

CITIES: Issuing general obligation bonds without public referendum for city park projects; scope of "essential corporate purpose." Iowa Code §§ 384.24, 384.25, 384.28 (1999). Without receiving prior voter approval, a city could finance the following city park projects with general obligation bonds: (a) the repairing of baseball, softball, and soccer fields; (b) the repairing and paving of roadways; (c) the maintenance of swimming pools; (d) the dredging of ponds; (e) the improving of restrooms in and roofs on buildings; (f) the repairing of plumbing in and roofing of stadiums; and (g) the draining and repairing of trails. (Kempkes to Chapman, State Representative, 6-1-99) #99-6-1(L)

June 1, 1999

The Honorable Kay Chapman
State Representative
425 2nd St. S.E., ste. 1010
Cedar Rapids, IA

Dear Representative Chapman:

You have requested an opinion on the financing of city park projects, which implicates Iowa Code chapter 384 (1999). That chapter permits a city to issue general obligation bonds -- instruments supported by its general taxing power -- without a public referendum for any "essential corporate purpose" and with a public referendum for any "general corporate purpose." See Iowa Code §§ 384.25, 384.26, 384.28. See generally City of Fort Dodge v. Janvrin, 372 N.W.2d 209, 211 (Iowa 1985); Grove v. City of Des Moines, 280 N.W.2d 378, 379-80 (Iowa 1979); Green v. City of Cascade, 231 N.W.2d 882, 885-86 (Iowa 1975).

With regard to city parks, you ask whether "essential corporate purpose" could include the following seven projects: (a) the repairing of baseball, softball, and soccer fields; (b) the repairing and paving of roadways; (c) the maintenance of swimming pools; (d) the dredging of ponds; (e) the improving of restrooms in and roofs over buildings; (f) the repairing of plumbing in and roofs over stadiums; and (g) the draining and repairing of trails. If "essential corporate purpose" does encompass these seven projects, the city may proceed to issue general obligation bonds without needing prior voter approval in a public referendum.

I.

Chapter 384 is entitled "City Finance." Division III of chapter 384 governs issuance of bonds and defines the phrases "city enterprise," "essential corporate purpose," and "general corporate purpose." See Iowa Code § 384.24(2)-(4).

Section 384.24(4) identifies specific projects as "general corporate purposes," see Iowa Code § 384.24(4)(a)-(g), which also includes "[a]ny other purpose which is necessary for the operation of the city or the health and welfare of its citizens," Iowa Code § 384.24(4)(i). Section 384.26 provides special procedures governing the issuance of general obligation bonds for a general corporate purpose; they require voter approval in a public referendum before the city may issue them.

Section 384.24(3) identifies specific projects as "essential corporate purposes." For example, such projects include "[t]he opening, widening, extending, grading, and draining of the right-of-way of streets, highways, avenues, alleys, public grounds, and market places" Iowa Code § 384.24(3)(a). Section 384.25 provides special procedures governing the issuance of general obligation bonds for essential corporate purposes; they do not require voter approval in a public referendum before the city may issue them.

II.

You have asked whether the seven proposed projects properly fall within the scope of section 384.24(3)(o) and, as a result, be financed under procedures established by section 384.25.

(A)

The history behind the current language in section 384.24(3)(o) provides a good starting point for analyzing your question. See generally Iowa Code § 4.6(4). We need only look back some twenty years to 1980.

In that year, section 384.24(3)(o) defined "essential corporate purpose" only as the "rehabilitation and improvement of parks already owned, including the removal, replacement and planting of trees thereon." See Iowa Code § 384.24(3)(o) (1977). This language came before the Supreme Court of Iowa in Hamilton v. City of Urbandale, 291 N.W.2d 15, 18-19 (Iowa 1980), which held as a matter of law that it did not encompass the building of softball fields within a city park. According to the court, the phrase in section 384.24(3)(o) that began with the word "including" necessarily modified the preceding language. See id. at 18 ("[g]eneral words in a statute which are followed by specific words take their meaning from the specific ones"). The court then concluded that the construction of softball fields "can hardly be equated with tree planting." Id.

Three years later, in 1983, the General Assembly amended section 384.24(3)(o). See generally 1983 Iowa Acts, 70th G.A., ch. 90, § 1. As amended, section 384.24(3)(o) defined an "essential corporate purpose" as the

rehabilitation and improvement of parks already owned, including the removal, replacement and planting of trees in the parks, and facilities, equipment, and improvements commonly found in city parks.

(emphasis added). The General Assembly simultaneously amended section 384.28 by adding the following paragraph:

Definitions of city enterprises, essential corporate purposes, and general corporate purposes are not mutually exclusive and shall be liberally construed. The detailing of examples is not intended to modify or restrict the meaning of general words used. . . .

See generally 1983 Iowa Acts, 70th G.A., ch. 90, § 22.

The 1983 amendments to sections 384.24(3)(o) and 384.28 effectively overruled Hamilton v. City of Urbandale by providing cities with increased discretion in determining what is and what is not an "essential corporate purpose" for city park projects. Whether a particular project properly falls within the scope of section 384.24(3) now depends in part upon a city's judgment about the accoutrements "commonly found" in city parks. This judgment involves factual and policy questions for which this office, like a court, cannot substitute its judgment as a matter of law. Cf. Leonard v. Iowa State Bd. of Educ., 471 N.W.2d 815, 816 (Iowa 1991) (generally, courts will not second-guess administrative tribunal's decisions); Green v. City of Mt. Pleasant, 256 Iowa 1184, 131 N.W.2d 5, 17 (1964) (generally, courts will not interfere with legislative decision of "public purpose"). Public recreation, like beauty in the eye of its beholders, may take many forms.

(B)

Dictionary definitions also help identify what projects properly fall within section 384.24(3)(o) as "facilities, equipment, and improvements commonly found in city parks." See generally Iowa Code §§ 4.1(38), 4.2, 384.28; Bernau v. Iowa Dep't of Transp., 580 N.W.2d 757, 761 (Iowa 1998).

