The Commonwealth of Massachusetts

REPORT

OF THE

ATTORNEY GENERAL

FOR THE

Year Ending June 30, 1990

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To the Honorable Senate and House of Representatives:

The Annual Report of the Department of the Attorney General, which historically includes Opinions of the Attorney General ("Opinions") rendered during the fiscal year, was not published for fiscal year July 1, 1989 to June 30, 1990. Recognizing the importance to the legal community and the general public of publishing the Opinions in a manner that will provide a consistent source for reference and citation, and in order to ensure that they are available in their traditional form, I herewith issue the Opinions for Fiscal 1990.

Respectfully submitted:

SCOTT HARSHBARGER
Attorney General

DEPARTMENT OF THE ATTORNEY GENERAL

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Gerald T. Fitzgerald

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Andrew Zaikis
Margaret Zaleski
Reed Zars[78]
Judith Zeprun
Peter Zuk
Samuel Zurier

Assistant Attorneys General Assigned To Division of Employment Security

Maria Galvagna
William Luzier
Maria Moynihan[52]
Neal Steingold

Budget Director
Patrick J. Moynihan

Chief Clerk
Edward J. White

Fiscal Affairs Manager
Elizabeth M. Connolly

APPOINTMENT DATE	TERMINATION DATE
1. 8/1/89	50. 7/6/89
2. 9/11/89	51. 7/17/89
3. 9/18/89	52. 7/21/89
4. 9/25/89	53. 8/4/89
5. 10/16/89	54. 8/11/89
6. 12/4/89	55. 8/18/89
7. 1/16/90	56. 8/21/89
8. 1/22/90	57. 8/24/89
9. 2/26/90	58. 8/25/89
10. 3/19/90	59. 9/15/89
11. 4/2/90	60. 9/22/89
12. 4/17/90	61. 9/28/89
13. 5/21/90	62. 10/6/89
14. 5/29/90	63. 10/13/89
15. 6/4/90	64. 10/16/89
16. 6/11/90	65. 10/20/89
17. 6/19/90	66. 10/27/89
	67. 11/8/89
	68. 11/10/89
	69. 11/17/89
	70. 12/4/89
	71. 12/12/89
	72. 1/12/90
	73. 1/17/90
	74. 1/22/90
	75. 1/26/90
	76. 2/2/90
	77. 3/2/90
	78. 3/21/90
	79. 4/6/90
	80. 4/20/90
	81. 5/13/90
	82. 6/1/90
	83. 6/8/90
	84. 6/15/90
	85. 6/22/90
	86. 6/29/90

DEPARTMENT OF THE ATTORNEY GENERAL
STATEMENT OF FINANCIAL POSITION
FOR FISCAL YEAR ENDED
JUNE 30, 1990

Account	*Account Name*	*Appropriation*	*Expenditures*	*Advance*	*Encumbrances*	*Balance*
0810-0000	Administration	$13,334,443.38	$13,096,019.12	—	—	$238,424.26
0810-0014	Public Utilities Auth. by CH. 1221 1973	500,000.00	499,607.49	—	—	392.51
0810-0015	Seabrook Litigation Adm & Exp.	389,627.00	281,299.02	—	—	108,327.98
0810-0017	Judicial Proceedings, relevant to Fuel Charge	74,999.99	74,999.99	—	—	—
0810-0020	Criminal Tax Unit	187,871.00	167,818.58	—	—	20,052.42
0810-0021	Medicaid Fraud Control Unit	1,431,920.00	1,380,232.77	—	—	51,687.23
0810-0031	Local Consumer Aid Fund	695,965.00	690,185.29	—	—	5,779.71
0810-0033	Local Consumer Aid Fund Reimbursement	281,349.01	162,651.00	—	—	118,698.01
0810-0035	Antitrust Div. Adm.	401,824.00	372,760.33	—	—	29,063.67
0810-0201	Insurance Auth. by Ch 266, 1976	400,000.00	397,840.00	—	—	2,160.00
0810-0410	Forfeited Funds	86,487.19	40,458.84	—	—	46,028.35
0810-1000	Expert Witness and Litigation Service Alloc. (4400-1000)	50,000.00	30,119.47	—	—	19,880.53
0810-1031	Victim/Witness Discretionary Allocation of 0840-0105	143,750.00	135,049.99	—	—	8,700.01
0810-7872	Asbestos Property Litigation (Alloc of 1102-7872)	250,000.00	156,677.81	—	—	93,322.19
	TOTALS	$18,228,236.57	$17,485,719.70	—	—	$742,516.87
Schedule 2	TOTALS	$ 211,717.46	$ 29,147.44	—	—	$182,570.02
	GRAND TOTALS	$18,439,954.03	$17,514,867.14	—	—	$925,086.89

DEPARTMENT OF THE ATTORNEY GENERAL
GRANTS AND TRUSTS
RECEIPTS AND DISBURSEMENTS
JULY 1, 1989 TO JUNE 30, 1990

	Account Number	*Balance July 1, 1989*	*Receipts*	*Disbursements*	*Balance 6/30/90*
Attorney General Trust Fund	0810-6614	$80,727.18	$1,098,029.00	$1,098,024.00	$80,732.18
Water Pollution Control Program	0810-6630	—	—	—	—
Air Pollution Control Program	0810-6631	—	34,565.92	32,107.71	2,458.21
Anti-Trust Enforcement Program New England Bid Monitoring Project	0810-6643	—	—	—	—
Hazardous Waste Enforcement	0810-6647	20,344.81	33,813.72	20,344.79	33,813.74
Anti-Drug Abuse Act 1986	0810-6648	80,096.00	80,000.00	125,079.58	35,016.42
Coastal Zone Management Program Implementation	0810-6661	2,693.47	—	—	2,693.47
Pesticide Regulation Program Enforcement Activities	0810-6662	27,856.00	—	—	27,856.00
TOTALS		$211,717.46	$1,246,408.64	$1,275,556.08	$182,570.02

DEPARTMENT OF THE ATTORNEY GENERAL
SUSPENSE FUNDS
RECEIPTS AND DISBURSEMENTS
JULY 1, 1989 TO JUNE 30, 1990

Name	*Account*	*Balance July 1, 1989*	*Receipts*	*Disbursements*	*Balance 6/30/90*
Thomas C. McMahon v. Nyanza	0810-6732	$3,679.42	—	—	$3,679.42
Patrick Ciampo & Howard Johnson a/k/a Edward Miller	0810-6793	7,106.25	—	$7,106.25	—
Wm M. Johnson III & JG Salvage	0810-6808	2,646.84	—	2,646.84	—
Century Auto Appraisers, Inc R.B. Stone & Peter Slate	0810-6862	6,800.00	—	—	6,800.00
Leonidas & Ralph Benzan d/b/a Tropicana Oil Co.	0810-6878	1,000.00	—	1,000.00	—
Eric Bartlett d/b/a Bartlett Assoc. & Fix., Co.	0810-6885	2,000.00	—	—	2,000.00
Bruce Ledbury d/b/a Cars International	0810-6887	11,286.60	—	—	11,286.60
Aetna Finance d/b/a Itt Thorp Co.	0810-6902	1,251.38	—	—	1,251.38
Leland Powers School Settlement	0810-6904	5.79	—	5.79	—
Andrews Paint Co., FG Andrews	0810-6905	1,095.50	$200.00	—	1,295.50
Cabot Mtg. Corp.	0810-6906	375.75	—	375.75	—
North Shore Roommates Service	0810-6915	1,088.39	—	—	1,088.39
Diamond Chevrolet	0810-6917	7,396.00	—	—	7,396.00
Rusty Jones, Inc.	0810-6919	2,263.00	—	—	2,263.00
Business Education	0810-6921	162,298.81	—	—	162,298.81
O'Henry's Used Cars	0810-6922	9,000.00	—	9,000.00	—
Forest Mtg. Group	0810-6923	50.00	—	50.00	—
Mall Auto Sales	0810-6924	15,000.00	—	15,000.00	—
Economy Auto Sales	0810-6925	7,136.60	—	—	7,136.60
Womens World Health Spa	0810-6930	20,000.00	—	—	20,000.00
Casey Chevrolet	0810-6931	3,500.00	—	3,500.00	—
Village Truck	0810-6934	3,068.82	—	3,068.82	—
Second Chance Cars	0810-6936	500.00	—	500.00	—
Lee Auto	0810-6941	3,302.00	—	—	3,302.00
William Wolff	0810-6943	517.55	—	—	517.55
Miller Furniture	0810-6944	3,000.00	3,000.00	—	6,000.00

Wellesley Toyota	0810-6945	5,018.00	28,716.00	33,734.00	—
Tijuana, Goldstein et al	0810-6946	20,000.00	—	20,000.00	—
Ray's Auto Body	0810-6947	23,500.00	—	—	23,500.00
Dynamic Destinations	0810-6949	—	16,500.00	16,500.00	—
Hertz	0810-6950	—	4,989.18	263.73	4,725.45
Open Door Ticket Agency, (T.K.T.)	0810-6951	—	2,500.00	2,500.00	—
Missions of Mercy (M.O.M)	0810-6952	—	14,073.00	12,208.00	1,865.00
Outdoor World, Inc.	0810-6953	—	$140,000.00	—	$140,000.00
TOTALS		$323,886.70	$209,978.18	$127,459.18	$406,405.70

DEPARTMENT OF THE ATTORNEY GENERAL
STATEMENT OF INCOME
For Fiscal Year Ended
June 30, 1990

Account Number		
0801-40-01-40	Fees, Filing Reports, Charitable Organizations	$ 272,890.00
0801-40-02-40	Fees, Registrations, Charitable Organizations	48,620.10
0801-41-02-40	Fines & Penalties, Civil Actions	663,010.36
0801-62-02-40	Reimbursement for Services, Cost of Investigations — Consumer	146,840.02
0801-62-03-36	Local Consumer Aid Fund-Reimburse For Service	94,946.50
0801-65-09-36	Fuel Assessment	74,999.99
0801-67-67-40	Reimbursement, Indirect Cost Allowances	308,767.00
0801-67-01-40	Reimbursement, For Service	1,038,380.00
0801-68-04-36	Forfeitures	159,627.91
0801-69-99-40	Miscellaneous	$1,705,821.19
	TOTAL INCOME	$4,513,903.07

November 27, 1989

Number 1

Mary Ann Walsh, Secretary
Executive Office of Consumer Affairs and Business Regulation
One Ashburton Place
Boston, Massachusetts 02108

Ralph A. Iannaco
Executive Secretary
Board of Appeal on Motor Vehicle
Liability Policies and Bonds
280 Friend Street
Boston, Massachusetts 02114

Dear Secretary Walsh and Secretary Iannaco:

You have asked, on behalf of the Board of Appeal on Motor Vehicle Liability Polices and Bonds, for an opinion concerning what constitutes a "conviction" for the purposes of G.L. c. 90, § 22F, the so-called Habitual Traffic Offender Law.[1] In general, the Habitual Traffic Offender Law provides for the four year revocation of the driver's license of any person who has accumulated prescribed numbers of "convictions" for various motor vehicle offenses. G.L. c. 90, § 22F (1988 ed.). The question you ask seeks clarification of certain language in chapter 90C of the General Laws which provides a method for the non-criminal disposition of some motor vehicle offenses. Specifically, you ask whether payments made pursuant to the non-criminal procedures of chapter 90C, § 3, as it appeared prior to July 1, 1986, operate as "convictions" for purposes of the Habitual Traffic Offender Law. *See* St. 1985, c. 794.[2] For the reasons set forth below, I conclude that such payments do operate as convictions.

