

COUNTIES AND COUNTY OFFICERS; PUBLIC RECORDS; Auditor's duty to file claims. Iowa Code §§ 22.1, 22.2, 22.7, 331.401, 331.504 (2003). Iowa Code chapter 22 addresses public access to governmental records, but does not govern the filing or retention of public records. The county board of supervisors is responsible for determining whether the documentation accompanying a claim against the county provides sufficient information regarding the basis of the claim to justify payment. (Grady to Cozine, Cherokee County Attorney, 2-22-05) #05-2-2

February 22, 2005

Mark R. Cozine  
Cherokee County Attorney  
427 West Main  
P.O. Box 100  
Cherokee, Iowa 51012

Dear Mr. Cozine:

You have requested an opinion regarding a practice under which county law enforcement officials retain itemized telephone call records, rather than providing the records to the county auditor when a request for payment of the claim is submitted. You ask whether the practice violates the Iowa public records law, Iowa Code chapter 22. We conclude that chapter 22 is not directly implicated by this practice. We note itemized call records held by county officials do fall under the definition of public records and must be made available for public review and copying upon request. To the extent that specific entries are eligible for treatment as confidential under Iowa Code section 22.7, the lawful custodian of the records may redact confidential information prior to allowing public examination of the records.

As background to your inquiry, you explain that in the past your office and the sheriff have routinely submitted your telephone billing statements with complete itemized call records to the county auditor when requesting payment. The itemized call records included information regarding "cell phone calls and long distance calls to and from confidential informants." Your concerns arose when you learned that an individual went to the auditor's office and made a public records request for copies of the itemized call records covering a period of time. Without notice to you or to the sheriff, the auditor allowed the individual to copy the records. You indicate that the auditor "took the position the records are public information once submitted with claims for payment." In light of a belief that the itemized call records included information which should be treated as confidential, you and the sheriff determined that the itemized call records would no longer be provided to the auditor. The auditor has expressed concern that lack of submission of the itemized telephone records to the auditor's office violates chapter 22. Therefore, you ask whether retention of itemized telephone records by your office and the sheriff's office violates the public records law.

Iowa Code chapter 22 (2003) establishes the right of the public to access and copy governmental records. Section 22.1(3) defines "public records" to include "all records, documents, tapes, or other information, stored or preserved in any medium . . . ." Section 22.1(2) defines "lawful custodian" as "the government body currently in physical possession of the public record." Section 22.2 provides that "[e]very person shall have the right to examine and copy public records . . . ." See generally Iowa Code § 4.1(30)(a) (2003) ("shall" in statute imposes a duty).

The general rule of disclosure has certain specified exceptions within chapter 22. Section 22.7 sets forth many categories of records that "shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information . . . ." It is possible that certain entries on the itemized call records of law enforcement agencies may reasonably be treated as confidential records under section 22.7. See, e.g., Iowa Code §§ 22.7(5) (peace officer investigative reports generally considered confidential, and although "immediate facts and circumstances surrounding a crime or incident" are generally not confidential, the Code provides for confidentiality "in those unusual circumstances where disclosure would plainly and seriously jeopardize an investigation or pose a clear and present danger to the safety of an individual"); 22.7(18) (discretionary communications from persons outside the government generally considered confidential where "persons would be discouraged making them . . . if they were available for general public examination . . . ;" information in such communications is not confidential "to the extent that it can be disclosed without directly or indirectly indicting the identity of the person . . . making it or enabling others to ascertain the identity of that person . . . ;" information concerning a crime or illegal act is not confidential "except to the extent that its disclosure would plainly and seriously jeopardize a continuing investigation or pose a clear and present danger to the safety of any person"). In the event that the lawful custodian of a public record is in doubt regarding whether the record qualifies for treatment as a confidential record or believes that the circumstances justify restricting access to otherwise public records, subsection 22.8(4) identifies mechanisms for resolving these issues. Section 22.10 sets forth enforcement procedures which are available to the requestor of a record who believes that public records have been improperly withheld.

Thus, Iowa Code chapter 22 establishes the right of the public to access governmental records, delineates many categories of public records which may be maintained as confidential, and establishes procedures for resolving issues regarding confidentiality and enforcement. Iowa Code chapter 22 does not, however, govern the filing or retention of public records. See Clark v. Banks, 515 N.W.2d 5 (Iowa 1994) (finding that county sheriff, in the absence of a statutory duty to retain firearm permit applications, did not violate chapter 22 by returning the documents to the applicant after they had been processed) . Although the auditor, as clerk to the board of supervisors, maintains records of all board proceedings, including a minute book, warrant book, and claim register [Iowa Code §§ 331.303; 331.504 (2003)], we find no general duty on the part of other county officials to file documents for retention by the county auditor.

Mark R. Cozine  
Cherokee County Attorney  
Page 3

Finally, we note that the practice of county officers retaining itemized call records also implicates Iowa Code sections 331.401(1)(p) (supervisors' duty to examine and settle all claims against the county) and 331.504(8) (auditor's duty to file claims for presentation to the board with sufficient itemization to clearly show the basis of the claim)(2003). We previously examined the auditor's duties under section 331.504(8) and determined that the auditor performs a ministerial function in filing claims with the board and "should not refuse to file a claim for submission to the board on the basis of his or her belief that the supporting documentation is inadequate." 1990 Iowa Op. Att'y. Gen. 64 (# 90-2-2(L) at pp. 2-3) (copy enclosed). The board of supervisors is responsible for assessing the adequacy of proof supporting claims. Id. at p. 3. Assuming that the telephone billing statements indicating the billing period, basic services provided, and amount due are provided to the auditor as support for payment of the claims, this documentation would appear sufficient to "show the basis of the claims," as contemplated by section 331.504(8).

In summary, we conclude that Iowa Code chapter 22 does not govern the filing or retention of public records. The county board of supervisors is responsible for determining whether the documentation accompanying a claim against the county provides sufficient information regarding the basis of the claim to justify payment.

Sincerely,

Peter J. Grady  
Assistant Attorney General

COUNTIES AND COUNTY OFFICERS: Employee benefits; sick leave policy. Iowa Code §§ 70A.1(3), 70A.23, 509A.6, 509A.7, 509A.13. Iowa Code chapter 70A is not applicable to county employees. The county board of supervisors may exercise home rule authority to establish a policy which allows county employees and elected officials to receive payment for accrued but unused sick leave and/or vacation time. Whether a specific retirement health saving plan is one of the legal entities identified in Iowa Code sections 509A.6, 509A.7 and 509A.13 is beyond the scope of an Attorney General's opinion. Assuming without deciding that a plan is a legal entity as identified by these sections, none of these statutes directly limits the source of funds which may be used by an employee to cover the cost of the benefits the entities identified by these sections provide. (Vaudt to Davis, Scott County Attorney, 2-22-05) #05-2-3

February 22, 2005

William E. Davis  
Scott County Attorney  
Scott County Courthouse  
416 West Fourth Street  
Davenport, Iowa 52801-1187

Dear Mr. Davis:

A Retirement Health Savings Plan ("RHSP"), offered through the non-profit International City/County Management Association Retirement Corporation ("ICMA-RC") apparently allows public employees at or before retirement to convert their accrued but unused sick leave and vacation benefits into cash which is then invested in mutual funds offered by an ICMA-RC controlled affiliate. This investment is used to fund the former employee's financial need for medical benefits during retirement. You have requested an opinion from this office addressing whether the RHSP violates certain provisions of Iowa Code chapters 70A and 509A (2003). You also ask whether Iowa law "otherwise does not prohibit" Scott County from adopting the RHSP.

As to your question arising under chapter 70A, a series of our modern opinions clearly establishes that this chapter does not apply to county employees. Consequently chapter 70A does not affect the legitimacy of the RHSP. As to your second question, we decline to determine whether the RHSP qualifies as one of the legal entities identified in sections 509A.6, 509A.7, and 509A.13. The answers to this question and to the last question you pose are both beyond the scope of an Attorney General's opinion.<sup>1</sup> We

---

<sup>1</sup> The RHSP promotional materials provided with the opinion request sua sponte raise additional issues by making repeated references to several unspecified private letter rulings issued by the Internal Revenue Service as the legal basis under federal law for the RHSP. Assuming such rulings exist, whether they would in fact provide a sufficient legal basis under state law for the RHSP is beyond the scope of this Attorney General's opinion. The same disclaimer attaches to a purported opinion letter from ICMA-RC's legal counsel apparently analyzing permissible RHSP contributions and elections under federal tax law. We likewise decline to pass on the question of whether the RHSP otherwise implicates state tax laws or implementing rules.

provide opinions on precise legal questions. See 61 IAC 1.5(2) (opinion requests should contain sufficient information to determine the precise legal question presented). We do not use the opinion process to conduct generalized reviews of constitutional and statutory provisions to identify potential legal issues. 1996 Iowa Op. Att’y Gen. 119 (#96-10-11(L)) (1996 WL 769295); 1992 Iowa Op. Att’y Gen. 176, 177. This limitation is particularly relevant when -- as here -- the subject matter is factually diverse, involves several different statutory provisions, and implicates a number of legal arguments. See generally Exira Comm. Sch. Dist. v. State, 512 N.W.2d 787, 791 (Iowa 1994).

