

OPINIONS
OF THE
ATTORNEY GENERAL

OF THE
STATE OF WISCONSIN

VOLUME 76

January 1, 1987 through December 31, 1987

DONALD J. HANAWAY
ATTORNEY GENERAL



MADISON, WISCONSIN
1987

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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 Jan. 5, 1987
DONALD J. HANAWAY, DePere from Jan. 5, 1987, to

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LEGAL SERVICES DIVISION

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THOMAS DAWSON	Assistant Attorney General
THOMAS L. DOSCH	Assistant Attorney General
STEVEN D. EBERT	Assistant Attorney General
SHARI EGGLESON	Assistant Attorney General
KATHLEEN M. FALK	Assistant Attorney General
DANIEL S. FARWELL	Assistant Attorney General
WILLIAM FIELDS ⁴	Assistant Attorney General
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MATTHEW FRANK	Assistant Attorney General
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DAVID J. GILLES	Assistant Attorney General
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¹Resigned, 1987

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OPINIONS

OF THE

ATTORNEY GENERAL

Volume 76

Foster Homes; Insurance, Liability; Where a licensing agency waives the insurance requirement under section 48.627(1)(a) and (b), Stats., it does not assume any liability beyond the limited recovery in tort claims under sections 893.80(3) and 893.82(6). OAG 1-87

February 3, 1987

DARWIN L. ZWIEG, District Attorney
Clark County

Based upon a number of legislative changes during the last session, you ask the following question:

If a licensing agency appropriately and validly waives the requirements of section 48.627(1)(a), does the licensing agency, by virtue of this waiver step into the shoes of an insurance company under section 48.627(1)(a) Stats. and expose itself to virtually unlimited damages notwithstanding the provisions of section 893.80(3) limiting recovery in such tort claims to \$50,000.00?

Section 48.627(1)(a), Stats., provides that, before the foster home license is issued or renewed, the licensing agency shall require the applicant to furnish satisfactory proof that he or she has homeowners or renters liability insurance that provides coverage for negligent acts or omissions by foster children that result in bodily injury or property damage to third parties. Paragraph (b) allows the licensing agency to waive the requirement under paragraph (a) under certain circumstances. Paragraph (c) directs the Department of Health and Social Services to conduct a study to determine the cost-effectiveness of purchasing insurance to provide standard homeowners or renters liability insurance coverage for applicants who are granted a waiver under paragraph (b). If the department determines that it would be cost-effective to purchase such insurance, it can purchase the insurance from certain appropriations as set forth therein.

A license to operate a foster home may be obtained from the department or from a county agency or licensed child welfare agency as provided in section 48.75. Sec. 48.62(1), Stats. Although the duties of your office and your specific question are both limited to concerns over the liability of the county agency, I will discuss both municipal immunity and sovereign immunity because the department also may license foster homes directly.

Prior to 1961, local units of government were generally immune from tort liability. In *Holytz v. Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962), the court abrogated the doctrine of municipal immunity. Shortly after the *Holytz* decision, the Legislature enacted chapter 198, Laws of 1963, which created section 331.43. This statute established liability limitations and a notice requirement for tort actions against local units of government. Through the years, this section has been amended and ultimately renumbered to section 893.80 by chapter 323, section 29, Laws of 1979.

It is within the legitimate power of the Legislature to take steps to preserve sufficient public funds to ensure that the government is able to continue to provide those services which it believes benefits the citizenry. *Stanhope v. Brown County*, 90 Wis. 2d 823, 842, 280 N.W.2d 711 (1979). The Legislature's specification of a dollar limitation on damages recoverable allows for fiscal planning and avoids the risk of devastatingly high judgments while permitting victims of public tortfeasors to recover their losses up to that limit.

In *Sambs v. City of Brookfield*, 97 Wis. 2d 356, 377-78, 293 N.W.2d 504 (1980), the court concluded that the Legislature could reason that a statutory maximum should be imposed on the amount recoverable in those situations where the burden of unlimited liability may be substantial and the danger of disrupting the functioning of local government by requiring payment of substantial damage awards may be great. The court, 97 Wis. 2d at 376-77, further observed that:

Government engages in activities of a scope and variety far beyond that of any private business, and governmental operations affect a large number of people. Municipal units of government have hundreds and thousands of employees. Municipal units of government maintain hundreds and thousands of miles of streets and highways and drains and sewers, subject to many hazards; they operate numerous traffic signals, parking lots, office buildings, institutions, parks, beaches and swimming pools used by thousands of citizens. Damage actions against a governmental entity may arise from a vast scope and variety of activities. A claim against a government unit may range from a few dollars to a few million dollars. A municipal unit of government, limited in fund-raising capacity, may lack the resources to withstand substantial unanticipated liability. Unlimited recovery to all victims may impair the ability of government to govern efficiently. . . .

It is the legislature's function to evaluate the risks, the extent of exposure to liability, the need to compensate citizens for injury, the availability of and cost of insurance, and the financial condition of the governmental units. It is the legislature's function to structure statutory provisions, which will protect the public interest in reimbursing the victim and in maintaining government services and which will be fair and reasonable to the victim and at the same time will be realistic regarding the financial burden to be placed on the taxpayers.

The original creation of section 893.80(3) was a purposeful legislative decision to limit the amounts recoverable in any action founded on tort against the governmental bodies, officers, agents or employes covered therein. The Legislature has the power, knowledge and capability to change those limitations generally or in any given type of action. I cannot ascribe to the Legislature any intent to make such a change in liability limitations under the recent

amendments to section 48.627(1). These amendments merely offer a different approach to the problem of ensuring against such incidents.

Although section 48.627(1)(b) allows the licensing agency to waive the insurance requirement for foster home licensing, this does not support the conclusion that any new exposure to substantive liability was contemplated by the Legislature. It is a cardinal rule of statutory construction that conflicts between different statutes, by implication or otherwise, are not favored and will not be held to exist if they may otherwise be reasonably construed. *Moran v. Quality Aluminum Casting Co.*, 34 Wis. 2d 542, 553, 150 N.W.2d 137 (1967). Construction of statutes should be done in a way which harmonizes the whole system of law of which they are a part, and any conflict should be reconciled if possible. *Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B.*, 35 Wis. 2d 540, 556, 151 N.W.2d 617 (1967).

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); *Town of Madison v. City of Madison*, 269 Wis. 609, 614, 70 N.W.2d 249 (1955). Neither the absolute absence of any limitation on liability in section 48.627(1)(b) and (c) nor the discretionary waiver of the insurance requirement for foster home applicants constitutes a waiver of the liability limits established by the Legislature in section 893.80(3).

A waiver of statutory limits on liability cannot be "merely inferential" but "must be specific or express." *Gonzalez v. City of Franklin*, 128 Wis. 2d 485, 494, 383 N.W.2d 907 (1986). In *Gonzalez*, the court held that the language in a municipality's insurance policy allowing recovery to the full limitation of the policy did not waive the statutory liability limitation of \$50,000 set forth in section 893.80(3). In prior waiver cases the court found the expression of waiver to be explicit and direct. *Stanhope*, 90 Wis. 2d at 852; *Marshall v. Green Bay*, 18 Wis. 2d 496, 501-02, 118 N.W.2d 715 (1963).

The language of section 48.627(1)(b) and (c) makes no reference to governmental immunity or limitations on recovery. Any relationship between section 48.627(1)(b) and (c) and the statutory limitations on recovery in section 893.80(3) is merely inferential.

The language of the foster home provisions is not specific or express and does not contain a waiver of governmental liability limits.

When the department performs the licensing function, neither the Legislature nor the courts have overturned or restricted the doctrine of sovereign immunity. *Fiala v. Voight*, 93 Wis. 2d 337, 342, 286 N.W.2d 824 (1980). There must exist express legislative authorization in order for the state to be sued. *Kegonsa Jt. Sanit. Dist. v. City of Stoughton*, 87 Wis. 2d 131, 144-45, 274 N.W.2d 598 (1979). These two cases hold that no new exposure to substantive liability was contemplated by former sections 270.58(1) and 895.45 and thus today by a combined reading of sections 48.627(1) and 893.82(6). *Fiala*, 93 Wis. 2d at 342-47; *Forseth v. Sweet*, 38 Wis. 2d 676, 682, 158 N.W.2d 370 (1968).

In addition to this issue of liability limitations, your question seemingly implies that the licensing agency might become an insurer of sorts when granting a waiver. Neither the express terms of section 48.627(1) nor any reasonable implication arising thereunder renders the licensing agency any more or less liable than it otherwise might be under established legal principles merely because it waives the insurance requirement. The insurance requirement clearly was intended to benefit the public by providing a more readily available source of money where liability is established under existing principles.

This change in the foster home program protects only against what liability otherwise exists. As a program of indemnity much like that in *Fiala*, it operates for the benefit of the insured, and, as indicated above, to some extent for the benefit of the public.

Although the Legislature did not say that the Department of Health and Social Services can be sued, it did say that the department in its discretion may purchase insurance to cover these claims. Section 48.627(3) was amended by 1985 Wisconsin Act 336 to read: "The department is not liable for any act or omission by or affecting a foster child, but may, as provided in this section, pay claims described under sub. (1m) or may purchase insurance to cover such claims, within the limits of the appropriations under s. 20.435(4)(cf) and (pd)."

Prior to this amendment effective April 1, 1986, section 48.627(2)(a) authorized the department to pay claims "for which the insurer, if any, would be liable" clearly putting the state in the

position as an insurer. 1985 Wisconsin Act 24, effective July 1, 1985. Thus, the state has chosen either through payment of claims or purchase of insurance gratuitously to shield foster parents from monetary loss. *See Cords v. Ehly*, 62 Wis. 2d 31, 37, 214 N.W.2d 432 (1974). In doing so, the Legislature did not intend to make any change in liability limitations under sections 893.80(3) and 893.82(6). "The fact that the state may assume obligations which normally are performed by insurance companies under contracts of insurance does not mean that the state is an 'insurer' within the meaning of other statutes concerning insurers." *Cords*, 62 Wis. 2d at 56-57.

Section 48.627 originally provided that the department shall purchase insurance for licensed foster parents to cover the liability of foster parents to the extent that they were not already covered by their own insurance. Ch. 221, Laws of 1979. The statute now provides that such foster parents are obligated to provide their own insurance and any involvement on the part of the department for the payment of claims or the purchase of insurance is permissive rather than mandatory. Therefore, there is a clear legislative intent to narrow the government's obligations rather than to expand them.

DJH:DPJ

Law Enforcement; Radio; Sheriffs; A sheriff's actions in determining access to a county's law enforcement channel are ministerial in nature. The negligent exercise of that authority could subject the sheriff to liability. OAG 2-87

February 10, 1987

DENNIS LIEDER, *District Attorney*
Burnett County

You state that Burnett County has one centralized law enforcement radio channel with the terminal at the county jail. This channel is part of the sheriff's department and is handled by a dispatcher. It is available to the sheriff, his deputies, the Wisconsin State Highway Patrol, the Burnett County ambulance service, the fire department and all local police and town constables. Local police officers and town constables have been given special deputy status by the sheriff under section 59.21(5), Stats., as their authorization to use the radio system.

You further advise that recently one of the towns in your county began accepting applications for the position of police officer. Your county sheriff is opposed to one of the applicants for this position and advised the town board of supervisors that if this particular individual were appointed as police officer, he would not confer special deputy status on him and would not allow him access to the county's radio channel.

You have requested my opinion on three questions:

1. Does the county Sheriff have the authority to prevent a local police officer access to the county's centralized law enforcement communications channel?
2. If yes, may the County Board by resolution or ordinance override this decision of the Sheriff by adopting a policy permitting all law enforcement officers within the county to have access to such a system?
3. What is the potential liability of the Sheriff and/or the county for refusing to allow a local police officer to have access to such communication channels?

Sheriffs are recognized in Wisconsin as constitutional officers. Wis. Const. art. VI, §4. In addition to those powers granted by statute, sheriffs possess powers carried over from common law at

the time the Wisconsin Constitution was adopted. See *State ex rel. Kennedy v. Brunst*, 26 Wis. 412 (1870). The right to deputize persons for particular purposes expressed in section 59.21(5) recodifies the common law right of a sheriff to summon aid to preserve peace throughout a county. Certainly, a sheriff has the discretion to refuse to deputize anyone. As stated in *Andreski v. Industrial Comm.*, 261 Wis. 234, 240, 52 N.W.2d 135 (1952), “[n]o other county official supervises his [the sheriff’s] work . . . He chooses his own ways and means of performing it.”

Other than local practice, however, there is no innate connection between access to the radio channel and special deputization of local police officers. Notwithstanding the present practice in Burnett County, whether one is specially deputized or not should not be the sole condition precedent to the use of the radio frequencies at issue here. Burnett County holds the license for the frequencies and merely assigned the gate-keeping function to the sheriff. There is nothing in the Federal Communications Commission (FCC) license or the rules and regulations of the Wisconsin Police Emergency Radio Network (WISPERN, a coordinating body for statewide law enforcement use of such frequencies) which mandates special deputization. The license itself merely requires that the use be for police and emergency purposes.

The potential liability of the sheriff’s proposed action of denying access to a local police officer hinges on the above facts. If special deputization were necessary for access under the FCC license or WISPERN rules and regulations, such a decision on the sheriff’s part would be discretionary and within the scope of his employment. Thus, the sheriff would enjoy personal immunity. *Maynard v. City of Madison*, 101 Wis. 2d 273, 279-80, 304 N.W.2d 163 (Ct. App. 1981).

It is my opinion, however, that the sheriff’s gate-keeping function in allowing access to the law enforcement channel is ministerial rather than discretionary. Special deputization may be the tradition in Burnett County but is an unnecessary condition precedent. All that the gatekeeper is required to determine is whether the use is for police and emergency purposes, and such a determination is ministerial in character. This changes the liability exposure considerably in that immunity is lost by the negligent discharge of such a ministerial duty. *Maynard*, 101 Wis. 2d at 279, 304. Moreover, the failure of police to properly respond to an emergency situation has been

held to forfeit immunity. *See Domino v. Walworth County*, 118 Wis. 2d 488, 347 N.W.2d 917 (Ct. App. 1984).

Having examined the sheriff's function in granting access as ministerial, I now address the question of the county's liability exposure resulting from the sheriff's refusal to grant access to the law enforcement channel. The decision on whether or not to adopt a county ordinance mandating access is legislative in nature and cannot be the basis of a lawsuit because legislative and quasi-legislative acts enjoy immunity under section 893.80(4). However, under the statutes, the county may be held liable to indemnify the sheriff if he is found liable for damages because of his having breached a ministerial duty. Sec. 895.46, Stats. Thus, the county board should be encouraged to render its policy more specific to assure that the town police have access to the emergency radio network.

In conclusion, while special deputization is a discretionary function traditional to the office of sheriff, it should not be the condition precedent to access to the county communication channel. The licenses are issued to Burnett County for police and emergency purposes. The granting of access to the radio channels merely requires that a determination be made whether the purpose is for police or emergency use and, in my opinion, is a ministerial function. The sheriff would not be immune from suit should there be a negligent exercise of this function. The county would be immune but may be required to indemnify the sheriff for damages.

DJH:SJN

Cities; County Board; Public Officials; Reapportionment; Where, as a result of the alteration of the county board supervisory districts, a supervisor's residence is left outside the district he or she represents, the supervisor may continue to represent that district until the expiration of his term. When a city has combined the offices of alderman and county board supervisor where the aldermanic and supervisory boundaries are coterminous, the county board retains its discretion to decide whether to alter the supervisory districts after the city has annexed territory. OAG 3-87

February 11, 1987

WILLIAM A.J. DRENGLER, *Corporation Counsel*
Marathon County

You have asked two questions that have been raised by the City of Wausau's annexation of an urban portion of the Town of Stettin. Previously, Wausau had acted under section 66.192, Stats., to combine the offices of city alderman and county supervisor, which the city could do because the aldermanic district boundaries were coterminous with the supervisory district boundaries.

The residence of the county supervisor who was representing the district that included the Town of Stettin is within the area that was recently annexed to the City of Wausau. If the county board alters the supervisory districts so that they remain coterminous with the city's new aldermanic districts, the supervisor will be residing outside the district that he has been representing. If the county board refuses to amend the supervisory districts, then one or more of the new aldermanic districts in the expanded city will no longer have boundaries coterminous with the unaltered supervisory districts.

You first ask: if the county alters the supervisory district boundaries so that they remain coterminous with the city's aldermanic districts, does the county supervisor who resides in the city's newly annexed area vacate his office because he would no longer be a resident of the district he had been representing?

In my opinion, the supervisor does not vacate his office under these circumstances. The supervisor vacates his office when he moves away from his district, but he does not vacate his office when the district moves away from him.

The statutes that determine whether a county supervisor has vacated his or her office with a change of residence are sections 17.03(4) and 59.125.

A previous opinion considered whether a supervisor vacated his or her office by moving to a residence outside the district but inside the county. My predecessor concluded that by such a move the supervisor vacated his office because, under section 59.125,¹ he was no longer a resident of the district from which he was chosen. 74 Op. Att'y Gen. 160.

My conclusion is different in this case because here the district would be moving away from the supervisor who continues to reside in the same place as when he was elected. Since he is still a resident of the district from which he was chosen, he is eligible under section 59.125 to continue to hold the office of county supervisor.

In addition, because the supervisor would find his residence outside of his district due to a boundary change and because he would continue to reside in the county, he has not vacated his office under section 17.03, which as amended effective July 1, 1986, provides in part as follows:

Except as otherwise provided, a public office is vacant when:

.....

(4) The incumbent ceases to be a resident of:

(a) This state; or

(b) If the office is legislative, the district from which elected; or

(c) If the office is local, the county, city, village, town, district or area from which elected or within which the duties of the office are required to be discharged except as provided in ss. 60.30(6), 119.08(1)(c) and 120.05(1)(d).

¹ Section 59.125 was amended effective July 1, 1986, so that it is no longer phrased the same as when its application was considered in 74 Op. Att'y Gen. 160 (1985). However, the changes that were made in the statute would not affect the conclusion reached in that opinion. The statute was amended in the following respects by 1985 Wisconsin Act 304, sec. 142:

Eligibility for county office. No person is eligible to *file nomination, papers as a candidate for, have his or her name placed on a ballot for election to, or hold a county elective office who is not a resident an elector of the county. No person is eligible to file nomination papers as a candidate for, have his or her name placed on a ballot for election to, or hold the office of county supervisor who is not a resident an elector 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.*

To paraphrase section 17.03(4), a county supervisor vacates his office when he is no longer a resident of the district from which he was elected *or* the county within which his duties are required to be discharged.

When the supervisor's residence remains the same but the district's boundaries have changed, he still resides in the district from which he was elected. A situation like this case was discussed in 71 Op. Att'y Gen. 157, 161 (1982), where, as a result of reapportionment, a state senator found himself residing outside the district he had been representing. My predecessor concluded that no vacancy would result by reason of section 17.03(4) because the senator remained an inhabitant of the "district from which he or she is elected." Sec. 17.03(4), Stats. (1981).

The key language in both sections 59.125 and 17.03(4) is the phrase "from which." Those words appear in both statutes and should be applied the same way.² Because no vacancy occurred in the case of the state senator, so also no vacancy occurs in the case of the county supervisor who would find that because of a change in boundary lines he no longer resides in the district he had been representing. In both cases the elected official has remained in the district *from which* he or she was elected or chosen. In each case no vacancy is created by the change in district boundaries and the official continues to represent his or her old district until the expiration of the term. Because he remains a resident of the district from which he was elected, the Marathon County supervisor retains his eligibility under section 59.125 to hold the office of county supervisor and does not vacate his office under section 17.03(4). As in the case of the state senator, however, the county supervisor would have to move his or her residence to be within the new boundaries to be elected to a new term in the old district. *See* 71 Op. Att'y Gen. at 161.

² The argument that the "from which" phrase as applicable to county supervisors should be interpreted the same as the "from which" phrase applicable to state senators was strengthened by the recent change in section 17.03(4). Prior to the change section 17.03(4) provided that a local office was vacated if the official ceased "to be an inhabitant of the district, county, city, village, town, aldermanic district or school district *for* which he or she was elected" (emphasis added). In 1985 Wisconsin Act 304, sec. 133, the statute was amended by substituting the word "from" for the word "for." As a result, both legislative and local offices are vacated when the official ceases to inhabit the applicable area "from which" he or she was elected.

The alternative test in section 17.03(4) for creating a vacancy in the office of county supervisor focuses on the county of residence rather than on the district. Although the supervisor is elected from a district, his or her duties are countywide and not limited to the boundaries of the district. See *State ex rel. Gill, Att'y Gen'l v. The Supervisors of Milwaukee County*, 21 Wis. 449 [*443] (1867) and 60 Op. Att'y Gen. 55, 57-58 (1971). Whereas it was necessary to determine whether the supervisor remained an inhabitant of the *district* from which he or she was elected, the alternative test for a vacancy in the office depends upon whether the supervisor inhabits the *county* within which the duties of the office are required to be discharged. *Gill*, 21 Wis. at 453-54 [*447-48], and 60 Op. Att'y Gen. at 57-58. In the case you pose, the supervisor would satisfy this part of the section 17.03(4) test because the supervisor continues to reside in the county within which the duties of his office are required to be discharged.

Therefore, if Marathon County alters the supervisory district boundaries so that they are coterminous with Wausau's new aldermanic boundaries, the supervisor does not vacate his office by reason of the change in boundaries; and he can continue to represent his numbered district until the end of the term.

In your second question you ask: "Does the 'discretion' afforded a county board under 59.03(3)(c) require alteration of supervisory district boundaries where said boundaries are coterminous with city aldermanic boundaries, or does 62.08 appear to provide an adequate means to enfranchise those who become new city residents through annexation procedures?"

In my opinion, the county board retains the discretion to decide whether to amend supervisory district boundaries even when those boundaries are coterminous with city aldermanic district boundaries. The city does not deprive the county board of that discretion by choosing to combine the offices of alderman and supervisor. The city extends representation to the new residents in the annexed area by creating new wards or by altering old wards to include the new area pursuant to sections 5.15(2)(f)5., 62.08(2) and 66.021(7)(b).

Pursuant to section 59.03(3)(c), a municipal annexation may serve as a basis for altering the boundaries of supervisory districts,

“in the discretion of the county board.”³ In that statute, the Legislature clearly expressed its intent that the power to alter the supervisory district boundaries between federal decennial censuses is vested in the county board. This approach is consistent with section 59.03(3)(b), which gives the county board the authority to adopt the final supervisory district boundary plan after each federal decennial census. It is certainly logical to give the county board the authority to draw the boundaries for the county supervisors.

The city, by opting to combine the offices of alderman and supervisor where the boundaries for the aldermanic and supervisory districts are coterminous, does not deprive the county board of its authority to establish and alter the supervisory district boundaries. When a city annexes territory, it incorporates the new area into an existing ward or creates a new ward that will be placed in an aldermanic district. *See* secs. 5.15(2)(f)5., 62.08(2) and 66.021(7)(b), Stats. In this way the city extends representation to its new residents. However, in annexing the property, the city does not force the county board to amend the supervisory district boundaries.

Whether to alter the boundaries lies within the discretion of the county board.⁴

DJH:SWK

³ Section 59.03(3)(c) provides:

Changes during decade. After the enactment of a plan of supervisory districts under par. (b), a municipal incorporation, annexation, detachment or consolidation may serve as a basis for altering between federal decennial censuses the boundaries of supervisory districts, in the discretion of the county board. The number of supervisory districts in the county shall not be changed by any action under this paragraph. Any plan of county supervisory districts enacted under par. (b) may be amended under this paragraph but shall remain in effect as amended until superseded by another plan enacted by the county board under par. (b) and filed with the secretary of state.

⁴ If the county does not alter the supervisory district, the city will have to amend its charter ordinance that combines the offices of alderman and supervisor because, in that portion of the city where the aldermanic and supervisory districts are no longer coterminous, the offices cannot be combined. *See* sec. 66.192(1)(b), Stats.

Conflict Of Interest; Marital Property Law; The enactment of the marital property law does not change the applicability of section 946.13, Stats., to the member of a governmental body when that body employs the member's spouse. As was the case before the marital property law, the member of the governmental body avoids violation of section 946.13 if in his private capacity he does not negotiate, bid on or enter into the employment contract and in his public capacity he does not participate in the making of the contract and does not exercise discretion in the performance of the contract. OAG 4-87

February 25, 1987

TIM DUKET, *District Attorney*
Marinette County

You have asked whether a member of a school board violates section 946.13(1), Stats., when the board employs the member's spouse. Section 946.13(1) provides:¹

Any public officer or public employe who does any of the following is guilty of a Class E felony:

(a) In his private capacity, negotiates or bids for or enters into a contract in which he has a private pecuniary interest, direct or indirect, if at the same time he is authorized or required by law to participate in his capacity as such officer or employe in the making of that contract or to perform in regard to that contract some official function requiring the exercise of discretion on his part; or

(b) In his capacity as such officer or employe, participates in the making of a contract in which he has a private pecuniary interest, direct or indirect, or performs in regard to that contract some function requiring the exercise of discretion on his part.

In past opinions my predecessors have concluded that members of a city council and a school board did not violate section 946.13 when the respective governmental bodies employed their spouses as a police officer and a teacher. *See* 63 Op. Att'y Gen. 44 (1974) and

¹ Subsection (1) does not apply where the contract in which the board member is interested does not involve receipts and disbursements by the board of more than \$5,000 in any year. For purposes of this opinion, I assume that the spouse employed by the board is paid a salary high enough that subsection (1) applies to the board member.

52 Op. Att'y Gen. 367 (1963). Those opinions stated that the board member who received indirect or direct benefits from the spouse's contract could avoid violating section 946.13(1) by not participating in making the contract, either privately as an agent for the employed spouse or publicly as a member of the governmental body. 63 Op. Att'y Gen. at 45-46 and 52 Op. Att'y Gen. at 371.

You ask whether the marital property law that went into effect on January 1, 1986, changes the conclusions reached in those opinions. I believe that the applicability of section 946.13(1) is not affected by the marital property law.

The school board member can avoid violating paragraph (b) by not participating in his or her official capacity in the making of the contract and not performing in regard to the contract any function requiring the exercise of discretion on his or her part. *See* 75 Op. Att'y Gen. 172 (1986); 63 Op. Att'y Gen. at 45; 60 Op. Att'y Gen. 98, 100 (1971).

Paragraph (a) of 946.13(1) has three elements:

(1) a direct or indirect private pecuniary interest in a public contract; (2) negotiating, bidding or entering into the contract in a private capacity; and (3) being authorized or required to participate in the making of a contract or to perform some act with regard to the contract in an official capacity.

75 Op. Att'y Gen. at 173.

The third element is present when the school board hires the member's spouse as a teacher. The marital property law does not affect the fact that the school board member is authorized to participate in making the contract of employment with a teaching spouse. Therefore, to avoid violation of paragraph (a), the board member must avoid one of the other two elements.

Even before the marital property law, my predecessors concluded that the first element was present when the governing body employed a spouse of one of its members. A prior opinion dealing with the school board recognized that the board member benefited from at least an indirect pecuniary interest when the spouse was employed as a teacher. 52 Op. Att'y Gen. at 369. It was pointed out that even though the earnings of the teaching wife were her separate property, the school board member husband received at least indirect financial benefit from his wife's separate income because his

obligation to support her was made easier by her earnings and consequent contribution to the household expenses, and by her payments for her own expenses that would otherwise have to have been paid by the husband. 52 Op. Att'y Gen. at 369.

Under the marital property law, the board member spouse has a direct, rather than an indirect, pecuniary interest in the teaching contract because each spouse has an undivided fifty percent interest in marital property, which includes income. *See* sec. 766.31, Stats. Therefore, both before and after the marital property law, the first element of paragraph (a) is satisfied where the board member's spouse is employed as a teacher by that board.

The answer, then, to whether the board member violates paragraph (a) when his or her spouse is hired as a teacher turns on the second element, which is whether the board member in his or her private capacity "negotiates or bids for or enters into" the contract. Even if the board member does not personally participate in negotiating, bidding for or entering into the contract, there might be a violation of the law if the teaching spouse acts as an agent for the member spouse in the contractual process. The marriage alone, however, does not create an agency relationship between husband and wife. *See* Restatement (Second) of Agency §22(b) (1958) and 41 C.J.S. *Husband and Wife* §512a. and b. (1944). I do not believe that that statement is altered by the marital property law. The fact that either spouse now has the right to manage and control some of the marital property does not create an agency relationship between husband and wife for all activities. *See* sec. 766.51, Stats. For example, even though section 766.51 authorizes the teaching spouse to manage and control some marital property, it does not authorize the teaching spouse to bind the board member spouse to performance of the contract. Thus, when the teaching spouse enters the contract to teach, he or she does so only for himself or herself; the teaching spouse does not act for the board member spouse. As evidence of that, the board member spouse has no obligation under the contract to teach. It can be seen, then, that in negotiating, bidding for or entering a contract to teach, the teaching spouse does not act as an agent for the board member spouse. As a result, even though the board member spouse may enjoy a direct pecuniary interest in the contract, as long as he or she does not personally negotiate, bid on or enter into the contract, he or she avoids violat-

ing section 946.13(1) because the teaching spouse is not acting as his or her agent in the contractual process.

It may appear to be a very narrow reading of the statute to state that the board member spouse enjoys a direct pecuniary interest in the contract but is not represented by an agent spouse in the contracting process. However, because section 946.13(1) is a penal statute, it must be strictly construed. See *Menasha Wooden Ware Co. v. Winter*, 159 Wis. 437, 453, 150 N.W. 526 (1915); and 75 Op. Att'y Gen. 172 (1986). Under the strict construction, it cannot be said that the teaching spouse is an agent for the board member spouse when the teaching spouse negotiates, bids on and enters into a contract for the personal services of the teaching spouse.

Therefore, it is my opinion that the marital property law has not changed the applicability of section 946.13(1) in regard to school boards employing spouses of board members. As before the marital property law, the board member does not violate section 946.13(1) as long as he or she in a private capacity does not participate in the negotiating, bidding on or entering into the spouse's contract and also as long as he or she in the public capacity does not participate in the making of the contract and does not exercise discretion in the performance of the contract.

Even though I have concluded that the marital property law has not changed the applicability of section 946.13(1) and that members of governmental bodies can avoid violating that statute when their spouses are employed by the bodies, officials must remember that my conclusions concern only the applicability and scope of section 946.13(1), a felony statute. Conduct of public officials and employes is also affected by other statutes and local laws and rules that may impose more stringent standards than those found in section 946.13(1). For example, pursuant to section 19.59, a county, city, village or town might adopt a code of ethics that would prohibit one spouse from being employed by a governmental body and the other spouse serving on the body at the same time. I mention these other possible laws and rules only to caution officials that they might be affected by conflict of interest requirements other than those in section 946.13(1).

DJH:SWK

Federal Aid; Health And Social Services, Department Of; The Department of Health and Social Services cannot reobligate refunds of federal block grant monies received after the federally mandated time for closing the grant year. OAG 5-87

February 25, 1987

TIM CULLEN, *Secretary*

Department of Health and Social Services

Your predecessor has asked for an opinion regarding the proper disposition of refunds of federal block grant monies received by the Department of Health and Social Services (Department). Recently the state Legislative Audit Bureau (LAB) audited the Department's block grant expenditures and concluded that the Department's disposition of certain block grant refunds was not in compliance with federal block grant law. The LAB auditors concluded that the Department's re-obligation of refunds received after the expiration of the period in which the block grant monies had to be obligated or expended was inappropriate. The audit concluded that the refunds should have been returned to the United States Department of Health and Human Services. The refunds involve a total of \$8,721.23 for FY-1982 and FY-1983 under the Alcohol, Drug Abuse and Mental Health Services block grant and \$6,105.03 in FY-1983 under the Community Services block grant.

Because these are block grants, the interpretation of applicable statutes is primarily the responsibility of each state. Indeed, block grants are specifically exempt from the usual federal grant administration requirements in 45 C.F.R. Part 74 (1985). 46 Fed. Reg. 48,584 (1981), 47 Fed. Reg. 29,476 (1982). The statutes themselves, however, are quite clear. 42 U.S.C. §300x-2(a)(2) (1982) governs the use of funds under the ADAMH block grant. It provides: "Any amount paid to a State for a fiscal year and remaining unobligated at the end of such year shall remain available to such State for the purposes for which it was made for the next fiscal year."

Community Services block grants are governed by 42 U.S.C. §9907(b) (1982), which provides: "Payments to a State from its allotment for any fiscal year shall be expended by the State in such fiscal year or in the succeeding fiscal year."

Both statutes are clear and the policy behind both statutes is consistent: the federal government wants the state to use its yearly

allotment over a period not longer than two years. Therefore, FY-1982 funds would have to be used no later than the beginning of FY-1984. The Department's practice has been to credit refunds received after the two-year period to expenditures incurred before the expiration of that time as described in the letter requesting this opinion:

[R]efunds of the funds so expended or obligated that were received after the expiration of the two year period were "reobligated," i.e. used in lieu of funds previously obligated or expended. Since the block grants are reauthorized each year and DHSS has two years to obligate or expend the monies, the effect of the accounting transaction is to increase by the amount of the refund the monies available for obligation during the following FFY expenditure period.

The Department's policy is not consistent with the federal law. The federal law requires the monies to be spent within the applicable two-year period. The money is only "available" for the applicable two-year period. If the Department had not spent the money within that two-year period, it would have to refund the money. It must do the same with refunds of monies received after the applicable two-year period. Those monies are essentially block grant funds which were not spent within the two year period.

The contrary interpretation would allow the Department, or any other state, to frustrate the clear language of the applicable statutes by overpaying its subgrantees and not collecting the refunds until the applicable fiscal year's time period had expired. Interpreting the federal statutes as I have is consistent with the clearly expressed policy in 42 U.S.C. §§300x-1 and 9904. It also is consistent with the policy of requiring the early recapture of unspent monies. As the LAB report indicates, the money would not have to be refunded if the subrecipients' contracts had been closed out more expeditiously. Legislative Audit Bureau Report 86-8 at 16.

Finally, this policy is consistent with the state accounting policy expressed in section 20.001(5), Stats., which allows refunds received in the same fiscal year to be credited to the appropriation from which the original expenditure was made. Refunds received after the close of the fiscal year cannot be so credited.

DJH:AL

Children; Courts; Marriage And Divorce; The family court commissioner represents the public interest and does not act as an advocate for the party benefited when he brings a remedial contempt proceeding to enforce an existing order or judgment under section 767.29(1), Stats. OAG 6-87

February 27, 1987

MORGAN R. BUTLER, III, *Corporation Counsel*
Ozaukee County

On behalf of yourself and the family court commissioner for Ozaukee County, you ask a number of questions concerning the family court commissioner's role in enforcing maintenance orders. In doing so, you express your disagreement with the Wisconsin State Bar's Standing Committee on Professional Ethics which concluded in a 1983 opinion that the family court commissioner may not act as advocate and advisor simultaneously. E-83-20 Formal Ethics Opinions of the State Bar Standing Committee on Professional Ethics.

Insofar as your request seeks modification or clarification of the 1983 ethics opinion, your inquiry should be directed to the State Bar rather than to my office. However, I will share with you my opinion on the four questions you raised without referring specifically to the 1983 opinion. For the sake of accuracy, I will set forth each of your questions as they appear in your letter.

1. When a family court commissioner makes recommendations to the court concerning child custody or maintenance matters, is he acting as an "advisor" to the court such that he is in a conflict of interest situation should he bring contempt proceedings in the same matter pursuant to §767.29(1), Wisconsin Statutes.

Historically, the role of the family court commissioner was to act solely as a "friend of the court." The duties of the office, however, evolved into the separate functions of advising the court and prosecuting certain actions or proceedings. The family court commissioner now has the powers of a court commissioner pursuant to section 767.13(1)(b), Stats. *Strandberg v. Strandberg*, 27 Wis. 2d 559, 565, 135 N.W.2d 241 (1965). In reality, a family court commissioner is a court commissioner with special statutory powers and duties. 61 Op. Att'y Gen. 443, 446 (1972).

The office of court commissioner originally was expressly denominated as judicial in nature. Wis. Const. art. VII, §23. Even with the repeal of this constitutional provision in April 1977, court commissioners still have the powers provided in chapter 753. Sec. 807.04, Stats. Chapter 753 generally deals with the establishment and powers of the circuit courts. Further, section 757.22(1) provides that "no court commissioner or other judicial officer" may receive fees or compensation for services except those expressly authorized by law. The quoted passage implies that court commissioners are judicial officers.

Among his other responsibilities, the family court commissioner now has the power to make temporary orders concerning a number of matters during the pendency of an action affecting the family under chapter 767. Sec. 767.23(1), Stats.; *Strandberg*, 27 Wis. 2d at 564. Under section 767.29(1), he also has the duty to take such proceedings as he deems advisable to secure the payment of maintenance payments or support money adjudged or ordered to be paid when such payment is not made to the clerk of court at the time provided in the judgment or order. The means of enforcement include contempt proceedings under chapter 785 and any other appropriate remedy including those set forth in section 767.30(3). *In re Marriage of Biel v. Biel*, 130 Wis. 2d 335, 337, 387 N.W.2d 295 (Ct. App. 1986).

It is my opinion that the family court commissioner does not act as an advocate for the party benefited when he enforces an existing order under section 767.29(1). In a typical contempt proceeding, the only real issue is whether or not there has been compliance with a previously entered court order.

It is well established that the trial court has broad authority to enforce its judgments in family court proceedings and may employ any remedy customarily available to courts of equity and appropriate to a particular case. *Rotter v. Rotter*, 80 Wis. 2d 56, 62-63, 257 N.W.2d 861 (1977). It long has been held that in matters of equity, such as family court matters, trial courts have inherent powers, independent of contempt proceedings, to remedy injuries arising from violations of or noncompliance with their orders or judgments. *Laing v. Williams*, 135 Wis. 253, 258, 115 N.W. 821 (1908), cited and quoted approvingly in *Rotter*, 80 Wis. 2d at 63.

Decisions of the family court commissioner are subject to review by the judge of the branch of the court to which the case has been assigned upon the motion of any party. Sec. 767.13(1m), Stats. However, where the family court commissioner is not exercising a decision-making function but is merely acting to carry out existing judgments or orders, such activity is not in conflict with other family court commissioner activities of an advisory nature to the extent that he still acts in an advisory capacity.

If the enforcement remedy chosen is a contempt proceeding, the family court commissioner's participation is proper in remedial actions. Under section 757.69(7), a court commissioner must refer to a court of record for appropriate action every alleged showing of contempt in the carrying out of the lawful decisions of the commissioner. Similarly, section 785.06 provides that a court commissioner or a party to the action or proceeding may petition the circuit court "for a remedial or punitive sanction specified in s. 785.04" Although the family court commissioner can recommend remedial or punitive sanctions, he probably would be precluded from participating in further proceedings where punitive sanctions are recommended.

2. What activities of a family court commissioner constitute "advising" the trier of fact such that a conflict of interest is created should the family court commissioner bring a contempt proceeding in a specific matter?

In *Strandberg*, 27 Wis. 2d at 566, which was decided before the duties of the office were substantially redefined by chapter 105, Laws of 1977, the court warned against increased use of the family court commissioner where such use would undermine his position as investigator and conciliator. There appear to be areas, however, where the family court commissioner is mandated and able to carry out functions other than "advising" the trier of fact. If the petition or other relevant document does not seek or advocate any change in the relative positions of the parties on any issues triable to the court, it is my opinion that the family court commissioner can initiate and pursue that proceeding. As for specific instances, the activities in which the family court commissioner might engage are too numerous to discuss in this opinion. Obviously any close questions should be resolved by the family court commissioner not appearing in the proceedings.

3. Is there a conflict of interest if a family court commissioner gives "advice" in one matter and brings contempt proceedings in another but never engages in both activities in a single matter?

This question is somewhat general in nature, and an attempt to address the issue raised would either produce meaningless generalities or a lengthy discussion of many corollary issues. Your letter does not contain enough specific facts for me to properly evaluate the problem.

There is no conflict of interest, in my opinion, if no personal interest is represented. If the family court commissioner is not acting, in effect, as an advocate for one of the parties, he is seeking to do in an enforcement proceeding no more than enforcing the court's own orders and judgments.

The legislative command in section 767.29(1) "take such proceedings as either of them deems advisable to secure the payment of the sum including enforcement by contempt proceedings under ch. 785" means that either the family court commissioner or the clerk should petition the circuit court under section 785.06. In doing so, the family court commissioner simply would be reporting nonpayment to the court and initiating the contempt proceeding rather than conducting the contempt proceeding. This action is consistent with the family court commissioner's role as "advisor" to the court.

If your question is limited to two matters involving totally different parties, I fail to see how there could be a conflict of interest merely because the family court commissioner engages in differing activities. Even in the same matter with the same parties, there are proceedings where the family court commissioner's participation would not present a conflict of interest while participation in other activities might result in such a conflict.

4. Who does the family court commissioner represent when bringing a contempt action pursuant to §767.29(1), Wisconsin Statutes?

The family court commissioner is an integral and necessary representative of the public interest in all divorce cases, and it is contrary to the legislatively expressed public interest if the family court commissioner either neglects to perform his statutory duties or is prevented from performing them by his premature and summary dismissal or withdrawal from the case. *de Montigny v. de*

Montigny, 70 Wis. 2d 131, 141-42, 233 N.W.2d 463 (1975). The powers of the family court commissioner should be liberally construed to the end that such public interest is properly protected. *Masters v. Masters*, 13 Wis. 2d 332, 342, 108 N.W.2d 674 (1961).

The role of the family court commissioner in divorce matters is so important for the protection of the interest of the state that section 767.14 requires all pleadings to be served upon him and prohibits a judgment unless this requirement is satisfied. *Bottomley v. Bottomley*, 38 Wis. 2d 150, 157, 156 N.W.2d 447 (1968). The court, 38 Wis. 2d at 158, further explained the family court commissioner's role as follows:

The people of Wisconsin have declared in sec. 245.001(2), Stats., that marriages in this state are not to be treated as contracts in which only the immediate parties are interested. The interest of the public must always be taken into account. The family court commissioner is the protector of that public interest. He is not to be considered as being merely an aide of the court or an amicus curiae. Rather he has the heavy duty and responsibility of representing the public interest in every action involving marriage and the family.

The family court commissioner represents the public interest when he brings a contempt proceeding to enforce an existing order or judgment of the court. The court on its own initiative may issue an order requiring the payer to show cause at some reasonable time why he or she should not be punished for failing to satisfy a financial obligation under chapter 767. Sec. 767.305, Stats. In bringing an enforcement proceeding, the family court commissioner is merely reporting nonpayment to the court for appropriate judicial action. This is similar to the court commissioner's authority to refer applicable cases to the court for enforcement for nonpayment or to refer to a court of record for appropriate action every alleged showing of contempt in the carrying out of the lawful decisions of the commissioner. Sec. 757.69(1)(c) and (7), Stats. However, the family court commissioner ceases to represent the public interest and steps over the bounds of propriety whenever he advocates a change in the position of parties or represents the personal interests of one of the parties.

DJH:DPJ

Cooperative Educational Services Agencies; Schools And School Districts; State Aid; A school district and a cooperative educational service agency may not, without legislative authority, contract with a private driving school and receive state aid for pupil driving instruction services performed by such driving school. OAG 7-87

March 9, 1987

TOM LOFTUS, Chairperson
Assembly Organization Committee

You have asked for an opinion on whether a school district and a cooperative educational service agency (CESA) may contract with a private driving school and receive state aid for pupil driving instruction services performed by such private driving school. It is my opinion that they may not enter into such contracts and receive state aid.

The question necessitates an interpretation of sections 121.41(1), 20.255(2)(r) and 343.06(3), Stats. Section 121.41(1) provides that each public school district, county handicapped children's education board and vocational, technical and adult education district which provides driver education programs for students shall receive state aids in the amount of \$50 for each pupil who successfully completes a course in driver education approved by the Department of Public Instruction ("DPI").

Section 20.255(2)(r) makes an appropriation: "From the transportation fund, the amounts in the schedule to be distributed to school districts which operate driver education courses in accordance with s. 121.41(1). The distribution shall be made to school districts upon such reports in such form and containing such information as the state superintendent requires."

A person under the age of eighteen does not have to complete a course in driver education operated by a school district and approved by DPI in order to receive an operator's license. Section 343.06(3) sets out three alternative programs which would enable a person under eighteen to receive a driver's license:

The department [of transportation] shall not issue a license:

.....

(3) To any person under age 18 unless the person has satisfactorily completed a course in driver education in public schools

funnel state driver education funds to programs operated by private driving schools. That result contradicts the language of the legislative appropriation which authorizes the distribution of state funds only “to school districts which operate driver education courses” Sec. 20.255(2)(r), Stats.

Even aside from the appropriation language, I find a lack of authority to contract with private driver training schools. The Legislature has on several occasions rejected proposed legislation granting school districts broad powers of self-determination. In the absence of such broad authority, the legislative recognition that public school programs and private driver training school programs are distinct alternatives for procuring driver education suggests that the Legislature did not intend that contracts would be entered into with private driver training schools. Furthermore, when the Legislature intends to authorize contracts with private vendors, it has demonstrated the ability to expressly state the authority. *See, e.g.*, secs. 115.83(1)(a), 115.85(2)(d), 118.15(1)(d), 118.153(3)(c) and 120.21(1)(b), Stats.

In materials submitted relative to your opinion request, the argument was made that the contemplated contracts with private driving schools are the sole means of delivering cost-efficient driver education to students in smaller school districts. Although that may be the case, nonetheless, it is up to the Legislature to address any proposal for aid to districts in those circumstances.

DJH:DDS

approved by the department of public instruction, or in vocational, technical and adult education schools approved by the board of vocational, technical and adult education, or in non-public and private schools which meet the minimum standards set by the department of public instruction, or has satisfactorily completed a substantially equivalent course in driver training approved by the department [of transportation] and given by a school licensed by the department under s. 343.61

Statutes relating to the same subject matter are to be construed together and harmonized. *State v. Burkman*, 96 Wis. 2d 630, 642, 292 N.W.2d 641 (1980). Thus, the driver education provisions noted above must be read together in an effort to determine whether the Legislature intended to authorize and fund contracts entered into between school districts, CESAs and private driving schools.

A review of those statutory provisions reveals a legislative recognition that students can receive driver education in a number of ways. They can take part in driver education programs operated by public high schools and vocational schools or through county handicapped children's education boards. They can receive such education in nonpublic or private schools meeting DPI minimum standards. Finally, driver education is available through private driver training schools licensed by the Department of Transportation.

Though the Legislature approved these various programs as alternative means of meeting the driver education prerequisite for obtaining an operator's license, it provided funding at a level of \$50 per student only for those "school districts which operate driver education courses in accordance with s. 121.41(1)." Sec. 20.255(2)(r), Stats. It is my opinion that the Legislature did not intend to provide such funding for nonpublic high schools or private driver training schools.

I conclude that school districts, CESAs and private driver training schools may not indirectly accomplish what they cannot accomplish directly under the existing statutory framework. In other words, it is my opinion that the contracts contemplated in your request would be inconsistent with the legislative intent to fund only those programs operated by public schools. In effect, contracts between public schools, CESAs and private driving schools would

Bids And Bidders; Counties; Municipalities; Words And Phrases; Municipalities may require bidders to include a list of subcontractors. Counties may reject a proposal for failure to include a complete list, except when omitted subcontractors themselves submitted timely, written bids to the general contractor. OAG 8-87

March 16, 1987

WILLIAM A.J. DRENGLER, *Corporation Counsel*
Marathon County

You asked my predecessor for an opinion on the following question:

Given the history and judicial interpretation of sec. 66.29(7), Stats., does a public entity have discretionary power to demand a full and complete list of all the subcontractors and suppliers that a bidder will contract with on a given project, and the class of work to be performed by each?

More specifically, you asked whether Marathon County can consider a bid invalid if the proposal does not contain a complete list of material suppliers and subcontractors, in four different factual settings.

As a general rule, bids for municipal contracts must substantially comply with all requirements specified in statutes, ordinances and bid advertisements. 10 McQuillin *Municipal Corporations* §29.65 (3d ed. 1981). Moreover, a municipality can generally decline a bid for failure of literal compliance with specifications as advertised. *Id.* You explain that Marathon County currently requires a list of subcontractors through its County Project Manual, and specifies that failure to comply is grounds to reject the bid as invalid. Your question, then, is whether section 66.29(7), Stats., effectively overrides the general rule and limits municipal authority to reject certain bids. The statute provides in relevant part:

BIDDER'S CERTIFICATE. On all contracts the bidder shall . . . submit a list of the subcontractors he proposes to contract with, and the class of work to be performed by each, provided that to qualify for such listing such subcontractor must first submit his bid in writing, to the general contractor at least 48 hours prior to the time of the bid closing, which list shall not be added to nor altered without the written consent of the municipality. *A proposal of a bidder shall not be invalid if any subcon-*

tractor and the class of work to be performed by such subcontractor has been omitted from a proposal; such omission shall be considered as inadvertent, or that the bidder will perform the work himself.

This language seems to require the kind of bid specifications that Marathon County now issues, but at the same time directs that a bid “shall not be invalid” for failure to comply with the requirement. Conceivably, the last sentence of the section actually prohibits a municipality from rejecting a bid solely because of an incomplete subcontractor list.

However, the legislative history of section 66.29(7) leads me to conclude that the Legislature never intended such a severe restriction on municipal authority to reject bids. Rather, the debate over amendments to this section has been whether bidders must submit subcontractor lists as a statutory mandate, or only if municipalities so require. Before 1955, the statute unequivocally required that contractors include in bid proposals “a full and complete list of all the proposed subcontractors and the class of work to be performed by each” Sec. 66.29(7), Stats. (1953). A 1955 amendment removed the mandatory subcontractor list, and instead provided that municipalities could require such a list at their own discretion. Ch. 406, sec. 2, Laws of 1955. Even under the amended statute, though, a municipality could reject a bid that failed to comply with its subcontractor listing requirement. *See Druml Co. v. Knapp*, 6 Wis. 2d 418, 94 N.W.2d 615 (1959).

A 1959 amendment ultimately produced the current language, but began as an effort to reinstate the mandatory subcontractor lists. The original bill, 1959 Assembly Bill 574, simply restored the pre-1955 language. Subcontractors advanced this change, complaining that general contractors subjected subcontractors to “bid-peddling” when the bid specification did not require a subcontractor list. *See* letter from Peter Woboril, Wisconsin Council of Painting and Decorating Contractors of America, to Assemblyman Glenn Henry, Labor Committee, April 17, 1959; in 1959 A.B. 574 drafting file. General contractors opposed the amendment, as did the League of Wisconsin Municipalities, which argued that an inadvertent omission of a subcontractor from a bid might subject a municipality to “nuisance litigation.” *Id.* Municipalities, in other words, worried that a mandatory subcontractor list reduced their

flexibility and exposed bid decisions to challenge on technical grounds.

Hoping to eliminate “bid-peddling” but also meet the municipalities’ concerns, the subcontractors offered an amendment providing that a bid proposal “shall not be deemed invalid if the bidder establishes to the satisfaction of the municipality that any subcontractor . . . has been inadvertently omitted from a proposal.” *Id.* 1959 A.B. 574, Amendment 1. This amendment, which the assembly adopted, is the source of the current provision that a bid “shall not be invalid” because of an omitted subcontractor, and the context shows that one purpose was to protect municipal discretion. The bidder was required to submit a subcontractor list, but the municipality could overlook inadvertent omissions from the list without fear that an unsuccessful bidder would challenge the accepted bid as invalid. Similarly, the municipality could reject a bid because the list was incomplete, subject only to the bidder’s “inadvertent omission” defense.

The senate amended the assembly bill by introducing the language now in the statute, but nothing in the legislative history shows an intent to alter the basic thrust of the subcontractors’ proposal: reinstate the mandatory subcontractor list, but protect municipalities from litigation over that requirement. The senate version, in fact, tightened the control on general contractors, limiting the subcontractor list to those who submit bids in writing at least forty-eight hours before bid closing. The amendment also fully protected a municipal decision to *accept* a bid, specifying that a bid “shall not be invalid” if a qualified subcontractor is omitted; such omissions are deemed inadvertent (or evidence that the bidder plans to perform the work) rather than subject to proof as in the assembly version. Standing alone, that same language seems to prohibit *any* rejection of a bid based on omitted subcontractors. However, such a reading effectively nullifies the subcontractor list requirement, and removes traditional municipal authority to reject proposals that violate bid specifications. The history of section 66.29(7) shows no hint that the Legislature perceived municipal rejection of bids as a problem, or that it intended to place significant restrictions on municipal power to enforce bidding requirements.

In my view, section 66.29(7) simply provides that omission of a subcontractor from a proposal does not render the proposal statutorily invalid. When a municipality receives a bid containing an

incomplete subcontractor list, it must consider the bid. The municipality can either accept the bid or notify the general contractor that it intends to reject the bid for failure to comply with bid specifications. If the contractor can produce evidence that it acquired timely written bids, then the omission is presumptively inadvertent. Likewise, if the contractor indicates an intention and an ability to perform the work itself, the bid may not be rejected on that basis. This interpretation respects the underlying purpose of section 66.29(7), which is to protect the public and allow the municipality to pass on the capacity of subcontractors and suppliers named. See *Druml*, 6 Wis. 2d 418; *Boehck Construction Equipment Corp. v. Voight*, 17 Wis. 2d 62, 75, 115 N.W.2d 627, 117 N.W.2d 372 (1962).

Turning to your four specific questions, you first ask whether Marathon County may consider a proposal invalid when the bidder receives oral bids from subcontractors and omits those subcontractors from his proposal to the county. Had the bidder included subcontractors who failed to submit written bids, the proposal would be invalid under the terms of the statute and the county should refuse to consider it. Because the bidder properly excluded the deficient subcontractor bids, the county must consider his proposal. The county, though, may nevertheless reject the proposal if the bidder failed to list all the subcontractors he intends to work with, and the class of work each will perform. In other words, if the bidder fails to obtain timely written subcontractor bids, he can submit an incomplete proposal but risks rejection for failure to comply with bid specifications.

Your second question is whether Marathon County may "invalidate the proposal" when the subcontractors submitted timely, written bids but the bidder omitted them from his proposal. This bidder secured his subcontract bids as the statute requires, and erred only in failing to name them in his proposal. In my opinion, these are the omissions the Legislature intended to deem inadvertent, such that the municipality must consider them as part of the original proposal. The assembly's 1959 amendment to section 66.29(7) originally allowed bidders this "inadvertence" defense, and the enacted language retained the idea but relieved bidders of a duty to prove the inadvertence of an omission. This interpretation effectuates the 1959 amendment's dual purposes: it precludes last-minute bid-peddling by general contractors; and reduces litigation over the subcontractor requirement, providing in effect a "substantial compli-

ance” standard. In sum, if the bid’s only deficiency is failure to name subcontractors who were in fact qualified for listing, a municipality cannot reject the bid on that basis alone; the proposal is deemed to include the omitted subcontractors.

Your third question is whether the county may invalidate a proposal if the bidder omits subcontractors who submitted their bids in writing but after the forty-eight hour deadline. The answer is the same as for question one: the proposal is not automatically invalid, but the county may reject it because the subcontractor list is incomplete.

Your fourth question is whether the county may invalidate a proposal if, regardless of when the bidder receives written bids from subcontractors, he names alternative subcontractors and suppliers for each class of work to be performed. The *Druml* court specifically held that such alternative listing invalidated the general contractor’s bid. Your question is really whether the 1959 amendment affects that holding. In my opinion, it does not.

The *Druml* court voiced two major objections to alternative subcontractor listing. First, that practice allows the bidder to invite competition among the listed contractors after bid acceptance. *Druml*, 6 Wis. 2d at 423. Second, alternative listing makes it “more difficult, and possibly more expensive, for the [municipality] to ascertain the reliability and competence of several firms for each part of the work to be subcontracted.” *Id.* That difficulty clearly remains despite the 1959 amendment. Despite the statute’s requirement of written bids, alternative subcontractor listing would still invite the post bid competition which “tends to benefit the contractor, not the public.” *Druml*, 6 Wis. 2d at 423. A proposal that lists alternative subcontractors for each class of work is invalid under section 66.29(7), and the county should not consider it.

To conclude, and in answer to your general question, a public entity has power under section 66.29(7) to demand a full list of subcontractors and suppliers with which a bidder will contract. The statute, in fact, requires such a list. Municipalities have discretion to accept or reject a proposal that includes an incomplete list, but a list is deemed complete if the bidder merely omitted subcontractors who submitted timely, written bids. Such subcontractors are “qualified for listing” under the statute and are considered to be part of the proposal despite their omission. In that limited circumstance, a

municipality may not reject the bid solely because the list was incomplete at the time submitted.

DJH:AL:sb

Licenses And Permits; Private Detectives; Words And Phrases; Section 440.26, Stats., requiring the licensing of private detectives, does not apply to qualified arson experts or other expert witnesses merely because they may investigate matters relating to their field of expertise. OAG 9-87

March 16, 1987

FRANK A. MEYERS, *Administrator*
Division of Criminal Investigation

You ask for an opinion regarding the applicability of section 440.26, Stats., the private detective licensing law, to the hiring of "fire experts" in arson cases. Specifically, you ask whether a district attorney, defense attorney, insurance company and a private individual may each hire an unlicensed "private investigator/expert witness . . . to examine a fire scene or further investigate the cause and manner of a fire." Second, you ask whether such "private investigator/expert witness" may testify in court.

In my opinion, no expert witnesses, whether they be arson experts or any of hundreds of other types of experts, are required to be licensed as private detectives under section 440.26, merely because they may investigate matters relating to their fields of expertise. In any event, experts may testify regardless of licensure in this state.

The form of some of your questions seems to equate the position of expert witness with that of private investigator. There is no such necessary relationship and one must therefore separate these concepts.

Initially, I look to the plain language of the statute.

Two types of licenses have been established by the Legislature for private investigators, a "private detective agency license" and a "private detective license." Sec. 440.26(2)(a), Stats. The former may be issued to individuals, partnerships or corporations. The latter may be issued to an individual owner, co-owner or employe of a licensed agency. Everyone actually engaged in the work of a private detective must have the latter (individual) license. *Id.*

The scheme of the licensing provisions is designed to protect the public from incompetent and disreputable private investigators by a) prohibiting the licensing of minors; b) subjecting applicants to approval of the Department of Regulation and Licensing (hereinaf-

ter, "the department"); c) imposing requirements for bonding or liability policies on agency and individual applicants; and, d) providing civil and criminal sanctions for violations. Secs. 440.26(1), (3), (4), (6) and (7), Stats. This is a statutory scheme designed to regulate those agencies and individuals who hold themselves out professionally to be private detectives or private security guards. The statute is intended to regulate "those persons who engage in the business or profession of a private detective." 40 Op. Att'y Gen. 497, 498-99 (1951).

The licensing requirements of section 440.26 expressly apply only to private detective agencies, private detectives, investigators, special investigators, private security persons and suppliers of private security personnel. Sec. 440.26(1), Stats. Nowhere in the statute has the Legislature made any reference to expert witnesses being covered. Indeed, section 440.26 comprises the entirety of subchapter II of chapter 440 which subchapter is simply entitled, "Private Detectives."

Support for the proposition that expert witnesses are not required to be licensed as private detectives can be found by referring to the dictionary definition as well as to prior opinions of this office. The term "private detective" is not ordinarily understood to apply to expert witnesses. Common and approved usage and meaning of words may be established by reference to a recognized dictionary. *Kollasch v. Adamany*, 104 Wis. 2d 552, 563, 313 N.W.2d 47 (1981). Webster's New Collegiate Dictionary 909 (1979), defines "private detective" as "a person concerned with the maintenance of lawful conduct or the investigation of crime either as a regular employee of a private interest (as a hotel) or as a contractor for fees."

Opinions of this office have even more narrowly construed the term for purposes of the licensing statute. It has been said that the three principal characteristics of a private detective are: "1. He is an unofficial person, not an employe of a governmental agency. 2. He is engaged in obtaining information in secret, in that it is without the knowledge of the person being observed. 3. His information is obtained for and transmitted to a third person." 53 Op. Att'y Gen. 183, 185 (1964), citing 37 Op. Att'y Gen. 469, 470 (1948).

Whether reference is made to the dictionary definition or to the more restrictive description offered in prior opinions of this office, one thing is clear. Expert witnesses were not intended to be covered

by the private detective licensing provisions. For example, a pathologist does not become a private detective because he or she investigates the cause of death or an accountant a private detective because he or she investigates a corporate takeover or a white collar crime. Similarly, a qualified arson expert does not become a private detective merely because he or she investigates the cause and origin of a fire.

The department is authorized to adopt rules implementing these statutory provisions. Sec. 440.03(1), Stats. It is one of these rules which has quite possibly led to the confusion which prompted your request for an opinion.

Wisconsin Admin. Code §RL 3.01(8)(a), defines the term "private detective":

"Private detective" means a person engaged in obtaining or furnishing information with reference to:

1. Crimes or wrongs done or threatened against the United States or any state or territory thereof;
2. The identity, habits, conduct, business, occupation; honesty, integrity, creditability, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation or character of any person;
3. The location, disposition or recovery of lost or stolen property;
4. The cause or responsibility for fires, libels, losses, accidents, damage or injury to person or property;
5. The securing of evidence to be used before any court, board, officer or investigating committee.

It appears that this definition is more expansive than necessary and the exemptions in section RL 3.01(8)(b) do not relieve the overbreadth. By its terms, it would effectively include not only most expert witnesses but, also, many lay witnesses. It would include witnesses who investigate and those who do not. It would include witnesses licensed in a myriad of other professions and occupations in this and other jurisdictions. Needless to say, such a result could not have been intended by the Legislature. Even if we were to very narrowly construe the words "engaged in obtaining or furnishing information" to refer only to those whose job or profession in-

volves such activities, lay witnesses could be eliminated but not expert witnesses. It is impossible, therefore, to harmonize the rule with the statutory scheme.

Since this rule is out of harmony with the controlling statute, it is beyond the rule making power of the agency. *Plain v. Harder*, 268 Wis. 507, 511, 68 N.W.2d 47 (1955). It is a cardinal rule of construction that the statute controls and a rule out of harmony with the statute is a mere nullity. *Id.* at 511, citing *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134 (1936). See, also, section 227.11(2)(a): a rule is not valid if it exceeds the bounds of correct interpretation.

Your second question, whether such expert witnesses may testify in court, can be answered succinctly, "yes." This would be the case whether or not the witness was required to be licensed. Qualification of an expert witness to testify in Wisconsin has historically been a matter of experience, not licensure. *Karl v. Employers Ins. of Wausau*, 78 Wis. 2d 284, 297, 254 N.W.2d 255 (1977). The qualification of experts is within the sole discretion of the trial court. *Maci v. State Farm Fire & Casualty Co.*, 105 Wis. 2d 710, 720, 314 N.W.2d 914 (Ct. App. 1981). An expert may be qualified on the basis of knowledge, skill, experience, training and education. Sec. 907.02, Stats. The particular qualifications of the witness on the issue should control, rather than the label of a profession or trade. *Roberts v. State*, 41 Wis. 2d 537, 551, 164 N.W.2d 525 (1969).

In conclusion, district attorneys, defense attorneys, insurance companies and private individuals may each hire qualified fire investigators as expert witnesses without regard to their licensure and these experts may testify without regard to their licensure.

DJH:DH

Children; Confidential Reports; Criminal Law; Physicians And Surgeons; A medical or mental health professional may report suspected child abuse under the permissive provisions of section 48.981(3), Stats., when the abuser, rather than the victim, is seen in the course of professional duties. Section 51.30 does not act as a bar to such reports made in good faith. OAG 10-87

March 16, 1987

PAMELA J. KAHLER, *Corporation Counsel*
Dunn County

You ask whether suspected child abuse may be reported under section 48.981(2), Stats., when the abuser, rather than the victim, is seen in the course of professional duties. The situation leading to your question is one where an individual seeking professional help for mental or emotional problems or an individual taken into custody under chapter 51 voluntarily and without solicitation informs a medical or mental health professional of incidents where he or she has abused a child in some manner.

Under section 48.981(2), certain individuals, including medical and mental health professionals,

having reasonable cause to suspect that a child seen in the course of professional duties has been abused or neglected or having reason to believe that a child seen in the course of professional duties has been threatened with abuse or neglect and that abuse or neglect of the child will occur shall report as provided in sub. (3).

This passage mandates reporting by those individuals if child abuse is suspected when the child is seen in the course of professional duties.

Subsection (2) further provides that “[a]ny other person, including an attorney, having reason to suspect that a child has been abused or neglected or reason to believe that a child has been threatened with abuse or neglect and that abuse or neglect of the child will occur may make such a report.” While the earlier passage mandates reporting where the suspicion of child abuse arises only after the child has been seen, there is no such limitation in the later provision.

In *State v. Campbell*, 102 Wis. 2d 243, 253, 306 N.W.2d 272 (1981), the court observed: “The reporting requirement [under sec.

48.981(2)] is exacted, on pain of criminal penalty, of persons in a position to view the effects of physical abuse, but not necessarily their cause. It is logical to restrict the exacted duty to readily observable effects creating 'reasonable cause to suspect' child abuse."

It is my opinion that reporting is mandatory where the professional has reasonable cause to suspect child abuse after actually seeing the child in a professional capacity. It further is my opinion that any person, including a professional, may, but is not required to, report suspected child abuse regardless of the source of that suspicion. As the court pointed out in *State v. Campbell*, mandatory reporting is the duty of only those persons who actually see the child professionally. The duties of the professional end at that point.

Under section 51.30(4) all mental health treatment records are confidential and privileged to the subject individual except as otherwise provided such as under section 905.04. Section 905.04(4) contains exceptions to the physician-patient privilege but none of these privileges apply to this situation. Section 51.30(9) provides for both criminal penalties and private actions against persons who violate these confidentiality provisions.

There is an inevitable clash between two important principles and goals. On the one hand, there is the desire or need to report child abuse or neglect in critical situations in order to assure that appropriate protective services are provided to these abused and neglected children. At the same time, however, there are equally important legal and practical reasons for preserving the confidentiality of all treatment records and protecting the traditional doctor-patient relationship. If at all possible, the ultimate goal is to preserve the vitality of each of these purposes.

In 68 Op. Att'y Gen. 342, 346 (1979), my predecessor concluded that harmonization of these same statutes under the mandatory reporting provisions jeopardizes no interest sought by section 51.30 and fully implements section 48.981. As was there concluded, a contrary interpretation would defeat the purpose of section 48.981 to report child abuse or neglect in critical situations without serving any interest essential to section 51.30.

The statutes were contemporaneously acted upon by the 1977 Legislature. Chs. 355 and 428, Laws of 1977. Under chapter 355,

the Legislature declared its liberal purpose with respect to child abuse and neglect as follows:

It is the purpose of this act to protect the health and welfare of children by encouraging the reporting of suspected child abuse and child neglect in a manner which assures that appropriate protective services will be provided to abused and neglected children and that appropriate services will be offered to families of abused and neglected children in order to protect such children from further harm and to promote the well-being of the child in his or her home setting, whenever possible.

The Legislature expressly made the confidentiality provisions of section 51.30(4)(a) subordinate to section 905.04. That section creates a physician-patient testimonial privilege but expressly exempts situations where the examination of an abused or injured child creates a reasonable ground for an opinion of the physician, registered nurse or chiropractor that the condition was other than accidentally caused or inflicted by another. Sec. 905.04(4)(e), Stats.

The reports under section 48.981 themselves are confidential. Reports and records may be disclosed only to certain enumerated persons and under certain limited conditions. A person to whom a report or record is disclosed may not further disclose it except to the persons and for purposes specified. Sec. 48.981(7)(e), Stats.

As observed in the 1979 opinion referred to above, the essential difference between the two sections concerns which public officials are entitled to the confidential information. Thus, the objective of section 51.30 to preserve the confidentiality of treatment records is hardly imperilled by disclosing certain aspects of those treatment records in child abuse or neglect situations to other appropriate public officials who themselves are under a duty to preserve the confidentiality. Although that opinion and your question present close and difficult questions, an attorney general's opinion is entitled to considerable weight when the Legislature amends the statute but makes no change in that part of the statute interpreted by the attorney general. *Town of Vernon v. Waukesha County*, 99 Wis. 2d 472, 479, 299 N.W.2d 593 (Ct. App. 1980). Both of these statutes have been amended in some respect since 1979 with no changes material to these questions.

In *Tarasoff v. Regents of University of California*, 118 Cal. Rptr. 129, 529 P.2d 553, 560 (1974), the court adopted a balancing ap-

proach to safeguarding the confidential character of psychotherapeutic communication, weighing the public interest in supporting effective treatment of mental illness and in protecting the right of patients to privacy against another public interest, that of safety from violent assault. Noting decisions of diverse jurisdictions holding that the relationship of a doctor to his patient is sufficient to support a duty to use reasonable care to warn third persons of dangers emanating from the patient's illness, the court reasoned: "As the present case illustrates, a patient with severe mental illness and dangerous proclivities may, in a given case, present a danger as serious and as foreseeable as does the carrier of a contagious disease or the driver whose condition or medication affects his ability to drive safely." *Tarasoff*, 529 P.2d at 559.

The court concluded that revelation of a confidential communication is not a breach of trust or violation of professional ethics where the psychotherapist has reasonable cause to believe that a patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and disclosure of his communication is necessary to prevent the threatened danger. *Tarasoff*, 529 P.2d at 561. The court further concluded that a doctor or psychotherapist bears a duty to use reasonable care to give threatened persons such warnings as are essential to avert foreseeable danger arising from the patient's condition or treatment. *Tarasoff*, 529 P.2d at 559. In doing so, the court reasoned: "[T]he public policy favoring protection of the confidential character of patient-psychotherapist communications must yield in instances in which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins." *Tarasoff*, 529 P.2d at 561.

I find the reasoning of the court in *Tarasoff* to be persuasive on the issue of permissive reporting under section 48.981(2). It is my opinion that a medical or mental health professional may report suspected child abuse under the permissive provisions of section 48.981(3) when the abuser, rather than the victim, is seen in the course of professional duties. Unlike the court in *Tarasoff*, I am unwilling to find a duty to so report under any circumstances. In deciding whether to report, the professional must weigh the danger of serious harm to the child against the harm to the patient that might result from revelation. *Tarasoff*, 529 P.2d at 560. However, within that broad range in which professional opinion and judg-

ment may differ respecting the proper course of action, the professional is free to exercise his or her own best judgment. 64 Op. Att'y Gen. 82, 89 (1975); *see also*, Annot., 20 A.L.R.3d 1109 (1968).

The Legislature has exonerated those making good faith reports from "any liability, civil or criminal." Sec. 48.981(4), Stats. It is my opinion that this immunity from liability includes immunity from the damage and penalty provisions of section 51.30(9) and (10). For the purpose of any proceeding, civil or criminal, this subsection establishes that the good faith of any person reporting under section 48.981 shall be presumed. 68 Op. Att'y Gen. at 346.

In any event, the rule of privileged communications, including those between physician and patient, is not a principle of substantive law but merely a rule of evidence. *See* 97 C.J.S. *Witnesses* §§252, 293 (1957). *See also*, 58 Am. Jur. *Witnesses* §432 (1948). The nature of this testimonial privilege is thoroughly discussed in 64 Op. Att'y Gen. 82.

The purpose of the privilege is prevention of disclosure by a physician on the witness stand. *See Wilkins v. Durand*, 47 Wis. 2d 527, 538, 177 N.W.2d 892 (1970), and the cases cited therein. There is no constitutional physician-patient privilege. 64 Op. Att'y Gen. at 83.

It is only in a legal proceeding that a patient may peremptorily prevent his physician from disclosing confidential communications. The physician-patient privilege does not prohibit a physician from disclosing confidential communications outside of evidentiary court proceedings. 64 Op. Att'y Gen. at 85-86.