The answer to your question requires a brief review of the pertinent statutory language. Prior to 1983, a procedure for the non-criminal disposition of minor motor vehicle offenses was contained in G.L. c. 90, § 20F. No statutory language at that time expressly provided that non-criminal dispositions through the payment of fines pursuant to § 20F were "convictions" for purposes of the motor vehicle laws. Accordingly, a 1982 opinion of my predecessor concluded that, since the word "conviction" generally refers only to judgments of guilt in a criminal proceeding, fines paid in the non-criminal context of § 20F were not "convictions" for the purposes of G.L. c. 90, § 20, which, like the Habitual Traffic Offender Law, permits the revocation of a driver's license upon the accumulation of certain "convictions." *See* 1982/83 Op. Att'y Gen. No. 2, Rep. A.G., Pub. Doc. No. 12 at 81-83 (1982).

Subsequent to this opinion, however, the Legislature, by St. 1982, c. 586, repealed G.L. c. 90, § 20F, and placed the procedures for the non-criminal disposition of motor vehicle offenses in chapter 90C of the General Laws. As of April 14, 1983, the effective date of the 1982 legislation, § 4 of chapter 90C provided, in pertinent part, as follows: "Any provision of this chapter to the contrary notwithstanding, *any payment of a fine made pursuant to the provisions of this chapter shall operate as a conviction for purposes of registry of motor vehicles*

action pursuant to chapter ninety." *See* G.L. c. 90C, § 4, as appearing in St. 1982, c. 586 (emphasis added). This language, which existed in the form set forth above until July 1, 1986, effectively superseded the prior opinion of the Attorney General by making express the legislative intent that, as of April 14, 1983, non-criminal fines were to be considered convictions for the purposes of chapter 90.[3] Since the Habitual Traffic Offender Law is a part of chapter 90, it is clear that "fines" under chapter 90C paid prior to July 1, 1986, are "convictions" for the purposes of the Habitual Traffic Offender Law.

It is equally clear that all payments under G.L. c. 90C, § 3, made prior to July 1, 1986, are "fines" as that word was used in § 4, and therefore operate as convictions. Section 3 of chapter 90C is the provision which prior to July 1, 1986, as now, provided for the non-criminal disposition of some motor vehicle offenses either through a contested non-criminal trial or through uncontested payments made to the court in person or by mail. All payments prescribed by § 3, as it appeared prior to July 1, 1986, were clearly designated as "fines." For example paragraph (a)(1) of § 3, as appearing in St. 1982, c. 586, required the district courts to promulgate a schedule of penalties for the purposes of non-criminal dispositions pursuant to that section. This schedule was then described as the "schedule of fines" and payments made pursuant to it as "the scheduled fine." As to uncontested payments in person or by mail, § 3 stated that the "payment of *such fine* shall operate as a final disposition of the case," and, as to payments required after a contested non-criminal trial, it stated that the clerk-magistrate or the justice "may impose at a minimum *the scheduled fine*. . . or may increase the penalty to an amount not exceeding *the maximum fine* permitted by law for the particular violation." (Emphasis added.)[4]

In sum, I conclude that all payments made pursuant to G.L. c. 90C, § 3, prior to July 1, 1986, are "fines" and that non-criminal dispositions through the payment of such fines are "convictions" for the purpose of G.L. c. 90, § 22F, the Habitual Traffic Offender Law.

Very truly yours,

JAMES M. SHANNON
ATTORNEY GENERAL

[1] The Board seeks this opinion in order to carry out its duty pursuant to G.L. c. 90, § 28, to hear appeals from decisions of the Registrar of Motor Vehicles, the official charged with revoking licenses pursuant to the Habitual Traffic Offender Law.

[2] You need to know this because convictions accumulated over a period of five years may be counted in determining license revocations under the Habitual Traffic Offender Law. *See* G.L. c. 90, § 22F. Currently, this includes convictions going back to late 1984.

[3] Effective July 1, 1986, the Legislature amended chapter 90C in part to designate non-criminal motor vehicle violations by the new appellation, "civil motor vehicle infractions." *See* St. 1985, c. 794, §§ 12, 14. Accordingly, G.L. c. 90C, § 4, was changed to make clear that all payments pursuant to chapter 90C, by whatever appellation,

were convictions for the purposes of chapter 90. *See* St. 1985, c. 794, § 3. The pertinent language of § 4 currently reads as follows: "Any provision of this chapter to the contrary notwithstanding, any payment of a penalty, fine or assessment made pursuant to the provisions of this chapter, including the payment of an assessment for a civil motor vehicle infraction shall operate as a conviction for the purposes of registry of motor vehicles action pursuant to chapter ninety. . . ." G.L. c. 90C, § 4, as appearing in St. 1985, c. 794, § 12. There is no question, and you have raised none, that all payments pursuant to the current chapter 90C are "convictions" for the purposes of the Habitual Traffic Offender Law.

[4] Since I conclude that § 3 payments made before July 1, 1986, are "fines" and therefore "convictions" according to G.L. c. 90C, § 4, as it then existed, I need not determine whether the broader language of the current § 4 (*see* note 3, *ante*) could retroactively turn pre-July 1, 1986, payments into convictions.

December 7, 1989

Number 2

Michael J. Connolly
Secretary of State
State House
Boston, Massachusetts 02133

Dear Secretary Connolly:

You have asked my opinion whether chapter 516 of the Acts of 1989, "An Act making it unlawful to discriminate on the basis of sexual orientation," may be the subject of a referendum petition under Article 48 of the Amendments to the Massachusetts Constitution. Your opinion request arose because a referendum petition calling for the repeal of this law, signed by ten qualified voters, was filed with your office in a timely fashion. For the reasons discussed below, it is my opinion that the Massachusetts Constitution excludes chapter 516 from the referendum process.

Article 48 of the Amendments to the Massachusetts Constitution sets forth standards for the submission of laws enacted by the Legislature to the referendum process. Among these standards is the exclusion from the process of certain subjects:

> No law that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal or compensation of judges; or to the powers, creation or abolition of the courts; or the operation of which is restricted to a particular town, city, or other political division . . . ; or that appropriates money for the current or ordinary expenses of the commonwealth . . . shall be the subject of a referendum petition. Amendments, Art. 48, The Referendum, Pt. III, § 2.

"The excluded matters provision has consistently been read to mean that if any portion of a law relates to a matter excluded from the referendum process, the law in its entirety may not be the subject of a referendum petition." 1982/83 Op. Att'y Gen. No. 4, Rep. A.G., P.D. No. 12 at 88, 89 (1982).[1] *See also* 1965/66 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 312 (1966)[2] This reading is consistent with the views of the framers of Article 48. *See* 2 Debates in the Constitutional Convention, 1917-1918 (1918) ("Debates").[3]

Accordingly, I have reviewed chapter 516 to determine whether any of its sections relate to a subject matter excluded from the referendum process. Based on this review, I have concluded that §§ 1 and 14 of chapter 516 relate to "religion, religious practices or religious institutions" and that, therefore, chapter 516 cannot be the subject of a referendum.[4]

Chapter 516, when it becomes effective, will generally amend the anti-discrimination laws found in chapter 151B of the General Laws to include the prohibition against discrimination on the basis of sexual orientation. Included in chapter 151B as it currently appears is an exemption which generally permits religious institutions to discriminate in their employment and admission practices. Section 1 and, in similar terms, § 14 of chapter 516 would amend chapter 151B to broaden that exemption by adding the proviso that "notwithstanding the

provisions of any general or special law nothing herein shall be construed to bar any religious . . . institution . . . from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained." St. 1989, c. 516, § 1.[5]

This broadened religious exemption applies not only to discrimination on the basis of sexual orientation but also to all of the anti-discrimination provisions of chapter 151B. Thus §§ 1 and 14 alter the legal status of religious institutions with respect to discrimination on the basis of such characteristics as race, sex, national origin, age, and handicap. The full text of §§ 1 and 14 are set forth in the margin.[6]

I begin my analysis with the proposition that the words of Article 48 "are to be given their natural and obvious sense according to common and approved usage." *See* 1949/50 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 72, 73 (1950), and cases cited. Under any ordinary sense of the word "relate," §§ 1 and 14 relate to religion, religious practices and institutions. Both sections by their express terms directly provide for special treatment of "any religious or denominational institution or organization." *Cf. Commonwealth v. Morash*, 402 Mass. 287, 293-294 (1988), *reversed on other grounds sub nom. Massachusetts v. Morash*, 109 S.Ct. 1668 (1989) ("a law 'relates to' an [area], in the normal sense of the phrase, if it has a connection with or reference to such a[n area]."). In allowing a referendum on a law permitting the dissemination of certain kinds of birth control information, the Supreme Judicial Court in 1941 noted that "[t]he proposed law makes no discrimination by reason of the religious views of the persons within its scope" and that "[r]eligion is not a factor in [the law's] application . . ." *Opinion of the Justices*, 309 Mass. 555, 558-559 (1941). Here, in sharp contrast, §§ 1 and 14 make an institution's connection with religion the sole factor in the application of the exemption, and make "religious principles" the sole basis upon which such discrimination is permitted.

The relationship of §§ 1 and 14 to religious institutions is also clear when these provisions are considered in the context of chapter 516 as a whole. Chapter 516 generally prohibits discrimination on the basis of sexual orientation. Sections 1 and 14, however, exempt religious institutions from this general prohibition. A law that establishes a general rule, but exempts religious institutions from its application, manifestly "relates" to religious institutions. In this regard, chapter 516 is like St. 1950, c. 400, which Attorney General Francis E. Kelly found to be excluded from the referendum process because it generally provided school committees with the authority to disapprove of private schools but disallowed any disapproval "on account of religious teaching." 1949/50 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 72-73 (1950). The religious exemption there, like the religious exemption here, "related" to religion. *Id.*

That §§ 1 and 14 relate to religion is even more apparent when these sections are viewed within the broader context of chapter 151B, the statute they amend. Chapter 516 does not merely create a prohibition against discrimination on the basis of sexual orientation and then subject that prohibition to a religious exemption. The expanded religious exemption created by chapter 516 applies to a variety of anti-discrimination prohibitions already existing in Chapter 151B. Were chapter 516 to be repealed, religious organizations would lose the benefit of this expanded exemption with respect to all of the anti-discrimination prohibitions that would continue to exist. Such a diminution of the freedom of religious institutions is not properly placed before the voters. *Cf. Opinion of the Justices*,

309 Mass. 555, 559 (1941) (finding measure unrelated to religion because it "will not interfere with the freedom of any person within its scope to act in strict accordance with his religious views").

The exclusion of laws relating to religious institutions from the referendum and initiative process reflects the profound concern of those present at the Constitutional Convention of 1917-1918 "that to promote civic harmony the irritating question of religion should be removed as far from politics as possible." *Bloom v. School Committee of Springfield*, 376 Mass. 35, 39 (1978). Mr. Swig of Taunton, the author of the exclusion, noted that:

> We have some men in politics who make religion a profession. They try to get political preferment because of their religious belief . . . I am endeavoring, by means of my amendment, to protect the initiative and referendum from the efforts that will be made . . . to drag constantly before the people these religious fights. 2 Debates at 767.