The verb "rehabilitate" commonly means to restore to a former capacity or state. Webster's New Collegiate Dictionary 966-67 (1979). The verb "improve" commonly means to enhance in value or quality or to make better. Id. at 573; accord Chase v. Sioux City, 86 Iowa 603, 53 N.W. 333, 334 (1892). Both words thus signify some form of maintenance, repair, construction, or betterment. See Jarnagin v. Fisher Controls Int'l Inc., 573 N.W.2d 34, 36 (Iowa 1997); Buttz v. Owens-Corning Fiberglass Corp., 557 N.W.2d 90, 91

(Iowa 1996); Crabb's English Synonyms 576 (1917); see also Des Moines City Ry. v. City of Des Moines, 205 Iowa 495, 216 N.W. 284, 287 (1927).

The noun "park" in this context commonly means a tract of land maintained as a place of beauty or of public recreation. Webster's Third New International Dictionary 1642 (1967). Accord Fetters v. City of Des Moines, 260 Iowa 490, 149 N.W.2d 815, 820 (1967); Woodward v. City of Des Moines, 182 Iowa 1102, 165 N.W. 313, 314 (1917); 10 E. McQuillin, The Law of Municipal Corporations § 28.50, at 186 (1990).

(C)

New York City's Central Park was the first place deliberately set aside by an American city or town for exclusive public use as a pleasure ground, for rest and exercise in the open air. 10 McQuillin, supra, at 187 (footnote omitted). Like most other cities across America, cities in Iowa followed New York City's example by setting aside areas for use as public parks. Particularly in densely populated cities, parks may be manifestly essential to the health, comfort, and pleasure of their residents. Id., § 28.51, at 192; see City of Quitman v. Jelks, 77 S.E. 76, 76 (Ga. 1913); Meyer v. City of Cleveland, 35 Ohio App. 20, 21, 171 N.E. 606 (1930); Annot., "Taxes -- Corporate Purposes," 46 A.L.R. 609, 693, 707 (1927); see also Norman v. City of Chariton, 201 Iowa 279, 207 N.W. 134, 136 (1926).

While dating from the Great Depression, an Iowa case that expounded upon the meaning of "park" provides some insight into what projects properly fall within section 384.24(3)(o) as "facilities, equipment, and improvements commonly found in city parks." In Golf View Realty Co. v. Sioux City, 222 Iowa 433, 269 N.W. 451, 455 (1936), the Supreme Court of Iowa observed:

It is a matter of common knowledge that "parks" are used by the public generally for recreation through many different games, such as tennis, pitching horse shoes, croquet, baseball, basketball, golf, walking, horse-back riding, picnicking, and general outdoor exercise.

(D)

In addition to Golf View Realty Co. v. Sioux City, we have discovered other authorities that would support a city's judgment that the seven proposed projects come within the purview of section 384.24(3)(o). See Fetters v. City of Des Moines, 149 N.W.2d at 820; Heino v. City of Grand Rapids, 168 N.W. 512, 516 (Mich. 1918); Horn v. City of Minneapolis, 234 N.W. 289, 291 (Minn. 1931); Ehmen

v. Village of Gothenburg, 70 N.W. 237, 238 (Neb. 1897); Meyer v. City of Cleveland, 35 Ohio App. 20, 21-24, 171 N.E. 606 (1930); City of Waco v. McCraw, 93 S.W.2d 717, 718-19 (Tex. 1936); 10 McQuillin, supra, § 28.50, at 186, 188 n. 4, § 28.51, at 193, 195 n. 4, § 28.52, at 197, § 28.52.10, at 206; Annot., "Public Purpose -- Auditorium or Stadium," 173 A.L.R. 415, 415 (1948); Annot., "Taxes -- Corporate Purposes," 106 A.L.R. 906, 917-18 (1937); Annot., "Taxes -- Corporate Purposes," 46 A.L.R. 609, 668-75 (1927); Webster's New Collegiate Dictionary 1122 (1979). Cf. Iowa Code § 384.24(2)(c) ("city enterprise" includes recreational facilities, recreational facility systems, zoos, museums, certain fine-arts centers, "as well as those programs more customarily identified with the term 'recreation' such as public sports, games, pastimes, diversions, and amusement, on land or water, whether or not such facilities are located in or as a part of any public park").

Except for those situations clearly outside the range of reasonable discretion, this office normally accords respectful consideration to a city's legislative judgment on projects it considers proper for treatment under sections 384.23(3) and 384.25. Ultimately, of course, this state's judiciary wields the authority to determine whether a particular project satisfies the statutory prescriptions governing the issuance of general obligation bonds. See generally Dingman v. City of Council Bluffs, 249 Iowa 1121, 90 N.W.2d 742, 747 (1958); State ex rel. City of O'Neill v. Marsh, 238 N.W. 760, 762 (Neb. 1931).

III.

In summary: Without receiving prior voter approval, a city could finance the following city park projects with general obligation bonds: (a) the repairing of baseball, softball, and soccer fields; (b) the repairing and paving of roadways; (c) the maintenance of swimming pools; (d) the dredging of ponds; (e) the improving of restrooms in and roofs on buildings; (f) the repairing of plumbing in and roofing of stadiums; and (g) the draining and repairing of trails.

Sincerely,



Bruce Kempkes
Assistant Attorney General

NATURAL RESOURCES; WATERS AND WATER COURSES; BOATING REGULATIONS:
Vessels. Iowa Code §§ 462A.2(29), 462A.9(6) (1999). An air
mattress, inner tube, or similar water toy is not clearly within
the scope of the term "vessel" as defined in Iowa Code section
462A.2(29) and used in Iowa Code section 462A.9(6). This statute
is implemented by the Natural Resource Commission's administrative
rule at 571 IAC 37.13 which does not unambiguously require that a
person wear a personal flotation device while floating on an air
mattress, inner tube, or similar water toy in a public water body.
(Smith to Martin, Cerro Gordo County Attorney, 8-31-99) #99-8-1(L)

August 31, 1999

Paul L. Martin
Cerro Gordo County Attorney
220 N. Washington Ave.
Mason City, IA 50401-3254

Dear Mr. Martin:

You have requested an opinion of the Attorney General concerning the scope of the term "vessel" as defined in Iowa Code section 462A.2(29) in relation to the statutory requirement that vessels carry certain types of life preservers. We understand that your request arises from a disagreement with the Law Enforcement Bureau of the Iowa Department of Natural Resources concerning whether a person floating on an inner tube in a public water body must wear a personal flotation device (PFD). The disagreement concerns the question whether the legislature viewed "tubers" as boaters when enacting the requirement that "vessels" carry life preservers.

