arranged plan or program are detrimental to the public health or welfare, that detriment persists. Just what there is in the practice prohibited, differing from the practice authorized, that makes it inimical to the public welfare, does not appear.

The only practical effect of these provisions is to prohibit individuals from combining to purchase funeral services in advance of their need. Such arrangements would in no way threaten the public health and welfare. As a result, there is no relationship between this prohibition of price reductions and the State's legitimate interest in licensing the professions of embalming and funeral directing to protect the public welfare.

Applying the reasoning of the above cited authorities, it is my opinion that 1949 PA 268, Section 10(3)(e) and the part of Section 12, quoted above, prohibit a business practice having no detrimental effect on the public health, safety, morals or general welfare and as such are unconstitutional, in violation of Article 1, Section 17 of the Constitution of the State of Michigan (1963).

FRANK J. KELLEY,
Attorney General.

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CONSTITUTIONAL LAW: Statutory classification based upon population.

The statutory provision authorizing county boards of commissioners in counties containing a population of more than 180,000 and less than 250,000 to appoint a warden to have full charge of the county jail is unconstitutional because there is no reasonable relationship to the population classification designated therein and the object to be achieved.

Opinion No. 4762 March 12, 1973.

Mr. Donald A. Burge
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County of Kalamazoo
County Building
Kalamazoo, Michigan 49006

Your request for opinion cites 1851 PA 156, § 2, as last amended by 1927 PA 310, MCLA 46.2; MSA 5.322. Sub-section (a) which was added by said amendment provides:

> "The board of supervisors in any county containing a population of not less than one hundred eighty thousand [180,000] nor more than two hundred fifty thousand [250,000] according to the last United States census may, by a majority vote of members-elect at any regular or legally called special meeting thereof, provide by resolution for the appointment of a warden or other official and the necessary deputies and assistants to have full charge and control of the county jail and the prisoners therein, under the supervision of the board of supervisors. The board shall fix the salary or compensation and pre-

scribe the duties of such official or officials. They may be required to furnish bonds in amounts and with sureties approved by the board of supervisors."

You present upon behalf of the board of county commissioners of Kalamazoo County the following questions and request my opinion thereon:

"1. What is the authority of the County Board of Commissioners to appoint a warden for the County jail?

"2. Is there such a conflict between the statutory authority of a warden and the statutory authority of a sheriff so as to make jail administration impractical under a warden system?

"3. What liability, if any, would the County be assuming by managing a jail under a warden system?

"4. Does the County have the power to give the warden and his deputies the powers of a peace officer?"

Also transmitted therewith were your brief to Lawrence McGowan, Chairman, Jail Study Committee, re liability of county for operation of jail facilities as well as "Brief of Authorities Concerning Questions Submitted for Formal Opinion" from Richard D. Reed, Special Counsel, Jail Study Committee. After dealing at length with each of the above questions and the citation of authorities relative thereto, your letter states:

"In the last analysis, however, it is the opinion of this office that the above lengthy discussion of the questions proposed is entirely unnecessary. It is our considered opinion that subsection a of C.L. '48, § 42.2; MSA § 5.322 is unconstitutional. . . ."

The title to 1851 PA 156, as amended, reads:

"AN ACT to define the powers and duties of the boards of supervisors of the several counties, and to confer upon them certain local, administrative and legislative powers; and to prescribe penalties for the violation of the provisions of this act."

Section 2 as originally enacted read:

"The Alderman of each ward of the City of Detroit, having the shortest time to serve, shall act as Supervisor on the Board of Supervisors; the City of Monroe shall be entitled to one Supervisor for each ward, who shall be the assessor thereof respectively, and the City of Grand Rapids shall be entitled to two Supervisors."

Said section was published without change as 1857 CL 336 and 1871 CL 468 but was not published in either the Compiled Laws of 1897 or the Compiled Laws of 1915. Instead, it was noted that it had been superseded by city charter provisions. 1897 CL 2475n; 1915 CL 2265n. However, § 2 was never repealed and was first amended by 1925 PA 262 to delete its former provisions and insert in lieu thereof:

"The board of supervisors is hereby authorized to offer and pay out of the general fund of the county, not to exceed one thousand [1,000] dollars as a reward for the arrest and conviction or for information leading to the arrest and conviction of any person or persons

> having committed a crime within the county or having escaped from any penal institution therein: Provided, That the powers granted hereby may be exercised by the finance committee of the board of supervisors where said board of supervisors is not in session."

Those provisions were not altered by the amendment of 1927 PA 310 but instead, sub-section (a), above quoted, was inserted at the end thereof. There have been no further amendments. MCLA 46.2; MSA 5.322. Nor has the title of the act been amended to make a reference to a warden for the county jail.

