

The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

Year Ending June 30, 1986



To the Honorable Senate and House of Representatives:

The Annual Report of the Department of the Attorney General, which historically includes Opinions of the Attorney General ("Opinions") rendered during the fiscal year, was not published for fiscal year July 1, 1985 to June 30, 1986. Recognizing the importance to the legal community and the general public of publishing the Opinions in a manner that will provide a consistent source for reference and citation, and in order to ensure that they are available in their traditional form, I herewith issue the Opinions for Fiscal 1986.

Respectfully submitted,

SCOTT HARSHBARGER
Attorney General

DEPARTMENT OF THE ATTORNEY GENERAL

ATTORNEY GENERAL
FRANCIS X. BELLOTTI

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Lisa Levy
James Lewis⁵⁶
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Maria Lopez
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Nancy Marks
George Matthews
Paul Matthews
Suzanne Matthews²
Janet McCabe
Kathleen McDermott
Susan McHugh
Edward McLaughlin
Georgianna McLoughlin⁶⁰

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Paul Merry
James Milkey
William Mitchell
Paul Molloy
Paul Muello
Mark Muldoon
Sherry Mulloy
Kim Murdock
Thomas Norton
Henry O'Connell
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Stephen Ostrach
Howard Palmer
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T. David Raftery
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Frances Robinson
John Roddy
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John White	Carolyn Wood	Andrew Zaikis
Douglas Wilkins	Christopher Worthington	Margaret Zaleski
Gregg Wilson ⁶	Harry Yee ¹⁴	Donald Zerendow
H. Reed Witherby	Judith Yogman	Stephen Ziedman

Assistant Attorneys General Assigned To Division of Employment Security

Robert Lombard	Anne Marie Irwin
Robin Barclay	Wendy Thaxter
Willie Carpenter ⁵⁴	Alan Rosenfeld ⁶⁰

<i>Chief Clerk</i> Edward J. White	<i>Assistant Chief Clerk</i> Maria Grassia
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APPOINTMENT DATE

- 1. 7/8/85
- 2. 7/15/85
- 3. 8/19/85
- 4. 9/1/85
- 5. 9/9/85
- 6. 9/23/85
- 7. 10/7/85
- 8. 12/2/85
- 9. 1/6/86
- 10. 1/13/86
- 11. 3/31/86
- 12. 4/7/86
- 13. 5/23/86
- 14. 6/2/86
- 15. 6/9/86
- 16. 6/23/86

TERMINATION DATE

- 50. 7/5/85
- 51. 7/19/85
- 52. 7/26/85
- 53. 8/2/85
- 54. 8/16/85
- 55. 8/30/85
- 56. 9/27/85
- 57. 11/1/85
- 58. 11/26/85
- 59. 12/31/85
- 60. 1/3/86
- 61. 3/14/86
- 62. 4/11/86
- 63. 4/25/86
- 64. 5/2/86
- 65. 5/9/86
- 66. 5/30/86
- 67. 6/6/86
- 68. 6/13/86
- 69. 6/27/86

DEPARTMENT OF THE ATTORNEY GENERAL
STATEMENT OF FINANCIAL POSITION
FOR FISCAL YEAR ENDED
JUNE 30, 1986

<i>Account</i>	<i>Account Name</i>	<i>Appropriation</i>	<i>Expenditures</i>	<i>Advance</i>	<i>Encumbrances</i>	<i>Balance</i>
0810-0000	Administration	\$12,080,065.00	\$11,140,187.00	—	—	\$ 939,878.00
0810-0014	Public Utilities Auth. by CH. 1221 1973	500,000.00	499,618.00	—	—	382.00
0810-0017	Judicial Proceedings, relevant to Fuel Charge	75,000.00	74,799.00	—	—	201.00
0810-0021	Medicaid Fraud Control Unit	1,935,184.00	1,418,633.00	—	\$126,370.00	390,181.00
0810-0031	Local Consumer Aid Fund	505,983.00	503,989.00	—	1,260.00	734.00
0810-0032	Local Consumer Aid Fund Deposits	136,238.00	79,032.00	—	—	57,206.00
0810-0035	Antitrust Div. Adm.	445,002.00	381,320.00	—	20,042.00	43,640.00
0810-0201	Insurance Auth. by Ch 266, 1976	400,000.00	399,742.00	—	110.00	148.00
0810-0410	Forfeited Funds	330,666.00	35,199.00	—	83,801.00	211,666.00
	TOTALS	\$16,408,138.00	\$14,532,519.00	—	\$231,583.00	\$1,644,036.00
Schedule 2	TOTALS	\$ 83,204.00	\$ 52,479.00	—	—	\$ 30,725.00
	GRAND TOTALS	\$16,491,342.00	\$14,584,998.00	—	\$231,583.00	\$1,674,761.00

DEPARTMENT OF THE ATTORNEY GENERAL
GRANTS AND TRUSTS
RECEIPTS AND DISBURSEMENTS
JULY 1, 1985 TO JUNE 30, 1986

	<i>Account Number</i>	<i>Balance July 1, 1985</i>	<i>Receipts</i>	<i>Disbursements</i>	<i>Balance June 30, 1986</i>
Water Pollution Control Program	0810-6630	\$17,353.00	—	\$17,353.00	—
Air Pollution Control Program	0810-6631	3,976.00	\$21,992.00	25,944.00	\$24.00
Anti-Trust Enforcement Program					
New England Bid Monitoring Project	0810-6643	152.00	—	—	152.00
Hazardous Waste Enforcement	0810-6647	—	9,182.00	9,182.00	—
Coastal Zone Management Program Implementation	0810-6661	2,693.00	—	—	2,693.00
Pesticide Regulation Program Enforcement Activities	0810-6662	\$27,856.00	—	—	27,856.00
TOTALS		<u>\$52,030.00</u>	<u>\$31,174.00</u>	<u>\$52,479.00</u>	<u>\$30,725.00</u>

DEPARTMENT OF THE ATTORNEY GENERAL
SUSPENSE FUNDS

RECEIPTS AND DISBURSEMENTS
JULY 1, 1985 TO JUNE 30, 1986

<i>Name</i>	<i>Account Number</i>	<i>Balance July 1, 1985</i>	<i>Receipts</i>	<i>Disbursements</i>	<i>Balance June 30, 1986</i>
Thomas C. McMahon v. Nyanza	0810-6732	\$ 3,679.00	—	—	\$ 3,679.00
Owen A. Infiorati Motors, Inc.	0810-6773	1,500.00	\$ (1,500.00)	—	—
Joseph T. Granese, d/b/a King B's Auto Mart	0810-6774	15,000.00	—	\$ 4,500.00	10,500.00
William Hartwick, et al.	0810-6781	6,575.00	—	6,575.00	—
Chrysler Corporation	0810-6784	10,000.00	—	—	10,000.00
Patrick Ciampo & Howard G. Johnson a/k/a Edward Miller	0810-6793	7,106.00	—	—	7,106.00
Robert Wilcox, d/b/a Robert's Auto Sales	0810-6805	1,000.00	—	—	1,000.00
Wm. H. Johnson III & J & G Salvage, Inc.	0810-6808	2,647.00	—	—	2,647.00
Gordon Kalil, William D. Lagrange and William M. O'Brien	0810-6810	4,592.00	(4,592.00)	—	—
Stephen Sesser Construction Co., Wonder Construction Co.	0810-6811	380.00	—	—	380.00
Edward J. Borlem, et al.	0810-6812	700.00	—	700.00	—
Paul Solas, T. William Solas, d/b/a Cancer Rehabilitative Center	0810-6813	1,818.00	—	—	1,818.00
John Lavalee, d/b/a New England Auto Sales	0810-6814	10,000.00	—	10,000.00	—
Century of Lawrence, Inc. and John J. Muldoon and Ronald M. Nolan	0810-6818	3,637.00	(3,637.00)	—	—
Allan C. Keene, et al.	0810-6819	2,843.00	—	—	2,843.00
N.J. MacDonald and Sons, Inc., and Edward J. MacDonald	0810-6820	663.00	(663.00)	—	—
Fiori Depot Motors, Inc.	0810-6829	12,700.00	—	—	12,700.00
Freitas Associates, Inc. et al.	0810-6835	250.00	(250.00)	—	—
Janet Strom Enterprises, et al.	0810-6836	466.00	5,440.00	5,419.00	487.00
Bennet Street Auto Sales, Inc.	0810-6841	16,976.00	2,000.00	13,980.00	4,996.00
Dean Street Auto Sales, Inc. and Kenneth Trofani	0810-6842	3,465.00	11,000.00	5,917.00	8,548.00
Stephen R. Hamparian, d/b/a Commercial Tow & Repair	0810-6843	1,261.00	—	—	1,261.00
The Word Guild, Inc.	0810-6844	232.00	(232.00)	—	—
Richard and Janet Cecca	0810-6845	750.00	(750.00)	—	—
Majestic Auto Buyers, Inc.	0810-6850	17,500.00	2,000.00	—	19,500.00
Plymouth County Memorial Park Inc.	0810-6851	462.00	—	462.00	—
Leigh Alamo, d/b/a Lee's Auto Sales	0810-6855	2,250.00	—	2,250.00	—

<i>Name</i>	<i>Account Number</i>	<i>Balance July 1, 1985</i>	<i>Receipts</i>	<i>Disbursements</i>	<i>Balance June 30, 1986</i>
Olympic Auto Sales	0810-6857	20,000.00	—	—	20,000.00
Ventura Auto Sales, Inc.	0810-6858	500.00	(500.00)	—	—
Festino Fuel, Inc. Joseph & Vincent Festino	0810-6859	33,810.00	—	32,810.00	1,000.00
H.J. Wassar Co., Inc.	0810-6861	149.00	—	—	149.00
Century Auto Appraisers, Inc. R.P. Stone, Jr. & Peter Slate	0810-6862	2,000.00	—	—	2,000.00
Anthony Parrino, d/b/a Parrino's Auto Sales & Towing Service	0810-6863	1,375.00	(1,375.00)	—	—
Boston Bullion Ltd., et al.	0810-6864	2,400.00	—	—	2,400.00
Joseph F. & Janet B. Pierce	0810-6865	1,273.00	—	1,273.00	—
Porter Chevrolet, Inc.	0810-6866	35,853.00	—	33,608.00	2,245.00
Eden Roc, Inc. Tucker Const. Inc. et al.	0810-6870	2,418.00	(2,418.00)	—	—
Castleblue, Inc. d/b/a Coppercraft Guild	0810-6873	3,041.00	—	3,041.00	—
Border Buick, Inc.	0810-6874	1,050.00	(1,050.00)	—	—
Adventures Travel Unlimited, Inc.	0810-6875	800.00	—	800.00	—
American Income Life Insurance Co.	0810-6876	5,279.00	—	(326.00)	5,605.00
Pampalone Music School, Inc. Vito Pampalone	0810-6877	46.00	—	—	46.00
Leonidas & Ralph Benzan d/b/a Tropicana Oil Co.	0810-6878	1,000.00	—	—	1,000.00
Richard O'Riley, d/b/a Riley Auto Acres & Rocasco Auto Parts	0810-6880	17,000.00	—	—	17,000.00
Maria Monge, d/b/a J & R Repair & Used Cars, & Richard Santos	0810-6881	31,500.00	—	—	31,500.00
Feel Fit Health Center Ltd. & Edward P. Matter	0810-6882	3,000.00	—	2,730.00	270.00
G.P. Malloy, individually, d/b/a Car Wholesalers	0810-6883	17,000.00	12,250.00	29,250.00	—
Alfred J. Fabri and Brian Dimetres	0810-6884	9,600.00	5,600.00	—	15,200.00
Eric Bartlett d/b/a Bartlett Assoc. & Fix., Co.	0810-6885	200.00	1,300.00	—	1,500.00
Silver City Ford, Robert M. Barboza, individually	0810-6886	500.00	(500.00)	—	—
Bruce Ledbury d/b/a Cars International Ltd.	0810-6887	11,500.00	7,675.00	6,829.00	12,346.00
Ozella Dodge Sales, Inc.	0810-6888	120,000.00	—	97,500.00	22,500.00
Jane & George Enos, d/b/a Jane's Day Care	0810-6889	287.00	162.00	449.00	—
Travelers Insurance Company	0810-6890	27,581.00	593.00	28,174.00	—
Bruce P. Michaud, Michaud Tours	0810-6891	1,076.00	(157.00)	919.00	—
Michael Alves, d/b/a Scooby Enterprises	0810-6892	—	500.00	500.00	—
Franklin Lama	0810-6893	—	1,000.00	—	1,000.00
Savings Subaru	0810-6894	—	4,500.00	—	4,500.00
Vurhoe Insurance Restitution Account	0810-6896	—	78,233.00	—	78,233.00
William O'Brien, O'Brien Fence Corp.	0810-6897	—	6,250.00	6,250.00	—
Yenom Auto Sales, Inc. et al.	0810-6898	—	9,000.00	—	9,000.00

