wis. 2d at 62; *Bowman*, 34 Wis. 2d at 73; *La Follette*, 33 Wis. 2d at 397-98; *Thompson v. Giessel*, 271 Wis. 2d at 28; *Dammann*, 228 Wis. at 197. In those decisions, the “giving or loaning” of state credit only occurred when it resulted in the creation of a legally enforceable obligation on the state’s part to pay one party an obligation incurred in favor of that party by another party. *Id.* In other words, the court has consistently held that article VIII, section 3 *only* prohibited the state from incurring a legally enforceable obligation by acting as a guarantor or surety.

In past opinions, this office has also focused on that particular phrase and similarly interpreted the entire constitutional provision. 66 Op. Att’y Gen. 9 (1977). If I were to follow the limited approach of those opinions here, I would readily opine that the Program does not violate article VIII, section 3. While I reach the same conclusion, I choose not to so restrict my examination.

Limiting the analysis to the creation of an obligation is not surprising when one considers the economic history of state government during the period in which the Wisconsin Constitution was drafted. Historian George Rogers Taylor, in *The Transportation Revolution*, describes state financing and borrowing during this period as follows:

“The growth of state debts for the purpose of financing internal improvements, largely canals, was gradual until about 1830. ... Then in the 1830’s the first real boom in state-financed internal improvements took place. During 1830-1838 states borrowed nearly \$150,000,000, and by 1838 the total of their outstanding debt amounted to \$170,806,187. ... As long as the boom lasted, the states had little trouble in borrowing by selling their bonds either at home or abroad. ... But the era came definitely to an

end with the second crisis, which broke in 1839. By that time the states had definitely exhausted their credit, and it had become apparent that the expected returns on their investments in banks and internal improvements would not materialize. Instead of receiving the major part of their income, as had been expected, from their investments in banks or internal improvements, the states were suddenly faced with the necessity of taxing their citizens in order to meet the interest on debts incurred in order to promote banking or public works projects. ... By December, 1842, Florida, Mississippi, Arkansas, Indiana, Illinois, Maryland, Michigan, Pennsylvania, and Louisiana had defaulted on at least some of their obligations, and Ohio and New York were saved from similar humiliation only by taking extra ordinary measures.

“Efforts at further borrowing were now hopeless, and for nearly a decade the states struggled to recover financial solvency. ... Three states and the Territory of Florida actually repudiated bonds. ... The other states, those which had fallen into grave financial difficulties but did not repudiate their obligations, were forced to take strenuous measures to meet interest payments on their swollen debts. Most states now sold the securities and the public works they owned for what these would bring. ... In addition, though some put it off as long as possible, practically all of the states in financial difficulties now had seriously to begin to tax. In an attempt to avoid levying substantial general property taxes, a number of states imposed taxes on banks and other corporations while others attempted to raise money by licenses on occupations. Attempts to impose state income and inheritance taxes brought in but little revenue. Finally, most states were forced to lean heavily on general property taxes. ... This was a decade [1850-60], it will be remembered, of such tremendous enthusiasm for railroads that undoubtedly the increase in state debts for this purpose would have been much larger had it not been for a number of important restraining influences: 1) some of the states had not yet recovered their credit and were burdened with heavy debts incurred during the thirties; 2) nineteen states had been so affected by this severe crisis following the boom of the thirties that they had amended their constitutions so as to impose debt limitations upon themselves; ...”

George Rogers Taylor, *The Transportation Revolution*, Holt, Rhinehart and Winston, New York 1962, pp. 374-7.

The Wisconsin Constitution was drafted during the period when other states were feeling the effects of the severe financial crisis described above. This historical background goes a long way toward explaining the stringent financial limitations found in article VIII of the Wisconsin Constitution—particularly sections 3 and 10. It also explains why the framers of the Wisconsin Constitution included a specific section to prevent the state from acting as a surety or guarantor of the collateral obligation of another party. *See also*, the discussion in *Sloan, Stevens & Morris v. The State*, 51 Wis. 623, 629-30, 8 N.W. 393 (1881); *accord*, *Wein v. State*, 39 N.Y.2d 136, 347 N.E.2d 586 (1976).

Like the other constitutional limitations upon state financing activities, article VIII, section 3 has been interpreted by the court primarily in the context of pre-1969 “dummy” corporation devices. Those prior interpretations² do not reflect the present reality of the state itself being able to provide or use credit rather than loaning its credit elsewhere. Wis. Const. art. VIII, sec. 7(2)(a). In fact, your inquiry is premised upon a transaction involving this change of circumstances. For this reason, I believe it is now appropriate to shift the focus of the inquiry.

Article VIII, section 3 prohibits the giving or loaning of the credit of the state “*in aid of any individual ...*” It is my opinion that if it can be determined that the funds in the Program are not given *in aid of an individual*, then there can be no infringement of this constitutional provision. It is true that the funds administered through the Program will ultimately be received by individuals for facilities and structures to be constructed on private land. However, the Wisconsin Supreme Court long ago held that the state does not lend its credit within the meaning of this constitutional provision by merely making a voluntary lawful gift to a number of citizens. *Appeal of Van Dyke*, 217 Wis. 528, 545, 259 N.W. 700 (1935); *State ex rel. Atwood v. Johnson*, 170 Wis. 251, 176 N.W. 224 (1919). Therefore, it is necessary to analyze in a general sense what actually takes place when the Program disburses funds to individuals.

An understanding of the regulatory scheme of the Department of Natural Resources which led the Legislature to create the Program is essential. Chapter NR 243 Wis. Adm. Code entitled

“Animal Waste Management” was promulgated by the Department of Natural Resources pursuant to chapter 147. The stated purpose of that chapter is to eliminate the discharge of pollutants into the waters of the state. Sec. 147.01, Stats. “Pollutant” is defined in that chapter to include agricultural waste. Sec. 147.015, Stats.

Chapter NR 243 Wis. Adm. Code establishes design standards and accepted animal waste management practices for the large animal feeding operations category of point sources. See sec. 147.015(8), Stats. The chapter also establishes the criteria under which the Department of Natural Resources may issue a permit to other animal feeding operations which discharge pollutants to waters of the state. Section NR 243.21 Wis. Adm. Code authorizes onsite investigation by the Department of Natural Resources to determine whether unacceptable practices of an operation are causing or have caused the discharge of a significant amount of animal waste pollutants to the waters of the state. Both large and small operators which fail to take corrective measures in a specified period of time are required to obtain a permit which may contain a schedule of compliance designed to implement accepted waste management procedures necessary to control the discharge. Section NR 243.24 Wis. Adm. Code. Compliance includes the construction of structures and facilities necessary to control the discharge. Violation of the foregoing rules may lead to the enforcement of civil and criminal penalties. Secs. 147.21 and 147.29, Stats.

In my view, the Legislature created the Program to facilitate the construction of facilities and structures to protect the state’s surface waters from the adverse effect of animal water pollution in accordance with the policy and purposes of chapter 147. The facilities and structures designed to treat, store or control runoff of animal waste are *required* by the Department of Natural Resources, not “in aid” of any individual, but “in aid” of the public purpose of eliminating water pollution. The *required* facilities and structures must be built on private land. However, they provide the individual with only an incidental private benefit.

Because the private benefit is only incidental to the dominant purpose for the Program, the instant matter may be distinguished from others where the individual derives more than an incidental private benefit. Your example, suggesting that warm clothing that contributes to an individual’s health could be deemed necessary for

public health and welfare, falls in the latter category. Certainly, one cannot argue in such a situation that the individual does not receive much more than an incidental private benefit.

I wish to be clear that the issuance of general obligation bonds requires more than satisfaction of the public purpose test. As previously pointed out in 63 Op. Att'y Gen. 342, 343 (1974), "[g]eneral obligation bonding never was intended to be a substitute for the direct appropriation of tax revenues for financing any state program possessed with a public purpose." Article VIII, section 7, paragraphs (1) and (2)(a), enumerate the purposes for which the state may contract debt. One of the purposes enumerated for the creation of public debt includes the improvement of waters. In my opinion, article VIII, section 7(2)(a) provides authority for the state to borrow money to make funds available for the Program.

BCL:JSS

Open Meeting; Public Records; Radio; Television; Open meetings and public records laws are not applicable to independently created and independently operated non-stock, non-profit "friends" corporations organized to provide financial and other support to radio and television stations licensed to governmental agencies. OAG 7-85

March 8, 1985

TIMOTHY F. CULLEN, *Chairperson*
Senate Organization Committee

The Senate Organization Committee requests my opinion as to whether the open meetings and public records laws apply to "friends" organizations which provide financial and other support to public television and radio stations which are licensed to governmental units. Your inquiry states:

For example, the Wisconsin Public Radio Association exists to support the activities of the state radio network; the Friends of WHA-TV support Channel 21, which is part of the University of Wisconsin-Madison; Channel 10/36 Friends supports the activities of the two television stations licensed to the Milwaukee Area Technical College; and FM 90 Friends is affiliated with

WUWM-FM, the public radio station of the University of Wisconsin-Milwaukee.

On the basis of the limited facts furnished and information available to me, it is my opinion that, assuming the entities are organized as nonprofit educational or charitable corporations, neither the corporations nor their governing boards are subject to the open meetings or public records laws. I do not have sufficient information with respect to any formal organization FM 90 Friends may have which would form the basis for an opinion. A search of the Office of Secretary of State has failed to disclose any corporate filings with respect to that name.

The open meetings law is only applicable to organizations which fall within the definition of a governmental body set forth in section 19.82(1), Stats., which provides in material part: “ ‘Governmental body’ means a state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order; a governmental or quasi-governmental corporation; or a formally constituted subunit of any of the foregoing”

Similarly, the public records law is only applicable to officials or organizations which fall within the definition of “authority” in section 19.32(1):

“Authority” means any of the following having custody of a record: a state or local office, elected official, agency, board, commission, committee, council, department or public body corporate and politic created by constitution, law, ordinance, rule or order; a governmental or quasi-governmental corporation; any court of law; the assembly or senate; a nonprofit corporation which receives more than 50% of its funds from a county or a municipality, as defined in s. 59.001(3), and which provides services related to public health or safety to the county or municipality; or a formally constituted subunit of any of the foregoing.

None of the organizations referred to was created by the Wisconsin Constitution, statute or ordinance. I have no information which would lead me to conclude that any organization referred to was created by or pursuant to “rule or order” of some governmental body, such as the Board of Regents, Educational Communications Board or Board of Directors of the Milwaukee Area Technical College. Furthermore, I have no information which would lead

me to conclude that any one of the organizations is a formally constituted subunit of a parent governmental body. Generally speaking a subunit would be a separate body created by the parent body and composed of members who are also members of the parent body.

Section 36.25(5) provides that:

The board of regents, as licensee, shall manage, operate and maintain broadcasting station WHA and WHA-TV and shall enter into an affiliation agreement with the educational communications board pursuant to s. 39.14 to provide that the board of regents shall grant the educational communications board the part-time use of equipment and space necessary for the operations of the state educational radio and television networks.

Section 39.11 empowers the Educational Communications Board to manage, operate and maintain broadcasting station WLBC and to establish and operate a statewide educational radio network. Subsection (1) empowers the board to “[r]eceive and disburse state, federal and *private funds*.” Subsections (6) and (14) provide that the board shall:

(6) Furnish leadership in securing adequate funding for state-wide joint use of radio and television for educational and cultural purposes, including funding for media programming for broadcast over the state networks. The educational communications board may submit joint budget requests with state agencies and other nonstate organizations or corporations for the purposes stated above.

....

(14) Coordinate the radio activities of the various educational and informational agencies, civic groups, and citizens having contributions to make to the public interest and welfare.

The Wisconsin Blue Book 1983-84 at 408 in setting forth the structure of the Educational Communications Board states: “The *Development and Public Awareness Unit* seeks funding from listeners, viewers and private funding sources for the purpose of funding and promoting the programming broadcast on the networks.”

In an opinion at 70 Op. Att’y Gen. 163 (1981), it was stated that the Educational Communications Board could contract with “friends organizations” (nonprofit entities incorporated for the

purpose of assisting and promoting the activities of Educational Communications Board as a licensee of educational radio and television programs) to raise funds for educational radio and television. The opinion further stated that funds contributed directly to the "friends" did not become state funds until transferred to the Educational Communications Board by the friends organization.

The records of the Office of Secretary of State indicate the following:

WISCONSIN PUBLIC RADIO ASSOCIATION, INC. is incorporated under chapter 181 as a non-stock, non-profit corporation for educational purposes to assist public radio stations in Wisconsin including WHA and those operated by the Educational Communications Board. It claims exempt status under I.R.C. § 501(c)(3) (1954). It has members who pay dues and who elect a board of directors consisting of nine members.

FRIENDS OF WHA-TV, INC., is a chapter 181 non-stock non-profit membership corporation organized for charitable and educational purposes. It claims income tax exemption under I.R.C. § 501(h) (1954). On December 14, 1982, it claimed 23,000 members and the certificate states that thirty members constitute a quorum and that fifty-five were present at the meeting to adopt restated articles. It was originally incorporated by John F. Whitmore on January 10, 1969, as Community Council for Public Television, Inc., and later changed its name to Friends of Channel 21, Inc., and to its present name on June 28, 1982.

CHANNEL 10/36 FRIENDS, INC., was originally Community Broadcast Council, Inc. It is a chapter 181 non-profit member corporation having 6987 members on October 18, 1976. It claims to be organized for purposes "exclusively charitable, scientific, literary and educational," and claims exemption under I.R.C. § 501(c)(3) (1954). Its particular purpose is to support public television broadcasting by stations WMVS/WMVT.

Neither the open meetings law nor public records law is applicable to independent private associations or non-profit corporations which have a public purpose and are organized by friends of the university or other state agencies. 73 Op. Att'y Gen. 53 (1984); 46 Op. Att'y Gen. 83 (1957). *Glendale Development v. Board of Regents*, 12 Wis. 2d 120, 106 N.W.2d 430 (1960). As indicated earlier, the Friends of WHA-TV Inc., Channel 10/36 Friends, Inc. and

Wisconsin Public Radio Association, Inc., appear to be non-stock non-profit corporations created by private citizens. They are corporate bodies but not bodies *corporate and politic* and are not quasi-governmental corporations. Their powers are derived from the general laws of the state and they differ from quasi-governmental corporations such as the Wisconsin Solid Waste Recycling Authority and Wisconsin Housing Finance Authority. The latter were created by the Legislature by statute or pursuant to statutory direction and have delegated powers largely controlled by statute. In 73 Op. Att'y Gen. 53 (1984), it was stated that the Historic Sites Foundation, Inc., which by contract managed Circus World Museum, and which was organized by friends of the State Historical Society, was not a governmental body subject to the open meetings law. The opinion discussed the term "quasi-governmental corporation":

Section 19.81(2) also expressly includes quasi-governmental corporations within its definition of a governmental body. There are no reported Wisconsin decisions that define the term "quasi-governmental." The word "quasi" is defined in *Webster's New Collegiate Dictionary* 700 (7th ed. 1977) as: "(1) having some resemblance ... by possession of certain attributes" and, "(2) having a legal status only by operation or construction of law and without reference to intent." In *State v. Wisconsin Telephone Co.*, 91 Wis. 2d 702, 284 N.W.2d 41 (1979), it was held that the ordinary and common meaning of words may be established by the definition in a recognized dictionary. Using the dictionary definition there seems to be little doubt but that the nonstock body politic corporations created by the Legislature to perform essentially governmental functions are quasi-governmental corporations. Corporations such as the Wisconsin Solid Waste Recycling Authority and Wisconsin Housing Finance Authority were essentially created to achieve legitimate governmental functions by means that could not be employed by state agencies because of constitutional restraints.

....

The activities of the Wisconsin Solid Waste Recycling Authority and Wisconsin Housing Finance Authority are largely controlled by statute. Thus, these corporations and similar entities fall within the definition of a quasi-governmental corporation.

In contrast, the functions of the HSF cannot possibly be considered governmental. It exercises no sovereign power and does not engage in activity that is dependent on or controlled by delegation from the Legislature. The functions pursued by the HSF under its articles and by-laws are the same functions that any private nonstock corporation could engage in. Its powers are derived from the general laws of the state. The HSF is a private corporation with no governmental attributes. While the members of the Board of Curators are also directors of the HSF, they hold and administer the position of director as private citizens not as state officials.

Our conclusion that the term “quasi-governmental corporation” is limited to nonstock body politic corporations created by the Legislature to perform essentially governmental functions is supported by the discussion of a somewhat related term, “quasi-municipal corporation,” in McQuillin *Municipal Corporations* § 2.13 (3rd Ed. 1971):

The terms “quasi-municipal,” as applied to corporations, “quasi-corporations,” “public quasi-corporations,” and other similar terms, are often used as meaning the same thing. Better designation, it would seem, would be to confine the term “quasi-corporation” to organizations not strictly corporations at all, and to designate as “quasi-municipal” those organizations which are deemed corporations but which are held not municipal corporations, strictly speaking, but which resemble municipal corporations in some respect. As the term is used herein, what is meant is a corporation created or authorized by the legislature which is merely a public agency endowed with such of the attributes of a municipality as may be necessary in the performance of its limited objective. *In other words, a quasi-municipal corporation is a public agency created or authorized by the legislature to aid the state in, or to take charge of, some public or state work, other than community government, for the general welfare.* “Quasi-municipal” corporations are public in nature, but not, strictly speaking, municipal corporations. They are bodies which possess a limited number of corporate powers and which are low down in the scale or grade of corporate existence, and consist of various local government areas established to aid the administration of public functions.

(Emphasis added.)

Section 19.32(1) makes the public records law applicable to "a non-profit corporation which receives more than 50% of its funds from a county or a municipality, as defined in s. 59.001(3)." The latter statute defines "municipality" to include "cities, villages and towns." The non-profit corporations in question do not receive more than fifty percent of their funds from a municipality and do not fall within the definition of "governmental body" in section 19.82(1) or of "authority" in section 19.32(1).

We are not aware that any specific persons employed by the Educational Communications Board, Board of Regents or University of Wisconsin System hold offices or positions of employment with any of the non-stock corporations or friends associations referred to. If there were dual office or position holding, section 36.23, which is applicable to the Board of Regents and university employes, might be applicable.

Conflict of interest. No regent or officer or other person appointed or employed in any position in the system may at any time act as agent for any person or organization where such act would create a conflict of interest with the terms of the person's service in the system. The board shall define conflicts of interest and adopt rules related thereto.

If a public contract were involved between the Board of Regents, Educational Communications Board, Board of Directors of the Milwaukee Area Technical College or one of their subunits and a non-profit friends organization, section 946.13, which prohibits public officers and employes from having private pecuniary interests in public contracts, might be applicable.

Certain organizations and professional fund raisers seeking contributions from the general public are required to be registered with the Department of Regulation and Licensing. Sec. 440.41, Stats. That department has advised that Wisconsin Public Radio Association, Inc., Friends of WHA-TV, Inc. and Channel 10/36 Friends, Inc., are registered pursuant to section 440.41(2) and (4), and file annual financial reports as therein required. The department advises that FM 90 Friends is not separately registered, since it claims exemption because of its association with UW-M Foundation and that its reporting is done in connection with filings by that organi-

zation. You may wish to inquire of that department concerning such filings and information available therefrom.

BCL:RJV

Schools And School Districts; A school district has no power to transfer gift and grant moneys received by the district under section 118.27, Stats., to a nonprofit, nonstock, section 501(c)(3) corporation, which would manage the moneys and distribute the principal and interest for the benefit of area high school students in the form of scholarships; if moneys are accepted under section 118.27, the school district must act as trustee of the moneys, except under the circumstances outlined in section 66.30(2m). OAG 8-85

March 14, 1985

DR. HERBERT J. GROVER, *State Superintendent*
Department of Public Instruction

You have sought my opinion on a proper interpretation of section 118.27, Stats. Your specific question is as follows:

May a school district transfer assets received by it pursuant to §118.27 to a nonprofit, non-stock §501(c)(3) corporation which would manage such assets and distribute the principal and interest derived from such assets for the benefit of area high school students in the form of scholarships?

In my opinion, a school district lacks authority to make transfers of this nature.

The Wisconsin Supreme Court has stated that “[t]he establishment and operation of public schools is a governmental function of the state, and the legislature may and has delegated portions of that power to the various school districts.” *Buse v. Smith*, 74 Wis. 2d 550, 563, 247 N.W.2d 141 (1976). In keeping with this principle that school districts are arms of the state exercising delegated powers, it has long been recognized that school districts have only those powers given to them by statute and such other powers as are necessarily implied. *State ex rel. Van Straten v. Milquet*, 180 Wis. 109, 113, 192 N.W. 392 (1923); 61 Op. Att’y Gen. 204, 205 (1972). Section 118.27, the statutory section about which you are concerned, reads as follows:

Gifts and grants. The school board of a district may receive, accept and use gifts or grants of furniture, books, equipment, supplies, moneys, securities or other property, real or personal, used or useful for school research and educational purposes. All moneys received as gifts or grants shall be placed in the school district treasury but shall be considered segregated trust funds. Whenever a school board receives gifts or grants under this section, it shall make such use thereof, or invest the same in the case of moneys, as the donor or grantor specifies. In the absence of any specific direction as to the use of such gifts or grants by a donor or grantor, the school board may determine the use of or invest the same in accordance with the law applicable to trust investments. In the use, control or investment of such gifts or grants, the school board may exercise the rights and powers generally conferred upon trustees.

Without question, this section gives a school board statutory authority to act as a trustee of gifts and grants made to and accepted by the school district. Your question, however, focuses upon whether that authority can be further delegated to a nonprofit, nonstock corporation. I find no express authority in section 118.27 for such delegation, and for several reasons I do not believe that the existence of such authority can be necessarily implied.

First, section 118.27 states that “[i]n the use, control or investment of ... gifts or grants, the school board may exercise the rights and powers *generally conferred upon trustees*.” The Wisconsin Supreme Court has recognized that “a trustee charged with the duty of administering a trust cannot delegate to agents powers vested in the trustee which involve an exercise of judgment and discretion” *Muench v. Public Service Comm.*, 261 Wis. 492, 515-1, 53 N.W.2d 514, 55 N.W.2d 40 (1952). A contract between a school district and a non-profit corporation, whereby the school district would divest itself of the gift and grant moneys and the corporation would be empowered to make the discretionary investment and management decisions, would, in my opinion, directly contravene this principle.

Second, courts faced with issues regarding school districts' *discretionary* powers have quite consistently ruled that such powers, already delegated to the school district by the Legislature, cannot be further delegated to other entities. See *Bunger v. Iowa High*

School Athletic Association, 197 N.W.2d 555 (Ia. 1972), and cases cited therein. In *Muehring v. School Dist. No. 31 of Stearns County*, 224 Minn. 432, 28 N.W.2d 655, 658 (1947), the court explained that “[d]elegation of governmental power [to a public corporation, agency or officer] is a manifestation of legislative intention that only the public authority to which the delegation is made, and not some agency or person of its choosing, shall exercise such power.”

Third, once gift and grant moneys are accepted by the school district, they become “public moneys” in accordance with section 34.01(6). Chapter 34, dealing with public deposits, is very explicit in its requirements that public moneys be deposited promptly in an approved public depository. This, too, lends support to the conclusion that gift and grant moneys received by a school district cannot be diverted or transferred to a nonprofit, nonstock corporation without specific statutory authorization.

The only instance in which I find that a school board is empowered to transfer assets received by it under section 118.27 is outlined in section 66.30(2m). That section allows a group of school boards to form a nonprofit-sharing corporation to contract with the state or the University of Wisconsin for the furnishing of “services for educational study and research projects.” Under section 66.30(2m)(e), the participating school boards are authorized to transfer gifts and grants to the corporation, and the corporation is authorized to receive the gifts and grants “and be subject to their use, control and investment as provided in s. 118.27.”

Please note that this opinion applies only to gifts and grants for which the donor or grantor has not specified a use or an investment scheme. Under section 118.27, a school board must abide by donor or grantor specifications, if such specifications exist.

BCL:RCB

Bids And Bidders; Contracts; The preference for Wisconsin businesses included in sections 16.75 and 16.855, Stats., applies only when a Wisconsin business and an out-of-state business submit identical, low bids. OAG 9-85

March 18, 1985

DORIS J. HANSON, *Secretary*

Department of Administration

You have asked for an opinion interpreting those parts of sections 16.75(1)(a) and 16.855(1), Stats., which state that a preference shall be given for Wisconsin businesses when the department awards contracts. Your letter states that since these provisions have been enacted, the department has interpreted them as meaning that a preference would be given only if the Wisconsin bidder and an out-of-state bidder had the exact same low bid. You enclose a letter from Governor Warren P. Knowles, dated March 10, 1970, in which he states that when signing into law the bill which amended section 16.855(1) to provide a preference for Wisconsin-based firms, he interpreted that preference as applying only in the event there was a tie between bidders, one of which was an out-of-state firm and the other a Wisconsin-based firm. I conclude that both sections 16.75 and 16.855(1) should be interpreted as providing a preference for Wisconsin-based firms only when the bidding results in a Wisconsin firm and an out-of-state firm submitting an identical bid.

Section 16.75(1)(a) provides that all contracts for materials, supplies, equipment and contractual services, except for some enumerated exceptions, must be awarded to the lowest responsible bidder. The statute goes on to enumerate some of the factors to be considered in defining lowest responsible bid and then states a "preference shall always be given to materials, supplies, equipment and contractual services of Wisconsin producers, distributors, suppliers and retailers."

Section 16.855(1) requires the department to let by contract to the lowest qualified responsible bidder all construction work when the estimated cost of the construction exceeds \$30,000. The second sentence states: "In the absence of compelling reasons to the contrary, preference shall be given to Wisconsin-based firms."

Neither statute is clear. On its face, section 16.75(1)(a) simultaneously requires that the department award contracts to the lowest responsible bidder and always give preference to Wisconsin businesses. The "preference" is not defined at all. Similarly, section 16.855(1) requires the department to award contracts to the lowest

responsible bidder, but to give preference to Wisconsin-based firms in the absence of "compelling reasons to the contrary." The statute does not suggest what reasons may be considered compelling. Neither statute defines a Wisconsin business or a Wisconsin-based business.

When the language of a statute is ambiguous or unclear, we must examine the scope, history, context, subject matter and object of the statute in order to discern the intent of the Legislature. A statute must be interpreted in such a way as to avoid absurd or unreasonable results. *Green Bay Redevelopment Authority v. Bee Frank*, 120 Wis. 2d 402, 409, 355 N.W.2d 240 (1984). If possible, provisions of a statute which appear to conflict should be construed harmoniously in order to give effect to the primary purpose of the statute. *State v. Schaller*, 70 Wis. 2d 107, 110, 233 N.W.2d 416 (1975).

The primary purpose of competitive bidding statutes like sections 16.75 and 16.855 is to assure that the state receives the highest quality materials and workmanship at the lowest possible price. 66 Op. Att'y Gen. 284 (1977). Both statutes provide for exceptions to this general policy in limited and unusual circumstances, e.g., sections 16.75(2)(b) and 16.855(10). This legislative policy would be frustrated if a Wisconsin firm, which was not the lowest bidder, had to be awarded the contract each time an out-of-state firm submitted the lowest bid. Quite obviously, such a practice would also discourage out-of-state bidders from participating in the state's contracts, thereby further frustrating the legislative goal of competitive bidding.

I cannot conclude that the Legislature intended that any preference for Wisconsin businesses overcome the specifically stated requirement of awarding contracts to the lowest qualified bidder. Although the legislative history of the statutes is unenlightening on specific legislative intent, I believe it is important that the language which provides a preference for Wisconsin businesses was inserted after the requirement of awarding contracts to the lowest responsible bidder. *State v. Consolidated Freightways Corp.*, 72 Wis. 2d 727, 737, 242 N.W.2d 192 (1976). I conclude, therefore, that the preference for Wisconsin businesses expressed in sections 16.75 and 16.855 must defer to the more specific requirement that contracts be awarded to the lowest bidder.

I also conclude that in the case of identical low bids between a Wisconsin contractor and an out-of-state contractor, the contract must be awarded to the Wisconsin bidder. This interpretation gives effect to the Wisconsin preference without doing violence to the specific requirement of awarding contracts to the lowest qualified bidder. This interpretation also obviates the necessity of the department engaging in determinations of what are compelling reasons in any given contract; a lower bid would be a compelling reason not to give a preference.

In reaching the conclusion that the preference for Wisconsin businesses operates only in case of a tie bid, I have not relied on either former Governor Knowles' letter or your agency's interpretation of the statutes. My interpretation of the statute, however, coincides with Governor Knowles' understanding and your department's administering of the statute. The United States Supreme Court has said that agency interpretation of an ambiguous statute and the uniform practice of a department charged with administering the statute can be convincing when interpreting an ambiguous statute. *State of Wisconsin v. State of Illinois*, 278 U.S. 367 (1929). The seventh circuit has noted that when interpreting a statute, a court may give special credence to contemporaneous constructions of statutes by the agency charged with administration of the statute. *Chacon v. Hodgson*, 465 F.2d 307 (7th Cir. 1972). Our supreme court has long held that the construction and interpretation given to a statute by the agency which is charged with the duty of enforcing the statute is entitled to great weight and any rational basis will sustain its practical interpretations. *School Dist. of Drummond v. ERC*, 121 Wis. 2d 126, 132-33, 358 N.W.2d 285 (1984). Governor Knowles' understanding of the preference language and your agency's interpretation of the statutes support my interpretation of the statute.

BCL:AML

Compatibility; Offices of president of common school district board and chairperson of town board within district and offices of school board member and town clerk are probably compatible.
OAG 10-85

March 26, 1985

DARWIN L. ZWIEG, *District Attorney*
Clark County

You request my opinion on two questions:

1. Are the offices of president of a common school district board and chairperson of a town board in a town located within such school district compatible so as to permit one person to hold both offices at the same time?
2. Are the offices of member of a common school district board and town clerk of a town located within such school district compatible so as to permit one person to hold both offices at the same time?

The answer is that there is probable compatibility between the two offices referred to in each question. A person serving in both capacities might, at some time, be faced with a conflict of interest with respect to specific issues. In some instances conflict can be averted by abstention from participation in discussions, negotiation or voting. Where a public contract is involved in which the officer has a private pecuniary interest, abstention from voting might not avoid violation of section 946.13(1)(a), Stats. See 60 Op. Att'y Gen. 367 (1971) and *State v. Davis*, 63 Wis. 2d 75, 216 N.W.2d 31 (1974).

We are dealing with separate governmental units which have separate statutory powers. Common school districts are subject to chapters 118 and 120. A school district board has powers which include those set forth in sections 120.12 and 120.13, and the district president has powers set forth in section 120.15. 1983 Wisconsin Act 532 became effective January 1, 1985, and revised town law. Powers and duties of a town chairperson are set forth in new section 60.24 and powers and duties of a town clerk are set forth in new section 60.33.

I am not aware of any statute which makes the offices of town chairperson and president of a common school district board, or the offices of town clerk and member of a common school district board, incompatible. Wisconsin Constitution article XIV, section 13 does continue the common law and provides: "Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature."

Common law incompatibility of offices or of an office and a position is discussed in 63A Am. Jur. 2d *Public Officers and Employees* § 78 (1984):

Incompatibility is to be found in the character of the offices and their relation to each other, in the subordination of the one to the other, and in the nature of the duties and functions which attach to them. They are generally considered incompatible where such duties and functions are inherently inconsistent and repugnant, so that because of the contrariety and antagonism which would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices, considerations of public policy render it improper for an incumbent to retain both. Two offices or positions are incompatible if there are many potential conflicts of interest between the two, such as salary negotiations, supervision and control of duties, and obligations to the public to exercise independent judgment. If the duties of the two offices are such that when placed in one person they might disserve the public interests, or if the respective offices might or will conflict even on rare occasions, it is sufficient to declare them legally incompatible. Incompatibility has been said to exist when there is a built-in right of the holder of one position to interfere with that of the other, as when the one is subordinate to, or subject to audit or review by, the second; obviously, in such circumstances, where both posts are held by the same person, the design that one act as a check on the other would be frustrated. Incompatibility exists only when the two offices or positions are held by one individual, and it does not exist where the two offices or positions are held by two separate individuals, even though such individuals are husband and wife.

An incompatibility exists whenever the statutory functions and duties of the offices conflict or require the officer to choose one obligation over another.

At 63A Am. Jur. 2d *Public Officers and Employees* § 79 (1984) the distinction between incompatibility and conflict of interest is discussed:

Incompatibility of office or a position is not the same as a conflict of interest. Incompatibility of office or position involves a conflict of duties between two offices or positions. While this

conflict of duties is also a conflict of interest, a conflict of interest can exist when only one office or position is involved, the conflict being between that office or position and a nongovernmental interest. Incompatibility of office or position requires the involvement of two governmental offices or positions. Moreover, incompatibility of office or position may be sufficient for a vacation of an office when conflict of interest is not.

Certain of the common law aspects of conflict of interest are set forth in 63A Am. Jur. 2d *Public Officers and Employees* § 322 (1984):

At common law, it was held that a conflict of interest existed if an administrative official voted on the matter in which he had a personal direct and pecuniary interest. This rule especially applied in cases where public officials could gain personally from their inside information.

A person's status as a public officer forbids him from placing himself in a position where his private interest conflicts with his public duty. His good faith is of no moment because it is the policy of the law to keep him so far from temptation as to insure the exercise of unselfish public interest. This policy is not limited to a single category of public officer but applies to all public officials. Anything which tends to weaken public confidence and to undermine the sense of security for individual rights is against public policy. The state has a substantial compelling interest in restricting unethical practices of its employees and public officials not only for the internal integrity of the administration of government, but also for the purpose of maintaining public confidence in state and local government.

Any interest which a public officer acquires which is adverse to those of the public, without a full disclosure, is a betrayal of his trust and a breach of confidence. However, it has been stated that the law does not forbid the holding of an office and exercising powers thereunder because of a possibility of a future conflict of interest.

Wisconsin applies the common law rules of incompatibility as between public offices and a public office and a public position. Acceptance of an incompatible office or position vacates the first office. Where potential conflicts are substantial, the possibility that the person might be permitted to abstain from voting in areas of

conflict would not avert a holding of incompatibility. *Otradovec v. City of Green Bay*, 118 Wis. 2d 393, 397, 347 N.W.2d 614 (1984).

Neither the school district board nor the town board is subordinate to the other in terms of supervision, control, establishment of compensation, appointment or discharge. A comparison of the duties of the offices of school district president and chairperson of town board and school district board member and town clerk fails to disclose areas of substantial potential conflict which would make such offices incompatible. In the event a conflict does arise, the individual should abstain from participation in discussions and from voting on such issue and might consider resigning from one of the offices. A much closer question would arise if the offices of school district treasurer and town treasurer or town board member or town treasurer and school board member were involved. Under section 60.34(5), as created by 1983 Wisconsin Act 532, the town treasurer has a duty to apportion and pay over tax moneys to the school district on written request of the district board. Further, section 74.03(5) requires the town treasurer to settle and pay over monies collected to the school district treasurer on or before March 15 or on or before the 15th of each month thereafter, and section 120.16(2) authorizes a school district treasurer to "[a]pply for, receive and sue for all money appropriated to or collected for the school district." However, with respect to the offices within your inquiry, the potential of conflict is not of sufficient nature as to require a holding on incompatibility. Where the Legislature has not specified that offices are incompatible, and where conflicts are not readily visible by comparison of duties, the question of whether one person should hold more than one office is best left to the electors.

BCL:RJV

Curators, Board Of; Historical Society, State; Words And Phrases; The State Historical Society of Wisconsin is a state agency. The Board of Curators of the society falls within the coverage of sections 893.82 and 895.46, Stats. The only members of the board that have to comply with section 19.43 by virtue of their appointment to the board are the three members nominated by the Governor with the advice and consent of the senate. OAG 11-85

April 10, 1985

RICHARD A. ERNEY, *Director*
State Historical Society of Wisconsin

You have requested my opinion on the following questions:

1. Is the State Historical Society of Wisconsin a state agency?
2. Are the members of the Board of Curators covered by sections 893.82 and 895.46, Stats.?
3. Are the members of the Board of Curators required to make financial disclosures under section 19.43?

Your first question arises out of the fact that the society was initially chartered as a private corporation. *See* Ch. 17, Laws of 1853. This legislative description continued for almost one hundred years. During that period the society was generally considered to be a private corporation, created for public purposes. *State ex rel. Wisconsin Dev. Authority v. Dammann*, 228 Wis. 147, 172, 277 N.W. 278 (1938); 36 Op. Att'y Gen. 285 (1947).

In 1949, the Legislature amended the corporate description of the society by adding the words, "Said society shall be an official agency ... of the state." *See* Ch. 52, sec. 13, Laws of 1949; sec. 44.01, Stats. (1949). This office in 39 Op. Att'y Gen. 110, 113 (1950), concluded that the legislative description, "official agency," in chapter 52, Laws of 1949, was merely a recognition of the fact that over the years the society had become a state agency through increased legislative control over the activities of the society. The legislative description of 1949 continued for twenty years.

As a consequence of the general state reorganization act (ch. 276, Laws of 1969), section 44.01, Stats. (1949), appeared in the 1969 statutes as section 44.01(1) and provided: "The historical society shall constitute a body politic and corporate by the name of 'The State Historical Society of Wisconsin,' may sue and be sued, and shall possess all the powers necessary to accomplish the objects and perform the duties prescribed by law."

The reorganization act renewed the question of the legal status of the society because it deleted the reference to the state agency and relied on the original 1853 Corporate Charter description. In an attempt to correct this situation, the Legislature in chapter 125, section 302, Laws of 1971, amended section 44.01(1) to its present

language which describes the society as: “[A] body politic and corporate by the name of ‘The State Historical Society of Wisconsin,’ and shall possess all the powers necessary to accomplish the objects and perform the duties prescribed by law. The historical society shall be an official agency and the trustee of the state.” This legislative description of the society is arguably ambiguous because it encompasses the corporate charter language of 1853 along with the designation “official agency.”

In *Majerus v. Milwaukee County*, 39 Wis. 2d 311, 159 N.W.2d 86 (1968), the court at page 315 describes the wide variety of state boards created by the Legislature:

While some state boards are created a body corporate with the power to sue and be sued, other bodies corporate do not have the right to sue or be sued. Some agencies are not separate corporate bodies but they may sue and be sued. Other divisions of the state government have neither corporate status nor authority to sue or be sued.

The situation described in *Majerus* has become further complicated by the state’s use of private corporations to accomplish public purposes that the state cannot directly perform because of constitutional restraints. In *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 208 N.W.2d 780 (1973), the court discussed the power of the Legislature to create corporate entities separate and distinct from state government which have the ability to achieve state objectives which the state could not directly accomplish. These corporations have been referred to as “independent going concerns” or ignobly as “dummy” corporations. Apparently, in recognition of the variety of legislative descriptions and consequent confusion, the court in *Warren* held that it would, in effect, ignore the legislative denomination given to the entity in question and look to its powers and structure in order to determine its nature, *i.e.*, whether the entity is a private corporation or a state agency. As noted in *Warren* the leading case on this issue is *Sullivan v. Board of Regents of Normal Schools*, 209 Wis. 242, 244 N.W. 563 (1932). Also see *Lister v. Board of Regents*, 72 Wis. 2d 282, 292-293, 240 N.W.2d 610 (1976). In *Sullivan* the court discussed numerous criteria which would distinguish a private corporation from a state agency. These criteria, for our purposes, can be simply stated as a means of measuring the degree of state control over the operations and functions of the

entity. Obviously, if the Legislature controls the entity, it cannot fit the description of an "independent going concern."

In examining the society, we find:

1. That its operations are largely controlled by chapter 44.
2. That its funding is controlled by section 20.245.
3. That its trust funds are administered by the State of Wisconsin Investment Board under section 25.17(3)(c).
4. That the positions of director, associate director, assistant directors and librarian of the society are provided for by statute. *See* sec. 230.08(2)(c), Stats.
5. That, except as described above, the employes of the society are all state employes largely falling into or covered by the classified service. *See* sec. 230.08(3), Stats.
6. That the society holds all property as trustee for the state. *See* sec. 44.01(1), Stats.
7. That the composition of the Board of Curators is set by the Legislature. *See* sec. 15.70, Stats.

The above list is not intended to be all inclusive, but it is sufficient to illustrate that the society has few, if any, of the attributes of an "independent going concern" or private corporation. The activities and operations of the society are subject to legislative control and, accordingly, it is my opinion that the society is a state agency.

You also ask whether the members of the Board of Curators are covered by sections 893.82 and 895.46.

The answer to this question is, yes.

Section 893.82 is the claims statute which sets forth the manner in which state employes and officers must be sued. Section 895.46 provides for the indemnification of state employes and officers in the event an action under section 893.82 results in a judgment against the officer or employe. The members of the Board of Curators are state officers. *Burton v. State Appeal Board*, 38 Wis. 2d 294, 156 N.W.2d 386 (1968).

Your last question asks whether the Board of Curators is required to make the financial disclosures required by section 19.43.

Section 19.43 states in part: "Each individual who in January of any year is an *official required to file* shall file a statement of eco-

conomic interests with the board no later than April 30 of that year.” (Emphasis supplied.)

The statutory language “official required to file” is defined in section 19.42(10). The only definition relevant to this discussion is found in section 19.42(10)(d) which provides: “A state public official whose appointment to state public office requires the advice and consent of the senate.”

The composition of the Board of Curators is prescribed in section 15.70 and consists of:

- (1) The governor, or his or her designee.
- (2) The speaker of the assembly or his or her designee chosen from the representatives to the assembly.
- (3) The president of the senate or his or her designee chosen from the members of the senate.
- (4) Three members nominated by the governor and with the advice and consent of the senate appointed for staggered 3-year terms.
- (5) Members selected as provided in the constitution and bylaws of the historical society. After July 1, 1986, the number of members on the board of curators selected under this subsection may not exceed 30.
- (6) One member of the senate from the minority party in the senate and one representative to the assembly from the minority party in the assembly, appointed as are members of standing committees in their respective houses.

The Governor, the speaker of the assembly or designee, the president of the senate or designee and the minority party members are all required to file by virtue of their elective office. Sec. 19.42(10)(c), Stats. They are not required to file because of their position on the Board of Curators. In the event the Governor appoints a designee to the Board of Curators, such person would not be required to file by virtue of such appointment. The board members who are selected under the constitution or bylaws of the society are not required to file because they do not fall within the definition of “official required to file.” However, the three board members nominated by the Governor with the advice and consent of the senate would be required to make financial disclosures by

virtue of their appointment to the Board of Curators. Sec. 19.42(10)(d), Stats.

BCL:CAB

Counties; Mineral Rights; In tax delinquency proceedings, a county acquires fee simple title to land, including mineral interests therein, whether severed or not. 25 Op. Att'y Gen. 630 (1936); 49 Op. Att'y Gen. 77 (1960); 49 Op. Att'y Gen. 130 (1960). However, further legislative action is necessary to insure that assessment and tax delinquency proceedings are consistent with the provisions of 1983 Wisconsin Act 455 and are adequate to satisfy the due process rights of the owner of mineral interests to notice of the taking through delinquent tax proceedings. OAG 12-85

April 11, 1985

TIMOTHY F. CULLEN, *Chairperson*
Senate Organization Committee

You have requested my opinion on several questions regarding the acquisition of mineral interests by counties in tax delinquency proceedings. You first ask whether a county acquires the mineral interests in property in tax delinquency proceedings in two instances: (a) where one person owns both the surface and mineral rights; and (b) where one person owns the land's surface and, by reservation or separate conveyance, another person owns the mineral interests in the same land. If the answer to (b) is yes, you further ask whether a county's acquisition of such mineral interests in a tax delinquency proceeding without any notice to the owner of such interests constitutes a deprivation of due process of law. Finally, you ask whether section 70.32(1), Stats., is determinative of the treatment of severed mineral interests in tax delinquency proceedings, or is at odds with the ownership of a mineral interest as a fee simple estate, particularly in light of the provisions of 1983 Wisconsin Act 455, which deals with the preservation or lapse of such interest.

Your first question has already been addressed and answered by this office in several prior opinions. Those opinions have guided the decisional processes of local tax authorities without dissenting voice, either legislative or judicial, for many years. Based on those

opinions, the answer to your first question in both instances (a) and (b) is yes. In tax delinquency proceedings, a county acquires fee simple title to land, including mineral interests therein, whether severed or not.

In 25 Op. Att'y Gen. 630 (1936), an opinion which relied in part on section 70.32(1), the general statute dealing with the valuation of real estate, the attorney general concluded that, with certain noted exceptions, where ownership of the surface of lands and the ownership of the minerals underneath are in different persons, it is very doubtful that the law permits the separate assessment of the mineral rights. Other opinions have generally concluded that when the county acquires title to lands either by a tax deed issued pursuant to section 75.14 or by a judgment in a foreclosure in rem proceeding under section 75.521, the reservation of mineral rights by a former owner is cut off and the title of the county is no longer subject to such reservation. 49 Op. Att'y Gen. 77 (1960); 49 Op. Att'y Gen. 130 (1960). Although the above opinions made no reference to mineral interests severed by separate conveyance, the necessary implication is that such opinions apply to severed mineral interests in general.

The latter opinions rest in part on the general proposition that: "The law is well settled that a valid tax deed cuts off all former titles and liens. Sec. 75.14(1), Stats.; XX Op. Att'y Gen. 409; *Jarvis v. Peck*, 19 Wis.* 74; *Cole v. Van Ostrand*, 131 Wis. 454, 465; *Doherty v. Rice*, 240 Wis. 389." 35 Op. Att'y Gen. 429 (1946). By virtue of sections 75.14(1) and 75.36(2), a county acquires an "absolute estate in fee simple in such land subject, however, to all unpaid taxes and charges which are a lien thereon" As discussed in *Leciejewski v. Sedlak*, 110 Wis. 2d 337, 348, 329 N.W.2d 233 (Ct. App. 1983):

It has been held that the effect of a tax deed is not limited to passing that person's title in whose name the land was taxed, but is to divest all interests in the land and to vest in the grantee an independent and paramount title. [Citation.] A tax title does not connect itself with the previous chain of title, but breaks up all previous titles. [Citation.] A tax deed is not derivative, but creates a new title that extinguishes all former titles and liens not expressly exempted from its operation. [Citations.]

See also *Leciejewski v. Sedlak*, 116 Wis. 2d 629, 639, 342 N.W.2d 734 (1984); *In Matter of Foreclosure of Tax Liens*, 106 Wis. 2d 244, 251-52, 316 N.W.2d 362 (1982). Similarly, under section 75.521, a foreclosure judgment vests in the county a fee simple absolute and cuts off any "right, title, interest, claim, lien or equity of redemption ..." of any person in the land. Sec. 75.521(8), Stats. Such a provision is inconsistent with the idea that foreclosure may grant a county good title as to one person but not as to another. *In Matter of Foreclosure of Tax Liens*, 106 Wis. 2d at 252; *Leciejewski*, 110 Wis. 2d at 347. Section 75.521(13)(b) contains a virtually identical provision applying to the judgment entered in any contested foreclosure in rem proceeding. See 62 Op. Att'y Gen. 234 (1973).

Your second question inquires as to the due process rights of the owner of a mineral interest to notice of the taking of that interest through tax delinquency proceedings.

The answer to your second question requires an examination of 1983 Wisconsin Act 455 and the recent decision in *Mennonite Bd. of Missions v. Adams*, 103 S. Ct. 2706 (1983), regarding notice in tax delinquency proceedings. 1983 Wisconsin Act 455 requires that severed mineral interests be registered or otherwise used within specified time periods. If the mineral interests are not registered or otherwise used, they lapse. Newly created section 706.01(7m) reads:

"Interest in minerals" means any fee simple interest in minerals beneath the surface of the land which is:

- (a) Separate from the fee simple interest in the surface of the land; and
- (b) Created by an instrument transferring, granting, assigning or reserving the minerals.

This legislation is in accord with the Wisconsin Supreme Court's recognition that mineral rights are an interest in land which may be created or transferred as any other estate in land. *Chicago & N.W. Transp. Co. v. Pedersen*, 80 Wis. 2d 566, 259 N.W.2d 316 (1977).

1983 Wisconsin Act 455 provides for the recording of mineral interest claims to reflect an estate separate from the surface fee. Newly created section 706.057(7) provides:

Upon receipt of a statement of claim ... [under that section] in the office of the register of deeds, the register of deeds shall record the claim in a manner which will permit the existence of

an interest in minerals to be determined by reference to the parcel or parcels of land above the interest in minerals.

Thus, the Legislature intends that owners of separate fee simple interests in minerals registered pursuant to 1983 Wisconsin Act 455 have legally protected property interests.

Published notice of the time limit for redeeming specifically described lands sold for taxes is required in all delinquent tax proceedings. Secs. 75.07 and 75.09, Stats. Holders of registered mineral interests would receive such notice. However, newspaper publications alone may no longer suffice to satisfy due process. As stated in *Schroeder v. City of New York*, 371 U.S. 208, 212-13 (1962):

The general rule that emerges from the *Mullane* [*v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)] case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question.

Recently, the Supreme Court held that constructive notice to a mortgagee who is identified in the public record does not satisfy due process requirements. *Mennonite*, 103 S. Ct. at 2711. The Court set forth how much notice was due:

Since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale. ... When the mortgagee is identified in a mortgage that is publicly recorded, constructive notice by publication must be supplemented by notice mailed to the mortgagee's last known available address, or by personal service. But unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of *Mullane*.

Mennonite indicates that publication alone is constitutionally inadequate where an owner's address can readily be ascertained from public records. Where the holder of a mineral interest records such interest pursuant to 1983 Wisconsin Act 455, the holder's address can readily be ascertained by reference to the parcel of land above such interest in minerals. Sec. 706.057(7), Stats. By virtue of a recorded mineral interest, the holder possesses an interest in property protected by the due process requirements set forth in *Mennonite*. Thus, publication would be acceptable as notification to

the holder of a recorded interest in minerals only if it were supplemental to other notices given by mail.

Under the present statutory scheme, the holder of an interest in minerals registered pursuant to 1983 Wisconsin Act 455 would not necessarily receive notice of tax delinquency proceedings other than by publication.

The notices required in various delinquent tax proceedings differ, e.g., see sections 75.12(1) and 75.521(3)(c), but only published notice of the time limit for redeeming specifically described lands sold for taxes is required in all such proceedings. Secs. 75.07 and 75.09, Stats.

Section 75.12 requires that, prior to issuance of a tax deed, written notice be "served upon the owner, or one of the owners of record in the office of register of deeds of the county wherein the land is situated." The owner is to be served personally or by mail. A tax title issued without strict compliance with the notice requirements of section 75.12 would be void. *Preston v. Iron County*, 105 Wis. 2d at 349, citing *Potts v. Cooley*, 51 Wis. 353, 355, 8 N.W. 153 (1881). However, section 75.12 requires only that one of the owners of record be notified. The holder of an interest in minerals registered pursuant to 1983 Wisconsin Act 455 would necessarily receive notice under that statute. See sec. 706.01(7m), Stats. In fact, *Mennonite* indicates that the Legislature should revise section 75.12 to provide written notice to the holder of a recorded interest in order to satisfy due process. It is no longer true, as was suggested in 39 Op. Att'y Gen. 595, 596 (1950), that notice served on one of the owners of record would suffice.

Under section 75.521(13)(b), a foreclosure judgment has the effect of the issuance of a tax deed. *Leciejewski*, 110 Wis. 2d at 347. The notice provisions of section 75.521 require that the list of tax liens contain the name or names of the "last owner or owners ... as such ownership ... appears of record in the office of the register of deeds" of the county where property is located and that notice be mailed to those persons. Sec. 75.521(3)(a)2. and (c), Stats. The claim of the holder of an interest in minerals registered pursuant to 1983 Wisconsin Act 455 would appear in the office of the register of deeds. Such a holder is therefore an "owner" for purposes of section 75.521. In view of *Mennonite*, a county is required to mail

notice of the foreclosure pursuant to section 75.521(3)(e) to the last-known address of such a mineral interest "owner" of record.

The answer to your final question concerning section 70.32(1) is that although the section is determinative of the treatment of severed mineral interests in tax delinquency proceedings, the statute need not be viewed as at odds with the ownership of a mineral interest as a fee simple estate.

The assessment and taxation of a real estate parcel includes the assessment and taxation of standing timber and mineral interests in such parcel. Sec. 70.32(1), Stats. Thus, in the case of growing timber, it has long been held that such timber must be assessed to the landowner and that the sole means whereby the owner of the land can secure relief from the statutory assessment is by contract with the purchaser of the timber. *Schmidt v. Almon*, 181 Wis. 244, 194 N.W. 168 (1923). An agreement between the owner of the surface and the owner of the minerals underneath concerning the sharing of the real estate tax burden was likewise suggested in 25 Op. Att'y Gen. 630, 631 (1936). The last sentence of section 70.32(1) does provide that, for the years 1957 on, where a Wisconsin governmental unit has retained mineral rights, timber rights, etc., in real estate, the assessable value of such property shall be reduced by the value of the retained right and such retained interest shall be excepted in the assessment of the property. However, in all other cases, a tax deed or a judgment in a foreclosure in rem proceeding cuts off mineral interests in property which were taxable to the landowner. 49 Op. Att'y Gen. 130 (1960). Such mineral interests include those severed by separate conveyance as well as by reservation.