Also pertinent to your inquiry are the provisions of RS 1846, chap 14, § 75, which as originally enacted read:

> "The sheriff shall have the charge and custody of the jails of his county, and of the prisoners in the same; and shall keep them himself, or by his deputy or jailor *for whose acts he shall be responsible.*" [1948 CL 51.75] (Emphasis added)

Section 75 was first amended by 1952 PA 110 to delete the words above underscored. The section has not since been amended or repealed. MCLA 51.75; MSA 5.868. 1952 PA 110 also amended RS 1846, chap 14, § 70 to make corresponding changes relieving the sheriff from liability for the acts of deputies appointed by him. MCLA 51.70; MSA 5.863. See *Bayer* v *Macomb County Sheriff,* 29 Mich App 171 (1970), citing *Bridgman* v *Bunker,* 12 Mich App 44, 47 (1968).

Pertinent to the constitutionality of 1851 PA 156, § 2(a), as amended by 1927 PA 310, MCLA 46.2; MSA 5.322, art 4, § 29 of the Michigan Constitution specifies:

> "The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. No local or special act shall take effect until approved by two-thirds of the members elected to and serving in each house and by a majority of the electors voting thereon in the district affected. . . ."

Section 29 incorporated without substantive change, art 5, § 30 of the 1908 Constitution in the present Constitution. In the following cases similar issue as to the validity of a state statute was ruled upon by the Michigan Supreme Court.

In *City of Dearborn* v *Wayne County Board of Supervisors,* 275 Mich 151, 155-157 (1936), which was an action by City of Dearborn and other municipalities for a declaration of rights under 1909 PA 279, § 27, as amended by 1935 PA 131 providing for the representation of cities upon the board of county supervisors, the circuit court held the section, as amended, to be valid. Prior to such amendment, § 27 had provided for representation in accordance with a graduated scale of population of cities upon the board of county supervisors. As amended by 1935 PA 131, the prior provisions of the section were reenacted without change other than the insertion at the end thereof of a proviso applicable only to a

county whose cities have a total representation of 75 or more upon the board of supervisors and establishing for any such county a different scale of representation for its cities under which the percentage of the representatives from a city with the population of 500,000 or more would be increased. It was conceded

1. Wayne County was the only county of the state in which the number of representatives of cities upon its board of supervisors exceeded 75; and
2. Detroit was the only city in the state with a population in excess of 500,000.

The Court held that § 27, as amended by 1935 PA 131, to be a local act stating:

> "The legislature has enacted a number of laws upon a population basis and without referendum requirement, which, in proesenti, [sic] could apply only to the county of Wayne or the city of Detroit. Some of them have been before this court. The principles upon which they have been sustained as general laws or defeated as local acts are well established in this State and elsewhere.
>
> "The first test to be applied is whether population has a reasonable relation to the purpose of the statute. In *Mulloy* v. *Wayne County Board of Supervisors,* 246 Mich. 632, 635, the distinction is pointed out:
>
> " 'Clearly, because of its provision as to population, the act applies to Wayne county only. If it is a reasonable and logical basis of classification, considering the subject of legislation, unquestionably a specified population may be made the test of the applicability of a general legislative act; and under such conditions the act will not be construed to be invalid as local legislation. *Hayes* v. *Auditor General,* 184 Mich. 39. But where the subject of legislation is such that population has no obvious relation to the purpose sought to be accomplished, an attempt to make the application of the legislative act dependent on population is unwarranted and amounts to local legislation. *Attorney General,* ex rel. *Dingeman* v. *Lacy,* 180 Mich. 329.'
>
> "Upon this test, statutes have been sustained in *People* v. *Brazee,* 183 Mich. 259 (L. R. A. 1916E, 1146), (larger license fees for private employment agencies); *Burton* v. *Koch,* 184 Mich. 250 (enlarged board of education); *Hayes* v. *Auditor General,* 184 Mich. 39 (salary of county agent); *Kates* v. *Reading,* 254 Mich. 158 (consolidating courts); and held invalid in *Attorney General, ex rel. Dingeman,* v. *Lacy,* 180 Mich. 329 (establishing domestic relations court).
>
> "The second test of a general law, based upon population, is that it shall apply to all other municipalities if and when they attain the statutory population. It must have—'an open end through which cities are automatically brought within its operation when they attain the required population.' *Kates* v. *Reading, supra.*
>
> "The same idea is expressed, as quoted in *Mulloy* v. *Board of Supervisors, supra,* p 638:
>
> " 'The classification must not be based upon existing circumstances

only, but must be so framed as to include in the class additional members as fast as they acquire the characteristics of the class.' *Bingham* v. *Board of Supervisors of Milwaukee County*, 127 Wis. 344 (106 N. W. 1071).