Quite apart from the testimonial physician-patient privilege, principles of professional conduct must be considered. For example, section 448.01(11) defines "unprofessional conduct" as those acts or attempted acts of commission or omission defined as unprofessional conduct by the Medical Examining Board under the authority delegated to the board by statute. As your concern also pertains specifically to physicians, the principles of medical ethics of the American Medical Association historically have excepted from the category of unprofessional conduct revelations either required by law or necessary to protect the welfare of the individual or the community. In order to avoid needless repetition, I again invite your attention to the discussion of these considerations in the 1975 opinion.

It is my opinion that the Legislature intended to protect children by allowing physicians and other mental health professionals to report cases of suspected child abuse or neglect when a patient informs such persons of incidents where he or she has abused a child in some manner, and that section 51.30 does not act as a bar to such reporting. Although they obviously must be considered by the individual professional, the issues of possible unprofessional conduct and medical ethics are outside the scope of this opinion. From a strictly statutory standpoint, however, I conclude that those professionals who make good faith reports, especially where there is a serious and immediate threat to a child, are immune from any liability, civil or criminal, under section 48.981(4), including the damage and penalty provisions of section 51.30(9) and (10).

DJH:DPJ

Civil Service; Residence, Domicile And Legal Settlement; The residency requirement for classified civil service positions when no similar requirement exists for positions in the unclassified service constitutes a violation of the equal protection clause of the fourteenth amendment to the United States Constitution. OAG 11-87

March 16, 1987

TOM LOFTUS, *Chairman*

Committee on Assembly Organization

The Committee on Assembly Organization has asked whether it is constitutional to have a residency requirement for classified civil service positions when no similar requirement exists for positions in the unclassified service. It is my opinion that this is a violation of the equal protection clause of the fourteenth amendment. I must point out that this opinion is limited to application of the equal protection clause and does not address the constitutionality of the residency requirement under other provisions of the Constitution, such as, the privileges and immunities clause. See *Supreme Court of New Hampshire v. Piper*, _U.S._ 105 S. Ct. 1272 (1985).

You point out that section 230.16(2), Stats., requires that all applicants for positions in the classified service be residents of Wisconsin at the time of application. The application and examination process may be opened to non-residents if there is a critical need for employes in specific classifications or positions. Sec. 230.16(2), Stats. The application process for unclassified positions, on the other hand, is not limited to residents of Wisconsin.

Since the statutes distinguish between applicants for classified positions and applicants for unclassified positions, this classification would be measured against the "rational basis" standard which "has consistently been applied to state legislation restricting the availability of employment opportunities." *Dandridge v. Williams*, 397 U.S. 471, 485 (1970); *Kotch v. Board of River Port Pilot Com'rs*, 330 U.S. 552, 563-64 (1947); *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938); 70 Op. Atty. Gen. 156, 159 (1981). The strict scrutiny standard of equal protection would be inapplicable here because the classification does not interfere with the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class. See *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 16 (1973).

Under the rational basis standard, a statute is constitutional if it "rationally furthers some legitimate state purpose." *Rodriguez*, 411 U.S. at 17; *McDonald v. Bd. of Election Com'rs of Chicago*, 394 U.S. 802, 809 (1969). Equal protection requires that a classification which results in unequal treatment bear some rational relationship to a legitimate state purpose. *Durso v. Rowe*, 579 F.2d 1365, 1372 (7th Cir. 1978); *Dannhausen v. First Nat. Bank of Sturgeon Bay*, 538 F. Supp. 551, 562 (E.D. Wis. 1982). Equal protection does not require that all persons be treated identically, but it does require that a distinction made have some relevance to the purpose for which the classification is made. *Rinaldi v. Yeager*, 384 U.S. 305, 308-09 (1966); *Hill v. Burke*, 422 F.2d 1195, 1196 (7th Cir. 1970). The basic test is not whether some inequality results from the classification, but whether there exists a rational basis to justify the inequality of the classification. *Milwaukee Brewers v. DH&SS*, 130 Wis. 2d 79, 98, 387 N.W.2d 254 (1986); *Voit v. Madison Newspapers, Inc.*, 116 Wis. 2d 217, 226, 341 N.W.2d 693 (1984).

The residency requirement applicable to classified positions rationally furthers the state's legitimate interest in securing governmental employment for its citizens. It has been recognized that a state has a substantial interest in providing services to its residents on a preferential basis. *Martinez v. Bynum*, 461 U.S. 321, 327-28 (1983); *Vlandis v. Kline*, 412 U.S. 441, 452-53 (1973). By preserving most, if not all, of its classified civil service positions for residents of Wisconsin, the state helps reduce unemployment among its citizens. Reducing unemployment, of course, has a variety of positive ripple effects which contribute to the fiscal health of the state.

While the residency requirement furthers a legitimate state purpose, the distinction between classified and unclassified positions does not bear a rational relationship to this purpose. The distinction appears arbitrary. It is not clear why the Legislature chose to exempt all unclassified positions from the residency requirement. The positions which comprise the unclassified service are set forth in section 230.08 and include the following: all elected state officers; officers appointed by the Governor; the director, associate director, assistant directors and librarian of the state historical society; the state archivist and state historian; all faculty and academic staff in the University of Wisconsin system; all division administrators; legislative officers; the judges, clerks and assistants of the court of appeals and supreme court; boys and girls employed in youth

camp; the state auditor and personnel of the legislative audit bureau; the director and personnel of the legislative fiscal bureau; the deputy or assistant of each elective constitutional officer; certain deputies and executive assistants; court reporters; the executive directors of the ethics board, judicial commission and investment board; the chairperson of the parole board; the state public defender and attorneys in the state public defender's office; appointments of the lieutenant governor; the director of prison industries; the executive director and staff of the board on aging; bureau directors in the department of regulation and licensing; the program director for crime victims compensation; the executive secretary of the elections board; the deputy director of the council on criminal justice; the executive secretary of the waste facility siting board; the executive director of the sentencing commission; and the director and staff of the federal-state relations office.

To comport with equal protection, there must be a rational basis to justify the inequality between classified and unclassified positions. *Milwaukee Brewers*, 130 Wis. 2d at 98. I am unable to find a rational basis to justify the inequality. For many of the unclassified positions, such as faculty in the University of Wisconsin System or the state historian, the Legislature may have decided that recruitment should be national in scope due to the specialized knowledge, skills and training required for these positions. Recruitment for such positions, if limited to residents of Wisconsin, might produce very few qualified candidates. However, the same can be said about many classified positions such as engineers, biologists and environmental scientists. Furthermore, some of the unclassified positions, such as youth camp counselors or employes of the court of appeals and supreme court or court reporters, do not have such specialized knowledge, skills and training to require a national recruitment. Perhaps the best example of the arbitrariness of the distinction between classified and unclassified positions is that assistant attorneys general, who are classified employes, must be residents while assistant state public defenders, who are unclassified employes, need not be residents.

The statutory residency requirement for all classified positions and the statutory exemption for all unclassified positions sweep too broadly. In deciding which positions should be covered by the residency requirement, the Legislature must paint with a finer brush by examining the knowledge, skills and training pertinent to each

position and then deciding whether a national recruitment would be necessary to produce qualified candidates. The residency requirement should apply to only those positions, classified or unclassified, for which a national recruitment would not be necessary.

DJH:NS

Architects And Engineers; Licenses And Permits; The Examining Board of Architects, Professional Engineers, Designers and Land Surveyors may not promulgate a rule requiring out-of-state applicants for certification as land surveyors to pass an examination concerning Wisconsin practices and procedures if they possess a valid certification in another state. OAG 12-87

March 19, 1987

MARLENE CUMMINGS, *Secretary*

Department of Regulation and Licensing

Your predecessor asked whether the Examining Board of Architects, Professional Engineers, Designers and Land Surveyors may adopt a rule requiring land surveyors applying for Wisconsin registration under the reciprocity provision to pass an examination on knowledge of Wisconsin practice and procedures. The board is concerned that surveyors from other states applying for Wisconsin registration may not know Wisconsin practices and procedures.

The proposed rule would read: "An applicant applying for registration as a land surveyor under section 443.06(2)(d), Stats. shall show knowledge of Wisconsin land surveying practices and procedures by completing the 4 hour 'state' part of the Principles and Practice Examination as described in s. 6.04, Wis. Adm. Code."

The pertinent portion of section 443.06, Stats., provides:

(2) . . . The section may grant a certificate of registration as a land surveyor to any person who has submitted to it an application, the required fees and one or more of the following:

. . . .

(d) An unexpired certificate of registration as a land surveyor issued to the applicant by the proper authority in any state or territory or possession of the United States or in any other country whose requirements meet or exceed the requirement for registration in this subsection.

It is my opinion that the board may not validly promulgate the proposed rule.

Section 443.06(2) specifies the conditions under which the land surveyors section may grant a certificate of registration to land surveyors. Several alternative combinations of prerequisite qualifications are provided and three of the alternative combinations

require the taking and passing of a written and oral examination. The reciprocity alternative under consideration does not. It merely requires a valid certificate of registration issued by another state, territory or possession of the United States or any other country whose requirements for certification equal or exceed Wisconsin's requirements for certification.

The statutory provision under consideration provides that the section "may grant a certificate" if one of the alternative combination of prerequisite qualifications is met. While generally the word "may" in a statute will be construed as permissive, it will not be so construed where a different construction is demanded by statute in order to carry out the intent of the Legislature. *Miller v. Smith* 100 Wis. 2d 609, 302 N.W.2d 468 (1981). It is my opinion that the statute may not be read to be permissive rather than mandatory. If the statutory provision is not given a mandatory construction, the board could legally decide to withhold a certificate of registration to an applicant even though he or she met the qualifications established by the Legislature.

An examining board may not lawfully deny an applicant for licensure, under a reciprocity statute, based upon a board rule establishing an additional qualification for licensure, if the applicant otherwise meets the criteria established by statute, *Application of State Board of Medical Examiners*, 201 Okl. 365, 206 P.2d 211 (1949), and an applicant under such circumstances may compel board action by mandamus. *Levin v. Board of Medical Examiners of California*, 74 Cal. 104, 239 P. 410 (1925).

The Legislature has established the criteria for the granting of a certificate of registration applied for under the reciprocal provision. The criteria are explicit. The proposed rule would add a condition not contemplated in the statute, and thus would not be a correct interpretation of the law. Section 227.10(2) provides: "No agency may promulgate a rule which conflicts with state law." And section 227.11(2)(a) provides that a rule of an agency "is not valid if it exceeds the bounds of correct interpretation."

This opinion is consistent with one issued in 1978, OAG 73-78, wherein it was concluded that the board could not validly promulgate a rule requiring non-resident land surveyors applying for reciprocal registration under the same statutory provision, then section

443.02(3)(a)4., to take and pass the same examination as given to state applicants.

Reliance may be placed on an attorney general's interpretation of a statute where the statute has been amended or reenacted without a material change in the language construed by the attorney general. *Town of Vernon v. Waukesha County*, 99 Wis. 2d 472, 479, 299 N.W.2d 593 (Ct. App. 1980), *aff'd*, 102 Wis. 2d 686, 307 N.W.2d 227 (1981).

In this case, chapter 443 has been amended at least fifteen times by the 1979, 1981 and 1983 Legislatures, including a vast revision by chapter 167, Laws of 1979, but the provision under consideration has remained unchanged. I must therefore conclude that the Legislature concurs with the 1978 opinion.

The current request for an opinion may have been prompted by the last paragraph in the 1978, OAG 73-78, opinion which reads: "The legitimate concern of the Board that out-of-state applicants should be knowledgeable regarding land surveying procedures and practices peculiar to Wisconsin probably would justify a rule requiring applicants to demonstrate that knowledge, by examination or otherwise, but only to a reasonable degree consistent with the public interest."

The quoted language from the 1978 opinion is inconsistent with the opinion itself and is inconsistent with the conclusion I reach in this opinion. It is an incorrect statement of the law and the quoted language is withdrawn.

DJH:WHW

Public Officials; Salaries And Wages; Words And Phrases; A commissioner who is designated chairperson of a state commission under section 15.06(2), Stats., is not appointed to a new position. Article IV, section 26 of the Wisconsin Constitution thus precludes a salary increase based on such designation. OAG 13-87

March 19, 1987

JOHN TRIES, *Secretary*

Department of Employment Relations

Your predecessor requested an opinion on several questions relating to the setting of salaries for commission chairpersons designated by the Governor under section 15.06(2), Stats.

First, your predecessor asked:

Assume that commission members and the chairperson are assigned to the same executive salary group under s. 20.923(4), Stats. May the Commissioner who is designated chairperson by the Governor after the commencement of his or her term receive a pay increase to compensate for the chairperson duties and responsibilities?

It is my opinion that the commissioner who is designated chairperson is prohibited by Wis. Const. art. IV, §26, from receiving an increase in salary due to such designation.

The Legislature has established the method of selection of members and chairpersons of commissions in section 15.06, as follows:

(1) Selection of members. (a) Except as otherwise provided in this subsection and s. 15.105(17), the members of commissions shall be nominated by the governor, and with the advice and consent of the senate appointed, for staggered 6-year terms expiring on March 1 of the odd-numbered years.

....

(2) Selection of officers. Each commission may annually elect officers other than a chairperson from among its members as its work requires. Any officer may be reappointed or reelected. At the time of making new nominations to commissions, the governor shall *designate* a member or nominee of each commission to serve as the commission's chairperson for a 2-year term expiring on March 1 of the odd-numbered year except that:

[exceptions relate to two commissions that elect their chairpersons.]

Commissioners' salaries are established, for the entire term, at the time of appointment. Section 20.923(1) provides in part:

The salary-setting authority of . . . elective . . . officials elsewhere provided by law is subject to and limited by this section, and the salary rate for these positions upon appointment and subsequent thereto shall be set by the appointing authority pursuant to this section, except as otherwise required by article IV, section 26, of the constitution.

Wis. Const. art. IV, §26, states in part:

The legislature shall never grant any extra compensation to any public officer . . . after the services shall have been rendered or the contract entered into; nor shall the compensation of any public officer be increased or diminished during his term of office
. . . .

An appointing authority is thus precluded by this section of the Constitution from raising the salary of the appointed state officer during his term. Any pay adjustments to be made during the term must be established at the commencement of the term. *See* 72 Op. Att'y Gen. 45, 49 (1983).

The answer to your first question is therefore controlled by whether the chairperson of a commission occupies a position separate from that of a commission member or only assumes additional duties. In establishing the method of selection of chairpersons, the Legislature has indicated that this is not a position separate from that of commission member. Section 15.06(2) requires the Governor to *designate* a commission member or nominee as chairman for a two-year term. This contrasts with the method of appointment of members of commissions by nomination of the Governor and concurrence by the senate. Sec. 15.06(1)(a), Stats.

The Governor does not appoint a commission chairperson but *designates* a commission member or nominee "to serve as" chairperson. Sec. 15.06(2), Stats. This legislative intent to not establish a separate chairperson position is further indicated by section 15.06(3) which provides that "[a] commissioner may not hold any other office or position of profit . . ." The commissioner designated chairperson does not cease being a commissioner and thus

could not, at the same time, hold the chairmanship were it a separate position. A reasonable reading of section 15.06 thus indicates that the Legislature did not intend the specified method of designation of a commission member as chairperson to constitute creation of a position separate from that of commissioner.

Second, your predecessor asked:

Would your answer differ if at the time of appointment to the Commission, the appointment letter set forth that in the event the person were designated chairperson, he or she would receive a set amount of money?

My answer to this question is no, since the Governor would have the discretion to alter a commissioner's salary during his term by designating (or not redesignating) the commissioner member as chairperson. This discretion is precluded by Wis. Const. art. IV, §26. As my predecessor correctly stated in discussing this constitutional prohibition at 72 Op. Att'y Gen. at 49:

Under the present constitutional provision any pay adjustments during a term must be clearly provided for in specific amount or be ascertainable by reference to a salary range schedule which was in effect on the date of appointment of such official and which is not subject to discretionary change thereafter. Neither the schedule or plan, or the implementation of the schedule or plan, can be dependent upon the exercise of legislative or administrative discretion during the term.

While the amount of additional salary provided to one designated chairperson would be fixed at the time of appointment, the Governor would have the discretion to increase or decrease the commissioner's salary by designating or not redesignating him or her chairperson during that commissioner's term. Since designation as chairperson does not constitute appointment to another position, this change of salary during the fixed term of the commissioner would violate Wis. Const. art. IV, §26.

Your predecessor's final question asks:

Is the designation of a Commissioner as chairperson in the middle of his or her term a new or second appointment whereby the person may receive additional compensation without violating Article IV, Section 26 of the state constitution?

The answer to this question is no. As I concluded in my discussion of the first question, the Legislature has not established a position of commission chairperson separate from that of commission member. Rather, section 15.06(2) requires the Governor to "designate" a member or nominee "to serve as" chairperson. Chairperson designation is therefore not a new appointment authorizing a grant of additional compensation within the strictures of Wis. Const. art. IV, §26.

DJH:WMS

Confidential Reports; Snowmobiles; Snowmobile accident reports filed with the Department of Natural Resources pursuant to section 350.15(3), Stats., are not confidential documents. OAG 14-87

March 25, 1987

CARROLL D. BESADNY, *Secretary*
Department of Natural Resources

You inquire as to whether snowmobile accident reports filed with the Department of Natural Resources pursuant to section 350.15(3), Stats., are confidential documents.

Section 350.15(3) requires every snowmobile operator involved in an accident which results in the death of any person to file an accident report with the Department of Natural Resources. Your inquiry concerns the interpretation of section 350.15(4) which reads as follows:

(4) **REPORTS CONFIDENTIAL.** No report required by this section to be filed with the department shall be used as evidence in any trial, civil or criminal, arising out of an accident, except that the department shall furnish upon demand of any person who has or claims to have made such a report, or upon demand of any court, a certificate showing that a specified accident report has or has not been made to the department solely to prove a compliance or a failure to comply with the requirement that such a report be made.

Your letter states that the Legislature intended that accident reports remain confidential because section 350.15(4) provides that the department must furnish certificates showing that specified accident reports have or have not been filed with the department. You state that if the reports were not intended to remain confidential, there would be no need to provide a certificate of compliance. A copy of the report could simply be provided. I do not agree.

Based upon the reasons set forth herein, it is my opinion that snowmobile accident reports filed with the department pursuant to section 350.15(3) are not confidential documents.

First, section 350.15(4) does not state that accident reports are to be treated as confidential documents. Although the title of section 350.15(4) states that the reports are confidential, section 990.001(6) provides that the titles to subchapters, sections, subsections, paragraphs and subdivisions of the statutes are not part of the statutes.

A title may be used only to resolve existing doubts or ambiguities as to statutory meanings and not to create ambiguity where none exists. *State v. Dahlk*, 111 Wis. 2d 287, 294, 330 N.W.2d 611 (Ct. App. 1983); *Wisconsin Valley Imp. Co. v. Public Serv. Comm.*, 9 Wis. 2d 606, 618, 101 N.W.2d 798 (1960).

The language in section 350.15(4) is clear and unambiguous. The statute provides that accident reports are not to be used as evidence in any trial and that the department must furnish a certificate showing that a specified accident report has or has not been filed with the department. The certificate may be used as evidence in a trial. It serves the purpose of proving an accident report has or has not been filed without the necessity of putting the accident report into evidence. The certification procedure set out in the statute appears to have no bearing on the issue of confidentiality.

The purpose of statutory interpretation is to ascertain and give effect to the Legislature's intent. Where the meaning of a statute is clear on its face, the courts will not look outside the language of the statute to determine legislative intent. *In Interest of J.V.R.*, 127 Wis. 2d 192, 199, 378 N.W.2d 266 (1985); *Wis. Elec. Power Co. v. Public Service Comm.*, 110 Wis. 2d 530, 534, 329 N.W.2d 178 (1983). The rules of construction are used only to determine the meaning of an ambiguous statute. *Hemerley v. American Fam. Mut. Ins. Co.*, 127 Wis. 2d 304, 307, 379 N.W.2d 860 (1985).

Second, section 350.15(4) contains essentially the same language as section 346.73(2) which relates to the filing of automobile accident reports with the Department of Transportation. Section 346.73(2) predates section 350.15(4) and reads as follows:

346.73 ACCIDENT REPORTS NOT TO BE USED IN TRIAL. (2) Notwithstanding s. 346.70(4)(f), written accident reports required to be filed with the department or with a county or municipal authority shall not be used as evidence in any judicial trial, civil or criminal, arising out of an accident, except that such reports may be used as evidence in any administrative proceeding conducted by the department. The department shall furnish upon demand of any person who has or claims to have made such a report, or upon demand of any court, a certificate showing that a specified accident report has or has not been made to the department solely to prove a compliance or a failure

to comply with the requirement that such a report be made to the department.

Prior to 1972, section 346.73 also contained section 346.73(1) which stated:

346.73 ACCIDENT REPORTS CONFIDENTIAL. (1) All required written accident reports, including those required by county and municipal authorities and reports supplemental thereto, are without prejudice to the individual so reporting. Reports made to the division of motor vehicles are for the confidential use of the division and for the confidential use of the highway commission for highway engineering purposes. Written reports made to county and municipal authorities are for the confidential use of such authorities. Notwithstanding the confidential nature of written accident reports, the division of motor vehicles or county or municipal authority may disclose the identity of a person involved in an accident when such identity is not otherwise known or when such person denies his presence at such accident.

In April 1972, the Legislature repealed section 346.73(1) and amended the title to section 346.73 to delete all references to confidentiality. Ch. 253, sec. 4, Laws of 1971. These modifications reflect the Legislature's intent that section 346.73 was not designed to require broad confidential treatment of motor vehicle accident reports. That same Legislature then created section 350.15 in May 1972, using language virtually identical to section 346.73(2). Ch. 277, sec. 41, Laws of 1971. Thus, it is apparent that the Legislature intended section 350.15 to have the same limited scope as section 346.73(2).

Third, public policy and public interest favor the public's right to inspect public records. Without an exception based upon a statute, common law, or an overriding public interest in nondisclosure, there is a presumption that the public has the right to inspect public records. Section 19.31, Stats.; *Hathaway v. Joint School District No. 1*, 116 Wis. 2d 388, 392, 342 N.W.2d 682 (1984).

Your letter further states that this opinion will affect the department's administration of section 30.67(4) and Wis. Admin. Code §NR 64.10. These sections contain language essentially identical to that found at section 350.15(4). In my opinion, based upon the

reasons previously stated herein, accident reports filed pursuant to these sections are not confidential documents.

In summary, section 350.15(4) does not state that accident reports are to be treated as confidential documents. The statute is designed to limit the extent to which the reports can be used as evidence in legal proceedings and to ensure the availability of documentary evidence which can be used to prove compliance or failure to comply with the requirement that such a report be made.

DJH:RJM

Counties; Towns; Zoning; A town with village powers that is subject to a county zoning ordinance is not prohibited by statute from any and all regulation of driveway installation. A town which is subject to a county zoning ordinance that contains no limitation on the issuance of county zoning permits may not set a quota on the number of residential building permits that the town will issue each year. OAG 15-87

March 31, 1987

FRANK W. BERRYMAN, *Corporation Counsel*
Iowa County

You indicate that Iowa County has enacted a comprehensive zoning ordinance and that the Town of Arena has adopted that ordinance. You also indicate that the Town of Arena has recently enacted or adopted a Land Use Guidance System. A copy of that document together with a copy of the town's land division and building code ordinances were enclosed with your request. Similar materials were furnished to this office by the town.

Initially, you inquired whether the enactment of the Land Use Guidance System, as incorporated by reference in the accompanying ordinances, impermissibly constituted the enactment of a zoning ordinance contrary to the provisions of section 60.62(3), Stats., or the enactment of a building code contrary to the provisions of section 101.65(1)(a), and Wis. Admin. Code §ILHR 20.02(1)(b). Upon being advised that such an inquiry would require a section by section analysis of the provisions of each ordinance as well as a section by section analysis of the provisions of the Land Use Guidance System adopted by reference in each ordinance, you referred our office to the Iowa County Zoning Administrator, who indicated that Iowa County has two principal areas of concern. The first is whether a town may adopt driveway performance standards as town building regulations pursuant to either sections 60.22(3) and 61.34(1) or section 101.65. The second is whether a town may set a quota on the number of residential building permits it will issue each year.

I am of the opinion that a town with village powers is not prohibited by statute from any and all regulation of driveway installation. However, I decline to decide whether the specific provisions of the town's driveway performance standards are consistent with state law in every respect. I am also of the opinion that a town

which is subject to a county zoning ordinance that contains no limitation on the issuance of county zoning permits may not set a quota on the number of residential building permits that the town will issue each year.

A description of the town's Land Use Guidance System is a useful starting point for analysis. In 1985, after receiving recommendations from a long range planning commission, the town enacted a land use guidance system consisting of three elements. Element I is the long-range policy plan which contains four land use planning goals: to preserve the family farm and farmland; to guide future growth of the town; to plan for the provision of necessary public services; and to protect the natural environment. The plan also contains specific policies aimed at achieving these goals. This long range policy plan was developed as the town's "master plan" pursuant to section 62.23.

Element II lists the performance standards through which the planning policies are implemented. The land division standards apply to the creation of new parcels for residential and commercial uses. They establish minimum frontage, parcel size and lot width. They also require that deed restrictions or similar notations be included on certified survey maps. The building standards for private and commercial structures restrict the issuance of permits to those that comply with the driveway and land division standards. They also provide that in any given year, the town will issue only seven residential construction permits, four of which are granted on the basis of length of land ownership, two of which are granted by drawing and one of which is reserved for farm usage. The driveway standards apply to residential, agricultural and commercial driveways, and regulate location, access, width, grade and curve radius. The building permit and driveway standards are incorporated by reference and enforced through the town building code. The land division standards are similarly enforced through the town's subdivision ordinance.

Element III sets forth the administrative procedures for reviewing and approving proposed land uses, granting variances and amending provisions of the Land Use Guidance System.

Under section 61.35, towns exercising village powers pursuant to sections 60.10(2)(c) and 60.22(3) may adopt a master plan. The Land Use Guidance System itself therefore creates no potential

conflict between jurisdictions, because a land use guidance system is simply such a master plan. Potential jurisdictional conflicts arise because the town has given certain aspects of its master plan the force of law by enacting building code and subdivision ordinances which make compliance with the Land Use Guidance System mandatory.

With respect to your first inquiry, I am not persuaded that a town with village powers is completely devoid of statutory authority to enact an ordinance concerning the installation of driveways.

Section 101.65(1)(a) permits towns to “[e]xercise jurisdiction over the construction and inspection of new dwellings by passage of ordinances” But Wis. Admin. Code §ILHR 20.02(5) provides: “LANDSCAPING. The scope of this code does not extend to driveways, sidewalks, landscaping and other similar features not having an impact on the dwelling structure.” This provision indicates that a driveway is not a “dwelling” within the meaning of section 101.65. Therefore, town regulation of driveway installation is neither permitted nor prohibited by section 101.65.

Another potential source of authority to regulate driveway installation in towns exercising village powers pursuant to sections 60.10(2)(c) and 60.22(3) is section 61.34(1), which provides:

Powers of village board. (1) GENERAL GRANT. Except as otherwise provided by law, the village board shall have the management and control of the village property, finances, highways, streets, navigable waters, and the public service, and 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, and may carry its powers into effect by license, regulation, suppression, borrowing, taxation, special assessment, appropriation, fine, imprisonment, and other necessary or convenient means. The powers hereby conferred shall be in addition to all other grants and shall be limited only by express language.

In *Wind Point v. Halverson*, 38 Wis. 2d 1, 8, 155 N.W.2d 654 (1968), the Wisconsin Supreme Court noted that “[t]he dividing line between a zoning regulation and a building code regulation is not easily drawn.” In that case, the court upheld a village building code regulation requiring minimum setback lines. In doing so, the court indicated that “a setback ordinance may also be adopted by a city

or village other than by adopting a zoning ordinance, as a building restriction or part of a building code, pursuant to the general grant of power in sec. 61.34(1), Stats. This court has liberally construed the power of a city or village to enact building regulations pursuant to the general grant of police power . . .” *Halverson*, 38 Wis. 2d at 9.

I perceive no meaningful distinction under the language of the statute between a setback ordinance and an ordinance regulating driveway installation. Both appear to be permissible if enacted “for the government and good order of the [town or] village . . . [or] for the health, safety, welfare and convenience of the public . . .” Sec. 61.34(1), Stats.

In addition, section 236.45(1), which authorizes towns that have established planning agencies to enact subdivision ordinances, provides as follows:

DECLARATION OF LEGISLATIVE INTENT. The purpose of this section is to promote the public health, safety and general welfare of the community and the regulations authorized to be made are designed to lessen congestion in the streets and highways; to further the orderly layout and use of land; to secure safety from fire, panic and other dangers; to provide adequate light and air including access to sunlight for solar collectors and to wind for wind energy systems; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate adequate provision for transportation, water, sewerage, schools, parks, playgrounds and other public requirements; to facilitate the further resubdivision of larger tracts into smaller parcels of land. The regulations provided for by this section shall be made with reasonable consideration, among other things, of the character of the municipality, town or county with a view of conserving the value of the buildings placed upon land, providing the best possible environment for human habitation, and for encouraging the most appropriate use of land throughout the municipality, town or county.

In *Town of Sun Prairie v. Storms*, 110 Wis. 2d 58, 327 N.W.2d 642 (1983), the court upheld a town subdivision ordinance establishing an 80,000 square foot minimum lot size against a challenge that the ordinance impermissibly regulated the zoning process. In reaching this result, the court emphasized that the statutory delega-

tion of power in section 236.45 is to be liberally construed in favor of the local unit of government exercising those powers and that site considerations are an integral part of a municipality's effort to achieve its planning goals. Under *Storms*, it is therefore conceivable that certain requirements with respect to driveway installation may also be imposed in connection with a town's subdivision requirements.

I decline, however, to make any specific judgment as to whether the town's driveway performance standards, as incorporated by reference in the town's building code, are permissible enactments under section 61.34(1), or as to whether some of those specific provisions could permissibly be inserted in the town's land division ordinance pursuant to section 236.45. To a certain extent, such a judgment would require a factual analysis as to how the town's ordinance operates in actual practice. An attorney general's opinion is not an appropriate vehicle for resolving such disputes. See 68 Op. Att'y Gen. 416, 421 (1979). More importantly, it is not our function to be the final arbiter of jurisdictional disputes between local units of government concerning specific ordinance provisions. Were we to start resolving such disputes, we would undoubtedly be inundated by similar requests from other counties in their disputes with towns and other local units of government.

If a case or controversy exists, the courts are available for the resolution of such disputes. Compare *City of Madison v. Town of Fitchburg*, 112 Wis. 2d 224, 228-32, 332 N.W.2d 782 (1983). For practical reasons, my analysis is necessarily limited to the question of whether towns may lawfully exercise certain kinds of powers without infringing upon the statutory authority granted to counties. Under the circumstances, I therefore merely conclude that a town exercising village powers does not lack statutory authority to enact ordinances concerning driveway installation.

Turning to your second area of inquiry, I am also of the opinion that the town lacks statutory authority to enact an ordinance containing a quota system.

"What the ordinance is called is not as important as its nature." *New Berlin v. Stein*, 58 Wis. 2d 417, 422, 206 N.W.2d 207 (1973). The fact that the quota system is contained in the town's building code ordinance is therefore not controlling.

A zoning ordinance "covers the immediate use of land" *Storms*, 110 Wis. 2d at 68, quoting E.C. Yokley, *Law of Subdivisions*, sec. 39 at 157-58 (2d ed 1981). Such quota or "slow growth" provisions are generally characterized as "exclusionary . . . zoning ordinances" *Construction Ind. Ass'n, Sonoma Co. v. City of Petaluma*, 522 F.2d 897, 908 (9th Cir. 1975), cert. denied, 409 U.S. 1003 (1976). See also, *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13-14 (1974).

Section 60.62 provides as follows:

Zoning authority if exercising village powers. (1) Subject to subs. (2) and (3), if a town board has been granted authority to exercise village powers under s. 60.10(2)(c), the board may adopt zoning ordinances under s. 61.35.

(2) If the county in which the town is located has adopted a zoning ordinance under s. 59.97, the exercise of the authority under sub. (1) is subject to approval by the town meeting or by a referendum vote of the electors of the town held at the time of any regular or special election.

(3) *In counties having a county zoning ordinance, no zoning ordinance or amendment of a zoning ordinance may be adopted under this section unless approved by the county board.*

In the fact situation you present, the county board has not approved the ordinance, and it therefore may not be enforced pursuant to the town's zoning powers. Under *Storms* and *Stein*, however, further analysis is required in order to ascertain whether alternate sources of statutory authority exist for the exercise of such powers. Since the town has placed these quota provisions in its building code, I first examine the limitations upon a town's ability to enact an ordinance containing a building code.

Section ILHR 20.02 of the Wisconsin Administrative Code provides, in part, as follows:

(1) MUNICIPAL ORDINANCES. (a) No municipality shall adopt an ordinance on any subject falling within the scope of this code including, but not limited to, establishing restrictions on the occupancy of dwellings for any reason other than non-compliance with the provisions of this code as set forth in s. ILHR 20.10(3). This code does not apply to occupancy require-

ments occurring after the first occupancy for residential purposes following the final inspection referred to in s. ILHR 20.10(1)(b)3.

Viewed as a building code enacted pursuant to section 101.65(1)(a), a quota system runs afoul of this prohibition because the opportunity to build and to occupy the premises is denied for reasons totally unrelated to the criteria contained in the Uniform Dwelling Code. Since Wis. Admin. Code §20.02(1)(a) indicates that compliance with the uniform dwelling code is the exclusive standard to be applied under a municipality's building code, the quota system is not a valid exercise of the town's powers under section 101.65(1)(a).

It can also be argued that, even if a quota system may not properly be enacted as part of a building code or a zoning ordinance, it can nevertheless be enacted as an exercise of the town's broad police powers under section 61.34(1), or as an exercise of the town's subdivision power under section 236.45.

Although it grants broad authority to towns with village powers, section 61.34(1) cannot be construed so as to authorize such towns to engage in zoning without county board approval because section 60.22(3) precludes the exercise of "those powers which conflict with statutes relating to towns and town boards." Unless county board approval is obtained pursuant to section 60.62(3), section 61.34(1) therefore cannot be construed to permit a town with village powers to engage in the process of zoning.

In *Beck v. Town of Raymond*, 118 N.H. 793, 394 A.2d 847 (1978), a town did attempt to utilize its police powers to enact a slow growth ordinance containing a quota system that permitted the issuance of at least one building permit per year to the owner of record at the commencement of each succeeding one year period. The New Hampshire Supreme Court applied the following test from *Village House, Inc. v. Town of Loudon*, 114 N.H. 76, 314 A.2d 635, 636-37 (1974), to determine whether the ordinance constituted a zoning ordinance: "[T]he court must consider the nature and purpose of the regulations, their relationship if any to a general plan of development, their comprehensiveness, their effect on property values and property rights, and the situation surrounding their passage." In determining that the ordinance constituted a zoning ordinance under these criteria, the court held as follows:

The ordinance establishes a definite and detailed scheme of control that substantially restricts the use of land throughout the town. The general ordinance is not an emergency measure.

. . . .

When legislation attempts to control population growth through definite and detailed control of land development it must be enacted in accordance with the zoning statute. [Citations omitted]

We hold that the Raymond general ordinance is so “comprehensive” as to require compliance with RSA 31:60-89, and is an invalid exercise of the police power delegated to a municipality pursuant to RSA 31:39. . . .

We hold that the general police power delegated to a municipality pursuant to RSA 31:39 may not be used as a usual and expedient mechanism for effecting zoning regulations which would otherwise fall within the scope of RSA 31:60-89. When such ordinances become a substitute for a zoning plan, the purpose and effect of the zoning enabling legislation is defeated.

Beck, 394 A.2d at 851. The holding in *Beck* is equally applicable here. A slow growth ordinance therefore cannot be enacted pursuant to the authority granted a town with village powers under section 61.34(1).

Given the Wisconsin Supreme Court’s holding in *Storms*, the question is somewhat closer with respect to the town’s exercise of its subdivision powers under section 236.45. Nevertheless, a town may not use its subdivision powers as a subterfuge for enacting what would otherwise be an invalid zoning ordinance. In *Rayco Inv. Corp. v. Board of Selectmen of Raynham*, 368 Mass. 385, 331 N.E.2d 910 (Mass. 1975), the Town of Raynham enacted a subdivision ordinance prohibiting the issuance of any additional permits to trailer parks. While acknowledging that trailer parks are subject to regulation under a town’s police powers, the Massachusetts Supreme Court nevertheless concluded that the ordinance was, in fact, a zoning ordinance rather than a subdivision ordinance:

A further consideration which leads us to this conclusion is that were we to adopt the defendants’ theory the assorted protections contained in the Zoning Enabling Act could in many instances be circumvented, thereby defeating the purpose of the

statute. For example, just as the town purports to limit the number of mobile home parks within its borders under its police power, so another town might want to limit the number of apartment buildings in the town, perhaps as a health regulation to protect the town's water supply or sanitation facilities. Under the theory advanced by the defendants, the latter measure could be viewed as outside the scope of the Zoning Enabling Act if not adopted strictly as a zoning regulation. The problem with this approach is that it views the municipal police power in a vacuum, whereas the law is clear that a municipality's "independent police powers . . . cannot be exercised in a manner which frustrates the purpose or implementation of a general or special law enacted by the Legislature

Rayco, 331 N.E.2d at 915.

Cases such as *Beck* and *Rayco* indicate that the question of whether a particular enactment constitutes a zoning ordinance is often a matter of degree. The more comprehensive the ordinance, the more likely it will be characterized by a court as a zoning ordinance. A quota system which virtually precludes all forms of building is far broader in scope than either of the ordinances enacted in *Rayco* and *Beck*. Since such an ordinance constitutes a pervasive regulation of, and in many instances a prohibition on the use of, land, I therefore conclude that such an ordinance is a zoning ordinance which requires county board approval.

DJH:FTC

County Highway Department; Highways; The county highway department may perform ditching and culvert work on private lands to promote a public purpose such as soil conservation. However, activity in this area should respect available private sector alternatives, and ensure that accounting procedures will protect all taxpayers equally. OAG 16-87

April 2, 1987

PHILIP J. FREEBURG, *District Attorney*
Langlade County

You request my opinion on two specific factual situations. First, you question whether the county highway department has authority to perform snow plowing on private property. The request for an opinion on that question was orally withdrawn after your review of section 86.105, Stats., and 67 Op. Att'y Gen. 304 (1978). Second, you request my opinion as to whether the county highway department has authority to perform ditching and culvert work on private land, at cost, when the work is unrelated to highway maintenance. You state that such work is often done in farm fields, nowhere near the highway right of way. I conclude, for the reasons discussed below, that the county highway department has authority to perform ditching and culvert work on private land, but only when this work serves a public purpose such as soil conservation.

As a general rule, it can be stated that where the benefit is primarily private in nature, use of county funds and county equipment is prohibited. These problems were discussed in 42 Op. Att'y Gen. 88 (1953) and 50 Op. Att'y Gen. 98 (1961). The Legislature is the best judge of what is necessary to meet the needs of the public and determine proper public services. *State ex rel. La Follette v. Reuter*, 33 Wis. 2d 384, 394, 147 N.W.2d 304 (1967); *State ex rel. Thomson v. Giessel*, 265 Wis. 185, 193, 60 N.W.2d 873 (1953). Counties are creatures of the Legislature and, as such, 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, 450, 234 N.W.2d 354 (1975); *Dane County v. H&SS Dept.*, 79 Wis. 2d 323, 329, 255 N.W.2d 539 (1977). A county board has only such powers as are expressly conferred upon it by statute or which may be necessarily implied from those expressly given. *Dodge County v. Kaiser*, 243 Wis. 551, 11 N.W.2d 348 (1943); *Maier v. Racine County*, 1 Wis. 2d 384, 84 N.W.2d 76 (1957).

Assuming the ditching and culvert work on private land promotes soil conservation the county deems necessary, statutory authority exists for local government to perform such work. Section 59.07(137) provides that a county board “[m]ay contract to do soil conservation work on privately owned land either directly or through a committee designated by it.” A county board is responsible for developing and implementing a soil and water conservation program as specified in chapter 92. Sec. 59.879(1), Stats. Inferentially at least, soil conservation work done on private land should be pursuant to “standards and specifications” developed by the county’s land conservation committee under section 92.07(3). *See also* sec. 92.08, Stats.

Section 59.874 provides:

Land clearing and weed control. The board may purchase or accept by gift or grant tractors, bulldozers and other equipment for clearing and draining land and controlling weeds on same, and for such purposes to operate or lease the same for work on private lands; charge fees for such service and rental of such equipment on a cost basis.

Compare sec. 66.34, Stats. (limits authority for any city, village or town to perform soil conservation work on privately owned land).

Although sections 59.07(137) and 59.874 provide authority for county government to perform soil conservation work on private land, caution is warranted in the implementation of such procedures. To sustain a public purpose, the advantage to the public must be direct, and not merely indirect or remote. *State ex rel. Bowman v. Barczak*, 34 Wis. 2d 57, 64, 148 N.W.2d 683 (1967) (quoting *State ex rel. W. D. A. v. Dammann*, 228 Wis. 147, 180, 277 N.W. 278, 280 N.W. 698 (1938)). Public funds must be spent for public benefit. *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391, 421, 208 N.W.2d 780 (1973). Therefore, sections 59.07(137) and 59.874 must be narrowly construed to include several restrictions not expressly set forth in the statute. This reasoning relies heavily upon the leading case on the proper or improper use of highway equipment, *Heimerl v. Ozaukee County*, 256 Wis. 151, 40 N.W.2d 564 (1949).

In *Heimerl*, the court declared section 86.106 unconstitutional. That section provided:

Private road work by municipalities and counties. Any town, city, or village, by its governing body, may enter into contracts to build, grade, drain, surface, and gravel private roads and driveways. Any county, by its governing body, may enter into agreements with a municipality to perform for it any such work.

Heimerl, 256 Wis. at 153.

In declaring section 86.106 unconstitutional, the court established limitations on private work done by municipalities. It listed three areas where the statute was too broad in its powers: (1) no limitation was made regarding the road's necessity for ingress and egress; (2) no structure was established for charges and disbursements to protect taxpayers; and (3) no restriction was made to avoid the county's competition with private persons. *Heimerl*, 256 Wis. at 160-61. The court held that section 86.106 would result in the expenditure of public funds for a private purpose without any direct advantage accruing to the public and would authorize municipalities to engage in private business. *Heimerl*, 256 Wis. at 161. The court reasoned:

Even if the county highway department required payment of every item properly chargeable for work done by authority of the resolution and without any ultimate cost to the county (which sec. 86.106, Stats., does not provide), until it received compensation from the city, village, or town, it would have the taxpayers' money invested in the work, money raised by a tax levy.

Heimerl, 256 Wis. at 158.

In *Heimerl*, the court distinguished and indirectly supported soil conservation statutes. The court stated that sections 59.08(47) (which is now section 59.874) and 92.08 served "natural governmental functions . . . necessary to the health, safety, and welfare of the community as a whole." *Heimerl*, 256 Wis. at 157. The court's conclusion relies upon the county or community accruing a public benefit. Soil conservation has been determined to be publicly beneficial.

When a gully starts on one farmer's field it does not respect the boundary fence but becomes a common enemy which may threaten an entire countryside, and while the farmer upon whose fields soil conservation work is performed derives a private benefit this does not negate the very large and substantial gains

which result to the public generally. The fact that the expenditure 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. *State ex rel. W. D. A. v. Dammann*, 228 Wis. 147.

38 Op. Att'y Gen. 228, 232 (1949).

Although sections 59.07(137) and 59.874 promote a public purpose, soil conservation, the *Heimerl* case imposes additional considerations such as competition with private enterprise and proper accounting procedures. Counties have no commercial status and cannot unreasonably compete with private enterprise. *Garfield Inv. Co. v. Town of Oconomowoc*, 257 Wis. 98, 100, 42 N.W.2d 361 (1950). Sections 59.07(137) and 59.874 provide no restriction for counties where private contractors are equipped to perform work on private land. The use of county and highway personnel and equipment to perform soil conservation work under section 66.34 was discussed in 48 Op. Att'y Gen. 263, 264 (1959), which concluded:

Soil conservation has been deemed to be a public purpose by both the state and federal governments as evidenced by the soil conservation programs which now exist. True, the operation of these programs may in a particular instance benefit one person more than another or more than the general public. However, the carrying out of the over-all plan is obviously for the benefit of the general welfare, since it conserves a natural asset necessary to everyone. In my opinion, therefore, soil conservation work is not for a private purpose within the prohibition of the *Heimerl case*.

I concur with my predecessor's opinion that "soil conservation work is not for a private purpose within the prohibition of the *Heimerl case*." 48 Op. Att'y Gen. at 264. However, in the event a county expended large sums of public funds on ditching and culvert work which was only peripherally related to soil conservation efforts of public benefit, a court applying the *Heimerl* public benefit tests might find the application of these statutes inappropriate. I conclude the county highway department's ditching and culvert work on private land can be undertaken only if it promotes a public purpose such as soil conservation. However, activity in this area

should respect available private sector alternatives and ensure that accounting procedures will protect all taxpayers equally.

DJH:AEM

Housing; Municipal housing authorities are not public depositors under chapter 34, Stats. OAG 17-87

April 2, 1987

RICHARD E. GALECKI, *Commissioner*
Office of Commissioner of Banking

In 35 Op. Att'y Gen. 58 (1946), the attorney general opined that funds of a municipal housing authority were subject to the public deposit laws under chapter 34, Stats. The opinion specifically concluded that funds of the authority would be "public deposits" and the authority would be a "public depositor" under section 34.01.

In 1978 the Legislature amended section 34.01 to include the Wisconsin Housing Finance Authority (now the Wisconsin Housing and Economic Development Authority) as a public depositor. You have asked whether the 1978 amendment of chapter 34 affects the earlier conclusion that housing authorities are within the ambit of that chapter. I must conclude that housing authorities are not public depositors under chapter 34.

An attorney general's opinion is entitled to considerable weight when the Legislature amends the statute and makes no change in that part of the statute interpreted in the opinion. *Town of Vernon v. Waukesha County*, 99 Wis. 2d 472, 479-80, 299 N.W.2d 593 (Ct. App. 1980). This tenet of statutory construction is based on the theory that the Legislature knows of the interpretation and impliedly adopts that interpretation when it reenacts the statute. The presumption that the Legislature adopts an interpretation of the statute when it substantially reenacts the statute does not follow, however, if there are material changes or additions in the later enactment which disclose a different intention. *State v. Hackbarth*, 228 Wis. 108, 122, 279 N.W. 687 (1938).

The 1978 amendments to chapter 34 do disclose a different intention. If the Legislature had adopted this office's earlier interpretation that housing authorities were included within chapter 34, the Legislature would have found it unnecessary to include the state housing authority. Nothing in the earlier opinion would lead the Legislature to conclude that local housing authorities under section 66.40 were included within chapter 34, but a state housing authority would not be. On the contrary, that opinion concluded that a housing authority, although a body corporate, separate and apart

from the city, was nevertheless an agency of the city. It notes that the status of the local housing authority was similar to the Wisconsin university building corporation. The logic of that opinion would compel the conclusion that a state housing authority was an agency of the state and therefore included within chapter 34.

If the Legislature had agreed with the earlier opinion's interpretation of chapter 34, it would not have had to specifically include the state housing authority. As a general rule, the express mention of one entity in a statute implies the exclusion of others. *State ex rel. Harris v. Larson*, 64 Wis. 2d 521, 219 N.W.2d 335 (1984). That is especially true in this case given the presumption that the Legislature knew of the earlier opinion interpreting the statute to include housing authorities and its manifest decision to refer only to the state housing authority. The Legislature easily could have included the word "authority" or the words "housing authority" along with drainage districts, power districts, school districts, sewer districts and the other governmental entities now listed in section 34.01(4). In light of this history, I must conclude that the Legislature did not intend to include any housing authority other than the state housing authority in chapter 34.

You have also asked whether any situation could arise in which the local government pooled-investment fund referred to in section 34.01(5) could be deemed to have occasioned a "loss," given the definition of that term in section 34.01(2). Loss is defined as a loss resulting from the failure of a public depository to repay a public depositor the full amount of its deposit because a regulatory agency has taken possession of the public depository or because the depository has, with the consent of a regulatory agency, adopted a stabilization and readjustment plan or sold part or all of its assets. It is difficult to conceive of a situation in which a local government pooled-investment fund could incur a loss as a result of any action by a regulatory agency. Certainly, section 34.01(2) on its face presumes that the public depository is a regulated institution. Because a local government pooled-investment fund would not be such an institution, and the investments would not have to be placed in such an institution, section 25.50, the definition of "loss" in section 34.01(2) might not be inclusive enough to cover a loss in a government pooled-investment fund. I cannot conclude, however, that as a matter of law such a loss could not occur. It is impossible to predict how investment funds will be structured or how various

funds will be regulated in the future. You may wish to ask the Legislature to clarify the definition of loss specifically to include losses in government pooled-investment funds to avoid any future confusion.

DJH:AL

Funds; Municipalities; A local unit of government may not create and accumulate unappropriated surplus funds. However, a local unit of government may maintain reasonable amounts necessary in the exercise of sound business principles to meet the immediate cash flow needs of the municipality during the current budgetary period or to accumulate needed capital in non-lapsing funds to finance specifically identified future capital expenditures.
OAG 18-87

April 7, 1987

TOM LOFTUS, *Chairperson*
Assembly Organization Committee

You ask whether local units of government may lawfully create and accumulate unappropriated surplus funds.

In my opinion, local units of government may not lawfully create and accumulate such surplus funds. However, local units of government may maintain reasonable amounts necessary in the exercise of sound business principles to meet their immediate cash flow needs during the current budgetary period or to accumulate needed capital in non-lapsing funds to finance specifically identified future capital expenditures.

Although various statutory restrictions may impact upon the handling of surplus monies by local units of government, the prohibition upon the creation and accumulation of such surplus funds is primarily of constitutional origin: "Wisconsin Constitution art. VIII, §5 restricts the state from levying taxes to create a surplus having no public purpose. Although the constitutional provision does not apply directly to municipalities, the same limitation applies [indirectly to them] . . . because the state cannot delegate more power than it has . . ." *Barth v. Monroe Board of Education*, 108 Wis. 2d 511, 514-15, 322 N.W.2d 694 (Ct. App. 1982). Furthermore, while it is true that cities and villages are municipal corporations that have broad home rule powers under article XI, section 1 of the Wisconsin Constitution and section 62.11(5), Stats., they are subject to the same surplus prohibition as the state under the public purpose doctrine. 74 Op. Att'y Gen. 25, 27 (1985); see *Barth*, 108 Wis. 2d at 520.

Your question no doubt arises because of the supreme court's construction of this prohibition in *Immege v. Elkhorn*, 253 Wis.

282, 34 N.W.2d 101 (1948), a case in which a county board attempted to set aside funds for future use in building a new courthouse but made no specific appropriation toward courthouse construction or toward a bond issue for such construction. The Wisconsin Supreme Court held that it was not appropriate to levy a tax to enrich the public treasury or to create a surplus, or to accumulate funds in substantial amounts for contingencies which might never occur.

The holding in *Immega* was first qualified in *Fiore v. Madison*, 264 Wis. 482, 486, 59 N.W.2d 460 (1953), where the court held that, even with respect to an unallocated cash or similar liquid surplus, "the last cent need not be devoted to reduction of taxes in aid of the budget. Ordinary business principles, which city government is neither required by law nor expected to disregard, permit the retention of reasonable working cash balances in the city treasury." The court also upheld a city's authority to transfer substantial amounts of money from the general fund and the municipal reserve fund into a non-lapsing city-county building reserve fund pursuant to a statute permitting such funds to accumulate from year to year. The court noted that once such funds were transferred, they ceased to be part of an unallocated surplus which could be used to defray budgetary costs and reduce taxes. *Fiore*, 264 Wis. at 486. After *Fiore*, the principle to be distilled from the case law is that "[t]aken together, *Immega* and *Fiore* establish generally that a city [or other local unit of government] may retain funds to meet its needs, but may not simply carry a large surplus which has not been designated for any particular use." *Blue Top Motel, Inc. v. City of Stevens Pt.*, 107 Wis. 2d 392, 399, 320 N.W.2d 172 (1982). See also, 62 Op. Att'y Gen. 312, 315 (1973); 46 Op. Att'y Gen. 230, 231 (1957); 37 Op. Att'y Gen. 586 (1948); 34 Op. Att'y Gen. 345 (1945).

In *Barth*, 108 Wis. 2d at 520, the court of appeals indicated that "[i]t is possible that a sinking fund dedicated to all current and future capital expenditures without relation to specific capital projects has so little public purpose that it violates the prohibition against taxing for purposes other than a public purpose." However, the court saw no need to decide the issue because the monies in question had been allocated by their transfer to a swimming pool sinking fund before suit was filed. With respect to the deference to be accorded a local unit of government's handling of surplus monies, the court did, however, make the following comments:

In this era of tight tax dollars, the risk that school districts will overuse a power to tax to accumulate funds for future capital expenditures is small. The legislature has endeavored to give municipalities the power to run local affairs in the manner sound businesses are run. In those situations where sound business judgment would accumulate capital to finance a capital expenditure rather than financing the expenditure by incurring debt, our construction permits the school district to follow sound business practice. Barth's construction would unjustifiably restrict the school district from engaging in a sound practice.

Barth, 108 Wis. 2d at 518.

Based upon the holdings in *Barth*, *Blue Top Motel*, *Fiore* and *Immega*, I conclude that a local unit of government may not lawfully create and accumulate unappropriated surplus funds.

DJH:FTC

Indians; Intoxicating Liquors; Tribally owned or operated liquor establishments must comply with state liquor laws, including licensing requirements. Indian tribes are within the coverage of chapter 125, Stats., and any license issued to a tribe counts toward the local quota. OAG 19-87

April 7, 1987

TOMMY G. THOMPSON, *Governor*

Several months ago, Governor Earl requested an opinion of the Attorney General regarding the application of state liquor licensing laws to a tribal business enterprise operating within the exterior boundaries of the tribal reservation. The opinion request related to the development of the Oneida Rodeway Inn, a tribally-owned hotel and convention center situated on trust lands within the Oneida Reservation. The convention center site is also located within the Village of Ashwaubenon (Village) in Brown County. The Oneida Indian Nation of Wisconsin (Tribe) has issued a tribal liquor license for the project and has applied to the Village for a concurrent state license. The question presented was whether the Tribe is required to secure the state license in addition to the tribal license for its convention center. In addition, the governor asked whether a tribal liquor license would count toward the Village's local quota.

For the reasons discussed below and in an opinion issued on July 23, 1986, 75 Op. Att'y Gen. 123 (1986), which is enclosed, it is my opinion that under 18 U.S.C. §1161, state liquor licensing laws are applicable to an on-reservation liquor establishment operated in connection with a tribal business enterprise. It is also my opinion that tribally-owned businesses require licenses pursuant to chapter 125, Stats., and that, under the current statute, such licenses count toward the issuing municipality's quota. Finally, based on *Rice v. Rehner*, 463 U.S. 713 (1983), and on recent federal and state precedent, 69 Op. Att'y Gen. 183 (1980) is withdrawn to the extent it is inconsistent with this opinion. See also *Squaxin Island Tribe v. State of Washington*, 781 F.2d 715 (9th Cir. 1986); *cf. State v. Webster*, 114 Wis. 2d 418, 338 N.W.2d 474 (1983).

The cited 1980 opinion concluded in part that the legislative history of Pub. L. No. 277, 18 U.S.C. §1161, and federal policies favoring tribal sovereignty indicate that "neither the state nor its political subdivisions have authority to impose local liquor licens-

ing requirements on Indian tribes . . . where the Tribe has adopted its own ordinance in conformance with state law.” 69 Op. Att’y Gen. at 194. At the time this conclusion was the most logical one available based on the current case law. See *United States v. State of New Mexico*, 590 F.2d 323 (10th Cir. 1978), *cert. denied*, 444 U.S. 832 (1979); see also McDonnell, *Federal and State Regulation of Gambling and Liquor Sales within Indian Country*. 8 Hamline L. Rev. 599, 603 (1985).

In 1983, however, the Supreme Court directly addressed for the first time, in *Rice*, the question whether 18 U.S.C. §1161 authorizes individual states to regulate liquor transactions on Indian reservations. *Rice* held that section 1161 delegated to the states as well as to individual Indian tribes the authority to regulate liquor transactions on Indian reservations. 463 U.S. at 730-31 n.4, 733-34. In so holding, the court reversed a lower court decision which relied heavily on *United States v. State of New Mexico* and expressly rejected the interpretation of 18 U.S.C. §1161 contained in 69 Op. Att’y Gen. 183.

Following *Rice* and the court’s earlier opinion in *United States v. Mazurie*, 419 U.S. 544 (1975), it is now settled that 18 U.S.C. §1161 delegates to the individual states and to Indian tribes concurrent jurisdiction over the regulation and sale of liquor within Indian country. *Rice*, 463 U.S. at 728-29, 733. Under section 1161, liquor transactions in Indian country must be in conformity with both the laws of the state in which such act or transaction occurs and with tribal ordinances approved under the procedures specified in the statute: “The legislative history of §1161 indicates . . . that Congress intended that state laws would apply of their own force to govern tribal liquor transactions as long as the tribe itself approved these transactions by enacting an ordinance.” *Id.* at 726.

In 75 Op. Att’y Gen. 123 (1986), this office addressed the application under *Rice* and 18 U.S.C. §1161 of state liquor laws, including licensing requirements, to liquor establishments owned or operated by either individual tribe members or non-Indians, and located on Indian reservations. That opinion concluded:

It is my opinion that state liquor laws are applicable to an on-reservation liquor establishment owned or operated by either a tribe member or a non-Indian, regardless of where the business is located within reservation boundaries. These privately-owned

businesses also require licenses pursuant to chapter 125, and those licenses count toward the issuing municipality's quota.

As noted therein, these conclusions are essentially compelled by the holding in *Rice* that in enacting 18 U.S.C. §1161, Congress authorized rather than preempted state regulation over private Indian liquor transactions on the reservation, 463 U.S. at 726, and by the court's description of congressional intent in enacting section 1161. *Id.* at 728-29.

The only aspect of your request which goes beyond the issues covered in 75 Op. Att'y Gen. 123 (1986), is the fact that, in the case of the Oneida Rodeway Inn, the tribe *itself* rather than an individual owns and operates the liquor establishment in question. Because of that fact, it has been suggested that aspects of tribal sovereignty not considered or discussed in *Rice* might support a different answer to the question of whether the tribe is required to obtain a state liquor license under section 1161. An examination of both *Rice* and chapter 125 has convinced me, however, that the tribe is subject to the licensing requirements of chapter 125 if it engages in the sale or distribution of alcoholic beverages.

Certainly *Rice* itself forecloses any claim that section 1161 preempts the state's authority. *Id.* at 230-35. Moreover, as the Ninth Circuit has recently and persuasively observed, *Rice* also effectively forecloses any substantial challenge to the state's authority to regulate or license liquor sales to non-tribal members on grounds that such regulation would infringe tribal sovereignty. *Squaxin*, 781 F.2d at 719-20.

I presume that the Oneida Rodeway Inn serves the general public rather than solely or even primarily Oneida tribal members. Under such circumstances, any suggestion that the application of state liquor licensing requirements to the tribe itself would infringe on tribal sovereignty appears to be succinctly but firmly rejected in *Rice*:

To the extent that Rehner seeks to sell *to non-Indians, or to Indians, who are not members of the tribe* with jurisdiction over the reservation on which the sale occurred, the decisions of this Court have already foreclosed Rehner's argument that the licensing requirements infringe upon tribal sovereignty.

If there is any interest in tribal sovereignty implicated by imposition of California's alcoholic beverage regulation, it exists

only insofar as the State attempts to regulate [the] sale of liquor to other members [of the governing tribe on its reservation].

Rice, 463 U.S. at 720-21 (footnote and citations omitted; emphasis supplied); see also *Squaxin*, 718 F.2d at 719.

In *Squaxin* the issue was whether the State of Washington could lawfully regulate and tax tribal liquor sales to non-Indians, 781 F.2d at 717. The Ninth Circuit held that the State of Washington is authorized to tax tribal liquor sales to non-Indians and to regulate all tribal liquor sales. *Id.* at 724. *Squaxin* is recent persuasive precedent, therefore, in support of the conclusion that tribal sovereignty is not infringed by application of a state's alcohol beverage control scheme to liquor sales by Indian tribes.

Other factors reinforce a reading of *Rice* and section 1161 as requiring that tribes operating liquor establishments on their reservations comply with applicable state licensing requirements. First, other case law interpreting section 1161 analyzes the location of the establishment rather than the nature or identity of the owners as determining the statute's application. See *Mazurie*, 419 U.S. at 551-53, 557-58. *United States v. Morgan*, 614 F.2d 166 (8th Cir. 1980); *United States v. Mission Golf Course, Inc.*, 548 F. Supp. 1177, (C.D.S.D. 1982), *aff'd*, 716 F.2d 907 (8th Cir. 1983); *Berry v. Arapahoe & Shoshone Tribes*, 420 F. Supp. 934 (D. Wyo. 1976).

Secondly, there is no suggestion in the plain language of section 1161, in the available legislative history or the case law interpreting that section that the delegation of authority to the state is dependent in any way upon the form or details of the alcohol beverage regulatory scheme a particular state has chosen. *See gen.* 1953 *U.S. Code Cong. and Adm. News*, pp. 2399-2401; *Rice*, 463 U.S. at 726-29. *Mazurie*, for example, arose in Wyoming which apparently licenses liquor sales through local governmental entities not unlike Wisconsin's licensing statute does. 409 U.S. at 548. *Squaxin* arose in Washington, a "monopoly control" state. 781 F.2d at 717, 720. Paraphrasing the court's observation in *Squaxin*, 781 F.2d at 720, nothing in *Rice* suggests that the result would be different in a local option state such as Wisconsin: "Because there is no tradition of sovereign immunity in the area of liquor regulation . . . and because the activity has potential for substantial impact beyond the reservation, we accord little, if any, weight to an asserted tribal sovereignty interest." *Id.*, citing *Rice*, 463 U.S. at 725.

There are, of course, substantial differences in structure and detail between Wisconsin's alcohol licensing laws and the regulatory schemes in California and Washington upheld in *Rice* and *Squaxin*. That distinction is unpersuasive, however, because neither of those cases turned on the form of the state licensing scheme involved. Rather, *Rice* and in turn *Squaxin* depend on the court's interpretation of the federal legislation, 18 U.S.C. §1161 and its legislative history. In short, Wisconsin's alcohol licensing scheme appears to be included within the plain language of section 1161. Certainly the Supreme Court did not equivocate when it used the following language to describe section 1161 in *Rice*:

[C]ongress viewed §1161 as . . . legalizing Indian liquor transactions as long as those transactions conformed *both* with tribal ordinances and state law.

Id., 463 U.S. at 728 (emphasis supplied).

In my opinion, therefore, an Indian tribe must comply with state licensing requirements when it seeks to sell or distribute alcohol on its reservation.

The remaining question is whether a tribal liquor license would count toward the municipality's local quota. This question overlooks the threshold issue of whether Indian tribes, including the Oneida Tribe, are subject to or exempt from the licensing requirements of chapter 125.

Both the legislative policy underlying chapter 125 and the application of ordinary principles of statutory construction lead me to conclude that Indian tribal activities are subject to chapter 125 licensing requirements. Although Indian tribes are neither specifically included within nor excluded from statutory coverage, the statute evinces throughout the explicit legislative intent to establish a comprehensive, uniform, statewide scheme to regulate the sale and distribution of alcohol within the borders of the state. *See* secs. 125.01, 125.02 and 125.04, Stats. It is true that specific definitions such as those for a "club" or a "municipality" do not apply to an Indian tribe. Nonetheless, the licensing requirements apply generally to "persons." Secs. 125.02(4) and (11), 125.04(1), Stats. I assume that the entity operating the Oneida Rodeway Inn (whether the tribe itself or a tribal business corporation) is organized as a "partnership, corporation or association" within the meaning of the term "person" under the statute. Sec. 125.02(14), Stats. Given

the breadth of the statutory language and the express legislative intent to regulate liquor distribution and sale within the state, I am simply unaware of any basis to imply an exception in the state's liquor licensing requirements for liquor sales by Indian tribes. *Cf. Chemehuevi Ind. Tribe v. Cal. St. Bd. of Equal*; 757 F.2d 1047, 1054-55 (9th Cir. 1985) rev'd in part on other grounds, 474 U.S. _____, 106 S. Ct. 289, *reh'g denied*, 106 S. Ct. 839 (1985).

As in *Chemehuevi*, when a legislative body has made a general grant of authority and has neither explicitly created a particular exception nor otherwise indicated an intent to do so with respect to an Indian tribe, it is inappropriate to imply such an exception. *Id.*, 757 F.2d at 1054. This maxim has particular force when the exercise of the state's authority is both constitutionally permissible and consistent with the overall legislative intent of the statute. Accordingly, I conclude that Indian tribes are included within the coverage of chapter 125 by virtue of their inclusion within the statutory definition of "person," see sections 125.02(14) and 125.04, and must obtain a statutorily required license in order to sell or distribute liquor legally within the state.

The issue of whether state liquor licenses issued to on-reservation liquor establishments count toward the local quota on "Class B" licenses for on-premises sale of intoxicating liquor is discussed at 3-4 of the attached opinion. Because chapter 125 itself currently requires that Indian tribes comply with state liquor licensing requirements, it follows that a Class B license issued to an Indian tribe counts toward the municipality's quota, for the reasons discussed in the attached opinion.

DJH:MM

Intoxicating Liquors; Licenses And Permits; Municipalities; Municipalities may not require by ordinance that all grocery and liquor store employes and bartenders must obtain bartenders' or operators' licenses, such ordinances being in conflict with the provisions of chapter 125, Stats. OAG 20-87

April 7, 1987

DAVID C. RESHESKE, *District Attorney*
Washington County

You have requested an opinion on the validity of municipal ordinances which would require that all grocery store and liquor store employes and all bartenders acquire operators' licenses as a condition precedent to their employment in grocery stores, liquor stores or other licensed premises. I conclude that such ordinances would be invalid.

Section 125.10(1), Stats., provides in part that "[a]ny municipality may enact regulations incorporating any part of this chapter and may prescribe additional regulations for the sale of alcohol beverages, *not in conflict with this chapter.*" The question is whether the proposed ordinances are "in conflict with" any provisions contained in chapter 125 which regulate or govern the requirements for issuance of bartenders' licenses.

Section 125.17(1) provides that every municipality may issue operators' (commonly known as bartenders') licenses and goes on to state in part that "[o]perators' licenses may not be required *other than* for the purpose of complying with ss. 125.32(2) and 125.68(2)."

Section 125.32(2) specifically prohibits premises which hold either a Class "A" or a Class "B" license or permit pertaining to fermented malt beverages from being open for business unless there is present upon the premises the licensee, the agent named on the license if it is a corporate licensee, the agent named in any Class "B" permit *or* some person who has an operator's license and who is responsible for the acts of all persons serving beer. The subsection further provides that any person who holds a manager's license under section 125.18 or any member of the licensee's immediate family who has attained the legal drinking age "shall be considered the holder of an operator's license." The subsection further states that no person, which includes underage persons of the licensee's

immediate family, other than the licensee or agent, may serve beer in any place operated under these licenses or permits unless the person has an operator's license "or . . . is under the immediate supervision of the licensee or agent or a person holding an operator's license, who is on the premises at the time of the service." Section 125.68(2) contains virtually identical language in regard to "Class A" or "Class B" licenses and permits which pertain to intoxicating liquors.

The plain reading of these subsections indicates that the Legislature has declared that not all persons who may be involved in the serving of either fermented malt beverages or intoxicating liquor are required to possess an operator's license. The statutes clearly state that such an unlicensed person may serve beer or liquor if the server is under the immediate supervision of those persons named in the statutes.

It is also clear that the Legislature has occupied the field in the regulation of the trafficking in alcohol beverages for the purpose of ensuring that the laws and regulations in this area are uniform. Section 125.01, which contains the legislative intent of chapter 125, specifically states that chapter 125 is to be construed "as an enactment of statewide concern for the purpose of providing a uniform regulation of the sale of alcohol beverages." This can be read as a restatement of the continual exercise of the Legislature of its power to regulate the sale of beer and liquor in a comprehensive fashion. To allow municipalities to enact ordinances such as those under discussion, as they saw fit, would result in a totally nonuniform system of regulation throughout the state concerning alcohol beverages.

In addition, the legislative history surrounding these changes to the laws regarding the employment of minors reflects this finding of clear legislative intent. Those problems involving the employment of underage persons for the purpose of serving alcohol beverages on licensed premises became apparent when 1983 Wisconsin Act 74 took effect on July 1, 1984. Section 5 of that bill created section 125.02(8m) which defined the legal drinking age as nineteen years of age. Section 11 repealed and recreated section 125.07(4) which concerned in part the prohibitions against underage persons being on licensed premises or knowingly possessing alcohol beverages. In addition, that section created paragraphs (e) and (f) of subsection (4) which provided certain exceptions for underage persons from

possessing beer or intoxicating liquor under certain conditions as part of their employment. Paragraph (e) provided that underage persons employed by licensees or permittees, including retail establishments, are not prohibited from possessing beer during either the brewing process or for sale or delivery to customers. Paragraph (f) provided that underage persons employed by a brewery, winery or a facility for the rectifying or manufacture of intoxicating liquor were not prohibited from possessing alcohol beverages during regular working hours and during the course of their employment. This subsection specifically omitted any reference to or exception for underage persons being employed by retail licensees. Therefore, this portion of that legislation created an internal inconsistency between the treatment of beer and liquor vis-a-vis the employment of underage persons on premises covered by retail beer and liquor licenses. As a practical matter, this appeared to prohibit the employment of all underage persons by retail licensees which would include restaurants and the like for the reason that virtually all of such premises are covered by both beer and intoxicating liquor licenses.

It was this problem that was finally rectified by the Legislature by the enactment of 1985 Wisconsin Act 28, which took effect on July 19, 1985. In part, this act created section 125.07(4)(bm) which provided a series of six particular kinds of circumstances and employment in the course of which underage persons may legally possess alcohol beverages during working hours and as part of their employment. One of those provisions specifically provides for the employment of underage persons by retail licensees or permittees under the terms and conditions specifically stated in sections 125.32(2) and 125.68(2). The act then repealed section 125.07(4)(e) and (f) to finally remove any internal inconsistency regarding the employment of underage persons on licensed premises.

Further, that act repealed section 125.10(4) which prohibited municipalities from enacting ordinances which forbade persons eighteen years of age or over from being employed on premises licensed for the sale of beer. One of the drafters' notes in regard to 1985 Wisconsin Act 28 states that since that act now provides that underage persons may possess alcohol beverages for sale and delivery by virtue of the provisions of this act, section 125.10(4) is surplusage and should be repealed.

It is, therefore, readily apparent that the Legislature clearly intended that underage persons may possess alcohol beverages in the

course of their employment under those terms and conditions as is shown by the evolution of the present statutes.

The ordinance about which you inquire would conflict with state statutes in two ways. First, because a person must have attained the legal drinking age in order to have an operator's license, section 125.04(5), the ordinance would require that all employes of a licensed premise be over the legal drinking age. Section 125.07(4)(bm)5. specifically permits underage employes in those establishments. Such an ordinance would also require operators' licenses other than those required in sections 125.32(2) and 125.68(2), in violation of section 125.17(1).

In the past, this office has reached a similar conclusion in regard to a question of whether municipalities could validly enact ordinances which raised the minimum age requirements for holding operators' licenses to a level above that prescribed by statute and concluded such ordinances were invalid as being in conflict with the particular state statutes. *See* 61 Op. Att'y Gen. 381 (1972). That opinion also concluded that neither the general police power granted by chapter 62 nor the home rule provisions of Wis. Const. art. XI, §3 expanded the powers of municipalities to enact ordinances in this area beyond that authority granted by section 66.054 and chapter 176, the predecessors to chapter 125.