We paraphrase your questions as whether "vessel" as used in Iowa Code section 462A.9(6) includes an air mattress, inner tube, or similar water toy on which a person can float. After considering statutory definitions, related statutes, relevant administrative rules, dictionary definitions, and the maxim that penal statutes are to be narrowly construed, we advise that an air mattress, inner tube, or similar water toy is not clearly within the scope of the term "vessel" as defined in Iowa Code section 462A.2(29) and used in Iowa Code section 462A.9(6). We further advise that administrative rules implementing section 462A.9(6) do not unambiguously require that a person wear a personal flotation device while floating on an air mattress, inner tube, or similar water toy in a public water body, and that criminal statutes must be narrowly construed.

Initially, we note that Iowa Code chapter 462A, entitled "Water Navigation Regulations", generally concerns registration and operation of what are commonly referred to as boats. The substantive regulations in chapter 462A prohibit or restrict operation of various types of "vessels" or "watercraft" in various circumstances. Chapter 462A regulates boating but not swimming.

The specific statute in issue, section 462A.9, classifies vessels for purposes of specifying required safety equipment. Subsection 6 addresses the need for life preservers:

Every vessel shall carry at least one life preserver, life belt, ring buoy or other device, of the sort prescribed by the rules of the [natural resource] commission, for each passenger, so placed as to be readily accessible. . . .

To ascertain the scope of "vessel" as used in section 462A.9(6), we first consider the statutory definition of "vessel" in section 462A.2(29):

"Vessel" means every description of watercraft, other than a seaplane, used or capable of being used as a means of transportation on water or ice. Ice boats are watercraft.

Vessels, then, are all types of "watercraft" except seaplanes. The term "watercraft" is defined in section 462A.2(32):

"Watercraft" means any vessel which through the buoyance [sic] force of water floats upon the water and is capable of carrying one or more persons.

These statutory definitions of "vessel" and "watercraft" have a distinctly circular relationship, creating ambiguity. The term "inflatable vessel" is defined by section 462A.2(12) as "a vessel which achieves and maintains its intended shape and buoyancy by inflation." It does not resolve the ambiguity. It is certain that some inflatable devices are "vessels," but uncertain whether a air mattress, inner tube, or other water toy is included.

To glean the meaning of an ambiguous statute, it is helpful to consider it *in pari materia* with related statutes. Turning back to section 462A.9(6), the substantive requirement is that every vessel "carry" a specified type of life preserver or other device "for each passenger. . . ." Similarly, section 462A.12 contains a list of prohibitions and

restrictions concerning where and how one may "operate" vessels or watercraft. The quoted language is strained when applied to a person floating on an air mattress, inner tube, or similar water toy. It is difficult to visualize an air mattress or inner tube being "operated" or a PFD being "carried" on an air mattress or inner tube "for each passenger." In contrast, a "vessel" might reasonably be viewed to include a raft made of a platform mounted on inner tubes lashed together and used to "navigate" downstream on a river.

The phrase "an air mattress, inner tube, other toy or other beach type item" is used only in section 462A.6, which exempts certain types of vessels from registration requirements. Section 462A.6(6) exempts:

An air mattress, inner tube, or other toy or beach type item which is being used in a recognized swimming area. In the case of a natural lake or reservoir these beach or swimming areas may be less, but in no case shall exceed three hundred feet from shore.

Section 462A.6(7)(a) also exempts "[i]nflatable vessels, seven feet or less in length." It is clear from the exemption for air mattresses, inner tubes, and the like, that they do not have to be registered as "vessels." However, if these registration exemptions have negative implications, they do not resolve the ambiguity in the statutory definition of "vessel" as applied to a requirement that life preservers be carried on vessels.

When construing an ambiguous statute, administrative construction of the statute should be considered. Iowa Code § 4.6(6). Section 462A.9(6) mandates rulemaking to prescribe the "sort" of life preserver or other device for various types of vessels. The Natural Resource Commission has adopted rules implementing this mandate in 571 IAC 37.13, entitled "Buoyant safety equipment." Subject to exceptions not relevant here, subrule 37.13(2) states that no person may use a vessel less than 16 feet in length or a canoe or kayak of any length unless at least one personal flotation device equivalent to a U.S. Coast Guard Type I, Type II or Type III PFD is "on board" for each person. The administrative rules are silent concerning the applicability of this requirement to air mattresses, inner tubes or similar water toys. The language "on board" for each person is strained when applied to an air mattress or inner tube. The administrative rule does not purport to clarify ambiguity in the statute.

Though the legislature may be its own lexicographer, and a court may not add words or change terms under the guise of judicial construction, a court is not bound by

Mr. Paul L. Martin
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a statutory definition that is arbitrary or uncertain. *Iowa Beef Processors, Inc., v. Miller*, 312 N.W.2d 530, 533 (Iowa 1981). When a statutory definition is ambiguous, it can be helpful to consult a dictionary. The dictionary definition of "vessel" is:

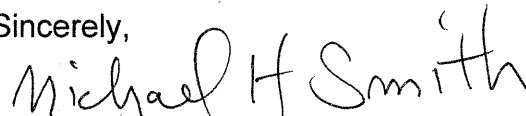
a usually hollow structure used on or in the water for purposes of navigation; a craft for navigation of the water; especially a watercraft or structure with its equipment whether self-propelled or not that is used or capable of being used as a means of transportation in navigation or commerce on water and that usually excludes small rowboats and sailboats.