The foregoing notwithstanding, 1983 Wisconsin Act 455, enacted effective July 1, 1984, now appears to specifically recognize that interests in minerals may not only be separate from the surface of the land for ownership purposes, but may also be separately treated for purposes of registration, assessment and taxation. Newly created section 706.057(2)(d) recognizes that a fee simple interest in minerals beneath the surface of the land may be preserved if "[p]roperty taxes are paid on the interest in minerals by the owner of the interest in minerals." Such language appears to accept a separate assessment and taxation of such interest in minerals, though it is not clear what existing statutory machinery is available to implement such separate treatment. For instance, while section 74.06 authorizes the local treasurer to "receive the tax on

any part of any lot or parcel of land or on any undivided share or interest therein which the person paying the tax will clearly define," it is said that "such statute contemplates a separation only in such instances where the same involve merely a matter of computation and not one of assessment" *Schmidt*, 181 Wis. at 248-49. Therefore, while it may be that section 70.32(1) could now be read with section 706.057(2)(d) and interpreted as allowing for the separate assessment and taxation of any such fee simple interest in minerals beneath the surface of the land to the owner of such interest, statutory clarification and implementation by the Legislature is clearly in order.

BCL:JCM

Counties; Licenses And Permits; Where a county board has designated the county humane society or other organization to provide a dog pound, section 174.09(2), Stats., requires any surplus in excess of \$1,000 must be paid over annually by the county treasurer to such society and no consent of the respective collecting towns, villages and cities is needed. OAG 13-85

April 25, 1985

THOMAS LOFTUS, *Chairperson*
Assembly Committee on Organization

The Assembly Committee on Organization requests my opinion on the following question:

Do the provisions of section 174.09(2), Stats., require a county, without the consent of towns, villages and cities, to pay over any surplus in excess of \$1,000 in the dog license fund, to a humane society designated by the county board to provide a pound, for the society's use in constructing and operating such pound?

Section 174.09(2), Stats., as amended by 1983 Wisconsin Act 451, provides:

Expenses necessarily incurred by the county in purchasing and providing books, forms and other supplies required in the administering of the dog license law, expenses incurred by the county under s. 95.21(4)(b) and (8) and expenses incurred by the

county pound or by a humane society or other organization designated to provide a pound for collecting, caring for and disposing of dogs may be paid out of the dog license fund. The amount remaining in the fund after deducting these expenses shall be available for and may be used as far as necessary for paying claims allowed by the county to the owners of domestic animals because of damages done by dogs during the license year for which the taxes were paid. Any surplus in excess of \$1,000 which may remain from the dog license taxes of any license year shall on March 1 of the succeeding year be paid by the county treasurer to the *county humane society or other organization designated by the county board to provide a pound. If there is no humane society or other organization designated to provide a pound, these funds shall be paid to the towns, villages and cities of the county for their use in the proportion in which the towns, villages and cities contributed to the fund out of which the surplus arises.*

The answer to your question is yes. The statute uses the word "shall" which is to be construed as mandatory. *In re E.B.*, 111 Wis. 2d 175, 185, 330 N.W.2d 584 (1983). Where the county humane society or other organization has been "designated by the county board to provide a pound" "[a]ny surplus in excess of \$1,000 ... shall ... be paid ... to" such society or organization.

Section 174.046(1) provides:

POUND. A county board may provide a pound for strays or unwanted dogs in the county. A county board may designate a humane society or other organization to provide a pound for strays or unwanted dogs in the county. A county pound or a humane society or other organization designated to provide a pound may receive payment from the dog license fund for expenses incurred in the collecting, caring for and disposing of dogs *and may receive surplus from the dog license fund as provided under s. 174.09(2).*

Prior to the enactment of 1983 Wisconsin Act 451, which became effective May 18, 1984, there was a question whether a county could pay dog license monies over to a humane society to construct a pound since such expenditures are in the nature of capital improvements and may not have been included within the term "expenses" as used in then section 174.09(2). Former and present

section 174.09(2) provides that “*expenses* incurred by the county pound or by a humane society or other organization designated to provide a pound for collecting, caring for and disposing of dogs may be paid out of the dog license fund.”

Former subsection (2) provided that after payment of dog damage claims:

Any surplus in excess of \$1,000 which may remain from the dog license taxes of any license year shall on March 1 of the succeeding year *be paid* by the county treasurer *to the towns, villages and cities of the county for their use in the proportion* in which the towns, villages and cities contributed to the fund out of which the surplus arises.

The Legislature made it clear by amendment of subsection (2) that “any surplus in excess of \$1,000 ... shall ... be paid ... to the county humane society or other organization designated by the county board to provide a pound.” Although towns, villages and cities collect the license fees and pay them over to the county treasurer, they are not entitled to any of the surplus from basic fees paid into the county in dog license fund unless “there is no humane society or other organization designated [by the county board] to provide a pound.” By reason of section 175.05(3), towns, villages and cities by ordinance can impose an additional tax, which shall be collected by such municipality and shall be deducted and withheld by the municipal treasurer before payment of dog license taxes to the county treasurer. Sec. 174.08, Stats.

BCL:RJV

State Aid; Vocational, Technical And Adult Education, Board Of; The Wisconsin Board of Vocational, Technical and Adult Education has authority to adopt a policy which provides for the payment of state aids for the nonreimbursed costs incurred when vocational, technical and adult education districts enter into contracts pursuant to section 38.14(3), Stats., and when the State Board determines that the services provided are not “community services” within the meaning of section 38.28(1m)(a). In order to receive state aids for qualifying contracts, however, fees must be charged which are equivalent to the uniform program and material fees normally charged to district students. OAG 14-85

April 29, 1985

ROBERT P. SORENSEN, PH.D., *State Director**Wisconsin Board of Vocational, Technical and Adult Education*

You ask whether the Wisconsin Board of Vocational, Technical and Adult Education (State Board) has authority to adopt a policy which provides for the payment of state aids for nonreimbursed costs incurred when vocational, technical and adult education (VTAE) districts enter into contracts pursuant to section 38.14(3), Stats., and when the State Board determines that the contractual services provided are not "community services" within the meaning of section 38.28(1m)(a). You also ask whether districts, as a precondition to the receipt of state aids for qualifying contracts, must charge fees equivalent to the uniform program and material fees normally charged to district students. In my opinion, except for contracts under section 118.15(1)(b), which you point out are not aidable because of section 118.15(2)(c), the answer to both of your questions is "yes."

Prior to July 1984, the term "district aidable cost" was defined by section 38.28(1m)(a) to include the annual cost of operating a district, but to exclude all expenditures relating to "community service" programs. The State Board classified *all* contractual activities as community service programs and, therefore, did not pay state aids to districts for the costs incurred in such contractual activities.

Section 38.14(3) authorizes district boards to enter into contracts to provide services to public and private educational institutions, local governmental bodies, and private industries and businesses. This furthers the mission and purpose of the VTAE system, which recently was expanded by the Legislature to include, *inter alia*, the provision of occupational education, training and retraining programs, and the provision of "customized training and technical assistance to business and industry in order to foster economic development and the expansion of employment opportunities." Sec. 38.001(2)(b), Stats., as created by 1983 Wisconsin Act 379, effective May 3, 1984. In the same session, the Legislature amended section 38.28(1m)(a) to exclude from the definition of the term

“district aidable cost” not only expenditures for community service programs, but also “all receipts under s. 38.14(3).” 1983 Wisconsin Act 27, sec. 912b, effective July 2, 1984.

In view of these statutory changes, the State Board adopted a policy on July 24, 1984, which provides for the payment of state aids to districts for the nonreimbursed costs incurred when the districts enter into contracts pursuant to section 38.14(3), and when the State Board determines that the contractual services are not “community services” within the meaning of section 38.28(1m)(a). The policy is authorized, in my opinion, because such nonreimbursed costs come within the definition of “district aidable cost” contained in section 38.28(1m)(a), namely, “the annual cost of operating a vocational, technical and adult education district,” and because such nonreimbursed costs are not excluded from the statutory definition either as expenditures relating to “community service programs” or as “receipts under s. 38.14(3).”

Significantly, only “receipts” from contracts made under authority of section 38.14(3) are not aidable—not the nonreimbursed costs incurred by the districts in connection with such contracts. I caution, however, that because fees charged to students directly under section 38.24 are excluded from “district aidable cost[s]” under section 38.28(1m)(a), any nonreimbursed costs for contracts made under authority of section 38.14(3) may not be reimbursed by state aid to the extent that they relate to student fees, which otherwise would not be aidable.

In response to your second question, as you note in your letter, section 38.24(1) provides that students shall be charged “uniform” fees for programs and materials. Payment of state aids for the nonreimbursed costs of qualifying contracts, which do not charge fees equivalent to the uniform fees, would frustrate the principle of uniformity embodied in section 38.24(1). Charging fees equivalent to uniform fees in qualifying contracts, therefore, is a precondition to the receipt of state aids. It would be wise to require that contracts specifically state what fees will be charged so that the State Board can determine the appropriate amount of state aids.

BCL:JWC

Open Meeting; Schools And School Districts; In exceptional cases, section 19.85(1)(f), Stats., would permit a school board to reconvene into closed session to interview applicants for a vacant position on such board, but appointment should be made in open session. Section 19.85(1)(c) would not permit a closed session for purposes of interviewing applicants for a vacant school board position and to make appointment thereto. OAG 15-85

May 9, 1985

JOHN E. FRYATT, *District Attorney*

Waukesha County

You request my opinion whether a governmental body such as a school board of a common school district, which has the power to fill a vacancy on such body pursuant to section 17.26(1), Stats., can, at a duly noticed meeting, reconvene in closed session under exemptions contained in section 19.85(1)(c) and (f) to interview interested persons and to appoint a successor. Exemptions (c) and (f) provide:

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

....

(f) Considering financial, medical, social or personal histories or disciplinary data of specific persons, preliminary consideration of specific personnel problems or the investigation of charges against specific persons except where par. (b) applies which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations.

In my opinion a governmental body cannot reconvene in closed session to interview potential candidates unless the information solicited and discussions involve "financial, medical, social or personal histories or disciplinary data of specific persons ... which, if discussed in public, *would be likely* to have a *substantial adverse effect upon the reputation* of any person referred to in such histories or data" Sec. 19.85(1)(f), Stats. As I stated in OAG 9-76 in discussing section 66.77(4)(e), Stats. (1975):

To justify considering individual qualifications in closed session, it is not sufficient that personal information is the subject of discussion, even if public discussion of that information *might result in some damage to reputations*. The exception applies only where such discussion in open session might *unduly damage* reputations. *State ex rel. Youmans v. Owens* (1965), 28 Wis. 2d 672, 685, 137 N.W. 2d 470, held that, in determining whether public disclosure might *unduly damage* reputations, the interest of the public in being informed on public matters must be balanced against harm to reputations which would likely result from public airing.

It would be extremely unusual that a general discussion of qualifications of potential candidates for a school board position might involve undue damage to reputations or even danger of possible undue damage. It would appear to me, that before a board could legally convene in closed session in reliance upon the exception, at least one board member would have to have actual knowledge of information which he or she reasonably believed would unduly damage reputations if divulged in open session and that there was probability that such information would be divulged.

The present test, under section 19.85(1)(f), requires a determination that the information involved "*would be likely to have a substantial adverse effect upon the reputation*" involved. This is a much more demanding test than was applicable under the predecessor statute, section 66.77(4)(e), Stats. (1975), which used language "*which may unduly damage reputations.*" And *see State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 137 N.W.2d 470 (1965).

A governmental body should utilize a closed session only in the exceptional case. The purpose behind interviewing potential appointees is often to ascertain how such persons stand with respect to policy and political issues, rather than to inquire into "financial, medical, social or personal histories or disciplinary data of specific persons" Furthermore, although closure might be warranted as to some part of an interview of a specific person seeking appointment, it would not be warranted with respect to all discussion with said person. With respect to certain other persons seeking appointment, closure would not be warranted at all. The governmental body, not the individual, has the power to open or close a meeting. *State ex rel. Bilder v. Delavan Tp.*, 112 Wis. 2d 539, 558, 334

N.W.2d 252 (1983). In limited situations under exemption (b), an employe may demand that a meeting be held in open session. Even where closure is permissible, discussion must be limited to matters which relate to the exempt area. Section 19.85(1) provides in part:

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

As to whether the actual vote to appoint can be taken in closed session, *Cities Service Oil Company v. Board of Appeals*, 21 Wis. 2d 516, 124 N.W.2d 809 (1963), held that votes which are "an integral part" of the closed deliberations may be taken in closed session. Thus, for example, a school board could, citing exemption (c), convene in closed session to both interview and hire an employe, *i.e.*, a teacher or administrator, since the act of hiring is an integral part of the reason for which the closed session is authorized, namely considering employment.

I am of the opinion, however, that neither exemption (c) nor (f) authorizes a school board to make an actual appointment of a new member in closed session. Exemption (c) does not apply because I do not consider the act of a governmental body to fill a vacant office pursuant to section 17.26(1) to be "considering employment" as that term is used in section 19.85(1)(c). Exemption (f) does not apply because the vote to appoint is not an integral part of deliberations which may only be closed for the duration of discussions about financial, medical, social, personal histories or disciplinary data which would be likely to substantially and adversely affect the reputation of people involved.

The purpose of the open meetings law is to give the public the fullest and most complete information regarding the affairs of government as is compatible with conduct of governmental business. *Martin v. Wray*, 473 F. Supp. 1131, 1137 (E.D. Wis. 1979). Section 19.81(2) 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." If there is substantial question as to whether closure is permitted under a given exemption, the meeting should be held in open session.

BCL:RJV

County Board; County Executive; Ordinances; Words And Phrases; A county board does not have power to amend a resolution, ordinance or part thereof, vetoed by the county executive, but can pass a separate substitute for submission to the executive. A county board has a duty to promptly reconsider vetoed resolutions, ordinances or parts thereof. OAG 16-85

May 9, 1985

FRANK VOLPINTESTA, *Corporation Counsel*
Kenosha County

You request my opinion with respect to three questions which relate to action a county board may take in responding to the county executive's veto of parts of the annual budget. You state:

Upon passage of the 1985 budget by the Kenosha County Board, it was referred to the county executive for approval. The county executive approved certain portions of the budget as presented, including the total levy, and vetoed other portions and line items. In his message to the county board regarding said vetoes, he gave his reasoning on the items vetoed and intended that certain of the vetoed line items be subsequently increased by the board by way of transfers from other line items in the budget or from the general fund, thus leaving the total levy unaffected. In some instances he asked that a line item be decreased or eliminated with the transfer of said funds to the general fund.

Your questions relate to Wisconsin Constitution article IV, section 23a, which provides:

Every resolution or ordinance passed by the county board in any county shall, before it becomes effective, be presented to the chief executive officer. If he approves, he shall sign it; if not, he shall return it with his objections, which objections shall be entered at large upon the journal and the board shall proceed to reconsider the matter. Appropriations may be approved in whole or in part by the chief executive officer and the part approved shall become law, and the part objected to shall be returned in the same manner as provided for in other resolutions or ordinances. If, after such reconsideration, two-thirds of the members-elect of the county board agree to pass the resolution or ordinance or the part of the resolution or ordinance objected to, it shall become effective on the date prescribed but not earlier than the date of passage following reconsideration. In all such cases, the votes of the members of the county board shall be determined by ayes and noes and the names of the members voting for or against the resolution or ordinance or the part thereof objected to shall be entered on the journal. If any resolution or ordinance is not returned by the chief executive officer to the county board at its first meeting occurring not less than 6 days, Sundays excepted, after it has been presented to him, it shall become effective unless the county board has recessed or adjourned for a period in excess of 60 days, in which case it shall not be effective without his approval.

The statutory counterpart as to veto power for counties of less than 500,000 is contained in section 59.032(6), Stats., and contains language substantially identical to the constitutional provision. In an opinion dated August 22, 1984, 73 Op. Att'y Gen. 92 (1984), it was stated that the veto power of the county executive was similar to that of the Governor and extends to any part of a county board resolution or ordinance containing an appropriation and can effect a change in policy as well as amount if the net result of the partial veto is a complete, entire and workable ordinance or resolution which the county board could have passed in the first instance. See *State ex rel. Sundby v. Adamany*, 71 Wis. 2d 118, 237 N.W.2d 910 (1976); *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 264 N.W.2d 539 (1978).

1. Does the county board have power to amend a resolution, ordinance or part of a resolution or ordinance containing an appropriation which the county executive has vetoed and returned to the board?

The answer is no. However, the county board does have the power to pass a separate substitute for submission to the executive. The power of the board on reconsideration is whether to override the veto. Sec. 59.032(5) and (6), Stats., and 62 Op. Att'y Gen. 238, 240 (1973). If the matter is not brought to a vote, or if less than two-thirds of the members-elect vote to override, the veto stands and that part of the resolution or ordinance either fails to become law or becomes law as altered depending upon the circumstances. To promote orderly procedure, it is suggested that vetoed items be considered promptly and separately from legislative attempts to provide the executive with a proposal which might be approved. If open meeting and any special statutory notice requirements are satisfied, the board, of course, has the power to pass a new and separate resolution or ordinance to fill any void caused by the executive veto. After the budget hearings have been held and the budget is approved by the county board and submitted to the county executive, any new appropriations or transfers would require a two-thirds vote of the entire membership. Sec. 65.90(5), Stats. As a general rule the county board has continuing power to reconsider its actions and adopt an ordinance or resolution which has previously been defeated. 56 Am. Jur. 2d *Municipal Corporations* § 352.

There may be a misunderstanding as to the effect of the veto of the county executive on the budget. Your statement of facts states that the county executive "approved the total levy." I believe such conclusion is erroneous. In my opinion, the act of a county executive in deleting or in some manner reducing an appropriation has the direct effect of reducing the amount of total funds to be raised and any necessary tax levy. Section 70.62 establishes limitations on tax levies. The board cannot make tax levies for future years or create a sinking fund. *Immege v. Elkhorn*, 253 Wis. 282, 34 N.W.2d 101 (1948). A veto does not have the effect of transferring the budgeted amount to surplus or to the general fund as is made clear by section 59.032(5). This is extremely important and ties in with the purposes of section 65.90. Where an entire budget is vetoed, a county board might be expected to take prompt action to approve

another for submission to the executive. Where separate items are vetoed, the county executive always runs the risk that the vetoes will be overridden or that further legislative action will address the particular area. The executive's influence as to amounts and subjects to be included in a budget is probably more direct and greater at formulating time than at veto time. Section 59.032(5) provides:

Notwithstanding any other provision of the law, the county executive shall be responsible for the submission of the annual proposed budget to the county board and may exercise the power conferred under sub. (6) to veto any appropriation made by the county board in the budget. No money may be appropriated for any purpose unless approved by the county board. The failure of the county board, upon reconsideration under sub. (6), to approve any appropriation vetoed by the county executive does not operate to appropriate the amount specified in the proposed budget submitted by the county executive.

Section 65.90 requires a listing of all existing indebtedness, all anticipated revenues, all proposed appropriations and requires availability for public inspection, publication of a summary and a public hearing. Subsection (5)(a) provides, in part:

Except as provided in par. (b) and except for alterations made pursuant to a hearing under sub. (4), the amount of tax to be levied or certified, the amounts of the various appropriations and the purposes for such appropriations stated in a budget required under sub. (1) may not be changed unless authorized by a vote of two-thirds of the entire membership of the governing body of the municipality, except that in the case of a city board of education transfers may be authorized by a two-thirds vote of the board for funds under the board's control. Any municipality, except a town, which makes changes under this paragraph shall publish a class 1 notice thereof, under ch. 985, within 10 days after any change is made. Failure to give such notice shall preclude any changes in the proposed budget and alterations thereto made under sub. (4).

2. Must the county board take action on a county executive's veto immediately upon its return or may it table the matter for consideration at a later time?

The constitutional and statutory provisions provide that: "If he approves, he shall sign it; if not he shall return it with his objections ... and the board shall proceed to reconsider the matter."

In my opinion, the board has a duty to promptly reconsider the matter at its first meeting following its return with objections. Neither the constitution nor statute establish a time within which the board must act. The open meetings law would require that rather specific notice of the reconsideration after veto be given. Sec. 19.84, Stats. A court might hold that failure to reconsider at the next meeting at which adequate notice could be given would make the returned ordinance, resolution or vetoed part thereof void. See 5 McQuillin *Municipal Corporations* § 16.46 (3rd Rev. Ed.). A contrary view is stated in 62 C.J.S. *Municipal Corporations* § 424. Tabling could be construed to be rejection or failure to override. Time constraints in the budget and tax levy process require prompt reconsideration or rejection where amounts appropriated are to be financed by tax levy. Budget hearings at the county level required by section 65.90(3) are usually held in late October or November, and the town, city or village clerk must deliver the tax roll to the respective municipal treasurer on or before the third Monday in December. Sec. 70.68(2), Stats.

3. May the county board consider all line item vetoes of the county executive on one motion or must each veto be considered individually?

Wisconsin Constitution article IV, section 23a and section 59.032(6) require that the "part" vetoed shall be returned:

[W]ith his objections, which ... shall be entered at large upon the journal and the board shall proceed to reconsider the matter. ... If, after such reconsideration, two-thirds of the members-elect of the county board agree to pass the resolution or ordinance *or the part of the resolution or ordinance objected to*, it shall become effective ... the votes of the members of the county board shall be determined by ayes and noes and the names of the members voting for or against the resolution or ordinance *or the part thereof objected to* shall be entered on the journal.

In my opinion, the board could consider all line vetoes in one motion. Section 990.001(1) is at least applicable to words in section 59.032(6), and the word "part" as used therein can be construed as parts since the singular includes the plural. In most cases, a county

board would be well advised to consider each veto separately in order to seriously consider the objections which the county executive is required to set forth as to each part. In 70 Op. Att'y Gen. 189 (1981), it was stated that failure of the Governor to express objections which could be identified as to several possible vetoes made such possible vetoes ineffective. A county board and county executive have important legislative and administrative powers. There is some room for give and take, but efficient county government requires that they cooperate.

BCL:RJV

Farmland Preservation Act; Land Conservation Board; Zoning;
The Land Conservation Board has authority to prospectively revoke an exclusive agricultural zoning ordinance certification granted under sections 91.06 and 91.78, Stats. Notice and an opportunity to be heard must be afforded to the local zoning authority and to landowners who might be affected by a decertification decision. If a decision to decertify is made, only those lands which are rezoned are subject to the lien and property tax credit recapture provisions of section 91.77(2). OAG 17-85

May 9, 1985

LA VERNE AUSMAN, *Secretary*

Department of Agriculture, Trade and Consumer Protection

You ask whether the Land Conservation Board (Board) may revoke or rescind an exclusive agricultural zoning ordinance certification previously granted under sections 91.06 and 91.78, Stats., and inquire as to the procedure which should be followed if the Board has such power.

In my opinion, the Board has authority to prospectively revoke or rescind a certification granted under sections 91.06 and 91.78, if the Board provides notice and an opportunity to be heard to the local governing body having jurisdiction and to landowners who might be affected by such a decertification decision.

Pursuant to chapter 91, the Board, which is created under section 15.135(4), certifies county agricultural preservation plans and exclusive agricultural zoning ordinances enacted by local units of government. Such certifications affect the amount of the farmland

preservation tax credit determined by the Department of Revenue pursuant to section 71.09(11). The Board also possesses certain appellate functions which are not at issue here. Chapter 91 also grants extensive powers to the Department of Agriculture, Trade and Consumer Protection (Department) in connection with the administration of the Farmland Preservation Act. In general, the Department possesses administrative and fact-gathering powers which are to be used to assist the Board in performing its decision-making functions.

You indicate that the Board and the Department have recently become aware that two exclusive agricultural zoning ordinances which the Board has certified under sections 91.06 and 91.78 have been amended so as to remove large tracts of land from exclusive agricultural zoning status. This information, presumably acquired pursuant to section 91.77(3), indicates that a majority of the land formerly zoned exclusive agricultural has been rezoned to other classifications. You indicate that, based upon the information acquired, the two zoning ordinances apparently no longer meet the standards contained in section 91.75 and, therefore, could not have been certified by the Board in whole or in part had the entire zoning ordinances initially been submitted to the Board in their present form. You therefore inquire as to the Board's power to remedy such situations.

Your inquiry arises under subchapter V of the Farmland Preservation Act, which is entitled "Exclusive Agricultural Zoning." Section 91.78 of that subchapter provides that "OPIES OF EXCLUSIVE AGRICULTURAL ZONING ORDINANCES MAY BE SUBMITTED TO THE BOARD FOR REVIEW AND CERTIFICATION UNDER S. 91.06."

Section 91.06 provides as follows:

Certification. The board shall review farmland preservation plans and exclusive agricultural use zoning ordinances submitted to it under ss. 91.61 and 91.78 and shall certify to the appropriate zoning authority whether the plans and ordinances meet the standards of subchs. IV and V, respectively. Certifications may be in whole or in part.

The minimum standards which are to be applied by the Board in deciding whether to certify an exclusive agricultural zoning ordinance are contained in section 91.75. Under various provisions contained in section 71.09(11)(b)3., an exclusive agricultural zoning

ordinance certification must be in effect "at the close of the year for which credit is claimed" to entitle the land owner to a property tax credit under section 71.09(11)(b)2. in connection with such certification.

Rezoning is covered by section 91.77, which provides as follows:

Ordinance revisions. (1) A county, city, village or town may approve petitions for rezoning areas zoned for exclusive agricultural use only after findings are made based upon consideration of the following:

(a) Adequate public facilities to accommodate development either exist or will be provided within a reasonable time.

(b) Provision of public facilities to accommodate development will not place an unreasonable burden on the ability of affected local units of government to provide them.

(c) The land proposed for rezoning is suitable for development and development will not result in undue water or air pollution, cause unreasonable soil erosion or have an unreasonably adverse effect on rare or irreplaceable natural areas.

(2) Land which is rezoned under this section shall be subject to the lien provided under s. 91.19(8) to (10) for the amount of tax credits paid on the land rezoned. If the rezoning occurs solely as a result of action initiated by a governmental unit, any lien required under s. 91.19(8) to (10) shall be paid by the governmental unit initiating the action.

(3) The department shall be notified of all rezonings under this section.

Your inquiry requires an analysis of the inter-relationship between the certification provisions of sections 91.06 and 91.78, the tax credit provisions of section 71.09(11)(b)3. and the rezoning provisions of section 91.77. Such an analysis is required because section 91.06 does not specifically state that ordinance revisions submitted to the Department pursuant to section 91.77(3) may be considered by the Board in making certification decisions.

The powers that may be exercised by the Board include not only those powers expressly granted by statute, but also those powers necessarily implied as essential to the accomplishment of its duties. *See Kasik v. Janssen*, 158 Wis. 606, 609-10, 149 N.W. 398 (1914). For example, it has long been held that the power to correct clerical

errors which plainly appear of record is a necessary power in the administration of every agency. *Bell v. Hearne et al.*, 60 U.S. 614 (1856). The United States Supreme Court has stated that:

To hold otherwise would be to say that once an error has occurred the [agency] is powerless to take remedial steps. ... In fact, the presence of authority in administrative officers and tribunals to correct such errors has long been recognized—probably so well recognized that little discussion has ensued in the reported cases.

American Trucking Ass'n v. Frisco Transp. Co., 358 U.S. 133, 145 (1958) (footnote omitted). Although policy considerations similar to those identified by the Supreme Court in *American Trucking* are present here, further analysis is required when an agency seeks to do more than simply correct a clerical error. See *Mid-Plains Telephone v. Public Serv. Comm.*, 56 Wis. 2d 780, 788-89, 202 N.W.2d 907 (1973).

An administrative agency has only those powers which are expressly conferred or necessarily implied from the statutes under which it operates. *Elroy-Kendall-Wilton Schs. v. Coop. Educ. Serv.*, 102 Wis. 2d 274, 278, 306 N.W.2d 89 (Ct. App. 1981). "The rule that an administrative agency, being a creature of statute, is limited in powers to those expressly delegated by the legislature, permits the exercise of power which arises by fair implication from the express powers." *Wisconsin's Environmental Decade, Inc. v. PSC*, 69 Wis. 2d 1, 16, 230 N.W.2d 243 (1975). Continuing jurisdiction on the part of the agency may be implied even where it has not been expressly granted by statute. Cf. *Wilbur v. United States*, 281 U.S. 206, 217 (1930); *Brougham v. Blanton Mfg. Co.*, 249 U.S. 495, 501 (1919). See 2 Davis *Administrative Law Treatise* sec. 18.09 (1st Ed. 1958). However, any reasonable doubt concerning the existence of statutory authority must be resolved against the agency. See *State (Dept. of Admin.) v. ILHR Dept.*, 77 Wis. 2d 126, 136, 252 N.W.2d 353 (1977).

I find no reasonable doubt as to the existence of continuing jurisdiction to make certification decisions because statutes should be given a contemporary and practical interpretation and must be construed to avoid absurd or unreasonable results. *State v. Coble*, 95 Wis. 2d 717, 291 N.W.2d 652 (Ct. App. 1980), *aff'd*, 100 Wis. 2d 179, 301 N.W.2d 221 (1981); *Estate of Evans*, 28 Wis. 2d 97, 101,

135 N.W.2d 832 (1965). If the Board did not possess continuing jurisdiction to rescind or revoke its certification when a local unit of government amends its exclusive agricultural zoning ordinance, the municipality could simply wait until certification were granted and then immediately rezone all or some portion of the lands in the certified area to a classification other than exclusive agricultural. Such a result would entirely thwart the purpose of the Farmland Preservation Act and could not possibly have been contemplated by the Legislature.

In my opinion, the power to prospectively revoke or rescind an exclusive agricultural zoning ordinance certification is fairly implied from the provisions of sections 71.09(11), 91.06 and 91.77. The statutory scheme indicates that once an ordinance is submitted to the Board for certification under section 91.78 the Board may alter its certification decision if the ordinance is changed. Section 91.06 obligates the Board to review exclusive agricultural zoning ordinances submitted to it under section 91.78. Section 91.78 contains no requirement that the ordinance be submitted to the Board by the local unit of government. An ordinance may be submitted to the Board by the Department acting pursuant to information received under section 91.77(3). In such situations, the original ordinance submission and any amendments received by the Department must be evaluated to determine whether the rezoning amendments cause the entire ordinance to fall below the minimum standards contained in section 91.75.

Because section 91.73(2) requires that the ordinance be consistent with the plan established under subchapter IV, it is also doubtful that any significant change could lawfully be made in the ordinance unless the plan were also changed. Moreover, various provisions of section 71.09(11)(b)3. require that exclusive agricultural zoning certification be in effect "at the close of the year for which credit is claimed." And section 71.09(11)(h)1. authorizes the Department of Revenue to require that a certificate from the local zoning authority stating that the land is covered by a certified exclusive agricultural zoning ordinance be submitted by the property owner each time a farmland preservation tax credit claim is filed. The fact that the Department of Revenue can continue to require proof of certification provides further indication that the certification process is not static, but continuing. These statutory provisions indicate that the Legislature has vested the Board with

continuing jurisdiction to make prospective certification decisions when local units of government remove land from the exclusive agricultural zoning classification by amending an ordinance which the Board has already certified.

You also ask what procedure should be established and followed to revoke or rescind a previously-granted certification. Any such prospective determination must afford due process to affected parties. "[I]t has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard." *Garfield v. United States ex rel. Goldsby*, 211 U.S. 249, 262 (1908). Under the longstanding rule of that case, property owners who might be adversely affected would have to be notified and given an opportunity to be heard during the course of proceedings at which information concerning possible decertification is received. The "local governing body having jurisdiction" under section 91.01(8) should also be notified. It may also be desirable to notify one or more of the agencies listed in section 91.13(2), since they might also have information which should be considered in making a decertification decision. Because due process requires an impartial decision-maker, *cf. Mid-Plains*, 56 Wis. 2d at 789, it is also imperative that no prejudgment bias in favor of decertification be exhibited during the course of any such proceedings.

One other item of importance is raised in the materials which you have submitted. There is a suggestion that section 91.77(2) might be interpreted to require the imposition of a lien under section 91.19(8), which would have to be repaid by the responsible local unit of government under certain specified circumstances. Section 91.77(2) applies only to "land rezoned." As to such land, sections 91.19(8) and 91.77(2) authorize the Department to impose a lien for any tax credits received during the past ten years (plus six percent compound interest per annum in certain circumstances) and require the governmental unit that initiated the rezoning to satisfy the lien if the rezoning occurs solely as a result of such action. Your materials indicate that no tax credits were ever claimed in connection with any of the lands rezoned in these situations. Therefore, no lien can be imposed and no payment can be required. Those lands which remain in exclusive agricultural zoning status are not affected by section 91.77(2). They will, however, suffer a prospective reduction in tax credits under section

71.09(11)(b)3. if the ordinance is decertified, unless certification is again granted prior to the close of the calendar year.

BCL:FTC

Municipalities; Schools And School Districts; Taxation; School districts may not invoke the damage and interest provisions of section 74.22, Stats., to penalize a township for failing to settle tax payments within the time required by law. OAG 18-85

May 20, 1985

THOMAS LOFTUS, *Chairperson*
Assembly Organization Committee

You request an opinion on the rights and responsibilities of town, city and village treasurers relative to the settlement of taxes with other governmental units under section 74.22, Stats. Your request is on behalf of a local attorney who is concerned about a township's practice of delaying tax payments while earning additional interest and thereby "floating" funds due local school districts. The delay which results from this type of investment practice prompts you to present four questions regarding a school district's right to compel timely tax settlements: can a school district impose penalties under section 74.22 for late payments; do any statutory duties exist for immediate payment by towns to school districts; when is a delay of payment unreasonable; and finally, can delays from county units of government be prevented?

1. Can a school district employ all or a portion of section 74.22 to impose penalties on a town, city or village treasurer who fails to settle tax payments within the time required by law?

Section 74.22 provides that:

If any town, city or village treasurer shall fail to make settlement of the taxes included in the tax roll within the time required by law the county treasurer shall charge such town, city or village treasurer 5% damages and 12% interest per year from the day payment should have been made on the balance of unsettled taxes due; and if any town, city or village treasurer shall withhold the payment of any public moneys collected or

received, after the same should be paid and shall have been demanded, such treasurer shall pay 10% damages and 12% interest, as above specified, on such moneys; which moneys, damages and interests may be collected by action upon such town, city or village treasurer's bond.

Damage and interest provisions of this statutory section represent penalties which are to be imposed on the local treasurer for failing to settle tax payments within the time required by law. *Rinder v. Madison*, 163 Wis. 525, 158 N.W. 302 (1916). The right to impose these penalties, however, rests solely with the county treasurer. *State ex rel. Sheboygan County v. Telgener*, 199 Wis. 523, 526, 227 N.W. 35 (1929), states that ordinarily "sec. 74.22 ... gives the county treasurer the right to bring an action against the [local] ... treasurer on his official bond, to recover the funds ... withheld." The right to impose penalties under section 74.22 cannot be extended to other local units of government, such as a school district, unless this right is expressly granted by the Legislature.

Forfeitures and penalties are not favored in the law and statutes imposing them are subject to the rule of strict construction. *State v. James*, 47 Wis. 2d 600, 602, 177 N.W.2d 864 (1970). Under the rule of strict construction, statutory interpretation will not stray beyond the express language of the statute. A close examination of chapter 74 in its entirety reveals that the Legislature has not expressly granted to a school district, a school board or a school board treasurer the right to impose penalties for late tax settlements. Furthermore, this right does not appear in any of the language constituting chapter 120 which defines the scope of authority for school district governments. Section 120.16(2) permits the school district treasurer to "[a]pply for, receive and sue for all money appropriated to or collected for the school district ...," but there is no mention of the right to impose penalties or a forfeiture.

An express statutory right to impose penalties for late tax settlement exists in Wisconsin in three situations: where a town, city or village is liable to a county treasurer, section 74.22; where an individual taxpayer is liable to a county, section 74.32; and finally, where a county shall be liable to the state treasurer, section 74.27. Given the strict construction applied to penal statutes, I conclude that section 74.22, as a penal statute, grants exclusive power to the county treasurer. Section 74.22 must be read in its entirety and it mentions only the right of the county treasurer to impose penalties

under that section in the event of late tax settlements. Therefore, a school district cannot employ section 74.22 in whole or in part to impose penalties on a town, city or village treasurer for delayed payments.

While a school district is not entitled to the damages and twelve percent interest allowed under section 74.22, a school district may be entitled to interest on monies withheld at the legal rate of five percent under sections 120.16(2) and 138.04. In *Milwaukee v. Firemen Relief Asso.*, 42 Wis. 2d 23, 39, 165 N.W.2d 384 (1969), the court ruled that rates of interest set forth in section 138.04 "should be construed as being declaratory of the common law as it now exists and as applicable to all legal entities, including all branches of government, unless specifically exempted by legislative enactment." This language was recently upheld in *Boldt v. State*, 101 Wis. 2d 566, 583, 305 N.W.2d 133 (1981). I construe the phrase in section 74.03(8)(g), "[s]ettlements for all other taxes and special assessments shall be made without interest," as referring solely to payments made by the county treasurer to a town. It is not applicable to late payments by towns to school districts and therefore does not prohibit the imposition of a five percent legal interest rate on late payments made by towns to school districts.

2. Are there any statutory provisions other than section 74.22 which impose a duty of immediate payment by a town to a school district?

Despite recent, substantial changes in Wisconsin town law, local treasurers are still clearly required to promptly settle monies owed to school districts. Several statutory sections untouched by legislative revisions state that payments must be made by local treasurers within certain dates. Section 74.03(5)(a) requires the town, city or village treasurer to settle for all local collections "[o]n or before March 15 and on or before the 15th day of each month" For the first settlements made by counties pursuant to section 74.03(8)(a), the county treasurer is to settle for all collections of delinquent, postponed taxes and special assessments "[o]n or before August 20." There is no provision for delay in either section 74.03(5)(a) or 74.03(8)(a).

Before its repeal in 1983 Wisconsin Act 532, section 60.49(6)(a) expressly required town treasurers to make proportional settlements of school monies under section 74.03(8)(f) whenever the

same had been paid to the treasurer or whenever credit had been received from the county treasurer. Sec. 60.49(6)(a), Stats. (1981-82). This statutory command for expediency remains despite the repeal of section 60.49(6)(a). Section 60.34(4) and (5), effective January 1, 1985, retains the substantive aspects of section 60.49(6)(a) and (b). The drafter's note to 1983 Wisconsin Act 532 refers to the repeal of section 60.49(6)(a) as an effort either to avoid duplication of treasurer's duties already found under section 74.03, or an effort to remove outdated, obsolete portions of that statute. There is no evidence that the Legislature considered requirements for timely tax settlements to be outdated or obsolete. Thus, a local treasurer's duty to settle payments whenever credit is available remains within the language of sections 60.34(5)(a) and (b) and 74.03.

Legislative intent to compel prompt settlement is further evidenced by the recent revision of section 74.03(8)(f). Under the amended section, county treasurers may pay proportional settlements directly, and more expediently, to school districts without having to first send these monies to town, village or city treasurers. Section 74.03(8)(f) as amended by 1983 Wisconsin Act 395.

Finally, section 60.34(5)(a) limits delays in payment to a five-day grace period for town treasurers making preliminary settlements of available monies. Section 60.34(5)(a) requires town treasurers to "make partial apportionment of levies by school districts and vocational, technical and adult education districts out of any funds available in the town treasury prior to the tax apportionment provided by s. 74.03(5) within 5 days after the filing of a written request by the district board."

3. When is a delay of payment unreasonable?

As noted above, section 60.34(5)(a) requires a town treasurer to respond to a school district's request for partial levy payments within five days. The Legislature specifically amended section 60.49(6)(b) in 1981, replacing the phrase "respond to a school district ... promptly" with the phrase "respond to a school district ... within five days." Chapter 196, section 1m, Laws of 1981, effective April 21, 1982. This is evidence of express legislative intent to prevent any delay lasting more than five days from the time that a school district submits its request for payment. Note also that legislative changes in 1981 included a provision that "*the town board may not deny such a request.*" Chapter 196, section 1m, Laws

of 1981. These changes survived the Legislature's recent revision of chapter 60 and remain part of section 60.34(5)(a). Thus, the clear intent of existing statutory sections is to compel prompt settlement.

"Prompt" settlements will be construed fairly narrowly by the courts and untimely payments will not be permitted without substantial justification. It will be unreasonable for a local treasurer to withhold school district funds to pay town government operating expenses, 21 Op. Att'y Gen. 407 (1932); and a town treasurer may not delay such payments to await approval or authorization from the town board, *First Nat. Bank v. Town of York*, 212 Wis. 264, 249 N.W. 513 (1933); section 60.34(5)(b).

Ultimately, when town officials delay settlement to make interest on the "float" of loans they are acting unreasonably and are not complying with the law. Wisconsin statutes allow local governmental units to invest only those funds "not immediately needed." Sec. 66.042(1), Stats. Funds owing to local units, such as a school district, would be ineligible for investment by local officials because they do not constitute monies "not immediately needed." Wisconsin statutes further direct that it is "the duty of the [town] clerk to draw and deliver to the [town] treasurer an order ... before or at the time when such payment is required to be made by the treasurer." Sec. 66.042(1), Stats.

4. Can anything be done by a town to prevent an apparent delay of payment by the county treasurer?

Recent legislative revisions of chapter 60 included the repeal of section 60.49(9) which specifically allowed town treasurers to sue for monies that county treasurers neglected or refused to settle. Currently, town treasurers may rely on section 74.28 to bring mandamus and compel prompt settlement.

Section 74.28 provides that "[e]ach county treasurer shall pay to the several towns, cities or villages on demand, all money collected or received by him and belonging to them; but he may retain in the county treasury all amounts due from any town, city or village to the county."

A county treasurer who is investing monies immediately owing will also be in violation of section 66.04(2), as discussed in response to your third question. Finally, in those extreme cases where county

treasurers willfully neglect to settle payments promptly, such treasurers may be subject to criminal sanctions under section 946.12(1).

BCL:DDS

Public Officials; Schools And School Districts; Section 118.12(1)(a), Stats., applies only to materials and items that are part of or reasonably could become part of a school district's instructional process; enforcement authority usually lies with the school board president for the district; violations of section 118.12(1)(a) could possibly constitute violations of sections 946.12 and 946.13. OAG 19-85

May 21, 1985

DR. HERBERT J. GROVER, *State Superintendent*
Department of Public Instruction

You have sought my opinion on the following questions relating to section 118.12(1), Stats.:

1. Is it a violation of §118.12(1)(a) for a teacher to distribute advertising material to students offering books and periodicals for sale to students when:
 - a. the books or periodicals are not used for instruction in the schools, or
 - b. the distributed material has been approved by the school board or school administration in order to promote reading activities by students outside the classroom?
2. Is it a violation of §118.12(1)(a) for a school administrator or school employe to arrange for:
 - a. students to rent from a private company graduation caps and gowns to be used in the school's graduation ceremony?
 - b. the in-school sale of graduation announcements, class rings, or other school jewelry to students?
 - c. students to have their yearbook pictures taken by a particular photographer, who supplies film and photo-

graphic equipment to the school's newspaper and journalism classes?

- d. students to sell candy or other food products to the public where the proceeds go to a school program, such as the school band?
3. Is it a violation of §118.12(1)(a) for a school employe who develops and owns an educational computer program to:
 - a. sell the program to the school district in which she/he is employed? What if the employe has no involvement in the district's decision to buy the program?
 - b. sell the program to a cooperative educational service agency (CESA) which is located in and serves the same area as the employing school district?
 - c. sell the program to students as a "study aid"? What if the "study aid" is not used by any of the employe's students?
4. Is it a violation of §118.12(1)(a) for a teacher to sell items which may be used as school books, supplies or equipment during the summer vacation period?
5. Who is responsible for enforcing §118.12?
6. Would violations of §118.12(1)(a) also be considered criminal conduct under the provisions of either §946.12, Misconduct in public office or §946.13, Private interest in public contract prohibited?

My general answers, which will be elaborated upon, are that section 118.12(1)(a) applies only to materials and items that are or reasonably could become part of the instructional programs of a school district; that enforcement authority usually lies with the school board president for the district; and that violations of section 118.12(1)(a) could also constitute violations of sections 946.12 and 946.13.

Section 118.12(1) reads as follows:

(a) Within the school district of his or her jurisdiction or employment, no school teacher, agency administrator or employe, school district administrator or other school employe connected with any public school may act as an agent or solicitor for the sale of school books, school supplies or school equipment, or

solicit or promote such sales to individuals or the school district or receive any fee or reward for any such sales.

(b) Any person violating this subsection shall forfeit not less than \$50 nor more than \$200 for each offense and may be removed from office therefor.

The broad purpose behind this statute was described by one of my predecessors. In 12 Op. Att'y Gen. 72 (1923), it was stated that "[t]he purpose of the statute is manifestly to prevent persons connected with the public school system from having their judgments warped by financial interest in the sale of school supplies." Similarly, in 27 Op. Att'y Gen. 267, 268-69 (1938), it was stated:

From the wording of the statute taken as a whole, it is apparent that at the time of the enactment thereof the legislature recognized that the persons named therein might be in a position to take an unfair advantage either of the school or of the students attending such a school and it was to prevent such an abuse that the statute was enacted.

The key to answering the majority of your questions lies in the proper interpretation of the phrase "school books, school supplies or school equipment." As you correctly point out in your request, the phrase prior to 1961 read "school books, maps, charts, school library books, school furniture, apparatus or stationery." In 1961 this language was changed to read, as it does currently, "school books, school supplies or school equipment." See ch. 253, Laws of 1961. The drafting record for chapter 253, Laws of 1961, contains no explanation for the change. In fact, the drafting file seems to indicate that the Legislature was focusing only upon the class of persons to whom section 118.12(1)(a) (then, section 40.93) would apply. In my opinion, then, the reworking of the phrase "school books, maps, charts, school library books, school furniture, apparatus or stationery" was of little consequence. The old phrase was perhaps more explicit and more obviously applicable only to items that are tied to a school's instructional process. However, in the absence of any legislative history, other than what I have already discussed, I do not believe that the current phrase should be construed any differently. Accordingly, I would interpret the phrase "school books, school supplies or school equipment" to apply only to books, supplies and equipment which are or reasonably could become tied to a school's instructional process.

I.

Applying this definition to subpart (a) of your first question, related to a teacher distributing advertising materials to students offering books and periodicals for sale, it is my opinion that a teacher cannot distribute such materials if the books and periodicals being advertised are or reasonably could become instructional materials within the district. If the books and periodicals are or reasonably could be used in the classroom, or are or reasonably could become part of the collection in a school library or instructional materials center, then they constitute "school books" within the meaning of section 118.12(1)(a). Further, the teacher would be "promoting" a sale to "an individual." Even if the teacher did not receive remuneration of any sort, the statute still appears to stand in the way of such advertising. A person cannot "solicit" or "promote" or "receive any fee or reward." The use of disjunctives suggests that promoting a sale is different than receiving a payment or royalty or bonus for a sale. The statute appears to bar even advocating sales of books and periodicals.

Subpart (b) of your first question asks whether it makes any difference if the materials being advertised have been approved by the school board or school administration in order to promote reading activities by students *outside* the classroom. In my opinion, a violation of section 118.12(1)(a) would occur whenever a teacher distributes advertising materials relating to books and periodicals which have been approved by the school board to promote outside reading. The reason is that such materials could very well become part of a district's instructional program or part of a district's library collection.

II.

The items set forth in question 2—caps and gowns, graduation announcements, class rings and other school jewelry, yearbook pictures and candy and other food products sold by students to the public—do not, in my view, constitute "school books, school supplies or school equipment." These items are generally sold on a periodic basis only, are not part of the ongoing curriculum and are not a part of the instructional process within a school district. Thus, in my opinion, section 118.12(1)(a) does not apply to these items.

III.

Your third question focuses upon educational computer programs and how they are to be handled under section 118.12(1)(a). As a preliminary matter, I would note that although section 118.12(1)(a) uses the terms "school books," "school supplies" and "school equipment," these terms should not be given a technical meaning. In my opinion, the terms were meant to be comprehensive. That is, they were meant to encompass all items which are proper to be used in the instructional process. Computer programs, in my opinion, constitute instructional materials.

Accordingly, in response to subpart (a) of your third question, it is my opinion that if a school district employe or other person specified in section 118.12(1)(a) develops an educational computer program, that person cannot sell the program to the district by which he or she is employed if the program is or reasonably could become part of the district's instructional materials. In further response to subpart (a) of your third question, I do not believe that it makes any difference that the person may not be involved in the district's decision to buy the program. A sale of this nature would still generate a "fee or reward" for the seller, and thus it is clearly prohibited by the statute.

In response to subpart (b) of your third question, selling a computer program to a cooperative educational service agency (CESA) is, in my opinion, a nearly indistinguishable situation, given the agency relationship between CESAs and the districts they serve. Hence, programs should not be sold to the CESA that serves the district by which the seller is employed or with which the seller is connected.

Lastly, you ask in subpart (c) whether it makes any difference if the program is sold as a "study aid." Again, I believe that the guiding principle should be whether or not the program is or could reasonably become part of the instructional process that takes place within the school district. If it is part of the instructional process or reasonably could become so in the future, then in my opinion the educational computer program, however it may be labelled, falls within the parameters of the phrase "school books, school supplies or school equipment."

IV.

Your fourth question asks whether it is a violation of section 118.12(1)(a) for a teacher to sell items which may be used as school books, supplies or equipment during the summer vacation period. I find nothing in section 118.12(1) that would lead to a conclusion that sales, solicitation and promotional activities related to books, supplies and equipment used during summer months can be viewed any differently than sales, solicitations and promotional activities relating to materials used during the traditional academic year.

V.

Your fifth question focuses upon enforcement of section 118.12(1). In my opinion, enforcement authority lies with the school board president within each district.

The penalty for violating section 118.12(1)(a) is a forfeiture of not less than fifty dollars and not more than two hundred dollars for each offense, and possible removal from office. Section 120.15(4) states clearly that the school district president (the president of a school board) of a common or union district is responsible for prosecuting "any action for the recovery of any forfeiture incurred under chapters 115 to 121 in which the school district is interested." If the school district president has incurred the forfeiture, then section 120.15(4) hands prosecutorial authority to the school district treasurer.

While by its terms section 120.15 applies only to common or union high school districts, the section is also made applicable to city school districts and unified school districts by sections 120.49 and 120.75. These sections specify that the school boards and school officers of city districts and union districts have the same powers and duties as the boards and officers of a common school district. One situation unique to a city district, however, is that if the board president is the one who incurs a forfeiture for violating section 118.12(1)(a), prosecutorial authority then passes to the city treasurer. The reason is that under section 120.48(2) the city treasurer serves as the treasurer of the school board in a city school district.

I would also note that if a person charged with prosecuting violations of section 118.12(1)(a) fails to prosecute within ten days after being requested in writing by an elector of the school district

to do so, any elector of the school district may then prosecute the action. Sec. 118.12(3), Stats.

An action under section 118.12(1)(a) would, in my opinion, be covered by chapter 778. Section 778.01 states that “[w]here a forfeiture imposed by statute shall be incurred it may be recovered in a civil action” Section 778.02 states that “[e]very such forfeiture action shall be in the name of the state of Wisconsin” The persons authorized to “prosecute” violations of section 118.12(1)(a), however, may not proceed alone in filing a civil action. In *State v. Wisconsin Telephone Co.*, 91 Wis. 2d 702, 713, 284 N.W.2d 41 (1979), the Wisconsin Supreme Court noted its “disapproval of private persons purporting to bring actions on behalf of the state.” In regard to a statutory section which contained the phrase “the person or corporation prosecuting thereof,” the court concluded that the phrase cannot be construed to mean that a private person could commence a forfeiture action alone, and thus force the state to become a party. Rather, “it must be held to mean that a private person could prosecute in conjunction with the state pursuant to sec. 288.04 [now section 778.04], which provides in part, ‘In case a portion of any forfeiture shall belong or shall be payable to any person, he *may* join with the state as a plaintiff; ...’ (Emphasis supplied.)” *Wisconsin Telephone*, 91 Wis. 2d at 713-14. Based upon this case, I conclude that the authority to “prosecute” violations of section 118.12(1)(a) means that the persons given this authority may only make the sworn relation upon which a prosecuting authority of the state bases a forfeiture action; no independent prosecutorial authority exists under section 118.12.

VI.

Your sixth and final question asks whether violations of section 118.12(1)(a) could also constitute criminal conduct under sections 946.12 (misconduct in public office) and 946.13 (private interest in a public contract). In my opinion, violations of section 118.12(1)(a) *could* constitute violations of the latter statutes.

Both sections 946.12 and 946.13 apply to public officers and public employes. The definitions of the terms “public officer” and “public employe” are set forth in section 939.22(30). A “public officer” is any person “appointed or elected according to law to discharge a public duty for the state or one of its subordinate

governmental units.” A “public employe” is any person, not an officer, who “performs any official function on behalf of the state or one of its subordinate governmental units and who is paid from the public treasury of the state or subordinate governmental unit.” In my opinion, those categories of persons bound by section 118.12(1)(a)—school teachers, agency administrators or employes, school district administrators or other school employes—easily fall within the definitions of either a public officer or public employe.

An analysis of a predecessor to sections 946.12 and 946.13 supports this conclusion. Section 348.28, Stats. (1953), whose principles were incorporated into sections 946.12 and 946.13 by chapter 696, Laws of 1955, specified that the section applied to, among others, “[a]ny officer, agent or clerk of ... any school district [or] school board ... or in the employment thereof.” It appears that the Legislature, when adopting sections 946.12 and 946.13, simply condensed the lengthy list down into two general categories: public officers and public employes. There is no indication that school district officers, teachers or other district employes were to be excluded.