DJH:JCM

County Board; Public Officials; Real Estate; Where the county board as a whole must decide whether to purchase land, a county board supervisor would violate section 946.13(1)(a), Stats., if land owned by his partnership was sold to the county for a purchase price in excess of \$5,000. OAG 22-87

April 21, 1987

KEITH ZEHMS, Corporation Counsel
Eau Claire County

You have asked whether a county board supervisor can sell real estate to the county without violating section 946.13(1), Stats.

The relevant parts of section 946.13 provide:

Private interest in public contract prohibited. (1) Any public officer or public employe who does any of the following is guilty of a Class E felony:

(a) In his private capacity, negotiates or bids for or enters into a contract in which he has a private pecuniary interest, direct or indirect, if at the same time he is authorized or required by law to participate in his capacity as such officer or employe in the making of that contract or to perform in regard to that contract some official function requiring the exercise of discretion on his part; or

(b) In his capacity as such officer or employe, participates in the making of a contract in which he has a private pecuniary interest, direct or indirect, or performs in regard to that contract some function requiring the exercise of discretion on his part.

(2) Subsection (1) does not apply to the following:

(a) Contracts in which any single public officer or employe is privately interested which do not involve receipts and disbursements by the state or its political subdivision aggregating more than \$5,000 in any year.

....

(3) A contract entered into in violation of this section is void and the state or the political subdivision in whose behalf the contract was made incurs no liability thereon.

(4) In this section "contract" includes a conveyance.

The facts have been reported as follows: The property in question is 240 acres within the county forest boundary in the Town of Lincoln, Eau Claire County. The county board supervisor is one of three owners of the property, each of whom is an equal partner in the ownership. The three partners offered the land to the county in January 1986 for \$49,000. After making an on-site inspection, the parks and forests director recommended purchase to the committee on parks and forests. Subsequent to a Department of Natural Resources land agent appraising the land at \$72,000, the partnership offered the land to the county for \$33,000, which was fifty-four percent less than the appraised value.

The committee on parks and forests recommended purchase of the land and introduced a resolution to that effect to the county board per section 16.30.020 of the County Code, which provides in part:

It is the intent of the board to acquire lands within, or bordering, the county forest boundaries, as they become available and upon a determination by the committee that county ownership of the land is beneficial to the residents of Eau Claire County and of the state.

Sufficient funds exist in the county forest land purchases account to make the recommended purchase. Under section 4.04.080 of the County Code, the county board must approve the land purchase. The county supervisor involved does not serve on the parks and forests committee or on the committee on administration to which the resolution was referred. The supervisor has abstained from any discussion or vote on the county board floor concerning the land purchase. The partnership withdrew its offer to sell the land to the county prior to the county board taking action, and the board placed the resolution on file.

The first question is: where the county board as a whole makes the decision whether to purchase land, can a county board supervisor sell real estate to the county and recover more than \$5,000 without violating section 946.13(1)?

In my opinion, the answer is no. The supervisor cannot avoid violating section 946.13(1)(a) when he sells the property to the county while he is a supervisor.

The comments in the Judiciary Committee Report on the Criminal Code (submitted 1953), page 179, explain the purpose of section 946.13(1):

The object of this statute is to prevent a public officer or employe from having private pecuniary interests which may influence him to exercise discretionary powers in his official capacity in a manner inconsistent with the interests of the public. It is derived from that rule of agency which prohibits an agent from serving two masters with opposing interests in the same transaction and the common-law rule which prohibits public officers from simultaneously holding incompatible offices.

The officer or employe may be guilty under this section even though he does not actively participate on both sides of the transaction. However, he must actively participate on one side or the other. He is guilty under subsection (1)(a) if he acts in a private capacity and under subsection (1)(b) if he acts in his official capacity.

Because section 946.13(1)(b) requires the supervisor to participate in his official capacity, he can avoid violating that subsection by not taking part in discussions or votes by the county board on the land purchase. In prior opinions, my predecessors and I have concluded that violation of section 946.13(1)(b) can be avoided by an official not participating in the transaction in his or her official capacity. *See* 76 Op. Att'y Gen. 15 (1987); 75 Op. Att'y Gen. 172 (1986), and 63 Op. Att'y Gen. 43 (1974).

Section 946.13(1)(a), however, because it is concerned with the official's actions in his private capacity, cannot be avoided simply by not participating in the official capacity. Section 946.13(1)(a) has three elements: "(1) a direct or indirect private pecuniary interest in a public contract; (2) negotiating, bidding or entering into the contract in a private capacity; and (3) being authorized or required to participate in the making of the contract or to perform some act with regard to the contract in an official capacity." 75 OAG at 173.

In this case, because the county board as a whole decides whether to purchase the land, there can be no dispute that the supervisor selling the land is authorized to participate in his capacity as supervisor in making the purchase.

The other two elements would also be satisfied because the supervisor has a direct private pecuniary interest in the sale of the

land; and, to complete the sale, he would enter into the contract, if not also negotiate the contract. Therefore, because all three elements of section 946.13(1)(a) would be satisfied, the supervisor would have violated the statute.

Because section 946.13(1)(a) requires only that the supervisor have the authority to act in his official capacity and does not require that he actually do something in that capacity, he cannot avoid violation of the subsection by refraining from acting. In 60 Op. Att'y Gen. 98, 100 (1971), it was pointed out that "[a]bstention from voting would not avoid a violation under section 946.13(1)(a), Stats., if the other elements could be proven."

In this case, because all the other elements of section 946.13(1)(a) would be present, the supervisor could not avoid violating the statute simply by refraining from voting or otherwise participating in his official capacity in the purchase of the property.

The second question is whether the supervisor could avoid liability by completely divesting himself of the land in question.

If the supervisor sells his interest to someone else before the county purchases the land, he would not be liable for any negotiating or bidding that occurs or any contracts that are entered into after he divests himself of the property. He would not be violating section 946.13(1)(a) because he would no longer have a pecuniary interest, either direct or indirect, in the county's contract and he would no longer be negotiating or bidding or entering into the contract with the county. Because he no longer had a private pecuniary interest in the property or the contract, he would not be violating section 946.13(1)(b) when he participated in his official capacity in the county's purchase. The sale of his interest to a third party could not, however, relieve the supervisor from any liability that he may have incurred when he, or someone on his behalf, negotiated or bid on the contract while he owned the property.

The supervisor's resignation from the county board would have the same effect as the sale of his interest to a third party. He would not be liable for any negotiating, bidding or contracts entered into after the resignation; but he would still be liable for any negotiating or bidding done by him or on his behalf while he was a supervisor.

In your final question, you ask whether the \$5,000 exception under section 946.13(2)(a) applies to the total amount of the land

purchase or to the share each of the three equal partners would receive.

In my opinion, the \$5,000 exception applies to the value of the total contract, not to the share each individual partner receives.

The exception states that section 946.13(1) does not apply to contracts which do not involve receipts and disbursements by the state or its political subdivision aggregating more than \$5,000 in any year. The statute thus applies to the value of the contract, not the amount received by the public officer or employe. A contract or series of contracts is therefore subject to section 946.13(1) as long as it exceeds \$5,000 in the year regardless of the amount the involved public officer or employe receives.

DJH:SWK

Arrest; Automobiles And Motor Vehicles; Drunk Driving; Section 345.24, Stats., does not require the release of a person twelve hours after his arrest for one of the alcohol-related driving offenses specified in that statute if the person's blood-alcohol content still exceeds .05 percent, as long as the person is brought before a court without unreasonable delay. OAG 23-87

April 27, 1987

KENNETH J. BUKOWSKI, *Corporation Counsel*
Brown County

You have asked whether section 345.24, Stats., requires the release of a person twelve hours after his arrest for one of the alcohol-related driving offenses specified in that statute, even if the person's blood-alcohol content still exceeds .05 percent. The answer is no, provided that the person is brought before a court without unreasonable delay.

Section 345.24 reads as follows:

Officer's action after arrest for driving under influence of intoxicant. A person arrested under s. 346.63 or an ordinance in conformity therewith or s. 346.63(1m) or (2) or 940.25, or s. 940.09 where the offense involved the use of a vehicle, may not be released until 12 hours have elapsed from the time of his or her arrest or unless a chemical test administered under s. 343.305(2)(b) shows that there is 0.05% or less by weight of alcohol in the person's blood or 0.05 grams or less of alcohol in 210 liters of the person's breath, but the person may be released to his or her attorney, spouse, relative or other responsible adult at any time after arrest.

As created in 1971, this statute required an OMVWI arrestee to be detained for four hours unless he could be released to a responsible adult or unless his blood-alcohol content (BAC) tested at less than .05 percent.¹ Ch. 278, sec. 46, Laws of 1971. The time limit was increased to twelve hours in 1981. Ch. 20, sec. 1597r, Laws of 1981.

In construing a statute, one must first look to the language of the statute itself. *State v. Waalen*, 130 Wis. 2d 18, 24, 386 N.W.2d 47

¹ The statute also provides in the alternative that a person can be released if there is .05 grams or less of alcohol in 210 liters of the person's breath. Since your question specifically refers to blood-alcohol content, however, this opinion will only address that basis for release from custody.

(1986). Only when the statutory language is ambiguous or unclear should one examine the scope, history, context, subject matter and object of the statute to determine legislative intent. *Id.*

Where there is no responsible adult to assume custody of a person arrested for one of the alcohol-related driving offenses specified in section 345.24, the statute prohibits the person's release unless one of two conditions has been satisfied: 1) twelve hours have elapsed since the person's arrest; or 2) a chemical test administered under section 343.305(2)(b) shows that the person's blood-alcohol or breath-alcohol level is .05 or less. As a practical matter, the chemical test referred to in the statute will likely be the initial test administered immediately after the person's arrest because section 345.24 does not require law enforcement officers to give an arrestee repeated tests to determine if his BAC has subsided to .05 or less.²

The statutory language plainly requires that a person arrested for one of the designated offenses be detained for twelve hours unless his BAC is tested and found to be .05 percent or less or unless he can be released to the custody of a responsible adult. However, the statute does not explicitly authorize or prohibit the detention of a person for more than twelve hours after his arrest where his BAC still exceeds .05 percent. To answer your question it is therefore necessary to look outside the statute to determine legislative intent. *Milwaukee Met. Sewerage Dist. v. DNR*, 126 Wis. 2d 63, 71, 375 N.W.2d 649 (1985).

Case law interpreting section 345.24 is scarce. Nevertheless, in *State v. Welsh*, 108 Wis. 2d 319, 337, 321 N.W.2d 245 (1982), *rev'd on other grounds*, 466 U.S. 740 (1984), the supreme court made the following observations on the Legislature's purpose in enacting the statute:

Undoubtedly, this provision was enacted to prevent drunken drivers from returning to the road while intoxicated. Presumably, this four-hour statutory limitation sought to provide an adequate time allowance for the arrested intoxicant's blood alcohol content to metabolize to a safer level, equal to or less than .05 percent. Restraining those drivers who pose a danger to

² Under section 343.305(5), of course, the person is entitled to one test in addition to that administered upon the request of a law enforcement officer under section 343.305(2)(b) or required under section 343.305(2)(c).

themselves and the public for the four-hour statutory period constitutes a preventive measure, designed to promote public safety.

Although the above comments were made when the statute only required a four-hour detention period, their force has not been diminished by the Legislature's increase of the detention period to twelve hours. Rather, the tripling of the time allotted for the intoxicated driver to regain sobriety manifests the Legislature's recognition that some OMVWI arrestees are still too intoxicated to drive four hours after their arrests.³

Since the purpose in enacting section 345.24 was to provide an adequate time for the arrested intoxicant's BAC to metabolize to .05 percent or less, and since the Legislature recently increased the statute's mandatory detention period to twelve hours, it would be inconsistent with legislative intent to require the release of a driver whose BAC exceeds .05 percent. While not *prima facie* evidence that a person is under the influence of an intoxicant, a BAC greater than .05 but under .10 is relevant evidence on the issue of intoxication. *See* sec. 885.235(1)(b), Stats.

Reading section 345.24 to require the release of a driver whose BAC exceeds .05 percent would also be inconsistent with the last two sentences of section 969.07, which governs the taking of bail by a law enforcement officer. The last two sentences of that statute provide as follows:

This section does not require the release of a defendant from custody when an officer is of the opinion that the defendant is not in a fit condition to care for his or her own safety or would constitute, because of his or her physical condition, a danger to the safety of others. If a defendant is not released under this section, s. 970.01 shall apply.

Because section 969.07 only applies to persons charged with misdemeanors, *see* 63 Op. Att'y Gen. 241, 243 (1974), it has limited applicability to those persons arrested for one of the offenses designated in section 345.24, many of whom are charged with civil

³ The blood-alcohol chart reprinted in *State v. Hinz*, 121 Wis. 2d 282, 284-85, 360 N.W.2d 56 (Ct. App. 1984), shows that alcohol is burned up at the rate of .015 percent per hour. Thus, a person whose BAC is greater than .11 at the time of arrest will still have a BAC exceeding .05 four hours later. (.11 minus (4 x .015) equals .05 percent.)

offenses and some of whom are charged with felonies. Nevertheless, this section evinces the Legislature's intent to permit law enforcement officers to retain custody of those defendants whose physical condition renders them a danger to themselves or others. This intention would be frustrated by requiring the release of OMVWI arrestees who still have a BAC greater than .05.

Support for my opinion that section 345.24 does not require the release of an OMVWI arrestee within twelve hours if his BAC still exceeds .05 percent comes from an unpublished decision of the Wisconsin Court of Appeals, *City of Madison v. Zwettler*, No. 78-490 (dec'd May 23, 1979). I have enclosed a copy of that decision with this opinion.

Zwettler had been arrested at 3:31 a.m. for operating a motor vehicle while intoxicated. She was held in jail until making her initial court appearance at approximately 9 a.m., more than five hours after her arrest. The county court dismissed the complaint, finding that sections 345.23⁴ and 345.24 required the defendant's release after a four-hour detention period once she had deposited her valid driver's license with the detaining authorities. The circuit court reversed, finding that the statutes require only that the defendant be brought before the court without unreasonable delay after expiration of the four-hour period specified in section 345.24, Stats. (1975), unless sooner released under the "blood-alcohol level" or "responsible adult" provisions of the statute. Slip op. at 1-2.

⁴ Section 345.23 provides as follows:

Officer's action after arrest without a warrant. If a person is arrested without a warrant for the violation of a traffic regulation, the arresting officer shall issue a citation under s. 345.25, and in addition:

- (1) May release him; or
- (2) Shall release him when he:
 - (a) Makes a deposit under s. 345.26; or
 - (b) Makes a stipulation of no contest and deposit under s. 345.27; or
 - (c) Deposits his valid Wisconsin operator's license as defined in s. 343.01(2)(c) with the officer. The license deposited shall be the license under which he was operating at the time of arrest. If the license is deposited with the officer, the officer shall issue to the licensee a receipt which shall be valid as a driver's license through the date specified on the receipt, which shall be the same as the court appearance date, and the officer shall, at the earliest possible time prior to the court appearance date, deposit the license with the court.
- (d) Presents a guaranteed arrest bond certificate under s. 345.61.
- (3) Shall, if the alleged violator is not released under sub. (1) or (2), bring him or her without unreasonable delay before a judge or, for ordinance violations, before a municipal judge in the county in which the violation was alleged to have been committed.
- (4) Shall, if the alleged violator is released under sub. (1) or (2), specify on the citation a return date which may not be more than 90 days after the issue date.

The court of appeals affirmed the circuit court's order. The court noted that section 345.23 deals with arrests for violations of traffic regulations generally, while section 345.24 establishes a specific procedure for dealing with OMVWI arrestees. The court found that the general provisions of section 345.23(1) and (2) are inconsistent with mandatory detention under section 345.24 and are therefore inapplicable to motorists arrested for driving while intoxicated. However, the court held that section 345.23(3) does not conflict with section 345.24. Construing these statutes together, the court of appeals concluded that, "at the expiration of the mandatory four-hour detention required by section 345.24, the accused must be brought before the court without unreasonable delay." Slip op. at 3-4.

The court in *Zwettler* apparently found that only when the period specified in section 345.24 for holding designated arrestees had expired would section 345.23(3) kick in and require that the person be brought before the court without unreasonable delay if the authorities wished to detain him further. Requiring that the person be brought before a court after the expiration of the twelve-hour period now set by section 345.24 would have the salutary effect of preventing law enforcement authorities from arbitrarily detaining OMVWI arrestees. Although *Zwettler* was decided when the mandatory detention period was four rather than twelve hours, it supports my view that an OMVWI arrestee is not automatically entitled to release once the detention period established by section 345.24 has elapsed.

While *Zwettler* is consistent with my interpretation of section 345.24, I must caution you that, as an unpublished decision of a single court of appeals judge, *Zwettler* is of no precedential value under the rules of appellate procedure. See sec. 809.23(3), Stats. However, it does indicate that at least one member of the court of appeals views section 345.24 as I do.

As a final matter, I note that my construction of section 345.24 is consistent with avoiding liability for failing to retain custody of intoxicated motorists. See Annot., 48 A.L.R. 4th 320 (1986), Failure to Restrain Drunk Driver as Ground of Liability of State or Local Government Unit or Officer.

DJH

Clerk Of Courts; Courts; Fees; In the appropriate case, a court may enforce the collection of the receiving and disbursing fee under section 814.61(12)(b), Stats., for maintenance payments, child support or family support payments by entering an income withholding order as one of the remedial sanctions available under section 785.04(1). The power of the clerk of court is limited to moving the court for a remedial sanction under chapter 785 after which the specific remedy is to be imposed by the court under section 785.04(1). OAG 24-87

May 1, 1987

GEORGE E. RICE, *Acting Corporation Counsel*
Milwaukee County

You request an opinion concerning the enforcement of section 814.61(12)(b), Stats., pertaining to the annual fee for receiving and disbursing money deposited as payment for maintenance payments, child support or family support under interim or final orders in an action affecting the family. You specifically ask whether collection of this fee can be enforced by income withholding orders issued by a court or a court commissioner pursuant to provisions within chapter 767. Section 814.61(12)(b) was created as a part of subchapter II of chapter 814 by chapter 317, Laws of 1981 and now provides:

In a civil action, the clerk of court shall collect the fees provided in this section. Unless a specific exemption is provided, a governmental unit, as defined in s. 108.02(17), shall pay fees under this section. The clerk shall collect the following fees:

....

(b) *Maintenance payments and support.* For receiving and disbursing money deposited as payment for maintenance payments, child support or family support payments, under interim or final orders in an action affecting the family, an annual fee of \$10 to be paid by the party ordered to make payments. The court shall order the annual fee to be paid at the time of, and in addition to, the first payment to the clerk in each year for which payments are ordered. If the annual fee is not paid when due, the clerk shall not deduct the annual fee from the maintenance or support payment, but:

1. The clerk has standing to move the court for a remedial sanction under ch. 785.

2. The annual fee is increased to \$20. The \$20 fee shall be doubled each succeeding year in which the annual fee remains unpaid, but the total annual fee shall not exceed \$320.

The statute clearly prohibits the clerk from deducting the annual fee from the maintenance or support payment. The clerk's only recourse under this statute is to move the court for a remedial sanction under chapter 785.

In Wisconsin, the acts of a clerk of court are ministerial and clerical, and the clerk may not exercise judicial powers except in accordance with the strict language of a statute conferring such power. *State v. Dickson*, 53 Wis. 2d 532, 541-42, 193 N.W.2d 17 (1972). Ministerial acts are those done in obedience to instructions of a legal authority without the exercise of the actor's discretion or judgment upon the propriety of the act being done. *State v. Johnston*, 133 Wis. 2d 261, 267, 394 N.W.2d 915 (Ct. App. 1986).

The clerk of the court has well-defined responsibilities for the receipt and disbursement of maintenance and support payments under section 767.29 and subsequent provisions in that chapter. If the maintenance payments or support money adjudged or ordered to be paid are not paid to the clerk at the time provided in the judgment or order, the clerk or the family court commissioner "shall take such proceedings as either of them deems advisable to secure the payment of the sum including enforcement by contempt proceedings under ch. 785 or by other means." Sec. 767.29(1), Stats. In contrast, the clerk's only apparent power under section 814.61(12)(b) is to move the court for a remedial sanction under chapter 785.

Under section 785.04(1) a court may impose a number of remedial sanctions including:

(d) An order designed to ensure compliance with a prior order of the court.

(e) A sanction other than the sanctions specified in pars. (a) to (d) if it expressly finds that those sanctions would be ineffectual to terminate a continuing contempt of court.

These broad powers under section 785.04 codify and reaffirm the court's inherent powers essential to its existence and necessary to

further the orderly and efficient exercise of its jurisdiction. *Jacobson v. Avestruz*, 81 Wis. 2d 240, 245-47, 260 N.W.2d 267 (1977). These inherent powers are conceded because without them a court could not properly function. *State v. Braunsdorf*, 98 Wis. 2d 569, 578-79, 297 N.W.2d 808 (1980).

If the court in a remedial contempt proceeding finds that an income withholding order would ensure compliance with the court's prior order or that any other enumerated sanction would be ineffectual in terminating a continuing contempt of court, there is no obvious reason on the face of the statute why the court could not enter such an order. The need or appropriateness of such a remedy in any individual case is a matter for the parties to argue and the court to decide based upon the circumstances of that case.

DJH:DPJ

Residence, Domicile And Legal Settlement; Words And Phrases; Under chapter 55, Stats., the definition of residency contained in section 49.01(8g) is to be used for venue purposes and for the purpose of assigning financial liability between counties for the cost of non-emergency services. Although the assignment of financial liability between counties is not contemplated in protective placement proceedings under chapter 55, in such proceedings a court may place an individual through another county's board, but any such placement order is not binding unless that county receives notice and an opportunity to be heard. OAG 25-87

May 1, 1987

JAMES J. DUVALL, *District Attorney*
Buffalo County

You ask three questions relating to protective placements under chapter 55, Stats. Several of the issues you have raised are discussed in 65 Op. Att'y Gen. 49 (1976).

Your first question is as follows: "1. What is the definition of 'residence' for venue purposes in Chapter 55?"

In my opinion, the definition of residence for venue and other purposes under chapter 55 is physical presence plus intent to remain in a place of fixed habitation.

Section 55.06(3)(c), Stats., which is the venue provision to which you refer, provides that "[a] petition may be filed either in the county of legal settlement or the county of residence of the person to be protected." Section 49.01(8g), in turn, provides as follows: "'Residence' means the voluntary concurrence of physical presence with intent to remain in a place of fixed habitation. Physical presence is prima facie evidence of intent to remain." This section is specifically referred to as the definition of residence in section 55.06(8): "[T]he appropriate board designated under s. 55.02 or an agency designated by it having responsibility for the place of legal residence of the individual as provided in s. 49.01(8g) shall make a recommendation for placement."

In addition, the definition of residence contained in section 49.01(8g) is adopted under section 51.01(14) as the definition of residence both for purposes of commitment under section 51.20, and for the purpose of determining county responsibility for provision of services under sections 51.42(1)(b) and 51.437(4)(a) and (c).

With respect to the process of placement in a facility, commitment and protective placement are closely tied together. *See generally* 65 Op. Att'y Gen. 49 (1976). *See also* 66 Op. Att'y Gen. 249 (1977). Although section 55.06(3)(c) permits a protective placement petition to be filed in the county of legal settlement, except for the assignment of guardian ad litem fees, "[t]he retention of the references to legal settlement . . . can best be explained as a 'legislatively dropped stitch.'" 65 Op. Att'y Gen. at 52. With the exception noted, I reiterate my predecessor's conclusion that "legal settlement determinations were not intended to play a part in the 51.42 and 51.437 programs." 65 Op. Att'y Gen. at 51.

In connection with your first inquiry, you also state the following:

Individual people have, of their own will, while competent and not pursuant to a court order, moved to certain counties which possess facilities which they find desirable. At times these people then become incompetent and proper subjects for Chapter 55. The counties with such facilities have taken a hard-line, stating that these persons retained "residency" in the county from which they originated despite their voluntary move and have refused Chapter 55 placement or services.

In 65 Op. Att'y Gen. at 52, it was stated that the definition of residency contained in what is now section 49.01(8g) creates a rebuttable presumption with respect to legal residency for purposes of protective placement and commitment. After that opinion was issued, however, the Legislature amended section 55.06 so as to specifically cross-reference the definition of residency contained in section 49.01(8g) into the protective placement statutes. *See* ch. 430, sec. 69, Laws of 1975. By virtue of this amendment, it is my opinion that the definition of residency contained in section 49.01(8g) is now controlling for all purposes with respect to protective placement and commitment. In addition to the statutory amendment, two other factors favor this conclusion.

First, in enacting chapters 51 and 55, it seems likely that the Legislature did not contemplate the occurrence of the type of "facility shopping" which you describe. Second, both sections 51.42(1)(b) and 51.437(4)(a) place responsibility upon each county board for providing care and treatment to "citizens residing within its county" This language indicates that the Legislature also

intended that only one county would be responsible for the provision of services to the individual protectively placed.

Under the circumstances, it might have been preferable if the Legislature had used the term domicile, rather than residence, in chapters 51 and 55. *See generally* 61 Op. Att’y Gen. 245 (1972). *Also see Estate of Daniels*, 53 Wis. 2d 611, 614-15, 193 N.W.2d 847 (1972). Some concepts relevant to the law of domicile are contained in section 49.01(8r), which permits a guardian to make choices as to residency if the ward is incompetent, and in section 51.22(4), which provides that if placement outside the county is authorized by the 51.42 board, “the placement does not transfer the patient’s legal residence to the county of the facility’s location while such patient is under commitment.” Even though concepts related to the law of domicile are relevant to a determination of residency under section 49.01(8g), in certain circumstances it may be fairly easy for an individual to change his or her legal residence within the meaning of that statute.

Although your factual description is very general in nature, given the definition of residence selected by the Legislature, in situations where the subject of the protective placement is physically present, intent to remain in a place of fixed habitation is the controlling factor in determining residence. *Compare Miller v. Sovereign Camp W. O. W.*, 140 Wis. 505, 508, 122 N.W. 1126 (1909). In such situations, if the individual intends to remain in a place of fixed habitation within the county where he or she is physically present, it is my opinion that that county may not refuse to provide placement or services or attempt to assign financial responsibility for such placement or services to another county.

In connection with your second question, you state that “[other] counties have maintained Chapter 55 actions based on ‘residence’ in the venue section of Chapter 55, but then found them non-residents for placement purposes and either placed them to the board of another county or placed them to their own board but assigned the cost of providing care to another county.” You then pose the following question: “2. May the court placing the individual under Chapter 55 either place such individual through another county’s board or, in the alternative, place the individual through its own [county’s] board, but assign financial responsibility for such placement to another county?”

It is my opinion that a court may place an individual through another county's board, but that any such placement order is not binding on another county and may be collaterally attacked if that county did not receive notice and an opportunity to be heard. However, it is also my opinion that the assignment of financial responsibility between counties by the court is not contemplated in protective placement proceedings.

Preliminarily, it should be noted that the venue provision contained in section 55.06(3)(c) is not jurisdictional in nature. *Compare Shopper Advertiser v. Department of Rev.*, 117 Wis. 2d 223, 344 N.W.2d 115 (1984). The filing of a protective placement petition in a county other than the county of legal residence under section 49.01(8g), therefore, does not prevent a court from issuing a final order concerning protective placement. In its final order, the court "shall order placement through the appropriate board designated under s. 55.02 or an agency designated by it." Sec. 55.06(9)(a), Stats. Nothing in this statute, which governs the contents of the court's final order, requires any specific assignment of financial responsibility between counties.

The court's final order may nevertheless have certain consequences with respect to the assignment of financial responsibility for non-emergency services. Section 55.06(13) provides that "[t]he appropriate board shall be charged for the cost of care and custody resulting from placement under this section." The meaning of the phrase "appropriate board" is not entirely clear. However, section 51.22(1) unambiguously indicates that final orders under chapter 51, and, by inference, under chapter 55, should be directed to the county of residence: "[a]ny person committed under this chapter shall be committed to the county department under s. 51.42 or 51.437 serving the person's county of residence" Any finding as to residency has implications with respect to financial liability under section 55.06(13).

In 65 Op. Att'y Gen. at 52, 53, it was stated:

In order to comply with the letter and spirit of sec. 51.002 and the entire mental health act as revised, information concerning the person's place of residence should be procured at the earliest possible time. . . .

. . . .

In all commitments or admissions, every effort should be made to resolve differences of opinion relative to an applicant's place of residence as soon as possible.

If time is not of the essence and it appears certain that the subject of the protective placement petition possesses residence in another county, the preferred course of action would be to transfer venue to that county. *Compare Shopper Advertiser*, 117 Wis. 2d at 231-33. Unfortunately, "[i]t is often difficult to determine residence of an individual who requires emergency care." 65 Op. Att'y Gen. at 52. In such difficult cases, the court issuing a protective placement order has two options. Where little or no information concerning residency is available, the court may order placement to the designated department in its county under section 55.02 that has responsibility for the provision of the needed services and withhold making any finding as to residency. In such circumstances, absent the existence of a cooperative agreement, that county may then seek reimbursement through legal channels from the county of residence.

In rare cases, a change of venue may not be feasible, and an inter-county dispute as to residency may have to be resolved prior to the issuance of the court's final order. Absent future legislative direction to the contrary, in such situations those counties which might potentially be affected by the court's residency finding should be provided with notice and an opportunity to be heard pursuant to section 55.06(5). *See, e.g., Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). *But see, Columbia County v. Wisconsin Retirement Fund*, 17 Wis. 2d 310, 116 N.W.2d 142 (1962). In cases where that is not done, the court's final order is not binding upon any county that did not receive notice and an opportunity to be heard, and could be collaterally attacked either in a subsequent timely legal proceeding between counties to determine financial responsibility or by moving to vacate portions of the court's final order. *See Wengerd v. Rinehart*, 114 Wis. 2d 575, 587-88, 338 N.W.2d 861 (Ct. App. 1983). *Compare Comstock v. Boyle*, 134 Wis. 613, 114 N.W. 1110 (1908).

To alleviate the potential problems posed by the last of these situations, it has been "suggest[ed] to the Department of Health and Social Services that a need exists for prompt legislative action to establish a method for resolving such disputes." 65 Op. Att'y Gen. at 53. To date, there has been no such legislation. The depart-

ment also has not attempted to address this problem pursuant to its rulemaking powers under sections 51.42(7)(b)8. and 51.437(16).

On December 1, 1982, the department did, however, issue the enclosed policy memorandum concerning residency for the purpose of funding human services. The memorandum addresses many situations where residency disputes might arise and also provides for a mechanism for resolving such disputes. The provisions of this memorandum, which does not have the force of law, have been voluntarily followed by a number of counties. Your county may wish to do the same.

Your third question is as follows: "3. If the placing court has authority to assign financial responsibility, what county is responsible for the cost of placement, county of residence, county of legal settlement, or whatever county initially places the individual?"

Except in the case of emergency services, it is my opinion that the county of residence is responsible for the cost of placement.

Section 51.42(1)(b) provides, in part, as follows:

County liability. The county board of supervisors has the primary responsibility for the well-being, treatment and care of the mentally ill, developmentally disabled, alcoholic and other drug dependent citizens *residing within its county* and for ensuring that those individuals in need of such emergency services found within its county receive immediate emergency services. *County liability* for care and services purchased through or provided by a county department of community programs established under this section *shall be based upon the client's county of residence* except for emergency services for which liability shall be placed with the county in which the individual is found. For the purpose of establishing county liability, "emergency services" includes those services provided under the authority of s. 51.15, 51.45(11)(a) or (b) or (12), 55.05(4) or 55.06(11)(a) for not more than 72 hours.

Similarly, section 51.437(4)(c) provides that "[c]ounty liability for care and services purchased through or provided by a county department of developmental disabilities services established under this section shall be based upon the client's county of residence" Despite its placement in chapter 51, this latter provision refers generally to services provided under chapter 55. *See, e.g.,* sec. 55.02, Stats.

Since legal settlement determinations were not intended to play a part in the 51.42 and 51.437 programs and since there is a statutory seventy-two-hour limitation on liability for emergency services under section 51.42(1)(b) for individuals found within a county, neither the county of legal settlement nor the county where the petition is filed appears to be a workable definition of "residence" as that term is employed in sections 51.42(1)(b) and 51.437(4)(a). It is therefore my opinion that, except in the case of emergency services, legal residency as defined in section 49.01(8g) is also controlling for the purpose of assigning financial liability between counties for the costs of protective placement or commitment.

DJH:FTC

Licenses And Permits; Regulation And Licensing, Department Of:
The Department of Regulation and Licensing has the authority to promulgate rules for procedures for the summary suspension of occupational licenses. Summary suspension of occupational licenses may constitutionally be invoked only in emergency situations and then only if the licensee is afforded a prompt hearing on whether the summary suspension should continue until a decision is made after a full hearing on the merits of the license deprivation. OAG 26-87

May 11, 1987

MARLENE A. CUMMINGS, *Secretary*
Department of Regulation & Licensing

Your predecessor asked for comments on proposed administrative rules which would provide procedural guidelines for summary suspension of occupational licenses in Wisconsin. I have reviewed the proposed rules and conclude that the department has authority to enact these rules and that they meet constitutional due process and statutory requirements.

The Wisconsin Legislature has provided for summary suspension of licenses in section 227.51(3), Stats., which states, in part: "If an agency finds that public health, safety or welfare imperatively requires emergency action and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. Such proceedings shall be promptly instituted and determined."

The first question to consider is whether the department has authority to enact guidelines for handling summary suspensions.

It is my opinion that the department does have authority to enact procedural guidelines for summary suspension of occupational licenses. Section 440.03(1) provides: "The department may adopt rules defining uniform procedures to be used by the department, the real estate board and all examining boards attached to the department for receiving, filing and investigating complaints, for commencing disciplinary proceedings and for conducting hearings."

It is my opinion that "summary suspension" is clearly within the embrace and intent of the statutory phrase "receiving, filing and investigating complaints, for commencing disciplinary proceedings

and for conducting hearings” in the above cited statute. The proposed rules are consistent with the administrative function of the department and do not interfere with the independent authority of examining boards with respect to discipline.

Having concluded that the department does have the authority to enact rules governing procedures for summary suspension of licenses, my next inquiry is whether the particular rules you submitted meet constitutional due process and statutory requirements.

The three statutory requirements for summary suspension of licenses are stated in section 227.51. These requirements are each provided for in the proposed rules which the department has submitted. Proposed RL X.05(1)(b) requires that the agency find that the public health, safety or welfare imperatively requires emergency action. Proposed RL X.05(7)(g) requires that the finding that the public health, safety or welfare imperatively requires emergency action be included in the summary suspension order. Finally, proposed RL X.05(8) requires that disciplinary hearings be promptly instituted and decided. Therefore, it is my opinion that the department’s summary suspension rules are consistent with the Wisconsin statutes.

A constitutional issue arises in connection with summary suspension of occupational licenses because a licensee has a legally recognized expectation of continued enjoyment in his or her license absent proof of culpable conduct. Accordingly, licensees have a property interest in their licenses sufficient to invoke the protection of the due process clause. See *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

Procedural due process requires that the state not suspend or revoke a license without affording the licensee a full and fair hearing before an impartial tribunal at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). In general, under this definition, a licensee is entitled to a hearing prior to deprivation of his or her license.

However, the Supreme Court has rejected the idea that every deprivation must be preceded by a hearing. The Court has recognized situations where post-deprivation hearings satisfy procedural due process. Post-deprivation hearings satisfy due process demands, for instance, when the exigencies of a particular situation make it impossible to provide a full and meaningful hearing prior

to the deprivation. See *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Boddie v. Connecticut*, 401 U.S. 371 (1971).

In *Barry v. Barchi*, 443 U.S. 55 (1979), the United States Supreme Court held that a post-deprivation hearing was sufficient to meet procedural due process requirements. There, the Court upheld the validity of a New York statute which granted the New York State Racing and Wagering Board authority to suspend horse trainers' licenses without a pre-deprivation hearing. After weighing the interests of the horse trainers against the interests of the state, the Court found that although the interests of the trainers were substantial, they were outweighed by the state's interest in using the summary suspension procedure to preserve the integrity of horse racing and to protect the public from harm.

In reaching its holding, the Court placed importance on the fact that the New York statute required that the board have probable cause to believe that a horse trainer had violated the racing rules before it could issue a summary suspension. In describing probable cause requirements in this circumstance, the Court stated: "To establish probable cause, the State need not postpone a suspension pending an adversary hearing to resolve questions of credibility and conflicts in evidence. At the interim suspension stage, an expert's affirmance, although untested and not beyond error, would appear sufficiently reliable to satisfy constitutional requirements." *Barchi*, 443 U.S. at 65.

Later in *Cleveland Bd. of Educ. v. Loudermill*, __ U.S. __, 105 S. Ct. 1487 (1985), the Supreme Court reiterated the rule that due process requires that a person be given an opportunity for a prompt hearing before he or she is deprived of significant rights, and noted that in *Barchi* the horse trainer was, in fact, given an opportunity to present his case before the summary suspension. But the Court recognized that in emergency situations, the deprivation of rights could constitutionally take place prior to a hearing. Footnote 7 citing *Ewing v. Mytinger & Casselberry*, 339 U.S. 594 (1950) (immediate seizure under the Federal Food, Drug and Cosmetic Act of mislabeled products which would be "misleading to the injury or damage of the purchaser or consumer" if the product were introduced into interstate commerce), and *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (summary seizure of food unfit for human consumption held in storage).

Also see Hodel v. Virginia Surface Min. & Reclam. Ass'n, 452 U.S. 264, 299-300 (1981), where the Court acknowledged that summary actions were justified in emergency situations and cited numerous cases to that effect.

The summary suspension rules which the department submitted are similar to those approved by the Supreme Court in *Barchi*. As true of the New York statute, the department's rules require a probable cause determination prior to summary suspension. In order to issue a summary suspension order, a licensing authority or person acting under its delegation must have probable cause to believe "that the respondent has engaged in or is likely to engage in acts which imperatively require an emergency suspension of respondent's license to protect the public health, safety or welfare." Proposed RL X.05(1)(b). Moreover, the department's rules provide additional protection of licensees' interests by allowing a licensee to challenge a probable cause determination by showing cause why the summary suspension should not be continued. This challenge can be made at an oral hearing which, if requested, is to take place within twenty days of the summary suspension. At this hearing, the department's rules allow the licensee to appear with counsel and to call and cross-examine witnesses and to introduce evidence into the record.

But the validity of any action taken under the statute and proposed rules will be measured against whether the facts support a finding that there was a severe emergency.

Due process requires that a person be given a prompt hearing in summary suspension matters prior to the full hearing on the merits and it is my recommendation that the proposed rules be amended as follows:

(5)(b) The request for hearing shall be filed with the licensing authority. The hearing affording the opportunity to show cause shall be scheduled *promptly for hearing on a date within but no later than 20 days of after the filing of the request for hearing with the licensing authority unless a later time is requested by or agreed to by the licensee.*

It is my opinion that these and other safeguards contained in the department's summary suspension rules, including provisions for notice, afford a licensee due process under the fourteenth amendment. In situations in which there is probable cause to believe that a

licensee endangers the public health, safety or welfare, the state's interest in having an expedient procedure to protect its citizens becomes acute. The rules submitted by the department provide guidelines for such a procedure and at the same time grant substantial assurances that a licensee's interest will not be baselessly compromised. *Barchi*, 443 U.S. at 65.

The department should be cautioned, however, that the hearing to show cause provision cannot be used to justify substantial delays in conducting a full hearing. In defending the promptness of a final determination, the state will bear the burden of showing a state interest in any appreciable delay in final resolution. Given the weight of the licensee's interest in a quick resolution of the charges against him or her, this burden would be difficult to meet. *See Barchi*, 443 U.S. at 66. Therefore, a licensing authority or person acting under its delegation should be quite sensitive to motions made under proposed RL X.05(8)(b) of the department's rules.

In view of my conclusions above, it is my opinion that the department can promulgate the proposed rules with the one change I have suggested.

DJH:WHW:ch

Bingo; Licenses And Permits; Lotteries; Words And Phrases; To be eligible to obtain a raffle license from the State of Wisconsin, an organization, whether it is tax exempt or not, must qualify as a local organization. If a licensed organization no longer meets the eligibility requirements for licensure during the effective period of the license, such license is subject to revocation or suspension by the Bingo Control Board. OAG 27-87

May 27, 1987

MARLENE A. CUMMINGS, *Secretary*
Department of Regulation & Licensing

You request my opinion on several questions involving the proper construction to be given section 163.90, Stats., in determining the type of organization eligible to obtain a raffle license under chapter 163.

You first ask the following:

In order to be qualified for a license to conduct raffles, an organization must be a "local religious, charitable, service, fraternal or veterans organization or any organization to which contributions are deductible for federal or state income tax purposes . . .". [sic] Is the phrase "or any organization to which contributions are deductible for federal or state income tax purposes" to be construed disjunctively so as to create a separate class of qualified organizations to which the antecedent qualifying word "local" does not apply?

I conclude the word "local" applies to both descriptive phrases in the statute. Therefore, organizations to which contributions are deductible for federal or state income tax purposes must also qualify as local organizations in order to be eligible for licensure.

The problem giving rise to your question lies in the placement of the qualifying word "local" combined with the use of the disjunctive "or" connecting the two phrases which describe the potentially eligible types of organizations. The combination of these two factors creates an internal ambiguity, the resolution of which requires analysis utilizing principles of statutory construction, including intrinsic and extrinsic aids and discussion of the legislative intent of this statute.

The particular portion of the statute under discussion is ambiguous because reasonable persons could, in construing it, reach two

different conclusions. It could be reasonably argued that since the qualifier "local" precedes only the five enumerated types of organizations which are then disjunctively separated from the tax-exempt organizations, two separate classes are created and tax-exempt organizations, need not, therefore, be local in nature. It could also reasonably be argued that the word "or" is simply used as a grammatical bridge to connect the last in a series or list of types of organizations potentially eligible for licensure and the qualifying word "local" modifies all types including the tax exempts.

When the language of a statute is ambiguous, it becomes both necessary and permissible to look at the intent of the Legislature as that may be ascertained by the use of various construction aids, both extrinsic and intrinsic. *See Tahtinen v. MSI Ins. Co.*, 122 Wis. 2d 158, 166, 361 N.W.2d 673 (1985).

Regarding the use of the qualifying word "local," it is stated that:

Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent. . . . The rule is another aid to discovery of intent or meaning and is not inflexible and uniformly binding. Where the sense of the entire act requires that a qualifying word or phrase apply to several preceding or even *succeeding* sections, the word or phrase will not be restricted to its immediate antecedent (emphasis supplied).

(Footnotes and cites omitted.) Sutherland Stat Const §47.33 (4th Ed, 1984 rev). *See also Jorgenson and another v. City of Superior*, 111 Wis. 561, 566, 87 N.W. 565 (1901); *accord Fuller v. Spieker*, 265 Wis. 601, 605, 62 N.W.2d 713 (1954).

When the word "or" is used, it appears to be commonly thought of in its disjunctive sense in that it is most often used to separate different classes of things, classes or types of conduct and the like. However, as was seen with the discussion of the qualifying word, "local," such is not always the case and at times the word "or" is interpreted or construed to be the equivalent of or interchangeable with the word "and." As stated in Sutherland:

While there may be circumstances which call for an interpretation of the words "and" and "or," ordinarily these words are not interchangeable. Because a list exists [as we are faced with in section 163.90], the "or" between subsections (3) and (4) make it

necessary to read “or” as a disjunctive. There has been, however, so great laxity in the use of these terms that courts have generally said that the words are inter-changeable and that one may be substituted for the other, *if consistent with the legislative intent*.

Sutherland, *Id.*, §21.14 (4th Ed, 1986 rev) (emphasis supplied).

Our appellate courts have adopted and followed this same reasoning from as early as 1915. The supreme court held that “[o]r” is usually disjunctive; occasionally, to avoid absurdity, it is construed as a conjunctive and equivalent to ‘and,’ . . .” *Menominee River B. Co. v. Augustus Spies L. & C. Co.*, 147 Wis. 559, 569, 132 N.W. 1118 (1912). The court went on to state that:

The popular use of “or” and “and” is so loose and so frequently inaccurate that it has infected statutory enactments. While they are not treated as interchangeable, and should be followed when their accurate reading does not render the sense dubious, their strict meaning is more readily departed from than that of other words, and one read in place of the other in deference to the meaning of the context. . . . 2 Lewis’s Sutherland, Stat. Constr. §397.

State ex rel. Rich v. Steiner, 160 Wis. 175, 177-78, 151 N.W. 256 (1915). *Rich* was subsequently followed and cited with approval in *State ex rel. Wisconsin D. M. Co. v. Circuit Court*, 176 Wis. 198, 204, 186 N.W. 732 (1922), and *City of Hartford v. Godfrey*, 92 Wis. 2d 815, 820, 286 N.W.2d 10 (Ct. App. 1979).

Finally, it appears that when the statute under consideration was created, the Legislature intended that only organizations which are truly local in character and nature would be eligible to hold raffle licenses. The language used by the Legislature in section 163.90 was taken from a portion of the constitutional amendment to Wis. Const. art. IV, §24, which modified Wisconsin’s historic strict constitutional prohibition against lotteries.

Additional support for this limited construction is specifically provided by the language of the constitutional provision itself which requires that “[a]ll profits must inure to the licensed *local* organization” Wis. Const. art. IV, §24 (2). This language appears in the same subsection which provides that local “religious, charitable, service, fraternal or veterans organizations or those to which contributions are deductible for federal or state income tax purposes” may operate raffles under license from the state.

In addition, the drafting records pertaining to 1977 Assembly Bill 860 which, among other things, created section 163.90 by virtue of enactment of ch. 426, sec. 9, Laws of 1977, effective June 7, 1978, indicate that the word "local" was not even contained in the first draft of the language. "Local" was added to the legislation by the express special request of State Representative Steve Gunderson, the author of 1977 Assembly Bill 860, because Representative Gunderson did not "want statewide or national organizations to be able to hold raffles or receive profits from them." Representative Gunderson also stated that the local limits which he desired injected in the legislation were to ensure that raffles would be allowable only for small local organizations.

What clearly emerges from this discussion is that the Legislature intended in its enactment of the enabling legislation, following the amendment of the state constitution to allow raffles, that only those organizations which are local should be eligible to be licensed to conduct raffles. Therefore, I conclude that the statute under consideration must be construed so that the word "local" modifies and applies to all the described types of organizations, including tax-exempt organizations, and that connecting word "or" is to be construed as a bridging word connecting the tax-exempt organizations as the last in a list of eligible organizations and is to be read, therefore, conjunctively.

I, therefore, conclude that in order to be eligible to obtain a raffle license pursuant to chapter 163 an organization, regardless of whether or not it is tax exempt, must be a local organization as that has been defined and explained in OAG 13-86 issued on May 7, 1986, to your predecessor.

You desired answers to your next three questions only if I reached the opposite conclusion above. Therefore, those questions need not be addressed.

Your fifth question asks whether a tax-exempt organization under I.R.C. 501 (c)(3) (1986), which has obtained a raffle license from the state and subsequently loses its tax-exempt status, continues to be eligible for a raffle license despite the loss of that status. If the organization was and is a local organization as that term has been defined for you, then, assuming it meets the other eligibility requirements, the organization would continue to be eligible for a raffle license regardless of whether or not it was tax exempt. If the

organization under consideration is not local, it is then not an eligible organization under section 163.90 and may not be issued a raffle license whether or not it was tax exempt.

If the organization was a local tax-exempt organization at the time of licensure, but does not fall into one of the five specifically described types of local organizations eligible to be licensed, and subsequently loses its tax-exempt status, I conclude that such organization is no longer eligible to be licensed to conduct raffles. Your question then concerns what results flow from this loss of eligibility before the existing license term expires.

It appears in general that licenses may be revoked for any reason that would have justified a refusal to issue the license in the first place. See 53 C.J.S. *Licenses* §44 (1948); *Butcher v. Maybury*, 8 F.2d 155 (D.C. Wash. 1925); *Mahaney v. Cisco*, 248 S.W. 420 (Tex. Civ. App. 1922), *reh'g denied*, 248 S.W. 420 (Tex. Civ. App. 1923). It is obvious that if an organization applying for a license does not meet the eligibility requirements of section 163.90, then a refusal to issue that license not only would have been justified but would have been required. Therefore, it appears that the Bingo Control Board and your department have, pursuant to sections 163.04 and 163.05, the authority to revoke such a license following notice and hearing to the licensee. In addition, I note that there is contained in chapter 163 no so-called "grandfather clause" providing for such a contingency or event and containing any provisions allowing the licensee to continue to operate under the license once it becomes ineligible and no longer meets the requirements contained in section 163.90.

Therefore, while the revocation of a license is generally considered to be within the discretionary power of the revoking authorities, see 53 C.J.S. *Licenses* §44 (1948), to allow a licensee who is clearly no longer eligible to be a licensee to continue to conduct raffles under these circumstances would appear to be unwise.

DJH

Vocational, Technical And Adult Education, Board of; Criteria and procedures for review of district board appointments by the state VTAE board explained. Effect of an "elected official" member not seeking re-election midway in his term as a district board member discussed. OAG 28-87

May 28, 1987

FRED A. RISSER, *Chairman*
Senate Organization Committee

You have asked a series of questions regarding the process by which appointments were made to the District No. 4 Vocational, Technical and Adult Education (VTAE No. 4) Board and approved by the State Board of Vocational, Technical and Adult Education (state board) on September 24, 1986.

1. If these appointments were such that the District 4 Board is not in compliance with Wis. Stats. 38.08(1)(a)1. and 2., does the District 4 Board have the authority to administer the district . . . ?

If a situation would arise where an individual holds a position on the board as a result of a defective appointment, public policy considerations would dictate that the actions taken by the board would still be valid. Therefore, the board would continue to have the authority to administer the district as set forth in sections 38.12-38.18, Stats.

This result follows from the *de facto* doctrine of law which has evolved out of a need to protect the interests of third persons and the general public in the official actions of persons exercising the duty of office. It would be unreasonable to expect the public to inquire into the title of every official or to require officials to be constantly defending their right to office. This doctrine has been specifically followed in Wisconsin with respect to appointed officials. *In re Burke*, 76 Wis. 357, 45 N.W. 24 (1890) and 67 Op. Att'y Gen. 169 (1978).

Pursuant to section 38.04(15), the state board has established criteria and procedures for review of district board appointments. The state board could require the defect in appointment to be corrected at the next available opportunity. The district could remove the unqualified member at any time.

2. Does the following statement from the "Plan of Representation" prepared by the Appointment Committee of District No. 4 meet the specific requirements of section 38.08(1)(a)2. that "the employer and employe members of the district board *shall* be representative of the various businesses and industries"?

"Area Vocational, Technical and Adult Education District No. 4 Plan of Representation 1986. 'The plan of representation for the Area Board of Vocational, Technical and Adult Education District No. 4 shall be that all board members shall represent the District in its entirety.' "

Chapter VTAE 2 of the Wisconsin Administrative Code establishes criteria and procedures for the review of district board member appointment by the state board as required under the statutes. Section VTAE 2.04(2)(b) provides that the plan of representation prepared by the appointment committee shall include:

A statement explaining the plan of representation and demonstrating how the plan of representation gives equal consideration to:

1. The general population distribution of the district.
2. The distribution of women within the district.
3. The distribution of minorities within the district.

The appointment committee is then required to submit with its proposed appointments a "statement explaining how the employer and employe members as appointed are representative of the various businesses and industries in the district as required under s. 38.08(1)(a)2, Stats." Wis. Admin. Code §VTAE 2.04(3)(c) (1986).

The plan of representation of VTAE No. 4 begins with the paragraph you quote and goes on to state:

The plan of representation for the area board of Vocational, Technical and Adult Education District No. 4 takes into consideration the requirements of the statutes that equal consideration be given to the general population distribution of the District, the distribution of women within the District, and the distribution of minorities within the District.

This language complies with the requirement that the plan of representation gives equal consideration to the three elements found in section 2.04(2)(b), which are listed above. The appointments themselves must then be representative of the various businesses and industries in the district. Whether the appointments were representative is a factual question which would require a detailed analysis of information not provided to this office. Even were such information to be available, opinions issued by the attorney general are not intended to address questions of that nature.

3. Does the District Appointment Committee or the State Board have the authority to make certain "categories", i.e. employer/employee "primary" and others, i.e. representatives of the various businesses and industries "secondary" with the intent being that appointments *must* include "primary" but need not necessarily meet the "secondary"?

The statutes provide:

1. A district board shall administer the district and shall be composed of 9 members who are residents of the district, including 3 employers, 3 employes, 2 additional members and a school district administrator, as defined under s. 115.001(8). . . .

2. The employer and employe members of the district board shall be representative of the various businesses and industries in the district. The school district administrator shall be employed by the school board of a school district located in the district. At least 2 of the members of the district board shall be elected officials of a county board of supervisors, common council, village board of trustees, town board of supervisors or school board

Sec. 38.08(1)(a)1.-2., Stats.

The statute clearly requires that the board contain three employers, three employes, two at-large members and one school district administrator. These are required categories. Then in addition, the statute provides that of these members, two must possess the secondary characteristic of being an elected official, and the employer and employe members must be representative of the various businesses and industries in the district.

Under section 38.04(15), the state board is given authority to establish criteria and procedures for the review of district board

member appointments. It has done this at Wis. Admin. Code §VTAE 2.04. Under these regulations, the state board will look for both the required number of employes and employers and representation among businesses and industries. It cannot ignore these statutory requirements.

4. When a member is midway into a 3-year term as an “elected official” and does not seek re-election to the office that qualified him for that category:
 - a. does the member remain representative of the “elected official” category for the remainder of his term?
.....
 - b. must the next available appointment be used to fill that category? or
 - c. must the member resign? or
 - d. can the member be removed by 17.16(1), Wis. Stats.?

The member does not remain representative of the “elected official” category for the remainder of his term of appointment. He or she does, however, continue to serve in that capacity until a successor is appointed and qualified. Sec. 38.08(2), Stats. Because the statutes require that at least two of the members of the board be elected officials, the board must use the “next available opportunity” to correct the imbalance. The board must look at the terms of all existing board members to determine when the imbalance could first be corrected through the appointment process. This would occur as soon as a vacancy exists, and the board has an opportunity to correct the deficiency in the number of elected officials by appointing a person to fill an employer, employe or additional member position (whichever is vacant), who also possesses the secondary characteristic of being an elected official.

The member need not resign. A person who meets the “elected official” requirement found in section 38.08(1)(a)2. must also have been appointed to the board as a member of one of the categories found in section 38.08(1)(a)1., that is, an employer, an employe or an at-large member. The member can be removed at the end of his term under section 17.13(1). However, the person can continue to be reappointed so long as he remains a member of one of these categories.

Section 17.16(1) does not provide removal authority. It merely states that “[r]emovals from office at pleasure shall be made by order, a copy of which shall be filed as provided by sub. (8), except that a copy of the order of removal of a court commissioner, a jury commissioner or family court commissioner shall be filed in the office of the clerk of the circuit court.” Section 17.13(1) gives the appointment board authority to remove any of its appointed members “at pleasure.”

5. . . . [D]id the State Board err in returning the May 2, 1986 and June 10, 1986 recommendations of the District Appointment Committee for failure to include a “*new* elected official”?

The state board did not err in returning the recommended appointments to VTAE No. 4 for failure to include a “new elected official,” because the appointments as proposed would have resulted in an absence of one of the required elected officials. The appointment committee was required to use this first available opportunity to correct this imbalance. This would have resulted in the district board not being in compliance with the statutes on composition of a district board. Therefore, it was necessary for the appointments to be made in such a manner that this category be complete.

6. . . . [D]id the State Board err in extending additional time to the Appointment Committee in lieu of itself . . . appointing the district board members in accordance with 38.10(2)(a)2 and 38.10(2)(f)?

On May 2, 1986, the appointment committee of VTAE No. 4 submitted its recommendations for three members. On May 28, 1986, the state board disapproved the district board’s appointments. The appointment committee at that point had the following options. It could reconvene the appointment committee, use the same slate of candidates, correct the imbalance and resubmit the candidates selected to the state board for approval and/or disapproval or could refuse to act and indicate such to the state board, in which case the state board would assume the appointment responsibility.

The district appointment committee met again and resubmitted these same names. These names were not acceptable, and the state board informed the appointment committee that if it did not sub-

mit acceptable nominations within the required time period, it would be required to formulate a plan of representation and appoint the district board members itself.

The statute provides that the state board should make the district appointments only if the local board fails to take action and reach agreement within thirty days after their first meeting. Sec. 38.10(2)(f), Stats. As long as the local appointment committee meets and takes timely action, which it did, the state board will not intervene. Therefore, it is my opinion that the state board did not err in giving the appointment committee additional time to submit "acceptable" recommendations.

7. If the State Board becomes aware that members who are in mid-terms but who never did qualify for the representation assigned to them . . . does the State Board have authority to require the position be vacated and a new qualified member appointed?

Under state law, the state board has the authority to establish by rule, criteria and procedures for the review of district board member appointments by the board. Sec. 38.04(15), Stats. The state board also is authorized to "require that district board appointments comply with the provisions of the plan [of representation]." Sec. 38.10(2)(c), Stats. While it is my opinion that these statutory provisions authorize the state board to require appointment of a qualified member at the next available opportunity, I do not believe they can be read broadly enough to encompass removal of a member in mid-term. Such authority is reserved to the appointing body or a court.

DJH:JSM

Foster Homes; Housing; Zoning; A community living arrangement which has a capacity for eight or fewer persons and which meets all other statutory criteria is entitled to locate in any zoning district where single or multi-family residences are a permitted use. Any such community living arrangement which has a capacity of from nine to fifteen persons is entitled to locate in any zoning district where multi-family residences containing more than two families are a permitted use, and is entitled to apply for special zoning permission to locate in any zoning district where single or two family uses are permitted. Such a community living arrangement which has a capacity of more than fifteen persons is entitled to apply for special zoning permission to locate in any zoning district where single or multi-family uses are permitted. A community living arrangement which meets all applicable statutory criteria is not entitled to locate in an exclusive agricultural zoning district, but may seek special zoning permission to do so if local ordinances permit. OAG 29-87

May 29, 1987

TIMOTHY F. CULLEN, *Secretary*
Department of Health and Social Services

You ask two questions concerning the establishment of community living arrangements in "residential zones," "residential areas" or "areas zoned for residential use" within the meaning of chapter 205, Laws of 1977.

One of your questions may be paraphrased as follows: Are community living arrangements which satisfy all other applicable statutory criteria entitled to locate in any zoning districts in which residential uses are expressly permitted, even though such areas are not zoned exclusively for residential use?

In my opinion, the answer is yes.

Chapter 205, section 1, Laws of 1977, provides as follows:

Legislative purpose. The legislature finds that the language of statutes relating to zoning codes should be updated to take into consideration the present emphasis on preventing or reducing institutionalization and legislative and judicial mandates to provide treatment in the least restrictive setting appropriate to the needs of the individual. This change in emphasis has occurred as the result of recent advances in corrections, mental health and

social service programs. It is the legislature's intent to promote public health, safety and welfare by enabling persons who otherwise would be institutionalized to live in normal residential settings; thus hastening their return to their own home by providing them with the supervision they need without the expense and structured environment of institutional living. To maximize its rehabilitative potential, a community living arrangement should be located in a residential area which does not include numerous other such facilities. The residents of the facilities should be able to live in a manner similar to the other residents of the area. The legislature finds that zoning ordinances should not be used to bar all community living arrangements since these arrangements resemble families in all senses of the word except for the fact that the residents might not be related. The legislature also finds that deed covenants which restrict or prohibit the use of property for community living arrangements are contrary to the vital governmental purpose of achieving these goals. The legislature believes these matters of statewide concern can be achieved only by establishing criteria which restrict the density of community living arrangements while limiting the types of and number of facilities which can exist in residential neighborhoods having an appropriate atmosphere for the residents, thereby preserving the established character of a neighborhood and community.

Section 46.03(22), Stats., as created by chapter 205, section 2, Laws of 1977, provides, in part, as follows:

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

(b) Community living arrangements shall be subject to the same building and housing ordinances, codes and regulations of the municipality or county as similar residences located in the area in which the facility is located.

....

(d) A community living arrangement with a capacity for 8 or fewer persons shall be a permissible use for purposes of any deed covenant which limits use of property to single-family or 2-family residences. A community living arrangement with a capacity for 15 or fewer persons shall be a permissible use for purposes of any deed covenant which limits use of property to more than 2-family residences. Covenants in deeds which expressly prohibit use of property for community living arrangements are void as against public policy.

With respect to such community living arrangements, chapter 205, section 10-12, Laws of 1977, established uniform criteria for the location of such facilities in counties, towns, villages and cities. Ordinarily, any such facilities which are licensed, operated or permitted under the authority of your department are entitled to locate in specified residential zones or areas, provided that they meet two criteria. First, the community living arrangement must be more than 2,500 feet from any other community living arrangement unless this distance requirement is reduced by municipal ordinance. *See* secs. 59.97(15)(a), 60.62, 60.74(9)(a), 61.35 and 62.23(7)(i)1., Stats. Second, a municipality may prohibit the establishment of additional community living arrangements where the total capacity of all such community living arrangements within the municipality would exceed twenty-five, or one percent of the municipality's population, whichever is greater. *See* secs. 59.97(15)(b), 60.74(9)(b), 61.35 and 62.23(7)(i)2., Stats. This prohibition can also be imposed on a ward by ward basis in cities. Sec. 62.23(7)(i)2., Stats.

Depending upon their capacity, community living arrangements which meet the applicable statutory criteria may be established in specified residential districts. Ordinarily, community living arrangements having a capacity to serve eight or fewer persons are "entitled to locate in any *residential zone*" Secs. 59.97(15)(c), 60.63(4) and 62.23(7)(i)3., Stats. Community living arrangements which have a capacity to serve from nine to fifteen persons are "entitled to locate in any *residential area* except areas zoned exclusively for single-family or 2-family residences . . . [and are] . . . entitled to apply for special zoning permission to locate in those areas." Secs. 59.97(15)(d), 60.63(5) and 62.23(7)(i)4., Stats. Finally, community living arrangements having a capacity to serve more than fifteen persons are "entitled to apply for special zoning permission to locate in *areas zoned for residential use*." Secs.

59.97(15)(e), 60.63(6) and 62.23(7)(i)5., Stats. "Special zoning permission" includes, but is not limited to "special exception, special permit, conditional use, zoning variance, conditional permit and words of similar intent." Secs. 59.97(15)(g), 60.63(8) and 62.23(7)(i)7., Stats. *Also see* sec. 61.35, Stats.

Preliminarily, I am of the opinion that the phrases "residential zone," "residential area" and "areas zoned for residential use" have the same meaning.

In construing a statute, the entire section and related sections are to be considered in its construction or interpretation. *State v. Phillips*, 99 Wis. 2d 46, 50, 298 N.W.2d 239 (Ct. App. 1980). Furthermore, a statute should be construed to give effect to its leading idea, and the entire statute should be brought into harmony with the statute's purpose. *Pella Farmers Mutual Insurance Co. v. Hartland Richmond Town Insurance Co.*, 26 Wis. 2d 29, 41, 132 N.W.2d 225 (1965). Sections of statutes relating to the same subject matter must be construed *pari materia*. *Jung v. State*, 55 Wis. 2d 714, 720, 201 N.W.2d 58 (1972).

State v. Clausen, 105 Wis. 2d 231, 244, 313 N.W.2d 819 (1982). The purpose of the statutes is to allow community living arrangements to locate in certain types of zoning districts which are residential in nature. There is no indication anywhere that the Legislature intended that such residential districts have three different characteristics, depending upon the size of the community living arrangement. Applying the rules of construction contained in *Clausen*, I, therefore, conclude that the terms "residential zones," "residential areas" and "areas zoned for residential use" are synonymous.

In determining whether these terms refer only to zoning districts which are primarily residential in nature as opposed to zoning districts in which residential uses are expressly permitted, certain rules of construction apply: "In situations where one of several interpretations of a statute are possible, this court 'must ascertain the legislative intention as disclosed by the language of the statute in relation to its scope, history, context, subject matter, and the object intended to be remedied or accomplished.'" *State ex rel. First Nat. Bank & Trust v. Skow*, 91 Wis. 2d 773, 779, 284 N.W.2d 74 (1979) (citation omitted). In addition, "[u]nder the accepted law of Wisconsin and of other jurisdictions, remedial statutes should be liberally construed 'to suppress the mischief and advance the rem-

edy which [the statute] intended to afford.' ” *Madison v. Hyland, Hall & Co.*, 73 Wis. 2d 364, 373, 243 N.W.2d 422 (1976). It is also well-settled that a statute should be construed so as to avoid unreasonable or absurd results. *State v. Phillips*, 99 Wis. 2d 46, 51, 298 N.W.2d 239 (Ct. App. 1980); *Braun v. Wisconsin Electric Power Co.*, 6 Wis. 2d 262, 268, 94 N.W.2d 593 (1959).

The thrust of chapter 205, Laws of 1977, is to assure that community living arrangements having a capacity to serve eight or fewer persons are treated as a single or two-family unit for zoning purposes, while community living arrangements having a capacity to serve from nine to fifteen people are to be treated as a multi-family (more than two) unit for zoning purposes.

A construction which permits community living arrangements of eight or fewer residents to locate in any zoning district where one or two family residences are permitted uses and which permits community living arrangements serving nine to fifteen residents to locate in any zoning district where multi-family residences are permitted accomplishes a number of results.

First, it effectuates the legislative purpose of treating community living arrangements like families for zoning purposes, since the Legislature has found that “these arrangements resemble families in all senses of the word except for the fact that the residents might not be related.” Ch. 205, sec. 1, Laws of 1977. Second, “in harmony with the elementary principle of property law favoring the free and unrestricted use of land,” it accomplishes the remedial purpose of “enabl[ing] ‘persons who otherwise would be institutionalized to live in normal residential settings.’ ” *Crowley v. Knapp*, 94 Wis. 2d 421, 433 n.1, 288 N.W.2d 815 (1980). Third, it tends to avoid absurd or unreasonable results by precluding fact battles over the characteristics of various zoning districts and by precluding municipalities from attempting to prohibit the establishment of community living arrangements by denominating certain districts as commercial or industrial even though substantial residential uses are permitted in those districts.

Such a construction is also in accord with decisions from other states which treat the residents of community arrangements as families for zoning purposes. *See, e.g., State ex rel. Thelen v. City of Missoula*, 168 Mont. 375, 543 P.2d 173 (1975); *Berger v. State*, 71 N.J. 206, 364 A.2d 993, 1003 (1976); *City of White Plains v. Ferrai-*

oli, 34 N.Y.2d 300, 313 N.E.2d 756, 357 N.Y.S.2d 449 (1974). See also *Leland Acres, Etc. v. R. T. Partnership*, 106 Mich. App. 790, 308 N.W.2d 648, 652 (1981).

Applicable rules of statutory construction and pertinent authorities from other jurisdictions favor a construction which permits community living arrangements which have a capacity to serve eight or fewer persons and which meet all other statutory criteria to locate in any zoning district where single or multi-family residences are permitted. Similarly, community living arrangements having a capacity to serve from nine to fifteen persons are entitled to locate in any zoning district where multi-family residences are permitted. By the same token, community living arrangements which have a capacity to serve more than fifteen persons are entitled to apply for special zoning permission to locate in any zoning district where single or multi-family uses are permitted.

Your remaining question may be paraphrased as follows: Are community living arrangements which satisfy all other applicable statutory criteria entitled to locate in exclusive agricultural zoning districts?

In my opinion, the answer is no. However, community living arrangements may seek special zoning permission to locate in such areas if permitted by local ordinance.

Section 91.75 provides, in part, as follows:

Ordinance standards. A zoning ordinance shall be deemed an "exclusive agricultural use ordinance" if it includes those jurisdictional, organizational or enforcement provisions necessary for its proper administration, if the land in exclusive agricultural use districts is limited to agricultural use and is identified as an agricultural preservation area under any agricultural preservation plans adopted under subch. IV and if the regulations on the use of agricultural lands in such districts meet the following standards which, except for sub. (4), are minimum standards:

(1) Except as provided under subs. (2) and (6), the minimum parcel size to establish a residence or a farm operation is 35 acres.

(2) The only residences allowed as permitted uses are those to be occupied by a person who, or a family at least one member of which, earns a substantial part of his or her livelihood from farm

operations on the parcel, or is a parent or child of the operator of the farm. Preexisting residences located in areas subject to zoning under this section which do not conform to this paragraph may be continued in residential use and may be exempted from any limitations imposed or authorized under s. 59.97(10).

(3) No structure or improvement may be built on the land unless consistent with agricultural uses.

As has been explained, in most circumstances, the residents of a small community living arrangement should be treated as a family for zoning and land use purposes. Ch. 205, sec. 1, Laws of 1977. *Also see Crowley*, 94 Wis. 2d at 432-36. However, under section 91.75(2), residential uses in exclusive agricultural districts are treated as non-conforming uses, except that a county may exempt them from the limitations contained in section 59.97(10).

Residential uses are not permitted in exclusive agricultural zoning districts unless a person residing on the premises earns a substantial part of his or her livelihood from farm operations or is a parent or child of the operator of the farm. Sec. 91.75(2), Stats. Although it can be argued that a community living arrangement should also be permitted in the unlikely event that a person living on the premises meets these criteria, I am of the opinion that the type of residential use permitted by section 91.75(2) is the functional equivalent of a farmhouse, and is incidental to the principal use of the premises, which is required to be an "agricultural use[s]." Sec. 91.75(3), Stats. *Compare Walworth County v. Hartwell*, 62 Wis. 2d 57, 61, 214 N.W.2d 288 (1974).

The terms "residential zones," "residential areas" and "areas zoned for residential use" should be construed in their ordinary and accepted sense. Sec. 990.01(1), Stats.; *State ex rel. B'nai B'rith F. v. Walworth County*, 59 Wis. 2d 296, 307, 208 N.W.2d 113 (1973). In their commonly accepted sense, it is my opinion that these terms refer to the principal use of the property. *Cf.*, *Hartwell*, 62 Wis. 2d at 61. By its very name, the phrase "exclusive agricultural use" connotes a principal use which is agricultural, as opposed to residential. Sec. 91.75(intro.), Stats. Areas zoned exclusive agricultural, therefore, are not "residential zones," "residential areas" or "areas zoned for residential use" within the meaning of chapter 205, Laws of 1977.

Nevertheless, community living arrangements may be entitled to locate in exclusive agricultural zoning districts under some circumstances. Section 91.75(5) provides as follows:

Special exceptions and conditional uses are limited to those agricultural-related, religious, other utility, institutional or governmental uses which do not conflict with agricultural use and are found to be necessary in light of the alternative locations available for such uses. The department shall be notified of the approval of any special exceptions and conditional uses in areas zoned for exclusive agricultural use.

This broad language is sufficient to permit the establishment of community living arrangements in exclusive agricultural districts if the alternative locations for such uses in other zoning districts are insufficient. The establishment of community living arrangements in exclusive agricultural districts is, therefore, dependent upon the terms and provisions contained in local ordinances.

In conclusion, community living arrangements which meet all other applicable statutory criteria and which have the appropriate capacity are entitled to locate in zoning districts where residential uses are permitted. They are not entitled to locate in exclusive agricultural zoning districts because the only new uses permitted in such districts are agricultural. They can, however, apply for special zoning permission to locate in exclusive agricultural zoning districts under the terms and conditions specified in local ordinances.