Webster's Third New International Dictionary (unabridged), G.C. Merriam, 1967. The term "watercraft" is simply "equipment for water transport." *Id.* The term "navigation" is "the science or art of conducting ships or aircraft from one place to another. . . ." *Id.* Like the statutory definitions, these dictionary definitions indicate that the terms "vessel" and "watercraft" are used interchangeably. The dictionary definitions suggest that neither includes an air mattress, inner tube or similar water toy.

Finally, we consider the rule of construction that penal statutes are strictly construed. A court must resolve doubts against the state and in favor of the accused. *State v. Phillips*, 569 N.W.2d 816, 818 (Iowa 1997). Violations of regulations in chapter 462A or administrative rules adopted under chapter 462A are made simple misdemeanors by section 462A.13. There is doubt whether the General Assembly intended the word "vessel" to include an inner tube. We believe that a court would strictly construe the word "vessel" to exclude an air mattress, inner tube or similar water toy.

We conclude that an air mattress, inner tube, or similar water toy is not clearly within the scope of the term "vessel" as defined in Iowa Code section 462A.2(29) and used in Iowa Code section 462A.9(6). We further conclude that administrative rules implementing section 462A.9(6) do not require that a person wear a personal flotation device while floating on an air mattress, inner tube, or similar water toy in a public water body.

Sincerely,



MICHAEL H. SMITH
Assistant Attorney General

COUNTY RECORDERS: Proper handling of social security numbers. Iowa Code §§ 22.7(33), 22.8(1), 331.602(1), 331.603(3), 321.606-609, 421.17(25), 422.72, 428A.1, 428A.2, 428A.4, 428A.7, 558.8, 558.41, 558.49-55, 558.69, 595.4, 598.22B(3)(a), 904.602(2) (1999); House Files 472, 659, 704, 78th G.A., 1st Sess. (Iowa 1999); 561 IAC 9.2(3), (4); 730 IAC 79.5(5); Privacy Act of 1974, § 7, Pub.L. 93-579, 5 U.S.C. § 552a, note; 42 U.S.C. §§ 405(c)(2)(C)(i), (vi), (viii)(I), (II), (III), 666(a)(13)(B). County recorders should accept declarations of value and groundwater hazard statements which contain social security numbers of the transferors and transferees of real property. Because state provisions of law mandating disclosure of social security numbers on such forms pre-date October 1, 1990, federal confidentiality provisions do not apply. Recorders should refuse to record conveyance instruments when a declaration of value is required and social security numbers or a proper affidavit are not provided, but recorders should accept groundwater hazard statements which do not disclose social security numbers if otherwise complete. County recorders have no statutory or constitutional duty to shield unsolicited social security numbers from public disclosure and are not authorized to refuse to record documents simply because a third person placed a social security number on the document. A person who records an affidavit of identity containing the person's own social security number has no reasonable expectation of privacy in the number. (Griebel to Davis, Scott County Attorney, 10-7-99) #99-10-1(L)

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

Dear Mr. Davis:

You have requested an opinion of the Attorney General on the proper handling of social security numbers by county recorders. You ask:

- (1) Should county recorders accept documents containing social security numbers which are not recorded, but are forwarded to state agencies, such as declarations of value and groundwater hazard statements?
- (2) Does the county recorder have liability for recording documents containing social security numbers?
- (3) Does the county recorder have liability for refusing to record documents containing social security numbers?
- (4) Can a person waive privacy rights by voluntarily including the person's own social security number in a document intended for recording, such as an affidavit of identity?

Your questions implicate both state law on the proper function and duties of county recorders, and federal law restrictions on the collection and confidentiality of social security numbers. Each question will be separately addressed following an overview of relevant state and federal law.

Duties of County Recorder Under State Law

County recorders are generally required to record “all instruments presented to the recorder’s office for recordation upon payment of the proper fees and compliance with other recording requirements as provided by law.” Iowa Code § 331.602(1) (1999). The Iowa Supreme Court has interpreted this language as affording the recorder no discretion to refuse to record an instrument presented in proper form with appropriate fees. Proctor v. Garrett, 378 N.W.2d 298, 299 (Iowa 1985); Weyrauch v. Johnson, 201 Iowa 1197, 1201, 208 N.W. 706, 708 (1926). The Court reasoned that it was not the proper function of recorders, who are ordinarily not trained in the law, to determine the legal validity or effect of instruments presented for recording. Proctor, 378 N.W.2d at 299. See also Putensen v. Hawkeye Bank of Clay County, 564 N.W.2d 404, 409 (Iowa 1997) (recorder’s receipt of documents under Iowa Code chapter 655A is nondiscretionary and, therefore, does not rise to the level of state action). Absent specific legislative direction, recorders should accordingly not refuse to record an instrument presented in proper form with appropriate fees.

Declarations of Value

County recorders are required to “refuse to record any deed, instrument, or writing by which any real property in this state shall be granted, assigned, transferred, or otherwise conveyed [with certain statutory exceptions]¹ until the declaration of value has been submitted to the county recorder.” Iowa Code § 428A.4 (1999). Declarations of value disclose the full consideration paid for the real property transferred and are used for property tax purposes. Iowa Code § 428A.1. Forms for declarations of value are prescribed by the director of the Iowa Department of Revenue and Finance (“Revenue and Finance”) and are designed to solicit information needed by the director to produce sales/assessment ratio studies. Iowa Code §§ 428A.1, 428A.7.

¹ Declaration of value statements are not required if certain of the exceptions listed in Iowa Code section 428A.2 apply, for deeds which state they are provided in fulfillment of a recorded real estate contract, or when property is acquired by eminent domain. Iowa Code §§ 428A.1, 428A.4 (1999).

County recorders do not record or retain declaration of value forms. Iowa Code §428A.1. Recorders receive declarations of value partially completed by sellers or buyers or their agents. Id. After entering additional information on the form, recorders transmit the form to the city or county assessor. Id. The assessor completes the final section of the form and transmits one copy of the form to Revenue and Finance. Id.

Revenue and Finance rules have required from 1983 that declarations of value disclose the social security number or federal identification number of the seller and buyer. 730 IAC 79.5(5). Rule 79.5(5) directs recorders not to record any document for which a declaration of value is required if the form is not fully and accurately completed. If the social security number of a seller or buyer cannot in good faith be supplied, an affidavit must be filed by the person submitting the form stating that a good faith effort was made and identifying the reasons why the number could not be obtained. Id.

