

TABLE OF CONTENTS

WYOMING ATTORNEY GENERAL’S OFFICE OPINIONS – 1999

FORMAL OPINION NO. 99-001 1

You have requested our advice on whether the Sheridan County Board of County Commissioners may engage in a collective bargaining process with the United Mine Workers of America, and related questions regarding how the collective bargaining process may be adopted and its binding effect on future boards.

FORMAL OPINION NO. 99-002 7

Can the County regulate two lot divisions as “subdivisions” under its Land Development Regulations?

If the answer to the first question is “no” what other statutes might be applied to allow the County to regulate two lot land divisions or “lot splits”?

If lot splits cannot be regulated, is there a mechanism to prevent a developer from circumventing the subdivision regulations by executing a series of lot splits?

FORMAL OPINION NO. 99-003 13

Does revenue derived from a tax imposed pursuant to W.S. 39-6-412(k) constitute general fund money of the County such that the bid procedure set forth in W.S. 18-6-201(a) is required to be followed in utilizing these funds to pay for the construction of a jail?

FORMAL OPINION 99-004 16

What are the restrictions on the Miner’s Hospital Fund? If the fund were used for other than the stated purpose, what ramifications would result?

Is there a mechanism to free the Miner’s Hospital Funds for other uses?

FORMAL OPINION NO. 99-005 14

The Pari-Mutuel Commission has raised a question regarding whether WYO. STAT. § 11-25-104(j) allows appeals from decisions of the stewards regarding rulings on the outcome of fouls committed during the running of a race.

FORMAL OPINION NO. 99-006 31

Do Game and Fish enforcement officers have authority to enter private lands without a search warrant, or without landowner permission, or “without probable cause” that a violation is occurring in order to check compliance with hunting and fishing laws and regulations?

May Game and Fish law enforcement officers enter **private property** to check compliance with statute and regulations when it is simply known or probable that hunting or fishing activities are occurring?

If wardens do have the authority, then does the Commission have the power through policy to restrict this authority on private lands? If the Commission does have this power, the Commission could, 1) choose to restrict enforcement authority or, 2) choose not to restrict enforcement authority on private lands.

FORMAL OPINION NO. 99-007 41

Whether the residency requirement under WYO. STAT. § 16-6-301(b) requires that bidding corporate parties be incorporated or maintain their principal office in Wyoming.

FORMAL OPINION NO. 99-008 46

May state agencies use compensatory time in lieu of monetary overtime pay to compensate at-will contract employees for overtime work?

FORMAL OPINION NO. 99-009 52

Who is vested with jurisdictional authority over fire safety and building codes in health care facilities constructed in Wyoming municipalities?

In collecting on a debt arising out of a consumer credit transaction, may a collection agency collect from the consumer any portion of the commission or other fee charged by the collection agency to the creditor for its services in collection of that debt?

In collecting on a debt arising out of consumer credit transaction, may a collection agency collect from the consumer any fees that are permitted to be charged to the consumer under the debt agreement, even if the creditor has not assessed the fees?

Is Section 11(a) of Chapter 4 of the Regulations in conflict with the Code?

February 26, 1999

FORMAL OPINION NO. 99-001

TO: Matthew F. Redle
Sheridan County and Prosecuting Attorney

FROM: Gay Woodhouse
Attorney General

Michael L. Hubbard
Deputy Attorney General

Martin L. Hardsocg
Assistant Attorney General

RE: Inquiry concerning Sheridan County Board of Commissioner's authority to enter collective bargaining agreement.

You have requested our advice on whether the Sheridan County Board of County Commissioners may engage in a collective bargaining process with the United Mine Workers of America, and related questions regarding how the collective bargaining process may be adopted and its binding effect on future boards.

Consistent with Wyoming case law and advice given in Attorney General Opinion No. 81-012, (Sept. 1, 1981), authored by Steven F. Freudenthal, a governmental entity may not enter into a collective bargaining process "absent express statutory or constitutional authority." Because it is the Attorney General's advice that the Sheridan County Board of Commissioners is not authorized to enter a collective bargaining agreement, related issues will not be addressed.

Wyoming law defining collective bargaining by governing bodies

WYO. STAT. § 27-7-101 provides:

It is hereby declared to be the policy of the state of Wyoming that workers have the right to organize for the purpose of protecting the freedom of labor, and of bargaining collectively with employers of labor for acceptable terms and conditions of employment, and that in the exercise of the aforesaid rights, workers should be free from the interference, restraint or

coercion of employers of labor, or their agents in any concerted activities for their mutual aid or protection.

Whether this statutory policy applies to public employees has been the subject of litigation in Wyoming.

The issue of whether public entities, as employers, are authorized to enter collective bargaining agreements with public employees, has arisen several times over the last approximate thirty years. In 1968, the Wyoming Supreme Court addressed the issue of whether the city of Laramie could collectively bargain with municipal firefighters in *State v. City of Laramie*, 437 P.2d 295 (Wyo. 1968). The Wyoming Supreme Court noted the majority rule that there is no right by public employees to collectively bargain with governing bodies. *Id.* at 299. However, in that case, there existed specific statutory authority requiring municipalities to collectively bargain with its firefighters. The court held that the statute requiring collective bargaining with firefighters was constitutional but refused to address the broader question of whether governing bodies could enter a collective bargaining relationship with public employees absent explicit statutory authority. *Id.*

In 1975, the Court again addressed collective bargaining between governmental entities and public employees in *Retail Clerks Local 187 v. University of Wyoming*, 531 P.2d 884 (Wyo. 1975). A declaratory judgment action was brought against the University of Wyoming by a union of the university's employees to enforce alleged rights to collective bargaining with the university. After the Court held that there was no subject-matter jurisdiction to hear the declaratory judgment action, the Court briefly addressed the issue of whether the plaintiff union was statutorily entitled to sue to force a collective bargaining agreement with the University, notwithstanding the sovereign immunity status accorded governing bodies.

Again, the Court recognized the widely-held majority rule that "statutes governing labor relations between employers and employees are construed only to apply to private industry." *Id.* at 888 (citing numerous cases).¹ Further, the court held that unless such statutes contain explicit language making collective bargaining requirements applicable to municipalities, no such requirement existed. *Id.* The Court adopted this approach, citing among other cases the United States Supreme Court's determination in *United States v. United Mine Workers*

¹ See also 2 Michael E. Libonati & John Martinez, *Local Government Law* § 10.42 (1993 & Supp. 1998), where the authors explain that "[M]ost jurisdictions deny local government units authority to bargain collectively with public employees in the absence of enabling legislation."; William L. Corbett, Comment, *The Right of Wyoming State and Municipal Employees to Organize, Receive Exclusive Recognition, and Bargain Collectively*, 5 *Land & Water L. Rev.* 605, 611 (1970), where author explains "The majority of these cases have held that unless the public employer is expressly authorized to bargain collectively, the government cannot do so." (Citation omitted).

of America, 330 U.S. 258 at 267, in which the Court addressed the similar “Norris-LaGuardia Act,” and in which the Court stated “these considerations, on their face, obviously do not apply to the Government as an employer or to relations between the Government and its employees.” *Id.*

Thus, in *Retail Clerks Local 187* and *City of Laramie*, the Wyoming Supreme Court expressly recognized the majority rule that collective bargaining rights do not apply to the employment relationships between governing bodies and public employees, unless explicitly provided for in statute.

Three years later in *Police Protective Association of Casper v. City of Casper*, 575 P.2d 1146 (Wyo. 1978), the Wyoming Supreme Court again had an opportunity to address whether a city had authority to enter a collective bargaining agreement. The majority avoided the issue and decided the dispute on a contractual basis, refusing to address the issue of whether the City of Casper could collectively bargain with its police force.

However, in *Police Protective Association of Casper*, Justice Raper authored a well-reasoned specially concurring opinion, in which Justice Thomas joined, addressing the issue of whether governing bodies were legally *authorized* to enter into collective bargaining agreements with their public employees. While Justice Raper agreed that public employees could organize representation to improve their employment rights, he opined that unless expressed, specific statutory authority exists, governing bodies could not enter a collective bargaining agreement with their employees. In support of this conclusion, Justice Raper cited *Retail Clerks Local 187*, stating “[I]t was made clear in *Retail Clerks Local 187 AFL-CIO v. University of Wyoming*, 1975, 531 P.2d 884, that statutes governing labor relations between employers and employees apply only to **private industry**.” (emphasis added) *Id.* at 1153.

Justice Raper further relied upon the prevailing majority view that unless specifically authorized, “a governmental body may not enter into a collective-bargaining agreement with its employees.” *Id.* (citing numerous supporting cases).

In further support of his concurring opinion, Justice Raper cited the often-cited rule that a governing body may not delegate away its continuing legislative discretion and authority. He explained that this rule is derived from the paramount interest of preserving legislative control, the loss of which would “usurp those legislative powers, which cannot be contracted away.” *Id.* at 1154. Finally, Justice Raper noted that where a legislature chooses to authorize collective bargaining (noting that a number of states have provided for collective bargaining), such authority is to be carefully defined through limitation and regulation of each party’s obligations under the collective bargaining agreement. *Id.* Justice Raper concluded that the Wyoming legislature’s specific authorization for collective bargaining with Wyoming firemen, and conversely, the lack of similar authority with respect to other public employees,

represented legislative intent that such collective bargaining not be permitted unless expressly authorized by statute. *Id.*

Formal Attorney General Opinions

This office has rendered two formal opinions on collective bargaining between particular governmental bodies and public employees. Acting Attorney General John J. Rooney issued a formal opinion on whether a board of trustees of a school district could recognize a union and whether it could enter a collective bargaining relationship with the union. Att'y Gen. Op. No. 78-18 (July 3, 1978). After reviewing the cases cited herein, Attorney General Rooney opined that because there existed broad statutory authority for school districts to contract with teachers, school districts were permitted to collectively bargain with teachers. The Attorney General further concluded that under the broad statutory authority given school districts, a school district could collectively bargain but was not required to do so.

Approximately three years later in 1981, Attorney General Steven F. Freudenthal issued a formal opinion addressing whether the City of Casper was authorized to enter a collective bargaining relationship with the Police Protective Association of Casper. Att'y Gen. Op. No. 81-012 (Sept. 1, 1981). In his opinion, Attorney General Freudenthal expressly adopted the position of Justice Raper in his specially concurring opinion in *Police Protective Association of Casper v. City of Casper*, 575 P.2d 1146, 1150-54 (Wyo. 1978), where Justice Raper concluded that a governing body could not enter into a collective bargaining relationship without specific and express authority to do so. Citing the same reasons relied upon by Justice Raper, including the majority rule and the general prohibition against delegation of legislative control, Attorney General Freudenthal opined that the City of Casper could not collectively bargain with its public employees without express authority or constitutional authority, which he concluded did not exist.

In sum, the Wyoming Supreme Court's decision in *Retail Clerks Local 187 AFL-CIO* and Justice Raper's concurring opinion in *Police Protective Association of Casper*, as well as Attorney General Steven Freudenthal's 1981 formal opinion, No. 81-012, adopt the majority rule that a governing body may not enter a collective bargaining agreement with its public employees, absent express and specific authority to do so.

Without expressed, specific authority, the Sheridan County Board of Commissioners may not enter into a collective bargaining agreement

As articulated in the Wyoming case law and subsequent Attorney General opinions cited above, a governing body may not enter into a collective bargaining agreement with its public employees unless it has express and explicit authority to enter such a collective bargaining relationship.

"Municipalities and other political subdivisions are creatures of the State, and they only have such powers as are bestowed by the State." *Police Protective Association v. Casper*, 55 P.2d 1146, 1154 (Wyo. 1978). A review of Sheridan County's authority pursuant to WYO.

STAT. § 18-2-101 *et seq.* fails to disclose any specific authority which would permit the Sheridan County Board of County Commissioners to enter into a collective bargaining agreement. While WYO. STAT. § 18-2-101(a)(iv) allows counties to enter into contracts and perform other acts in the “exercise of its corporate or administrative powers,” this broad authority lacks the specificity required to enter into a collective bargaining agreement. “A grant to public employees of full collective-bargaining rights must be ***deliberately expressed and is not to be implied.***” *Police Protective Association of Casper v. City of Casper*, 575 P.2d 1146, 1153 (Wyo. 1978) (Justice Raper’s concurring opinion) (citation omitted) (emphasis added).

While argument may be made that authority to collectively bargain is implied, this argument fails under closer examination. To be implied, a power must be necessarily or fairly implied from or incident to an express power, or essential to effectuation of an express authority.” Att’y Gen. Op. No. 81-012 (Sept. 1, 1981) (citing *Schoeller v. Board of County Commissioners*, 568 P.2d 869, 876 (Wyo. 1977)). While Sheridan County may enter contracts and perform acts necessary to the exercise of its corporate or administrative powers, authority to collectively bargain is not an authority reasonably inferred or implied from this broad authority nor is the authority to collectively bargain essential or even necessary to effectuate this broad authority.

In any event, there is no statutory language which specifically provides Sheridan County authority to collectively bargain (with the exception of firemen pursuant to WYO. STAT. § 27-10-101 *et seq.*), which is required under Wyoming case precedent and attorney general opinion.

In conclusion, Wyoming statutes defining the powers and responsibilities of counties, including Sheridan County, do not include specific, express authority granting counties the power to collectively bargain. Because no specific, express authority to collectively bargain exists (with the exception of firemen pursuant to WYO. STAT. § 27-10-101 *et seq.*), it is our opinion that Sheridan County may not enter into a collective bargaining relationship with its public employees.

June 22, 1999

FORMAL OPINION NO. 99-002

TO: Stephen E. Weichman
Teton County and Prosecuting Attorney

FROM: Gay Woodhouse
Attorney General

Michael L. Hubbard
Deputy Attorney General

RE: Subdivision Issues

Dear Mr. Weichman:

You have requested the opinion of the Attorney General on the following issues regarding the authority of counties to regulate subdivisions.

- 1) Can the County regulate two lot divisions as “subdivisions” under its Land Development Regulations?
- 2) If the answer to the first question is “no” what other statutes might be applied to allow the County to regulate two lot land divisions or “lot splits”?
- 3) If lot splits cannot be regulated, is there a mechanism to prevent a developer from circumventing the subdivision regulations by executing a series of lot splits?

DISCUSSION

In 1997, the Wyoming Supreme Court rendered its decision in *McCellan v. State*, 933 P.2d 461 (Wyo. 1997), a criminal case involving land splits under the Wyoming real estate subdivision laws. In *McCellan, supra*, the defendant made the argument that the subdivision laws allowed land to be divided one time into two parcels, one or both of which are less than thirty-five acres, without a subdivision being created. This argument, ultimately rejected by the court, is based on WYO. STAT. § 18-5-302(a)(vii), which defines “subdivision” as follows:

‘Subdivision’ means **a division of a lot, tract, parcel or other unit of land into three (3) or more lots, plots, units, sites or other subdivision of land** for the immediate or future purpose

of sale, building development or redevelopment for residential, recreational, industrial, commercial or public uses. The word 'subdivide' or any derivative thereof shall have reference to the term subdivision, including mobile home courts, the creation of which constitutes a subdivision of land. (Emphasis added.)

WYO. STAT. § 18-5-304 specifically provides that "[N]o person shall subdivide land or commence the physical layout or construction of a subdivision without first obtaining a subdivision permit from the board of the county in which the land is located." WYO. STAT. § 18-5-314 provides for criminal sanctions for persons who willfully violate the act or any rule or order issued under this article.

In *McCellan, supra*, the defendant purchases approximately 1,000 acres of land in Johnson County. Defendant conveyed 40 acres to his mother and step-father on January 19, 1994. On May 12, 1994, the mother and step-father conveyed 30 of the 40 acres to the Tradesman Corporation, a closely held corporation. Defendant was president and vice-president of the Tradesman Corporation, and his wife was its secretary and treasurer.

Thereafter, defendant conveyed 40 acres to himself and his wife on May 31, 1994. On the same date, defendant and his wife conveyed 20 of their 40 acres to Dave L. Costello and Patricia Costello. On August 31, 1994, the Tradesman Corporation conveyed 20 acres of its 30 acres to Defendant.