We have previously declined the invitation to pass on the legitimacy of vehicles akin to the RHSP under section 509A.13, as the answer requires a level of analysis clearly beyond the scope of an Attorney General’s opinion. See Iowa Op. Att’y Gen. #02-5-2 (2002 WL 1617558) (“[W]e are not able to comment on whether any specific group insurance plan qualifies as ‘accident, health or hospitalization insurance, or a medical service plan’ subject to the requirements of section 509A.13. This would require an analysis of the terms and conditions of the specific plan in question. Such a factual analysis is beyond the scope of an Attorney General’s opinion. See 61 Iowa Admin. Code 1.5(3)(c).”) We reaffirm our prior position here as to section 509A.13 and decline to express an opinion as to the applicability of sections 509A.6 and 509A.7 to the RHSP for the same reason. Whether the RHSP is as a matter of law one of the legal entities identified by Iowa Code sections 509A.6, 509A.7 and 509A.13 is a matter best left to private counsel with specific expertise in the several substantive areas of Iowa law that the RHSP may implicate if it in fact is one of the benefits vehicles these sections identify.<sup>2</sup>

Accordingly, assuming without deciding that the RHSP is subject to chapter 509A as one of the legal entities identified by sections 509A.6, 509A.7 and 509A.13, we limit our analysis under chapter 509A to the following: whether the collective phrase “at the/such employee’s own/sole expense” found in these sections permits eligible county employees prior to or at retirement to convert accrued but unused sick leave and vacation

---

<sup>2</sup> Iowa Code section 509A.1 grants governing bodies authority to “establish plans for and procure group insurance, health or medical service, or health flexible spending accounts as described in section 125 of the Internal Revenue Code of 1986.” Although your opinion request presumes otherwise, the RHSP may not be any of these legal entities. Furthermore, the RHSP may not be a “hospital or medical service plan” under section 509A.6, an “existing contract” under section 509A.7, or “accident, health or hospitalization insurance, or a medical service plan” under section 509A.13. The kind of legal entity the RHSP is determines whether and to what extent the provisions of chapter 509A apply. If the RHSP does not qualify as one of the legal entities identified in sections 509A.1, 509A.6, 509A.7 and 509A.13, chapter 509A does not apply to the RHSP. Under the analysis assumption made in this opinion, only sections 509A.6, 509A.7 and 509A.13 will be reviewed.

into cash value and place the cash in the RHSP to fund post-retirement medical benefits. We conclude under this assumption that these provisions do not prohibit the contemplated conversion.

You initially identify Iowa Code sections 70A.1(3) and 70A.23 as potentially applicable to the RHSP. Section 70A.1(3) relevantly provides that “[s]eparation from State employment shall cancel all unused accrued sick leave.” (Emphasis added.) It then explains how eligible State employees can accrue additional vacation time each pay period through converting accumulated but unused sick leave. Section 70A.23 articulates how an eligible State employee can elect, at retirement, to receive a cash payment for accumulated but unused sick leave. Neither of these provisions reference county employees explicitly nor by implication.

You cite a 1948 opinion from this office as support for your belief that sections 70A.1(3) and 70A.23 apply to county employees. 1948 Iowa Op. Att’y Gen. 88. This opinion concluded that employees of county boards of social welfare were actually state, rather than county employees, and that because of their status as state employees, state law regarding vacation, sick leave and working hours applied to these individuals. 1948 Iowa Op. Att’y Gen. at pp. 90-92. The nonapplicability of Iowa Code chapter 70A to county employees has been well-settled by at least four modern AG opinions which directly address this point. Each explicitly confirms that chapter 70A (formerly chapter 79) does not apply to county employees. See 1982 Op. Att’y Gen. 271 (#81-10-9(L)) (1981 WL 315390) (finding that state statutes dealing with sick leave policies (including chapter 70A) are “inapplicable to the counties”); 1980 Op. Att’y Gen. 359 (#79-8-16(L)) (1979 WL 21049) (limiting application of section 79.1 to eligible state employees and concluding that county boards of supervisors have authority to establish sick leave policy for county employees); 1970 Iowa Op. Att’y Gen. 462, 463 (concluding county boards of supervisors have the authority to provide vacation and sick leave to county employees at county’s expense, similar to benefits provided state employees under section 79.1); 1964 Op. Att’y Gen. 118, 119 (concluding that Iowa Code section 79.1—the precursor to section 70A.1—is inapplicable to county employees because it only references “employees of the state”, and county boards of supervisors have the sole determination as to the vacation time and sick leave granted employees under their jurisdiction).

In fact, the 1981 and 1979 opinions directly addressed whether a board of supervisors had authority to establish sick leave policies including provisions allowing county employees or elected officials to receive payment for accrued sick leave. We concluded that the policies addressed in those opinions were within the scope of the county’s home rule authority. 1982 Iowa Op. Att’y Gen. 271 (#81-10-9(L)) (1981 WL 315390) (board of supervisors found to have authority to establish a sick leave policy for elected officials which would permit payment for accrued sick leave); 1980 Op. Att’y Gen. 359 (#79-8-16(L)) (1979 WL 21049) (finding no statutory prohibition restricting the board of supervisors from establishing a sick leave policy allowing county employees to receive payment for accrued sick leave). The ultimate conclusions drawn from this series

of opinions relevant to the instant opinion request are two-fold: First, sections 70A.1(3) and 70A.23 do not apply to the RHSP since chapter 70A does not apply to county employees. Second, county boards of supervisors have exclusive home-rule authority to establish vacation and sick-leave policies for county employees. In exercising this authority, the supervisors may establish a policy which allows county elected officials and employees to receive payment for accrued but unused sick leave and/or vacation time.

You also inquire whether sections 509A.6, 509A.7, and 509A.13 preclude a county employee at or prior to retirement from converting the value of accrued but unused sick leave and vacation benefits to cash and placing the cash in the RHSP to fund post-retirement medical benefits. Each of these sections recognizes that qualified retirees can continue existing coverage by paying for it themselves:

[A]ny employee [may] continue such life insurance in force after termination of active service at such employee's sole expense. . . .

Iowa Code § 509A.6 (2003) (emphasis added).

This section does not prevent a retired employee over sixty-five years of age or older from voluntarily continuing in force, at the employee's own expense, an existing contract.

Iowa Code § 509A.7 (2003) (emphasis added).

[T]he . . . county board of supervisors . . . shall allow its employees who retire before attaining sixty-five years of age to continue participation in the group plan or under the group contract at the employee's own expense until the employee attains sixty-five years of age.

Iowa Code § 509A.13 (2003) (emphasis added). Specifically, you ask whether the collective phrase “at the/such employee's own/sole expense” contemplates a retiree's use of accrued sick leave or vacation benefits to fund—through the RHSP—the benefits the legal entities identified by these sections provide.

As noted above, whether the RHSP qualifies as one of the legal entities recognized by sections 509A.6, 509A.7 and 509A.13 is beyond the scope of this opinion. Assuming without deciding that the RHSP is in fact one of these entities, none of these provisions places a direct limitation upon the source of funds used by an employee to

cover the cost of the benefits the entities identified by these sections provide.<sup>3</sup> We fail to see how the voluntary use of funds obtained by an eligible employee “cashing out” accrued but unused sick leave and/or vacation prior to or at retirement and placing it in the RHSP to fund the benefits upon retirement runs counter to these sections.

The key determination is whether the cost of continuing the benefit is borne solely by the employee. If all county employees or an identified group of eligible employees are entitled to receive payment for accrued leave, regardless of RHSP participation, then investment of the funds received from exercise of this option into the RHSP would clearly be an expense to the employee. However, if the county provides the option of cashing out accrued leave only to those employees who agree to invest the proceeds into the RHSP, it is possible to conclude that the RHSP is actually being funded by the county, rather than by the employee. We believe that it is not the source of the funds, but the terms of the sick leave or vacation leave policy and the conditions under which an employee may cash out accrued leave which controls this determination. As such, this determination is not appropriate for resolution through an Attorney General’s opinion.

In summary, Iowa Code chapter 70A is not applicable to county employees. The county board of supervisors may exercise home rule authority to establish a policy which

---

<sup>3</sup> However, other sections of chapter 509A may be violated by the RHSP if it is one of the section 509A.6, 509A.7 and 509A.13 identified entities. Two examples illustrate the potential conundrum. First, section 509A.4 makes employee participation in any “qualified health care plan” optional. If the RHSP is a qualified health care plan under these definitions, the RHSP promotional materials suggest that the decision to participate in the RHSP, once made, may be an irrevocable election by the employee or a mandated contribution by the employer. Both outcomes run counter to the flexibility section 509A.4 provides employees when considering available employer-offered group health coverage options. Second, section 509A.5 requires that the fund supporting administration of each group plan be “under the control” and be expended “under the direction” of the governing body. Through the quoted language the legislature vests a great deal of discretion in the governing body to determine whether and in what manner a fund will be invested. By contrast, the RHSP appears to directly contradict this statutory mandate by removing all discretion and requiring the monetary value of accrued but unused sick leave and vacation be invested in mutual fund securities offered by an ICMA-RC controlled affiliate.