Groundwater Hazard Statements

Iowa law has required from 1987 that all persons transferring real property in Iowa submit to the buyer and to the county recorder a statement disclosing wells, disposal sites, underground storage tanks and hazardous waste. Iowa Code § 558.69 (1999).² Groundwater hazard statements are not required for tax purposes, but to disclose a transferor's knowledge of subsurface conditions relevant to potential groundwater contamination. 1988 Iowa Op. Att'y Gen. 46. The form of groundwater hazard statements is prescribed by the director of the Iowa Department of Natural Resources ("Natural Resources"). Iowa Code § 558.69. The forms are not recorded by the recorder. Id. If the form does not disclose a well, disposal site, underground storage tank or hazardous waste, the recorder may destroy the form after a copy has been supplied to the buyer. Id.³ Forms disclosing a groundwater hazard are transmitted to Natural Resources at the discretion of the director. Id.⁴

² Iowa Code section 558.69 was amended in the 1999 session to require additional disclosures regarding private burial sites. House File 472, 78th G.A., 1st Sess. § 1 (Iowa 1999).

³ Department of Natural Resources rules direct the recorder to return the original form to the transferee when the recorded instrument is returned if the form does not disclose a well, disposal site, underground storage tank or hazardous waste. 561 IAC 9.2(3).

⁴ Earlier this year Natural Resources notified recorders that groundwater hazard statements did not need to be transmitted to the director any longer. To date, however, the administrative rule which requires transmission has not been repealed. See 561 IAC 9.2(3).

County recorders are required to "refuse to record any deed, instrument, or writing for which a declaration of value is required under chapter 428A unless the statement required by this section has been submitted to the county recorder." Iowa Code § 558.69. Forms mandated by Natural Resources have from 1987 required disclosure of the social security number of the transferor and transferee. 561 IAC 9.2(4). While Natural Resources has not yet amended its rule, all references to social security numbers were removed from the model forms in July, 1999, when the forms were updated following the last legislative session.

Federal Restrictions on Collection and Use of Social Security Numbers

Section 7(a)(1) of the Privacy Act of 1974, Pub.L. 93-579, uncodified, but appearing in the annotated code as an historical note at 5 U.S.C. § 552a, deems it unlawful for a "Federal, State or local government agency to deny to any individual any right, benefit, or privilege provided by law because of such individual's refusal to disclose his social security number." The Act does not prohibit voluntary requests for an individual's social security number, but prescribes an informed consent process whereby individuals must be informed in advance whether the disclosure is mandatory or voluntary, by what statutory or other authority the number is solicited, and what uses will be made of it. Privacy Act of 1974, §7(b).

The Privacy Act contains two express exceptions. Section 7(a)(1) does not apply when disclosure of a social security number is required by federal statute, or by federal, state or local statute or regulation for identification purposes under a system of records in existence and operating before January 1, 1978. Privacy Act of 1974, § 7(a)(2). Shortly after the passage of the Privacy Act, the Social Security Act was amended in 1976 to expressly authorize states to require disclosure of social security numbers for identification purposes in the administration of any tax, general public assistance, driver's license, or motor vehicle registration law. 42 U.S.C. § 405(c)(2)(C)(i), (vi).

Several federal statutes expressly require state or local governmental agencies to collect social security numbers. For instance, to facilitate the collection of child support, federal law started requiring in 1996 that states create procedures for placing social security numbers in the records of any individual subject to a divorce decree, support order, or paternity determination. 42 U.S.C. § 666(a)(13)(B). See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub.L. 104-193, § 317.

Federal law also provides that "Social security account numbers . . . that are obtained or maintained by an authorized person pursuant to any provision of law, enacted on or after October 1, 1990, shall be confidential, and no authorized person shall disclose any such social security account number" 42 U.S.C. § 405(c)(2)(C)(viii)(I). An "authorized person" is defined in 42 U.S.C. § 405(c)(2)(C)(viii)(III) as "an officer or employee . . . of any State, political subdivision of a State, or agency of a State or political subdivision of a State, and any other person (or officer or employee thereof), who has or had access to social security account numbers or related records pursuant to any provision of law enacted on or after October 1, 1990."

- (1) Should county recorders accept documents containing social security numbers which are not recorded, but are forwarded to state agencies, such as declarations of value and groundwater hazard statements?**

County recorders are clearly required under state statutes and rules to accept declarations of value and groundwater hazard statements which contain the social security numbers of sellers and buyers of real property in Iowa. Iowa Code §§ 428A.7, 558.69; 730 IAC 79.5(5), 561 IAC 9.2(4). Because state provisions of law mandating use of social security numbers for identification purposes on both forms pre-date October 1, 1990, the federal confidentiality restrictions in 42 U.S.C. § 405(c)(2)(C)(viii)(I) do not apply.

More difficult issues arise in considering a recorder's obligation when declarations of value or groundwater hazard statements are submitted without the social security numbers required under state law. State law directs recorders not to record conveyance instruments when declarations of value or groundwater hazard statements are required and are not properly submitted. Iowa Code §§ 428A.4, 558.69. The ability to record instruments with the recorder is unquestionably a "right, benefit or privilege" within the meaning of the Privacy Act. The consequence of a recorder's refusal to record a conveyance instrument can be substantial. As described by the Iowa Supreme Court, "[a] person who has erroneously been denied recordation of a valid instrument by the officer's interpretation of the law could lose the benefits of the filing or recording statutes and possibly be denied a position of priority in the event of competing claims." Proctor, 378 N.W.2d at 300. See also Iowa Code § 558.41 (1999) ("An instrument affecting real estate is of no validity against subsequent purchasers . . . unless the instrument is filed and recorded in the county in which the real estate is located. . ."). Denying the benefits of Iowa's recording statutes based on a person's refusal to disclose a social security number accordingly falls within the prohibitions of section 7(a)(1) of the Privacy Act unless an exception applies.