DJH:FTC

Confidential Reports; Minors; Police; Schools And School Districts; Students; A school cannot use confidential information obtained from law enforcement authorities to require students, under threat of expulsion, to participate in group or individual counseling, nor can the school use such information to suspend or expel students. The school can use such confidential information to refer a student to county social welfare agencies or nongovernmental self-help groups, but only if the student consents to such referral. OAG 30-87

June 12, 1987

RALPH E. SHARP, JR., *Corporation Counsel*
Dodge County

You requested an opinion from my predecessor regarding the construction of section 48.396(1), Stats., as it pertains to the confidential exchange of information between law enforcement officers and school officials. Specifically, you ask whether a child's school can use records obtained under section 48.396(1) for any or all of the following purposes:

1. Requiring students to participate in counseling for drug and alcohol abuse with a school counselor;
2. Requiring students to participate in group counseling conducted within the school for drug and alcohol abuse;
3. Referring students to county social welfare agencies for an evaluation of their use of drugs and alcohol and such counseling as may be recommended;
4. Referring students to self-help groups which are not operated by a governmental agency;
5. Suspending students from school for a violation of the laws prohibiting the use, possession, or distribution of intoxicants and controlled substances; and
6. Expelling students from school for a violation of the laws prohibiting the use, possession, or distribution of intoxicants and controlled substances.

You indicate that your questions were prompted by the Mayville School District's request for the release of sheriff's department records of complaints implicating the district's students in the use, possession or distribution of intoxicants and controlled substances.

According to your letter, the school district has asked the sheriff's department to routinely notify the district of complaints involving students so that the district can implement a school board policy on alcohol and drug abuse.

Pursuant to that policy, a copy of which was enclosed with your opinion request, a student receives an automatic three-day suspension the first time the school district discovers the student has used, possessed or been under the influence of intoxicants, mood-altering drugs or look-alike drugs or has possessed drug-related paraphernalia. The prohibited behavior need not occur on school grounds or while school is in session; rather, the prohibition is in effect twenty-four hours a day, 365 days a year. In addition to the suspension, the student is referred to the Student Assistance Program, which can require in-school counseling or referral to alcohol and drug abuse groups. The failure to comply or cooperate with the assistance provided triggers expulsion proceedings against the student. Second and subsequent violations draw more severe penalties.

In my opinion, a school cannot use confidential information obtained from the police to require students, under threat of expulsion, to participate in group or individual counseling, nor can the school use such information to suspend or expel students. The only exception to this prohibition would be if the student has entered into an informal disposition under section 48.245, whereby he agrees to undergo counseling or to voluntarily absent himself from school for a stated period. It is also my opinion that the school can use confidential information to refer a student to county social welfare agencies or nongovernmental self-help groups, but only if the student consents to such referral.

The starting point for my analysis is section 48.396(1):

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 under s. 48.293, by order of the court assigned to exercise jurisdiction under this chapter or by order of the circuit court under sub. (5). 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.

The Wisconsin Supreme Court has noted the purpose underlying this confidentiality requirement for 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).

It is apparent from *Herget* that the confidentiality of juvenile police records is not intended solely to protect the juvenile from the stigma attached to having a police record or being contacted by the police. Rather, the confidentiality provision is also designed to encourage the juvenile and others having contact with him to furnish the police with information which they might otherwise not disclose. For example, parents might be willing to supply police with information about their child or their child's friends only if they knew such information would not be used by school authorities as the basis for suspension or expulsion proceedings. Likewise, a juvenile being investigated by the police for suspected alcohol or drug involvement might be more willing to cooperate if he or she knew such cooperation would not result in automatic suspension from school.

The *Herget* court believed that one reason the Legislature enacted a confidentiality requirement for juvenile police records was to encourage juveniles and other persons to furnish information which they might not otherwise be willing to disclose to juvenile

authorities. The possibility that using confidential police information to suspend or expel students or to coerce them into counseling could deter cooperation with juvenile authorities is one reason I find such usage contrary to the confidentiality requirement of section 48.396(1). A second reason is that I seriously doubt school officials can use confidential information obtained from the police to suspend or expel a student without disclosing that information to persons not entitled to receive it. (See 69 Op. Att'y Gen. 180, 182 (1980), where my predecessor expressed similar doubt.)

Under *Goss v. Lopez*, 419 U.S. 565 (1975), certain due process safeguards, including notice and a hearing, must be observed where sanctions such as suspension or expulsion from school are imposed. In Wisconsin such due process safeguards are codified in section 120.13(1)(b) and (c). These statutes contemplate that persons in addition to "officials of the school attended by the child" will be privy to information giving rise to a student's suspension or expulsion. For example, section 120.13(1)(b) entitles a suspended student — or his parent or guardian — to a conference with "the school district administrator or his or her designee who shall be someone other than a principal, administrator or teacher in the suspended pupil's school." Because the person conducting the conference cannot be from the suspended pupil's school, that individual is therefore outside the class of persons with whom the police can exchange confidential information under section 48.396(1).

With respect to expulsion proceedings, there is an even greater risk that persons not specified in section 48.396(1) will have access — either directly or indirectly — to confidential information contained in police files on juveniles. While your letter states that only the people described in section 118.125(2)(d),¹ the child and the child's parent or guardian can attend such proceedings, I do not believe this is always the case.

Under section 120.13(1)(c), an expulsion hearing must be closed only if the pupil and, if the pupil is a minor, his parent or guardian, request it. If a minor pupil and his parent or guardian request a

¹ That section provides as follows:

(d) Pupil records may be made available to persons employed by the school district which the pupil attends who are required by the department under s. 115.28(7) to hold a certificate, license or permit and other school district officials who have been determined by the school board to have legitimate educational interests.

closed hearing, then the general public will be barred from attending. Even in a closed hearing, however, due process may require that persons other than the child, his parent or guardian and school district employes specified in section 118.125(2)(d) be present as witnesses for the board or for the pupil facing expulsion.

In *Racine Unified School Dist. v. Thompson*, 107 Wis. 2d 657, 668, 321 N.W.2d 334 (Ct. App. 1982), the court held that school boards are authorized to issue subpoenas and take testimony at expulsion hearings. This means that even in a closed hearing, witnesses subpoenaed by the school board may become privy to the police information which triggered the expulsion hearing. The same holds true for witnesses who testify without being subpoenaed.

If witnesses who testify at expulsion hearings are not "officials of the school attended by the child," their receipt of confidential police information on juveniles would run afoul of the confidentiality provision of section 48.396(1).

Moreover, if a parent — for whatever reason — does not request a closed expulsion hearing for his minor child, it appears the school board can hold an open hearing, presumably with the general public being permitted to attend. This latter situation would certainly contravene section 48.396(1) and further supports my opinion that confidential police information on juveniles cannot be used by schools to suspend, expel or coerce into counseling those students implicated in alcohol- or drug-related offenses.

Additional, albeit indirect, support for my conclusion comes from a recently enacted statute governing privileged communications between pupils and certain enumerated school employes. Section 118.126(1), which took effect in April of 1986, provides as follows:

Privileged communications. (1) A school psychologist, counselor, social worker or nurse shall keep confidential information received from a pupil that the pupil or another pupil is using or is experiencing problems resulting from the use of alcohol or other drugs unless:

(a) The pupil using or experiencing problems resulting from the use of alcohol or other drugs consents in writing to disclosure of the information;

(b) The school psychologist, counselor, social worker or nurse has reason to believe that there is serious and imminent danger to the health, safety or life of any person and that disclosure of the information to another person will alleviate the serious and imminent danger. No more information than is required to alleviate the serious and imminent danger may be disclosed; or

(c) The information is required to be reported under s. 48.981.

In most cases, this statute would prevent school psychologists, counselors, social workers or nurses from divulging to school officials information received from a pupil regarding drug or alcohol use by him or another pupil. Thus, such information could rarely, if ever, be used as a basis for suspension or expulsion proceedings against a pupil. In my opinion, it would therefore be anomalous to permit school officials to use confidential police information regarding juvenile alcohol or drug usage to suspend or expel pupils, particularly since such information may have been obtained from persons to whom the privilege contained in section 118.126(1) applies.

As a final matter, I believe it is necessary to correct an erroneous impression created by an earlier opinion of this office. Specifically, in 69 Op. Att'y Gen. 180 (1980), to which you alluded in your letter, my predecessor implied that confidential information imparted to school officials by the police becomes part of a pupil's records under section 118.125. My reading of section 118.125(1)(d) is to the contrary. That subsection, which defines "pupil records," explicitly excludes from the definition

notes or records maintained for personal use by a teacher or other person who is required by the department under s. 115.28(7) to hold a certificate, license or permit if such records and notes are not available to others nor does it include records necessary for, and available only to persons involved in, the psychological treatment of a pupil.

In my opinion, confidential information obtained from juvenile authorities would not fall within the definition of "pupil records" contained in section 118.125(1)(d). Language to the contrary in 69 Op. Att'y Gen. 180 (1980) is hereby withdrawn.

In closing, I want to stress that this opinion in no way implies that school officials are powerless to discipline students who engage in drug or alcohol use, whether such conduct occurs on or off

school grounds.² Rather, this opinion merely concludes that confidential information about juvenile drug or alcohol use, which is obtained from law enforcement authorities, cannot be used to suspend or expel students or to force them to undergo counseling. Such information may be used, however, in less serious types of disciplinary actions where confidentiality can be assured. It can also be used to refer a student to county welfare agencies or to nongovernmental self-help groups, if the student consents to such referral.

I recognize that the conclusions reached in this opinion may frustrate educators who believe they should be able to use the information contained in juvenile police records to enforce school codes of behavior. However, authority for such usage would have to come from the Legislature, whose enactment of section 48.396(1) accorded confidential status to police records on juveniles.

DJH:MMM

² The extent to which schools can discipline pupils for conduct occurring away from school grounds is unresolved. *See, e.g.*, Annot., 53 A.L.R.3d 1124 (1973).

Compatibility; Retirement Systems; Public school administrators are eligible to be candidates for and to vote for teacher representatives on the Teachers Retirement Board. OAG 32-87

June 16, 1987

GARY I. GATES, *Secretary*
Department of Employee Trust Funds

You request my opinion on whether public school administrators are eligible to vote for public school teacher candidates for the Teachers Retirement Board (Board) and to run for election to that Board as public school teachers. Public school teachers elect nine of the thirteen Board members. Sec. 15.165(3)(a), Stats. The other Board members are appointed by the governor. Sec. 15.07(1)(b), Stats.

It is my opinion that public school administrators are public school teachers for these Board election purposes, and are authorized by section 15.165(3)(a)1. to be candidates and to vote for teacher positions on the Board.

Section 15.165(3)(a) sets forth the qualifications for election to the Board by stating:

There is created in the department of employe trust funds a teachers retirement board. The board shall consist of 13 members, to serve for staggered 5-year terms. The board shall consist of the following members:

1. Six public school teachers who are participating employes in the Wisconsin retirement system and who are not eligible for election under any other subdivision of this paragraph, elected by participating employes meeting the same criteria.
2. One public school teacher from a vocational, technical and adult education district who is a participating employe in the Wisconsin retirement system, elected by teacher participating employes from vocational, technical and adult education districts.
3. One administrator in Wisconsin's public schools who is not a classroom teacher.
4. Two university of Wisconsin system representatives who are teacher participants in the Wisconsin retirement system. The

representatives under this subdivision shall not be from the same campus.

5. One representative who is a member of a school board.

6. One annuitant who was a teacher participant in the Wisconsin retirement system, elected by the annuitants who were teacher participants.

7. One teacher in the city of Milwaukee who is a participating employe in the Wisconsin retirement system, elected by the teachers of the public schools in that city who are participating employes.

“Teacher” is defined in section 40.02(55) as follows:

“Teacher” means any employe engaged in the exercise of any educational function for compensation in the public schools or the university in instructing or controlling pupils or students, or in administering, directing, organizing or supervising any educational activity, but does not include any employe determined to be an auxiliary instructional employe under s. 115.29(3).

While the definitions set forth at section 40.02 are by that statutory section to be used “[i]n this chapter,” they are also properly used in interpreting section 15.165(3)(a) since the Board’s duties and responsibilities are set forth exclusively in chapter 40. *See* secs. 40.03(7) and 40.63(5), Stats. *Gutter v. Seaman*, 103 Wis. 2d 1, 23, 308 N.W.2d 403 (1981).

Public school administrators are thus “teachers” and eligible to participate in the section 15.165(3)(a)1. election notwithstanding subsection (3)(a)3. which requires that the governor also appoint a public school administrator to serve on the Board. Sec. 15.07(1)(b), Stats. The only “teachers” that are excluded from the subsection (3)(a)1. election are those “eligible” for *election* under other (3)(a) subdivisions. Since the subsection (3)(a)3. administrator is appointed, not elected, that exclusion does not apply.

Statutes dealing with the same subject matter must be construed together and harmonized if possible. [Case cites omitted.] This is especially true of the statutes in question, which were amended in the same bill.

State v. Campbell, 102 Wis. 2d 243, 252, 306 N.W.2d 272 (Ct. App. 1981).

The Board was created and the definition of teacher was established in the same session law. Ch. 96, Laws of 1981. This same session law also recreated the basis for teacher membership on the Retirement Research Committee (R.R.C.). As then created, section 13.50(1)(c) reads in part as to the teacher representatives:

The committee shall consist of:

....

(c) Three representatives of public employes, appointed by the governor, of whom:

1. One shall be representative of state employes, or nonteaching local government employes;
2. One shall be a teacher holding a license or certificate under s. 118.19 who is not employed by the state or the city of Milwaukee; and
3. One shall be a teacher holding a license or certificate under s. 118.19 who is employed by the city of Milwaukee.

(Section 118.19 concerns the required license to teach.)

It is significant that the Legislature limited teacher participation on the R.R.C. to certificate-holding teachers. This contrasts with section 15.165(3)(a) which does not restrict the term "teacher" to licensed teaching employes.

Differences between the Board and R.R.C. statutes are more instructive than the similarities. The Legislature could have established either the restrictive (teacher license) R.R.C. requirement or broad section 40.02(55) definition of "teacher" for both the R.R.C. and Board. As the court stated in *State v. Campbell*, 102 Wis. 2d at 253:

Since both statutes were under consideration at the same time, we conclude that the differences in the language chosen for each statute imply a different scope for each.

Had the Legislature intended the Board teacher-representative elections to be limited to licensed teaching employes, it could have so specifically provided at section 15.165(3)(a) as it did at section 13.50(1)(c). I find no basis to add a restriction that the Legislature was aware of but chose not to include.

I therefore conclude that public school administrators are eligible to be candidates and to vote for candidates for the Teachers Retirement Board under section 15.165(3)(a).

DJH:WMS

County Board; Funds; Under section 65.90(5), Stats., a vote of two-thirds of the entire membership of the county board is needed to transfer funds from the contingency fund to use for a purpose not anticipated in the budget. OAG 33-87

June 16, 1987

RALPH E. SHARP, JR., *Corporation Counsel*
Dodge County

You have asked whether under section 65.90(5)(a), Stats., a transfer of funds from a contingency account requires a two-thirds vote of the entire membership of the Dodge County Board where the funds are not used to supplement appropriations for a particular office, department or activity that is in the budget.

Your question has been prompted by a recent 20 to 16 vote by the thirty-seven member Dodge County Board in favor of a resolution authorizing the transfer of \$10,000 from the budget's contingency fund to defray the expenses of a committee appointed to negotiate with a landfill operator. The committee was not funded in the 1987 budget.

Section 65.90(5) provides:

(a) 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. 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 notice shall preclude any changes in the proposed budget and alterations thereto made under sub. (4).

(b) A county board may authorize its standing finance committee to transfer funds between budgeted items of an individual county office or department, if such budgeted items have been separately appropriated, and to supplement the appropriations for a particular office, department or activity by transfers from the contingent fund. Such committee transfers shall not exceed the amount set up in the contingent fund as adopted in the annual budget, nor aggregate in the case of an individual office,

department or activity in excess of 10 per cent of the funds originally provided for such office, department or activity in such annual budget. The publication provisions of par. (a) shall apply to all committee transfers from the contingent fund.

Transfers from the contingency fund for purposes unanticipated in the budget have been considered in at least two prior opinions from this office. In the first, the author concluded that the transfer could be made on a majority vote since a contingency fund is established to cover unanticipated needs. *See* 32 Op. Att’y Gen. 301, 302 (1943). That conclusion was rejected, however, in the more recent opinion by my predecessor, who decided that section 65.90(5)(a) required a two-thirds vote of the entire membership of the county board to transfer funds to an “office, department or activity not referred to in the annual budget.” 57 Op. Att’y Gen. 134, 138 (1968).

The more recent opinion is persuasive because, in the nineteen years since it was issued, the Legislature has acted on section 65.90 nine times without altering the language material to the opinion. *See* 1985 Wisconsin Act 225, sec. 29; ch. 203, secs. 1 and 2, Laws of 1981; ch. 418, sec. 408, Laws of 1977; ch. 224, sec. 73, Laws of 1975; ch. 224, Laws of 1973; ch. 211, secs. 77 and 124, Laws of 1971; ch. 154, sec. 28, Laws of 1971; ch. 40, sec. 30, Laws of 1971; and ch. 55, sec. 45, Laws of 1969. In two of those actions, the Legislature dealt specifically with section 65.90(5)(a) without making changes that would have altered the 1968 attorney general’s opinion.

Because the Legislature has acted on section 65.90 since the 1968 opinion without making any changes that would affect it, the opinion is entitled to considerable weight. *Town of Vernon v. Waukesha County*, 99 Wis. 2d 472, 478-80, 299 N.W.2d 593 (Ct. App. 1980), and *Wisconsin Valley Imp. Co. v. Public Serv. Comm.*, 9 Wis. 2d 606, 616-17, 101 N.W.2d 798 (1960).

Interpreting section 65.90(5) to require the two-thirds vote for transfer of the contingency funds in the municipalities covered by section 65.90 is consistent with sections 59.84(9) and 65.06(6)(a), (7) and (8), which require a two-thirds or three-fourths vote to transfer funds out of the contingency accounts in counties with populations over 500,000 and in first class cities.

In my opinion, then, the 20 to 16 vote that prompted your question was not sufficient to authorize the transfer from the con-

tingency fund because the twenty votes in favor of the transfer fell short of the needed two-thirds.

DJH:SK

Clerk of Courts; Courts; Fees; The only fee authorized to be paid any clerk of courts under section 102.26(1), Stats., in worker's compensation matters is a \$3 fee imposed under section 814.61(5) when applicable. OAG 34-87

June 29, 1987

PATRICK J. FARAGHER, *Corporation Counsel*
Washington County

You ask what fees may be charged by clerks of courts for judicial review actions in circuit courts or for appeals from judgments of circuit courts in worker's compensation cases. In my opinion, the only fee permitted is a \$3 fee for docketing or certifying judgments.

Chapter 102, Stats., is the worker's compensation statute. Section 102.23 governs judicial review actions in circuit courts and section 102.25 governs appeals from judgments of circuit courts under chapter 102. Section 102.26(1) governs fees and provides in pertinent part:

No fees may be charged by the clerk of any court for the performance of any service required by this chapter, except for the docketing of judgments and for certified transcripts thereof.

The fee for docketing and certifying judgments is set at \$3 by section 814.61(5). This \$3 fee is the only fee authorized by the statutes to be paid to clerks of courts in worker's compensation cases, and then only when applicable.

The specific provisions of section 102.26(1) prevail over any other statutory provisions which might be considered. *Schroeder v. City of Clintonville*, 90 Wis. 2d 457, 463-64, 280 N.W.2d 166 (1979). Thus, apart from section 814.61(5), the other fees prescribed by chapter 814 may not be charged by clerks of court for judicial review actions in circuit courts or for appeals from judgments of circuit courts in worker's compensation cases.

The language of section 102.26(1) has been unchanged since the original enactment of the Worker's Compensation Act in 1911. See sec. 2394-22, Stats. (1911). It appears not to have been a controversial section because the legislative notes submitted by the original drafting committee include no specific comment on the exemption from fees of clerks of court by the section.

The exemption from fees is consistent with the purpose of the Worker's Compensation Act, to wit: to relieve courts, employers and employes from the heavy costs, tremendous waste and long delays occasioned by personal injury actions arising from accidents at work, and to substitute a new system designed to deliver recompense fairly, efficiently and promptly. *Borgnis v. Falk Co.*, 147 Wis. 327, 367, 133 N.W. 209 (1911). As the court noted in *Borgnis*:

It has endeavored by this law to provide a way by which employer and employed may, if they so choose, escape entirely from that very troublesome and economically absurd luxury known as personal injury litigation, and resort to a system by which every employee not guilty of wilful misconduct may receive at once a reasonable recompense for injuries accidentally received in his employment under certain fixed rules, without a lawsuit and without friction.

. . . .

If experience shall demonstrate that it is practicable and workable and operates either wholly or in great measure to put an end to that great mass of personal injury litigation between employer and employee, with its tremendous waste of money and its unsatisfactory results, which now burdens the courts, the long and painstaking labors of those legislators and citizens who collaborated in framing it will be fittingly rewarded by a result so greatly to be desired. That result will mean a distinct improvement in our social and economic conditions.

Since the language of section 102.26(1) has remained unchanged since adoption of the original act in 1911, and since the exemption from court fees fits precisely into the low cost purposes of the act, I must conclude that section 102.26(1) means what it says. No fees may be charged by any clerk of courts for any service required by chapter 102, including the commencement of judicial review actions under section 102.23 and including appeals from judgments of circuit courts under section 102.25, except for the docketing of judgments and the certifying of transcripts of judgments.

DJH:JPA

Fees; Licenses And Permits; Mineral Rights; Natural Resources, Department Of; All staff work necessary to determine whether an applicant meets the requirements of the Metallic Mining Reclamation Act must be included in the cost of evaluating the permit, including any evaluation of compliance with other environmental requirements. The withdrawal of a mining permit application by the applicant prior to a final decision on the application does not relieve the applicant from the obligation to pay the cost of evaluation. OAG 35-87

June 29, 1987

CARROLL D. BESADNY, *Secretary*
Department of Natural Resources

You have requested my opinion on two questions related to the assessment of fees to cover the actual cost to the Department of Natural Resources, hereafter DNR, of evaluating a mining permit application. You ask what staff work should be covered by the application fee under section 144.85(2)(a), Stats., and Wis. Admin. Code §NR 132.06(3)(a). You also ask whether the withdrawal of a mining permit application prior to a final decision on the application affects the department's obligation to assess the mining permit fee. These questions arise from the mining permit application of Exxon Coal and Minerals Company that has recently been withdrawn by the company.

In answer to your first question, all staff time required to determine whether the applicant meets the requirements of the Metallic Mining Reclamation Act, hereafter MMRA, must be included in the mining permit application fee. The fact that such staff work may include a determination of compliance with nonmining permit, license or approval requirements related to the mining site does not exempt such work from the assessment.

My answer to your second question is that withdrawal of a mining permit application by the applicant prior to a final decision on the application by the DNR does not relieve the applicant of the obligation to pay the entire cost of evaluation.

Section 144.85(1)(a) provides that no person may engage in mining for metallic minerals without a mining permit covering the site. Under this section, a person desiring to mine must apply to the DNR for a mining permit. Section 144.85(2)(a) requires that:

The application shall be accompanied by a fee established by the department, by rule, which shall cover the estimated cost of evaluating the mining permit application. After completing its evaluation, the department shall revise the fee to reflect the actual cost of evaluation. The fee may be revised for persons to reflect the payment of fees for the same services to meet other requirements.

Pursuant to this section, the DNR has promulgated a rule relating to the payment of fees. Wisconsin Administrative Code §NR 132.06(3)(a) provides:

The application shall be accompanied by the following:

(a) A fee of \$10,000 to cover the estimated cost of evaluating the operator's mining permit application. Upon completion of its evaluation, the department shall adjust this fee to reflect the actual cost of evaluation less any fees paid for the same services to satisfy other requirements. Evaluation of a mining permit application shall be complete upon the issuance of an order to grant or deny a mining permit.

You have asked for clarification as to what staff work should be included in the cost of evaluating the operator's mining permit application. Specifically, you point out that, in order to construct and operate a mine, an applicant will also be required to obtain several additional departmental permits. In any particular mining operation, these permits would regulate activities affecting the surface water, groundwater and activities resulting in air pollution as well as the generation, treatment, storage and disposal of wastes. You ask if section 144.85(2)(a) requires that the cost of evaluating the nonmining permits be included in the mining permit application fee.

This raises a question of statutory interpretation, the purpose of which is to ascertain and give effect to the intent of the Legislature. *DeMars v. LaPour*, 123 Wis. 2d 366, 370, 366 N.W.2d 891 (1985). When interpreting a statute, the primary source of interpretation is the language of the statute itself. *State v. Consolidated Freightways Corp.*, 72 Wis. 2d 727, 737, 242 N.W.2d 192 (1976). The threshold question to be addressed when construing a statute is whether the language used is ambiguous. *State v. Engler*, 80 Wis. 2d 402, 406, 259 N.W.2d 97 (1977). As stated in *Stoll v. Adriansen*, 122 Wis. 2d 503, 510, 362 N.W.2d 182 (Ct. App. 1984), "if the statutory lan-

guage is plain and clearly understood, that meaning must be given to the statute." A statute is ambiguous if reasonable persons could disagree as to its meaning. The test for ambiguity is whether the statute is capable of being understood by reasonably well-informed persons in two or more different senses. *State v. Derenne*, 102 Wis. 2d 38, 45, 306 N.W.2d 12 (1981). When two interpretations of a statute are possible, the intent of the Legislature is disclosed by the language of the statute in relation to the scope, history, context, subject matter and the object intended to be remedied or accomplished. *State v. Automatic Merchandisers*, 64 Wis. 2d 659, 663, 221 N.W.2d 683 (1974).

The phrase "cost of evaluation" of the mining permit application as used in section 144.85(2)(a) is ambiguous because it is unclear whether the DNR costs associated with evaluating nonmining permits, licenses and approvals related to the mining operation are to be included in the application fee. One could take the position that the mining permit fee application applies only to DNR staff work which is solely attributable to the evaluation of the mining permit and that work done on other permits related to the mine and to the ultimate approval or disapproval of the permit to mine are not subject to the fee. An alternative view is that the mine permit is an "umbrella" permit under which all other permitting falls and therefore the costs of evaluating all DNR requirements related to the mining activities are subject to the permit fee.

For the reasons stated below, it is my opinion that all staff work necessary to determine whether a mining permit should be granted, including the evaluation of other environmental requirements, must be included in the mining permit application fee.

The intent of a statute must be derived from the act as a whole. *State ex rel. B'nai B'rith F. v. Walworth County*, 59 Wis. 2d 296, 308, 208 N.W.2d 113 (1973). A review of the MMRA, sections 140.82 to 144.94, reveals that the process of obtaining a mining permit was intended to provide for the comprehensive regulation of a metallic mineral mining operation. Section 144.83 gives the DNR broad authority to regulate exploration, prospecting, mining and reclamation.

The Legislature was aware that a mining operation would necessarily require the obtaining of nonmining permits, licenses and approvals from the DNR. It provided that the hearing on a mining

permit application is to be a master hearing and, when possible, is to include all environmentally related activities regulated by the DNR. Section 144.836 provides:

(1) SCOPE. (a) The hearing on the prospecting or mining permit shall cover the application and any statements prepared under s. 1.11 [environmental impact statements] and, to the fullest extent possible, all other applications for approvals, licenses and permits issued by the department.

The DNR has promulgated rules designed to use the mining permit as the means by which a comprehensive evaluation of the proposed mine operation takes place. Wis. Admin. Code §NR 132.01. The mining plan required to be submitted by the applicant must include plans for complying with all environmental requirements. Wis. Admin. Code §NR 132.07.

Each approval or denial of an application must be accompanied by detailed findings of fact, conclusions of law and an order. Sec. 144.85(5)(a)f.2., Stats. In order to issue a mining permit, the department must find, among other things, that:

The proposed operation will comply with all applicable air, groundwater, surface water and solid and hazardous waste management laws and rules of the department.

....

The proposed mine will not endanger public health, safety or welfare.

Sec. 144.85(5)(a)1.b. and d., Stats.

Plainly, the statutes require that DNR include in its evaluation of the mining permit application an evaluation of the applicant's compliance with all related environmental laws. This evaluation necessarily includes all information submitted in the application, all information received at the master hearing and any other information required by the department for its consideration when deciding whether to issue the permit.

The Legislature recognized that the mining application fee would necessarily overlap with costs normally assessed by the DNR when carrying out other regulatory responsibilities. It specifically provided for an offset so there would be no duplicative charges. Section 144.85(2)(a) provides: "[t]he fee may be revised for persons to reflect the payment of fees for the same services to meet other

requirements." This provision manifests the intent of the Legislature to include all of the actual costs of the evaluation even when the evaluation included "services" necessary to insure that other requirements are being met. The only limitation on the fee assessment is that it should be reduced in those circumstances where the services were already paid for under nonmining regulatory fees.

These other regulations provide for a variety of fee structures. For example, when an environmental impact statement is required, the full cost of preparation by the DNR is charged to the applicant. Sec. 23.40(3), Stats. Thus, any charges for work performed in preparing the environmental impact statement cannot be charged as a cost of the mining permit application fee.

Other fees assessed by the DNR are fixed amounts and are not based on actual costs. For example, a major new source of air pollution would be required to pay a basic fee of \$2,550. Wis. Admin. Code §NR 410.03(1)(a)3.¹ In this instance any evaluation costs associated with assuring compliance with air pollution control regulations that are in excess of the air permit fees and which have not been charged as part of the cost of preparation of an environmental impact statement are chargeable to the applicant as part of the mining permit application fee.

There are also DNR approvals that may be required in mining operations for which there is no fee. For example, section 144.025(2)(e) and Wis. Admin. Code ch. NR 112 require approval for high capacity wells. There is no fee charged for processing the approval. Thus, when the approval is done as part of the mining permit evaluation, the full cost of work done must be charged as part of the application fee.

The assessment of all of the actual costs associated with approving a metallic mineral mining operation reflects a legislative purpose to have the operator of the mine, rather than the public, bear the costs of approval. Like the preparation of an environmental impact statement, the effort required to decide whether to issue a mining permit may be substantial. In most instances, the evaluation

¹ Section 144.399(3) provides for an offset of air pollution permit fees for costs assessed by the DNR when doing air quality analysis on the same pollution source in conjunction with the preparation of an environmental impact statement. Thus, as in section 144.85, the Legislature sought to avoid duplicative costs while at the same time not allowing an applicant to avoid costs incurred by the DNR merely because the costs were related to one or more regulatory programs.

of nonmining permits that are related to the mining operation is a far more complex and demanding process than is normally the case in nonmining circumstances. The usual permit fees fall far short of covering these costs. In order to cover these expenses, the Legislature provided that the applicant pay all of the actual costs of all work necessary to decide on the application.²

Your second question asks whether withdrawal of the mining permit application prior to a final decision by the DNR affects your obligation to assess the mining permit fee. You point out that Wis. Admin. Code §132.06(3)(a) provides that the initial mining fee is \$10,000 and that upon completion of the evaluation the fee is to be adjusted to reflect the actual cost of evaluation. The rule states that the completion occurs upon the issuance of an order to grant or deny a mining permit. You note that Exxon Minerals and Coal Company withdrew its application shortly before the master hearing and that therefore the permit application will not be acted upon. In my opinion, the withdrawal of the application necessarily terminates the evaluation process and therefore the fee adjustment must reflect costs up to the time of withdrawal.

While it is correct that Wis. Admin. Code §NR 132.06(3)(a) does not appear to provide for this possibility, the rule should be construed to avoid an unreasonable or absurd result.³ *Wis. Environmental Decade v. Public Service Comm.*, 84 Wis. 2d 504, 528, 267 N.W.2d 609 (1978). Rules are subject to the same principles of construction as applied to statutes. *Law Enforce. Stds. Bd. v. Lyndon Station*, 101 Wis. 2d 472, 488, 305 N.W.2d 89 (1981).

The statute upon which the rule is based does not define when completion of the evaluation occurs. Sec. 144.85(2)(a), Stats. The legislative purpose to require reimbursement to the DNR for incurred costs would not be fulfilled if an applicant could make an eleventh hour withdrawal and thereby pass the costs to the public.

DJH:RAS

² The Legislature also took other measures to insure that an approved mining operation would not result in costs to the public. Section 144.86 requires a mine operator to post a bond to cover any state reclamation costs in the event the operator fails to comply with the MMRA or permit. This provision is further evidence of legislative intent that the costs of mining related activities should not be paid by the public.

³ If the lack of a denial of the application were to prevent DNR from recovering costs, the department could simply go through the otherwise meaningless exercise of issuing a denial, on the basis of the withdrawal.

Compatibility: Commander in the Brown County sheriff's department, a supervisory position, is not incompatible with the office of president of a village within Brown County. Abstention from participation in discussions or voting or resignation from one of the offices should be considered if a conflict arises. OAG 36-87

June 29, 1987

KENNETH J. BUKOWSKI, *Corporation Counsel*
Brown County

You have asked whether the offices of village president and commander in the Brown County sheriff's department are compatible.

You explain that the four commanders in the sheriff's department are in management positions working directly under the supervision of the sheriff. The commander is a deputized, non-bargaining unit, supervisory position in the department.

Currently, one of the commanders in the Brown County sheriff's department is president of a village that has contracted the department to provide law enforcement services for the village. The agreement requires the county to furnish full-time protection services to the village and requires the village to pay for the services at the same cost as the contract rates for the sheriff's department non-supervisory employes, to pay certain fringe benefits for the five deputies assigned to the village and to pay a support charge equal to forty percent of the contract costs.

The contract further provides that the assignment of officers to the village is within the discretion of the sheriff's department and shall be made on the same basis as assignments to other sections of the county. The contract, however, includes an exception that states that no officer shall be assigned to the village without the approval of the village. The approval cannot be withheld unreasonably or without just cause.

Your letter does not state whether the village president in his office of commander has any duties that affect the assignment of officers to the village or that directly affect the village in any other way.

Offices can be incompatible because a statute declares them to be so or they can be incompatible under the common law rule. I am not aware of any statute that declares the offices of village president

and supervisory deputy sheriff incompatible. The discussion of the common law of incompatibility set forth in 63 Am. Jur. 2d *Public Officers and Employees* §78 (1984) was quoted in 74 Op. Att'y Gen. 50, 52 (1985):

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.

Under these standards, the offices of supervisory deputy sheriff and village president are not incompatible. The offices are parts of separate governmental bodies and neither is subordinate to the other. The duties and functions of each office do not, by their nature, clash. Being roles in separate governmental bodies, the two offices would not normally face conflicts over salary negotiations,

supervision and control of duties or obligations to the public to exercise independent judgment.

The duties of the two offices are consistent to the extent that each is required to maintain peace and good order and see that the laws of its jurisdiction are obeyed. *See* secs. 59.24(1) and 61.24, Stats.

The contract between the village and the county creates a possibility of conflict between the offices of sheriff's commander and village president, however. Pursuant to paragraph C-4 of the contract, the village can refuse to approve an officer assigned to the village. In his role as commander, the village president might assign an officer to the village who would not meet with the approval of other villagers. The president then might be faced with a conflict in his role as commander and his role as president representing the villagers.

Paragraph C-5 of the contract provides that the person designated as liaison between the village and the county for the provision of police services "shall be the person holding the position of Patrol Commander within the organizational structure of the Brown County Sheriff's Department and the Allouez Village Administrator or their respective designee." A conflict may arise if the village president is the patrol commander. In that event, he would be representing the county as commander and in his role as village president he could strongly influence the village administrator who may be subordinate to him.

If either of these situations create possible conflicts, the advice previously given by this office is applicable: "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." 74 Op. Att'y Gen. at 54.

As in this case, where the Legislature has not specified that the offices are incompatible, and where conflicts are not readily visible by comparison of the normal duties of the offices, "the question of whether one person should hold more than one office is best left to the electors." 74 Op. Att'y Gen. at 54. In this case, that choice would be left with the voters of the village and the sheriff of Brown County.

DJH:SWK

Emergency Medical Services Act; Physicians And Surgeons: The coordinating physician, as defined in Wis. Admin. Code ch. H 21, is the person authorized to establish policies and procedures in providing emergency medical services under the Emergency Medical Services Act. OAG 37-87

July 6, 1987

KENNETH J. BUKOWSKI, *Corporation Counsel*
Brown County

You request my opinion as to who is authorized to establish policies and procedures to govern the provision of emergency medical services under the Emergency Medical Services Act, section 146.35, Stats.

It is my opinion that the coordinating physician, as defined in Wis. Admin. Code §H 21.02(4), has the exclusive authority to establish policies and procedures. If the policies and procedures are part of the emergency medical services programs plan, they are subject to the approval of the secretary of the Department of Health and Social Services.

Section 146.35(8) provides that the secretary of the Department of Health and Social Services may promulgate all rules necessary for the administration of the Emergency Medical Services Act. Pursuant to this authority, the secretary promulgated Wis. Admin. Code ch. H 21. A review of this chapter makes it clear that it is the coordinating physician who is authorized to establish the policies and procedures that control the providing of emergency medical services.

In Wis. Admin. Code §H 21.02(4) "coordinating physician" is defined as follows: "The licensed physician who will coordinate, direct and inspect continually and establish standard operating procedures, and oversee the conduct of emergency medical technicians-advanced (paramedics) in the county or municipality incorporated within the approved plan."

While this is not an explicit grant of authority to the coordinating physician, rules of statutory construction are applicable to the administrative code and one of the rules of statutory construction is that effect is to be given to every word or phrase. *Kollasch v. Adamany*, 104 Wis. 2d 552, 313 N.W.2d 47 (1981).

Additional authority is granted to the coordinating physician in Wis. Admin. Code §H 21.04(6), which sets forth one of the conditions for approval of emergency medical services plans:

Assurance that at least 2 licensed emergency medical technicians-advanced (paramedics) be present whenever they function as emergency medical technicians-advanced (paramedics). A physician or a nurse designated by the coordinating physician or a physician's assistant designated by the coordinating physician may replace one of the emergency medical technicians-advanced (paramedics).

It can be inferred from this provision that the intent of the rules promulgated by the secretary is that the coordinating physician have the authority to establish policies and procedures.

Further, nowhere in Wis. Admin. Code ch. H 21 is there any language suggesting that anyone other than the coordinating physician has the power to establish policies and procedures for providing emergency medical services.

Practical considerations support this conclusion. Many of the procedures performed by emergency medical technicians-advanced are procedures that would be performed by a licensed physician if the physician were physically present. Section 146.35(1)(d) authorizes emergency medical technicians-advanced to administer intravenous solutions, perform gastric and endotracheal intubation and administer parenteral injections when "voice contact with or without a telemetered electrocardiogram is monitored by a licensed physician and direct communication is maintained, upon order of such physician"

Further, section 146.35(1)(e) authorizes emergency medical technicians-advanced to "[p]erform other emergency *medical* procedures prescribed by rule by the department." The other procedures that emergency medical technicians-advanced are authorized by section 146.35(1) to perform are procedures that should be performed under standards established by a physician. Thus, it may be inferred that the secretary had in mind the supervising role of a licensed physician in providing emergency medical services when promulgating the rules.

For the reasons stated above, it is my opinion that the policies and procedures established by the coordinating physician are not

subject to approval by the Brown County Emergency Medical Services Council.

You also ask who appoints the coordinating physician. It is my opinion that the entity, a county, municipality, hospital or combination thereof, that submits the emergency medical services plan to the department pursuant to section 146.35(3) has the authority to appoint the coordinating physician.

DJH:WHW

Copyright; Natural Resources, Department Of; The Department of Natural Resources may seek to obtain copyrights for publications entitled "Walleye Waters," "Trout Waters," "Musky Waters" and "Canoe Waters" which were written and compiled by state employes on state time provided the copyrights have not been invalidated due to the omission of the copyright notice. OAG 38-87

July 6, 1987

CARROLL D. BESADNY, *Secretary*
Department of Natural Resources

You have requested my opinion as to whether the Department of Natural Resources may copyright various documents or publications which have been written or compiled by state employes on state time.

You state: "This issue has arisen by virtue of requests by private enterprises who want to reprint or reproduce four DNR publications ("Walleye Waters", "Trout Waters", "Musky Waters", and "Canoe Waters") for sale to the public. By copyrighting the publications, the Department would be able to regulate or prohibit their sale."

It is my opinion that the Department of Natural Resources may acquire copyrights in the above-mentioned publications provided they are still valid under the provisions of 17 U.S.C. §405. Under the Federal Copyright Act, 17 U.S.C. §105, copyright protection "is not available for any work of the United States Government," but there is no similar provision relating to state governments. The statute relating to copyrights, 17 U.S.C. §102, is not restricted to private parties and there is no reason to imply such restriction. It would appear, in fact, that the opposite inference is justified since only one governmental entity, the United States government, is specifically excluded from the protection afforded by the act. This is consistent with 36 Op. Att'y Gen. 356, 357 (1947) which concluded that "a state may acquire a copyright on the works of its employes."

The extent to which a state may obtain copyright protection, however, depends on state law and policy and is "subject to exceptions dictated by public policy with respect to such publications as statutes and judicial opinions." Latman, *The Copyright Law* 43 (5th ed. 1979). Statutes and judicial opinions are deemed to be within

the public domain and are, therefore, not copyrightable by either individuals or states. *State of Ga., Etc. v. Harrison Co.*, 548 F. Supp. 110 (N.D. Ga. 1982). It would appear that state administrative codes are also within the public domain and exempt from copyright protection. *Bldg. Officials & Code Adm. v. Code Tech. Inc.*, 628 F.2d 730 (1st Cir. 1980).

Having reviewed the publications referred to in your opinion request, I am of the opinion they are not of the nature of statutes and judicial opinions and are not in the public domain. Thus, such publications would appear to qualify for copyright protection under 17 U.S.C. §102, provided copyrighting the publications would not be inconsistent with any state law or policy.

Since Wisconsin's public records law, section 19.32(2), Stats., defines "record" so as not to include "materials to which access is limited by copyright, patent or bequest," there would appear to be no state law or policy which would prohibit your department from acquiring copyrights in the above-mentioned publications. There is, however, a requirement that a notice of copyright appear on all "publicly distributed copies" of any such publications. 17 U.S.C. §401. Under 17 U.S.C. §405, the omission of notice will invalidate the copyright unless at least one of three conditions is met:

- (1) the notice has been omitted from no more than a relatively small number of copies or phonorecords distributed to the public; or
- (2) registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered; or
- (3) the notice has been omitted in violation of an express requirement in writing that, as a condition of the copyright owner's authorization of the public distribution of copies or phonorecords, they bear the prescribed notice.

Obviously, the department cannot meet either condition (1) or (3). It also appears unlikely that the department will be able to meet condition number (2) since the publications have been distributed to the public for a considerable period of time. If that period is more than five years, the department no longer has a valid copyright interest. If any of the publications have been distributed for a

period less than five years, and your department still desires a copyright, you should add the proper copyright notice to the publications and attempt to register the works with the Register of Copyrights as soon as possible. I am, of course, not expressing an opinion on whether the registration will be accepted.

DJH:GSW

Courts: A trial court does not have the authority to stay the execution of a sentence of imprisonment to the county jail for more than sixty days except for legal cause or when placing a person on probation; overcrowding does not constitute legal cause under section 973.15(8)(a), Stats. OAG 39-87

July 13, 1987

JOHN P. RUNDE, *District Attorney*
Portage County

You have asked me the following question: "Does a court have the authority to stay the imposition [execution] of a sentence to the county jail for a period longer than 60 days?" The answer is no except for legal cause.

You state that the Portage County Jail is overcrowded and that, as a result, the jailor for the Portage County Sheriff's Department is delaying the execution of sentences for traffic offenses for as long as a year.

Section 973.15(8), Stats., provides:

The sentencing court may stay execution of a sentence of imprisonment only:

- (a) For legal cause;
- (b) Under s. 973.09(1)(a); or
- (c) For not more than 60 days.

The purpose of section 973.15(8) was explained in the Judicial Council Note, 1981:

Sub. (8) has been added to specify the circumstances under which execution of a sentence of imprisonment may be stayed. Par. (a) references the rule of *Reinex v. State*, 51 Wis. 152 (1881) and *Weston v. State*, 28 Wis. 2d 136 (1965), whereby execution can be stayed for "legal cause", such as during the pendency of an appeal. Par. (b) cross-references the probation statute. Par. (c) is new. It allows the court to delay the commencement of a sentence for up to 60 days. The Wisconsin supreme court recently held that courts have no authority to stay execution of a sentence of imprisonment in the absence of such a statutory provision or legal cause. *State v. Braun*, 100 Wis. 2d 77 (1981).

The first question that must be answered is whether section 973.15(8) applies to jail sentences as well as prison sentences. The answer is yes.

Section 990.01 provides:

Construction of laws; words and phrases. In the construction of Wisconsin laws the words and phrases which follow shall be construed as indicated unless such construction would produce a result inconsistent with the manifest intent of the legislature:

(1) General Rule. All words and phrases shall be construed according to common and approved usage; but technical words and phrases and others that have a peculiar meaning in the law shall be construed according to such meaning.

The common and approved meaning can be ascertained by reference to a recognized dictionary. *State v. Kay Distributing Co., Inc.*, 110 Wis. 2d 29, 35, 327 N.W.2d 188 (Ct. App. 1982). "Imprisonment" is defined in Black's Law Dictionary 681 (5th ed. 1979) as follows:

The act of putting or confining a man in prison. The restraint of a man's personal liberty; coercion exercised upon a person to prevent the free exercise of his powers of locomotion. *It is not a necessary part of the definition that the confinement should be in a place usually appropriated to that purpose*; it may be in a locality used only for the specific occasion; or it may take place without the actual application of any physical agencies of restraint (such as locks or bars), as by verbal compulsion and the display of available force. Every confinement of the person is an "imprisonment," whether it be in a prison, or in a private house, or even by forcibly detaining one in the public streets. Any unlawful exercise or show of force by which person is compelled to remain where he does not wish to be.

(Emphasis added.) This definition is clearly broad enough to include jail sentences as well as prison sentences.

Furthermore, in construing a statute, the entire section and related sections are to be considered. *State v. Clausen*, 105 Wis. 2d 231, 244, 313 N.W.2d 819 (1982). A statute should be construed to give effect to its leading idea, and the entire statute should be brought into harmony with the statute's purpose. *Ibid.* Sections of

statutes relating to the same subject matter must be construed in *pari materia*. *Ibid*.

A number of sections in chapter 973 use the term "imprisonment" to include jail sentences. For example, section 973.015(1) refers to "imprisonment for one year or less in the county jail." Section 973.02 provides that the "place of imprisonment" when the sentence is less than one year shall be "the county jail." Section 973.03(3)(a) refers to "imprisonment in the county jail." And section 973.035 refers to "sentence of imprisonment to . . . a county jail." Since all of these sections, as well as section 973.15(8), relate to sentencing, they should be construed in *pari materia*. Hence, the term "imprisonment" as used in section 973.15(8) should be construed to include jail sentences.

Since subsection (b) of section 973.15(8) is merely a cross-reference to the probation statute which has no application in the present context, the question that remains is whether an overcrowded jail constitutes "legal cause" as that term is used in section 973.15(8)(a). The answer is no.

In *State v. Shumate*, 107 Wis. 2d 460, 465, 319 N.W.2d 834 (1982), the court reviewed a number of cases dealing with the power of a trial court to stay the execution of a sentence. The court concluded that a trial court has no inherent power to stay execution of a sentence in the absence of statutory authority or legal cause. *Ibid*. The court also concluded, quoting from *State v. Braun*, 100 Wis. 2d 77, 85, 301 N.W.2d 180 (1981), that although:

"Precisely what constitutes legal cause for the stay of execution of sentence has not been defined in detail in our law," it is apparent that this term, "legal cause," means that a stay or release on bail is appropriate *only* when the defendant has the right to pursue within the Wisconsin court system *some relief against the sentence or conviction*.

Shumate, 107 Wis. 2d at 465; emphasis added.

Since the Judicial Council Note makes specific reference to *Braun*, it seems clear that "legal cause," for purposes of section 973.15(8)(a), should be given the narrow interpretation given that term by the supreme court in *Shumate*. Consequently, an overcrowded jail would not constitute legal cause for staying execution of a sentence beyond sixty days.

It should be noted, however, that section 973.03(1) provides that “[i]f at the time of passing sentence upon a defendant who is to be imprisoned in a county jail there is no jail in the county suitable for the defendant . . . the court may sentence the defendant to any suitable county jail in the state.” Since an overcrowded jail would not be suitable, it may be appropriate for the court to use section 973.03(1) to alleviate the overcrowded jail conditions that exist in Portage County.

DJH:JG

Counties; Public Purpose Doctrine; Under appropriate circumstances, a county may appropriate county funds reasonably necessary for improvement, maintenance and operation of county property which is not deemed to be surplus, even though such property may no longer be required for the public purpose for which it was originally acquired and is not currently required for some other specific public use. OAG 40-87

July 13, 1987

FRED A. RISSER, *Chairperson*
Senate Organization Committee

The Senate Committee on Organization has requested an opinion on whether a county board may appropriate county funds for capital improvements, maintenance and operation of a county farm when "the county farm does not house county charges or is not used to house persons in need of public aid or support and is not being used for development, park or recreational purposes." It is assumed for the purpose of this opinion that such county farm was initially acquired for an authorized public purpose, a county poor farm, and that the county board has not declared that the farm is surplus property. I also assume that the county is continuing to operate the property in a manner which is similar to that in which it was operated prior to the discontinuation of its use as a county poor farm.

In *Buell v. Arnold*, 124 Wis. 65, 70, 102 N.W. 338 (1905), the court advised that "[c]ounties are parts of the state government, exercising delegated political powers for public purposes, and can take and hold lands for public use only. They cannot hold property for profit, or take title to it for the purpose of revenue, the same as an individual or private corporation." It was also pointed out in 41 Op. Att'y Gen. 162 (1952) that while a county may maintain and operate a farm in connection with, and as an incident to, certain institutions of a charitable, penal or civic nature, it may not maintain and operate such a farm as a separate enterprise. However, neither of these opinions indicate that the county may not continue to provide for such maintenance, operation and improvements of its public property as may be reasonably necessary, simply because the county has determined that certain of its property is no longer required or useful for the public purposes for which it was originally acquired or because the county may have no immediate spe-

cific public use to which the property may be put. Moreover, counties are not required by law nor expected to disregard ordinary sound business principles and practices which may reasonably dictate the retention of assets in reasonable amounts to meet the needs of an on-going operation. See *Fiore v. Madison*, 264 Wis. 482, 486, 59 N.W.2d 460 (1953). ; *Blue Top Motel, Inc. v. City of Stevens Pt.*, 107 Wis. 2d 392, 398-99, 320 N.W.2d 172 (1982); 73 Op. Att'y Gen. 125, 127 (1984); 76 Op. Att'y Gen. 77 (1987).

It is my opinion that once a county acquires property for a valid public purpose, it is not suddenly *ultra vires* for a county to continue to own, manage and maintain such property when that specific purpose for which such property was originally acquired ceases. The ownership of real property by a public body, such as a county, should be viewed from the perspective that such body is essentially perpetual. In the overall continuum, it may reasonably be expected that there will be periods where a public property may no longer be required or useful for the specific public purpose which justified its original acquisition, yet also not be considered as surplus by the governmental body involved, even though there may be no immediate public use to which the property may be put. In fact, under appropriate circumstances, the retention of property originally acquired by the county for a now terminated public use, in order to insure its continued availability, may itself be legitimately viewed as serving a valid continuing public purpose.

For instance, it has long been generally recognized that a municipal corporation may lease its property which is not required for a municipal or other public purpose. *Annot.*, 47 A.L.R. 3d 19, 67 (1973), "Power of Municipal Corporation to Lease or Sublet Property Owned or Leased by It"; 10 McQuillin *Municipal Corporations* §28.42 (1981); *S.D. Realty Co. v. Sewerage Comm.*, 15 Wis. 2d 15, 112 N.W.2d 177 (1961); *Smith v. Wisconsin Rapids*, 273 Wis. 58, 76 N.W.2d 595 (1956); *Bell and another v. The City of Platteville*, 71 Wis. 139, 36 N.W. 831 (1888); 58 Op. Att'y Gen. 179, 180-82 (1969). This rule undoubtedly extends to quasi-municipal corporations, such as counties. See *S.D. Realty Co.*, 15 Wis. 2d at 27-28; *Madison v. Hyland, Hall & Co.*, 73 Wis. 2d 364, 370, 243 N.W.2d 422 (1976); sec. 59.07(1), Stats. It has also been recognized that although a municipal corporation lacks authority to purchase a farm in the first instance for other than a public purpose, it may nevertheless lawfully own, manage and maintain such a farm for its

own pecuniary advantage and profit pending determination as to its ultimate disposition. *Libby v. City of Portland*, 105 Me. 370, 74 A. 805, 806 (1909).

The manner in which such property is operated during the interim period between one specific public use and another is largely within the discretion of the governing body involved. Determinations as to whether a particular utilization of public property legitimately satisfies the immediate or prospective wants or needs of a municipality are said to be "largely within the discretion of municipal authorities, and that courts should not interfere with such discretion except in a plain case of its abuse." *Bell*, 71 Wis. at 145; *Stone v. Oconomowoc*, 71 Wis. 155, 36 N.W. 829 (1888). Where the issue involves a legislative determination of public need and public purpose, the courts will only find an absence of such need or purpose if it is "clear and palpable" that there can be no public benefit. *See State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 56, 205 N.W.2d 784 (1973).

The public purpose doctrine, which dictates that there can be no expenditure of public funds to satisfy a private rather than a public purpose, is a limitation of constitutional origin which applies to entities operating under delegated power, such as counties, because the state cannot delegate more power than it has. *Barth v. Monroe Board of Education*, 108 Wis. 2d 511, 514-15, 322 N.W.2d 694 (Ct. App. 1982); *Hammermill*, 58 Wis. 2d at 47-48. The authority of such entities to expend public funds must tend to the preservation of the general public welfare, and "[i]n order for a municipality to employ taxes to carry on a competitive business, such business must involve a public function or be concerned with some element of public utility." *Heimerl v. Ozaukee County*, 256 Wis. 151, 160, 40 N.W.2d 564 (1949).

Therefore, the county must take care to insure that there not be so little public purpose in maintaining the operation of such property that specific expenditures in reference to the same would be deemed to violate the prohibition against taxing for purposes other than a public purpose. *See Barth*, 108 Wis. 2d at 520. An analysis might well consider such things as the type of activity carried on, the duration of such use, the amount of funds necessarily expended and control and accountability, since a reviewing court would evaluate both "the public purpose and the means of attaining it." *State ex rel. Warren v. Reuter*, 44 Wis. 2d 201, 213, 170 N.W.2d 790

(1969). However, what constitutes a public purpose is a continually evolving concept, and “[t]he trend of both legislative enactments and judicial decisions is to extend the concept of public purposes in considering the demands upon municipal governments to provide for the needs of the citizens.” *Hammermill*, 58 Wis. 2d at 55-56.

DJH:JCM

County Board; County Executive; Land Conservation Committee; Appointments to a county land conservation committee, created by the county board pursuant to section 92.06, Stats., are made by the county board, not by the county executive. OAG 41-87

July 13, 1987

DENNIS KENEALY, *Corporation Counsel*
Fond du Lac County

You request my opinion whether it is the county executive or the county board which has the authority to make appointments to the land conservation committee, created by the county board pursuant to section 92.06, Stats.

In my opinion, appointments to the Land Conservation Committee are to be made by the county board and not by the county executive.

Prior to 1982, chapter 92, then entitled the "soil and water conservation district law," provided for soil and water conservation programs and functions implemented in part through an organizational structure which included a state board of soil and water conservation districts and county soil and water conservation districts. At that time, the Legislature viewed the question of whether conservation of soil, water or related resources presented a problem of public concern within a particular county as a matter to be determined by each county board. If a county board of supervisors determined that conservation of soil, water or related resources presented a problem of public concern in the county, it could declare the county to be a soil and water conservation district. Sec. 92.05, Stats. (1979-80). In that event, the statutes provided that the county board's agricultural and extension committee, created under section 59.87(2), which could be augmented by not more than two additional non-county board members, would be the supervisors of said district. Sec. 92.06, Stats. (1979-80).

By the enactment of chapter 346, Laws of 1981, however, the Legislature recognized that the continual depletion of our soil resources by wind and water erosion and nonpoint sources of pollution had become "state problems" which were endangering our state's citizens, resources and productivity. It, therefore, abolished both the existing state board and the county soil and water conservation districts and created a new state land conservation board

and required the creation of a county land conservation committee by the county board in every county. Section 92.06 now provides that each county board "shall appoint to the land conservation committee" at least two persons who are members of the committee on agriculture and extension education, created under section 59.87(2), a person from the county agricultural stabilization and conservation committee, any number of county board members and not more than two additional non-county board members.

As you point out, in counties having an elected county executive that executive makes most of the appointments which would otherwise normally be made by the county board or county board chairperson. The principal appointment powers of the county executive in your county are set forth in section 59.031(2)(br) and (c), which provides in part as follows:

(br) In any county with a population of less than 500,000, appoint and supervise the heads of all county departments except those elected by the people and except where the statutes provide that the appointment shall be made by other elected officers. Notwithstanding any statutory provision that a board or commission or the county board or county board chairperson appoint a department head, except s. 17.21, the county executive shall appoint and supervise the department head. Notwithstanding any statutory provision that a board or commission supervise the administration of a department, the department head shall supervise the administration of the department and the board or commission shall perform any advisory or policy-making function authorized by statute. . . .

(c) Appoint the members of all boards and commissions where appointments are required and where the statutes provide that the appointments are made by the county board or the chairperson of the county board.

Similar appointment authority may be exercised by county administrators in counties which have such a chief administrative officer. *See* sec. 59.033(2)(b) and (c), Stats.

You express the view that the county executive has authority to appoint the members of the Land Conservation Committee pursuant to above provisions of section 59.031(2)(c), since you feel such committee more clearly equates with a typical "board" or "commission" than with the more traditional standing committee of the

county board, created under section 59.06. However, in 61 Op. Att'y Gen. 116 (1972), this office rejected the argument that the Legislature intended to include the appointment of members of committees which were in the nature of boards and commissions within the appointive power of the county executive. That opinion addressed the same language as contained in present section 59.031(2)(c) and concluded that the Legislature used the words "boards and commissions" advisedly to the exclusion of "committees," whether such "committees" were created under section 59.06 or some other statutory authority. 61 Op. Att'y Gen. at 119-20. I believe that that interpretation of the operative statutory language is correct. Such a long-standing construction by the attorney general will be given great weight by the courts. *State v. Smith*, 50 Wis. 2d 460, 471-72, 184 N.W.2d 889 (1971); *Elkhorn School Dist. v. East Troy School Dist.*, 110 Wis. 2d 1, 4, 327 N.W.2d 206 (Ct. App. 1982). In my opinion, it may reasonably be presumed that the Legislature acted advisedly and with full awareness of such board-commission/ committee distinction when it recreated a version of section 92.06 which retained the committee format.

There are other indications in revised chapter 92 which support the conclusion that the Legislature intended the Land Conservation Committee to function as part of the committee structure of county government, despite its rather broad statutorily delegated powers. For instance, section 92.06(1)(d) provides that committee members "shall be paid the same per diem as members of other county board committees" and section 92.06(1)(e) provides that "[t]he county board may assign other programs and responsibilities to the land conservation committee."

In addition, several partial vetoes of 1981 Senate Bill 72, which ultimately became chapter 346, Laws of 1981, likewise reflect legislative policy supporting the conclusion reached above. *See State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 708-09, 264 N.W.2d 539 (1978). The drafting files of the Legislative Reference Bureau indicate that the Governor vetoed two subsections of section 92.06 which would have allowed the Land Conservation Committee to designate its own chairperson and provide for separate budget preparation. The Governor's veto message in references to these vetoes advised in part that "[t]hese sections are vetoed because each county board has its own procedures for choosing committee chairs

and preparing committee budgets.” The Governor also advised that he vetoed certain language in section 92.07(1):

[T]o 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.

The latter veto was previously discussed in 74 Op. Att’y Gen. 227, 233 (1985).

Under the above-quoted provisions of section 59.031(2)(br), the county executive is the appointing authority for all county department heads, except those departments headed by an official elected by the people or when the statutes provide for appointment by other elected officers, but the executive appoints any department head which would be appointed under the statutes by a board or commission, the county board or the county board chairperson in the absence of a county executive. Chapter 92 contains no express provision for the creation of either a department or a department head, and it is my opinion that the land conservation committee is not a “department head” within the contemplation of the statutes.

Section 92.09 does authorize employment of a staff to assist the county in carrying out its statutory duties and responsibilities under chapter 92. As originally passed by the Legislature, that statute provided:

The land conservation committee may employ county soil and water conservation staff, subject to the approval of the county board. The county soil and water conservation staff [, under the direction of the committee,] is responsible for the administration of the county soil and water conservation program and may exercise the powers granted to the land conservation committee.

However, the Governor vetoed the bracketed language and submitted the following veto message to the Legislature:

I have vetoed the language “under the direction of the committee” as it relates to local land conservation committee staff supervision to recognize that various counties may handle their administrative responsibilities differently. For example, land

conservation committee staff could be in a division which reports to a department head, who in return reports to a committee.

This statement, as well as the Governor's other comments explaining his partial vetoes of 1981 Senate Bill 72, evince the intent that the county Land Conservation Committee functions, not as a department head, but as a committee responsible to the county board for carrying out the state land conservation program in a manner as consistent with that individual county's local administrative structure as the language of chapter 92 will permit. In some counties this might, in fact, involve the appointment of a department head by a county executive.

DJH:JCM

Conflict Of Interest; Contracts; County Board; Public Officials; Section 946.13, Stats., which prohibits private interests in public contracts, applies to county board or department purchases aggregating more than \$5,000 from a county supervisor-owned business. OAG 42-87

August 21, 1987

GARY J. SCHUSTER, *District Attorney*
Door County

You have asked for my opinion whether section 946.13(1), Stats., is violated under the following situations.

In the first case, a county board supervisor owns a small business that is sufficiently large that he is not on the premises at all times. Throughout the year, various county departments purchase from the store items that are budgeted for but which do not require bids. County policy does not require prior committee approval before the purchases, which are not immediately paid for. For payment, vouchers are submitted to the finance committee and then to the entire county board for review and approval. The owner of the store sits on the finance committee and votes on the approval of the vouchers. Almost inevitably, the vouchers for all purchases, including those from other stores as well as the supervisor's, are approved unanimously. During the year, the aggregate of county purchases from the supervisor's store exceeds \$5,000.

In the second case, another supervisor owns a printshop from which various county departments purchase stationery, books, directories, etc., for a total amount of less than \$5,000 a year. In addition, however, the county board negotiates and enters into a contract with this supervisor for the printing of the county's business stationery and directories. The amount of this contract is barely under \$5,000. The total of the contract and the purchases exceeds \$5,000. The supervisor does not absent himself from meetings or voting on approval of vouchers.

The relevant parts of section 946.13 provide:

Private interest in public contract prohibited. (1) Any public officer or public employee who does any of the following is guilty of a Class E felony:

(a) In his private capacity, negotiates or bids for or enters into a contract in which he has a private pecuniary interest, direct or

indirect, if at the same time he is authorized or required by law to participate in his capacity as such officer or employe in the making of that contract or to perform in regard to that contract some official function requiring the exercise of discretion on his part; or

(b) In his capacity as such officer or employe, participates in the making of a contract in which he has a private pecuniary interest, direct or indirect, or performs in regard to that contract some function requiring the exercise of discretion on his part.

(2) Subsection (1) does not apply to the following:

(a) Contracts in which any single public officer or employe is privately interested which do not involve receipts and disbursements by the state or its political subdivision aggregating more than \$5,000 in any year.

In my opinion, both supervisors are in violation of subsections (a) and (b) of section 946.13(1).

The supervisors are violating subsection (b) because in their official capacity they are performing in regard to contracts in which they have a pecuniary interest, a function requiring the exercise of their discretion when they vote on the vouchers that approved the payment to their respective businesses. Voting to approve the vouchers is a function performed in regard to the contract. *See* 24 Op. Att’y Gen. 422, 423 (1935), in which it was stated that an officer in his official capacity acts upon a contract when he, among other things, is under legal obligation to “pay the bill for the services or goods or to approve the purchase price and order warrants to be drawn in payment thereof.”

The supervisors can avoid violation of subsection (b) by abstaining from voting on the vouchers related to their respective businesses. Because actual participation in one’s official capacity is required to violate section 946.13(1)(b), my predecessors and I have concluded that violation of subsection (b) can be avoided by not participating in the making of the contract or in the performance of a function requiring the exercise of the official’s discretion. *See* 76 Op. Att’y Gen. 92 (1987); 76 Op. Att’y Gen. 15 (1987); 75 Op. Att’y Gen. 172 (1986); and 63 Op. Att’y Gen. 43 (1974).

The only way for the supervisors to do business with the county and avoid violating subsection (a), however, is to make sure that

their sales to the county do not exceed a total of \$5,000 in a year. The three elements required for violation of subsection (a) are:

(1) a direct or indirect private pecuniary interest in a public contract; (2) negotiating, bidding or entering into the contract in a private capacity; and (3) being authorized or required to participate in the making of the contract or to perform some act with regard to the contract in an official capacity.

75 Op. Att'y Gen. at 173.

All three elements are satisfied in the situations you presented. The supervisors certainly have a pecuniary interest in the county's purchase of products from their respective businesses. The supervisors participated in their private capacities in the county's purchases because the county made the purchases from the supervisors' businesses. It would be immaterial if the business employee directly involved in the sale was someone other than the owner-supervisor. 4 Op. Att'y Gen. 205 (1915). When the sale was made, the supervisor participated through the actions of his or her agent. 75 Op. Att'y Gen. at 173. The third element would have been satisfied even if the supervisors had abstained from voting on the vouchers since the third element does not require actual participation in one's official capacity. This element is satisfied as long as the supervisor has the authority to act in regard to the contract in his or her official capacity. Because the supervisor has the authority to approve the vouchers for payment to his or her business, the third element is satisfied.

The dollar limit imposed by section 946.13(2) must always be kept in mind, however. Even if the supervisor participates in both his or her private and official capacities, there is no violation of the statute unless the receipts or disbursements by the county in regard to the individual supervisor exceed \$5,000 for the year. Therefore the supervisors can continue to do business with the county as long as that \$5,000 limit is not exceeded.

The conclusions reached in this opinion might be viewed by some as placing both the supervisors and the county at a disadvantage by limiting the possible parties with which each can do business. My conclusions, however, are consistent with earlier opinions, which advised that officials could not exceed the applicable dollar limit in doing business with their respective jurisdictions. See 34 Op. Att'y Gen. 430 (1945); 25 Op. Att'y Gen. 357 (1936); 25 Op.

Att'y Gen. 308 (1936); 24 Op. Att'y Gen. 312 (1935); 22 Op. Att'y Gen. 262 (1933); 21 Op. Att'y Gen. 537 (1932); 18 Op. Att'y Gen. 329 (1929); and 4 Op. Att'y Gen. 205 (1915). The Legislature has tried to reduce the disadvantage by raising the dollar limit over the years to the current \$5,000 figure.

DJH:SWK

Bids And Bidders; County Board; Words And Phrases; Section 59.08(1), Stats., does not apply to architectural services. OAG 43-87

August 21, 1987

DARWIN L. ZWIEG, *District Attorney*
Clark County

You ask whether architectural services are subject to the competitive bidding requirements of section 59.08, Stats., including the requirement that the county board advertise its intent to let contracts between \$5,000 and \$20,000. If section 59.08 does not apply to architectural services, you ask whether the county could nonetheless advertise for those services. I conclude that section 59.08 does not apply to architectural services but the county may advertise for proposals for architectural services.

Section 59.08(1) states:

All public work, including any contract for the construction, repair, remodeling or improvement of any public work, building, or furnishing of supplies or material of any kind where the estimated cost of such work will exceed \$20,000 shall be let by contract to the lowest responsible bidder. Any public work, the estimated cost of which does not exceed \$20,000, shall be let as the board may direct. If the estimated cost of any public work is between \$5,000 and \$20,000, the board shall give a class 1 notice under ch. 985 before it contracts for the work or shall contract with a person qualified as a bidder under s. 66.29(2).

“Public work” is not defined. In *Flottum v. Cumberland*, 234 Wis. 654, 662-63, 291 N.W. 777 (1940), our supreme court interpreted section 62.15(1), which required cities to award contracts to the lowest responsible bidder for “all public work,” as not including architectural services. Because both sections 62.15(1) and 59.08(1) involve public bidding, they should be considered *in pari materia* and construed together. *Glinski v. Sheldon* 88 Wis. 2d 509, 519, 276 N.W.2d 815 (1979). The predecessor to present section 59.08 became law approximately five years after the court’s decision in *Flottum*. The court’s interpretation of “public work” in section 62.15(1) became part of that statute because the statute was not amended. The Legislature’s use of “public work” in the county bidding statute so soon after the court’s interpretation of that

phrase as not including architectural services in the city bidding statute leads me to conclude that the Legislature did not intend architectural services to be included. *Salerno v. John Oster Mfg. Co.*, 37 Wis. 2d 433, 155 N.W.2d 66 (1967).

In 65 Op. Att'y Gen. 251 (1976), section 16.75 was interpreted as requiring the state to comply with state bidding requirements before purchasing architectural and engineering services. That interpretation, however, rested on the definition of "contractual services" in section 16.70 as including "all materials and services." The opinion noted that the court's holding in *Flottum* that services requiring professional education and experience were not included in bidding requirements was the general rule in most jurisdictions.

In *Aqua-Tech v. Como Lake Protect. & Rehab. Dist.*, 71 Wis. 2d 541, 546, 239 N.W.2d 25 (1976), the court reaffirmed its holding in *Flottum* and noted that the professional services exception to the usual bidding requirements has been "engrafted onto bid statutes by judicial construction on the theory that public bodies should be free to judge the professional qualifications of those who are to perform such services." *Aqua-Tech*, 71 Wis. 2d at 546. In light of this legislative history, I must conclude that the Legislature did not intend to include architectural and engineering services within the definition of "public work" in section 59.08.

Because professional services are not included within the definition of "public work," the county need not advertise its intent to let a contract involving professional services. The county could decide that it is good public policy to advertise for proposals to provide architectural services. "Statutory bidding requirements [are designed] to prevent fraud, collusion, favoritism and improvidence in the administration of public business, as well as to insure that the [public] receives the best work or supplies at the most reasonable price practicable." *Blum v. Hillsboro*, 49 Wis. 2d 667, 671, 183 N.W.2d 47 (1971). It certainly would be reasonable for a county to conclude that what is true of all other contracts is also true for professional services.

DJH:AL

Contracts; Farmland Preservation Credit; Land Conservation Committee; Land conservation committee responsibilities and prohibition of private interest in public contracts discussed.
OAG 44-87

August 24, 1987

CARROLL D. BESADNY, *Secretary*
Department of Natural Resources

HOWARD C. RICHARDS, *Secretary*
Department of Agriculture, Trade and Consumer Protection

You have asked for an opinion concerning the application of section 946.13, Stats., which prohibits a private interest in a public contract, to various grant programs administered by your agencies through county land conservation committees (committees). Land conservation committees are created by county boards under section 92.06. Section 92.07(3) gives them the authority to distribute and allocate federal, state and county funds made available for cost-sharing programs or other incentive programs for improvements and practices relating to soil and water conservation on private or public lands. The members of the committee are appointed by the county board for two year terms. Sec. 92.06(1)(c), Stats.

The relevant parts of section 946.13 provide:

Private interest in public contract prohibited. (1) Any public officer or public employe who does any of the following is guilty of a Class E felony:

(a) In his private capacity, negotiates or bids for or enters into a contract in which he has a private pecuniary interest, direct or indirect, if at the same time he is authorized or required by law to participate in his capacity as such officer or employe in the making of that contract or to perform in regard to that contract some official function requiring the exercise of discretion on his part; or

(b) In his capacity as such officer or employe, participates in the making of a contract in which he has a private pecuniary interest, direct or indirect, or performs in regard to that contract some function requiring the exercise of discretion on his part.

