"HOME RULE" FOR IOWA CITIES AND TOWNS?

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The Sixtieth General Assembly of the State of Iowa has enacted a bill, known as House File 380,[1] which has been hailed by some as granting complete "home rule" to Iowa cities and towns. By reason of the serious consequences which might befall municipalities acting upon such an assumption, should the assumption prove unwarranted, a critical examination of the new act in the light of existing statutes, precedents, and authorities seems desirable.

I—Construction of Prior Law

Title XV of the *Code of Iowa* deals with the powers of cities and towns. It contains both general and express grants of power which, in substance, have been part of Iowa law since the 1850's. One of the sections purporting to confer general power is section 368.2, which appears in the 1962 *Code of Iowa* as follows:

> Cities and towns are bodies politic and corporate, under such name and style as may be selected at the time of their organization, with the authority vested in the mayor and a common council, together with such officers as are in this title mentioned or may be created under its authority, and shall have the general powers and privileges granted, and such others as are incident to municipal corporations of like character, not inconsistent with the statutes of the state, for the protection of their property and inhabitants, and the preservation of peace and good order therein, and they may sue and be sued, contract and be contracted with, acquire, lease, and hold real and personal property, and have a common seal.[2]

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1 Iowa Laws ch. 235 (1963), which adds to IOWA CODE § 368.2 (1926), the following paragraph:

> "It is hereby declared to be the policy of the state of Iowa that the provisions of the Code relating to the powers, privileges, and immunities of cities and towns are intended to confer broad powers of self-determination as to strictly local and internal affairs upon such municipal corporations and should be liberally construed in favor of such corporations. The rule that cities and towns have only those powers expressly conferred by statute has no application to this Code. Its provisions shall be construed to confer upon such corporations broad and implied power over all local and internal affairs which may exist within constitutional limits. No section of the Code which grants a specific power to cities and towns, or any reasonable class thereof, shall be construed as narrowing or restricting the general grant of powers hereinabove conferred unless such restriction is expressly set forth in such statute or unless the terms of such statute are so comprehensive as to have entirely occupied the field of its subject. However, statutes which provide a manner or procedure for carrying out their provisions or exercising a given power shall be interpreted as providing the exclusive manner of procedure and shall be given substantial compliance, but legislative failure to provide an express manner or procedure for exercising a conferred power shall not prevent its exercise. Notwithstanding any of the provisions of this section, cities and towns shall not have power to levy any tax, assessment, excise, fee, charge or other exaction except as expressly authorized by statute."

The Bill also provides that "cities and towns shall not have power to license construction contractors."

2 This section has remained unchanged since it appeared as IOWA CODE § 695 1897), except for an amendment adding authority to lease property, Iowa Laws ch. 200, § 5 (1947). It does not differ in substance from statutes dating back to IOWA CODE § 664 (1851).

Section 366.1 of the Code is of like import and, with respect to the power of cities and towns to adopt ordinances, provides as follows:

> Municipal corporations shall have power to make and publish, from time to time, ordinances, not inconsistent with the laws of the state, for carrying into effect or discharging the powers and duties conferred by this title, and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of such corporations and the inhabitants thereof, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days.[3]

Commencing with the *City of Clinton* case,[4] in 1868, the Supreme Court of Iowa, in a long line of cases, has construed the quoted sections according to the following rule, sometimes called "Dillon's rule" after the judge who wrote the opinion:

> Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the state, and the *corporation* could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere *tenants at will* of the legislature. This plenary power on the part of the legislature over public corporations, saving vested rights of property and of creditors, is a doctrine so well settled that it is unnecessary to refer to more than a few cases asserting it.[5]

Many years later, after quoting Dillon's Rule, the Court in *Van Eaton v. Town of Sidney* stated:

> When the legislature attempts to make a grant of power to a municipality and the same is doubtful or uncertain, all doubts and uncertainties are resolved against the municipality. . . . All powers conferred are to be strictly construed, and, in the case of reasonable doubt the power should be denied. . . .
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> Powers conferred upon a municipality cannot be enlarged by liberal construction. . . . It is not enough that it be useful or convenient, it must be indispensible. . . .
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> Where a statute confers certain specific powers, those not enumerated are withheld. In other words, enumeration of powers operates to exclude such as are not enumerated. . . .[6]

The Court then quoted the two general powers statutes set forth above, as well as a statute authorizing cities and towns to purchase light plants and held that the combined powers conferred by the three statutes were not enough to create an implied power to finance such a purchase with a bond issue.