There could be other practical state law impediments to a county adopting the RHSP, depending not only on whether and what kind of legal entity it is under the cited chapter 509A provisions. For example, the promotional materials state that Zenith Administrators, Inc., is ICMA-RC’s third-party administrator (“TPA”) of the claims process under the RHSP. If the RHSP is determined to be “life or health insurance coverage or annuities” under Iowa Code section 510.11 (2003) and Zenith cannot claim an exemption from registration under that section, Zenith would need to register with the Iowa insurance commissioner prior to administering the claims process. See Iowa Code § 510.21 (2003) (“A person shall not act or represent oneself to be an administrator in this state . . . unless the person holds a current certificate of registration as an administrator issued by the commissioner of insurance.”)



William E. Davis  
Scott County Attorney  
Page 6

allows county employees and elected officials to receive payment for accrued but unused sick leave and/or vacation time. Whether a specific retirement health saving plan is one of the legal entities identified in Iowa Code sections 509A.6, 509A.7 and 509A.13 is beyond the scope of an Attorney General's opinion. Assuming without deciding that a plan is a legal entity as identified by these sections, none of these statutes directly limits the source of funds which may be used by an employee to cover the cost of the benefits the entities identified by these sections provide.

Sincerely,

Jeanie K. Vaudt  
Assistant Attorney General

PUBLIC HEALTH: Do-not-resuscitate order; Durable medical power of attorney. Iowa Code §§ 144A.7A, ch. 144B (2005). The holder of a patient's durable power of attorney for health care cannot revoke an out-of-hospital do-not-resuscitate order unless designated on the out-of-hospital do-not-resuscitate order as an individual authorized to revoke the order. To the extent that the provisions of chapter 144B relating to durable powers of attorney for health care conflict with section 144A.7A, the latter prevails with respect to out-of-hospital do-not-resuscitate orders, because it is more specific and because it is more recently enacted. (Smith to Eichhorn, State Representative, 6-22-05) #05-6-1

June 22, 2005

The Honorable George S. Eichhorn  
State Representative  
3533 Fenton Avenue  
P.O. Box 140  
Stratford, Iowa 50249

Dear Representative Eichhorn:

You have requested an opinion of the Attorney General concerning an apparent conflict between Iowa Code section 144A.7A(7) which limits revocation of out-of-hospital do-not-resuscitate orders and the provisions in Iowa Code chapter 144B which relate to the durable power of attorney for health care. You point out that under Iowa Code section 144A.7A(7) an out-of-hospital do-not-resuscitate order can be revoked only by a patient or "an individual authorized to act on the patient's behalf *as designated on the out-of-hospital do-not-resuscitate order. . . .*" Iowa Code § 144A.7A(7) (2005) (emphasis added). In light of this statute, you ask whether an out-of-hospital-do-not-resuscitate order can be revoked by a patient's attorney-in-fact who holds a durable power of attorney for health care purposes, but is not specifically designated in the do-not-resuscitate order. Under the express terms of section 144A.7A, the holder of a patient's durable power of attorney for health care cannot revoke an out-of-hospital do-not-resuscitate order unless designated on the order as an individual authorized to revoke the order.

The persons authorized to revoke an out-of-hospital-do-not-resuscitate order are required to be named in the order under the plain language of Iowa Code section 144A.7A. Under this statute an out-of-hospital do-not-resuscitate order "is deemed

revoked at any time that a patient, *or an individual authorized to act on the patient's behalf as designated on the out-of-hospital do-not-resuscitate order*, is able to communicate in any manner the intent that the order be revoked, without regard to the mental or physical condition of the patient.” Iowa Code § 144A.7A(7) (emphasis added). Further, revocation “is only effective as to the health care provider upon communication to that provider by the patient, *an individual authorized to act on the patient's behalf as designated in the order*, or by another person to whom the revocation is communicated.” Id. Any doubt that only a person designated on the order may revoke the order is resolved by the following subsection which states: “The personal wishes of family members *or other individuals who are not authorized in the order to act on the patient's behalf* shall not supersede a valid out-of-hospital do-not-resuscitate order.” Iowa Code § 144A.7A(8) (emphasis added).

Although this statutory language of chapter 144A seems clear on its face, the confusion arises when a person serves as a patient’s attorney-in-fact and holds a durable power of attorney for health care purposes pursuant to Iowa Code chapter 144B, but is not specifically designated in the do-not-resuscitate order. A person holding a durable power of attorney for health care purposes is authorized “to make health care decisions for the principal if the principal is unable, in the judgment of the attending physician, to make health care decisions.” Iowa Code 144B.1(2). Further, a declaration directing that life-sustaining procedures be withheld or withdrawn that is “executed by the principal” pursuant to chapter 144A “shall not otherwise restrict the authority of the attorney in fact unless either the declaration or the durable power of attorney provides otherwise.” Iowa Code § 144B.6(2). Significantly, there is no counterpart in chapter 144A that preserves the authorization in a durable power of attorney from being superseded by a out-of-hospital do-not-resuscitate order. The legislation enabling out-of-hospital do-not-resuscitate orders does not include any explicit reference to the relationship with durable powers of attorney for health care.

Reading the provisions of chapter 144A and 144B together, there is an apparent conflict between the authority to revoke an out-of-hospital do-not-resuscitate order delineated in chapter 144A and the authority over health care decisions conferred on the attorney-in-fact under chapter 144B. Your request asks our office to resolve whether an attorney-in-fact, who is not designated in the do-not-resuscitate order itself, nevertheless, retains the authority to make the health care decision to revoke a do-not-resuscitate order.

Following principles of statutory construction, we must conclude that the failure to designate the attorney-in-fact as an individual authorized to act on the patient’s behalf on the out-of-hospital do-not-resuscitate order operates to limit the authority of an attorney-

in-fact to revoke that order. Conflicts between general and more specific statutes as well as conflicts between earlier and more recent statutes are resolved in favor of the more specific and more recent. Iowa Code §§ 4.7, 4.8. See Doe v. Ray, 251 N.W.2d 496, 503 (Iowa 1977). Applying these criteria, the authority to revoke an out-of-hospital do-not-resuscitate order would be limited to those persons “authorized to act on the patient’s behalf as designated on the out-of-hospital do-not-resuscitate order,” because section 144A.7A is the more specific and the more recent statute. The 2002 legislation is more specific insofar as it addresses only the narrow category of health care decisions involved in out-of-hospital do-not-resuscitate orders. Further, the authority of an attorney-in-fact conferred under chapter 144B was enacted in 1991. 1991 Iowa Acts, ch. 140, §§ 1-12. The limitation on the authority to revoke an out-of-hospital do-not-resuscitate order to those persons “authorized to act on the patient’s behalf as designated on the out-of-hospital do-not-resuscitate order” was enacted in 2002. 2002 Iowa Acts, ch. 1061, § 5. The 2002 legislation is the more recent by over ten years.

Although your request does not inquire about the process by which a patient consents to issuance of an out-of-hospital do-not-resuscitate order, we suggest that the patient’s intent with respect to the effect of any previously-executed durable power of attorney for health care could be clarified and conflict between chapters 144A and 144B avoided by modifying the form for out-of-hospital do-not-resuscitate orders. The provisions in chapter 144A are ambiguous concerning the process by which a patient consents to issuance of an out-of-hospital do-not-resuscitate order. The ambiguity should be resolved in favor of a requirement of written consent to issuance of an out-of-hospital do-not-resuscitate order. The apparent conflict between chapters 144A and 144B can be avoided by modification of the order form to require written consent with appropriate certification of the patient’s intent to supersede any previous authorization in a durable power of attorney for health care. To explain the rationale for our suggestion, we examine the statutory authorization for out-of-hospital do-not resuscitate orders in more detail.

In 2002, the General Assembly amended Iowa Code chapter 144A by adding provisions authorizing an attending physician to issue an out-of-hospital do-not-resuscitate order for a patient who is in a terminal condition. 2002 Iowa Acts, ch. 1061, § 5. Administrative rules of the Department of Health refer to out-of-hospital do-not-resuscitate orders as “OOH DNR” orders, a term we use for convenient reference. The authorization for OOH DNR orders in the 2002 amendment of chapter 144A established an alternative to two other statutory procedures for withholding or withdrawal of life-sustaining measures. Both of those alternatives require written consent of the patient or a person authorized to act for the patient.

First, a competent adult may personally execute a “declaration” directing that life-sustaining procedures be withheld or withdrawn. Iowa Code § 144A.3. This is commonly referred to as a “living will.” The declaration must be signed by the declarant in the presence of two witnesses or be duly acknowledged but “may be revoked at any time and in any manner” by the declarant. Iowa Code § 144A.3(2).

Second, life-sustaining measures may be withheld or withdrawn from a patient who is in a terminal condition and who is comatose, incompetent, or otherwise physically or mentally incapable of communication and has not made a “declaration” if there is consultation and written agreement between the attending physician and a person from one of six classes specified by statute. Iowa Code §144A.7. The patient’s attorney-in-fact designated in writing to make treatment decisions for the patient is given highest priority to consult with the attending physician and enter a written agreement for withholding or withdrawal of life-sustaining procedures. Iowa Code § 144A.7(1)(a).