<i>Name</i>	<i>Account Number</i>	<i>Balance July 1, 1985</i>	<i>Receipts</i>	<i>Disbursements</i>	<i>Balance June 30, 1986</i>
Homefolks Realty, Inc.	0810-6899	—	2,105.00	2,105.00	—
Leo Hamel	0810-6900	—	3,975.00	—	3,975.00
Marshall Pontiac—Nissan	0810-6901	—	3,700.00	3,428.00	272.00
Aetna Finance d/b/a I.T.T. Thorp Corp.	0810-6902	—	34,000.00	34,000.00	—
The Burmac Group Inc., et al.	0810-6903	—	639.00	639.00	—
Leland Powers School Settlement	0810-6904	—	42,000.00	—	42,000.00
Andrews Paint Co., & F. G. Andrews, Individual	0810-6905	—	200.00	—	200.00
Cabot Mtg. Corp. etc.	0810-6906	—	30,000.00	29,824.00	176.00
Zena Nemetz	0810-6907	—	7,666.00	7,666.00	—
Alex O'Neil	0810-6908	—	2,500.00	1,800.00	700.00
Peanut Corp., Deborah Clark	0810-6909	—	900.00	—	900.00
Theodore Nader, d/b/a Nader Auto Body	0810-6910	—	2,500.00	—	2,500.00
TOTALS		<u>\$478,690.00</u>	<u>\$260,064.00</u>	<u>\$373,072.00</u>	<u>\$365,682.00</u>

DEPARTMENT OF THE ATTORNEY GENERAL
STATEMENT OF INCOME
For Fiscal Year Ended
June 30, 1986

<i>Account Number</i>	
0801-40-01-40	Fees, Filing Reports, Charitable Organizations
0801-40-02-40	Fees, Registrations, Charitable Organizations
0801-40-03-40	Fees, Professional Fund Raising Council
0801-41-02-40	Fines & Penalties, Civil Actions
0801-62-02-40	Reimbursement for Cost of Investigations—Consumer
0801-62-03-36	Local Consumer Aid Fund—Reimburse for Service
0801-67-67-40	Reimbursement, Indirect Cost Allowances
0801-67-01-40	Reimbursement, For Service
0801-69-99-40	Miscellaneous
	TOTAL INCOME
	\$ 226,740.00
	35,296.00
	815.00
	212,235.00
	48,100.00
	104,265.00
	327,792.00
	1,081,494.00
	123,163.00
	<u>\$2,159,900.00</u>

July 5, 1985

Number 1

Frank T. Keefe
Secretary of Administration and Finance
State House
Boston, Massachusetts 02133

Joseph Barresi
Inspector General
One Ashburton Place
Boston, Massachusetts 02108

Dear Secretary Keefe and Inspector General Barresi:

You have asked whether a designer appointed to do a feasibility study on a public building project may be appointed to perform subsequent design services for the same project under certain conditions. For the reasons discussed below, I have concluded that a designer who has been previously appointed to do a feasibility study may not be re-appointed to perform subsequent design services, either by approval of the Designer Selection Board (DSB) or by appointment of the deputy commissioner of the Division of Capital Planning and Operations (DCPO) or the Executive Office for Administration and Finance.

Your joint opinion request arose from a difference of opinion between the Inspector General¹ and the DSB² concerning the proper interpretation of the provisions of chapter 7 of the General Laws relating to the selection of designers for public construction projects. My opinion was sought to resolve these questions of statutory interpretation.

The overall statutory framework that applies to your request is set forth in G.L. c. 7, §§ 38A 1/2 through 380.³ These statutes provide a comprehensive scheme for the selection of designers for public building projects in the Commonwealth and were drafted by the Special Commission Concerning State and County Buildings, commonly known as the Ward Commission, a Commission on which I served.

Two of these statutory provisions are central to your question. Section 38H(d) of chapter 7 provides, in pertinent part:

A designer or programmer appointed to do a feasibility study, master plan, or program for a project shall be ineligible for appointment to perform the design services for that project.

Section 38I provides:

The deputy commissioner may appoint a designer to perform continued or extended services if the following conditions are met:

- (i) a written statement is filed with the [DSB] explaining the reasons for the continuation or extension of services;
- (ii) the program for the design services is filed with the [DSB] if one is required by the regulations of the division; and
- (iii) the [DSB] approves the appointment of the designer for continued or extended services and states the reasons therefor.

In accordance with its interpretation of sections 38H(d) and 38I, the DSB promulgated a "Policy on Employment of Study Consultants for Subsequent Design Projects" (DSB Policy) on November 17, 1982.⁴ The effect of the DSB policy is that a designer appointed to do a feasibility study, master plan, or program for a project may be appointed by the deputy commissioner to perform design development services on that same project, if the procedures outlined in § 38I are fully complied with. The Inspector General has opposed the implementation of the DSB Policy on the grounds that, in his view, it does not conform to statutory requirements.

Based primarily on the clear statutory prohibition contained in § 38H(d), it is my opinion that the DSB Policy is inconsistent with the provisions of chapter 7, insofar as the DSB Policy permits a designer who has been appointed to conduct a feasibility study to be eligible for appointment to perform subsequent design services on the same public construction project. I reach my conclusion by applying traditional rules of statutory construction.

First, and most important, G.L. c. 4, § 6, provides that words and phrases in a statute shall be construed according to the common and approved usage of the language. The plain language doctrine is founded on the presumption that the Legislature meant what the words in a statute plainly say. *State Board of Retirement v. Boston Retirement Board*, 391 Mass. 92, 94 (1984). A statute's language is the primary source of its meaning, and when the statute is unambiguous, the statute must be construed as written. *Zoning Board of Appeals of Greenfield v. Housing Appeals Committee*, 15 Mass. App. Ct. 553, 562 (1983).

In this instance, the plain language of section 38H(d) absolutely prohibits the appointment of a designer who has performed a feasibility study to engage in subsequent design services on the same project.⁵ The plain language of section 38I, in combination with the definition of "continued services" set forth in Section 38A 1/2(b),⁶ allows a designer who is already working on a project to apply for a continued or extended services contract. To apply for a continued services contract under Section 38I, a designer must file a written statement with the DSB explaining the reasons for the continuation or extension of design services. The DSB may then approve the appointment of the designer for the continued or extended services, stating its reasons. If all the conditions set forth in § 38I are met, the deputy commissioner may appoint a designer for continued or extended services.

While, on their face, the provisions of sections 38H(d) and 38I may appear to conflict, it is possible, and therefore preferable, to read them harmoniously, giving effect to each provision. *Cf. Kargman v. Commissioner of Revenue*, 389 Mass. 784, 788 (1983) (potentially conflicting statutes should, if possible, "be construed to have consistent directives so that both may be given effect"). Accordingly it is my opinion that these statutes, construed together, permit continued design services only by a designer who was not the feasibility designer on the same project.

This construction is also consistent with the legislative history contained in the *Final Report to the General Court of the Special Commission Concerning State and County Buildings*, (hereafter, the *Ward Commission Report*). While the *Ward Commission Report* does not discuss the interplay between sections 38H(d) and 38I, the Ward Commission did identify specific "instances of the abuse of continued and extended services." 7 *Ward Commission Report* 203 (December 31, 1980). The Ward Commission found an inherent conflict of interest where the

master planner for a project and the individual architect designing a particular building were the same person or from the same firm. *Id.* at 203-04. The *Ward Commission Report* explicitly disapproved particular examples involving the use of a “continued services” contract to award subsequent design work to a designer who did the original feasibility study or master plan for the project. *Id.* In order to construe sections 38H(d) and 38I, the *Ward Commission Report* must be given weight. It is a well established rule of statutory construction that statutes are construed so as to effectuate the purpose of their framers, *Commonwealth v. Galvin*, 388 Mass. 326, 328 (1983), especially in cases involving favoritism and corruption in public contracts. *Interstate Engineering v. City of Fitchburg*, 367 Mass. 751, 758 (1975).⁷

In sum, I conclude that a designer or programmer who has already been appointed to do a feasibility study is ineligible, pursuant to § 38H(d), to perform subsequent design services on the same project.

Very truly yours,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

¹ The Inspector General is charged with investigating waste and mismanagement in the expenditure of public funds in public construction contracts. G.L. c. 12A, § 7.

² The DSB is an eleven-member, independent, unpaid board, a majority of whom are architects and engineers. G.L. c. 7, § 38B. The DSB has a statutorily mandated role in the selection of designers for building projects of state agencies, building authorities, and certain other public agencies. G.L. c. 7, § 38C. It is required to advertise for designers, select three finalists, and transmit a list of its chosen finalists to the deputy commissioner of DCPO. G.L. c. 7, §§ 38D, 38F. The deputy commissioner must appoint a designer from the list transmitted by the DSB. G.L. c. 7, § 38G.

³ The designer selection statutes were renumbered effective July 12, 1984. Sections 30B to 30P of G.L. c. 7, as appearing in St. 1980, c. 579, § 51, were redesignated G.L. c. 7, §§ 38A 1/2 to 38O pursuant to St. 1984, c. 189, § 5. This opinion refers to the new section numbers.

⁴ The DSP Policy provides, in pertinent part, as follows:

- (1) A designer or programmer appointed to do a feasibility study, master plan or program for a project, shall be ineligible for subsequent appointment to perform the design services for that project—unless formally approved for continued or extended services as provided for by Chapter 7, Section [38I]
- (2) A designer, programmer or consultant if not employed as the prime designer in the development of a feasibility study, master plan or program may be subsequently employed by other firms to perform services relating to the project, but may not be appointed to be the prime designer for the design services of that program, unless formally approved in conformance with the provisions of Chapter 7, Section [38I] of the General Laws.