On September 6, 1994, defendant and his wife conveyed their remaining 20 acres to his mother and step-father. On the same date, defendant conveyed 10 acres to his mother and 10 acres to his step-father. Defendant kept the remaining 85.216 acres of the 165.216 acres involved in the transactions in his own name. At the end of the series of conveyances, the 165.216 acres was divided as follows:

Defendant	85.216 acres
Mother and Step-father	30.00 acres
Tradesman Corporation	10.00 acres
Mother	10.00 acres
Step-father	10.00 acres
Costellos	20.00 acres

The defendant did not apply for a subdivision permit prior to making any of the conveyances. Defendant, after a jury trial, was found guilty of three counts of violating the subdivision laws. The conveyance of 20 acres to the Costellos on May 31, 1994, was determined by the jury to be illegal. In addition, the conveyance of 10 acres to his mother on September 6, 1994, was illegal, as well as the conveyance of 10 acres to his step-father on September 6, 1994.

In response to the defendant's argument that the subdivision laws allow land to be divided one time into two parcels, one or both of which are less than 35 acres, the *McCellan* court explained:

If we were to read the statute as McCellan suggests, there would never be a subdivision or a statute violated by a conveyance or a series of conveyances since each conveyance of land to another person necessarily splits the land into only two parcels. We will not construe a statute in a manner which will render any portion of it meaningless. *McAdams v. State*, 907 P.2d 1302, 1304 (Wyo. 1995).

The court noted that the Costello conveyance was not an isolated conveyance of 20 acres from McCellan's larger tract, but it was a part of a broader division on McCellan's land into 3 or more parcels. Further, the conveyances to the defendant's mother and defendant's step-father of 10 acres each amounted to further and independent subdivisions of the land. *McCellan, supra*, 933 P.2d at 465.

The court further explained that the jury was entitled to consider the history of conveyances. The court noted that WYO. STAT. § 18-5-303 which provides for exemptions has an exception, *i.e.*, "**unless the method of sale is adopted for the purpose of evading the provisions of this article**, this article shall not apply to." In other words, the exemptions do not apply if the method of sale is for the purpose of evading the provisions of the subdivision laws. The history of the conveyances could be considered to determine defendant's intent to evade the subdivision requirement.

In *McCellan, supra*, the defendant presented a series of constitutional challenges to the subdivision statutes. With regard to the vagueness challenge, the court concluded:

We conclude that the provisions in the real estate subdivisions article afford sufficient notice to people of average intelligence **that dividing land into three or more parcels of less than thirty-five acres without obtaining a permit is unlawful**. The statute clearly proscribes such activity . . . (Emphasis added.)

Id., 933 P.2d at 467.

Your first question is as follows:

Can the County regulate two lot land divisions as "subdivisions" under its Land Development Regulations?

The Teton County regulations at Article VIII, page 24, define “subdivision” differently than the statutory definition. The County regulations provide:

Subdivision means any division of a plat, tract, parcel, or lot of land into two (2) or more parts by means of platting in accordance with the procedures and standards of Article VI, Platting and Land Records.

As you explain, the justification for this definition is found at WYO. STAT. § 18-5-315, which provides:

If any board **has or enacts resolutions or regulations which impose requirements on subdividers or subdivisions** which are more restrictive than the provisions of this article, **the authority to enact such local resolutions or regulations being hereby granted**, the local provisions are not superseded by the provisions of this article. (Emphasis added.)

The plain language of this provision relates to “resolutions or regulations which impose [more restrictive] requirements.” The statutory minimum requirements for subdivision permits are found at WYO. STAT. § 18-5-306, while the statutory definitions of “subdivision” and “subdivider” are found at WYO. STAT. § 18-5-302. This authority seems to be limited.

This office essentially answered your question in Formal Opinion No. 79-35 rendered on December 18, 1979. One of the several questions addressed in the opinion was as follows:

Are the exemptions set forth under W.S. 18-5-303 of the Real Estate Subdivision Act subject to nullification by the boards of county commissioners under authority of W.S. 18-5-315?

We answered the question “no”! The opinion quoted a subdivision case from Montana, *State ex rel. Swart v. Casne*, 564 P.2d 983, 986 (Mont. 1977), “[A]n administrative agency is not a ‘super legislature’ empowered to change statutory law under the cloak of an assumed delegated power.” The opinion went on to discuss WYO. STAT. § 18-5-315 in great detail:

It is apparent that the Legislature did not grant the power to determine to whom the article should apply, but rather, the power to require more of those to whom it does apply. This result is demanded by the fact that nowhere can a definition of “requirement” be found which is in terms of whom. All definitions are in terms of what, as in “something demanded.”

Moreover, interpretation of the “requirement” limitation is reinforced by the words “on subdividers or subdivisions” which immediately follow the word “requirements.” If “requirements” were intended to include regulations determining to whom the provision should apply, the Legislature would not have included words such as “subdividers” or “subdivisions,” which define the coverage of the Act.

Like the definitions of “subdivider” and “subdivision,” the exemptions of W.S. 18-5-303 are concerned not with what is required or demanded by the article, but rather with to whom the article applies. **Boards were not given the power to change the definitions of W.S. 18-5-302 nor to nullify the exemptions of W.S. 18-5-303.** The grant of W.S. 18-5-315 is limited to the power to determine what is required of those who are subject to the article, and then only to making those things demanded more restrictive. (Emphasis added.)

Id. at p.353

The opinion concludes:

The boards of county commissioners were granted the authority in W.S. 18-5-315 to supplement the provisions of the article by adopting resolutions or regulations which contain requirements more restrictive than those contained in W.S. 18-5-306. **This authority is limited to adopting more restrictive requirements; it does not include the power to change the scope of the article nor to regulate divisions of land exempted from it.** (Emphasis added.)

Id. at p. 354.

Schoeller v. Board of County Comrs., 568 P.2d 869, 877 (Wyo. 1977), noted that in general the powers of county boards are administrative and they have only such powers as might be granted expressly by statute or necessarily implied to execute some express power. In other words, delegations of power are strictly construed and convey no powers except those expressed or necessarily implied to carry out the object of the grant.

We believe that the authority granted in WYO. STAT. § 18-5-315 must be strictly construed. This authority does not, in our opinion, extend to changing the definition of “subdivision” for purposes of the Wyoming real estate subdivision laws. As noted by the

Wyoming Supreme Court in *McCellan, supra*, the provisions of the real estate subdivisions article afford sufficient notice, “that dividing land into three or more parcels of less than thirty-five acres without obtaining a permit is unlawful.” The statute has established the parameters of the subdivision laws. The county has no authority to change the statutory definition. However, *McCellan, supra*, does not leave the county unprotected from attempts to evade the subdivisions laws by way of lot splits.

Question #2

If the answer to the first question is “no” what other statutes might be applied to allow the County to regulate two lot land divisions or “lot splits”?

If the lot split is simply a single division of land into two parcels, or the split falls into one of the statutory exemptions with no evidence of any intent to evade the provisions of the subdivision laws, then the division does not qualify as a subdivision. However, if there are multiple land splits of the same tract of land over a period of time, similar to the facts in *McCellan*, or there is an intent to evade the subdivision laws, then the subdivision laws applied as provided in *McCellan, supra*. Each factual situation must be reviewed on a case-by-case basis to determine *McCellan’s* applicability.

Question #3

If lot splits cannot be regulated, is there a mechanism to prevent a developer from circumventing the subdivision regulations by executing a series of lot splits?

Yes, please see *McCellan v. State*, 933 P.2d 461 (Wyo. 1997). As noted by the Wyoming Supreme Court, the statute cannot be read in such a way that would render any portion of it meaningless.

We hope this information is helpful.

August 2, 1999

FORMAL OPINION NO. 99-003

TO: Norman E. Young, Esq.
Fremont County and Prosecuting Attorney

FROM: Gay Woodhouse
Attorney General

Michael L. Hubbard
Deputy Attorney General

Jennifer A. Golden
Senior Assistant Attorney General

QUESTION PRESENTED:

Does revenue derived from a tax imposed pursuant to W.S. 39-6-412(k) constitute general fund money of the County such that the bid procedure set forth in W.S. 18-6-201(a) is required to be followed in utilizing these funds to pay for the construction of a jail?

ANSWER: No, please see discussion

DISCUSSION

WYO. STAT. § 18-6-201(a) generally provides for the board of county commissioners to “receive sealed proposals for the building of the jail” Subsection (b) of WYO. STAT. § 18-6-201 provides:

This section applies only if the cost of the construction of the jail is to be paid from the general fund of the county. If bonds are to be issued pursuant to W.S. 18-4-302 then the above limitations shall not apply. (emphasis added)

In interpreting statutes, the court looks first to the language of the statute, and if the language is clear and unambiguous, the court will not look at statutory rules of construction, nor will it attribute another meaning to the statute, but will give the statute effect according to its plain and obvious meaning. *Amoco Production Co. v. Hakala*, 644 P.2d 785 (Wyo. 1982).

Absent ambiguity in a statute, there is no need to resort to any rules of statutory construction. *Matter of North Laramie Land Co.*, 605 P.2d 367 (Wyo. 1980). Ambiguity exists when a word or group of words in a statute is susceptible of more than one meaning. *State ex rel. Albany County Weed & Pest District v. Board of County Com'rs of Albany County*, 592 P.2d 1154 (Wyo. 1979). We do not find any ambiguity in the words used in WYO.STAT. § 18-6-201(b).

In this instance, bonds will not be issued because the citizens of Fremont County approved the optional one cent "capital facilities tax" provided for pursuant to WYO. STAT. § 39-6-412(k) (after the 1998 re-codification, this section is found at WYO. STAT. §§ 39-15-203(a)(iii) and 39-15-204(a)(iii)) in order to construct a new jail. Thus, your question is whether or not the optional sales tax money constitutes general fund money.

WYO. STAT. § 39-15-204(a)(iii) authorizes the county to impose an excise tax not to exceed one percent (1%) upon retail sales of tangible personal property, admissions and services made, and upon storage, use and consumption of tangible personal property, within the county. The revenue from the tax must be used in a specified amount for specific purposes authorized by the qualified electors. Furthermore, the specific purposes may not include ordinary operations of local government except those operations related to a specific project. The amount of revenue to be collected and the purpose or purposes for which it is proposed to be used must be specified in the ballot proposition. The tax terminates on the last day of the month following the month in which the amount approved by the electors is collected. WYO. STAT. § 39-15-203 (a)(iii)(C).

The administration of the tax is vested in the Department of Revenue. The Department is required to keep complete records of all monies received and disbursed by it. WYO. STAT. § 39-15-211(b). All revenue collected by the department must be transferred to the state treasurer. Pursuant to statute, the state treasurer deducts one percent (1%) to defray the cost of collecting the tax and administrative expenses incident thereto and thereafter the state treasurer is required to:

Deposit the remainder into the trust and agency fund for monthly distribution to the county treasurer of the county in which the tax has been imposed to be distributed immediately by the treasurer to the sponsoring entity; (emphasis added)

WYO. STAT. § 39-15-211(b)(ii).

The above-quoted statute is less than clear as to which account the money is to be held. The statute simply does not say whether this money is to be placed in the general fund or some other account by the treasurer of the sponsoring entity. Generally, a reviewing court will not supply omissions in a statute and words may not be inserted in a statutory provision under the guise of interpretation. *Matter of Voss' Adoption*, 550 P.2d 481 (Wyo. 1976). The omission of words from a statute must be considered intentional on the part of the legislature.

Carroll By and Through Miller v. Wyoming Production Credit Ass'n, 755 P.2d 869 (Wyo. 1988). Unlike the optional sales tax authorized by WYO.STAT. § 39-15-203(a)(i) which is specifically directed into the county general fund by WYO.STAT. § 39-15-211(a)(i)(B)(I), the capital facilities sales tax is not specifically directed into the county general fund.

Furthermore, in ascertaining the meaning and purpose of a statute, all statutes which relate to the same subject or which have the same general purpose should be looked to. *Kamp v. Kamp*, 640 P.2d 48 (Wyo. 1982). The Wyoming Funds Consolidation Act found at WYO.STAT. §§ 9-4-201 thru 9-4-216 may provide some insight with regard to legislative intent.

Under WYO.STAT. § 9-4-203(a)(iii) "Earmarked revenue" is generally defined as "revenue which is dedicated by law for expenditure for specified activities, functions or programs and limited in the amount expended for the activities by the amount of money deposited to the credit of the governmental unit responsible for the specified functions and activities." At least at the state level, the "earmarked revenue fund is to be used to account for state revenue which is specifically dedicated by law, whether earmarked or restricted, to defray the cost of a particular governmental unit, activity or function of state government...." WYO. STAT. § 9-4-203(c). By comparison, the "general fund is to be used to account for the ordinary operations of state government, and is designed to receive all revenues and account for all expenditures not otherwise provided for by law in any other fund." WYO. STAT. § 9-4-204(b).

WYO. STAT. § 18-6-201(b) provides that the receipt of sealed bids is required "only if the cost of the construction of the jail is to be paid from the general fund of the county." (emphasis added) In this case, the cost of the construction is to be paid by the capital facilities tax revenue approved by the voters. Such revenue is earmarked for the specific purpose and in a specific amount approved by the voters. It is not discretionary money, nor can it be used for the ordinary operations of local government. It is our opinion that the capital facilities tax revenue would not be considered general fund money of the county for purposes of WYO. STAT. § 18-6-201(b). By the same token, if the county had used monies generated by the optional sales tax authorized by WYO. STAT. § 39-15-203(a)(i), we would have drawn the opposite conclusion because WYO. STAT. § 39-15-211(a)(i)(B)(I) specifically directs such revenue into the county general fund. In this case, the capital facilities tax revenue is not directed into the county general fund, but rather is specifically directed to the sponsoring entity for the specific purpose approved by the voters.

All statutes must be construed in *pari materia*. *State ex rel. Motor Vehicle Div. v. Holtz*, 674 P.2d 732 (Wyo. 1983). Reading the statutes in *pari materia*, as we must, we believe that the capital facilities tax revenue is "earmarked revenue", as opposed to "general fund revenue." Therefore, WYO. STAT. § 18-6-201(b) does not require the county to receive sealed proposals for the building of the jail. Although the county is not required to receive

sealed bids, the county is not prohibited from using this procedure if the county commissioners deem it appropriate.

If you have further questions, please contact us at your convenience.

August 25, 1999

FORMAL OPINION 99-004

TO: Honorable Jim Geringer
Governor

FROM: Gay Woodhouse
Attorney General

Michael L. Hubbard
Deputy Attorney General

QUESTIONS PRESENTED:

- 1) What are the restrictions on the Miner's Hospital Fund? If the fund were used for other than the stated purpose, what ramifications would result?
- 2) Is there a mechanism to free the Miner's Hospital Funds for other uses?

SHORT ANSWERS:

- 1) So long as the funds are spent in a manner reasonably calculated to provide hospital services to disabled or incapacitated miners then the purpose of the land grant is fulfilled. Any other use may result in litigation.
- 2) Congress could amend the Act of Admission to free the funds for other uses.

DISCUSSION

A. USE OF FUNDS

Pursuant to the Act of Admission the State of Wyoming received land grants from the federal government. The land grants found at Section 11 of the Act of Admission were

provided in various amounts for specific purposes. For example, Section 11 provides for the following:

for a hospital for miners who shall become disabled or incapacitated to labor, while working in the mines of the state, 30,000 acres. (Emphasis added.)

Unlike other land grants found in Section 11, the above-quoted land grant for a miners' hospital did not specify a specific location for the hospital. Chapter 81 of the 1890-1891 Session Laws provided for the establishment of a hospital for miners. (1890-1891 Wyo. Sess. Laws Ch. 81.) Section 1 of the Act provided, the "hospital shall be located by a vote of the people, as hereinafter provided, which shall be a state charitable institution." Section 2 explained:

The objects of said hospital shall be to provide sustenance, care and medical and surgical attention for all miners, who shall become disabled or incapacitated to labor while working in the mines of the state, and who shall be in **need** of such sustenance, care or medical or surgical attention. (Emphasis added.)

Section 13 of the Act provided for a vote of the people to determine the location of the miners' hospital at the general election to be held in November of 1892. "Every city, town and village in the State of Wyoming, at or within three (3) miles of which shall be employed no less than one thousand (1,000) miners, shall be eligible as a seat for such hospital." Any city, town or village meeting this criteria could be nominated as a candidate for the location of the miners' hospital. Thereafter, a vote was held "For Seat of the Wyoming Miners' Hospital." All votes cast for any city, town or village not eligible for the hospital were excluded from the vote. See Section 19. As we know, Rock Springs was selected as the site for the miners' hospital.

In 1893, the Wyoming legislature appropriated money for the building and equipment of a hospital at or near the town of Rock Springs in Sweetwater County. (1893 Wyo. Sess. Laws Ch. 18.) A statewide mill levy ($\frac{3}{4}$ of the mill) was imposed as the "State Hospital building tax" to build the new hospital. An additional $\frac{1}{4}$ of one mill was imposed for maintenance of the hospital, which tax was known as the "State Hospital maintenance tax." (1893 Wyo. Sess. Laws Ch. 18, §§ 2 and 3.)