The *Van Eaton* case was decided in 1930, and a respectable body of precedent is cited in it. The subsequent cases which have reiterated the

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[3] This section has remained unchanged since IOWA CODE § 482 (1873), and is substantially similar to Iowa Laws ch. 157, §§ 41-43 (1858).

[4] City of Clinton v. Cedar Rapids & M.R.R.R., 24 Iowa 455 (1868).

[5] *Id.* at 475.

[6] 211 Iowa 986, 990, 231 N.W. 475, 477 (1930).

rule are too numerous to even attempt to list, let alone quote therefrom. A few examples which are cited in the footnote hereto will suffice to show that the rules quoted in that case continued to flourish in full force and vigor up to the enactment of House File 380 by the Sixtieth General Assembly.[7]

II—House File 380—Analysis of Provisions

1. Perhaps the best way to an understanding of the effect of House File 380 is through a sentence-by-sentence analysis of its provisions made in the light of the existing precedents. House File 380 amends section 368.2 by adding to it a new paragraph. The first sentence of the new paragraph says:

> It is hereby declared to be the policy of the State of Iowa that the provisions of the Code relating to the powers, privileges, and immunities of cities and towns are intended to confer broad powers of self-determination as to strictly local and internal affairs upon such municipal corporations and should be liberally construed in favor of such corporations.

It is noteworthy that the amendment is prefaced by a declaration of policy and that the introductory sentence employs the word "should" rather than "shall". There is a very good reason why the legislature saw fit to phrase the introduction in terms of a wish rather than a command. The Constitution of Iowa provides:

> The powers of the government of Iowa shall be divided into three separate departments - the Legislative, the Executive, and the Judicial - and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any function appertaining to either of the others, except in cases hereinafter expressly directed or permitted.[8]

In *Des Moines Independent Community School District v. Armstrong*, the Court said:

> Courts are not bound by the construction one legislature may put upon the Acts of a previous session. *The interpretation of an existing statute is a judicial, not a legislative function.* The legislative intent that is controlling in the construction of a statute has reference to the legislature which enacted it, not a subsequent one.[9] [Italics supplied.]

Thus it is quite apparent that the reason the first sentence of House File 380 is expressed in terms of wish rather than command is that the Legislature knew it was treading in an area where it has no power to command.

2. The second and third sentences in House File 380 state:

> The rule that cities and towns have only those powers expressly conferred by statute has no application to this Code. Its provisions shall be construed to confer upon such corporations broad and implied power over all local and internal affairs which may exist within constitutional limits.

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[7] City of Ames v. Olson, 253 Iowa 983, 114 N.W.2d 904 (1962); Board of Water & Light Trustees v. City of Muscatine, 253 Iowa 558, 113 N.W.2d 260 (1962); Wilson v. City of Council Bluffs, 253 Iowa 162, 110 N.W.2d 569 (1961); Kane v. City of Marion, 251 Iowa 1157, 104 N.W.2d 626 (1960); Dotson v. City of Ames, 251 Iowa 467, 101 N.W.2d 711 (1960); Stoner McCray System v. City of Des Moines, 247 Iowa 1313, 78 N.W.2d 843 (1956); Gritton v. City of Des Moines, 247 Iowa 326, 73 N.W.2d 813 (1955); Huff v. City of Des Moines, 244 Iowa 89, 56 N.W.2d 54 (1952); City of Des Moines v. District Court, 241 Iowa 256, 41 N.W.2d 36 (1950).

[8] IOWA CONST. art. III, § 1 (1857).