In comparing the statutory authorization for OOH DNR orders with the related statutes authorizing alternative procedures for withholding or withdrawing life-sustaining measures, we consider first whether the OOH DNR order enabling legislation requires consent of the patient or a person acting for the patient. We consider, also, in what form the consent is to be given. The statutory requirements for the OOH DNR order are set forth in the first three subsections of Iowa Code section 144A.7A, as follows:

1. If an attending physician issues an out-of-hospital do-not-resuscitate order for an adult patient under this section, the physician shall use the form prescribed pursuant to subsection 2, include a copy of the order in the patient's medical record, and provide a copy to the patient or an individual authorized to act on the patient's behalf.
2. The department, in collaboration with interested parties, shall prescribe uniform out-of-hospital do-not-resuscitate order forms and uniform personal identifiers, and shall adopt administrative rules necessary to implement this section. The uniform forms and personal identifiers shall be used statewide.
3. The out-of-hospital do-not-resuscitate order form shall include all of the following:

- a. The patient's name.
- b. The patient's date of birth.
- c. The name of the individual authorized to act on the patient's behalf, if applicable.
- d. A statement that the patient is in a terminal condition.
- e. The physician's signature.
- f. The date the form is signed.
- g. A concise statement of the nature and scope of the order.
- h. Any other information necessary to provide clear and reliable instructions to a health care provider.

Iowa Code § 144A.7A(1)-(3). Nothing in the quoted text expressly or impliedly requires consent of the patient or an individual authorized to act for the patient. The only signature expressly required by section 144A.7A is by the attending physician.

As directed by subsection 144A.7A(2), the Department of Health has adopted administrative rules establishing procedures and prescribing a form for the out-of-hospital do-not-resuscitate order. 641 Iowa Admin. Code 142. The administrative rules and prescribed form contemplate that the attending physician will not issue an OOH DNR order unless the patient “or individual legally authorized to act on the patient’s behalf” decides that the patient should not be resuscitated. 641 Iowa Admin. Code 142.5(1)(c). Consistent with the statute, the administrative rules indicate that the OOH DNR order may be revoked only by the patient or “an individual authorized to act on the patient’s behalf as designated on the OOH DNR order.” 641 Iowa Admin. Code 142.6.

The prescribed form includes the following notice to the patient: “To the extent that it is possible, a person designated by the patient may revoke this order on the patient’s behalf. If the patient wishes to authorize any other person(s) to revoke this order, the patient MUST list those persons’ names below: . . .” 641 Iowa Admin. Code 142 – Appendix A. The form does not have a signature line for the patient or an individual authorized to act on the patient’s behalf. The administrative rules and form contemplate a written order issued by a physician upon oral consent from a competent adult patient or an individual legally authorized to act on the patient’s behalf. The form includes a certification statement above a signature line for the attending physician. The physician’s certification verifies consultation with the patient or the patient’s authorized representative, but does not include any specific statement that the physician has explained the revocation criteria to the patient or individual authorized to give the patient’s consent for issuance of the order.

The administrative rules require that in determining whether an OOH DNR order should be issued, the attending physician must consult with the patient or a person legally authorized to act for the patient, such as the patient's attorney-in-fact or conservator. If the consultation is with an adult patient who has previously executed a durable power of attorney for health care, the patient can easily and effectively supersede a previous delegation of authority to an attorney-in-fact. The patient's oral statement to the attending physician would be sufficient. Iowa Code § 144B.8 (2005) ("A durable power of attorney for health care may be revoked at any time and in any manner . . ."). The apparent conflict between section 144A.7A and chapter 144B arises only where there is no indication that the patient intended that the OOH DNR order supersede a previously-executed durable power of attorney for health care.

The rules reasonably contemplate that an OOH DNR order can be issued only upon consent of the patient or an individual authorized to act for the patient. In prescribing an OOH DNR form that does not require written consent of the patient, it is likely that the Department of Public Health took into consideration the absence of any requirement for written consent in section 144A.7A. However, the rules expressly state that an OOH DNR order is issued for a "qualified patient." 641 Iowa Admin. Code 142.3(1). The term "qualified patient" is defined in Iowa Code section 144A.2(11) to mean a patient who has "executed" a declaration or an OOH DNR order and has been determined by an attending physician to be in a terminal condition. Although the term "qualified patient" is not used in section 144A.7A, authorizing issuance of an OOH DNR order, the enabling legislation for OOH DNR orders included other references to execution of an OOH DNR order. For example, the first sentence of Iowa Code section 144A.11(2) previously stated:

The *making* of a declaration pursuant to section 144A.3 does not affect in any manner, the sale, procurement, or issuance of any policy of life insurance, nor shall it be deemed to modify the terms of an existing policy of life insurance. a condition of being insured for, or receiving, health care services.

Iowa Code § 144A.11(2) (2001) (emphasis added). As amended in 2002, the same subsection now states:

The *executing* of a declaration pursuant to section 144A.3 *or out-of-hospital do-not-resuscitate order pursuant to section 144A.7A* does not affect in any manner, the sale, procurement, or issuance of any policy of life insurance, nor

shall it be deemed to modify the terms of an existing policy of life insurance, a condition of being insured for, or receiving, health care services.

2002 Iowa Acts, ch. 1061, § 10 (Emphasis added).

The word “execute” has several common meanings and does not necessarily require a written acknowledgment or even a signature on a written document. A person may “execute” a task that does not involve any writing. An OOH DNR order is a document. Use of the words “execute” and “executing” in a statute referring to a document such as a written order strongly implies that a person “executing” the document should at least sign a consent form on the document. Considering omission of the term “qualified patient” from section 144A.7A and its silence concerning consent to issuance of an OOH DNR order, one might question whether the legislature intended its amendment of the definition of “qualified patient” to include the requirement of written consent for issuance of a OOH DNR order. We are reluctant to assume such legislative inadvertence. See Miller v. Westfield Insurance Co., 606 N.W.2d 301, 305 (Iowa 2000) (“[A] statute will not be construed to make any part of it superfluous unless no other construction is reasonably possible.”). Legislative substitution of the word “executing” for the word “making” in the amendment of the first sentence of section 144A.11(2) is inconsistent with such inadvertence. Although section 144A.7A sets forth certain criteria for issuance of an OOH DNR, it does not address the issue of consent. Instead, it mandates that the Department of Public Health shall prescribe the OOH DNR order form and adopt administrative rules necessary to implement the statute. To the extent there is ambiguity in the relationship between the definition of “qualified patient” in section 144A.2(11), OOH DNR criteria in section 144A.7A, and related provisions in section 144A.11, the ambiguity should be resolved in favor of requiring written consent to issuance of an OOH DNR order.

The OOH DNR form should be revised to include signed consent of the patient or individual authorized to act for the patient, including certification that, notwithstanding any durable power of attorney for health care that may previously have been executed by the patient, the patient intends the OOH DNR order to be revoked only by a person whose name is listed on the order. These revisions would make the order form consistent with the requirement in sections 144A.2(11) and 144A.11 that the patient (or individual legally authorized to act on the patient’s behalf) “execute” the OOH DNR order. The revisions would also avoid any misunderstanding concerning intent to supersede a previous delegation of authority in a durable power of attorney for health care and avoid the apparent conflict with chapter 144B.



In summary, we conclude that the holder of a patient's durable power of attorney for health care cannot revoke an out-of-hospital do-not-resuscitate order unless designated on the out-of-hospital do-not-resuscitate order as an individual authorized to revoke the order. We reach this conclusion because the limitation of revocation authorization to the patient and individuals designated in the order is required by the plain language of Iowa Code section 144A.7A. To the extent that the provisions of chapter 144B relating to durable powers of attorney for health care conflict with section 144A.7A, the latter prevails because it is more specific with respect to out-of-hospital do-not-resuscitate orders and because it is more recently enacted. In order to avoid the conflict between chapters 144A and 144B, we suggest that the form used for out-of-hospital do-not-resuscitate orders be modified to provide for written consent with appropriate certification by the patient of intent to supersede the authorization in any previously-executed durable power of attorney for health care.

Sincerely,

Michael H. Smith  
Assistant Attorney General

COUNTY AND COUNTY OFFICERS; EMINENT DOMAIN: Duty of county attorney to represent township. Iowa Code sections 6B.2, 331.756, 359.18 (2005). Iowa Code section 6B.2(2) imposes a duty on the county attorney to conduct eminent domain proceedings whenever the damages are payable from funds disbursed by a township regardless of the population of the county. (Pottorff to Kendell, Warren County Attorney, 6-29-05) #05-6-2

Mr. Gary W. Kendell  
Warren County Attorney  
301 N. Buxton, Suite 301  
Indianola, Iowa 50125

Dear Mr. Kendell:

Our office is in receipt of your request for an opinion concerning the construction of statutes that relate to the duties of county attorneys. You point out that Iowa Code section 6B.2(2) provides that eminent domain proceedings shall be conducted . . . [b]y the county attorney, when the damages are payable from funds disbursed by the county, or *by any township*, or school corporation.” Iowa Code § 6B.2(2) (2005) (emphasis added). Township trustees, in turn, are empowered to condemn land within the territorial limits of the township. Iowa Code § 359.28. Iowa Code section 331.756(64), by contrast, provides generally that it is the duty of the county attorney to “[r]epresent the township trustees *in counties having a population of less than twenty-five thousand* except when the interests of the trustees and the county are adverse as provided in section 359.18.”<sup>1</sup> Iowa Code § 331.756(64) (emphasis added). Section 331.756, which was enacted in 1981 within the county home rule act, delineates the basic duties of the county attorney. Subsection 66, later renumbered subsection 64, cross references the duty of the county attorney to represent the township trustees under section 359.18. 1981 Iowa Acts, 69<sup>th</sup> G.A., ch. 117, § 756(66).