The Revised Statutes of 1899 located the State Miners' Hospital at Rock Springs, "to provide sustenance, care and medical and surgical attention for all miners who shall become disabled or incapacitated to labor while working in the mines of the state, and who shall be in need of such sustenance, care or medical or surgical attention, and to such other persons as may be admitted under the laws, rules and regulations established for the government thereof." The Revised Statutes of 1899 also changed the name of the hospital from the

Wyoming State Miners' Hospital to "The Wyoming General Hospital." R.S., Chapter 3, Sections 660-661.

In 1947, the Wyoming legislature conveyed the Wyoming General Hospital located at Rock Springs to Sweetwater County. The same act abolished the Wyoming General Hospital. Section 2 of the 1947 Act provided in part:

That while said property is operated and maintained as a hospital for miners who shall become disabled or incapacitated for labor while working in the mines of the State, or shall make provision for the hospitalization of such miners in such institution, the income from land granted to the State of Wyoming the United States of America under the provisions of the Act admitting said State to the Union, approved July 10, 1890, . . . and the income from proceeds derived from the sales of said lands or portion thereof, shall, as they accrue, be paid to said county to be used for the purposes for which said Federal Grant was made.

(1947 Wyo. Sess. Laws Ch. 64.)

In a formal opinion dated July 21, 1983, Op. Atty Gen. No. 83-012, this office explained that the above-quoted statute was repealed in 1974 by the Funds Consolidation Act that placed the miners' hospital land income fund as an account within the general fund and the miners' hospital permanent land fund was made an account within the permanent land fund. (1974 Wyo. Sess. Laws Ch. 16.) The opinion also explained that the only other reference to the miners' hospital was in the Act of Admission. As noted in the 1983 opinion:

[B]ecause there is no current Wyoming statute directing that funds received as the result of a grant of 30,000 acres of land to support a miners' hospital be paid to any specific hospital, it appears that these monies could be paid to any hospital that treats miners who have become disabled or incapacitated to labor while working in the mines of the State.

We would also note that there is no current Wyoming statute that designates Rock Springs, or any other location in Wyoming, as the seat for the miners' hospital.

Section 12 of the Act of Admission provided in pertinent part:

and the lands granted by this section shall be held, appropriated, and disposed of **exclusively** for the purposes herein mentioned, **in such manner as the legislature of the state may provide.** (Emphasis added.)

In Article 18, Section 2 of the Wyoming Constitution, Wyoming agrees to accept the grants of land from the federal government with the conditions and limitations that may be imposed by the acts or acts of Congress making such grants or donations. Article 18, Section 2 provides:

The proceeds from the sale and rental of all lands and other property donated, granted or received, or that may hereafter be donated, granted or received, from the United States or any other source, **shall be inviolably appropriated and applied to the specific purposes specified in the original grant or gifts.** (Emphasis added.)

In *United States v. New Mexico*, 536 F.2d 1324 (10th Cir. 1976), the Tenth Circuit Court of Appeals held:

The wording of the Enabling Act evidences a determination by Congress that the health needs of New Mexico miners could best be provided by a separate hospital for miners. To imply a more expansive purpose for the trust than that stated in the Enabling Act is to indulge in a license of construction which Congress intended to prevent.

Id. 536 F.2d at 1327.

The court explained that since the purpose of the grant was to establish and maintain a miners' hospital, the funds could not be spent at other hospitals even though such money is being used to provide health care for miners. Furthermore, the hospital must be operated as a licensed and certified general hospital. At a minimum the hospital must afford surgical care. *Id.* 536 F.2d at 1328-1329.

B. EXISTENCE OF A TRUST

More recently, a Utah court has questioned whether or not the language of the federal land grants for a miners' hospital created a "trust." In *United States Mine Workers of America v. State of Utah*, 6 F.Supp.2d 1298 (D. Utah 1998), the court held that Section 12 of the Utah Enabling Act does **not** create a trust relationship with the State as trustee and disabled miners as the beneficiaries. The court explained:

The Enabling Act gives **wide discretion** to the State to use the proceeds from the land grants in the manner that it designates as appropriate. The University Rehabilitation Center provides care to disabled miners free of charge and this is sufficient

compliance under the Utah Enabling Act. **Article XX of the Utah Constitution does not create a trust but merely emphasizes that the land should be used in the manner provided by law.** This case is distinguishable from *United States v. New Mexico*, in that the New Mexico Enabling Act is **vastly different** from the Utah Enabling Act. Finally, school trust lands are unique in that they are held in trust pursuant to the Utah Enabling Act, the Utah Constitution and the School and Institutional Trust Lands Management Act and therefore the use of these land grants does not apply to Section 12 of the Enabling Act and the grants for a miners' hospital. (Emphasis added.)

Id. 6 F.Supp.2d at 1306-1307.

Wyoming was admitted to the Union in 1890, four years before the State of Utah in 1894. The New Mexico Enabling Act was effective July 20, 1910, twenty years after the Wyoming Act of Admission. The Wyoming Act of Admission does not contain the trust language found in the New Mexico Enabling Act. In addition, the Wyoming Constitution does not contain the trust language found in the Utah Constitution with regard to the acceptance of the federal land grants. See Article XX of the Utah Constitution.

The Utah Enabling Act is similar to the Wyoming Act of Admission in that the Utah Enabling Act simply provides the following:

for a miners' hospital for disabled miners, fifteen thousand acres;
. . . and the lands granted by this section shall be held,
appropriated, and disposed of exclusively for the purposes
herein mentioned, in such manner as the legislature of the State
may provide.

This language is similar to the language found in Section 11 of the Wyoming Act of Admission and identical to the language of Section 12 of the Wyoming Act of Admission. By comparison, the language of the New Mexico Enabling Act at Section 10 provides:

That it is hereby declared that all lands hereby granted, including those which, having been heretofore granted to the said Territory, are hereby expressly transferred and confirmed to the State, shall be by the said State **held in trust**, to be disposed of in whole or in part only in manner as herein provided and for the several objects specified in the respective granting and confirmatory provisions, and that the natural products and money proceeds of any of said lands shall be subject to the **same trusts** as the lands producing the same.

Disposition of any of said lands, or of any money or thing of value directly or indirectly derived therefrom for any object other than that which such particular lands, or the lands from which such money or thing of value shall have been derived, were granted or confirmed, or in any manner contrary to the provisions of this Act, **shall be deemed a breach of trust.** (Emphasis added.)

Id. 6 F.Supp.2d at 1304.

The Utah court noted “the New Mexico Enabling Act actually specifies clearly that the lands shall be held in trust and further, it does not give any discretion whatsoever to the New Mexico legislature.” *Id.* 6 F.Supp.2d at 1304. The court also explained “[T]he Enabling Act of New Mexico and Arizona ‘marked a complete and absolute departure from the enabling acts under which other states were admitted to the Union’,” citing *Murphy v. State*, 65 Ariz. 338, 181 P.2d 336, 344 (1947). Of the first forty-eight states to enter the Union, only New Mexico and Arizona specify that lands are to be held in trust. *Id.* 6 F.Supp.2d at 1304-1305. Citing from *Murphy v. State*, *supra*, the court explained:

Where land was granted by the United States to the state for various purposes the acts of admission, the organic acts, or the enabling acts as passed by Congress were each specific as to the purpose for which the land was granted, **but all left to the legislatures of the states full power and authority to determine how the granted lands were to be sold or leased and how and by whom the moneys derived from disposition of the lands were to be kept and preserved for the purposes for which the lands had been granted.** (Emphasis added.)

Id. 6 F.Supp.2d at 1304-1305.

The court in *United Mine Workers of America v. State of Utah*, *supra*, explained, “[I]t is clear to this court that the intent of Congress changed dramatically from the time the Utah Enabling Act was passed to the time of passage of the New Mexico-Arizona Enabling Act.” In addition, the court noted, “it is equally clear that at the time of the Utah Enabling Act Congress’ intent was to give **wide discretion to the state legislature** when it came to the disposition of funds and it was not the intent of Congress that the lands be held in trust.” *Id.* 6 F.Supp.2d at 1305. (Emphasis added.)

The court also notes that many of the cases cited in support of the trust argument come out of Arizona and New Mexico. See *Lassen v. Arizona*, 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515 (1967); *United States v. New Mexico*, 536 F.2d 1325 (10th Cir. 1976). Such

cases do not necessarily control the interpretation of the Utah Enabling Act, nor the Wyoming Act of Admission. The court concluded:

Because Congress gave the State wide discretion in the manner in which the funds would be disposed of, the plain language of the statute does not create a trust in the traditional sense. **This court would agree that the lands granted for a miners' hospital should not be used for a prison or a park or for that matter even a hospital that charged disabled miners for treatment in the same manner it charged all of its patients. However, the manner in which the State chooses to accommodate disabled miners is left to the discretion of the legislature under the Utah Enabling Act** The fact that the legislature chose to use the funds for a rehabilitation center which treats other people in addition to miners is allowable. **So long as disabled miners can use the center free of charge then the purpose of the grant has been complied with.** (Emphasis added.)

Id. 6 F.Supp.2d at 1302-1303.

The State of Utah had never used the money from the land grants for a separate stand alone miners' hospital. In 1959, the money was transferred to the University of Utah for the purpose of establishing a rehabilitation center.

C. NEEDS ASSESSMENT

Interpreting the plain language of the federal land grants for the Wyoming miners' hospital there is nothing to suggest that Congress intended to create a trust. Further, there is a strong presumption that the plain language of the statute expresses Congressional intent. *Id.* 6 F.Supp.2d at 1302. Section 11 of the Act of Admission provides:

for a hospital for miners who shall become disabled or incapacitated to labor, while working in the mines of the state, 30,000 acres.

Section 12 provided in pertinent part that the lands would be "disposed of exclusively for the purposes herein mentioned, in such manner as the legislature of the state may provide." The Wyoming Constitution provides at Article 18, Section 2 that the proceeds "shall be inviolably appropriated and applied to the specific purposes specified in the original grant or gifts." Obviously, the money was to be used to provide hospital services for miners who become disabled or incapacitated while working in the mines of the state. As previously

noted, the land grants did not specify where the miners' hospital would be located. In fact, a popular election was held in 1892 to determine where the state miners' hospital would be located. The legislature has the discretion to locate the hospital where it deems appropriate. The funds should be used to provide the greatest benefit to the disabled miners of the State of Wyoming. A needs assessment would appear to be within the discretion of the legislature and would appear to be an appropriate use of the funds. The needs assessment would be an appropriate way to determine the most effective use of the funds throughout the State of Wyoming.

The manner in which the State chooses to accommodate disabled miners is left to the discretion of the legislature. The legislature is given wide discretion when it comes to the disposition of the fund for the stated purpose, *i.e.*, "for a hospital for miners who shall become disabled or incapacitated to labor, while working the mines of the state." We think that so long as these funds are spent in a manner reasonably calculated to provide hospital services to miners then the purpose of the land grant is fulfilled. Any other use of the funds would most likely result in litigation.

There is a mechanism to free the funds for other uses, namely federal legislation amending the Act of Admission. In fact, in 1996, Congress designated and ratified Utah's assignment of the miners' hospital funds to the University of Utah.

If we may be of further assistance, please contact us.

September 7, 1999

FORMAL OPINION NO. 99-005

TO: Frank Lamb
Executive Director
Pari-Mutuel Commission

FROM: Gay Woodhouse
Attorney General

Michael L. Hubbard
Deputy Attorney General

Barbara L. Boyer
Senior Assistant Attorney General

RE: Statutory authority to hear appeals from stewards' ruling on fouls committed during the running of a race

Dear Mr. Lamb:

The Pari-Mutuel Commission has raised a question regarding whether WYO. STAT. § 11-25-104(j) allows appeals from decisions of the stewards regarding rulings on the outcome of fouls committed during the running of a race. Under the current interpretation of the Pari-Mutuel statutes, the answer must be no.

An agency or commission "only has the power and authority granted by the constitution or statutes creating the same [citations omitted]. Such statutes must be strictly construed or 'any reasonable doubt of existence of any power must be resolved against the exercise thereof' [citations omitted]." *Tri-County Electric Association v. City of Gillette*, 525 P.2d 3, 8-9 (Wyo. 1974). In addition, the Wyoming Supreme Court held that "an administrative board has no power or authority other than that particularly conferred upon it by statute or by construction necessary to accomplish the aims of the statutes." *Ibid.* at 9. See also, *Hupp v. Employment Security Commission*, 715 P.2d 223, 225 (Wyo. 1986).

Restricting the right of appeal under certain circumstances is not without precedent in Wyoming. See *McGann v. City Council of City of Laramie*, 581 P.2d 1104 (Wyo. 1978) (dealing with the city of Laramie's authority to amend zoning classifications, which authority was not reviewable pursuant to the Administrative Procedure Act because the power conferred was legislative in nature, and the provisions of the APA do not apply to legislative

actions); *Walker v. Board of County Commissioners, Albany County*, 644 P.2d 772 (Wyo. 1982)(right of appeal of a new applicant for a liquor license from denial by licensing authority specifically prohibited by statute).

Barring a specific constitutional directive, the legislature can preclude judicial review:

'Each statute must be carefully examined to discover the legislature's intent to restrict judicial review of administrative action. [Citations omitted.] While it is often said that barring constitutional impediments the legislature can preclude judicial review [citations omitted], such intent must be made specifically manifest, and persuasive reason must exist to believe such was the legislative purpose. [citations omitted.] Only upon a showing of clear and convincing evidence of contrary legislative intent should the courts restrict access to judicial review.'

Walker, 644 P.2d at 774 (Wyo. 1982), quoting *U.S. Steel Corporation v. Wyoming Environmental Quality Council*, 575 P.2d 749, 750 (Wyo. 1978).

To determine whether the legislature has restricted appellate access in any way, the Pari-Mutuel Commission statutes must first be carefully examined. The pertinent section of the Pari-Mutuel Wagering Act is WYO. STAT. § 11-25-104 (emphasis added):

(e) The commission shall authorize by permits and supervise the conduct of all events provided for and regulated by this act, and shall make reasonable rules and regulations for the control, supervision and direction of applicants and permittees, including regulations providing for resolving scheduling conflicts and settling disputes between permittees and the supervising, disciplining, suspending, fining and barring from pari-mutuel events of all persons required to be licensed by this act, and for the holding, conducting and operating of all pari-mutuel events conducted pursuant to this act.

* * *

(g) The commission may delegate authority to enforce rules of the commission and this act to three (3) stewards at each pari-mutuel event, at least one (1) of whom shall be an employee of and selected by the commission. * * * Stewards shall exercise such reasonable and necessary authority as is designated by rules of the commission including the following:

- (i) Enforce rules of the commission and this act;
 - (ii) **Rule on the outcome of events;**
 - (iii) Levy fines not to exceed two hundred dollars (\$200.00) for violations of rules of the commission. Violations shall be reported daily and fines paid to the commission within forty-eight (48) hours of imposition and notice;
 - (iv) Suspend licenses not to exceed thirty (30) calendar days for violations of rules of the commission. Suspensions shall be reported to the commission daily;
 - (v) Recommend the commission impose fines or suspensions greater than permitted by paragraphs (iii) and (iv) of this subsection.
- (h) Only a licensed steward of the permitted event may impose fines or license suspensions except that a starter may impose fines when horses arrive at the gate until off time in an amount not exceeding two hundred dollars (\$200.00).
- (j) **Any fine or license suspension imposed by a steward or fine imposed by a starter may be appealed in writing to the commission within five (5) days after its imposition.** The commission may affirm or reverse the decision of a steward or starter or may increase or decrease any fine or suspension.

The lines of authority appear to be clearly laid out in the statutes. The Commission has full authority to authorize permits for the conducting of events, to license individuals involved in the business of racing, and to otherwise supervise the conduct of all events. As part of its authority to supervise the conduct of racing, the Commission has been given the power to adopt reasonable rules and regulations for the supervision and direction of licensees and permittees. In addition, by statute, the Commission has the power to delegate part of its responsibilities to a panel of stewards. The stewards, who are required to receive specific training and certification in all areas pertinent to horse racing, are given the authority by statute and rule to enforce the rules of the commission, to rule on the outcome of events, to levy fines, to suspend licenses, and to recommend cases to the Commission for increased fines and suspensions. Of these powers, the critical one in question involves the power of the stewards to rule on the outcome of races.