⁵ It is a well-settled rule of statutory construction that the word “shall” ordinarily indicates that a statutory provision containing directions to public officers is mandatory. *Hashimi v. Kalil*, 388 Mass. 607, 609-10 (1983); *Barclay v. Deveau*, 11 Mass. App. Ct. 236, 243 (1981).

⁶ G.L. c. 7, § 38A 1/2(b), defines “continued services” as “authorization for a designer who has been appointed for one stage of a project to act as the designer for a succeeding stage or stages of the same project.”

⁷ With respect to your further question, whether a consultant or subcontractor to a designer of a feasibility study, program, or master plan can be selected, under special circumstances, to perform design services for the same project, my answer is again in the negative, for much the same reasons. Although the statutory language of § 38H(d) does not expressly prohibit the use of consultants as it does the use of the original designers themselves, I construe the statute broadly to apply to consultants and subcontractors as well as designers, in order to effectuate the remedial purpose of the statute.

July 22, 1985

Number 2

Roland R. Piggford, Director
Massachusetts Board of Library Commissioners
648 Beacon Street
Boston, Massachusetts 02215

Dear Mr. Piggford:

You have requested my opinion as to whether the Board of Library Commissioners ("Board") has the authority to promulgate regulations implementing G.L. c. 78, §§ 33 and 34,¹ and to adjudicate disputes arising under those sections.² It is my opinion that the Board does not possess such authority.

Neither § 33 nor § 34 expressly authorizes the Board to regulate or adjudicate matters concerning selection of library materials or contracts with library employees.³ There is no general rule-making or adjudicatory authority supplied in the remainder of chapter 78, either. Although it is true that when a general power is given, all authority necessary to carry it out may be inferred by implication, *Multi-Line Rating Bureau v. Commissioner of Insurance*, 357 Mass. 19, 22 (1970), chapter 78 grants no general power to the Board either to promulgate regulations or to adjudicate disputes. Rather, the Board's statutory authority is relatively limited. In accordance with §§ 14-21, the Board functions as an advisory body to state and certain municipal libraries on matters of funding and library services. It is also empowered under § 19 to expend sums appropriated for library services, accept federal grants, contract with other state agencies and municipalities to provide library services, and represent the Commonwealth in the receipt and distribution of funds from private sources, as well as to "certify and issue certificates to" librarians under § 22. Clearly absent from those specific powers is the general authority to promulgate regulations or to conduct adjudicatory hearings in accordance with the Administrative Procedure Act, G.L. c. 30A, §§ 1 *et seq.*, and related regulations 801 C.M.R. §§ 1.00 *et seq.*

In contrast, the Board does have certain regulatory and adjudicatory authority conferred by G.L. c. 78, §§ 19A-19C and 25, but that authority is specific in nature. Sections 19A-19C require the Board to establish certain minimum standards of free public library service for municipalities, as well as a comprehensive state-wide program of regional public library systems. Consistent with that specific statutory authority, the Board has set up a regulatory scheme at 605 C.M.R. §§ 4.00 *et seq.* and 5.00 *et seq.* Section 25 expressly authorizes the Board to regulate state certification of librarians and to adjudicate certification disputes. In accordance with this clear legislative directive, the Board has issued regulations for librarian certification, codified at 605 C.M.R. §§ 3.00 *et seq.*

The express regulatory and adjudicatory authority granted in §§ 19A-19C and 25 contrasts sharply with the lack of such authority in §§ 33 and 34, indicating that the omission of such authority in the latter sections was intentional. The presence of express authority in one part of a statute and the lack of it in others dealing with the same subject matter implies a legislative intent to exclude that authority where it is not expressly granted. *New England Power Co. v. Board of Selectmen of Amesbury*, 389 Mass. 69, 74 (1983). See also *American Grain Products Processing Institute v. Department of Public Health*, 392 Mass. 309, 315 (1984).

Furthermore, the provisions in §§ 33 and 34 that expressly delegate authority to local officials also evince an intent not to vest such authority in the state Board. The first sentence of § 33¹ is directed to trustees of free public libraries or, in their absence, to the appropriate municipal officials, and requires the local body to establish a written policy for the selection and use of library materials and facilities in accordance with standards adopted by the American Library Association. Similarly, the clear language of § 34² directs local officials to execute written employment contracts with library employees. Such clear delegation to local authorities in both instances reflects a legislative intent making it impossible for me to infer that the state Board is vested with similar authority. *See* 1984/85 Op. Atty. Gen. No. 5, Rep. A.G., Pub. Doc. No. 12 at _____ (1984) (where local power to remove local tax assessors from office is vested in local officials, such power on the part of the Commissioner of Revenue cannot be implied).

In sum, it is my opinion that the Board has neither express nor implied authority to promulgate regulations or to adjudicate disputes concerning local policies for selection of library materials or written employment contracts between municipalities and library employees.

Very truly yours,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

¹ Those statutes require free public libraries to establish written policies for the selection and use of library materials and to execute written contracts with certain library employees.

² You have asked a number of additional questions concerning the application of §§ 33 and 34 to contracts between library employees and local governments. I must decline to address your questions concerning whether municipalities must bear the costs of implementing these sections, or whether §§ 33 and 34 could also apply to the removal of library materials or acceptance of donations, since answering those questions would require factual determinations that must be made on a case-by-case basis. 1983/84 Op. Atty. Gen. No. 2, Rep. A.G., Pub. Doc. No. 12 at 2 (1983). Opinions of the Attorney General are rendered solely upon factual situations that actually confront a given state agency and not upon hypothetical questions or general requests for information. *See* 1966/67 Op. Atty. Gen. No. 55, Rep. A.G., Pub. Doc. No. 12 at 114 (1966). Nor need I reach your specific questions concerning which American Library Association publication(s) may serve as the standard for selection of library materials, whether the Board may define the term "free public library," and which employees are covered by the statutes or the employment contracts themselves, since, for the reasons discussed in this opinion, I have found that the Board lacks authority to regulate such matters.

³ The Board's regulations at 605 C.M.R. §§ 2.00 *et seq.*, entitled "Regulations for Adopting Administrative Regulations," merely set up a rule-making procedure, and do not of themselves reflect any general legislative grant of authority for the Board to promulgate regulations.

^a That section provides:

The board of trustees of a free public library in any city or town, or in the absence of such board, the city or town official possessing the appointive powers of such board, shall establish a written policy for the selection of library materials and the use of materials and facilities in accordance with standards adopted by the American Library Association. No employee shall be dismissed for the selection of library materials when the selection is made in good faith and in accordance with the approved policy adopted pursuant to the provisions of this section.

^c Section 34 provides that:

The board of trustees of a free public library in any city or town, or in the absence of such board, the city or town official possessing the appointive powers of such board shall, except in the case of those employees subject to the provisions of chapter one hundred and fifty E, execute a written employment contract with an employee of said library outlining the basic conditions of employment, including but not limited to the establishment of a probationary period and the procedure for dismissal during this period and the establishment of a procedure which specifies the cause for dismissal after the completion of such probationary period.

November 6, 1985

Number 3

Ira A. Jackson
Commissioner of Revenue
Department of Revenue
100 Cambridge Street
Boston, MA 02204

Dear Commissioner Jackson:

Pursuant to G.L. c. 58, § 1A, ¶ 5,¹ you have asked my opinion on a question relating to computation of the excise tax due from a development project proposed under G.L. c. 121A.²

Your letter states the facts giving rise to your request as follows. A corporation organized under chapter 121A will acquire the property in question from the City of Boston and would then give a forty-year ground lease to develop and operate that property to a limited partnership that would not be organized under that statute.³ The partnership would demolish the building now on the site and construct and operate a large underground garage. The surface of the site would be maintained as a park. During the term of that lease the chapter 121A corporation would receive a percentage of the partnership's net income together with certain fixed sums. The precise question you have referred to me is whether, in those circumstances, "it is permissible for the computation of the gross income portion of the excise imposed by G.L. c. 121A, § 10, to be based on the gross income of the c. 121A corporation rather than the gross income of the entire 121A project."⁴ In the circumstances described by your letter, it is my opinion that it is not only "permissible" but, except as discussed below, ordinarily to be anticipated that the computation be based on the income of the chapter 121A corporation.

My first ground for that opinion is the clear and unambiguous language of the statute, which must be given its ordinary meaning. *Bronstein v. Prudential Insurance Co.*, 390 Mass. 701, 704 (1984). In relevant part, G.L. c. 121A, § 10, ¶ 3, provides:

... [S]uch corporation shall pay in each calendar year to the commonwealth ... an excise ... equal to five percent of its gross income in such preceding calendar year ...

The obvious antecedent of "its" in that provision is "such corporation," and so the intent of the Legislature appears to be that the relevant excise on the corporation will be measured solely by reference to that corporation's income.

Any contrary reading would immediately lead to serious difficulties and therefore should be avoided. See *Adamowicz v. Ipswich*, 395 Mass. 757, 760 (1985) (statutes should be construed so as to produce workable results). For example, looking beyond the income of the chapter 121A corporation would clearly be inappropriate in the majority of chapter 121A projects which involve residential development. Obviously, the Legislature did not intend that the amount of a chapter 121A corporation's excise should depend on the amounts of its tenants' personal incomes. Furthermore, even in commercial chapter 121A projects, there seems to be no basis for looking beyond the corporation's income. The intended

measure of the excise assessed on the gross income of a chapter 121A corporation that is a commercial lessor logically should be that corporation's own gross income rather than the gross income of the various entities that may lease office space from it.

This result follows not only from the plain language of G.L. c. 121A, § 10, ¶ 3, but also from the purpose which I believe underlies the excise imposed by that provision. That excise tax is assessed in lieu of the local property tax from which the chapter 121A corporation is exempted by G.L. c. 121A, § 10. *See Opinion of the Justices*, 341 Mass. 760, 774 (1960). Gross income derived from occupancy of a piece of property is one indication of the property's value, *cf. Alstores Realty Corp. v. Board of Assessors of Peabody*, 391 Mass. 60, 66-69 (1984), and it is also commonly used as a basis for measuring excise taxes. *See, e.g.,* G.L. c. 63, § 22A (gross investment income); *Commissioner of Revenue v. Massachusetts Mutual Insurance Co.*, 384 Mass. 607, 612 (1981). On the other hand, the gross income of the corporation's lessees measures their individual business success or the value of their individual leases to them; in neither case does that income seem rationally related to the value of the tax exemptions granted to the chapter 12A corporation.

The fact that the lease proposed here is a forty-year ground lease to develop the property and operate a garage on it rather than a short-term commercial lease for office space may have practical and financial consequences for the project, but I see no reason to infer that the Legislature intended that fact, standing alone, to require different treatment for purposes of section 10. Indeed, chapter 121A elsewhere discusses "ground rent," the payment made under a ground lease, in terms that suggest that a "ground lease" for purposes of chapter 121A should be viewed as simply one specific category of a "lease" rather than as a distinct form of legal interest. *See* G.L. c. 121A, § 15(1) ("expenses . . . including any ground rents or other payments under any lease . . ."). *See also* G.L. c. 121A, § 10, ¶ 9 ("gross income" includes "payments actually made by persons for the right to . . . occupy . . . all of the project . . .").