Federal law expressly exempts state agencies and political subdivisions from complying with section 7(a)(1) of the Privacy Act when social security numbers are required in connection with the administration of tax laws. 42 U.S.C. § 405(c)(2)(C)(i). See 1994 Mich. Op. Att'y Gen. 6814 (Congress authorized states and local governmental units to use social security numbers in the administration of homestead property tax exemptions). Revenue and Finance requires disclosure of social security numbers on declarations of value to assist in the administration of property tax laws. In compliance with section 7(b) of the Privacy Act the form prescribed by Revenue and Finance contains the following notice:

Social Security Account numbers are required by 701 IAC 79.5(5), pursuant to Iowa Code sections 428A.1 and 428A.7, as authorized by 42 U.S.C. § 405(c)(2)(C)(i), and will be used to verify or inquire into facts relating to the sales price to be used for equalization purposes in administering the property tax.

Recorders should accordingly deny recordation of conveyance instruments in compliance with state law when declarations of value are required and are submitted without social security numbers or the affidavit alternatively permitted by rule 79.5(5). See Grabscheid v. Calvert Sales, Inc., 157 B.R. 600, 603 (E.D. Mich 1993) (secretary of state correctly refused to file financing statement which lacked debtor's tax identification number), *affirmed*, In re C.J. Rogers, Inc., 39 F.3d 669 (6th Cir. 1994).

The basis for requiring disclosure of social security numbers on groundwater hazard statements is less clear. The form previously prescribed by Natural Resources did not contain the notice required by section 7(b) of the Privacy Act. Our research has not found any provision of federal law which authorizes or requires states or political subdivisions to collect social security numbers in the administration of environmental laws. Denying recordation of conveyance instruments for failure of a transferor to disclose the social security number of the transferor and transferee on a groundwater hazard statement appears to conflict with section 7(a)(1) of the Privacy Act.

Three additional factors weigh in favor of recorders accepting groundwater hazard statements even when social security numbers are not fully disclosed. First, the form has now been updated to remove all reference to social security numbers. Even though 561 IAC 9.2(4) has not yet been amended to correspond with the new form, recorders should require use of the revised form as it includes the new disclosures regarding private burial sites on transferred property. Second, as noted above, recorders were recently directed not to forward

the forms to the director of Natural Resources. The forms are, thus, primarily used by the private parties to the real estate transaction, not by any governmental agency. Third, in most instances a fully completed declaration of value will be available to transferees. Iowa Code §558.69.⁵ Because social security numbers must appear on the declaration of value unless a proper affidavit is supplied to the recorder, they will generally be available for public examination. Under current Iowa law declarations of value are public records which can be obtained if needed from the assessor or Revenue and Finance.

In sum, recorders should accept declarations of value and groundwater hazard statements which contain social security numbers of the sellers and buyers of real estate. Recorders should refuse to record conveyance instruments when a declaration of value is required and social security numbers or a proper affidavit are not provided in compliance with Iowa Code sections 428A.1, 428A.4 and 428A.7, and 701 IAC 79.5(5). Recorders should accept groundwater hazard statements which do not disclose social security numbers if otherwise complete.

(2) Does the county recorder have liability for recording documents containing social security numbers?

Numerous documents containing social security numbers are presented to county recorders for recording, such as mortgages, mortgage releases, and financing statements. Recorders play no role in the collection of these social security numbers. Recorders neither solicit the numbers nor make any use of the numbers when fulfilling statutory filing and recording duties. You have not identified any provision of law which mandates placement of social security numbers on documents typically filed with the recorder. Rather, you ask generally whether recorders incur liability for recording documents which disclose social security numbers. Clearly, Iowa law does not grant recorders any discretion on whether to record the documents in question. Thus, we interpret your question as asking whether recorders have any obligation to redact social security numbers prior to releasing public records for public examination or copying.

County recorders are generally not required by Iowa law to keep social security numbers confidential or to redact social security numbers which appear on documents

⁵ Groundwater hazard statements are required even when a declaration of value is not required, but only for those voluntary transfers described in 561 IAC 9.1(4). See 1988 Iowa Op. Att'y Gen. 46.

recorded in the recorder's office. Iowa laws regarding the confidentiality of social security numbers are very narrowly targeted to specific circumstances. See Iowa Code §§ 22.7(33) (social security numbers of owners of unclaimed property are confidential), 421.17(25) (social security numbers provided by clerks of court to Revenue and Finance are held in confidence and used only for offset purposes), 422.72 (Revenue and Finance must remove social security numbers from sample income tax information), 595.4 (social security numbers collected by county registrars on marriage license applications are confidential), 598.22B(3)(a) (social security numbers collected by clerks of court or the child support recovery unit in connection with initial or modified orders for paternity or support are not public records), and 904.602(2) (Department of Corrections shall not disseminate social security numbers to the public). By contrast, none of the duties listed in Iowa Code section 331.602 or the recording provisions of chapter 558 specifically require or authorize county recorders to shield social security numbers from public disclosure.⁶

The federal Privacy Act is not implicated when social security numbers simply appear in public records maintained by state or local ministerial governmental officers as long as governmental employees or officers have not required, solicited or compiled the numbers. See Privacy Act of 1974, § 7(a); Fla. Op. Att'y Gen. (1999 WL 248344) (Privacy Act governs collection of social security numbers by state or local governmental bodies, but only applies to the executive branch of the federal government with respect to release of such numbers). The federal confidentiality provisions of 42 U.S.C. § 405(c)(2)(C)(viii)(I) only apply when social security numbers are obtained or maintained pursuant to a provision of law enacted on or after October 1, 1990. Thus, absent a constitutionally protected right of privacy, recorders would have no legal duty to shield unsolicited social security numbers from public disclosure.