The stewards are given direct authority to rule on the outcome of races as they are the “judges” hired by the Commission to perform the on-site supervision of the race meet. Incidents involving riding violations committed by jockeys or interferences by a horse and/or rider are typical of the events that can occur during the running of a race, which may affect its outcome. The stewards watch the live race through binoculars and television monitors and then, in the case of a questionable racing incident, review the video tapes that typically show a head on view, a pan or side view and a backside view shot from the inside of the track. From these three angles, the stewards are able to review as many times as necessary a particular incident that may give rise to a foul. In addition, the stewards question the jockeys involved in the incident for their views. The review process is akin to instant replay and it helps the stewards make the most accurate decision that can be made in the time frame allowed.

The question is, however, whether these types of decisions are final and non appealable to the Pari-Mutuel Commission. The statutes clearly create the right of appeal to the Commission only in those cases involving actions taken against a license: a fine or suspension. Within the statutory scheme, the Commission retains full power over licenses, with the limited exception of the minor infractions that may be ruled on by the stewards. Because the Commission is the licensing authority, it makes sense that only the Commission has the power to take major enforcement action in the nature of revocation, suspension and fine. Decisions involving the outcome of a race, however, have been fully delegated to the three individuals chosen to supervise the conduct of racing and by statute have not been specifically included in those that may be appealed to the Commission. If the legislature had intended such decisions to be appealable, it would have written the statute in such a way as to be absolutely clear that all stewards’ decisions are appealable, instead of just certain of those decisions. *Hupp*, 715 P.2d at 227. However, under the reasoning of *Walker*, even if there appear to be restrictions upon the right of appeal, there still must be persuasive reason to believe the Legislature intended this result.

The Commission is typically a lay board (no provisions within the statutes require any expertise in the field of horse racing), and expert decisions on the actual running of the racing events are appropriately delegated to the expertise of the stewards. By the wording of the statutes that grants appellate review only to licensing issues, the final word regarding the official outcome of a race, therefore, rests with the stewards. See *Cramer v. New York State Racing Association*, 525 N.Y.S.2d 938 (NY 1988)(stewards are authorized to resolve all objections concerning a race and declare the official outcome for purposes of distributing the betting pools). The ability to have an official outcome of a race shortly after the race is run is an extremely important function of horse racing, as it allows the betting public to determine prior to the start of the next race whether they hold winning tickets, and it prevents the delay of the start of the next race. In addition, during the running of quarter horse trials, the determination of which horses qualify as the top runners is made at the end of the day’s trials. Significant delays in such determinations could impact the final races, typically run within one to two weeks.

Because of the difficulty a lay commission has when faced with the task of reviewing what is essentially the call of an umpire hired for his or her expertise and because of the increased popularity of seeking legal remedies for perceived injustices, two of the major racing jurisdictions in the United States, Oklahoma and California, have recently adopted legislation and rules prohibiting appeals of stewards' decisions regarding the outcome of a race. Kentucky, a state often viewed as a center for horse racing and breeding, has long had rules prohibiting this type of appeal.

In addition, in cases that are appealed to commissions and district courts regarding such decisions, courts are loathe to upset the judgment of the stewards:

Our [the court of appeals'] reaction on reviewing the videotape, which constitutes a portion of the record before us, was not unlike that of the [common pleas court] as the tape suggests some interference or intimidation. Our review of the common pleas court's decision, however, includes the remainder of the record as well.

Sidney Gendelman, a steward for the race at issue, with approximately twelve years of experience as a steward and forty-four years experience in the racing industry, testified that a horse is clear when it is separated from another horse by 'a length, a length and a half or two'; that despite Woods [the jockey] standing up on Bobby M. [his horse] to check him, a length and a quarter to a length and a half separated the two horses at that time; **that Woods was grandstanding as he knew the race was over.**

* * *

Similarly, . . . the other two stewards . . . testified that when Woods stood up on Bobby M., Wall Street Dancer was clear of Bobby M., and that Bobby M. had plenty of room to come through on the rail. Clark [steward], himself a former jockey, testified that there was no reason for Woods to check, or pull up on, Bobby M. * * * In summing up his testimony, Borgemenke [steward] stated: 'In my opinion I think Charlie Woods just tried to make something out of nothing that wasn't there. I think, like we said, he was on a beat horse, and he knew it. So he stood up on the horse to make it look good like something happened which never did.'

Miller v. Ohio State Racing Commission, 1995 WL 89696 (Ohio App. 10 Dist.)(emphasis added)(unpublished decision)(upholding decision of commission affirming the findings of the stewards).

The decision in *Miller* has one of the best discussions regarding the difficulty in evaluating the events that happen during the running of a race. As indicated, the tape definitely showed that something happened, and, to the uneducated eye, it appeared as though there was some type of interference or intimidation. However, in the expertise of the stewards, the jockey was grandstanding in an attempt to create the illusion of interference when none was actually present. The stewards, with their many years of experience, recognized that. Other cases also typically defer to stewards' decisions in light of their vast experience and numerous years in the business. *Pelling v. Illinois Racing Board*, 574 N.E.2d 116, 118 (Ill. 1991)(“Each steward testified to his years of experience in judging thousands of races.”)

Because these situations are difficult for a lay board to decide, reason dictates that decisions of stewards regarding the outcome of a race should be considered final. Montana has gone so far as to pass a rule that states, “On review of a stewards' decision disqualifying a horse in a race, the board shall not substitute its judgment for (second guess) that of the stewards as to the weight of the evidence on questions of fact.” Rule 8.22.302, ARM. In a sense, the Montana board assumes a truly appellate role in reviewing such cases, where only procedural or legal claims, not factual claims, are raised. This particular rule came under scrutiny by the Montana Supreme Court in 1998 in *Smith v. Board of Horse Racing*, 956 P.2d 752 (Mont. 1998), when the board relied upon it when upholding a stewards' decision regarding a disqualification of a horse.

The trainer argued that he was not given meaningful participation in the hearing before the stewards and that, therefore, his due process rights were violated on appeal when the board concluded it was required to accept the stewards' findings as to the facts in the case. The Montana Supreme Court agreed with Mr. Smith, stating that it was unconstitutional for the board to defer to the stewards on questions of fact in a “situation such as this where the stewards made their factual determination without affording both sides an opportunity to be heard. Such deference is only appropriate if the stewards have weighted the factual contentions of both sides of the dispute.” *Smith*, 956 P.2d at 754. In Wyoming, any concerns about due process and the right to be heard should be foreclosed by the Commission Rules, which permit both an informal and a formal hearing process before the stewards to discuss and determine on any infractions of the rules. The process allows a licensee an opportunity to be heard, to be represented by counsel, to bring witnesses and to present a defense. Commission Rules, Chpt. III, Secs. 4 and 5.

Other factors also argue in favor of the legislature's intent to prohibit this type of appeal. For example, when an owner enters his horse into a race, he does so with the knowledge that he has no guarantee of winning and he assumes the risk that is inevitable when 10 horses in

a limited space vie for position and the win. Interference can result, and the decision as to the outcome following interference is left to the opinion and judgment of the experts hired by the Commission. See, Commission Rules, Chpt. II, Sec. I (g) (“Every licensed person participating in a permitted event including all owners and trainers and their stable employees are subject to the Laws of Wyoming and the Rules promulgated by the Commission immediately upon acceptance and occupancy of stabling accommodations from or approved by a permittee or upon making entry to run on permittee’s track. Owners, trainers and stable employees shall abide by the Laws and Rules and accept the decisions of the Stewards on any and all questions, subject to their right of appeal to the Commission.”).

As Associate Justice Johnson stated, in his concurring and dissenting opinion in *Youst v. Longo*, 207 Cal.Rptr. 447, 454 (Calif. 1984), some incidents, like opinion calls regarding the outcome of a race, are “the kind of acts a sports competitor can be assumed to risk when he voluntarily participates in an athletic event.” Associate Justice Johnson also stated, almost as though he were a harbinger of what California would eventually pass regarding appeals of stewards’ decisions involving the outcome of a race, “I want to emphasize, moreover, what I would not hold were I in the majority. I am not suggesting the courts second guess the stewards. Whatever fouls they call or discipline they impose should remain final. Moreover, whichever horse they declare to be the winner should remain the winner **for all purposes**. The same goes for place, show and the remaining order of finish they certify.” *Youst v. Longo*, 207 Cal.Rptr. at 460 (emphasis added). (NOTE: The original decision in *Youst v. Longo* was vacated on other grounds and remanded to the Racing Board for further action regarding Petitioner’s claim for compensation for the intentional interference with his prospective economic advantage, e.g. winning the race. *Youst v. Longo*, 215 Cal. Rptr. 577 (Calif. 1985). This decision was affirmed by the California Supreme Court on other grounds by *Youst v. Longo*, 233 Cal. Rptr. 294, 306 (Calif. 1987); however, the Supreme Court held that the Racing Board lacked jurisdiction to award general tort damages in such cases and that the “the chance of winning a horserace or any sporting event does not present a basis for tort liability for interference with prospective economic advantage.”).

In conclusion, Wyoming’s Pari-Mutuel Wagering Act permits delegation of the direct supervision of horse racing to three stewards. Of the decisions made by the stewards, the only ones that, by statute, may be appealed to the Commission are those involving fines and suspensions. All other decisions of the stewards are considered final and non appealable to the Commission. Given the nature of horse racing, the necessity of immediate decision making, and the fact that the stewards are hired by the Commission specifically because of their expertise, training and certification, it is clear that the legislature did not intend for the Commission to be second guessing its experts in matters involving racing fouls and the determination of the outcome of a race. Without specific statutory authority to hear such appeals, the Commission does not have the jurisdiction to hear these appeals. Any rules conferring such authority have not been adopted in accord with the statutes and should be amended.

September 8, 1999

FORMAL OPINION NO. 99-006

TO: John Baughman, Director
Wyoming Game and Fish Department

FROM: Gay Woodhouse
Attorney General

Michael L. Hubbard
Deputy Attorney General

Rowena Heckert
Deputy Attorney General

QUESTION 1: Do Game and Fish enforcement officers have authority to enter private lands without a search warrant, or without landowner permission, or “without probable cause” that a violation is occurring in order to check compliance with hunting and fishing laws and regulations?

SHORT ANSWER: Game and Fish law enforcement officers may enter **open fields** without a search warrant, or without landowner permission, or without probable cause to check compliance with hunting and fishing laws and regulations.

QUESTION 2: May Game and Fish law enforcement officers enter **private property** to check compliance with statute and regulations when it is simply known or probable that hunting or fishing activities are occurring?

SHORT ANSWER: If the private property is an open field, the law enforcement officers may enter the property to check compliance. Probable cause is required to search individual effects and buildings.

QUESTION 3: If wardens do have the authority, then does the Commission have the power through policy to restrict this authority on private lands? If the Commission does have this power, the Commission could,

1) choose to restrict enforcement authority or, 2) choose not to restrict enforcement authority on private lands.

SHORT ANSWER: The Wyoming Game and Fish Commission may only interpret the laws of the state and therefore may not limit the authority of law enforcement officers to enter private property. See Discussion.

DISCUSSION

I. The Statutes

The State of Wyoming, in its sovereign capacity and as trustee, must manage and regulate the State's wildlife for the common benefit and interest of all its citizens:

For the purpose of this act, all wildlife in Wyoming is the property of the state. It is the purpose of the act and the policy of the state to provide an adequate and flexible system for control, propagation, management, protection and regulation of **all** Wyoming wildlife. (Emphasis added.)

WYO. STAT. § 23-1-103.

This ownership of the wildlife is also sanctioned by the United States Constitution. *O'Brien v. State*, 711 P.2d 1144, 1148-49 (Wyo. 1986), quoting *Lacoste v. Department of Conservation of the State of Louisiana*, 263 U.S. 545, 44 S.Ct. 186, 68 L.Ed. 437 (1924). The legislature has required the Wyoming Game and Fish Commission, acting through the Wyoming Game and Fish Department, to administer, manage and maintain **all** the State's wildlife. WYO. STAT. §§ 23-1-302 and 23-1-401. A very significant portion of that wildlife is found on private property.

By statute, the legislature has provided the Commission with extensive authority and responsibility to regulate and manage the wildlife resources of the State. WYO. STAT. § 23-1-302(a)(xvi). In order to protect the wildlife resources of the State, the legislature has enacted many, many statutes requiring or forbidding certain activities which routinely occur on private property. Some of those prohibited activities include hunting without a license, WYO. STAT. § 23-1-101; fishing without a license, WYO. STAT. § 23-3-301; hunting without required colored clothing, WYO. STAT. § 23-3-113; hunting on private property without landowner permission, WYO. STAT. § 23-3-305; and exceeding the limits on the number, kinds, and sometimes gender, of animals and fish to be taken. WYO. STAT. §§ 23-3-101 through 109 and §§ 23-2-201 through 208. Additionally, licensees are required to produce their licenses for inspection at the request of any authorized Department representative, and there are different licenses

required for resident and non-resident hunters and fishermen. WYO. STAT. §§ 23-2-101 through 208 and 23-3-308(b). Finally, there are countless restrictions on hunting and fishing found in the general regulatory provisions of WYO. STAT. §§ 23-3-101 through 406, many of which pertain to activities which regularly occur on both public and private land.

WYO. STAT. § 23-1-302(a)(xvi) directs the Commission to “provide for the enforcement of this act.” The ability to engage in open fields searches is essential to the enforcement of the State’s wildlife laws because many ranch properties in Wyoming are too large for hunting activities to be observed from public roads. Over fifty percent of the lands in Wyoming is held in private property, and an interpretation of the laws to conclude that game wardens could not enforce those laws on private property without a warrant would render much of the act unenforceable. See *Oliver v. United States*, 466 U.S. 170, 184, fn. 13, 80 L.Ed.2d 214, 104 S.Ct. 1735 (1984) (“Certainly the Framers did not intend that the Fourth Amendment should shelter criminal activity wherever persons with criminal intent choose to erect barriers and post “no trespassing” signs.”). Because statutes should not be interpreted to result in a nullity, the statute providing for enforcement of the Game and Fish laws cannot be interpreted by the Commission in such a way that negates the authority required to adequately enforce the laws. See *Corkill v. Knowles*, 955 P.2d 438 (Wyo. 1998) (court must assume that legislature did not intend futile things and statutes should not be interpreted to produce absurd results).

In order to have an adequate and flexible system for control, propagation, management, protection and regulation of **all** Wyoming wildlife, as required by WYO. STAT. § 23-1-103, the Department must enforce the Game and Fish laws on private property. For example, WYO. STAT. § 23-3-305 prohibits hunting on private property without landowner permission. If the Commission, through the Department’s law enforcement personnel, could not enter private property to ensure compliance with these prohibitions, it would render WYO. STAT. §§ 23-1-302(a)(xvi) and 23-3-305, directing the Commission to provide for enforcement of the act, ineffective unless landowners sought their assistance. In addition, the legislature’s requirement to provide for a system of regulation of all Wyoming wildlife would be impossible to achieve, because over half of the State’s land, and presumably nearly as much of the State’s wildlife, would be outside the Commission’s regulatory authority.

II. The Fourth Amendment - Open Fields Doctrine

The authority of a law enforcement officer to enter private property without a warrant is limited by the Fourth Amendment to the United States Constitution which defines the protections landowners have from illegal search and seizure of their property.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

While the United States Supreme Court has interpreted this provision to mean that warrantless searches of “persons, houses, papers and effects” constitute a violation of the property owner’s constitutional rights, the Court has held that such protection does not extend to open fields. *Hester v. United States*, 265 U.S. 57, 68 L.Ed. 898, 44 S.Ct. 445 (1924).

In *Oliver, supra*, Justice Powell quoted Justice Holmes from *Hester, supra*, which first enunciated the “open fields” doctrine:

The special protection accorded by the Fourth Amendment to the people in their ‘persons, houses, papers, and effects,’ is not extended to the open fields. The distinction between the latter and the house is as old as the common law.

Id. 80 L.Ed.2d at 222.

In *Oliver*, the Court upheld what has come to be known as the “open fields doctrine.” In *Oliver*, the Kentucky state police, acting on a tip, entered onto Oliver’s land to investigate whether he was growing marijuana. The property was fenced with a locked gate and a “no trespassing” sign. The police, without a warrant, climbed over the fence and observed a field of marijuana over a mile from the road. The police later obtained a warrant and arrested Oliver.

Oliver claimed that because he had the property posted “no trespassing” and because the gate was locked, the officers’ trespass constituted an illegal warrantless search. In ruling against Oliver, the Court “reject[ed] the suggestion that steps taken to protect privacy establish that expectations of privacy in an open field are legitimate.” *Id.* at 182.