Given that the persons described in section 118.12(1)(a) are also covered by sections 946.12 and 946.13, it is conceivable that conduct punishable under section 118.12(1)(a) could be punishable also under the other two statutory sections, depending upon the facts. No double jeopardy problem arises since the penalties under section 118.12 are civil. Double jeopardy problems only arise if a person is subjected to two possible criminal penalties for the same conduct. *State v. Roggensack*, 15 Wis. 2d 625, 633, 13 N.W.2d 389 (1962).

BCL:RCB

Contempt Of Court; Prisons And Prisoners; A person confined in the county jail for civil (remedial) contempt of court is not eligible for “good time” credit under section 53.43, Stats. OAG 20-85

June 11, 1985

DARWIN L. ZWIEG, *District Attorney*
Clark County

You have requested my opinion on the question whether a person sentenced to the county jail for remedial contempt of court is eligible for "good time" against his sentence under section 53.43, Stats.

Inmates of county jails generally are eligible for good time credit against their sentences under section 53.43 which provides, in pertinent part: "Every inmate of a county jail is eligible to earn good time in the amount of one-fourth of his or her term for good behavior if sentenced to at least 4 days, but fractions of a day shall be ignored."

Resolution of the question you raise depends upon whether the person is incarcerated for civil (remedial) or criminal (punitive) contempt.

There are two forms of contempt of court—civil and criminal. Civil contempt is remedial and coercive. It generally involves the enforcement of a private right through fines or imprisonment which can be purged by compliance with the order that led to the contempt. Criminal contempt, on the other hand, involves punishment for past actions that is determinate and not purgeable. Its purpose is to vindicate the authority and dignity of the court.

Share Corp. v. Pro-Specialties, Inc., 107 Wis. 2d 318, 323, 320 N.W.2d 24 (Ct. App. 1982) (footnotes omitted); *State v. King*, 82 Wis. 2d 124, 129-31, 262 N.W.2d 80 (1978); sec. 785.01(2) and (3), Stats. Also see *Schroeder v. Schoessow*, 108 Wis. 2d 49, 60-61, 321 N.W.2d 131 (1982); *Schroeder v. Schroeder*, 100 Wis. 2d 625, 632-38, 302 N.W.2d 475 (1981).

It is my opinion that one confined to the county jail for civil (remedial) contempt is not eligible to earn good time credit, but one confined to the county jail for criminal (punitive) contempt is eligible for good time credit under section 53.43.

The issue you raise is not controlled by *Prue v. State*, 63 Wis. 2d 109, 216 N.W.2d 43 (1974). In *Prue*, the court held that section 53.43 does not apply to persons confined to jail as a condition of their probation, but that the court could order good time credit for those inmates if it so chose. The court held that probation is not a

“sentence” and, consequently, the confinement in jail as a condition of probation is not a “sentence.” 63 Wis. 2d at 114, 116. In the contempt situation, however, it is clear that the court has treated both the remedial and punitive sanctions as “sentences” when they involve jail time (or “imprisonment,” the term used in chapter 785). Indeed, in *Schroeder v. Schroeder*, the court expressly refers to a purgeable “sentence of incarceration” for civil contempt. 100 Wis. 2d at 639. *Also see, generally, State v. King*. Therefore, the remedial and punitive sanctions, when they involve incarceration in the county jail, are “sentences” for purposes of section 53.43.

Since the civil contempt order is remedial and coercive in nature, the sentence is indefinite: the inmate wins release, or “purges” the contempt, upon compliance with the court order which led to his incarceration in the first place.

The fact that civil contempts are remedial or coercive, *i.e.*, designed to force one party to accede to another’s demand, is demonstrated by the statutory requirement that the sentences be purgeable. Civil contempt looks to the present and future and the civil contemnor holds the key to his jail confinement by compliance with the order.

State v. King, 82 Wis. 2d at 130 (footnotes omitted).

Confinement for civil contempt may not exceed six months. Sec. 785.04(1)(b), Stats. That does not make the sentence for civil contempt determinate or otherwise non-purgeable. When imposing a sentence for civil contempt, the judge *must* clearly spell out what the contemnor must do to purge the contempt. *Schroeder v. Schroeder*, 100 Wis. 2d at 639. If the contemnor serves all six months, it is only because he chose never to comply with the court’s order.

Confinement for criminal contempt, on the other hand, is for a fixed period of time. Unlike the civil contemnor, “the criminal contemnor is brought to account for a completed past action, his sentences are not purgeable and are determinate.” *State v. King*, 82 Wis. 2d at 130. *See sec. 785.04(2)*, Stats. Since he is serving a fixed term in the county jail, the criminal contemnor is in the same position as any other inmate serving time for a criminal conviction.

It is clear from the plain language of the good time statutes that good time is to be credited against fixed determinate sentences. Thus, under section 53.11(1), the mandatory release date for inmates confined in the state prison system “is established at two-

thirds of the sentence"; and under section 53.43, the county jail inmate is eligible to earn good time "in the amount of one-fourth of his or her term." It is both logically and mathematically impossible to compute fractions of indefinite sentences, such as those imposed upon civil contemnors. Therefore, it is my conclusion that the inmate serving time for criminal contempt is eligible for good time, but the inmate serving time for civil contempt is not.

One might question why civil and criminal contemnors should be treated differently regarding their eligibility for good time credit. The answer is simply because the civil contemnor does not need to earn time for good behavior, just as he does not need the constitutional protections that a criminal contemnor is entitled to receive. *See State v. King*, 82 Wis. 2d at 131.

The courts have evidently declined to extend these rights to the civil contemnor, not because he may not serve sentences as long or even longer than those served by a criminal contemnor but on the theory that these rights are unnecessary because he holds the key to his confinement.

Id.

Unlike the civil contemnor, the criminal contemnor wins early release from his fixed sentence only with good behavior. There is no valid reason to deny the criminal contemnor the same good time eligibility available to other inmates serving determinate sentences in the county jail.

In your letter, you phrase the issue in terms of "remedial" (civil) contempt. The first example you give, however, appears to be "criminal" in nature. In this example, you state that failure to make court-ordered support payments after a finding of contempt will result in issuance of a warrant and commitment order, and the contemnor "doing the 30 days." If this is in fact a non-purgeable thirty-day sentence, or if the court neglects to specify how the contempt can be purged within that thirty days, it is punitive in nature and the contemnor is entitled to good time credit.

As you describe it, however, your first example appears to be a creature not currently recognized by Wisconsin law. You describe a civil contempt order, but with a fixed criminal punishment. Further, there is no provision spelling out how the contemnor is to purge the

contempt. This takes on all appearances of criminal contempt but without the requisite procedural and constitutional safeguards. *See* sec. 785.03(1)(b), Stats.; *State v. King*, 82 Wis. 2d at 131, 137. If Clark County judges are in fact using a hybrid civil contempt proceeding with a criminal punishment, they had better take a closer look at chapter 785. *Also see State v. King*, 82 Wis. 2d at 137.

Your second example, on the other hand, appears to be remedial in nature. It provides that the contemnor who fails to make court-ordered job applications “may purge himself of the contempt by continuing to make job applications and report them to the child support agency.” You do not, however, explain how the contemnor is able to make those job applications once he is incarcerated. Again, he must be permitted the opportunity to purge himself while serving his sentence, or it becomes criminal in nature. The court will have to spell out how he can comply with the job application order while he is incarcerated.

In your letter, you also ask whether a court may enter an order denying good time to a contemnor who is otherwise eligible. It is my opinion that the court has no such authority. An order denying good time eligibility to a criminal contemnor in county jail would violate the express terms of section 53.43 which plainly make *all* county jail inmates eligible for good time credit at the rate of one-fourth of their sentences. There is no provision authorizing a sentencing court to deny good time eligibility. Loss of good time occurs only if the inmate engages in misconduct after he has begun serving his sentence. The criminal contemnor, like any other inmate convicted of a crime, is eligible for good time in the jail during good behavior. Since the civil contemnor is not entitled to good time credit at all, there is no need for a court order denying good time.

BCL:DJO

Retirement Systems; Taxation; Taxation of certain public employe pensions may impair contracts in violation of the state and federal constitutions. OAG 21-85

June 13, 1985

THOMAS LOFTUS, *Chairperson*
Assembly Committee on Organization

You have asked for my opinion regarding proposed legislation¹ which would amend section 71.03(2)(d), Stats. That subsection presently exempts certain pension payments from state income taxation. Included are:

All payments received from the employee's retirement system of the city of Milwaukee, Milwaukee county employes' retirement system, sheriff's annuity and benefit fund of Milwaukee county, police officer's annuity and benefit fund of Milwaukee, fire fighter's annuity and benefit fund of Milwaukee, or the public employe trust fund as successor to the Milwaukee public school teachers' annuity and retirement fund and to the Wisconsin state teachers retirement system, which are paid on the account of any person who was a member of the paying or predecessor system or fund as of December 31, 1963, or was retired from any of the systems or funds as of December 31, 1963.

Sec. 71.03(2)(d), Stats.

Specifically, the issue is whether the amendment of section 71.03(2)(d) would violate the "contract clause" which is found in article I, section 10, clause 1 of our federal constitution; "no state shall ... pass any ... law impairing the obligation of contracts" and in article I, section 12 of our state constitution: "No bill of attainder, *ex post facto* law, nor any law impairing the obligation of contracts shall ever be passed." At the outset, it is important to realize that these constitutional provisions do not absolutely proscribe the passage of laws which impair the obligation of contracts. This principle was discussed by our supreme court in *State ex rel. Cannon v. Moran*, 111 Wis. 2d 544, 554, 331 N.W.2d 369 (1983):

Courts have long recognized that under the contract clause a contract includes the laws existing at the time it was made. Thus, the scope of the clause is limited to legislation which retrospectively impairs the obligations of contract. *Id.* at 429-30, [*Home*

¹ Section 1276m, Assembly Amendment 1 to 1985 Assembly Bill 85 adds the following language at the conclusion of section 71.03(2)(d): "but such exemption shall not exclude from gross income tax sheltered annuity benefits. The exemption under this paragraph does not apply to benefits received by individuals who retire on or after March 9, 1984."

Building and Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934)]; *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 303 (1827). Furthermore, the contract clause cannot be read literally to proscribe any impairment of preexisting contracts. "[L]iteralism in the construction of the contract clause ... would make it destructive of the public interest by depriving the State of its prerogative of self-protection." *W.B. Worthen Co. v. Thomas*, 292 U.S. 426, 433 (1934). Under certain circumstances the obligation of contract may be "obliged to yield to the compelling interest of the public—the exercise of the police power." *State ex rel. Building Owners v. Adamany*, 64 Wis. 2d at 292.

In *Cannon*, the supreme court began its analysis by determining whether or not an obligation of contract had been impaired. Before I begin a similar undertaking herein, I must first determine whether or not contracts existed between the persons and the governmental units named in section 71.03(2)(d). It is important to note that we are concerned with a closed set of persons—each of whom began his employment with his respective governmental unit on or before December 31, 1963. Any person employed after that date by any of those governmental units clearly will not be entitled to the tax exemption. This closed set is divided into two subsets—those pre-1964 employes who retired on or before March 8, 1984, and those pre-1964 employes who are still working and are members of the Wisconsin retirement system or any of the plans referred to in section 71.03(2)(d).

The Wisconsin Legislature mandated the development of a retirement system in Milwaukee County in chapter 201, Laws of 1937. Section 1 thereof provided: "In each county having a population of five hundred thousand or more a retirement system shall be established and maintained for the payment of benefits to the employes of such county and to the widows and children of such employes" Section 11 thereof provided: "All moneys and assets of the retirement system and all benefits and allowances, and every portion thereof, both before and after payment to any beneficiary, granted under the retirement system shall be exempt from any state, county or municipal tax"

Accordingly, Milwaukee County established a retirement system on January 1, 1938. The benefits payable thereunder were deemed payable pursuant to contract by virtue of chapter 138, Laws of 1945, effective May 15, 1945. Section (2) thereof provides in part:

The benefits of members, whether employes in service or retired as beneficiaries, and of beneficiaries of deceased members in the retirement system created by chapter 201, laws of 1937, as amended, shall be assured by benefit contracts as herein provided:

(a) Every such member and beneficiary shall be deemed to have accepted the provisions of this act and shall thereby have a benefit contract in said retirement system of which he is such member or beneficiary as of the effective date of this act

... each member and beneficiary having such a benefit contract shall have a vested right to such annuities and other benefits and they shall not be diminished or impaired by subsequent legislation or by any other means without his consent.

A retirement system for sheriffs of Milwaukee County was created by chapter 155, Laws of 1937, effective January 1, 1938. Coverage extended to members of the shrievalty whose rank was at least deputy sheriff or an equal classification. Chapter 487, Laws of 1955, effective August 3, 1955, amended section 59.130, as created by chapter 155, Laws of 1937, to provide an income tax exemption for annuities and benefits paid to any annuitant or beneficiary. This system was closed and limited to its August 1, 1947, membership by chapter 357, section 25, Laws of 1947.

The City of Milwaukee received a mandate from the Legislature in chapter 134, Laws of 1937, effective May 15, 1937. Section 1 thereof provided:

In all cities of the first class in this state, whether organized under general or special charter, annuity and benefit funds shall be created, established, maintained and administered (by such city) for all officers and employes of such cities, who at the time this section shall come into effect are not contributors, participants or beneficiaries in any pension fund now in operation in such city by authority of law

Two pension funds of concern herein were then in operation in 1937: the Policemen's Annuity & Benefit Fund of Milwaukee, established by chapter 589, Laws of 1921, and the Firemen's Annuity and Benefit Fund of Milwaukee, established by chapter 423, Laws of 1923.

The provisions of chapter 134, Laws of 1937, were greatly expanded two months after passage by chapter 396, Laws of 1937, effective July 16, 1937, which set forth comprehensive details as to the administration of the retirement system.

Section 1 thereof provided:

In each city of the first class a retirement system shall be established and maintained by such city for the payment of benefits to the employes of such city and to the widows and children of such employes, except employes who are or who become contributors to, participants in, or beneficiaries of any other pension, annuity or retirement fund in operation in the state by provision of law enacted by the legislature or by any municipality of this state.

Section 11 of chapter 396, Laws of 1937, provided:

All moneys and assets of the retirement system and all benefits and allowances, and every portion thereof, both before and after payment to any beneficiary, granted under the retirement system shall be exempt from any state, county or municipal tax.

The Policemen's and Firemen's Annuity and Benefit Funds were closed to new members by sections 32 and 33, chapter 441, Laws of 1947, effective July 30, 1947. Subsequent Milwaukee police and firemen came under the retirement system created by chapter 396, Laws of 1937. The present and future annuities and benefits accruing to Milwaukee policemen on July 30, 1947 were assured contract status by section 20, chapter 439, Laws of 1947, which created new section 67 of chapter 589, Laws of 1921, subsection (b) of which provided:

The annuities and all other benefits in the amounts and on the terms and conditions and in all other respects as provided in chapter 589, laws of 1921, as amended and then in effect in such city shall be obligations of such benefit contract on the part of the city and the retirement board and each policeman and beneficiary having such a benefit contract shall have a vested right to such annuities and other benefits and they shall not be diminished or impaired by subsequent legislation nor by any other means without his consent.

Milwaukee firemen received identical treatment and contract status from section 19, chapter 440, Laws of 1947, which created new

section 67 of chapter 423, Laws of 1923. Subsection (b) thereof used the same language as section 67(b) of chapter 589, Laws of 1921, differing only in the references to the creating law and to policemen.

Section 30 of chapter 441, Laws of 1947, strengthened the Milwaukee retirement system then in effect by creating a new section 14 of chapter 396, Laws of 1937. Subsection 2 of the newly-created section 14 provided:

The benefits of members, whether employes in service or retired as beneficiaries, and of beneficiaries of deceased members in the retirement system created by chapter 396, laws of 1937, as amended, shall be assured by benefit contracts as herein provided:

(a) Every such member and beneficiary shall be deemed to have accepted the provisions of this act and shall thereby have a benefit contract in said retirement system of which he is such member or beneficiary as of the effective date of this act unless, within a period of 30 days thereafter, he files with the board administering the system a written notice electing that this act shall not apply to him. The annuities and all other benefits in the amounts and upon the terms and conditions and in all other respects as provided in the law under which the system was established as such law is amended and in effect on the effective date of this act shall be obligations of such benefit contract on the part of the city and of the board administering the system and each member and beneficiary having such a benefit contract shall have a vested right to such annuities and other benefits and they shall not be diminished or impaired by subsequent legislation or by any other means without his consent.

Chapter 459, Laws of 1921, established a state retirement system to provide retirement benefits for public school, normal school and university teachers. This system replaced an earlier system established in 1911 which was insolvent. *State Teacher's Retirement Board v. Giessel*, 12 Wis. 2d 5, 8, 106 N.W.2d 301 (1960). Section 42.52, as created by section 3, chapter 459, Laws of 1921, provided: "The benefits payable to, or other right and interest of any member, beneficiary, or distributee of any estate under any provision of the state retirement law shall be exempt from any tax levied by the state or any subdivision thereof," Although the Legislature didn't

characterize the interests of participants and beneficiaries as contractual, the supreme court did in *Giessel*, 12 Wis. 2d at 9:

The nature of the state teachers' retirement system and the rights of the members thereof have been the subject of four prior decisions of this court: *State ex rel. Dudgeon v. Levitan* (1923), 181 Wis. 326, 193 N.W. 499; *State ex rel. O'Neil v. Blied* (1925), 188 Wis. 442, 206 N. W. 213; *State ex rel. Stafford v. State Annuity & Investment Board* (1935), 219 Wis. 31, 261 N.W. 718; *State ex rel. Thomson v. Giessel* (1952), 262 Wis. 51, 53 N. W. (2d) 726. The result of these decisions is that the teachers have a contractual relationship with the state and a vested right in the state teachers' retirement system.

Milwaukee teachers were given a retirement system in 1907 by chapter 453, Laws of 1907, which created section 925-xx, Stats. (1907). That section was repealed and recreated by chapter 510, Laws of 1909, effective June 22, 1909.

An income tax exemption was provided in 1929 by the enactment of chapter 266, section 3, Laws of 1929.

Subsection (17) of section 42.55² of the statutes is amended to read: (42.55) (17) All annuities granted under the provisions of this section shall be exempt from *taxation, and from execution, attachment and garnishment process, and no annuitant shall have the right to transfer or assign his annuity.*

While I was unable to locate a specific legislative declaration that a member's rights under this retirement system were based on or assured by a benefit contract, it is clear to me that the Legislature understood that contractual rights were involved when it passed section 6, chapter 78, Laws of 1957, creating section 38.24(3)(L):³

Nature of contractual rights unchanged. It is not intended that the enactment of this act (chapter [78], Laws of 1957), shall extend or impair the nature of any contractual rights of members of the retirement fund.

Finally, I am unable to locate the session laws granting an exemption from income taxation for benefits payable from the Mil-

² Section 925-xx of the statutes was renumbered section 42.55 by section 310, chapter 242, Laws of 1921, effective January 1, 1922.

³ Section 42.55 was renumbered section 38.24 by section 27, chapter 213, Laws of 1941, effective June 11, 1941.

waukee annuity and benefit funds for police and firefighters. These funds were closed to new members on July 30, 1947 as I earlier stated herein. Their tax exemption was preserved, however, by the language of section 4, chapter 267, Laws of 1963, which preserved the exemption for members who had retired from such systems as of December 31, 1963.

I conclude that a person who retired from any of the retirement systems referred to in section 71.03(2)(d) as of December 31, 1963, is a party to a contract between that person and the governmental units referred to in that subsection. Further, any person who, on December 31, 1963, was then a member of any of the retirement systems referred to and who had retired on or before March 8, 1984, is a party to a contract between themselves and the governmental units referred to. The contractual rights of the individuals just previously described will not be impaired in any way by section 1276(m) of Assembly Amendment 1 to 1985 Assembly Bill 85.

Finally, as to the remaining subset, these persons who, on December 31, 1963, were then members of the retirement systems referred to and who, on March 9, 1984, were still members of said retirement system or its successor, it is my opinion they, too, are parties to contracts between themselves and the governmental units referred to. The question now becomes whether or not these contracts will be impaired by the proposed legislation.

Our supreme court discussed the law regarding impairment in *Cannon*, 111 Wis. 2d at 554-55.

The first step in analyzing a contract clause problem is to determine whether an obligation of contract has been impaired. In *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. at 431, the court held:

“The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them (*Sturges v. Crowninshield*, *supra*, pp. 197, 198) and impairment, as above noted, has been predicated of laws which without destroying contracts derogate from substantial contractual rights.” (Footnote omitted.)

In a recent case the United States Supreme Court indicated that legislation which alters the contractual expectations of the parties impairs the obligation of contract. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 245-46 (1978). This court has recog-

nized that a contract is impaired when the consideration agreed upon is altered by legislation. *State ex rel. Building Owners v. Adamany*, 64 Wis. 2d at 291; *Paylowski v. Eskofski*, 209 Wis. 189, 193, 244 N.W. 611 (1932).

Cannon, involved a legislative attempt to reduce the salaries of certain Milwaukee County judges by the amount of pension benefits each received from prior judicial service in Milwaukee County. Prior to August 1, 1978, Milwaukee County circuit judges received compensation from both the state and Milwaukee County. Thus, each was eligible to participate in the Milwaukee County Employes Retirement System and the Wisconsin Public Employes Retirement System to the extent of compensation received from each.

Pursuant to the Court Reform Act, chapter 449, Laws of 1977, county supplements to judicial pay were abolished as of July 1, 1980. The state thus became the sole provider of judicial compensation. However, there was an exception for Milwaukee County circuit judges who held office on July 31, 1978, and who would continue to serve in that capacity. Those judges could elect to continue receiving their salary from both the state and Milwaukee County.

Six Milwaukee County circuit judges (five of whom are plaintiffs) chose not to participate in the dual system and thus terminated their membership in the Milwaukee County system. Two circuit judges became appellate court judges and did not have the option of dual system membership. Each of the plaintiffs elected to begin receiving a pension from the Milwaukee County Employes Retirement System.

Subsequently, the Legislature enacted chapter 38, Laws of 1979, creating section 40.91, Stats. (1979-80), which reduced these judges' salaries by the amount of retirement benefits each receives from the Milwaukee County Employes Retirement System. The plaintiffs sued, prevailing in the trial court. The court of appeals reversed and the supreme court accepted a petition for review.

The supreme court began its analysis by noting that plaintiffs had a contract with the Milwaukee County Employes Retirement System. It then looked to determine whether or not an obligation of contract was impaired and held:

Thus Chapter 38 effectively, albeit indirectly, deprives the plaintiffs of the benefits properly due them under their MCERS contracts. We would be putting form over substance if we held

that only a direct reduction in pension benefits constitutes an impairment. Accordingly, we conclude that the obligations of the plaintiffs' MCERS contracts are impaired by the salary setoff device of Chapter 38, Laws of 1979.

Cannon, 111 Wis. 2d at 557.

The supreme court then turned to the question of whether the impairment is constitutional.

The degree of impairment determines the level of scrutiny to which the legislation in question will be subjected. In *Allied Structural Steel Co. v. Spannaus*, 438 U.S. at 244-45, the court stated:

"[T]he first inquiry must be whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation." (Footnotes omitted.)

In finding that an impairment was severe, the *Spannaus* court relied upon those "factors that reflect the high value the Framers placed on the protection of private contracts." *Id.* at 245. In particular, the court noted that the legislation in question nullified an express term of the contract which was bargained for and reasonably relied upon by the parties, resulting in a completely unexpected liability to the plaintiff. 111 Wis. 2d at 544, 558.

As noted earlier, the supreme court held that the contract clause does not absolutely proscribe the passage of laws which impair the obligation of contracts.

In *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, the United States Supreme Court indicated that a law impairing contracts will survive the contract clause if:

1) An emergency⁴ exists which furnishes a proper occasion for the exercise of the state's reserved power to protect the vital

⁴ The public purpose no longer need involve an emergency or temporary situation. *Energy Resources Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 412 (1983).

interests of the community or to remedy a broad and general social or economic problem.

2) The law is addressed to a legitimate end, the protection of a basis societal interest, and not to the advantage of particular individuals.

3) The relief afforded by the impairing statute must be of a character suitable to the occasion necessitating exercise of the state's reserved power and should be granted upon reasonable terms and conditions which are appropriate to the public purpose requiring adoption of such a statute.

Using the same standards as the United States Supreme Court in *Spannaus*, the court deemed the impairment in *Cannon* to be severe. Then, applying the standards from *Blaisdell*, (cited herein), our supreme court held:

[T]he retroactive application of Chapter 38 will do little to protect the broad societal interests articulated in the legislative purpose. The marginal protection offered by Chapter 38, coupled with its severe impairment of the plaintiffs' MCERS contracts, indicates that it is neither reasonable nor of a character appropriate to the public purpose it was designed to meet.

Cannon, 111 Wis. 2d at 562.

I now turn to the question of whether the contracts between those people who were members of the retirement systems referred to in section 71.03(2)(d) on December 30, 1963, and who are still working for the units of government therein listed, will be impaired by the proposed legislation.

Again, I must divide that particular class of persons into two sub-classes—first, those who by virtue of chapter 96, Laws of 1981, are members of the Wisconsin Retirement System (former members of the Milwaukee public school teacher's annuity and retirement fund and Wisconsin state teachers retirement system); and, secondly, the remainder.

As to the first group, section 40.19(1), as created by chapter 96, Laws of 1981, and effective January 1, 1982, applies. The Legislature clearly stated its intent:

Rights exercised and benefits accrued to an employe under this chapter for service rendered shall be due as a contractual right and shall not be abrogated by any subsequent legislative act. The

right of the state to amend or repeal, by enactment of statutory changes, all or any part of this chapter at any time, however, is reserved by the state and there shall be no right to further accrual of benefits nor to future exercise of rights for service rendered after the effective date of any amendment or repeal deleting the statutory authorization for the benefits or rights... .

Therefore, if a member of the first subset retires after March 8, 1984, to the extent that his or her pension is attributable to post-March 8, 1984 earnings, that aliquot portion will be subject to tax. The pre-March 9, 1984 portion will remain tax-exempt. This result occurs because of the specific reservation by the Legislature of its right to prospectively amend or repeal the statute, provided it does not abrogate any rights or benefits accrued to a member.

It is important to note that section 43 of chapter 96, Laws of 1981, repealed and recreated section 71.03(2)(d). The only change made was to include the public employe trust fund as the successor to the Milwaukee public school teacher's annuity and benefit fund, and to the Wisconsin state teachers retirement system. The tax exemption remained intact and unaltered for the remainder of the persons described in section 71.03(2)(d). When the legislature enacts a statute, it is presumed to act with full knowledge of the existing laws, including statutes. *Mack v. Joint School District No. 3*, 92 Wis. 2d 476, 489, 285 N.W.2d 604 (1979). Further, "a statute must be presumed to be valid and constitutional, 2 Sutherland *Statutory Construction* (3rd ed.) pp. 326-27, sec. 4509 ..." *In re City of Beloit*, 37 Wis. 2d 637, 643, 155 N.W.2d 633 (1968). The obvious implication of the grandfathering of the December 31, 1963, system members by the language contained in section 4 of chapter 267, Laws of 1963, and the reiteration of that exception in chapter 96, Laws of 1981, is that the Legislature, in order to pass a constitutional statute which would not impair contract obligations, had a prospective outlook. Retired and present employes were grandfathered; future employes (after January 1, 1964) would receive taxable pensions upon retirement.

It is my opinion that the remainder of the class (those persons mentioned in section 71.03(2)(d) other than former members of the Milwaukee and state teacher retirement systems) in all likelihood will be entitled to receive tax-exempt pensions upon their retirement. In other words, the likely effect of the proposed legislation is to unconstitutionally impair their obligations of contract. This is

not to say, however, that these pensions remain irrevocably tax-exempt; only that the standards from *Spannaus*, *Blaisdell* and *Canon* are not met by the proposed legislation. If subsequent legislation meets those standards, then the impairment may well be constitutional.

In rendering this opinion, I became aware of an Ohio Supreme Court case, *Herrick v. Lindley*, 59 Ohio St.2d 22, 391 N.E.2d 729 (1979). In that matter, the Ohio Supreme Court held that retirement pensions could be later taxed even though the recipients had retired at a time when Ohio law provided that such pensions were tax free. This case is distinguishable from the question before me in several important respects.

First, the Ohio case was submitted for the plaintiffs on a theory of vested rights. They argued that the vesting statute, when read together with the exemption statute, results in the pensioners having a vested right to a continuing tax exemption. In this case, however, the issue is not one of statutory construction. Rather, it is a question of determining the scope of a contract, and of determining whether or not impairment of that contract by taxation is constitutional. Of course, the right of contract must yield to the police power when the safeguarding of the vital interests of the people so dictates. Thus, a Wisconsin court would be faced with a balancing test to decide whether or not impairment is constitutionally permitted. The Ohio court only had a "yes-no" choice.

Secondly, the Ohio Supreme Court would have had to approve of the appellate court's use of statutory construction to allow the continuing exemption. The Ohio Supreme Court dismissed this contention: "A right to tax exemption must appear with reasonable certainty in the language of a statute, and may not depend on a doubtful construction of that language." *Herrick*, 391 N.E.2d at 733. In this case, resort to statutory construction is unnecessary.

Finally, the Ohio Supreme Court viewed the tax exemption as irrevocable if plaintiffs were to have prevailed. Thus, the state partially relinquishes its ability to deal with changing future fiscal conditions. "The power to tax being a fundamental governmental power, its impairment should not be based on a debatable construction of statutory construction." *Herrick*, 391 N.E.2d at 733. In Wisconsin, the retirement benefits could be taxed (*i.e.*, the contract obligations could be impaired) if the public interest and needs of

the state outweigh the high value placed on the protection of private contracts.

Finally, I emphasize that this opinion is based on proposed legislation as it appeared on June 3, 1985. Subsequent amendments or declarations of legislative and public policy in connection with this legislation may well produce a different answer in the future.

BCL:DJS

Huber Law; Intoxicating Liquors; Prisons And Prisoners; Sheriff's jail policy prohibiting Huber Law prisoners from pursuing employment in business establishments that dispense alcoholic beverages impermissibly conflicts with the Huber Law. OAG 22-85

June 14, 1985

DAVID A. SHUDLICK, *District Attorney*
Monroe County

You have requested my opinion as to whether a county jail policy may prohibit prisoners sentenced under the Huber Law, section 56.08, Stats., from working in business establishments that dispense alcoholic beverages. For the reasons that follow, I conclude that a sheriff's policy that precludes a prisoner from working in such an establishment would not comport with the Huber Law, though enforcement of the sheriff's policy prohibiting such persons from consuming alcoholic beverages while at that location would not violate the Huber Law.

As set forth in your request, the following circumstances prompted your inquiry:

The Monroe County Police has a jail policy which prohibits persons who have been sentenced under the Huber Law from working in business establishments which dispense alcoholic beverages. ... Further, it is a commonly accepted practice that the place of employment for Huber prisoners is an extension of the county jail, and that any activity of a Huber prisoner at his place of employment is subject to the same rules and regulations as an individual who is in the actual confines of the jail.

In January, 1985, the Monroe County Circuit Court sentenced an individual to the mandatory 5-day jail sentence for

operating a motor vehicle while under the influence of an intoxicant, second offense. The Court further ordered that the defendant could serve his sentence under the Huber Law. However, the defendant happens to be the owner and operator of a tavern and would be working in an establishment where alcoholic beverages are sold and consumed. Therefore, pursuant to the jail policy, the defendant cannot exercise his Huber Law privileges.

The Monroe County sheriff's rules and regulations for Huber Law prisoners sentenced to the Monroe County Jail state in pertinent part that Huber prisoners "will not go into any tavern nor consume beer or intoxicating beverages." These rules also prohibit Huber prisoners from entering restaurants at any time and specify that "[f]or security purposes, [Huber prisoners] are subject to bodily search, submission to breath test for the detection of alcohol and/or drugs at any time [they] are confined in the Monroe County Jail."

The sheriff's rules do not specifically prohibit a prisoner from working in a tavern while exercising Huber Law privileges. I assume, however, that the sheriff interprets the restrictions on entering any tavern as encompassing entry for purposes of engaging in employment activities in such a place. I proceed with my opinion with this assumption in mind.

The Huber Law itself provides in relevant part:

56.08 "Huber Law"; employment of county jail prisoners. (1) Any person sentenced to a county jail for crime, nonpayment of a fine or forfeiture, or contempt of court, may be granted the privilege of leaving the jail during necessary and reasonable hours for any of the following purposes but whenever the sheriff of the county certifies that facilities are not available, the sentencing court shall be without authority to provide that persons committed for nonpayment of a fine imposed for violation of a municipal or county ordinance may be permitted to serve their alternative jail sentence under the provisions of this section:

- (a) Seeking employment or engaging in employment training;
- (b) Working at employment;
- (c) Conducting any self-employed occupation including housekeeping and attending the needs of the person's family;
- (d) Attendance at an educational institution; or
- (e) Medical treatment.

(2) Unless such privilege is expressly granted by the court, the prisoner is sentenced to ordinary confinement. The prisoner may petition the court for such privilege at the time of sentence or thereafter, and in the discretion of the court may renew his petition. The court may withdraw the privilege at any time by order entered with or without notice.

In answering your question, I have reviewed several Wisconsin statutes in addition to the Huber Law that bear on this issue. In your request, you called attention to section 53.375, which provides in part:

(1) Any sheriff, jailer or keeper of any prison, jail or house of correction or any other person who does any of the following with respect to a prisoner within the precincts of any prison, jail or house of correction shall be fined not more than \$10,000 or imprisoned not more than 9 months or both:

(a) Sells, gives or delivers any intoxicating liquor to the prisoner.

(b) Wilfully permits a prisoner to have any controlled substance or intoxicating liquor.

(c) Has within his or her possession in the prison, jail or house of correction any intoxicating liquor, with intent to sell, give or deliver the liquor to the prisoner.

(2) Any prisoner who uses intoxicating liquor in violation of s. 53.37(2) shall be fined not more than \$10,000 or imprisoned not more than 9 months or both. ...

....

(4) In this section:

....

(b) "Precinct" means a place where any activity is conducted by the prison, jail or house of correction.

In addition, the following statutes, which concern the duties of a sheriff as well as restrictions imposed on prisoners, offer assistance in resolving the dilemma the Monroe County sheriff faces:

59.23 Sheriff; duties. The sheriff shall:

(1) Take the charge and custody of the jail maintained by his county and the persons therein, and keep them himself or by his deputy or jailer.

....

53.37 Maintenance of jail and care of prisoners. . . .

....

(2) Neither the sheriff or other keeper of any jail nor any other person shall give, sell or deliver to any prisoner for any cause whatever any alcohol beverages unless a physician certifies in writing that the health of the prisoner requires it, in which case he may be allowed the quantity prescribed.

....

53.15 Activities off grounds. ... [A]ll wardens and superintendents of county prisons, jails, camps and houses of correction enumerated in ch. 56, may take inmates away from the institution grounds for rehabilitative and educational activities approved by the department and under such supervision as the superintendent or warden deems necessary. While away from the institution grounds an inmate is deemed to be under the care and control of the institution in which he is an inmate and subject to its rules and discipline.

Several principles flow from these statutory provisions. First, the Legislature has codified the sheriff's long-recognized inherent authority to operate and maintain the county jail and to assume the care and custody of the jail's inmates. Sec. 59.23, Stats. *See also Wisconsin Professional Police Association v. County of Dane*, 106 Wis. 2d 303, 310, 313, 316 N.W.2d 656 (1982); *State ex rel. Kennedy v. Brunst*, 26 Wis. 412, 414-15 (1870). This inherent power to control the jail and its inmates implies the power to make necessary and reasonable rules and regulations for effecting that control. *Cf.* sec. 53.15, Stats. (making prisoners subject to a jail's rules and regulations when prisoners are away from the institution's grounds for specified purposes).

Second, the statutes reflect a strong and longstanding concern with prisoners' use of alcoholic beverages. *See* secs. 53.37, 53.375, Stats. For example, section 53.375 is the latest in an unbroken line of statutes going back to 1858 that specifically prohibit prisoners

from consuming alcoholic beverages. *See, e.g.*, Rev. Stats. 1858, chapter 190, sections 6-7.

Although not apparent from the Huber Law itself, that statute's antecedents also contain similar prohibitions. In 1895, the Wisconsin Legislature authorized counties to establish workhouses for confining prisoners at hard labor. 1895 Wisconsin Laws, chapter 290, *codified at* section 697a-k (1898). The Legislature specified that "[n]o tobacco, liquor or other intoxicating beverage shall be furnished to or used by any person committed to the workhouse during his confinement therein." 1895 Wisconsin Laws, chapter 290, section 4, *codified at* section 697c (1898).¹ In 1913, the Legislature extensively amended section 697c. The 1913 amendments reinforced existing restrictions on prisoners' use of alcoholic beverages by adding the following provision:

2. ...

....

(c) *Any person who shall knowingly furnish to such convicted person, and any such convicted person who shall use any intoxicating liquors or drinks shall on conviction be punished by commitment to the county jail at hard manual labor for not less than thirty days and not more than six months.*

1913 Wisconsin Laws, chapter 625, section 1.² In 1917, the Legislature further strengthened this provision, amending it to read:

(c) The district attorney shall cause notice to be given, as provided in sections 1554 to 1556a, inclusive, and with like effect, forbidding any person to sell, furnish or give to such convicted person any intoxicating liquors or drinks during the term of his sentence. Any person who shall *** furnish to such convicted person, and any such convicted person who shall use any intoxicating liquors or drinks shall on conviction be punished by commitment to the county jail at hard manual labor for not less than thirty days and not more than six months.

1917 Wisconsin Laws, chapter 30, section 1.

¹ In 1907, the Legislature eliminated the restriction in section 697c on tobacco use by prisoners. 1907 Wisconsin Laws, chapter 341.

² Underscoring in statutory excerpts shows material added by the Legislature; asterisks indicate material legislatively deleted.

In 1919, the Legislature again revised section 697c(2). 1919 Wisconsin Laws, chapter 350, section 10. The amendment renumbered section 697c(2) as section 56.08 and provided as follows in subsection (3) of the renumbered statute:

(3) The county jail of such county is extended to any place within the county where said work is *** provided, *** and the sheriff shall at all times have the custody of such *** prisoners. Subsection (2) of section 55.07 shall apply to such prisoners; and the district attorney shall cause notice to be given, as provided in sections 1554 to 1556a, inclusive, and with like effect, forbidding any person to sell, furnish or give to such prisoners any intoxicating liquor during the term of his sentence.

At the same time, the Legislature amended another statute relating to prisoners and alcoholic beverages:

SECTION 12. Section 4497 is amended to read:

GIVING LIQUOR TO PRISONERS; MINGLING SEXES.

Section 4497. Any sheriff, jailer or keeper of any prison or any other person who shall sell, give or deliver to any prisoner, or wilfully or negligently permit any such prisoner to have any spirituous or intoxicating *** liquor, and any prisoner who shall use such liquor, *** in violation of subsection (2) of section 55.07, or who shall have in his possession in the precincts of any prison, with intent to sell, give or deliver the same to some prisoner, such spirituous or intoxicating liquor ... shall be punished by fine not exceeding one hundred dollars, or by imprisonment in the county jail not less than thirty days nor more than six months.

1919 Wisconsin Laws, chapter 350, section 12.

In 1947, the Legislature substantially revised section 56.08. 1947 Wisconsin Laws, chapter 366, section 7. This revision deleted references to alcoholic beverages. In the same year, however, the Legislature consolidated, renumbered, and revised several statutory chapters relating to prisons and jails. 1947 Wisconsin Laws, chapter 519. This revision included the following provision:

53.37 MAINTENANCE AND SANITATION OF PRISONERS; DIET; COST OF FOOD. . . .

....

(2) Neither the sheriff or other keeper of any jail nor any other person shall give, sell or deliver to any prisoner for any cause whatever any spirituous liquor or wine or cider or beer unless a physician certifies in writing that the health of the prisoner requires it, in which case he may be allowed the quantity prescribed.

1947 Wisconsin Laws, chapter 519, section 1. The legislation also cross-referenced section 53.37(2) to section 346.47, 1947 Wisconsin Laws, chapter 519, section 8, which the Legislature later renumbered as section 53.375, 1955 Wisconsin Laws, chapter 696, section 183, the statute you have cited as contributing to the sheriff's dilemma.

In 1959, the Legislature again changed section 56.08 substantially. 1959 Wisconsin Laws, chapter 504, section 3. This revision repealed former section 56.08 and then recreated it in essentially the same form in which it now exists. This change also specifically designated section 56.08 as the "Huber Law."

Although the Huber Law no longer contains within its terms the alcoholic beverage restrictions included in its predecessor statutes, this recapitulation of the statute's evolution shows that concern about prisoners' access to and use of alcoholic or intoxicating beverages existed from the earliest days of the Legislature's experimentation with alternatives to then-orthodox concepts of incarceration. Moreover, in my opinion, the lack of specific alcohol-related restrictions in the current Huber Law reflects nothing more than the Legislature's recognition and elimination of statutory redundancies. As I have already noted, section 53.375 is simply the latest in a long line of statutes imposing restrictions and penalties with respect to prisoners' use of alcoholic beverages. *See, e.g.*, Rev. Stats. 1858, chapter 190, sections 6-7. My review of these statutes persuades me that in removing alcohol-specific restrictions from the Huber Law, the Legislature removed a statutory overlap. The Legislature did not intend to diminish its concern with prisoners' use of intoxicating beverages.

In short, the history of Wisconsin statutes relating to prisoners and alcohol shows a strong, consistent intention to prevent prisoners from using alcoholic beverages while they serve their sentences.

Third, the Huber Law takes a broad, unrestricted view of the employment a Huber prisoner can pursue. Section 56.08 allows a

person granted Huber Law privileges to use them for (among other purposes) “[w]orking at employment,” section 56.08(1)(b), or “[c]onducting *any* self-employed occupation including housekeeping and attending the needs of the person’s family,” section 56.08(1)(c). Neither of these provisions contains any language indicating that a sheriff or court can preclude a prisoner from pursuing any lawful occupation while exercising Huber Law privileges. Moreover, the evolution of the Huber Law shows a steady trend toward an expansive view of permissible employment for Huber prisoners. Early versions of the Huber Law granted the sheriff and court considerable discretion as to what employment a prisoner could pursue. *Compare* 1919 Wisconsin Laws, chapter 350, section 10:

SECTION 10. Subsection 2 of section 697c is renumbered to be section 56.08, and amended to read:

56.08 EMPLOYMENT FOR THE BENEFIT OF DEPENDENTS. (1) *** In any county having no workhouse *** any person, and in all other counties any female person, convicted of any offense and sentenced to imprisonment in the county jail shall be committed to hard labor. Every such prisoner shall be required to do and perform any suitable *** labor provided for by the sheriff anywhere within said county; *** but the hours of labor in farm work shall be not less than ten nor more than twelve hours, and in all other work not more than ten hours, each day.

(2) *** At the time such sentence is imposed or at any time *** before its termination, the court sentencing such person may, upon consideration of his health and training, ability to perform labor of various kinds, and the ability of the sheriff to find and furnish various kinds of employment, direct the kind of labor at which such person shall be employed, and the nature of the care and treatment *** he shall receive during such sentence. ***

Under the current Huber Law, in contrast, neither the sheriff nor the court appears to have any power to prevent prisoners who already have jobs from continuing to engage in them when those prisoners exercise their Huber privileges.

Finally, the statutes make clear that prisoners serving Huber Law sentences, *Prue v. State*, 63 Wis. 2d 109, 114, 216 N.W.2d 43

(1974) (“[t]hose receiving Huber Law privileges are serving a sentence”), remain in the custody of the sheriff and are subject to the sheriff’s rules and regulations governing the jail. Sec. 53.15, Stats.; see also sec. 946.42(5)(b), Stats. (defining “custody” to include constructive custody). Thus, the jail’s rules as a general matter follow Huber Law prisoners into their workplaces.

Granting Huber Law privileges to a person employed or self-employed in an occupation in which the prisoner would necessarily have contact with (though not consume) alcoholic beverages exposes an apparent conflict among the applicable statutes and obviously creates the dilemma your sheriff faces. Literal application of the sheriff’s rules and regulations would vindicate the strong statutory policy against prisoners using alcohol. In addition, extension of the sheriff’s rules into a prisoner’s workplace enjoys some statutory approval. At the same time, however, the sheriff’s rules could easily deny a particular class of prisoners the benefits the Huber Law clearly grants them.

In reconciling these apparent contradictions, I have considered the statutes’ histories, contexts, subject matters, and purposes. *State v. Excel Management Services*, 111 Wis. 2d 479, 487, 331 N.W.2d 312 (1983). My reconciliation seeks “to achieve a reasonable construction which will effectuate the statute[s]’ purpose[s].” *State ex rel. Melentowich v. Klink*, 108 Wis. 2d 374, 380, 321 N.W.2d 272 (1982). My opinion also recognizes that “statutes cannot be construed in derogation of common sense.” *State v. Clausen*, 105 Wis. 2d 231, 246, 313 N.W.2d 819 (1982). In the end, my opinion, like a court decision construing statutes, must seek statutory harmony, not aggravate apparent discord. See, e.g., *Clausen*, 105 Wis. 2d at 244; *State v. Schaller*, 70 Wis. 2d 107, 110, 233 N.W.2d 416 (1975).

My review persuades me that, for several reasons, Huber Law prisoners whose employment requires them to have contact with alcoholic beverages must be permitted to engage in their employment while exercising their Huber Law privileges so long as that employment does not require them to consume alcoholic beverages and they do not in fact consume such beverages while serving their sentences under the Huber Law. First, the Huber Law itself contains no restriction on employment in which a Huber prisoner can engage, and I discern no legislative intent to restrict Huber Law privileges to employment approved by a sheriff or a court. Compare

sec. 56.08 (1)(c), Stats. (conferring on Huber prisoner a right to conduct “*any* self-employed occupation”). Unless the prisoner’s self-professed employment is illegal under some statute other than the Huber Law, a prisoner exercising Huber Law employment privileges must be allowed to engage in that employment.

Second, the statutes bearing on prisoners having contact with alcoholic beverages have as their ultimate goal preventing or minimizing the opportunity for actual consumption of alcoholic drinks by prisoners. The statutes specifically prohibit prisoners from consuming such drinks, section 53.375(2), and other statutory restrictions on transferring alcoholic beverages to prisoners serve as a means of accomplishing that goal. In my view, preventing prisoners’ use of alcoholic beverages is the end sought, and restrictions on others making transfers of alcoholic beverages to prisoners is a means to that end.

Third, the sheriff has inherent authority to establish rules governing prisoners in his or her custody. In addition, a sheriff has specific statutory authority to enforce those rules against prisoners while they are away from the jail’s premises but still under the sheriff’s constructive custody. In effect, the sheriff’s rules follow the prisoner. Thus, consistent with the prohibitions on prisoners’ consumption of alcoholic beverages, a sheriff could properly monitor Huber prisoners for alcohol consumption and punish a Huber prisoner who voluntarily consumes alcohol at the prisoner’s place of employment.

My opinion seeks to reconcile important competing demands. It allows Huber prisoners to pursue lawful occupations that do not require consumption of alcoholic beverages; it precludes Huber prisoners from actually consuming alcohol; and it allows the sheriff to punish prisoners who in fact consume alcoholic beverages while still in the sheriff’s care and custody. Thus, my opinion permits each competing interest—the Huber Law, the Legislature’s restriction on prisoners’ use of alcoholic beverages, and the sheriff’s inherent and statutory authority to control and discipline prisoners—to have effect and does not allow any one interest to interfere impermissibly with the others.

BCL:CGW

Hospitals; Implied Consent Law; A law enforcement officer may use physical restraint, subject to constitutional limitations, in order to draw a legally justified blood sample. Refusal by a health professional, without a "reasonable excuse," to comply with a law enforcement officer's authorized request to take a blood sample from a person whom the officer has physically restrained constitutes the refusal to aid an officer within the meaning of section 946.40, Stats. OAG 23-85

June 19, 1985

TIM A. DUKET, *District Attorney*
Marinette County

You have requested my opinion on several questions regarding the implied consent law and its relationship to certain other statutory and constitutional provisions.

Your first question relates to the circumstances that would require a law enforcement officer to obtain a search warrant, in spite of the existence of the implied consent statute, prior to taking a blood sample. Specifically, you ask how to reconcile the implied consent statute with *State v. Bentley*, 92 Wis. 2d 860, 286 N.W.2d 153 (Ct. App. 1979). That case discusses the requirements under the United States and Wisconsin Constitutions that a search warrant be obtained, or that certain standards justifying a warrantless search be met, before taking a blood sample. *Id.* at 864.

The implied consent statute permits the taking of blood, breath and urine samples, without a warrant or other legal basis separate from the statute itself, upon arrest of a person for violation of section 346.63(1), Stats., or a local ordinance in conformity therewith, or for violation of section 346.63(2), section 940.25 or section 940.09 where the offense involved the use of a vehicle. Sec. 343.305(2), Stats. The statute provides authority to administer a chemical test only if the arrested person has not withdrawn his implied consent by refusing to submit to the test. Sec. 343.305(3)(b), Stats. The statute provides certain penalties for the refusal to submit to a test. Sec. 343.305(3)(b), (8) and (9), Stats.

State v. Bentley was not controlled by the implied consent law. Bentley was charged with violating sections 940.09 and 940.25. At the time the case was decided, subsection (2) of the implied consent statute had not yet been amended to cover violations of sections

346.63(2), 940.09 and 940.25. See ch. 20, sec. 1568(f), Laws of 1981. See also 62 Op. Att'y Gen. 174 (1973). Therefore, the implied consent law was inapplicable. Even if the charged violations had been included in the implied consent law, the fact that Bentley had not yet been arrested when the blood sample was taken, 92 Wis. 2d at 863, and that he had refused permission to take the sample, 92 Wis. 2d at 862, meant that the implied consent law would not have provided justification for administering the blood test. The *Bentley* case was a constitutional challenge to the admissibility of blood test evidence. Accordingly, the Wisconsin Supreme Court looked to state and federal constitutional standards to appraise the evidence's admissibility.

In circumstances where the implied consent law does not furnish legal authority for drawing blood, the taking of a blood sample is only permissible if it can be justified on some other basis independent of the implied consent law. One such basis would be actual consent. See, e.g., *State v. Fillyaw*, 104 Wis. 2d 700, 312 N.W.2d 795 (1981), cert. denied, 455 U.S. 1026 (1982). Another would be a valid warrant. See *State v. Bentley*, 92 Wis. 2d at 864; *Schmerber v. California*, 384 U.S. 757, 770 (1966).

In the absence of justification under the implied consent law, actual consent or a warrant, a blood sample may nevertheless be taken if there exists probable cause for arrest and search, exigent circumstances and a reasonable method and manner of drawing the blood. *State v. Bentley*, 92 Wis. 2d at 864; *Schmerber v. California*, 384 U.S. at 768-72. In addition, there must be a "clear indication" that desired evidence in fact will be found. *Schmerber v. California*, 384 U.S. at 770.

As the above discussion indicates, the procedures relating to chemical testing which are specified in the implied consent law do not preempt general constitutional search and seizure principles. If a person refuses to submit to a blood sample within the meaning of section 343.305(3)(b), he or she may be subject to the penalties specified for such refusal in the implied consent law. Sec. 343.305(3)(b). (8) and (9), Stats. At the same time, if constitutional justification to draw that person's blood exists independently of the implied consent law, then the blood may be drawn despite the person's refusal, and it is my opinion that evidence of such a blood test would be admissible in subsequent criminal proceedings.

There are several reasons for my conclusion that, where independent legal justification exists, blood may be drawn despite a person's revocation of his implied consent. By its terms, section 343.305 is not exclusive. The statute was amended to eliminate language in subsection (2)(b) of the original statute which stated, "If the person refuses the request of a traffic officer to submit to a chemical test, no test shall be given" Ch. 193, sec. 7, Laws of 1977. *Compare* 62 Op. Att'y Gen. 174 (1973). The statute was further amended to add the current subsection (2)(d), stating, "This section does not limit the right of a law enforcement officer to obtain evidence by any other lawful means." Ch. 20, sec. 1568gm, Laws of 1981. The implied consent law does not alter independent legal standards authorizing the taking of blood samples under constitutionally permitted circumstances. *Scales v. State*, 64 Wis. 2d 485, 494, 219 N.W.2d 286 (1974). On the contrary, the legislative intent underlying the statute was to facilitate the taking of tests for intoxication and the prosecution of drunk drivers, and the courts have repeatedly stated that the statute must be liberally construed to further those policies. *See, e.g.*, Ch. 20, sec. 2051(13), Laws of 1981; *State v. Neitzel*, 95 Wis. 2d 191, 193, 203-04, 289 N.W.2d 828 (1980); *Scales v. State*, 64 Wis. 2d at 494. Thus, I conclude that the implied consent law is not violated when, on the basis of other legal authority, blood is drawn from a person who has refused to submit to the test within the meaning of section 343.305(3)(b).

Your second question relates to whether the exigent circumstances component of the constitutional standard for permitting a warrantless blood test is ever absent in a situation involving an intoxicated driver. Specifically, you ask whether exigent circumstances would be present if an accident occurred outside a courthouse at 10:00 a.m. and the district attorney and judge were available to provide a search warrant.