Our office has recognized that public disclosure of social security numbers may raise significant privacy issues. 1994 Op. Att'y Gen. 142, 145. Quoting from Greidinger v. Davis, 988 F.2d 1344 (4TH Cir. 1993), we stated:

At the time of [enactment of the Privacy Act of 1974], Congress recognized the dangers of widespread use of SSNs [social

⁶ House File 704, introduced in the 1999 legislative session, contains provisions which would require all government bodies in Iowa to redact social security numbers from public records before release to the public. While H.F. 704 did not survive funnel week, you may wish to monitor this bill in the next legislative session.

security numbers] as universal identifiers. In its report supporting the adoption of this provision, the Senate Committee stated that the widespread use of SSNs as universal identifiers in the public and private sectors is “one of the most serious manifestations of privacy concerns in the Nation.”

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Since passage of the Privacy Act, an individual’s concern over his SSNs confidentiality and misuse has become significantly more compelling. For example, armed with one’s SSN, an unscrupulous individual could obtain a person’s welfare benefits or Social Security benefits, order new checks at a new address on that person’s checking account, obtain credit cards, or even obtain the person’s paycheck. In California, reported cases of fraud involving the use of SSNs have increased from 390 cases in 1988 to over 800 in 1991. Succinctly stated, the harm that can be inflicted from the disclosure of a SSN to an unscrupulous individual is alarming and potentially financially ruinous.

Greidinger, 988 F.2d at 1353-54 (citations and footnote omitted). Congressional concern over access to social security numbers is further evidenced by the prohibition on disclosing social security numbers collected pursuant to laws enacted on or after October 1, 1990. 42 U.S.C. § 405(c)(2)(C)(viii)(I). Fraudulently obtaining a social security number or other personal information with the intent of obtaining a benefit is a central element of the new crime of identity theft in Iowa. See House File 659, 78th G.A., 1st Sess. (Iowa 1999).

While recognizing the privacy interests at stake, courts have generally not concluded that individuals have a constitutionally protected privacy interest in preventing disclosure of social security numbers. See Claugus v. Roosevelt Island Housing Management Corp., No. 96CIV8155, slip op. at 7, 1999 WL 258275 (U.S. Dist. Ct. S.D.N.Y. April 29, 1999) (no constitutionally protected privacy interest in an individual’s social security number); Travis v. Reno, 12 F.Supp.2d 921, 925 (W.D. Wis. 1998) (no constitutional right to prevent disclosure of social security number because there is no legitimate expectation of privacy), *reversed on other grounds*, 163 F.3d 1000 (7th Cir. 1998); Condon v. Reno, 972 F.Supp. 977, 989-90, 992 (D. S.C. 1997) (disclosure of social security numbers in connection with motor vehicle records does not impair constitutional right to privacy, even if such a right exists),

affirmed, 155 F.3d 453, 464-65 (4th Cir. 1998) (no constitutional right to privacy in a social security number); McElrath v. Califano, 615 F.2d 434, 441 (7th Cir. 1980) (no constitutional right to privacy in disclosure of social security number); Doyle v. Wilson, 529 F.Supp. 1343, 1348 (D. Del. 1982) (“...mandatory disclosure of one’s social security number does not so threaten the sanctity of individual privacy as to require constitutional protection.”) (citations omitted); In re Rausch, Ferm v. United States Trustee, 197 B.R. 109 (Bankr. Nev.1996), *affirmed*, 213 B.R. 364, 367 (D. Nev. 1997) (no fundamental constitutional right to prohibit disclosure of social security number of persons preparing bankruptcy petitions). The Ohio Supreme Court, in contrast, held in a 4-3 decision that employees of the City of Akron, Ohio, had a constitutionally protected interest in preventing disclosure of their social security numbers upon a media request to the city. State ex rel. Beacon Journal Publishing Company v. City of Akron, 70 Ohio St.3d 605, 612, 640 N.E.2d 164,169 (1994).

Authorities vary on whether state or local governmental officials have any duty to shield unsolicited social security numbers from public disclosure. An informal 1995 South Carolina Attorney General’s opinion concluded that clerks of court should redact social security numbers from all documents disclosed to the public, including those appearing on judgments, court orders, arrest warrants, and attachments to pleadings, to protect an individual’s right to privacy and preserve expectations of privacy which arose when the number was initially disclosed. So. Car. Op. Att’y Gen. 1995 WL 805780. A 1996 Ohio Attorney General’s opinion, on the other hand, declined to find such a duty with respect to mortgages, mortgage releases, veterans discharges, or financing statements submitted to the county recorder for filing. Ohio Op. Att’y Gen. 96-034. Although the Ohio Supreme Court had found that city employees have a constitutionally protected privacy interest in their individual social security numbers in Beacon Journal, *supra*, the Ohio Attorney General determined that an individual supplying a social security number to a lender for placement on a mortgage to be recorded in public records did not have a reasonable expectation of privacy. *Id.*

Iowa courts have recognized a constitutional right of privacy in certain types of personal information. McMaster v. Iowa Bd. of Psychology Examiners, 509 N.W.2d 754, 758 (Iowa 1993) (constitutional right of privacy extends to patient records of mental health professionals). The intimate, revealing, and potentially embarrassing nature of mental health records formed a key factor in the Court’s holding in McMaster. 509 N.W.2d at 758. Mental health patients clearly have an expectation of privacy and a compelling interest in keeping independent the patient’s choice of a mental health professional. *Id.* It seems unlikely the Court would extend the constitutional right of privacy to social security numbers placed on

real estate instruments provided to county recorders specifically to provide public, constructive notice of the matters asserted.

Cases in which courts have extended a constitutional right of privacy to the protection of personal information have largely involved individuals challenging governmental attempts to compel disclosure of personal information. Condon, 972 F.Supp. at 989. One court commented that it was unaware of any United States Supreme Court case in which a constitutional privacy violation has been based on public dissemination of personal information properly in the possession of the government. Id. In Iowa, actions based on invasion of privacy may not be premised upon the release of information in a public record. Howard v. Des Moines Register & Tribune, 283 N.W.2d 289, 298-300 (Iowa 1979). Further, constitutionally protected privacy interests generally relate to such matters as marriage, procreation, and family relationships -- those rights deemed "fundamental or implicit in the concept of ordered liberty." Rausch, 213 B.R. at 367, *citing*, Roe v. Wade, 410 U.S. 113, 152 (1973); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992).