Mr. Curtis of Boston concurred:

> It seems to me that all religious subjects would be handled better by considering them before the Legislature than in . . . making them the subject of a general discussion by the people at large. 2 Debates at 768.

The framers clearly had in mind religious measures of the type found in chapter 516. Chapter 516 includes a broad "preferment" of religious institutions that permits such institutions to discriminate on the basis of race, color, religious creed, national origin, sex, age, ancestry, handicap, and the new category of sexual orientation in ways not permitted of any other persons or organizations. This preferment has been considered and enacted by the Legislature. If it were made the subject of a referendum, the public would be permitted to vote directly on how religious institutions may conduct themselves. Under the plain terms of Article 48, this is simply not permitted.

In conclusion, I note that chapter 516 has engendered considerable controversy, and that this controversy has not centered on the sections of the law on which this opinion focuses. However, Article 48 of the Massachusetts Constitution requires that no law may be repealed through the referendum process if any of its provisions relate to religion. The law that would be repealed here expands the freedom of religious organizations from laws prohibiting discrimination not just on the basis of sexual orientation but also on the basis of such characteristics as race and national origin. Because chapter 516 thus relates to religion, it may not be subject to the referendum process. You should not, therefore, provide blank forms for the use of subsequent signers of the petition.

Very truly yours,

JAMES M. SHANNON
ATTORNEY GENERAL

[1] In this opinion, Attorney General Francis X. Bellotti found that St. 1982, c. 455 could not be submitted to the referendum process because three of its twelve sections related to the excluded matter of "compensation of judges." The remaining sections related to compensation of the members of the General Court, the Governor, other constitutional officers and court clerks. *Id.* at 88-89.

[2] In this opinion, Attorney General Edward W. Brooke found that the referendum process may be applied only to whole legislative enactments, each part of which must not relate to an excluded matter. Accordingly, his analysis focused on the three (of eighty-one) potentially problematic sections of St. 1966, c. 14, and he acknowledged that if the legislation violated Part III of Article 48 "*in any way*. . . it may not lawfully be the subject of a referendum petition." *Id.* at 314 (emphasis supplied).

[3] At the Constitutional Convention which adopted Article 48, the delegates specifically rejected a provision that would have permitted a referendum to be held on a part of a law. *See* 2 Debates at 3-6, 674-678, and 694-702. In so doing, the framers noted that even "small parts" of a law may be essential to the law's constitutionality, functioning, or purpose, or may reflect a legislative compromise essential to the passage of the entire law. *Id.* at 694-696, 699.

[4] In light of this conclusion it is unnecessary for me to determine whether chapter 516 may fall within any of the other exclusions of Article 48, Part III. Nor do I consider the application of additional exclusions from the referendum contained in Part II of Article 48. This provision excludes from both the referendum and the initiative process any "proposition inconsistent with any one of [several] rights of the individual," notably including "the right of access to and protection in courts of justice." Amendments, Art. 48, The Initiative, Pt. II, § 2, ¶ 3.

[5] I need not, for the purposes of this opinion, determine the precise contours of the legal effect of the language added to these sections, set forth in n. 6, *infra*. I merely note that language has been added, and that basic principles of statutory construction require that they not be considered superfluous. *International Organization of Masters v. Woods Hole, Martha's Vineyard & Nantucket Steamship Authority*, 392 Mass. 811, 813 (1984), *citing Casa Loma, Inc. v. Alcoholic Beverages Control Commission*, 377 Mass. 231, 234 (1979).

[6] Both §§ 1 and 14 of chapter 516 would repeal present law, and then reinsert language identical to that repealed together with new language. I have highlighted the language of §§ 1 and 14 that have not heretofore appeared in chapter 151B:

> SECTION 1. Subsection 5 of section 1 of chapter 151B of the General Laws, as appearing in the 1988 edition, is hereby amended by striking out the last sentence and inserting in place thereof the following sentence: *Notwithstanding the provisions of any general or special law* nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or religious purposes, which is operated, supervised, or controlled by or in connection with a religious organization, and which limits membership, enrollment, admission, or participation to members of that religion, from giving preference in hiring or employment to members of the same

religion *or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.*

SECTION 14. Said section 4 of said chapter 151B, as so appearing, is hereby further amended by striking out the third paragraph and inserting in place thereof the following paragraph: *Notwithstanding the provisions of any general or special law* nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised, or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from *taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are* calculated by such organization to promote the religious principles for which it is established or maintained.

The words beginning with "taking any action . . ." replace the words "making such a selection as is" which is the only language that § 14 of the new law repeals and does not reinsert.

January 12, 1990

Number 3

Frederick P. Salvucci, Secretary
Executive Office of Transportation and Construction
10 Park Plaza, Room 3510
Boston, Massachusetts 02116-3969

Dear Secretary Salvucci:

You have asked, on behalf of the Massachusetts Department of Public Works ("Department"), whether the procurement of design services for what is known as the "Parcel 7" portion of the Central Artery/Third Harbor Tunnel Project (Artery/Tunnel Project) is subject to the jurisdiction of the Designer Selection Board (DSB). For the reasons set forth below, I conclude that the various elements of the Parcel 7 facility all fall within the statutory exemption from DSB jurisdiction created by G.L. c. 7, § 39A(gl/2).

The Artery/Tunnel Project is a largely federally-funded Interstate Highway project of the Department. A primary feature of the Artery/Tunnel Project is the depression and widening of the Central Artery (I-93) between South Station and North Station along approximately the same alignment as the existing elevated Central Artery. In connection with the Artery/Tunnel Project, the Department proposes to develop a site commonly known as Parcel 7. The 58,000 square foot site is currently used for surface parking and is structureless except for an entrance to the Massachusetts Bay Transportation Authority's Haymarket Station located along the site's western edge. Parcel 7 is located in the Haymarket area of downtown Boston just west of the Central Artery, and it is bounded by Congress Street on the west, New Sudbury Street on the north, Blackstone Street on the east, and Hanover Street on the south. The site is located across the Central Artery from the North End community and directly adjacent to the Blackstone Block, an historic district which is listed on the National Register of Historic Places.

The Department proposes a three-phased design and construction project on the site. According to your description, Phase A will include a building to be located above-grade along the western portion of the site. This building will generally consist of a public marketplace on the ground floor topped by a three-story public parking garage.[1]

Phase B, which will occupy the eastern portion of the site adjacent to the Central Artery, will consist of a ventilation facility which will serve the tunnel through which the depressed Central Artery will pass. The facility will include a major below-grade structure to accommodate mechanical and electrical space for exhaust and fresh air intake fans and associated ducts and equipment. The substructure will support above-ground ventilation exhaust stacks and fresh air intake ducts and louvers.

Finally, in order to address aesthetic and urban design concerns relating to the above-ground ventilation stacks, a final phase of the construction, Phase C, will consist of a five to six-story "skin" to wrap around the above-ground features of the ventilation facility. The skin along the southeast quadrant of the site closest to the Blackstone Block will enclose the exhaust stacks and will include approximately 45,000 square feet of usable floor area, the ground floor of which will be

devoted to an extension of the public marketplace of Phase A, and the upper stories of which will be used for office space. The skin along the northeast quadrant of the site will consist of a wall encasing air intake louvers serving the fresh air supply system of the ventilation facility.

The Department proposes to use its own procedures for the selection of designers for the Parcel 7 project. The Inspector General, however, whose views I have solicited,[2] has taken the position that the entire Parcel 7 facility is subject to the jurisdiction of the Designer Selection Board, and that it is the DSB which must select designers for the Parcel 7 facility.

The designer selection laws are contained in G.L. c. 7, §§ 38A1/2 through 380. These provisions create the Designer Selection Board.[3] With certain limitations not pertinent here, the DSB has jurisdiction over the selection of all designers and others performing design services in connection with any "building project" for a public agency. *See* G.L. c. 7, § 38C. There is no question that the Department is a public agency whose building projects would be subject to DSB jurisdiction. If the Parcel 7 facility, therefore, or any part of it, is a "building project," then designer selection for the Parcel 7 facility is subject to the jurisdiction of the DSB.

A "building project" for purposes of chapter 7 is defined as,

> a capital facility project undertaken for the planning, acquisition, design, construction, demolition, installation, repair or maintenance of any building and appurtenant structures, facilities and utilities, including initial equipment and furnishings thereof; *provided, however, that appurtenant buildings or structures which are required to be constructed as integral parts of the development of sewer, water and highway systems shall not be subject to section thirty-eight C*. G.L. c. 7, § 39A(gl/2) (emphasis added).

Under this definition, a building project includes any "capital facility project" undertaken for the design and construction of a "building" with the exception of those buildings within the proviso highlighted above. That proviso, which I shall call the designer selection proviso, expressly exempts from the definition of the term "building project" for the purposes of DSB jurisdiction under section 38C, any "appurtenant buildings or structures which are required to be constructed as integral parts of the development of . . . highway systems."

For the reasons I now discuss, I conclude that all of the elements of the Parcel 7 facility fall within the terms of this proviso and are thus exempt from the jurisdiction of the DSB. In light of this conclusion, it is unnecessary for me to determine whether the elements of the Parcel 7 project, taken separately or together, constitute a "capital facility project" for the design and construction of a "building."[4]

I begin my analysis with an overview of the statutory history and purpose of the designer selection law. The designer selection law (G.L. c. 7, §§ 38A1/2-380) was enacted by the Legislature as part of St. 1980, c. 579. Chapter 579 was a sweeping reform measure resulting from recommendations of the Special Commission Concerning State and County Buildings, commonly known as the Ward Commission. One of the central findings of the Ward Commission was a pattern of waste, fraud and abuse in the award of contracts for the design of public buildings. *See* Final Report to the General Court of the Special Commission Concerning State and County Buildings (December 31, 1980) (Ward Commission Report), Vol. 7. at 187. The purposes of the designer selection reforms, as conceived by the Ward

Commission and stated in G.L. c. 7, § 38A1/2, are generally to prevent corruption and waste in the awarding of design contracts for public building projects.[5]

As a counter-weight to this legislative purpose, it must be recognized, however, that certain public building projects constructed in connection with public works projects, including highway systems, were meant to be exempted by the designer selection proviso from the designer selection requirements of the chapter 579 legislation. Although the Ward Commission Report does not expressly advocate such an exception, the corruption which prompted the Ward Commission investigation was not found in what is often referred to as "horizontal" construction, that is, water, sewer, highway and other public works construction, but rather in buildings ("vertical" construction) not related to such projects.[6] Moreover, a task force of the Inspector General's office which reviewed the chapter 579 legislation approximately two years after its enactment, advocated preserving and indeed strengthening the exemption from DSB jurisdiction of buildings related to sewer, water, and highway systems. *See* Final Report of the Chapter 579 Task Force (February 1, 1983) (Task Force Report). In the Task Force Report it was noted that entities such as the Department of Public Works which performed public works construction already had their own administrative procedures which governed the design and construction of horizontal projects. *Id.* at 159. The Task Force rejected proposals to subject horizontal projects to chapter 579-type safeguards, noting the view of some that such safeguards were unnecessary because "public horizontal design and construction projects are currently governed by agency and federal regulations which are often more stringent than those mandated by Chapter 579 for vertical projects." *Id.* at 160. The Task Force decided not to recommend changes without further study. Instead, the Task Force concluded that "the apparent diversity and complexity of existing controls over horizontal construction suggested that careful research on public horizontal design and construction processes is necessary in order to provide a basis for informed decisions regarding application of Chapter 579-type safeguards to horizontal projects." *Id.* at 160. The Legislature adopted these recommendations by preserving, in subsequent amendments to the designer selection law, the exemption for buildings related to sewer, water and highway systems, and indeed by extending that exemption in the manner recommended by the Task Force.[7]

It is apparent, therefore, that while the Legislature was deeply concerned with the pattern of corruption in the design and construction of public buildings, it wished to tread with caution in the area of buildings related to horizontal construction projects such as sewer, water and highway systems. The designer selection proviso reflects an attempt by the Legislature to balance its concern with preventing corruption against this desire to leave intact, at least for the present, existing controls over the designer selection for horizontal construction and related buildings.[8] In order to determine how that balance is struck, I must rely on the words of the statute, which, according to basic principles of statutory construction, must serve as the primary indicator of its meaning. *See Nantucket Conservation Foundation, Inc. v. Russell Management, Inc.*, 380 Mass. 212, 214 (1980).