Public employes and officers can avoid violations of subsection (b) by abstaining from voting on contracts related to their private business because actual participation in one's official capacity is required to violate section 946.13(1)(b). 76 Op. Att'y Gen. 92 (1987); 76 Op. Att'y Gen. 15 (1987); 75 Op. Att'y Gen. 172 (1986); and 63 Op. Att'y Gen. 43 (1974). The strictures of subsection (a), however, cannot be avoided by abstaining from official action because a violation of subsection (a) occurs if the public officer is even authorized to participate in the making of the contract or to perform some official discretionary function concerning the contract.

Specific questions have arisen concerning the committees' functions under the erosion control program, section 92.10, the soil and water conservation program, sections 92.104 and 92.105, the nonpoint source water pollution abatement program, section 144.25, and the Wisconsin farmers fund program, section 92.15. There may be slight variations in the way the counties administer specific programs. As the following discussion illustrates, however, the potential for a land conservation committee member violating section 946.13 exists under all of the programs mentioned.

Under the soil erosion control program, section 92.10, the county land conservation committee prepares and implements a soil erosion control plan for the county. Land owners or land users are eligible to receive state grants covering up to seventy percent of the cost of implementing conservation practices included in the soil erosion control plan. Although the funds come from the Department of Agriculture, Trade and Consumer Protection, under section 92.10(7) the recipient of the money must contract with the land conservation committee. That contract must include an agreement to conduct all land management activities in substantial accordance with the committee's plan or to repay the grant funds to the committee. The committee, therefore, determines whether a recipient is complying with its plan. The committee's determination that a recipient is not in compliance requires the recipient to repay the funds.

There can be no doubt that the contract is a "public contract" under section 946.13. There can be no doubt that the committee members are authorized to perform "some act with regard to the contract in an official capacity." Therefore, unless some other exception to section 946.13 applies, a member of the land conservation committee who entered into a contract under section 92.10

would be in violation of section 946.13(1)(a). As noted earlier, abstaining from voting as a committee member does not avoid violations of section 946.13(1)(a).

The same problem would occur if the land conservation committee administered the nonpoint source water pollution program under section 144.25. Under section 144.25(6), the county, city or village is responsible for local administration and implementation of watershed projects. Under the program, individuals may receive cost-sharing grants of up to eighty percent of the cost of implementing the approved management practice. Under section 144.25(8)(d), each cost-sharing grant must be approved by the designated management agency for the county. If the land conservation committee is designated as the management agency, any member of the committee who entered into a cost-sharing grant would be in violation of section 946.13(1)(a) unless some exception to that statute applied.

Under section 92.104, the land conservation committee must ensure that a soil and water conservation plan is prepared for land covered by a farmland preservation agreement. A committee approved plan must be included in any farmland preservation agreement. Sec. 92.104(2), Stats. Under section 92.104(4), if the committee determines that a farming operation is not being conducted in compliance with the plan, it must issue a notice of noncompliance. If a notice of noncompliance is in effect, the farmland is not eligible for farmland preservation tax credits under section 71.09(11).

Section 92.105 requires the land conservation committee to establish soil and water conservation standards. Section 92.105(5) and (6) requires the land conservation committee to determine whether the covered farming operations are complying with its soil and water conservation standards. If the committee determines that a farming operation is not complying, it must issue a notice of noncompliance and the farmland preservation credit under section 71.09(11) cannot be claimed.

The farmland preservation tax credit in section 71.09(11) provides a tax credit to owners of farmland which is subject to agricultural use restrictions. Although the usual tax credit would not be considered a public contract, except in some Hobbesian sense, the farmland preservation credit is definitely a contract between the claimant and the state. First, the payment is obviously more than

simply a credit against taxes owed because “[i]f the allowable amount of claim exceeds the income taxes otherwise due on claimant’s income or if there are no Wisconsin income taxes due on claimant’s income, the amount of the claim not used as an offset against income taxes shall be certified to the department of administration for payment to the claimant by check, share draft or other draft drawn on the general fund.” Sec. 71.09(11)(am), Stats. Section 71.09(11)(o) provides that no tax credit may be allowed if there is a notice of noncompliance under section 92.104 or 92.105. As discussed earlier, determinations of noncompliance are within the discretion of the land conservation committee. Therefore, any claimant’s eligibility for the tax credit depends on the exercise of discretion by the land conservation committee.

The farmland preservation credit is quite clearly a contract in which the claimant agrees to comply with various land use restrictions in exchange for money in the form of a tax credit or outright grant from the state. Secs. 92.104, 92.105 and 91.13(8), Stats. Section 91.13(8)(e) provides that the state agrees to pay, with respect to each year a farmland preservation agreement is in effect, the credits claimable under section 71.09(11) if all the requirements of that statute are satisfied. Anyone claiming a credit under section 71.09(11) is entering into a public contract. Because compliance with that contract is determined by the land conservation committee, any member of that committee would violate section 946.13(1)(a) by claiming the credit unless some exception to section 946.13 applied.

It has been suggested that committee members of those land conservation committees which employed staff would not be subject to the strictures of section 946.13 because section 92.09 provides that in those situations the staff “may exercise the powers granted to the land conservation committee.” That grant of authority to the staff, however, does not remove the committee’s authority and responsibility. The committee is still authorized to participate in the making of the contracts and authorized to perform acts with regard to the contracts. The committee may choose to exercise its authority through staff members. The ultimate authority, however, always remains with the committee. *Steele v. Gray*, 64 Wis. 2d 422, 219 N.W.2d 312, 223 N.W.2d 614 (1974). Because that authority remains with the committee, committee members risk violating sec-

tion 946.13(1)(a) even if actual decisions in individual cases are made by staff members.

Section 946.13(2)(a) provides that subsection (1) does not apply to “[c]ontracts in which any single public officer or employe is privately interested which do not involve receipts and disbursements by the state or its political subdivision aggregating more than \$5,000 in any year.” If a member of a land conservation committee is participating in all of the programs discussed above, but the total amount of payments does not aggregate more than \$5,000 in any year, there is no violation of section 946.13(1)(a). That is true even if the contract is for more than \$5,000 if the member does not receive more than \$5,000 in any single year. Therefore, if a committee member received a grant totaling \$20,000 to be paid in equal installments over five years, no violation of section 946.13(1)(a) would occur. If during one of those years, however, that committee member received some other grant over \$1,000, a violation would occur that year.

I realize these conclusions may work a harsh result and might actually discourage well-qualified and well-intentioned individuals from participating on the land conservation committees. Although public service often requires sacrifice, one may question whether a member of a land conservation committee should be denied assistance, which is by definition assistance granted in the public interest, merely because he or she consents to serve on that committee. The result in this opinion, however, is dictated by the statute. Absent any change in that statute, land conservation committee members would be well advised to enter into contracts discussed in this opinion only after careful thought. Anyone found guilty of violating section 946.13(1) is guilty of a felony. Any contract entered into in violation of section 946.13 is void and neither the state nor the county would incur any liability on that contract. Sec. 946.13(3), Stats. A committee member found in violation of this statute, therefore, would face a fine, imprisonment or both and might well be forced to pay back the amount of the contract.

DJH:AL

Oneida Indians; Waste Management; The Oneida Tribe is not a "municipality" within the meaning of sections 66.20 to 66.26, Stats. The Green Bay Metro Sewerage District may enter into an enforceable contract with the Tribe if certain conditions are met. OAG 45-87

August 24, 1987

KENNETH J. BUKOWSKI, *Corporation Counsel*
Brown County

On behalf of Brown County and the Green Bay Metropolitan Sewerage District (METRO) you have asked several questions concerning METRO's jurisdiction within the Oneida Reservation. Recently, the Town of Hobart, which is entirely within Brown County, filed a petition requesting annexation to METRO of all that part of the township not previously within METRO. Within the boundaries of that part of the Town of Hobart seeking annexation is territory identified as heirship land, tribal trust land and individual trust land, all of which is held in trust by the United States of America for either the Oneida Tribe or individual members of the Oneida Tribe. Reference to trust land in this opinion includes these various land tenure classifications. Part of the territory identified in the annexation petition, including both fee and trust land, lies within the original boundaries of the Oneida Reservation as established by the treaty with the Oneida, February 3, 1838, 7 Stat. 566.

METRO granted the Town of Hobart's annexation petition but expressly excluded the Oneida trust lands on the basis that:

1. The very existence and/or boundaries of the "reservation" is being litigated in Federal Court.
2. The Oneida Tribe of Wisconsin possesses certain attributes of sovereignty.
3. The Oneida Tribe of Wisconsin has retained certain powers of self government which include the authority to regulate or control certain aspects of the use or development of trust lands.
4. The Oneida Tribe of Wisconsin may not have the authority to voluntarily subject itself to the jurisdiction of METRO even if it had elected to do so, which it did not.

Based on these concerns and your interest in finding an effective way to provide adequate sewage treatment to the Oneida Indians, you ask the following questions:

1. Is the Oneida Tribe of Wisconsin a “municipality” within the meaning of Sections 66.20 to 66.26? (For example, and without limitation, 66.4(3) and (6).)
2. Is the Oneida Tribe of Wisconsin a “municipality” within the meaning of Section 66.30 of the Wisconsin Statutes for any purpose other than “the establishment of a joint transit commission.”
3. Mindful of its authorization “to contract and to be contracted with” in Section 66.24(1) does METRO have authority to enter into contracts with the Oneida Tribe of Indians of Wisconsin to provide *sewerage service* to lands held in trust by the United States of America either for the Oneida Tribe of Wisconsin or its individual tribal members? If not, what statutory amendments do you suggest to provide METRO with that contracting authority?
4. Does the Oneida Tribe of Wisconsin have the authority to enter into an enforceable agreement with METRO? If not, what statutory amendments or other action do you suggest to provide the Oneida Tribe of Wisconsin with that statutory authority?
5. Is it necessary for the Oneida Tribe of Wisconsin to waive whatever sovereign immunity it may have for the agreement to be enforceable, and if it is, does the Oneida Tribe have the authority to do so?
6. If the Oneida Tribe of Wisconsin does have authority to enter into an enforceable agreement with METRO, with or without the prerequisite of an enforceable waiver of sovereign immunity:
 - (a) In what jurisdiction would the agreement be enforceable?
 - (b) Would the agreement with the tribe be enforceable as to its individual tribal members?
 - (c) Must the United States as trustee of the lands serviced by METRO be a party to the agreement?
 - (d) Does the agreement need Secretarial approval as set forth in Title 25, Section 81 of the United States Code?

- (e) May METRO enforce its sewer use ordinances and other ordinances which provide:
1. Entry upon the land by METRO personnel.
 2. Monitoring and inspection of discharges.
 3. Compliance enforcement activities.
 4. Holding of hearings and imposition of punishment.
 5. METRO use of Section 823.02 of the Wisconsin Statutes including collection of user fees and payment for services.
 6. METRO issuance of pretreatment orders as deemed appropriate.
 7. Billing procedures and collection of charges for sewer treatment and other services.

(Emphasis added.)

Before considering your specific questions, a few preliminary issues need to be addressed.

You indicate that the status of the Oneida Reservation is at issue in litigation. I understand that the focus of that litigation is on whether the original Oneida Reservation has been diminished to where it now consists only of trust lands scattered throughout the Oneida Tribe's original territory as defined in the 1838 Treaty. As you may know, it is the policy of this office not to comment on issues in litigation. Since your concern is over METRO's jurisdiction only on trust land regardless of how the reservation is defined, rather than the matters at issue in the litigation, and since the issues you raise are only indirectly involved in that litigation, the no-comment policy is not applicable. It is assumed for purposes of this opinion that all the trust land in question lies within the original boundaries as defined in the 1838 Treaty. Also, it is assumed that at minimum the trust land constitutes the Oneida Reservation.

Recent case law has identified the criteria for determining whether a state has regulatory jurisdiction within reservation boundaries. In *County of Vilas v. Chapman*, 122 Wis. 2d 211, 361 N.W.2d 699 (1985), the court summarized the analysis which must be used to resolve jurisdictional disputes:

In *Webster* [*State v. Webster*, 114 Wis. 2d 418, 338 N.W.2d 474 (1983)] we discussed in some detail the analytical framework the

United States Supreme Court has developed to determine whether states have jurisdiction over Indian country. We noted that the Supreme Court has rejected the view that the states are absolutely barred from exercising jurisdiction over tribal reservations and members. However, two barriers remain to the state's exercise of jurisdiction. First, the exercise of such authority may be preempted by federal law. Second, state jurisdiction may infringe upon the right of Indians to establish and maintain tribal self-government. *Id.* at 432. The Supreme Court has stated that “[t]he two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members.” *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

Id. at 214.

In *Rice v. Rehner*, 463 U.S. 713, 719 (1983), the Court further clarified the relationship between the infringement and preemption inquiries where state regulatory jurisdiction within an Indian reservation is at issue, stating:

The role of tribal sovereignty in preemption analysis varies in accordance with the particular “notions of sovereignty that have developed from historical traditions of tribal independence. . . .” When we determine that tradition has recognized a sovereign immunity in favor of the Indians in some respect, then we usually are reluctant to infer that Congress has authorized the assertion of state authority in that respect. “ ‘Except when Congress has expressly provided that state laws shall apply.’ ” . . . If, however, we do not find such a tradition, or if we determine that the balance of state, federal and tribal interests so requires, our preemption analysis may accord less weight to the “backdrop” of tribal sovereignty.

Unquestionably, the Oneida Tribe's governmental status is relevant to any analysis of METRO's jurisdiction over Oneida Reservation lands. Within reservation boundaries, there can be overlapping jurisdiction between tribal government, state government (including its political subdivisions) and the federal government. It is settled that the Oneida Tribe, like other federally-recognized Indian tribes, retains attributes of sovereignty over both its members and its territory. *See Merrion v. Jicarilla Apache Tribe*, 455

U.S. 130 (1982); *Montana v. United States*, 450 U.S. 544, 563 (1981); *United States v. Mazurie*, 419 U.S. 544, 557 (1975). Environmental concerns are a legitimate attribute of tribal sovereignty. A federally-recognized tribes' territorial sovereignty has been held to include, in many cases, all land within its reservation boundaries. *Id.* See also *Buster v. Wright*, 135 F. Rptr. 947 (8th Cir. 1905), appeal dismissed, 203 U.S. 599 (1906) and *United States v. Wheeler*, 435 U.S. 313 (1978); 71 Op. Att'y Gen. 191 (1982) (concurrent jurisdiction between tribe and state to zone private property within reservation boundaries); 75 Op. Att'y Gen. 123 (1986) and 76 Op. Att'y Gen. 80 (1987) (concurrent state and tribal jurisdiction over liquor within reservation boundaries).

The tribe's interests in providing waste disposal facilities to Indians on trust land within the reservation are those of public health and safety, including the protection of the reservation environment from any pollution that may occur. These interests parallel the state's interests in public health and safety for all citizens, with the protection of the environment from transboundary pollution included.

The federal government has an interest in providing waste disposal facilities to tribes. It is expressed in the Indian Health Care Improvement Act of 1976 (18 U.S.C. §1601-1680 (1985)), which provides in relevant part:

[F]ederal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resettling responsibility to, the American Indian People.

18 U.S.C. §1601(a) (1985).

Also, the act provides that further improvement in Indian health is imperiled by "a lack of safe water and sanitary disposal services" (§1601(f)(6)) and provides for appropriations "to supply unmet needs for safe water and sanitary waste disposal facilities in existing and new Indian homes and communities." 18 U.S.C. §1632(a). Historically, such services have been provided by the federal government, first by the Bureau of Indian Affairs in the 1850's, and more recently by the Indian Health Service. See 1976 U.S. Code Cong. & Admin. News., p. 2652.

The federal interests are further implicated by the federal government's policy of encouraging tribal self-government.¹ This policy has recently been expressed and re-emphasized in the area of environmental programs through the creation of the Environmental Protection Agency's Indian policy which provides that the "EPA recognizes tribal governments as sovereign entities with primary authority and responsibility for the reservation populace. Accordingly, EPA will work directly with tribal governments as the independent authority for reservation affairs and not as political subdivisions of states or other governmental units." Office of the Administrator, United States Environmental Protection Agency; Indian Policy Implementation Guide (November 8, 1984). The most recent expression of the policy of encouraging tribal self-government is indicated by the Indian Alcohol and Substance Prevention and Treatment Act of 1986, 25 U.S.C. §2411 (Supp. 1987).

The backdrop of Indian sovereignty (in this analysis) is particularly significant, both because of the territorial aspect of the Oneida Tribe's sovereignty and because "the sovereign role of the tribes . . . does not disappear when the federal government takes responsibility for the management of federal program(s) on tribal lands." *State of Wash., Dept. of Ecology v. U.S.E.P.A.*, 752 F.2d 1465, 1471 (9th Cir. 1985).

In evaluating the federal, state and tribal interests in providing sewage treatment facilities to Indians on the Oneida Reservation one finds that the Oneida Tribe's interests in protecting the reservation environment and tribal self-government are enhanced by the federal government's interest in providing these services and its policy of strengthening tribal self-government. Taken together, these interests outweigh the state's interest in regulating waste disposal on the reservation.

This analysis, though not directly applicable to your first two questions, is relevant to your other questions concerning contracting with the Oneida Tribe to provide adequate sewerage disposal to the trust lands in question. Because METRO cannot exercise regulatory jurisdiction over trust lands within its district,

¹ See for example: Indian Reorganization Act of 1934, §§1-19, 25 U.S.C. §§461-79 (1983); Indian Financing Act of 1974, 25 U.S.C. §1451 *et seq.* (1983); Indian Self Determination Act of 1975, §2, 25 U.S.C. §450 (1983); Indian Tribal Government Tax Status Act of 1982, §203, I.R.C. §7701(a)(40) (1980 and Supp. 1, 1983); Indian Mineral Development Act of 1982, 25 U.S.C. §§2101-08 (1983).

contracting with the tribe appears to be the most viable method to make available such services on these lands.

Against this background, each of your questions will now be considered.

1. Is the Oneida Tribe of Wisconsin a "municipality" within the meaning of Sections 66.20 to 66.26? (For example, and without limitation, 66.24(3) and (6).)

State statutes empower a multiplicity of units of local government to construct, operate and maintain sewerage treatment systems. Such treatment districts, which are themselves special units of local government, are formed either as a metropolitan sewerage district or a joint sewerage district. Secs. 66.20 and 144.07, Stats. The organization and powers of a metropolitan sewerage district are for the most part set forth in sections 66.22 through 66.26. The procedures for creating a district are set forth in section 66.22. Subsection 1 provides in relevant part: "Proceedings to create a district may be initiated by resolution of the governing body of any municipality . . ." Municipality is defined as any town, village, city or county. Sec. 66.20(4), Stats. Clearly, a tribal government is not a municipality as that term is defined in these statutory provisions. The context within which municipality is used requires that the governmental unit be a political subdivision of the state. The Oneida Tribe's governmental status is not affected or determined by state law.

The governmental status of the Oneida Tribe was discussed in detail in 72 Op. Att'y Gen. 132 (1983). There, it was concluded that section 144.07(4)(a) does not authorize joint sewerage commissions to include tribal governments as member governmental units. In that opinion at 133-34, it is stated:

To operate effectively a joint commission must have sufficient authority over its member governmental units to enable it to carry out its various responsibilities set forth in chapter 144. Because of the special governmental status of Indian Tribes and the unique jurisdictional relationship they have with the state, it is unlikely the commission would have sufficient authority over a tribal government member to carry out commission activities as anticipated by chapter 144.

....

Because of the uncertainty regarding the jurisdictional relationship between Indian Tribes and the state over environmental matters generally, . . . it is my opinion that the Legislature simply did not have tribal governments in mind when it authorized governmental units to form joint sewerage commissions. Where the Legislature has recognized tribal government as of the same status as local units of government, it has done so explicitly.

Id. at 133-34 (citations omitted).

That analysis is equally applicable to metropolitan sewerage districts. It, therefore, is my opinion that the Oneida tribal government is not a municipality within the meaning of section 66.20(4).

2. Is the Oneida Tribe of Wisconsin a “municipality” within the meaning of Section 66.30 of the Wisconsin Statutes for any purpose other than “the establishment of a joint transit commission.”

The express mention of “federally recognized Indian tribe or band” in section 66.30(1)(b) and its visible absence in section 66.30(1)(a) is strong evidence of legislative intent to not include tribal governments as municipalities for any other purpose. If the Legislature had wanted to include tribes for any other purpose it would have done so when it originally included tribes in section 66.30(1)(b). The above-stated analysis for exclusion of Indian tribal governments in section 144.07(4)(a) is also applicable here.

3. Mindful of its authorization “to contract and to be contracted with” in Section 66.24(1) does METRO have authority to enter into contracts with the Oneida Tribe of Indians of Wisconsin to provide sewerage service to lands held in trust by the United States of America either for the Oneida Tribe of Wisconsin or its individual tribal members? If not, what statutory amendments do you suggest to provide METRO with that contracting authority?

Within the general constraints of the laws of contract and to the extent that such constraints limit the authority of a municipal body corporate, it is my opinion that METRO does have the authority to enter into a contract with the Oneida Tribe to provide sewerage service to any lands within the exclusive jurisdiction of the tribe. Since METRO excluded trust lands from the territory identified in the Town of Hobart’s annexation petition, such lands are outside

the territorial jurisdiction of METRO. A similar situation involving the authority of a joint sewerage commission to contract to provide service outside its territorial jurisdiction was addressed in 68 Op. Att'y Gen. 83 (1979). Relying on *Village of Butler v. Renner Mfg. Co.*, 70 Wis. 2d 1, 233 N.W.2d 380 (1975), the opinion concludes that a joint sewerage commission can contract to receive and treat discharges from a facility outside its legal jurisdiction. I have found no legal basis to distinguish between the contractual authority of a joint sewerage commission in this regard and a metropolitan sewerage district.

Your remaining questions focus on the authority of the Oneida Tribe of Wisconsin to enter into a contractual relationship with METRO for sewerage service. My response to your specific questions concerning the Oneida Tribe's authority to contract with METRO only reflects those legal principles that are applied generally to contractual relations with Indian tribes.

You ask:

4. Does the Oneida Tribe of Wisconsin have the authority to enter into an enforceable agreement with METRO? If not, what statutory amendments or other action do you suggest to provide the Oneida Tribe of Wisconsin with that statutory authority?

The Oneida Tribe is organized under the Indian Reorganization Act of June 18, 1934 (48 Stat. 984, 25 U.S.C. §461-478 (1983)), and has adopted a constitution and bylaws pursuant thereto which set forth the basic organization for the exercise of tribal governmental power (25 U.S.C. §476 (1983)). Also, pursuant to the Act, the tribe secured a corporate charter from the federal government for the purpose of engaging in business activities (25 U.S.C. §477 (1983)). Both the corporate charter and the constitution and bylaws were approved by the Secretary of the Interior. Under the Act, both the tribal government and the tribal corporation are authorized to enter into contracts. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 134, 147 (1982); *Montana v. United States*, 450 U.S. 544, 565 (1981); *Blackfeet Tribe of Blackfeet Indian v. Wippert*, 442 F. Supp. 65, 66 (1977).

Certain contracts with Indian tribes or individual tribe members are subject to the provisions of 25 U.S.C. §81 (1983). That statute provides in relevant part:

No agreement shall be made . . . with any tribe of Indians, or individual Indians . . . in consideration of services for said Indians relative to their lands . . . unless such contract or agreement be executed and approved as follows: . . .

. . . .

2. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs endorsed upon it.

Pursuant to this statutory language, any agreement with the Oneida Tribe or individual tribe members that would affect trust land would be void unless it is approved by the Secretary of the Interior. *A.K. Management Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785 (9th Cir. 1986); *United States ex rel. Shakopee v. Pan American Management Company*, 616 F. Supp. 1200 (D. Minn. 1985), *appeal dismissed* 789 F.2d 632 (8th Cir. 1986). *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613 (7th Cir. 1985). As an agreement between METRO and the Oneida Tribe would likely implicate trust lands,² such an agreement would require secretarial approval.

Also, under 25 U.S.C. §2004a (1983), the Secretary of Health and Human Services is authorized to acquire land and make agreements to enable the department to provide essential sanitation facilities to Indian homes and communities. Presumably, the Oneida Tribe in cooperation with the Department of Health and Human Services would be contracting with METRO under the auspices of this statute. Under this statute the federal government would be a party to the contract. If the federal government is involved questions of enforceability are resolved. 28 U.S.C. §1491 (1983); *United States v. Testan*, 424 U.S. 392 (1976).

Whether the Oneida Tribe has authority under its organic laws to enter into any contract is a question in the first instance that must be answered by the tribe.

5. Is it necessary for the Oneida Tribe of Wisconsin to waive whatever sovereign immunity it may have for the agreement to

² Section 66.24(4) gives the Metropolitan Sewerage District Commission the power to acquire land or property needed for its operations or easements or rights upon such land or property. In addition, section 66.25(1) allows the commission to make a special assessment against property which is served by the sewerage system. Both sections would affect trust lands.

be enforceable, and if it is, does the Oneida Tribe have the authority to do so?

The enforceability of an agreement between METRO and the Oneida Tribe will depend in large part upon the terms of that agreement. In numerous decisions, both in the federal and state courts, it has been held that Indian tribes enjoy sovereign immunity from suits similar to that of the United States. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977); *United States v. United States Fidelity and G. Co.*, 309 U.S. 506 (1940); *U.S. v. Oregon*, 657 F.2d 1009, 1012 (9th Cir. 1981); *Maryland Casualty Co. v. Citizens Nat. Bank of West Hollywood*, 361 F.2d 517, 520 (5th Cir. 1966); *State v. Peterson*, 98 Wis. 2d 487, 492, 297 N.W.2d 52 (Ct. App. 1980). It is unsettled whether an Indian tribe on its own may waive its sovereign immunity to suit, though it has been allowed. *Big Spring v. U.S. Bureau of Indian Affairs*, 767 F.2d 614 (9th Cir. 1985); *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980), *aff'd on other grounds* 455 U.S. 130 (1982); *Native Village of Gyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983); *U.S. v. Oregon*, 657 F.2d 1009 (9th Cir. 1981); *Namekagon Dev. Co. v. Bois Forte Res. Housing Authority*, 395 F. Supp. 23 (D. Minn. 1974), *aff'd*, 517 F.2d 568 (8th Cir. 1975). A tribe cannot waive its immunity by contract in matters affecting trust property without secretarial or congressional consent. 25 U.S.C. §81 (1983). It is unsettled whether tribes may waive their immunity without congressional authorization in contracts not related to trust property. The Oneida Tribe may have inherent authority to waive its immunity to suit in its own courts, at least where trust property is not affected. However, any waiver of immunity by the tribe must be express, as "[i]t is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), quoting *United States v. Testan*, 424 U.S. 392 (1976). *See also State of Wisconsin v. Baker*, 698 F.2d 1323, 1331 (7th Cir. 1983).

Most tribal immunity cases since 1934 center on the provisions of the Indian Reorganization Act. Some courts have held that tribes entering into business contracts through the tribal corporation can waive immunity to suit. *See, e.g., Maryland Cas. Co. v. Citizens Nat. Bank of West Hollywood*, 361 F.2d 517 (5th Cir.

1966), *cert. denied*, 385 U.S. 918 (1966); *Parker Drilling Co. v. Metlakatla Indian Community*, 451 F. Supp. 1127 (1978).

Clearly, the tribe's sovereign immunity will affect in some circumstances the enforceability of an agreement between METRO and the tribe. It is beyond the scope of this opinion to discuss options or contract language that may be available to overcome any sovereign immunity problem that may exist. Agreements between METRO and the Oneida Tribe in its non-governmental capacity (*i.e.*, business capacity) that do not implicate trust lands could be one way to overcome most, if not all, of the enforceability problems relating to tribal sovereign immunity. Perhaps this would be useful where services to tribal businesses are contemplated.

6. If the Oneida Tribe of Wisconsin does have authority to enter into an enforceable agreement with METRO, with or without the prerequisite of an enforceable waiver of sovereign immunity:

(a) In what jurisdiction would the agreement be enforceable?

It is unclear as to what jurisdiction the agreement would be enforceable in. It no doubt would be in the interest of the parties to address in the agreement any uncertainty concerning choice of laws or judicial forums for resolving disputes. In designating in the agreement the jurisdiction(s) where disputes concerning the terms of the agreement would be enforceable, consideration will need to be given to the fact that in sections 66.20-26 references are made to resolving disputes in state circuit court pursuant to chapter 227.

(b) Would the agreement with the tribe be enforceable as to its individual tribal members?

Whether individual tribe members residing on heirship land or trust allotments would be bound by the terms of the agreement between METRO and the tribe is unclear. As already indicated, the Oneida Tribe possesses governmental authority over both its members and its territory. Tribal governmental authority has been specifically upheld in such areas as the regulation of tribal hunting and fishing activities (*Settler v. Lameer*, 507 F.2d 231 (9th Cir. 1974)), domestic relations (*United States v. Quiver*, 241 U.S. 602 (1912); *Fisher v. District Court*, 424 U.S. 382 (1976)), zoning (*Knight v. Shoshone & Arapahoe Indian Tribes, et al.*, 670 F.2d 900 (10th Cir. 1982); *see also* 71 Op. Att'y Gen. 191, 192 (1982)), tribal membership (*Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)); property transactions (*Crabtree v. Madden*, 54 F. Rptr. 426 (8th Cir. 1893)),

power to license and tax property and commercial activity (*Morris v. Hitchcock*, 194 U.S. 384 (1904); *Buster v. Wright*, 135 F. Supp. 947 (8th Cir. 1905), *appeal dismissed* 203 U.S. 599 (1906); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980)). As already indicated, tribal power to zone trust lands within reservation boundaries was noted in 71 Op. Att'y Gen. 191 (1982).

Provided the tribe's actions relating to individual members' rights comply with the Indian Civil Rights Act, 25 U.S.C. §1302 (1983), it would appear that individual members would be bound by the exercise of tribal governmental authority in this regard.

(c) Must the United States as trustee of the lands serviced by METRO be a party to the agreement?

In almost all cases, yes. *See* discussion following question number 4.

(d) Does the agreement need Secretarial approval as set forth in Title 25, Section 81 of the United States Code?

See discussion following question number 4.

(e) May METRO enforce its sewer use ordinances and other ordinances which provide:

1. Entry upon the land by METRO personnel.
2. Monitoring and inspection of discharges.
3. Compliance enforcement activities.
4. Holding of hearings and imposition of punishment.
5. METRO use of Section 823.02 of the Wisconsin Statutes including collection of user fees and payment for services.
6. METRO issuance of pretreatment orders as deemed appropriate.
7. Billing procedures and collection of charges for sewer treatment and other services.

The enforceability of METRO's sewer use ordinances and any other ordinances which you list will depend on whether they are incorporated within the terms of the agreement. To the extent that an ordinance affects the interest in trust lands, the enforceability would depend upon federal government approval as already indi-

cated. Approval of such agreements by the federal government would likely resolve any enforcement concerns associated with sovereign immunity.

DJH:JDN

Libraries; Municipalities; Municipal libraries are a matter of statewide concern. Accordingly, home rule provisions will not justify local departures from the provisions of chapter 43, Stats. OAG 46-87

August 24, 1987

JAMES C. PANKRATZ, *Corporation Counsel*
Door County

In a 1981 opinion, my predecessor concluded that municipal libraries were a matter of paramount local concern and that cities and villages on the basis of home rule powers could therefore adopt rules different from those set forth in chapter 43, Stats. See 70 Op. Att'y Gen. 54, 58 (1981). In 1986, the Legislature enacted section 43.001 which consists of legislative findings and a declaration of policy regarding libraries. You ask whether the enactment of section 43.001 changes the conclusion in 70 Op. Att'y Gen. 54 that municipal libraries are a matter of paramount local concern.

Your request was prompted because the Door County board is considering taking action concerning the Door County library that is inconsistent with the provisions of chapter 43. The library, which is a joint library operated by the county and the City of Sturgeon Bay, was created pursuant to sections 66.30 and 43.56 (now section 43.53).

“ ‘Local affairs’ has been construed to include matters which primarily affect the people of the locality, in contrast to matters of ‘statewide concern’ which affect all the people of the state.” *Wis. Environmental Decade, Inc. v. DNR*, 85 Wis. 2d 518, 530, 271 N.W.2d 69 (1978). When there is a controversy between municipalities and the state, the court is required to make the ultimate determination as to whether a matter is of local or statewide concern. *Van Gilder v. Madison*, 222 Wis. 58, 73, 267 N.W. 25, 268 N.W. 108 (1936). In making that determination, however, the court may properly look to relevant declarations of the Legislature. *State ex rel. Brelsford v. Retirement Board*, 41 Wis. 2d 77, 85, 163 N.W.2d 153 (1968). Because matters of public policy are primarily for the Legislature, a determination by it that a certain matter is of statewide concern is entitled to great weight. *Fond du Lac v. Empire*, 273 Wis. 333, 338, 77 N.W.2d 699 (1956). See also *Brelsford*, 41 Wis. 2d at 86.

In concluding in the 1981 and 1984 opinions that municipal libraries were a matter of paramount local concern, my predecessor pointed out that the Legislature had not included a statement in chapter 43 to the effect that municipal libraries were a matter of statewide concern. 70 Op. Att'y Gen. at 57; and 73 Op. Att'y Gen. 86, 91 (1984).

Subsequent to these opinions, the Legislature in 1985 Wisconsin Act 177, sec. 6, created section 43.001, effective April 1986, which provides:

Legislative findings and declaration of policy. (1) The legislature recognizes:

(a) The importance of free access to knowledge, information and diversity of ideas by all residents of this state;

(b) The critical role played by public, school, special and academic libraries in providing that access;

(c) The major educational, cultural and economic asset that is represented in the collective knowledge and information resources of the state's libraries;

(d) The importance of public libraries to the democratic process; and

(e) That the most effective use of library resources in this state can occur only through interlibrary cooperation among all types of libraries.

(2) The legislature declares that it is the policy of this state to provide laws for the development and improvement of public libraries, school libraries and interlibrary cooperation among all types of libraries.

The legislative findings and declaration of policy are tantamount to a statement that libraries, including local municipal libraries, are a matter of statewide concern because they are critical to the educational and the democratic processes.¹

¹ As introduced in 1985 Assembly Bill 537, section 43.001 contained a subsection that provided: "The legislature declares that making high quality, publicly funded library resources, services and information readily available to all residents is a matter of statewide concern." That provision was deleted before passage of the bill. The meaning of the deletion in ascertaining legislative intent is ambiguous. The Legislature may have deleted it because the Legislature thought libraries were a matter of local concern; or, the Legislature may have deleted the provision because it thought the phrase was unnecessary in light of the other findings and statements of

This legislative statement and the provisions of chapter 43 reflect the fact that libraries have evolved from being a matter of local to being a matter of statewide concern. Because of the variety of services offered by libraries and the overwhelming number of books, films and other publications and items available for dissemination through the library, it is financially and physically impossible for each municipality, acting independently, to provide its citizens with all the needed, let alone available, services. The expanding role of the library was discussed in the 1984 opinion when it was stated: "The interplay between technology and information has led libraries to venture into new, non-traditional areas such as offering computer services and maintaining and lending various kinds of audio and audiovisual equipment." 73 Op. Att'y Gen. at 87. In that opinion this office considered the library's services in making available framed pictures, projectors, screens, audio cassette players and AM/FM radios in addition to books and magazines. 73 Op. Att'y Gen. at 89.

The Legislature in section 43.001 recognizes that each library cannot offer all the available services and publications that serve the educational and democratic processes. As a result, the Legislature declared that it is the state's policy to provide laws for the development and improvement of public libraries, school libraries and interlibrary cooperation among all types of libraries. Sec. 43.001(2), Stats. The Legislature also recognized that the most effective use of library resources in the state can occur only through interlibrary cooperation. Sec. 43.001(1)(e), Stats. Thus, for libraries to fulfill their role in the educational and democratic processes in this state, they must cooperate in an interlibrary network so that the maximum of services can be offered to each citizen of the state. The area from which a citizen can obtain library services and assistance has expanded beyond the local municipality to the limits of the interlibrary network, which can be statewide. *See* sec. 43.17(6), Stats. Under these circumstances, the operation and maintenance of public libraries, including municipal libraries, affects all the people of the state and they are a matter of statewide concern because of the extent to which libraries and municipalities rely on one another to furnish library services.

policy. Because of the ambiguity, no definite meaning can be given to the deletion of the provision. As discussed above, I believe that section 43.001, as passed, reflects the legislative belief that public libraries are a matter of statewide concern.

When considered in 1981, the issue of whether municipal libraries were a local or statewide concern was a close question. At that time, this office did not have the guidance of a statement from the Legislature. The Legislature's recent statement coupled with the continuing growth and evolution of library services now leads to the conclusion that the libraries covered by chapter 43 are of statewide concern. As a result of this conclusion, home rule provisions will not justify local departures from the provisions of chapter 43.²

DJH:SWK

² Because I have concluded that municipal libraries are a matter of statewide concern, it is not necessary to consider in this opinion whether the county board under the home rule provisions of section 59.025 has the power to adopt rules different from the provisions of chapter 43.

Housing; Real Estate; State; The rental unit energy efficiency statute, section 101.122, Stats., applies to the state. OAG 47-87

August 25, 1987

JOHN COUGHLIN, *Secretary*

Department of Industry, Labor and Human Relations

Your department has requested my opinion on two issues relating to the enforcement of section 101.122, Stats., the rental unit energy efficiency statute. You ask:

1. Does sec. 101.122, Stats., apply to the activities of the state?
2. If the answer to question 1 is no, may a state agency be required by the register of deeds to document its exclusion from sec. 101.122, Stats., in every property transaction filed for recording?

In my opinion, section 101.122 does apply to the activities of the state. It is therefore unnecessary to answer your second question.

Pursuant to section 101.122(2), your department has adopted Wis. Admin. Code ch. ILHR 67, establishing minimum energy efficiency standards for rental units. No owner may transfer a rental unit unless, within the previous five years, an inspector has inspected the unit and has issued a certificate stating that the unit satisfies the applicable standards. Sec. 101.122(4)(a), Stats. The only exemptions are for rental units which fall below the threshold for size or date of construction, or which are not used from November 1 to March 31, section 101.122(1)(e), for rental units to be demolished within two years after written waiver of compliance with the inspection and certification requirement by the department or local inspector, section 101.122(4)(b), and for rental units which the transferee stipulates shall be brought into compliance by the owner within one year of the date of transfer, section 101.122(4)(c).

In 69 Op. Att'y Gen. 103 (1980), it was stated:

It is a firmly established tenet of statutory construction that statutes of general application "do not apply to the state unless the state is explicitly included by appropriate language." *State ex rel. Martin v. Reis*, 230 Wis. 683, 687, 284 N.W. 580, 582 (1939); accord, *State ex rel. Department of Public Instruction v. ILHR Department*, 68 Wis. 2d 677, 681, 229 N.W.2d 591, 593-94 (1975); *Kenosha v. State*, 35 Wis. 2d 317, 323, 151 N.W.2d 36, 39

(1967); *Konrad v. State*, 4 Wis. 2d 532, 538-39, 91 N.W.2d 203, 206 (1958).

69 Op. Att’y Gen. 269, 271-72 (1980). However, this rule applies only where the statute is “written in general language that could apply to both the state and to private parties.” *Wis. Vet. Home v. Div. Nurs. Forfeit. Appeals*, 104 Wis. 2d 106, 110-11, 310 N.W.2d 646 (Ct. App. 1981).

Section 101.01(2)(e) provides:

[A]s used in ss. 101.01 to 101.25

. . . .

(e) *The term “owner” shall mean and include every person, firm, corporation, state . . . having ownership, control or custody of any place of employment or public building*

In *Wis. Vet. Home*, 104 Wis. 2d at 110, the court of appeals said that “[i]f the state were included in th[e] [statutory] definition by plain language, resort to a rule of statutory construction would indeed be unnecessary [citation omitted].” Here, the plain language of section 101.01(2)(e) indicates that the term “owner” includes the state because section 101.122 is between section 101.01 and section 101.25. A contrary construction of section 101.122 would require me to reject the plain meaning of section 101.01(2)(e).

I am cognizant of the fact that section 101.122(1)(d) defines “owner” as “any person having a legal or equitable interest in a rental unit.” I am required to construe each part of a statute with every other part so as to reach a harmonious whole. *In re Marriage of Levy v. Levy*, 130 Wis. 2d 523, 530, 388 N.W.2d 170 (1986).

The two statutory provisions can be harmonized without rejecting the plain meaning of section 101.01(2)(e). Applying section 101.01(2)(e), the state is an “owner” within the meaning of section 101.122. However, for section 101.122 to apply to the state, the state must also have “a legal or equitable interest in a rental unit” as required by section 101.122(1)(d). Where the latter condition is satisfied, it is my opinion that the rental unit energy efficiency statute does apply to the state.

DJH:FTC

Forfeitures; Sheriffs; Money resulting from a state forfeiture action under sections 161.555 and 973.075(4), Stats., must be deposited in the state school fund. Money granted to the state after a federal forfeiture proceeding need not be. OAG 48-87

August 25, 1987

ROBERT D. ZAPF, *District Attorney*
Kenosha County

Recently the Kenosha County sheriff's department investigated and arrested an individual for first-degree murder and arson. As a result of this investigation, \$133,405 was seized from the defendant and the residence of the deceased as proceeds of drug dealings. Your office could have sought forfeiture of this money under state law, but instead joined forces with the United States to pursue forfeiture under federal law. Upon application, \$100,054 of this money was transferred to your sheriff. This amount reflected that agency's help leading to the seizure and forfeiture of that property. You ask whether this sum must be deposited in the state school fund. My answer is no.

Article X, section 2 of the Wisconsin Constitution requires that "all moneys and the clear proceeds of all property that may accrue to the state by forfeiture" be deposited in the state school fund.

The Comprehensive Crime Control Act provides for the federal forfeiture of all moneys "furnished by any person in exchange for a controlled substance in violation of this title [and] all proceeds traceable to such an exchange . . ." 21 U.S.C. §881(a)(6) (1984). Property forfeited under this subchapter may be transferred to local agencies to reflect their contribution in the acts leading to the seizure or forfeiture of such property. 21 U.S.C. §881(e) (1984).

"[I]n any case concerning the interpretation of a statute the 'starting point' must be the language of the statute itself." *Lewis v. United States*, 445 U.S. 55, 60 (1980). Legislative purpose is expressed by the ordinary meaning of the words used. *United States v. Rodgers*, 104 S. Ct. 1942, 1946 (1984). Statutes should be read "with the saving grace of common sense." *Bell v. United States*, 349 U.S. 81, 83 (1955). In the absence of a showing to the contrary, laws are presumed to be consistent with each other. In the construction of statutes, it is the duty of the court "to harmonize and reconcile laws, and to adopt that construction of a statutory provi-

sion which harmonizes and reconciles it with other statutory provisions." 73 Am. Jur. 2d *Statutes* §254 at 425 (1974).

Looking at article X, section 2 and the applicable federal statutes, and giving their words their ordinary meaning, leads to the conclusion that the situation you have described was a federal forfeiture.

Since the sum in question resulted from a federal forfeiture action, it need not be deposited in the school fund. Obviously, that would not be the case if this money came from a state forfeiture under section 161.555 or section 973.075(4), Stats.

Because the federal statute and the Wisconsin Constitution can be harmonized, I see no ethical problems in choosing one of two perfectly legal alternatives.

DJH:MDB

Counties; Law Enforcement; Ordinances; Without statutory authority to do so, a county cannot use citations for violations of ordinances that have certain statutory counterparts. Section 66.119(3)(b), Stats., only authorizes the use of citations for violations of ordinances other than those for which a statutory counterpart exists. OAG 49-87

August 25, 1987

DEBRA WOJTOWSKI, *Corporation Counsel*
Pierce County

Your predecessor wrote that he was aware of a county that has authorized the issuance of citations for violations of ordinances for which there are statutory counterparts. The county has ordinances modeled after sections 947.01 (disorderly conduct); 943.24 (issuance of worthless checks); 161.41(3) (possession of marijuana); 943.20 (theft); 943.01 (damage to property); 943.13 and 943.14 (trespassing); 49.12 (misuse of public assistance); 940.19 (battery); 946.41 (obstructing); and 941.23, Stats. (carrying a concealed weapon). Pierce County has many of the same ordinances and would like to use citations rather than enforcing them by issuing summonses and complaints.

Your predecessor asked whether a county may authorize the use of a citation to be issued for violations of ordinances for which the listed statutory counterparts exist. He concluded that the county does not have the authority. I agree.

Pursuant to section 66.119, a county may by ordinance adopt and authorize the use of a citation to be issued for violations of ordinances other than those for which a statutory counterpart exists. There is no statutory authority, however, for counties to use the citation for violations of the listed ordinances for which a statutory counterpart does exist.

The citation authorized by section 66.119 invites the defendant to either make an optional court appearance or to make a cash deposit by a specified date. *See* sec. 66.119(1)(b)6. and 7., Stats.; and 70 Op. Att'y Gen. 280, 282 (1981). The statute provides that issuance of the citation gives the appropriate court subject matter jurisdiction of the offense for the purpose of receiving cash deposits, imposing a forfeiture if the defendant appears in court in response to the citation or entering judgment upon the citation and

the cash deposit if the defendant does not appear. *See* sec. 66.119(2)(b) and (3)(b) and (c), Stats.

If the defendant appears in court, the appearance gives the court personal jurisdiction and the citation may be used as the initial pleading, unless the court directs that a formal complaint be made. Sec. 66.119(3)(b), Stats.

If the defendant neither makes a cash deposit nor appears in court, the county may commence an action under section 778.10 for the collection of the forfeiture. *See* sec. 66.119(3)(c), Stats. Such an action is commenced with the filing of a summons and complaint. *See* secs. 778.015, 801.01 and 801.02(1), Stats. The issuance and filing of the citation, however, does not commence an action. *See* sec. 66.119(2)(b), Stats.

Citations should not be issued by the county for violations of ordinances for which there is a statutory counterpart unless there is some statutory authority to do so. Such citations are not authorized by section 66.119. If citations are issued for the ordinance violations listed above, there is no provision for a court to have subject matter or personal jurisdiction to collect deposits, or to hear the proceedings if the defendant appears. Also, the fact that section 66.119(2)(b) provides that issuance of the authorized citation does not violate section 946.68 implies that the issuance of unauthorized citations would be a violation. Section 946.68 prohibits sending or delivering to another any document which simulates a summons, complaint or court process with intent to induce payment of a claim. *See also* 38 Op. Att’y Gen. 61 (1949), discussing section 348.60 which was an earlier version of section 946.68.

I also agree with your predecessor’s conclusion that section 59.07(64) does not authorize the use of citations in the case of ordinances with statutory counterparts. Section 59.07(64) authorizes counties to “[e]nact ordinances to preserve the public peace and good order within the county.” That gives the county the authority to enact the substantive ordinances controlling conduct; but it does not authorize the use of citations in the enforcement of the ordinances.

In summary, in the absence of a statute authorizing the issuance of citations for the violation of ordinances that have the listed

statutory counterparts, I agree with your predecessor's conclusion that citations cannot be used for the violations of those ordinances.

DJH:SWK

Automobiles And Motor Vehicles, Police; An unmarked police vehicle displaying flashing red and blue lights is not a marked vehicle for purposes of section 346.04(3), Stats. OAG 50-87

September 1, 1987

DAVID C. RESHESKE, *District Attorney*
Washington County

You request my opinion as to whether a police vehicle displaying flashing red and blue lights is a marked vehicle for purposes of section 346.04(3), Stats. The answer to your question is no.

You state that you are aware of 65 Op. Att'y Gen. 27 (1976), wherein my predecessor concluded that a person who flees or attempts to elude an unmarked police car, with flashing red lights and/or siren operating, does not violate section 346.04(3) unless the person knows that the signal from the unmarked vehicle was given by a traffic officer. The rationale for this conclusion was based upon the fact that at that time many other emergency vehicles were also authorized to utilize flashing red lights, and accordingly, operators of other vehicles could hardly be expected to know whether the operators of such authorized emergency vehicles were traffic officers or not.

You further state that subsequent to the issuance of said opinion, section 346.03(3) was amended to provide that a police vehicle may be operated by means of a blue light and a red light. You are correct that subsection (3) thereof was amended by section 1 of 1983 Wisconsin Act 56 and section 1 of 1985 Wisconsin Act 143 to so provide. Section 346.03(3) reads as follows:

The exemption granted the operator of an authorized emergency vehicle by sub. (2)(a) applies only when the operator of the vehicle is giving visual signal by means of at least one flashing, oscillating or rotating red light except that the visual signal given by a police vehicle may be by means of a blue light and a red light which are flashing, oscillating or rotating. The exemptions granted by sub. (2)(b), (c) and (d) apply only when the operator of the emergency vehicle is giving both such visual signal and also an audible signal by means of a siren or exhaust whistle, except as otherwise provided in sub. (4).

I also note that section 347.25, which sets forth the lighting equipment which may be utilized by authorized emergency vehicles in-

cluding police vehicles and others, was amended by sections 4 and 5 of 1983 Wisconsin Act 56 and section 2 of 1985 Wisconsin Act 143. Said amendments manifest an apparent legislative intent to enable drivers of other vehicles to differentiate between authorized emergency vehicles, including police vehicles and others, based upon lighting equipment.

However, section 346.04(3), about which you inquire, has not been amended and still reads as follows:

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

In *State v. Van Meter*, 72 Wis. 754, 759, 242 N.W.2d 206 (1976), the court stated:

The violated statute requires that it must be shown that the defendant was the operator of the vehicle, that he received a visual or audible signal from a traffic officer, or marked police vehicle, and that he knowingly fled or attempted to elude the traffic officer by wilfull or wanton disregard of the signal, so as to interfere with or endanger the operation of the police vehicle, or the traffic officer or other vehicle or pedestrians.

The lights on a marked police vehicle are located on the roof of the vehicle while they are located above the front bumper and near the grill of an unmarked police vehicle, as well as inside of the rear windows of the vehicle. I assume that it is easier for a driver to see the lights of marked police vehicles than those of an unmarked police vehicle. However, a conviction under section 346.04(3) does not necessarily require that the police vehicle be marked.¹

In my opinion, section 346.04(3) requires that it must be shown that the operator of a motor vehicle received a visual or an audible signal from a traffic officer (whether in a marked or unmarked

¹ I note that section 347.25(1m)(g) specifically provides that red and blue lights may be used on an *unmarked* police vehicle. Consequently, the fact that a police vehicle displays both red and blue lights would not make it a *marked* police vehicle.

vehicle), or marked police vehicle, and knowingly fled or attempted to elude said officer in order to violate this section of the statutes. I therefore conclude, as did my predecessor, that section 346.19 is the proper statute to invoke under circumstances which do not meet the proof requirements of section 346.04(3).

Given the recent law change to provide that only police vehicles may use blue and red flashing lights, law enforcement authorities may wish to seek legislation adding to 346.04(3) a provision including unmarked police vehicles displaying blue and red lights authorized by section 346.03(3).

DJH:GBS

Circuit Court; Judges; Limits of a judge's authority in presiding over or conducting a John Doe proceeding discussed. Section 968.26, Stats., is not unconstitutional as a violation of the separation of powers doctrine. OAG 51-87

September 1, 1987

ROBERT D. ZAPF, *District Attorney*
Kenosha County

You have asked two questions based on the following factual scenario. A private individual petitioned a trial court judge to convene a John Doe proceeding. The judge declined; however, he referred the petition to the intake judge.

The intake judge, on his own motion, scheduled the matter for a John Doe hearing and began to subpoena witnesses. The judge indicated that he would conduct all the questioning and, if he felt it necessary, would appoint a special prosecutor to handle any resultant prosecutions. It should be noted that the John Doe complaint alleged that members of the Kenosha County Sheriff's Department may have committed the crime of misconduct in public office in the investigation of a then-pending first-degree murder prosecution.

You ask what, if any, are the limits of the judge's authority in presiding over or conducting a John Doe proceeding, and whether section 968.26, Stats., is unconstitutional as a violation of the separation of powers doctrine.

Section 968.26 states:

If a person complains to a judge that he has reason to believe that a crime has been committed within his jurisdiction, the judge shall examine the complainant under oath and any witnesses produced by him and may, and at the request of the district attorney shall, subpoena and examine other witnesses to ascertain whether a crime has been committed and by whom committed. The extent to which the judge may proceed in such examination is within his discretion. The examination may be adjourned and may be secret. Any witness examined under this section may have counsel present at the examination but such counsel shall not be allowed to examine his client, cross-examine other witnesses or argue before the judge. If it appears probable from the testimony given that a crime has been committed and who committed it, the complaint shall be reduced to writing and

signed and verified; and thereupon a warrant shall issue for the arrest of the accused. Subject to s. 971.23, the record of such proceeding and the testimony taken shall not be open to inspection by anyone except the district attorney unless it is used by the prosecution at the preliminary hearing or the trial of the accused and then only to the extent that it is so used.

The first reported case dealing with the John Doe proceeding is *State ex rel. Long and another v. Keyes*, 75 Wis. 288, 44 N.W. 13 (1889). The question before the court concerned the extent of the power and jurisdiction of the judge to subpoena and examine witnesses, in addition to the complaining witness, under oath for the purpose of ascertaining whether an offense had been committed and, if so, by whom. The judge was acting pursuant to Wis. Rev. Stat. of 1839 (Territorial), an act to provide for the arrest and examination of offenders, commitment for trial and taking bail, sec. 2, pp. 369-70, which stated:

Upon complaint made to any such magistrate that a criminal offense has been committed, he shall examine on oath the complainant and any witnesses produced by him, and shall reduce the complaint to writing, and shall cause the same to be subscribed by the complainant; and if it shall appear that any such offense has been committed, the court or justice shall issue a warrant reciting the substance of the accusation, and requiring the officer to whom it shall be directed forthwith to take the person accused and bring him before the said court or justices, or before some other court or magistrate of the county, to be dealt with according to law

In all likelihood, this statute was derived from the statutes of New York of 1828. The statute was first enacted when the common law permitted a magistrate to issue a warrant on a complaint upon mere suspicion. This statute protected the citizen from arrest and imprisonment on frivolous and groundless suspicion. The thrust of the opinion was that the magistrate enjoyed the authority to subpoena and examine witnesses, and this statutory power was created for the protection of the individual.

The extent of the judge's authority in conducting a John Doe proceeding has been discussed on numerous occasions since 1889. In *State ex rel. Kowaleski v. District Court*, 254 Wis. 363, 36 N.W.2d 419 (1949), a writ of prohibition was sought to prohibit a

trial judge from conducting a separate but concurrent John Doe proceeding investigating crimes other than those charged against Kowaleski in a case pending before that same judge. In discussing the judge's power vis-a-vis the individual's rights, the court quoted from *Long* and concluded the judge's actions in the John Doe proceeding did not "make any final disposition or determination which in any way will create an extreme emergency or exigency affecting the liberty or the constitutional rights of the plaintiff, Kowaleski." *Kowaleski*, 254 Wis. at 369. *Kowaleski*, it was held, was still protected by his statutory right to a preliminary hearing with its attendant benefits. The court did, however, state that the scope of the John Doe proceeding was limited by the allegations of the John Doe complaint. This case, as well as *State ex rel. Niedziejko v. Coffey*, 22 Wis. 2d 392, 126 N.W.2d 96, 127 N.W.2d 14 (1964), reaffirms that the acts of the judge in conducting the John Doe are judicial or quasi-judicial in nature and subject to a writ of prohibition. The writ of prohibition is exercised with caution, and as long as the judge does not abuse his discretion, it will not lie. It is presumed that the judge has not, and will not, abuse his discretion in the proper conduct of the proceeding.

The powers of the circuit judge conducting a John Doe proceeding are not unlimited. A circuit judge or other magistrate conducting a John Doe proceeding does not have the power to compel self-incriminating testimony and thereby grant immunity. *State ex rel. Jackson v. Coffey*, 18 Wis. 2d 529, 118 N.W.2d 939 (1963). Since a John Doe proceeding is conducted by a judge rather than "the court," there is no authority to grant immunity and compel testimony. Such action must be done by the court, on the record, rather than by the John Doe judge and must be done upon the motion of the district attorney. *State ex rel. Newspapers, Inc. v. Circuit Court*, 65 Wis. 2d 66, 221 N.W.2d 894 (1974); *Ryan v. State*, 79 Wis. 2d 83, 255 N.W.2d 910 (1977). *Jackson* also underscores the judge's right to examine witnesses albeit within the confines of the John Doe complaint. There are other limitations on the authority of the John Doe judge. Since it is not a felony criminal proceeding, the John Doe judge may not issue a material witness warrant pursuant to section 969.01(3). *State v. Brady*, 118 Wis. 2d 154, 345 N.W.2d 533 (Ct. App. 1984). It is also recognized that the secrecy provisions of a John Doe proceeding are equally binding on the judge as on all parties. *United States v. Crumble*, 331 F.2d 228 (7th Cir. 1964).

The John Doe judge's duty to enforce the secrecy provisions is subject to his or her discretion, and it is a valid exercise of that discretion to permit or deny the request of the attorney for the state for the presence and assistance of another public official with law enforcement responsibilities. Unless the judge is persuaded that the officer will make a material contribution to the investigation, his or her presence should ordinarily not be allowed.

Our Supreme Court has summarized the authority and overall obligation of the John Doe judge as follows:

[F]inal responsibility for the proper conduct of such proceedings rests with the presiding judge, whose obligation it is to ensure that the considerable powers at his or her disposal are at all times exercised with due regard for the rights of the witnesses, the public, and those whose activities may be subject to investigation.

State v. O'Connor, 77 Wis. 2d 261, 284, 252 N.W.2d 671 (1977).

The most comprehensive discussion of a judge's duty and authority in conducting a John Doe as well as discussing the constitutional question of separation of powers may be found in *State v. Washington*, 83 Wis. 2d 808, 266 N.W.2d 597 (1978). Washington claimed that section 968.26 violates the constitutional doctrine of separation of powers by vesting the investigatory power of the executive branch on a member of the judicial branch. Washington asserted that the John Doe judge merged into the executive and became both judge and prosecutor. The court rejected Washington's characterization of the judge as the chief investigator or as an adjunct of the prosecutor. Rather, the court stated:

We do not view the judge as orchestrating the investigation. The John Doe judge is a judicial officer who serves an essentially judicial function. The judge considers the testimony presented. It is the responsibility of the John Doe judge to utilize his or her training in constitutional and criminal law and in courtroom procedure in determining the need to subpoena witnesses requested by the district attorney, in presiding at the examination of witnesses, and in determining probable cause. It is the judge's responsibility to ensure procedural fairness.

Washington, 83 Wis. 2d at 823 (footnote omitted). By way of further defining the limits of the judge's authority, the court stated that it is not required that an attorney representing the state's

interests in a criminal prosecution be involved both in initiating and conducting the proceedings since section 968.26 does not require the participation of the district attorney. However, *Washington* should not be read as an endorsement of judicial orchestration of the John Doe proceeding since a prosecutor did conduct that particular proceeding.

The judge conducting a John Doe proceeding is expected to ensure that the proceeding be conducted in an orderly and expeditious manner which does not impair his or her ability to make an independent determination of probable cause. Thus, the central theme that evolves from the case law is that the judge may exercise discretion and, as long as he or she does not abuse that discretion, the judge is granted great latitude.

With respect to the question of separation of powers, the supreme court clearly finds no problems to exist in either the statutory scheme or the procedural application of the John Doe hearing.

Viewing the role of the John Doe judge as we do, we do not believe that the John Doe statute should fall on the ground that it vests non-judicial powers in the judiciary. Although the doctrine of separation of powers is a fundamental principle, it is neither possible nor practicable to categorize all governmental action as exclusively legislative, executive or judicial. The doctrine of separation of powers must be viewed as a general principle to be applied to maintain the balance between the three branches of government, to preserve their respective independence and integrity, and to prevent concentration of unchecked power in the hands of any one branch.

The contemporaneous and practical interpretation of the state constitution supports the conclusion that a John Doe proceeding does not contravene the constitution's mandate of separation of powers. *State ex rel. Owen v. Donald*, 160 Wis. 21, 111-112, 151 N.W. 331 (1915). As noted previously, John Doe proceedings in this state date back to at least 1889, forty-one years after the adoption of the Wisconsin Constitution. The John Doe is an institution which has been sanctioned by long usage and general recognition.

Washington, 83 Wis. 2d at 825-27 (footnotes omitted). Thus, the court expressly stated that the John Doe judge is not a part of the prosecution team and the court was unwilling to hold that section

968.26 violates the constitution. Rather than find constitutional infirmity, the court relied instead on its belief that witnesses and those accused are protected by appellate court review.

The statute in question does not impinge upon the prosecutor's discretionary role as does section 968.02(3), the statute under consideration in *Unnamed Petitioners v. Connors*, 136 Wis. 2d 118, ___N.W.2d___ (1987). The court in *Connors* specifically recognizes that the district attorney, as an officer of the executive branch, has the power to make the initial determination of whether or not to charge a criminal offense. While the district attorney must believe that the criminal complaint establishes probable cause to charge the defendant, section 968.26 does nothing more than recognize that it is ultimately the court that must rule upon the existence of that probable cause.

Traditionally, judges have recognized the importance of a prosecutor actually conducting the John Doe proceeding and it has never been suggested that the judge would participate in preparing, drafting or filing a criminal complaint. The importance of the prosecutor's presence and contribution was recognized in *State ex rel. Kurkierewicz v. Cannon*, 42 Wis. 2d 368, 166 N.W.2d 255 (1969). This participation by the prosecutor also distinguishes the John Doe proceeding from a section 968.02(3) proceeding.

The statute struck down in *Connors* was significantly different from section 968.26 in that it allowed the judge to "permit the filing of a complaint." It authorized the judge to make a charging decision *ab initio* when no prosecutor had acted. Section 968.26 does no such thing and is not in conflict with section 968.02(1): The statute overturned in *Connors* thus actually conferred executive power on the judiciary; section 968.26 has never been construed to make such a grant of authority.

In summary, the authority of the John Doe judge is not without limitation; however, the discretion of the judge is vast and, unless abused, will likely be upheld. There may be some blurring of the distinction between executive and judicial functioning in section 968.26; yet the Wisconsin Supreme Court in *Washington* specifically refused to find any constitutional infirmity.

Finally, I would comment that judicial functions are generally inconsistent with essentially investigatory and prosecutorial functions. Whenever possible, a John Doe proceeding should be con-

ducted with the participation of the district attorney or someone lawfully standing in his stead.

DJH:SDE

Funds; Legislation; Retirement Systems; Wisconsin Retirement System; Words And Phrases; Only the portion of 1987 Assembly Bill 265 that increases benefits for persons no longer working for a Wisconsin Retirement System participating employer is subject to the three-fourths vote requirement of article IV, section 26 of the Wisconsin Constitution. The Public Employe Trust Fund constitutes "state funds" as used in article IV, section 26 of the Wisconsin Constitution. OAG 52-87

September 2, 1987

TOM LOFTUS, *Chairperson*
Assembly Organization Committee

The 1987 Assembly Bill 265, if enacted, would provide increased retirement benefits to most Wisconsin Retirement System (WRS) participants currently working and already retired. You have requested my opinion as to whether that bill is subject to the "three-fourths vote" requirement and meets the "sufficient state funds" requirement of article IV, section 26 of the Wisconsin Constitution.

Article IV, section 26 of the Wisconsin Constitution states in part as follows:

The legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into: This section shall not apply to increased benefits for persons who have been or shall be granted benefits of any kind under a retirement system when such increased benefits are provided by a legislative act passed on a call of ayes and noes by a three-fourths vote of all the members elected to both houses of the legislature, which act shall provide for sufficient state funds to cover the costs of the increased benefits.

This provision thus prohibits legislation increasing retirement benefits of those no longer employed unless the legislation is enacted by a "three-fourths vote" and "provide[s] for sufficient state funds to cover the costs of the increased benefits." *State ex rel. Thomson v. Giessel*, 262 Wis. 51, 55, 53 N.W.2d 726 (1952); 60 Op. Att'y Gen. 463 (1971).

A three-fourths vote is required by article IV, section 26 of the Wisconsin Constitution to enact legislation that provides "increased benefits for persons who *have been or shall be granted*

benefits of any kind under a retirement system.” While it could be argued that “persons who . . . shall be granted benefits” includes present employes, that argument is in my view without substance. The prohibition, of article IV, section 26 against increasing compensation is directed to those no longer employed. This is clear from the first sentence of such section which states “[t]he legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, *after the services shall have been rendered or the contract entered into.*” The prohibition does not extend to those still employed. In *Thomson v. Giessel* (first *Giessel* case) the court held that a statute providing additional payments to teachers already retired violated article IV, section 26. In *State ex rel. Thomson v. Giessel*, 265 Wis. 558, 61 N.W.2d 903 (1953) (second *Giessel* case), the court reviewed legislation enacted after the first *Giessel* case which provided for rehiring retired teachers on a standby basis and paying of compensation for such standby service. The court in the second *Giessel* case declined to consider the reason that the Legislature passed the legislation and found the contracts valid on their face under article IV, section 26. Both of these cases were decided prior to the amendments to article IV, section 26 authorizing raising of benefits first of teachers and later of all retirees under the WRS after they no longer were working for a participating employer.

The *Giessel* cases indicate that the prohibition is against raising compensation after employment, not against raising compensation during the period of employment. This is consistent with the contract language of section 40.19(1), Stats., which states in part:

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.

Benefit rights vest at the time that employment is completed. *Thomson v. Giessel*, 262 Wis. at 55, 65. Article IV, section 26 does not prohibit the increasing of benefits while one is still employed. Thus

the sentence of such section “[t]his section shall not apply to increased benefits for persons who have been or shall be granted benefits of any kind under a retirement system” does not apply to those still employed. The purpose and effect of that language then is to allow the Legislature to increase benefits for those no longer employed regardless of whether they currently receive a WRS retirement benefit or for whatever reason are entitled to but have not yet applied for and commenced receiving such a benefit.

For example, a WRS participant can terminate his employment with the state or a municipality prior to normal retirement date (65 or 62 with 30 years of service for the general category employe) and wait to apply for and commence receiving his retirement benefit until he reaches normal retirement date. So also could a participant terminate employment and choose not to commence his annuity until long after normal retirement date. *See* sec. 40.23(1), Stats. This language of article IV, section 26 thus allows the Legislature to increase benefits for those no longer working regardless of whether they applied for and are receiving a retirement annuity or have not yet applied for and commenced receiving the retirement benefit. Without the words “or shall be granted,” a participant who had terminated employment but had not yet commenced receiving a WRS annuity would be excluded from the increased benefit. That such was the intent of the constitutional amendment in 1973 clearly appears from the ratification question included by the Legislature in 1973 Joint Resolution 15. Such ratification question states:

“Shall section 26 of Article IV of the constitution be amended to permit the legislature to increase the pensions of persons *who already have retired* under any public retirement system (such retirement benefits already may be granted to teachers), and to require the state to provide sufficient state funds to cover the costs of the increased benefits to all persons retired under a public retirement fund.”

The emphasis here is on those who have terminated service, not those participants still working.

It is, therefore, my opinion that those portions of 1987 A.B. 265 that increase retirement benefits for WRS participants no longer working for a WRS participating employer would be constitutionally valid only if enacted by a three-fourths vote. Those portions of the bill relating to participants employed on date of enactment

may, however, be severable and effective if enacted by a lesser affirmative vote.

Section 14 of 1987 A.B. 265 provides for a "special investment performance dividend" to be paid to retiree participants of the WRS. *See* sec. 40.04(3)(e)3., Stats., which would be created by section 14 of 1987 A.B. 265. Since the resulting increased retirement annuity is an increase in compensation for services already rendered, the three-fourths affirmative vote requirement of article IV, section 26 of the Wisconsin Constitution is applicable. *Thomson v. Giessel*, 262 Wis. at 65.

Other sections of 1987 A.B. 265 increase retirement benefits prospectively for employes still working. *See* secs. 7-11, 15, 23-24, 26, 31-36, 38, 45, 47-48, and 53. These benefit increases are not subject to the three-fourths vote requirement if the portions of the bill providing these prospective benefits are severable from the remainder of the bill.

The Legislature has adopted a rule of statutory construction regarding severability. Section 990.001(11) provides:

Construction of laws; rules for. In construing Wisconsin laws the following rules shall be observed unless construction in accordance with a rule would produce a result inconsistent with the manifest intent of the legislature:

....

(11) SEVERABILITY. The provisions of the statutes are severable. The provisions of any session law are severable. If any provision of the statutes or of a session law is invalid, or if the application of either to any person or circumstance is invalid, such invalidity shall not affect other provisions or applications which can be given effect without the invalid provision or application.

As stated by the court in *Burlington Northern v. Superior*, 131 Wis. 2d 564, 579-81, 388 N.W.2d 916 (1986); *cert. denied* 107 S. Ct. 883 (1987):

Section 990.001(1) sets forth the general rule of construction that an invalid statutory provision is severable from a valid provision. This court is bound to observe that rule unless observance "would produce a result inconsistent with the manifest intent of the legislature."

Ascertaining the severability of an unconstitutional provision from the remainder of a statute requires a determination of legislative intent [case cite omitted], which is a question of law. . . .

In determining legislative intent with respect to severability, the first resort is to the language of the statute. [Case cite omitted.] This is particularly true when the statute at issue contains an express severability clause. . . .

The factors to consider in deciding whether a statute should be severed from an invalid provision are the intent of the legislature and the viability of the severed portion standing alone. [Case cite omitted.] Invalid provisions of a statute may not be severed when it appears from the act that the legislature intended the statute to be effective only as an entirety and would not have enacted the valid part by itself.

The court tells us that the two factors to consider in deciding whether an invalid provision is severable from the remainder of a statute are “the intent of the legislature and the viability of the severed portion standing alone.” *Burlington Northern*, 131 Wis. 2d at 580. I find nothing in 1987 A.B. 265 in its present form that would preclude severance of the payment of the “special investment performance dividend” from the prospective benefit improvements established for those employed on the effective date of the statute that would be created. It is therefore my opinion that the portion of 1987 A.B. 265 which would be rendered invalid by a less than three-fourths affirmative vote is severable from the remainder of the bill. The remaining and controlling factor to be considered is the intent of the Legislature.

No express statement of the Legislature regarding severability is contained in 1987 A.B. 265. While the bill in its present form appears to address the needs of the majority of the participants in the WRS both working and retired, I note that other bills introduced in this session relate to specific portions of the membership separately. The 1987 A.B. 462 provides WRS benefit improvements mainly for active participants and does not include retired participants. 1987 Senate Bill 20, on the other hand, relates solely to annuitants. I find nothing in the report of the Joint Survey Committee on Retirement Systems in its statutorily required report (sec. 13.50(6), Stats.) indicating intent regarding severability. As the

supreme court instructed in *Burlington Northern*, 131 Wis. 2d at 580, legislative intent is a question of law and deference need not be given by that court to lower courts' determinations of legislative intent.

I therefore consider it inappropriate to speculate as to the intent of the Legislature since 1987 A.B. 265 is still in the legislative process and the intent thus has not been fully developed. The Legislature could insert an express statement of intent or enact the bill in an amended form that would provide further indication as to the intent regarding severability. It is my view that such a determination of intent must focus on the bill as enacted and not be based on its transitory status.

Article IV, section 26 of the Wisconsin Constitution requires that an act, which increases benefits for a WRS participant, no longer working for a participating employer, must "provide for sufficient state funds to cover the costs of the increased benefits." The increased benefits we are concerned with is the "special investment performance dividend" which would be provided to annuitants by section 14 of 1987 A.B. 265. Other benefit improvements in the bill are for employes still working and are not within the article IV, section 26 exclusion and thus do not come within the exception from the exclusion that we are concerned with here.