As noted above, this question need only arise if the implied consent law does not furnish authority to take the blood sample, and if the person from whom a sample is sought has not given actual consent.

My opinion is that drunk driving situations will usually, but not always, present exigent circumstances. Blood rapidly metabolizes alcohol, leading to deterioration and eventual disappearance of the evidence of intoxication. *State v. Bentley*, 92 Wis. 2d at 864; *Schmerber v. California*, 384 U.S. at 770. However, exigent circum-

stances are not present unless, in view of this biological phenomenon, the law enforcement officer reasonably believes that under the circumstances there is inadequate time to obtain a warrant. *State v. Bentley*, 92 Wis. 2d at 865; *Schmerber v. California*, 384 U.S. at 770-71. Your hypothetical example implies that a law enforcement officer has appeared at the scene immediately after an accident and could obtain a warrant immediately thereafter. On its face, this example suggests that the law enforcement officer probably could not reasonably believe that there was insufficient time to obtain a warrant before the evidence would deteriorate or disappear. However, a definitive determination of whether exigent circumstances exist depends upon the specific facts of each case. In the absence of information about the totality of the circumstances (including, for example, whether there were other demands on the officer—such as administering first aid—which prevented obtaining a warrant), a firm conclusion as to whether exigent circumstances exist is not possible.

It should be noted that, wherever possible, a search warrant should be obtained in order to avoid potential obstacles to future prosecution. Although there are legal exceptions to the general rule requiring search warrants, the law unquestionably looks more favorably on compliance with the general rule. Even in cases where the absence of a warrant is ultimately found to be legally justified, a significant expenditure of prosecutorial resources is often required in order to obtain that finding. Thus, complying with warrant procedures, where possible, is both legally preferable and practically advantageous.

Your third question relates to the circumstances that would permit a law enforcement officer to use physical restraint in order to obtain a blood sample. Specifically, you ask whether the severity of the offense or possession of a search warrant would justify overcoming a person's physical resistance in order to perform a blood test.

As has already been discussed, the implied consent law does not furnish permission to draw blood from a person who has withdrawn his implied consent. Sec. 343.305(3)(b), Stats. Therefore, where a person's physical resistance indicates or is accompanied by his withdrawal of implied consent, the statute does not furnish permission to exert physical force to draw blood from such a person. 68 Op. Att'y Gen. 209 (1979). However, if a person is uncon-

scious or otherwise not capable of withdrawing consent, the statute provides that the person is presumed not to have withdrawn consent. Sec. 343.305(2)(c), Stats. In such cases, physical force may be used to draw the blood, subject to the constitutional limitations discussed below.

In addition, as has already been noted, other legal bases which permit obtaining a blood sample include a valid search warrant, or the presence of probable cause, exigent circumstances, a reasonable method and manner of drawing the blood and a clear indication that the desired evidence will be found. *State v. Bentley*, 92 Wis. 2d 860; *Schmerber v. California*, 384 U.S. 757. These legal bases would permit restraining a person in order to draw blood, subject to the following constitutional limitations.

Any attempt to use physical restraint in order to take a blood sample is subject to constitutional limits on reasonable searches and seizures. See *Schmerber v. California*, 384 U.S. at 768. The leading case of *Schmerber v. California* suggested, without deciding, that administering a blood test by other than medical personnel or in other than a medical environment, or failure to respect a person's preference for a different type of chemical test on grounds of fear, concern for health or religious scruple, would fail to meet the reasonableness requirement of the fourth amendment of the United States Constitution. *Schmerber v. California*, 384 U.S. at 771-72. The United States Supreme Court has not defined the amount or type of force which would be unreasonable in administering a blood test. One commentator has stated, "The test is not rendered unreasonable in its performance merely because that amount of force needed to overcome the arrestee's resistance is used." 2 La Fave, *Search and Seizure* §5.3(c) at 325 n.97 (1978). However, there would clearly be circumstances in which the amount or type of force used could be found to be unreasonable and thus violative of the fourth amendment.

The fourth amendment of the United States Constitution requires that any intrusion beneath the skin, in order to be reasonable, must be justified under a balancing test that weighs the individual's interests in privacy and security against society's interest in conducting the procedure. *Winston v. Lee*, 53 U.S.L.W. 4367 (March 20, 1985). Factors to be considered when evaluating society's interest under this test include the existence of other adequate evidence and the severity of the underlying offense. *Winston v. Lee*;

Welsh v. Wisconsin, 104 S.Ct. 2091 (1984). Factors to be considered when evaluating the individual's interests in privacy and security include the degree of threat to health or safety. *Winston v. Lee*. I believe that attempting to draw blood by force from a person whose refusal "was due to a physical inability to submit to the test due to a physical disability or disease unrelated to the use of alcohol, controlled substances or other drugs," see section 343.305(3)(b)5.d., would be unreasonable.

In addition to search and seizure considerations, the use of force in order to extract a blood sample must comply with the due process clause of the fourteenth amendment of the United States Constitution. In *Rochin v. California*, the United States Supreme Court found that a course of events consisting of illegally breaking into a man's home, struggling to open his mouth and remove what was there, and having his stomach's contents forcibly extracted by use of a "stomach pump" against his will in order to obtain evidence of narcotics, "shock[ed] the conscience" of the Court and violated due process of law. *Rochin v. California*, 342 U.S. 165, 172 (1952). Subsequently, the United States Supreme Court found that the due process clause was not violated in two blood-test cases on the ground that a simple, medically-administered blood test is routine and not brutal, offensive or shocking. *Schmerber v. California*, 384 U.S. at 759-60; *Breithaupt v. Abram*, 352 U.S. 432, 435-37 (1957). The Court specifically suggested that a person's resort to physical violence to resist a blood test would not in itself render an ensuing test violative of the due process clause. *Schmerber v. California*, 384 U.S. at 760 n.4. However, the Court stated, "It would be a different case if the police initiated the violence, refused to respect a reasonable request to undergo a different form of testing, or responded to resistance with inappropriate force." *Schmerber v. California*, 384 U.S. at 760 n.4. See also *South Dakota v. Neville*, 459 U.S. 553, 559 n.9 (1983).

As is true of unreasonable force under the fourth amendment, the dimensions of "inappropriate force" under the due process clause have not been defined by the United States Supreme Court. I believe that the use of force to draw blood from a person whose refusal "was due to a physical disability or disease unrelated to the use of alcohol, controlled substances or other drugs," see section 343.305(3)(b)5.d., would violate the fourteenth amendment as well as the fourth amendment.

Your fourth question is whether hospital personnel would be required to comply with a law enforcement officer's request to take a blood sample from a person whom the officer has legally subdued by force for purposes of submitting to a blood sample, where the officer has completely restrained the person and has immobilized the person's arm.

In a prior opinion, I stated that hospitals, physicians, nurses and other health professionals would be criminally liable under section 946.40 for refusing to aid an officer, if they refused to comply with an officer's request to draw a blood sample from a person who has not withdrawn his implied consent or who is unconscious or otherwise incapable of withdrawing consent. 68 Op. Att'y Gen. 209 (1979). The mere fact that a police officer has physically restrained the person does not alter that analysis. It should be noted, however, that section 946.40 imposes criminal liability only if the refusal or failure to assist an officer is without "reasonable excuse," and only if the officer's command is legally authorized. It is my opinion that one such "reasonable excuse" for a health professional's refusal to comply with an officer's request to draw blood would be the absence of clear legal justification for the officer's request, such as the absence of authorization under the implied consent statute, a warrant or express consent. Another example of a good reason would be a medical basis for the refusal to draw the blood. Indeed, as noted above, a health professional's refusal to comply on medical grounds may, itself, indicate that the officer's request is not legally authorized, since both the fourth and fourteenth amendments forbid involuntary blood tests under certain medically unsound conditions.

BCL:SFG

Automobiles And Motor Vehicles; County Board; Words And Phrases; A county board has power under section 59.07(18) and (64), Stats., to enact a reasonable licensing ordinance regulating the operation of motor vehicle race tracks outside the limits of cities and villages. OAG 24-85

June 26, 1985

GLENN L. HENRY, *Corporation Counsel*
Dane County

You request my opinion as to whether the Board of Supervisors of Dane County has authority to enact an ordinance to regulate, through licensing, the operation of motor vehicle race tracks in unincorporated areas of the county. The proposed ordinance would define "motor vehicle" to include any self-propelled motor driven device, with the exception of railroad trains. It would include midget and large cars, motorcycles and snowmobiles. The ordinance purports to be applicable to both private and publicly owned areas. Motor vehicle race track is defined therein as "any place, whether on land or ice-bound waters, whereon a motor vehicle race of any type is held." The proposed annual license fee would be \$250.00 and, in addition, a permit fee of \$25.00 would be required for each day races were held. Certification as to track and spectator safety, adequate security force and ambulance and emergency medical personnel and public liability policy in the amount of one million dollars would be required. Certification by the Dane County Zoning Administrator as to compliance with zoning ordinances and from the Dane County Health Department as to the adequacy of plumbing and sanitary facilities would also be required as well as certification from the local fire department concerning the adequacy of on site facilities for the safe storage and handling of flammable fuels and for safe evacuation of persons from the premises in case of fire or other emergency. The proposed ordinance purports to be grounded on sections 59.07(18) and 59.07(64), Stats.

In my opinion, the County Board of Supervisors has the power to adopt and enforce such an ordinance.

Counties are auxiliaries of the state and can exercise only powers as are conferred upon them by statute or such as are necessarily implied therefrom. *Spaulding v. Wood County*, 218 Wis. 224, 260 N.W. 473 (1935); *Maier v. Racine County*, 1 Wis. 2d 384, 84 N.W.2d 76 (1957); *State ex rel. Conway v. Elvod*, 70 Wis. 2d 448, 234 N.W.2d 354 (1975). I am of the opinion, however, that the power to regulate race track activities is necessarily implied from powers granted in section 59.07(intro.), (18) and (64), which provides in part:

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

....

(18) AMUSEMENTS, REGULATION. (a) Exercise outside of cities and villages all the powers conferred on cities to regulate dance halls, roadhouses and *other places of amusement*.

(b) Enact ordinances to regulate, control, prohibit and license dance halls and pavilions, amusement parks, carnivals, street fairs, bathing beaches and *other like places of amusement*. Such ordinances shall provide for license fees yielding as nearly as possible sufficient revenues for administering their provisions. ...

....

(d) Ordinances enacted by a board under par. (b) or (c) shall not apply to any city or village which by ordinance regulates and controls such places.

....

(64) PEACE AND ORDER. Enact ordinances to preserve the public peace and good order within the county.

You are concerned that section 59.07(18) might not be applicable because of the rule of *ejusdem generis* that general words, following enumerated words in a statute, are restricted to a sense analogous to the less general. *Cheatham v. State*, 85 Wis. 2d 112, 124, 270 N.W.2d 194 (1978). You state that a motor vehicle race track is not analogous to the places of amusement enumerated in section 59.07(18) since persons attending motor vehicle races attend as spectators rather than as active participants. I do not agree since all of the activities set forth have both spectators and participants as do motor vehicle races. They are all similar to a degree in that they involve crowd concentrations and health and safety considerations. See *Mehlos v. Milwaukee*, 156 Wis. 591, 599-601, 146 N.W. 783 (1914), in which the court discussed the need for reasonableness with respect to city regulations enacted under the police power.

A racetrack is a place of amusement. *Gottlieb v. Sullivan County Harness Racing Ass'n.*, 269 N.Y.S. 314, 25 A.D.2d 798 (1966). It must be conceded that a motor vehicle race track is a place of amusement which a city can regulate and paragraph (a) of section 59.07(18) uses the words "other places of amusement" rather than

“other like places of amusement” employed in (b). The introduction to section 59.07 states that “[t]he board ... may exercise the following powers, *which shall be broadly and liberally construed and limited only by express language.*” In my opinion, authority granted a county board under section 59.07(18)(a) to “[e]xercise outside of cities and villages *all the powers conferred on cities* to regulate ... other places of amusement,” and authority granted in section 59.07(18)(b), which is applicable to all areas in a county, to regulate and license the activities and places enumerated including “other like places of amusement,” would, as broadly and liberally construed, include the power to regulate and license motor vehicle track racing by reasonable means. I am aware of section 175.20, which refers to places of amusement set forth in section 59.07(18)(b).

In *State v. Village of Lake Delton*, 93 Wis. 2d 78, 117, 286 N.W.2d 622 (1978), it was held that an ordinance regulating water-ski exhibitions by prohibiting them unless licensed and confining them to certain locations and times was a valid exercise of village powers and did not offend the public trust doctrine. That ordinance was grounded on section 30.77(3) which empowers municipalities to enact boating regulations and section 61.34(1) which embodies the general grant of police powers to villages. The court held that “secs. 30.77(3) and 61.34(1) together confer sufficient authority to enact the regulation here at issue.”

Section 59.07(64) which empowers a county board to enact ordinances to “preserve the public peace and good order within the county” is supportive of power to regulate race tracks through licensing. “The power to regulate ordinarily includes the power to license when such power is necessary to proper regulation.” *Milwaukee v. Filer & Stowell Co.*, 161 Wis. 426, 428, 154 N.W. 625 (1915). The same rule is stated at 9 McQuillin *Municipal Corporations* § 26.27 (3d ed. 1978). The basis for licensing as a means of regulation of race tracks is quite different than requiring a license from each holder of an alarm system which was questioned in 72 Op. Att’y Gen. 153, 155 (1983). Regulation of race tracks is grounded on preserving the public peace and good order of the county and health, welfare and safety considerations.

We are not concerned with an area within which the state has preempted regulation. See 46 Op. Att’y Gen. 184 (1957). The proposed ordinance does not appear to be in conflict with section

350.04, which enables counties, towns, cities and villages to regulate snowmobile races. State statutes, other than section 93.24(5), do not specifically address regulation of off-highway motor vehicle racing. Section 93.24(5) is concerned with the use of mufflers on motor vehicles used on the state fairgrounds in racing competition or practice. Any ordinance must be reasonable. In my view, the proposed ordinance does not infringe on constitutionally protected rights of freedom of speech or assembly. See *Milwaukee, Etc. v. Milwaukee County Park Com'n*, 477 F. Supp. 1210 (E.D. Wis. 1979).

Due process and equal protection considerations with respect to reliance upon section 59.07(64) in regulation matters were discussed in 60 Op. Att'y Gen. 158 (1971) and will not be restated here. That opinion stated that section 59.07(64) provided authority for the enactment of a county ordinance regulating the sale of beverages in disposable bottles. In 56 Op. Att'y Gen. 126 (1967), section 59.07(64) was cited as authority for enactment of a county curfew ordinance applicable to areas outside cities and villages.

In *Stetzer v. Chippewa County*, 225 Wis. 125, 273 N.W. 525 (1937), the court upheld the power of a county to regulate dance halls by licensing under a statute somewhat similar to section 59.07(18)(b). The court stated:

The court, in the *Mehlos Case, supra*, sustained the delegation of power to cities to regulate dancing. Further, sec. 22, art. IV, Const., provides:

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

....

On the right of regulation in general, as a proper subject for exercise of police power, see annotation 48 A.L.R. 144, 60 A.L.R. 173.

In construing sec. 22, art. IV, Const., the court in *Supervisors of La Pointe v. O'Malley*, 47 Wis. 332, 336, 2 N.W. 632, 635, said:

“We are inclined to hold that when any subject of legislation is entrusted to said county boards, by general words, such boards acquire the right to pass any ordinance necessary or convenient for the purpose of disposing of the whole subject so committed to them; and that, for the purpose of disposing of such subject they have all the powers which the legislature itself would have over the same subject, unless the legislature, in conferring such power, has restricted the power of the boards, or directed that it should be done in a certain way.” *Lund v. Chippewa County*, 93 Wis. 640, 646, 67 N.W. 297; *State ex rel. Rose v. Superior Court of Milwaukee County*, 105 Wis. 651, 673, 81 N.W. 1046.

The right to regulate public dances and dance halls necessarily implies the right to enforce closing hours. In the *Pumplin Case*, *supra*, the court held that the county board, under its delegated authority, had the right to prohibit “public amusements operated in disregard or violation of the regulatory provisions of such ordinances.”

In my opinion, motor vehicle race tracks as defined in the proposed ordinance are places of amusement which are subject to reasonable regulation by licensing by a county board under section 59.07(18) and (64).

BCL:RJV

Bingo; Indians; Taxation; The state may not constitutionally impose the general sales tax, section 77.52, Stats., on reservation sales of cigarettes and bingo admissions by Indian retailers to non-members of the governing tribe. The state may impose the use tax, section 77.53, on such cigarette sales and, arguably, on sales of bingo admissions. Section 77.53 requires Indian retailers to precollect the use tax. Whether the chapter 77 use tax may be imposed on reservation sales of other types of services to non-Indians depends on the facts of the particular case. Impediments to effective enforcement when the retailer is an Indian tribe or tribal corporation discussed. OAG 25-85

July 1, 1985

MICHAEL LEY, *Secretary*
Department of Revenue

You ask a series of questions relating to whether the State of Wisconsin may constitutionally impose its general sales and use taxes, section 77.51 *et seq.*, Stats., on reservation sales to non-tribal members by Indian retailers of certain taxable goods and services, particularly sales of cigarettes and admissions to bingo and other entertainment events. You also pose a number of questions concerning what enforcement procedures the department may employ in the event a delinquent tax liability is assessed against an Indian retailer.

For purposes of this opinion the term "Indian retailer" means an individual Indian, Indian partnership, Indian corporation or Indian tribe which sells any type of tangible personal property or services taxed under section 77.52(1) or (2), on the Indian reservation where the retailer's business is located. *Cf.* section TAX 9.01(4) Wis. Adm. Code.

For the reasons explained below, the state may not constitutionally impose the general sales tax, section 77.52, on reservation sales of cigarettes and bingo admissions by Indian retailers to non-members of the governing tribe. The state may, however, impose the use tax, section 77.53, on such cigarette sales and, arguably, on sales of bingo admissions. Section 77.53 requires Indian retailers to precollect the use tax. Whether the chapter 77 use tax may be imposed on reservation sales of other types of services to non-Indians would depend on the facts of the particular case. There are, in addition, a variety of impediments to effective enforcement of delinquent tax liability when Indian retailers are involved, particularly if the retailer is the tribe itself or a tribal corporation.

Considering first your questions concerning imposition of the tax, you ask:

1. Whether the State of Wisconsin may impose the sales tax upon Indian retailers who make sales of tangible personal property under s. 77.52(1), Stats., such as cigarettes, sold on Indian reservations to persons other than enrolled members of the tribe residing on the tribal reservation?

2. Whether the State of Wisconsin may require such Indian retailers to precollect the use tax on the sales described in the preceding question?
3. Whether the State of Wisconsin may impose the sales tax upon Indian retailers who sell taxable services, such as admissions to entertainment events and bingo under s. 77.52(2)(a)2., Stats., furnished and sold on Indian reservations to persons other than enrolled members of the tribe residing on the tribal reservation?
4. Whether the State of Wisconsin may require such Indian retailers to precollect the use tax on the sales described in the preceding question?

I discussed application of Wisconsin's former cigarette tax statute, chapter 139, subchapter II, Stats. (1979), to Indian persons or tribes selling cigarettes on Indian reservations in detail in an earlier opinion. 68 Op. Att'y Gen. 151 (1979). See also *Washington v. Confederated Tribes of the Colville Indian Reservation* 447 U.S. 134 (1980). The case law governing the state's authority to tax activities of Indians on their reservations discussed in my 1979 opinion, together with *Colville*, clearly control the application of the state's chapter 77 sales and use taxes to reservation Indians.

As noted in my earlier opinion:

The United States Supreme Court ... [has] made clear that a general exemption from state taxes extends to Indian tribes and Indian persons within reservation boundaries. As indicated, the Court in *Moe v. Confederated Salish and Kootenai Tribes, Etc.*, 425 U.S. 463 (1976), specifically struck down Montana's personal property tax on property located within the reservation; the vendor license fee sought to be applied to a reservation Indian conducting a cigarette business on reservation land; and the cigarette sales tax as applied to on-reservation sales by Indians to Indians. It follows that where the burden of the tax sought to be imposed is on an Indian person or Indian tribe located within reservation boundaries, such tax cannot be lawfully imposed. ...

....

Use taxes together with sales taxes constitute a general taxing plan under which everything is taxable at the retail level unless

specifically exempted. See *Dept. of Revenue v. Milwaukee Refining Corp.*, 80 Wis. 2d 44, 257 N.W.2d 855 (1977). The tax burden of a use tax is on the consumer.

68 Op. Att'y Gen. at 155-57.

Relying on *Moe*, the opinion concluded:

If [an Indian] retailer's sales are to Indian persons on a reservation, such sales are not subject to ... tax [under ch. 139, such. II, Stats.].

....

... [Nonetheless], the state does have jurisdiction to require Indian retailers doing business on a reservation to precollect [alternate use] taxes on sales to non-Indians assuming that state law requires such precollection.

Id. at 158-61. See also *Colville*, 447 U.S. at 151.

The statutory scheme authorizing the chapter 77 sales and use tax is similar in material respects to the manner in which cigarettes were taxed prior to the 1983 amendments to chapter 139, subchapter II, discussed below. As already noted, chapter 77, subchapter III, the Wisconsin sales and use tax law, constitutes a general taxing plan under which everything is taxable at the retail level unless specifically exempted. *Dept. of Revenue v. Milwaukee Refining Corp.*, 80 Wis. 2d 44, 49, 257 N.W.2d 855 (1977). Under ordinary circumstances the incidence of the general sales tax falls directly on the retailer. *Id.*, sec. 77.52(1), Stats. The answer to your first and third questions, therefore, follows: the state may not constitutionally impose its general sales tax, section 77.52(1), upon sales of either cigarettes or bingo admissions by Indian retailers on their reservation regardless of the identity of the purchaser of those goods or services. Because the incidence of the tax falls directly on the Indian retailer, the tax is impermissible. *Moe*, 425 U.S. at 480-81; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

Under the statutory sales tax scheme, a "use" or excise tax equivalent to the sales tax is imposed on the "storage, use or other consumption" of goods and services to which the sales tax applies if the sales tax has not been paid. Sec. 77.53, Stats. In the case of a sale by an Indian retailer to a non-Indian purchaser, the incidence of the use tax, section 77.53, falls on the purchaser. *Cf.*, *Colville*, 447 U.S. at 142 n.9. Accordingly, in answer to question two above,

the state can require Indian retailers doing business on the reservation to precollect the use tax, section 77.53, on sales of cigarettes to non-Indians, assuming that state law requires such precollection. *Moe*, 425 U.S. at 481-83; *Colville*, 447 U.S. at 150-51 and n.25; 68 Op. Att'y Gen. at 161.

In my opinion, section 77.53 clearly requires such precollection. See sec. 77.53(3), (4), (5) and (7), Stats. Precollection requirements are a common feature of state use tax statutes, because of the impracticality of collecting use taxes directly from individual consumers. *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 555 (1977). A precollection requirement is consistent with the statutory purpose of the use tax law of taxing sales not reached by the general sales tax. *Rice Insulation, Inc. v. Department of Revenue*, 115 Wis. 2d 513, 515, 340 N.W.2d 556 (Wis. App. 1983). See gen. McCloud, *Sales Tax and Use Tax: Historical Developments and Differing Features*, 22 Duquesne L. Rev. 823 (1984). In the case of an Indian tribe located within the taxing state, the constitutionally required nexus for imposition of the precollection requirements clearly exists, as noted in the district court decision in *Colville. Confederated Tribes of Colville v. State of Washington*, 446 F. Supp. 1339, 1357-58 (E.D. Wash. 1978), affirmed and reversed in part on other grounds in *Colville*, 447 U.S. 134.

Finally, the conclusion that section 77.53 requires retailers to precollect the use tax is strongly supported by *National Geographic*, currently the leading case on the constitutionality of use tax collection statutes. *National Geographic* involved the constitutionality of the California statute, on which the Wisconsin sales and use tax statute was originally patterned. In fact, a comparison of the California statute quoted in *National Geographic*, 430 U.S. at 553 n.1, with current section 77.53(3) reveals that the language requiring collection of the use tax by retailers is substantially identical. I have no difficulty concluding, therefore, that section 77.53 requires precollection of the use tax by Indian retailers.

Your fourth question asks about application of the use tax to taxable services such as admissions to bingo and entertainment events conducted on the reservation. I have been unable to locate any precedent which resolves the issue of whether taxes on the sale of tangible goods are distinguishable, under *Colville*, from taxes on the sale of services. My analysis of *Moe*, *Colville* and subsequent

Supreme Court cases addressing the question of a state's taxing or regulatory authority over non-Indians on an Indian reservation suggests that the state arguably may apply the use tax to sales of bingo admissions, but that authority to tax other services cannot be resolved without reference to the facts of each case. *See gen. White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Central Machinery Company v. Arizona State Tax Commission*, 448 U.S. 160 (1980); *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832, 73 L. Ed.2d 1174 (1982); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 76 L. Ed. 2d 611 (1983) ("*Mescalero Apache II*").

The cited cases suggest a number of factors that are relevant to the determination of whether a particular state tax on non-Indians on a tribal reservation may infringe on tribal sovereignty or be preempted by federal law. These include:

1. Is there a pervasive scheme of federal regulation in the area? *See White Mountain, Ramah Navajo, Central Machinery and Mescalero Apache II.*

2. Would the state tax or regulation adversely affect the tribe's ability to comply with federal policies, including tribal self-sufficiency and self-determination *See White Mountain and Mescalero Apache II.*

3. Do the taxes burden commerce that would exist on the reservation regardless of the claimed exemption? *See Moe, Colville.*

4. On whom does the burden of the tax ultimately fall? *See Moe, Colville, White Mountain and Ramah Navajo.*

5. Is the state's tax justified by any regulatory function or service? *See Ramah Navajo and Mescalero Apache II; cf. Rice v. Rehner*, 463 U.S. 713, 724 103 S. Ct. 3291, 3298 (1983).

In the case of taxation of bingo admissions, application of each of the five factors identified above would appear to favor imposition of the chapter 77 use tax on non-Indians. There is no pervasive scheme of federal regulation, nor does it appear that the tribe's ability to comply with federal policies would be adversely affected by imposition of the tax. As discussed, the burden of the tax falls on the non-Indian consumer. Wisconsin has a strong interest in the regulation of bingo, at least with regard to non-Indians. Wis.

Const. art. IV, sec. 24 and chs. 163 and 945, Stats. See also *Oneida Tribe of Indians of Wis. v. State of Wis.*, 518 F. Supp. 712 (W.D. Wis. 1981). Particularly reminiscent of *Colville* is the fact that in promoting their high stakes bingo operations, the various tribes are clearly marketing their exemption from Wisconsin's stringent regulation of bingo-related activities. Cf., *Id.* 447 U.S. at 155, 157.

In answer to your fourth question, therefore, the state arguably has authority to impose the chapter 77 use tax on non-Indians purchasing admission to bingo events on Indian reservations. As already discussed, section 77.53 requires precollection of the tax by Indian retailers. With regard to reservation sales of other types of services, the answer would depend on the application of the five factors listed above to the facts of the particular case.

Assuming that a delinquent tax liability can be assessed against Indian retailers for failure to precollect the chapter 77 use tax, you ask the following questions about enforcement:

5. In the event of a delinquent tax liability, to what extent may the department pursue collection efforts against Indian retailers, particularly in regard to:
 - a. Garnishing bank accounts of Indian tribes?
 - b. Seizing cigarettes?
 - c. Off-setting refunds of cigarette excise taxes?
6. If not currently authorized, may any of the foregoing collection procedures be authorized by enabling legislation at the state level without violating the federal constitution or laws?

Indian tribes possess the common law immunity from suit enjoyed by sovereign powers and are exempt from suit absent congressional authorization. *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506, 512-13 (1940), quoted in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Aspects of tribal sovereign immunity create, in varying degrees, difficulties with each of the enforcement mechanisms you suggest if the Indian retailer is an Indian tribe or a tribal corporation. Tribal sovereign immunity does not immunize individual Indians or Indian partnerships from suit. *Puyallup Tribe v. Washington Game Dept.*, 433 U.S. 165, 171-72 (1977). Although the difficulties in securing personal jurisdiction over an individual Indian retailer in state court actions such as garnishment may be significant, cf., *Sanapaw v. Smith*, 113 Wis. 2d

232, 335 N.W.2d 425 (Ct. App. 1983), criticized, *County of Vilas v. Chapman*, 122 Wis. 2d 211, 361 N.W.2d 699 (1985), this discussion is limited to enforcement efforts against a tribe itself or against a tribal corporation.

Garnishment is the only one of the enforcement methods you mention which requires an action in state court. Garnishment in Wisconsin is a statutory procedure requiring service of process upon both the garnishee and the defendant (in this case, the tribe or tribal corporation). Sec. 812.04(3) and 812.07, Stats. Commencement of a garnishment action by proper service of process brings the funds held by the garnishee under the jurisdiction of the court. *Elliott v. Regan*, 274 Wis. 298, 303, 79 N.W.2d 657 (1956); *Winner v. Hoyt*, 68 Wis. 278, 289, 32 N.W. 128 (1887).

The requirements for service upon a garnishee defendant are not only statutory, chapter 812, but have a constitutional basis as well. See generally *Snaidach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *North Georgia Finishing v. Di-Chem*, 419 U.S. 601 (1975).

An action for garnishment of a tribal bank account collides directly with the problem of tribal sovereign immunity. *United States Fidelity & Guaranty Co.*, 309 U.S. at 512-13; *Puyallup*, 433 U.S. at 172-3. Where tribal sovereign immunity has not been waived, Indian tribes are immune from garnishment actions as either garnishee or defendant. *North Sea Products, Ltd. v. Clipper Seafoods*, 92 Wash. 2d 236, 595 P.2d 938 (Wash. 1979); *Maryland Casualty Co. v. Citizens National Bank of West Hollywood*, 361 F.2d 517, 521-22 (5th Cir. 1966). These cases illustrate the general rule that a proceeding against property in which the sovereign has an interest is a suit against the sovereign for which a waiver of immunity is necessary. See *Maricopa County v. Valley National Bank*, 318 U.S. 357 (1943).

A waiver of sovereign immunity by Congress cannot be implied, but must be unequivocal. *Santa Clara Pueblo*, 436 U.S. at 58. Indeed, *Santa Clara Pueblo* strongly suggests that only Congress and not the tribe itself can abrogate tribal sovereign immunity. *Id.*, 436 U.S. at 58-59. Furthermore, general statutes such as the Indian Civil Rights Act, 25 U.S.C. § 1301, *et seq.*, or Pub. L. No. 280 (28 U.S.C. § 1360(a)), the statute providing for state civil jurisdiction in actions to which Indians are parties, do not waive general tribal

immunity from suit. *Id.*, 436 U.S. at 59; *Atkinson v. Haldane*, 569 P.2d 151, 167 (Alaska 1977).

For tribes organized under the Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*, two formal types of tribal organizations are possible: governmental corporations organized under section 16 of the act, 25 U.S.C. § 476, and business corporations organized under section 17 of the act, 25 U.S.C. § 477. *Atkinson*, 569 P.2d at 170-75; *S. Unique v. Gila River Pima-Maricopa*, 674 P.2d 1376, 1379-82 (Ariz. App. 1983).

Courts have uniformly held that section 16 corporations, *i.e.* tribal governmental units, enjoy full sovereign immunity. *See, e.g., Atkinson*, 569 P.2d at 174-75; *Boe v. Fort Belknap Indian Community, Inc.*, 455 F. Supp. 462 (D. Mont. 1978); *Parker Drilling Co. v. Metlakatla Indian Community*, 451 F. Supp. 1127, 1131 (D. Alaska 1978).

Section 17 business corporations, on the other hand, clearly have the ability to waive sovereign immunity, although the mere fact of corporate activity or the mere existence of a corporate charter does not waive tribal immunity for governmental conduct. *Parker Drilling*, 451 F. Supp. at 1136; *Gold v. Confederated Tribes of the Warm Springs*, 478 F. Supp. 190, 196 (D. Ore. 1979), and cases cited therein; *but see Martinez v. Southern Ute Tribe*, 150 Colo. 504, 374 P.2d 691, 694 (1962). However, a "sue and be sued" clause in the corporate charter will constitute a waiver of sovereign immunity. *See, e.g., Parker Drilling*, 451 F. Supp. at 1136; *Kenai Oil and Gas, Inc. v. Dept. of Interior*, 522 F. Supp. 521 (D. Utah 1981). The scope of waiver is limited by the precise terms of the corporate charter, however, and a tribal business organization may restrict the extent of the waiver to limit its liability. *Parker Drilling*, 451 F. Supp. at 1137. A common exclusion from waiver, from "the levy of any judgment, lien or attachment upon [tribal] property other than income or chattels especially pledged," preserves tribal sovereign immunity in garnishment actions. *Maryland Casualty*, 361 F.2d at 521; *cf. Namekagon Development Co. v. Bois Forte Reservation Housing Authority*, 517 F.2d 508 (8th Cir. 1975).

In summary, bank accounts of a tribal governmental corporation enjoy sovereign immunity from state court garnishment actions. Bank accounts of a tribal business corporation may also be immune from garnishment, unless a sue and be sued clause in the corporate

charter waives sovereign immunity. Even then, scope of the waiver may preclude the availability of garnishment as a remedy for collection of outstanding tax liability in a garnishment action.

With regard to garnishment actions, the limitations on the state's ability to garnish assets of an Indian tribe or tribal business corporation based on tribal sovereign immunity is a matter of federal law. Because only Congress and to a limited extent the tribe itself can waive tribal immunity from suit, state legislation authorizing garnishment of tribal assets would have no effect.

You inquire next about the department's authority to seize cigarettes, presumably shipments destined for sale on the reservation prior to the actual retail sale. As you are undoubtedly aware, off-reservation seizures of cigarettes destined for delivery to Indian retailers on their reservation have been approved by the courts if authorized by statute and warranted by surrounding circumstances. *Colville*, 447 U.S. at 161-62; *Stagner v. Wyoming State Tax Commission*, 682 P.2d 326 (Wyo.) *appeal dismissed*, 105 S. Ct. 237 (1984). Circumstances which justify seizure are suggested in *Colville* where the Court noted that the tribes involved had consistently refused to fulfill validly imposed collection and remittance obligations and pointedly emphasized that the seizures had in fact taken place off the reservation. *Colville*, 447 U.S. at 161-62. *Stagner* suggests that the lack of alternative enforcement options is also a circumstance which would justify seizure as an enforcement mechanism for collection of an otherwise valid tax. *Stagner* 682 P.2d at 331-32.

After *Colville*, on-reservation seizures are not likely to be approved by the courts, particularly when an off-reservation seizure is an available option. At best, the legality of on-reservation seizures is technically unsettled. The assertion by the state of authority to make on-reservation seizures would invite litigation which the state is likely to lose, given the implicit suggestion in *Colville* that such seizures would "unnecessarily intrud[e] on core tribal interests." *Id.*, 447 U.S. at 162.

Unlike under the cigarette tax statute itself, chapter 139, subchapter II, there appears to be no clear statutory authority for the department to seize shipments of cigarettes en route to Indian retailers who have refused to comply with the collection and remittance obligations of section 77.53. *Cf.* sec. 139.40, Stats. Nonethe-

less, in view of *Colville* and *Stagner*, clearly delineated statutory authority to seize goods when there is a documented pattern of refusal to comply with validly imposed state tax obligations would not violate federal law, as long as the seizures occurred outside a tribal reservation. Of course, as with garnishment, if on-reservation seizures are preempted as a matter of federal law, the acquisition of additional statutory authority under state law would be ineffective.

Finally, you ask about the department's authority to offset refunds to Indian tribes of cigarette taxes under chapter 139, subchapter II, particularly section 139.323, Stats. (1983), against a use tax liability assessed under chapter 77, subchapter III. I am not aware of any basis in federal law to suggest that such a procedure would be illegal as long as the taxes involved are valid and basic constitutional requirements, including the right to due process, are met. *Cf. Moe*, 425 U.S. at 483; *Colville*, 447 U.S. at 161-62.

I am, however, of the opinion that such an offset is not currently authorized by statute and that it may be difficult, for a variety of reasons, for the department to secure the additional authority to offset tribal refunds under section 139.323 against an outstanding use tax liability under the general sales tax statute. My opinion, in this regard, is based both on the unambiguous language of section 139.323 itself and on the legislative history of the 1983 amendments to the cigarette tax statute contained in 1983 Wisconsin Act 27.

Following my 1979 opinion, the department interpreted chapter 139, subchapter II, as containing an implied exemption from the state's cigarette tax law for Indian persons or tribes buying or selling cigarettes on their reservations. *See* section TAX 9.08 Wis. Adm. Code (1981). The 1979 opinion also highlighted the fact, however, that under the existing statute, the department had no effective means of collecting the alternative use tax lawfully imposed by section 139.33 on non-Indian purchasers when the sales occurred on Indian reservations or on Indian trust lands. This loophole in the cigarette tax law resulted in significant annual revenue losses from reservation cigarette sales to non-Indians in the years following 1979. (*See* Veto Message on 1981 S.B. 783, Budget Adjustment Bill, April 29, 1982, p. 4).

In 1982, then Governor Dreyfus vetoed statutory amendments to chapter 139 patterned directly on the Washington statute approved in *Colville*, largely because of vigorous tribal opposition to

the amendments. In doing so, the Governor urged that legislation be developed which would accommodate both state and tribal interests. *Id.*

Following the Governor's veto of the 1981 amendments to chapter 139, state and tribal representatives developed a mutually acceptable proposal which was substantially incorporated into Governor Earl's 1983 Budget Bill (*See* LRB bill folder for 1983 S.B. 83, secs. 1496-1507). The amendments to chapter 139, subchapter II, were modified in minor respects during consideration by the Joint Finance Committee and were subsequently enacted without further change. *See* Sen. Sub. Amend. 1 to 1983 S.B. 83, secs. 1502m and 1506m; and 1983 Wisconsin Act 27, secs. 1496-1506m.

The 1983 amendments made two principal changes in chapter 139, subchapter II. First, the tax on cigarettes imposed by section 139.31 was changed from an occupational tax on the seller to an excise tax, the incidence of which falls on the ultimate consumer-purchaser. Sec. 139.31(1), Stats. (1983). Secondly, the department was authorized to enter into voluntary agreements with the various state tribes, the net effect of which is to refund to the tribe seventy percent of all taxes collected under section 139.31(1) in respect to cigarette sales on that tribe's reservation or trust lands as well as all such taxes precollected on sales to tribal members. Secs. 139.323 and 139.325, Stats. (1983).

Section 139.323 contains no express authority for the department to offset the seventy percent tribal refund authorized thereunder against tax liability assessed under the sales tax statute. The statute is not ambiguous, but even if it were, the legislative history discussed above would not support an argument that such authority could be implied. Instead, the legislative history of the 1983 amendments to chapter 139 strongly suggests that the conditions set forth in section 139.323 for the seventy percent tribal refund were intended to be mandatory, precise and exclusive.

The enactment of the 1983 amendments to the cigarette tax law and their ongoing administration with regard to sales on Indian reservations has been, as you know, dependent to a significant degree on the cooperation of tribal authorities. This is a factor you undoubtedly will wish to consider in deciding whether to seek statu-

tory authority to offset section 139.323 refunds against tax liability assessed under the general sales tax law.

BCL:MAM

Licenses And Permits; Optometry; Ophthalmic assistants performing functions that are within the statutory definition of optometry under the delegation and supervision of an ophthalmologist are not engaged in the unlawful practice of optometry.

A certified optometric technician who performs services included within the definition of optometry under the delegation and supervision of a licensed optometrist is engaged in the unlicensed practice of optometry. OAG 26-85

July 3, 1985

BARBARA NICHOLS, *Secretary*

Department of Regulation and Licensing

You have asked whether ophthalmic technicians or assistants performing functions that are included within the statutory definition of the practice of optometry in section 449.01(1), Stats., under the general supervision of an ophthalmologist are engaged in the unlawful practice of optometry in violation of section 449.02(1).

I conclude that they are not.

Section 449.02(1) provides, in part: "No person shall practice optometry within the meaning of this chapter (dealing with optometry) without a license to do so" Section 449.02(2) provides, in part: "This section shall not apply to physicians and surgeons duly licensed as such in Wisconsin" Since ophthalmologists are licensed physicians and surgeons, they may perform acts that constitute the practice of optometry without violating section 449.02(1). And because ophthalmic assistants are performing certain delegated, supervised tasks of an ophthalmologist, they are not in violation of section 449.02(1) because of section 448.03(2), which provides in part:

Nothing in this chapter [the Medical Practices Act] shall be construed either to prohibit, or to require a license or certificate under this chapter for any of the following:

.....

(e) Any person providing patient services as directed, supervised and inspected by a physician or podiatrist who has the power to direct, decide and oversee the implementation of the patient services rendered.

Thus, the Medical Practices Act exempts from licensure or certification persons performing patient services under the direction and supervision of physicians and surgeons, including the specialist under consideration, ophthalmologists.

In *Huss v. Vande Hey*, 29 Wis. 2d 34, 138 N.W.2d 192 (1965), the supreme court considered the issue of the propriety of a physician's charges for physical therapy services performed by a nurse unlicensed by the Medical Examining Board. The applicable statute prohibited a person from practicing physiotherapy unless he was licensed by the Medical Examining Board or "unless he practices under a prescription and the direct supervision of a person licensed to practice medicine and surgery." Relying on the doctrine of *respondeat superior* (a legal maxim meaning that the master or principle is responsible for the acts of his or her agent), the court held that a physician's charge for physical therapy services was lawful in spite of the fact that the services were physically performed by a nurse, unlicensed by the Medical Examining Board, when the physician was not physically present. "Whether the medical doctor is physically present or absent at the time physical therapy is rendered by a nurse in his office, the doctor is fully responsible for her conduct under the doctrine of *respondeat superior*." *Huss*, 29 Wis. 2d at 43.

It is my opinion that while there may be an arguable difference between the "under a prescription and the direct supervision" language considered by the supreme court in the *Vande Hey* decision and the "as directed, supervised and inspected" language of the current section 448.03(2) now under consideration, the terms are similar enough for our purposes to conclude that the supreme court would reach the same answer as I have on the issue presented by your first question.

A medical practitioner authorized to delegate tasks under section 448.03(2)(e) is limited by section 448.21, which provides that physicians' assistants may not perform patient services, except routine screening, in the practice of dentistry or dental hygiene, optometry, chiropractic or podiatry.

It has been suggested that since physicians' assistants are prohibited by section 448.21 from performing patient services in these four specialty areas, ophthalmic assistants are likewise prohibited from performing optometric services. However, section 448.21 only limits a medical practitioner in delegating certain tasks to *physicians' assistants*, not to all ancillary health personnel.

Moreover, ophthalmic assistants and physicians' assistants are separate and distinct classifications of health personnel. Ophthalmic assistants generally attend a certified school for two years. Upon graduation and completion of a written examination, they are certified by the Joint Commission on Allied Health Personnel in Ophthalmology, a private organization consisting of several ophthalmological organizations and societies. In the program, ophthalmic assistants are trained to perform various diagnostic tasks and measurements under the direction and supervision of a licensed ophthalmologist. In order to be certified, ophthalmic assistants must prove their competency in the following areas: patient history taking, basic skills and lensometry, such as measurement of basic curve, ophthalmic patient services, such as measurement of interpupillary distance for far and near, basic tonometry, instrument maintenance and repair and general medical knowledge and cardiopulmonary resuscitation. Once certified, ophthalmic assistants may be employed as such by ophthalmologists in clinics or hospitals.

Physicians' assistants are a separate classification of health personnel. They must meet specific certification requirements and are statutorily regulated. Since physicians' assistants are not trained to perform optometric tasks, it is reasonable that they are prohibited by statute from performing these tasks. If physicians' assistants are also trained as ophthalmic technicians, they may perform as such under section 448.03(2).

It is clear that the Legislature did not intend that all personnel who assist physicians be classified as physicians' assistants. Section 448.05(5) expresses the legislative intent that physicians' assistants be a specific classification of health personnel with rules applicable to that classification. This section provides, in part: "Nothing in this subsection shall be construed as requiring certification under this subsection of other persons who assist physicians."

Your second question reads: "Is a certified optometric technician who practices optometry as defined by Wis. Stats. 449.01(1) under the general supervision of a licensed optometrist engaging in the unlicensed practice of optometry in violation of Wis. Stats., sec. 449.02(1)?"

The applicable statutes seem to dictate a yes answer.

As noted earlier, section 449.02 bars persons from practicing optometry without a license to do so (except licensed physicians and surgeons). But there is no language in chapter 449, similar to that in chapter 448, that authorizes optometrists to delegate to assistants certain optometric tasks. While statutory authorization may not be necessary for delegation, the section 449.02 proscription would render nonlicensed persons operating under the delegation violative of the statute.

My answer to your second question is consistent with the opinions at 10 Op. Att'y Gen. 247 (1921) and 60 Op. Att'y Gen. 371 (1971). Because these two early opinions issued before the enactment of section 448.03(2), they no longer have a bearing on your first question.

BCL:WHW

HMO; Health And Social Services, Department Of; Health maintenance organizations which contract with the Department of Health and Social Services to provide coverage to medical assistance recipients are required to offer continuation of benefits to those whose eligibility for medical assistance terminates pursuant to section 632.897(1). OAG 27-85

July 3, 1985

THOMAS P. FOX, *Commissioner*
Office of Commissioner of Insurance

You request my opinion concerning a question that has arisen over hospital and medical coverage for persons insured under individual and group policies. Specifically, you ask whether health maintenance organizations (hereinafter "HMOs") which contract with the Department of Health and Social Services (hereinafter "DH&SS") to provide coverage to medical assistance recipients are

required to offer continuation of benefits to those whose eligibility for medical assistance terminates pursuant to section 632.897(1), Stats.

You also ask a subsidiary question which is relevant only if the answer to the first question is in the affirmative. Your second question is whether the Office of the Commissioner of Insurance (hereinafter "OCI") may exempt an HMO from section 632.897, under section 628.36(2m)(b) and (3), when the HMO contracts with DH&SS to provide coverage to medical assistance recipients.

The genesis of your question appears to be DH&SS's decision to contract with HMOs to provide medical assistance to Medicaid recipients. In February 1982, in response to legislative mandates to increase enrollment of Medicaid recipients in HMOs, DH&SS requested and received from the Federal Department of Health and Human Services a waiver of those federal regulations which permit Medicaid recipients to go to any health care provider. In July 1983, DH&SS released "proposal specifications" soliciting proposals from HMOs in Dane County and Milwaukee County for the purpose of providing health care services to Medicaid recipients on a prepaid basis. Contracts were signed in May and June 1984 with thirteen of the fourteen bidders. Enrollment of Medicaid eligibles in HMOs in Dane County began on July 1, 1984, and in Milwaukee County on September 1, 1984. Enrollment in Milwaukee was on a voluntary basis from September 1 through December 1, 1984. Beginning January 1, 1985, eligible recipients were required to enroll in one of the eight available HMOs in Milwaukee. The contract between DH&SS and the respective HMOs is labeled a "Contract for Services Between DH&SS and [an HMO]" (hereinafter the "Contract"). The prefatory contract language is as follows:

The Department of Health and Social Services and [an HMO], an insurer with a certificate of authority to do business in Wisconsin, and an organization which makes available to enrolled participants, in consideration of periodic fixed payments, comprehensive health care services provided by providers selected by the organization and who are employees or partners of the organization or who have entered into a referral or contractual arrangement with the organization, for the purpose of providing and paying for Medical Assistance contract services to recipients enrolled in the HMO under the State Medical Assistance Plan approved by the Secretary of the United States De-

partment of Health and Human Services pursuant to the provisions of the Social Security Act, do herewith agree:

Section 632.897 mandates that any group insurance policy must contain certain continuation and conversion benefits for the insureds and some of the insureds' dependents. Your first question is essentially a question of statutory interpretation of the scope of section 632.897(1)(b) and (c). The relevant statutory language is as follows:

632.897. HOSPITAL AND MEDICAL COVERAGE FOR PERSONS INSURED UNDER INDIVIDUAL AND GROUP POLICIES.

....

(b) "Employer" means the policyholder in the case of a group policy as defined in par. (c)1 and the sponsor in the case of a group policy is defined in par. (c)2 or 3.

(c) "Group policy" means:

1. An insurance policy issued by an insurer to a policyholder on behalf of a group whose members thereby receive hospital or medical coverage on either an expense incurred or service basis, other than for specified diseases or for accidental injuries;

2. An uninsured plan or program whereby a health maintenance organization, labor union, religious community or other sponsor contracts to provide hospital or medical coverage to members of a group on either an expense incurred or service basis, other than for specified diseases or for accidental injuries; or

3. A plan or program whereby a sponsor arranges for the mass marketing of franchise insurance to members of a group related to one another through their relationship with the sponsor.

It appears that DH&SS is an "employer" within the terms of section 632.897(1)(b). "Policyholder" is defined in section 600.03(37) as "the person who controls the policy by ownership, payment of premiums or otherwise. See also 'insured.'" See also definition of "control," section 600.03(13). The term insured is defined in section 600.03(26) as follows:

“Insured” means any person to whom or for whose benefit an insurer makes a promise in an insurance policy. The term includes policyholders, subscribers, members and beneficiaries. This definition applies only to chs. 600 to 646 and does not apply to the use of the word in insurance policies.

Although there may be very strong policy reasons for permitting DH&SS to proceed with its plan without requiring compliance with section 632.897, the DH&SS program and Contracts appear to fall unambiguously within the terms of section 632.897. Consequently, because there is no facial ambiguity of the statutory language, there is no need to analyze the legislative intent or legislative history associated with section 632.897. In short, although the Legislature may not have considered the impact of section 632.897 on programs such as the one at issue, the language in section 632.897 unambiguously covers this fact situation.

Although the contract between DH&SS and the HMOs uses terms such as “enrollee” and “participant” instead of “insured” or “policyholder,” it is clear that DH&SS “controls the policy[ies] by ownership, payment of premiums or otherwise.” Sec. 600.03(37) and (13), Stats. Also, the contract for services between DH&SS and the HMOs are group policies within the terms of section 632.897(1)(c)1. in that they are “[a]n insurance policy issued by an insurer to a policyholder on behalf of a group whose members thereby receive hospital or medical coverage on ... [a] service basis” The Contract is an “insurance policy issued by an insurer” pursuant to the definitions provided in section 600.03 and 632.897(1)(d). For example, the Contract clearly deals with insurance in that it is included within the definition: “Risk distributing arrangements providing for compensation of damages or loss through the provision of services or benefits in kind rather than indemnity in money.” Sec. 600.03(25)(a)1, Stats. The Contract is a “policy” in that it is a “document ... used to prescribe in writing the terms of an insurance contract” Sec. 600.03(35) (definition of “policy”), Stats. “Insurer” is defined as “any person or association of persons doing an insurance business as a principal, and includes fraternal, issuers of gift annuities, cooperative associations organized under s. 185.981 and insurers operating under subch. I of ch. 616. It also includes any person purporting or intending to do an insurance business as a principal on his or her own account.” Sec. 600.03(27), Stats. *See also* sec. 632.897(1)(d), Stats. The HMOs

involved here clearly fall within the definition of "insurer" given their agreement to provide comprehensive health care services in consideration of periodic fixed payments. Moreover, the conclusion that the Contracts involved here are "group policies" pursuant to section 632.897(1)(c) is consistent with the definition of "group insurance policy" contained in section 600.03(23).

Similarly, section 632.897(1)(b) and (c)2 provides an alternative rationale for finding that DH&SS is an "employer" and thereby subject to the continuation and conversion requirements contained therein. That is, pursuant to section 632.897(1)(b), DH&SS is a sponsor of a group policy as defined in section 632.897(1)(c)2. The Contract could be viewed in this instance as an uninsured plan or program whereby an HMO contracts to provide hospital or medical coverage to members of a group on an expense incurred or service basis. *See* sec. 632.897(1)(c)2, Stats.

With regard to the second question posed in your letter, it does appear that OCI may, pursuant to section 628.36(2m)(b) and (3), exempt an HMO from section 632.897, even when the HMO contracts with DH&SS provide coverage to medical assistance recipients. Subsection (3) provides as follows:

EXEMPTION BY RULE. By rule the commissioner may exempt from the application of any part of subs. (1) to (2m) [including the requirement that plans comply with chapters 600 to 646 as set forth in section 628.36(2m)(b), including 632.897] plans which provide innovative approaches to the delivery of health care or which are designed to contain health care costs, and which cannot operate successfully consistent with all of the provisions in subs. (1) to (2m). The commissioner may promulgate such a rule only if on a finding that the interests of the public requires such plans as an experiment, to supply health care services that are not otherwise available in adequate quantity or quality, or to contain health care costs. The promulgated rule shall be as narrow as is compatible with the success of the plan.

I am unable at this time to render an opinion as to whether the criteria as set forth in this subsection have been met in this case. It certainly appears that the use of HMOs by DH&SS is designed to contain health care costs. However, I have been provided with no factual record by your office or by DH&SS which would permit me

to render an opinion as to whether the DH&SS program "cannot operate successfully consistent" with the requirements in the insurance laws, most particularly the requirement contained in section 632.897. Finally, the requirement that whatever rule is adopted by OCI be as "narrow as is compatible with the success of the plans" suggests that it would be very difficult to render an opinion as to whether a particular rule comports with OCI's exemption authority absent a review of the actual language of the proposed rule.