The Court concluded that the government’s intrusion upon the open fields is **not** one of those “unreasonable searches” proscribed by the text of the Fourth Amendment. *Id.* 80 L.Ed.2d at 223. The Court also noted that this interpretation of the Fourth Amendment’s language is consistent with the understanding of the right to privacy expressed in our Fourth Amendment jurisprudence. *Id.*

The Court explained an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home. “[T]here is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields.” *Id.* 80 L.Ed.2d at 224. The Court further

explained that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home. At common law, the curtilage is the area to which extends the intimate activity associated with the “sanctity of a man’s home and the privacies of life.” *Id.* 80 L.Ed.2d at 225. Thus, an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers.

Furthermore, the Court rejected the notion that the government’s intrusion upon an open field was a “search” in the constitutional sense because that intrusion was a trespass at common law. In the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment. *Id.* 80 L.Ed.2d at 227-228.

In *United States v. Cain*, 454 F.2d 1285 (7th Cir. 1972), the U.S. Court of Appeals upheld the warrantless searches of a portion of a farm operated as the Grasse Lake Hunting Club. The defendants were charged with violation of the Migratory Bird Treaty Act. United States Game Management agents entered the grounds of the Hunting Club pursuant to a routine supervisory procedure to insure that all hunting ceased at the proper time. Citing from *McDowell v. United States*, 383 F.2d 599 (8th Cir. 1967), the court explained:

Under federal law the search of open fields without a search warrant is not constitutionally ‘unreasonable.’ *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1926). This is true even though entrance to the area searched was gained by trespass.

Id. 454 F.2d at 1286.

Thus, an entry by trespass on to open land did not vitiate an otherwise lawful search. *Id.* 454 F.2d at 1287, citing *United States v. Sorce*, 325 F.2d 84 (7th Cir. 1963).

Further, a search of open fields, without a search warrant, even if such fields are construed as part of a commercial enterprise, is not constitutionally “unreasonable.” *McDowell, v. supra*, at 603.

In *United States v. Pinter*, 984 F.2d 376 (10th Cir.), cert. denied, 126 L.Ed.2d 224 (1993), the Tenth Circuit Court of Appeals held:

The open fields doctrine does not require that law enforcement officials have some objective reason - either probable cause or reasonable suspicion - before entering an open field. The fact that the agents suspected Pinter of wrongdoing makes no difference to the analysis. The fact that the property was privately

owned and the agents were trespassers makes no difference. The fact that the property may not have been 'open' in the sense that the area was wooded and the laboratory location was not visible from a public place likewise is of no significance.

Id. 984 F.2d at 379.

The court refused to carve out an exception to the open fields doctrine, *i.e.*, one which would require probable cause or reasonable suspicion before law enforcement officers could enter an open field. *Id.* The court declined to impose any such limitation on the open fields doctrine.

In *United States v. Eastland*, 989 F.2d 760 (5th Cir. 1993), the court agreed with the established precedent that no expectation of privacy attaches to open fields:

It is well-established that the Fourth Amendment does not apply to observations while standing on open fields. See *United States v. Pace*, 955 F.2d 270, 274 (5th Cir. 1992) . . . Justification for a search or seizure under the Fourth Amendment is required because it demands reasonableness. See *Terry v. Ohio*, 392 U.S. 1, 20-21, 88 S.Ct. 1868, 1879-1880, 20 L.Ed.2d 889 (1968). But, where, as here, the governmental intrusion does not implicate the Fourth Amendment, the reasonableness requirement is likewise not implicated.

Id. 989 F.2d at 765.

The court concluded in a footnote, "therefore, we need not reach whether the officers had probable cause, or at least reasonable suspicion to justify entry." *Id.* 989 F.2d at 765, fn. 6.

In *United States. Greenhead, Inc.*, 256 F.Supp. 890 (N.D.Cal. 1966), the court specifically upheld an open field search by game wardens who had "no knowledge or suspicion that the game laws were being violated." See also, *United States v. Wylder*, 590 F.Supp. 926 (D.Ore. 1984) (upholding warrantless search by game wardens); *United States v. Swann*, 377 F.Supp. 1305 (D.Maryland 1974) (upholding warrantless search by game wardens).

While the case law supports that a search of open fields by a law enforcement officer need not require probable cause or reasonable suspicion, it is important to note that the law enforcement officer must be acting within the scope of his duties. A law enforcement officer is entitled to privileged immunity when acting within the scope of his duties. See *Maughon*

v. Bibb County, 160 F.3d 658, 660 (11th Cir. 1998) (qualified immunity shields officers insofar as their conduct does not violate clearly established statutory or constitutional rights); *Storms v. Wyoming*, 590 P.2d 1321 (Wyo. 1979) (police officer entering private premises in performance of duty is not a trespasser); *Thurlow v. Crossman*, 143 N.E.2d 812 (Mass. 1957).

In contrast, if an officer's actions are not "reasonably necessary to perform his dut[ies]" then his trespass may be outside of his authority and "not shielded by the privilege." See e.g., *Downs v. United States*, 522 F.2d 990 (6th Cir. 1975); *Guilbeau v. Tate*, 94 So.2d 896 (La. 1957) (wildlife agent with no reason to believe hunting or fishing was occurring and who harbored ill will toward defendant found guilty of trespass).

III. The Wyoming Constitution/Wyoming Supreme Court

Article I, Section 4 of the Wyoming Constitution provides:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon probable cause, supported by affidavit, particularly describing the place to be searched or the person or thing to be seized.

This section has been recognized to be somewhat stronger than the federal Fourth Amendment in that under the Wyoming Constitution it is mandatory that the search warrant be issued upon an affidavit. *Hall v. State*, 911 P.2d 1364, 1368 (Wyo. 1996).

However, with regard to the scope of the State provision the Wyoming Supreme Court stated in *Callaway v. State*, 954 P.2d 1365, 1370-1371 (Wyo. 1998):

We noted in *Gronski* that our approach to the search and seizure area usually has implied the reading of the state and federal constitutions together and treating the scope of the state provision as the same as that of the federal provision. *Gronski*, 910 P.2d at 565-66 (citing, *Parkhurst v. State*, 628 P.2d 1369, 1374 (Wyo. 1981), cert. denied, 454 U.S. 899, 102 S.Ct. 402, 70 L.Ed.2d 216 (1981)). We perceive the protection furnished by the two constitutional provisions to be identical in this case.

Id. 954 P.2d at 1370-1371.

Generally, federal interpretations of the Fourth Amendment are regarded as persuasive and the Wyoming Supreme Court adheres to them closely absent some contrary direction from the legislature of the State of Wyoming. *Saldana v. State*, 846 P.2d 604, 611 (Wyo. 1993). In *State v. George*, 231 P. 683 (Wyo. 1924), the Wyoming Supreme Court quoted Justice Holmes from the *Hester* case, *i.e.*, that the Fourth Amendment does not extend to open fields and explained:

We believe the reasoning of these cases is directly applicable to the case at bar, insofar as the search and seizure of the 32 sheep on the open plain is concerned We are constrained to hold that the search and seizure made as above stated was not unreasonable within the meaning of section 4 of article 1 of the Constitution,

Id., 231 P. at 689.

The Court did say that whether searches and seizures are unreasonable depends, to some extent, upon the articles procured and the circumstances under which they were obtained. *Id.*

The Wyoming statutes are much clearer with respect to conducting searches of personal property. WYO. STAT. § 23-6-109 provides in part:

(b) Any person authorized to enforce the provisions of this act may search **without warrant**, any camp, camp outfit, pack, pack outfit, pack animal, motor vehicle, boat, wagon or trailer for any wildlife which he has **probable cause** to believe was taken or is possessed unlawfully.

(c) Any person authorized to enforce the provisions of this act may search **with a search warrant** any place or property for any wildlife which he may have probable cause to believe was taken or is possessed unlawfully. (Emphasis added.)

WYO. STAT. § 23-6-109 reflects the protections provided by the Fourth Amendment which extend to “the people in their person, houses, papers and effects.” *Hester, supra*; see *Oliver, supra*, 466 U.S. at 178 (“the Amendment reflects the recognition of the Framers that certain enclaves should be free from arbitrary government interference.”). Therefore, while a law enforcement officer may enter open fields without probable cause or a warrant, WYO. STAT. § 23-6-109 and the Fourth Amendment require that the officer have probable cause to search individual’s effects or buildings.

We have not found any Wyoming cases that would provide greater constitutional protection under Article I, Section 4 of the Wyoming Constitution for open field searches than those provided by the Fourth Amendment. However, as suggested by the concurring opinion in *Saldana, supra*, “[T]he Wyoming Supreme Court continues to be willing to independently interpret the provisions of the Wyoming Constitution.” *Id.* 846 P.2d at 624. However, as an independent source of individual rights, such rights must spring from a process that is articulable, reasonable and reasoned. *Id.* While it is possible for the Wyoming Supreme Court to expand upon the open fields doctrine, such process has not yet occurred in the State of Wyoming and we are left with the scope of such doctrine as delineated above.

IV. Prior Attorney General Opinions

In 1952, this Office issued a formal opinion concluding a deputy game warden would not be committing a trespass should he enter private land for the purpose of enforcing the game laws notwithstanding notice by a landowner that he will not permit game wardens upon the premises. Op. Att'y Gen. 771-772 (Wyo. 1952). This opinion was based upon a prior 1933 formal opinion, which stated:

We think that any officer charged with the enforcement of the game, bird and fish laws of this state has a right to enter upon private premises in the performance of his duties **where he sees the law being violated or where he sees any person or persons engaged in hunting or fishing.**

Op. Att'y. Gen. 137, 138 (Wyo. 1933).

The 1933 opinion explained, “[T]he very fact that it is necessary for one engaged in hunting or fishing to have a license should be sufficient authority to an officer, whose duty it is to enforce the law relative to hunting and fishing, to make inquiry and ascertain whether or not any person hunting or fishing has a proper license.” *Id.* at 138.

CONCLUSION

The special protections of the Fourth Amendment do not extend to open fields. Government intrusion upon open fields is not an unreasonable search proscribed by the Fourth Amendment. An individual may not legitimately demand privacy for activities conducted out-of-doors in fields, such as cultivation of crops or hunting and fishing activities. In the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment. The search of open fields without a search warrant is not constitutionally unreasonable, even if entrance to the area searched was gained by trespass.

Furthermore, under the open fields doctrine the law enforcement official does not need either probable cause or reasonable suspicion before entering an open field. The fact that the government agents have no objective reason to suspect wrongdoing makes no difference to the analysis. The Fourth Amendment does not apply to observations while standing on open fields.

Game and Fish law enforcement officers may enter **open fields** without a search warrant, without landowner permission, and without probable cause in order to check compliance with hunting and fishing laws or regulations.

Finally, the Commission does not have the authority to override State statute in order to limit the actions game wardens may take in enforcing the State game laws. A State agency may not abrogate or limit rights conferred by the legislature and may not interpret statutes to create an incongruous result. See *Corkill v. Knowles*, *supra*; *May v. City of Laramie*, 131 P.2d 300 (Wyo. 1942).

September 7, 1999

FORMAL OPINION NO. 99-007

TO: Mac Landen
Procurement Manager, Department of Administration and Information

FROM: Gay Woodhouse
Attorney General

Vicci Colgan
Chief Deputy Attorney General

Martin L. Hardsocg
Assistant Attorney General

QUESTION: Whether the residency requirement under WYO. STAT. § 16-6-301(b) requires that bidding corporate parties be incorporated or maintain their principal office in Wyoming.

SHORT ANSWER: Yes. See Discussion.

Background

Kinko's, Inc. is a corporation based in California, incorporated in Delaware and has maintained stores in Wyoming for many years. The Department of Administration and Information has treated Kinko's as a non-resident bidder pursuant to WYO. STAT. § 16-6-301(b), which affords resident companies a 10% preference in bidding on public printing contracts. The Department of Administration and Information has classified Kinko's as a non-resident pursuant to WYO. STAT. § 16-6-301(b) because Kinko's is not incorporated or based in Wyoming, generally relying on the residency requirements of a similar statute, WYO. STAT. § 16-6-101(a)(i)(C) & (D), which applies to public works and contracts. Kinko's, having maintained stores in Wyoming for years, has requested that it be considered a Wyoming resident for the purposes of applying the 10% bid preference pursuant to WYO. STAT. § 16-6-301.

You have requested an opinion from this office concerning whether the corporate residency requirement of WYO. STAT. § 16-6-301(b) may be interpreted to include the element of incorporation or maintenance of corporate headquarters in Wyoming. As discussed below, the Department of Administration and Information is correct in interpreting

the corporate residency definition of WYO. STAT. § 16-6-301(b) as requiring incorporation or maintenance of corporate headquarters in Wyoming.

Discussion

Residency status under WYO. STAT. § 16-6-301(b)

WYO. STAT. § 16-6-301 specifically sets forth criteria for bidding on public printing contracts, including allowance of a preference for resident contractors. The statute defines “resident” as follows:

(b) As used in this section, “resident” means any person, partnership, corporation or association who has been a **bona fide resident of this state**, for one (1) year or more immediately prior to bidding upon a contract, and who has an established printing plant in actual operation in the state of Wyoming immediately prior to bidding upon a contract.

The statutory definition of residency has two elements: 1) bona fide residency in the state for at least one year prior to bidding; and 2) maintenance of an established printing plant in operation prior to bidding upon the contract.

This statute is preceded in the code by a separate body of statutes setting forth criteria for bidding on public works and contracts, WYO. STAT. §§ 16-6-101 through 16-6-119, which also provides a bidding preference for resident contractors. See WYO. STAT. § 16-6-101(a)(i). Unlike the definition of the term “resident” found in WYO. STAT. § 16-6-301 above, the definition of “resident” found in WYO. STAT. § 16-6-101(a)(i)(C)&(D) specifically requires, among other things, that a corporation be incorporated in Wyoming. Because of their close proximity in the Wyoming code and similarity and relation to each other in the Wyoming code (they each concern contractors bidding on public work), the Wyoming Department of Administration and Information has applied the incorporation requirement found in WYO. STAT. § 16-6-101(a)(i) to WYO. STAT. § 16-6-301, even though it is not expressly stated.

It should be noted that by expressed limitation, the definition of “resident” in WYO. STAT. § 16-6-101(a)(i) applies only to the Public Works and Contracts statutes (The act), which do not include WYO. STAT. § 16-6-301. See WYO. STAT. § 6-6-101(a)(iii). Thus, while construction of the term “resident” under the public works and contracts statutes may provide some direction on what the legislature intended under the Public Printing Contracts statute, it is not dispositive. The question then remains: must a “resident” corporation, as defined pursuant to WYO. STAT. § 16-6-301(b), be incorporated or maintain its principal office in Wyoming?

Interpretation of term “Bona fide resident”

As a general rule “The legal existence, the home, the domicile, the habitat, the residence, and the citizenship of the corporation can only be in the state by which it was created, notwithstanding it may lawfully do business in other states.” 8 Fletcher Cyc Corp. § 4025 (1992 Perm. Ed.). However, determination of whether a corporation is a resident or non-resident must be derived from the “aim and context of the statute in which the residence requirement is contained and the extent and character of its business transacted there.” 18A Am.Jur.2d *Corporations* § 306 (1985); See also 8 Fletcher Cyc Corp. § 4037 (1992 Perm. Ed.). Accordingly, the Wyoming Supreme Court has recognized that the word “residence” is a “word with extremely uncertain meaning as used in statutes” and that the term must be construed “in light of the context of its use and with consideration for the purposes of the Act.”

Wyoming Insurance Guaranty Association v. Woods, 888 P.2d 192, 198 (Wyo. 1994). Consequently, the application and scope of the term “bona fide resident” in WYO. STAT. § 16-6-301(b) must be ascertained from the legislative intent of the statutory language itself, common law, rules of statutory construction and case law, if available.

It is presumed that the legislature enacts statutes with full knowledge of existing law and with reference to it and, consequently, statutes are “construed in connection and in harmony with the existing law, and as part of a general and uniform system of jurisprudence.” *Keller v. Merrick*, 955 P.2d 876, 879 (Wyo. 1998). “Statutes relating to the same subject should be read *in pari materia* to ascertain legislative intent.” *Dye by Dye v. Fremont County School Dist. No. 24*, 820 P.2d 982, 984 (Wyo. 1981). The Wyoming Supreme Court has stated that “all statutes relating to the same general purpose shall be read in connection with it as constituting one law.” *Stringer v. Board of County Commissioners of Big Horn County*, 347 P.2d 197, 200 (Wyo. 1959); See also *Halliburton Co. v. McAdams, Roux and Associates*, 773 P.2d 153 (1989) (statutes are construed with reference to other relevant statutes).