[9] 250 Iowa 634, 645, 95 N.W.2d 515, 521 (1959).

There is a similar provision which has occupied space in the Code of Iowa since 1851. Now appearing as section 4.2, Code 1962, it says:

> The rule of common law that statutes in derogation thereof are to be strictly construed has no application to this Code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its objects and assist the parties in obtaining justice.

There is a line of cases annotated under note 3, section 4.2, *Iowa Code Annotated,* which cite section 4.2 in support of the construction placed by the Court upon various statutes considered therein. However, the interesting thing about that line of cases is that the Court invariably arrived at its decision by application of other rules and principles and simply cited section 4.2 as *additional* rather than primary authority for the conclusion reached. For example, see the last sentence of the opinion in the case of *Dethlefs v. Carrier,*[10] in which the Court, after disposing of the case by application of other rules, makes passing reference to section 4.2. In other words, section 4.2 is used as the "something extra" to definitely tip the scales in the direction that they probably would have tipped anyway. This is the exact result that was intended in modeling House File 380 after the pattern of section 4.2.

There is also a line of cases annotated under note 2, section 4.2, *Iowa Code Annotated,* which holds that certain classes of statutes are to be strictly construed despite the language of section 4.2. This is particularly true of statutes which provide a penalty for their violation. Logically, it would follow that the strict construction rule would apply in the case of ordinances enforceable by any penalty, despite the language of House File 380. In the case of ordinances enforceable by fine there appears a further limiting factor in another provision of H.F. 380 which will be discussed at a later point in this article.

3. The fourth sentence in section 1 of House File 380 says:

> No section of the Code which grants a specific power to cities and towns, or any reasonable class thereof, shall be construed as narrowing or restricting the general grant of powers hereinabove conferred unless such restriction is expressly set forth in such statute or unless the terms of such statute are so comprehensive as to have entirely occupied the field of its subject.

The intention of the quoted provision is clear. It is to give some relief from the application of the rule, *expressio unius est exclusio alterius,* to statutes conferring power upon municipalities. The question as in the case of the other provisions hereinabove considered is whether it opens the door a crack or a mile. In support of the conclusion that the former was intended, it is to be noted that the Supreme Court has, on occasion, declined to apply the *expressio unius* rule to the statutes relating to the powers of municipal corporations. In *Bay v. Davidson*[11] the Supreme Court considered the question whether the express prohibition in a statute, against a member of a council having an interest in a contract of work for the city, authorized such a councilman to enter into other kinds of contracts, not expressly prohibited by the statute. The Court said:

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[10] 245 Iowa 786, 790, 64 N.W.2d 272, 275 (1954).
[11] 133 Iowa 688, 111 N.W. 25 (1907).

> It is the argument on this point that as the law making power has seen fit to legislate upon the subject, and by specific enactment put restraint only upon such contracts as have in view the performance of service or work, this must be accepted as accomplishing an abrogation of the common law rule, as related to all other contracts, between a municipality and one of its officers. This position is wholly untenable. It would seem that counsel have in mind the maxim *"expressio unius est exclusio alterius"* (the naming of one person or thing is an exclusion of the other). Reflection will make it clear that the maxim cannot be given application to work a result as here contended for. The legislature has done nothing more than to emphasize the prohibition as to service contracts. And, in our opinion, it would be absurd to give effect to the statute as evidencing at once a change of view respecting the matter of public policy, and as a declaration for the legality of all contracts theretofore within the class prohibited at common law save those in such statute prohibited in terms.[12]

The anti-*"expressio unius"* clause of House File 380 parallels section 4.2, *Code of Iowa*, in general type in the same manner as the anti-"creatures of statute" clause discussed under paragraph 2, *supra*, and should be subject to the same conclusion. That is, it could not operate to enlarge municipal powers to adopt ordinances enforceable by means of a penalty.