I turn then to the words of the designer selection proviso which exempt from the jurisdiction of the DSB "appurtenant buildings or structures which are required to be constructed as integral parts of the development of . . . highway systems."[9] I note first that the exemption applies to "appurtenant buildings or structures." The term "appurtenant" in its ordinary sense is defined and used generally to describe something which stands in the relationship of an incident to

a principal. *See generally* 6 C.J.S. *Appurtenant* 139-140 (1975). *See also Assessors of Lawrence v. Arlington Mills*, 320 Mass. 272 (1946) (for purposes of determining whether land and water rights constitute a taxable unit, "appurtenant" construed to mean "joined . . . by necessity or use"). The subordinate element need not actually be a part of the principal element but it usually serves an essential need or relationship rather than a mere convenience. 6 C.J.S. *Appurtenance* 134, 135 (1975). Words such as "accessory," "incident," "adjunct," "appended," or "annexed" are frequently used synonymously with "appurtenant." Black's Law Dictionary 94 (5th ed. 1979); Webster's Third New International Dictionary 107 (1981). These definitions suggest that the Legislature, by exempting not just "buildings" but "appurtenant buildings or structures" meant that, where a building project consists of a principal element together with an incidental but necessary adjunct, both the principal element and its adjunct are exempt from DSB jurisdiction so long as the principal element is "required to be constructed as an integral part of the development of highway systems."

As I now discuss, construction of this phrase leads me to conclude that Phase C, the office space and wall area that will surround the ventilation facility (Phase B), is "appurtenant" to that ventilation facility, and that the two phases, therefore, together constitute "appurtenant buildings or structures" which fall within the designer selection proviso by virtue of the undisputed functional necessity of the ventilation facility to the operation of the Artery/Tunnel Project.

The Inspector General does not dispute, nor could he, that the ventilation facility (Phase B) is required to be constructed as integral to the development of the Artery/Tunnel Project. The facility is necessary to ventilate the tunnel segment between North and South Stations and is therefore functionally necessary to the operation of the tunnel. The ventilation facility will include, in addition to a major below-ground structure to house exhaust and intake fans and equipment, an approximately 125 foot high above-ground exhaust duct and a fresh air intake structure. As this facility will be located in the heart of downtown Boston, adjacent to the North End community and the historic Blackstone Block, it must be enclosed in some way that will render it consistent with its context.[10] The proposed Phase C building is, as you have described it, necessary to accomplish this purpose. It will minimize the visual impact of the ventilation exhaust ducts on the North End community and make them architecturally compatible with the adjacent historic buildings of the Blackstone Block.[11] The area of the structure that will include office space is, as you have proposed it, reasonably related in size and scale to the purpose of enclosing the exhaust stacks passing through it. It is also to be located at the corner of the site closest to the Blackstone Block where integration of the Parcel 7 facility through some human-oriented, aesthetically compatible use is most necessary.

In my view, this office space is no more than a necessary part of the skin for the ventilation facility. As such, the office space is properly viewed as appurtenant to the ventilation facility.[12] The ventilation facility, appurtenant office space and wall surrounding it, in my view, collectively constitute "appurtenant buildings or structures which are required to be constructed as integral parts of the development of . . . highway systems."

The more difficult question is whether Phase A, which involves a three-story garage with a marketplace on the ground floor, fits within the designer selection proviso. This phase will be constructed first on the Parcel 7 site and operate as an independent facility for approximately six years. Although this garage/market

building will eventually share a common wall with the ventilation/office building, I do not regard the building as so functionally or operationally connected to the ventilation/office building that it can be said to be "appurtenant" to that building. If the Phase A garage/market building fits within the designer selection proviso, then it must do so on its own, independently of any relationship to the ventilation/office building. I conclude for the following reasons that it does.

My analysis requires me to explore in greater detail the meaning of the phrase in the designer selection proviso which exempts buildings "required to be constructed as integral parts of the development of . . . highway systems." In this regard, I note that the words "required" and "integral" convey the concept of necessity. To "require" is "to demand as necessary or essential," or "to have a compelling need for." *See* Webster's Third New International Dictionary 1929 (1981). "Integral" is defined as "essential to completeness." *Id.* at 1173. Buildings in order to be exempt, therefore, must be necessary to the development of the highway system. This, however, does not mean, as the Inspector General argues, that only buildings which are functionally necessary to the operation of a completed highway are exempt. The exemption includes not only buildings which are necessary in an engineering sense to a highway, but also buildings which are necessary to "the development" of highway systems. The word "development" connotes a process over time. *See* Webster's Third New International Dictionary 618 (1981) ("development" is the "act, process, or result of developing," "a gradual unfolding by which something is developed"). The class of buildings which are necessary to the development of a highway system is, in my view, broader than the class of buildings necessary to a finished highway, and may include buildings necessary to enable the process of building a highway to go forward.

My reading of the designer selection proviso is supported by a review of the statutory context in which the proviso is found. As I have already noted, a "building project" which is subject to DSB jurisdiction includes (with the exception of building projects falling within the proviso) any "capital facility project" for the construction and design of a building. G.L. c. 7, § 39A(g1/2). The term "capital facility project" includes a broad range of public construction and improvement projects, but specifically excludes from that definition "a highway improvement such as a highway, bridge, or tunnel." *See* G.L. c. 7, §§ 39A(f) (defining "capital facility") and 39A(g) (defining "capital facility project"). The specific examples of a "highway, bridge or tunnel" which serve to illustrate the general term "highway improvement" suggest that the exclusion for a "highway improvement" is confined to projects bearing a direct relation to the operation of a completed highway. *See Haas v. Breton*, 388 Mass. 591, 595-596 (1979) (general term in a statute takes meaning from the context in which it is employed), and cases cited. If the designer selection proviso were also limited to buildings directly related to the operation of a completed highway, it would be mere surplusage because such buildings are already exempted from DSB jurisdiction by virtue of their not being "capital facility projects." In order to be faithful to the principle that, where possible, every word of a legislative enactment is to be given force and effect (*see United States Jaycees v. Massachusetts Commission Against Discrimination*, 391 Mass. 602 [1984]), the designer selection proviso must be construed to include a broader class of buildings than the class comprised in the exemption for "highway improvements."

Turning to the application of the designer selection proviso to Phase A of the Parcel 7 facility, I note first that a parking garage and certainly retail space, at least where not built to directly service motorists along the highway, are not related directly in their function to the operation of a completed highway. I conclude, however, that the Phase A marketplace and garage is, in the circumstances that you have described to me, necessary to enable the process of building the Artery/Tunnel Project to go forward and is for this reason necessary to the "development" of the highway system of which the Artery/Tunnel Project is a part.

The development of a modern highway is a complex process, involving buildings and structures not thought generally to have been a part of the construction of a simple roadway. *See Opinion of the Justices*, 330 Mass 713, 721-723 (1953). Particularly where, as here, construction is to take place in a densely populated urban area, the disruption and displacement of ordinary activities of urban life is inevitable. Appropriate measures to mitigate that disruption are a necessary part of the development of the modern highway. Indeed, in this case, they are required as a condition of federal funding.[13]

The garage and retail space you seek to build in Phase A of Parcel 7 is specifically conceived as a mitigation measure designed to alleviate disruption caused by the development of the Artery/Tunnel Project. Phase A is planned to be built in advance of the construction of the Artery/Tunnel Project construction so that it will be available for the replacement of lost parking and retail space at the point when those losses occur. As to the parking, the 350 spaces planned for Phase A will replace the same number of public parking spaces which it is estimated will be lost under the existing elevated Central Artery during construction of the Artery/Tunnel Project. The location of those spaces at Parcel 7 is necessary because that site is the only feasible and available site adjacent to the area where the spaces will be lost. Similarly, the retail space is envisioned as a place for the relocation of the adjacent North End merchants and pushcart vendors who wil be displaced by the construction of the Artery/Tunnel Project. In short, these are mitigation measures which are narrowly conceived to address specific disruption caused by the development of the Artery/Tunnel Project. As such, I conclude that they are required to be constructed as an integral part of the development of the Artery/Tunnel Project and that the Phase A garage/market building is therefore exempt from DSB jurisdiction.

In conclusion, I note that, even though Parcel 7 is exempt from the jurisdiction of the DSB, the designer selection procedures which the Department proposes for Parcel 7 provide the same types of safeguards as the procedures used by the DSB.[14] Moreover, federal regulators who will be providing federal funds for the construction of Parcel 7 will provide oversight, and you have informed me that the Division of Capital Planning and Operations (DCPO), the state agency created by the Ward Commission legislation to oversee public building projects, is involved in the project.[15] It is to these safeguards that the Legislature has generally chosen to subject building projects such as Parcel 7 which are required to be constructed as integral to the development of highway systems.

In sum, therefore, it is my opinion that all of the elements of the proposed Parcel 7 facility fall within the designer selection proviso of G.L. c. 7, § 38A(g1/2), and that designer selection for the facility is not within the jurisdiction of the Designer Selection Board.

Very truly yours,

JAMES M. SHANNON
ATTORNEY GENERAL

[1] Construction of this phase will also require reconstruction and improvements of the Haymarket Station entrance currently on the site both to integrate it within the new Parcel 7 building complex and to make it accessible to the handicapped.

[2] The Inspector General is charged with the prevention and detection of fraud, waste and abuse in the expenditure of public funds in public construction. G.L. c. 12A, § 7.

[3] The DSB is an eleven-member, independent, unpaid board, a majority of whose members are architects and engineers. G.L. c. 7, § 38B. For projects within its jurisdiction, the DSB is required to advertise for designers, setting forth specific information pertaining to the project and the qualifications required of applicants. G.L. c. 7, § 38D. The DSB reviews all applications in accordance with the written criteria and selects at least three finalists for every contract award. The DSB is required to rank the finalists and prepare a written record of the reasons for its ranking. G.L. c. 7, § 38F(c). The selection of a designer other than the first ranked designer must be justified in writing. G.L. c. 7, § 38G(a).

[4] The term "capital facility project" is defined in G.L. c. 7, §§ 39A(f) and (g). The term "building" is not defined in chapter 7 but is generally construed in its ordinary sense. *See Modern Continental Construction Co. v. Lowell*, 291 Mass. 829, 839 (1984), and cases cited.