" 'The classification should be prospective, calculated to embrace any change in population or circumstances, and should be complete, covering all kinds of subjects dealt with.' 36 Cyc. p. 1006.

"And in 59 C. J. p. 731:

" 'Where a law relates to a class, it must, in order to be regarded as a general law, be general in its application to the class, it must operate uniformly as to all of the persons or subjects included and all of the class within like circumstances must come within its operation. Where the basis of classification is such that new members of the class may come into existence, the law must be so framed as to include them when they arrive.'

"The constitutional provision cannot be circumvented by the subterfuge of couching a law in general terms. The statute must meet the tests through practical operation of its provisions. In *Mulloy* v. *Board of Supervisors, supra*, the act was held invalid because its terms could not be squared with automatic application to other counties as they should reach the provided population."

Mulloy v. *Wayne County Board of Supervisors*, 246 Mich 632, 635, 638 (1929), cited in *Dearborn* involved the validity of 1927 PA 390 which provided for a county civil service commission in counties having a population of 300,000 or more. At the time of its enactment, Wayne County was the only county having the required population. The court noted that Kent County, the next most populous, would presumably not attain 300,000 until 1937 and that Genesee was the next largest. The Court pointed out that various provisions of the act made it applicable only to a county which would have the required 300,000 population by January 1, 1929 and concluded that Act 390 was a local act and not having been submitted to a referendum of the electors was invalid. Among the authorities cited therein was *State v Ritt*, 76 Minn 531, 535-536, 79 NW 535, 536 (1899), which involved the validity of a Minnesota statute cited as Laws of 1899, c 140, which act was applicable to "each county in this state having a population of not less than 100,000 and not over 185,000 inhabitants." The Court noted that the act could never apply to any county which might achieve the required population subsequent to the annual election of November, 1900. The Court held the act to be special legislation regulating the affairs of counties and invalid as violating § 33 and § 34 of art 4 of the Minnesota Constitution. The opinion stated:

". . . Or again, even where the subject of the legislation is such that classification by population would be proper, a particular basis might be incomplete and arbitrary because it did not include within the class all the objects or places similarly situated; that is, whose conditions rendered such legislation equally appropriate. That, in our opinion, is the fatal defect in the act under consideration. The essential provision of this act, and the one which was designed to differen-

tiate counties falling within its purview, is the one providing for one assessor for the whole county, instead of an assessor in each township, city, and village, as provided in the then existing general laws. All the other provisions of the act are merely incidental or auxiliary to this. We are not prepared to say that population might not be a legitimate basis upon which to divide counties into two classes,—one in which there should be but one assessor for the entire county, and the other in which there should be an assessor for each municipal division of the county. If such a basis of classification would be proper upon such a subject, it must be because very populous counties usually contain a large amount of urban as well as suburban and rural property, the values of which, according to area, differ greatly, depending upon location and the nature of the improvements, and therefore that it is desirable that all the property in the county should be assessed by, or under the immediate supervision of, one officer, in order to attain greater uniformity in the valuation of the different classes of property. But, the more populous the county, the stronger this reason would apply. If it applies to counties whose population is between 100,000 and 185,000, it applies with still greater force to counties containing more than 185,000. There is no apparent reason suggested by necessity, or by the difference in the situation or circumstances of counties having a population of not less than 100,000 and not over 185,000 and counties having a population of over 185,000, why the county assessor system should be applied to the former, and the latter left under the local assessor system in the same class with counties having a population of less than 100,000. The attempted classification is therefore arbitrary and incomplete, for the reason that it does not include all the members of the same class, but excludes some whose conditions and wants render such legislation equally necessary and appropriate to them as a part of the same class. . . ."

1913 PA 386, 1915 CL 2456, provided for the appointment of a chief deputy sheriff in counties having a population of more than 150,000 and less than 300,000 population. Former Attorney General Alex J. Groesbeck in OAG 1919, p 92, pointing out that such provision was applicable only to Kent County, held the same to constitute local legislation and, therefore, invalid under art 5, § 30 of the 1908 Constitution.