BCL:KJO

Fire Department; Municipalities; Section 61.65(2), Stats., permits three or more municipalities, including a mixture of three villages and a city, to establish and operate a joint fire department. Recourse to section 66.30 does not appear to be necessary or appropriate for the purpose of creating such a joint fire department. OAG 28-85

July 24, 1985

THOMAS LOFTUS, *Chairperson*

Assembly Committee on Organization

The Assembly Committee on Organization has requested my opinion as to whether section 61.65(1) and (2) or 66.30, Stats., permits three or more municipalities, including a mixture of three villages and a city, to establish and operate a joint fire department. The specific example you provide involves the Villages of Shorewood, Whitefish Bay and Fox Point and the City of Glendale in Milwaukee County. The City of Glendale is a third class city and the population of the smallest of the villages exceeds 7,000.¹

Chapter 171, Laws of 1981, revised a number of municipal statutes dealing with local police and fire protective services, including section 61.65(1) and (2), to increase the methods by which larger villages may provide police or fire protective services. Section 61.65(2), which sets forth those options, provides in part as follows:

(2)(a) Each village with a population of 5,500 or more shall provide fire protection services by one of the following methods:

¹ Source: State of Wisconsin, 1983-84 Blue Book.

....

3. Creating a joint fire department with a city or town or with another village.

(b)1.

2. Each village with a population of 5,500 or more that creates a joint fire department with another municipality shall create a joint board of fire commissioners with that municipality to govern the joint department.

Chapter 171, Laws of 1981, was apparently designed in part to provide larger villages, such as those in your example, with greater flexibility in satisfying their responsibility to provide adequate and economical fire protection services for their citizens.

The concern motivating your question centers in part on the statutory language which authorizes "[e]ach village with a population of 5,500 or more" to create a joint fire department with "a city or town or with another village." Materials forwarded from your office suggest that "[t]here is a question whether this language limits the number to two municipalities and no more." In my opinion, the subject statutory language does not so limit the number of municipalities which may join with a village with a population of 5,500 or more to create a joint fire department.

In construing statutory language, such as that used in the above quoted provisions of section 61.65(2) and companion provisions of the statutes dealing with the creation of joint fire departments, "[t]he singular includes the plural," unless such construction would produce a result inconsistent with the manifest intent of the Legislature. Sec. 990.001(1), Stats. According to the analysis of the Legislative Reference Bureau which accompanied the bill which became chapter 171, Laws of 1981, such law was intended to increase the options of villages that provide protective services. Thus, the application of the above rule of statutory construction to the subject statutory language is in keeping with that evident intent of the Legislature.

Recourse to section 66.30 does not appear to be either necessary or appropriate. The preservation of order and the protection of life and property are matters of statewide concern, and "[t]hese powers so vested by the legislature in the municipalities may be withdrawn, modified, or dealt with as the public interest requires in the opinion

of the legislature." *Van Gilder v. Madison*, 222 Wis. 58, 76, 268 N.W. 108 (1936). Section 61.65(5) expressly provides: "The provisions of this section shall be construed as an enactment of state-wide concern for the purpose of providing a uniform regulation of police and fire departments." Section 62.13(12), which deals with city police and fire departments, contains similar language. Therefore, the provisions of section 61.65(2) dealing with the creation of a joint fire department, as complemented by companion provisions under the city statutes, section 62.13(2)(b), and the town statutes, section 60.55(1)(a)2., should be viewed as establishing mandatory requirements for governing the creation and operation of any joint fire department involving a large village, *i.e.*, a village with a population of 5,500 or more. Whatever authority villages subject to section 61.65 may exercise to establish joint fire departments with other municipalities is already expressly set forth in that statute or arises therefrom by necessary implication.

A unified administration of such a joint fire department would be assured by granting the joint board of fire commissioners optional powers to control and manage such department, as authorized under the provisions of sections 61.65(3g)(d)2. and 62.13(6). However, where the electors do not approve such a broad grant of optional powers to the joint board, organization and supervision of the department, contracting and the audit of such department would remain in the joint control of the common councils, village boards or town boards and the executive officers of the respective municipalities.

BCL:JCM

Employer And Employee; Physicians And Surgeons; Public Records; The final decision of a quasi-judicial body regarding disciplinary action against a physician in the unclassified service is properly deemed available under the public records law. OAG 29-85

August 2, 1985

JUDITH A. TEMBY, *Secretary*
Board of Regents

On behalf of the Board of Regents, you ask whether the final decision and order of the Council of Trustees of the University of

Wisconsin Hospital and Clinics regarding disciplinary action taken against a physician on the active medical staff is accessible under the public records law, section 19.31, Stats., *et seq.*

You state that the Council of Trustees was created by the Board of Regents to govern the University Hospital and Clinics. In the instant matter, the Council of Trustees acted as the decision-maker of last resort in disciplinary proceedings against a physician on the active medical staff. The physician is an unclassified employe. All proceedings have been conducted in closed session pursuant to section 19.85(1)(b) and bylaws of the medical staff.

You ask whether the Council of Trustees' final decision is accessible to the public under the public records law.

You have assumed that the requested documents are "records" within the definition in section 19.32(2), and the Council of Trustees falls within the definition of an "authority" under section 19.32(1). Therefore, there is a presumption in favor of public access and only in extraordinary cases may access be denied. Sec. 19.31, Stats. The analysis begins with section 19.35(1)(a), which reads:

Access to records; fees. (1) RIGHT TO INSPECTION. (a) Except as otherwise provided by law, any requester has a right to inspect any record. Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect. The exemptions to the requirement of a governmental body to meet in open session under s. 19.85 are indicative of public policy, but may be used as grounds for denying public access to a record only if the authority or legal custodian under s. 19.33 makes a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made.

As stated in 73 Op. Att'y Gen. 20-21 (1984):

This provision recognizes three possible bases for denying access to public records: (1) express statutory exemptions; (2) exemptions under the open meetings law if the requisite demonstration is made; and (3) common law principles. The crux of the common law on public records is the "balancing test" which provides that the custodian "must balance the harm to the public interest from public examination of the records against the benefit to the public interest from opening these records to examination, giving much weight to the beneficial public interest in open

public records." *State ex rel. Bilder v. Delavan Tp.*, 112 Wis. 2d 539, 553, 334 N.W.2d 252 (1983).

As to the first possible basis, I am not aware of any express statutory exemption that applies to the situation you pose.

As to the second, pertinent exemptions under section 19.85 authorize closed sessions for the following purposes:

(a) Deliberating concerning a case which was the subject of any judicial or quasi-judicial trial or hearing before that governmental body.

(b) *Considering* dismissal, demotion, licensing or *discipline of any public employe* or person licensed by a board or commission or the investigation of charges against such person, or considering the grant or denial of tenure for a university faculty member, *and the taking of formal action on any such matter*; provided that the faculty member or other public employe or person licensed is given actual notice of any evidentiary hearing which may be held prior to final action being taken and of any meeting at which final action may be taken. The notice shall contain a statement that the person has the right to demand that the evidentiary hearing or meeting be held in open session. This paragraph and par. (f) do not apply to any such evidentiary hearing or meeting where the employe or person licensed requests that an open session be held.

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

.....

(f) *Considering* financial, medical, social or personal histories or *disciplinary data of specific persons, preliminary consideration of specific personnel problems* or the investigation of charges against specific persons except where par. (b) applies which, if discussed in public, would be likely to have a substantial adverse effect upon the reputation of any person referred to in such histories or data, or involved in such problems or investigations.

The relationship between section 19.35(1)(a) and the exemptions to the open meetings law is as follows:

The statute recognizes that in the exemption provisions the Legislature has identified categories of sensitive information, but the Legislature has not mandated that all such information be withheld all the time. In my opinion the exemptions under section 19.85 may not be used as the basis for general blanket exceptions under the public records law. When exemptions to the open meetings law are relied on, section 19.35(1)(a) requires a case-by-case determination with respect to each request as of the time of the request. Any blanket custodial policy would be contrary to this requirement.

73 Op. Att'y Gen. at 22. In accord, 73 Op. Att'y Gen. 26, 28 (1984) and 66 Op. Att'y Gen. 302, 306 (1977).

With the burden of decision-making comes the power to exercise discretion.

The legislature has provided that the governmental unit, not the individual, has the power to open or close meetings and it is the legal custodian of the record, not the citizen, who has the right to have the record closed if the custodian makes a specific demonstration that there is a need to restrict public access at the time the request to inspect is made.

State ex rel. Bilder v. Delavan Tp., 112 Wis. 2d 539, 558, 334 N.W.2d 252 (1983).

You state that the attorney for the physician points to section 230.13 as a basis for keeping records of disciplinary actions confidential. That statute does authorize the state Department of Employment Relations to keep closed records pertaining to "disciplinary actions." Sec. 230.13(5), Stats. However, as a matter of express authority, the authority under section 230.13 is given only to the secretary of the Department of Employment Relations and the administrator of the Division of Merit Recruitment and Selection. I am advised by their offices that their custodial jurisdiction over personnel files extends only to employes in the classified service and not to any employes in the unclassified service. Their jurisdiction would not extend to faculty who are in the unclassified service. Sec. 230.08(2)(d), Stats. Thus, neither would their discretionary authority under section 230.13 extend to personnel records of employes in the unclassified service.

It may be argued that even if section 230.13 does not technically apply to persons in the unclassified service, the statute does express

a legislative sensitivity to certain types of state personnel records and that sensitivity should extend to records of those in the unclassified service. But even if that were so, the authority under section 230.13 is discretionary. As with the exemptions to the open meetings law, I would expect the court to find this to be a matter of custodial discretion, not a personal right on the side of the individual involved. *Bilder*, 112 Wis. 2d at 558.

Finally, it may very well be that the possible limitation on access to Department of Employment Relations records under section 230.13 would not affect access to the proceedings before and decision of a separate quasi-judicial body. This is certainly the case with respect to disciplinary matters that come before the state Personnel Commission. Although the commission will honor a request to keep a hearing closed, under section 230.44(4)(a) the commission's decision and the transcript of proceedings are open to the public by virtue of section 230.45(1)(h) and section PL 6.04(4)(b) and (c) Wis. Adm. Code.

In your letter you state that the Board of Regents has "preliminarily concluded that the Final Decision and Order in the case before the Council of Trustees should be accessible to the public." Given the statutory presumption in favor of access to public records, and the discretionary nature of granting an exception, it is my opinion that a court would sustain your decision.

BCL:RWL

County Board; Public Officials; A county board supervisor elected at the 1984 Spring election who moved from such district in the Fall of 1984 vacated his office even though he continued to reside in the same county because 1983 Wisconsin Act 484 amended section 59.125, Stats., to require that "[n]o person is eligible to hold the office of county supervisor who is not a resident of the supervisory district from which he or she was chosen." OAG 30-85

August 8, 1985

JOHN D. OSINGA, *District Attorney*
Portage County

You request my opinion whether a person elected to the office of county supervisor in Portage County at the 1984 Spring election

and who thereafter qualified, in late April or early May of 1984, vacated his office by moving from the supervisory district from which he was elected in the Fall of 1984 even though he continued to be a resident of Portage County.

I am of the opinion that he did vacate such office. It is my opinion, however, that he continues to serve in a *de facto* status until his successor has been appointed and qualifies. *State ex rel. Reynolds v. Smith*, 22 Wis. 2d 516, 522, 126 N.W.2d 215 (1964).

In 60 Op. Att'y Gen. 55 (1971), it was stated that a county board supervisor did not vacate his or her office by moving from the district from which elected if he or she continues to reside in the county. The opinion did not cite, but did follow the holding in *State ex rel. Gill, Att'y Gen'l v. The Supervisors of Milwaukee County*, 21 Wis. 449 (1867). In 1971, section 59.03(2)(d), Stats., provided that a candidate must be a qualified elector and resident of his or her supervisory district and section 59.03(2)(e) provided that in the case of a vacancy the person to be appointed must be a qualified elector and resident of the supervisory district. No specific statute provided that a person who ceased to be a resident of the district vacated the office. It was stated that section 17.03(4) was not applicable, since as a county officer he or she did not cease to be a resident of the county. The opinion noted "that sec. 17.03(4), Stats., uses the phrase 'for which he was elected' rather than 'from which he was elected.'" 60 Op. Att'y Gen. at 56.

Chapters 427 and 447, Laws of 1977, created section 59.125 to provide: "No person is eligible to become a candidate for county elective office who is not a resident of the county at the time of filing nomination papers. In addition, candidates for county supervisor to which s. 59.03(3)(d) applies shall be qualified as provided in that paragraph." At that time section 59.03(3)(d) required that "[a] candidate for the office of supervisor shall be a qualified elector and resident of his or her supervisory district at least 10 days prior to the earliest time for the commencement of the circulation of nomination papers."

Section 149 of 1983 Wisconsin Act 484 amended section 59.03(3)(d) by deleting the sentence quoted above. Section 154 of the same Act changed the language in section 59.125 from eligibility "to become a candidate" to eligibility "to hold the office of county supervisor" in providing:

Eligibility for county office. No person is eligible to become a candidate for hold a county elective office who is not a resident of the county at the time of filing nomination papers. In addition, candidates for. *No person is eligible to hold the office of county supervisor to which s. 59.03(3)(d) applies shall be qualified as provided in that paragraph who is not a resident of the supervisory district from which he or she is chosen. No person is eligible to hold the office of district attorney who is not licensed to practice law in this state.*

The change in language also established that the Legislature intended that although a county supervisor was a county officer, such officer was elected *from* and *for* a specific district. The change also required a county supervisor to continue to be a resident of the supervisory district for which he or she was elected during the entire term.

Section 175(2) of 1983 Wisconsin Act 484 contained a specific provision as to the initial applicability of such portions of the Act. As presented to the Governor, it contained a provision postponing the effective date of altered section 59.125 to June 1, 1985. Such provision for postponement was vetoed by the Governor.

Any county supervisor holding office on the effective date of this act specified in Section 176(1) who is not a resident of the supervisory district from which he or she is chosen vacates his or her office on the 30th day commencing after the effective date of this act. ~~The effective date of this section shall be June 1, 1985.~~

Section 175(2) of 1983 Wisconsin Act 484.

Section 176(1) of 1983 Wisconsin Act 484 provided that, except for sections not material here, the Act took effect on June 1, 1984. Therefore, section 59.125, as amended, became effective June 1, 1984.

In enacting the thirty-day grace period provision, the Legislature may have been responding to the rule that if an officer who is eligible at the time of his or her election becomes ineligible under some legal or constitutional provision during his or her term, such officer should be allowed a reasonable time in which to remove the ineligibility before the office can be deemed vacant. *State ex rel. Postel v. Marcus*, 160 Wis. 354, 152 N.W. 419 (1915).

It is my opinion that the veto by the Governor effectively removed the words shown above as deleted by dash marks even though the written objections submitted by such officer made reference to "a prohibition on convicted felons being placed on a ballot," and section 175(2) does not appear to be concerned with convicted felons in any degree. By reason of the special provision in section 175(2) quoted above, county board supervisors not residing in their district on June 1, 1984, were granted a thirty-day grace period to move back into the district from which they were elected. Any such supervisor who failed to reestablish such residency within the thirty-day period would vacate such office by reason of section 59.125 and the special provision quoted above.

Any supervisor who moved *from* the supervisory district from which elected after June 1, 1984, would vacate his or her office by reason of sections 17.03(4) and (13) and 59.125. Section 17.03(4) and (13) provides:

Vacancies, how caused. Any public office is deemed vacant upon the happening of any of the following events, except as otherwise provided:

....

(4) His or her ceasing to be an inhabitant of this state ... or if the office is local, his or her ceasing to be an inhabitant of the *district*, county, city, village, town, aldermanic district or school district *for which he or she was elected* or within which the duties of his or her office are required to be discharged...

....

(13) On the happening of any other event which is declared by any special provision of law to create a vacancy.

The Legislature has the power to establish eligibility requirements for those public offices not created or regulated by the Wisconsin Constitution. *State ex rel. Buell v. Frear*, 146 Wis. 291, 299, 131 N.W.2d 832 (1911). The office of county supervisor is one such public office. As a statutorily-created office, the office of county supervisor can be altered legislatively as to term, eligibility to hold office and duties, without regard to any rights an incumbent might

have. *The State and De Guenther v. Douglas*, 26 Wis. 428 (1870); *State ex rel. Williams v. Samuelson*, 131 Wis. 499, 111 N.W. 712 (1907). Also, since the constitution does not set forth the cases in which the office of county supervisor is deemed vacant, the Legislature can and has acted to so provide in section 17.03(4) and (13), promulgated under authority of article XIII, section 10 of the Wisconsin Constitution. This section provides: "The legislature may declare the cases in which any office shall be deemed vacant, and also the manner of filling the vacancy, where no provision is made for that purpose in this constitution."

When it is established that a county board supervisor has moved out of the supervisory district from and for which he or she was elected, the county board chairperson, with board approval, can act to fill the office of supervisor pursuant to section 59.03(3)(e). In my opinion, an appointing authority has a duty to act to fill a vacancy within a reasonable time where circumstances indicate that a vacancy does exist. See section 17.03 as to other events which cause a vacancy. In some situations a formal resignation may be voluntarily tendered by a person who is not certain as to whether he or she has vacated an office. Section 17.16(10) provides that "[a] person lawfully removed from office shall be ineligible to appointment or election to fill the vacancy caused by such removal." Under the facts stated in your letter, the supervisor would not be ineligible for appointment to fill the vacancy if he regained eligibility by returning to reside in the district since no formal removal proceedings have taken place under section 17.16.

BCL:RJV

County Board; Judges; A county board of supervisors does not have authority to pay the bar dues of elected circuit judges serving the county. Such dues are professional responsibilities of the person serving as judge and are not costs of operation of the circuit court. The Legislature could enact legislation to empower the county to pay such dues as a part of compensation or reimbursement for expense connected with duties, or could provide that the state pay such dues. OAG 31-85

August 14, 1985

RALPH E. SHARP, JR., *Corporation Counsel*
Dodge County

You ask my opinion on two questions, which I have taken the liberty to restate:

1. Does the Board of Supervisors of Dodge County (hereinafter "the Board") have the authority to pay the Wisconsin bar dues for the circuit judges serving Dodge County?
2. Does the Circuit Court for Dodge County have inherent power to direct the Board to pay the state bar dues of its presiding judge?

In my opinion, the answer to the first question is no. The answer to the second question is probably not.

It is well established that a county board "has only such powers as are expressly conferred on it or necessarily implied from those expressly given." *Dodge County v. Kaiser*, 243 Wis. 551, 557, 11 N.W.2d 348 (1943); *Maier v. Racine County*, 1 Wis. 2d 384, 385, 84 N.W.2d 76 (1957). As stated in *State ex rel. Conway v. Elvod*, 70 Wis. 2d 448, 450, 234 N.W.2d 354 (1975): "A county is totally a creature of the legislature, and its powers must be exercised within the scope of authority ceded to it by the state." *Accord, Dane County v. H&SS Dept.*, 79 Wis. 2d 323, 329-30, 255 N.W.2d 539 (1977). And, as you have noted, in *Dodge County v. Kaiser*, there is quoted with approval the statement from *Spaulding v. Wood County*, 218 Wis. 224, 229, 260 N.W. 473 (1935), that: "It has been held that if there be a fair and reasonable doubt as to an implied power it is fatal to its being."

Article VII, section 6 of the Wisconsin Constitution, provides: "The legislature shall prescribe by law the number of judicial circuits, making them as compact and convenient as practicable, and bounding them by county lines." Article VII, section 7 of the Wisconsin Constitution provides that circuit judges shall be chosen by the qualified electors of each circuit and "shall reside in the circuit from which elected." Article VII, section 10(2) of the Wisconsin Constitution provides: "Justices of the supreme court and judges of the courts of record shall receive such compensation as the legislature may authorize by law, but may not receive fees of office."

In *Committee to Retain Byers v. Elections Board*, 95 Wis. 2d 632, 291 N.W.2d 616 (Ct. App. 1980), it was held that the office of circuit judge is a state rather than a county office even though under former statutes the county paid a portion of the circuit judge's salary. The court stated, 95 Wis. 2d at 635:

Furthermore, circuit court judges are compensated as state employees, sec. 753.07(1), Stats., and are classified as constitutional officers or as other elected state officials for statutory salaries. Section 20.923(2), Stats. On the other hand, neither constitutional provisions designating county offices, art. VI, §4 nor the statutory provision of ch. 59, designate the office of circuit court judge as a county office.

Wisconsin has an integrated bar. The current amount established for dues for persons admitted to the bar is \$100 plus assessments for the State Board of Professional Responsibility and the State Board of Attorneys Professional Competence. Judicial members' dues are two-thirds or \$66.67 without voting rights and the full rate if voting rights are desired. Judicial members are not liable to pay the assessments for the two boards named above. SCR 10.03(5).

In 7 Am. Jur. 2d *Attorneys at Law* §7 (1980), it is stated:

All members of an integrated bar may be required to pay dues, which are deemed to be a licensing fee. A state requirement that lawyers must maintain membership in and pay dues to the integrated state bar has been held not to violate the right of freedom of association guaranteed by the First Amendment to the Constitution of the United States.

Citing Lathrop v. Donohue, 367 U.S. 820, *reh. den.*, 368 U.S. 871 (1961).

I find no Wisconsin statute expressly conferring on county boards the power to pay state bar dues of circuit judges. If such power exists, then it is one necessarily implied by, or inferable from, some other power expressly granted; and, looking to the statutes which might arguably confer such implied power, I conclude that they do not. Several statutes merit mention. The first is section 753.073, which provides:

A circuit judge shall be reimbursed by the state for actual and necessary itemized expenses incurred in the discharge of judici-

ary duty outside of the county of residence, and in attending meetings of the judicial conference or the committees thereof, and as a judge designated to serve on the judicial administrative committee or the subcommittees thereof.

This statute clearly creates no implied power for a county to pay the state bar dues in question, being manifestly designed for the state to take care of only those expenses, such as for dining and lodging, incurred by a circuit judge while engaged in those activities described in section 753.073.

The second statute is section 59.15(3), which in pertinent part provides that a county board "may provide for reimbursement to any elective officer, deputy officer, appointive officer or employe of any expense out-of-pocket incurred in the discharge of his duty in addition to his salary or compensation" This statute, however, is made inapplicable to circuit judges, *inter alia*, by an express provision of subsection (2) of section 59.15.

The third statute is subsection (1) of section 59.15, which empowers a county board, as to an officer paid in whole or in part from the county treasury, to "establish the total annual compensation for services to be paid to the officer (exclusive of reimbursements for expenses out-of-pocket provided for in sub. (3))." Such statute, however, is by an express provision therein made inapplicable to circuit judges.

The fourth statute is section 753.19, which provides:

The cost of operation of the circuit court for each county, except for the salaries of judges and court reporters provided to be paid to the state, and except for the cost assumed by the state under this chapter and chs. 40 and 230, and except as otherwise provided, shall be paid by the county.

This statute should be considered in connection with article VII, section 24(1) of the Wisconsin Constitution, which in pertinent part reads: "To be eligible for the office of ... judge of any court of record, a person must be an attorney licensed to practice law in this state and to have been so licensed for 5 years immediately prior to election or appointment."

I construe this constitutional provision as laying down not only bar licensure requirements for a person running for the office of circuit judge in Wisconsin, but as also requiring that during a

circuit judge's term of office, such person must be licensed to practice law in Wisconsin. And this constitutional provision must be read in the light of SCR 10.03(3), which provides that "[n]o individual other than an enrolled active member of the state bar may practice law in this state or in any manner purport to be authorized or qualified to practice law."

There have been few cases which have been concerned with what items are included in the "cost of operation of the circuit court for each county, except for" salaries of judges and court reporters provided by the state as used in section 753.19. *Romasko v. Milwaukee*, 108 Wis. 2d 32, 42, 321 N.W.2d 123 (1982), extended the cost of operation concept to include fees of a guardian ad litem appointed by the court. The case notes that traditional costs of operation have been concerned with suitable courtrooms, offices, security personnel, clerks, furniture and supplies. *State ex rel. Reynolds v. County Court*, 11 Wis. 2d 560, 576-78, 105 N.W.2d 876 (1960), declined to decide whether or not air conditioning is a cost necessary to the functioning of the court. The court reviewed *Stevenson v. Milwaukee County*, 140 Wis. 14, 121 N.W. 654 (1909), which held that a court had power to appoint a bailiff, and *In re Court Room*, 148 Wis. 109, 134 N.W. 490 (1912), which was concerned with the adequacy of proposed courtroom facilities. The court concluded that the court had power "to determine *its necessities* to function efficiently as a court and perform its duties."

In my opinion, bar dues are personal professional costs related to the eligibility of a person to serve as circuit judge as distinguished from "the cost of operation of the circuit court for each county except for the salaries" or a court's "necessities to function efficiently as a court and perform its duties." In my opinion, bar dues of individuals who must be licensed as attorneys to serve as circuit judges are not a court's necessities which would permit a court to utilize its inherent power to compel the county to pay such dues so that the court could perform its duties.

The Legislature could enact legislation to provide that county boards, as a part of compensation or reimbursement for expenses related to the duties of judge, could pay the bar dues of judges elected to serve circuits which include the county. It has not done so. The Legislature could, of course, provide that the state pay the cost of the bar dues for all circuit court judges as a fringe benefit portion of their compensation or as reimbursement for out-of-

pocket expenses incurred by such judges in the discharge of their duties.

BCL:RJV

Corporations; Legislation; Wisconsin Higher Education Corporation; The Legislature may impose certain controls on public purpose corporations, including the Wisconsin Higher Education Corporation, without violating article IV, sections 31 and 32 of the Wisconsin Constitution or the state's covenants with student loan revenue obligation bondholders. OAG 32-85

August 16, 1985

ANTHONY S. EARL

Governor

Your June 5, 1985, letter requests my opinion as to the validity of certain provisions of 1985 Assembly Bill 85 (the budget bill). In my opinion the provisions would be valid if enacted into law.¹

Your letter states:

The proposal would impose upon the internal operations of the Wisconsin Higher Education Corporation (WHEC), a corporation organized under Chapter 181 of the Wisconsin Statutes, certain restrictions that would not be imposed upon any other Chapter 181 corporation in this state.

While undoubtedly WHEC would be the only corporation presently affected by the legislation and while the proponents of the proposal unquestionably are motivated by a desire to better oversee WHEC specifically (the legislative history refers exclusively to WHEC), the proposed legislation nowhere mentions WHEC; rather, it applies to a class of nonstock corporations defined as "public purpose corporations," of which class, conceptually, WHEC is but one member.

¹ Subsequent to your request, on July 15, 1985, Assembly Bill 85 was enacted into law as 1985 Wisconsin Act 29. The provisions in question were vetoed. Since the veto is subject to override, this opinion refers to the provisions in question as the "proposed legislation" or the "proposal." References are to the Engrossed Bill, dated June 14, 1985.

Chapter 181, Stats., is entitled "Nonstock Corporations." Section 2054m of AB 85 amends chapter 181 to create section 181.79, entitled "Public Purpose Corporations," defined as "any corporation organized under this chapter to provide for a guaranteed student loan program." Provisions are made for the appointment, compensation and removal of board members and the chief administrative officer of the corporation. In addition, section 181.79 subjects the corporations to state purchasing, travel expense, employe compensation, ethics and audit requirements. Sections 148m and 153m of AB 85 would add public purpose corporations to the list of entities covered by the open records law and open meetings law, respectively.

I

You first ask whether these provisions violate section 31, clause 7 or section 32 of article IV of the Wisconsin Constitution. In my opinion, they do not.

Consideration of this question is subject to several well-established rules of statutory construction. A statute will be upheld if there is any reasonable basis for the classification made. *Messner v. Briggs and Stratton Corp.*, 120 Wis. 2d 127, 137, 353 N.W.2d 363 (Ct. App. 1984). To defeat the proposed legislation, an opponent would have to demonstrate beyond a reasonable doubt that it is repugnant to an express provision of the constitution; the conflict must be "clear and irreconcilable." *State ex rel. La Follette v. Reuter*, 36 Wis. 2d 96, 113, 153 N.W.2d 49 (1967). If the legislation is open to more than one reasonable construction, the construction which will accomplish the Legislature's purpose and avoid unconstitutionality must be adopted. *Madison Metropolitan Sewerage Dist. v. Stein*, 47 Wis. 2d 349, 357, 177 N.W.2d 131 (1970). Finally, "[i]t is elementary that if the statute appears on its face to be constitutional and valid, [the supreme court will] not inquire into the motives of the legislature" *State ex rel. Thomson v. Giessel*, 265 Wis. 558, 564, 61 N.W.2d 903 (1953).

The provisions in question provide, in pertinent part, as follows:

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.

Wis. Const. art. IV, sec. 31.

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.

Wis. Const. art. IV, sec. 32. The proposed legislation grants no powers or privileges to public purpose corporations; rather, it imposes regulations upon them.² The simple response to your first question, therefore, is that the Legislature's proposal is outside the clear and explicit words of the constitutional provisions, so that even if it were to be construed as a special or private law, it is not the kind of special or private law prohibited by the constitution. Assuming, nevertheless, that the Legislature's proposal were to be construed as granting corporate powers or privileges, it still is not prohibited by article IV, sections 31 and 32 of the Wisconsin Constitution.

In *State ex rel. Wisconsin Dev. Authority v. Dammann*, 228 Wis. 147, 194-96, 277 N.W. 278 (1938) (on rehearing), the court considered whether an act granting the Wisconsin Development Authority (a corporation organized under general corporation statutes)

the privileges, (1) of access to records of the public service commission; (2) of commanding the public service commission to obtain further information; (3) of having the governor command any officer, agent, or employee of the state to give assistance or advice; and (4) of having the secretary of state audit certain of its accounts ... violate[d] sec. 31, art. IV... .

Id. at 194. The court stated:

[I]t is only a privilege inhering in the corporate charter as part of the corporation's organic act that is within the provision in sec. 31, art. IV, Wis. Const., prohibiting the granting of corporate powers or privileges by special act. In *In re Southern Wisconsin*

² Arguably, public purpose corporations are already subject to legislative audit, one of the proposed requirements, by operation of section 181.27(2), which allows the state, for good cause, to petition the circuit court for access to the books and records of any chapter 181 corporation.

Power Company, supra, the court said, with reference to a franchise to construct a dam (p. 257):

“While the franchise here granted was a legislative grant, it was not a corporate power or privilege within the meaning of sec. 31, art. IV, of the constitution. If such a franchise were granted to a corporation it would become its property, but would not be essential to its corporate existence. The clause prohibiting the granting of corporate powers or privileges simply prohibits the grant of corporate charters by special act. A franchise is not essentially corporate, and it is not the grant of a franchise that is prohibited by the constitution, but the grant of a corporate franchise.”

It follows that if in any of the above respects any power whatever was vested in the Wisconsin Development Authority the power was not a corporate power in the sense referred to in the constitutional provision.

Id. at 195. The proposed regulations are no more privileges inhering in any corporation’s charter as part of the corporation’s organic act than were the provisions enacted with respect to the Wisconsin Development Authority.

Assuming that the proposed legislation was deemed to confer powers or privileges and was deemed to be part of the corporation’s charter, it still is not constitutionally prohibited. In my opinion, it is not special nor private and, even if it is deemed to be so, the Legislature can properly single out for regulation entities like WHEC.

As already stated, nothing in AB 85 mentions WHEC. Chapter 181, a general law governing nonstock corporations, would be amended to provide for a class of nonstock corporations known as “public purpose corporations.” All of the proposed regulations would apply to this class. While WHEC presently is the only existing corporation organized under chapter 181 to operate a guaranteed student loan program, the fact that at the time of a particular enactment applicable to a class, there is only one member thereof, does not militate against the validity of the legislation. *Adams v. The City of Beloit and others*, 105 Wis. 363, 81 N.W. 869 (1900); *accord, State ex rel. Thomson v. Giessel*, 265 Wis. 185, 197-98, 60 N.W.2d 873 (1953). A “public purpose corporation” is “any corporation organized under [chapter 181] to provide for a guaran-

teed student loan program.” Nothing in chapter 181 would limit the freedom of any person or persons to organize a corporation for this purpose.³ Nothing in section 39.33, authorizing the Higher Educational Aids Board (“HEAB”) to organize a guarantee corporation, can be read to block anyone else’s freedom to do the same. Thus, as far as state law is concerned, the public purpose corporation is a conceptually valid classification. It does not “preclude addition to the members included within” it, *State ex rel. Risch v. Trustees*, 121 Wis. 44, 54, 98 N.W. 957 (1904), and thus is not a closed class.⁴

One might contend that only one guarantee entity in each state is contemplated by the federal laws governing the guaranteed student loan program, such that, even if promoters could organize a competing corporation under state law and could find lenders with whom to do business, the federal government would not contract with the competing corporation because one guarantor already was operating in that state. I find no legal support for such a contention.

The statutes and rules governing the essential provisions of the federal guaranteed student loan program—guarantee payments, advances for reserve funds, interest subsidy payments, payments of administrative costs—all contemplate the possibility of multiple non-governmental guarantee entities within a single state. *e.g.*, Title 20 U.S.C. § § 1072(a)(1), (c)(6)(A); 1078(b)(1)(K), (c)(1)(A), (f)(1) and 1078-1(a); 34 C.F.R. Part 682.

I understand that private guarantors organized in other states do business with Wisconsin lenders in competition with WHEC. I see no reason why other private guarantors organized in this state could not do likewise. Such other guarantors, if organized under chapter 181,⁵ would be public purpose corporations and thus as subject to the proposed legislation as WHEC.

Having concluded that the legislation would create a class of corporations, and not just regulate WHEC, the question remains

³ Proposed section 181.79 would be read as an exception to section 181.03 which prohibits the organization under chapter 181 of insurance corporations.

⁴ *Risch* involved a challenge to a legislative classification on equal protection grounds. There is no reason to believe that the principle stated would not apply to classifications challenged under article IV, sections 31 and 32 of the Wisconsin Constitution.

⁵ To be eligible to participate in the federal program, private guarantors must be nonprofit.

whether the classification is valid. There are four rules for determining the propriety of a classification under article X, section 31 of the Wisconsin Constitution.

- (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.

Stein, 47 Wis. 2d at 360. The proposed legislation satisfies all four rules.

There are substantial distinctions between public purpose corporations and other corporations, for-profit and non-profit alike. Public purpose corporations are conceived as guarantors of loans to post-secondary students under a federal program providing for interest subsidies, special financial inducements to lenders, reserve fund subsidies and, most significantly, federal reinsurance. No other class of corporations possesses these characteristics.

While there is no statement of legislative purpose in the proposal, the legislative history amply reveals that the classification is germane to the purpose of the legislation. The purpose of the legislation, as distinct from the motive to regulate WHEC, appears to be the improvement of legislative oversight over entities providing student loan insurance. The proposed classification, embracing WHEC and any other entity like WHEC, is germane to that purpose, since it (the classification) contains the essential characteristics of WHEC and any other entity which might come to exist.

The classification is not based only on existing circumstances. As already observed, a classification is valid even though only one member presently exists as long as others can aspire to membership. At any time, another corporation like WHEC could come into being and become a public purpose corporation subject to the same special regulation as WHEC.

Finally, the proposed legislation clearly applies equally to each member of the class; all public purpose corporations are subject to all of the requirements of the proposal.

Even if one or more of the four criteria for a valid classification were deemed to have been violated, and, therefore, the proposed legislation were deemed to apply only to WHEC, it is still constitu-

tional. If the Legislature chose to, it could regulate WHEC by name and not create special or private legislation contrary to the constitution.

In reaching this conclusion, I have had to reevaluate an earlier formal opinion which concluded that "the Legislature could not single out [WHEC] for special enactments concerning its internal affairs. ..." 72 Op. Att'y Gen. 135, 138 (1983). This conclusion was based upon perceived distinctions between WHEC and other "private corporations" on the one hand, and public authorities, such as the Wisconsin Housing and Economic Development Authority, on the other hand. After reviewing the supreme court's pronouncements regarding legislative control over entities specially created outside the government to carry out a public purpose, including corporations, and in light of recent dramatic changes in the relationship between the state and WHEC, I have concluded that WHEC can be regulated by particular legislation applying to it alone, as long as other constitutional provisions are observed.

The state has the power to create separate entities designed to indirectly carry on a public purpose which the state cannot carry on because of constitutional restrictions. *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 425, 208 N.W.2d 780 (1973). The state has exercised this power many times and in a variety of ways with no clear pattern. Some entities are or have been denominated authorities,⁶ such as the Wisconsin Housing and Economic Development Authority. Others have been denominated corporations, such as the so-called "dummy building corporations." Still others are or have been denominated authorities but were or are corporations, e.g., the Community Development Finance Authority, chapter 233, and the Wisconsin Economic Development Authority. *Dammann*, 228 Wis. 147.

Recently enacted is legislation, 1985 Wisconsin Act 26, creating the "Bradley Center Sports and Entertainment Corporation,"

⁶ American authorities trace their ancestry to the Port of London Authority, which was so named because Lloyd George did not want to use such common names as "commission," "board" or "agency." Having observed that each section of the draft enabling act began "Authority is hereby given ...," he suggested the name "Port of London Authority." Cohen, *They Builded Better Than They Knew* 290 (1946).

which is a chapter 181 corporation, like WHEC, but which resembles more closely an independent authority.⁷

WHEC was organized by a state agency (HEAB) under general corporation laws. This device has been used before. The Educational Communications Board organized the Wisconsin Public Broadcasting Foundation.⁸ The Building Commission organized the Wisconsin State Public Building Corporation, the Board of Regents organized the Wisconsin University Building Corporation, the Wisconsin Federal Surplus Property Development Commission organized the Wisconsin Federal Surplus Property Development Corporation and the Wisconsin Turnpike Commission organized at least one turnpike corporation. *Herro v. Wisconsin Fed. Surp. P. Dev. Corp.*, 42 Wis. 2d 87, 166 N.W.2d 433 (1969); *State ex rel. Thomson v. Giessel*, 267 Wis. 331, 333, 65 N.W.2d 529 (1954); *Thomson v. Giessel*, 265 Wis. at 196; *State ex rel. Wisconsin Univ. Bldg. Corp. v. Bareis*, 257 Wis. 497, 501, 44 N.W.2d 259 (1950).⁹

The State Historical Society, now denominated both a “body politic and corporate” and “an official agency and trustee of the state,” section 44.01(1), was chartered specially by the Legislature in 1853¹⁰ as a corporation and was reorganized a century later (by the society itself) under chapter 181. 42 Op. Att’y Gen. 333 (1953).

The State Medical Society, was specially chartered by the Legislature in 1841, but later given “the general powers of a corporation.” *State Medical Society v. Comm. of Insurance*, 70 Wis. 2d 144, 147, 233 N.W.2d 470 (1975).

A myriad of other private entities carrying out public purposes was identified in *Dammann*, 228 Wis. at 172, 178: the State Horticultural Society, the Wisconsin Horse Breeders’ Association, the Wisconsin Agricultural Society, Memorial Hall, Wisconsin Department of Grand Army of Republic, Wisconsin Department of Spanish War Veterans Associations, to name a few.

⁷ The Bradley Center Sports and Entertainment Corporation is subject to state audit and has a board of directors appointed by the Governor—two of the regulations the proposed legislation would impose on public purpose corporations.

⁸ This corporation is subject to state audit and board membership is regulated—two controls sought to be placed upon public purpose corporations. Sec. 39.12, Stats.

⁹ On the local level, Milwaukee County organized the Milwaukee County Industrial Development Corporation. *State ex rel. Bowman v. Barczak*, 34 Wis. 2d 57, 148 N.W.2d 683 (1967).

¹⁰ This was prior to the 1871 constitutional amendment creating the prohibitions against specific legislation.

It is apparent that the state has chosen many different devices to carry out proper governmental functions. In a number of cases, the legislation relating to those devices has been upheld under the constitutional provisions prohibiting special or private laws. In *Barczak*, 34 Wis. 2d at 74-75, the court upheld section 59.071, authorizing the creation of local industrial development corporations. In *Thomson v. Giessel*, 267 Wis. at 341-42, the court upheld the creation of the Wisconsin State Public Building Corporation. In *Nusbaum*, 59 Wis. 2d at 428, the court upheld the housing authority. Finally, in *Wisconsin Solid Waste Recycling Auth. v. Earl*, 70 Wis. 2d 464, 488, 490, 235 N.W.2d 648 (1975), the court upheld the former solid waste recycling authority.

Of importance in *Barczak* and *Giessel*, was the fact that the corporations were organized under general corporation laws. WHEC was organized under chapter 181, a general corporation law. The proposed regulations are amendments to that general law and so are valid.

In *Nusbaum* and *Earl*, the authorities were not organized under general corporation laws but the legislation was still upheld.

Art. IV, sec. 31, Wisconsin Constitution, 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. Ch. 234, Stats., does not involve the promotion of private or local interests, as condemned by the framers of sec. 31, but a legitimate governmental and statewide purpose as declared by the legislature. Ch. 234 is not objectionable as either a special or private law.

Nusbaum, 59 Wis. 2d at 448.

In *Nusbaum* this court held that the Housing Finance Authority was created in order to promote public and state purposes rather than private or local interests and, therefore, the Housing Finance Authority Act did not contravene these constitutional provisions.

....

... We agree that *Nusbaum* is controlling here, since the Recycling Authority, no less than the Housing Finance Authority, involves a legitimate governmental and statewide purpose, rather than a special or private purpose.

Earl, 70 Wis. 2d at 488, 490 (footnotes omitted).

“The purpose of [article IV, section 31] is to insure that legislation will promote the general welfare and further statewide interests, as opposed to private concerns.” *La Follette v. Reuter*, 36 Wis. 2d at 113. WHEC, no less than the housing authority and the recycling authority, involves a legitimate governmental and statewide purpose—the provision of a guaranteed student loan program—rather than a special or private purpose. The proposed legislation, therefore, is constitutional under *Nusbaum* and *Earl*.

Other private but governmentally-created corporations have balked at legislative control in the past. In *State Medical Society*, the society—a state-chartered corporation—tried to convert its WPS division into a chapter 611 domestic insurance corporation. The decision of the court is strong authority for the Legislature’s right to regulate special corporations.

The society was incorporated in the year 1841 pursuant to Laws of 1841, Bill No. 53, ch. 2, sec. 1. Later statutes contained provisions for SMS to be continued with the general powers of a corporation.

Petitioner SMS contends that it is not “a unique organization,” as assessed by the trial court. It finds little distinction in being a nonprofit association, holding a charter from the state and being cloaked with the general powers of a corporation. Whatever the number of entities which might be found to exist under each category, suffice it to say, that it is a rare organization that possesses all three attributes plus a history of statutory enactments reaffirming its existence and granting it special powers. ...

.....

There is no basis ... for SMS to deny that it is unique and charged with a public interest.

State Medical Society, 70 Wis. 2d at 147-48, 149.

Further authority for the Legislature’s right to control corporations exercising public purposes is found in *Thomson v. Giessel*, 265 Wis. 185. The claim there was that turnpike corporations, organized by the State Turnpike Commission, were themselves state agencies because routes had to be approved by the highway commission and the Governor and that when their bonds were retired

the roads would become state property. These restrictions, the court held, "do not make a turnpike corporation a state agency. The legislature has declared that the purpose to be served by the construction of the toll road is a public purpose. It is only proper that its construction be subject to the approval of the state highway commission and the governor." *Thomson v. Giesel*, 265 Wis. at 196.

Other precedents exist for legislative regulation of particular state-created corporations. Just as board membership of public purpose corporations would be regulated by the proposed legislation, the members of the boards of the Wisconsin University Building Corporation and the Wisconsin Public Broadcasting Foundation are limited by statute. *Bareis*, 257 Wis. at 501; sec. 39.12(4), Stats. In *State ex rel. Warren v. Reuter*, 44 Wis. 2d 201, 216, 170 N.W.2d 790 (1969), the court found not only a right, but a duty to regulate private corporations receiving public funds:

The question of reasonable regulations for control and accountability to secure the public interest is one of degree and depends upon the purposes, the agency and the surrounding circumstances. Only such control and accountability as is reasonably necessary under the circumstances to attain the public purpose is required. Budgeting and auditing are, of course, basic and necessary controls; additional types of control vary with the demands or requirements of the circumstances. What would be sufficient control for daily operations may not serve for capital improvements and vice versa. What controls may be necessary for an agency to be formed may not be necessary for an agency which has been operating for many years and has established an acceptable policy and is under regulations and control of other governmental bodies. Likewise, controls which are sufficient today for this appropriation may not be sufficient tomorrow under different circumstances.

I understand that WHEC receives no public funds except as consideration for services rendered. Nevertheless, as guidelines for the permissible scope of government regulation of private entities performing public purposes, the above-quoted language is instructive.¹¹ Within reasonable limits, I believe that WHEC and entities like WHEC are subject to legislative oversight in the public interest.

¹¹ WHEC receives other benefits from the state; it enjoys a virtual monopoly by dint of its creation by HEAB.

In addition to the state's general interest in promoting public well-being by regulating governmentally-created corporations, the state has a particular relationship with WHEC by virtue of the language of section 39.33 and WHEC's relationship with HEAB and the student loan revenue obligation bond program.

Under section 39.33(1), HEAB was authorized to organize and "maintain" a guarantee corporation. Thus, the state has the responsibility to see that WHEC remains in existence. It is reasonable to conclude that the duty to maintain WHEC carries with it a right, if not a duty, to regulate its affairs that would not necessarily exist with respect to just any corporation.

Another particular aspect of the state's relationship with WHEC provides a reasonable basis for the proposed legislation. The state has issued \$215,000,000 of Student Loan Revenue Obligation Bonds to finance its operations as a lender under the guaranteed student loan program. All loans made with bond proceeds have been guaranteed by WHEC. The board and WHEC are parties to the Corporation Reserve Agreement, setting out certain rights and obligations by both parties to secure the integrity of the bonds and the program itself. As long as any bonds are outstanding, the state has a special interest in the operations of WHEC.

Finally, throughout its history, WHEC has in other ways played a unique role in the performance of the state's duties under the guaranteed student loan program,¹² justifying more precise legislative oversight than might otherwise be the case. HEAB has statutory authority to furnish administrative services to WHEC. Sec. 39.33, Stats. By contract, the state has obligated itself to do so. This obligation is a covenant with bondholders. Thus, by virtue of its responsibilities to bondholders, the state is intimately concerned in the operations of WHEC.

In recent months WHEC's relationship with the state has become even more intimate. I understand that, by contract, WHEC now provides administrative services to HEAB, including the servicing of loans made by private lenders. By assuming the responsibility of administering the lender servicing program—one of

¹² WHEC's Articles of Incorporation state that the corporation's purposes are "primarily to aid governmental programs for promotion of higher education"

HEAB's major statutory responsibilities, section 39.33(10)¹³ — WHEC has subjected itself to a reasonable degree of legislative control. It is my further understanding that 174 of 193 HEAB employes now work for WHEC under contract with HEAB. This unusual state of affairs is further evidence of WHEC's special status.

The legislative history reveals that there is concern that WHEC is considering making major expenditures, for a building and a computer, out of its insurance reserve fund. Report from the Legislative Fiscal Bureau to the Joint Finance Committee, May 10, 1985. The state is justified in legislating to preserve the integrity of insurance reserves. The insurance code (which would apply to public purpose corporations, being insurers) is replete with regulations to protect consumers of insurance. WHEC's reserve fund is of special concern to the state because WHEC's operations are part and parcel of a special government program.

In summary, the proposed legislation imposes reasonable controls over the operations of public purpose corporations, including WHEC. The legislation does not violate article IV, sections 31 and 32 of the Wisconsin Constitution.¹⁴

¹³ This opinion is not the vehicle for judging the propriety of a state agency apparently contracting away the entire operation of a statutory program. Nevertheless, it is appropriate to question whether the Department of Administration's authority to "contract for services which can be performed more economically or efficiently by ... contract," section 16.705(1), extends this far. It is also appropriate to raise whether loan servicing is within the scope of WHEC's authority under its Articles of Incorporation, which states as the corporation's purpose, "[t]o maintain, operate and administer a guaranteed student loan program ..."

¹⁴ What has been stated with respect to the constitutional prohibition against special or private legislation leads to the conclusion that the proposed legislation is also valid under due process and equal protection principles. See discussion of *State ex rel. Risch v. Trustees* at page 174 hereof.

The State's authority to regulate public purpose corporations in the manner proposed derives from the police power.

The [police] power is not limited to regulations designed to promote public health, public morals or public safety, or to the suppression of what is offensive, disorderly, or unsanitary, but extends to so dealing with conditions which exist as to bring out of them the greatest welfare of the people by promoting public convenience or personal prosperity.

Watchmaking Examining Bd. v. Husar, 49 Wis. 2d 526, 531, 182 N.W.2d 257 (1971). The police power properly can be used "to promote the general prosperity of the state by the regulation of economic conditions." *Id.* at 530. In testing the constitutionality of the proposed legislation under the due process and equal protection clauses the question is whether it has "any reasonable basis." *Id.* at 530.

Almost by definition, corporations performing public purposes are imbued with the public interest. WHEC was created to guarantee loans under the government's guaranteed student loan program. One could argue that the integrity of the program

II

Your letter also asks whether the proposed legislation affects the state's covenants under the student loan revenue obligation bond program (the "Program"). In my opinion, it does not.

In the State Building Commission resolution creating the Program (the "Resolution"), the state covenanted with bondholders that as long as any bonds issued to finance the Program are outstanding and unpaid, the state will not limit or alter its powers to fulfill the terms of any agreements with bondholders or in any way impair the rights and remedies of bondholders. A similar pledge is contained in section 18.61(1) with respect to revenue obligation programs generally. The Resolution also contains a covenant that the state will maintain and enforce a contract between the state and WHEC known as the Corporation Reserve Agreement and take no action in connection therewith which in any manner will adversely affect the rights of bondholders. Among other provisions, the Corporation Reserve Agreement obligates the state to provide administrative services to WHEC as long as any bonds are outstanding.

These covenants are protected against impairment by the contract clauses of the state and federal constitutions. Wis. Const. art. 1, sec. 12. U.S. Const. art. 1, sec. 10. See *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977). WHEC's contractual obligations, e.g., lender servicing agreements, employment contracts, etc., are similarly protected.

In 72 Op Att'y Gen. at 142, I cautioned that any "attempt to abrogate [WHEC's obligation to collect delinquent student loans] or otherwise transfer [WHEC's] obligations to the state would more than likely be a violation of the Contract Clause." I also stated that state assumption of WHEC's guarantee function would amount to giving the state's credit in aid of private individuals in violation of Wisconsin Constitution article VIII, section 3. If the proposed legislation were interpreted to have the effect of transforming WHEC into a state agency, the state's covenant not to impair the rights of bondholders would be breached. A state guarantee of student loan payments would be unconstitutional and, thus, void. The bondholders would be left without an essential component of the Pro-

depends upon the responsible administration of the corporation. The proposed "public accountability" measures are all reasonably related to that end.

gram's security. The proposed legislation does not, however, transform WHEC into a state agency.

The supreme court has repeatedly held that dummy corporations are not state agencies. *E.g.*, *Thomson v. Giessel* 265 Wis. at 196; *Thomson v. Giessel*, 267 Wis. at 340; *Bareis*, 257 Wis. at 501; *Nusbaum*, 59 Wis. 2d at 424. There is historical precedent for regulations of governmentally-created entities like that proposed by AB 85. The Wisconsin Federal Surplus Property Development Corporation had to report to the state Department of Resource Development. *Herro*, 42 Wis. 2d at 95. State turnpike corporations had to seek route approval from the Legislature and the Governor. *Thomson v. Giessel*, 265 Wis. at 198. The members and officers of the Wisconsin University Building Corporation had to be "persons who [held] certain offices in the administrative structure of the university." *Bareis*, 257 Wis. at 501. The membership of the board of the corporation organized by the Educational Communications Board is statutorily restricted and the corporation must submit to an examination of its records by the Educational Communications Board, the Department of Administration, the Legislative Fiscal Bureau and the Legislative Audit Bureau, among others. Sec. 39.12(3) and (4), Stats. Similar restrictions are part of the laws governing Wisconsin Housing and Economic Development Authority and the Bradley Center Sports and Entertainment Corporation.

I have no fear that WHEC would be construed as a state agency in light of these historical precedents. If the closeness of WHEC's relationship to the state were a problem, WHEC was closest when the bonds were issued; until recently, WHEC's board was the HEAB board. For most of its existence, WHEC had no employees, but, rather, was a shell, with legal independence from the state but practical dependence upon the state for the performance of its functions. Even after the proposed legislation, WHEC will be more of a separate creature than at the time the bonds were issued. If separation from the state were important to bondholders, they may be benefitted, rather than injured, by WHEC's new relationship with the state.

Bondholders might benefit in other ways. The proposed legislation subjects WHEC to the ethics law, permits legislative audit, limits expenses of travel and employe compensation, opens WHEC's affairs up to public scrutiny and returns board member-

ship to gubernatorial appointees. These could all be perceived as enhancing the security of bondholders, to the extent the integrity of the bonds is dependent upon the integrity of WHEC. The state has an obligation to do nothing to jeopardize the well-being of bondholders. The proposed legislation does not affront that obligation.

With respect to WHEC's contractual obligations, as opposed to the state's contractual obligations to bondholders, there are no apparent impairment problems either. On its face, the proposed legislation does not affect WHEC's ability to perform its contractual obligations to private lenders, employees or others. But "impairment is ultimately an issue of fact." 72 Op Att'y Gen. at 140. Whether or not any particular contract would be impaired cannot be determined at this time. On the basis of the facts known to me the proposed legislation does not violate either the state or federal contract clause.