---

<sup>1</sup>Section 359.18 imposes the same duty on the county attorney to represent township trustees by stating: “*In counties having a population of less than twenty-five thousand*, where the trustees institute, or are made parties to, litigation in connection with the performance of their duties, as provided in this chapter, the county attorney, as a part of the county attorney's official duties, shall appear in behalf of the township trustees, except in cases in which the interests of the county and those of the trustees are adverse.” Iowa Code 359.18 (emphasis added).

You ask whether section 6B.2(2) and section 331.756(64) should be construed to impose a duty on the county attorney to conduct eminent domain proceedings when damages are payable from funds disbursed by a township *only* in counties with a population of less than twenty-five thousand. We conclude that Iowa Code section 6B.2(2) imposes a duty on the county attorney to conduct eminent domain proceedings whenever the damages are payable from funds disbursed by a township regardless of the population of the county.

Iowa Code sections 6B.2(2) and 331.756(64) are in conflict. Ordinarily, courts “attempt to harmonize all relevant legislative enactments . . . ‘so as to give meaning to all if possible.’” State v. Albrecht, 657 N.W.2d 474, 479 (Iowa 2003) (quoting from Messina v. Iowa Dep’t of Job Serv., 341 N.W.2d 52, 56 (Iowa 1983)). But in this circumstance Iowa Code section 6B.2(2) would impose a duty on the county attorney to conduct condemnation proceedings in all counties when Iowa Code section 331.756(64) would limit that duty to counties with a population of less than twenty-five thousand. Accordingly, we turn to principles of statutory construction to resolve the conflict.

Principles of statutory construction focus on the specific or general nature of the statutes and the time that each was enacted. Conflicts between general and specific statutes are resolved in favor of the specific statute. Iowa Code § 4.7; Doe v. Ray, 251 N.W.2d 496, 503 (Iowa 1977). Conflicts between earlier and later enacted statutes are resolved in favor of the later enacted statute. Iowa Code § 4.8; Doe v. Ray, 251 N.W.2d at 503.

Analyzing the statutes under these principles, it is evident that Iowa Code section 6B.2(2) is the more specific and the later enacted statute. Section 6B.2(2) imposes a specific duty on the county attorney to conduct eminent domain proceedings when damages will be disbursed by a township. Section 331.756(64) imposes a general duty to represent the township trustees, but limits this duty of the county attorney to those counties having a population of less than twenty-five thousand. Because section 6B.2(2) applies particularly to eminent domain while section 331.756(64) applies generally to representation of township trustees in all matters, section 6B.2(2) is the more specific statute.

Further, the duty to conduct eminent domain proceedings is the later enacted statute. Although section 331.756(64), about which you specifically inquire, was not enacted until 1981, the general obligation of the county attorney to represent township trustees in counties having a population of less than twenty-five thousand actually dates

Mr. Gary W. Kendell  
Warren County Attorney  
Page 3

to enactment of section 359.18 in 1911. 1911 Iowa Acts, 34<sup>th</sup> G.A., ch. 31, § 1. The duty to conduct eminent domain proceedings when the damages are payable from funds disbursed by a township was enacted more than ten years later in 1924. Senate File 187, 40<sup>th</sup> G.A., Ex. Sess., § 20 (Iowa 1924).<sup>2</sup> We consider the duty to conduct eminent domain proceedings under section 6B.2(2), therefore, to be the later enacted statute.<sup>3</sup>

In summary, applying principles of statutory construction, we conclude that Iowa Code section 6B.2(2) prevails as the more specific and the later enacted statute. Iowa Code section 6B.2(2), therefore, imposes a duty on the county attorney to conduct eminent domain proceedings whenever the damages are payable from funds disbursed by a township regardless of the population of the county.

Sincerely,

JULIE F. POTTORFF  
Deputy Attorney General

---

<sup>2</sup> Due to late adjournment of the extraordinary session of the 40<sup>th</sup> General Assembly, “all laws of a permanent and general nature which [did] not take effect by publication” were omitted from the published session laws and codified immediately into the 1924 Code. See 1924 Iowa Acts, 40<sup>th</sup> G.A. Ex. Sess., ch. 1, § 1. Two bound volumes containing the previously unpublished acts of the extraordinary session were prepared under the Work Projects Administration (WPA) in 1941. These volumes, which include all enrolled bills omitted from the session laws as published, are available at the law library in the Iowa State Capitol. Senate File 187 is included as chapter 128, at pages 577 through 586.

<sup>3</sup> We note that delineation of the basic duties of county attorneys enacted in 1981 included *both* the duty to “[r]epresent township trustees in counties having a population of less than twenty-five thousand” *and* the duty to “[c]onduct legal proceedings relating to the condemnation of private property as provided in section 472.2.” 1981 Iowa Acts, 69<sup>th</sup> G.A., ch. 117, §§ 756(66), (70). Section 472.2 is the statutory predecessor to section 6B.2 and imposed a duty on the county attorney to conduct eminent domain proceedings when the damages are payable from funds disbursed by a township in language identical to the current language found in section 6B.2(2). Iowa Code § 472.2(2) (1981).

MUNICIPALITIES: Zoning; dual service on planning and zoning commission and board of adjustment. Iowa Code §§ 414.6, 414.7, 414.8, 414.9, 414.12 (2005). A city ordinance requiring common membership on the planning and zoning commission and board of adjustment does not necessarily result in a defacto single board. As long as precautions are taken to ensure that the two entities continue to operate as separate entities, common membership on the planning and zoning commission and board of adjustment does not violate chapter 414 and is not otherwise prohibited by Iowa law. (Smith to Rants, State Representative, 2-22-05) #05-2-1

February 22, 2005

The Honorable Christopher Rants  
Speaker, Iowa House of Representatives  
State Capitol  
LOCAL

Dear Speaker Rants:

You have requested our opinion concerning whether a city's appointment of the same members to both the city planning and zoning commission and board of adjustment violates Iowa law. Your request states that, in effect, the council created a defacto "single board". It is our opinion that a city ordinance requiring common membership on the planning and zoning commission and the board of adjustment does not necessarily result in creation of a defacto single board. If appropriate administrative limitations on combining functions and meetings are in place, such an ordinance does not violate Iowa law.

In April 2004, the city council of Sioux City amended existing city zoning ordinances to require common membership of the planning and zoning commission and the board of adjustment. The resulting ordinances provide, in pertinent part, that members of the board of adjustment "shall also be appointed to the planning and zoning commission" and that members of the planning and zoning commission "shall also be appointed to the board of adjustment." On April 22, 2004, shortly after the council acted, a city planner wrote to members of the preexisting board of adjustment encouraging them to apply for appointment to the new board. The planner characterized the ordinance as replacing the board of adjustment and planning and zoning commission "with a single board to cover both administrative functions."

The members of the defunct board of adjustment wrote this office to complain about the city's action in creating a "single board". They attached a copy of the ordinance and the April 22, 2004, letter from the city planner. Later, the city attorney wrote this office, stating that the complaint from the members of the board of adjustment that the city had created a "single board" was "totally false". The city attorney indicated that "[t]he City Council did not create a single board to replace the two boards. What the City Council did do is retain two separate boards with a common membership." The city attorney's characterization of the effect of the ordinance is

consistent with the plain language of the ordinance. The distinction is important. Thus, we analyze the legality of a city ordinance providing for common membership on the board of adjustment and the planning and zoning commission.

In Iowa, municipal home rule does not extend to city zoning matters, which fall under the provisions of Iowa Code chapter 414 (2005). *Hawkeye Outdoor Advertising v. Bd. of Adjustment*, 356 N.W.2d 544, 546-47 (Iowa 1984) (city sign ordinance was adopted pursuant to home rule authority rather than chapter 414 because it did not contain zoning regulations). Therefore, we consider the zoning functions of the city council, the planning and zoning commission, and the board of adjustment, as provided in chapter 414.

“Zoning is the legislative division of a region, most commonly a city, into separate districts with different regulations within the districts for land use, building size, etc.” 8 MCQUILLIN, MUNICIPAL CORPORATIONS, § 25.01, at pp. 7-8 (3<sup>rd</sup> ed. 2000). The legislative role of the city council over zoning matters is expressly stated in Iowa statute. The city council is designated as the “local legislative body” empowered to divide the city into zoning districts and adopt uniform regulations and restrictions applicable to each district through enactment of city zoning ordinances. Iowa Code § 414.2 (2005).

In order to regulate the use of property through zoning, the city council must appoint a zoning commission to recommend to the council zoning district boundaries and appropriate regulations and must develop the regulations in accordance with a comprehensive plan. Iowa Code §§ 414.3, 414.6 (2005). Neither the size nor membership of the zoning commission is dictated by statute. However, where a city planning commission is already in place, the council is explicitly authorized to combine planning and zoning advisory roles in one commission. Iowa Code § 414.6 (2005). In Iowa, as in most states, the city zoning or planning and zoning commission is only an advisory body that recommends plans and regulations and amendments to the city council. Unlike the city council, the commission acts in an administrative, rather than legislative capacity. Iowa Code § 414.6; *Anderson v. Jester*, 206 Iowa 452, 457, 221 N.W. 354, 357 (1928); 1978 Iowa Op. Atty. Gen. 560, 561 [1978 WL 17425]; 8A MCQUILLIN, MUNICIPAL CORPORATIONS, §§ 25.213 at p. 188, 25.224 at pp. 226-27 (3<sup>rd</sup> ed. 2003).