As above noted, applicability of the "warden" provision of sub-section (a) of 1851 PA 156, § 2, is limited to those counties having a population according to the last federal census of not less than 180,000 nor more than 250,000. On September 5, 1927, the effective date of 1927 PA 110 by which this provision was incorporated in § 2, the 1920 federal decennial census was the applicable census to which reference was made. Kent County was the only county in the state the population of which according to that census fell within that bracket. Wayne County was the only county which then had a population in excess of 250,000. Under the 1930 census, the counties of Kent, Genesee and Oakland each had the required population. By 1940, the population of Oakland County exceeded 250,000 leaving only Kent and Genesee counties the board of supervisors of which were authorized by this act to take the required action. By 1950 the population

of both of those counties exceeded 250,000 but Macomb County qualified. By 1960 the population of Macomb County exceeded 250,000 but Ingham and Saginaw counties qualified. By 1970 the population of Ingham County exceeded 250,000 leaving Saginaw which together with Kalamazoo and Washtenaw qualify so as to permit the taking of this action by their board of commissioners.

Thus, according to the terms of the act, the board of supervisors of Kent County was authorized to act at any time between September 5, 1927 and the effective date of the 1950 census but not thereafter; Genesee County between the effective date of the 1930 census and that of the 1950 census; and Oakland County during the 1930 decennial period. Macomb County was authorized to act during but not after the 1950's. The same was true of Ingham during the 1960's. Saginaw County qualified under both the 1960 and 1970 census while Kalamazoo and Washtenaw counties qualify only under the latter. Wayne County, of course, never did and presumably never will qualify.

It is quite conceivable that the problems incident to the administration and operation of the county jail in each of the larger counties of the state are geater and perhaps sufficiently different so as to warrant classification upon the basis of population in the adoption of legislation with respect thereto including an act granting powers as those in § 2(a). Assuming that to be the case, then what is the reason for the maximum limitation of 250,000 population which has the effect of excluding the following counties from exercising the powers granted by § 2(a):

A. Wayne County at any time.
B. Oakland except during the 1930's.
C. Kent and Genesee following the effective date of the 1950 census.
D. Macomb County following the effective date of the 1960 census.
E. Ingham following the effective date of the 1970 census.

Assuming the act to be valid and that action was taken by the board of supervisors, or its successor the board of commissioners, to place the "warden system" in effect in a given county during the period the provisions of § 2(a) were in effect in that county, I am not suggesting that such system would not thereafter remain in effect in that county. But if such power may only be exercised by the board of a county having a minimum population of 180,000, why should it not be possible for the board to take action at any time when the population of the county exceeds 250,000? For example,

1. Oakland County could take the necessary action in the 1930's. Why not in the 1940's when its population was 254,068?
2. Genesee County could take the necessary action in either the 1930's or 1940's. Why not in the 1950's when its population was 270,963?
3. Macomb County could take the necessary action in the 1950's. Why not in the 1960's when its population was 405,804?
4. Ingham County could take the necessary action in the 1960's. Why not in the 1970's when its population is 261,039?

The apparent answer is that the maximum population limitation of 250,000 has no "reasonable relation to the purpose of the statute." Instead, by imposing the minimum limitation of 180,000 together with the maximum of 250,000, § 2(a) was so limited as to be applicable at the time of its adoption by 1927 PA 310 to only Kent County. Furthermore, the imposition of such maximum limitation has the effect of excluding from the operation of the act those counties to which the same would be applicable were population a logical basis for classification. For those reasons and upon the basis of the above-cited authorities, I am of the opinion that § 2(a) is not a general act and, therefore, contravenes art 4, § 29 of the Michigan Constitution. Inasmuch as § 2(a) is unconstitutional, consideration of the specific questions presented relative to the operation and effect thereof becomes unnecessary.

FRANK J. KELLEY,
Attorney General.

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TOWNSHIPS: Authority to charge for fire protection service call.

A township is without authority to charge for fire service protection calls.

Opinion No. 4768 April 20, 1973.

Honorable Roy L. Spencer
State Representative
The Capitol
Lansing, Michigan 48901

This office is in receipt of your letter which presented the following questions:

1. Can a township impose a specific charge on an individual or corporation for a fire service call within said township?
2. By what legal authority and under what circumstances may a township that either has its own fire department or contracts for fire control services from some other unit of government impose or collect a fee for fire control services from an individual or corporation?

Townships have such powers as are conferred by law. *Hanslovsky v Township of Leland*, 281 Mich 652 (1937). It is my opinion that a township cannot impose a specific charge on an individual or corporation for a fire service call within a township. Although 1945 PA 246, § 1, MCLA 41.181; MSA 5.45(1), empowers a township to enact ordinances which concern:

> ". . . regulating the public health, safety and general welfare of persons and property, fire protection . . . ."

such does not provide authority to charge for a fire protection service call.

The means by which a township may finance fire protection service is limited by law to appropriations from general and contingent funds or by