Further, the legislature is presumed to enact statutes with knowledge of the common law. *Keser v. State*, 706 P.2d 263 (Wyo. 1985). A statute which is ostensibly designed to change common law must be strictly construed, and it is presumed that no change to common law is intended unless stated in clear and unequivocal terms. *State v. Stovall*, 648 P.2d 543, 548 (Wyo. 1982). “When a word has a well-settled meaning in law at the time of its usage, its use by the legislature will be so understood unless a different meaning is unmistakably intended.” *Sorenson v. State*, 604 P.2d 1031, 1038 (Wyo. 1979).

The legislature, in two different but related statutes concerning the procurement of different public contracts, has authorized preferential treatment for resident corporations. One statute explicitly requires that the corporation be incorporated in Wyoming to be considered a resident. See WYO. STAT. § 16-3-101(a)(i)(C),(D). The other statute, WYO. STAT. § 16-6-301, makes no reference to incorporation or maintenance of a principal office and only

requires that such corporations be “bona fide residents” to benefit from the preferential treatment as bidding parties. The Wyoming Supreme Court has acknowledged that “The accepted common law “place of residence” for a corporation is “[t]he place where its principal office is located, or where its principal operations are carried on [.]” *Woods*, 888 P.2d at 199 (emphasis in original). It is not reasonable to assume that the legislature’s failure to make specific reference to incorporation as an element of residency in WYO. STAT. § 16-6-301 automatically eliminates this requirement, especially in light of the rule of statutory construction which requires that a statutory change in common law does not occur unless stated in clear and unequivocal terms. *State v. Stovall*, 648 P.2d 543, 548 (Wyo. 1982). Unless the legislature clearly indicates an intent to remove the incorporation or principal office requirements of corporate residency, these criteria remain.

It also must be presumed that when the legislature employed the term “resident” in WYO. STAT. § 16-6-301, it intended to retain the word’s “well-settled meaning in law at the time of its usage.” See *Sorenson v. State*, 604 P.2d 1031, 1038 (Wyo. 1979). Enacted in 1959, it cannot be reasonably asserted that the term “bona fide resident”, as used in the statute, was intended to differ from the common law meaning of the word, which requires that resident corporations be incorporated or maintain their principal office/headquarters in their state of residency. *Wyoming Insurance Guaranty Association v. Woods*, 888 P.2d 192, 198 (Wyo. 1994). Because the legislature did not use language in the statute to indicate an intent to deviate from this common law meaning, the incorporation requirement remains an element of the definition of residency as used in this statute.

Similarly, the legislature’s specific requirement in the related statute, WYO. STAT. § 16-6-101(a)(i)(C),(D), that corporations be incorporated in Wyoming to be considered Wyoming residents, is also indicative of the legislature’s general legislative intent. Both statutes concern the practice of bidding on public contracts for public work. While the two statutes are not in the same act, they clearly concern the same subject matter and must, therefore, be read in *pari materia*, if possible. *Dye by Dye v. Fremont County School Dist. No. 24*, 820 P.2d 982, 984 (Wyo. 1981). The only way to harmonize the intent of the two statutes is to interpret the residency requirement in WYO. STAT. § 16-6-301 as including an incorporation or maintenance of home office element, which is also consistent with established common law.

The qualifying term “bona fide” must also be considered when interpreting the scope of the residency requirement. Black’s Law Dictionary defines “bona fide” as:

In or with good faith, honestly, openly, and sincerely; without deceit or fraud. Truly; actually; without simulation or pretense. Innocently; in the attitude of trust and confidence; without notice of fraud, etc. Real, actual, genuine, and not feigned.

Black's Law Dictionary 177 (6th Ed. 1990). Consequently, when the phrase "bona fide resident" is considered as a whole, it connotes an intent to require that the residency requirement be clearly satisfied, strictly applied and closely adhered to, without pretense or doubt.

Finally, it is necessary to consider the public policy and practical implications of interpreting the term "resident" as not requiring incorporation or maintenance of a home office in the State of Wyoming. If a corporation is not incorporated in Wyoming and need only be registered with the Secretary of State as a foreign corporation or under some other status, then the residency requirement loses all significance and the preference given to resident corporations is nullified because the preference might be given to virtually any entity conducting business in Wyoming. Further, if the residency requirement is not tied to objective criteria such as the incorporation element and is based upon factors such as business activity in the state, the Department of Administration and Information would be required to enter into an arbitrary and subjective analysis of what degree of corporate activity constitutes residency and what activity fails to satisfy this standard. Such a practice would arguably, by its very nature, be arbitrary and capricious. A statute should not be interpreted in such a manner that it produces unreasonable or absurd results. *Corkill v. Knowles*, 955 P.2d 438 (Wyo. 1998).

Conclusion

For a corporation to qualify as a "resident" pursuant to WYO. STAT. § 16-6-301(b), the corporation must be incorporated or maintain its principal office in the State of Wyoming.

July 10, 2000

FORMAL OPINION NO. 99-008

TO: Judith Uphoff
Director, Department of Corrections

FROM: Gay Woodhouse
Attorney General

John W. Renneisen
Deputy Attorney General

Jennifer A. Golden
Senior Assistant Attorney General

Dean W. Jessup
Assistant Attorney General

QUESTION: May state agencies use compensatory time in lieu of monetary overtime pay to compensate at-will contract employees for overtime work?

ANSWER: Yes

DISCUSSION

To provide background for discussing the question presented, we will first discuss federal overtime compensation requirements and parameters. We will then review the statutory provisions authorizing the hiring of at-will contract employees to reach the answer to your question.

A. Federal Overtime Compensation Requirements

The Fair Labor Standards Act (FLSA) sets minimum wage, overtime pay, equal pay, recordkeeping and child labor standards for employees covered by its provisions. 29 U.S.C. § 201 *et seq.* (1994 & Supp. 1998). Employees covered by the FLSA are referred to as nonexempt employees, and employees not covered by the FLSA are referred to as non-covered or exempt employees. Exempt employees are generally salaried employees falling into the three major categories of executive, administrative (managerial), and professional employees. 29 U.S.C. § 203(e)(2)(C).

The FLSA requires that nonexempt employees be paid overtime compensation for hours worked in excess of forty hours in any one working week. 29 U.S.C. § 207. In such cases, the rate of compensation is one and one-half times that employee's regular rate of pay. *Id.* An option available only to state and local government employers is to compensate overtime work with compensatory time (comp time) rather than monetary overtime compensation. 29 U.S.C. § 207(o).

The use of comp time is simply the granting of time off in lieu of monetary overtime compensation. Comp time must be provided at a rate of one and one-half hours of comp time for each hour of over-time worked. 29 U.S.C. § 207(o)(1). An employee must agree to receive comp time in lieu of monetary compensation before performance of the overtime work and generally may accrue a maximum of 240 hours of comp time (the equivalent of 160 hours of actual overtime work). 29 U.S.C. § 207(o)(2)(A)(ii); 29 U.S.C. § 207(o)(3). Any overtime worked in excess of the 240 hour comp time cap must be compensated with monetary overtime compensation, until such time as the employee's comp time balance is below the 240 hour cap.¹

Payments for accrued comp time may be made at any time and must be paid at the employee's regular pay rate when the employee receives the payment. Upon termination of employment, an employee must be paid all unused comp time, figured at the higher of:

1. the employee's average regular rate during the last 3 years of employment; or
2. the final regular rate received by the employee.

29 U.S.C. § 207(o)(4).

The option to compensate employees for overtime work with comp time rather than monetary overtime compensation is an option available only to government employers. In recognition of the limited monetary resources available to government employers, Congress created this alternative to provide government employers some flexibility in compensating their employees for overtime hours worked. Subject to the above-outlined constraints, a government employer may compensate its employees for overtime work with comp time, monetary overtime compensation or a combination of both.

B. Application of Overtime Requirements to At-Will Contract Employees

¹ Employees who work in a public safety activity, emergency response activity or seasonal activity may accrue up to 480 hours of comp time. 29 U.S.C. § 207(o)(3). A discussion of the factors to consider in determining whether an employee fits into one of these categories is beyond the scope of this opinion. Agencies are encouraged to contact this office with any questions concerning whether an employee fits within one of these categories.

In 1992, the legislature authorized the Department of Administration and Information, Human Resources Division, to implement and administer a program allowing agencies to hire at-will contract employees. 1992 Wyo. Sess. Laws Ch. 71. WYO. STAT. § 9-2-1022(a)(xi)(F) (Lexis 1999) requires the Human Resources Division to promulgate rules necessary to administer a program whereby contract employees may be used to meet agency programmatic needs. WYO. STAT. § 9-2-1022(a)(xi)(F) requires that the rules be structured such that:

(I) At-will contract employees receive benefits limited to coverage and employer contributions as required by law for social security, worker's compensation, unemployment compensation and group insurance benefits as provided in subdivision (III) of this subparagraph * * *;

(II) The minimum benefits or rights specifically required under any federal law are provided. In determining the minimum benefits or rights provided under federal law, the rules shall require employment contracts under this subparagraph to be structured so as to exempt at-will contract employees from coverage to the greatest extent possible;

(III) Except as provided in this subdivision * * *, ***no at-will contract employees shall be eligible for or accrue any type of leave*** or be eligible to participate in or otherwise be covered by state employees' and officials' group insurance, the state retirement system or the deferred compensation program. If the employment contract so provides, an at-will contract employee may be eligible for membership in the state employees' and officials' group insurance plan in accordance with W.S. 9-3-207, or in the case of the Wyoming retirement system an at-will contract employee of a member employer may be enrolled in the system if that employee's wages under the contract are reported on an Internal Revenue Service Form W-2 Wage and Tax Statement, provided the employee pays the total premium or contribution required[.]

* * *

WYO. STAT. § 9-2-1022(a)(xi)(F)(I)-(III) (emphasis added).

Your question is whether the highlighted language, making at-will contract employees ineligible for the accrual of leave, also precludes an agency from using comp time to compensate at-will contract employees for overtime work. To answer this question we must

determine whether the legislature intended the phrase “any type of leave” to include comp time. In making this determination, we use the following well-established rules of statutory interpretation. The initial inquiry is to ascertain the legislature’s intent by looking to the plain meaning of the words used in the statute. *Newton v. State ex rel. Wyo. Workers’ Compensation Division*, 922 P.2d 863, 865 (Wyo. 1996). The statute must be construed as a whole and in *pari materia* with all parts of the statute. *Id.* If the statute is clear and unambiguous, the plain language controls. *Id.* However, if the statute is ambiguous, then extrinsic aids of statutory interpretation may be used to help determine the legislature’s intent. *Id.*

Based on these rules, our first inquiry is to determine what the legislature intended when it made at-will contract employees ineligible for any type of leave, with the key word of course being “leave.” The legislature did not define the term leave, and we must therefore look to the plain meaning of the term. *Webster’s Dictionary* defines leave as an “authorized * * * absence from duty or employment.” *Webster’s Ninth New Collegiate Dictionary* 681 (1988). A similar but more generalized definition of the term leave can be found in *Black’s LawDictionary*, which defines the term to mean “permission or authorization to do something.” *Black’s Law Dictionary* 890 (6th ed. 1990).

Using these definitions, the meaning of leave is arguably broad enough to include comp time, because an employee receiving comp time is in fact entitled to an authorized absence from duty. However, the rules of statutory interpretation require that we construe the statute as a whole and give effect to all its parts, and we must therefore consider the other parts of WYO. STAT. § 9-2-1022(a)(xi)(F) before settling on a definition for the term leave. For the reasons that follow, we conclude that the meaning of the term leave, as used in WYO. STAT. § 9-2-1022(a)(xi)(F)(III), is narrower than the meaning provided by the above-quoted definitions.

Subparagraphs II and III of WYO. STAT. § 9-2-1022(a)(xi)(F) govern separate and discrete types of employee benefits and rights. Subparagraph II governs the benefits and rights federal law mandates an employer afford its employees, and Subparagraph III governs optional benefits of the type that an employer typically includes in a compensation package, such as health insurance and a retirement plan. Evident in subparagraphs II and III is the legislature’s recognition that it may restrict the optional benefits to be paid at-will contract employees, but it must afford such employees any federally mandated rights, such as overtime compensation required under the FLSA.

As stated earlier in this opinion, our goal in construing any statute is to determine the legislature’s intent. To this end, it is relevant that the language making at-will contract employees ineligible for leave is contained in subparagraph III, governing optional or “fringe” benefits, rather than in subparagraph II, governing federally mandated rights and benefits. Subparagraph III represents the legislature’s intent to restrict the optional benefits made

available to at-will contract employees. Read in this context, the term leave must be construed to mean leave given to employees as an optional or fringe benefit, not leave mandated by state or federal law. We thus conclude that the legislature intended the term leave to have the narrow meaning of vacation, sick, holiday and other types of leave afforded as an optional benefit of employment.

Compensation for overtime worked by a nonexempt employee is not an optional benefit. It is a federal right, and the use of comp time in lieu of monetary overtime compensation is simply an alternative available to government employers to provide them flexibility in allocating their limited employee and monetary resources. It is intended to benefit government employers, not employees. Although comp time is leave in the sense of being an authorized absence from work, it is not leave that is granted as an optional or fringe benefit, and it is not the type of leave restricted by subparagraph III.

This interpretation of subparagraph III's restriction on leave is consistent with the concern the legislature likely meant to address with the restriction. Like any employment benefit, the eligibility for and accrual of vacation, sick and other types of leave is intended to be part of a compensation package that promotes and awards employee loyalty, longevity of service and quality performance. State employees who have accrued vacation and sick leave are entitled to be paid for those hours when their employment with the state ends. This is a cost the state is willing to incur for its longer term employees, but perhaps not for short-term contract employees. By restricting at-will contract employee eligibility for this type of leave benefit, the legislature has avoided payment for accrued leave to such employees upon employment termination.

On the other hand, the cost of overtime compensation is not avoided by restricting the use of comp time. A state agency must compensate its nonexempt contract employees for any overtime work, with the only question being when that payment is made. Although an agency must pay for any comp time an employee has accrued when that employee's employment ends, the only alternative to that is payment in the same period in which the overtime was worked. Thus, the savings the legislature sought with the restriction on leave is not achieved by a similar restriction on the use of comp time.

It should also be noted that an agency has greater control over an employee's accrual of comp time than over an employee's accrual of vacation or sick leave. An employee earns vacation or sick leave merely by virtue of the employee's employment. An employee earns comp time, however, only when that employee works overtime hours. Whether and how many overtime hours an employee works is within the agency's control, and, thus, with careful planning, an agency can avoid large accruals of comp time.

Lastly, defining the term leave more broadly than sick, vacation, holiday and other similar types of optional leave would result in numerous conflicts with other state and federal laws. For example, if leave were interpreted to mean simply an authorized absence from

work, this would mean an at-will contract employee could not be excused from work for jury duty, to vote in an official public election, for military leave, for leave while receiving worker's compensation disability benefits or for leave mandated by the federal Family and Medical Leave Act. These potential conflicts with state and federal law are further evidence that the legislature did not intend such a broad definition of leave.

CONCLUSION

Comp time differs from leave such as annual, sick or holiday leave, in that it compensates for actual hours worked above the maximum hour limitations imposed by federal law. It is not a benefit or right merely by virtue of employment. It is an alternative means to compensate for overtime hours worked by a nonexempt employee. Therefore, the use of comp time for nonexempt at-will contract employees is not precluded by WYO. STAT. § 9-2-1022(a)(xi)(F)(III).

September 24, 1999

FORMAL OPINION NO. 99-009

TO: Garry L. McKee, Director
Department of Health

FROM: Gay Woodhouse
Attorney General

Michael L. Hubbard
Deputy Attorney General

Marci M. Hoff
Assistant Attorney General

QUESTION PRESENTED : Who is vested with jurisdictional authority over fire safety and building codes in health care facilities constructed in Wyoming municipalities?

SHORT ANSWER: The Department of Health has jurisdictional authority over fire safety and building codes for the construction of health care facilities while municipalities retain jurisdiction for other building standards, that are not in conflict with state standards. See Discussion.

DISCUSSION

I. Home Rule

Municipalities are granted broad powers over their local affairs under the Wyoming Constitution's "home rule" provision:

(B) All cities and towns are hereby empowered to determine their local affairs and government as established by ordinances passed by the governing body, subject to referendum when prescribed by the legislature, and further subject only to statutes uniformly applicable to all cities and towns, and to statutes prescribing limits of indebtedness. * * * (emphasis added)

WYO. CONST. art. 13, § 1(b).