Section 14 of 1987 A.B. 265 states in part as follows:

SECTION 14. 40.04(3)(e) of the statutes is created to read:

40.04(3)(e)1. As of the last day of the first full month occurring after the effective date of this paragraph . . . [revisor inserts date], \$1,300,000,000 shall be distributed from the transaction amortization account of the fixed retirement investment trust to the *fixed annuity reserve* and the fixed employer accumulation reserve as follows:

a. To the *fixed annuity reserve*, an amount equal to a percentage of the total distribution determined by dividing the fixed annuity reserve balance on the prior January 1 by the total balance of the fixed annuity reserve plus the employe accumulation reserve and the employer accumulation reserve of the fixed retirement investment trust on the prior January 1.

. . . .

3. The resulting increase in the *fixed annuity reserve*, after crediting the annuity reserves' actuarial contingency reserve under sub. (6)(b) with an amount determined to be sufficient to the purposes of that reserve, shall on recommendation of the actuary be distributed on or before January 1, 1988, as a *special investment performance dividend* in accordance with the procedures specified in s. 40.27(2). . . .

Section 14 of 1987 A.B. 265 clearly indicates that the monies to finance the "special investment performance dividend" would come from the "transaction amortization account," an account within the "fixed retirement trust" established under the "public employe trust fund" created by section 40.01(1). *See* sec. 40.04(3), Stats. The question thus presented is whether the "public employe trust fund" monies constitute "state funds" under the prohibitions of article IV, section 26.

It is my opinion that the "public employe trust fund" constitutes "state funds" as that term is used in article IV, section 26 of the Wisconsin Constitution. "State funds" constitutes funds paid from the state treasury and includes the general fund, segregated funds, and funds in trust. *See B. F. Sturtevant Co. v. Industrial Comm.*, 186 Wis. 10, 19-21, 202 N.W. 324 (1925).

A previous attorney general was asked whether article IV, section 26 prohibited increases after retirement which were funded out of segregated funds. His reply states in part as follows (60 Op. Att'y Gen. 298, 304-5 (1971)):

I am not unmindful of the fact that the court in *Singer v. Boos*, [44 Wis. 2d 374, 171 N.W.2d 307 (1969)], used language which would indicate that Art. IV, sec. 26, Wis. Const., prohibitions apply only to public officers paid out of the general fund. Such language at page 380 reads:

"This court has repeatedly held that the constitutional prohibition in art. IV, sec. 26, applies only to public officers who are paid out of the state general fund."

In reading the cases cited by the court for this proposition I find no showing that the court intended to change its previous holdings that the payment which is precluded by the constitution is from the State Treasury. I find no indication that the court intended, in *Singer v. Boos*, to construe Art. IV, sec. 26, Wis.

Const., as allowing payment of extra compensation to employes paid from segregated funds rather than the State general fund.

State ex rel. Holmes v. Krueger (1955), 271 Wis. 129, 72 N.W.2d 734, and *Columbia County v. Wisconsin Retirement Fund* (1962), 17 Wis. 2d 310, 116 N.W.2d 142 are cited by the court as authority for the above quoted statement in *Singer v. Boos*. The *Holmes* case refers to extra compensation payable out of the public treasury of the State. No mention is made of the term State general fund. See pages 133 to 136. In the *Columbia County* case, the material statement on page 326 reads:

“The Wisconsin Constitution, sec. 26, art. IV, does not apply to counties. *Sieb v. Racine* (1922), 176 Wis. 617, 187 N.W. 989; *Dandoy v. Milwaukee County* (1934), 214 Wis. 586, 254 N.W. 98.”

Sieb v. Racine (1922), 176 Wis. 617, 187 N.W. 989, at page 625, also uses the language *state treasury* as follows:

“* * * It has been held that the constitutional provision referred to applies only to public officers whose salaries are paid out of the state treasury.”

I, therefore, see no indication that the court intended in *Singer v. Boos*, supra, to except segregated funds from the constitutional prohibition and I, therefore, consider State employes paid from segregated funds subject to Art. IV, sec. 26, Wis. Const.

(Emphasis supplied in original.)

The public employe trust fund is included in the prohibited sources for the general prohibition of article IV, section 26. I find no basis for excluding that fund from the “state funds” requirement later inserted in that section.

The requirement that there be sufficient “state funds” allocated in the bill to pay for the retirement benefit improvement is directed toward precluding prospective assessment of benefit improvement costs against non-state fund participating employers rather than toward what state treasury source is used. Section 14 of 1987 A.B. 265 allocates a portion of the public employe trust fund from the transaction amortization account to the fixed annuity reserve to

fund payment of the “special investment performance dividend” to WRS annuitants. This use of “state funds” is consistent with article IV, section 26 of the Wisconsin Constitution.

DJH:WMS

Adolescent Pregnancy Prevention Services Board; Establishment Clause, United States Constitution; Constitutionality of the administration of grant monies by the Adolescent Pregnancy Prevention Services Board pursuant to section 46.93, Stats., discussed. OAG 53-87

September 8, 1987

HANNAH ROSENTHAL, *Chairperson*
Adolescent Pregnancy Prevention Services Board

You indicate that the Adolescent Pregnancy Prevention Services Board awards grant monies from a sum certain account pursuant to section 46.93(2), Stats., and that in 1986, the first year in which grants were issued, \$803,900 in grant monies was issued to thirteen of twenty-six applicants. Approximately five of these applicants had religious ties, and two of them were successful in obtaining grants in excess of \$80,000 each. One of these organizations conducts its activities in a parochial school because it needs classroom and related space, and no rental charge is made by the parochial school for that space. The other organization with religious ties also apparently has conducted a number of its funded activities in parochial schools. In addition, several board-funded organizations that do not have religious ties have contacted church or church youth groups and have conducted programs for those groups in churches. Individuals conducting such programs have been paid with board funds, but no governmental funds have been paid to the churches themselves. Based upon my examination of the grant applications filed by the two organizations with religious ties for the period prior to this fiscal year, my understanding is that the majority of the activities conducted by each grantee involve counseling, teaching and instruction of adolescents on matters related to premarital sex and premarital pregnancy. You also indicate that more organizations with religious ties have applied for grant monies for the 1987-88 fiscal year, but that only one organization with religious ties ranks sufficiently high to receive such funding.

Because program activities have been conducted in sectarian facilities, you state that, based upon 75 Op. Att'y Gen. 251 (1986), the board has or intends to place certain restrictions on the award of grant monies, and that the board is concerned that such grant monies be awarded and used in a constitutional fashion. You then, in effect, ask three questions concerning the award and handling of

funds administered by the board. For the sake of simplicity, I will address your questions out of order. The first question I will address is as follows:

May any of the following entities receive funding from the . . . Board either as a grantee or under a subcontract with a grantee:

- a. Churches, synagogues, or other religious organizations?
- b. Religious service organizations, i.e. Catholic Social Services, Jewish Social Services, Lutheran Social Services?
- c. Parochial schools?
- d. Religious youth organizations, i.e. Young Life, B'nai B'rith Youth Organization, church youth groups?

I am of the opinion that neither direct nor indirect funding may be given to any pervasively sectarian organization or to any other organization that engages in a specifically religious activity in connection with the provision of referral, teaching and counseling concerning matters related to premarital sex and premarital pregnancy.

As amended by section 863br of 1987 Wisconsin Act 27, which has been partially vetoed by the Governor, section 46.93 provides in part as follows:

Adolescent pregnancy prevention programs and pregnancy services. (1) LEGISLATIVE FINDINGS. The legislature finds that the 1,100,000 annual unintended or unwanted adolescent pregnancies in the United States, as estimated by the federal national center for health statistics, is a tragic and undesirable consequence of complex societal problems. The legislature recognizes that there is a lack of adequate health care, education, counseling and vocational training for adolescents which may provide positive options to adolescents in the area of pregnancy and parenting. To reduce the incidence, and adverse consequences, of adolescent pregnancy, the legislature finds that adolescent pregnancy prevention programs and pregnancy services are essential to encourage and implement community programs which address the complex societal problems facing adolescents and provide positive options to adolescent pregnancy.

. . . .

(2) PURPOSE; ALLOCATION. From the appropriation under s. 20.434(1)(b), the board shall review and either approve

for award or disapprove grant applications from applying organizations to provide for adolescent pregnancy prevention programs or pregnancy services that include health care, education, counseling and vocational training. Types of services and programs that are eligible for grants include all of the following:

- (a) Adolescent health clinics located in schools.
- (b) A statewide communications media campaign to discourage adolescent sexual activity and encourage the assumption of responsibility by adolescents, including male adolescent responsibility, for their sexual activity and for parenting.
- (c) Adoption counseling for adolescents.
- (d) Residential facilities for pregnant adolescents.
- (e) Adult role model programs for adolescents.

....

(3m) LIMITATIONS ON GRANT AWARD AND USE. The board in awarding grants under sub. (3) may not disapprove an application from an applying organization solely because the applying organization has a religious affiliation. The following activities are prohibited under any grant award under sub. (3):

- (a) The singing of hymns or reading of prayers.
- ~~(b) The existence of religious symbols in the physical surroundings within which activities under the grant are conducted.~~
- (b) The existence of restrictions, based on religion or absence of religion, on persons applying for or receiving services under the grant.
- (c) The supplying or promotion of written material that has a religious context.
- ~~(c) Any other activity having a religious purpose.~~

....

(4) PROHIBITED USES OF FUNDS. Funds received by an organization under a grant awarded under this section may not be used for any of the following:

- (a) Purchasing or dispensing contraceptives in adolescent health clinics located in schools.
- (b) Providing abortions.

(c) Advertising abortion services in a statewide communications media campaign.

The provisions added by the Legislature in the budget bill are underscored, while the provisions vetoed by the Governor are lined out.

In construing this statute, I am guided by the fundamental principle that “[a]ll statutes are presumed constitutional and will be held to be so unless proven otherwise beyond a reasonable doubt” *State ex rel. Ft. How. Paper v. Lake Dist. Bd.*, 82 Wis. 2d 491, 505, 263 N.W.2d 178 (1978). If possible, I must also “avoid construing a statute in such a way as would render that statute unconstitutional.” *United States Fire Ins. Co. v. E.D. Wesley Co.*, 105 Wis. 2d 305, 319, 313 N.W.2d 833 (1982). These principles and their importance are described in detail in *Treiber v. Knoll*, 135 Wis. 2d 58, 64-65, 398 N.W.2d 756 (1987), quoting *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32, 46, 205 N.W.2d 784 (1973) and *State ex rel. Carnation Milk Products Co. v. Emery*, 178 Wis. 147, 160, 189 N.W. 564 (1922). Also see *State ex rel. Unnamed Petitioners v. Connors*, 136 Wis. 2d 118, 120-21 n.2, 401 N.W.2d 782 (1987).

The first amendment to the United States Constitution provides in part: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” This provision applies to the states through the fourteenth amendment. See *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940). A similar prohibition is contained in article I, section 18 of the Wisconsin Constitution which provides as follows: “[N]or shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.” Both constitutional provisions serve the same dual purpose of prohibiting the “establishment” of religion. *State ex rel. Wis. Health Fac. Auth. v. Lindner*, 91 Wis. 2d 145, 163, 280 N.W.2d 773 (1979).

Governmental funding to religious organizations is constitutionally permissible only if the statutory funding scheme passes muster under each part of a three-part test: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster ‘an excessive government entanglement with religion’ [citations omitted].” *Lemon v. Kurtzman*, 403 U.S.

602, 612 (1971). The Wisconsin Supreme Court has adopted this three-part test for the purposes of state constitutional analysis. *State ex rel. Warren v. Nusbaum*, 64 Wis. 2d 314, 219 N.W.2d 577 (1974). Although it has never been held to be dispositive, *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring), a fourth factor which must be considered is the degree of political divisiveness fostered by the statutory scheme. See *Committee for Public Ed. & Religious Lib. v. Nyquist*, 413 U.S. 756, 794-98 (1973); *Lindner*, 91 Wis. 2d at 162.

The statutory funding scheme originally adopted by a unanimous Legislature consists of a competition for grant monies, with the proviso that the funds cannot be used to provide abortions, to advertise abortion services statewide or to purchase or dispense contraceptives in health clinics in schools. The stated purpose of this statutory scheme is detailed in depth in 1985 Wisconsin Act 56, sec. 2:

Legislative findings. (1) The legislature finds that the high number of unintended or unwanted pregnancies and the resultant high number of abortions is a tragic and undesirable consequence of complex societal problems. Strong efforts must be made to ensure that unintended pregnancies do not become unwanted pregnancies. Strong efforts also must be made to reduce the number of unintended pregnancies and to promote programs that enhance the use of options other than abortion. The legislature finds that a multifaceted approach to reducing abortions is necessary and desirable and must involve not only private and public institutions and agencies but, more important, families. Health care providers, public and private schools, social service agencies, community and volunteer groups and members of the clergy must work with families and develop programs to promote constructive life values and responsible behavior, with emphasis on educating and counseling adolescents.

(2) The legislature finds that programs must be made available to assist adolescents in acquiring decision-making skills, enhancing their self-esteem, learning responsible behavior and realizing their full potential. The legislature believes that prevention of unintended pregnancies among adolescents will increase the possibility that adolescents will obtain necessary living skills prior to having children.

(3) The legislature believes that adolescents should be encouraged to take responsibility for the consequences of their actions. It is clear that among adolescents the burden of unwanted pregnancies presently is borne by the adolescent mothers and that ways must be found for adolescent fathers, as well as the parents of adolescents, to share in this responsibility. During pregnancy and after pregnancy, adolescent parents should be informed on how to keep themselves and their babies healthy and should be given the skills needed to achieve economic self-sufficiency. The legislature further finds that there is a need for increased awareness, especially among adolescents, of the availability of adoption as a potential alternative to abortion.

(4) The legislature finds that while this act carries a state financial commitment, that commitment will be repaid many times in economic, social and human terms.¹

As was the case in *Kendrick*, 657 F. Supp. at 1557-58, the Legislature's statement of purpose makes specific reference to solving the problems created by the "1,100,000 annual unintended or unwanted adolescent pregnancies in the United States . . ." Sec. 46.93, Stats. Given this statement, I have no hesitation in concluding that section 46.93 has a valid, laudable secular legislative pur-

¹ The constitutionality of a federal statutory scheme with certain similarities to section 46.93 is analyzed in *Kendrick v. Bowen*, 657 F. Supp. 1547 (D.D.C. 1987). That case examined the constitutionality of the Adolescent Family Life Act ("AFLA"), 42 U.S.C. §§300z through 300z-10 (1981), which provides for grants for demonstration projects to public or private non-profit organizations for the purpose of providing pregnancy care and prevention services. These services include maternity counseling, adoption and referral services, services to discourage adolescent sexual relations, counseling and family planning services. *Kendrick*, 657 F. Supp. at 1553. The federal statutory scheme is similar to the state statute in that both contain a funding mechanism which provides for competition for grant monies, and in that the legislative findings made by Congress are similar to those made by the Legislature in 1985 Wisconsin Act 56, sec. 2 and in section 46.93(1). See 42 U.S.C. §300z(a) (1981). The federal statutory scheme differs in that 42 U.S.C. §300z-5(a)(21) (1981) provides that an applicant for a grant must describe how it will involve religious organizations "as appropriate in the provision of services." An additional difference is that 42 U.S.C. §300z-10 (1981) provides that grant monies generally cannot be used for any kind of abortion counseling or referral.

In *Kendrick*, 657 F. Supp. at 1553, the district court found the federal statutory scheme to be unconstitutional insofar as it permitted funding for activities involving or related to pregnancy "referral, teaching or counseling services" to be made to organizations with a religious character and purpose. The district court's decision was recently stayed by Chief Justice Rehnquist pending docketing of a timely appeal and the Supreme Court's ultimate disposition on the merits. *Bowen v. Kendrick*, No. A-99 (August 10, 1987). Because the *Kendrick* case has not finally been resolved and, more importantly, because of the key differences between the federal and state statutory schemes, as emphasized by the statutory amendment contained in the budget bill, I take note of but place no special reliance on *Kendrick* in this opinion.

pose of curbing the societal problems caused by unwanted teenage pregnancies.

I next must examine whether section 46.93 has a primary effect which advances religion. A statute may have more than one primary effect. *Nyquist*, 413 U.S. at 783 n.39. If one such primary effect is the advancement of religion, then the statute is constitutionally infirm. *Id.* "Aid may normally be thought of as having the primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting." *Nusbaum*, 64 Wis. 2d at 325. *See Hunt v. McNair*, 413 U.S. 734, 743 (1973). The intentional or inadvertent inculcation of religious beliefs is absolutely prohibited. *Grand Rapids School Dist. v. Ball*, 473 U.S. 373, 105 S. Ct. 3216, 3223-24 (1985). In addition, governmental funds cannot be used to subsidize "the primary religious mission" of an institution. *Ball*, 105 S. Ct. at 3226. And where adolescents are involved, the perception that the powers of government have been enlisted to support a religious denomination must be avoided. *Ball*, 105 S. Ct. at 3223-24. If possible, a limiting construction of the statute must be employed in order to avoid any of these results. *Cf. Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

Applying the presumption of constitutionality, and given my obligation to construe the statute so as to avoid an unconstitutional result, I cannot say beyond a reasonable doubt that no such limiting construction is possible. First, the overall purpose of section 46.93 is religiously neutral and unquestionably legitimately secular. An establishment clause issue arises only on a limited number of occasions when the board is asked to approve grants to applicants possessing specific characteristics. Second, the statutory amendments recently enacted by the Legislature in the budget bill now specifically prohibit prayer reading or singing as well as the distribution or promotion of written religious material. Third, the Governor's veto message at 93-94 makes it clear that his purpose was solely to veto language more restrictive than constitutionally required:

While several of the prohibited activities contained in this section are necessary to ensure that the grant program comports with the Establishment Clause of the First Amendment, I have

vetoed those sections or parts of sections that are potentially more restrictive than Establishment Clause jurisprudence would suggest.

In order to pass muster under the Establishment Clause, an aid program must: (a) have a secular purpose, (b) have a primary effect that neither advances nor inhibits religion, and (c) avoid excessive entanglement between government and religion. When determining whether an assistance program passes this test, it is valuable to determine whether the institutions receiving assistance have independently secular functions that the State may assist without directly aiding religious activities.

Accordingly, I have vetoed those provisions which have the potential to exclude those institutions which, although affiliated with a religious institution, may serve independently secular functions of valuable benefit to their communities and the state. I believe subsections (b) and (e), and a portion of subsection (a), sweep too broadly in this regard.

Thus, the phrase "of hymns" in section 46.93(3m)(a) was apparently vetoed so that the singing of secular songs which are also hymns would not be prohibited. *Compare Marsh v. Chambers*, 463 U.S. 783, 792-93 (1983). Similarly, the language relating to the presence of religious symbols was apparently vetoed because the mere presence or existence of religious symbols somewhere in a structure where funded activities occur does not necessarily create a symbolic link between church and state. Finally, an individual instructor may have a religious purpose or motive in providing referral, teaching or counseling in matters related to premarital sex and premarital pregnancy, but such a purpose does not automatically render the funding of those activities constitutionally infirm.²

Since it is limited to situations involving religiously affiliated institutions that "serve independently secular functions of valuable

² In *Kendrick*, 657 F. Supp. at 1563, it was inferred that the federal statutes endorsed the beliefs of those religions that advocate the preferability of adoption to abortion. Even though section 46.93(4) prohibits the board from funding certain abortion-related activities, and even though adoption is specifically identified as a "potential alternative to abortion" in 1985 Wisconsin Act 56, sec. 2(3), the inference drawn by the district court in *Kendrick* cannot be drawn here. Although 1985 Wisconsin Act 56, sec. 2(1) states that "members of the clergy must work with families and programs to promote constructive life values and responsible behavior, with emphasis on education and counseling adolescents," section 46.93 does not require that any religious organization receive grant monies. Section 46.93(4) also does not prohibit funding for abortion counseling and referral.

benefit to their communities and the state[,]” the Governor’s veto message presupposes that pervasively sectarian organizations are constitutionally ineligible for funding and that any religious activities engaged in by secular organizations also may not constitutionally be funded. This construction may properly be considered as a part of the legislative history of the statute. See 76 Op. Att’y Gen. 173 (1987); *State ex rel. Kleczka v. Conta*, 82 Wis. 2d 679, 708-09, 264 N.W.2d 539 (1978). Under the United States Supreme Court’s holding in *Hunt*, 413 U.S. at 743, and the Wisconsin Supreme Court’s holding in *Nusbaum*, 64 Wis. 2d at 325, it is my opinion that the narrowing construction employed by the Governor in his veto message is constitutionally required. Given this narrowing construction of the statute, it is my opinion that section 46.93 does not have a primary effect of advancing religion.

I next must examine whether the statute fosters an excessive governmental entanglement with religion. In doing so, I cannot ignore the possibility that someone might argue that the narrowing construction of section 46.93 which I have adopted with respect to the funding of pervasively sectarian organizations could be avoided if the board were to monitor the activities of those organizations. In determining whether excessive entanglement would exist, the factors to be considered are “the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.” *Lemon*, 403 U.S. at 615. Given the kinds of activities which are funded by the board, such monitoring would result in an impermissible entanglement between government and those kinds of religious organizations:

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that . . . the First Amendment . . . [is] respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

Lemon, 403 U.S. at 619.

It is worth noting that the current Chief Justice of the United States Supreme Court, in criticizing the Court’s prior decisions in

this area, has stated that the Court routinely “takes advantage of the ‘Catch-22’ paradox of its own creation . . . whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement.” *Aguilar v. Felton*, 473 U.S. 402, 105 S. Ct. 3232, 3243 (1985) (Rehnquist, J., dissenting). *Lindner* also indicates that it is more likely that constitutional problems can be avoided if day-to-day supervision of pervasively sectarian organizations can be minimized or eliminated. But that ordinarily can be done only with respect to content-neutral activities where the use of funding “can be ascertained in advance and cannot be diverted to sectarian uses.” *Wolman v. Walter*, 433 U.S. 229, 251 n.17 (1977). Since pregnancy referral, teaching and counseling activities are not necessarily content neutral I conclude that excessive governmental entanglement would result if grants were given to pervasively sectarian organizations to perform such services.

The same constitutional problems do not obtain with respect to the monitoring of secular organizations so as to ensure that they do not conduct religious activities in connection with the provision of pregnancy referral, teaching or counseling services pursuant to a grant from the board. Nevertheless, in *State ex rel. Warren v. Nusbaum*, 55 Wis. 2d 316, 332, 198 N.W.2d 650 (1972), the court held that, even though the Marquette Dental School performed an entirely secular function

it would appear advisable that the statute require *and the contract provide* that . . . students, [not] . . . be required to take religious instruction or courses of a religious nature as a prerequisite to their undertaking or completing their education Even th[is] peripheral matter . . . ought to be brought into line with the completely secular policies established and maintained for the admission and graduation of . . . students in order to make clear the entirely secular nature of all aspects of the . . . operation.

(Emphasis and bracketed material supplied). Such a contractual type of grant restriction would also help minimize the need to monitor secular organizations.

The determination as to whether a particular applicant is eligible for funding “is to be made with regard to the entire context in which the institution operates.” *Lindner*, 91 Wis. 2d at 158. In making such determinations with respect to organizations with reli-

gious ties, the board is required to engage in a two-step analysis. First, it must determine whether the applicant is ineligible because it is pervasively sectarian. If the applicant is not pervasively sectarian, the board then must determine whether the applicant will be conducting a specifically religious activity in connection with the provision of referral, teaching and counseling pursuant to a grant made by the board.

A pervasively sectarian organization is one in which "a substantial portion of its functions are subsumed in the religious mission . . ." *Nusbaum*, 64 Wis. 2d at 325. Elementary and secondary parochial schools have been held to be pervasively religious in character. See *Meek*, 421 U.S. at 366; *Lemon*, 403 U.S. at 615. It follows, almost by definition, that a church or synagogue is pervasively sectarian. Although no church-affiliated colleges appear to be grant applicants, the case law relating to them is instructive. It is noteworthy that some of these colleges are pervasively sectarian while others are not. In general, such colleges that make no attempt to indoctrinate students through teaching or required attendance at religious services have a predominantly secular function of providing higher education. *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 762 (1976); *Tilton v. Richardson*, 403 U.S. 672, 685-89 (1971). But many factors have been considered in making such determinations, including the stated purpose of the college; the degree of religious control over the governing board; the extent of ownership, financial assistance, and affiliation by or with the sponsoring church; the place of religion in the college's program; the occupation and other activities of alumni; and the work and image of the college in the community. See *Horace Mann League v. Board of Public Works*, 242 Md. 645, 220 A.2d 51, 65, cert. den., 385 U.S. 97 (1966).

With respect to social service organizations, religious youth groups or other applicants that have organizational ties to a particular religious faith, you may wish to develop a detailed questionnaire examining some of these factors, and may also wish to require the submission of incorporation papers, bylaws, resolutions or relevant policy statements. In *Bradfield v. Roberts*, 175 U.S. 291 (1899) the Supreme Court held that it was permissible to give aid to a corporation which was owned and operated entirely by members of a religious order because the organization was limited by its corporate charter to the secular purpose of operating a charitable hospi-

tal open to persons of all religious beliefs.³ The submission made by the organization must ordinarily be accepted at face value, but the board can require as much detailed information as it sees fit in determining whether a substantial portion of the applicant's functions are subsumed in the religious mission. See *Holy Trinity Community School v. Kahl*, 82 Wis. 2d 139, 149-50, 262 N.W.2d 210 (1978). Such a finding and determination should be made as to each applicant with religious ties.

Once the board is satisfied that the applicant is not a pervasively sectarian organization, it then must determine whether the applicant will be conducting a specifically religious activity in connection with the provision of referral, teaching and counseling pursuant to a grant made by the board. In this regard, some of the same information used to determine whether the applicant is pervasively sectarian may be useful. In addition, information should be sought as to whether the applicant will confine itself to the presentation of psychiatric, humanitarian, sociological, health or other nonreligious reasons in connection with such items as the advisability of premarital sexual activities and abortion. An unequivocal statement should also be obtained as to whether adolescents will or will not be instructed according to doctrine adhered to by the religious organization with which the grant applicant is affiliated. If the applicant represents that no such religious activities will be conducted, the grant should incorporate that restriction and should provide that violation of that restriction constitutes grounds for termination of the grant and recovery of funds previously paid. This two-step process should avoid any possibility of unconstitutional administrative entanglement after grants are issued.

With respect to the fourth factor I must consider, a greater risk of political divisiveness exists where the statutorily prescribed funding mechanism permits organizations with religious ties to compete annually for grants. *Meek v. Pittenger*, 421 U.S. 349, 372 (1975). The problem is that continuing annual appropriations generate increasing demands as costs and population grow. *Nyquist*, 413

³ In *Kendrick*, 657 F. Supp. at 1565, the district court found organizations with "explicit or implicit corporate policies" that "prohibit any deviation from religious doctrine" to be pervasively religious in nature. I am not suggesting that an organization must teach or counsel in a manner contrary to the views of the religious entity with which it is affiliated. But it is my opinion that an organization operated without reference to such doctrine ordinarily will not be considered to be pervasively sectarian.

U.S. at 797-98. The danger perceived by the courts in such a funding mechanism is that religious groups with the power to employ political machinery in furtherance of their own interests are likely to receive a disproportionate share of such grants. *Cf. Engel v. Vitale*, 370 U.S. 421, 426-27, 429 (1962); *Everson v. Board of Education of Ewing Tp.*, 330 U.S. 1, 15 (1947). Although this factor is not dispositive, special care must be taken to avoid constitutional violations when such a funding mechanism is selected. *See Lemon*, 403 U.S. at 622-24.

Evaluating all of these factors, I find no constitutional infirmity in awarding grants to organizations that are not pervasively religious in character, provided that such organizations do not engage in specifically religious activities in connection with activities conducted pursuant to the receipt of such grants. I note that "it does not follow that a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.'" *Harris v. McCrae*, 448 U.S. 297, 319 (1980). I am therefore determining that section 46.93 is constitutional, but I am also construing it so as to avoid an unconstitutional result. I conclude only that the board would violate the establishment clause by issuing grants to pervasively sectarian organizations or to any other organization that engages in a specifically religious activity in connection with the provision of pregnancy referral, teaching or counseling services to adolescents. As stated in *Nusbaum*, 64 Wis. 2d at 325, quoting *Tilton v. Richardson*, 403 U.S. at 682: "Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics." Therefore, I also express no opinion as to whether any particular grant recipient or applicant falls within the scope of this prohibition since that is a factual determination which must be made by the board through the application process. *See* 68 Op. Att'y Gen. 416, 421 (1979).

My conclusion is based upon the nature of these activities and does not necessarily apply to other activities that could be funded under section 46.93 or any other statute. The potential constitutional infirmity exists and a limiting construction of the statute is therefore required because most pervasively religious organizations hold moral views with respect to premarital sexual relations and other related topics. The constitutional danger is that the state may

provide funding to a pervasively sectarian organization or a secular affiliate which funding could then be used, either intentionally or unintentionally, to inculcate the moral views of the pervasively sectarian organization on these subjects. With respect to grant monies given to pervasively sectarian organizations or their secular affiliates for other purposes, a specific analysis of the activity funded would be required. Therefore, nothing said here is intended to address or implicate the legality of providing state aid to pervasively sectarian organizations or their secular affiliates for purposes other than pregnancy care and prevention services involving referral, teaching and counseling.

I next address the following inquiry:

May funding provided by the . . . Board be used to provide program services in a building housing a church/ synagogue or other place of worship? If yes, under what circumstances?

I am of the opinion that an organization which satisfies the criteria mentioned in response to your first question ordinarily may not provide pregnancy referral, teaching and counseling services to adolescents in a building housing a place of worship, a parochial school or any other facility actively used for a pervasively sectarian purpose, even if no religious activities are conducted and all religious artifacts or symbols are removed or covered in those areas where program services are provided.

Since I have already indicated that funding may not constitutionally be provided by the board to pervasively sectarian organizations, the principal constitutional danger in funding program services provided in a building housing a facility actively used for a pervasively sectarian purpose is that a "crucial symbolic link . . . at least in the eyes of impressionable youngsters" between church and state will be created or perceived. *Ball*, 105 S. Ct. at 3223-24. As previously explained in response to your first inquiry, if at all possible a narrowing construction of section 46.93 must be employed in order to avoid such an unconstitutional result.

I am aware that "the use of a church facility by a state agency is not per se a violation of the Fi[rst] Amendment." *Lemke v. Black*, 376 F. Supp. 87, 89 (E.D. Wis. 1974), *vacated and remanded*, 525 F.2d 694 (7th Cir. 1975). On the other hand, the establishment clause clearly prohibits the locating of publicly funded classes in rooms with religious symbols and other religious decorations. *See*

Lemon, 403 U.S. at 615. The Supreme Court's recent decision in *Ball* indicates that buildings housing facilities actively used for a pervasively sectarian purpose ordinarily possess significant symbolic overtones in circumstances involving the teaching or counseling of adolescents.

In *Ball*, 105 S. Ct. at 1318-20, the Court refused to permit public funding of a "Community Education" program involving classes taught on parochial school premises after normal parochial school hours by part-time public school employes that were usually also full-time parochial school employes. Cases interpreting *Ball* have held that "symbolic impact" depends upon "the location and timing of the classes as well as the tender and impressionable ages of the children who are, one way or another, whether or not participants, in contact with the program." *Ford v. Manuel*, 629 F. Supp. 771, 777, 779 (N.D. Ohio 1985). See also *Parents Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1241-42 (2nd Cir. 1986).

Cases decided prior to *Ball* use similar tests. In *Decker v. O'Donnell*, 661 F.2d 598 (7th Cir. 1980), the court invalidated the use of Comprehensive Employment Training Act ("CETA") funding for employes of parochial schools. Relying upon *Meek*, 421 U.S. 349, a case in which the Supreme Court struck down the provision of therapeutic services by public school employes on the premises of parochial schools, the seventh circuit held that the "outstationing" of governmentally employed CETA workers in parochial schools for the purposes of providing remedial educational services was constitutionally prohibited. *Decker*, 661 F.2d at 610. In addition, the court held that the provision of nursing services by CETA employes was constitutionally impermissible because the "nursing services permitted do not exclude services treating high school children on matters of sexuality, sexual hygiene, and mental health." *Decker*, 661 F.2d at 613.

Decker, 661 F.2d at 607, tends to indicate that state funding of secular teaching or counseling services performed in facilities such as parochial schools is ordinarily constitutionally prohibited because the elementary and secondary schools involved are pervasively sectarian. Somewhat the same standard was employed in *Moore v. Board of Education*, 4 Ohio Misc. 257, 212 N.E.2d 833 (1965) where the court indicated that the test is whether by using such facilities a symbolic link is created or perceived "[i]n the eyes of the pupils — impressionable children." Similarly, in *Stark v. St.*

Cloud State University, 604 F. Supp. 1555, 1561 n.8 (D. Minn. 1985), the court concluded that “the parochial schools utilized . . . fit precisely the ‘pervasively sectarian’ description in *Lemon*.” That is also true with respect to buildings housing places of worship or other facilities actively used for pervasively sectarian purposes.

There may be rare situations involving the use of segregated areas such as basements, vacant buildings or areas with separate entrances where the use of church, parochial school or similar space to conduct referral, counseling and teaching activities is analagous to the lease arrangements approved in 75 Op. Att’y Gen. 265 (1986) and *State ex rel. Sch. Dist. v. Nebraska State Bd. of Ed.*, 188 Neb. 89, 195 N.W.2d 161, *cert. den.*, 409 U.S. 921 (1972). But caution is warranted since the subject matter of the activity for which funding is received carries religious or moral overtones. Given the nature of the clientele served, there is a strong likelihood that a crucial symbolic link between government and religion would be created or perceived where a state-funded program to refer, counsel or teach adolescents on personal moral choices respecting pre-marital sex, pregnancy and abortion is conducted in a building housing a facility actively employed for a pervasively sectarian purpose.

Finally, you note that, based upon the advice given by my predecessor in 75 Op. Att’y Gen. 251 (1986), the executive committee of the board has decided to recommend that the following conditions or restrictions be placed upon the use or acceptance of grant monies distributed by the board:

1. Funding provided by the . . . Board may not be used to provide program services within a parochial school during regular school hours.
2. Funding provided by the . . . Board may be used to provide program services within a parochial school after regular school hours, if the program is opened to all students regardless of race, religion, color, and national origin, and if all religious artifacts and symbols are removed or covered.
3. Recruitment of participants for programs utilizing any funds provided by the . . . Board must be conducted on a community-wide basis, and cannot be self-selecting on the basis of religion, etc.

You therefore ask whether these restrictions on the use of grant monies issued by the board are legally required. In view of the fact

that I have already indicated that such activities can rarely be conducted in any facility actively employed for a pervasively sectarian purpose even when no services are conducted and all religious artifacts or symbols are removed or covered, I need only analyze whether the board's programs must be open to all students, whether recruitment can be "self-selecting" and whether community-wide recruitment is required.

I am of the opinion that programs funded by the board must be open to all students regardless of race, religion, color and national origin, and that it is desirable but not required that recruitment not be "self-selecting" and that community-wide recruitment occur.

Your principal concern may have been addressed by the enactment of section 46.93(3m)(b) which now prohibits "[t]he existence of restrictions, based on religion or absence of religion, on persons applying for or receiving services under the grant." It is self-evident that to bar any adolescent from participation in a governmentally-funded activity based upon any of the other characteristics mentioned would constitute a violation of federal and state equal protection guarantees as well as various federal and state statutes prohibiting discrimination. *See, e.g., State ex rel. Palleon v. Musolf*, 120 Wis. 2d 545, 356 N.W.2d 487 (1984).

You have verbally indicated that the term "self-selection" refers to a process whereby a grantee contacts a church, parochial school or religious youth group and offers to provide counseling services to the adolescents who are members of the organization. Your concern is that, by contacting only certain religiously affiliated organizations and/or by failing to publicize the availability of scheduled programs on a community-wide basis, the grantee may intentionally or unintentionally limit participation in such publicly funded services to the members of a particular religious denomination or denominations, even though individuals that are not members of the religiously affiliated organization would not be prohibited from receiving such services if they had been made aware of their availability.

The statute contains no requirement that community-wide recruitment occur. If the availability of these programs is widely publicized by other grantees within the community, it may be that the failure of any particular grantee to publicize the availability of such services would cause no legal problem. But there is a possible

danger that, in practice, the activities of one or more grantees may favor members of a particular religion or religions with respect to the availability or provision of program services. *Cf. Wilder v. Sugarman*, 385 F. Supp. 1013, 1023 n.16 (S.D.N.Y. 1974) (three-judge court). If so, claims of religious discrimination may result. Whether such religious discrimination would in fact occur depends upon the facts of each particular case. Thus, while I believe that community-wide recruitment is desirable in order to avoid any potential claims of religious discrimination, I cannot say that it is legally required.

In conclusion, the board may not constitutionally provide funding to pervasively sectarian organizations or to any other organization that engages in a specifically religious activity in connection with the provision of referral, teaching or counseling concerning matters related to premarital sex and premarital pregnancy. Such activities also ordinarily may not be conducted in a building housing a place of worship, a parochial school or any other facility actively used for a pervasively sectarian purpose, even if no services are conducted and all religious symbols or artifacts are covered or removed. Finally, discrimination on the basis of race, color, creed or national origin is not permissible, and community-wide recruitment is not necessarily required but may be desirable in order to avoid any possibility that religious discrimination with respect to the availability or provision of services might occur.

DJH:FTC

Civil Rights; Discrimination; Words And Phrases; Section 942.04, Stats., potentially applies to service clubs; constitutionality of state regulation of such clubs is to be analyzed according to Board of Dirs. of Rotary Intern. v. Rotary Club, __U.S.__, 107 S. Ct. 1940 (1987). OAG 54-87

September 30, 1987

FRED A. RISSER, *Chairperson*
Senate Organization Committee

On behalf of the Senate Organization Committee, you request my opinion regarding the impact of *Board of Dirs. of Rotary Intern. v. Rotary Club, __U.S.__, 107 S. Ct. 1940 (1987)*, on service clubs in Wisconsin. In that case, the Supreme Court held that California's public accommodations law, which prohibited sex discrimination by business establishments, does not violate first amendment freedoms of private association and expressive association. It is my opinion that the denial of rights statute, section 942.04, Stats., potentially applies to Wisconsin service clubs, and that the constitutionality of such application is to be analyzed according to the factors set forth in the *Rotary Intern.* case.

Section 942.04(1) provides, *inter alia*, that whoever does the following is guilty of a Class A misdemeanor:

(a) Denies to another . . . the full and equal enjoyment of any public place of accommodation or amusement because of sex . . .; or

(b) Gives preferential treatment to some classes of persons in providing services or facilities in any public place of accommodation or amusement because of sex[.]

Section 942.04(2) provides that "public place of accommodation or amusement":

shall be interpreted broadly to include, but not be limited to, places of business or recreation, hotels, motels, resorts, restaurants, taverns, barbershops, nursing homes, clinics, hospitals, cemeteries, and any place where accommodations, amusement, goods or services are available either free or for a consideration except where provided by bona fide private, nonprofit organizations or institutions.

Section 942.04(3) provides that no person, club or organization may “give preferential treatment, because of sex . . . regarding the use of any private facilities commonly rented to the public” and imposes Class A Misdemeanor punishment for violators.

In 1895, one year before the United States Supreme Court put its imprimatur on the “separate but equal” fiction which justified the Jim Crow laws, *Plessy v. Ferguson*, 163 U.S. 537 (1896), Wisconsin’s Legislature adopted its first denial of rights statute. Section 4398c, Stats. (1895), imposed both criminal and civil liability upon “any person who shall deny to another person, in whole or in part, the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, restaurants, saloons, barber shops, eating houses, public conveyances on land or water, theaters, and all other places of public accommodation or amusement, except for reasons alike to all persons of every race or color.”

In 1898, the reference to “theaters” was deleted. The statute remained substantially the same until 1955. Chapter 696, Laws of 1955, changed the scheme somewhat so that the enumerated list of places was eliminated, and the phrase “any place of public accommodation or amusement” was substituted therefor. Public place of accommodation was defined to “include inns, restaurants, taverns, barbershops and public conveyances.” Sec. 942.04(2), Stats. (1955). The change in language effected no substantive change of meaning. 52 Op. Att’y Gen. 263, 265 (1963).

In 1965, the statute was amended to expand the definition of “public place of accommodation or amusement.” Chapter 439, Laws of 1965, provided that the term:

shall be interpreted broadly to include, but not be limited to, places of business or recreation, hotels, motels, resorts, restaurants, taverns, barbershops, nursing homes, clinics, hospitals, cemeteries, and any place where accommodations, amusement, goods or services are available either free or for a consideration except where provided by bona fide private, nonprofit organizations or institutions.¹

This amendment to section 942.04 was enacted eighteen months after the landmark Civil Rights Act of 1964. Title II of that Act, 42

¹ Curiously, the 1965 amendment deleted “public conveyances” from the list of enumerated public places of accommodation.

U.S.C. §2000a, prohibited discrimination in places of public accommodation, as broadly defined by the Act. Title II also exempted from its coverage “private club[s] or other establishment[s] not in fact open to the public.” 42 U.S.C. §2000a(e). It is reasonable to assume that the Wisconsin Legislature had this historic federal legislation in mind when it expanded the definition of “public place of accommodation or amusement” in 1965.

In 1975, the Legislature added sex to the list of protected classes and added the current subsection (1)(b). Chs. 94, 256, Laws of 1975.

The term “public place of accommodation or recreation” is defined in terms of the sites at which discrimination is prohibited; e.g., “places of business” or “place[s] where accommodations, amusement, goods or services are provided” rather than the conduct which is prohibited. Despite the relatively narrow definition of “public place of accommodation,” it is my opinion that section 942.04 extends to discriminatory conduct by those who deny equal rights at public places of accommodation. Section 942.04(1)(b) imposes liability on anyone who “gives preferential treatment to some classes of persons in providing services or facilities in any public place of accommodation.” If an organization provides services or facilities, and does so in a public place of accommodation, and provides those services or facilities in a discriminatory way, the organization is liable under the statute, unless it is a “bona fide private, nonprofit organization or institution.”

The Minnesota Supreme Court has held that the Jaycees is a business organization which sells memberships as its product, and which has as its goal the advancement of its members. *United States Jaycees v. McClure*, 305 N.W.2d 764, 769 (Minn. 1981). The California Court of Appeals has held that the Rotary International is a business establishment which, through meetings and publications, provides business-to-business contacts and business benefits to its members. *Rotary Club of Duarte v. Board of Directors*, 178 Cal. App. 3d 1035, 224 Cal. Rptr. 213, 225-26 (Cal. App. 1986). To the extent that any Wisconsin service club provides similar benefits to its members, the club provides “services” within the meaning of section 942.04.

Whether a service club provides services in a “public place of accommodation” depends on the practices of the club. To the

extent that meetings take place in restaurants, hotels and the like, they obviously occur in public places of accommodation. Similarly, to the extent a service club operates from any fixed location to market memberships, arrange club meetings or coordinate club projects, the club is a place of business and therefore within the definition of public place of accommodation.

A service club is not liable under the statute, however, if it falls within the exception for “bona fide private, nonprofit organizations or institutions.” Although the Wisconsin courts have not had an opportunity to interpret that phrase, it is my opinion that the courts would use the same factors used by the federal courts in determining whether an organization is a “private club” within the meaning of Title II of the Civil Rights Act of 1964.

The courts have considered several factors in interpreting the term “private club,” including selectivity in membership, organization size, the existence of formal membership procedures, the degree of membership control over internal governance, limitations on the use of facilities, and the extent of advertising or publicity. *Nesmith v. Young Men’s Christian Ass’n of Raleigh, N.C.*, 397 F.2d 96, 101-02 (4th Cir. 1968); *United States v. Trustees of Fraternal Order of Eagles*, 472 F. Supp. 1174, 1175 (D. Wis. 1979); *Cornelius v. Benevolent Protective Order of Elks*, 382 F. Supp. 1182, 1203 (D. Conn. 1974); *Wright v. Cork Club*, 315 F. Supp. 1143, 1153 (D. Tex. 1970). The Minnesota Supreme Court used these factors in determining whether the Jaycees was a private group under that state’s public accommodations statute. *United States Jaycees v. McClure*, 305 N.W.2d 764, 770 (Minn. 1981). The factors were approved by the Supreme Court in *Roberts v. United States*, 468 U.S. 609, 629-30 (1984).

Because of the generality of your question, I cannot offer an opinion whether any particular Wisconsin service club is covered by section 942.04. Whether the club “provides services” and operates in a “public place of accommodation” are highly dependent on the particular facts of the club. However, it does appear that many service clubs operating in Wisconsin would indeed be covered by the statute. Similarly, whether a particular service club is a “private . . . organization” within the exception must be analyzed according to the factors outlined above.

Once it is decided that a particular service club is covered under section 942.04, the case cited in your opinion request becomes relevant. State regulation of voluntary associations potentially implicates the First Amendment protections given to expression and association. In *Roberts*, the Court stated that "because the bill of rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the state." 468 U.S. at 618. Not all associations are entitled to the same degree of constitutional protection, however. Associations which are "distinguished by smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship" are entitled to the greatest protection from state interference. 468 U.S. at 620. At the other end of the spectrum, large business enterprises are far removed from the concerns which give rise to the constitutional protections of personal liberty. 468 U.S. at 620.

The *Roberts* decision stated that a number of factors were relevant in determining whether an association was entitled to constitutional protection. The relevant factors "include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." 468 U.S. at 620. After analyzing the Jaycees on the relevant factors, the Court determined that the Jaycees was not entitled to constitutional protection of its decision to exclude women. 468 U.S. at 621. In the *Rotary Intern.* case, the Supreme Court reached the same conclusion with regard to a California Rotary Club after analyzing the same factors. 107 S. Ct. at 1945-47.

The Court also considered in each case whether the respective judicial orders to admit women would violate the group's freedom of expressive association. *Roberts*, 468 U.S. at 622-29; *Rotary Intern.*, 107 S. Ct. at 1947-48. In both cases, the Court held that admitting women would not affect the male members' right of expressive association. *Roberts*, 468 U.S. at 628; *Rotary Intern.*, 107 S. Ct. at 1848. Both cases recognize that the state statute which required admission of women served a compelling state interest to eliminate invidious discrimination, recognized that the statute served the purpose by a means which was least restrictive of members' expressive rights, and emphasized that admitting women would not infringe on the organization's abilities to engage in any

of the expressive activities it had previously engaged in. *Roberts*, 468 U.S. at 622-29; *Rotary Intern.*, 107 S. Ct. at 1047-48.

Because of the generality of your question, I cannot offer an opinion whether any particular Wisconsin service club is within the zone of privacy established by the first amendment. That analysis "requires a careful inquiry into the objective characteristics of the particular relationships at issue." *Rotary Intern.*, 107 S. Ct. at 1147, n.6. It is my opinion, however, that the issue of sex discrimination in service clubs is to be analyzed with reference to the terms of section 942.04, and the *Roberts* and *Rotary Intern.* cases.

DJH:BAO

Civil Service; Criminal Law; Drugs; Employer And Employee; Municipalities; A municipality's decision to require pre-employment drug testing for prospective employes must balance the need for testing in particular positions against the invasion of personal rights that the search entails, considering all relevant factors. OAG 55-87

September 30, 1987

TOM LOFTUS, *Chairman*
Assembly Organization Committee

You ask on behalf of the Committee on Assembly Organization whether the city of West Allis may lawfully require pre-employment drug testing of all prospective civil service employes. It is my opinion it is unlikely that an employer could justify testing of every prospective employe, but that each position must be separately analyzed using the relevant constitutional factors.

The fourth amendment to the United States Constitution and article 1, section 11, of the Wisconsin Constitution protect people against unreasonable searches and seizures. The basic purpose of the amendment is "to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). The test of reasonableness is not capable of precise definition or mechanical application, but requires a balancing of the need for the particular search against the invasion of the personal rights that the search entails. *Bell v. Wolfish*, 441 U.S. 520, 529 (1979).

The courts have considered the involuntary taking and analysis of urine by governmental employers to be a search and seizure within the meaning of the fourth amendment. *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 176 (5th Cir. 1987); *McDonnell v. Hunter*, 809 F.2d 1302, 1307 (8th Cir. 1987); *Shoemaker v. Handel*, 795 F.2d 1136, 1141 (3rd Cir. 1986); *Capua v. City of Plainfield*, 643 F.2d 1507, 1513 (D. N.J. 1986); *Lovvorn v. City of Chattanooga*, 647 F. Supp. 875, 879 (D. Tenn. 1986); *American Federation of Government Employees, AFL-CIO v. Weinberger*, 651 F. Supp. 726, 732 (S.D. Ga. 1986); *Patchogue-Medford Congress of Teachers v. Board of Education*, 111 A.D. 35, 505 N.Y.S.2d 888 (N.Y. App. 2nd Div. 1986), 1 IER Cases 1315 *affirmed*, ___ N.Y.2d ___, No. 156 (June 9, 1987); *City of Palm Bay v. Bauman*, 475 S.2d 1322 (Fla. App. 5 Dist. 1985).

The supreme court has established a two-part test to determine whether a reasonable expectation of privacy exists.

The first [question] is whether the individual, by his conduct, has “exhibited an actual (subjective) expectation of privacy”—whether in the words of the *Katz [v. United States]*, 347 U.S. 347, 351 (1967) majority, the individual has shown that “he seeks to preserve [something] as private.” The second question is whether the individual’s subjective expectation of privacy is “one that society is prepared to recognize as ‘reasonable,’ ”—whether in the words of the *Katz* majority, the individual’s expectation, viewed objectively, is “justifiable” under the circumstances.

Smith v. Maryland, 442 U.S. 735, 740-41 (1979) (citations omitted).

Drug testing by urinalysis involves two steps, collection of the sample and disposition and analysis of the sample. Under most testing schemes, the subject is required to urinate under the close supervision of a government representative, to reduce the possibility of sample substitution or alteration. *Capua*, 643 F. Supp. at 1511; *National Treasury Employees Union v. Von Raab*, 649 F. Supp. 380, 382 (D. La. 1986). Those procedures have been determined to be highly intrusive. Indirect observation has been held to be less intrusive, but still intrusive enough to be an invasion of the subject’s expectation of privacy. *American Federation of Government Employees*, 651 F. Supp. at 732. However, at least three courts have hinted that the intrusion of urinalysis is minimal. *Turner v. Fraternal Order of Police*, 500 A.2d 1005, 1009, 1010 (D.C. App. 1985); *National Treasury Employees Union v. Von Raab*, 808 F.2d 1057, 1061 (5th Cir. 1987); *Mack v. U.S., FBI*, 653 F. Supp. 70, 74-75 (S.D.N.Y. 1986).

The courts are similarly divided as to the reasonableness of any subjective expectation of privacy which may exist. Most courts have held that a person has a reasonable and legitimate expectation of privacy in the personal information contained in bodily fluids. *Schmerber v. California*, 384 U.S. 757, 769-70 (1966); *Capua*, 643 F. Supp. at 1513; *McDonell v. Hunter*, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985); *Storms v. Coughlin*, 600 F. Supp. 1214, 1218 (S.D. N.Y. 1984). Some courts have held that employees in certain occupations have a diminished expectation of privacy because of the public safety aspects of their jobs, *Lovvorn*, 647 F. Supp. at 880; *Allen v. City of Marietta*, 601 F. Supp. 482, 491 (N.D. Ga. 1985),

because of the highly regulated nature of their employment, *Shoemaker*, 795 F.2d at 1142, or because of their law enforcement characteristics, *Mack*, 653 F. Supp. at 75; *Turner*, 500 A.2d at 1008. Some writers have even suggested that there is no reasonable expectation of privacy in a body waste product which must necessarily be eliminated. *Turner*, 500 A.2d at 1011; *Mack*, 653 F. Supp. at 75.

The courts all seem to recognize that a governmental employer has a legitimate interest in hiring employes who are free from the influence of drugs which may adversely affect the government's ability to discharge its statutory responsibilities. *Allen*, 601 F. Supp. at 491; *Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy*, 538 F.2d 1264, 1267 (7th Cir. 1976). The strength of that interest increases as the risk of public danger or injury increases, compare *Patchogue*, 505 N.Y.S.2d at 891, 1 IER Cases at 1317, with *Allen*, 601 F. Supp. at 491, or as the risk of conflict of interest increases, *McDonell*, 809 F.2d at 1308; *National Treasury Employees Union*, 808 F.2d at 1062.

The broad range of weights assigned by the courts to the subjective expectations of privacy in urination, the reasonableness of an asserted privacy interest in a body waste, and the strength of the government's legitimate interest in a drug-free work place make it impossible to give a single answer to your question. The strengths of each factor will vary with each job category, each degree of collection surveillance, and whatever conclusion is made about the reasonableness of a privacy interest in the body waste product. The leading case on the subject suggests nine factors which must be weighed and balanced. *National Treasury Employees Union*, 816 F.2d at 177-80.

The courts have generally held that a current employe may be subject to urinalysis only if the employer has a reasonable, individualized suspicion that the employe was using illegal drugs. *Lovvorn*, 647 F. Supp. at 881, and cases cited. At least two courts, however, have permitted random testing of employes without reasonable suspicion. *McDonell*, 809 F.2d at 1308 (prison guards); *Shoemaker*, 795 F.2d at 1143 (jockeys).

Pre-employment testing raises somewhat different issues than testing of current employes. Nonconsensual testing of current employes, without reasonable suspicion of drug use, has been held to impermissibly create an additional condition of employment.

Capua, 643 F. Supp. at 1519; *American Federation of Government Employees*, 651 F. Supp. at 736; *National Treasury Employees Union*, 649 F. Supp. at 387-88. The courts tend to view purported consents to such testing as coerced, since employees were given only the option of consenting to the test or being terminated. *Capua*, 643 F. Supp. at 1521; *Palm Bay*, 475 S.2d at 1324-25.

It is substantially easier to prove voluntary consent in pre-employment testing. The prospective employe is put on notice from the beginning that drug-free status at the time of hire is a condition of employment. Those who object to such testing need not apply for government employment. Clearly, a government employer has a right to establish that its prospective employes are physically and mentally able to perform their assigned duties. The courts which have considered this issue have tended to permit pre-employment drug testing for dangerous or sensitive jobs. *National Treasury Employees Union*, 816 F.2d at 180; *McLeod v. City of Detroit*, 39 FEP Cases 225 (E.D. Mich. 1985). In *dictum*, other courts have stated that pre-employment drug screening does not implicate the fourth amendment. *McDonell*, 612 F. Supp. at 1130 n.6; *Lovvorn*, 647 F. Supp. at 881 n.7; *Turner*, 500 A.2d at 1011.

The government has interests in regulating the conduct of its employes that differ significantly from those it possesses in connection with regulation of the conduct of the citizenry in general. *Kelley v. Johnson*, 425 U.S. 238, 245 (1976). Liberty interests are subject to greater restrictions than first amendment interests, *ibid*, but the courts have expanded on the precise holding of *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), to declare that public employment may not be conditioned on waiver of a constitutional right. *McDonell*, 612 F. Supp. at 1131; *American Federation of Government Employees*, 651 F. Supp. at 736.

It is my opinion that a pre-employment drug testing program most likely would be upheld by the courts in situations where public safety and security create a strong governmental interest in the integrity of an employe's character and physical and mental faculties, and where the circumstances of collection are least intrusive. In practice, public employment involves positions which vary greatly in terms of responsibility, danger, and opportunities for conflict of interest, in which the government's interest in a drug-free employe varies accordingly, and testing programs involve collection circumstances which vary in intrusiveness. For each of these posi-

tions, the city of West Allis will have to perform a case-by-case analysis of the fourth amendment factors to determine whether pre-employment testing is reasonable.

In addition, I would advise any municipality undertaking such testing to adopt a resolution setting forth findings that the job classifications subject to testing give rise to a strong governmental interest in the integrity of an employe's character and physical and mental faculties such that pre-employment testing is desirable and in the public interest. Such a finding would be helpful should such testing be challenged in court.

Aside from these guidelines, the uncertainty of the law does not permit an unequivocal answer to your question. The city may take some comfort in knowing that a good faith attempt to comply with an unsettled constitutional standard may protect it from damages if it errs. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982).

The legal issues surrounding pre-employment drug testing do not end with a constitutional analysis of the reasonableness of the initial search. The results of urinalysis must be recorded and communicated in some form which will ultimately identify the prospective employe. The testing process should not disseminate identifiable results further than justified by the government's interest in a drug-free workforce. The testing process should be conducted in a manner which reduces the risk of rejection based on false-positive test results. The precise design of these safeguards, however, is beyond the scope of your request.

DJH:BAO

District Attorney; Law Enforcement; Police; The police may justifiably prevent a district attorney from inspecting their investigation files on pending criminal cases to determine whether there is exculpatory evidence which must be disclosed to a defendant only in those exceptional instances in which a compelling need to maintain secrecy outweighs the constitutional and statutory considerations ordinarily demanding access. OAG 56-87

October 1, 1987

ROBERT D. ZAPF, *District Attorney*
Kenosha County

You ask whether the police may prevent a district attorney from inspecting their investigation files on pending criminal cases to determine whether there is exculpatory evidence which must be disclosed to the defendant.

It is my opinion that the police may justifiably close their files to the district attorney only in those exceptional instances in which a compelling need to maintain secrecy outweighs the constitutional and statutory considerations ordinarily demanding access.

Due process requires the prosecution to disclose material evidence favorable to a defendant. *Pennsylvania v. Ritchie*, 107 S. Ct. 989, 1001 (1987); *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *State v. Ruiz*, 118 Wis. 2d 177, 187-88, 347 N.W.2d 352 (1984). This does not mean that either litigation or investigation files must be relinquished for a defendant's unsupervised perusal. *Pennsylvania v. Ritchie*, 107 S. Ct. at 1003; *United States v. Bagley*, 473 U.S. 667, 675 (1985); *Moore v. Illinois*, 408 U.S. 786, 795 (1972). But the prosecution must deliver specific information to a defendant when there is a reasonable probability that the information would change the result of a criminal proceeding. *Pennsylvania v. Ritchie*, 107 S. Ct. at 1001; *United States v. Bagley*, 473 U.S. at 675-76, 682.

The responsibility for disclosure, although primarily that of the district attorney, is shared by the police. See *Walker v. Lockhart*, 763 F.2d 942, 958 (1985), *cert. denied*, 106 S. Ct. 3332 (1986). The police need not reveal exculpatory evidence directly to a defendant, but they must make it available to the district attorney so he can discharge his responsibility to insure that those he chooses to prosecute are convicted fairly. *Campbell v. Maine*, 632 F. Supp. 111, 121

(D. Me. 1985), *aff'd*, 787 F.2d 776 (1st Cir. 1986). See *Walker v. Lockhart*, 763 F.2d at 958.

The district attorney, however, cannot blindly rely on the police to provide him with any exculpatory evidence they might have. *Carey v. Duckworth*, 738 F.2d 875, 877-78 (7th Cir. 1984). The failure to disclose exculpatory evidence cannot be excused because the police rather than the prosecutor are at fault. *United States ex rel. Smith v. Fairman*, 769 F.2d 386, 391-92 (7th Cir. 1985); *Walker v. Lockhart*, 763 F.2d at 957-58; *Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842, 846 (4th Cir. 1964). Regardless of the moral or ethical culpability of the district attorney, suppression of exculpatory evidence in the possession of the police undermines the result of any proceeding in which the evidence was unavailable to the accused. *Id.* If the district attorney has reason to believe that the police are in possession of exculpatory evidence, therefore, he must take the initiative and obtain the evidence from them. *Carey v. Duckworth*, 738 F.2d at 878. See *United States ex rel. Smith v. Fairman*, 769 F.2d at 391-92; *Walker v. Lockhart*, 763 F.2d at 957-59. *Cf. Jones v. State*, 69 Wis. 2d 337, 348-49, 230 N.W.2d 677 (1975) (to comply with statutory discovery requirements prosecutor must acquire all evidence in possession of state investigative agencies).

In the vast majority of cases I would expect the police to voluntarily cooperate with the prosecutor in discharging their mutual obligation to discover and disclose exculpatory evidence. A simple request, therefore, will usually be sufficient to secure police files for this purpose.

A prosecutor, however, has no authority to order the police to surrender their files. See sec. 62.09(13)(a), Stats. (police must follow orders of mayor and common council). And in those rare cases in which the police refuse to relinquish them to the prosecutor, he must resort to more formal means of obtaining papers in the possession of others.

A subpoena is the most expeditious legal means of acquiring police files. See *Jones v. State*, 69 Wis. 2d at 349-50. See also *Pennsylvania v. Ritchie*, 107 S. Ct. at 994. But even a subpoena does not create an absolute right to acquire the documents it demands. A court may quash or modify a subpoena on motion of the recipient if it is "unreasonable and oppressive." Sec. 805.07(3), Stats. In

determining whether a subpoena is unreasonable, the court must balance the intensity of the litigant's need for the material against the extent of any harm which would be caused by its production. *Dow Chemical Co. v. Allen*, 672 F.2d 1262, 1268-70 (7th Cir. 1982) (and authorities cited).

It is not possible to catalogue the exceptional situations in which a district attorney may be foreclosed from acquiring police investigation files. The balance in each case must be struck on the basis of its particular facts. *Dow Chemical Co. v. Allen*, 672 F.2d at 1269. Some examples of extraordinary situations in which access might be denied, however, are those where the district attorney himself is the target of the police investigation, where the files contain classified national security information, or where there is valid reason to believe that the district attorney will needlessly divulge sensitive information other than the specific evidence the defendant is lawfully entitled to receive.

In making its determination whether a subpoena should be honored, the court may examine the desired documents in camera to balance a defendant's right to disclosure of exculpatory evidence against a contravening public interest in maintaining confidentiality. *Pennsylvania v. Ritchie*, 107 S. Ct. at 1003-04. The court may order inspection of such parts of police files as is consistent with the public interest. See *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 438-40, 279 N.W.2d 179 (1979). And it may issue a protective order prohibiting disclosure to persons other than those having a valid reason to review the files. *Dow Chemical Co. v. Allen*, 672 F.2d at 1269 n.10. The defendant's interest in obtaining exculpatory evidence is fully protected by an in camera judicial review of investigation files. *Pennsylvania v. Ritchie*, 107 S. Ct. at 1003-04.

DJH:TJB

Clerk Of Courts; Courts; Fees; If the court fails to order the annual fee paid under section 814.61(12)(b), Stats., for receiving and disbursing money deposited as payment for maintenance payments, child support or family support, the clerk of court can bill the payor and then collect the fee with the same remedies available as in any other case of a debt created by law. Although the clerk cannot seek a remedial sanction under chapter 785 in these situations, the clerk does have the authority to increase the fee after providing the payor with written notice of this obligation and a reasonable opportunity to pay. OAG 57-87

October 21, 1987

JAMES T. RUNYON, *Corporation Counsel*
Lincoln County

You ask a number of questions concerning the enforcement of section 814.61(12)(b), Stats., pertaining to the annual fee for receiving and disbursing money deposited as payment for maintenance payments, child support or family support under interim or final orders in an action affecting the family. Section 814.61(12)(b) was created as a part of subchapter II of chapter 814 by chapter 317, Laws of 1981, and it now provides:

In a civil action, the clerk of court shall collect the fees provided in this section. Unless a specific exemption is provided, a governmental unit, as defined in s. 108.02(17), shall pay fees under this section. The clerk shall collect the following fees:

. . . .

[12](b) *Maintenance payments and support.* For receiving and disbursing money deposited as payment for maintenance payments, child support or family support payments, under interim or final orders in an action affecting the family, an annual fee of \$10 to be paid by the party ordered to make payments. The court shall order the annual fee to be paid at the time of, and in addition to, the first payment to the clerk in each year for which payments are ordered. If the annual fee is not paid when due, the clerk shall not deduct the annual fee from the maintenance or support payment, but:

1. The clerk has standing to move the court for a remedial sanction under ch. 785.

2. The annual fee is increased to \$20. The \$20 fee shall be doubled each succeeding year in which the annual fee remains unpaid, but the total annual fee shall not exceed \$320.

All of your questions assume that the court has failed to order the annual fee to be paid at the time of the first payment to the clerk under the maintenance or support order or judgment. The two separate mandates of section 814.61(12)(b) are that (1) the clerk shall collect the annual fee and (2) the court shall order the annual fee to be paid.

Your first question is whether the clerk can bill the payor and collect the fee where the order or judgment does not specifically order payment of the fee as anticipated by the statute. Neither sections 59.39 through 59.42, dealing with the powers and the duties of the clerk of court, nor the provisions of chapter 767, addressing actions affecting the family, provide an answer to this question.

It is my opinion that the \$10 annual fee is a debt created by statute which the obligor owes whether or not payment has been ordered by the court. The absence of any formal notice of this obligation in an order or judgment does not relieve him of the obligation if some other notice is given of this responsibility. In this latter respect, the clerk may bill the payor and then collect the fee with the same remedies available as in any other case of a debt created by law.

You next ask whether the clerk may move the court for a remedial sanction and assess double the annual fee where the payor is in default and again where no divorce order or judgment has specifically ordered payment of this fee. The clerk of court has well-defined responsibilities for the receipt and disbursement of maintenance and support payments under section 767.29 and subsequent provisions in that chapter. If the maintenance payments or support money adjudged or ordered to be paid are not paid to the clerk at the time provided in the judgment or order, the clerk or the family court commissioner "shall take such proceedings as either of them deems advisable to secure the payment of the sum including enforcement by contempt proceedings under ch. 785 or by other means." Sec. 767.29(1), Stats. In contrast, the clerk's only apparent power under section 814.61(12)(b) is to move the court for a remedial sanction under chapter 785.

It is my opinion that the remedial sanctions under chapter 785 are not available under these circumstances. Contempt of court may include misconduct in the presence of the court or disobedience, resistance or obstruction of the authority, process or order of a court. Sec. 785.01(1), Stats. Where the court has failed specifically to order payment of the annual \$10 fee, the payor cannot be in contempt of court.

The acts of a clerk of court are ministerial, and the clerk may not exercise judicial powers except in accordance with the strict language of a statute conferring such power. *State v. Dickson*, 53 Wis. 2d 532, 541-42, 193 N.W.2d 17 (1972). Ministerial acts are those done in obedience to instructions of a legal authority without the exercise of the actor's discretion or judgment upon the propriety of the act being done. *State v. Johnston*, 133 Wis. 2d 261, 267, 394 N.W.2d 915 (Ct. App. 1986). Although other remedies are available, the clerk cannot seek a remedial sanction on the theory that the payor has acted or failed to act in contempt of the clerk's request or demand for payment.

Fundamental fairness requires that the fee not be increased until either the court provides for payment by order or judgment or the clerk bills the obligor and gives him a reasonable opportunity to pay. The increase in the annual fee under section 814.61(12)(b)2. is not contingent upon the court ordering the annual fee to be paid at the time of the first payment. Although this question and your other questions easily could be resolved by very minor statutory clarifications, it is my opinion that the clerk does have the authority at present to increase the fee after providing the payor with written notice of this obligation and a reasonable opportunity to pay.

DJH:DPJ

Municipalities; Taxation; Vocational, Technical And Adult Education; Municipalities may use the add-on method of recovery of refunded taxes from Vocational, Technical and Adult Education districts pursuant to section 74.73(2), Stats., regardless of whether the refunds are for unlawful taxes under section 74.73(1r) or excessive assessments under section 74.73(4). OAG 58-87

October 22, 1987

TOM LOFTUS, Chairperson
Assembly Organization Committee

Vocational, Technical and Adult Education districts are authorized by section 38.16(1), Stats., to levy a tax which is collected by each city, village and town in the district as part of the property tax. In section 74.73 the Legislature has established a procedure under which individuals can recover unlawful taxes and excessive assessments which they have paid to cities, villages and towns. With respect to unlawful taxes, that procedure is set forth in section 74.73(1r), which provides as follows:

Any person aggrieved by the levy and collection of any unlawful tax assessed against him may file a claim therefor against the town, city or village which collected such tax in the manner prescribed by law for filing claims in other cases. If it appears that the tax for which such claim was filed or any part thereof is unlawful and that all conditions prescribed by law for the recovery of unlawful taxes have been complied with, the town board, village board or common council may allow and the town, city or village treasurer shall pay such person the amount of the claim found to be unlawful and excessive. If any town, city or village fails or refuses to allow the claim, the claimant may have and maintain an action against the same for the recovery of all money so unlawfully levied and collected, together with interest at the legal rate computed from the date of filing the claim. Every such claim shall be filed, and every action to recover any money so paid shall be brought, within one year after such payment.

With respect to excessive assessments, section 74.73(4) provides as follows:

No claim may be filed and no action may be brought under this section which is based upon an allegedly excessive assess-

ment except that in counties with a population of under 500,000 which have not adopted a county assessor system a claim may be filed and an action may be brought if the tax is paid on the contested assessment by January 10 of the year following the year of the assessment and a claim filed within 10 days thereafter and suit commenced within 30 days following the denial of the claim or within 90 days after the claim is filed if the municipalities fail to act on the claim.

The same statute also establishes a procedure under which a city, village or town can then in turn recover the proportionate share of illegally collected tax which it paid over to the Vocational, Technical and Adult Education district. Section 74.73(2) provides as follows:

If any town, city or village has paid such claim or any judgment recovered thereon after having paid over to the county treasurer the state, county and metropolitan sewerage area debt retirement tax levied and collected as part of such unlawful tax, or has paid any necessary expenses in defense of such action, the town, city or village shall be credited by the county treasurer, on the settlement with the proper treasurer for the taxes of the ensuing year, the whole amount of such state, county and metropolitan sewerage area debt retirement tax so paid into the county treasury and the county's, state's and metropolitan sewerage area debt retirement tax proportionate share of the taxable costs, interest and expenses of suit, unless such claim or judgment is the result of an error or defect, other than an error or defect of law, caused by the town, city or village or official thereof. The county treasurer shall also be allowed by the state treasurer the amount of state tax so illegally collected and the state's proportionate share of such taxable costs, interest and expenses of suit and shall be paid in his settlement with the state treasurer next after the payment of such claim or the collection of such judgment. If any part of such unlawful tax was paid over to any school district or vocational, technical and adult education district before the payment of such claim or judgment, the town shall charge the same to such district with the proportionate share of the taxable costs, interest and expenses of suit, and the

town clerk shall add the same to the taxes of such district in the next annual tax.¹

You ask whether this add-on method of recovering a proportionate share of the refund applies to both section 74.73(1r) and (4). I am of the opinion that it does.

Section 74.73(1r) concerns itself with the method of filing a claim for the recovery of "unlawful taxes," as that term is defined elsewhere in the statutes. The first sentence of section 74.73(2), which follows immediately thereafter, refers to "such claim or any judgment recovered thereon." It is evident that the term "such claim" refers to the claim described in the preceding subsection. By direct reference, therefore, the section 74.73(2) add-on provision applies to unlawful taxes refunded to taxpayers under section 74.73(1r).

Section 74.73(4) permits, in certain limited situations, claims based upon "allegedly excessive assessments." In my opinion, it does not matter in the context of your request whether a particular claim is one for an "excessive assessment" pursuant to this subsection or is instead one for an "unlawful tax" pursuant to subsection (1r). Section 74.73 must be read in its entirety, as a unified statutory scheme for the recovery of overpaid taxes. When viewed in this context, section 74.73 suggests that whether characterized as an unlawful tax or an excessive assessment, once these overpayments have been refunded to the taxpayer a city is permitted to charge back the Vocational, Technical and Adult Education district by the add-on method.