It should further be noted that the clause carries a built-in exception for construing statutes where "the terms of such statute are so comprehensive as to have entirely occupied the field of its subject". This exception is broader than one might think. For example, note the list of subjects covered by Chapters 362 to 420 of the Code and reflect upon their content. Is there actually much "field" within the normal purview of municipal government that has not been rather thoroughly occupied by the General Assembly? Certainly the coverage of the subjects in the aforesaid chapters is as complete as in the coverage of the code chapters on criminal law, of which the Supreme Court said in the case of *Estes v. Carter:* "Besides, the statutory offenses so nearly cover all the common law offenses, that it is reasonable to infer that those which are omitted were intended to be excluded."[13]

The argument that a state does not have a certain power "because Congress has occupied the field" is a familiar one. All of the case precedents so holding should be applicable in determining whether by the enactment of a particular statute the "legislature has occupied the field" to the exclusion of municipal regulation. In most instances the application of such precedents will probably reveal that the field has been occupied within the meaning of the above exception contained in House File 380.

4. The fifth sentence in section 1 of House File 380 provides:

> However, statutes which provide a manner or procedure for carrying out their provisions or exercising a given power shall be interpreted as providing the exclusive manner of [sic] procedure and shall be given substantial compliance, but legislative failure to provide an express manner or procedure for exercising a conferred power shall not prevent its exercise.

The quoted sentence is a definite limitation upon any proposed construction that would declare House File 380 a "home rule" act. Consider

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[12] *Id.* at 694, 111 N.W. at 27.
[13] 10 Iowa 400, 401 (1860).

a few of the more familiar fields of local endeavor. Municipalities cannot devise a new way of assessing public improvements because the "manner or procedure" is spelled out in great detail in Chapters 391, 391A and 417 of the Code and, therefore, falls within the quoted exception. Similarly, municipal corporations cannot seize upon the Act as authorization to embark upon a spree of installment purchasing under contract for the reason that the law provides a manner or procedure for time financing by means of bond issues.

The final clause of the quoted sentence is simply declaratory of the common law rule that when a statute requires or authorizes a thing to be done and fails to prescribe the procedure, any *reasonable* method will suffice.

While on the subject of "reasonableness", however, it is well to consider the words of the Court in *City of Creston v. Mezvinsky:*

> It is the well established rule of this court, and of many others, that the determination of whether or not an ordinance providing for a license is reasonable and valid is for the courts. If the court, upon an examination of its terms, finds it to be unreasonable, the court must hold it to be void.[14]

The quoted rule of "reasonableness" is one that is not affected by the express terms of House File 380 and would continue as a limiting factor upon exercise of power by municipalities irrespective of what effect might be given to those clauses of House File 380 which tend to narrow the "creatures of statute" and "expressio unius" rules.

5. The sixth sentence in House File 380 was no part of the original bill sought by the League of Iowa Municipalities and was not in House File 380 as introduced. Added to the bill by amendment, it makes the bill read a little like the classic insurance policy which "giveth at the beginning and taketh away at the end." The sentence provides:

> Notwithstanding any of the provisions of this section, cities and towns shall not have power to levy any tax assessment, excise, fee, charge or other exaction except as expressly authorized by statute.

It is indeed fortunate that the introductory clause reads, "Notwithstanding any of the provisions of *this* section". Otherwise, a great many established city license fees, that have been collected for many years under the provisions of other sections which grant the authority to require a license or permit, but made no express reference to fees, would have been automatically wiped out in the name of "home rule". As it is we are able to argue that since such existing fees were never collected by authority of "the provisions of *this* section", the enactment of the section has no relevance to their continuance. The adoption of the amendment was no doubt intended to prevent cities and towns from adopting a program of licenses and fees for revenue similar to that which has been enjoyed by the City of Davenport for many years under authority of its special charter. The fear that cities might have used House File 380 to license for revenue was unfounded as the Supreme Court, in the *City of Creston* case, had already disposed of that danger, saying:

> It is also a well-recognized rule that the power to "regulate and license" does not grant authority to tax. Under the statute in ques-

[14] 213 Iowa 1212, 1214, 240 N.W. 676, 677 (1932).