[5] G.L. c. 7, § 38A1/2 states that the purpose of the designer selection law is to: ensure that the Commonwealth receives the highest quality design services for all its public building projects; provide for increased confidence in the procedures followed in the procurement of design and design related services; promote consistency in the methods of procurement of design and design related services for all public building projects in the Commonwealth; foster effective broad-based participation in public work within the design professions; provide safeguards for the maintenance of the integrity of the system for procurement of designers' services within the Commonwealth.

[6] *See generally* Ward Commission Report, Vol. 6 (Construction Defects/State and County Buildings). It was corruption and mismanagement in the design and construction of buildings, such as schools and housing projects, which were unrelated to horizontal public works projects which led to the establishment of the Ward Commission and which served as the Commission's principal focus.

[7] The original chapter 579 legislation had limited the exemption to buildings "required to be constructed as integral parts of the development of sewer, water and highway systems *by a state agency*." St. 1980, c. 579, § 7 (emphasis added). The exemption, as amended, is no longer limited to state agencies, and therefore includes municipal, county, and other public agency projects. St. 1984, c. 484, §7.

[8] In this regard, I note that the designer selection law is quite different from the public bidding laws from which the Inspector General seeks to draw an analogy. The Inspector General relies on *Modern Continental Construction Co., Inc. v. Lowell*, 391 Mass. 829 (1984), a case which involved a determination whether a sewer construction project which included a related building was exempt from the bidding requirements for public buildings contained in G.L. c. 149, §§ 44A-44H. Public works projects not involving "buildings" were subject to the less stringent bidding requirements of G.L. c. 30, § 39M, governing contracts for public works. It was argued that, since the building involved in the project (a pumping station) was merely incidental to the sewer project as a whole, the project should be exempt from the bidding requirements of chapter 149 regarding buildings. The Court rejected this argument. Rather, the Court concluded that, since the Legislature had not clearly exempted such projects from the requirements of chapter 149, no exemption could be inferred based on the predominant public works character of the project. *Id.* at 838-840. The clear basis for the decision in *Modern Continental* was the Legislature's failure to expressly exempt public works projects involving buildings from the requirements of chapter 149. Here, in sharp contrast, I need not infer any exemption to conclude that the elements of Parcel 7 are exempt from DSB jurisdiction. The designer selection law, unlike chapter 149, expressly provides in the designer selection proviso an exemption for buildings which are related to highway and other public works projects.

[9] I note parenthetically that the words of the proviso did not originate with chapter 579. Similar language first appeared in 1953 as an exemption from the jurisdiction of the director of building construction, an officer who, at that time, had control and supervision of certain state "building construction projects." *See* G.L. c. 7, § 30A, as appearing in St. 1953, c. 612, § 5. *See also* G.L. c. 7, § 30B, as appearing in St. 1953, c. 612, § 5 (governing designer selection for building projects under the supervision and control of the director of building construction). Although, the language of that exemption remained substantially intact through several amendments of the statutes governing the director of building construction, *see* St. 1969, c. 704, § 3, St. 1975, c. 311, § 2, there appears never to have been any judicial construction of the exemption.

[10] This requirement has a legal as well as a practical component. Significant historic sites are afforded special protections under state and federal law which compel project proponents to identify, analyze, avoid and/or mitigate the effects of highway construction on historic sites. *See* 16 U.S.C. § 470f (National Historic Preservation Act); 49 U.S.C. § 303 (Department of Transportation Act); 23 U.S.C. § 138 (Federal Aid Highway Act); G.L. c. 9, §§ 26-27C (Massachusetts Historical Commission).

[11] The Blackstone Block consists of small seventeenth to nineteenth century brick buildings (including the historic Union Oyster House) which are organized around meandering alleyways. Because of the proximity of the southern edge of the Parcel 7 site to the Blackstone Block as well as to the nearby Faneuil Hall and Haymarket marketplaces, it draws considerable pedestrian traffic.

[12] I do not mean to suggest that an office building should always, or even usually, be viewed as an appurtenance to structures with a direct highway use. In my view, it is the unique location of the ventilation facility in an historic downtown district that makes the use of so elaborate a skin as an office building an appurtenance to the ventilation facility.

[13] Federal regulations on highway projects require the development of mitigation measures appropriate to the undertaking and specific commitments in writing to fulfill them. *See* 23 C.F.R. § 771. 125(a)(1); *see also* 23 C.F.R. §§ 771.106(d) and 771.109(b). The Department's commitments to the mitigation measures at Parcel 7 are reflected in (1) the approved Final Environmental Impact Statement (FEIS) for the Artery/ Tunnel Project at 249-252, (2) the Record of Decision of the Federal Highway Administration on the FEIS dated January 27, 1986, and (3) the federal-aid project agreement for the Parcel 7 facility (No. IR-93-1[159]) dated April 26, 1989.

[14] They include public advertisement in the Central Register and newspapers of general circulation, the filing of pre-application information and qualifications, pre-established written criteria for selection, the appointment of an experienced selection panel of public employees composed primarily of individuals trained professionally as architects and engineers, guidelines for ranking prospective consultants, and a written record.

[15] With certain exceptions, the DCPO exercises "control and supervision of all building projects undertaken by any state agency . . . ." G.L. c. 7, § 40A. You do not question the jurisdiction of DCPO over the Parcel 7 project, and this Opinion, therefore, has not addressed any issue regarding that jurisdiction.

January 19, 1990

Number 4

William A. Delahunt
District Attorney, Norfolk County
P.O. Box 309
360 Washington Street
Dedham, Massachusetts 02026

Dear District Attorney Delahunt:

You have requested my opinion whether the so-called "Testimonial Dinner Law" prohibits the solicitation of money for a campaign fund-raising event on behalf of a candidate for public office who is employed as an assistant district attorney.[1] The Testimonial Dinner Law, G.L. c. 268, § 9A (1988 ed.), provides a criminal penalty for persons who solicit money for a "testimonial" of any kind on behalf of someone who is employed in any state or local "law enforcement, regulatory or investigatory" agency.[2] Your concern appears to be that many campaign fund-raising events, while not promoted as "testimonials" or in similar terms, nevertheless involve expressions of tribute to the candidate or to his or her past achievements. You have asked whether solicitations for all such campaign events would run afoul of section 9A.

For the reasons set forth below, I conclude that a campaign fund-raising event is not a "testimonial" within the meaning of the Testimonial Dinner Law merely because it involves expressions of tribute to the candidate. I further conclude that whether a particular campaign event is a "testimonial" will depend on its purpose and how it is promoted, and I offer some general guidelines for compliance with section 9A.

Since the term "testimonial" is not defined in chapter 268, the ordinary meaning of that term must serve as the primary indicator of its meaning. *See Bronstein v. Prudential Insurance Company of America*, 390 Mass. 701, 704 (1984). The American Heritage Dictionary (2d College ed. 1985) defines a testimonial as "[s]omething given as a tribute for a person's service or achievement." Similarly, Webster's New World Dictionary (2d College ed. 1978) defines a testimonial as "something given or done as an expression of gratitude or appreciation."

It is true that a campaign fund-raising event may involve expressions of gratitude or tribute to the candidate. A speech, for example, which is given in support of a candidate's bid for office will generally extol the candidate's virtues and praise his or her achievements. Nevertheless, the essential purpose of most campaign fund-raising events is not to honor a person for his or her past achievements but to further the political future of the candidate. A campaign fund-raising event, therefore, the primary focus of which is to promote a political candidacy rather than to honor the candidate, does not fall squarely within the definition of "testimonial." *See* 1965/66 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 369-370 (1966) (looking to primary purpose of an event to determine whether it was a "testimonial" and determining that the sale of tickets to an event at which presentation of an award to a public law enforcement employee was "merely an incidental part of the evening" would generally not violate the Testimonial Dinner Law).

I recognize that campaign fund-raising by public employees could be subject to abuse of the kind sought to be prevented by the Testimonial Dinner Law. A 1963

Opinion of the Attorney General has identified two main objectives of section 9A. "One is to remove persons in the public service in any of the described categories in the statute from any suspicion of being influenced in any way because of the sponsorship, purchase of tickets, attendance or non-attendance at such affairs. The other is to relieve the public from the actual and implied pressures to purchase dinner tickets imposed knowingly or unknowingly by the honored guest or persons sponsoring such affairs." 1962/63 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 110, 111 (1963).

Although these objectives might be further served were section 9A to cover all campaign fund-raising events which involved words of tribute to the candidate, the ordinary meaning of the word "testimonial" simply does not, as I have already discussed, encompass all such events. Moreover, even were there some uncertainty as to the scope of the word "testimonial," I would be required, given the penal nature of section 9A, to adhere to the rule that "penal statutes must be construed strictly and not extended by equity, or by the probable or supposed intention of the legislature as derived from doubtful words." *Collatos v. Boston Retirement Board*, 396 Mass. 684, 686-687 (1986) (quotations and brackets omitted). *See* 1964/65 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 275-276 (1965). Strictly construed, the word "testimonial" clearly does not apply to the typical campaign fund-raising event merely because words of tribute are spoken.

In any case, the dangers inherent in political fund-raising on behalf of public employees have not gone unaddressed by the Legislature. Campaign fund-raising is subject to regulation under the terms of another statute, chapter 55 of the General Laws. Section 9A, therefore, cannot be read in isolation, but must be read, if possible, in conjunction with chapter 55 so as to constitute an harmonious whole consistent with its legislative purpose. *See Registrar of Motor Vehicles v. Board of Appeal on Motor Vehicle Liability Policies and Bonds*, 382 Mass. 580, 585 (1981). A review of chapter 55 further supports the conclusion that sections 9A was not intended to prohibit all campaign fund-raising events which in any way involve expressions of tribute to a candidate.

Chapter 55 is a generally comprehensive statute regulating the financing of political campaigns. In that chapter, the Legislature has evinced a desire to permit public employees to run for public office without having to resign their employment and to permit political committees organized on their behalf to raise funds for that purpose. *See* G.L. c. 55, § 13 (prescribing how funds may be raised on behalf of public employees). *See also* Director of the Office Campaign and Political Finance Advisory Opinion No. 88-16 ("A public employee is not required to relinquish his or her employment with the Commonwealth in order to seek elected office").[3]

If campaign fund-raising events which in any way paid tribute to a political candidate were "testimonials" and thus prohibited by section 9A, it is fair to say that campaign fund-raising on behalf of the public employees described in section 9A would be severely hampered. Given the legislative intent expressed in chapter 55 that public employees be permitted to run for public office and raise campaign funds through their political committees, I do not believe that the Legislature in enacting section 9A could have intended to achieve such a result. Indeed, had the Legislature wished to so severely restrict the campaign fund-raising activities on behalf of the huge subset of public employees covered by section 9A, it would have done so in plainer terms.[4]

Instead, I conclude that the Legislature in enacting section 9A intended to prohibit fund-raising for "testimonials" in the ordinary sense of that term, that is, events held in honor of a person's past achievements, including such events as retirement dinners or tributes for years of public service. *See, e.g.*, 1964/65 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 275 (1965). It did not intend to prohibit all campaign fund-raising events which incidentally involved tributes to the candidate through campaign speeches and the like.

As to the dangers either that campaign contributors could bring undue influence to bear on public employees running for office, or that persons raising money on behalf of public employees could exert undue pressure in soliciting campaign funds, the Legislature has, through chapter 55, provided numerous safeguards.[5] It is to these restrictions that campaign fund-raising events are generally subject, and solicitations for such events do not violate the Testimonial Dinner Law provided the campaign purpose of the event is clearly and prominently disclosed and the trappings of a "testimonial" are avoided.