If the add-on provision did not apply, a city would be left with no statutory authority to charge back the proportionate share of excessive assessments and city taxpayers would be forced to bear

¹ It should be noted that the first portion of section 74.73(2) clearly allows "any town, city or village" a credit in reference to taxes previously turned over to the county for state, county and metropolitan sewerage area debt retirement. However, the last sentence refers only to "the town" charging unlawful taxes to school or VTAE districts. The reference solely to towns appears to be a historical remnant, reflecting the state's early township based system of school government, which has somehow survived subsequent statutory revision. See ch. 27, secs. 412, 472 and 516, Rev. Stats. (1878) and sec. 1164, Rev. Stats. (1878); ch. 154, sec. 52, Laws of 1971. The current statutes require districts to certify the amount of the school levy and the proportionate amount of the tax to be spread upon the tax rolls for collection in each city and village, as well as in each town. See secs. 38.16(1), 120.12(3) and (4), 120.17(8), Stats. I conclude that the omission of any reference to "city or village" in the last sentence of the subsection evidences "a legislatively dropped stitch in the statute" of no legal consequence. See *Scharping v. Johnson*, 32 Wis. 2d 383, 394, 145 N.W.2d 691 (1966).

the entire cost of these refunds, even though the cost of refunds for unlawful taxes would be shared. I see no logical reason why this inconsistency would be appropriate. In any event, I conclude that the add-on provision of section 74.73(2) does apply to taxes refunded under section 74.73(1r) as well as to taxes refunded under section 74.73(4).

DJH:BLB

Legislature; Public Officials; Wisconsin Employment Relations Commission; The senate may not appoint a commissioner to fill a vacancy in a term which will not occur during the extant session of the senate. In the present case, the provisional appointment for the vacancy in the term ending March 1, 1985, was valid, but the appointment for a full term beginning March 1, 1985, and ending on March 1, 1991, was invalid. The acts of the commissioner holding over in office are valid. OAG 59-87

October 29, 1987

STEPHEN SCHOENFELD, *Chairman*

Wisconsin Employment Relations Commission

You ask whether Commissioner Danae Davis Gordon was properly appointed for the term she is presently serving. If the appointment is not valid, you ask whether that invalidity affects any commission decisions in which Commissioner Davis Gordon participated as a member of a two-one majority. I have concluded that Commissioner Davis Gordon's appointment to the term beginning on March 1, 1985, was not valid but that her acts as a commissioner are legally valid and not subject to collateral attack.

Commissioner Davis Gordon was nominated by the Governor and, on May 24, 1984, appointed by the senate "to serve for the term ending March 1, 1985, and to a subsequent term ending March 1, 1991." The question is whether on these facts the Governor can nominate and the senate appoint a commissioner for a term which has not yet begun. Section 17.20(2), Stats., governs the procedure for filling vacancies on commissions. It provides:

Vacancies occurring in the office of any officer normally nominated by the governor, and with the advice and consent of the senate appointed, may be filled by a provisional appointment by the governor for the residue of the unexpired term, if any, subject to confirmation by the senate. Any such appointment shall be in full force until acted upon by the senate, and when confirmed by the senate shall continue for the residue of the unexpired term, if any, or until a successor is chosen and qualifies.

It is agreed that there was a vacancy on the commission for the term which ended March 1, 1985. That portion of Commissioner Davis Gordon's appointment and confirmation is not in question.

The question is whether on May 24, 1984, the then Governor could nominate and the then senate appoint Commissioner Davis Gordon for the term beginning on March 1, 1985, and ending on March 1, 1991.

In *State v. Roden*, 219 Wis. 132, 262 N.W. 629 (1935), the incumbent Governor on January 4, 1935, appointed a register of deeds to succeed a deceased incumbent "for the term expiring on January 4, 1937." The deceased incumbent's term expired on January 7, 1935, but he had been re-elected to office for the term which would have ended in January 1937. At the time, section 17.21 provided that vacancies in elective county offices would be filled "[i]n the office of . . . register of deeds . . . by appointment by the governor . . . for the residue of the unexpired term." The court held that section 17.21 did not contemplate an appointment to fill a vacancy in an office, the term of which had not yet begun.

The words in present day section 17.20(2) are identical to the words construed in *Roden*. The appointment on May 24, 1984, was for the residue of the unexpired term, that is until March 1, 1985. As the court noted, however, "if there is a vacancy and it can be filled by appointment before the term begins, then the appointment is for the full term and not for the unexpired portion of the term." *Roden*, 219 Wis. at 135. The court held that the Governor on January 4, 1935, could only appoint for the unexpired portion of the term ending January 7, 1935, because there was no "vacancy" for the term which would begin January 7, 1935, and end in January 1937.

That is also the case here. The vacancy for the term ending March 1, 1985, could be filled by appointment and confirmation under section 17.20(2). There was no vacancy for the term beginning March 1, 1985, and ending March 1, 1991, on May 24, 1984, however. That appointment, like the appointment in *Roden*, is for the full term. The appointment for the term beginning March 1, 1985, therefore, should have been made under section 15.06(1)(a) which provides: "Except as otherwise provided . . . the members of commissions shall be nominated by the governor, and with the advice and consent of the senate appointed, for staggered 6-year terms expiring on March 1 of the odd-numbered years."

On its face, the statute does not prohibit a governor from nominating, and a senate appointing, for terms beginning well beyond

their respective terms. That prohibition is implicit in the statute and the appointment power, however. If governors were allowed to nominate and senates allowed to appoint for anticipated vacancies in terms which had not yet begun, a governor with a cooperative senate could presume to fill vacancies in appointive offices occurring many years past the end of his or her term and well past the end of the senate's session and the next election. In the present case there is no question concerning the Governor's authority to appoint because Anthony Earl was governor both on May 24, 1984, and March 1, 1985. The 1985-86 session of the Legislature, however, began on January 15, 1985. Sec. 13.02(1), Stats. Therefore, the senate which confirmed Commissioner Davis Gordon on May 24, 1984, would not have been eligible to entertain an appointment for the term beginning March 1, 1985, since there was no vacancy in that term on May 24, 1984.

Our Legislature has one biennial session. *State ex rel. Sullivan v. Dammann*, 221 Wis. 551, 562, 267 N.W. 433 (1936). That session begins in January of each odd-numbered year. Sec. 13.02(1), Stats. Under section 13.02(4), any measures introduced in the regular session of the odd-numbered year which do not receive final action carry over to the regular annual session held in the even-numbered year. This is a legislative recognition that the Legislature's business does not carry over from one biennial session to another. The senate which began its session on January 15, 1985, is the senate which had the right to pass on the appointment of Commissioner Davis Gordon for the term beginning March 1, 1985, and ending March 1, 1991. The preceding session of the senate did not have that authority. Its attempt to appoint was not valid.

This conclusion is consistent with the holding in *Roden* and with the general proposition that a prospective appointment to fill a vacancy sure to occur in a public office is a valid appointment and vests title to the office in the appointee if made by an officer who, or by a body which, is empowered to fill the vacancy when it arises. 67 C.J.S. *Officers* §40 (1978); *State v. Lexcen*, 131 Mont. 161, 308 P.2d 974 (1957). Otherwise stated, an appointment to an office in anticipation of a vacancy in that office is proper only where the officer or body making the appointment is still in office when the vacancy occurs. Governor Earl, whose term continued to January 1987, could appoint for the residue of the term ending March 1, 1985, and could nominate for the full term ending March 1, 1991. The

senate which confirmed Commissioner Davis Gordon's appointment on May 24, 1984, however, was not "in office" when the vacancy for the term ending March 1, 1991, occurred. Because the senate which was in session on May 24, 1984, had no authority to appoint for a vacancy which would not occur until after the legislative session ended, its attempt to appoint was a nullity.

Under section 17.20(2), a provisional appointee serves for the residue of the unexpired term "or until a successor is chosen and qualifies." Because her appointment to the term ending March 1, 1985, was valid, Commissioner Davis Gordon had a legal right to continue in office under the holdover clause. Because she had that right she is an officer *de jure*, and not *de facto*. *State ex rel. Thompson v. Gibson*, 22 Wis. 2d 275, 294, 125 N.W.2d 636 (1964); 35 Op. Att'y Gen. 447 (1946). Even if she were not a *de jure*, but only a *de facto* officer, however, any of her acts as commissioner were valid as to the public and third parties and cannot be attacked collaterally. *State ex rel. Reynolds v. Smith*, 22 Wis. 2d 516, 126 N.W.2d 215 (1964). All of Commissioner Davis Gordon's acts to this time are legally valid. Under section 17.20(2) Commissioner Davis Gordon may continue to serve as a commissioner until a successor is chosen and qualifies, that is, until someone is nominated by the Governor, and with the advice and consent of the senate appointed, under section 15.06(1).

DJH:AL

County Board; Open Meeting; A county board chairperson and a county board committee are not authorized by section 19.85(1)(c), Stats., to meet in closed session to discuss appointments to county board committees; however, in appropriate circumstances section 19.85(1)(f) would authorize closed sessions. OAG 60-87

November 6, 1987

MICHAEL J. HARVEY, *Corporation Counsel*
Ozaukee County

You have asked for my opinion whether the county board chairperson and the members of the administrative committee may meet in closed session to discuss appointments of county board supervisors to committees.

In the past, the administrative committee has closed the meetings under section 19.85(1)(c), Stats., to discuss committee appointments for supervisors.

I have concluded that section 19.85(1)(c) does not authorize the county board chairperson and the administrative committee to meet in closed session to discuss the appointments.

Section 19.85(1)(c) authorizes a meeting to be closed to consider "employment, promotion, compensation or performance evaluation data of any public employe over which the governmental body has jurisdiction or exercises responsibility." Only county board members are appointed by the chairperson to the committees. See sec. 59.06(1), Stats. Because the county board members are elected officials performing the duties of their office when serving on the county board committees, they cannot be public employes under section 19.85(1)(c). Cf. *Gannett Satellite Info. Net. v. Bd. of Educ.*, 201 N.J. Super. 65, 492 A.2d 703, 705-06 (1984). ("[T]he personnel exception to the Open Public Meetings Act does not apply to elected officials whose continued retention in office is dependent on the approval of the public, not on any particular agency or department.") Therefore, the meeting to discuss the appointment of the committee members cannot be closed under section 19.85(1)(c).

Only under limited circumstances would a closed session of the meeting be authorized. It would be permitted by section 19.85(1)(f) for the purpose of:

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.

However, before the meeting could be closed under section 19.85(1)(f), at least one committee member or the chairperson would have to have actual knowledge of information which he or she reasonably believed would be likely to have a substantial adverse effect upon the reputation involved and there must be a probability that such information would be divulged. 74 Op. Att'y Gen. 70, 71 (1985). The meeting could then be closed only to discuss such information.

DJH:SWK

Conflict Of Interest; Contracts; Public Officials; Where the village board administers a community development block grant program, a member of the village board would violate section 946.13(1)(a), Stats., if he or she obtained a loan in excess of \$5,000 under the program. Acting in his private capacity as a contractor, the board member would violate section 946.13(1) if he contracted to perform the construction work for a third person who obtained a loan under the program. OAG 61-87

November 6, 1987

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

On behalf of the Village of Woodville you have asked whether sections 946.12 and 946.13(1)(a) and (b), Stats., prohibit either of the following situations:

1. A village board member participates in a village application procedure for a community development block grant (CDBG) and then later as an individual applies for and receives a grant or a loan from that CDBG for residential improvements. In regard to the latter, the board member did not participate in board approval of individual application.
2. A village board member who privately is a contractor enters into a contract with the recipient of a CDBG grant or loan to make the improvements on the recipient's residence.

Under Woodville's CDBG program, private homeowners can obtain an interest free loan for up to \$8,000 for residential improvements. The loans are funded by federal money funneled through the state to the village.

To be eligible for a loan, a resident must meet certain objective criteria that are based on figures furnished by the State Department of Development. The CDBG project director reviews the loan request to assess the eligibility of the applicant.

The director visits the applicant's residence to review the proposed work, to prepare a description of the work and to place priorities on the elements of the application. The director presents the application and the work write-up to the village board for approval.

If the application is approved, the resident obtains bids from contractors approved by the board and selects the contractor with the low bid, unless the board approves a contractor with a higher bid. The resident signs the mortgage and mortgage note, to which the village is a party.

The village board has various powers throughout the program. Any program criterion can be changed by a majority vote of the board, which serves as the final decision-making body for all criteria on project funding. Disputes between applicants and contractors must be arbitrated by the board. The project director and the board determine whether rehabilitation of a project is financially feasible and therefore eligible for a loan. The project director and the board develop criteria for approving contractors, who are hired by the applicant with the approval of the project director. Applicants are to be served on a first come, first serve basis, except that the board can move someone to the top of the list if it can document why such action was taken. Although deferred loans would normally not be for amounts in excess of \$8,000, the board can review applications on a case-by-case basis and approve loans for amounts greater than \$8,000 as long as there is collateral to secure the loan. In determining the rehabilitation work to be done, each case is judged by the board on a case-by-case basis.

In the process for granting a deferred loan, the board makes the final determination of the eligibility of the applicant, verifies that the work write-up conforms with includable costs, determines the amount of a rehabilitation deferred loan or interest subsidy for which the applicant is eligible and notifies the project director of loan approval or disapproval. If the loan is denied, the applicant may come before the board for an appeal.

Although the applicant selects the contractor, the selection must be made from the board's approved list of pre-qualified contractors. The applicant must hire the contractor who submits the low bid, unless the board allows him to take the second lowest bid. If the board decides that the low bid is valid, the applicant must pay the difference if he hires someone else. If the bids are over the \$8,000 loan limit, the matter is submitted to the board for a recommendation of what to do.

The portions of section 946.13 relevant to your questions provide:

Private interest in public contract prohibited. (1) Any public officer or public employe who does any of the following is guilty of a Class E felony:

(a) In his private capacity, negotiates or bids for or enters into a contract in which he has a private pecuniary interest, direct or indirect, if at the same time he is authorized or required by law to participate in his capacity as such officer or employe in the making of that contract or to perform in regard to that contract some official function requiring the exercise of discretion on his part; or

(b) In his capacity as such officer or employe, participates in the making of a contract in which he has a private pecuniary interest, direct or indirect, or performs in regard to that contract some function requiring the exercise of discretion on his part.

(2) Subsection (1) does not apply to the following:

(a) Contracts in which any single public officer or employe is privately interested which do not involve receipts and disbursements by the state or its political subdivision aggregating more than \$5,000 in any year.

It is my opinion that the village board member in your first question would be violating section 946.13(1)(a) when he obtains a community development block grant loan approved by the board of which he is a member. The three elements of section 946.13(1)(a) are: "(1) a direct or indirect private pecuniary interest in a public contract; (2) negotiating, bidding or entering into the contract in a private capacity; and (3) being authorized or required to participate in the making of the contract or to perform some act with regard to the contract in an official capacity." *See* 75 Op. Att'y Gen. 173 (1986).

All three elements would be satisfied in this case. The board member has a direct pecuniary interest in the loan he is obtaining. He enters into a contract with the village when he obtains the loan. Even though he did not participate in the approval of his loan, he had the authority as a board member to participate in the making of the contract. Also, as a board member, he has the authority to exercise various discretionary acts in regard to CDBG loans, of which his is one. Section 946.13(1)(a) does not require that the official actually do anything in his official capacity in regard to a contract; it only requires that the official have the authority to

perform the various functions. In this case, the board member had the authority to act, which satisfies the elements of the statute as much as actual participation.

In regard to your second question, it is my opinion that a board member would violate section 946.13(1) if he were hired as the contractor to perform the work for another CDBG loan applicant. As a member of the board, he has the authority to perform in regard to the contract between the applicant and the contractor official functions requiring the exercise of his discretion, such as participating in the arbitration of disputes between the applicant and the contractor, approving a bid that was higher than the low bid and deciding whether the CDBG program should pay for the excess of a bid over \$8,000. Because he would have the authority as an official to exercise his discretion in regard to a contract he had entered and in which he had a private pecuniary interest, he would be violating section 946.13(1)(a).

This opinion should not be read to mean that the acts discussed are the only ones that could constitute a violation of section 946.13(1) by the board member. The acts mentioned, however, are sufficient to show that the board member would be violating the statute if he obtained a CDBG loan or contracted to perform construction work for a CDBG applicant.

In answering these questions I have assumed that in his private capacity the board member would be receiving CDBG and other village funds aggregating in excess of \$5,000 in a year. If that figure were not exceeded in the year, there would be no violation of section 946.13. See sec. 946.13(2)(a), Stats.

Finally, it must be kept in mind that section 946.13 is a strict liability statute that does not require an official to have criminal intent or a corrupt motive. *State v. Stoehr*, 134 Wis. 2d 66, 76, 78-79, 396 N.W.2d 177 (1986). The statute "is directed not at corruption but at conduct presenting an opportunity for corruption." *Stoehr*, 134 Wis. 2d at 79. The Woodville village board has much discretionary power in carrying out the CDBG program established in that village and the power that lies in the board provides an opportunity for corruption if an official were so disposed. Because of that possibility, section 946.13 prevents the village board member from obtaining a CDBG loan under the program.

DJH:SWK

Administrative Code; Industry, Labor And Human Relations, Department Of; Wis. Admin. Code §ILHR 83.08(1)(b), authorizing delegation by DILHR of one of its powers requiring the exercise of judgment to a county, was unlawful, there being no statutory authorization for such delegation. OAG 63-87

November 9, 1987

JOHN T. COUGHLIN, *Secretary*

Department of Industry, Labor and Human Relations

On behalf of the Wisconsin Department of Industry, Labor and Human Relations (hereinafter "DILHR"), General Counsel Howard Bernstein has requested an opinion as to whether DILHR had statutory authority to adopt an emergency rule, namely, Wis. Admin. Code §ILHR 83.08(1) subsection (b). It reads:

The department may delegate to a county the review of plans for the installation of mound systems and pressure distribution systems serving one and 2 family dwellings. The delegation to review plans to these types of systems shall be upon the request of the county and shall be contingent upon an evaluation of the county's private sewage program and personnel by the department.

Mr. Bernstein indicates that DILHR believes "specific authority" for the adoption of such rule is found in subsection (a) of section 145.20(3), Stats.

Mr. Bernstein states that the Joint Committee for the Review of Administrative Rules, on July 23, 1987, "voted to suspend sec. ILHR 83.08(1)(b) on the basis of lack of statutory authority"; but he further advises me that "[t]he JCRAR motion also specified that the committee will rescind the suspension if the Attorney General is of the opinion that statutory authority exists."

It is my opinion that statutory authority for the adoption of the rule in question did not exist at the time of its recent adoption, and does not now exist, under section 145.20(3)(a) or any other statute.

It is well established that administrative officers and bodies "in the absence of statute or organic act permitting it, . . . cannot delegate powers and functions which are discretionary or quasi-judicial in character, or which require the exercise of judgment." 73 C.J.S. *Public Administrative Law and Procedure* §56(a) (1983). See also, *Bunger v. Iowa High School Athletic Association*, 197 N.W.2d

555, 560 (Iowa 1972); *State Tax Commission of Utah v. Katsis*, 62 P.2d 120, 122-23, 90 Utah 406 (1936); *Anderson v. Grand River Dam Authority*, 446 P.2d 814, 818 (Okla. 1968). While no reported Wisconsin case has expressly recognized the validity of this principle of law, I believe it would find acceptance in the courts of this state, particularly since we have found no reported case, state or federal, that has dissented from such principle.

In my judgment, it is obvious that the administrative power in question, namely, "the review of plans for the installation of mound systems and pressure distribution systems serving one and two family dwellings," is a power which clearly requires the exercise of judgment; and under the above principle of law, it is therefore plainly a power which could be lawfully delegated only pursuant to statutory authority for such delegation.

Subsection (a) of section 145.20(3), which you indicate DILHR views as the authority for the delegation of such power by DILHR, reads:

The department [DILHR] may specify categories of private sewage systems for which approval by the department *is required* prior to issuance of sanitary permits by the governmental unit responsible for the regulation of private sewage systems.

(Emphasis and bracketed material supplied.)

In my opinion, the language of this statute is pellucid: it gives DILHR an *express* power to "*specify*" categories of private sewage systems for which approval by DILHR is "*required*," prior to the issuance of sanitary permits by the governmental unit responsible for the regulation of private sewage systems. But such statute clearly gives DILHR no power to delegate to the county the review of plans for the installation of private sewage systems.

In arriving at such opinion, I have considered a DILHR intra-departmental memorandum which expresses the view that "ILHR 83.08(1)(b) simply creates a new category *based on county delegation*" (emphasis supplied). I believe it highly questionable that section 145.20(3) authorizes DILHR to specify categories of private sewage systems for which approval by DILHR is *not* required, though the power to specify "categories of private sewage systems for which approval by the department *is required*" (emphasis supplied) may imply categories wherein DILHR approval is not required. Be that as it may, "a new category based on county delega-

tion” is manifestly an unlawful category, absent statutory authorization for the delegation on which it is based; and since section 145.20(3)(a) provides no such delegation authorization, it clearly cannot be viewed as authority for the DILHR rule in question.

Your opinion-request letter also refers to DILHR being given “broad rulemaking powers over plumbing by secs. 145.02(2) and 145.13, Stats.,” with perhaps an intimation that the power in DILHR to make the power-delegation in question might be encompassed by such powers. While your estimate of such rulemaking powers as “broad” is sound, it is my opinion that neither expressly nor by implication do such powers encompass a power in DILHR to delegate to a county the administrative power here in question. Nor do I find such power of delegation conferred on DILHR by any other statute.

The opinion-request letter also states:

I have learned since the JCRAR hearing that a rule very similar to sec. ILHR 83.08(1)(b) has been in the plumbing code for some time. Section ILHR 83.08(1)(d) [correctly, sec. ILHR 83.08(2)(d)] provides:

“The department may designate counties as agents for the review of plans and specifications for private sewage systems serving public buildings. All requests for variances to the code or experimental or alternative private sewage system designs shall be submitted to the department for review.”

DILHR has designated seven counties as agents under this rule (Columbia, Dane, Eau Claire, Monroe, Pierce, Sheboygan and Waukesha). *The rule goes back at least as far as 1976, when it was numbered sec. H 62.25(2)(d). It appears that the existence of this rule before the enactment of sec. 145.20(3)(a), Stats., by chapter 34, Laws of 1979, should have some bearing on the issue of statutory authority.*

(Bracketed material and emphasis supplied.)

No authorizing statute for the delegation effected by Wis. Admin. Code §ILHR 83.08(2)(d) is cited, and I find none in chapter 145; but I render no opinion on the validity of such delegation, as none has been requested. Let me add, however, that if such validity were to be assumed, that would hardly support a claim of validity

for the delegation of DILHR power effected by Wis. Admin. Code §ILHR 83.08(1)(b), because the validity of the latter delegation stands or falls on whether there is statutory authorization for it. In other words, the mere existence of Wis. Admin. Code §ILHR 83.08(1)(d) since 1976 does nothing whatsoever to establish the existence of statutory authorization for the delegation of DILHR power effected by Wis. Admin. Code §ILHR 83.08(1)(b) in 1987.

Finally, I direct your attention to subsection (a) of section 227.11(2), which reads: "Each agency may promulgate rules interpreting the provisions of any statute enforced or administered by it, if the agency considers it necessary to effectuate the purpose of the statute, *but a rule is not valid if it exceeds the bounds of correct interpretation*" (emphasis supplied). If §ILHR 83.08(1)(b) may correctly be viewed as an "interpretation" of section 145.20(3)(a), then it is my opinion that such rule "exceeds the bounds of correct interpretation" of such statute, by interpreting the statute as authorizing the delegation by DILHR of one of its discretionary or quasi-judicial powers.

DJH:JHM

Children; Counties; Health And Social Services, Department Of;
A county department of social services or county department of human services may not contract with other agencies to obtain section 48.981, Stats., reporting or investigatory services in situations other than the performance of independent investigations required by section 48.981(3)(d). A cooperative contract might be possible under section 66.30(2) in order to effectuate this purpose but the services must be furnished by the county department as defined in section 48.02(2g) and not by any other public or private agency. OAG 64-87

November 11, 1987

TIMOTHY F. CULLEN, *Secretary*
Department of Health and Social Services

You inform me that some counties are experiencing work load or budget problems in receiving and investigating reports of abused or neglected children under section 48.981, Stats., which has generated interest in having some or all of these activities performed by private agencies or public agencies other than the county department of social services under a contract with the county. Your legal staff has advised you that although contracting of independent investigations is allowable under section 48.981(3)(d), contracting for the other reporting and investigatory activities would violate the provisions of section 48.981. However, some counties strongly believe that the general authority of a county to enter into contracts under sections 46.22(1)(e) and 46.23(5)(d) is applicable to these situations under section 48.981.

In view of the continued dispute concerning child abuse and neglect contracting, you first ask whether a county department of social services or county department of human services may contract with other agencies to obtain section 48.981 reporting or investigatory services in situations other than performance of the independent investigations required by section 48.981(3)(d). You also ask that I discuss what impact such contracts would have on disclosure of information under the confidentiality provisions of section 48.981(7).

It is my opinion that a county cannot enter into a contract with such other agencies to perform services other than independent investigations required by section 48.981(3)(d). In taking this position, I am fully aware that section 46.22(1)(e) allows a county

department of social services to contract with public or voluntary agencies or others to purchase care and services which that department is authorized by any statute to furnish in any manner. A similar provision for contracting by county human services departments is found in section 46.23(5)(c) and (d).

Section 48.981(3)(c) requires the county department of social services to initiate a diligent investigation within twenty-four hours after receiving a report of abuse or neglect to determine if the child is in need of protection or services. Subsection (3)(d) provides that if an agent or employe of a county department required to investigate is the subject of a report or if the county department determines that, because of the relationship between the county department and the subject of the report, there is substantial probability that the county department would not conduct an unbiased investigation, the county department shall notify your department. Thereafter an independent investigation is conducted either by your department, another county department or a child welfare agency designated by you.

If your department designates a county department under sections 46.215, 46.22, 46.23, 51.42 or 51.437, that department must conduct the independent investigation. If a licensed child welfare agency agrees to conduct such an independent investigation, your department may designate that agency to do so.

It should be noted in passing that considerable confusion was eliminated with the enactment of 1985 Wisconsin Act 176 which changed all references under section 48.981 from "county agency" to "county department." While the term "county agency" was vague and required considerable interpretation, a "county department" is defined under section 48.02(2g) to mean a county department of social services or human services unless the context requires otherwise. For example, section 48.981(3)(d)2. specifically allows your department to designate a department under sections 51.42 or 51.437 to conduct an independent investigation.

The Legislature has clearly defined which agency is to perform the normal child abuse and neglect investigations. By creating a specific exception to this norm under subsection (3)(d) for independent investigations, the Legislature reaffirmed that all other reports are to be received and investigated by only the county department under subsection (3)(c).

Subsection (3)(d) concludes in the last sentence that the “powers and duties of the department or designated county department or child welfare agency making an independent investigation are those given to county departments under sub. (3)(c).” The quoted language is significant because in the absence of such language, it would be questionable whether an independent investigator would have the same rights and duties as the county department. Again the Legislature has indicated that independent investigations have a special status.

The Legislature apparently decided that child abuse or neglect cases are not the kind of matters that should be handled by contracting with whatever public or private agencies are willing to do so. Instead of piecemeal delivery of service and supervision, the county department is directed to make the investigations as part of the duty to provide a continuum of service and supervision by those experienced and proficient in juvenile matters.

The confidentiality provisions of section 48.981(7) pose an additional problem. In the context of your question, reports and records may be disclosed only to appropriate staff of your department or a county department, a professional employe of a county department under sections 51.42 or 51.437 who is working with the child with or under the supervision of the county department of social services or human services, and another county department currently investigating an abuse or neglect report. None of these exceptions under subparagraph (a)2., 5. and 7. allow for general access by another agency, public or private, under the proposed contract arrangements.

My predecessor concluded that a written and informed consent was necessary before client information could be released to another division within a county community human services department organized under section 46.23. 69 Op. Att’y Gen. 273 (1980). Unless specifically authorized to do so, a county department under section 48.981(7) cannot freely exchange information even with other state or county governmental units.

You also ask whether, assuming that counties have some contracting rights under section 48.981(3)(c), your department has the authority to require its approval prior to the implementation of such county contracts. You note that section 48.981(3)(c) requires that all investigations “be conducted in accordance with standards

established by the department for conducting child abuse and neglect investigations” Although these questions deal with the child abuse and neglect statute, I agree with your observation that my response may have widespread impact on other programs.

The nature and scope of an administrative agency’s authority is a matter of statutory interpretation. *City of Appleton v. Transportation Commission*, 116 Wis. 2d 352, 357, 342 N.W.2d 68 (Ct. App. 1983). The plain language of subsection (3)(c) limits your concern to the manner in which investigations are “conducted” and does not extend to approval of the terms of any contract between the county department and another agency even if such contracting is allowable.

Your legal staff has advised you that it would be possible for a county to contractually obtain its regular investigation services from another county’s department under section 66.30. This section authorizes local governments to enter into contractual arrangements with each other whereby powers would be exercised jointly or one government would perform services for another government.

Counties have only such powers as are expressly granted by statute or which are necessarily implied. *Maier v. Racine County*, 1 Wis. 2d 384, 385, 84 N.W.2d 76 (1957). I am concerned over whether a combined reading of sections 48.981(3)(c) and 66.30 results in a grant of power or a limitation of the exercise of power in the specific area of child abuse and neglect investigations.

Section 66.30(2) provides:

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

On the one hand, section 48.981(3)(c) does not specifically exclude action under section 66.30 thereby leading one to conclude that such a contract would be allowable. This approach is consist-

ent with the admonition that section 66.30 is to be interpreted liberally in favor of cooperative action between municipalities.

On the other hand, however, it is a well-established standard of statutory construction that a more recent and specific statute controls and exists as an exception to a general statute. *Grant County Service Bureau v. Treweek*, 19 Wis. 2d 548, 552, 120 N.W.2d 634 (1963); 60 Op. Att'y Gen. 313, 315 (1971). The general provisions concerning local cooperation originated with the enactment of section 66.30 under chapter 210, Laws of 1939. Section 48.981 originally was created by chapter 333, Laws of 1965, but it later was repealed and recreated to resemble the present statute by chapter 355, Laws of 1977.

Although you did not ask this specific question, I am concerned that the power of the county to contract under section 66.30(2) might not extend to the investigatory contracts anticipated under section 48.981(3)(c). In any event, my observations concerning the more recent and specific statute controlling any earlier or general provisions applies to any possible conflict between the general contracting powers under section 46.22(1)(e) which originally were enacted under chapter 218, Laws of 1971, and the limitation on child abuse and neglect investigations contracting under section 48.981(3)(c) and (d) which were enacted under chapter 355, Laws of 1977.

Furthermore, the specific mention of the county department's power to contract with public or private organizations to provide continuing education and training programs under section 48.981(8)(c) indicates that the Legislature did not intend the county department to have a general contracting authority for other purposes under section 48.981. If the county department was intended to have inherent contract authority, there would be no need for the contract reference in subsection (8)(c).

Even if a cooperative contract is made under section 66.30(2), the services must be furnished by the county department as defined in section 48.02(2g) and not by any other public or private agency.

DJH:DPJ

Funeral Directors And Embalmers; Insurance; A plan whereby a funeral service person (a licensed funeral director, operator of a licensed funeral establishment or an employe of the same) also acts as an insurance agent and as such writes a life insurance policy naming as the beneficiary a funeral director or establishment and additionally negotiates a contract wherein the named insured in the policy contracts with a funeral director or establishment for providing burial or funeral services to the insured is illegal. OAG 65-87

November 24, 1987

MARLENE A. CUMMINGS, *Secretary*

Department of Regulation & Licensing

You have asked for an opinion relating to the sale of life insurance by licensed funeral directors, operators of licensed funeral establishments or their employes (hereinafter referred to as funeral service persons).

Section 632.41(2), Stats., provides: "BURIAL INSURANCE. No contract in which the insurer agrees to pay for any of the incidents of burial or other disposition of the body of a deceased may provide that the benefits are payable to a funeral director or any other person doing business related to burials."

71 Op. Att'y Gen. 7, 8 (1982), stated that this statutory provision did not prohibit the writing of a life insurance policy designating "a funeral director or funeral home as beneficiary of a life insurance policy in conjunction with a separate agreement, between the insured and the funeral director or funeral home, to use the proceeds for funeral and burial expenses."

This 1982 opinion was premised upon two assumptions:

[T]hat the life insurance policy provides only for payment of a specific amount of money to a named beneficiary and makes no reference to payment of funeral, burial or other expenses related to disposition of the body of the deceased.

. . . [T]hat the contract of insurance is solely between the insurer and the insured and that it makes no reference to any actual or contemplated contract between a funeral director, or any other person doing business related to burials, and the person who is insured, which involves payment for funeral and burial services.

71 Op. Att'y Gen. at 8.

You request an opinion under the following plan:

The funeral service person (a licensed funeral director, an operator of a licensed funeral establishment, or an employee of same) will become licensed as an insurance agent. He or she will then sell a "pre-need funeral insurance" package to members of the public. The package will consist of: (1) a policy of life insurance, issued by the life insurance company for which the funeral service person is acting as agent, with the purchaser as the insured, and the funeral service person, or the funeral establishment with which he or she is associated, as the beneficiary, and (2) a "separate" agreement between the insured and the funeral director or funeral establishment to use the proceeds of the insurance policy for funeral and burial expenses.

The plan appears to be a thinly concealed attempt to evade the proscription of section 632.41(2) and, in my opinion, must legally fail.

The critical distinction between the assumed facts in the 1982 opinion and the facts in the plan presented in your opinion request is that in the latter situation we do not have the separateness between the insurance policy and the separate agreement between the insured and the funeral service person.

The authorized acts of an agent are legally imputed to the agent's principle, *Rosecky v. Tomaszewski*, 225 Wis. 438, 274 N.W. 259 (1937). Further, *Jeske v. General Acc. F. & L. Assur. Corp.* 1 Wis. 2d 70, 87, 83 N.W.2d 167 (1957), holds that an agent's knowledge is imputed to the company he or she represents.

Under the facts assumed for this opinion, the agent knows that the benefits of the insurance policy being written are payable to a funeral director or establishment and the agent also knows that the separate agreement provides that the benefits of the policy will be used to pay or help pay for the funeral and burial expenses of the insured.

Since the acts and knowledge of the agent are imputed to the insurer, the insurer legally knows that it is agreeing to pay the insurance proceeds to a beneficiary which is a funeral director or establishment for the incidents of burial or other disposition of the body of the insured.

The obvious legislative purpose for section 632.41(2) is to prevent monopolistic or unfair trade practices that may result if an insurer writes such policies and has a tie with a particular funeral director or establishment. The explanatory note to chapter 375, Laws of 1975, creating the statutory provision involved states: "It is not the provision of burial services that is objectionable, but the tie-in arrangement between an insurer and an undertaker."

Gray v. United States, 410 F.2d 1094, 1104 (3rd Cir. 1969) held that two plans "separate in that they were not created by the same document, nor initiated at the same time, nor . . . mak[ing] any reference to each other" (footnotes omitted) are a single contract where the purpose of the two plans was to "form an integrated program" or a single purpose. The court stated: "One good ground for rejecting that position [that the two plans be considered separately] is to prevent attempts to avoid the reach of the statute by a series of contrived plans none of which, in itself, would fall under the section." *Id.* at 1105.

My predecessor's 1982 opinion rested upon the fact assumption that an insurer issued an insurance policy merely naming as the beneficiary a funeral director or establishment and that the insured independently entered into a separate contract with the funeral establishment or person agreeing to utilize the insurance proceeds to pay or help pay for the expenses of the funeral and burial. But the critical aspect of the assumed facts in that opinion is that the insurer was not privy to the separate contract between the insured and the funeral establishment or person.

In this case, that is not true. Since the acts and knowledge of the agent are imputed to the insurer, the insurer knows that two plans, the insurance policy naming the funeral establishment or person as a beneficiary and the agreement to use the policy proceeds to pay for the expenses of the funeral and burial, form a single purpose, that is, to pay for the incidents of burial or other disposition of the body and provide that the insurance benefits are payable to the funeral service person who will provide the funeral and burial service. The two plans must be considered as a single contract designed to "avoid the reach of the statute."

Several plans alternative to the plan stated in your letter of request have been proffered for consideration.

One plan would have the funeral establishment create a separate corporation that would write the two plans, the insurance policy and the "separate" agreement. If the separate corporation is acting as agent for the funeral establishment, my opinion remains the same. The separate corporation would still be acting as agent for both the funeral establishment and the insurer.

Another alternative plan submitted for consideration would allow the insured to change the beneficiary in the policy at a later time. Again, this would not change my opinion since the policy, as written, would still name a funeral establishment or person as beneficiary and still would have been written in connection with the contract between the insured and funeral establishment or person to utilize the insurance proceeds to pay for the incidents of burial.

It has been strongly advanced that it is in the public interest to allow the providing of a "pre-need" funeral and burial plan through the insurance policy route. This argument should be addressed to the Legislature. This opinion only addresses the law as it exists in relation to a specific set of facts.

Since I have determined that the plan is illegal under section 632.41(2), it is unnecessary for me to consider whether it is illegal under either section 445.12(7) or 445.12(3), or whether it is unethical and therefore prohibited.

DJH:WHW

Medicaid; Nursing Homes; Nursing home guarantor agreements may violate section 49.49(4), Stats., after the resident becomes certified Medicaid eligible. OAG 66-87

December 8, 1987

GEORGE F. POTARACKE, *Executive Director*

State of Wisconsin Board on Aging and Long Term Care

You seek my opinion as to the legality of a guarantor provision found in certain nursing home admission agreements used in Wisconsin.

You state that nursing homes often use an admission agreement under which a person admitted to a nursing home must have another person co-sign the agreement in the capacity of a "guarantor" or "designated representative." A guarantor, in this context, is a person who enters into a contract with a nursing home assuring payment for the care and maintenance of a resident. The contract obligates the guarantor to underwrite the resident's care indefinitely, for a stated period of time (*e.g.*, two years) or until subsequent amendment by the parties to the guarantor contract.

Your letter questions: (1) whether the usage of such provisions violates federal or Wisconsin law; (2) whether such provisions are enforceable; and (3) whether attempts at enforcement after the nursing home resident is Medicaid eligible violate section 49.49(4), Stats. Faced with the impossibility of knowing all of the relevant facts that could be present in any given case that might arise, it is not feasible to give absolute answers in the abstract. However, bearing that limitation in mind, I do conclude the following. First of all, the mere requirement that there be a contract co-signor with a prospective private pay resident is not *per se* illegal. But if such contract provisions are essentially a device to erode the "anti-supplementation rule" discussed below, or impede the resident's conversion to Medicaid payment when eligible, they could be deemed by a court as void or even subject their instigator to criminal prosecution. Furthermore, once the resident becomes Medicaid eligible, attempts at enforcement of the guarantor provision would most likely be viewed as violations of section 49.49(4).

The situation that prompts your questions seems to be an extension of the problem dealt with by my predecessor in 75 Op. Att'y Gen. 14 (1986), issued March 7, 1986. That opinion concluded that

nursing home admission contract provisions requiring a resident entering on private pay status to remain so for a specified period of time before converting to Medicaid, regardless of whether or not the person became eligible for Medicaid sooner, were most likely illegal. In that opinion as well as this one the central issue is not so much the contract provisions themselves, but whether in any particular case they operate as a device to defeat Medicaid regulations.

The legal authority examined in the prior opinion need not be repeated here. It suffices to note that for nearly twenty years Congress and the various states have striven to establish that nursing homes must accept Medicaid reimbursement as payment in full and to abolish supplementation agreements with residents or their families. The relevant criminal statutes reflecting this policy are 42 U.S.C. §1396h(d) and its Wisconsin counterpart, section 49.49(4), which provides as follows:

(4) Prohibited Facility Charges. (a) No person, in connection with the medical assistance program when the cost of the services provided to the patient is paid for in whole or in part by the state, may knowingly and wilfully charge, solicit, accept or receive, in addition to any amount otherwise required to be paid under a medical assistance program, any gift, money, donation or other consideration, other than a charitable, religious or philanthropic contribution from an organization or from a person unrelated to the patient, as a precondition of admitting a patient to a hospital, skilled nursing facility or intermediate care facility, or as a requirement for the patient's continued stay in such a facility.

Section 49.49(4) generally prohibits supplementation arrangements with Medicaid recipients as a precondition to their admission or continued care. Thus, so long as a nursing home resident is not Medicaid eligible, the presence of a guarantor agreement poses no conflict with the statute. However, once the resident becomes Medicaid eligible and the nursing home attempts to enforce supplemental payment from the guarantor in return for the resident's continued stay at the facility, a conflict would exist and the statute would govern. See *Milwaukee Police Ass'n v. City of Milwaukee*, 113 Wis. 2d 192, 335 N.W.2d 417 (1983). Under such circumstances, it is my opinion that the courts would likely view the guarantor provision as an illegal device to supplement the Medicaid payments in violation of section 49.49(4).

Although there have been no Wisconsin cases construing guarantor provisions, in *Glengariff Corp. v. Snook, et al.*, 471 N.Y.S.2d 973, 122 Misc. 2d 784, Medicare and Medicaid Guide (CCH) ¶33,605 at 9905 (N.Y. Sup. Ct., Nassau County, 1984), the court refused to enforce the following provision:

Patient and Sponsor acknowledge and agree that the Glengariff Corporation is not obligated to accept Medicaid payments in lieu of the private payments from the Patient and Sponsor required hereunder unless and until (a) the Patient shall have been a patient in the facility for a period of at least *18 months* and (b) the Patient and Sponsor shall have paid in full all sums due The Glengariff Corporation hereunder from the Patient and Sponsor for all periods prior to the first actual receipt of such Medicaid payments and shall have performed in full all of the obligations under this agreement on their part to be performed during such periods. The Glengariff Corporation will credit against the sums due The Glengariff Corporation hereunder from the Patient and Sponsor any reimbursements actually received from Medicare for Facility services and items furnished by the Glengariff Corporation to the Patient.

Id., ¶33,605 at 9905, emphasis supplied.

In *Glengariff*, the “sponsor” placed his mother in a nursing home and entered into a contract which included the above provision. Prior to the end of the eighteen month private pay period, the sponsor determined that he was no longer able to maintain the payments. Because his mother no longer had necessary resources, she became a certified Medicaid eligible person. Defendant refused to pay the difference between Medicaid payments and the contract. The corporation began a collection action, arguing that the right to apply for Medicaid benefits had been waived for the duration of the contract period. The court concluded that public policy considerations precluded a finding that the right to apply for Medicaid benefits had been waived. It therefore held that the defendant’s mother had a right under the circumstances to apply for and become certified eligible for Medicaid benefits. The court also found that it was against public policy to require a person or a sponsor of a person certified eligible for Medicaid benefits to pay charges in excess of the Medicaid payments.

It is my opinion that a court in Wisconsin would most likely reach the same result if presented with the attempted enforcement of a guarantor provision against a Medicaid certified nursing home resident.

DJH:MJL:EGY

Constitutionality; Legislation; Retirement Systems; Section 684r of the 1987 budget bill, which limits the distribution from the special performance dividend to only those annuitants receiving a supplemental benefit, does not violate the United States or Wisconsin Constitutions. OAG 67-87

December 8, 1987

GARY I. GATES, *Secretary*
Department of Employee Trust Funds

You request my opinion as to whether sections 436m, 684r and 688km of 1987 Wisconsin Act 27 (the 1987 budget bill) violate the contract clauses of the United States or Wisconsin Constitutions. Specifically, you ask:

Does redirecting the investment earnings of the assets in the annuity reserve to fund supplemental benefits payable only to pre-1974 retirees violate the contractual rights of those who retired after that date?

It is my opinion that these statutory changes do not cause a constitutional infringement of the contractual rights of the Wisconsin Retirement System (WRS) annuitants who retired after 1974 and are not given the benefit of the "special performance dividend." The contractual rights of the various WRS annuitants are not uniform and are greatly determined by the content of the statutes in effect on the date the annuitants terminated public employment. Consequently, a general statement as to the constitutional rights of all annuitants under the WRS is inappropriate in answering your question.

All laws are presumed to be constitutional and one attacking a statute must, to overcome this presumption, prove the statute unconstitutional beyond a reasonable doubt. *State ex rel. Cannon v. Moran*, 111 Wis. 2d 544, 552-53, 331 N.W.2d 369 (1983). Minimal alteration of contract rights does not constitute a constitutional impairment. Since reasonable arguments can be advanced that any alteration of the contract rights of the post-1974 annuitants was minimal, I cannot conclude that the statutory provisions in question are unconstitutional beyond a reasonable doubt.

Sections 436m, 684r and 688km of the 1987 budget bill (as vetoed in part by the Governor) state as follows:

SECTION 436m. 20.515(1)(a) of the statutes is amended to read:

20.515(1)(a) *Annuity supplements and payments.* A sum sufficient to pay the benefits authorized under ss. 40.02(17)(d)2, ~~1985 stats.~~, and 40.27(1) and (1m), *1985 stats.*, in excess of the amounts payable under other provisions of ch. 40 *and any distributions made under s. 40.04(3)(e) after the effective date of this paragraph . . . [revisor inserts date], notwithstanding s. 40.27(2)* and to reimburse any amounts expended under par. (w) for the costs of administering the benefits provided under ss. 40.02(17)(d)2, ~~1985 stats.~~, and 40.27(1) and (1m), *1985 stats.*

SECTION 684r. 40.04(3)(e) of the statutes is created to read:

40.04(3)(e)1. As of the last day of the first full month occurring after the effective date of this subdivision . . . [revisor inserts date], \$230,000,000 shall be distributed from the transaction amortization account of the fixed retirement investment trust to the appropriate reserve of the fixed retirement investment trust as follows:

a. The portion credited to the fixed annuity reserve shall be distributed by the board as soon as possible after the effective date of this subdivision . . . [revisor inserts date], but with an effective date of July 1, 1987. Notwithstanding s. 40.27(2), the board shall make the distribution as a special investment performance dividend to provide an annuity increase only to those persons currently receiving a supplemental benefit under ss. 40.02(17)(d)2, ~~1985 stats.~~, and 40.27(1) and (1m), *1985 stats.* The ~~special investment performance dividend under this subdivision shall be equal to the supplemental annuity that an annuitant currently receives pursuant to ss. 40.02(17)(d), 1985 stats., and 40.27(1) and (1m), 1985 stats.~~ Any payment under s. 20.515(1)(a) to annuitants receiving special investment performance dividends under this subdivision shall be reduced by the amount of the special investment performance dividends under this subdivision.

b. The board, on recommendation of the actuary, shall provide that the portion of funds transferred from the transaction amortization account under this subdivision credited to the fixed employer accumulation reserve shall be included in the actuary's recommendation of the required employer contribution for cal-

endar year 1988, as otherwise determined under s. 40.05(2)(am). ~~The portion of funds transferred from the transaction amortization account under this subdivision credited to the fixed employe accumulation reserve shall be included in determining the rate of interest credited to individual employe accumulation accounts as of December 31, 1987, notwithstanding any restriction on interest credits provided by sub. (4)(a).~~

c. The board shall make the distribution under subd. 1.a as soon as possible after the effective date of this subdivision . . . [revisor inserts date]. Until such time as the special investment performance dividend is effective, the supplemental annuity benefit under ss. ~~40.02(17)(d)2, 1985 stats.,~~ and 40.27(1) and (1m), 1985 stats., shall continue to be funded from money available under s. 20.515(1)(a). After the effective date of the special investment performance dividend, the department shall provide from the portion to be credited to the fixed annuity reserve funds sufficient to reimburse the appropriation under s. 20.515(1)(a) for supplemental benefits payments made after June 30, 1987.

SECTION 688km. 40.27(1) and (1m) of the statutes are repealed.

Section 40.27(1) and (1m), Stats. (1985), repealed prospectively by budget bill section 688km, provides for payment of supplemental benefits to certain WRS annuitants who were annuitants as of September 1974. This supplemental benefit payment is presently paid from state general purpose revenues and not from WRS trust funds. See secs. 20.001(3)(d), 20.005(3) (reference to 20.515(1)(a)), and 20.515(1)(a), Stats.

The 1987 budget bill thus amends section 20.515(1)(a) by directing that the supplemental benefits will be paid by "a special investment performance dividend." This "dividend" results from the distribution of \$230,000,000 from the transaction amortization account of the WRS fixed retirement trust to each of the three reserves (employe accumulation reserve, employer accumulation reserve, and annuity reserve). Sec. 40.04(3), (4), (5) and (6), Stats.

That portion credited to the fixed annuity reserve is denominated a "special performance dividend" and is distributed solely to those annuitants eligible for supplemental benefits under section 40.27(1) and (1m), Stats. (1985). The amount of this "special performance dividend" is offset from the general purpose revenue appropriation

for supplemental benefits. See sec. 436m of the 1987 budget bill. Annuitants who commenced their annuities after September 1974 receive no benefit from the special performance dividend. The issue then is whether the effect of these budget bill changes on individual WRS participants, who do not benefit but may be disadvantaged therefrom, violate the contract clauses of the United States or Wisconsin Constitutions.

Article I, section 10, clause 1 of the United States Constitution states that “[n]o state shall . . . pass any . . . law impairing the obligation of contracts” Similarly, article I, section 12 of the Wisconsin Constitution states that “[n]o bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed”

As the court stated in *Cannon*, 111 Wis. 2d at 554, “[t]he first step in analyzing a contract clause problem is to determine whether an obligation of contract has been impaired.” A contract is impaired when the rights and obligations of the parties to that contract, which arise *by virtue of that contract*, are altered by legislation. *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 431 (1934).

The budget bill statutory changes that accelerate transfer of monies from the transaction amortization account to increase earnings credited to the annuity reserve, payable solely to supplemental benefit recipients, potentially cause detriment to non-supplemental benefit recipients in two ways. First, limiting the special performance dividend to supplemental benefit recipients precludes the remainder of the WRS annuitants from receiving an annuity increase due to the accelerated recognition of gains from the transaction amortization account. Second, in future years, all WRS annuitants could receive reduced dividend increases because later transfers from the transaction amortization account would be lower because of the present transfer of monies from that account.

Section 40.04, which controls the distribution of earnings, profits or losses of the fixed retirement investment, provides in part:

(3) A fixed retirement investment trust and a variable retirement investment trust shall be maintained within the fund under the jurisdiction and management of the investment board for the purpose of managing the investments of the retirement reserve accounts and of any other accounts of the fund as determined by

the board, including the accounts of separate retirement systems. Within the fixed retirement investment trust there shall be maintained a transaction amortization account and a current income account, and any other accounts as are established by the board or the investment board. . . .

(a) All earnings, profits or losses of the fixed retirement investment trust and the net gain or loss of the variable retirement investment trust shall be distributed annually on December 31 to each participating account in the same ratio as each account's average daily balance within the respective trust bears to the total average daily balance of all participating accounts in that trust. *For the fixed retirement investment trust the amount to be distributed shall be the then balance of the current income account plus 7% of the then balance of the transaction amortization account.*

. . . .

(6) An annuity reserve shall be maintained within the fund to which shall be transferred amounts equal to the present value as of the date of commencement of annuities granted under this chapter. *The reserve shall be increased by investment earnings at the effective rate* and shall be reduced by the aggregate amount of annuity payments and death benefits paid with respect to the annuities.

"Effective rate" is defined at section 40.02(23) as:

(a) For the fixed annuity division, the rate, . . . determined by dividing the remaining fixed annuity division investment earnings for the calendar year or part of the calendar year, after making provision for any necessary reserves and after deducting prorated interest and the administrative costs of the fixed annuity division for the year, by the fixed annuity division balance at the beginning of the calendar year as adjusted for benefit payments and refunds paid during the year excluding prorated interest.

Fixed annuity reserve surpluses are distributed under the authority of section 40.27(2), which provides:

(2) Fixed annuity reserve surplus distributions. Surpluses in the fixed annuity reserve established under s. 40.04(6) and (7) shall be distributed by the board if the distribution will result in

at least a 2% increase in the amount of annuities in force, on recommendation of the actuary, as follows:

(a) The distributions shall be expressed as percentage increases in the amount of the monthly annuity in force, including prior distributions of surpluses but not including any amount paid from funds other than the fixed annuity reserve fund, preceding the effective date of the distribution. The percentage increase in any calendar year may not exceed the salary index for the previous calendar year. For purposes of this subsection, annuities in force include any disability annuity suspended because the earnings limitation had been exceeded by that annuitant in that year.

(b) Different percentages may be applied to annuities with different effective dates as may be determined to be equitable but no other distinction may be made among the various types of annuities payable from the fixed annuity reserve.

(c) The distributions shall not be offset against any other benefit being received but shall be paid in full, nor shall any other benefit being received be reduced by the distributions. The annuity reserve surplus distributions authorized under this subsection may be revoked by the board in part or in total as to future payments upon recommendation of the actuary if a deficit occurs in the fixed annuity reserves.

Rights of the post-1974 annuitants established in section 40.27(2) could be impaired by the budget bill amendments since the special investment performance dividend is offset against and reduces the supplemental benefit. *See* sec. 684r of the 1987 budget bill. To the extent that the special performance dividend is used to offset supplemental benefits, less money is available to fund fixed annuity reserve surplus dividends under section 40.27(2). The only basis given in this statutory section for a lesser benefit is revocation "by the board in part or in total as to future payments upon recommendation of the actuary *if a deficit occurs in the fixed annuity reserves.*" *See* sec. 40.27(2)(c), Stats. Do the post-1974 annuitants thus have a contractual right to the terms of section 40.27(2) distribution of surplus that cannot constitutionally be infringed by the special performance dividend provisions of the 1987 budget bill? Although the answer to this question is not entirely free from

doubt, I find no indication of such contractual right in Wisconsin case law sufficient to hold the subject statute unconstitutional.

Wisconsin common law holds that participants have no vested rights to retirement benefits absent a specific statutory or contractual provision creating vested rights. *State ex rel. McCarty v. Gantner*, 240 Wis. 548, 555, 4 N.W.2d 153 (1942). Whatever rights are established contractually or by statute are determined as they exist at the time of retirement. *State ex rel. Smith v. Annuity & Pension Board*, 241 Wis. 625, 629, 6 N.W.2d 676 (1942). *State Teachers' Retirement Board v. Giessel*, 12 Wis. 2d 5, 10, 106 N.W.2d 301 (1960), held that the contractual rights included the right to earnings (the teachers' retirement system was a money-purchase benefit system in 1960). Neither that case nor any later Wisconsin case negates the concept that the vested rights are fixed at retirement absent a statute giving greater or lesser rights.

Section 40.19(1), effective January 1, 1982, appears to provide vesting during employment by stating that:

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*. This section shall not be interpreted as preventing the state from requiring forfeiture of specific rights and benefits as a condition for receiving subsequently enacted rights and benefits of equal or greater value to the participant.

Arguably then, one of the contractual rights accrued "for service rendered" by WRS participants is the right to fixed annuity reserve surplus distributions. Section 40.19(1) was enacted effective January 1, 1982. Ch. 96, Laws of 1981. Participants who retired since that date probably have a contractual right to annuity increases based on distribution of fixed annuity surpluses. Participants employed by WRS participating employers after January 1, 1982, and not yet retired, may also have a contractual right to future annuity increases based on "benefits accrued . . . for service rendered." That

contractual right would continue until abrogated by the "special performance dividend" language in the 1987 budget bill.

While section 40.19(1) authorizes "forfeiture of specific rights and benefits" that have vested, such forfeiture must under that statute be based upon the participant "receiving subsequently enacted rights and benefits of equal or greater value." The 1987 budget bill appears to contain no *quid pro quo* for those WRS participants who do not receive the special investment performance dividend so this method of requiring forfeiture of vested rights appears inapplicable.

Section 40.19(2m) also specifically guarantees to a WRS participant, who was a participating employe during the period January 1, 1982 to March 9, 1984, the right to have his or her retirement benefit determined under the statutes in effect on his or her termination. Such section states as follows:

Any person who is a participant in the Wisconsin retirement system *before March 9, 1984*, and who is not subsequently a participating employe in the Wisconsin retirement system shall continue to have the amount of, and eligibility for, the person's benefits determined in accordance with the statutes in effect on the date the person terminated as a participating employe.

Fixed annuity reserve distribution as mandated in section 40.27(2) is an element of "benefits determined in accordance with the statutes in effect on the date the person terminated as a participating employe." Section 40.19(1) precludes abrogation of that contractual right "by any subsequent legislative act."

Even those WRS participants who were not participating employes after January 1, 1982, and thus not covered by the vesting language of section 40.19(1), may be held to have vested rights abrogated by the special investment performance distribution method mandated in the 1987 budget bill. Section 40.19(3), applying to WRS participants who were not participating employes after January 1, 1982 (the date of merger of the retirement systems), limits the benefit vesting to "the statutes in effect on the date the person terminated." Such section states:

Any person who is a participant in the Wisconsin retirement fund or a member of either the state teachers retirement system or the Milwaukee teachers retirement fund *prior to January 1, 1982*, and who does not subsequently become a participating

employe in the Wisconsin retirement system, shall continue . . . to have the amount of and eligibility for the person's benefits determined in accord with the statutes in effect on the date the person terminated as a participating employe.

The statutory benefits which vested on termination of employment prior to January 1, 1982, also included annuity improvements from distribution of annuity reserve surpluses. *See* secs. 41.20(1)(a) and 42.37(5), Stats. (1979). Statutes in effect prior to January 1, 1982, further provided that annuity reserve surplus distributions "shall not be offset against any other benefit received but shall be paid in full, nor shall any other benefit being received be reduced by any such distribution." *See* sec. 40.70(3), Stats. (1979). It therefore appears that pre-1982 annuitants may have vested rights to annuity increases from annuity reserve surpluses that are infringed by the special investment performance dividend portions of the 1987 budget bill. Since it appears that there exists the potential of various degrees of impairment of the vested contracts of WRS participants, I must now consider whether this impairment is unconstitutional beyond a reasonable doubt.

As the court stated in *Cannon*, 111 Wis. 2d at 558:

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.

The impairment does not appear to be severe in terms of the effect on an individual retiree's benefit. You have informed my office that the special investment dividend if distributed to all annuitants, based on the present pre-budget bill statutes, would result in an annuity increase of approximately two percent. This does not appear to be a significant impairment in light of the authority of the Employe Trust Funds Board to equitably allocate the surplus distributions. That Board has specific authority to provide higher increases to annuitants who retired at earlier dates thus limiting or completely denying increases to later annuitants. Sec. 40.27(2)(b), Stats. In *Cannon* the impairment, held to be severe, consisted of loss of the plaintiffs' entire benefit from the Milwaukee County Retirement System. *Cannon*, 111 Wis. 2d at 558. Contrast this with *Chappy v. LIRC*, 136 Wis. 2d 172, 188-89, 401 N.W.2d 568 (1987), in which the court held that a *de minimus* loss shown was not a severe loss. The *Chappy* court refused to speculate as to whether the loss could be shown to be severe, absent the plaintiffs' failure to satisfy their burden of showing that the contract impairment was severe. I also decline to speculate whether the facts relating to specific individual retirees would show a severe loss.

The court indicated in *Cannon*, 111 Wis. 2d at 558, that the basis for a determination as to whether there is a "substantial impairment" is not limited to the amount of money involved but must also take into consideration whether "the legislation in question nullified an express term of the contract which was bargained for and reasonably relied upon by the parties."

As previously shown, a substantial number of the post-1974 annuitants were employed during a period during which express statutory contract terms vested in them the general right to annuity improvements based on surpluses in the fixed annuity account. In *Chappy v. LIRC*, 136 Wis. 2d at 187, the court stated that "In determining the extent of the impairment, a court should look to the reasonableness of the parties' reliance upon the contract affected. . . . The severity of the impairment is then used to measure the thoroughness of the scrutiny to which the legislation is subjected." It appears that it was not reasonable for participants to expect a surplus in the fixed annuity reserve to be distributed as an annuity increase. The "assumed benefit rate" (of increase from investment) "used for calculating reserve transfers at time of retirement" is established by statute as a "rate of 5%." Sec. 40.02(6),

Stats. The “assumed rate,” defined by statute as “the probable average effective rate expected to be earned for the fixed annuity division on a long-term basis,” is set initially by statute at “a rate of 7.5%.” Sec. 40.02(7), Stats. Participants could therefore expect that the built-in 2 1/2 percent initial difference between the “assumed benefit rate” and the “assumed rate” would provide surplus monies in the annuity reserve, which would be used to increase annuities when the actual rate of return exceeded 5%. There is, *however*, no clear indication in the facts before me that there was substantial reliance on surplus distribution from the fixed annuity reserve. I therefore consider the impairment not to be severe and not proscribed by the constitutions.

While the subject 1987 budget bill sections thus do not have to be based upon a significant and legitimate public purpose to survive a constitutional challenge, it is my opinion that the legislation would pass such higher test. As stated in *Chappy*, 136 Wis. 2d at 187-88, that public purpose “should be directed towards remedying a broad and general social or economic problem.”

There is no legislative statement of the public purpose served by creating the special performance dividend method of payment of pre-1974 supplemental benefits rather than continuing payment from general fund monies. You have, however, informed my office that the amount of money available from the “special performance dividend” would fund the supplemental benefits into perpetuity with little necessity for future general purpose revenue funds. The pre-1979 annuitants never had a vested right to continued payment of the supplements since such supplements were, as stated in section 40.27, “subject to the continuation of the [general purpose revenue] appropriation.” Making these supplements permanent appears to provide a final remedy for a broad and general economic problem without subjecting the pre-1974 annuitants to the uncertainty of the biennial budget process. Present statutes allow “equitable” distribution of annuity reserve surpluses. Sec. 40.27(2)(b), Stats. The subject budget bill amendments can be considered to be an extension of that concept and a legitimate basis for enactment.

As the Wisconsin Supreme Court stated in *North Side Bank v. Gentile*, 129 Wis. 2d 208, 385 N.W.2d 133 (1986):

This court’s review of a legislative enactment is limited in scope. All statutes are presumed to be constitutional, and the

party attacking a statute must prove it unconstitutional beyond a reasonable doubt. [Case cites omitted.] “The cardinal rule of statutory construction is to preserve a statute and find it constitutional if it is at all possible to do so.” [Case cite omitted.] We must uphold the constitutionality of a statute if there is any reasonable basis for it.

“[T]he task of this court in passing upon the constitutionality of laws is limited and restrained. This court does not sit as a superlegislature debating and deciding upon the relative merits of legislation. It looks for a reasonable basis upon which the legislature might have acted, and assumes that the legislature had such a purpose in mind when it enacted the law in question.” [Case cite omitted.]

I therefore conclude that, given the presumption of constitutionality, section 684r of the 1987 budget bill, which limits the distribution from the special performance dividend to only those annuitants receiving a supplemental benefit, does not violate the contract clauses of the United States or Wisconsin Constitutions.

DJH:WMS

Employe Trust Funds, Department Of; Insurance; Public Officials; Section 632.895(5m), Stats., which requires that disability insurance policies must provide coverage for grandchildren of the insured, does not apply to group insurance contracts between health maintenance organizations and the group insurance board of the Department of Employe Trust Funds. Under sections 40.51(7) and 40.03(6)(a)2., the group insurance board may not establish a pool of municipal employers to provide health care benefits on a self-funded basis. OAG 68-87

December 21, 1987

ROBERT HAASE, *Commissioner*
Office of Commissioner of Insurance

Your predecessor asked two questions concerning the applicability of the insurance code to insurance contracts purchased or administered by the Group Insurance Board (GIB) to cover state and municipal employes. Secs. 40.03(6) and 40.51(7), Stats. To paraphrase the request, the two questions are:

1. Does section 632.895(5m), Stats., apply to group health insurance contracts between health maintenance organizations and the GIB?

2. May the GIB establish a pool of municipal employers under section 40.51(7) to provide health care benefits on a self-funded basis?

For the reasons which follow, my answer is "no" to both questions.

Section 632.895, which is part of the Wisconsin Insurance Code, is entitled "mandatory coverage." Subsection (5m) of that section states:

COVERAGE OF GRANDCHILDREN. Every disability insurance policy issued or renewed on or after May 7, 1986, that provides coverage for any child of the insured shall provide the same coverage for all children of that child until that child is 18 years of age.

"Disability insurance policy" is defined at section 632.895(1)(a) as: "surgical, medical, hospital, major medical or other health service coverage." There is no mention of the state nor a state agency in section 632.895.

Chapter 40 defines the responsibilities of the Department of Employee Trust Funds and the various boards which administer the public employe trust fund. One of these, the GIB, is authorized to provide group insurance plans for public employes and their dependents. *See* sec. 40.03(6), Stats. This may be done on a self-insured basis, where the board contracts directly with the providers of health care services, or it may be done by entering into contracts with outside insurers. *See* sec. 40.03(6)(a)2. and (6)(a)1., Stats., respectively.

Section 40.02(20) is part of the definitional section which begins chapter 40. It states:

“Dependent” means the spouse, minor child, including stepchildren of the current marriage dependent on the employe for support and maintenance, or child of any age, including stepchildren of the current marriage, if handicapped to an extent requiring continued dependence. For group insurance purposes only, the department may promulgate rules with a different definition of “dependent” than the one otherwise provided in this subsection for each group insurance plan.

Section 632.895(5m) requires that health service policies extend coverage to include the insured’s grandchildren. Such section does not specifically include the state or GIB. Section 40.02(20), defining “dependent” for Wisconsin Retirement System purposes only, does not include grandchildren of the insured. The Department of Employee Trust Funds (DETF) is also authorized by section 40.02(20) to promulgate rules establishing a different definition of “dependent” for group insurance purposes. Such a different definition of “dependent” (which does not include the insured’s grandchildren) was promulgated under this authority at Wis. Admin. Code §ETF 10.01(2)(b), which states:

(2) “Dependent” means:

....

(b) For health insurance purposes, an employe’s spouse and an employe’s unmarried child who is dependent upon the employe or the employe’s former spouse for at least 50% of support and maintenance. In this paragraph, “child” includes a natural child, stepchild, adopted child, child in an adoptive placement under s. 48.837(1), Stats., and a legal ward who became a legal

ward of the employe or the employe's former spouse prior to age 19, and who is:

1. Under the age of 19,
2. Age 19 or over but less than age 25 if a full-time student, or
3. Age 19 or older and incapable of self-support because of a physical or mental disability which is expected to be of long-continued or indefinite duration.

Thus, neither the specific statute nor the specific rule defining "dependent" for GIB group health insurance plans includes the section 632.895(5m) required coverage for grandchildren.

Statutory provisions which are written in such general language as to make them reasonably susceptible to being construed as applicable alike both to the government and to private parties are subject to a presumptive rule of construction which exempts the government from their operation in the absence of other particular indicia supporting a contrary result in particular instances.

This rule has long been followed in Wisconsin. *See, e.g., State ex rel. Dept. of Pub. Instruction v. ILHR*, 68 Wis. 2d 677, 680-81, 229 N.W.2d 591, 593-94 (1975); *Door County v. Plumbers Local No. 298*, 4 Wis. 2d 142, 150, 89 N.W.2d 920, 924 (1958), *revd on other grounds*, 359 U.S. 354 (1959); *State ex rel. Martin v. Reis*, 230 Wis. 683, 687, 284 N.W. 580, 582 (1939).

Wis. Vet. Home v. Div. Nurs. Forfeit. Appeals, 104 Wis. 2d 106, 110, 310 N.W.2d 646 (Ct. App. 1981).

The rule of explicit inclusion, as it has come to be known, is derived from the presumption that "the legislature does not intend to deprive the crown of any prerogatives, rights, or property unless it expresses its intention to do so in explicit terms." *State v. Milwaukee*, 145 Wis. 131, 135, 129 N.W. 1101 (1911). This "rule of strict construction" is "given its strongest force when the state would be included in a law 'to its hurt' " and applies " 'in the absence of other particular indicia supporting a contrary result in particular circumstances.' " *Wis. Vet. Home*, 104 Wis. 2d at 110-11. The state is hurt where there is interference with its exercise of authority in the administration of the affairs of state. *See Wis. Vet. Home*, 104 Wis. 2d at 112-13.

Since section 40.02(20) establishes (and authorizes by unrestricted rule-making) a definition of "beneficiary" more restrictive than that set forth in section 632.895(5m), the state is hurt by the loss of flexibility in contracting for its group health insurance. That infringement of exercise of state authority is even more apparent from the DETF rule promulgated under its section 40.02(2) rule-making authority.

Legislative intent to not include the GIB health insurance contracts within those subject to the requirements of section 632.895 is apparent in that the Legislature specifically included GIB contracts under the immediately following statute, section 632.897. Section 632.897, which establishes general requirements for group health insurance policies, is specifically made applicable, in part, to the GIB by sections 40.51(3), (4), (5) and (9). I also note that more recently, the Legislature, when enacting an additional requirement in section 632.897 by 1987 Wisconsin Act 27 (the 1987 budget bill), again considered it necessary to specifically include such requirement in section 40.51. *See* sec. 688m of 1987 Wisconsin Act 27.

The maxim or rule that a statute which expresses one thing is exclusive of another, is applied to statutory interpretation. Where a form of conduct, the naming of its performance and operation, the persons and things to which it refers, are designated, there is an inference that all omissions should be understood as exclusions. The rule is that if a statute provides one thing, a negative of all others is implied.

Gottlieb v. Milwaukee, 90 Wis. 2d 86, 95, 279 N.W.2d 479 (Ct. App. 1979) (footnotes omitted). Here the Legislature has enacted two general statutes mandating requirements for health insurance contracts. Specific legislation makes the GIB subject to parts of one of the statutes. The express mention of section 632.897 in chapter 40 negates the intent that the similar statute, section 632.895, was also intended to apply to the GIB contracts.

Interpreting the similar general statutes (sections 632.895 and 632.897) to apply to the GIB health service contracts would nullify the purpose of sections 40.51(3), (4), (5), (9) and section 688m of the 1987 Wisconsin Act 27 and render them superfluous. "Basic rules of statutory interpretation forbid this result." *Fred Rueping Leather Co. v. City of Fond du Lac*, 99 Wis. 2d 1, 6, 298 N.W.2d 227 (Ct. App. 1980). Thus it appears that had the Legislature intended

the section 632.895(5m) requirement to be applicable to GIB contracts, it would have included specific reference to that section in section 40.51.

With respect to your second question, section 40.51(7) provides in pertinent part that “[a]ny employer, other than the state, may offer to all of its employes a health care coverage plan through a program offered by the group insurance board.” Elsewhere in chapter 40, the statute defining the powers and duties of the group insurance board state that the board “[m]ay . . . on behalf of the state, provide any group insurance plan on a self-insured basis” Sec. 40.03(6)(a)2., Stats.

Municipal employers are not “the state.” Instead, municipalities are separate bodies politic and corporate which are created by the state. See *Madison v. Hyland, Hall & Co.*, 73 Wis. 2d 364, 371-72, 243 N.W.2d 422, appeal dismissed, 429 U.S. 933 (1976), and *Bleck v. Monona Village*, 34 Wis. 2d 191, 196, 148 N.W.2d 708 (1967). Pursuant to the plain language of section 40.03(6)(a)2., therefore, the group insurance board may contract directly with health care providers on behalf of state employes, but may not do so on behalf of municipal employes. This interpretation is not only consistent with the statutory language, but it also avoids the potential of creating an obligation on the part of the state to pay the debt of another, which is prohibited by article VIII, section 3 of the Wisconsin Constitution.

DJH:WMS

Lakes; Navigable Waters; Waters; An artificial waterway connected with or located within 500 feet of a navigable waterway is a public waterway to which public access must be provided pursuant to sections 236.16(3) and 30.19(1)(a) and (5), Stats. OAG 69-87

December 23, 1987

CARROLL D. BESADNY, *Secretary*
Department of Natural Resources

You have requested my opinion whether statutory public access requirements apply to artificial lakes created within 500 feet of the ordinary high water mark of a navigable stream. You state that a subdivision developer proposes to create two artificial ponds within 500 feet of a navigable stream; your request does not state whether the developer proposes to connect the artificial ponds to the navigable stream. For the reasons which follow, I conclude that an artificial waterway connected with or located within 500 feet of a navigable waterway is a public waterway to which public access must be provided pursuant to sections 236.16(3) and 30.19(1)(a) and (5), Stats.