For these reasons, I conclude that the answer to your question is that the relevant income under G.L. c. 121A, § 10, ¶ 3, is that of the chapter 121A corporation and not that of the limited partnership.⁵

This opinion is limited to answering the precise question you have asked. I do not hereby express any views as to the legality, propriety, or wisdom of the proposed project in terms of chapter 121A or other provisions of law. *Cf.* 1961/62 Op. Atty. Gen., Rep. A.G., Pub. Doc. No. 12 at 199, 200-01 (1962). Your request for an opinion notes, and other comments I have received argue, that the proposed project may not be authorized by G.L. c. 121A or may be otherwise unlawful.⁶

It would be inappropriate for me to address those arguments for three basic reasons. First, I have not been directly asked for an opinion on those matters; your specific request relates only to "the computation of the gross income portion of the excise" and so is quite narrow. In issuing formal opinions it has been my consistent policy to answer only those questions explicitly presented to me and those which must necessarily be resolved to answer the questions explicitly asked. *Cf. Opinion of the Justices*, 386 Mass. 1201, 1221 (1982) (Supreme Judicial Court advisory opinions are confined to the particular questions of law submitted to the Court).

Second, even if you had explicitly asked for an opinion on one or more of the broader questions mentioned above, I would respectfully have to decline an answer. It has been my consistent policy, and that of my predecessors, to issue

formal opinions on only those questions that involve matters which are within the specific area of authority of the officer or agency making the request. 1967/68 Op. Atty. Gen. No. 30, Rep. A.G., Pub. Doc. No. 12 at 95, 96 (1967); *cf. Opinion of the Justices*, 386 Mass. 1201, 1219-20 (1982) (Supreme Judicial Court renders advisory opinions only as necessary to enable state departments to perform their duties). Your general duties with respect to G.L. c. 121A are limited and appear to involve only the "administration of taxes" rather than oversight over the operation or enforcement of chapter 121A generally. See G.L. c. 121A, § 10, ¶ 5.⁷ Your specific authority to opine on G.L. c. 121A matters is both conferred and limited by G.L. c. 58, § 1A, the statute under which your request was made explicitly. It is limited to "any question arising under any statute relating to the assessment, classification and collection of taxes" While the narrow question you have asked and I have answered above fits that formula, the broader questions raised by materials submitted to me and discussed in footnote 6 above involve the construction and administration of Chapter 121A generally, rather than the specific topic of taxes. Hence they do not fall within the ambit of G.L. c. 58A, § 1A, and I should not answer them.

There is also a third reason why I decline to express any opinion on the broader issues potentially raised by this project. Each of those issues is or may be subject to the explicit oversight of another public agency, namely the Boston Redevelopment Authority, which St. 1960, c. 652, §§ 12-14, designates as the regulatory authority for chapter 121A projects in the City of Boston. See *Bronstein v. Prudential Insurance Company*, 390 Mass. 701, 705 (1984). Since the Authority has not yet finally approved the project, my opinion would seem both premature and perhaps unnecessary. *Cf.* 1984/85 Op. Atty. Gen. No. 5, Rep. A.G., Pub. Doc. No. 12 at _____ (1984); 984/85 Op. Atty. Gen. No. 8, Rep. A.G., Pub. Doc. No. 12 at _____ (1985). Furthermore, it is certainly possible and perhaps quite likely, in view of the material I have received strenuously opposing the project, that litigation will be commenced which will raise some or all of the broad issues mentioned above. In such circumstances no opinion of this office would resolve the matter and so, as has been my consistent practice and that of my predecessors, none should be given. 1975/76 Op. Atty. Gen. No. 37, Rep. A.G. Pub. Doc. No. 12 at 121 (1976); *see also* G.L. c. 58, § 1A, ¶ 5 (Attorney General's opinion, when given, is to be "binding"). Significant legal questions such as those mentioned above may be resolved through litigation, and where, as provided by St. 1960, c. 652, §§ 13-14, any private person aggrieved has standing to seek judicial review,⁸ the courts are the only forum that can provide a definitive resolution that will be binding upon all interested parties, both private and public.

Very truly yours,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

¹ That statute provides in relevant part that:

[the Commissioner of Revenue] shall, at the request of the assessors of any city or town or upon his own initiative, give his opinion

to assessors and collectors upon any question arising under any statute relating to the assessment, classification and collection of taxes or he may obtain the opinion of the attorney general upon such question.

Your request states that your opinion on this question had previously been asked by the Commissioner of Assessing of the City of Boston.

² Chapter 121A has received extensive attention from both the legislative and judicial branches of government. As originally adopted, chapter 121A “was an attempt to eliminate substandard living conditions in urban areas by utilizing private capital to revitalize decaying urban areas. St. 1945, c. 654, §§ 1 and 3.” *Bronstein v. Prudential Insurance Co.*, 390 Mass. 701, 704 (1984). In 1960, chapter 121A was amended to include construction of commercial, industrial, and other non-residential buildings. *Id.* Despite that change, however, “the fundamental underpinning of the statute remained the same, i.e., that such projects be undertaken for a public purpose.” *Id.* at 704-05 (citing *Opinion of the Justices*, 341 Mass. 760, 776-77 (1960)).

This public purpose is accomplished, however, through reliance on private corporations or, as permitted by G.L. c. 121A, § 18C, individuals or other entities regulated or organized pursuant to chapter 121A. *But see* G.L. c. 121A, § 8 (every chapter 121A corporation “shall be deemed to have been organized to serve a public purpose . . .”). Thus “[a]lthough there is some measure of supervision and participation by a public agency, urban renewal projects under c. 121A are primarily conceived of and implemented by the private corporations which will operate them. Further, these projects receive large public benefits [through the tax concessions in G.L. c. 121A, § 10].” *Boston Edison Co. v. Boston Redevelopment Authority*, 374 Mass. 37, 50 (1977).

³ At the expiration of the lease, title to the property would be transferred from the corporation to the City of Boston.

⁴ I assume that by “the entire project” you refer to the partnership that will actually develop and operate the underground garage.

⁵ Of course in taxing that income, the Department of Revenue may exercise its statutory powers to verify the corporation’s return and, if warranted, to assess any additional tax it finds, as a matter of fact, to be due. *See* G.L. c. 121A, § 10, ¶ 5; G.L. c. 62C, § 26(b); *cf. Brown, Rudnick, Freed & Gesmer v. Board of Assessors of Boston*, 389 Mass. 298, 303 (1983); *Massachusetts Pike Towers Associates v. Commissioner of Revenue*, 381 Mass. 584 (1980).

⁶ It has been argued that by giving a forty-year ground lease to the partnership, the corporation will “transfer in whole or in part the land or interests therein . . .” to an entity not organized under chapter 121A and so will violate G.L. c. 121A, § 11, ¶ 3. It has also been suggested that the terms of the ground lease between the chapter 121A corporation and the limited partnership may not reflect an ordinary, arms’ length commercial transaction. *Cf.* 760 C.M.R. § 25.09(4)(a) (regulations of the Executive Office of Communities and Development making 5% of gross rental the maximum fee paid by a state-regulated chapter 121A entity to a project manager). Finally, it has also been suggested that the limited partnership should itself be considered the true developer of the garage and taxed accordingly or that it should be treated as the developer of a separate subproject falling under chapter 121A for which a separate

excise payment would be due. *Cf.* G.L. c. 121A, § 1, ¶ 6 ("project" defined as "construction . . . operation and maintenance . . ." without explicit reference to formal ownership). On the other hand, the proponents of the project, the City of Boston, and certain other officials have responded to each of those arguments and have also stressed what they perceive would be the substantial financial and esthetic benefits the proposed project would have for Boston and the overall public interest.

⁷ However, as noted above, in performing those duties you are authorized to exercise all of your authority under G.L. c. 62C. *See* G.L. c. 121A, § 10, ¶ 5.

⁸ *See, e.g., Boston Edison Company v. Boston Redevelopment Authority*, 374 Mass. 37, 43 (1977).

November 8, 1985

Number 4

Michael Joseph Connolly
Secretary of State
State House
Boston, Massachusetts 02133

Dear Secretary Connolly:

You have asked my opinion whether chapter 416 of the Acts of 1985, entitled "An Act Requiring the Use of Safety Belts in Certain Motor Vehicles," may be the subject of a referendum petition under Article 48 of the Amendments to the Massachusetts Constitution. Your opinion request arose because a referendum petition calling for the repeal of this law, signed by ten qualified voters, was filed with your office in a timely fashion. For the reasons discussed below, I have concluded that the law in question is an appropriate subject for a referendum petition.

A law that relates to any matter excluded from the referendum process may not be the subject of a referendum petition. Amendments, art. 48, The Referendum, pt. III, § 2. I have examined the various provisions of the law and find that it does not relate to religion, religious practices, or religious institutions; the appointment, qualification, tenure, removal, or compensation of judges; or the powers, creation, or abolition of courts. The operation of the law is not restricted to a particular town, city, or other political subdivision or to particular districts or localities of the Commonwealth. It does not appropriate money for the current or ordinary expenses of the Commonwealth or for any of its departments, boards, commissions, or institutions.

Accordingly, I have concluded that the law does not contain matter excluded from the referendum process and is appropriately the subject of a referendum petition. I have therefore provided you with a fair and concise summary of the law for inclusion on the petitions that you must prepare for use in gathering additional signatures and for inclusion on the ballot should a sufficient number of signatures be filed with your office within the time period allowed by Article 48.

Very truly yours,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

December 11, 1985

Number 5

The Honorable George Keverian
Speaker
House of Representatives
State House
Boston, MA 02108

Dear Speaker Keverian:

On behalf of the House of Representatives, you have asked for my opinion, pursuant to G.L. c. 12, § 9, concerning the constitutionality of a bill presently pending before that body. The bill in question, House 6602, would amend chapter 40A of the General Laws to empower municipalities to prohibit vending machines in all areas under their care and control.¹ Specifically, you have inquired whether the proposed law would violate the First Amendment to the United States Constitution or its state counterpart, article 16 as amended by article 77 of the Amendments to the Massachusetts Constitution.² You have also asked whether municipalities are presently authorized under the Home Rule Amendment to prohibit or regulate newspaper vending machines.

For the reasons discussed below, it is my opinion that the proposed law, as presently drafted, would be likely to withstand a facial challenge on First Amendment grounds. I have further concluded that, even without this law, municipalities presently have the power to regulate or prohibit newspaper vending machines under the Home Rule Amendment. An "as applied" challenge to a municipal ordinance or by-law adopted pursuant to House 6602 or the Home Rule Amendment, however, would turn on factual determinations beyond the scope of an opinion of the Attorney General. Where appropriate in the margin of this opinion I have provided advice concerning the drafting of the bill and its implementation by municipalities to lessen the likelihood of successful as applied challenges.