The Wyoming “home rule” amendment was adopted in 1972. The basic grant of home rule authority is generally explained:

Broadly speaking, it gives to municipalities some degree of constitutional status and some protection against unbridled domination by the legislature. In other words, from the point of view of municipalities, it mitigates the more unfavorable consequences of the creature concept. ... It should, in the first place, eliminate questions under Dillon’s Rule. The common feature of all home rule provisions is the grant of independent legislative authority, within prescribed limits, to municipalities. Therefore, the mere fact that the city has no express or implied statutory authority for particular action should not, without more, make the action illegal. The more difficult questions concern the right of a municipality, under its home rule authority, to take action in conflict with state statutes, or in areas that the legislature might otherwise be considered to have preempted.... (emphasis added)

E. GEORGE RUDOLPH, WYOMING LOCAL GOVERNMENT LAW, § 2.6, at 76-77 (1985).

In *Police Protective Ass’n v. City of Rock Springs*, 631 P.2d 433, 439 (Wyo. 1981), the Wyoming Supreme Court explained, “Article 13, Section 1 of the Wyoming Constitution, giving ‘home rule’ to cities and towns, exempts ‘statutes uniformly applicable to all cities and towns’ from the authorization given to cities and towns to ‘determine their local affairs and government.’” The court held that the city did not have the authority to engage in collective bargaining.

As noted by Professor Rudolph, the Wyoming “home rule” amendment was patterned after the Kansas amendment. It is an essential element of all constitutional provisions establishing the principle of home rule that the constitution and general laws of the state shall continue in force within the municipalities. 56 Am.Jur.2d *Municipal Corporations* § 128, p. 184 (1971).

Home rule allows municipalities to control their local affairs unless preempted by statute. Further, municipalities may legislate on the same statutory subject so long as the municipal ordinance does not conflict with the statute and the subject has not been specifically preempted by the legislature.

In determining whether home rule applies, we must evaluate three areas: (1) the conflict, if any, between a relevant state statute and a municipal ordinance; (2) whether the statute has uniform application; and (3) if any preemptive statutory language exists.

II. Department of Health Authority

The Department of Health has broad power over licensing and operations of health care facilities under WYO. STAT. §§ 35-2-901-910. Pursuant to WYO. STAT. § 35-2-906, the Department of Health must approve building plans prior to construction of health care facilities. Subsection (a) of WYO. STAT. § 35-2-906 provides:

A licensee who contemplates construction of or alteration or addition to a health care facility shall submit plans and specifications to the division for preliminary inspection and approval prior to commencing construction. Significant changes to the original plans must also be submitted and approved prior to implementation. The plans and any changes shall indicate any increase in the number of beds. (emphasis added)

Under subsection (e) of the same statute provides “[T]his section shall remain in effect until June 30, 2001.”

WYO. STAT. § 35-2-908 specifically provides, “[T]he department shall promulgate and enforce reasonable rules and regulations necessary to protect the health, safety and welfare of patients of health care facilities licensed under the act.” (emphasis added) Pursuant to rules promulgated by the department, the construction of health care facilities must meet the “Guidelines for Design and Construction of Hospital and Health Care Facilities” as outlined under Chapter III, Construction Rules for Health Facilities (hereinafter “Construction Rules”). The construction rules adopt the 1994 edition of NFPA 101 and the Life Safety Code as the Wyoming State Fire Minimum Standards for Health Care Facilities. Construction Rules, Sec. 4 (a)(i). Assisted living facilities are specifically exempted from these requirements. See Construction Rules, § 4 (b)(i)(A).

The Department of Health Rules and Regulations for Assisted Living Facilities, promulgated pursuant to WYO. STAT. § § 35-2-901 *et seq.* (hereinafter ALF Rules) provide with regard to building codes:

Section 18. Construction/Remodeling.

(c) Codes and Standards. All new construction shall meet the provisions of the 1991 edition of the NFPA 101 Life Safety Code of the National Fire Protection Association that are applicable to residential board and care occupancies. All new construction shall meet the provisions of the 1991 edition of the Uniform Building Code, the 1991 edition of the Uniform Mechanical Code and the 1991 edition of the Uniform Plumbing Code, except as modified by the 1991 edition of the NFPA 101 Life Safety Code.

ALF Rules, Ch.4, § 18(c).

While these rules address the codes that must be utilized, your question remains whether the state or the municipality has jurisdiction to require compliance with a particular building code.

III. FIRE CODE JURISDICTION

Fire standards must be differentiated from the other building codes as authority over fire codes is vested in the “council on fire prevention and electrical safety and energy efficiency in buildings.” WYO. STAT. § § 35-9-103(a)(iii), 106. In addition, the State Fire Marshal is granted the power to enforce fire safety in the state. WYO. STAT. 35-9-107(a).

Under WYO. STAT. § 35-9-106(a)(i)(A), the council is required to adopt rules and regulations to establish minimum fire standards not exceeding the standards prescribed by the Uniform Fire Code, the Uniform Building Code and the Uniform Mechanical Code for all new building construction. The State Fire Marshal is required to enforce the regulations promulgated by the council. See WYO. STAT. § 35-9-107(a)(ii). However, WYO. STAT. § 35-9-121(a) requires the State Fire Marshal to delegate this authority to cities, towns and counties upon request:

(a) The state fire marshal shall delegate complete authority to municipalities and counties which apply to enforce and interpret local or state fire, energy efficiency, building or electrical safety standards. . . . The state fire marshal shall notify the governing body of the municipality or county of the minimum standards and requirements of the act [§§ 35-9-101 through 35-9-130] and W.S. 16-6-501 and 16-6-502 and transfer jurisdiction and authority by letter... . (emphasis added)

It is important to note that there are exceptions to the council’s rulemaking authority under WYO. STAT. § 35-9-106 and the State Fire Marshal’s enforcement authority under WYO. STAT. § 35-9-107. Such exceptions are listed in WYO. STAT. § 35-9-118. More specifically, WYO. STAT. § 35-9-118(a)(ii) provides:

W.S. 35-9-106 through 35-9-117 do not apply to:

(ii) County memorial hospitals, hospital districts, private hospitals and other health care facilities. (emphasis added)

Thus, the rules and regulations of the council establishing fire standards do not apply to hospitals and other health care facilities. Nor does the enforcement power of the State Fire Marshal apply to these facilities.

While “health care facilities” is not defined in WYO. STAT. § 35-9-102, the phrase is defined in WYO. STAT. § 35-2-901(a)(x) as follows:

‘Health care facility’ means any ambulatory, surgical center, assisted living facility, adult day care facility, birthing center, boarding home, freestanding diagnostic testing center, home health agency, hospice, hospital, intermediate care facility for the mentally retarded, medical assistance facility, nursing care facility, rehabilitation facility and renal dialysis center; (emphasis added)

To ascertain the legislative intent, we must read all of the statutes in pari materia. *Mauler v. Titus*, 697 P.2d 303 (Wyo. 1985). Although the State Fire Marshal is required to delegate enforcement authority to local governments under WYO. STAT. § 35-9-121, such authority does not include “health care facilities” because such facilities are specifically exempted from WYO. STAT. §§ 35-9-106 through 35-9-117. The reasonable interpretation of this specific exemption reflects a clear intent of the legislature to leave the fire standards of health care facilities under the jurisdiction of the health department. See *V-1 Oil Co. v. City of Rock Springs*, 823 P.2d 1176 (Wyo. 1991), (“Reasonable interpretation” of language reflects clear intent).

Wyoming municipalities may govern their own affairs unless preempted by statute; the Department of Health fire codes clearly preempt municipal fire codes. “A city or town can only exercise those powers expressly or impliedly conferred by constitution or statute. The legislature is therefore the well-spring of practically all powers here in play.” *Tri-County Elec. Ass’n v. City of Gillette*, 584 P.2d 995, 1005 (Wyo. 1978). Since the Fire Marshal cannot delegate jurisdiction of fire codes to municipalities for hospitals and other health care facilities the jurisdiction remains within the confines of the state, specifically the Department of Health.

IV. Fire Escape Statutes - Hospitals

WYO. STAT. § 35-9-501 *et seq.*, outlines the type of fire escapes that must be utilized in buildings, including “hospital buildings, two (2) or more stories in height.” These fire escape statutes, pursuant to WYO. STAT. § 35-9-507, are not applicable:

. . . in any incorporated city or town that has by ordinance adopted a uniform building code which provides among other things adequate and safe means of inside fire escapes, smoke towers and fireproof inclosed stairways and further fixes the types of occupancies and types of buildings subject to said code.

Thus, a city or town with a uniform building code may regulate its own fire escapes, but WYO.STAT. § 35-9-507 does not confer fire code jurisdiction in other areas to the city or town. Such jurisdiction is clearly maintained by the Department of Health pursuant to WYO.STAT. § 35-9-118(a)(ii) and WYO.STAT. § 35-2-906.

The Department of Health has jurisdiction to establish and enforce fire safety standards for health care facilities.

V. Building Codes

Each health care facility in the state must have a valid license issued by the Department of Health. WYO. STAT. § 35-2-902. Licensees must comply with the rules and regulations promulgated by the Department of Health. See WYO. STAT. § 35-2-905 (a). As previously noted, the Department of Health has promulgated fire and building codes with which all health care facilities must comply. See ALF Rules, Ch.4, § 18(c).

The second prong of your question focuses on jurisdiction over building codes. As stated earlier, state statute requires the Department of Health to inspect and approve plans and specifications for health care facilities. See WYO. STAT. §§ 35-2-906, 908. The Department has promulgated rules regarding construction codes but has not addressed specific issues, such as mine subsidence compliance and local natural hazards. Statutorily, if federal funds are being used for the facility, the medical construction project must conform to federal and state requirements. WYO. STAT. § 35-2-343. Article 13 § 1 of the Wyoming Constitution provides municipalities with the power to govern their local affairs and establish their own ordinances. Further, the Constitution reads:

(d) The powers and authority granted to cities and towns, pursuant to this section, shall be liberally construed for the purpose of giving the largest measure of self-government to cities and towns.

WYO. CONST. art. 13, § 1(d).

The legislature has specifically granted municipalities the powers to:

(xxv) Prescribe the thickness, strength and manner of constructing any buildings and the construction of fire escapes therein, and provide for their inspection;

(xxvi) Provide for the repair, removal or destruction of any dangerous building or enclosure;

(xxvii) Define fire limits and prescribe limits within which no building may be constructed except of brick, stone or other incombustible material, without permission and cause the destruction or removal of any building constructed or repaired in violation of any ordinance;

WYO. STAT. § 15-1-103(a).

This statute, in context with the powers granted under the Wyoming Constitution, delegates to the city the right to implement its own building requirements within its jurisdiction: requirements with which all buildings must comply.

In *State ex rel. Schneider v. City of Kansas City*, 612 P.2d 578, 228 Kan. 25 (1980), the Kansas Supreme Court explained:

There is no question that cities in Kansas may pass ordinances setting minimum standards for construction projects, including the adoption of building, mechanical, plumbing, electrical and similar codes. The state, on the other hand, has adopted comprehensive building codes of its own that are mandatory in the construction of all school buildings and, apparently, sometimes conflict with the codes adopted by Kansas City. Do such statutes preclude local municipalities from enforcing local building codes which are or may be in conflict therewith? We think so. (emphasis added)

Id., 612 P.2d at 581.

In determining whether an ordinance is in conflict with general laws, the test is whether or not the ordinance permits or licenses that which the statute forbids or prohibits, and vice versa. *Middleburg Hts. v. Ohio Board*, 605 N.E.2d 66, 68 (Ohio 1992).

In applying the home rule doctrine to decide whose code prevails, we must determine whether a conflict exists between the two building codes. The Department of Health has the power to license health care facilities and has promulgated rules continuing building requirements. This power is not in direct conflict with the authority of the municipality to regulate its own building codes. The requirements of the Department of Health are building standards for health care facilities and the municipality may demand more stringent requirements in areas where there is no conflict with the state standards. Thus, in areas of mine subsidence, drinking water supply, localized natural hazards, etc., the local building codes would apply. Thus, there is overlapping jurisdiction in the area of building codes, except in the area of fire codes which is exclusive to the Department. In the case of building code conflicts for health care facilities, the state standards apply. The health care facility

would have to meet the state building codes before being licensed by the Department of Health.

CONCLUSION

With regard to health care facilities, the Department of Health has jurisdiction over the fire and building code requirements. The fire code jurisdiction is exclusive. The building code jurisdiction is not. The local municipality maintains jurisdiction over the building codes standards that do not conflict with the state building codes for health care facilities. If you have any further questions or concerns regarding this matter, please contact us.

July 10, 2000

FORMAL OPINION NO. 99-010

To: The Honorable Rocklon L. Edmonds
Chairman, Wyoming Collection Agency Board

From: Gay Woodhouse
Attorney General

Rowena L. Heckert
Deputy Attorney General

Drake D. Hill
Senior Assistant Attorney General

P. Olen Snider, Jr.
Assistant Attorney General

Issues

By letter dated August 27, 1998, you requested an opinion regarding the application of WYO. STAT. § 40-14-101 through 40-14-702, the Wyoming Uniform Consumer Credit Code (the "Code"), to certain practices of collection agencies governed by WYO. STAT. § 33-11-101 through 33-11-116, the Wyoming Collection Agency Act (the "Act"). The Collection Agency Board (the "Board") has promulgated regulations to aid in the administration of the Act (the "Regulations"). Your letter poses three specific questions:

QUESTION NO. 1. In collecting on a debt arising out of a consumer credit transaction, may a collection agency collect from the consumer any portion of the commission or other fee charged by the collection agency to the creditor for its services in collection of that debt?

ANSWER: No. Even if the debt agreement provides that the creditor may collect its costs of collection (including any commission or fee charged by the collection agency), neither the creditor nor the collection agency may collect any default charges unless they are specifically allowed under the Code.

QUESTION NO. 2. In collecting on a debt arising out of consumer credit transaction, may a collection agency collect from the consumer any fees that are permitted to be charged to the consumer under the debt agreement, even if the creditor has not assessed the fees?

ANSWER: No. Generally, unless the collection agency agreement specifically provides otherwise, the creditor must determine the amount of the debt to be collected, not the agent. The creditor, however, may assess any charge that is allowed under the contract and also allowed under the Code and other applicable law.

QUESTION NO. 3. Is Section 11(a) of Chapter 4 of the Regulations in conflict with the Code?

ANSWER: No. Section 11(a) of Chapter 4 of the Regulations is drawn nearly verbatim from the federal Fair Debt Collection Practices Act and should be interpreted consistently with its federal counterpart.

Discussion

QUESTION NO. 1

You first inquire whether a collection agency may collect from a consumer its commission or other fee charged by the collection agency to the creditor. Because the Code restrictions on default charges are generally the same for all consumer credit transactions, this opinion addresses default charges in connection with all three types of consumer credit transactions.

Your inquiry raises issues of statutory interpretation. A Wyoming statute must be construed to give effect to the Legislature's intent in enacting the statute. *Parker Land & Cattle Co. v. Wyo. Game & Fish Comm'n*, 845 P.2d 1040, 1042, 1044 (Wyo. 1993). One looks first to the plain language of the statute. *Chevron, U.S.A., Inc. v. State*, 918 P.2d 980, 984 (Wyo. 1996). Should the statute's plain language be ambiguous, general rules of statutory construction must be used to ascertain legislative intent. *Parker*, 845 P.2d at 1044. Courts find a statute to be ambiguous if the statutory language permits more than one plausible construction. *Pinther v. State Dept. of Admin. & Inf.*, 866 P.2d 1300, 1303 (Wyo. 1994); *Cf. Enron Oil & Gas v. Dept. of Revenue*, 820 P.2d 977, 982 (Wyo. 1991) (differing interpretations must be credible).

The Code applies only to "consumer credit transactions," which term is not defined specifically. Given the Code's structure and the language used in WYO. STAT. § 40-14-120, a consumer credit transaction is one involving a consumer credit sale, a consumer lease or a consumer loan.

In the Code, the Legislature identified six specific charges a creditor may assess: application fees (WYO. STAT. § 40-14-309(b)), service or finance charges (WYO. STAT. § 40-14-212, 310, 348, 360 & 363), specified additional charges (WYO. STAT. § 40-14-213, 311), delinquency charges (WYO. STAT. § 40-14-214, 312), deferral charges (WYO. STAT. § 40-14-215, 313), and limited collection charges (WYO. STAT. 40-14-236, 244, 247, 248-249, 334-336, 338, 340, 353, 504 & 505). Under the Code a creditor is allowed to impose a fee only if it is within one of these six categories. Conversely, if a fee is not within a permitted category, then the creditor may not require the consumer to pay it. This conclusion follows from the rule of statutory interpretation that, generally, where a statute enumerates the subjects or things on which it is to operate, it is construed as excluding from its effect all those not expressly mentioned. *City of Cheyenne v. Huitt*, 844 P.2d 1102, 1104 (Wyo. 1993). By enumerating these specific allowable charges, the Legislature excluded all others.