III

Having concluded that the proposed legislation is constitutional and would not violate the state's duty to bondholders, I must still caution the state's lawmakers to tread carefully in this area. The wisdom of creating dummy corporations and of delegating to them the administration of important government programs, is for the Legislature and the Governor to determine. The supreme court has recognized the state's right to do so and right to regulate to a degree the entities so created. But there are limits to the state's control even where a private entity receives public money.

A private agency cannot and should not be controlled as two-fistedly as a governmental agency. If such need for control is present, it might be better to use a governmental agency. A private agency is selected to aid the government because it can perform the service as well or better than the government. We should not bog down private agencies with unnecessary governmental control.

Warren v. Reuter, 44 Wis. 2d at 217. Similar thoughts were expressed regarding dummy corporations.

"If a person enters into a contract with a dummy corporation, which is both created and limited by the statutes, he is entitled to rely on the provisions of the statutes." *Herro*, 42 Wis. 2d at 118.

If we are going to recognize that ... [dummy corporations] are separate and distinct from the state, then it must be determined that the property owned by the dummy corporation is not the state's property. ... The legislature, as well as the public, must treat the dummy corporation as a distinct entity.

Herro, 42 Wis. 2d at 116.

One might well question why the Legislature would allow HEAB, a state agency over which it has complete authority, to contract away its program responsibilities to WHEC, a private corporation over which it has less authority, and then try to regulate WHEC, rather than attempt to achieve the same results by regulating HEAB. Constitutionally, however, the Legislature, in this case at least, has the power to take either course, the proposed regulations being reasonably related to the purpose sought to be achieved and properly drawn to achieve that purpose.

BCL:ESM

Milwaukee County; Public Assistance; A county may not require or request that a public assistance applicant or recipient provide a fingerprint for the purposes of identification as a precondition to receiving aid. OAG 33-85

August 16, 1985

GEORGE E. RICE, *Acting Corporation Counsel*
Milwaukee County

You ask my opinion on an adopted resolution of the Milwaukee County Board of Supervisors, as approved by the county executive, which attempts to detect and to prevent fraud in the administration of the general relief program. Specifically, you ask whether the county board can require general relief applicants to provide a fingerprint on a county I.D. card for identification purposes.

Eligible dependent persons are entitled to general relief in Wisconsin under one of two basic administrative arrangements. Section 49.02(1), Stats., provides that municipalities shall provide such relief while section 49.03 establishes two optional programs whereby counties may, at their election, assume some or all of the responsibility for the provision of general relief. Counties in which relief is

administered by municipalities are said to be on the "unit" system, and counties electing to provide relief directly to recipients, pursuant to section 49.03, are said to be on the "county" system. *Brown County v. H&SS Department*, 103 Wis. 2d 37, 45-46, 307 N.W.2d 247 (1981).

With respect to a particular group of relief recipients denominated as "state dependents" under section 49.04(1), the state, rather than the local relief granting agencies, bears the ultimate cost of any assistance granted on a temporary basis as defined by section 49.01(7). The underlying purpose of section 49.04 was to relieve counties of the added burden of relief to transients from outside the state as a result of the migrations following World War II by providing state reimbursement for aid given to persons who had no legal settlement in Wisconsin and who had resided in the state for less than one year. However, it was intended that the counties or local units of government should remain primarily liable for the relief of persons whose need for relief could be fairly said to have arisen in the background of local conditions. *State ex rel. Milwaukee County v. Schmidt*, 50 Wis. 2d 303, 310-11, 184 N.W.2d 183 (1971).

The relationship between counties and the state and the extent of the authority which counties may legitimately exercise was summarized in *Dane County v. H&SS Dept.*, 79 Wis. 2d 323, 329-30, 255 N.W.2d 539 (1977):

This court recently reaffirmed the principle that counties are creatures of the Legislature and their powers must be exercised within the scope of authority ceded to them by the state. *State ex rel. Conway v. Elvod*, 70 Wis. 2d 448, 234 N.W.2d 354 (1975). The Legislature's authority to regulate the powers of a county are found in Art. IV, sec. 23, Wis. Const. *State v. Sylvester*, 26 Wis.2d 43, 132 N.W.2d 249, 253 (1965). In governmental matters, the county is simply the arm of the state; the state may direct its action as it deems best and the county cannot complain or refuse to obey. *McDougall v. Racine County*, 156 Wis. 663, 146 N.W. 794 (1914). *Madison Metropolitan Sewerage District v. Committee on Water Pollution*, 260 Wis. 229, 50 N.W.2d 424 (1951). The county exists in large measure to help handle the state's burden of political organization and civil administration. *State v. Mutter*, 23 Wis.2d 407, 127 N.W.2d 15, 18 (1964), *appeal dismissed*, 379 U.S. 201. But as a creature of the state, it is not

permitted to "censor or supervise" the activities of its creator. *Marshfield v. Cameron*, 24 Wis.2d 56, 63, 127 N.W.2d 809 (1964).

In the absence of statewide enabling legislation, it is my opinion that the county board has no authority to require a general relief applicant to provide a fingerprint as a condition of original or continuing eligibility.

The whole matter of general relief is of statutory origin. Therefore, the Legislature, having full power with respect to the furnishing of general relief, may prescribe the conditions under which it is to be furnished. *Holland v. Cedar Grove*, 230 Wis. 177, 189, 282 N.W. 111, 282 N.W. 448 (1939).

The local relief granting agency has a clear duty to support all dependent persons. *State ex rel. Tiner v. Milwaukee County*, 81 Wis. 2d 277, 282-83, 260 N.W.2d 393 (1977), and cases cited therein. The court has consistently held that eligibility for relief is entirely governed by statute and has declared invalid attempts at establishing preconditions to the receipt of relief that are not provided for by the Legislature. *Tiner*, 81 Wis. 2d at 284.

In *State ex rel. Sell v. Milwaukee County*, 65 Wis. 2d 219, 222 N.W.2d 592 (1974), the county required denial of general relief until an applicant transferred to the county relief-granting agency his car title and license plates. The court held:

[B]y requiring the transfer as a preliminary to the granting of even temporary relief, the department has spelled out in rule form an unauthorized and illegal prerequisite to the exercise by welfare authorities of their statutory duty to determine whether or not a person seeking temporary assistance is, in fact, a dependent person and eligible for relief.

State ex rel. Sell, 65 Wis. 2d at 223-24. The proposed fingerprinting requirement clearly constitutes a precondition to eligibility.

In this latter respect, I fail to see the distinction between a request for a fingerprint as opposed to a requirement when the failure to comply with a request results in the application being denied. It is unnecessary to speculate concerning the possible legality of such a statutory requirement, when examined in light of the federal Social Security Act and constitutional protections, unless and until the Legislature so acts. The enactment of such a provision

at least would carry with it a legislative determination that this identification procedure constitutes a necessary and reasonable means of controlling and preventing welfare fraud. However, it would be premature for me to discuss such a restriction on eligibility when the Legislature has not yet shown any interest in adopting statewide this type of fraud control measure.

Although your request deals in large part with general relief, you also raise the same questions for the federal-state categorical aid programs. My response obviously is the same with the further admonition that such a measure, as applied to the social security programs, would have to be within the broad range of discretion vested in the states under federal law. *Swanson v. Health & Social Services Dept.*, 105 Wis. 2d 78, 85-86, 312 N.W.2d 833 (Ct. App. 1981).

BCL:DPJ

District Attorney; Medical Aid; Neither district attorney nor corporation counsel have a duty to petition for protective placement, determination of incompetency or otherwise intervene where an apparently competent elderly person with life threatening illness chooses to remain at home under doctor's and family care rather than seek a higher level of care which might extend her life. OAG 34-85

August 16, 1985

GARY J. SCHUSTER, *District Attorney*
Door County

You request my opinion whether a district attorney or county corporation counsel has a duty to institute protective placement proceedings under section 55.06, Stats., or involuntary guardianship proceedings under sections 880.05 and 880.33 or to otherwise intervene where no request has been made by an official, agency or other interested person as defined in sections 55.01(4), 55.06(2), 880.01(1) and (6) and 880.07(1) under the following fact situation:

A situation arose recently in Door County involving a seventy-five year old woman suffering advanced gangrene in her leg. Still in possession of her mental faculties, this woman elected to not seek medical attention for herself beyond in-home nursing care.

It was her desire to face death and not prolong life at the cost of amputated limbs. This woman was attended at home by her brother who, while not whole-heartedly endorsing the woman's approach to her illness, did not wish to go against those desires. The Door County Department of Social Services interviewed the woman, her doctor, and members of the family. Following the interviews our office was approached with the question of whether or not any duty to act on behalf of this woman was imposed by law.

In my opinion, neither the district attorney nor the county corporation counsel have a duty under the facts given to intervene to compel such person to submit to a higher type of medical treatment by petitioning the court for protective placement under section 55.06 or appointment of a guardian on the basis of incompetency under section 880.33.

Where a chapter 55 petition has been filed, section 55.06(1)(c) provides: "If requested by the court, the district attorney or corporation counsel shall assist in conducting proceedings under this chapter." Assistance is to be distinguished from prosecution of a petition. See 68 Op. Att'y Gen. 97 (1979) and 72 Op. Att'y Gen. 194 (1983).

The district attorney is a constitutional officer with some immemorial duties. However, the bulk of a district attorney's duties are statutory and, although there are many instances in which such officer may be called upon to exercise discretion, duties in representing the state and county are subordinate to legislative direction. *State v. Coubal*, 248 Wis. 247, 21 N.W.2d 381 (1946); *State v. Karpinski*, 92 Wis. 2d 599, 285 N.W.2d 729 (1979); *State v. Hooper*, 101 Wis. 2d 517, 532, 305 N.W.2d 110 (1981). A corporation counsel has limited powers of a civil nature as prescribed by express statute or assigned from those of the district attorney by ordinance pursuant to section 59.07(44). Section 59.47 sets forth certain duties of a district attorney, but there are many specific duties set forth in other statutes as referenced in the general index. There is no statute of which I am aware that makes it the duty of the district attorney to petition the court to compel medical care whenever such officer is advised that there is someone in the county, rich or poor, with a serious disease, ailment or condition which requires medical attention.

Your statement of facts assumes that the elderly person involved is “in possession of her mental faculties” and “of sound mind.” The provisions of determination of incompetency on an involuntary basis under section 880.33(1) are primarily concerned with the “mental condition of the proposed ward” Although it can be argued that one who fails to seek a high level of medical care when faced with a life threatening illness is incompetent to take care of his or her affairs, section 880.01(4) states that “[p]hysical disability without mental incapacity is not sufficient to establish incompetence.” Section 55.06 does permit a court to provide protective placement to protect the health of certain persons having a special need for medical treatment.

Section 55.06(2)(c) includes an individual who:

As a result of developmental disabilities, infirmities of aging, chronic mental illness *or other like incapacities*, is so totally incapable of providing for his or her own care or custody as to create a substantial risk of serious harm to oneself or others. Serious harm may be occasioned by overt acts or *acts of omission*...

Section 55.01(3), (4m) and (5) provides:

(3) “Infirmities of aging” means organic brain damage caused by advanced age or other physical degeneration in connection therewith to the extent that the person so afflicted is substantially impaired in his ability to adequately provide for his own care or custody.

....

(4m) “Mental illness” means mental disease to the extent that an afflicted person requires care, treatment or custody for his or her own welfare or the welfare of others or of the community.

(5) “Other like incapacities” means those conditions incurred at any age which are the result of accident, organic brain damage, mental or *physical disability* or continued consumption or absorption of substances, *producing a condition which substantially impairs an individual from adequately providing for his own care or custody*.

However, section 55.06(1) provides in part that “[n]o protective placement ... may be ordered unless there is a determination of incompetency in accordance with ch. 880, except in the case of a minor” Further, there is some question as to its use for situa-

tions where emergency medical treatment is required. In *State ex rel. Watts v. Combined Community Services*, 122 Wis. 2d 65, 90, 362 N.W.2d 104 (1985), the court stated:

Chapter 51, Stats., application requires that a person be rehabilitable. *Section 55.06 requires that a person have a permanent condition that requires only "care and custody," rather than active treatment.* However, once an individual in protective placement faces involuntary mental hospitalization under sec. 55.06(9)(d) or 55.06(9)(e), he is in the same relationship with the state as is the person facing immediate hospitalization under ch. 51.

In your situation the individual had not been determined to be incompetent and is presumed to be competent.

Constitutional considerations with respect to the right of a person to refuse medical treatment are summarized in 16A C.J.S. *Constitutional Law* § 527 (1984):

A competent individual has a right based on First Amendment religious liberty to refuse medical treatment unless the state can demonstrate a compelling interest that would justify overriding the individual's choice. [Citing *Holmes v. Silver Cross Hospital of Joliet, Ill.* 340 F. Supp. 125 (D.C. Ill. 1972).] In nonemergency situations involving an incompetent patient who is opposed to medical treatment on religious grounds, the court must determine what choice the patient, if competent, would have made with respect to available medical treatment. The free exercise of religion is not infringed by the refusal of a court to terminate the use of life support systems and to permit a person to die, insofar as an incompetent adult in a vegetative state is concerned, in the absence of dogma of the religion of that person that life be or not be sustained by extraordinary measures. [Citing *Matter of Quinlan*, 348 A 2d. 801 (1975), 355 A 2d. 647 (1976), *cert. denied Garger v. New Jersey*, 429 U.S. 922 (1976).]

Without violating First Amendment rights, blood transfusions may not be judicially ordered for a patient who objects to it on religious grounds and who is fully competent, at least where there is no compelling state interest which justifies overriding an

adult patient's decision; on the other hand, in view of the interest of the state in the preservation of life, blood transfusions may be judicially ordered, regardless of religious objections expressed by, or in behalf of, a patient in danger who is either unconscious, or incapable of making an intelligent choice. A statute may, without constituting an establishment of religion, preclude courts from using the receipt of public funds from compelling the performance of a sterilization procedure which is contrary to the religious beliefs or moral convictions of a hospital.

In *Matter of Quinlan*, 355 A.2d 647, 663-64 (N.J. 1976), it was stated:

Presumably this right [the unwritten constitutional right of privacy] is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman's decision to terminate pregnancy under certain conditions. ...

....

... Ultimately there comes a point at which the individual's rights overcome the State interest. ...

... Karen's independent right of choice, however, would ordinarily be based upon her competency to assert it.

The court held that by reason of the circumstances, Karen Quinlan's right of privacy could be asserted by her guardian.

In *Guardianship & Protective Placement of Shaw*, 87 Wis. 2d 503, 275 N.W.2d 503 (Ct. App. 1979), the court considered section 55.06 and chapter 880 and held that where protective placement is sought on grounds of alcoholism, there must be a finding of incompetency before protective placement can be ordered and that an alcoholic who continues to drink because of a preference for an alcoholic lifestyle is not necessarily incompetent.

I conclude that, under the facts stated, there is no duty to intervene to attempt to force such person to submit to a higher level of medical treatment.

BCL:RJV

Claims Board; Employe Trust Funds Board; Retirement Systems;
The specific appeal procedures provided for the Public Employe Trust Funds do not take precedence over the general grant of authority to the Claims Board to hear claims against state agencies, but the Claims Board lacks authority to order payment of the claim from the trust funds. OAG 35-85

September 3, 1985

GARY I. GATES, *Secretary*
Department of Employe Trust Funds

You request my opinion regarding the authority of the Claims Board to determine a claim relating to the Wisconsin Retirement System (WRS) and to award payment from WRS trust funds.

The facts upon which your questions are based are summarized in this excerpt from the January 31, 1985, findings and recommendations of the Claims Board:

Ken Corbett of Oshkosh, Wisconsin, claims \$728.25 as the amount he paid in December, 1983, prior to his retirement, to purchase the six-month qualifying period of state service pursuant to s. 40.02(17)(b), Stats., to increase his monthly retirement annuity. 1983 Wisconsin Act 141, effective March 9, 1984, changed the maximum annuity benefit permitted to be paid from the retirement system. As a result, claimant received no additional annuity benefit for the purchase of the six-month qualifying period of state service from the Department of Employe Trust Funds. Laws under which the state retirement system is administered do not provide for the refund claimant is requesting. The Board concludes the claim should be paid based on equitable principles. The Board further concludes under authority of s. 16.007(6m), Stats., payment of this claim should be made from the Department of Employe Trust Funds appropriation s. 20.515(1)(r), Stats.

Section 16.007(1), Stats., grants the authority to the Claims Board to "receive, investigate and make recommendations [to the Legislature] on all claims presented against the state which are referred to the board by the department [of administration]." Where the claim is not more than \$1,000, the Claims Board may order it paid (without referring it to the Legislature) and may

specify the specific appropriation from which it should be paid. Sec. 16.007(6)(a), Stats.

Section 40.03(1)(j) authorizes the Employe Trust Funds (ETF) Board to "accept appeals ... from determinations ... made by the department [of employe trust funds]." Review of the ETF Board decision is by writ of certiorari from circuit court. Sec. 40.08(12), Stats.

I now answer your questions based upon the facts as set forth above with the additional assumptions you request in certain of the questions.

Your first question asks:

Do the specific appeal procedures provided for the Public Employe Trust Funds ... take precedence over the general grant of authority to the Claims Board to review and dispose of claims against the ... state?

The answer to this question is no, since I find no such limitation in the authority granted to the Claims Board. Nothing in the grant of authority to the Claims Board limits it to considering only those claims which have been turned down under other specified methods of review.

Generally, a claim against a state agency would be handled under a specific statutorily designated procedure or the general procedure of chapter 227. In section 16.007, however, the Legislature granted the authority to the Claims Board to "receive, investigate and make recommendations [to the Legislature] on all claims presented against the state which are referred to the board by the department [of administration]." There is nothing in that grant of authority limiting it to claims that have first followed another specified administrative procedure.

It must be further noted that the basis for the award (equity) is not within the area of authority granted to the ETF Board and the board thus lacked any basis to consider this requested relief. The Department of Employe Trust Fund's (DETF) refusal to pay the claim was stated as follows in a letter from administrator Patricia F. Weigert to Mr. Corbett, dated March 23, 1984:

... the statutes contain no provision for refunding payments which were made to purchase qualifying service.

....

I'm sorry to have to deny your request, but as I stated earlier, the law does not permit refunds of this kind under circumstances where you were properly advised at the time you took action.

Mr. Corbett did not proceed under the administrative procedure to appeal the DETF denial to the ETF Board but instead filed his claim with the Claims Board, alleging in part:

Briefly, I again would like to state the provision to purchase the six months qualifying period was designed to be of benefit to the employe.

If it wasn't of benefit, morally it should be returned—it wasn't meant to be a tax or penalty.

After hearing Mr. Corbett's claim, the Claims Board recognized that "[l]aws under which the state retirement system is administered do not provide for the refund claimant is requesting." The Claims Board then concluded that "the claim should be paid on equitable principles." While the Claims Board has specific authority to pay a claim on equitable grounds, the ETF Board lacks such authority. It is thus clear that a hearing before the ETF Board requesting equitable relief would be futile since the ETF Board could not grant the relief.

The Wisconsin Supreme Court has generally held that "where a statute relating to an administrative agency provides a direct method of judicial review of agency action, such method of review is generally regarded as exclusive, especially where the statutory remedy is plain, speedy, and adequate." *Kegonsa Jt. Sanit. Dist. v. City of Stoughton*, 87 Wis. 2d 131, 145, 274 N.W.2d 598 (1979). This "exhaustion of remedies" rule does not apply, however, where the agency lacks the authority to grant the relief requested. *Nodell Inv. Corp. v. Glendale*, 78 Wis. 2d 416, 424-26, 254 N.W.2d 310 (1977). "Recourse to the [ETF Board] would thus have been a futile or useless act" (footnote omitted) and not required by the "exhaustion of remedies" rule. *Kaiser v. City of Mauston*, 99 Wis. 2d 345, 354, 299 N.W.2d 259 (Ct. App. 1980).

Mr. Corbett filed his claim with the Claims Board without appealing to the ETF Board. You ask whether the result would be different if Mr. Corbett appealed the department's determination to the ETF Board, the board's decision was against the claimant, and the claimant then filed a claim with the Claims Board, rather than

appealing the ETF Board's decision via certiorari. I see no different result.

As previously stated, the grant of authority to the Claims Board "to receive, investigate and make recommendations on all claims" presented to it, is not limited to those claims that have gone through other specified administrative procedures. Even if the grant of authority were construed to be so limited, the limitation would not apply to claims solely in equity such as the instant situation. The ETF Board lacked the authority to grant Mr. Corbett's claim on equity grounds. Thus, the statutorily provided administrative procedure, including review by the circuit court of the ETF Board denial, provided no remedy. Since the ETF Board could not grant the equity claim, recourse to the board and review by certiorari of the decision of the board would have been a futile act and one not required by the doctrine of exhaustion of remedies. *Kaiser*, 99 Wis. 2d at 352-54.

Your next question whether the Claims Board is authorized to pay the claim from the Public Employee Trust Fund. In my opinion, the authority to pay from the trust fund is solely granted to the ETF Board, and the Claims Board, therefore, lacks authority to order payment from the fund.

Section 40.01(2) describes the public employe trust funds and the ETF Board trusteeship as follows:

The public employe trust fund is a public trust and shall be managed, administered, invested and otherwise dealt with solely for the purpose of ensuring the fulfillment at the lowest possible cost of the benefit commitments to participants, as set forth in this chapter, and shall not be used for any other purpose. Revenues collected for and balances in the accounts of a specific benefit plan shall be used only for the purposes of that benefit plan, including amounts allocated under s. 40.04(2), and shall not be used for the purposes of any other benefit plan. Each member of the employe trust funds board shall be a trustee of the fund and the fund shall be administered by the department of employe trust funds. All statutes relating to the fund shall be construed liberally in furtherance of the purposes set forth in this section.

The appropriations that establish and maintain the trust fund are specific as to both the source and usage of the fund. That usage

does not include equitable claims such as we are concerned with in this opinion. In contrast, section 16.007 authorizes the Claims Board to determine or recommend that a claim be paid from any specific appropriation in the words:

(5) ... If the claims board determines to pay or recommends that a claim be paid from a specific appropriation or appropriations, it shall include that determination or recommendation in its conclusions.

....

(6m) The claims board, ... may specify that a claim shall be paid from a specific appropriation or appropriations. If a claim requires legislative action, the board may recommend that the claim be paid from a specific appropriation or appropriations. If no determination is made as to the appropriation or appropriations from which a claim shall be paid, the claim shall be paid from the appropriation under s. 20.505(4)(d).

“[W]here a general statute conflicts with a specific statute, the specific statute prevails.” *State ex rel. S.M.O.*, 110 Wis. 2d 447, 453, 329 N.W.2d 275 (Ct. App. 1982). The general language of section 16.007(5) and (6m) authorizing the Claims Board to order or recommend a claim to be paid from an agency’s appropriation does not prevail over the specific language of section 40.01(2) granting sole management over the trust fund to the ETF Board.

When confronted with a statutory inconsistency of this nature, the statutes should be harmonized to give effect to all of the provisions. *Glinski v. Sheldon*, 88 Wis. 2d 509, 519, 276 N.W.2d 815 (1979). The statutory authority of the Claims Board and ETF Board can be properly harmonized by construing the statutory sections to allow the Claims Board to determine whether equity requires a return of a deposit, but then requiring payment only from the general fund. General fund payment is specifically authorized by the last sentence of section 16.007(6m).

Harmonizing these two statutes in that manner also dispels any doubt about the constitutionality of section 16.007 when applied to trust fund monies. As stated in *Wipperfurth v. U-Haul Co. of Western Wis., Inc.*, 98 Wis. 2d 516, 522, 297 N.W.2d 65 (Ct. App. 1980): “One of the most fundamental rules of statutory construction requires the court to not only construe a statute to avoid any construction that renders the statute unconstitutional, but also to con-

strue the statute to dispel any serious doubts concerning its constitutionality." (Footnote omitted.)

Section 40.19(1) explicitly mandates that the rights exercised and benefits accrued for services rendered by fund participants shall be due as a "contractual right." That contractual right includes earnings from the trust funds where those earnings affect a benefit (additional deposits, separation benefit, death benefit). *State Teachers' Retirement Board v. Giessel*, 12 Wis. 2d 5, 10, 106 N.W.2d 301 (1960). If a payment on "equitable grounds" were deducted from the trust funds, the resulting loss of earnings to the fund could violate contractual rights of fund members. To avoid this doubt as to the constitutionality of the Claims Board ordering payment from the trust fund, I construe section 16.007 as allowing payment only from the general fund.

The Claims Board concluded that the refund payment should be made from section 20.515(1)(r), the general appropriation covering "[a]ll moneys credited to the public employe trust fund for payment from the appropriate accounts and reserves." You ask whether the Claims Board could have properly specified the refund payment to be paid from the sum sufficient appropriation of section 20.515(1)(a). This section is by its specific language limited to sum sufficient payment of benefits authorized by section 40.02(17)(d)2. (creditable service for certain protective occupation participants) and section 40.27(1) (supplemental benefits). Based upon the specificity of that sum sufficient appropriation, I see no basis to include the refund payment which is the subject of this opinion within the limited area covered by section 20.515(1)(a).

BCL:WMS

Coroner: A county coroner can legally appoint a deputy coroner after the time limit for such appointment set forth in section 59.365(1), Stats. OAG 36-85

August 27, 1985

MATTHEW F. ANICH, *District Attorney*
Ashland County

You request my opinion whether section 59.365(1), Stats., which provides in part that "[w]ithin 10 days after entering upon the

duties of the office, the coroner may appoint one or more proper persons, residents of the county, deputy coroner," precludes the coroner from appointing a deputy after such ten-day period has elapsed. Your tentative conclusion is that the time requirement of the statute is "directory" merely and not "mandatory," and that a coroner can legally appoint additional deputies after such ten-day period. I agree with your conclusion.

The apparent purpose of the ten-day time limit in section 59.365(1) is to insure that appointment of deputy coroners be made promptly after the coroner takes office. However, statutes setting time periods within which various officials or agencies are to perform an act are commonly construed to be directory and not jurisdictional or mandatory, where no substantial rights have been jeopardized and no prejudice will occur. 1A Sutherland *Statutory Construction* § 25.03 (4th ed. 1972). See also *Muskego-Norway C.S.J.S.D. No. 9 v. WERB*, 32 Wis. 2d 478, 485d, 145 N.W.2d 680 (1966): requirement that board file findings within sixty days after hearing is directory; *Worachek v. Stephenson Town School Dist.*, 270 Wis. 116, 122, 70 N.W.2d 657 (1955): requirement that teacher file teaching certificate within ten days after contracting to teach is directory; *State v. Industrial Comm.*, 233 Wis. 461, 466, 289 N.W. 769 (1940): requirement that commission act on petition to review findings and order of examiner within ten days is directory; *Appleton v. Outagamie County*, 197 Wis. 4, 9, 10, 220 N.W. 393 (1928): requirement that county board levy taxes at its November session is directory.

As you point out, the supreme court has previously concluded that the requirement in section 59.365(1), that the appointment of a deputy coroner be "filed and recorded in the office of the clerk of the circuit court," is directory and that the initial misfiling in the county clerk's office did not affect the validity of such appointment. *State ex rel. Ikeler v. Koszewski*, 243 Wis. 483, 485-88, 11 N.W.2d 176 (1943). More specifically, in *State ex rel. Johnson v. Nye*, 148 Wis. 659, 135 N.W. 126 (1912), the supreme court has expressly ruled that a statutory requirement as to the time of making an appointment to a public office is directory merely and that the Governor could, therefore, legally appoint a state grain commissioner in October although by law he should have made such appointment in the January preceding. In rejecting the argument that the late appointment was void, the court said, 148 Wis. at 669:

“It is true, as appears from the complaint, that the defendant was not appointed in January, nor until October, 1911. But under the decisions of this court we think the statute is directory, not mandatory, and that the appointment made after January is a valid appointment.”

I consider *State ex rel. Johnson* as dispositive of your question. There is no substantial reason why a deputy coroner might not be appointed after the time prescribed as before. Such an appointment works no injury or wrong. You advise, in fact, that its purpose in this instance is to provide service to a distant part of the county “to reduce response time after notification of a death.” The appointment clearly serves the purpose of the statutory provision involved and there is no indication that the Legislature intended to preclude such an appointment.

BCL:JCM

Administrative Law And Procedure; Architects And Engineers;
The Designer Section of the Examining Board of Architects, Professional Engineers, Designers and Land Surveyors does not have rulemaking authority. OAG 38-85

September 17, 1985

BARBARA NICHOLS, *Secretary*
Department of Regulation and Licensing

You have asked whether an administrative rule pertaining to the Designers Section of the Examining Board of Architects, Professional Engineers, Designers and Land Surveyors may be amended by the Designers Section or only by the board. Since an amendment of an administrative rule falls within the power to make administrative rules, the legal question presented is whether a statutorily created section of the board has rulemaking authority.

It is my opinion that only the board has administrative rule-making authority.

The question arises because of two statutes. Section 15.08(5)(b), Stats., authorizes *examining boards* to formulate rules for their own guidance and for the guidance of the trade or profession to which they pertain.

Section 15.405(2) creates the Examining Board of Architects, Professional Engineers, Designers and Land Surveyors and provides, in part:

(a) In operation, the examining board shall be divided into an architect section, an engineer section, a design section and a land surveyor section. ...

(b) All matters pertaining to passing upon the qualifications of applicants for and the granting or revocation of registration, *and all other matters of interest* to either the architectural, engineering, designing or surveying section shall be acted upon *solely* by the interested section.

On October 5, 1978, I issued an unpublished formal opinion (OAG 73-78) which stated that the sections of the board were not authorized to promulgate rules. In that opinion, I noted that section 15.405(2)(b) was not a grant of rulemaking authority and that the only rulemaking authority that had been granted was to the board by section 15.08(5). Constructions placed upon statutes by the attorney general are entitled to important consideration, *State ex rel. West Allis v. Dieringer*, 275 Wis. 208, 81 N.W.2d 533 (1957), and are entitled to considerable weight when such construction is left undisturbed by the Legislature. *See Wisconsin Valley Imp. Co. v. Public Serv. Comm.*, 9 Wis. 2d 606, 101 N.W.2d 798 (1960), where four years after the attorney general's construction of a statute, the Legislature amended a portion of the statute, but left the provisions interpreted by the attorney general intact.

In this case, seven years and three sessions of the Legislature have passed without legislative change in the statutes under consideration. While this premise for statutory interpretation would carry more weight had the 1978 opinion been published, it may be assumed that had the opinion been considered to be in error, those concerned with the statutes in question would have brought the opinion to the attention of the Legislature with a request for legislative reversal of the 1978 opinion.

I am also informed that it has been a longstanding interpretation of the board that the sections do not have rulemaking authority under the applicable law. A longstanding construction of an ambiguous statute by an agency is entitled to great weight. *State ex rel. City B. & T. Co. v. Marshall & I. B.*, 8 Wis. 2d 301, 99 N.W.2d 102 (1959).

Finally, I would note that in creating the sections of the board in section 15.405(2), the Legislature used the qualifying phrase “[*i*]n operation, the examining board shall be divided into ... [the four sections].” The meaning of the qualifier “in operation” refers to the performance of ministerial and factfinding duties and, while the extent of the qualifier is not defined, I believe that it is clear that the Legislature meant to create something less than fully autonomous entities with all the powers granted to the parent board.

BCL:WHW

State; Taxation; A deficit reported in financial statements prepared in accordance with Generally Accepted Accounting Principles would not violate article VIII, section 5 of the Wisconsin Constitution, which requires a balanced budget. OAG 39-85

October 7, 1985

DORIS J. HANSON, *Secretary*
Department of Administration

You advise that the state is redesigning its central accounting system in accordance with Generally Accepted Accounting Principles (“GAAP”), a significant aspect of which is the reporting of information on the accrual or modified accrual basis as opposed to the reporting of information on the cash or modified cash basis. You anticipate, as a result of accruing expenses that are presently not accrued, that “the State will identify a net increase in liabilities in the general fund that are unfunded in the budget,” *i.e.*, that the state will have a deficit. You ask whether article VIII, section 5 of the Wisconsin Constitution “would require the creation of new revenues or a reduction in spending to cover the additional liabilities shown” In my opinion, article VIII, section 5 of the Wisconsin Constitution would not require either a tax increase or spending cuts, irrespective of the fact that the state’s financial reports might show a deficit, because the constitution does not require the state to follow accrual basis accounting.

Article VIII, section 5 of the Wisconsin Constitution provides:

The legislature shall provide for an annual tax sufficient to defray the estimated expenses of the state for each year; and whenever the expenses of any year shall exceed the income, the

legislature shall provide for levying a tax for the ensuing year, sufficient, with other sources of income, to pay the deficiency as well as the estimated expenses of such ensuing year.

The words of the constitution must be interpreted in the “ ‘sense most obvious to the common understanding at the time of its adoption’ ” *Payne v. Racine*, 217 Wis. 550, 555, 259 N.W. 437 (1935). The movement among states and local governments toward reporting their finances according to GAAP is a relatively recent one. Goading, *Municipal Finance: Searching for Standards in Governmental Accounting and Financial Disclosure*, 55 Tul. L. Rev. 821 (1981); see Governmental Accounting Standards Board (GASB) Statement No. 1, *Authoritative Status of NCGA Pronouncements and AICPA Industry Audit Guide* (1984); National Council on Governmental Accounting Statement No. 1, *Governmental Accounting and Financial Reporting Principles* (“NCGA Statement 1”) (1979). It would be unreasonable to construe the constitution, adopted in 1848, to require the use of GAAP accounting principles. The constitution does not prescribe any particular method of accounting; in fact it does not even require the preparation of a budget. Thus, the fact that analyzing the state’s financial condition according to any particular principles of accounting, *e.g.*, the accrual basis mandated under GAAP, would report a deficit (or a surplus) would be of no constitutional significance. What the constitution requires, simply, is that the Legislature plan in such a way as to insure that on an annual basis, revenues are sufficient to defray the state’s expenses.

In *State ex rel. Owen v. Donald*, 160 Wis. 21, 122, 151 N.W. 331 (1915), the court summarized the constitutional framers’ vision of Wisconsin government and concluded with the following:

They then vitalized the entirety by a plan for creating and circulating the necessary life blood for the particular state purposes in view, all on a basis of uniformity and equality and with well defined restrictions as to anticipating future resources, except in case of extraordinary occasions, to a small amount. Estimated expense, year by year, to carry on the government according to the constitutional plan was the ruling thought. It was provided:

“*The legislature shall provide an annual tax sufficient to defray the estimated expenses of the state for each year; and whenever the expenses of any year shall exceed the income the legislature shall provide for levying a tax for the ensuing year, sufficient, with other*

sources of income, to pay the deficiency as well as the estimated expenses of such ensuing year."

Thus the constitution plainly contemplates legislative action to determine the sufficiency of income each year to cover the regular expenses until the next opportunity for such action, and for a legislative levy of a tax therefor and to make up any deficiency for the preceding year. Nothing in that field was left to administrative officers, but merely to administer. That is plain.

Earlier in the opinion the court indirectly referred to article VIII, section 5 of the Wisconsin Constitution as providing "for an annual accumulation of money sufficient to defray the cost, denominated 'expenses of the state,' of all legitimate state activities." *Owen*, 160 Wis. at 84.

In *Chicago & N. W. R. Co. v. The State*, 128 Wis. 553, 633-35, 108 N.W. 557 (1906), the court discussed the operation of article VIII, section 5 of the Wisconsin Constitution in connection with section 2 of the same article, which covers appropriations:

The common way of laying taxes, state and national, is to provide for an annual tax sufficient to meet the annual expenses, having regard to the experience of the past and the probabilities of the future, and to appropriate from the fund so accumulated, or to be paid therefrom when accumulated, such sums as seem for the fiscal year necessary for the particular purposes. The raising of the revenue is one thing; the appropriation of the money to proper public purposes is another. The last is covered by sec. 2 of art. VIII, "No money shall be paid out of the treasury except in pursuance of an appropriation by law." Taking the two together it will be seen that one section provides for accumulating the public fund out of which appropriations for public purposes may be made; the other provides for devoting the same to the specific public purposes.

. . . .

It will not do to set up a judicial standard as to the best method of determining the amount of money to be raised by taxation and of framing laws to put the taxing machinery in motion to that end. Probably the annual budget method is the most businesslike way, both with reference to the amount to be raised by taxation and the division thereof to the particular public purposes. But the constitution leaves the way open for the

legislature to exercise the widest discretion in that matter. It can proceed by various forms of taxation for raising public revenue, all or most of which may leave the amount that will be produced thereby some what indefinite, so long as the legislative idea is an annual income sufficient for the annual needs

As I understand the proposed accounting changes, the state would move from a "modified cash basis" to the accrual basis or modified accrual basis, as required by GAAP.

Under the *cash* basis of accounting, revenues and transfers in are not recorded in the accounts until cash is received, and expenditures or expenses (as appropriate) and transfers out are recorded only when cash is disbursed. Under the *accrual* basis of accounting, most transactions are recorded when they occur, regardless of when cash is received or disbursed. Items not practically measurable until cash is received or disbursed are accounted for at that time in both commercial and governmental accounting, as may be items whose measurement would be approximately the same under either basis or which are immaterial.

The *accrual* basis is the superior method of accounting for the economic resources of any organization. It results in accounting measurements based on the substance of transactions and events, rather than merely when cash is received or disbursed, and thus enhances their relevance, neutrality, timeliness, completeness, and comparability. Accordingly, the Council recommends use of the accrual basis to the fullest extent practicable in the government environment. The accrual basis is necessarily applied somewhat differently in the proprietary funds (accrual basis) than in the governmental funds (modified accrual basis), however. The cash basis of accounting is not appropriate.

NCGA Statement 1 at 11. By accruing more revenues and expenses than is done presently, the state's books will show a deficit. Since the constitution does not require the accrual basis of accounting, the deficit produced under GAAP will not violate the constitution.

NCGA Statement 1 recognizes that cash basis accounting may be required in certain states and suggests separate reporting under GAAP and under legal requirements. NCGA Statement 1 at 5 and 13. Whether or not the Department of Administration chooses to, or is required by the Legislature to, report separately, a reported deficit under GAAP will not present constitutional problems as

long as the Department is satisfied that the budget is balanced in accordance with statutory requirements.

BCL:ESM

Judges: If defeated in the last attempt at reelection, a judge must have served eight years as a circuit judge, not a county judge, before August 1, 1978, in order to be eligible for appointment as a reserve judge. OAG 40-85

October 14, 1985

J. DENIS MORAN, *Director*

State Courts

You ask whether a judge who has served for twenty years, first as a county judge and, since 1978, as a circuit judge, but who was defeated in his last reelection attempt, is eligible for appointment as a reserve judge upon his leaving the bench on August 1, 1985.

Section 753.075(2), Stats., determines the eligibility for appointment as a reserve judge:

(a) Any person who, as of August 1, 1978, has served a total of 8 or more years as a supreme court justice or circuit judge; or

(b) Any person who has served 4 or more years as a judge or justice of any court or courts of record and who was not defeated at the most recent time he or she sought reelection to a judicial office.

The judge is not eligible under section 753.075(2)(b) because he was defeated when he sought reelection.

The court system of Wisconsin was reorganized effective August 1, 1978, by creating a court of appeals and by coalescing the county courts and circuit courts. This process culminated in chapter 449, Laws of 1977. Chapter 449, section 491, Laws of 1977, provided that, until the terms of individual county judges expired, each

county court was denominated as a circuit court and each county judge denominated as a circuit judge. That section also provided that the courts of the state were altered by making the jurisdiction, powers, duties, functions, rights, benefits and compensation of county courts and county judges identical to the circuit courts and circuit judges.

Chapter 449, section 312, Laws of 1977, created section 753.075 in its present form. The question essentially becomes, therefore, whether the fact that all county judges became circuit judges on August 1, 1978, means they were deemed to be circuit judges for the purposes of section 753.075(2)(a) before that date. I conclude that someone who has served as a county judge before August 1, 1978, is not eligible under section 753.075(2)(a).

Although all county judges became circuit judges on August 1, 1978, nothing in chapter 449, Laws of 1977, or any of the other legislation affecting the court reorganization, makes that designation retroactive. On the contrary, section 753.075(2)(a) clearly requires that the person must have "served" as a circuit judge for eight or more years. Becoming a circuit judge on August 1, 1978, does not alter the fact that the judge served as a county judge before that time.

The Legislature was certainly aware of the distinction it was making in subsection (a). Subsection (b) does not refer to circuit judges; it merely requires service as a judge of a court of record.

In the absence of ambiguity, it is the duty of the court, and of this office, to give the words of a statute their obvious and ordinary meaning without resort to legislative history, rules of interpretation or canons of construction. *Dept. of Transp. v. Transp. Comm.*, 111 Wis. 2d 80, 87-88, 330 N.W.2d 159 (1983). I conclude that section 753.075(2)(a) is not at all ambiguous. The inclusion of former county judges as eligible for appointment as reserve judges under subsection (2)(b) dispels any doubt concerning the intent of the Legislature.

BCL:AL

Municipalities; Public Officials; Words And Phrases; Where a commission is created by two villages, acting pursuant to section 66.30, Stats., for a joint exercise of a power possessed by such villages, its voting members, whether drawn from the governing bodies of such villages or from citizen-residents thereof, are public officers, who enjoy the indemnification protection provided by section 895.46(1).

A non-voting member of such commission, who cannot serve as an officer thereof, and whose sole power and duty is to provide "input" to the commission relative to the particular needs of the corporation appointing him/her to the commission, is neither a public officer nor a public employe, so as to enjoy the indemnification protection of section 895.46(1). Moreover, such non-voting commission member is not entitled to such protection as an agent of any department of the State of Wisconsin. OAG 41-85

October 21, 1985

DAVID A. DANZ, *District Attorney*
Walworth County

You request my opinion on this question: Does section 895.46, Stats., cover members of a joint commission formed by two or more municipalities under the authority of section 66.30 for the purpose of constructing, operating and maintaining a wastewater treatment facility?

By way of background, you state:

The Village of Fontana-on-Geneva Lake and the Village of Walworth, Walworth County, Wisconsin, pursuant to Wisconsin Statute Section 66.30, established a Commission by intergovernmental agreement (written contractual agreement) for the purpose of constructing, operating and maintaining a joint wastewater treatment facility. The intergovernmental agreement provides that the Commission shall consist of three members from each Village Board, to be appointed by the President and confirmed by the full Village Board. In addition, each Village President shall appoint a citizen member to serve on the commission. The citizen members are also subject to confirmation by their respective Village Board. The Commission consists of eight voting members, four from each Village. Kikkoman Foods, Inc., a privately owned Wisconsin corporation located in the Town of

Walworth, Walworth County, Wisconsin, entered into a contractual agreement with the Village of Fontana-on-Geneva Lake, the Village of Walworth and the Fontana/Walworth Pollution Control Commission to use the joint municipal wastewater treatment facility for the disposal of its wastes. Kikkoman Foods, Inc. is authorized to appoint one member to the Commission who sits only in an advisory capacity and has no voting power.

The Commission's primary responsibility is to construct, maintain and operate the joint wastewater treatment facility. The Commission does not have authority to incur indebtedness or to borrow funds. All funds for the capital cost of the wastewater treatment facility have been paid by the Village of Fontana-on-Geneva Lake, the Village of Walworth and Kikkoman Foods, Inc. The maintenance and operational costs for the wastewater treatment facility will be financed by user charges paid to the Commission by the Village of Fontana-on-Geneva Lake, the Village of Walworth and Kikkoman Foods, Inc., based upon the amount and kind of wastes supplied to the wastewater treatment facility by each of the users.

From your statement, it appears that the "joint commission" referred to in your question is one established pursuant to section 66.30 "for the purpose of constructing, operating and maintaining a joint wastewater treatment facility." It further appears that such commission is comprised of three elements: the first being *voting* members of such commission drawn from the boards of the municipalities which are a party to the intergovernmental agreement (hereinafter "the Agreement") creating the joint commission (hereinafter "the Commission"); the second being *voting* citizen members of the Commission appointed by the governmental parties to the Agreement; and the third being a *non-voting* member of the Commission appointed by a private party which has entered into a contract with the Commission, and with the municipalities which are party to the Agreement, relating to the use of the joint wastewater treatment facility.

In pertinent part, section 895.46, reads:

(1)(a) If the defendant in any action or special proceeding is a *public officer or employe* and is proceeded against in an *official capacity* or is proceeded against as an *individual* because of acts

committed while carrying out duties as an officer or employe and the jury or the court finds that the defendant was acting within the scope of employment, the judgment as to damages and costs entered against the officer or employe in excess of any insurance applicable to the officer or employe shall be paid by the state or political subdivision of which the defendant is an officer or employe. Agents of any department of the state shall be covered by this section while acting within the scope of their agency. ... (Emphasis supplied.)

From this portion of section 895.46, it is clear that its indemnification protection extends only to three categories of individuals: 1) public officers; 2) public employes; and 3) the "agents of any department of the state," referred to elsewhere in section 895.46 simply as an "agent of the state" or "agent."

In giving you my opinion, I will first consider whether a voting member of the Commission, who is also a board member of one of the governmental parties to the Agreement, is a public officer, public employe or agent of a department of the State of Wisconsin; then whether a voting citizen member of the Commission is such officer, employe or agent; and finally whether a non-voting citizen member of the Commission is such officer, employe or agent.

A.

(1)

Is a voting member of the Commission who is also a member of the governing board of a municipality which is a party to the Agreement (with such member hereinafter called "voting board member") a public officer, and therefore covered by section 895.46? In my opinion, yes.

In answering this question, I have first concluded that the Commission is a governmental body or instrumentality performing a governmental function. It is an agency or instrumentality created by a contract (the Agreement) between two Wisconsin villages, made pursuant to section 66.30. In pertinent part, subsection (2) thereof provides that,

In addition to the provisions of any other statutes specifically authorizing cooperation between municipalities, unless such statutes specifically exclude action under this section, *any municipal-*

ity may contract with other municipalities, for the receipt or furnishing of services or the joint exercise of any power or duty required or authorized by law. ... (Emphasis supplied.)

The Agreement is clearly a contract for the joint exercise of a power possessed by the contracting villages: namely, the municipal police power of sewage collection and disposal, or, put otherwise, the municipal police power to operate a sewerage system.¹ See section 24.256, Vol. 7, McQuillin Municipal Corporations, 3rd Ed. Rev. (1981). Such power is provided Wisconsin villages under the broad language of subsection (1), section 61.34, which states, *inter alia*, that a village board “shall have power to act for the government and good order of the village, for its commercial benefit and for the health, safety, welfare and convenience of the public” The existence of such power is further recognized by certain aspects of subsections (3) and (5), section 61.34, section 61.36 and portions of chapter 144, as, e.g., sections 144.01(9) and 144.04-144.07. Moreover, a joint exercise of such particular power by villages is not only sanctioned by section 66.30, but also by subsection (2) of section 61.34.

The Commission is the governmental instrumentality or body created by the Agreement for the joint exercise of power involved in what the opening paragraph of the Agreement describes as “a single contractual relationship for the joint participation in the collection, treatment and disposal of sewage” That it is such instrumentality is unequivocally shown by the delegation to it, in the Agreement, of “all such powers as hereinafter stated which are necessary for the acquisition, construction, maintenance, and operation of Wastewater Collection, Treatment, and Disposal Facilities to service all of the Villages of Fontana and Walworth”

Having concluded, then, that the Commission is a governmental instrumentality or body, it is my further conclusion that a voting board member of the Commission is a public officer.²

¹ This is plain from the opening paragraph of the Agreement, which reads: “THIS AGREEMENT made and entered into as of this 3rd day of December, 1984, between the Village of Fontana-on-Geneva Lake, Wisconsin (“Fontana”), and the Village of Walworth, Wisconsin (“Walworth”), municipal corporations and political subdivisions of the State of Wisconsin, all pursuant to section 66.30 of the Wisconsin Statutes, 1983, as amended, to establish a single contractual relationship for the joint participation in the collection, treatment, and disposal of sewage and creation of Fontana/Walworth Water Pollution Control Commission (“Commission”).”

² Were it my conclusion that the Commission is not a governmental instrumentality or body, it would then logically follow that neither an officer nor employe of the

It appears that no reported case has defined the meaning of "public officer" as that term is employed in section 895.46(1)(a). However, the case of *Martin v. Smith*, 239 Wis. 314, 1 N.W.2d 163 (1941), has been described as "The leading case in Wisconsin establishing criteria to determine whether one is a public officer or a mere employe" *Burton v. State Appeal Board*, 38 Wis. 2d 294, 299, 156 N.W.2d 386 (1968) (hereinafter "Burton"); this despite the fact that *Martin v. Smith* was concerned only with "addressing the definition of a 'public officer' in the context of art. XIII, sec. 3 of the Wisconsin Constitution." *Wis. Law Enforce Stds. Bd. v. Lyndon Station Vil.*, 98 Wis. 2d 229, 240, 295 N.W.2d 818 (Ct. App. 1980) (hereinafter "Lyndon Station Vil."). *Martin v. Smith*, 239 Wis. at 332, quoted with approval the definition of "public office" found in a Montana case, with such definition listing several required aspects of such office, including the necessary possession of "a delegation of the sovereign power of government to be exercised for the benefit of the public." As to this particular feature of a "public office," it was recognized by the *Martin* court as the *sine qua non* for public office, with the report stating, "It is certain that a person employed cannot be a public officer, however chosen, *unless there is devolved upon him by law the exercise of some portion of the sovereign power of the state in the exercise of which the public has a concern.*" (Emphasis supplied; 239 Wis. at 332). See also *Burton*, 38 Wis. 2d at 300, 301. Both the Supreme Court of Wisconsin and its Court of Appeals have also recognized that for a position to be a "public office," it need not meet *all* the criteria for public office set forth in the above-mentioned definition of *Martin v. Smith*. See *Burton*, 38 Wis. 2d at 303; *Lyndon Station Vil.*, 98 Wis. 2d at 244. The "*principal consideration* determining whether a position is a [public] office and one holding it is a [public] officer *is the type of power that is wielded*" (bracketed material and emphasis supplied; *Burton*, 38 Wis. 2d at 300).

A voting board member of the Commission exercises a portion of the sovereign power of government for the benefit of the public. This is so because under the Agreement the Commission jointly exercises the municipal police power possessed by each of the contracting villages to operate a sewerage system. And when the voting board member uses his voting power to effect or to reject the taking

Commission would have the "public" status entitling him/her to the indemnification protection of section 895.46. See 71 Op. Att'y Gen. 127 (1982).

of some action by the Commission constituting the joint exercise of such power, he/she is, in my opinion, definitely exercising a portion of the sovereign power of government for the benefit of the public. Moreover, when a voting board member acts as an officer of the Commission, he/she is then engaged in an exercise of a portion of such sovereign power.

The Agreement, providing that "the Commission shall exercise the powers of the Contracting Municipalities with respect to constructing, operating, maintaining, managing and administering Wastewater collection, treatment, and disposal facilities for the Contracting Municipalities and other Customers," bestows on the Commission a formidable array of powers. For example, the Commission has "the power to make investigations and inspections of all Customers and all local Sewer Systems" and to "develop surveillance and monitoring procedures to assure compliance with any regulation of the Commission," and the power to issue a "Cease and Desist Order" to a customer violating the Agreement, or any regulation of the Commission. A voting board member using his voting power in connection with the Commission's exercise of such powers is very plainly exercising a portion of the sovereign power of government for the public benefit.

The Rules of Procedure of the Commission designate six Commission officers, and spell out their powers and duties in detail. The description of the powers and duties of the President, Secretary and Treasurer of the Commission, which may also be exercised and discharged by, respectfully, the Vice-President, Deputy Secretary and Deputy Treasurer, leaves no doubt in my mind that a voting board member, acting in any one of such offices, is engaged in an exercise of a portion of such sovereign power.

It should be noted that many of the powers conferred on the Commission by the Agreement are exercised *independently, i.e.*, without control of any superior power other than the law. This independent exercise of power by a governmental body is essential to viewing the power exercised as falling within the "portion of the sovereign power of government to be exercised for the benefit of the public" which must be delegated to a governmental post before it can be properly deemed a "public office." See *Burton*, 38 Wis. 2d at 301; *Martin v. Smith*, 239 Wis. at 314; *Lyndon Station Vil.*, 98 Wis. 2d at 241-42.

Certain of the Commission's powers are subject to control of the Contracting Municipalities. However, the fact that such powers of the Commission are so controlled and, therefore, not independently exercised by it, does not mean that its independent exercise of a substantial portion of its powers fails to satisfy the "independent exercise of sovereign power" criterion for public office. I have found no case law holding that one exercising a portion of sovereign power in a governmental position must be denied recognition as a public officer because he/she *also* exercises powers subject to the control of others. Logic clearly militates against such a holding. Moreover, *Lyndon Station Vil.*, *supra*, implies a holding that one occupying a governmental post and exercising a portion of the sovereign power independently is a public officer, despite the fact that such person is subject in certain respects to control of the superior body or officer. *Lyndon Station Vil.* involved the issue of whether a village police chief was an officer subject to the provisions of article XIII, section 3 of the Wisconsin Constitution, which renders a person convicted of an infamous crime ineligible to any office of trust, power or profit in Wisconsin. Finding the police chief subject to such constitutional provision, the Court viewed as one of the "most important" of such chief's powers "the authority to arrest as authorized in section 61.28" (98 Wis. 2d at 241-42), specifically pointing out that such power is *not* subject to the authority of the village board and then stating: "Thus, for purposes of article XIII, section 3 of the Wisconsin Constitution a village police chief does possess a delegation of a portion of the sovereign power of government to be exercised for the benefit of the public. *Martin*, 239 Wis. at 332." (*Id.*) The Court so held despite the fact that the statutes cited by it as descriptive of the power wielded by the village police chief clearly show that by no means were all of his powers exercised independently, with section 61.28 providing that he "shall obey all lawful written orders of the village board," and section 60.54(2) giving him the power to attend upon sessions of his county's circuit court "when required by the sheriff." The Court's decision clearly implies, I believe, a holding that one can meet the "independent exercise of sovereign power" criterion even though he/she may, in the exercise of *some* of his/her powers, be subject to the control of others.