In contrast to the advisory role of a planning and zoning commission, a board of adjustment generally has appellate jurisdiction over decisions of administrators, and original jurisdiction over applications for variances, special exceptions, and nonconforming uses. 8A MCQUILLIN, MUNICIPAL CORPORATIONS, § 25.228 at pp. 239-40. In Iowa, the quasi-judicial functions and powers of the board of adjustment are specified by statute and include: hearing appeals from zoning decisions made by city administrators, hearing and deciding special exceptions, and granting variances. Iowa Code §§ 414.7; 414.12 (2005). The jurisdiction of the board of adjustment conferred by sections 414.7 and 414.12 is exclusive and a city ordinance or other action of a city council is invalid to the extent that it diminishes the statutory authority of

the board of adjustment. *Holland v. City of Decorah*, 662 N.W.2d 681, 682-5 (Iowa 2002), citing *Depue v. City of Clinton*, 160 N.W.2d 860, 862 (Iowa 1968).

As noted above, composition and conduct of the zoning commission or planning and zoning commission are not specified by section 414.6 or other statute. Thus, these are matters within the scope of municipal home rule. Chapter 414 does, however, dictate the composition of the board of adjustment and impose procedural requirements for meetings of the board. Iowa Code §§ 414.8 (providing for number of members, length and staggering of terms, and procedures for removal and filling of vacancies), and 414.9 (requiring open meetings and minutes of its proceedings, showing the vote of each member on each question) (2005).

Combination of the planning and zoning commission with the board of adjustment is not expressly prohibited by Iowa Code chapter 414. We must, however, also consider whether the statutory scheme in chapter 414 impliedly preempts combination of the two bodies into a single body. See, e.g., *City of Des Moines v. Gruen*, 457 N.W.2d 340, 341-2 (Iowa 1990). Implied preemption is suggested by the express authority given to the council in section 414.6 to combine a city planning commission with the zoning commission. The roles of the city council, zoning commission and board of adjustment are all designated in chapter 414, together with authorization to combine the zoning commission with a city planning commission. That authorization could be merely a relic of a more detailed statutory framework predating enactment of municipal home rule. Statutes formerly governing city planning commissions were repealed by 1972 Iowa Acts, ch. 1088, § 199 (city home rule). But an alternative interpretation not rendering the authorization superfluous is that the legislature still viewed the express authorization to combine zoning and planning commissions as necessary after enactment of municipal home rule. See *Am. Legion v. Cedar Rapids Bd. of Review*, 646 N.W.2d 433, 439 (Iowa 2002) (the court “will not interpret a statute so as to render a part of it superfluous”); *State v. Jeannie Coulter Day Care Nursery*, 218 N.W.2d 579, 582 (Iowa 1974) (“[T]he legislature will be presumed to have inserted every part in a statute for a purpose and to have intended that every part shall be carried into effect.”)

If the General Assembly had intended to authorize combining of the board of adjustment and the planning and zoning commission, it could have expressly authorized such combination, as in Iowa Code sections 414.6 (combination of planning commission and zoning commission authorized) and 331.323 (authorizing combination of county offices). In at least one state, the functions of municipal boards of adjustment have been combined with the functions of municipal planning and zoning commissions. 8A MCQUILLIN MUNICIPAL CORPORATIONS, § 25.228, at p. 242. Thus, it is highly doubtful whether combining the board of adjustment and the planning and zoning commission into a single board would be consistent with chapter 414. However, because the Sioux City ordinance does not purport to combine the board of adjustment with the planning and zoning commission we need not resolve this question. Rather, we focus upon the provisions in the ordinance which call for common membership on the two bodies.

The potential for conflicting functions or duties is an important factor in evaluating provisions for common membership on two bodies (also described as “dual service of members”). See Iowa Op. Att’y Gen # 04-11-1(L) [2004 WL 3190443] (considering dual service by county supervisors on city/county solid waste agency board); 1982 Iowa Op. Att’y Gen 156 (#81-6-12(L)) [1981 WL 315315] (concluding that legislator’s dual service on local transit agency board does not involve a conflict in duties). It is well settled that the legislative role of the city council in establishing zoning standards cannot be combined with the quasi-adjudicatory role of the board of adjustment in applying the standards. “The application [of zoning standards] cannot be handled by the legislative body that created the standard without danger of contravening the separation of powers doctrine.” *Holland v. City of Decorah*, 662 N.W.2d 681 at 684 (quoting *Depue*, 160 N.W.2d 860 at 864 n. 5). Common membership on the city council and board of adjustment would violate the required separation of legislative and adjudicatory duties. We have also previously concluded that dual service on the city council and planning and zoning commission constituted incompatible offices because the member serving in both roles would be approving or disapproving his or her own recommendation. 1978 Op. Atty. Gen. 560 (#78-6-5) [1978 WL 17425].

In comparison, common membership on the board of adjustment and the planning and zoning commission does not violate the prohibition against combining legislative and adjudicatory functions. Nor does it put a member in the position of approving or disapproving the member’s own recommendation made in service on the other body. Neither the board of adjustment nor the planning and zoning commission is required to report to the other body under the statutory scheme set forth in chapter 414. The city attorney has suggested that requiring common membership will allow members of the two bodies to become more familiar with the relationship between their respective functions (which can be characterized as the “big picture” and the “small picture” in zoning). We caution, however, that unless meetings of the two bodies are carefully separated it will be difficult for the public, as well as staff and the members themselves, to determine which “hat” the members are wearing as they conduct business.

We conclude that an ordinance requiring common membership on the board of adjustment and the planning and zoning commission does not violate Iowa Code chapter 414 and is not otherwise prohibited. But our conclusion is conditional. Members of the board of adjustment must be chosen in accordance with the provisions of section 414.8, meetings of the board must be held in compliance with the requirements of section 414.9, and board authority to exercise its statutory functions may not be limited. Unless the functions of the two bodies are carefully separated, the provision for common membership could result in a blurring of the lines between actions of the planning and zoning commission and actions of the board of adjustment. As discussed above, we believe combination of the commission and the board into a single entity may run afoul with chapter 414. Therefore, we advise the council to consider further amending



The Honorable Christopher C. Rants  
Page 5

its ordinances to mandate separate meetings of the commission and the board to better assure that the distinctions between roles of the two bodies are not eroded to the extent of creation of a de facto "single board."

Sincerely,

Michael H. Smith  
Assistant Attorney General

MUNICIPALITIES; CITIES; REAL PROPERTY: Subdivision platting. Iowa Code §§ 354.8, 354.9, 368.7, 368.19 (2005). A municipal ordinance may condition the city's approval of subdivision platting of land within the two-mile extraterritorial area around the city limits on the property owner's consent to annexation if the city's comprehensive plan shows that the city has planned for development of the land as part of the city's growth area and has the capability to extend municipal services such as water and sanitary sewer that would otherwise not be available to the subdivision. Annexation of the land prior to approval of the subdivision may be required if the land is contiguous to the city. An agreement to apply for voluntary annexation of the property in the future, when the property becomes contiguous to the city boundary, may be required if the land is not currently contiguous to the city. (Smith to Warnstadt, State Senator, 5-13-05)  
# 05-5-1

May 13, 2005

The Honorable Steve Warnstadt  
State Senator  
Iowa State Capitol  
LOCAL

Dear Senator Warnstadt:

You have requested an opinion concerning the authority of a city to condition approval of a subdivision plat on the property owner's consent to annexation of the property. You present a series of questions that we paraphrase as follows:

1. If a city ordinance prohibits approval of the subdivision of land that may lawfully be annexed to the city based on its location, may the city rely on the ordinance and Iowa Code section 354.9(2) to condition subdivision approval on the property owner's consent to annexation?
2. If a city ordinance requires all subdivisions to have appropriate infrastructure and to be served with city-supplied water where available and the city has a policy of not providing water service outside city limits, may the city condition approval of an extraterritorial plat on the property owner's voluntary annexation of the subdivision into the city – if the property is contiguous to the city boundary – or the property owner's agreement to voluntary annexation of the property in the future when the property becomes contiguous to the city boundary?

In answer to your questions, we opine that, pursuant to Iowa Code section 354.9, a municipal ordinance may condition the city's approval of subdivision platting of land

within the two-mile extraterritorial area around the city limits on the property owner's consent to annexation if the city's comprehensive plan shows that the city has planned for development of the land as part of the city's growth area and has the capability to extend municipal services, such as water and sanitary sewer, to the area that would otherwise not be available to the subdivision. Annexation of the land prior to approval of the subdivision may be required if the land is contiguous to the city. An agreement to apply for voluntary annexation of the property in the future, when the property becomes contiguous to the city boundary, may be required if the land is not currently contiguous to the city.