The answer to your inquiry hinges on whether a collection agency's commission is within one of the six categories of allowable charges under the Code. Clearly the commission is not an application fee or a service or finance charge. Neither is it among the specified additional charges allowed under the Code. It then must be a default charge to be allowable. The Code specifies that "the agreement with respect to a consumer credit transaction may not provide for charges as a result of default by the consumer other than those authorized by" the Code. (WYO. STAT. § 40-14-248, 336).

The Code authorizes a creditor to assess a particular default charge only if it is within any of three categories: delinquency charges, deferral charges and limited collection charges. Delinquency charges are those that a creditor assesses for payments that are more than ten days past-due. (Wyo Stat. § 40-14-214(a), 312(a)). Deferral charges are those that a creditor assesses to allow the consumer to pay a scheduled installment at a later date. (WYO. STAT. § 40-14-215(a), 313(a)).

The Code allows limited collection charges of varying kinds, which may be imposed on a consumer depending on the type of consumer credit transaction involved. In a consumer credit sale, a consumer lease or a general consumer loan, a creditor may collect sums advanced to protect the collateral securing the transaction (WYO. STAT. § 40-14-219, 317(a)), sums paid to outside legal counsel for reasonable, post-default attorney's fees (WYO. STAT. § 40-14-247, 335), and sums paid as reasonable expenses incurred in realizing on a security interest (WYO. STAT. § 40-14-248, 336). In a supervised loan (a special kind of consumer loan), the same charges may be collected, except that attorney's fees are not allowed on loans over \$1,000 (WYO. STAT. § 40-14-353). In a pawn transaction and a post-dated check or similar arrangement (both being special kinds of consumer loans), the creditor may collect no charges, default or otherwise, other than its finance charge (WYO. STAT. § 40-14-360(a), 363(a)).

The collection agency's commission is neither a delinquency charge nor a deferral charge. It is also not attorney's fees or expenses incurred in realizing on a security interest or in protecting collateral. Because the collection agency's commission is not an allowed

collection charge, it is also not an allowed default charge. As such, the collection agency's commission may not be claimed or collected from the consumer.

This reasoning is not limited to a collection agency's commissions. It also applies to any other default charge that is not specifically allowed under the Code. Perhaps the most common default charge arises in collection of so-called "bad" checks. If the check is tendered as payment under a consumer credit transaction, the creditor may not collect the statutory damages provided in WYO. STAT. § 1-1-115. This is because they are default charges, i.e., imposed on the consumer due to its failure to pay its debt when due, and are not specifically allowed under the Code. When statutes that relate to the same subject are in conflict, they must be harmonized, when possible. In such circumstances, the statutes should be interpreted and construed so that the statutes are given as full effect as possible, giving effect to every word, clause and sentence, see *Chevron*, 918 P.2d at 984; *State Dept. of Revenue & Tax'n v. Pacificorp*, 872 P.2d 1163, 1166 (Wyo. 1994), and as part of a general and uniform system of jurisprudence, see *Pinther*, 866 P.2d at 1303; *Parker*, 845 P.2d at 1044. The Wyoming Supreme Court has favored harmonizing conflicting statutes by giving effect to the more specific statute. *Stauffer Chem. Co. v. Curry*, 778 P.2d 1083, 1093 (Wyo. 1989); *Gerstell v. State ex rel. Dept. of Revenue & Tax'n*, 769 P.2d 389, 394 (Wyo. 1989). Given the Code's listing of allowable default charges, it is much more specific and will control over WYO. STAT. § 1-1-115.

QUESTION NO. 2

You secondly inquire whether a collection agency may, on behalf of the creditor, add a charge that is expressly permitted under the debt agreement when the creditor has failed to do so. The Code does not govern a creditor's relationship with its chosen collection agent; that relationship is instead governed by general principles of agency law. WYO. STAT. § 40-14-103. An "agency" relationship is created when one person manifests his consent to another that the other is to act on his behalf and subject to his control, and the other person consents so to act. Restatement (Second) of Agency § 1 (1958). When the right of control with respect to the other's physical conduct is missing, the person is an independent contractor. *Id.* § 2. It has been noted that "most of the persons known as agents, that is, collection agencies [among others,] are independent contractors ... since they are employed to perform services [but] are not subject to the control or right to control in the performance of the services." See *id.* § 14N, comment a. However, they may fall within the category of agents. Every collection agency operates under some form of agreement or understanding with the creditor.

As agents, any authority that a collection agency has to augment a consumer's debt must be found in the agreement between the creditor and the collection agency. See *id.* § 7, comments b & c. The agreement itself may not have to be in writing to establish the agency relationship or the agent's authority, but if not, it must be found in the conduct of the parties. It is difficult to imagine, however, that a creditor in a consumer credit transaction would

delegate to the collection agent any authority over such an important prerogative of the creditor unless it did so expressly and in writing, especially given the detail and complexity in calculating installment payments and interest charges.

Thus, absent authority to augment the creditor's determination of the amount due on a consumer debt, the collection agency may not add charges that the creditor has not imposed. This is not to say that a collection agency is prohibited from pointing out to the creditor that it may be entitled to impose a particular charge. But the collection agency may not, on its own and without the creditor's consent or ratification, impose charges that the creditor has chosen not to impose, whether consciously or due to oversight.

There is a context where a collection agency might have implied authority to calculate the amount due. When a consumer purchases goods or services by check issued as payment for a cash sale of goods and the check is returned unpaid, the seller may be entitled to certain civil damages specified by statute. (WYO. STAT. § 1-1-115). Calculating the correct amount of damages due under the statute should be a ministerial, mathematical process. In such cases, the collection agency might have the implied authority to collect more than the face amount of the check.

Agencies, however, should tread carefully in exercising such authority. In *Johnson v. Statewide Collections, Inc.*, 778 P.2d 93 (Wyo. 1989), a collection agency was collecting on a "bad" check. The Code was not involved in this case as the check was issued as payment for a cash sale of goods. Consequently the only question was whether the charge was "permitted by law." Under the "bad" check statute, the holder of the check was specifically authorized to impose the surcharge. In computing the amount due under WYO. STAT. § 1-1-115, the collection agency incorrectly doubled the statutory surcharge. The collection agency admitted the error, but claimed that it was an inadvertent and bona fide error. The Court determined that the collection agency had failed to prove this defense and therefore ruled that, by adding amounts not authorized by agreement or statute, the collection agency had violated the federal Fair Debt Collection Practices Act ("FDCPA"). Clearly where a collection agency acts on implied authority to calculate the amount of the creditor's claim, it must do so carefully and correctly.

Federal consumer protection law further supports the conclusion that a collection agency generally may not add to the debt. It does so by requiring the agent to verify the amount of a consumer debt with the creditor, not determining it on its own. Under the FDCPA, a debtor is entitled to dispute the amount of debt owed. If the amount is disputed, the collection agency must "obtain verification of the debt" and, until the debt is so verified, must cease all collection efforts. 15 U.S.C. § 1692g(b).

The courts do not appear to have addressed from whom the verification must be obtained, only that the debt collector must obtain it from someone. For example, in *Statewide*, *supra*, the Wyoming Supreme Court held that "[t]he burden is on the debt collector to demand adequate verification so that it can comply with [15 U.S.C. § 1692g]. The failure to do so by [the debt collector], in this instance, subjects it to the sanctions provided under 15 U.S.C. §

1692k.”(*Statewide, supra* at 100-01). The Court ruled that the collection agency was liable for failing to obtain verification from the creditor, even though it had requested it. The Court specifically noted that obtaining a copy of the “bad” check is not sufficient verification. It follows that a collection agency may not add fees that the creditor cannot verify as part of the amount due under the debt.

QUESTION NO. 3.

Your final inquiry is whether Section 11(a) of Chapter 4 of the Board's Regulations conflicts with the Code. Whether a conflict exists will depend on how one interprets Section 11(a). If Section 11(a) would allow a collection agency to collect a fee only if it is allowed under the Code, then there is no conflict. As noted above, courts favor harmonizing conflicting provisions by giving effect to the more specific provision. Given the Code's specific listing of allowable charges, it is much more specific and will control over Section 11(a), but this applies only if the provisions are in actual conflict.

Section 11(a) is taken nearly verbatim from section 1692f(1) of the FDCPA. It provides that a collection agency may not use unfair or unconscionable means to collect or attempt to collect any debt. Rules and Regulations of the Collection Agency Board ch. 4, § 11 (effective June 26, 1997). Among the proscribed activities is the "collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law."

Generally, when a state administrative agency adopts a rule that is identical to a federal statute, judicial interpretations of the federal statute provide persuasive authority for interpreting the analogous state provision. *Cf.* 2B N.J. Singer, *Statutes & Statutory Construction* § 52.02 (5th ed. 1992 & Cum. Supp. 1999). One federal district court perfectly summarized the operation of section 1691(f)(1):

[T]he agreement creating the debt need not expressly authorize [a] fee if state law affirmatively permits [the] fee even if not specified in the agreement. However, the agreement must expressly authorize the fee if state law permits such a fee only if specified in the agreement. And no such fee may be collected even if provided in the agreement if state law prohibits [the] fee in addition to the principal obligation *because a contract can never impose charges that are prohibited by state law.* *West v. Costen*, 558 F.Supp. 564, 582 (W.D.Va. 1983) (italics added).

The Board's interpretation and implementation of Section 11(a) should be consistent with the court's cogent summary cited above. Under this interpretation, there can be no conflict with the Code.

CONCLUSION

A collection agency, in collecting on a debt arising out of a consumer credit transaction, may not collect from a consumer any portion of its commission or other fees for collection of the debt.

Generally, unless the collection agency agreement specifically provides otherwise, the creditor must determine the amount of the debt to be collected, not the collection agent. The creditor, however, may assess any charge that is allowed under the contract and also allowed under the Code and other applicable law.

Section 11(a) of Chapter 4 of the Regulations is drawn nearly verbatim from the federal Fair Debt Collection Practices Act and should be interpreted consistently with its federal counterpart. Thus, there is no conflict between the regulation and the Code.

INDEX

PAGE NUMBER [from printed version]

- A -

abolished	19
account	15, 16, 19
accrue	19, 48, 49
administration	15, 42, 43, 46, 48, 61
administrative	7, 11, 12, 15, 25, 26, 47, 66
Administrative Procedure Act	25
admission	17, 19, 21-24
appeal	25, 26, 28-30
application	44, 48, 54, 61-63
application fee	63
appropriate	16, 20, 23, 30
assessment	23
at-will	47-52
authority	3-8, 11, 12, 22, 25-28, 31-34, 37, 40, 41, 53-59, 64-66

- B -

benefits	49-51
bona fide resident	43
bonds	14, 15
building code	55-57, 59, 60

- C -

capital facilities	16
certified	20

citizens	15, 33
code	43, 55-57, 59-67
coercion	3
collecting	15, 61, 65, 67
Collection Agency Board	61, 66
collective bargaining agreement	3-7
commission	25-34, 41, 61-63, 67
commissioners	3, 6, 7, 11, 12, 14, 16, 25, 44
compensate	47-49, 51, 52
compensatory	47, 48
confirmed	21
constitution	19-21, 23, 25, 33, 34, 38, 39, 54, 57-59
constitutional	3, 4, 6, 10, 26, 35-39, 54
construction	9, 14, 16, 20, 25, 43-45, 53, 55, 56, 58, 59, 62, 66
consumer	61-65, 67
contract	6, 43, 47-52, 62, 66, 67
control	5, 6, 22, 26, 33, 34, 51, 54, 64, 66
conveyance	9, 10
corporate	7, 42, 43, 45, 46
credit	15, 16, 61-64, 67
creditor	61-65, 67
criteria	18, 43, 45, 46

- D -

debt	61, 62, 64-67
debtor	65
delegate	5, 26, 27, 56, 57, 64
Department of Health	53, 55, 57-60
deposit	15

derived	5, 14, 19, 21, 22, 44
disabled	17-21, 23, 24
discretion	5, 20, 22-24
discretionary	16
disposition	21, 22, 24
distribution	15
dividing	10, 12

- E -

earmarked	16
employees	4-7, 30, 47-52
employers	3-5, 48, 51
enabling	4, 20-23
enforce	4, 26, 27, 34, 39, 40, 55, 56, 58
enforcement	28, 32-34, 36, 37, 39, 40, 56, 57
exceed	15, 27
exemptions	10-13
expertise	28, 29, 31

- F -

Fair Debt Collection Practices Act	62, 65, 67
Fair Labor Standards Act	47
finance charge	63
fire	53, 55-60
funds	14, 16, 17, 19, 20, 22-24, 58

- G -

grants	17-21, 23, 28
--------------	---------------

- H -

health care facilities 53, 55-60
holiday 50-52
home rule 53, 54, 59
hospital 17-21, 23, 24, 55-57
hunting 32-34, 36, 38, 40

- I -

incapacitated 17-19, 23, 24
incorporation 42-46
insurance 44, 45, 49, 50
intent 5, 10, 13, 16, 22, 23, 26, 30, 34, 44, 45, 49, 50, 57, 62
interference 3, 29-31, 39
interpreting 14, 23, 43, 45, 46, 66
intimidation 29
intrusion 35-37, 40

- J -

jurisdiction 4, 31, 53, 56-60
justification 11, 37

- K -

- L -

labor 3-5, 18, 19, 23, 24, 47
land 4, 8-14, 17-24, 33-36, 40, 62
legislative 5, 6, 16, 25, 26, 44, 45, 54, 57, 62
legislature 5, 11, 12, 15, 18, 19, 21-24, 26, 28, 31, 33, 34, 38, 41, 43-45, 48-51, 53,
54, 57, 58, 62, 63

license	20, 26-28, 33, 40, 58, 59
limitations	14, 19, 52
local affairs	53, 54, 58
lot splits	8, 12, 13
- M -	
maintain	20, 33, 42, 43, 45, 46
maintenance	18, 42-46
manage	33
mechanism	8, 13, 17, 24
mill levy	18
monetary	47, 48, 51
municipalities	4, 53, 54, 56-59
 - N -	
 - O -	
officers	32, 33, 35, 37, 40
omission	15
Open Fields Doctrine	34, 36, 37, 39, 40
overtime	47-52
 - P -	
parcels	8-10, 12, 13
Pari-Mutuel Commission	25, 26, 28
permit	6, 9, 10, 12, 30, 40
plain language	11, 22, 23, 50, 62
policy	3, 4, 32, 33, 46
political	6
power	7, 11, 12, 22, 25, 27, 28, 32, 55, 56, 58, 59

precedent	7, 25, 37
preclude	26, 59
principal	42-46, 66
private land	33, 40
probable	32, 34, 36-40
procurement	42, 44
promulgate	49, 55
protecting	3, 35, 63
public entities	4

- Q -

- R -

race	25, 27-31
regulate	8, 10, 12, 13, 33, 57, 59
regulations	8, 10-13, 18, 26, 27, 32, 40, 55, 56, 58, 61, 62, 66, 67
relations	4, 5
requirements	4, 11, 12, 42, 45, 47, 48, 55, 56, 58-60
residency	42, 43, 45, 46
resident	33, 42-46
resolutions	11, 12
responsibility	33
restraint	3
restrict	26, 32, 50
revenue	14-16, 49, 62, 64

- S -

sale	8, 10, 20, 62, 63, 65
sales tax	15, 16

sanctions	9, 65
school districts	6
scope	12, 37-39, 44, 45, 48
sealed bids	16
session laws	18
sick	50-52
statutory	3-7, 10-15, 25, 28, 31, 37, 43-45, 47, 49, 50, 54, 62-66
stewards	25-31
subdivide	9
subdivisions	6, 8, 10-12
supervision	26, 27, 31
suspicion	36, 37, 40

- T -

tax	14-16, 18, 49
territory	21
trainer	30
treasurer	9, 15
trespass	35-38, 40
trust	15, 20-23, 45

- U -

uniform application	54
---------------------------	----

- V -

vacation	50, 51
violations	27
voters	16

- W -

wardens	32, 34, 37, 40, 41
warrant	32, 34-36, 38-40
warrantless	35-37
wildlife	33, 34, 38, 39
Wyoming Uniform Consumer Credit Code	61