I begin my analysis by noting that the questions presented arise only because it is clear from the bill's title that the proposed law is intended to apply to newspaper vending machines.³ Vending machines in general are not protected by the First Amendment since they are not designed to communicate or express ideas or information. Cf. *Caswell v. Licensing Commission*, 387 Mass. 864, 867-68 (1983) holding that video games are not protected by the First Amendment or by article 6. It is well established, however, that the right to freedom of speech and of the press secured by the First Amendment extends to the distribution and circulation of printed material. *Lovell v. Griffin*, 303 U.S. at 452; *Schneider v. State*, 308 U.S. 47, 160 (1939); *Talley v. California*, 362 U.S. 60, 64 (1960). Several courts that have considered the question have held that the First Amendment applies to the sale of newspapers through newspaper vending machines.⁴

Thus, the application of the proposed law to newspaper vending machines surely raises the question of whether the law abridges First Amendment rights. But to say the [statute] presents a First Amendment issue is not necessarily to say that it constitutes a First Amendment violation." *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 104 S. Ct. 2118, 2128 (1984). The right to engage in expressive activity is not absolute, but may be regulated as to time,

place, and manner in order to accommodate competing governmental interests. Such time, place, and manner restrictions are valid, despite their impact on protected activity, provided that they are content neutral (that is, justified without reference to the content of the regulated speech), that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels of communication.⁵

On its face, the proposed law satisfies these requirements. It is content neutral, since it applies with equal force first to all vending machines and second to all newspaper vending machines. The First Amendment forbids the government from regulating protected activity in ways that favor some viewpoints or ideas at the expense of others. *City Council v. Taxpayers for Vincent*, 104 S. Ct. at 2128. The proposed law, in authorizing an absolute ban of all vending machines, would not permit officials to discriminate based upon their disagreement with a particular newspaper's content.⁶

It is equally like that, even were a municipality to ban all newspaper vending machines, ample alternative means of distributing newspapers would remain.⁷ Newsstands, home-delivery, and ambulatory news vendors would be unaffected by the proposed law. It is not dispositive that these methods of distribution may be less efficient or more costly. The First Amendment does not guarantee a right to the least expensive or most advantageous form of expression. *City Council v. Taxpayers for Vincent*, 104 S. Ct. at 2133; *Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority*, 745 F.2d at 774. Of course, if it could be shown that, in a particular municipality, newspaper vending machines were the only realistic means of distributing newspapers, an ordinance banning such machines would be vulnerable to an "as applied" attack. Cf. *Philadelphians Newspapers, Inc. v. Borough Council*, 381 F. Supp. 228 (E.D. Pa. 1974). Such hypothetical factual situations, however, are beyond the scope of this opinion, which considers only the facial constitutionality of the proposed law.

The question is thus reduced to whether the proposed law is narrowly tailored to serve a significant governmental interest, an inquiry of somewhat greater complexity. I am assuming that the purpose of the proposed law is twofold: to protect the safety of the public by eliminating obstacles to traffic on public property and to advance esthetic values by prohibiting an intrusive and unattractive format for expression. The Supreme Court has recognized the substantiality of both these interests. See *City Council v. Taxpayers for Vincent*, 104 S. Ct. at 2130 (municipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression); *Schneider v. State*, 308 U.S. 147, 160 (1939) (municipal authorities have duty to keep streets open and available for movement of people and property, and conduct of those using streets may be lawfully regulated). See also *Young v. American Mini Theatres*, 427 U.S. 50, 71 (1976) (plurality opinion) (city's interest in attempting to preserve or improve the quality of life is one that must be accorded high respect).

It could be contended, however, that the proposed law is not "narrowly tailored" to serve these interests, since there may be means of accomplishing the same objectives short of an absolute prohibition of newspaper vending machines.⁸ The Supreme Court has recently made clear, however, that when it is the "tangible medium" of expression itself that conflicts with the substantial governmental interest involved, a law prohibiting that medium curtails no more expression than is necessary to accomplish its purpose. *City Council v. Taxpayers for Vincent*, 104 S. Ct. at 2132 (upholding ordinance prohibiting the posting of

signs on public property); *Clark v. Community for Creative Non-Violence*, 104 S. Ct. 3065 (1984) (upholding prohibition on sleeping in certain public parks, and assuming that sleeping was protected by First Amendment under circumstances presented). See also *Gannett Satellite Information Network, Inc. v. Metropolitan Transportation Authority*, 745 F. 2d at 774-75 (even if licensing fees were so prohibitive that they effectively banned newspaper vending machines, fees were valid since no less restrictive means existed for raising revenue).⁹

Furthermore, the requirement that a content-neutral law affecting First Amendment expression be "narrowly tailored" does not mean that the law must precisely fit the contours of the governmental interests involved. "[A]n incidental burden on speech is no greater than is essential, and is therefore permissible . . . , so long as the neutral regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation." *United States v. Albertini*, 105 S. Ct. 2897, 2907 (1985). Accord *Clark v. Community for Creative Non-Violence*, 104 S. Ct. at 3071.

Therefore, I believe that a content-neutral law, such as the one you have asked me to review, authorizing municipalities to ban newspaper vending machines is sufficiently related to legitimate state interests to withstand a facial challenge. Again, however, it is quite possible that particular ordinances or by-laws enacted pursuant to this law would be subject to successful attack in particular factual situations.

In response to your second question, it is my opinion that municipalities presently have the authority under the Home Rule Amendment to the Massachusetts Constitution, art. 89, § 6, to enact ordinances or by-laws regulating or prohibiting the placement of newspaper vending machines in public areas. Indeed, pursuant to my authority under G.L. c. 40, § 32, to approve or disapprove town by-laws, I have approved a number of town vending machine by-laws which, on their face, appear to be reasonable, content neutral, and narrowly tailored to achieve legitimate municipal objectives, such as protecting public safety, ensuring accessibility to public facilities, and maintaining the neatness and orderliness of public areas.¹⁰

Under the Home Rule Amendment, municipalities "may enact legislation to advance the common good so long as it is not inconsistent with State law." *Marshfield Family Skateland, Inc. v. Marshfield*, 389 Mass. 436, 440, *appeal dismissed*, 464 U.S. 987 (1983). As discussed above, depending on particular factual circumstances, local legislation prohibiting or regulating newspaper vending machines might well be characterized as advancing the public good. Nor am I aware of any state statutes precluding local action of this nature. To the contrary, state law expressly authorizes municipal officials to "grant permits for the placing and maintaining of . . . structures projecting into or placed on or over public ways." G.L. c. 85, § 8.

I therefore conclude, subject to the reservations expressed above, that the proposed law could be successfully defended against a facial attack on First Amendment grounds and that, even without the proposed law, municipalities presently have the power to enact ordinances or by-laws reasonably regulating or prohibiting the placement of newspaper vending machines in public places.

Very truly yours,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

¹ The proposed law is worded as follows: "A city acting by and through its council and a town acting by and through its board of selectmen may prohibit vending machines in all areas of said city or town under their care and control." On a point unrelated to the subject of your opinion request and recognizing that my role under G.L. c. 12, § 9, includes advising you on proposed legislation, I would suggest you substitute "town meeting" for "board of selectmen," since the town meeting, not the selectmen, would be the body empowered to enact the ban authorized by the proposed law. *See* G.L. c. 39, § 1; c. 40, § 21.

² The First Amendment, which by its terms applies only to laws enacted by Congress, is made applicable to the states by the Fourteenth Amendment. *Lovell v. Griffin*, 303 U.S. 444, 450 (1938). Since "the criteria . . . for judging claims arising under the First Amendment . . . are equally appropriate to claims brought under cognate provisions of the Massachusetts Constitution," it is not necessary to analyze separately the article 16 issue. *Opinions of the Justices*, 387 Mass. 1201, 1202 (1982). *But cf. Commonwealth v. Sees*, 374 Mass. 532, 536-3 (1978) (Massachusetts Constitution provides greater protection to nude dancing in bars than does United States Constitution because of lack of preferred position of alcoholic beverages under state Constitution).

³ The bill is entitled "An Act Permitting Cities and Towns to Ban Newspaper Vending Machines." A different title, making it clear this is a bill intended to address the public safety and esthetic features of all vending machines, might be advisable.

⁴ *See, e.g., Gannett Satellite Information Network, Inc. v. Metropolitan Transp. Auth.*, 745 F.2d 767, 772 (2d Cir. 1984); *Miami Herald Publishing Co. v. City of Hallandale*, 734 F.2d 666, 673 (11th Cir. 1984); *Gannett Satellite Information Network, Inc. v. Town of Norwood*, 579 F.Supp. 108, 114 (D. Mass. 1984); *Southern N.J. Newspapers, Inc. v. N.J. Dep't of Transp.*, 542 F. Supp. 173, 183 (D.N.J. 1982).

⁵ *Clark v. Community for Creative Non-Violence*, 104 S. Ct. 3065, 3069 (1984); *City Council v. Taxpayers for Vincent*, 104 S. Ct. at 2130; *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 45 (1983). *Accord Gannett Satellite Information Network, Inc. v. Metropolitan Transp. Auth.*, 745 F.2d at 773 (applying above criteria to regulation of newspaper vending machines).

⁶ To the extent that an ordinance adopted pursuant to the proposed law would ban all newspaper vending machines in a particular municipality, such an ordinance would not be subject to challenge on the ground that it vests an impermissible degree of discretion in local officials to select which machines will be permitted. *Compare Gannett Satellite Information Network v. Town of Norwood*, 579 F. Supp. 108 (D. Mass. 1984) (town by-laws vested virtually unbridled discretion in town officials to issue permits for newspaper vending machines); *Miller Newspapers, Inc. v. City of Keene*, 546 F. Supp. 831 (D.N.H. 1982) (seizure of newspaper vending machines in absence of ordinance setting forth appropriate procedures and standards subjected newspapers to exercise of officials' unbridled discretion and violated due process). It is therefore my advice that any bill you enact on this subject matter restrict the discretion of municipal authorities, channeling it in a manner discouraging content-based discrimination.

⁷ The proposed law concerns the placement of vending machines only on property under the care and control of a municipality. I have assumed for purposes of this

opinion that any ordinance adopted pursuant to this law would effectively prohibit all newspaper vending machines on public property within a particular municipality. It would remain open to newspaper publishers to place their machines on privately owned property, however. Municipalities in which realistic alternative means of distribution do not exist would be ill-advised to adopt by-laws or ordinances of the type contemplated by the bill.

⁸ For example, municipalities could limit the number of newspaper vending machines or require that they be placed a certain distance apart or that they conform to certain esthetic standards. Such time, place, and manner restrictions may be permissible under the First Amendment, as long as adequate standards are provided to guide the regulators' discretion. See note 6, *supra*.

⁹ In *Vincent*, the Court characterized as inapposite its previous decisions such as *Schneider v. State*, *supra*, striking down absolute prohibitions on the distribution of handbills and leaflets. In such cases, the interest advanced in support of the ordinance, e.g., anti-littering, could be addressed without prohibiting the distribution of printed material. In contrast, where the substantive evil addressed by a law is not merely a possible by-product of protected activity, but is created by the medium of expression itself, e.g., a sign, absolute prohibition may be justified. *City Council v. Taxpayers for Vincent*, 104 S. Ct. at 2132.

¹⁰ For instance, I have approved by-laws prohibiting the placement of newspaper vending machines in a way that would endanger the safety of persons or property, unreasonably preclude the flow of pedestrian traffic, or preclude entrance or exit from business premises or lawfully parked vehicles. The approved by-laws also prohibit placement of such machines on sites used for public transportation or public utility purposes, impose size restrictions on the machines, and require that they be kept in good condition. In approving those by-laws, as in answering your first question, I confine my analysis to their facial validity, recognizing that an as-applied challenge will turn on factual determinations beyond my purview.