*BACKGROUND: PROBLEMS OF "FRINGE" DEVELOPMENT*

Cities and their residents generally are harmed in several different ways by uncontrolled subdivision development in fringe areas just outside the edges of city boundaries. Extension of municipal services in an orderly and efficient manner is frustrated. Rural subdivisions with inadequate streets, private wells and septic systems can be attractive to developers because they are cheaper to develop. Residents of rural subdivisions generally resist annexation to avoid higher property taxes and fees for connecting to municipal water and sewer systems, thus frustrating orderly urban growth. *See: "Rethinking Municipal Annexation Powers," 24 Urban Lawyer 247, 251-4 (Spring 1992); Op. Att'y Gen. No. 98-1-1 (1998 WL 541519).*

Once an area of the city is developed, the cost of change becomes prohibitive, and it becomes evident that a subdivider has cast the pattern for the future community. Since urbanization of raw land at the city's edge is now the most important development area, it is here that the most significant public influence should be exerted.

*"Note, Subdivision Regulation in Iowa," 54 Iowa L.Rev. 1121, 1122 (1969), quoted in Oakes Construction Co. v. City of Iowa City, 304 N.W.2d 797, 805 (Iowa 1981).*

Clearly, the problems of community development for which solutions are sought through subdivision control do not terminate at the corporate boundary of the regulating municipality. 4 *Anderson's American Law of Zoning* § 25.06 (4<sup>th</sup> Ed. 1997). The enabling statutes of some states, including Iowa, recognize these problems and seek to resolve them by giving municipalities authority to regulate the subdivision of land within a specified distance of corporate limits. *Id.*

*EXTRATERRITORIAL SUBDIVISION REGULATION*

Municipal regulation of subdivision plats is authorized by Iowa Code section 354.8 (2005). The last unnumbered paragraph of the statute authorizes a city to establish jurisdiction to review subdivisions or plats of survey outside its boundaries pursuant to section 354.9. Relevant provisions of section 354.9 include the following authorizations. A city that has adopted ordinances regulating the division of land is authorized by section 354.9 to designate, by ordinance specifically referring to section 354.9, an extraterritorial area subject to the city's review and approval. The area of extraterritorial review may not extend more than two miles from the city's boundaries. To be effective, the ordinance designating the extraterritorial review area must be filed with the county recorder and county auditor. Iowa Code § 354.9(1) (2005). "The standards and conditions applied by a city or county for review and approval of the subdivision shall be the same standards and conditions used for review and approval of subdivisions within the city limits or shall be the standards and conditions for review and approval established by agreement of the city and county pursuant to chapter 28E." Iowa Code § 354.9(2).

The Iowa Supreme Court has adopted a "reasonably liberal reading" of the state statutes and city ordinances authorizing municipal regulation of subdivision plats, recognizing the very close relation among municipal planning, zoning and subdivision control and the importance of zoning and subdivision control for effectuating comprehensive land-use plans. *Oakes*, 304 N.W.2d at 806. Under the liberal approach, a platting authority has the flexibility to disapprove plats or condition approval for reasons that are not "spelled out in so many words" in the governing statutes or ordinances. *Blumenthal Investment Trusts v. City of West Des Moines*, 636 N.W.2d 255, 267 (Iowa 2001).

In previous opinions, we have addressed several issues relating to a city's extraterritorial regulatory authority over subdivision plats. We have advised that both a county and a city by ordinance may provide reasonable standards and conditions affecting proposed subdivisions within the city's extraterritorial jurisdiction. 1994 Iowa Op. Att'y Gen. 142 [# 94-9-4(L)] (1994 WL 601538). We have advised that, pursuant to sections 354.8 and 354.9, a city can require subdivision platting within an area of its extraterritorial jurisdiction when neither state law nor county ordinance requires such platting. Iowa Op. Att'y Gen. # 98-1-1(L) (1998 WL 541519). Finally, we have opined that municipal home rule authorizes agreements through which landowner-developers act for themselves and their successors in consenting to annexation if the land becomes adjacent to the city. Iowa Op. Att'y Gen. # 00-12-1 (2000 WL 33258480).

*CONDITIONING ANNEXATION CONSENT:  
STATUTORY AND CONSTITUTIONAL CONSIDERATIONS*

The question whether subdivision plat approval can be conditioned on consent to annexation requires analysis of the relationship between municipal authority to regulate extraterritorial subdivision platting and municipal authority to annex territory. The law of annexation is purely statutory. *Pruss v. Cedar Rapids/Hiawatha Annexation Special Local Committee*, 687 N.W.2d 275 (Iowa 2004). A state may expand or contract the territorial area of its cities with or without the consent of its citizens, unrestrained by the United States Constitution. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79, 28 S.Ct. 40, 52 L.Ed. 151 (1907). See *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71, 99 S.Ct. 383, 390, 58 L.Ed.2d 292 (1978).

State constitutional provisions and statutory annexation frameworks vary among jurisdictions. Although state statutes establishing annexation methods need not include any right to vote, the statutory establishment of voting rights on annexation proposals may trigger strict judicial scrutiny of provisions in state statutes or municipal ordinances that interfere with those voting rights. In constitutional challenges against annexation statutes or municipal ordinances that condition extraterritorial services or plat approval on annexation consent, the result largely depends on the role of voting under the state's annexation statutes or the state's constitution. The interplay between state-mandated annexation elections and judicial scrutiny of alternative annexation methods has been analyzed by courts in several jurisdictions.

In some states, a petition of a majority of voters in a territory is required for annexation. For example, a Wisconsin annexation statute provides that “[n]o populated fringe area may become part of the city until the majority of electors and/or property owners in a particular area desire to annex.” *Hoepker v. City of Madison Plan Commission*, 209 Wis. 2d 633, 646, 563 N.W.2d 145, 150 (1997) [citations omitted]. The Wisconsin Supreme Court held in *Hoepker* that the City of Madison violated safeguards in Wisconsin's annexation statutes by requiring landowners to petition for annexation as a condition of obtaining approval of a subdivision plat for property adjoining the city. *Hoepker*, 209 Wis. 2d at 645-49, 563 N.W.2d at 150-52. The ruling in *Hoepker* followed an earlier decision in which the Wisconsin Supreme Court analogized the annexation petition process to an election. *Town of Fond du Lac v. City of Fond du Lac*, 22 Wis.2d 533, 536-40, 126 N.W.2d 201 (1964) (invalidating annexation where annexing city obtained agreement of landlord to obtain consent of tenants and city obtained consents of residents by inducements and eviction threats).

An opinion of our Supreme Court has mentioned *Hoepker* without any comment concerning whether the *Hoepker* rationale has any relevance in Iowa. *Blumenthal Investment Trusts v. City of West Des Moines*, 636 N.W.2d 255, 267 (Iowa 2001) (rejecting claim under 42 U.S.C. §1983 that application of municipal subdivision platting ordinance violated developer's right to substantive due process). In evaluating whether *Hoepker* and *Town of Fond du Lac* have any relevance under Iowa law we must consider similarities and differences between the statutory annexation frameworks in Iowa, Wisconsin, and other states whose appellate courts have analyzed the Wisconsin cases.

In Oregon, like Wisconsin, a “double majority” of landowners and voters in a territory must consent to annexation. In an action brought under 42 U.S.C. §1983 by homeowners residing outside a city, a federal appellate court held a municipal ordinance violated equal protection rights under the United States Constitution by requiring the nonresidents to consent to annexation as a condition of a subsidy or reduction in hook-up costs for mandated sewer connections. *Hussey v. City of Portland*, 64 F.3d 1260 (9<sup>th</sup> Cir. 1995), cert. denied, 516 U.S. 1112, 116 S.Ct. 911, 133 L.Ed.2d 843 (1996). The court considered alternative annexation methods provided by Oregon statutes, including an election or written consent of a majority of all voters registered in the territory and owners of all land in the territory. Without consent of a double majority of registered voters and landowners, Portland would have had to conduct an election to annex the territory. Further, the consent forms used by Portland stated that if the city attempted to annex the territory by election, the agreement would constitute a waiver of the right to vote and would count as a “yes” vote. 64 F.3d at 1262-63. Distinguishing decisions by federal appellate courts in other federal circuits, the court relied on the rationale of the Wisconsin Supreme Court in *Town of Fond du Lac*. The court ruled that because in Oregon, like Wisconsin, the annexation by petition of voters in the territory was an alternative to election, the municipal ordinance affected voting rights. 64 F.3d at 1264-65. The court relied also on *Curtis v. Bd. of Supr's of Los Angeles County*, 7 Cal.3d 942, 501 P.2d 537 (1972) (invalidating state statute that authorized owners of property with 51% of total assessed value to prevent an annexation election). In *Hussey*, the federal court concluded that the Portland ordinance severely and unreasonably interfered with the right to vote, triggering application of a strict scrutiny test that Portland conceded the ordinance could not satisfy. 64 F.3d at 1265-66.

*Hussey* was distinguished by the Court of Appeals of Oregon in an action for judicial review of a state administrative order requiring the owner of a commercial business to connect to the sanitary sewer system of an adjoining city, which required consent to annexation as a condition of the sanitary sewer connection. In *Jeld-Wen, Inc.*

*v. Environmental Quality Comm.*, 162 Or. App. 100, 986 P.2d 582 (1999), the court rejected the petitioner's reliance on *Hussey* finding that because the petitioner was not a voter and no voters lived on the petitioner's property the EQC policy requiring use of the centralized sewer system and annexation in order to access that system in no way infringed upon anyone's voting rights. 162 Or. App. at 110, 986 P.2d at 588.