Even when a constitutional right of privacy in personal information exists, the right is not absolute. "[P]rivacy interests must always be weighed against such public interests as the societal need for information, and a compelling need for information may override the privacy interest." McMaster, 509 N.W.2d at 759, *citing* Childester v. Needles, 353 N.W.2d 849, 853 (Iowa 1984). Where a constitutional right of privacy is not implicated, but private interests in confidentiality compete with the public's interest in access to public records, the Iowa Supreme Court has also employed a balancing test. *See generally* DeLaMater v. Marion Civil Service Com'n, 554 N.W.2d 875 (Iowa 1996) (balancing test applied to Iowa's personal records exemption in Iowa Code section 22.7(11)). As noted above, no exemption in Iowa's public record laws applies to social security numbers generally appearing on public records recorded at the offices of county recorders. If a balancing test was applied, however, the interests of the public in maintaining ready access to instruments filed with county recorders would be very strong.

Imposing a generalized duty on county recorders to redact all social security numbers which may appear on any document submitted for recording would substantially impair the public's right of access to instruments and documents affecting title to real property in Iowa. County recorders maintain detailed index books to assure ready public access to deeds, mortgages, mortgage releases, affidavits, tax liens and other documents. *See* Iowa Code §§331.606-609, 558.49-55. Recordors commonly reproduce instruments in miniature form

for ready access. Iowa Code § 331.603(3). Instruments filed and indexed in the recorder's office "shall constitute notice to all persons of the rights of grantees conferred by such instruments." Iowa Code § 558.55.

Given the purpose for which documents are submitted to recorders, persons who place social security numbers on such documents do not have a reasonable expectation of privacy. Affirmatively placing social security numbers in the public domain is a key factor. The Ohio Supreme Court, for example, declined to treat as confidential social security numbers disclosed by the public during emergency "911" calls. State ex rel. Cincinnati Enquirer v. Hamilton County, 75 Ohio St.3d 374, 378, 662 N.E.2d 334, 337-08 (1996) (per curium). While the Court had earlier found in Beacon Journal that employees had a reasonable expectation that public employers would keep social security numbers confidential, the Court concluded in Cincinnati Enquirer that "911" callers anticipated such calls would be recorded and disseminated to the public. Thus, the fact that "911" callers may disclose a social security number in the course of the call did not transform a public record into a confidential record. Id.

In sum, county recorders have no statutory or constitutional duty to shield unsolicited social security numbers from public disclosure when the numbers are placed by third persons on instruments and documents submitted to the recorder for recording and indexing. Persons concerned about the privacy of social security numbers should take steps to preserve confidentiality before documents are submitted for filing in the public records of the county recorder.⁷

(3) Does the county recorder have liability for refusing to record documents containing social security numbers?

For the reasons described above, county recorders are not authorized to refuse to record documents simply because a third person placed a social security number on the document. Documents which are presented in proper form with the appropriate fees must be recorded. Proctor, 378 N.W.2d at 299. Recorders refusing to record documents may

⁷ Once documents containing social security numbers have been recorded, persons able to establish the grounds set forth in Iowa Code section 22.8(1) (1999) may seek an injunction to restrain public examination. Courts may enjoin public examination of a public record upon a showing that (1) the examination would clearly not be in the public interest and (2) the examination would substantially and irreparably injure the person or persons. Id.

accordingly be subject to a writ of mandamus. *Id.* Other forms of liability are also possible depending on the facts and circumstances involved. See *Baie v. Rook*, 223 Iowa 845, 273 N.W. 902, 905-06 (1937) (cause of action for breach of recorder's duty to properly index chattel mortgage accrued at time of breach of official duty); *First National Bank v. Clements*, 87 Iowa 542, 54 N.W. 197, 198 (1893) (recorder liable for unreasonable delay in recording mortgage).

(4) Can a person waive privacy rights by voluntarily including the person's own social security number in a document intended for recording, such as an affidavit of identity?

Owners in possession of real estate are authorized to file affidavits explaining defects in the chain of title. Iowa Code § 558.8 (1999). Such affidavits are granted a presumption from the date of recording that the purported facts stated therein are true. *Id.* Owners often file affidavits declaring themselves different persons from those with similar or identical names against whom judgments appear in the abstract. The very purpose of a so-called "affidavit of identity" is public notice of its contents. A person recording an affidavit of identity which includes the person's own social security number has clearly waived any reasonable expectation of privacy in the number.⁸

Conclusion

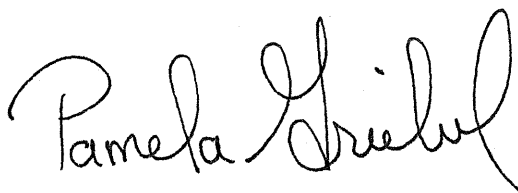
In conclusion, county recorders should accept declarations of value and groundwater hazard statements which contain social security numbers of the transferors and transferees of real property. Because state provisions of law mandating disclosure of social security numbers on such forms pre-date October 1, 1990, federal confidentiality provisions do not apply. Recordors should refuse to record conveyance instruments when a declaration of value is required and social security numbers or a proper affidavit are not provided, but recordors should accept groundwater hazard statements which do not disclose social security numbers if otherwise complete. County recorders have no statutory or constitutional duty to shield unsolicited social security numbers from public disclosure and are not authorized

⁸ Similarly, statutory penalties for violations of federal confidentiality provisions are only imposed for unauthorized disclosure of a person's social security number. 42 U.S.C. §405(c)(2)(C)(viii)(II). If an individual consents to the disclosure of a social security number for a particular purpose, re-release of the number for that purpose would not be "unauthorized." Or. Op. Att'y Gen. (1993 WL 602063).

Mr. William E. Davis
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to refuse to record documents simply because a third person placed a social security number on the document. Finally, a person who records an affidavit of identity containing the person's own social security number has no reasonable expectation of privacy in the number.

Sincerely yours,

A handwritten signature in black ink, reading "Pamela D. Griebel". The signature is written in a cursive style with a large, looped initial "P".

Pamela D. Griebel
Special Assistant Attorney General