December 26, 1985

Number 6

A. Joseph DeNucci, Chairman
Committee on Human Services and Elderly Affairs
State House—Room 22
Boston, Massachusetts

Dear Chairman DeNucci:

On behalf of the Committee on Human Services and Elderly Affairs of the House of Representatives, you have requested my opinion, pursuant to G.L. c. 12, § 9, as to whether a bill presently being considered by the General Court, H. 6921, would be preempted by the consent decrees that have been entered in the case of *Williams v. Lesiak*, United States District Court, District of Massachusetts, C.A. No. 72-571-Mc. For the reasons explained below, it is my opinion that the consent decrees would not preempt the proposed legislation as presently drafted.

General Laws chapter 12, section 9, contemplates not only that I issue opinions to the General Court and its committees, but that I advise you in the preparation of legislative documents. In this instance the advice I render is as important as my opinion itself. I advise you not to add an emergency preamble to H. 6921, thereby deferring its effective date and permitting me to move to modify the referenced consent decrees. If those decrees are modified, no preemption issue will be presented.

The bill in question would place the Treatment Center for Sexually Dangerous Persons (hereafter the Treatment Center) exclusively within the Department of Correction. Under the current statute, the Treatment Center is "subject to the jurisdiction of the department of mental health" but is located "at a correctional institution approved by the commissioner of correction." G.L. c. 123A, § 2. The proposed legislation would thus end the bifurcated administration of the Treatment Center by placing the facility within a single state agency. The bill does not address any of the treatment programs or other aspects of the daily operation of the facility.

The federal litigation that you have cited has a long and complex history. It was originally brought on behalf of the patient population at the Treatment Center challenging both the conditions of confinement and the types of therapy and treatment programs that were provided. Several separate consent decrees were agreed to by the parties and approved by the court. In addition, the court entered numerous other specific orders addressing particular aspects of the operation of the Treatment Center.

As part of a consent decree entered by the court on June 14, 1974, the parties agreed that the Treatment Center was to be treated as a facility of the Department of Mental Health and more particularly that the clinical staff of the Department of Mental Health was to have primary responsibility for the handling of patients other than dealing with security problems. This consent decree amplified the legislative determination contained in G.L. c. 123A, § 2, and clarified the operational distinction between treatment and security, with the Department of Mental Health having responsibility for the former and the Department of Correction the latter.

My opinion that the proposed law is not foreclosed by this consent decree rests on three grounds. First, the General Court is not a party to the *Williams v. Lesiak* lawsuit, and its prerogatives cannot be constrained by an agreement by agencies of the executive branch of the state government. See *Massachusetts Association for Retarded Citizens, Inc. v. King*, 668 F. 2d 602, 609 (1st Cir. 1981).

Second, the consent decree was based on the pre-existing state statute. If the statute were to be amended, the change should be sufficient reason for the federal court to modify the consent decree. Changes in the statutes have repeatedly been found to be sufficient justification for modification of a consent decree. *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961). See also *Fortin v. Commissioner of Massachusetts Department of Public Welfare*, 692 F. 2d 790, 799 (1st Cir. 1982). If this law is enacted, as litigation counsel for the defendants in the *Williams v. Lesiak* case, I would seek to have the consent decree modified to conform with the newly enacted state law. For this reason, I reiterate the advice given in the beginning of this opinion: enact this law without an emergency preamble to provide me the necessary time to go before the federal court with a motion to modify the consent decree, thereby avoiding any possible conflict between the state law and the federal consent decree.

Third, if the court declined to modify the consent decree, I believe the law would nevertheless be defensible as a valid exercise of the sovereign power of the state to govern its agencies. I would defend the statute by advancing the legal proposition that a consent judgment, approving a non-litigated settlement, does not constitute a "Law of the United States" and therefore does not preempt state law under the Supremacy Clause. See, e.g., *Gibbins v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Cf. *New York State Association for Retarded Children v. Carey*, 631 F. 2d 162 (2nd Cir. 1981) (an express obligation under a consent decree to maintain a review panel was held not to preempt a subsequently enacted state law preventing the Governor from funding the review panel).

For the foregoing reasons, I answer your request for my opinion and advice by concluding that the enactment of H. 6921 is not preempted by existing federal court consent decrees.

Very truly yours,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

February 11, 1986

Number 7

Maria Matava, Commissioner
Department of Social Services
150 Causeway Street
Boston, Massachusetts

Dear Commissioner Matava:

You have requested my opinion regarding the legality of proposed regulations which would allow the Department of Social Services (the "Department") to report incidents of suspected child abuse directly to district attorneys, thereby eliminating the need for so-called "letters of interchange" from this office. Having reviewed the proposed regulations, 110 C.M.R. §§ 4.50 *et seq.*,¹ I opine that they will indeed obviate the need for these letters of interchange.²

To explain the basis for this conclusion, a brief analysis of the powers and duties of the Attorney General and district attorneys vis-a-vis criminal prosecution is necessary. In his capacity as "chief law officer of the Commonwealth," *Commonwealth v. Kozlowsky*, 238 Mass. 379, 389 (1921), the Attorney General "may institute, conduct, and maintain all such suits and proceedings as he deems necessary for the enforcement of the laws of the State, the preservation of order, and the protection of public rights." *Id.* at 390-91. Of course, the management and prosecution of criminal matters are included in such suits and proceedings. *Id.* at 388.

However, criminal prosecution is not exclusively the province of the Attorney General; the office of district attorney embodies similar powers. The statutory scheme that governs the office of district attorney and articulates its powers and duties establishes concurrent jurisdiction with the Attorney General in certain matters, including the institution and prosecution of criminal actions. G.L. c. 12, § 27. In fact, criminal prosecutions have traditionally been recognized as an ordinary function of the district attorney. *Kozlowsky*, 238 Mass. at 387; G.L. c. 12, § 27.³ Since district attorneys have original jurisdiction in criminal matters, crimes or suspected violations of law may be reported directly to them without the need for intervention from this office. Therefore, it is consistent with the powers of the district attorney to receive reports of suspected child abuse and act on them without any involvement of the Attorney General.

Your question also cannot be answered intelligently without a description of the letters of interchange program, an administrative scheme which is predicated upon the prosecutorial powers the district attorneys and I share. The Fair Information Practices Act, G.L. c. 66A, §§ 1 *et seq.* (hereafter "FIPA") generally precludes an agency such as yours from disseminating personal data of the type contained in your files to persons (including other state agencies) other than the data subject. The principal non-consensual exception to this general rule of interdiction is contained in G.L. c. 66A, § 2(c), which permits disclosure of personal data when "authorized by statute or regulations which are consistent with the purposes of [FIPA]" *Id.*

At the time your predecessors in office devised the letters of interchange program, there was no statute directly and explicitly authorizing the disclosure to any prosecutor of personal data contained in files pertaining to alleged incidents of child abuse. There was, however, a regulation in place authorizing all agencies within the Executive Office of Human Services to give access to such data "to authorized investigative agents of the Attorney General . . . acting in furtherance of their official duties." 101 C.M.R. § 8.06(7) (1979). A regulation so limited to investigative agents appears consistent with FIPA. See *Torres v. Attorney General*, 391 Mass. 1, 12 (1984). Because the Attorney General may himself obtain personal data pursuant to the regulation, is statutorily authorized to interchange duties with the district attorneys, G.L. c. 12, § 27, and to designate whatever investigative agents he chooses, G.L. c. 12, § 2, your predecessor suggested that she could turn personal data over to the district attorneys if we would draft letters of interchange. Since your current regulations authorize direct release to the district attorneys, this cumbersome process is now unnecessary.

Not only is direct reporting to the district attorney consistent with the respective authority of the Attorney General and the district attorneys, but this procedure is also consistent with the present⁴ statutory scheme relative to the reporting requirements of the Department in known or suspected cases of child abuse. As provided throughout G.L. c. 119, §§ 51A and 51B, the Department is statutorily obligated to notify a district attorney of certain incidents of reported abuse or neglect. Further, G.L. c. 119, § 51B, provides that while the Department is statutorily required to report certain instances of abuse or neglect, it is by no means precluded from reporting other incidents it believes merit involvement of the district attorney. Rather, the specific language of G.L. c. 119, § 51B(4)(e) encourages the Department to report any incident of child abuse, stating, "nothing herein shall be construed to prevent the department from notifying a district attorney relative to *any* incidents reported to the department" (emphasis supplied). Therefore, it appears consistent with legislative intent for the Department to report incidents of child abuse or neglect directly to the district attorney, thereby obviating the need for intervention from this office.

The lingering outstanding issue is whether disclosure of information to a district attorney relative to suspected cases of child abuse or neglect violates laws relating to confidential information or privileged communications. Reference to G.L. c. 119, § 51B(4)(e), readily disposes of this question. That section expressly relieves the Department of any liability for unlawful disclosure by so reporting:

No provision of chapter sixty-six A, section one hundred and thirty-five of chapter one hundred and twelve and sections fifty-one E and fifty-one F of this chapter relating to confidential data or confidential communications shall prohibit the department from making such notifications or from providing to the district attorney any information obtained pursuant to clause (1).⁵

In conclusion, I believe the proposed regulations, 110 C.M.R. §§ 4.50 *et seq.*, which allow direct reporting of incidents of child abuse to the district attorneys, totally eliminate the need for my participation in such reporting by way of letters of interchange.

Very truly yours,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

¹ The proposed regulations provide for mandatory reporting of certain cases and discretionary reporting of others and establish procedures for releasing background information and documents to the district attorneys.

² To the extent you have asked me to go further and opine as to the general legality of the regulations, I must decline to do so for two reasons. First, like my predecessors, I traditionally decline to answer such hypothetical, abstract questions; and, second, assessing the validity of regulations is primarily a judicial function. *See* G.L. c. 30A, § 7.

³ While it has long been held that district attorneys may prosecute criminal matters, such power is tempered by the fact that they must accede to the supervision and intervention of the Attorney General, if and when he chooses to exercise it. *Burlington v. District Attorney of the Northern District*, 381 Mass. 717 (1980); *Kozlowsky*, 238 Mass. at 390.

⁴ At the time procedures relative to “letters of interchange” were established, G.L. c. 119, § 51B, was not specific as to the exchange of information between the Department and the Attorney General or district attorneys. *See* St. 1973, c. 1076. However, the enactment of St. 1983, c. 288, articulates a statutory scheme encouraging the free flow of information to the district attorneys.

⁵ Subsection (1) of § 51B relates to investigations and accumulation of information regarding any reported case of suspected abuse or neglect.