Appellate courts in Arizona have distinguished both *Town of Fond du Lac* and *Hussey* because Arizona's annexation statutes do not provide for annexation by election or by petition of resident voters in a territory. In *Goodyear Farms v. City of Avondale*, 148 Ariz. 216, 714 P.2d 386 (1986), the Arizona Supreme Court rejected an equal protection challenge to Arizona's annexation statute. The Court distinguished *Town of Fond du Lac*, quoting from a subsequent Wisconsin appellate opinion that explained the distinction between consent of landowners and consent of voters:

Ownership itself, detached from the personal benefits or detriments that accompany residency in a municipality, is more of a private right than the political right a resident may have in annexation. . . . The two types of interests are treated differently because they are different. Thus the political nature of annexation petitions recognized as applicable to electors in *De Bauche v. Green Bay*, 227 Wis. 148, 153-54, 277 N.W. 147 (1938) and *Fond Du Lac* is not applicable to property owners.

*Goodyear Farms*, 148 Ariz. at 220, 714 P.2d at 390, quoting *Town of Medary v. City of La Crosse*, 88 Wis.2d 101, 105, 277 N.W.2d 310, 314 (Wis. App. 1979). The *Goodyear Farms* Court concluded, "[w]e do not believe that the Arizona annexation petition process, which is signed by property owners, would be a political right analogous to voting." *Id.*

*Hussey* was subsequently distinguished by the Arizona Court of Appeals in an opinion rejecting constitutional challenges to an Arizona statute giving a city the power to prohibit incorporation of any new city within its statutorily defined "urbanized area." The court explained that because the Arizona legislature had determined that the issue of municipal incorporation in defined areas would not be decided by an election at all, the process through which landowners could petition for incorporation did not "equate to an election." *City of Tucson v. Pima County*, 199 Ariz. 509, 517-20, 19 P.3d 650, 658-61 (Ariz. App. 2001).

Both *Hussey* and *Town of Fond du Lac* were also distinguished by the Washington Supreme Court in consolidated cases involving property owner and fire district challenges to Washington statutes authorizing annexation by petition of owners of properties constituting specified percentages of the assessed value in the annexation territory. The petitions resulting in the challenged annexations were obtained by the cities through “outside utility agreements” by which the cities extended utility services conditioned on consent to annexation. *Grant County Fire Dist. No. 5 v. City of Moses Lake*, 145 Wash.2d 702, 42 P.3d 394 (2002) [*Grant County I*]. Under the Washington statutory scheme considered by the court, the petition method of annexation was an alternative to an election method in which a majority of residents vote to annex a particular property to a city. The court distinguished *Hussey* because the Oregon method for annexation by petition required a double majority of both property owners and voters in the territory to be annexed. The court also rejected the analogy between annexation by petition and voting set forth in *Town of Fond du Lac*, noting that courts in several jurisdictions had rejected the analogy. 145 Wash.2d 720-23, 42 P.3d 403-04. The court rejected equal protection challenges to the statutory scheme, but the majority held that it violated the privileges and immunities clause of the Washington Constitution. On rehearing, the court vacated that portion of its decision and upheld the constitutionality of the annexation statute. *Grant County Fire Dist. No. 5 v. City of Moses Lake*, 150 Wash.2d 791, 83 P.3d 419 (2004) [*Grant County II*].

Iowa statutes also provide alternate methods of annexation. A city may annex territory by involuntary annexation, a process which culminates in an election. *See Iowa Code §§ 368.11 – 368.20* (2005). When an election to approve an involuntary annexation proposal is held, “registered voters of the [annexation] territory *and* of the city may vote, and the proposal is authorized if a majority of the total number of persons voting approves it.” Iowa Code § 368.19 (emphasis added). A city may also annex territory by voluntary annexation upon application of *the owners of the property* in the annexation territory. Iowa Code § 368.7 (2005). Territory comprising not more than twenty percent of the land area may be included in the application without the consent of the owner to avoid creating an island or to create more uniform boundaries. Iowa Code § 368.7(1)(a) (2005).

Iowa’s annexation statutes differ from Wisconsin’s and Oregon’s, the two states in which courts have found a requirement of consent to annexation as a condition for approval of an otherwise extraterritorial subdivision to be unconstitutional. Unlike the annexation statutes in those two states, Iowa Code chapter 368 does not give a majority of electors residing in a proposed annexation territory a veto over either a voluntary or



involuntary annexation. Involuntary annexations are approved, not upon a majority vote of the electors in the territory to be annexed, but upon a majority of the total combined votes cast in the annexation territory and the city proposing annexation. Thus, electors in the proposed annexation area do not control the outcome of an election for approval of an involuntary annexation. *See City of Altoona v. Sandquist*, 230 N.W.2d 507, 509 (Iowa 1975) (holding that Iowa Code section 362.26 (1971), a predecessor to current Code section 368.19, was only intended to extend franchise to residents of an annexation area, not “to grant those persons a veto power over annexation”). Even in the context of voluntary annexations, consent of residents is not required under the Iowa statutes. Rather, voluntary annexations in Iowa require only consent of property owners.

Because property owners, rather than resident electors, control voluntary annexation decisions, an ordinance making subdivision plat approval conditional on consent to annexation does not affect voting rights. Therefore, if challenged on constitutional equal protection or substantive due process grounds, such an ordinance would be subjected a rational basis test rather than the strict scrutiny test applied to a statute or ordinance which infringes upon voting rights.

Given application of the “rational basis test” and the “reasonably liberal” construction to be given by Iowa courts to statutes and ordinances authorizing municipal subdivision regulations, we believe that a court would find that a city ordinance may condition approval of an extraterritorial subdivision plan upon the property owner’s consent to annexation. However, we hesitate to opine that such an ordinance would be found reasonable and within the scope of authority granted by sections 354.8 and 354.9 in all circumstances. A challenge to the validity of a city’s subdivision ordinances and decisions of the council acting pursuant to the ordinances are resolved by the courts based upon consideration of the specific terms of the ordinance, the facts and circumstances surrounding application of the ordinance, and the rationale given for the city’s decision. *C.f. Carruthers v. Board of Supervisors, Polk County*, 646 N.W.2d 867 (Iowa Ct. App. 2002) (upholding denial of subdivision plat approval based upon local board consideration facts and circumstances). Inquiry into the validity of a specific ordinance requirement is necessarily fact-based and outside the scope of our opinion process. *See* 61 Iowa Admin. Code 1.5(13)(c).

However, in circumstances where the land is shown as a growth area in the city’s comprehensive plan and services of the annexing city such as water or sanitary sewer are available and needed to better assure adequate infrastructure for the subdivision, we believe that an ordinance conditioning subdivision plat approval on consent to annexation

to receive those services would likely be upheld as reasonable and within the scope of sections 354.8 and 354.9. We note that municipal ordinances conditioning extension of extraterritorial utility services on consent to annexation generally have been upheld in other jurisdictions in circumstances where annexation voting rights were not implicated. *See, e.g., Grant County*, 150 Wash.2d 791, 83 P.3d 419 (2004) [Grant County II]; *Yakima County Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wash. 2d 371, 858 P.2d 245 (1993); *Johnson v. City of La Grande*, 167 Or.App. 35, 1 P.3d 1036 (Or.App. 2000) (distinguishing *Hussey*); *Jeld-Wen, Inc. v. Environmental Quality Comm.*, 162 Or. App. 100, 986 P.2d 582 (1999) (also distinguishing *Hussey*); *Vine St. Comm. Prtnrshp. v. City of Maryville*, 989 P.2d 1238 (Wash.App. 2000) (invalidating retroactive enforcement of ordinance); *Andres v. City of Perrysburg*, 47 Ohio App.3d 51, 546 N.E.2d 1377 (1988).

Your inquiry distinguishes between the situation in which land to be subdivided is contiguous to city boundaries and the situation in which land is within the extraterritorial area regulated by the city but not contiguous to the city boundary. When land proposed for subdivision is contiguous to the city annexation may be accomplished prior to approval of a subdivision plan. When the land is not contiguous annexation is not a current option. You ask whether a city may condition subdivision plat approval or the provision of city services upon the property owner signing an agreement to voluntarily annex the property in the future, when it is contiguous to the city. This office previously examined this type of agreement and concluded that – if the agreement was properly recorded so that subsequent purchasers had actual or constructive notice – it would be binding upon successor property owners. Iowa Op. Att’y Gen. # 00-12-1 (2000 WL 33258480). In light of the 2000 opinion and our analysis herein, we conclude that a city may require an agreement for future annexation prior to approval of a subdivision or the provision of municipal services and that the agreement, if properly recorded, would likely be enforceable against landowner parties to the agreement and subsequent purchasers of property covered by the agreement.

In summary, we conclude that, pursuant to Iowa Code section 354.9, a municipal ordinance may condition the city’s approval of subdivision platting of land within the two-mile extraterritorial area around the city limits on the property owner’s consent to annexation if the city’s comprehensive plan shows that the city has planned for development of the land as part of the city’s growth area and has the capability to extend municipal services such as water and sanitary sewer that would otherwise not be available to the subdivision. Annexation of the land prior to approval of the subdivision may be required if the land is contiguous to the city. An agreement to apply for

The Honorable Steve Warnstadt  
State Senator  
Page 10

voluntary annexation of the property in the future, when the property becomes contiguous to the city boundary, may be required if the land is not currently contiguous to the city.

Sincerely,

Michael H. Smith  
Assistant Attorney General