Section 30.19(1)(a) provides:

Enlargement and protection of waterways. (1) PERMITS REQUIRED. Unless a permit has been granted by the department or authorization has been granted by the legislature, it is unlawful:

(a) To construct, dredge, commence or do any work with respect to any artificial waterway, canal, channel, ditch, lagoon, pond, lake or similar waterway where the purpose is ultimate connection with an existing navigable stream, lake or other body of navigable water, or where any part of such artificial waterway is located within 500 feet of the ordinary high-water mark of an existing navigable stream, lake or other body of navigable water.

Section 30.19(4) authorizes the department to issue a permit upon a finding:

that the project will not injure public rights or interest, including fish and game habitat, that the project will not cause environmental pollution . . . , that the project conforms to the requirement of laws for the platting of land and for sanitation and that no material injury to the rights of any riparian owners on any body of water affected will result

Section 30.19(5) further provides that “all artificial waterways constructed under this section shall be public waterways,” and allows the department to condition permits as it finds necessary to “protect public health, safety, welfare, rights and interest and to protect private rights and property.”

Section 236.16 sets forth mandatory layout requirements for subdivision plats, specifying minimum lot width, area and street width. Section 236.16(3) requires subdivisions abutting navigable lakes or streams to provide public access to the water as follows:

(3) LAKE AND STREAM SHORE PLATS. All subdivisions abutting on a navigable lake or stream shall provide public access at least 60 feet wide providing access to the low water-mark so that there will be public access, which is connected to existing public roads, at not more than one-half mile intervals as measured along the lake or stream shore except where greater intervals and wider access is agreed upon by the department of natural resources and the department [of development], and excluding shore areas where public parks or open-space streets or roads on either side of a stream are provided. No public access established under this chapter may be vacated except by circuit court action. This subsection does not require any local unit of government to improve land provided for public access.

Your question concerns the interplay between sections 30.19 and 236.16(3) and, in essence, asks whether proximity to navigable water converts what would ordinarily be a private lake into a public waterway.

In 64 Op. Att’y Gen. 146 (1975), my predecessor determined that section 236.16(3) does not apply to artificial lakes on private land created by the damming of a non-navigable stream, but specifically limited his opinion to situations not reached by section 30.19. He concluded, 64 Op. Att’y Gen. at 149, “[i]n this instance, to require public access to entirely artificial lakes where the common law confers no public rights would abrogate the common law.” Of course, the difference between the facts you pose and the 1975 opinion is the intervention of section 30.19(5), which does abrogate the common law by declaring artificial waterways “public” if they connect to or are constructed within 500 feet of a navigable stream. I must next consider the extent to which the “public waterway” designation alters the private owner’s property rights, and ulti-

mately, whether the department may condition a permit on the owner's provision of "public access" to the water.

As a starting point for this analysis, I note that Wisconsin has long recognized an expansive definition of waters protected under the public trust doctrine established by Wis. Const. art. IX, §1. Under this doctrine, the state holds the beds of all navigable waters in trust for its citizens. Although the original purpose of the trust doctrine was to promote commercial navigation, the Wisconsin Supreme Court has expanded it to protect the public's use of navigable waters for purely recreational and nonpecuniary purposes. *State v. Bleck*, 114 Wis. 2d 454, 465, 338 N.W.2d 492 (1983); *Muench v. Public Service Comm.*, 261 Wis. 492, 53 N.W.2d 514 (1952). Natural, navigable waters of this state are thus impressed with the public trust, and all citizens enjoy access to and the full use of these waters on an equal footing. Moreover, private individuals cannot secure title to a lakebed because that title belongs to the state. *State v. Bleck*, 114 Wis. 2d at 462.

At the other end of the spectrum, our supreme court has held in *Mayer v. Grueber*, 29 Wis. 2d 168, 176, 138 N.W.2d 197 (1965), that the beds of artificially-created lakes do not belong to the state:

In the case of artificial bodies of water, all of the incidents of ownership are vested in the owner of the land. An artificial lake located wholly on the property of a single owner is his to use as he sees fit, provided, of course, that the use is lawful.

On the resolution of private versus public lakebed ownership, the facts you pose fall somewhere in the middle. The lakebeds themselves are on private land, yet the close proximity to navigable water which triggers the operation of section 30.19 suggests that it is the connection or merging of shared waters that makes water a "public" resource.¹ Two Wisconsin cases further refine the boundaries of private and public lakebed ownership, and together suggest a result that protects public rights yet does not deprive the owner of a property interest.

In *Haase v. Kingston Co-operative Creamery Asso.*, 212 Wis. 585, 589, 250 N.W. 444 (1933), the supreme court held that an artificial enlargement of a previously non-navigable stream does not confer public rights in the water, placing that case on the *Mayer v. Grueber*

¹ There is no helpful legislative history to aid in construction of section 30.19.

side of the ledger. In an earlier case, however, the court held that public rights attach to the increased surface water created by the artificial enlargement of a previously natural and navigable lake. *Mendota Club v. Anderson and another*, 101 Wis. 479, 493, 78 N.W. 185 (1899). Even though the public was entitled to the *use* of the newly-created surface water, ownership of the new lakebed remained in the private owner and did not transfer to the state. The court reached this result with some rather pragmatic imagery:

Certainly, persons navigating the lake cannot be required or expected to carry with them a chart and compass and measuring lines, to determine whether they are at all times within what were the limits of the lake prior to the construction of the dam.

Thus, according to *Mendota Club*, it is possible under Wisconsin law to retain the underlying private ownership of the lakebed even though public rights attach to the new surface water. In my opinion, the facts you present are very close to the *Mendota Club* case: by virtue of section 30.19, the creation of an artificial lake connected or in close proximity to a navigable waterway creates public rights to *use* the surface water even though the artificial lakebed remains in private ownership. Support for this result appears in section 30.19(5) itself, which declares that artificial waterways created under that section are “public”—but does not state that title to the bed vests in the state. In turn, the right to use a public waterway necessarily implies public access, since without it the right is meaningless.

Section 30.19(1)(a) requires a permit not only when an artificial waterway actually connects with an existing navigable water, but also when any part of the artificial waterway is located within 500 feet of the ordinary high water mark of a navigable water body. The statute does not reveal the basis for the 500-foot limit, but Wisconsin cases suggest that the state has a valid police-power purpose in regulating areas located in close proximity to navigable waters as well as connected waterways. In *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), the court upheld a shoreland zoning ordinance which restricted the alteration of lands within 1000 feet of the ordinary high water mark of a navigable lake, pond or flowage. The court reasoned that the special relationship between lands within the 1000-foot buffer zone and the contiguous waterway warrants public trust protection:

What makes this case different from most condemnation or police power zoning cases is the interrelationship of the wetlands, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing, and scenic beauty.

Just v. Marinette County, 56 Wis. 2d at 16-17.

The court's recognition of a valid police-power basis for regulating lands in close proximity to navigable waters lends solid justification to the 500-foot limit in section 30.19(1)(a). In effect, even where an artificial waterway is not connected to a navigable waterway, close proximity creates a presumption of hydrologic connection. The supreme court reaffirmed its *Just v. Marinette County* police-power analysis in *M & I Marshall & Ilsley Bank v. Town of Somers*, (slip op. at 14-16, November 4, 1987). Thus, the special relationship between navigable waters and lands adjacent to them provides ample basis for the 500-foot limit established in section 30.19(1)(a).

I am aware that recent United States Supreme Court cases consider the issue of whether conditioning property development on the grant of public access constitutes a taking in violation of the Just Compensation Clause of the fifth amendment.² In *Nollan v. California Coastal Com'n*, 107 S. Ct. 3141 (1987), the Supreme Court invalidated a public easement condition imposed upon a coastal development permit. The Court repeated earlier holdings that "land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land,'" 107 S. Ct. at 3146. In the *Nollan* case, however, the Court could not identify a legitimate state interest sought to be advanced by the lateral shoreline easement across the *Nollan's* property to enable the public to travel from one public beach to another. For example, the Court noted that it would see no problem in requiring an easement to permit the public to view the beach if preserving the public's view of the ocean were the state's asserted interest. "In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" 107 S. Ct. at 3148.

² "[N]or shall private property be taken for public use, without just compensation." Article V, Amendments to the United States Constitution.

The public access condition established by section 236.16(3) easily meets the test established in *Nollan v. California Coastal Commission*. The purpose of a public access requirement is to protect the public's state constitutional right to use public waterways, and access is the *sine qua non* to the enjoyment of that right. It makes no difference how the waterway became public, whether by operation of law or through connection to a navigable water: the public access condition assures the public's right to use state waterways. The "legitimate state interest," therefore, is the protection of public rights in water, and, unlike the mandated easement in *Nollan*, requiring developers to provide public access to the shore advances that interest.

In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), the Court held a governmental public access requirement to a pre-existing private pond to be a taking. In that case, however, the Court emphasized that under Hawaii law the pond had always been private property notwithstanding its connection to navigable water. More significantly, the Court noted that legitimate takings cases arise only where there is an interference with an " 'economic advantage' that has the law back of it." *Kaiser Aetna*, 444 U.S. at 178. In *Kaiser Aetna*, the developers owned the pond and had exclusive access to it, at least until the government intervened and (after the owners had made costly improvements) declared that the developers must now provide public access. In contrast, under the facts you pose, the developer under section 30.19 has no "right" to create a lake within 500 feet of public waters, where it presumably would impact the quality and quantity of existing public waters. The *Kaiser Aetna* court acknowledged:

We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, or could have conditioned its approval of the dredging on petitioners' agreement to comply with various measures that it deemed appropriate for the promotion of navigation.

Kaiser Aetna, 444 U.S. at 179.

Under section 30.19(4) and (5), the state has sufficient authority to deny the developer a permit in the first place without causing a taking. Thus, even under *Kaiser Aetna* the state certainly may condition its section 30.19 permit on providing public access to a

newly-created lake which exists in close proximity to and may have impacts on existing public waters.

Accordingly, an artificial waterway connected with or located within 500 feet of a navigable waterway is a public waterway to which the department may require public access. If this requirement is imposed as a condition of a section 30.19 permit for the enlargement of waterways, it is not a governmental taking under the rationale of *Kaiser Aetna* and *Nollan* because the owner has not lost an essential element of a pre-existing property interest and the condition bears a reasonable relationship to the state's protection of public waters.

DJH:MS

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Wis. Admin. Code ILHR 83.08(1)(b), authorizing delegation by DILHR of one of its powers requiring the exercise of judgment to a county, was unlawful, there being no statutory authorization for such delegation. OAG 63-87 282

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Wis. Admin. Code ILHR 83.08(1)(b), authorizing delegation by DILHR of one of its powers requiring the exercise of judgment to a county, was unlawful, there being no statutory authorization for such delegation. OAG 63-87 282

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AUTOMOBILES AND MOTOR VEHICLES

Drunk driving

Section 345.24, Stats., does not require the release of a person twelve hours after his arrest for one of the alcohol-related driving offenses specified in that statute if the person's blood-alcohol content still exceeds .05 percent, as long as the person is brought before a court without unreasonable delay. OAG 23-87 95

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Municipalities may require bidders to include a list of subcontractors. Counties may reject a proposal for failure to include a complete list, except when omitted subcontractors themselves submitted timely, written bids to the general contractor. OAG 8-87..... 29

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Municipalities may require bidders to include a list of subcontractors. Counties may reject a proposal for failure to include a complete list, except when omitted subcontractors themselves submitted timely, written bids to the general contractor. OAG 8-87..... 29

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To be eligible to obtain a raffle license from the State of Wisconsin, an organization, whether it is tax exempt or not, must qualify as a local organization. If a licensed organization no longer meets the eligibility requirements for licensure during the effective period of the license, such license is subject to revocation or suspension by the Bingo Control Board. OAG 27-87 115

CESA

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Abuse or neglect

A medical or mental health professional may report suspected child abuse under the permissive provisions of section 48.981(3), Stats., when the abuser, rather than the victim, is seen in the course of professional duties. Section 51.30 does not act as a bar to such reports made in good faith. OAG 10-87 39

A county department of social services or county department of human services may not contract with other agencies to obtain section 48.981, Stats., reporting or investigatory services in situations other than the performance of independent investigations required by section 48.981(3)(d). A cooperative contract might be possible under section 66.30(2) in order to effectuate this purpose but the services must be

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Where, as a result of the alteration of the county board supervisory districts, a supervisor's residence is left outside the district he or she represents, the supervisor may continue to represent that district until the expiration of his term. When a city has combined the offices of alderman and county board supervisor where the aldermanic and supervisory boundaries are coterminous, the county board retains its discretion to decide whether to alter the supervisory districts after the city has annexed territory. OAG 3-87 10

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Annual fee for maintenance or support payments

In the appropriate case, a court may enforce the collection of the receiving and disbursing fee under section 814.61(12)(b), Stats., for maintenance payments, child support or family support payments by entering an income withholding order as one of the remedial sanctions available under section 785.04(1). The power of the clerk of court is limited to moving the court for a remedial sanction under chapter 785 after which the specific remedy is to be imposed by the court under section 785.04(1). OAG 24-87 100

If the court fails to order the annual fee paid under section 814.61(12)(b), Stats., for receiving and disbursing money deposited as payment for maintenance payments, child support or family support, the clerk of court can bill the payor and then collect the fee with the same remedies available as in any other case of a debt created by law. Although the clerk cannot seek a remedial sanction under chapter 785 in these situations, the clerk does have the authority to increase the fee after providing the payor with written notice of this obligation and a reasonable opportunity to pay. OAG 57-87 265

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Public school administrators

Public school administrators are eligible to be candidates for and to vote for teacher representatives on the Teachers Retirement Board. OAG 32-87 141

School administrators

See Public school administrators

Sheriffs

Commander in the Brown County sheriff's department, a supervisory position, is not incompatible with the office of president of a village within Brown County. Abstention from participation in discussions or voting or resignation from one of the offices should be considered if a conflict arises. OAG 36-87 156

Teachers Retirement Board

Public school administrators are eligible to be candidates for and to vote for teacher representatives on the Teachers Retirement Board. OAG 32-87 141

Village President

Commander in the Brown County sheriff's department, a supervisory position, is not incompatible with the office of president of a village within Brown County. Abstention from participation in discussions or voting or resignation from one of the offices should be considered if a conflict arises. OAG 36-87 156

CONFIDENTIAL REPORTS**Child abuse**

A medical or mental health professional may report suspected child abuse under the permissive provisions of section 48.981(3), Stats., when the abuser, rather than the victim, is seen in the course of professional duties. Section 51.30 does not act as a bar to such reports made in good faith. OAG 10-87 39

Juveniles

A school cannot use confidential information obtained from law enforcement authorities to require students, under threat of expulsion, to participate in group or individual counseling, nor can the school use such information to suspend or expel students. The school can use such confidential information to refer a student to county social welfare agencies or nongovernmental self-help groups, but only if the student consents to such referral. OAG 30-87 134

Snowmobile accident reports

Snowmobile accident reports filed with the Department of Natural Resources pursuant to section 350.15(3), Stats., are not confidential documents. OAG 14-87 56

CONFLICT OF INTEREST**Private interest in public contracts**

Section 946.13, Stats., which prohibits private interests in public contracts, applies to county board or department purchases aggregating more than \$5,000 from a county supervisor-owned business. OAG 42-87 178

Where the village board administers a community development block grant program, a member of the village board would violate section 946.13(1)(a), Stats., if he or she obtained a loan in excess of \$5,000 under the program. Acting in his private capacity as a contractor, the board member would violate section 946.13(1) if he contracted to perform the construction work for a third person who obtained a loan under the program. OAG 61-87 278

School board member

The enactment of the marital property law does not change the applicability of section 946.13, Stats., to the member of a governmental body when that body employs the member's spouse. As was the case before the marital property law, the member of the governmental body avoids violation of section 946.13 if in his private capacity he does not negotiate, bid on or enter into the employment contract and in his public capacity he does not participate in the making of the contract and does not exercise discretion in the performance of the contract. OAG 4-87 15

Teacher

The enactment of the marital property law does not change the applicability of section 946.13, Stats., to the member of a governmental body when that body employs the member's spouse. As was the case before the marital property law, the member of the governmental body avoids violation of section 946.13 if in his private capacity he does not

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negotiate, bid on or enter into the employment contract and in his public capacity he does not participate in the making of the contract and does not exercise discretion in the performance of the contract. OAG 4-87..... 15

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Contract clauses and the 1987 Budget Bill

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Private interest in public contracts

Section 946.13, Stats., which prohibits private interests in public contracts, applies to county board or department purchases aggregating more than \$5,000 from a county supervisor-owned business. OAG 42-87 178

Land conservation committee responsibilities and prohibition of private interest in public contracts discussed. OAG 44-87 184

Where the village board administers a community development block grant program, a member of the village board would violate section 946.13(1)(a), Stats., if he or she obtained a loan in excess of \$5,000 under the program. Acting in his private capacity as a contractor, the board member would violate section 946.13(1) if he contracted to perform the construction work for a third person who obtained a loan under the program. OAG 61-87..... 278

COOPERATIVE EDUCATIONAL SERVICES AGENCIES

Driver education programs in schools

A school district and a cooperative educational service agency may not, without legislative authority, contract with a private driving school and receive state aid for pupil driving instruction services performed by such driving school. OAG 7-87 26

COPYRIGHT

Natural Resources, Department of

The Department of Natural Resources may seek to obtain copyrights for publications entitled "Walleye Waters," "Trout Waters," "Musky Waters" and "Canoe Waters" which were written and compiled by state employes on state time provided the copyrights have not been invalidated due to the omission of the copyright notice. OAG 38-87 162

COUNTIES**Bids and bidders**

Municipalities may require bidders to include a list of subcontractors.

Counties may reject a proposal for failure to include a complete list, except when omitted subcontractors themselves submitted timely, written bids to the general contractor. OAG 8-87 29

Citations for ordinance violations

Without statutory authority to do so, a county cannot use citations for violations of ordinances that have certain statutory counterparts. Section 66.119(3)(b), Stats., only authorizes the use of citations for violations of ordinances other than those for which a statutory counterpart exists. OAG 49-87 211

Funds for a county farm

Under appropriate circumstances, a county may appropriate county funds reasonably necessary for improvement, maintenance and operation of county property which is not deemed to be surplus, even though such property may no longer be required for the public purpose for which it was originally acquired and is not currently required for some other specific public use. OAG 40-87 169

Human services department

A county department of social services or county department of human services may not contract with other agencies to obtain section 48.981, Stats., reporting or investigatory services in situations other than the performance of independent investigations required by section 48.981(3)(d). A cooperative contract might be possible under section 66.30(2) in order to effectuate this purpose but the services must be furnished by the county department as defined in section 48.02(2g) and not by any other public or private agency. OAG 64-87 286

Lands sold for taxes

Section 75.36, Stats., provides that a county need not assume and pay all unpaid or delinquent municipal taxes, assessments and charges due on a parcel of property at the time the county acquires such property by tax deed. The statute also provides that the county is not required to assume and pay any such taxes which remain unrecovered upon the sale of such property because the sum realized was insufficient to pay all such outstanding municipal tax obligations. (Unpub.) OAG 31-87

Public purpose doctrine

Under appropriate circumstances, a county may appropriate county funds reasonably necessary for improvement, maintenance and operation of county property which is not deemed to be surplus, even though such property may no longer be required for the public purpose for which it was originally acquired and is not currently required for some other specific public use. OAG 40-87 169

Social services department

A county department of social services or county department of human services may not contract with other agencies to obtain section 48.981, Stats., reporting or investigatory services in situations other than the performance of independent investigations required by section 48.981(3)(d). A cooperative contract might be possible under section

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Social services department *(continued)*

66.30(2) in order to effectuate this purpose but the services must be furnished by the county department as defined in section 48.02(2g) and not by any other public or private agency. OAG 64-87 286

Tax delinquent property, selling of

Section 75.36, Stats., provides that a county need not assume and pay all unpaid or delinquent municipal taxes, assessments and charges due on a parcel of property at the time the county acquires such property by tax deed. The statute also provides that the county is not required to assume and pay any such taxes which remain unrecovered upon the sale of such property because the sum realized was insufficient to pay all such outstanding municipal tax obligations. (Unpub.) OAG 31-87

Zoning

A town with village powers that is subject to a county zoning ordinance is not prohibited by statute from any and all regulation of driveway installation. A town which is subject to a county zoning ordinance that contains no limitation on the issuance of county zoning permits may not set a quota on the number of residential building permits that the town will issue each year. OAG 15-87 60

COUNTY BOARD

Architectural services, contracts for

Section 59.08(1), Stats., does not apply to architectural services. OAG 43-87 182

Committees

A county board chairperson and a county board committee are not authorized by section 19.85(1)(c), Stats., to meet in closed session to discuss appointments to county board committees; however, in appropriate circumstances section 19.85(1)(f) would authorize closed sessions. OAG 60-87 276

Contingency fund

Under section 65.90(5), Stats., a vote of two-thirds of the entire membership of the county board is needed to transfer funds from the contingency fund to use for a purpose not anticipated in the budget. OAG 33-87 145

Land Conservation Committee appointments

Appointments to a county land conservation committee, created by the county board pursuant to section 92.06, Stats., are made by the county board, not by the county executive. OAG 41-87 173

Residence of supervisor

Where, as a result of the alteration of the county board supervisory districts, a supervisor's residence is left outside the district he or she represents, the supervisor may continue to represent that district until the expiration of his term. When a city has combined the offices of alderman and county board supervisor where the aldermanic and supervisory boundaries are coterminous, the county board retains its

COUNTY BOARD (*continued*)Residence of supervisor (*continued*)

discretion to decide whether to alter the supervisory districts after the city has annexed territory. OAG 3-87 10

Supervisor doing business with county

Section 946.13, Stats., which prohibits private interests in public contracts, applies to county board or department purchases aggregating more than \$5,000 from a county supervisor-owned business. OAG 42-87 178

Supervisor selling real estate to county

Where the county board as a whole must decide whether to purchase land, a county board supervisor would violate section 946.13(1)(a), Stats., if land owned by his partnership was sold to the county for a purchase price in excess of \$5,000. OAG 22-87 90

COUNTY EXECUTIVE

Land Conservation Committee appointments

Appointments to a county land conservation committee, created by the county board pursuant to section 92.06, Stats., are made by the county board, not by the county executive. OAG 41-87 173

COUNTY HIGHWAY DEPARTMENT

Ditching and culvert work on private lands

The county highway department may perform ditching and culvert work on private lands to promote a public purpose such as soil conservation. However, activity in this area should respect available private sector alternatives, and ensure that accounting procedures will protect all taxpayers equally. OAG 16-87 69

COURTS

Annual fee for maintenance or support payments

In the appropriate case, a court may enforce the collection of the receiving and disbursing fee under section 814.61(12)(b), Stats., for maintenance payments, child support or family support payments by entering an income withholding order as one of the remedial sanctions available under section 785.04(1). The power of the clerk of court is limited to moving the court for a remedial sanction under chapter 785 after which the specific remedy is to be imposed by the court under section 785.04(1). OAG 24-87 100

If the court fails to order the annual fee paid under section 814.61(12)(b), Stats., for receiving and disbursing money deposited as payment for maintenance payments, child support or family support, the clerk of court can bill the payor and then collect the fee with the same remedies available as in any other case of a debt created by law. Although the clerk cannot seek a remedial sanction under chapter 785 in these situations, the clerk does have the authority to increase the fee after providing the payor with written notice of this obligation and a reasonable opportunity to pay. OAG 57-87 265

COURTS (*continued*)

Family Court Commissioner

The family court commissioner represents the public interest and does not act as an advocate for the party benefited when he brings a remedial contempt proceeding to enforce an existing order or judgment under section 767.29(1), Stats. OAG 6-87 21

Fees

The only fee authorized to be paid any clerk of courts under section 102.26(1), Stats., in worker's compensation matters is a \$3 fee imposed under section 814.61(5) when applicable. OAG 34-87 148

Jail sentence, staying execution of

A trial court does not have the authority to stay the execution of a sentence of imprisonment to the county jail for more than sixty days except for legal cause or when placing a person on probation; overcrowding does not constitute legal cause under section 973.15(8)(a), Stats. OAG 39-87 165

Sentencing

A trial court does not have the authority to stay the execution of a sentence of imprisonment to the county jail for more than sixty days except for legal cause or when placing a person on probation; overcrowding does not constitute legal cause under section 973.15(8)(a), Stats. OAG 39-87 165

CRIMINAL LAW

Child abuse

A medical or mental health professional may report suspected child abuse under the permissive provisions of section 48.981(3), Stats., when the abuser, rather than the victim, is seen in the course of professional duties. Section 51.30 does not act as a bar to such reports made in good faith. OAG 10-87 39

Search and seizure

A municipality's decision to require pre-employment drug testing for prospective employes must balance the need for testing in particular positions against the invasion of personal rights that the search entails, considering all relevant factors. OAG 55-87 257

DISCRIMINATION

Service clubs

Section 942.04, Stats., potentially applies to service clubs; constitutionality of state regulation of such clubs is to be analyzed according to *Board of Dirs. of Rotary Intern. v. Rotary Club*, ___ U.S. ___, 107 S. Ct. 1940 (1987). OAG 54-87 251

Sex discrimination

Section 942.04, Stats., potentially applies to service clubs; constitutionality of state regulation of such clubs is to be analyzed according to *Board of Dirs. of Rotary Intern. v. Rotary Club*, ___ U.S. ___, 107 S. Ct. 1940 (1987). OAG 54-87 251

DISTRICT ATTORNEY

Police files

The police may justifiably prevent a district attorney from inspecting their investigation files on pending criminal cases to determine whether there is exculpatory evidence which must be disclosed to a defendant only in those exceptional instances in which a compelling need to maintain secrecy outweighs the constitutional and statutory considerations ordinarily demanding access. OAG 56-87..... 262

DRUGS

Testing; pre-employment

A municipality's decision to require pre-employment drug testing for prospective employes must balance the need for testing in particular positions against the invasion of personal rights that the search entails, considering all relevant factors. OAG 55-87..... 257

DRUNK DRIVING

Arrest and release

Section 345.24, Stats., does not require the release of a person twelve hours after his arrest for one of the alcohol-related driving offenses specified in that statute if the person's blood-alcohol content still exceeds .05 percent, as long as the person is brought before a court without unreasonable delay. OAG 23-87..... 95

Release after arrest

Section 345.24, Stats., does not require the release of a person twelve hours after his arrest for one of the alcohol-related driving offenses specified in that statute if the person's blood-alcohol content still exceeds .05 percent, as long as the person is brought before a court without unreasonable delay. OAG 23-87..... 95

EMERGENCY MEDICAL SERVICES ACT

Policies and procedures

The coordinating physician, as defined in Wis. Admin. Code ch. H 21, is the person authorized to establish policies and procedures in providing emergency medical services under the Emergency Medical Services Act. OAG 37-87..... 159

EMPLOYE TRUST FUNDS, DEPARTMENT OF

Group Insurance Board

Section 632.895(5m), Stats., which requires that disability insurance policies must provide coverage for grandchildren of the insured, does not apply to group insurance contracts between health maintenance organizations and the group insurance board of the Department of Employee Trust Funds. Under sections 40.51(7) and 40.03(6)(a)2., the group insurance board may not establish a pool of municipal employers to provide health care benefits on a self-funded basis. OAG 68-87 311

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EMPLOYER AND EMPLOYEE

Drug testing; pre-employment

- A municipality's decision to require pre-employment drug testing for prospective employes must balance the need for testing in particular positions against the invasion of personal rights that the search entails, considering all relevant factors. OAG 55-87 257

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- Constitutionality of the administration of grant monies by the Adolescent Pregnancy Prevention Services Board pursuant to section 46.93, Stats., discussed. OAG 53-87 233

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- Land conservation committee responsibilities and prohibition of private interest in public contracts discussed. OAG 44-87 184

FEDERAL AID

Block grant monies

- The Department of Health and Social Services cannot reobligate re-funds of federal block grant monies received after the federally mandated time for closing the grant year. OAG 5-87 19

FEES

Annual fee for maintenance or support payments

- In the appropriate case, a court may enforce the collection of the receiving and disbursing fee under section 814.61(12)(b), Stats., for maintenance payments, child support or family support payments by entering an income withholding order as one of the remedial sanctions available under section 785.04(1). The power of the clerk of court is limited to moving the court for a remedial sanction under chapter 785 after which the specific remedy is to be imposed by the court under section 785.04(1). OAG 24-87 100
- If the court fails to order the annual fee paid under section 814.61(12)(b), Stats., for receiving and disbursing money deposited as payment for maintenance payments, child support or family support, the clerk of court can bill the payor and then collect the fee with the same remedies available as in any other case of a debt created by law. Although the clerk cannot seek a remedial sanction under chapter 785 in these situations, the clerk does have the authority to increase the fee after providing the payor with written notice of this obligation and a reasonable opportunity to pay. OAG 57-87 265

FEES (continued)**Courts**

The only fee authorized to be paid any clerk of courts under section 102.26(1), Stats., in worker's compensation matters is a \$3 fee imposed under section 814.61(5) when applicable. OAG 34-87 148

Mining permit application

All staff work necessary to determine whether an applicant meets the requirements of the Metallic Mining Reclamation Act must be included in the cost of evaluating the permit, including any evaluation of compliance with other environmental requirements. The withdrawal of a mining permit application by the applicant prior to a final decision on the application does not relieve the applicant from the obligation to pay the cost of evaluation. OAG 35-87 150

Register in Probate

The time of the filing of the inventory of the estate, not the time of filing the petition for probate, determines the applicable filing fee. (Unpub.) OAG 62-87

FORFEITURES**Federal forfeiture action**

Money resulting from a state forfeiture action under sections 161.555 and 973.075(4), Stats., must be deposited in the state school fund. Money granted to the state after a federal forfeiture proceeding need not be. OAG 48-87 209

State forfeiture action

Money resulting from a state forfeiture action under sections 161.555 and 973.075(4), Stats., must be deposited in the state school fund. Money granted to the state after a federal forfeiture proceeding need not be. OAG 48-87 209

FOSTER HOMES**Insurance requirement waived**

Where a licensing agency waives the insurance requirement under section 48.627(1)(a) and (b), Stats., it does not assume any liability beyond the limited recovery in tort claims under sections 893.80(3) and 893.82(6). OAG 1-87 1

Zoning

A community living arrangement which has a capacity for eight or fewer persons and which meets all other statutory criteria is entitled to locate in any zoning district where single or multi-family residences are a permitted use. Any such community living arrangement which has a capacity of from nine to fifteen persons is entitled to locate in any zoning district where multi-family residences containing more than two families are a permitted use, and is entitled to apply for special zoning permission to locate in any zoning district where single or two family uses are permitted. Such a community living arrangement which has a capacity of more than fifteen persons is entitled to apply for special zoning permission to locate in any zoning district

FOSTER HOMES (continued)

Zoning (continued)

where single or multi-family uses are permitted. A community living arrangement which meets all applicable statutory criteria is not entitled to locate in an exclusive agricultural zoning district, but may seek special zoning permission to do so if local ordinances permit. OAG 29-87 126

FUNDS

Contingency fund

Under section 65.90(5), Stats., a vote of two-thirds of the entire membership of the county board is needed to transfer funds from the contingency fund to use for a purpose not anticipated in the budget. OAG 33-87 145

“State funds”

Only the portion of 1987 Assembly Bill 265 that increases benefits for persons no longer working for a Wisconsin Retirement System participating employer is subject to the three-fourths vote requirement of article IV, section 26 of the Wisconsin Constitution. The Public Employee Trust Fund constitutes “state funds” as used in article IV, section 26 of the Wisconsin Constitution. OAG 52-87 224

Surplus funds in local units of government

A local unit of government may not create and accumulate unappropriated surplus funds. However, a local unit of government may maintain reasonable amounts necessary in the exercise of sound business principles to meet the immediate cash flow needs of the municipality during the current budgetary period or to accumulate needed capital in non-lapsing funds to finance specifically identified future capital expenditures. OAG 18-87 77

Transfer of

Under section 65.90(5), Stats., a vote of two-thirds of the entire membership of the county board is needed to transfer funds from the contingency fund to use for a purpose not anticipated in the budget. OAG 33-87 145

FUNERAL DIRECTORS AND EMBALMERS

Insurance agent

A plan whereby a funeral service person (a licensed funeral director, operator of a licensed funeral establishment or an employe of the same) also acts as an insurance agent and as such writes a life insurance policy naming as the beneficiary a funeral director or establishment and additionally negotiates a contract wherein the named insured in the policy contracts with a funeral director or establishment for providing burial or funeral services to the insured is illegal. OAG 65-87 291

HEALTH AND SOCIAL SERVICES, DEPARTMENT OF

Child abuse and neglect investigations

A county department of social services or county department of human services may not contract with other agencies to obtain section 48.981, Stats., reporting or investigatory services in situations other than the performance of independent investigations required by section 48.981(3)(d). A cooperative contract might be possible under section 66.30(2) in order to effectuate this purpose but the services must be furnished by the county department as defined in section 48.02(2g) and not by any other public or private agency. OAG 64-87 286

Federal block grant monies

The Department of Health and Social Services cannot reobligate refunds of federal block grant monies received after the federally mandated time for closing the grant year. OAG 5-87 19

HIGHWAYS

County Highway Department

The county highway department may perform ditching and culvert work on private lands to promote a public purpose such as soil conservation. However, activity in this area should respect available private sector alternatives, and ensure that accounting procedures will protect all taxpayers equally. OAG 16-87 69

HOUSING

See also **FOSTER HOMES**

Community living arrangements

A community living arrangement which has a capacity for eight or fewer persons and which meets all other statutory criteria is entitled to locate in any zoning district where single or multi-family residences are a permitted use. Any such community living arrangement which has a capacity of from nine to fifteen persons is entitled to locate in any zoning district where multi-family residences containing more than two families are a permitted use, and is entitled to apply for special zoning permission to locate in any zoning district where single or two family uses are permitted. Such a community living arrangement which has a capacity of more than fifteen persons is entitled to apply for special zoning permission to locate in any zoning district where single or multi-family uses are permitted. A community living arrangement which meets all applicable statutory criteria is not entitled to locate in an exclusive agricultural zoning district, but may seek special zoning permission to do so if local ordinances permit. OAG 29-87 126

Funds

Municipal housing authorities are not public depositors under chapter 34, Stats. OAG 17-87 74

HOUSING (*continued*)

Group homes

See Community living arrangements

Multi-family residences

A community living arrangement which has a capacity for eight or fewer persons and which meets all other statutory criteria is entitled to locate in any zoning district where single or multi-family residences are a permitted use. Any such community living arrangement which has a capacity of from nine to fifteen persons is entitled to locate in any zoning district where multi-family residences containing more than two families are a permitted use, and is entitled to apply for special zoning permission to locate in any zoning district where single or two family uses are permitted. Such a community living arrangement which has a capacity of more than fifteen persons is entitled to apply for special zoning permission to locate in any zoning district where single or multi-family uses are permitted. A community living arrangement which meets all applicable statutory criteria is not entitled to locate in an exclusive agricultural zoning district, but may seek special zoning permission to do so if local ordinances permit. OAG 29-87

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Municipal housing authority

Municipal housing authorities are not public depositors under chapter 34, Stats. OAG 17-87.....

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Rental unit energy efficiency statute

The rental unit energy efficiency statute, section 101.122, Stats., applies to the state. OAG 47-87

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INDIANS

Liquor license

Tribally owned or operated liquor establishments must comply with state liquor laws, including licensing requirements. Indian tribes are within the coverage of chapter 125, Stats., and any license issued to a tribe counts toward the local quota. OAG 19-87

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Oneida Roadway Inn

Tribally owned or operated liquor establishments must comply with state liquor laws, including licensing requirements. Indian tribes are within the coverage of chapter 125, Stats., and any license issued to a tribe counts toward the local quota. OAG 19-87

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Tribal liquor license

Tribally owned or operated liquor establishments must comply with state liquor laws, including licensing requirements. Indian tribes are within the coverage of chapter 125, Stats., and any license issued to a tribe counts toward the local quota. OAG 19-87

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INDUSTRY, LABOR AND HUMAN RELATIONS, DEPARTMENT OF

Administrative rules and statutory authorization

Wis. Admin. Code ILHR 83.08(1)(b), authorizing delegation by DILHR of one of its powers requiring the exercise of judgment to a

INDUSTRY, LABOR AND HUMAN RELATIONS, DEPARTMENT OF *(continued)**Administrative rules and statutory authorization (continued)*

county, was unlawful, there being no statutory authorization for such delegation. OAG 63-87 282

INSURANCE**Funeral directors**

A plan whereby a funeral service person (a licensed funeral director, operator of a licensed funeral establishment or an employe of the same) also acts as an insurance agent and as such writes a life insurance policy naming as the beneficiary a funeral director or establishment and additionally negotiates a contract wherein the named insured in the policy contracts with a funeral director or establishment for providing burial or funeral services to the insured is illegal. OAG 65-87 291

Governmental bodies, officers, agents or employes

Where a licensing agency waives the insurance requirement under section 48.627(1)(a) and (b), Stats., it does not assume any liability beyond the limited recovery in tort claims under sections 893.80(3) and 893.82(6). OAG 1-87 1

Group Insurance Board

Section 632.895(5m), Stats., which requires that disability insurance policies must provide coverage for grandchildren of the insured, does not apply to group insurance contracts between health maintenance organizations and the group insurance board of the Department of Employee Trust Funds. Under sections 40.51(7) and 40.03(6)(a)2., the group insurance board may not establish a pool of municipal employers to provide health care benefits on a self-funded basis. OAG 68-87 311

INTOXICATING LIQUORS**Indians**

Tribally owned or operated liquor establishments must comply with state liquor laws, including licensing requirements. Indian tribes are within the coverage of chapter 125, Stats., and any license issued to a tribe counts toward the local quota. OAG 19-87 80

Licenses and permits

Municipalities may not require by ordinance that all grocery and liquor store employes and bartenders must obtain bartenders' or operators' licenses, such ordinances being in conflict with the provisions of chapter 125, Stats. OAG 20-87 86

JOHN DOE PROCEEDING

See JUDGES

JUDGES

John Doe proceeding

Limits of a judge's authority in presiding over or conducting a John Doe proceeding discussed. Section 968.26, Stats., is not unconstitutional as a violation of the separation of powers doctrine. OAG 51-87 217

KNIVES

Balisong

Possession of balisong or butterfly knives is prohibited by section 941.24, Stats., because their blades open by a thrust or movement. (Unpub.) OAG 21-87

Butterfly knife

Possession of balisong or butterfly knives is prohibited by section 941.24, Stats., because their blades open by a thrust or movement. (Unpub.) OAG 21-87

Switchblade Knife Act (U.S.)

Possession of balisong or butterfly knives is prohibited by section 941.24, Stats., because their blades open by a thrust or movement. (Unpub.) OAG 21-87

LAKES

See also **WATERS**

Artificial lakes

An artificial waterway connected with or located within 500 feet of a navigable waterway is a public waterway to which public access must be provided pursuant to sections 236.16(3) and 30.19(1)(a) and (5), Stats. OAG 69-87 316

LAND CONSERVATION COMMITTEE

Appointments to

Appointments to a county land conservation committee, created by the county board pursuant to section 92.06, Stats., are made by the county board, not by the county executive. OAG 41-87..... 173

Private interest in public contracts

Land conservation committee responsibilities and prohibition of private interest in public contracts discussed. OAG 44-87 184

LAW ENFORCEMENT

Burnett County police and emergency radio

A sheriff's actions in determining access to a county's law enforcement channel are ministerial in nature. The negligent exercise of that authority could subject the sheriff to liability. OAG 2-87..... 7

Citations for ordinance violations

Without statutory authority to do so, a county cannot use citations for violations of ordinances that have certain statutory counterparts. Section 66.119(3)(b), Stats., only authorizes the use of citations for viola-

LAW ENFORCEMENT *(continued)*Citations for ordinance violations *(continued)*

tions of ordinances other than those for which a statutory counterpart exists. OAG 49-87 211

Police files

The police may justifiably prevent a district attorney from inspecting their investigation files on pending criminal cases to determine whether there is exculpatory evidence which must be disclosed to a defendant only in those exceptional instances in which a compelling need to maintain secrecy outweighs the constitutional and statutory considerations ordinarily demanding access. OAG 56-87 262

Radio channel for police and emergency use

A sheriff's actions in determining access to a county's law enforcement channel are ministerial in nature. The negligent exercise of that authority could subject the sheriff to liability. OAG 2-87 7

LEGISLATION

Budget Bill for 1987

Section 684r of the 1987 budget bill, which limits the distribution from the special performance dividend to only those annuitants receiving a supplemental benefit, does not violate the United States or Wisconsin Constitutions. OAG 67-87 299

Retirement benefits

Only the portion of 1987 Assembly Bill 265 that increases benefits for persons no longer working for a Wisconsin Retirement System participating employer is subject to the three-fourths vote requirement of article IV, section 26 of the Wisconsin Constitution. The Public Employee Trust Fund constitutes "state funds" as used in article IV, section 26 of the Wisconsin Constitution. OAG 52-87 224

"Three-fourths vote" requirement

Only the portion of 1987 Assembly Bill 265 that increases benefits for persons no longer working for a Wisconsin Retirement System participating employer is subject to the three-fourths vote requirement of article IV, section 26 of the Wisconsin Constitution. The Public Employee Trust Fund constitutes "state funds" as used in article IV, section 26 of the Wisconsin Constitution. OAG 52-87 224

LEGISLATURE

Appointees

The senate may not appoint a commissioner to fill a vacancy in a term which will not occur during the extant session of the senate. In the present case, the provisional appointment for the vacancy in the term ending March 1, 1985, was valid, but the appointment for a full term beginning March 1, 1985, and ending on March 1, 1991, was invalid. The acts of the commissioner holding over in office are valid. OAG 59-87 272

LIABILITY

Governmental bodies, officers, agents or employes

Where a licensing agency waives the insurance requirement under section 48.627(1)(a) and (b), Stats., it does not assume any liability beyond the limited recovery in tort claims under sections 893.80(3) and 893.82(6). OAG 1-87 1

LIBRARIES

Home rule

Municipal libraries are a matter of statewide concern. Accordingly, home rule provisions will not justify local departures from the provisions of chapter 43, Stats. OAG 46-87 203

LICENSES AND PERMITS

Bartenders' licenses

Municipalities may not require by ordinance that all grocery and liquor store employes and bartenders must obtain bartenders' or operators' licenses, such ordinances being in conflict with the provisions of chapter 125, Stats. OAG 20-87 86

Grocery store employes

Municipalities may not require by ordinance that all grocery and liquor store employes and bartenders must obtain bartenders' or operators' licenses, such ordinances being in conflict with the provisions of chapter 125, Stats. OAG 20-87 86

Liquor store employes

Municipalities may not require by ordinance that all grocery and liquor store employes and bartenders must obtain bartenders' or operators' licenses, such ordinances being in conflict with the provisions of chapter 125, Stats. OAG 20-87 86

Mining permit fees

All staff work necessary to determine whether an applicant meets the requirements of the Metallic Mining Reclamation Act must be included in the cost of evaluating the permit, including any evaluation of compliance with other environmental requirements. The withdrawal of a mining permit application by the applicant prior to a final decision on the application does not relieve the applicant from the obligation to pay the cost of evaluation. OAG 35-87 150

Occupational license

The Department of Regulation and Licensing has the authority to promulgate rules for procedures for the summary suspension of occupational licenses. Summary suspension of occupational licenses may constitutionally be invoked only in emergency situations and then only if the licensee is afforded a prompt hearing on whether the summary suspension should continue until a decision is made after a full hearing on the merits of the license deprivation. OAG 26-87 110

LICENSES AND PERMITS *(continued)***Out-of-state applicants**

The Examining Board of Architects, Professional Engineers, Designers and Land Surveyors may not promulgate a rule requiring out-of-state applicants for certification as land surveyors to pass an examination concerning Wisconsin practices and procedures if they possess a valid certification in another state. OAG 12-87..... 49

Private detectives

Section 440.26, Stats., requiring the licensing of private detectives, does not apply to qualified arson experts or other expert witnesses merely because they may investigate matters relating to their field of expertise. OAG 9-87..... 35

Raffle license

To be eligible to obtain a raffle license from the State of Wisconsin, an organization, whether it is tax exempt or not, must qualify as a local organization. If a licensed organization no longer meets the eligibility requirements for licensure during the effective period of the license, such license is subject to revocation or suspension by the Bingo Control Board. OAG 27-87..... 115

Surveyors, out-of-state

The Examining Board of Architects, Professional Engineers, Designers and Land Surveyors may not promulgate a rule requiring out-of-state applicants for certification as land surveyors to pass an examination concerning Wisconsin practices and procedures if they possess a valid certification in another state. OAG 12-87..... 49

LOTTERIES**Raffle license**

To be eligible to obtain a raffle license from the State of Wisconsin, an organization, whether it is tax exempt or not, must qualify as a local organization. If a licensed organization no longer meets the eligibility requirements for licensure during the effective period of the license, such license is subject to revocation or suspension by the Bingo Control Board. OAG 27-87..... 115

MARITAL PROPERTY LAW**School Board member and employment of spouse**

The enactment of the marital property law does not change the applicability of section 946.13, Stats., to the member of a governmental body when that body employs the member's spouse. As was the case before the marital property law, the member of the governmental body avoids violation of section 946.13 if in his private capacity he does not negotiate, bid on or enter into the employment contract and in his public capacity he does not participate in the making of the contract and does not exercise discretion in the performance of the contract. OAG 4-87..... 15

MARRIAGE AND DIVORCE

Child support and maintenance

The family court commissioner represents the public interest and does not act as an advocate for the party benefited when he brings a remedial contempt proceeding to enforce an existing order or judgment under section 767.29(1), Stats. OAG 6-87 21

Family Court Commissioner

The family court commissioner represents the public interest and does not act as an advocate for the party benefited when he brings a remedial contempt proceeding to enforce an existing order or judgment under section 767.29(1), Stats. OAG 6-87 21

MEDICAID

Nursing homes and contracts for prospective residents

Nursing home guarantor agreements may violate section 49.49(4), Stats., after the resident becomes certified Medicaid eligible. OAG 66-87 295

MINERAL RIGHTS

Fees for mining permit

All staff work necessary to determine whether an applicant meets the requirements of the Metallic Mining Reclamation Act must be included in the cost of evaluating the permit, including any evaluation of compliance with other environmental requirements. The withdrawal of a mining permit application by the applicant prior to a final decision on the application does not relieve the applicant from the obligation to pay the cost of evaluation. OAG 35-87 150

MINORS

Confidential reports

A school cannot use confidential information obtained from law enforcement authorities to require students, under threat of expulsion, to participate in group or individual counseling, nor can the school use such information to suspend or expel students. The school can use such confidential information to refer a student to county social welfare agencies or nongovernmental self-help groups, but only if the student consents to such referral. OAG 30-87 134

MUNICIPALITIES

Bartenders' licenses

Municipalities may not require by ordinance that all grocery and liquor store employes and bartenders must obtain bartenders' or operators' licenses, such ordinances being in conflict with the provisions of chapter 125, Stats. OAG 20-87 86

Bids and bidders

Municipalities may require bidders to include a list of subcontractors. Counties may reject a proposal for failure to include a complete list,

MUNICIPALITIES (*continued*)**Bids and bidders** (*continued*)

except when omitted subcontractors themselves submitted timely, written bids to the general contractor. OAG 8-87..... 29

Drug testing; pre-employment

A municipality's decision to require pre-employment drug testing for prospective employes must balance the need for testing in particular positions against the invasion of personal rights that the search entails, considering all relevant factors. OAG 55-87..... 257

Grocery store employes

Municipalities may not require by ordinance that all grocery and liquor store employes and bartenders must obtain bartenders' or operators' licenses, such ordinances being in conflict with the provisions of chapter 125, Stats. OAG 20-87..... 86

Libraries

Municipal libraries are a matter of statewide concern. Accordingly, home rule provisions will not justify local departures from the provisions of chapter 43, Stats. OAG 46-87..... 203

Liquor store employes

Municipalities may not require by ordinance that all grocery and liquor store employes and bartenders must obtain bartenders' or operators' licenses, such ordinances being in conflict with the provisions of chapter 125, Stats. OAG 20-87..... 86

Surplus funds

A local unit of government may not create and accumulate unappropriated surplus funds. However, a local unit of government may maintain reasonable amounts necessary in the exercise of sound business principles to meet the immediate cash flow needs of the municipality during the current budgetary period or to accumulate needed capital in non-lapsing funds to finance specifically identified future capital expenditures. OAG 18-87..... 77

Tax refunds

Municipalities may use the add-on method of recovery of refunded taxes from Vocational, Technical and Adult Education districts pursuant to section 74.73(2), Stats., regardless of whether the refunds are for unlawful taxes under section 74.73(1r) or excessive assessments under section 74.73(4). OAG 58-87..... 268

NATURAL RESOURCES, DEPARTMENT OF**Copyright of publications**

The Department of Natural Resources may seek to obtain copyrights for publications entitled "Walleye Waters," "Trout Waters," "Musky Waters" and "Canoe Waters" which were written and compiled by state employes on state time provided the copyrights have not been invalidated due to the omission of the copyright notice. OAG 38-87..... 162

Fees for mining permit application evaluation

All staff work necessary to determine whether an applicant meets the requirements of the Metallic Mining Reclamation Act must be in-

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NATURAL RESOURCES, DEPARTMENT OF *(continued)*

Fees for mining permit application evaluation *(continued)*

cluded in the cost of evaluating the permit, including any evaluation of compliance with other environmental requirements. The withdrawal of a mining permit application by the applicant prior to a final decision on the application does not relieve the applicant from the obligation to pay the cost of evaluation. OAG 35-87 150

NAVIGABLE WATERS

Artificial lakes

An artificial waterway connected with or located within 500 feet of a navigable waterway is a public waterway to which public access must be provided pursuant to sections 236.16(3) and 30.19(1)(a) and (5), Stats. OAG 69-87 316

NURSING HOMES

Guarantor agreements

Nursing home guarantor agreements may violate section 49.49(4), Stats., after the resident becomes certified Medicaid eligible. OAG 66-87 295

Medicaid and contracts for prospective residents

Nursing home guarantor agreements may violate section 49.49(4), Stats., after the resident becomes certified Medicaid eligible. OAG 66-87 295

ONEIDA INDIANS

Contracts

The Oneida Tribe is not a "municipality" within the meaning of sections 66.20 to 66.26, Stats. The Green Bay Metro Sewerage District may enter into an enforceable contract with the Tribe if certain conditions are met. OAG 45-87 189

Green Bay Metropolitan Sewerage District

The Oneida Tribe is not a "municipality" within the meaning of sections 66.20 to 66.26, Stats. The Green Bay Metro Sewerage District may enter into an enforceable contract with the Tribe if certain conditions are met. OAG 45-87 189

OPEN MEETING

Closed session

A county board chairperson and a county board committee are not authorized by section 19.85(1)(c), Stats., to meet in closed session to discuss appointments to county board committees; however, in appropriate circumstances section 19.85(1)(f) would authorize closed sessions. OAG 60-87 276

ORDINANCES**Statutory counterparts**

- Without statutory authority to do so, a county cannot use citations for violations of ordinances that have certain statutory counterparts. Section 66.119(3)(b), Stats., only authorizes the use of citations for violations of ordinances other than those for which a statutory counterpart exists. OAG 49-87 211

PHYSICIANS AND SURGEONS**Confidential communications**

- A medical or mental health professional may report suspected child abuse under the permissive provisions of section 48.981(3), Stats., when the abuser, rather than the victim, is seen in the course of professional duties. Section 51.30 does not act as a bar to such reports made in good faith. OAG 10-87 39

Emergency medical services

- The coordinating physician, as defined in Wis. Admin. Code ch. H 21, is the person authorized to establish policies and procedures in providing emergency medical services under the Emergency Medical Services Act. OAG 37-87 159

Privileged communications

See Confidential communications

POLICE**Cars**

- An unmarked police vehicle displaying flashing red and blue lights is not a marked vehicle for purposes of section 346.04(3), Stats. OAG 50-87 214

Confidential reports

- A school cannot use confidential information obtained from law enforcement authorities to require students, under threat of expulsion, to participate in group or individual counseling, nor can the school use such information to suspend or expel students. The school can use such confidential information to refer a student to county social welfare agencies or nongovernmental self-help groups, but only if the student consents to such referral. OAG 30-87 134

- The police may justifiably prevent a district attorney from inspecting their investigation files on pending criminal cases to determine whether there is exculpatory evidence which must be disclosed to a defendant only in those exceptional instances in which a compelling need to maintain secrecy outweighs the constitutional and statutory considerations ordinarily demanding access. OAG 56-87 262

District attorney

- The police may justifiably prevent a district attorney from inspecting their investigation files on pending criminal cases to determine whether there is exculpatory evidence which must be disclosed to a defendant only in those exceptional instances in which a compelling need to maintain secrecy outweighs the constitutional and statutory considerations ordinarily demanding access. OAG 56-87 262

PRIVATE DETECTIVES

Expert witnesses in arson cases

Section 440.26, Stats., requiring the licensing of private detectives, does not apply to qualified arson experts or other expert witnesses merely because they may investigate matters relating to their field of expertise. OAG 9-87.....

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PROBATE

See REGISTER IN PROBATE

PUBLIC EMPLOYES

See PUBLIC OFFICIALS

PUBLIC OFFICIALS

Aldersperson

Where, as a result of the alteration of the county board supervisory districts, a supervisor's residence is left outside the district he or she represents, the supervisor may continue to represent that district until the expiration of his term. When a city has combined the offices of alderman and county board supervisor where the aldermanic and supervisory boundaries are coterminous, the county board retains its discretion to decide whether to alter the supervisory districts after the city has annexed territory. OAG 3-87

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Appointees

The senate may not appoint a commissioner to fill a vacancy in a term which will not occur during the extant session of the senate. In the present case, the provisional appointment for the vacancy in the term ending March 1, 1985, was valid, but the appointment for a full term beginning March 1, 1985, and ending on March 1, 1991, was invalid. The acts of the commissioner holding over in office are valid. OAG 59-87

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County Board supervisor

Where, as a result of the alteration of the county board supervisory districts, a supervisor's residence is left outside the district he or she represents, the supervisor may continue to represent that district until the expiration of his term. When a city has combined the offices of alderman and county board supervisor where the aldermanic and supervisory boundaries are coterminous, the county board retains its discretion to decide whether to alter the supervisory districts after the city has annexed territory. OAG 3-87

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Insurance

Section 632.895(5m), Stats., which requires that disability insurance policies must provide coverage for grandchildren of the insured, does not apply to group insurance contracts between health maintenance organizations and the group insurance board of the Department of Employee Trust Funds. Under sections 40.51(7) and 40.03(6)(a)2., the group insurance board may not establish a pool of municipal employers to provide health care benefits on a self-funded basis. OAG 68-87

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PUBLIC OFFICIALS *(continued)*

Private interest in public contracts

Where the county board as a whole must decide whether to purchase land, a county board supervisor would violate section 946.13(1)(a), Stats., if land owned by his partnership was sold to the county for a purchase price in excess of \$5,000. OAG 22-87 90

Section 946.13, Stats., which prohibits private interests in public contracts, applies to county board or department purchases aggregating more than \$5,000 from a county supervisor-owned business. OAG 42-87 178

Where the village board administers a community development block grant program, a member of the village board would violate section 946.13(1)(a), Stats., if he or she obtained a loan in excess of \$5,000 under the program. Acting in his private capacity as a contractor, the board member would violate section 946.13(1) if he contracted to perform the construction work for a third person who obtained a loan under the program. OAG 61-87 278

Salaries and wages

A commissioner who is designated chairperson of a state commission under section 15.06(2), Stats., is not appointed to a new position. Article IV, section 26 of the Wisconsin Constitution thus precludes a salary increase based on such designation. OAG 13-87 52

PUBLIC PURPOSE DOCTRINE

County funds

Under appropriate circumstances, a county may appropriate county funds reasonably necessary for improvement, maintenance and operation of county property which is not deemed to be surplus, even though such property may no longer be required for the public purpose for which it was originally acquired and is not currently required for some other specific public use. OAG 40-87 169

PUBLIC SCHOOLS

See **SCHOOLS AND SCHOOL DISTRICTS**

RADIO

Police and emergency use in Burnett County

A sheriff's actions in determining access to a county's law enforcement channel are ministerial in nature. The negligent exercise of that authority could subject the sheriff to liability. OAG 2-87 7

REAL ESTATE

County Board supervisor selling to county

Where the county board as a whole must decide whether to purchase land, a county board supervisor would violate section 946.13(1)(a), Stats., if land owned by his partnership was sold to the county for a purchase price in excess of \$5,000. OAG 22-87 90

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REAL ESTATE (continued)

Rental unit energy efficiency statute

The rental unit energy efficiency statute, section 101.122, Stats., applies to the state. OAG 47-87 207

REAPPORTIONMENT

Residence of County Board supervisor

Where, as a result of the alteration of the county board supervisory districts, a supervisor's residence is left outside the district he or she represents, the supervisor may continue to represent that district until the expiration of his term. When a city has combined the offices of alderman and county board supervisor where the aldermanic and supervisory boundaries are coterminous, the county board retains its discretion to decide whether to alter the supervisory districts after the city has annexed territory. OAG 3-87 10

REGISTER IN PROBATE

Filing fees

The time of the filing of the inventory of the estate, not the time of filing the petition for probate, determines the applicable filing fee. (Unpub.) OAG 62-87

REGULATION AND LICENSING, DEPARTMENT OF

Suspension of occupational licenses

The Department of Regulation and Licensing has the authority to promulgate rules for procedures for the summary suspension of occupational licenses. Summary suspension of occupational licenses may constitutionally be invoked only in emergency situations and then only if the licensee is afforded a prompt hearing on whether the summary suspension should continue until a decision is made after a full hearing on the merits of the license deprivation. OAG 26-87 110

RESIDENCE, DOMICILE AND LEGAL SETTLEMENT

Civil service

The residency requirement for classified civil service positions when no similar requirement exists for positions in the unclassified service constitutes a violation of the equal protection clause of the fourteenth amendment to the United States Constitution. OAG 11-87 45

Protective placements

Under chapter 55, Stats., the definition of residency contained in section 49.01(8g) is to be used for venue purposes and for the purpose of assigning financial liability between counties for the cost of non-emergency services. Although the assignment of financial liability between counties is not contemplated in protective placement proceedings under chapter 55, in such proceedings a court may place an individual through another county's board, but any such placement order is not binding unless that county receives notice and an opportunity to be heard. OAG 25-87 103

RETIREMENT SYSTEMS

Investment earnings

Section 684r of the 1987 budget bill, which limits the distribution from the special performance dividend to only those annuitants receiving a supplemental benefit, does not violate the United States or Wisconsin Constitutions. OAG 67-87 299

Legislation to increase benefits

Only the portion of 1987 Assembly Bill 265 that increases benefits for persons no longer working for a Wisconsin Retirement System participating employer is subject to the three-fourths vote requirement of article IV, section 26 of the Wisconsin Constitution. The Public Employee Trust Fund constitutes "state funds" as used in article IV, section 26 of the Wisconsin Constitution. OAG 52-87 224

Teachers Retirement Board

Public school administrators are eligible to be candidates for and to vote for teacher representatives on the Teachers Retirement Board. OAG 32-87 141

SALARIES AND WAGES

Commission chairperson

A commissioner who is designated chairperson of a state commission under section 15.06(2), Stats., is not appointed to a new position. Article IV, section 26 of the Wisconsin Constitution thus precludes a salary increase based on such designation. OAG 13-87 52

SCHOOLS AND SCHOOL DISTRICTS

Confidential reports

See Student records

Driver education programs

A school district and a cooperative educational service agency may not, without legislative authority, contract with a private driving school and receive state aid for pupil driving instruction services performed by such driving school. OAG 7-87 26

State aid

A school district and a cooperative educational service agency may not, without legislative authority, contract with a private driving school and receive state aid for pupil driving instruction services performed by such driving school. OAG 7-87 26

Student records

A school cannot use confidential information obtained from law enforcement authorities to require students, under threat of expulsion, to participate in group or individual counseling, nor can the school use such information to suspend or expel students. The school can use such confidential information to refer a student to county social welfare agencies or nongovernmental self-help groups, but only if the student consents to such referral. OAG 30-87 134

SHERIFFS

Forfeiture funds

Money resulting from a state forfeiture action under sections 161.555 and 973.075(4), Stats., must be deposited in the state school fund. Money granted to the state after a federal forfeiture proceeding need not be. OAG 48-87 209

Radio channel for police and emergency use

A sheriff's actions in determining access to a county's law enforcement channel are ministerial in nature. The negligent exercise of that authority could subject the sheriff to liability. OAG 2-87 7

SNOWMOBILES

Accident reports

Snowmobile accident reports filed with the Department of Natural Resources pursuant to section 350.15(3), Stats., are not confidential documents. OAG 14-87 56

STATE

Rental unit energy efficiency statute

The rental unit energy efficiency statute, section 101.122, Stats., applies to the state. OAG 47-87 207

STATE AID

Drive education programs in schools

A school district and a cooperative educational service agency may not, without legislative authority, contract with a private driving school and receive state aid for pupil driving instruction services performed by such driving school. OAG 7-87 26

STUDENTS

Confidential reports

A school cannot use confidential information obtained from law enforcement authorities to require students, under threat of expulsion, to participate in group or individual counseling, nor can the school use such information to suspend or expel students. The school can use such confidential information to refer a student to county social welfare agencies or nongovernmental self-help groups, but only if the student consents to such referral. OAG 30-87 134

TAXATION

Counties

Section 75.36, Stats., provides that a county need not assume and pay all unpaid or delinquent municipal taxes, assessments and charges due on a parcel of property at the time the county acquires such property by tax deed. The statute also provides that the county is not required to assume and pay any such taxes which remain unrecovered upon the

TAXATION *(continued)***Counties** *(continued)*

sale of such property because the sum realized was insufficient to pay all such outstanding municipal tax obligations. (Unpub.) OAG 31-87

Real estate taxes

Section 75.36, Stats., provides that a county need not assume and pay all unpaid or delinquent municipal taxes, assessments and charges due on a parcel of property at the time the county acquires such property by tax deed. The statute also provides that the county is not required to assume and pay any such taxes which remain unrecovered upon the sale of such property because the sum realized was insufficient to pay all such outstanding municipal tax obligations. (Unpub.) OAG 31-87

Refunds

Municipalities may use the add-on method of recovery of refunded taxes from Vocational, Technical and Adult Education districts pursuant to section 74.73(2), Stats., regardless of whether the refunds are for unlawful taxes under section 74.73(lr) or excessive assessments under section 74.73(4). OAG 58-87.....

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TOWNS**Countywide comprehensive zoning ordinance**

A town with village powers that is subject to a county zoning ordinance is not prohibited by statute from any and all regulation of driveway installation. A town which is subject to a county zoning ordinance that contains no limitation on the issuance of county zoning permits may not set a quota on the number of residential building permits that the town will issue each year. OAG 15-87

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VOCATIONAL, TECHNICAL AND ADULT EDUCATION, BOARD OF**Appointments to district board**

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District board appointments

Criteria and procedures for review of district board appointments by the state VTAE board explained. Effect of an "elected official" member not seeking re-election midway in his term as a district board member discussed. OAG 28-87

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Tax refunds

Municipalities may use the add-on method of recovery of refunded taxes from Vocational, Technical and Adult Education districts pursuant to section 74.73(2), Stats., regardless of whether the refunds are for unlawful taxes under section 74.73(lr) or excessive assessments under section 74.73(4). OAG 58-87.....

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WASTE MANAGEMENT

Green Bay Metropolitan Sewerage District

The Oneida Tribe is not a "municipality" within the meaning of sections 66.20 to 66.26, Stats. The Green Bay Metro Sewerage District may enter into an enforceable contract with the Tribe if certain conditions are met. OAG 45-87 189

Indians

The Oneida Tribe is not a "municipality" within the meaning of sections 66.20 to 66.26, Stats. The Green Bay Metro Sewerage District may enter into an enforceable contract with the Tribe if certain conditions are met. OAG 45-87 189

WATERS

Artificial lakes

An artificial waterway connected with or located within 500 feet of a navigable waterway is a public waterway to which public access must be provided pursuant to sections 236.16(3) and 30.19(1)(a) and (5), Stats. OAG 69-87 316

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Commissioner

The senate may not appoint a commissioner to fill a vacancy in a term which will not occur during the extant session of the senate. In the present case, the provisional appointment for the vacancy in the term ending March 1, 1985, was valid, but the appointment for a full term beginning March 1, 1985, and ending on March 1, 1991, was invalid. The acts of the commissioner holding over in office are valid. OAG 59-87 272

WISCONSIN POLICE EMERGENCY RADIO NETWORK

See RADIO

WISCONSIN RETIREMENT SYSTEM

Benefits for persons no longer working

Only the portion of 1987 Assembly Bill 265 that increases benefits for persons no longer working for a Wisconsin Retirement System participating employer is subject to the three-fourths vote requirement of article IV, section 26 of the Wisconsin Constitution. The Public Employee Trust Fund constitutes "state funds" as used in article IV, section 26 of the Wisconsin Constitution. OAG 52-87 224

WORDS AND PHRASES

"bid-peddling"

Municipalities may require bidders to include a list of subcontractors. Counties may reject a proposal for failure to include a complete list, except when omitted subcontractors themselves submitted timely, written bids to the general contractor. OAG 8-87 29

WORDS AND PHRASES (*continued*)

"contractual services"

Section 59.08(1), Stats., does not apply to architectural services. OAG 43-87 182

designate

A commissioner who is designated chairperson of a state commission under section 15.06(2), Stats., is not appointed to a new position. Article IV, section 26 of the Wisconsin Constitution thus precludes a salary increase based on such designation. OAG 13-87 52

expert witness

Section 440.26, Stats., requiring the licensing of private detectives, does not apply to qualified arson experts or other expert witnesses merely because they may investigate matters relating to their field of expertise. OAG 9-87 35

"local"

To be eligible to obtain a raffle license from the State of Wisconsin, an organization, whether it is tax exempt or not, must qualify as a local organization. If a licensed organization no longer meets the eligibility requirements for licensure during the effective period of the license, such license is subject to revocation or suspension by the Bingo Control Board. OAG 27-87 115

"or"

To be eligible to obtain a raffle license from the State of Wisconsin, an organization, whether it is tax exempt or not, must qualify as a local organization. If a licensed organization no longer meets the eligibility requirements for licensure during the effective period of the license, such license is subject to revocation or suspension by the Bingo Control Board. OAG 27-87 115

"private club"

Section 942.04, Stats., potentially applies to service clubs; constitutionality of state regulation of such clubs is to be analyzed according to *Board of Dirs. of Rotary Intern. v. Rotary Club*, ___ U.S. ___, 107 S. Ct. 1940 (1987). OAG 54-87 251

private detective

Section 440.26, Stats., requiring the licensing of private detectives, does not apply to qualified arson experts or other expert witnesses merely because they may investigate matters relating to their field of expertise. OAG 9-87 35

"Public Employe Trust Funds"

Only the portion of 1987 Assembly Bill 265 that increases benefits for persons no longer working for a Wisconsin Retirement System participating employer is subject to the three-fourths vote requirement of article IV, section 26 of the Wisconsin Constitution. The Public Employe Trust Fund constitutes "state funds" as used in article IV, section 26 of the Wisconsin Constitution. OAG 52-87 224

"public work"

Section 59.08(1), Stats., does not apply to architectural services. OAG 43-87 182

WORDS AND PHRASES *(continued)*

Residence

Under chapter 55, Stats., the definition of residency contained in section 49.01(8g) is to be used for venue purposes and for the purpose of assigning financial liability between counties for the cost of non-emergency services. Although the assignment of financial liability between counties is not contemplated in protective placement proceedings under chapter 55, in such proceedings a court may place an individual through another county's board, but any such placement order is not binding unless that county receives notice and an opportunity to be heard. OAG 25-87..... 103

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Only the portion of 1987 Assembly Bill 265 that increases benefits for persons no longer working for a Wisconsin Retirement System participating employer is subject to the three-fourths vote requirement of article IV, section 26 of the Wisconsin Constitution. The Public Employee Trust Fund constitutes "state funds" as used in article IV, section 26 of the Wisconsin Constitution. OAG 52-87 224

"switchblade knife"

Possession of balisong or butterfly knives is prohibited by section 941.24, Stats., because their blades open by a thrust or movement. (Unpub.) OAG 21-87

ZONING

Agricultural districts

A community living arrangement which has a capacity for eight or fewer persons and which meets all other statutory criteria is entitled to locate in any zoning district where single or multi-family residences are a permitted use. Any such community living arrangement which has a capacity of from nine to fifteen persons is entitled to locate in any zoning district where multi-family residences containing more than two families are a permitted use, and is entitled to apply for special zoning permission to locate in any zoning district where single or two family uses are permitted. Such a community living arrangement which has a capacity of more than fifteen persons is entitled to apply for special zoning permission to locate in any zoning district where single or multi-family uses are permitted. A community living arrangement which meets all applicable statutory criteria is not entitled to locate in an exclusive agricultural zoning district, but may seek special zoning permission to do so if local ordinances permit. OAG 29-87 126

Community living arrangements

See also Foster homes

A community living arrangement which has a capacity for eight or fewer persons and which meets all other statutory criteria is entitled to locate in any zoning district where single or multi-family residences are a permitted use. Any such community living arrangement which has a capacity of from nine to fifteen persons is entitled to locate in any zoning district where multi-family residences containing more than two families are a permitted use, and is entitled to apply for

ZONING (continued)

Community living arrangements (continued)

special zoning permission to locate in any zoning district where single or two family uses are permitted. Such a community living arrangement which has a capacity of more than fifteen persons is entitled to apply for special zoning permission to locate in any zoning district where single or multi-family uses are permitted. A community living arrangement which meets all applicable statutory criteria is not entitled to locate in an exclusive agricultural zoning district, but may seek special zoning permission to do so if local ordinances permit. OAG 29-87 126

Countywide comprehensive zoning ordinance

A town with village powers that is subject to a county zoning ordinance is not prohibited by statute from any and all regulation of driveway installation. A town which is subject to a county zoning ordinance that contains no limitation on the issuance of county zoning permits may not set a quota on the number of residential building permits that the town will issue each year. OAG 15-87 60

Driveway installation

A town with village powers that is subject to a county zoning ordinance is not prohibited by statute from any and all regulation of driveway installation. A town which is subject to a county zoning ordinance that contains no limitation on the issuance of county zoning permits may not set a quota on the number of residential building permits that the town will issue each year. OAG 15-87 60

Group homes

See Community living arrangements; Foster homes

Multi-family residences

See also Foster homes

A community living arrangement which has a capacity for eight or fewer persons and which meets all other statutory criteria is entitled to locate in any zoning district where single or multi-family residences are a permitted use. Any such community living arrangement which has a capacity of from nine to fifteen persons is entitled to locate in any zoning district where multi-family residences containing more than two families are a permitted use, and is entitled to apply for special zoning permission to locate in any zoning district where single or two family uses are permitted. Such a community living arrangement which has a capacity of more than fifteen persons is entitled to apply for special zoning permission to locate in any zoning district where single or multi-family uses are permitted. A community living arrangement which meets all applicable statutory criteria is not entitled to locate in an exclusive agricultural zoning district, but may seek special zoning permission to do so if local ordinances permit. OAG 29-87 126

ZONING (continued)

Towns

A town with village powers that is subject to a county zoning ordinance is not prohibited by statute from any and all regulation of driveway installation. A town which is subject to a county zoning ordinance that contains no limitation on the issuance of county zoning permits may not set a quota on the number of residential building permits that the town will issue each year. OAG 15-87 60

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