> tion the power given to cities and towns is only to "regulate and license" transient merchants.
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> In the early case of City of Burlington v. Putnam Ins. Co., 31 Iowa 103, we held that licenses are a part of the police regulations and can be charged for as such, and only to the extent proper to reasonably compensate the city for issuing and enforcing the licenses and for the care exercised by the city under its police authority over the particular person licensed.
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> See also City of Ottumwa v. Zekind, 95 Iowa 622.
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> Such is the general rule.
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> We must, therefore, determine the reasonableness of this ordinance not only by its express terms, but also in consideration of the added burden imposed by the city, in granting licenses under the ordinance, and also bearing in mind the fact that the city cannot, under the guise of an ordinance to "license and regulate" impose a tax or prohibit such transient merchant from doing business in the municipality. Tested by these considerations we think the ordinance in question must be held to be unreasonable and invalid.[15]

Thus, the last sentence in section 1 of House File 380 was not the product of necessity for the reason that cities were already restricted, as to the amount of license fees, to the recovery of administrative costs. On the other hand, the restriction imposed in the new provision goes beyond the existing limitation on the amount of fees and not only flatly prohibits them, so as to prevent the city from recovering its cost of administering any *new* license ordinances, but also prevents the city from imposing any "charge or other exaction except as expressly authorized by statute". This last provision has considerable significance. Suppose it were held that the earlier provisions actually gave a city implied authority to act in matters not expressly authorized by statute. Without power to enforce its regulatory acts by "fee, charge, or *other exaction*" (which presumably would include fines for violation of any regulatory measure adopted), of what practical use is the power?

For example, suppose that in the absence of express statutory authorization a council decided that it would be in the public interest to provide for the licensing of television repairmen. Let us assume for purposes of the illustration that such decision was arrived at in some hypothetical community where hypothetical, incompetent, and impecunious persons holding themselves out to be television repairmen have ruined numerous television sets and caused the aroused citizenery to demand that the council do something. Under the theory that House File 380 is a "home rule" act such council might adopt a sweeping ordinance providing for an examining board, educational requirements, and prohibiting unlicensed persons from holding themselves out as TV repairmen. But what good would it be? The council couldn't charge license fees to cover the cost of its administration. If it already happened to be bumping the 30 mill tax ceiling it couldn't even pay for the administration. It couldn't enforce it by fine as that would become under the heading of "other exaction". In short, the ordinance would be worthless.

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[15] *Ibid.*

6. Section two of House File 380 requires no comment. It was added to the bill by House amendment at the same time as the last sentence of section 1 hereinbefore discussed. It is my understanding that both amendments were proposed by the same group for the same purpose, one amend- being the shotgun approach and the other the specific interest approach, the theory being that, were the amendment rejected that now appears as section 2, the amendment that now appears as the last sentence of section one would still accomplish their intended purpose. It has — and more.

III—House File 380—Intent

House File 380 was not intended as a complete "home rule" measure, although one who reads it out of context and without bothering to research the precedents construing the existing provisions of section 368.2 might be tempted to regard it as such. Arguing that the naked language of House File 380 spells out "home rule" overlooks the fact that the same argument could be made for the existing language of section 368.2, *Code of Iowa,* and in a great number of cases, some of which are cited above, it *was* made but the cases held otherwise.

I believe the intent of House File 380 was to open the door slightly. The reason its language is phrased somewhat in the superlative degree is because the cited precedents demonstrate the almost total ineffectiveness of lesser degrees of expression for the purpose of conferring powers upon municipalities. The language of House File 380 was designed for the purpose of providing the slight additional amount of persuasion, in those very close cases where the court was in genuine doubt as to whether to rule in favor of the existence of some implied power, necessary to tip the scales in favor of the city. It was intended to enable cities and towns to win close cases and not to constitute them independent sovereignties. The League of Iowa Municipalities had offered a proposed amendment to the Constitution of Iowa for the purpose of establishing broad form "home rule". House File 380 was offered merely as a mild form of possible immediate relief to be applied to city problems during the long haul necessary to the adoption of an amendment to the constitution.