While it is my opinion that it suffices to establish that a voting board member is a public officer when he/she exercises indepen-

dently a portion of the sovereign power, despite the control exercised by others over certain of the Commission's powers, it is certainly noteworthy that the position occupied by such member on the Commission meets another important test of "public office," to wit, that such position "must have some permanency and continuity, and not be only temporal or occasional." *Martin v. Smith*, 239 Wis. at 332; *Burton*, 38 Wis. 2d at 300, 302; *Lyndon Station Vil.*, 98 Wis. 2d at 240, 242. The position of a voting board member clearly has "some permanency or continuity," since the Agreement expressly provides that "the commissioners appointed by the president of the Governing Bodies from the Governing Body membership shall be *permanent* members on the Commission and shall continue to serve as long as they continue to be members of the Governing Body of the respective Contracting Municipalities." (Emphasis supplied.)

It is true that the position of the voting board member of the Commission does not meet all of the tests of public office laid down in *Martin v. Smith*, as, e.g., entry into it by the taking of an oath. Such position, however, does meet the quintessential test of "independent exercise of sovereign power," and Wisconsin case law clearly holds that a position may be a public office without meeting "all criteria listed in *Martin*." See *Lyndon Station Vil.*, 98 Wis. 2d at 244.

(2)

The voting board member of the Commission being, in my opinion, a public officer, there is therefore no need to consider whether he/she is an employe of the Commission, except to state that his/her status as a public officer makes it clear that he/she is not a public employe. It is also unnecessary for me to consider whether the voting board member is an agent of any department of the State of Wisconsin.

B.

(1)

Are the voting members of the Commission who are not members of the Governing Bodies of the Contracting Municipalities, but who are citizen/residents of such municipalities (one for each of them, appointed by the governing body thereof) public officers, and

therefore covered by section 895.46? In my opinion, Yes, for the same reasons that a voting board member of the Commission is a public officer.

While the position of a voting citizen member of the Commission possesses, as does the position of a voting board member thereof, the "some permanency and continuity" characteristic of public office, the former position might be said to enjoy less by way of "permanency and continuity" than the latter, but clearly not so much less as to make the former position one "only temporal or occasional." As noted, the voting board member is a "permanent member of the Commission," who continues to serve as such so long as he/she is a member of the governing body of one of the Contracting Municipalities. The voting citizen members, however, have their terms fixed by the Agreement in the following language:

"The appointed citizen-resident from Fontana shall serve for a term of one year from and after the date of the Agreement; the appointed citizen-resident from Walworth shall serve for two years from and after the date of this Agreement. Terms of the appointed citizen-resident members of the Contracting Municipalities shall be staggered so that upon the expiration of the one year term of the commissioner from Fontana, the next appointed member from Fontana shall serve for two (2) years. The terms of succeeding commissioners from Fontana and Walworth shall be for two (2) years (p. 18, Agreement).

(2)

Again, with respect to the voting citizen member of the Commission, my opinion that he/she is a public officer makes it unnecessary for me to address the questions of whether he/she is a public employe or an agent of any department of the state.

C.

(1)

Is the non-voting member of the Commission, appointed by a private party which has entered into a contract with the Commission and with the Contracting Municipalities, a public officer, so as to be covered by section 895.46? In my opinion, No.

As the Agreement shows, such non-voting member of the Commission is a "permanent member thereof who represents Kikkoman Foods, Inc. His/her limited function on the Commission, in a non-voting, advisory capacity, is plainly evidenced by (a) the statement in the Agreement that, "In recognition of Kikkoman Foods, Inc.'s contribution toward the cost of the construction of the joint sewage treatment facility, Kikkoman Foods, Inc. shall be entitled to a permanent representative on the Commission *in a non-voting capacity to provide input relating to their [sic] [Kikkoman's] particular needs*" (emphasis supplied); and (b) by the provision in Section 3 of the Commission's Rules of Procedure that, "the non-voting member from Kikkoman Foods, Inc., shall not be eligible to hold any office on the Commission."

In view of such provision, I believe it plain that since the non-voting member cannot serve as an officer of the Commission, he will have no opportunity as such officer to exercise any portion of the sovereign power of government. Further, the non-voting citizen member of the Commission is denied any exercise of such power by the fact that he/she is powerless to vote for or against action of the Commission, constituting an exercise of the sovereign power of government. It follows, then, that the non-voting citizen member of the Commission, denied in such capacity the exercise of any portion of such sovereign power by reason of his/her inability to vote and to hold Commission office, is plainly not a public officer because the position he/she holds on the Commission lacks the quintessential attribute of public office, namely possession of a portion of the sovereign power of government.

It is true, of course, that the advisory role of the non-voting citizen member may conceivably have some impact on the voting of the voting members of the Commission. But it is the possession of a portion of the sovereign power of government, and not merely the possession of an ability to have some advisory influence on its exercise, which is the indispensable attribute of public office.

It is also true that the non-voting citizen-member's position on the Commission does have the "permanency" attribute of a public office; but it is clear that such attribute, standing alone, does not make a public office.

(2)

Is the non-voting member of the Commission, though not an officer thereof, its employe? In my opinion, no.

Such member of the Commission is not an employe thereof, if only for the reason that the Agreement, providing that he/she serves on the Commission "in a non-voting capacity to provide input relating to their [sic] [Kikkamon's] particular needs" (emphasis supplied), and referring to "The non-voting commissioner representing Kikkamon Foods, Inc.," (emphasis supplied), makes it amply clear that such commissioner is in no sense the servant or employe of the Commission, but rather the servant and employe of Kikkamon, who functions solely as a conduit through which there passes to the Commission "input" relating to the "particular needs" of Kikkamon. This is further shown by the provision of the Agreement that "Kikkamon Foods, Inc., shall have the right to designate the individual to serve as said [non-voting] commissioner and may substitute individuals in their [sic] discretion as business needs arise," and by the fact that there is no provision, either in the Agreement or in the Commission's Rules of Procedure, for payment by the Commission to the non-voting member of any wage, salary or other form of remuneration for his/her services on the Commission.

Still another factor showing that the non-voting member of the Commission is not an employe thereof is that he clearly does not serve as a subordinate, which service is characteristic of the public employe. See *Martin v. Smith*, 39 Wis. at 332-33. Instead, the Commission manifestly has no direction or control over the non-voting member's "input," no matter how unpalatable it might on occasion prove to be to the Commission.

(3)

Is the non-voting member of the Commission an agent of any department of the State of Wisconsin, and therefore covered by section 895.46? In my opinion, he/she clearly is not such agent.

The Legislature, employing the term "agents of any department of the state" in subsection (1) of section 895.46 did not use such term in so broad or loose a sense as to encompass a body such as the Commission, which is plainly not a department or agency of the

State of Wisconsin, but is instead an instrumentality or agency of the contracting political subdivisions of the state here involved.

BCL:JHM

Highways: Highway maintenance authorities may summarily remove unauthorized non-traffic signs placed within the limits of highway rights of way. OAG 42-85

October 23, 1985

LOWELL B. JACKSON, *Secretary*
Department of Transportation

You have asked whether highway maintenance authorities may summarily remove nontraffic signs, such as political and commercial advertising signs, placed within the limits of highway rights of way. It is my understanding that a district attorney has informed your department that he will consider bringing theft charges against county highway maintenance personnel who remove and dispose of such signs unless the putative owners of such signs are first given notice of the impending removal. In my opinion, the district attorney in question has no legal authority for his position.

Under the law, a highway consists of the entire area between the established right of way limits. Thus, the government's regulatory authority is not confined to the traveled portion of the roadway. Sec. 340.01(22), Stats.; *In the Interest of E.J.H.*, 112 Wis. 2d 439, 442, 334 N.W.2d 77 (1983). With two limited exceptions, specifically signs used to promote Wisconsin agricultural project products pursuant to section 86.19(1m), Stats., and signs related to barriers across streets for play purposes erected under section 66.046, section 86.19 makes clear that:

[N]o sign shall be placed within the limits of any street or highway except such as are necessary for the guidance or warning of traffic. ... The authorities charged with the maintenance of streets or highways shall cause the removal therefrom and the disposal of all other signs.

It must be emphasized that section 86.19 does not affect signs located outside of the highway right of way. The removal of signs outside the right of way requires a notice to the owner thereof. *See*,

for example, sec. 84.30, Stats. Also, it has been ruled that unauthorized signs within the right of way may be subject to summary removal "as a reasonable exercise of the police power of the state." 16 Op. Att'y Gen. 303, 305 (1927). Moreover, section 86.19 does not preclude maintenance authorities from following the procedures outlined in section 86.04 for the removal of encroachments from highways in appropriate cases, such as where there may be some doubt about the location of the right of way boundary or where a sign may only partly encroach upon the right of way.

The authority to regulate activities within the highway right of way for the benefit of the public is paramount. Even an abutting land owner's interest is subservient to that of the public. The unauthorized placement of sign posts in ditches may cause distraction to motor vehicle operators, impede mowing and other maintenance activities and also present safety hazards to the users of the off-roadway portion of highways, such as snowmobiles operated under section 350.02(2)(b). *See further* ch. TRANS 200, Wis. Adm. Code, governing the erection of signs in public highways and establishing a permit system.

In effect, the Legislature has deemed unauthorized signs placed within the highway right of way to be public nuisances which even under the common law were subject to summary abatement. *See generally* 39 Am. Jur. 2d, *Highways, Streets and Bridges*, sec. 327. Therefore, given the clear, direct language of the statute and the legislative grant of police power to protect the public, I am of the opinion that highway maintenance authorities may summarily remove nontraffic signs placed within the limits of the highway. Furthermore, even though in some cases those authorities might be able to notify the putative owners about the possibility of retrieving the signs after their removal, such notice would be gratuitous and is not required by the statutes. Nevertheless, both common sense and fairness dictate prudence in some cases. When, in the judgment of maintenance authorities, public safety does not demand immediate removal, an effort should be made to notify the sign owner, if known. Failing prompt removal by the owner, the sign may then be removed. Moreover, if the offending sign has more than a nominal scrap value, an effort should be made to locate the owner before disposing of the sign.

BCL:DSF

Notary Public; Public Officials; Residence, Domicile, And Legal Settlement; Section 137.01(1) and (2), Stats., which requires Wisconsin residency as a condition of appointment as notary public in Wisconsin, does not violate the Privileges and Immunities Clause of the Federal Constitution and should be complied with unless and until it is declared invalid by a court of competent jurisdiction in a proper case. OAG 43-85

November 7, 1985

DOUGLAS LA FOLLETTE

Secretary of State

You request my opinion whether those provisions of section 137.01(1) and (2), Stats., which require Wisconsin residency as a condition of being a notary public, violate article IV, section 2, clause I of the United States Constitution, commonly known as the Privileges and Immunities Clause.

For the reasons hereinafter stated, it is my opinion that they do not.

Section 137.01 is a duly enacted statute which is entitled to a strong presumption of constitutionality. A heavy burden is placed on a party making a constitutional challenge and, if any reasonable doubt exists, it must be resolved in favor of the constitutionality of the statute. *In the Matter of Guardianship of Nelson*, 98 Wis. 2d 261, 296 N.W.2d 736 (1980).

Section 137.01(1) is applicable to notaries public who are not attorneys and subsection (a) provides that “[t]he governor shall appoint notaries public *who shall be Wisconsin residents* and at least 18 years of age.” Subsection (2) provides that “[a]ny *Wisconsin resident* who is licensed to practice law in this state is entitled to a permanent commission as a notary public upon application to the secretary of state and payment of a \$15 fee.”

The application presently before you is from an attorney who was admitted to practice law in Wisconsin on February 22, 1985 but is a California resident who maintains his principal office in Santa Monica, California. He claims that a permanent commission as notary public “would be an indispensable part of practicing law in Wisconsin.”

Our supreme court has noted that the contours of the Privileges and Immunities Clause are not well developed. *Taylor v. Conta*, 106 Wis. 2d 321, 330, 316 N.W.2d 814 (1982). In *Taylor*, our court used a three-step inquiry to determine whether the challenged statute was constitutional under the clause. The court must find that a fundamental right or privilege is involved. To justify different treatment with respect to a privilege, the state must prove there is a substantial reason for discrimination and the means employed must bear a substantial relationship to legitimate state objectives. The court held that in matters of taxation, because nonresidents may present special problems for administration of state laws, the state need not grant nonresidents precisely the same rights it grants to residents. The court held that Wisconsin need not grant a nonresident deduction with respect to moving expenses incurred in connection with production of income outside Wisconsin and may tax the gain on the sale of a principal Wisconsin residence if the new residence is purchased outside the state even though tax on the gain would be deferred if the new principal residence were located in Wisconsin. In *Supreme Court of N.H. v. Piper*, 105 S. Ct. 1272 (1985), the United States Supreme Court applied a similar three-step analysis in determining that New Hampshire's exclusion of nonresidents from the bar violated the Privileges and Immunities Clause. The Court first found that the practice of law was a protected "privilege" under article IV, section 2 of the United States Constitution, and then concluded that there was no substantial reason for the difference in treatment between residents and nonresidents and that the discrimination practiced against the nonresidents did not bear a substantial relationship to any legitimate state objective. Piper lived in Vermont, just across the Connecticut River, which divides her state from New Hampshire. The Court ruled 8-1 in favor of Piper. Justice Byron White wrote a separate concurring opinion saying that the residency requirement was invalid only as it applied to Piper because she lives so close to the state line. In *Piper*, the state argued that the Privileges and Immunities Clause should not be applicable to the practice of law because attorneys' activities are crucial to the administration of justice and inextricably bound up with the exercise of judicial power. Relying on *In Re Griffiths*, 413 U.S. 717 (1973), the Court held that attorneys do not really exercise *actual governmental power*. In *Griffiths*, the Court specifically said that although it did not wish to denigrate in any way the great responsibility that the power to administer

oaths entails, it hardly involved matters of state policy or "acts of such unique responsibility as to entrust them only to citizens." *Griffiths*, 413 U.S. at 724.

One of the privileges guaranteed nonresidents by the Privileges and Immunities Clause is the privilege of engaging in certain businesses in a state on terms of substantial equality with the residents of that state. *Toomer v. Witsell*, 334 U.S. 385, 396 (1948). It can be argued that being a notary public is advantageous to the practice of law, and that a member of the Wisconsin Bar, who is a resident of Minnesota but practices in Wisconsin, might be at a disadvantage if he or she is not allowed to be a notary public.

Any such disadvantage would be *de minimis* as there are thousands of notaries public and other officials in Wisconsin who are empowered to take oaths, attestations and certify depositions who would be available to any non-resident attorney on a statutory fee basis. The facts here are distinguishable from *Piper*. There the Court found that the practice of law should be considered a "fundamental right" and that "[o]ut-of-state lawyers may—and often do—represent persons who raise unpopular federal claims. In some cases, representation by nonresident counsel may be the only means available for the vindication of federal rights." *Piper*, 105 S. Ct. at 1277. We do not believe the same importance can be attached to any need to import a non-resident notary public into Wisconsin. *Piper* is also distinguishable because no public office was involved. An attorney is an officer of the court for some purposes, but is not a public officer. It is my opinion that the acts which a notary can perform do not constitute the practice of law. One doesn't have to be a notary public to be an attorney or to engage in the law business and one doesn't have to be in the practice of law or be an attorney to be a notary public. Further, being a notary public is not usually considered a business or occupation in and of itself.

In my opinion, a nonresident does not have a fundamental right to engage in the activities delegated by the Legislature to notaries public. Section 137.01(5), (6), (6m) and (7) provides:

(5) Powers. Notaries public have power to act *throughout the state*. Notaries public have power to demand acceptance of foreign and inland bills of exchange and payment thereof, and payment of promissory notes, and may protest the same for nonacceptance or nonpayment, may administer oaths, take dep-

ositions and acknowledgments of deeds, and perform such other duties as by the law of nations, or according to commercial usage, may be exercised and performed by notaries public.

(6) Authentication. (a) The secretary of state may certify to the official qualifications of any notary public and to the genuineness of his signature and seal or rubber stamp.

(b) Whenever any notary public *has filed in the office of the clerk of circuit court of his county of residence his signature*, an impression of his official seal or imprint of his official rubber stamp and a certificate of the secretary of state, such clerk may certify to the official qualifications of such notary public and the genuineness of his signature and seal or rubber stamp.

(c) Any certificate specified under this subsection shall be presumptive evidence of the facts therein stated.

(6m) Change of Residence. A notary public shall not vacate his office by reason of his *change of residence* within the state. Written notice of any change of address shall be given to the secretary of state within 5 days of such change.

(7) Official Records To Be Filed. *When any notary public ceases to hold office* he, or in case of his death his executor or administrator, shall *deposit his official records and papers in the office of the clerk of the circuit court of the county of his residence*. If any such notary or any executor or administrator, after such records and papers come to his hands, neglects for 3 months to deposit them he shall forfeit not less than \$50 nor more than \$500. If any person knowingly destroys, defaces or conceals any records or papers of any notary public he shall forfeit not less than \$50 nor more than \$500, and shall be liable to the party injured for all damages thereby sustained. The clerks of the circuit courts shall receive and safely keep all such papers and records in their office.

Section 17.03 provides:

Any public office is deemed vacant upon the happening of any of the following events, except as otherwise provided:

....

(4) His or her ceasing to be an inhabitant of this state

Even if we assume that the activities which a notary public engages in do constitute a privilege within the Privileges and Immunities Clause, Wisconsin can limit appointments to persons who have bona fide residence within the state, because there is substantial reason for the difference in treatment between residents and nonresidents and any discrimination bears a substantial relationship to a legitimate state objective.

Wisconsin places great importance upon the right of any member of the public to inspect and copy public records. Secs. 19.31-19.37, Stats. A notary public, as a public officer, is the legal custodian of the records in his or her office. Although notaries public do not necessarily have a large number of retained records which would be subject to inspection and copying, there would be some. Section 137.01(7) requires that when a notary public ceases to hold office, he shall "deposit his official records and papers in the office of the clerk of the circuit court of the county of his residence." In order for a member of the public to have a meaningful right to inspect and copy public records in the hands of a notary public, such offices must have some place within the state where such records are maintained. Sec. 19.34, Stats. There is no indication that the applicant who has a California residence would maintain an office in Wisconsin. His office in California is not just across the river in an adjacent state as in *Piper*, but across many rivers and five states.

As early as 1881, our supreme court held that a notary public was an *officer of the state* and, under the then laws, "[i]t was necessary for him to reside in some county in the state in order to qualify him to hold the office. Having such residence, and thus being qualified, he had power to act in any county in the state." *Maxwell v. Hartman and another, imp.*, 50 Wis. 660, 665, 8 N.W. 103 (1881).

A *notary public* is a statutory state officer appointed pursuant to statute as the Legislature may prescribe rather than an officer of the court such as an attorney. Wis. Const. art. XIII, §9. In 63 Op. Att'y Gen. 74 (1974), it was stated that the position of notary public is an office of trust, profit or honor in this state subject to article XIII, section 3 of the Wisconsin Constitution.

In *State ex rel. Wisconsin Dev. Authority v. Damman*, 228 Wis. 147, 163, 277 N.W. 278 (1938), it was held that a person not an

elector of this state is ineligible to hold public office therein, although the constitution and statutes do not expressly so ordain.

In *Martin v. Smith*, 239 Wis. 314, 332, 333, 1 N.W.2d 163 (1941), the court was concerned with eligibility of a federal officer to hold a state office under article XIII, section 3 of the Wisconsin Constitution. The court held that the president of the university was not a public officer and noted, 239 Wis. at 333: "It may seem anomalous to some that the president of a great university should not be a public officer while a justice of the peace or a notary public is a public officer." The court stated, 239 Wis. at 332: "It is certain that a person employed cannot be a public officer, however chosen, unless there is devolved upon him by law the exercise of some portion of the sovereign power of the state." The court included notaries public within those public officers who do exercise some part of the sovereign power of the state.

Section 137.01(5) specifically restricts a Wisconsin notary public to notarial acts within the state.

I am aware that in *Bernal v. Fainter*, 104 S. Ct. 2312 (1984), the Court held that a statutory requirement in Texas, that a notary public be a citizen of the United States, was unconstitutional. Under Texas law, notaries authenticate written instruments, administer oaths and take out-of-court depositions. The court stated:

[It] has never deemed the source of a position—whether it derives from a State's statute or its Constitution—as the dispositive factor in determining whether a State may entrust the position only to citizens. Rather, this Court has always looked to the actual *function* of the position as the dispositive factor. The focus of our inquiry has been whether a position was such that the officeholder would necessarily exercise broad discretionary power over the formulation or execution of public policies importantly affecting the citizen population—power of the sort that a self-governing community could properly entrust only to full-fledged members of that community.

Bernal, 104 S. Ct. at 2318. The Court held that a notary's duties, "important as they are, hardly implicate responsibilities that go to the heart of representative government. Rather, these duties are essentially clerical and ministerial." *Bernal*, 104 S. Ct. at 2319. The Court referred to *In re Griffiths* and noted that "[i]f it is improper to apply the political function exception to a citizenship requirement

governing eligibility for membership in a State bar, it would be anomalous to apply the exception to the citizenship requirement that governs eligibility to become a Texas notary." *Bernal*, 104 S. Ct. at 2320.

Bernal is distinguishable on a number of grounds. The Court was not concerned with the Privileges and Immunities Clause, but with the Equal Protection Clause contained in the fourteenth amendment to the United States Constitution. The case was concerned with citizenship and not residency. The applicant, a native of Mexico, was a resident of Texas and proposed to utilize authority to act as a notary in his work in Texas. The Texas statute provided that a notary public must be a citizen of the United States. *Bernal*, 104 S. Ct. at 2316, cites *In re Griffiths*, but that case involved the right of a resident alien to become licensed to practice law, not to hold public office. Even in *Griffiths*, there was residency in the state in which the person intended to become licensed and pursue her profession. Performance of the acts a notary public is authorized to engage in do not constitute a "fundamental right" to which the Privileges and Immunities Clause extends.

Wisconsin has a long history of treating a notary public as holding an important public office. Such officer exercises a portion of the sovereign power of the state. Notaries public have, in some cases, been viewed as political officers. Such officers are required to preserve their records and make such records available for inspection and copying during office hours and to have their records filed with the clerk of court of their county of residence in case of resignation or death. In my opinion, the provisions of section 137.01(1) and (2), which require Wisconsin residency as a condition of being appointed a notary public, do not violate the Privileges and Immunities Clause. The statutory provisions are presumed valid and you should require compliance with their terms unless and until they are held invalid by a court of competent jurisdiction in a proper case.

BCL:RJV

County Board; County board's power to delegate authority concerning property transactions to its committees discussed. OAG 44-85

November 8, 1985

DARWIN L. ZWIEG, *District Attorney*
Clark County

You ask three questions relating to the authority of a county board to delegate powers concerning equipment and real property transactions to one of its committees.

Your first question may be restated as follows:

1. May the approval of the county board or one of its committees be required in connection with all equipment purchases made by the community unified services department even though the department's individual and aggregate purchases do not exceed the limits of state and county appropriations and maximum available funding from other sources?

In my opinion, county board approval of equipment purchases may be required.

In 69 Op. Att'y Gen. 128 (1980), I indicated that the county board exercises control over human services boards pursuant to the Coordinated Plan and Budget which is developed using the procedures specified in section 46.031(2)(b), Stats. My conclusion was as follows:

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.

69 Op. Att'y Gen. at 131. This quotation refers only to contracts for services and public treatment facilities.¹

¹ This conclusion must be modified slightly because of recent amendments to chapter 51. See 1985 Wisconsin Act 25, secs. 1078d-1106. Section 51.423(ar)1. and 2., as amended and renumbered by section 1087r of 1985 Wisconsin Act 29, has transferred the authority to enter into such purchase of service contracts from community boards to community departments. That legislation works no other substantive change with respect to county board authority in counties without a county executive or county administrator. However, in counties with a county executive or county administrator, section 51.42(6m) as created by section 1092 of 1985 Wisconsin Act 29, transfers the authority to enter into contracts from community boards to the director of the community department. Such contracts are subject to county board approval.

Section 51.42(6m), as created by section 1092 of 1985 Wisconsin Act 29, provides:

DIRECTOR IN CERTAIN COUNTIES WITH A COUNTY EXECUTIVE OR COUNTY ADMINISTRATOR.

In any county with a county executive or county administrator in which the county board has established a community department, but not in combination with another county, the county executive or county administrator shall appoint the director. ... The appointment is subject to confirmation by the county board unless the county board, by ordinance, elects to waive confirmation or unless the appointment is made under a civil service system competitive examination procedure established under s. 59.07(2) or ch. 63. Such director, subject only to the supervision of the county executive or county administrator, shall:

(a) Supervise and administer any program established under this section, subject to such delegation of authority as is not inconsistent with this section and the rules promulgated thereunder.

....

(c) Determine, subject to county board approval and with the advice of the community board, whether services are to be provided directly by the county agency or contracted for with other providers and make such contracts.

Section 51.437(10m), as created by section 1105 of 1985 Wisconsin Act 29, contains comparable provisions concerning services for the developmentally disabled.

Section 51.42(5m) now authorizes community departments to provide services “[w]ithin the limits of state and county appropriations and maximum available funding from other sources” This language is a limitation on obligations which may be incurred by such departments. *See* 73 Op. Att’y Gen. 96 (1984). It does not address the *manner* in which the county board may exert control over purchases made by those departments within the range of funding which may lawfully be expended by those departments. *See generally* 69 Op. Att’y Gen. 128 (1980), which fully describes the extent to which the county board may exercise control over purchases of services by community departments in counties without a county executive or a county administrator.

I find no language in sections 51.42 or 51.437 which explicitly authorizes community departments to purchase equipment without county board approval. Had the Legislature intended community departments to have such authority, it would have been a simple matter to enact language similar to that used for purchases of services in section 51.42(6m)(c). The extent to which the county board may delegate approval authority with respect to equipment purchases is analyzed as part of my response to your next question which I have restated as follows:

2. May the county board by resolution delegate power to a standing committee to purchase, sell, lease or otherwise enter into transactions and agreements concerning equipment, real property or property interests without requiring approval of the county board?

It is my opinion that within statutory limitations such power may be delegated to a committee by resolution, provided that the delegation contains sufficient standards for the exercise of purchasing authority by the committee.

Municipal powers of a ministerial, administrative or executive nature may be delegated to a committee, even if the delegation permits the exercise of some discretion or judgment. See *First Savings & Trust Co. v. Milwaukee County*, 158 Wis. 207, 227-28, 148 N.W. 22 (1914); *Kavanaugh v. Wausau*, 120 Wis. 611, 615-16, 98 N.W. 550 (1904); *Duluth, South Shore & Atlantic R. Co. v. Douglas County*, 103 Wis. 75, 79, 79 N.W. 34 (1889); *French v. Dunn County*, 58 Wis. 402, 406, 17 N.W. 1 (1883).

There are statutory limits on the delegation of powers by a county board to any committee or subordinate agency. For example, any such delegation must be by resolution and must require that the committee report its actions to the county board. Sec. 59.06(1), Stats. See *French*, 58 Wis. at 406. The county board's authority to settle claims in excess of \$2,500 could not be delegated. See sec. 59.07(3), Stats. The delegation could not infringe upon the statutory authority of the county clerk to hold property in the name of the county or to sign deeds when authorized by the county board pursuant to section 59.07(1). See sec. 59.57, Stats.; 65 Op. Att'y Gen. 132, 134 (1976). The delegation also could not infringe upon the administrative and managerial authority of the county executive under section 59.031(2). See 68 Op. Att'y Gen. 92 (1979).

There are no explicit statutory limits on the kinds of powers which may be delegated under section 59.06.² See *First Savings*, 158 Wis. at 228. In *French*, 58 Wis. at 405, the court held that a resolution authorizing the purchase of land suitable for a county poor farm at a cost not to exceed \$3,000 constituted a valid delegation of authority by the county board to a committee. The court conceded that the resolution permitted the exercise of judgment and discretion, but nevertheless concluded that the powers delegated were not "legislative." *French*, 58 Wis. at 406. Therefore, the power to exercise discretion in connection with the purchase of land or property is a power which may be delegated.

Any delegation of authority must be accompanied by ascertainable standards pursuant to which that authority is to be exercised. See *Smith v. Brookfield*, 272 Wis. at 10; compare *French*, 58 Wis. at 405-06. Accordingly, it would not be permissible for a county board to grant blanket authority to a committee to purchase, sell, lease or otherwise acquire real property or equipment, even if such broad authority were not characterized as legislative. However, absent any statute to the contrary, the county board could, for example, authorize a committee to purchase property for particular purposes if certain budgetary requirements were met, authorize a committee to approve the purchase of equipment if certain specifications were met or authorize a committee to approve a community department's purchases pursuant to specified standards not inconsistent with the Coordinated Plan and Budget.

Your third question relates only to real property interests and is as follows:

3. If the county board does not have the power to delegate authority to a standing committee such as a public property committee to purchase, sell or lease real property or real property interests without board approval, may it delegate and/or is it necessary to delegate such powers to the land conservation committee?

² Although it is conceivable that our courts would now approve a limited delegation of legislative authority under section 59.06, I do not find it necessary to reach this issue because I interpret your inquiry as being limited to delegations of ministerial, administrative or executive powers. Compare 61 Op. Att'y Gen. 214, 216 (1972), and *French*, 58 Wis. at 406, with *Smith v. Brookfield*, 272 Wis. 1, 10, 74 N.W.2d 770 (1956).

You have verbally indicated that your question is limited to property acquired for soil or water conservation purposes. It is my opinion that the county board may delegate relatively broad powers to the land conservation committee in connection with the lease or purchase of real property for the purposes of soil and water conservation, but such property transactions are subject to the approval of the county board.

Section 92.07 provides in part:

(1) **POWERS GENERALLY.** Each land conservation committee may carry out the powers delegated to the committee subject to the approval of the county board.

....

(3) **DISTRIBUTE FUNDS.** Each land conservation committee may distribute and allocate federal, state and county funds made available to the committee for cost-sharing programs or other incentive programs for improvements and practices relating to soil and water conservation on private or public lands, and within the limits permitted under these programs, to determine the methods of allocating these funds.

....

(8) **OBTAIN PROPERTY.** Each land conservation committee, in the name of the county, may obtain options upon and acquire, by purchase, exchange, lease, gift, grant, bequest, devise or otherwise, any property or rights or interests in property or in water. A land conservation committee may maintain, administer and improve any properties acquired. A land conservation committee may receive income from these properties on behalf of the county and may expend this income in carrying out the purposes and provisions of this subchapter. A land conservation committee may sell, lease or otherwise dispose of the property or interests in property in furtherance of the purposes and the provisions of this subchapter.

....

(12) **CONTRACTS; RULES.** Each land conservation committee, in the name of the county, may make and execute con-

tracts and other instruments necessary or convenient to the exercise of its powers.

Section 59.879 requires the county board to create a land conservation committee and specifies that the committee is required to exercise those powers granted under chapter 92. The form of "approval" which is to be exercised by the county board pursuant to section 92.01 is not entirely clear. On its face, the approval mentioned in the statute could extend only to powers delegated by the county board which are in addition to those exercised pursuant to section 59.879(2) or to all powers exercised by the land conservation committee pursuant to section 92.07.

Since the statute is ambiguous, I have examined its legislative history. *See State Historical Society v. Maple Bluff*, 112 Wis. 2d 246, 252-53, 332 N.W.2d 792 (1983). As originally passed by the Legislature, section 92.07(1) provided that "[e]ach land conservation committee may carry out the powers delegated to the committee [*under this section*] subject to the approval of the county board." *See* chapter 346, Laws of 1981. The drafting files of the Legislative Reference Bureau indicate that the Governor vetoed the underscored language and submitted the following veto message to the Legislature:

I have vetoed the words "under this section" to make it clear that the land conservation committee powers delegated by the state to the county land conservation committees are subject to the approval of the county board. County boards object to "super committees" that are free standing, have non-county board representatives they do not appoint, or have statutory authority not subject to the authority of the county board.

This language indicates that actions taken by the land conservation committee are subject to the approval of the county board. Since the Legislature did not override this veto, I conclude that any actions concerning real property transactions which are taken by the land conservation committee are subject to county board approval.

BCL:FTC

Discrimination; Housing, Milwaukee County; Counties may adopt and enforce fair housing ordinances under section 66.432, Stats., in municipalities within such counties which already have enacted their own fair housing ordinance. No double jeopardy problem arises if a county and a municipality in the county simultaneously seek to enforce their fair housing ordinances in connection with a single act of discrimination, provided that a violation of one or both of the ordinances is punishable only by a forfeiture. Section 66.432 authorizes cities, villages, towns and counties to prohibit bases of discrimination in addition to those specified in sections 66.432 and 101.22. OAG 46-85

December 17, 1985

E. MICHAEL McCANN, *District Attorney*
Milwaukee County

The Milwaukee County Board is contemplating enacting a County Fair Housing Ordinance. The ordinance would prohibit discrimination in housing based upon "presence of children in household, sex, race, color, handicap, religion, national origin, sex or marital status of the person maintaining a household, lawful source of income, age, ancestry or sexual orientation as defined in Section 111.32(13m), Wis. Stats." Apparently, most cities and villages in Milwaukee County have previously enacted their own fair housing ordinances. In regard to this proposed ordinance, you ask three questions which I set forth and address below.

1. May Milwaukee County adopt and enforce a fair housing ordinance in those municipalities within the county which have enacted their own fair housing ordinances?

Shortly after you posed this question to me, the Legislature acted to amend section 66.432(2), Stats., in the 1985 budget bill. On July 17, 1985, the Governor signed the budget bill making the amendment law. The amendment added counties to the list of municipalities which may enact fair housing ordinances under the authority granted in section 66.432. 1985 Wisconsin Act 29, sec. 1206m. It eliminated from section 66.432(2) the provision which only allowed counties to adopt fair housing ordinances under sections 59.07(11) and 66.433. This is a significant change because the unamended version of section 66.432 required considerable prior

cooperation by cities, towns and villages before a county could adopt and enforce a county fair housing ordinance.

By placing counties in the same clause as other municipalities, the Legislature has bestowed on counties the same authority to adopt fair housing ordinances under section 66.432 as is enjoyed by other municipalities. There is nothing in the statute to indicate that the Legislature intended that county ordinances should take precedence over or be subordinate to ordinances enacted by municipalities located within the county.

By contrast, in other areas, the Legislature has expressly limited or prohibited county authority. For example, the Legislature has provided that some types of county ordinances and codes shall not apply in cities or villages, if such municipalities have adopted ordinances or codes on the same subject matter. *E.g.*, sec. 59.07(18), (49), (50) and (51), Stats. The Legislature has also flatly precluded counties from enforcing some types of ordinances in cities or villages. *E.g.*, sec. 59.07(69), Stats.

It is my opinion that when the Legislature authorizes a county to adopt an ordinance, the county is not precluded from enforcing the ordinance in cities, towns and villages within the county unless there is specific statutory language to the contrary or unless such enforcement would be inconsistent with the intent of the legislation. Therefore, I believe that Milwaukee County may adopt and enforce a fair housing ordinance in those municipalities within the county which have enacted their own fair housing ordinance.

2. If the county may adopt and enforce a fair housing ordinance in those local municipalities within the county which have enacted their own fair housing ordinances, would a double jeopardy problem arise if both the county and a municipality therein sought enforcement in connection with a single act of alleged housing discrimination?

The fifth amendment to the United States Constitution and article I, section 8 of the Wisconsin Constitution protects persons against multiple criminal prosecutions. This protection is commonly referred to as the protection against "double jeopardy."

Double jeopardy protection does not apply to multiple municipal actions unless more than one action is a criminal proceeding and results in a criminal punishment. *State v. Kramsvogel*, 124 Wis. 2d 101, 109, 369 N.W.2d 145 (1985). Furthermore, since a municipi-

pal ordinance is not a state law, a violation of such ordinance does not constitute a crime if the ordinance violation is punishable only by a forfeiture. *Kramsvogel*, 124 Wis. 2d at 116. Therefore, the answer to your second question depends upon the penalty terms of the ordinances in a particular case.

I observe that the penalty section of the proposed Milwaukee County Fair Housing Ordinance allows only a forfeiture. The proposed forfeiture amounts are not less than \$100 nor more than \$1,000 for a first violation and not less than \$1,000 nor more than \$10,000 for a second violation within five years. Hence, the prohibition against double jeopardy would not bar Milwaukee County from enforcing the proposed fair housing ordinance if it is adopted with this forfeiture section.

3. Does the proposed ordinance exceed the authority granted in section 66.432, because it prohibits discrimination on the basis of "presence of children in household?"

Section 66.432(2) authorizes municipal ordinances prohibiting housing discrimination "solely on the basis of sex, race, color, physical condition, developmental disability as defined in s. 51.01(5), sexual orientation, religion, national origin or ancestry." It further states that:

Such an ordinance may be similar to s. 101.22 or may be more inclusive in its terms or in respect to the different types of housing subject to its provisions, but any such ordinance establishing a forfeiture as a penalty for violation shall not be less than the statutory forfeitures under s. 101.22.

Sec. 66.432(2), Stats.

The fair housing ordinance proposed in Milwaukee County contains five bases of prohibited discrimination found in section 101.22, but not specified in section 66.432. These bases are age, handicap, sex or marital status of the person maintaining a household, and lawful source of income. Ordinances adopted under section 66.432(2) may include all bases of discrimination listed in section 101.22, even though not specified in section 66.432, because section 66.432(2) states that a local ordinance "may be similar to s. 101.22"

I note parenthetically that the word "solely" in section 66.432(2) does not limit municipal ordinances to only those bases enumerated

in section 66.432(2). The Legislature chose the phrase "solely on the basis of" and not "solely on the bases of." Therefore, the common sense reading of the word "solely" is that it modifies each basis individually and not the listed bases as a group. This construction is consistent with the use of these terms in sections 101.22(1m)(a) and 111.31(1).

It is my opinion that local ordinances adopted under section 66.432(2) may also prohibit bases of discrimination not listed in section 66.432 or section 101.22. Section 66.432(2) states that a municipal fair housing ordinance "may be similar to s. 101.22 or may be more inclusive in its terms or in respect to the different types of housing subject to its provisions" The phrase "more inclusive in its terms" must have meaning. It is a cardinal rule of statutory construction that no statutory word or clause shall be rendered surplusage. *Garfield v. United States*, 297 F. Supp. 891 (W.D. Wis. 1969); *Kollasch v. Adamany*, 104 Wis. 2d 552, 563, 313 N.W.2d 47 (1981). The question then is: what are the "terms" in section 101.22 with respect to which a local fair housing ordinance may be "more inclusive"?

Civil rights statutes are considered to be remedial in nature and are to be construed liberally in favor of coverage to effectuate the constitutional mandate against discrimination. 14 C.J.S. Supp. *Civil Rights* § 10 (1985). Liberal construction of statutes consists of giving words meaning which render them effective to accomplish the legislative intent which the statute discloses. *State ex rel. Mueller v. School District Board*, 208 Wis. 257, 260, 242 N.W. 574 (1932). Words undefined within statutes are to be construed according to their common and approved usage unless such construction would produce a result inconsistent with the manifest intent of the legislation. Sec. 990.01(1), Stats. In determining legislative intent, it is appropriate to consider the language in the statute and other statutes dealing with the same subject matter. *Kollasch*, 104 Wis. 2d at 563.

Section 66.432(1) states that housing discrimination is a problem of "local interest." It further states that:

[T]he enactment of s. 101.22 by the legislature shall not preempt the subject matter of equal opportunities in housing from consideration by local governments, and shall not exempt cities, villages, towns and counties from their duty, nor deprive them of

their right, to enact ordinances which prohibit discrimination in any type of housing solely on the basis of sex, race, color, physical condition, developmental disability as defined in s. 51.01(5), sexual orientation, religion, national origin or ancestry.

In section 101.22(1) the Legislature declared that "it is the duty of the local units of government to assist in the orderly prevention or removal of all discrimination in housing through the powers granted under s. 66.433." The Legislature's recognition that different localities may have differing problems related to discriminatory practices is reflected in section 66.433, the Wisconsin Bill of Human Rights. In section 66.433, cities, towns, villages and counties are expressly "authorized and urged" to establish or participate in a "community relations-social development commission," whose purpose is:

[T]o study, analyze and recommend solutions for the major social, economic and cultural problems which affect people residing or working within the municipality including, without restriction because of enumeration, problems of the family, youth, education, the aging, juvenile delinquency, health and zoning standards, and *discrimination in housing*, employment and public accommodations and facilities on the basis of sex, class, race, religion, sexual orientation or ethnic or minority status.

Sec. 66.433(3)(a), Stats. This is a clear legislative expression of intent that communities may have differing problems which should be addressed at the local level.

Applying the above principles of construction and legislative intent leads to the conclusion that the word "terms" in section 66.432(2) should be construed to allow municipalities to deal with their particular problems regarding housing discrimination. Nothing in section 66.432 indicates that the phrase "more inclusive" applies only to certain types of terms in section 101.22.

However, the question remains whether municipalities can prohibit housing discrimination specifically on the basis of "presence of children in [a] household." Although municipalities would appear to have the authority under section 66.432 to prohibit such discrimination, I conclude that the unique legislative and administrative history of that section results in substantial uncertainty regarding the municipalities' authority to prohibit discrimination on the basis of "presence of children in [a] household."

You have suggested that "presence of children in household" is properly included in the proposed ordinance because it is a particularization of the term "age" in section 101.22. There is some merit to this proposition. Since it can be argued that when landlords or sellers deny housing because of the presence of children in a household, they effectively deny housing to children based upon their age.

However, a review of legislative history and administrative agency action persuades me that the Legislature did not intend the inclusion of "age" to be a protection against housing discrimination for families with children. The Legislature has at least twice rejected attempts to add language to section 101.22 which would explicitly protect children in families. In 1965, when section 101.22 was created, an amendment was rejected by the Assembly which would have added "age" and "number of children in family" to the list of prohibited bases of housing discrimination. Assembly Amendment 1 to Senate Amendment 5 to 1965 Assembly Bill 852; Assembly Bulletin of the Proceedings of the Wisconsin Legislature, 1965 session, p. 523. Neither basis was added to the then newly created section 101.22.

In 1979, "age" was added to section 101.22, but during the same session, the Senate declined to add "parental status" as an independent basis of prohibited discrimination. Assembly Amendment 5 to 1979 Senate Bill 244; Senate Bulletin of the Proceedings of the Wisconsin Legislature, 1979 session, p. 177.

I cannot say from this that the Legislature did not intend that the term "age" cover "presence of children in household." It can only be said that the Legislature did not explicitly protect families with children when it had an opportunity to do so. The failure of bills to become law often has nothing to do with the bills' content. *American Motors Corp. v. ILHR Dept.*, 101 Wis. 2d 337, 349, 305 N.W.2d 62 (1981).

I find it more significant that the administrative agency charged with administering section 101.22 has taken action to interpret the term "age" as being limited to persons eighteen years of age or older. A course of administrative interpretation may be used to supplement a statutory provision. *American Motors*, 101 Wis. 2d at 353. A clear source of administrative interpretation is an agency's

exercise of its rule-making power. Rule-making power is subject to legislative oversight and when a rule is promulgated and not suspended or set aside on legislative review under section 13.56, the rule is some evidence that the Legislature has acquiesced in the agency's interpretation of the statute. *American Motors*, 101 Wis. 2d at 354-55.

In this case the agency charged with implementing section 101.22 is the Department of Industry, Labor and Human Relations. Under the authority granted in section 101.22(3), the department has promulgated chapter Ind 89 of the Wisconsin Administrative Code entitled "Equal Opportunities, Fair Housing," for the purpose of administering the state fair housing statute.

In 1981, the department adopted section Ind 89.01(2) of the Wisconsin Administrative Code which states that "[a]ge" in reference to protected classes of persons covered by the act [section 101.22] means 18 years of age or older." Since the Legislature has acquiesced in this definition of "age" for purposes of housing discrimination, I must conclude that it did not intend to protect families with children when it included "age" in section 101.22.

In summary, the Legislature has at least twice rejected amendments which would have specifically extended coverage of the Fair Housing Act to children in households and the agency charged with administering the Act has defined age to include all persons except minors. In my opinion, this legislative and administrative history not only makes it clear that the prohibition against age discrimination does not cover children in a household, but also raises serious doubts as to whether a county can extend fair housing protection to this group.

Therefore, I conclude as a general proposition that municipal ordinances may contain bases of discrimination "more inclusive" than the bases of discrimination listed in sections 66.432 and 101.22. However, I would be remiss if I did not qualify this opinion by stating that courts might well strike down a provision prohibiting discrimination on the basis of "presence of children in [a] household" because of the unique legislative and administrative history discussed above.

BCL:PL

Credit Unions; The Wisconsin Credit Union Savings Insurance Corporation can make grants to member credit unions as necessary to meet federal insurance eligibility requirements, and the Office of the Commissioner of Credit Unions may require such grants on a case-by-case basis. OAG 48-85

December 27, 1985

RICHARD OTTOW, *Commissioner*
Office of the Commissioner of Credit Unions

You have requested my opinion as to whether the Wisconsin Credit Union Savings Insurance Corporation (WCUSIC) may assist state credit unions in meeting federal insurance eligibility requirements by providing funding with outright grants and, if so, whether the Office of the Commissioner may require such funding on a case-by-case basis. The answer to both questions is yes.

The factual background you present is as follows. Sections 2061 and 2062 of the recently enacted budget bill, 1985 Wisconsin Act 29, require state chartered credit unions to become federally insured or to liquidate. The present state insuring body, WCUSIC, will be liquidated upon completion of the transition. It is possible that some credit unions will qualify for federal insurance only if supplemental funding becomes available.

I.

Chapter 186 of the statutes governs credit unions. Section 186.35, Stats., created WCUSIC and regulates its operation.

Although not dealing with the issue directly, the terms of section 186.35 on its face, even before amendment by 1985 Wisconsin Act 29, are consistent with the authority to make grants to member credit unions. Subsection (2) states in part that the purpose of WCUSIC is to:

(a) Aid and assist any member credit union which develops financial difficulties such as insolvency, nonliquidity or liquidation, in order that the savings of each member of a member credit union shall be protected or guaranteed. ...

(b) Cooperate with its member credit unions and the office of the commissioner for the purpose of improving the general welfare of credit unions in this state.

Subsection (3)(d) states in part that WCUSIC is empowered to “[a]dvance funds to aid member credit unions to operate and to meet liquidity requirements.” It would seem that the prospect of a credit union facing liquidation for an inability to meet mandatory insurance requirements would justify “aiding” the member by “advancing funds to operate” in an effort to improve the “general welfare” of credit unions.

The meaning of a statutory provision must be considered in light of the entirety. *State v. Fouse*, 120 Wis. 2d 471, 355 N.W.2d 366 (Ct. App. 1984). The new act requires that credit unions apply for federal insurance within 180 days of the effective date of the act and be so certified within forty-two months or face mandatory liquidation by the Commissioner. 1985 Wisconsin Act 29, secs. 2061r, 2061t and 2061y. The newly created section 186.34(5) mandates that “every credit union ... shall take ... every action lawfully required to maintain federal share insurance coverage in full force and effect, and shall refrain or desist from taking any action that is likely to cause termination of federal share insurance coverage.” 1985 Wisconsin Act 29, sec. 2061y. The obvious intent of chapter 186, as amended, is to promote the transition to federal insurance. Efforts by WCUSIC, consistent with its statutory directives, to promote an orderly transition must be held to be within the scope of its authority.

The Legislature did not specifically deal with grants to effectuate federal insurability in the amendments to section 186.35. The amendments to section 186.35 other than those discussed above essentially deal with termination after the conversion to federal insurance. 1985 Wisconsin Act 29, secs. 2062b, 2062e, 2062h, 2062L, 2062n, 2062r, 2062u. Termination occasions the distribution of any remaining assets to member credit unions, in essentially a pro rata fashion, but only after all WCUSIC liabilities have been paid and member credit unions have been liquidated or granted federal coverage. 1985 Wisconsin Act 29, secs. 2061y and 2062u. Despite a provision in the act that the final distribution is to be reduced by any previous payout to the credit union (sec. 2062u), I see nothing in the amendments to section 186.35 that create a vested interest of each credit union in the assets of WCUSIC, or would otherwise limit their use pursuant to pre-existent legislative mandates. Moreover, the net reduction to WCUSIC assets could

well be greater by liquidation assistance than by grants to qualify for federal insurance.

In the absence of legislative history on point the following correspondence supports my conclusion. In a March 27, 1985, letter the Governor indicated that his intent in proposing mandatory federal insurance for credit unions was to avoid the panic that had occurred in a neighboring state from a loss of public confidence in privately insured savings and loans.¹ The Governor of the State of Ohio closed seventy-one privately insured, state chartered financial institutions after a surge of panic withdrawals by depositors on a privately insured savings bank that had sustained large losses resulting from the collapse of a security company.² If the Governor's support for this legislation was based upon a desire to avoid panic, it can reasonably be inferred that the Legislature had a similar intent in enacting the amendments to chapter 186. It would be inconsistent with this intent to hold that WCUSIC does not have authority to utilize its resources to minimize investor panic by acting before liquidation becomes necessary. Therefore, it is my opinion that WCUSIC can make grants to credit unions to assist in meeting eligibility requirements for federal insurance.

II.

I further conclude that the commissioner may require WCUSIC to provide such grants on a case-by-case basis. The commissioner has primary responsibility for enforcement of all laws relating to credit unions and exclusive supervision of WCUSIC. 64 Op. Att'y Gen. 7 (1975).

Section 186.35 on its face clearly indicates that WCUSIC is to function under the direct supervision of the commissioner. Subsection (1) states in part that "[t]his corporation shall be under the exclusive supervision of the commissioner." Subsection (7) states in part that "[t]he corporation shall be subject to supervision and an annual examination by the office of the commissioner." Subsection

¹ Letter from Anthony S. Earl, Governor, State of Wisconsin, to Edgar F. Callahan, Chairman, National Credit Union Administration, dated March 27, 1985.

² The Subcommittee on Commerce, Consumer and Monetary Affairs of the Committee of Government Operations, United States House of Representatives, Statement of Edwin J. Gray, Chairman of the Federal Home Loan Bank Board, April 3, 1985, p.2.

(2) provides in part that “[t]he ... corporation shall ... [c]ooperate with ... the commissioner for the purpose of improving the general welfare of credit unions” Subsection (3)(e), which empowers WCUSIC to “[a]ssist in the orderly liquidation of credit unions,” puts it in a clearly subordinate position to that of the commissioner who effects liquidations under section 186.29. Subsection (5)(d) requires that special assessments be levied against credit unions only upon the approval of the commissioner. Subsection (8) empowers WCUSIC to make recommendations to the commissioner regarding sanctions against a credit union for mismanagement, but not to take any direct action. The original articles of incorporation of WCUSIC as well as the bylaws and any amendments require approval of the commissioner. Sec. 186.35(1) and (9), Stats. Even liquidation of WCUSIC requires antecedent action by the commissioner and his supervision of the winding up of its affairs. Sec. 186.35(11), Stats., created by 1985 Wisconsin Act 29, sec. 2062u.

The narrowly circumscribed authority of WCUSIC stands in sharp contrast to the unfettered discretion of the commissioner. Sec. 186.012(2), Stats. (enforce all laws relating to credit unions); sec. 186.02(3), Stats. (approve or reject the proposed creation of credit unions); sec. 186.03, Stats. (enjoin certain activities); sec. 186.04(1), Stats. (assess examination and supervision fees against credit unions); sec. 186.09, Stats. (regulate credit union lending practices); sec. 186.11, Stats. (control credit union investments); sec. 186.112, Stats. (control credit union borrowing); sec. 186.113, Stats. (regulate certain services to or by credit unions); sec. 186.119, Stats. (control credit union examiners); sec. 186.16, Stats. (limit dividends); sec. 186.17, Stats. (require reserves in excess of the statutory guidelines); sec. 186.18, Stats. (exercise limited control over credit union dissolutions); sec. 186.19, Stats. (regulate bonding of credit union officers); sec. 186.22, Stats. (regulate the Credit Union Finance Corporation); sec. 186.23, Stats. (issue rules and regulations for the conducting of credit union business upon concurrence of the credit union review board); sec. 186.24, Stats. (remove credit union officials with the concurrence of the credit union review board); sec. 186.25, Stats. (control and supervise all credit unions transacting business in this state, determine reporting requirements, and assess forfeitures); sec. 186.26, Stats. (cause each credit union to be examined or audited annually); sec. 186.28, Stats. (prescribe book-keeping procedures and assess forfeitures for violations); sec.