Whether a given solicitation of funds for a campaign event would violate the Testimonial Dinner Law depends, of course, on the facts of the individual case. In order to avoid a violation of section 9A, it is imperative that solicited funds actually be used exclusively for campaign rather than personal purposes.[6] Moreover, the manner in which the event is promoted by persons orally soliciting funds or on printed advertisements or tickets must make clear that the purpose of the event is to promote the political candidacy of the person on whose behalf the event is organized.

Thus, in order to steer clear of a section 9A violation, promotions for the event as well as actual solicitations of funds should clearly and prominently advertise the event as a campaign event, the purpose of which is to promote a political candidacy and the proceeds of which are to be exclusively used for campaign purposes. Conversely, all advertisements and solicitations should avoid use of words like "testimonial," "retirement dinner," or other language which might suggest that the event is primarily tributary in character or which might tend to obscure the campaign purpose of the event. *See, e.g.*, 1965/66 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 369-370 (1966) (manner in which event is promoted on tickets and advertisements is a prime factor in determining whether event is a "testimonial"). Provided these guidelines are followed in letter and in spirit, the mere fact that an event will include speeches which urge support for the candidate by praising the candidate and his or her achievements will not render that event a "testimonial."

In sum, therefore, I conclude that a campaign fund-raising event is not a "testimonial" for the purposes of G.L. c. 268, § 9A, merely because it involves expressions of tribute to the candidate on whose behalf it is organized, and that solicitations for a campaign fund-raising event which conform to the guidelines set forth in this opinion would not violate the Testimonial Dinner Law.

Very truly yours,

JAMES M. SHANNON
ATTORNEY GENERAL

[1] I offer my opinion pursuant to G.L. c. 12, § 6, which authorizes me to provide legal advice and opinions to the district attorneys on matters pertaining to their official duties. The Testimonial Dinner Law is a criminal statute, violations of which are within your official duties to prosecute. I have been informed, moreover, that there is widespread uncertainty as to the applicability of this law to campaign fund-raising events. It is, therefore, particularly appropriate for me, as the Commonwealth's chief law officer, to give an opinion on this matter.

[2] General Laws c. 268, §9A, provides as follows:

> No person shall sell, offer for sale, or accept payment for, tickets or admissions to, nor solicit or accept contributions for, a testimonial dinner or function, or any affair, by whatever name it may be called, having a purpose similar to that of a testimonial dinner or function, for any person, other than a person holding elective public office, whose office or employment is in any law enforcement, regulatory or investigative body or agency of the commonwealth or any political subdivision thereof.
>
> Whoever violates any provision of this section shall be punished by a fine of not more than five hundred dollars.

[3] It is, of course, the intent of the Legislature that enacted section 9A which I seek to determine. In 1962, when section 9A was enacted (*see* St. 1962, c. 633), the provision of chapter 55 concerning fund-raising by public employees was then codified as G.L. c. 55, § 11 (*see* St. 1954, c. 644). Section 11, as does its present day counterpart section 13, prohibited public employees from themselves soliciting funds, directly or indirectly. Although section 11 did not then (as section 13 does now) expressly permit political committees to solicit contributions on the candidate's behalf, that permission was implicit. *See* 1964/65 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 112-116 (1964) (interpreting related section of chapter 55 prohibiting public employees from "directly or indirectly" giving campaign contributions to public officeholders to implicitly permit the giving of contributions to political committees formed on behalf of those officeholders). In 1962, therefore, as now, chapter 55 both permitted public employees to seek elected office and provided a means for them to raise campaign funds.

[4] Section 9A applies to solicitations on behalf of all non-elective personnel in any state or local "law enforcement, regulatory or investigatory body or agency." G.L. c. 268, § 9A. This includes employees of the judicial branch, as well as "most departments, offices, boards and commissions of the State and its political subdivisions." 1962/63 Op. Att'y Gen., Rep. A.G., P.D. No. 12 at 110, 111-112 (1963). Moreover, employees are covered whether or not they actually perform duties directly concerned with the functions of the agency which place it in one of the categories described in the statute. *Id.* at 111.

[5] For example, section 13 prohibits non-elective public employees from themselves soliciting campaign contributions. A political committee organized on behalf of the candidacy of a public employee may not solicit or receive money from any person who the candidate "knows or has reason to know . . . has an interest in any particular matter in which [he or she] participates or has participated . . . or which is the subject of his [or her] official responsibility." G.L. c. 55, § 13. Sections 16, 16A, and 17 protect public employees and persons doing business with the Commonwealth from pressures

to contribute to political campaigns. General provisions of chapter 55 also set limits upon how contributions may be made, how much may be given, and by whom. *See, e.g.*, G.L. c. 55, §§ 6-11, 13, 15, 16. In addition, extensive reporting requirements concerning political contributions ensure that contributions will be open to public scrutiny. *See* G.L. c. 55, §§ 18, 25.

[6] I stress, however, that the fact that solicited funds are to be used only for campaign purposes cannot alone be determinative of whether a violation of section 9A has occurred. It is the act of solicitation that section 9A addresses, and a solicitation which did not clearly and prominently identify the campaign purpose of the event would, in my view, violate section 9A even though the funds raised were actually used for campaign purposes and reported to the Office of Campaign and Political Finance as required by chapter 55. *See* G.L. c. 55, § 1, "Contribution," and § 18 (requiring the reporting of campaign funds raised through any means, "including testimonials").

May 24, 1990

Number 5

Mary Ann Walsh
Secretary of Consumer Affairs and Business Regulation
One Ashburton Place
Boston, Massachusetts 02108

Barbara Neuman
Executive Director
Board of Registration in Medicine
Ten West Street
Boston, Massachusetts 02111

Dear Secretary Walsh and Ms. Neuman:

My opinion has been requested on behalf of the Board of Registration in Medicine (the Board) concerning the extent to which a physician leave of absence is a "restriction" of staff privileges which a hospital must report to the Board pursuant to G.L. c. 111, § 53B. Since March 2, 1987, the Board has had in effect regulations which require hospitals to report all leaves of absence, voluntary and involuntary, which are related to physician competence. The Board believes that even prior to these regulations such reporting was required by the terms of section 53B, relevant parts of which have been in effect since 1980. It is concerned, however, that hospitals may have misunderstood the reporting requirements of section 53B and, prior to the promulgation of the Board's 1987 reporting regulations, may not have consistently been reporting leaves of absence to the Board. It is in connection with the Board's intention to request hospitals to now report those leaves of absence they may have previously failed to report that the Board seeks my interpretation of the requirements of section 53B. For the reasons set forth below, it is my opinion that a leave of absence taken for any reason related to the physician's competence to practice medicine is a reportable restriction pursuant to section 53B whether the leave is labelled as voluntary or involuntary.

Since its enactment in 1980, *see* St. 1980, c. 374, § 1, section 53B has required a hospital to report to the Board when it "restricts" the staff privileges of a physician "for any reason related to the [physician's] competence to practice medicine." Section 53B reads in relevant part:

> Any person licensed [to operate a hospital or other institution licensed by the Department of Public Health under G.L. c. 111, § 51] *shall report to the board of registration in medicine when the licensee* denies, *restricts*, revokes, or fails to renew *staff privileges*, or accepts the resignation *of. any physician registered wi'h the board* as qualified to practice medicine in the commonwealth *for any reason related to the registrant's competence to practice medicine* or for any reason related to a complaint or allegation regarding any violation of law or regulation, or hospital, health care facility or professional medical association by-laws, whether or not the complaint or allegation specifically cites violation of a specific law, regulation or by-law. . . . [emphasis added].[1]

Initially, I note that the Board itself appears, through its 1987 regulations, to have interpreted section 53B to require the reporting of leaves of absence related to physician competence. *See American Family Life Assurance Co. v. Commissioner of Insurance*, 388 Mass. 468, 474-475 (1983) (regulations are good indicators of an agency's interpretation of a statute it is charged with administering). These regulations, which were promulgated in part pursuant to the specific legislative authorization to effectuate the intent of section 53B (*see*, n. 1, *ante*), expressly require hospitals to report any "disciplinary action" to the Board. 243 Code Mass. Regs. § 2.07 (17)(c). "Disciplinary action," in turn, is defined to include a "voluntary or involuntary . . . leave of absence" provided it "relate[s] directly, or indirectly to . . . the licensee's competence to practice medicine." 243 Code Mass. Regs. § 3.02, "Disciplinary Action," (3)(1) and (4)(a). The Board's interpretation of section 53B as expressed in these regulations requires the reporting of leaves of absence whether voluntary or involuntary and is entitled to weight. *See Kvitka v. Board of Registration in Medicine*, 407 Mass. 140, 144 (1990); *School Committee of Springfield v. Board of Education*, 362 Mass. 417, 441 n. 22 (1972).[2]

The Board's interpretation, moreover, in my opinion, reflects a correct application of the principles of statutory construction which require that a law be interpreted so as to effectuate the intent of the Legislature as evidenced by the usual and natural meaning of the language used and considering the purposes and remedies intended to be advanced. *Deas v. Dempsey*, 403 Mass. 468, 470(1988); *Conroy v. Boston*, 392 Mass. 216, 219 (1984).

By its plain terms, section 53B requires a hospital to make a report to the Board when it "restricts" a physician's privileges for reasons relating to physician competence. During the period of any leave of absence, a physician's staff privileges are in suspension, albeit temporarily. The suspension of staff privileges is manifestly a "restriction" on those privileges as that term is ordinarily understood. *See* Webster's Third New International Dictionary 1937 (1981) (defining "restrict" as "to set bounds or limits to . . ." and giving "limit" as its synonym). Thus, where a hospital directly imposes a leave of absence on a physician for a reason related to the physician's competence to practice medicine, there is no question that the hospital "restricts" the physician's privileges and must report the leave of absence under section 53B.

In my view, moreover, a hospital also "restricts" the privileges of a physician when it permits a physician whose competence to practice medicine has come into question to "voluntarily" take a leave of absence in order to avoid potential disciplinary action by the hospital. Although the restriction of privileges may in this circumstance have been brought about through more indirect means, the hospital may still be said in practical terms to have restricted the physician's privileges.

Placing the "restricts" language within the context of section 53B, moreover, further supports the conclusion that a leave of absence whether labelled as voluntary or involuntary is reportable. *See International Brotherhood of Electrical Workers v. Western Mass. Electric Co.*, 15 Mass. App. Ct. 25, 27 (1982), and cases cited (words of a statute must be read in context). Section 53B requires reporting not only when a hospital "restricts" staff privileges but also when it "denies . . . , revokes, or fails to renew staff privileges, or accepts the resignation of, any physician" for reasons relating to competence. By expressly requiring a report when a hospital "accepts the resignation" of a physician, the statute itself clearly rejects any distinction based on claimed voluntariness.

Finally, when the language of section 53B is read in light of its purpose, it is plain that its reporting requirement must extend to any leave of absence related to physician competence whether imposed directly by the hospital or taken by the physician in order to avoid potential affirmative disciplinary action by the hospital. The role of the Board in the over-all statutory scheme is to take primary responsibility for the regulation of the practice of medicine in the Commonwealth in order to promote the public health, welfare and safety. *See Levy v. Board of Registration & Discipline in Medicine*, 378 Mass. 519, 524 (1979). In that capacity, the Board has been given the duty and authority to investigate physician competence and to protect the public against physician incompetence through the revocation of physician licenses and other means. *See* G.L. c. 112, §§ 5, 5A. The reporting requirements of section 53B are plainly aimed at furthering the ability of the Board to fulfill its function by providing a means to alert the Board to potential instances of physician incompetence.