February 28, 1986

Number 8

Roland R. Piggford, Director
Massachusetts Board of Library Commissioners
648 Beacon Street
Boston, Massachusetts 02115

Dear Mr. Piggford:

You have requested my opinion on three questions relating to the authority of the Board of Library Commissioners ("Board") under G.L. c. 78, § 19A (1984 ed.) ("section 19A").¹ To paraphrase your request, the questions you pose are:

- (1) May the Board waive the conditions of grant eligibility set forth in section 19A?
- (2) In determining a municipality's eligibility for state funding, may the Board include, as part of a municipality's annual budget for free public library services, fund appropriated for capital expenditures?
- (3) In determining a municipality's eligibility for state funding, may the Board exclude, as part of a municipality's annual budget for free public library services, an appropriation for capital expenditures that is to be funded by a loan order and bond issue?²

For the reasons discussed below, it is my opinion that: (1) the Board may not waive the conditions of grant eligibility set forth in section 19A; (2) the Board may not, for purposes of determining grant eligibility, include, as part of a municipality's annual budget for library services, funds appropriated by a municipality for capital expenditures; and (3) the Board may exclude, as part of a municipality's annual budget for library services, an appropriation by a municipality for capital expenditures that is to be funded by a loan order and bond issue.

The starting point for my analysis is the statutory scheme pertaining to the Board itself. Pursuant to G.L. c. 78, §§ 14-21 (1984 ed.), the Board functions as an advisory body to state and certain municipal libraries on matters of funding and library services. *See Generally* 1985/86 Op. Atty. Gen. No. 2, Rep. A.G., Pub. Doc. No. 12 at _____ (1985). Section 19 empowers the Board to "expend such sums as may be appropriated for the extension and encouragement of library services within the commonwealth," designates the Board as the state agency to deal with the federal government with regard to federal grants promoting library services, and authorizes the Board to contract with other state agencies and municipalities to provide library services and to represent the Commonwealth in the receipt and disbursement of funds from private sources. *Id.*

Section 19A is a critical components of that scheme. It imposes certain requirements on municipalities that wish to receive state funding. For purposes of this discussion, two of those requirements are particularly relevant. First, the municipality must be certified by the Board "to have met certain minimum standards of free public library service established by" the Board.³ Second, no municipality that appropriates in a given year less than six dollars per capita for free public library service "shall receive any money" if such appropriation is below the

average of its annual appropriations for such service for the immediately preceding four years. These are the statutory conditions you inquire about waiving in your first question.

For purposes of this first question, the relevant language of section 19A is clear and unambiguous. "In construing a statute, words are to be accorded their ordinary meaning and approved usage." *Hashimi v. Kalil*, 388 Mass. 607, 609 (1983) and cases cited. "The word 'shall' is ordinarily interpreted as imposing a mandatory or imperative obligation." *Hashimi*, 388 Mass. at 609–10 and cases cited. In addition, as a general rule, directives to public officials for the exercise of power or authority to protect private rights or the public interest are mandatory. 2A C. Sands, *Sutherland Statutory Construction*, § 57.14 (4th ed. 1972); *Hashimi*, 388 Mass. at 610. This is especially true with regard to statutes regulating public expenditures and directing the levying of taxes. 2A C. Sands, *supra* at §§ 57.14, 57.20. Because the Board was created by the Legislature, it has "only the powers, duties and obligations expressly conferred upon it by . . . statute . . . or such as are reasonably necessary . . . [to carry out] the purpose[s] for which it was established." See *Saccone v. State Ethics Commission*, 395 Mass. 326, 335 (1985). Here, the Legislature has spoken clearly. Thus, while the Board may, within the confines of sections 19A and 19B, amend the minimum standards of free public library service set forth in 605 C.M.R. §§ 4.00 and 5.00 *et seq.*, see generally 1985/86 Op. Atty. Gen. No. 2, Rep. A.G., Pub. Doc. No. 12 at _____ (1985), it may not alter or waive either the first or the second grant eligibility requirement of section 19A. Therefore, I concur with the Board's own answer to its first question: it is prohibited from certifying municipalities that are not in strict compliance with the statutory conditions of eligibility.

Your second and third questions are related and will be discussed together. The answer turns on the meaning of the phrases "appropriate for its free public library service" and "appropriation for free public library service" in paragraph four of section 19A. You ask whether those phrases include funds appropriated for capital expenditures or an appropriation for a capital expenditure that is to be funded by a loan order and bond issue. I am assuming that by "capital expenditures," you mean expenditures that are, in general, extraordinary and non-recurring, such as for the construction, renovation, improvement, expansion, or repair of a library building.

Neither the term "free public library service" nor the term "library service" is defined in G.L. c. 78⁴ or in the regulations promulgated by the Board pursuant to sections 19A and 19B. See 605 C.M.R. §§ 1.00 *et seq.* Given the lack of a conclusive statutory or regulatory definition,⁵ the lack of relevant case law, the the lack of relevant legislative history, I construe the word "service" in accordance with its common and ordinary meaning in a manner that promotes the object to be accomplished by section 19A. See *Dedham Water Co. v. Dedham*, 395 Mass. 510, 517–18 (1985); *Department of Community Affairs v. Massachusetts State College Building Authority*, 378 Mass. 418, 427 (1979); *DEQE v. Hingham*, 15 Mass. App. Ct. 409, 411 (1983) and cases cited. Under the circumstances, it is appropriate to consult a dictionary. *Milligan v. Tibbetts Engineering Corp.*, 391 Mass. 364, 368 (1984).

Webster's New World Dictionary 1301 (2d college ed. 1974) indicates that both the etymology and modern usages of "service" are closely linked to laborers and labor for the provision of a benefit. The meaning that is most applicable here defines "service" as "the act . . . or method of providing . . . people with the use of

something, as electric power, water, transportation, mail delivery, etc.” This definition suggests that repetition and maintenance of a routine is central to this meaning of “service,” since the word “method” means or implies a regular, orderly procedure or way of doing something. See *Webster’s*, *supra* at 894. See also *Webster’s Ninth New Collegiate Dictionary* 747 (1983). *Webster’s Ninth New Collegiate Dictionary* 1076 (1983) and *Webster’s Third New International Dictionary* 2075 (1964) offer the definition of “service” as “useful labor that does not produce a tangible commodity,” such as are performed by railroads, telephone companies, and physicians. This definition focuses on non-material, non-capital products or benefits. These definitions of “service,” like the definition of “library services” in the Public Library Services and Construction Act, 20 U.S.C. §§ 351a *et seq.*, as amended,⁶ suggest that non-recurring expenditures to construct new library buildings or to renovate, remodel, or expand existing library buildings are not contemplated by section 19A.

Such an interpretation would be consistent with G.L. c. 78, §§ 14–32, and the Board’s powers and duties thereunder. See, e.g., *Saccone*, 395 Mass. at 334 (where two or more statutes relate to the same subject matter, they should be construed together so as to constitute an harmonious whole). Pursuant to G.L. c. 78, § 15 (1984 ed.), the Board may advise librarians or trustees regarding “the selection or cataloguing of books and any other matter pertaining to the maintenance or administration of such library.” As discussed above, pursuant to section 19, the Board is authorized, among other things, to expend appropriated sums “for the extension and encouragement of library services within the commonwealth” and is designated as the state agency to deal with the federal government with respect to federal grants to the Commonwealth “for promoting library services.” Significantly, the Board is not, at least expressly, designated as the state agency to deal with the federal government with respect to federal grants for “construction” of public libraries. See footnote 6, *supra*. Section 19E, which provides for a comprehensive statewide program for the improvement and development of library and media “resources,” also suggests and distinction between library “services” and “construction” or “reconstruction” of public libraries. Compare G.L. c. 78, § 19E(1)–(5) with § 19E(6) and § 19E(6)(a) with § 19E(6)(b). Chapter 693 of the Acts of 1963, providing for an interstate library compact, repeatedly distinguishes between “library facilities” and “library services,” again suggesting that an appropriation for capital expenditures by a municipality is not considered an appropriation for “library service” under section 19A.

Such an interpretation of the phrase “library service” is also consistent with the purpose of section 19A. See *Saccone*, 395 Mass. at 328 (a statute is to be interpreted “according to the intent of the Legislature, as evidenced by the language used, and considering the purposes and remedies intended to be advanced”). Section 19A establishes the average of four prior years’ appropriations as the standard for measuring whether a current library budget qualifies a municipality for state aid. Including a one-time, anomalous sum for a capital expenditure in any one of the four years presumably would defeat the purpose of averaging, since the average figure would not reflect the routine level of funding. As a result, municipalities might be discouraged from making needed capital expenditures for fear of losing state aid for ordinary operating expenses. In contrast, excluding sums for capital expenditures would promote generous routine yearly appropriations to maintain a library system, would avoid rewarding a municipality that would otherwise be ineligible for state aid because of the paucity of its routine

expenditures, and would protect the eligibility of municipalities that need or desire to make an unusual increase in one year for a capital expenditure.

In light of the foregoing, I have concluded, with regard to your second and third questions, that funds appropriated by a municipality for capital expenditures may be excluded as part of a municipality's annual budget for library services in determining a municipality's eligibility for state funding under section 19A.

Very truly yours,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

¹ That section provides, in relevant part:

The state treasurer shall annually . . . pay from the General Fund to each city or town certified by the board . . . to have met certain minimum standards of free public library service established by said board a sum of money for its free public library or libraries which shall be determined as follows:

- (1) To each town having a population of less than two thousand five hundred a sum equivalent to the amount appropriated by it for free public library service during the preceding year, but in no event more than one thousand two hundred and fifty dollars;
- (2) to each city and to each town having a population of two thousand five hundred or more, a sum not exceeding fifty cents for each resident therein; provided, that such city or town appropriates during the preceding year for its free public library service at least one thousand two hundred and fifty dollars.

No city or town which appropriates for its free public library service in any one year an amount less than six dollars per capita of population shall receive any money under this section if such appropriation is below the average of its appropriation for free public library service for the four years immediately preceding.

(Emphasis added.)

² While a literal reading of section 19A might suggest that it is the state Treasurer's authority, and not that of the Board, which is implicated by section 19A, I have been advised by the state Treasurer that it is his practice to rely exclusively on the certifications provided by the Board and to make the payments from the General Fund accordingly. Thus, you appear to be the appropriate state officer to seek my opinion on these three questions of law.

³ Pursuant to section 19A and G.L. c. 78, § 19B (1984 ed.), the Board has promulgated such standards. See 605 C.M.R. §§ 4.00 and 5.00 *et seq.*

⁴ G.L. c. 78, § 19 (1984 ed.), gives the Board the power to “contract with any other state agency, city or town, public or private library to provide improved *library services* in an area, or to secure such services as may be agreed upon, *which services may include, but need not be limited to*, the lending of books and related library material, the establishment of branch libraries, depositories or bookmobile service, and to cooperative purchasing and processing of books, recordings, films, and related library materials” (emphasis added). However, this section expressly does not define the full contours of the term “library services.”

⁵ The Board could promulgate a regulation defining the term “library service.” That definition might exclude “capital expenditures,” in which case the regulation might also define what is meant by “capital expenditures.” This would provide guidance to the Board and to municipalities and resolve any ambiguity that might otherwise exist.

⁶ This federal statute authorizes the appropriation of monies to make grants to states for, among other things, “library services,” “public library services,” and “construction.” 20 U.S.C. § 351b. “Library service” is defined as “the performance of all activities of a library relating to the collection and organization of library materials and to making the materials and information of a library available to a clientele.” 20 U.S.C. § 351a(3). “Public library services” are defined as “library services furnished by a public library free of charge.” 20 U.S.C. § 351a(6). The term “construction” includes “construction of new buildings and acquisition, expansion, remodeling, and alteration of existing buildings” 20 U.S.C. § 351a(2).