186.29, Stats. (summary seizure of credit union business and property, suspension of operations or officers, commence liquidation, take automatic title to all credit union assets, initiate court action); sec. 186.30, Stats. (freeze dividends with concurrence of the credit union review board, depreciate shares, restrict loans, conveyances, or disbursements); sec. 186.31, Stats. (approve or reject consolidations); sec. 186.34, Stats. (1985 Wisconsin Act 29, sec. 2061y) (suspend/liquidate credit unions failing to apply for/obtain federal insurance). The above provisions, for the most part, empower the commissioner to make case-by-case determinations, and not just set industry-wide standards. Generally, the commissioner is subject to the credit union review board only upon appeal or after-the-fact review. Sec. 186.015, Stats.

If WCUSIC essentially can engage in discretionary activities only upon approval of the commissioner, and the commissioner can exercise discretion over virtually all aspects of credit union functioning, including WCUSIC activities, it logically follows that a decision by WCUSIC to refrain from exercising a power within its authority must also be subject to the approval of the commissioner. To conclude otherwise would be to grant WCUSIC a veto power over the commissioner's statutory prerogative, and thwart the legislative mandate of an orderly transition to federal insurance coverage for credit unions. Therefore, I conclude that the commissioner can require WCUSIC to make the grants discussed above on a case-by-case basis.

BCL:MJL

Conservation; Indians; Law Enforcement; Menominee Indians; Sheriffs; State and county conservation wardens and sheriff's officers have authority under state law to arrest a Menominee Indian suspect on the reservation following fresh pursuit for an off-reservation violation of state law, if the arrest is one the officer is otherwise authorized to make. Although the state is generally obliged to comply with Menominee tribal extradition procedures, the state's personal jurisdiction over an Indian arrested under the circumstances described is probably not pre-empted by federal law. OAG 50-85

December 30, 1985

C.D. BESADNY, *Secretary**Department of Natural Resources*

You have asked whether state and county conservation wardens, while in fresh pursuit of a suspected offender, may legally enter the Menominee Indian Reservation and arrest a Menominee Indian suspect for an off-reservation violation of state law, whether the potential charges include a felony, a misdemeanor or a violation punishable only by a civil forfeiture. Implicit in your inquiry is the question of whether, and to what degree, the state's personal jurisdiction over a suspect thus arrested is dependent upon compliance with tribal procedures regulating the extradition of Indians from the Menominee reservation. I have received a similar inquiry from Shawano County District Attorney Gary Bruno concerning the authority of Shawano County sheriff's officers. Therefore my response will address the authority of both sheriff's officers and conservation wardens.

For the reasons which follow, I am of the opinion that state and county conservation wardens and sheriff's officers have authority under state law to arrest a Menominee Indian suspect on the reservation following a fresh pursuit for a violation of state law occurring off the reservation, if the arrest is one the officer is otherwise authorized to make. Although the state is generally obliged to comply with Menominee tribal extradition procedures, the state's personal jurisdiction over an Indian arrested under such circumstances is probably not pre-empted by federal law. Neither the failure of the tribal ordinance to address the fresh pursuit situation nor an officer's failure to comply with applicable tribal extradition requirements in a particular instance is likely to deprive the Wisconsin courts of personal jurisdiction over such a defendant.

A. The requirements of Wisconsin law must be met.

Before addressing the conflicting state and tribal jurisdictional issues central to your inquiry, it is important to note that the requirements of Wisconsin arrest law generally must be met because the legality of a warrantless arrest after a fresh pursuit may be critical to the state's personal jurisdiction over a defendant as a matter of state law. *Cf. Walberg v. State*, 73 Wis. 2d 448, 243 N.W.2d 190 (1976); *State v. Monje*, 109 Wis. 2d 138, 325 N.W.2d

695 (1982), annotated at 25 A.L.R. 4th 157 (1983); *United States v. Crews*, 445 U.S. 463 (1980); 21 Am. Jur. 2d *Criminal Law* §§ 340-41.

Thus, I assume that the officer in question has probable cause to make an arrest before initiating the pursuit, and that the offense to be charged is one for which the officer is authorized to make an arrest. *City of Madison v. Ricky Two Crow*, 88 Wis. 2d 156, 276 N.W.2d 359 (Ct. App. 1979); *State v. Cheers*, 102 Wis. 2d 367, 386-88, 306 N.W.2d 676 (1981). I further assume that both sheriff's officers and conservation wardens are "peace officers" or "law enforcement officers" as defined in the statutes. Secs. 939.22(22) and 967.02(5), Stats.

If the officer has probable cause and the statutory authority to arrest without a warrant for the offense to be charged, it is irrelevant under section 175.40, Wisconsin's recently enacted statute on intrastate fresh pursuit, whether the alleged offense would be charged as a felony or misdemeanor or would simply be punishable by a civil forfeiture. Pursuant to section 175.40, any peace officer may, when in fresh pursuit, follow anywhere in the state and arrest any person for a violation of any law or ordinance the officer is authorized to enforce. Thus, Wisconsin has by statute abolished former territorial and subject matter limitations on a peace officer's authority to arrest after fresh pursuit within the state. *Cf. Carson v. Pape*, 15 Wis. 2d 300, 308, 112 N.W.2d 693 (1961). 5 Am. Jur. 2d *Arrest* § 51 (1962); Sec. 66.31, Stats. (1979); 61 Op. Att'y Gen. 419, 421 (1972).

The term "fresh pursuit,"¹ though not defined in section 175.40, is a venerable common law concept which has typically been defined in the case law as pursuit without unreasonable delay under all of the surrounding circumstances. *Six Feathers v. State*, 611 P.2d 857, 861 (Wyo. 1980); *see also State v. Tillman*, 208 Kan. 954, 494 P.2d 1178, 1182 (1972); *Swain v. State*, 50 Md. App. 29, 435 A.2d 805, 810 (1981). Consistent with the case law, the Wisconsin

¹ Although the terms "fresh pursuit" and "hot pursuit" are sometimes used interchangeably, "hot pursuit" is more frequently used as an example of an "exigent circumstance" which obviates the need to obtain a search or arrest warrant when an arrest is made within a private dwelling. *See Welsh v. Wisconsin*, 104 S. Ct. 2091 (1984), *rev'g State v. Welsh*, 108 Wis. 2d 319, 336, 321 N.W. 2d 245 (1982); *Steagald v. United States*, 451 U.S. 204, 221 (1981); *United States v. Santana*, 427 U.S. 38, 42-43 n.3 (1976). While the element of a chase is, of course, common to both concepts, the term "fresh pursuit" is more frequently applied when the chase occurs across jurisdictional boundaries.

Uniform Act on Close Pursuit, which may be interpreted *in pari materia* with section 175.40, provides that close pursuit “shall not necessarily imply instant pursuit, but pursuit without unreasonable delay.” Sec. 976.04(5), Stats.

In the hypothetical situation you pose, the fresh pursuit would occur when a violation of state law is committed outside of the Menominee reservation and the pursuing officer follows the Indian suspect onto the reservation where the arrest occurs. The Menominee reservation, of course, is located within Menominee County and within the State of Wisconsin. Although exercise of a state’s jurisdiction may be pre-empted or restricted by federal law because of a tribe’s sovereign status, an Indian reservation itself is not extraterritorial to the state in which it is located. *Cf. Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962). Therefore, assuming the arresting officer had probable cause and the statutory authority to arrest for the offense to be charged, an arrest after fresh pursuit onto the Menominee reservation is authorized under Wisconsin law. *Cf. sec. 175.40, Stats.; State v. Barrett*, 96 Wis. 2d 174, 182, 291 N.W.2d 498 (1980). Moreover, the state’s *subject matter* jurisdiction to try an Indian defendant for a violation of state law committed off the reservation is exclusive. *Organized Village of Kake*, 369 U.S. at 75.

B. Pre-emption analysis summarized.

The central issue raised by your inquiry is whether the state’s personal jurisdiction over a defendant arrested under the circumstances described is pre-empted by federal law and, in particular, whether the Menominee Tribe’s efforts to control the extradition from the reservation of Indians charged with off-reservation crimes would oust the state of jurisdiction.

Aspects of this question were discussed in an earlier opinion, 70 Op. Att’y Gen. 36 (1981). In that opinion, which did not address the element of fresh pursuit, I concluded, *inter alia*:

[N]either the state nor Shawano/Menominee County officials have authority to enter the reservation to arrest tribe members or otherwise acquire personal jurisdiction over tribe members residing and located on the reservation in criminal matters occurring off the reservation.

70 Op. Att’y Gen. at 40. Cases decided since that opinion was written, along with the enactment of section 175.40, suggest that

the foregoing conclusion may require modification, at least in the fresh pursuit situation you pose.

Relatively few cases address a state's authority to arrest an Indian on the reservation for off-reservation violations of state law and the effect of tribal extradition procedures on the exercise of a state's jurisdiction to arrest and convict. Those cases are inconsistent if not directly conflicting, and there are no Supreme Court decisions which squarely address the issue. *Cf. Davis v. Mueller*, 643 F.2d 521 (8th Cir.), *cert. denied* 454 U.S. 892 (1981); *Weddell v. Meierhenry*, 636 F.2d 211 (8th Cir. 1980), *cert. denied* 451 U.S. 941 (1981); *State of Arizona ex rel. Merrill v. Turtle*, 413 F.2d 683 (9th Cir. 1969), *cert. denied* 396 U.S. 1003 (1970); *Benally v. Marcum*, 89 N.M. 463, 553 P.2d 1270 (1976); *State ex rel. Old Elk v. District Court of Big Horn*, 552 P.2d 1394 (Mont.), *appeal dismissed* 429 U.S. 1030 (1976); *In the Matter of Little Light*, 598 P.2d 572 (Mont. 1979); *Fournier v. Roed*, 161 N.W.2d 458 (N.D. 1968). *See also* F. Cohen, *Handbook of Federal Indian Law*, 357-61, 382-84 (1982); Comment, *The Right of Tribal Self-Government and Jurisdiction of Indian Affairs*, 1970 Utah L. J. 291; Comment, *Tribal Control of Extradition from Reservations*, 10 Nat. Resources J. 626 (1970).

Furthermore, the reported cases often ignore extradition law generally, tending instead to either focus solely on the state's interest in securing jurisdiction over those who violate its laws or on the tribal interests in controlling the extradition of alleged offenders from within reservation borders. Finally, all of the reported cases in this area predate the most recent decisions of the Wisconsin and United States Supreme Courts which authoritatively restate the analytical framework to be applied in resolving state and tribal jurisdictional conflicts over Indians on the reservation. *See Rice v. Rehner*, 463 U.S. 713 (1983); *State v. Webster*, 114 Wis. 2d 418, 338 N.W.2d 474 (1983); *County of Vilas v. Chapman*, 122 Wis. 2d 211, 361 N.W.2d 699 (1985).

Rather than attempting to reconcile essentially irreconcilable cases, it seems more useful to attempt a fresh analysis of your questions based on *Rice* and *Webster*. Although both cases are factually distinguishable from the hypothetical situation you pose, the basic analytical framework used in each can be applied to the question of whether Menominee extradition procedures oust the state of personal jurisdiction over Indians arrested on the reservation for off-reservation offenses. *See Webster*, 114 Wis. 2d at 433. A

careful reading of both *Rice* and *Webster* is, therefore, essential to an understanding of this opinion.

As noted in those cases, states are not absolutely barred from exercising jurisdiction over tribal reservations and members. *Webster*, 114 Wis. 2d at 432, citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980). There are, however, two related but independent barriers to the exercise of state jurisdiction—federal pre-emption and state infringement upon the right of tribal self-government. *Id.*

In *Rice*, the Supreme Court summarized the shift away from inherent Indian sovereignty toward reliance on federal pre-emption as a bar to state jurisdiction:

The goal of any pre-emption inquiry is “to determine the congressional plan,” ... but tribal sovereignty may not be ignored and we do not necessarily apply “those standards of pre-emption that have emerged in other areas of the law.” ... We have instead employed a pre-emption analysis that is informed by historical notions of tribal sovereignty, rather than determined by them. ... We do not necessarily require that Congress explicitly pre-empt assertion of state authority insofar as Indians on reservations are concerned, but we have recognized that “any applicable regulatory interest of the State must be given weight” and “automatic exemptions “as a matter of constitutional law” are unusual.”

Rice, 463 U.S. at 718-19 (citations omitted).

C. The backdrop of tribal sovereignty.

The modern cases recognize that control over the extradition of Indians from the reservation is an aspect of tribal sovereignty or self-government. *Turtle*, 413 F.2d at 685-86; *Davis*, 643 F.2d at 525 n.8; *Benally*, 553 P.2d at 1271-72; cf. *Old Elk*, 552 P.2d at 1397-98. See also Cohen, *Handbook of Federal Indian Law* at 382. This conclusion is consistent with constitutional extradition law generally, since extradition is essentially intersovereign in nature, creating only incidental rights in the accused. See *Michigan v. Doran*, 439 U.S. 282, 287 (1978); *Tavarez v. U.S. Att’y Gen.*, 668 F.2d 805, 810 (5th Cir. 1982); *State ex rel. Niederer v. Cady*, 72 Wis. 2d 311, 317, 323-24, 240 N.W.2d 626 (1976). Extradition provides an orderly process serving the dual function of securing for the asylum jurisdiction a means of protecting its residents from unjust criminal

actions by the demanding jurisdiction and of securing for the demanding jurisdiction the return of a fugitive for trial. *Id.*

Since extradition is an aspect of tribal sovereignty, therefore, the first question under *Rice* is whether the Menominee Tribe has a tradition of tribal self-government over extradition of Indians accused of off-reservation violations of state law. *Rice*, 463 U.S. at 720; *Webster*, 114 Wis. 2d at 434; *Chapman*, 122 Wis. 2d at 215.

I am informed that in 1981, the Menominee Tribal Legislature adopted an ordinance governing extradition to the State of Wisconsin of Indians formally charged with felonies or with violating the terms of probation and parole under state law. In its statement of legislative policy, the ordinance sets forth the tribe's intent not to provide a haven for persons avoiding the enforcement of the state's criminal laws, but instead to provide a mechanism for state-tribal cooperation in returning to the demanding jurisdiction persons accused of violating the criminal laws of that jurisdiction.²

The existing tribal ordinance neither addresses nor provides any procedures for arrests by state law enforcement officers after a fresh pursuit onto the reservation, nor does it authorize the extradition of persons accused of misdemeanors or offenses punishable only by a civil forfeiture. However, it does appear that the Menominees have established a definite, if limited, policy of tribal self-government over the extradition of Indians charged with off-reservation felonies and probation and parole violations.

The second step in the *Rice* analysis requires an evaluation of the balance of state, federal and tribal interests involved. *Rice*, 463 U.S. at 720-25; *Webster*, 114 Wis. 2d at 435; *Chapman*, 122 Wis. 2d at 216. The tribe's interests, as expressed in the tribal ordinance, are in creating orderly procedures under the supervision of tribal authorities, for the transfer of certain fugitives from state jurisdiction back to the state and in preventing tribal lands from becoming a haven for violators of state law.

The state's interest in apprehending and bringing to trial persons accused of violating state law is clear. Equally clear is the possible direct impact, beyond reservation boundaries, on effective state and

² Section 976.07, Stats., enacted in 1982, authorizes the state to enter into an agreement for an essentially complementary arrangement for the extradition to the tribe of witnesses, fugitives and evidence. No formal agreement under section 976.07 has yet been reached.

local law enforcement if the state has no mechanism for arresting Indians who violate state laws off the reservation and bringing them before the state courts for trial. *Cf. Rice*, 463 U.S. at 724. This impact is particularly acute in the fresh pursuit situation where the identity of the suspect is often unknown to the pursuing officer so that alternative methods of apprehension, including the extradition process, are unavailable. Tribal concerns that the reservation not become a haven for fugitives are mirrored in those of state and local law enforcement that the reservation boundary not be a one-way barrier through which Indian lawbreakers can flee to avoid arrest. Disrespect for the law and the legal process is likely to be encouraged in both Indians and non-Indians if officers in fresh pursuit of a suspect cannot follow an Indian suspect onto the reservation to make an arrest.

The jurisdictional history of state, federal and tribal authority over the Menominee Reservation is exceedingly complex, and will not be repeated here. *See generally, Webster*, 114 Wis. 2d at 421-24, 436-37. Suffice it to say, as a result of the restoration of reservation status and retrocession of the state's jurisdiction, since March 1, 1976, the state has had no explicit authorization from Congress to exercise general jurisdiction over tribal members within the Menominee Reservation. *Webster*, 114 Wis. 2d at 437; *cf. Sanapaw v. Smith*, 113 Wis. 2d 232, 335 N.W.2d 425 (Ct. App. 1983). Although the state's jurisdiction over Indians on the Menominee Reservation is clearly limited, *Rice*, *Webster* and *Chapman* all caution that the lack of explicit federal authorization is not decisive, at least in matters where the state traditionally has exercised significant control or where there may be significant effects beyond the reservation boundaries. *Rice*, 463 U.S. at 731; *Webster*, 114 Wis. 2d at 433-34; *Chapman*, 122 Wis. 2d at 217-19. As noted above, the state has exclusive jurisdiction over off-reservation violations of state law and this is an area where the impact on state and local law enforcement could be direct and significant.

It may also be relevant that the state continues to have general jurisdiction over non-Indians on the reservation. The state, for example, has jurisdiction over crimes committed on the reservation by non-Indians against non-Indians. *United States v. Wheeler*, 435 U.S. 313, 324-25, n.21, citing *United States v. McBratney*, 104 U.S. 621 (1882).

Article IV, section 2 of the Federal Constitution, which governs extradition between states, does not apply to state-tribal extradition. *Cf. Ex Parte Morgan*, 20 F. 298 (W.D. Ark. 1883); *Turtle*, 413 F.2d at 685. Nonetheless, it is notable that as between the states, Wisconsin's right to secure the extradition of fugitives from its jurisdiction has constitutional protection. Furthermore, the traditional rule is that a state maintains its personal jurisdiction to try a defendant even if the defendant has been removed from an asylum jurisdiction in violation of the asylum state's or nation's extradition laws. *Frisbie v. Collins*, 342 U.S. 519, 522 (1952); *Mahon v. Justice*, 127 U.S. 700 (1888); *Davis*, 643 F.2d at 526; *Weddell*, 636 F.2d at 214-15; *Desjarais v. State*, 73 Wis. 2d 480, 489-90, 243 N.W.2d 453 (1976); *Baker v. State*, 88 Wis. 140, 59 N.W. 570 (1894); *cf. State v. Monje*, 109 Wis. 2d 138, 325 N.W.2d 695 (1982); *State v. Brown*, 118 Wis. 2d 377, 348 N.W.2d 593 (Ct. App. 1984).

On the other hand, in the interest of state and tribal comity, Wisconsin has a strong interest in cooperating with tribal law enforcement generally and in complying with tribal extradition requirements specifically. This interest has received express legislative recognition in the enactment of section 976.07, which clearly contemplates mutual assistance and cooperation in extradition matters.

The final component to be added to the balance is the nature of the federal interests involved. In general, there would appear to be a strong federal interest in promoting observance of extradition procedures between the state and the tribe, if only because the extradition clause of the Constitution has significant implications for federalism and national unity:

The purpose of the Clause was to preclude any state from becoming a sanctuary for fugitives from justice of another state and thus "balkanize" the administration of criminal justice among the several states. It articulated, in mandatory language, the concepts of comity and full faith and credit

Doran, 439 U.S. at 287-88. Certainly, the same policy considerations would apply to the state-tribal extradition context. At the same time, the federal government has no identifiable interest in obstructing a state's authority to bring before its courts those who violate its laws, so long as basic constitutional guarantees, such as due process, are observed.

Having determined that there is a limited tradition or policy of tribal sovereignty with regard to extradition of accused felons and probation and parole violators, and having identified the various state, tribal and federal interests involved, it is necessary to evaluate the balance of those interests in order to determine the "backdrop of tribal sovereignty" which must precede the pre-emption analysis in the situation you describe. *Rice*, 463 U.S. at 720-25; *Webster*, 114 Wis. 2d at 435-36.

Rice explicitly declares that there is no single notion of tribal sovereignty. *Rice*, 463 U.S. at 725. Based on *Rice* and *Webster*, the balance which the courts may strike in any particular instance cannot be predicted with certainty. *Cf. Chapman*, 122 Wis. 2d at 216-17. Both cases do, however, suggest a number of factors which may influence the balance in a particular case. Whether a tradition of tribal sovereignty exists and whether the subject matter has a substantial impact beyond the reservation are clearly important. *Rice*, 463 U.S. at 725. Both factors are present in the fresh pursuit situation you describe.

In addition, it seems particularly appropriate in such a jurisdictionally interrelated area as arrest and extradition to inquire whether an accommodation of state, tribal and federal interests is possible. *Cf. Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134, 156 (1980). Although the state, tribal and federal interests involved are significant, analysis suggests that they are not necessarily in conflict. It would appear, in fact, that an accommodation of state and tribal interests is possible to a great degree. The tribe has disavowed any interest in providing a sanctuary for fugitives from state jurisdiction and has sought primarily to establish a fair and orderly process for the apprehension of accused felons and probation and parole violators and their transfer to state custody. The state, of course, is primarily concerned about securing custody of fugitives by lawful means in order to bring them to trial, and has a strong interest in having the cooperation of tribal authorities in doing so.

In the situation where a state felony arrest warrant or a probation and parole hold has been issued or can be secured, state and tribal interests can be accommodated by compliance with existing tribal extradition procedures. Indeed, following *Chapman*, the tribal extradition ordinance would appear to control. *Chapman*, 122 Wis. 2d at 216-17.

Arguably at least, state and tribal interests can also be reconciled in the fresh pursuit situation, even though the tribal extradition ordinance does not address fresh pursuit or provide a mechanism to process arrests after a fresh pursuit by state or local law enforcement officers. Both legal precedent and practical concerns suggest that the failure of the tribal ordinance to address the fresh pursuit situation would not itself preclude a lawful arrest or pre-empt the state's jurisdiction. On the other hand, *Chapman* suggests that tribal legislation on the issue of fresh pursuit, if enacted, would be controlling. *Chapman*, 122 Wis. 2d at 211.

As noted earlier in this opinion, the doctrine of fresh pursuit is a venerable and universally recognized exception to intrastate limitations on the authority to arrest across jurisdictional lines. It has apparently been recognized in the reservation context as well. See Cohen, *Handbook of Federal Indian Law* at 357 n.80. In addition, the distinction between a warrantless arrest in advance of extradition based solely on probable cause and the institution of formal extradition proceedings based on an extradition warrant or requisition has long been recognized. *Burton v. New York C. & H. RR. Co.*, 245 U.S. 315, 318 (1917); *State v. Klein*, 25 Wis. 2d 394, 402-03, 130 N.W.2d 816 (1964). According to *Burton*, the federal constitutional provisions and statutes regulating extradition do not apply to an arrest prior to an extradition request, nor do they immunize a citizen from arrest until after extradition proceedings have been initiated. *Burton*, 245 U.S. at 318-19. By analogy, it seems unlikely that the failure of the tribal extradition ordinance to address the issue of arrests after fresh pursuit can by itself immunize tribe members from such an arrest or pre-empt a state officer's otherwise lawful authority to make such an arrest. Cf. *Chapman*, 122 Wis. 2d at 216-17.

As a practical matter, of course, in any fresh pursuit situation established policy should require that the state or local law enforcement officer involved contact tribal police at the earliest opportunity to inform tribal authorities of the entry into tribal jurisdiction and, if possible, to secure their assistance. If the fresh pursuit problem is a recurring one, it may be appropriate to explore the possibility of establishing a formal procedure for handling such arrests, possibly in the context of an agreement contemplated by section 976.07. A workable solution to tribal-state fresh pursuit issues is, of course, a goal to be pursued.

In summary, although there is a limited tradition of tribal sovereignty over certain extradition matters, the balance of state, federal and tribal interests involved appears to favor an accommodation of the competing sovereign interests, rather than ignoring one in favor of the others. *Cf. Rice*, 463 U.S. at 719, 724.

D. Pre-emption.

With this backdrop of tribal sovereignty in mind, the final question under *Rice* is whether the state's jurisdiction is pre-empted by federal law. 463 U.S. at 725.

Pre-emption may result either from specific treaty provisions or from pervasive federal regulation in a defined area which excludes state intervention. *Webster v. Department of Revenue*, 102 Wis. 2d 332, 333-34 nn.3 and 4, 306 N.W.2d 701 (Ct. App. 1981). Or, as repeatedly described in *Rice* and earlier cases, the question is whether the state's action would "impair a right granted or reserved by federal law." 463 U.S. at 726.

The various treaties with the Menominee contain no express provisions relating to extradition or criminal law generally. *See C. Kappler, Indian Treaties, 1778-1883 (1904 ed., reprinted 1972)*, and the successive treaties with the Menominee Tribe reprinted therein.

I am unaware of any federal statutes directly regulating either on-reservation arrests after fresh pursuit or state-tribal extradition problems generally. The Secretary of Interior has, however, promulgated a federal regulation under his general rule-making authority giving the Minneapolis Director of the Bureau of Indian Affairs (BIA) discretion to control the extradition of individual Indians from the Menominee Reservation. 25 C.F.R. § 11.95ME (1985). The BIA area director is authorized to order the arrest by tribal police of particular Indian fugitives accused of crimes off the reservation and the delivery of those persons to state authorities at the boundaries of the reservation. 25 C.F.R. § 11.95ME(a). Alternatively, the person arrested may demand a hearing before a tribal judge regarding the existence of probable cause and the likelihood of a fair trial in the demanding jurisdiction. 25 C.F.R. § 11.95ME(b); *but see Doran*, 439 U.S. at 290.

The federal regulation essentially gives the BIA area director discretion to secure the apprehension of a particular fugitive when tribal authorities cannot or will not act. Like the tribal ordinance, the regulation does not address the question of fresh pursuit by

state or local law enforcement officers onto the reservation. The federal regulation does appear to assume that state or local authorities themselves cannot go onto the reservation directly and make an arrest. In general, I do not disagree with that conclusion. See 70 Op. Att'y Gen. 36, 38-40 (1981).

It seems doubtful, however, that lack of state authority would be presumed in the fresh pursuit situation you describe involving an off-reservation offense over which the state unquestionably has exclusive jurisdiction. Cf. *Rice*, 463 U.S. at 726-33. Assuming this to be the case, the only remaining question is whether upholding the state's authority to make such arrests would "impair a right granted or reserved by federal law." *Id.* at 726.

In answering that question, it is important to bear in mind whose rights are at issue. Traditionally, extradition is a right of the sovereign, in this case the state and the Menominee Tribe. Cf. *Niederer*, 72 Wis. 2d at 324. By analogy with federal cases concerning the scope of extradition, the failure of the tribal ordinance or federal regulation to address the fresh pursuit situation would not by itself pre-empt a state officer's otherwise lawful authority to make such an arrest. *Burton*, 245 U.S. at 315; cf. *Chapman*, 122 Wis. 2d at 217-18.

There is, however, one case which does recognize tribal sovereignty as a bar to a state's jurisdiction in a fresh pursuit situation. *Benally*, 553 P.2d at 1270. *Benally* is partially distinguishable because the New Mexico fresh pursuit statute was limited to felony arrests and did not apply in that particular case. More importantly, the reasoning of the *Benally* decision is inconsistent with more recent cases like *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), and *Rice* which require a balancing of interests and that any applicable interest of the state be given weight. *Rice*, 463 U.S. at 720.

Contrary to the result in *Benally*, there is no persuasive evidence of congressional intent to make individual Indians who flee to the reservation to escape imminent arrest exceptions to the fresh pursuit doctrine or immune from ordinary state arrest authority. Cf. *Rice*, 463 U.S. at 733-34. My primary conclusion, therefore, based on *Rice* and *Webster*, is that an arrest after fresh pursuit under the circumstances you have described does not impair Menominee tribal sovereignty over extradition matters and is not pre-empted by

federal law. See also *Fournier*, 161 N.W.2d at 458; *Old Elk*, 552 P.2d at 1394; *Little Light*, 598 P.2d at 572; but see *Benally*, 553 P.2d at 1270; *Turtle*, 413 F.2d at 683.

Even if one assumes that some aspect of Menominee tribal sovereignty is at least minimally impaired by a state officer's on-reservation arrest following a fresh pursuit, cf. *Davis*, 643 F.2d at 525 n.8, it is doubtful that the state is thereby deprived of personal jurisdiction over a defendant thus arrested. *Id.* at 527. The general rule, cited above, is that failure to observe established extradition procedures does not deprive a state of personal jurisdiction over a defendant. *Frisbie*, 342 U.S. at 522; *Weddell*, 636 F.2d at 214-15; *Desjarlais*, 73 Wis. 2d at 489-90.

If the failure to comply with constitutional and statutory extradition requirements does not deprive a demanding state of jurisdiction, it is difficult to conclude that a state's failure to follow tribal extradition procedures would do so. As the Eighth Circuit has observed, in dicta:

[W]e are unable to find that the United States has by policy, by treaty, by statute or by court decision decreed [the state's] loss of personal jurisdiction over [the defendant] as a penalty for having arrested [him] in violation of the tribal extradition ordinance here involved.

Davis, 643 F.2d at 527.

In conclusion, although the state is obliged generally to comply with Menominee tribal extradition procedures, I conclude that an arrest after fresh pursuit under the circumstances described does not impair tribal sovereignty and is not pre-empted by federal law. Even if an arrest in a particular case is made in violation of tribal extradition procedure, federal extradition law clearly suggests that the state is not thereby deprived of personal jurisdiction over the defendant. Nonetheless, in light of *Chapman*, 122 Wis. 2d at 211, tribal legislation on the hot pursuit issue would generally be controlling. For this and other reasons, this office will continue its efforts to work with the tribe to reach a mutually acceptable resolution of tribal-state fresh pursuit problems.

BCL:MAM

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HEALTH AND SOCIAL SERVICES, DEPARTMENT OF

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Health maintenance organizations which contract with the Department of Health and Social Services to provide coverage to medical assistance recipients are required to offer continuation of benefits to those whose eligibility for medical assistance terminates pursuant to section 632.897(1). OAG 27-85 149

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Counties may adopt and enforce fair housing ordinances under section 66.432, Stats., in municipalities within such counties which already have enacted their own fair housing ordinance. No double jeopardy problem arises if a county and a municipality in the county simultaneously seek to enforce their fair housing ordinances in connection with a single act of discrimination, provided that a violation of one or both of the ordinances is punishable only by a forfeiture. Section 66.432 authorizes cities, villages, towns and counties to prohibit bases of discrimination in addition to those specified in sections 66.432 and 101.22. OAG 46-85 234

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IMPLIED CONSENT LAW

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A law enforcement officer may use physical restraint subject to constitutional limitations, in order to draw a legally justified blood sample. Refusal by a health professional to comply with a law enforcement officer's authorized request to take a blood sample from a person whom the officer has legally restrained by force constitutes the refusal to aid an officer within the meaning of section 946.40, Stats. OAG 23-85 123

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A law enforcement officer may use physical restraint subject to constitutional limitations, in order to draw a legally justified blood sample. Refusal by a health professional to comply with a law enforcement officer's authorized request to take a blood sample from a person whom the officer has legally restrained by force constitutes the refusal to aid an officer within the meaning of section 946.40, Stats. OAG 23-85 123

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Law enforcement, fresh pursuit onto reservation

State and county conservation wardens and sheriff's officers have authority under state law to arrest a Menominee Indian suspect on the reservation following fresh pursuit for an off-reservation violation of state law, if the arrest is one the officer is otherwise authorized to make. Although the state is generally obliged to comply with Menominee tribal extradition procedures, the state's personal jurisdiction over an Indian arrested under the circumstances described is probably not pre-empted by federal law. OAG 50-85..... 245

Sales and use tax

The state may not constitutionally impose the general sales tax, section 77.52, Stats., on reservation sales of cigarettes and bingo admissions by Indian retailers to non-members of the governing tribe. The state may impose the use tax, section 77.53, Stats., on such cigarette sales and, arguably, on sales of bingo admissions. Section 77.53 requires Indian retailers to precollect the use tax. Whether the chapter 77 use tax may be imposed on reservation sales of other types of services to non-Indians depends on the facts of the particular case. Impediments to effective enforcement when the retailer is an Indian tribe or tribal corporation discussed. OAG 25-85 134

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The Wisconsin Council on Criminal Justice may have access to the law enforcement and social service files of Wisconsin juveniles without a

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LAND CONSERVATION BOARD

Agricultural zoning, revocation of

The Land Conservation Board has authority to prospectively revoke an exclusive agricultural zoning ordinance certification granted under sections 91.06 and 91.78, Stats. Notice and an opportunity to be heard must be afforded to the local zoning authority and to landowners who might be affected by a decertification decision. If a decision to decertify is made, only those lands which are rezoned are subject to the lien and property tax credit recapture provisions of section 91.77(2). OAG 17-85 78

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State and county conservation wardens and sheriff's officers have authority under state law to arrest a Menominee Indian suspect on the reservation following fresh pursuit for an off-reservation violation of state law, if the arrest is one the officer is otherwise authorized to make. Although the state is generally obliged to comply with Menominee tribal extradition procedures, the state's personal jurisdiction over an Indian arrested under the circumstances described is probably not pre-empted by federal law. OAG 50-85..... 245

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LICENSES AND PERMITS

Dog license fund

Where a county board has designated the county humane society or other organization to provide a dog pound, section 174.09(2), Stats., requires any surplus in excess of \$1,000 must be paid over annually by the county treasurer to such society and no consent of the respective collecting towns, villages and cities is needed. OAG 13-85 65

Ophthalmic assistants

Ophthalmic assistants performing functions that are within the statutory definition of optometry under the delegation and supervision of an ophthalmologist are not engaged in the unlawful practice of optometry.

A certified optometric technician who performs services included within the definition of optometry under the delegation and supervision of a

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Neither district attorney nor corporation counsel have a duty to petition for protective placement, determination of incompetency or otherwise intervene where an apparently competent elderly person with life threatening illness chooses to remain at home under doctor's and family care rather than seek a higher level of care which might extend her life. OAG 34-85 188

MENOMINEE INDIANS

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State and county conservation wardens and sheriff's officers have authority under state law to arrest a Menominee Indian suspect on the reservation following fresh pursuit for an off-reservation violation of state law, if the arrest is one the officer is otherwise authorized to make. Although the state is generally obliged to comply with Menominee tribal extradition procedures, the state's personal jurisdiction over an Indian arrested under the circumstances described is probably not pre-empted by federal law. OAG 50-85..... 245

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Counties may adopt and enforce fair housing ordinances under section 66.432, Stats., in municipalities within such counties which already have enacted their own fair housing ordinance. No double jeopardy problem arises if a county and a municipality in the county simultaneously seek to enforce their fair housing ordinances in connection with a single act of discrimination, provided that a violation of one or both of the ordinances is punishable only by a forfeiture. Section 66.432 authorizes cities, villages, towns and counties to prohibit bases of discrimination in addition to those specified in sections 66.432 and 101.22. OAG 46-85 234

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In tax delinquency proceedings, a county acquires fee simple title to land, including mineral interests therein, whether severed or not. 25 Op. Att’y Gen. 630 (1936); 49 Op. Att’y Gen. 77 (1960); 49 Op. Att’y Gen. 130 (1960). However, further legislative action is necessary to insure that assessment and tax delinquency proceedings are consistent with the provisions of 1983 Wisconsin Act 455 and are adequate to satisfy the due process rights of the owner of mineral interests to notice of the taking through delinquent tax proceedings. OAG 12-85 59

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The Wisconsin Council on Criminal Justice may have access to the law enforcement and social service files of Wisconsin juveniles without a court order. It may not have access to juvenile court records without a court order. OAG 4-85 18

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Commission members indemnification protection

Where a commission is created by two villages, acting pursuant to section 66.30, Stats., for a joint exercise of a power possessed by such villages, its voting members, whether drawn from the governing bodies of such villages or from citizen-residents thereof, are public officers, who enjoy the indemnification protection provided by section 895.46(1).
 A non-voting member of such commission, who cannot serve as an officer thereof, and whose sole power and duty is to provide “input” to the commission relative to the particular needs of the corporation appointing him/her to the commission, is neither a public officer nor a public employe, so as to enjoy the indemnification protection of section 895.46(1). Moreover, such non-voting commission member is not entitled to such protection as an agent of any department of the State of Wisconsin. OAG 41-85 208

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Section 61.65(2), Stats., permits three or more municipalities, including a mixture of three villages and a city, to establish and operate a joint fire department. Recourse to section 66.30 does not appear to be necessary or appropriate for the purpose of creating such a joint fire department. OAG 28-85 154

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School districts may not invoke the damage and interest provisions of section 74.22, Stats., to penalize a township for failing to settle tax payments within the time required by law. OAG 18-85 84

NATURAL RESOURCES BOARD

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Section 137.01(1) and (2), Stats., which requires Wisconsin residency as a condition of appointment as notary public in Wisconsin, does not violate the Privileges and Immunities Clause of the Federal Constitution and should be complied with unless and until it is declared invalid by a court of competent jurisdiction in a proper case. OAG 43-85 .

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Ophthalmic assistants performing functions that are within the statutory definition of optometry under the delegation and supervision of an ophthalmologist are not engaged in the unlawful practice of optometry.

A certified optometric technician who performs services included within the definition of optometry under the delegation and supervision of a licensed optometrist is engaged in the unlicensed practice of optometry. OAG 26-85

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Service corporation directors

A service corporation incorporated under section 180.99, Stats., by persons all licensed in the same profession may not have persons on the board of directors who do not have the same license as the original incorporators. (Unpub.) OAG 45-85

PRISONS AND PRISONERS

Contempt, civil and criminal

A person confined in the county jail for civil (remedial) contempt of court is not eligible for "good time" credit under section 53.43, Stats. OAG 20-85 96

"Good time" credit

A person confined in the county jail for civil (remedial) contempt of court is not eligible for "good time" credit under section 53.43, Stats. OAG 20-85 96

Huber Law

Sheriff's jail policy prohibiting Huber Law prisoners from pursuing employment in business establishments that dispense alcoholic beverages impermissibly conflicts with the Huber Law. OAG 22-85..... 113

PUBLIC ASSISTANCE

Fingerprinting applicants

A county may not require or request that a public assistance applicant or recipient provide a fingerprint for the purposes of identification as a precondition to receiving aid. OAG 33-85 185

PUBLIC OFFICIALS

Commission members, indemnification protection

Where a commission is created by two villages, acting pursuant to section 66.30, Stats., for a joint exercise of a power possessed by such

PUBLIC OFFICIALS (*Continued*)

Commission members, indemnification protection (*Continued*)

villages, its voting members, whether drawn from the governing bodies of such villages or from citizen-residents thereof, are public officers, who enjoy the indemnification protection provided by section 895.46(1).

A non-voting member of such commission, who cannot serve as an officer thereof, and whose sole power and duty is to provide "input" to the commission relative to the particular needs of the corporation appointing him/her to the commission, is neither a public officer nor a public employe, so as to enjoy the indemnification protection of section 895.46(1). Moreover, such non-voting commission member is not entitled to such protection as an agent of any department of the State of Wisconsin. OAG 41-85 208

County board supervisor

A county board supervisor elected at the 1984 Spring election who moved from such district in the Fall of 1984 vacated his office even though he continued to reside in the same county because 1983 Wisconsin Act 484 amended section 59.125, Stats., to require that "[n]o person is eligible to hold the office of county supervisor who is not a resident of the supervisory district from which he or she was chosen." OAG 30-85 160

Notary public

Section 137.01(1) and (2), Stats., which requires Wisconsin residency as a condition of appointment as notary public in Wisconsin, does not violate the Privileges and Immunities Clause of the Federal Constitution and should be complied with unless and until it is declared invalid by a court of competent jurisdiction in a proper case. OAG 43-85 . 221

Private interest in public contracts

Section 118.12(1)(a), Stats., applies only to materials and items that are part of or reasonably could become part of a school district's instructional process; enforcement authority usually lies with the school board president for the district; violations of section 118.12(1)(a) could possibly constitute violations of sections 946.12 and 946.13. OAG 19-85 89

Residency requirements

A county board supervisor elected at the 1984 Spring election who moved from such district in the Fall of 1984 vacated his office even though he continued to reside in the same county because 1983 Wisconsin Act 484 amended section 59.125, Stats., to require that "[n]o person is eligible to hold the office of county supervisor who is not a resident of the supervisory district from which he or she was chosen." OAG 30-85 160

Vacating of office

A county board supervisor elected at the 1984 Spring election who moved from such district in the Fall of 1984 vacated his office even though he continued to reside in the same county because 1983 Wisconsin Act 484 amended section 59.125, Stats., to require that "[n]o person is eligible to hold the office of county supervisor who is not a

PUBLIC OFFICIALS (*Continued*)Vacating of office (*Continued*)

- resident of the supervisory district from which he or she was chosen.”
OAG 30-85 160

PUBLIC PURPOSE DOCTRINE

Discussed in relation to general obligation bond revenues

- The Farmers Fund Program, as set out in section 92.32, Stats., does not violate article VIII, sections 3 or 10 of the Wisconsin Constitution, nor are its terms contrary to the public purpose doctrine. OAG 5-85 ... 25

PUBLIC RECORDS

Disciplinary action against physician

- The final decision of a quasi-judicial body regarding disciplinary action against a physician in the unclassified service is properly deemed available under the public records law. OAG 29-85 156

Discovery

- Access to public records by parties to civil litigation, including administrative proceedings, must be accomplished through applicable means of discovery. OAG 1-85 1

“Friends” organizations

- Open meetings and public records laws are not applicable to independently created and independently operated non-stock, non-profit “friends” corporations organized to provide financial and other support to radio and television stations licensed to governmental agencies. OAG 7-85 38

Prosecutors’ case files

- Prosecutor’s case files are not subject to access under the public records laws. OAG 2-85 4

Settlement agreements

- Relationship between the public records law and pledges of confidentiality in settlement agreements discussed. OAG 3-85 14

RACETRACKS

See **AUTOMOBILES AND MOTOR VEHICLES**

RADIO

“Friends” organizations

- Open meetings and public records laws are not applicable to independently created and independently operated non-stock, non-profit “friends” corporations organized to provide financial and other support to radio and television stations licensed to governmental agencies. OAG 7-85 38

RESIDENCE, DOMICILE AND LEGAL SETTLEMENT

Notary public

Section 137.01(1) and (2), Stats., which requires Wisconsin residency as a condition of appointment as notary public in Wisconsin, does not violate the Privileges and Immunities Clause of the Federal Constitution and should be complied with unless and until it is declared invalid by a court of competent jurisdiction in a proper case. OAG 43-85 . 221

RETIREMENT SYSTEMS

Employe Trust Funds, Public

The specific appeal procedures provided for the Public Employe Trust Funds do not take precedence over the general grant of authority to the Claims Board to hear claims against state agencies, but the Claims Board lacks authority to order payment of the claim from the trust funds. OAG 35-85 193

Milwaukee

Taxation of certain public employe pensions may impair contracts in violation of the state and federal constitutions. OAG 21-85 100

REVENUE, DEPARTMENT OF

Discovery

Access to public records by parties to civil litigation, including administrative proceedings, must be accomplished through applicable means of discovery. OAG 1-85 1

SCHOOLS AND SCHOOL DISTRICTS

Damage and interest provisions on tax payments

School districts may not invoke the damage and interest provisions of section 74.22, Stats., to penalize a township for failing to settle tax payments within the time required by law. OAG 18-85 84

Employes, sales and promotion of materials to students

Section 118.12(1)(a), Stats., applies only to materials and items that are part of or reasonably could become part of a school district's instructional process; enforcement authority usually lies with the school board president for the district; violations of section 118.12(1)(a) could possibly constitute violations of sections 946.12 and 946.13. OAG 19-85 89

Grants and gifts

A school district has no power to transfer gift and grant moneys received by the district under section 118.27, Stats., to a nonprofit, nonstock, section 501(c)(3) corporation, which would manage the moneys and distribute the principal and interest for the benefit of area high school students in the form of scholarships; if moneys are accepted under section 118.27, the school district must act as trustee of the moneys, except under the circumstances outlined in section 66.30(2m). OAG 8-85 45

SCHOOLS AND SCHOOL DISTRICTS (Continued)

Open meeting

In exceptional cases, section 19.85(1)(f), Stats., would permit a school board to reconvene into closed session to interview applicants for a vacant position on such board, but appointment should be made in open session. Section 19.85(1)(c) would not permit a closed session for purposes of interviewing applicants for a vacant school board position and to make appointment thereto. OAG 15-85 70

Private interest in public contracts

Section 118.12(1)(a), Stats., applies only to materials and items that are part of or reasonably could become part of a school district's instructional process; enforcement authority usually lies with the school board president for the district; violations of section 118.12(1)(a) could possibly constitute violations of sections 946.12 and 946.13. OAG 19-85 89

SHERIFFS

Indians, fresh pursuit onto reservation

State and county conservation wardens and sheriff's officers have authority under state law to arrest a Menominee Indian suspect on the reservation following fresh pursuit for an off-reservation violation of state law, if the arrest is one the officer is otherwise authorized to make. Although the state is generally obliged to comply with Menominee tribal extradition procedures, the state's personal jurisdiction over an Indian arrested under the circumstances described is probably not pre-empted by federal law. OAG 50-85..... 245

STATE

Accounting principles used

A deficit reported in financial statements prepared in accordance with Generally Accepted Accounting Principles would not violate article VIII, section 5 of the Wisconsin Constitution, which requires a balanced budget. OAG 39-85 202

Generally Accepted Accounting Principles

A deficit reported in financial statements prepared in accordance with Generally Accepted Accounting Principles would not violate article VIII, section 5 of the Wisconsin Constitution, which requires a balanced budget. OAG 39-85 202

STATE AID

Vocational, Technical and Adult Education, Board of

The Wisconsin Board of Vocational, Technical and Adult Education has authority to adopt a policy which provides for the payment of state aids for the nonreimbursed costs incurred when vocational, technical and adult education districts enter into contracts pursuant to section 38.14(3), Stats., and when the State Board determines that the services provided are not "community services" within the meaning of section 38.28(1m)(a). In order to receive state aids for qualifying contracts, however, fees must be charged which are equivalent to the

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STATE AID (Continued)

Vocational, Technical and Adult Education, Board of (Continued)

uniform program and material fees normally charged to district students. OAG 14-85 67

TAXATION

Accounting principles used by the state

A deficit reported in financial statements prepared in accordance with Generally Accepted Accounting Principles would not violate article VIII, section 5 of the Wisconsin Constitution, which requires a balanced budget. OAG 39-85 202

Cigarette tax laws

The state may not constitutionally impose the general sales tax, section 77.52, Stats., on reservation sales of cigarettes and bingo admissions by Indian retailers to non-members of the governing tribe. The state may impose the use tax, section 77.53, Stats., on such cigarette sales and, arguably, on sales of bingo admissions. Section 77.53 requires Indian retailers to precollect the use tax. Whether the chapter 77 use tax may be imposed on reservation sales of other types of services to non-Indians depends on the facts of the particular case. Impediments to effective enforcement when the retailer is an Indian tribe or tribal corporation discussed. OAG 25-85 134

Indians

The state may not constitutionally impose the general sales tax, section 77.52, Stats., on reservation sales of cigarettes and bingo admissions by Indian retailers to non-members of the governing tribe. The state may impose the use tax, section 77.53, Stats., on such cigarette sales and, arguably, on sales of bingo admissions. Section 77.53 requires Indian retailers to precollect the use tax. Whether the chapter 77 use tax may be imposed on reservation sales of other types of services to non-Indians depends on the facts of the particular case. Impediments to effective enforcement when the retailer is an Indian tribe or tribal corporation discussed. OAG 25-85 134

Retirement systems

Taxation of certain public employe pensions may impair contracts in violation of the state and federal constitutions. OAG 21-85 100

Sales and use tax

The state may not constitutionally impose the general sales tax, section 77.52, Stats., on reservation sales of cigarettes and bingo admissions by Indian retailers to non-members of the governing tribe. The state may impose the use tax, section 77.53, Stats., on such cigarette sales and, arguably, on sales of bingo admissions. Section 77.53 requires Indian retailers to precollect the use tax. Whether the chapter 77 use tax may be imposed on reservation sales of other types of services to non-Indians depends on the facts of the particular case. Impediments to effective enforcement when the retailer is an Indian tribe or tribal corporation discussed. OAG 25-85 134

TAXATION *(Continued)*

School and school districts

School districts may not invoke the damage and interest provisions of section 74.22, Stats., to penalize a township for failing to settle tax payments within the time required by law. OAG 18-85

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TELEVISION

"Friends" organizations

Open meetings and public records laws are not applicable to independently created and independently operated non-stock, non-profit "friends" corporations organized to provide financial and other support to radio and television stations licensed to governmental agencies. OAG 7-85

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VETERANS AFFAIRS, DEPARTMENT OF

Authority to provide legal assistance

The Department of Veterans Affairs does not have express or implied authority under the provisions contained in chapter 45, Stats., to permit the department to utilize employe time and resources to assist in the establishment and operation of a charitable nonstock, nonprofit corporation which would provide assistance to veterans and their dependents and survivors. (Unpub.) OAG 37-85

VOCATIONAL, TECHNICAL AND ADULT EDUCATION, BOARD OF

State aid

The Wisconsin Board of Vocational, Technical and Adult Education has authority to adopt a policy which provides for the payment of state aids for the nonreimbursed costs incurred when vocational, technical and adult education districts enter into contracts pursuant to section 38.14(3), Stats., and when the State Board determines that the services provided are not "community services" within the meaning of section 38.28(1m)(a). In order to receive state aids for qualifying contracts, however, fees must be charged which are equivalent to the uniform program and material fees normally charged to district students. OAG 14-85

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WISCONSIN COUNCIL ON CRIMINAL JUSTICE

Juvenile records, access to

The Wisconsin Council on Criminal Justice may have access to the law enforcement and social service files of Wisconsin juveniles without a court order. It may not have access to juvenile court records without a court order. OAG 4-85

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WISCONSIN FARMERS FUND PROGRAM

Bonds for

The Farmers Fund Program, as set out in section 92.32, Stats., does not violate article VIII, sections 3 or 10 of the Wisconsin Constitution, nor are its terms contrary to the public purpose doctrine. OAG 5-85 ...

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WISCONSIN HEALTH FACILITIES AUTHORITIES
See BONDS

WISCONSIN HIGHER EDUCATION CORPORATION

Legislation imposing controls

The Legislature may impose certain controls on public purpose corporations, including the Wisconsin Higher Education Corporation, without violating article IV, sections 31 and 32 of the Wisconsin Constitution or the state's covenants with student loan revenue obligation bondholders. OAG 32-85 169

WORDS AND PHRASES

“Dummy” corporation

The State Historical Society of Wisconsin is a state agency. The Board of Curators of the society falls within the coverage of sections 893.82 and 895.46, Stats. The only members of the board that have to comply with section 19.43 by virtue of their appointment to the board are the three members nominated by the Governor with the advice and consent of the senate. OAG 11-85 54

“Independent going concern”

The State Historical Society of Wisconsin is a state agency. The Board of Curators of the society falls within the coverage of sections 893.82 and 895.46, Stats. The only members of the board that have to comply with section 19.43 by virtue of their appointment to the board are the three members nominated by the Governor with the advice and consent of the senate. OAG 11-85 54

“Motor vehicles”

A county board has power under section 59.07(18) and (64), Stats., to enact a reasonable licensing ordinance regulating the operation of motor vehicle racetracks outside the limits of cities and villages. OAG 24-85 129

“Part”

A county board does not have power to amend a resolution, ordinance or part thereof, vetoed by the county executive, but can pass a separate substitute for submission to the executive. A county board has a duty to promptly reconsider vetoed resolutions, ordinances or parts thereof. OAG 16-85 73

Public office

Where a commission is created by two villages, acting pursuant to section 66.30, Stats., for a joint exercise of a power possessed by such villages, its voting members, whether drawn from the governing bodies of such villages or from citizen-residents thereof, are public officers, who enjoy the indemnification protection provided by section 895.46(1).

A non-voting member of such commission, who cannot serve as an officer thereof, and whose sole power and duty is to provide “input” to the commission relative to the particular needs of the corporation appointing him/her to the commission, is neither a public officer nor a public employe, so as to enjoy the indemnification protection of sec-

WORDS AND PHRASES *(Continued)*

Public office *(Continued)*

tion 895.46(1). Moreover, such non-voting commission member is not entitled to such protection as an agent of any department of the State of Wisconsin. OAG 41-85

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"State agency"

The State Historical Society of Wisconsin is a state agency. The Board of Curators of the society falls within the coverage of sections 893.82 and 895.46, Stats. The only members of the board that have to comply with section 19.43 by virtue of their appointment to the board are the three members nominated by the Governor with the advice and consent of the senate. OAG 11-85.....

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WORKER'S COMPENSATION

Natural Resources Board member

Worker's compensation coverage exists for members of the Natural Resources Board, who are injured while in transit to or from a board meeting, regardless of whether their transportation to such meeting is furnished by the Department of Natural Resources. (Unpub.) OAG 49-85

ZONING

Agricultural zoning, revocation of

The Land Conservation Board has authority to prospectively revoke an exclusive agricultural zoning ordinance certification granted under sections 91.06 and 91.78, Stats. Notice and an opportunity to be heard must be afforded to the local zoning authority and to landowners who might be affected by a decertification decision. If a decision to decertify is made, only those lands which are rezoned are subject to the lien and property tax credit recapture provisions of section 91.77(2). OAG 17-85

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