If a physician could be shielded from having his or her possible incompetence come to the attention of the Board by the simple expedient of taking a voluntary leave of absence rather than risking affirmative disciplinary action by a hospital, incompetent physicians could easily evade the notice of the Board, and the purpose behind section 53B would be frustrated. I cannot impute to the Legislature an intention so easily to permit circumvention of so important a legislative purpose as the assurance of competent physicians. *See Levy v. Board of Registration & Discipline in Medicine*, 378 Mass. at 524-525 (interpreting statutory powers of the Board broadly "given the strong public interest in promptly disciplining errant physicians").

In sum, I conclude that a leave of absence, whether voluntary or involuntary, is a restriction on staff privileges within the meaning of G.L. c. 111, § 53B. Since section 53B went into effect in 1980, therefore, hospitals have been required to report any leave of absence which occurred for any reason related to the physician's competence to practice medicine.[3]

Very truly yours,

JAMES M. SHANNON
ATTORNEY GENERAL

[1] The Medical Malpractice Reform Act of 1986 (St. 1986, c. 351) added the word "denies" to the list of reportable limitations on staff privileges and added the last-quoted phrase requiring reports on limitations of staff privileges "for any reason related to a complaint or allegation regarding any violation of law . . . ." The Act also amended section 53B to expressly authorize the Board to promulgate "such regulations as are necessary to carry out the intent of this section."

[2] I note, however, that the Board has the authority to require by regulation reporting beyond that mandated by section 53B. *See Beth Israel Hospital v. Board of Registration in Medicine*, 401 Mass. 172, 178 (1987) (section 53B does not state exclusive circumstances in which Board reports may be required); *id.* at 176 (specific statutory requirement does not bar consistent agency action under general regulatory authority). The

1987 regulations therefore may not strictly speaking represent an agency interpretation of the precise mandate of section 53B. I need not pause over this question, however, since, irrespective of any agency interpretation, my reading of section 53B is fully supported by the plain language of the statute.

[3] I note that in this opinion you have asked me for my interpretation of the meaning of the section 53B reporting requirement concerning restrictions on staff privileges relating to physician competence, and I have confined myself, as is my general practice, to answering only the specific question you have asked. *See* 1985/86 Op. Att'y Gen. No. 3, Rep. A.G., P.D. No. 12 at _____ (1985). You have not sought, nor do I provide, any guidance as to what means may be available to you to either determine or enforce hospital compliance with G.L. c. 111, § 53B.

June 11, 1990

Number 6

Robert Q. Crane
Treasurer & Receiver-General
Chairman, State Board of Retirement
One Ashburton Place, Room 1219
Boston, Massachusetts 02108

Dear Chairman Crane:

You have asked on behalf of the State Board of Retirement (Board) for an opinion concerning the application of G.L. c. 32, § 15(3) to former Metropolitan District Commission (MDC) police officer Gerald Clemente. Your specific question is whether Gerald Clemente has been convicted of an offense involving the funds or property of a governmental unit within the meaning of subsection 15(3). In addition, you ask for guidance in determining what constitutes "restitution" under subsection 15(3).

As I discuss in the course of this opinion, your request presents difficulties because the guidance it seeks requires factual determinations which are within the jurisdiction of the Board rather than the Attorney General to make. Nevertheless, I proceed to review the law concerning subsection 15(3), and, within the limits of the facts you have stated in your request, to provide you with legal advice designed to assist the Board in proceeding in this matter.

I begin with the factual background you have provided in your letter and its accompanying materials. In 1987, a judgment of conviction was entered in the Federal District Court of Massachusetts against Gerald Clemente based on his plea of guilty to count 11 of a multi-count federal indictment. Count 11 charged Clemente with participating in an enterprise through a pattern of racketeering activity in violation of the Racketeer Influenced and Corrupt Organizations Act. 18 U.S.C. § 1962c. As described in count 11, the criminal enterprise generally consisted of a scheme to defraud whereby Clemente and others stole advance copies of police promotional examinations of the Massachusetts Department of Personnel Administration (MDPA) and distributed them to relatives, friends, associates, and purchasers so that others would be promoted within various police departments of the Commonwealth, including the MDC police.[1] The objectives of the scheme as stated in count 11 were to illegally assist those provided the exams in obtaining promotions within police departments so that they could enjoy the increased salary and other benefits related to the promotions.

With this background, I turn to the statute in question. Subsection 15(3) of chapter 32 of the General Laws provides for the forfeiture of the pension rights of a member of a retirement system and his or her beneficiaries after a final conviction of the member of "an offense involving the funds of a governmental unit or system referred to in subdivision (1) of this section." The forfeiture of pension rights applies "unless and until full restitution for any such misappropriation has been made."[2]

You point out that "the governmental unit . . . referred to in subdivision (1) of this section" is in Clemente's case the MDC.[3] You ask, therefore, whether the crime for which Clemente was convicted is an offense "involving the funds or

property" of the MDC and whether, based on this involvement of funds or property, the Board may discontinue Clemente's pension.[4]

In posing this question, you note that the crime to which Clemente pleaded guilty involved the theft of police promotional exams from the MDPA and their sale or provision by Clemente and others to MDC police officers, among others, for use in obtaining police promotions. You recognize that the police promotional exams of the MDPA cannot properly be characterized as property of the MDC. You propose, however, that "funds or property" of the MDC were nevertheless involved in the form of any increased salary and benefits paid out of MDC funds to police officers who received promotions as a result of their use of the stolen exams.

I limit the discussion which follows to an analysis of the potential theory of the involvement of the funds of the MDC which you have proposed and express no views concerning other possible theories of involvement which you have not proposed or which might be based on facts which are unknown to me or which might emerge during proceedings before the Board. *See* 1986/87 Op. Att'y Gen., Rep. A.G., Pub. Doc. No. 12 at 58, 60 (1986) (Attorney General does not answer hypothetical or abstract questions).[5] I conclude, for the reasons that I now set forth, that a crime such as Clemente's, if it achieved the improper promotion of MDC police officers who, as a result, obtained increased salary or other benefits, would be "an offense involving the funds or property" of the MDC within the meaning of G.L. c. 32, § 15(3).[6]

To begin, I note two apparent features of Clemente's crime which raise questions whether it could "involv[e] the funds or property" of the MDC within the meaning of subsection 15(3). First, any benefits paid to MDC police officers as a result of their improper promotions using the stolen exams would not have gone to Clemente but to the promoted officers. Second, any funds or property given to officers who obtained promotions would presumably not have been funds or property that had in any way been entrusted to Clemente's care.

While it may be that the crime resulting in forfeiture of pension rights pursuant to subsection 15(3) is often one in which an employee steals, for his or her own benefit, funds with which the employee has been entrusted in the course of his or her work, nothing in the language of subsection 15(3) limits its effects to such a crime. Indeed, it is difficult to imagine a broader formulation than the phrase "involving the funds or property." In the sense in which it is employed within subsection 15(3), the word "involve" has been defined to mean "to have an effect on [or to] concern directly." Webster's Third New International Dictionary 1191 (1964). Its synonym is "to affect." *Id.* A criminal enterprise, the purpose of which was to improperly obtain police promotions with all of their attendant benefits, would clearly affect the funds of the MDC if the scheme succeeded, and that is all the phrase "involving the funds or property" would in its ordinary sense require. Nothing in this broad formulation suggests any additional requirement that the involved funds or property have been placed within the employee's care or that the employee himself or herself have been the direct recipient of those benefits.

My conclusion is reinforced by the fact that the "offense involving the funds or property" terminology is used interchangeably in subsection 15(3) with the term "misappropriation."[7] That term, as it is used G.L. c. 32, § 15, has recently received the attention of the Appeals Court in *Arruda v. Contributory Retirement Appeal Board*, 28 Mass. App. Ct. 366, further appellate review denied, 407 Mass. 1102 (1990).[8] The Court in *Arruda*, looking to the ordinary dictionary definitions of the term "misappropriation," rejected any narrow construction of the term and

concluded that it required nothing more than that funds be "wrongly appropriated and misapplied." *Arruda*, 28 Mass. App. Ct. at 369.[9]

Based on this broad definition, the Court concluded that the term "misappropriate" in subsection 15(1) "clearly cover[ed]" the actions of an employee in approving excess payments from his employer (i.e., a "governmental unit" within chapter 32) to a contractor in order to provide kickbacks from the contractor to himself and others. The Court rejected the argument that an employee's "participation in a scheme of bribery and kickbacks from a *contractor* is not covered by the term 'misappropriate,' because [the employee] did not take money from [the employer] and apply *that* money to an illegal purpose or appropriate it to his own use." *Arruda*, 28 Mass. App. Ct. at 368 (emphasis in original). The causing of excess payments to be made by the employer to the contractor in furtherance of the bribery and kickback scheme was a "misappropriation" of those funds and it was irrelevant that those funds went to the contractor and not to the employee.

The plain meaning of "misappropriation" as set forth in the *Arruda* case leads me with little difficulty to the conclusion that the obtaining of benefits attending promotion within the MDC by an unlawful scheme to steal and distribute advance copies of police promotional exams constitutes a "misappropriation." *Arruda*, 28 Mass. App. Ct. 366. Such benefits are "wrongly appropriated and misapplied", *id.* at 369, and, as *Arruda* establishes, it is simply irrelevant that those benefits were not themselves appropriated for Clemente's own use. Similarly, although the question does not appear to have been directly raised in *Arruda* whether the funds misappropriated by the employee had been entrusted to his care, the broad view taken of the term misappropriate in that case clearly encompasses wrongly appropriated and misapplied funds without regard to whether they were funds entrusted to the employee's care. *See ante* at n. 9 (noting that misappropriation need not involve peculation).[10]

In sum, a criminal enterprise which used stolen police exams to gain the increased pay or other benefits attending police promotions is in my view an offense "involving . . . funds or property" or a "misappropriation" according to the plain meaning of those terms. My literal reading of those terms, moreover, is fully consistent with the plain purpose of subsection 15(3). *See Board of Education v. Assessors of Worcester*, 368 Mass. 511, 513 (1975) (statute to be interpreted according to the intent of the Legislature ascertained from words of the statute considered in connection with purposes for which statute was enacted). The forfeiture of pension rights under subsection 15(3) occurs only "unless and until full restitution is made." G.L. c. 32, § 15(3). The purpose of subsection 15(3) is therefore according to its express terms restitutionary. Reading the language of subsection 15(3) in accordance with its plain meaning to include any crime which affects the funds of the employee's governmental unit is in keeping with this purpose since this reading permits restitution for all of a governmental unit's losses attributable to crimes of its employees.