April 23, 1986

Number 9

Roy A. Hammer, Esq.
Chairman, IOLTA Implementation Committee
20 West Street, 3rd Floor
Boston, MA 02111

Dear Mr. Hammer:

You have asked my opinion concerning the operation of the Massachusetts Interest on Lawyers' Trust Account (IOLTA) program established pursuant to the decision in *Petition by the Massachusetts Bar Association and the Boston Bar Association*, 395 Mass. 1 (1985). In particular, you have asked whether, under Massachusetts law, the "entire beneficial interest" in the interest-bearing accounts for clients' funds to be established by lawyers under the IOLTA program will be held by the three tax-exempt charitable entities designated by the Supreme Judicial Court to receive the interest or dividends on such accounts.¹ For the reasons discussed below, it is my opinion that these three entities will hold the "entire beneficial interest" in such accounts even though they are not the legal owners of the accounts.²

In *Petition by the Massachusetts Bar Association*, *supra*, the Court amended Canon 9, DR 9-102, of Rule 3:07 of the Rules of the Supreme Judicial Court to authorize a lawyer or law firm, on a voluntary basis, to create and maintain interest-bearing trust accounts for clients' funds which, in the judgment of the lawyer or law firm, are nominal in amount or are to be held for a short period of time, subject to certain restrictions. 395 Mass. at 9-11. One of these restrictions is that all interest earned on such accounts must be paid, as directed by the attorney or law firm establishing the account, to one of the three tax-exempt entities designated by the Supreme Judicial Court for that purpose, *see* n. 1, *supra*, for use in (1) improving the administration of justice or (2) delivering civil legal services to those who cannot afford them. *Id.* at 10.

Prior to this rule change, clients' funds that were small in amount or were to be held for a short period of time were frequently co-mingled and placed in non-interest-bearing accounts held in trust for the individual client.³ *Id.* at 4. The IOLTA program will achieve its objectives only if attorneys can pool and deposit such clients' funds in interest-bearing, negotiable order of withdrawal (NOW) accounts, because "traditional" checking accounts do not earn interest and other interest-bearing checking accounts do not provide for withdrawal of funds on short notice. *Id.* at 7.

NOW accounts were authorized nationwide by the Consumer Checking Account Equity Act of 1980, 12 U.S.C. §§ 1832 *et seq.* The unique feature of the NOW account, when compared to the "traditional" checking account, is the interest that may be earned on deposited funds. *See* S. Rep. No. 96-368, 96th Cong., 2nd Sess. (1979), *reprinted in* 1980 U.S. Code Cong. & Ad. News 236, 238-43. However, NOW accounts are permitted:

only with respect to deposits or accounts which consist solely of funds in which the *entire beneficial interest* is held by one or more individuals or by an organization which is operated primarily for

religious, philanthropic, charitable, educational, or other similar purposes and which is not operated for profit.

(Emphasis added.) 12 U.S.C. § 1832(a)(2). *See also* 12 C.F.R. § 217.1(c)(3)(i)–(ii).

In *Petition by the Massachusetts Bar Association*, *supra*, the Supreme Judicial Court held that the interest or dividends earned on nominal or short-term trust deposits in NOW accounts under the IOLTA program would not be the property of the attorney or his client for constitutional purposes. The court reasoned that since the IOLTA program involves only those funds that traditionally would not be earning interest for the attorney or the client, neither loses anything as a result of the IOLTA program. Rather, the practical effect of the IOLTA program is to shift a part of the economic benefit from the depository institution to one of the tax-exempt designated entities. There is no economic injury to the client or the lawyer, nor are they deprived of any property because the IOLTA program creates income where there was none before. *Id.* at 5–7.⁴ For similar reasons, the court also held that the IOLTA program would not contravene relevant ethical considerations because clients lose nothing and there is no financial benefit to the participating lawyer. *Id.* at 7.

With these general considerations in mind, I now turn to your question of whether, under Massachusetts law, the “entire beneficial interest” in the interest or dividends earned on clients’ funds held in NOW accounts under the IOLTA program belongs to the designated tax-exempt entities that receive such interest or dividends.

There does not appear to be any Massachusetts statute or case law that definitively interprets the term “beneficial interest” for these purposes. In light of this, the term “beneficial interest” should be construed in accordance with its common and ordinary meaning. *See, e.g., Dedham Water Company v. Town of Dedham*, 395 Mass. 510, 517–18 (1985) (where the statutory language was not specific and legislative intent was unclear, court looked to the “usual and accepted meanings” including other legal sources and dictionary definitions). Since the IOLTA program involves trust accounts, it is appropriate to consider first the meaning of “beneficial interest” as that term has been construed under general principles of trust law and administration. Under the general common law of trusts and trust administration, the person who enjoys the advantages of the administration of a trust by a trustee is the “beneficiary,” and any right given by the trust instrument to receive a benefit from the trust constitutes a “beneficial interest” in the trust. *Hammond v. United States*, 584 F. Supp. 163, 172–73 (D. Conn. 1984) and *authorities cited*; *Sasso v. Gallucci*, 447 N.Y.S. 2d 618, 620, 112 Misc. 2d 865 (Sup. Ct. 1982); *Restatement (Second) of Trusts* § 3(4) (1959); 1 G. Bogert, *Trusts & Trustees* § 1 (rev. 2d ed. 1979); II A. Scott, *The Law of Trusts* § 128.2 (3d ed. 1967) and *cases cited*; 5 Words and Phrases, Supplement at 43 (1985).

A similar interpretation of the term “beneficial interest” exists under well-established principles of property law:

The expression, beneficial use or beneficial ownership or interest, in property is quite frequent in the law, and means in this connection such a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial use or interest is in another, and where such right is recognized by law, and can be enforced by the courts.

Montana Catholic Missions v. Missoula County, 200 U.S. 118, 127-28 (1906). *Accord Christiansen v. Department of Social Security*, 15 Wash. 2d 465, 131 P. 2d 189, 191 (1942). See also *Norman G. Jensen, Inc. v. Federal Maritime Commission*, 497 F. 2d 1053, 1057 (8th Cir. 1974) (The traditional meaning of the term "beneficial interest" is "the right to the use and enjoyment of property. This interest is normally owned by the legal titleholder, but by agreement or operation of law can be placed in another.").

In these circumstances, it is also appropriate to consult a dictionary. See *Dedham Water Company*, *supra*; *Milligan v. Tibbetts Engineering Corp.*, 391 Mass. 364, 368 (1984) (court defined "improvement" as used in G.L. c. 260, § 2B, according to its usual and natural meaning including dictionary definitions). *Black's Law Dictionary* 142 (5th ed. 1979) defines "beneficial interest" as the "profit, benefit or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control." See also 5 *Words and Phrases* at 439, 449 (1968) and Supplement (1985) at 39. *Webster's Third New International Dictionary* 203 (1964) defines the term "beneficial" as "receiving or entitling one to have or receive in one's own right and for one's own benefit an advantage, use, or benefit that need not be monetary." It defines "interest" as the "right, title, or legal share in something." *Id.* at 1178. *Webster's New World Dictionary* 131 (2d College ed. 1974) defines the word "beneficiary" as "a person named to receive the income or inheritance from a will, insurance policy, *trust*, etc." (emphasis added).

Also relevant are the definitions of "beneficiary" and "interest in property" found in G.L. c. 191A, §§ 1 *et seq.* (1984 ed.), which governs the disclaimer of certain "interests in property," including an interest in a trust. "Beneficiary" is defined as "any person to whom, and any estate, trust, corporation or other legal entity to which, an interest in property would pass in any manner described in section two . . .," including under a trust. An "interest in property" is defined as:

- (1) *any legal or equitable interest or estate, whether present, future or contingent, in any real or personal property or in any fractional part, share, or portion thereof, or in any specific asset or assets thereof;*
- (2) *any power to appoint, consume, apply, or expend property or any other right, power, or privilege relating thereto;*
- (3) any fractional part, share or portion of any interest described in clause (1) or (2).

(Emphasis added.)

The well-established, traditional interpretation of the terms "beneficial interest," "beneficiary," and "interest" under common law principles of trust law and administration, and property law, the dictionary definitions of these terms, and the statutory definitions of "beneficiary" and "interest in property" contained in G.L. c. 191A, § 1 (1984 ed.), lead me to conclude that the three charitable entities designated by the Supreme Judicial Court to receive the interest and dividends generated by funds held in lawyers' trust accounts under the Massachusetts IOLTA program hold a⁵ "beneficial interest" in such accounts even though they are not the legal owners of the accounts.⁶

Very truly yours,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

¹ The three tax-exempt charitable entities so designated are the Massachusetts Bar Foundation, the Boston Bar Foundation, and the Massachusetts Legal Assistance Corporation. *Petition by the Massachusetts Bar Association*, 395 Mass. at 10 n. 1.

² As discussed below, the genesis of your request is an eligibility restriction the United States Congress placed on the use of negotiable order of withdrawal (NOW) accounts, accounts which are critical to the success of the IOLTA program. Under 12 U.S.C. § 1832(a)(2), NOW accounts are permitted only with respect to deposits or accounts which consists solely of funds in which the "entire beneficial interest" is held by one or more individuals or by a non-profit organization with charitable, educational, or similar purposes. Interpretation of the term "entire beneficial interest" in 12 U.S.C. § 1832(a)(2) is, at least in part, a question of federal law. However, according to your opinion request, you cannot obtain the necessary federal financial agency approvals (i.e., the Federal Reserve Board, the Federal Home Loan Bank Board, and the Federal Deposit & Insurance Corporation) for the use of NOW accounts under the IOLTA program unless you receive my opinion on the meaning of that term under Massachusetts law. In view of this and the fact that the Attorneys General of several other states have issued such opinions, *see* n. 5, *infra*, I have proceeded to issue this opinion, although I do not ordinarily issue opinions as to the interpretation of federal law.

³ In contrast, large sums of money held for a client by an attorney for an indefinite period or long-term period traditionally could be and were placed in separate interest-bearing accounts for the benefit of the clients. *Id.* at 4. This practice is not affected by the rule change.

⁴ As the court recognized, its holding is consistent with the Internal Revenue Service ruling that interest earned on a lawyer's trust account and paid to a charitable entity under an IOLTA program is not includable in the client's gross income so long as the client cannot exercise any control over the creation or destiny of the earnings generated on his attorney-held funds. *Id.* at 8 (citing Rev. Ruling 81-209, 1981-2 C.B. 16, and 26 C.F.R. § 1.61-7). That ruling, which involved the IOLTA program in Florida, states that it is limited to the facts described therein, but the Massachusetts IOLTA program appears to be substantially the same as the Florida IOLTA program.

⁵ Since they are the only entities who may receive the interest or dividends, they hold the "entire beneficial interest" therein. *See also* II A. Scott, *The Law of Trusts* § 128.2 (3d ed. 1967) and cases cited.

⁶ I note that my opinion is consistent with those of Attorneys General in other states under similar IOLTA programs, including those of the Attorney General of Florida (August 21, 1981); the Attorney General of Maryland, 67 Op. Atty Gen. Md. 248 (August 19, 1982); the Attorney General of Illinois, 1983 Op. Atty Gen. Ill. 36 (September 14, 1983); the Attorney General of New Mexico (October 3, 1984); and the Attorney General of Missouri (April 2, 1985).

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