Accordingly, if Clemente's criminal scheme as alleged in count 11 succeeded in gaining increased pay or other benefits from the MDC for wrongfully promoted police officers, his conviction on count 11 would subject Clemente to the forfeiture of his pension benefits pursuant to subsection 15(3). I am unable, however, to determine, based on the facts which you have given me, to what extent the criminal scheme in fact succeeded in gaining increased pay or benefits from the MDC. Based on a reading of the allegations in count 11 to which Clemente pleaded guilty, it is plain that Clemente was convicted of participation in a

criminal enterprise which involved the theft of police promotional exams, and the sale of those exams to persons who were police officers in the MDC. It is equally plain that the purpose of this enterprise was to bring about the promotion of those police officers so that they could reap the benefits attending such promotion, including increased pay and benefits. Count 11, however, contains no allegation — and hence Clemente's plea imports no admission — that the criminal enterprise actually achieved its stated purpose. In other words, there is no allegation in the indictment that any MDC police officer who obtained an advance copy of the MDPA promotional exam actually received a promotion and increased pay or benefits. You have, moreover, provided me with no facts concerning this question.

I therefore cannot answer in any definitive way whether Clemente's pension may be forfeited. It is, moreover, within the jurisdiction of the Board rather than the Attorney General to make any factual determinations relating to whether a particular crime falls within subsection 15(3), and it is, therefore, for the Board to conduct any further investigation and proceedings which may be necessary to determine whether and to what extent Clemente's crime in fact involved the funds of the MDC or otherwise comes within subsection 15(3) (*see ante* at n. 4.).[11]

I note, however, that the absence in count 11 of any allegation that funds of the MDC were actually affected by Clemente's crime does raise a purely legal question which is appropriate for me to address, namely, whether a crime which has as its purpose a misappropriation of funds but does not require as a requisite of a conviction that the purpose be achieved is an offense "involving . . . funds or property" within the meaning of subsection 15(3).

In my view, the plain language of subsection 15(3) requires the answer to be yes. A criminal enterprise the purpose of which is to misappropriate funds and which in fact results in such a misappropriation plainly "involve[s]" those funds regardless of whether it is alleged in the indictment or required as an element of the offense that the criminal enterprise actually succeed. This conclusion is also fully consistent with the restitutionary purpose of subsection 15(3). The loss of funds attributable to a crime is no less real where proof of the loss is not required for a conviction. The statutory purpose of restoring to a governmental unit losses caused by the crimes of its employees is best served by reading subsection 15(3) according to its plain language to include any crime which actually caused a loss whether or not proof of the loss was a requisite of conviction. Accordingly, should the Board determine that Clemente has been convicted of such a crime, the Board should suspend all further pension payments to Clemente unless and until full restitution is made.

You have asked, as a final matter, what would constitute such "full restitution" in this case. It should be apparent from the foregoing discussion that your question as posed could only be answered in the abstract since I do not know precisely what losses may have been caused by Clemente's crime and that question can only be determined through proceedings before the Board. It has been long-established policy of the Attorney General not to answer abstract questions. 1986/87 Op. Att'y Gen., Rep. A.G., Pub. Doc. No. 12 at 58, 60 (1986). You have specifically proposed as a measure of restitution the increase in salaries and benefits realized by officers who obtained promotions as a result of Clemente's crime. This, in my view, would not be an unreasonable measure of restitution.[12] I do not however, suggest that this is the only appropriate measure of restitution or that other compensable losses may not have occurred. I believe that this question

is largely within your province to determine after appropriate proceedings pursuant to G.L. c. 32, § 15(2). I recognize that your task in this regard may not be an easy one because of the unusual nature of the crime and the difficulty in calculating the losses resulting from it. *Cf. United States v. Halper*, 109 S. Ct. 1892, 1900-1902 (1989) (noting difficulty often attending calculation of damages caused by frauds against the government and sanctioning reasonable approximation as a means of calculating restitution). For this reason, "the process of affixing a sanction that compensates the Government for all its costs inevitably involves an element of rough justice." *Id.* at 1902. It is my view, therefore, that losses of the MDC or the State Employee Retirement System (see *ante* at n. 4) which you can identify and reasonably approximate and which can be reasonably related to Clemente's crime would be countable in determining the appropriate amount of restitution.

To sum up, I conclude that a crime such as Clemente's, the purpose of which was to obtain promotions for MDC police officers together with the increased pay and benefits attending such promotions, is a crime involving the funds or property of the MDC within the meaning of G.L. c. 32, § 15(3), to the extent that the crime actually achieved its purpose. Whether Clemente's crime actually involved the funds or property of the MDC or is otherwise covered by subsection 15(3) and the extent of restitution which would entitle Clemente to the restoration of his pension rights should the Board revoke them remain to be determined by the Board in general accordance with the guidance provided in this opinion.

Sincerely yours,

JAMES M. SHANNON
ATTORNEY GENERAL

[1] The scheme was in part implemented through the use of the United States mails thereby constituting mail fraud, a "racketeering activity" under the Racketeer Influenced and Corrupt Organizations Act. *See* 18 U.S.C. § 1961. Count 11, after generally describing the criminal enterprise and alleging the required "pattern" of racketeering activity, also alleges twelve specific instances of racketeering activity, six of which involve schemes to promote MDC police officers.

[2] G.L. c. 32, § 15(3), provides in full as follows:

> *Forfeiture of Rights upon Conviction.* In no event shall any member after final conviction of an offense involving the funds or property of a governmental unit or system referred to in subdivision (1) of this section, be entitled to receive a retirement allowance or a return of his accumulated total deductions under the provisions of sections one to twenty-eight inclusive, nor shall any beneficiary be entitled to receive any benefits under such provisions on account of such member, unless and until full restitution for any such misappropriation has been made.

[3] The governmental unit referred to in subdivision (1) is "any governmental unit in which or by which [a member] is employed or was employed at the time of his retirement or termination of service." G.L. c. 32, § 15(1). You inform me that, prior to his indictment, Clemente was granted an accidental disability retirement allowance, and I infer from your letter that, at the time of his retirement, he was employed as an MDC police officer. The MDC is defined as a governmental unit for purposes of the pension laws. *See* G.L. c. 32, § 1, defining "governmental unit" to include "the commonwealth or any political subdivision thereof" and defining "political subdivision" to include "the metropolitan district commission." It appears, therefore, that the relevant governmental unit for purposes of subsection 15(3) is in this case the MDC.

[4] You have not sought to focus my attention on the additional phrase in subsection 15(3) which imposes a forfeiture of pension rights to the extent that the offense for which a member is convicted involves the funds or property of a "system referred to in subdivision (1) of this section." The retirement system referred to in subsection 15(1) is "any system of which [the person convicted] is a member." In the case of an MDC employee such as Clemente, that system is, as you know, the State Employees Retirement System. *See* G.L. c. 32, § 2. Although the remainder of this opinion focuses on the involvement of the funds or property of the relevant "governmental unit," that is, the MDC, I do not mean to suggest that Clemente's crime may not also have involved the funds or property of the State Employee's Retirement System. Indeed, count 11 specifically states that one of the objectives of the criminal enterprise was to assist others in realizing "whatever pension benefits would accrue by reason of the appointment to or promotion within the police department." To the extent that any such benefits have been paid out of the funds of the State Employee's Retirement System, they could be considered in calculating restitution. *See* discussion, *infra*, at 12-13.

[5] I note for example that portions of count 11 broadly allege that Clemente deprived the Commonwealth of his own services as an MDC police officer. I do not know what facts might underlie this allegation or whether the funds or property of the MDC are implicated. Count 11 also refers to instances where test scores were altered in order to advance the positions of certain police officers. The indictment, however, does not indicate whether this part of the scheme involved MDC police officers.

[6] As this conclusion suggest, I take the funds or property of the MDC to include any funds appropriated by the Legislature for the use of the MDC or property purchased with those funds. Since the MDC is an agency of the Commonwealth, it conducts its activities and meets its payroll not with funds of its own but with Commonwealth funds made available to it from the State treasury by periodic appropriations. *See Gallagher v. Metropolitan District Commission*, 371 Mass. 691, 698 (1977). *See, e.g.*, G.L. c. 29, §§ 9A, 12, 13, 14, 26, 27. For the phrase "funds or property" in section 15 to have any meaning when the "governmental unit" to which the term applies is the MDC, it must, therefore, include Commonwealth funds appropriated for the use of the MDC.

[7] Subsection 15(3) provides that pension rights be forfeited "unless and until full restitution for any such misappropriation has been made." *See ante* at n. 2. The term "such misappropriation" plainly refers to the "offense involving the funds or property."

[8] The Court in this case was interpreting the word "misappropriation" as it was used, not in subsection 15(3), but in subsection 15(1), which provides a method for the

forfeiture of pension rights of those who have been "charged," as opposed to convicted, of the misappropriation of funds or property of a governmental unit or retirement system. It can be readily inferred, however, that the Legislature, which enacted the two subsections simultaneously, see St. 1945, c. 658, § 1, intended the word "misappropriation" to have the same meaning in both subsections. *See Randall's Case*, 331 Mass. 383, 386 (1954).

[9] As the Court sets forth in its opinion, at 368, the American Heritage Dictionary 838 (1976) defines "misappropriate" as follows: "1.a. To appropriate wrongly. b. To appropriate dishonestly for one's own use; embezzle. 2. To use for illegal purposes." In Webster's Third New International Dictionary 1442 (1971), the word is defined as: "1a: to apply to illegal purposes . . . b: to appropriate dishonestly for one's own use: embezzle . . . 2: to appropriate wrongly or misapply in use . . . ." The Court also notes, at 368-369 and n. 4, that a restricted construction of "misappropriate" is specifically rejected in Black's Law Dictionary 901 (5th ed. 1979), which defines misappropriation as: "The act of misappropriating or turning to a wrong purpose; wrong appropriation; a term which does not necessarily mean peculation, although it may mean that . . . ." "Peculation," the Court notes, is defined in Black's Law Dictionary 1017-1018 (5th ed. 1979) as: "The unlawful appropriation, by a depository of public funds, of the property of the government intrusted to his care, to his own use, or that of others. The fraudulent misappropriation by one to his own use of money or goods intrusted to his care."

[10] I add that while the Black's Law Dictionary definition of "misappropriation" suggests that misappropriation may sometimes mean peculation, that is, misappropriation of entrusted funds, *see ante* at n. 9, I see no basis to infer such a restriction in the way "misappropriation" is used in section 15. The use of the word "misappropriation" interchangeably with the extremely broad expression "offense involving . . . funds or property" strongly suggests that the word "misappropriation" was used in its usual, broad sense. Moreover, as noted *ante* at n. 4, the term "misappropriation" in subsection 15(3) refers not only to a crime involving the funds of the employee's governmental unit but also to the retirement system of which the employee is a member. A crime "involving the funds or property" of an employee's retirement system would virtually never involve peculation except in the singular circumstance where the convicted retirement system member was also an employee of the retirement system. If "misappropriation" is to have any meaning in this context, then, it must include more than peculation.

[11] G.L. c. 32, § 15(2) sets forth the procedures for proceedings under section 15, and specifically provides that the Board itself may initiate such proceedings.

[12] I do not, for example, believe it would be necessary for the Board to attempt to discount the amount of restitution by the value of any increased services improperly promoted officers may have provided to the MDC as a result of their promotions. While an improperly promoted MDC police officer may have adequately performed the duties required of his or her enhanced rank, the officer's promotion as a result of a criminal enterprise such as the one at issue here severely damages the reputation and integrity of the MDC. While you might plausibly determine that such damage is in whole or in part too intangible to quantify for purposes of restitution, the existence of such damage would militate strongly against requiring you to consider any services of improperly promoted police officers as a benefit bestowed on the MDC.

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