IV—Advising Council

One of the principal jobs of a city attorney is to advise his council as to the extent of their statutory power, *when his advice is asked for.* Although House File 380 has been labeled "home rule" by various editorial writers and by the Attorney General,[16] it is my recommendation, based upon the foregoing analysis and the history of court interpretation of prior statutory provisions of equally sweeping language when read out of context, that city attorneys take a conservative approach to the "home rule" aspects of House File 380. It should be considered as being nothing more than an additional bit of persuasion useful for winning close cases where, in its absence, there would exist a reasonable doubt in the mind of the court as to the existence, under some other statute, of an implied power. In view of the last sentence of section one, it may not even amount to that. The

[16] See Letter, June 10, 1963, from Attorney General to Senator Shaff.

opinion of the Attorney General is most charitable to cities and towns but it must be borne in mind that the City Attorney and *not* the Attorney General will have the burden of upholding any council action taken under House File 380. The Attorney General's opinion cites no case precedents and, as Justice Larson said about attorney general opinions:

> [I]t must be remembered the attorney general's opinion officially issued may be accepted or rejected and is entitled to no greater respect than the logic of its reasoning and the authority cited in support of its conclusion.[17]

V—Defending Council Action

Once a council has taken official action in any matter, it is the duty of the city attorney to exert every possible effort to uphold the legality of that action, irrespective of what his advice was or might have been had it been sought or followed prior to the time the council acted.[18]

Therefore, having determined that the most prudent, sensible, and probably correct legal course is to *advise* councils against attempting ambitious acts in the name of "home rule" under House File 380, it remains of equal importance to consider how best to defend them in the event they proceed to act without or contrary to such advice.

1. *Attorney General's Opinion.* Despite its shortcomings noted above, the opinion of the Attorney General directed to Senator Shaff, under date of June 10, 1963, should be cited in the event it becomes necessary to defend a council for assumption of "home rule" powers under House File 380. It is an "official" opinion of the Attorney General and, according to Thornton:

> In giving his advice and opinion on questions of law, the attorney general's duties are quasi judicial . . . . Therefore, the opinions of successive attorneys general have come to constitute a body of legal precedents and exposition, having authority the same in kind if not the same in degree, with decisions of the courts of justice, and administrative officers should regard them as law until they are withdrawn or overruled by the courts.[19]

Although the Attorney General's opinion should be cited, it would be exceedingly dangerous to rely on it alone in attempting to uphold "home rule". The Court said, in one case:

> We have given careful consideration to the attorney general's opinion referred to at the outset hereof. We are reluctant to disagree with an opinion of the attorney general but are persuaded to do so here. Of course his opinions are not binding upon us and it is our duty to make independent inquiry as to the interpretation to be given the statutes involved, City of Nevada v. Slemmons, 244 Iowa 1068, 1071, 59 N.W.2d 793, 794, 43 A.L.R.2d 693, 695; Lever Bros. Co. v. Erbe, 249 Iowa 454, 470, 87 N.W.2d 469, 479, 480.[20]

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[17] Larson, *The Importance and Value of Attorney General Opinions,* 41 IOWA L. REV. 351, 361 (1956).

[18] MUNICIPAL CODE OF DES MOINES § 2-348 (1954), provides in pertinent part: "It shall be the duty of the corporation counsel or city solicitor and assistants and city prosecutor: (1) To appear for the city . . .and defend *all* causes in the state, federal or municipal courts in which the city is a party or interested . . . (3) To . . . defend all actions or proceedings brought by or against any city officer in his official capacity. . . ." *(Italics supplied.)* Ordinance provisions of this type quoted are virtually universal in all cities and towns.

[19] 2 THORNTON ON ATTORNEYS AT LAW 1140 (1914).

[20] Des Moines Independent Community School Dist. v. Armstrong, 250 Iowa 634, 644, 95 N.W.2d 515, 521 (1959).

And in another case considering an attorney general's opinion (written by the author of this article), the Court said:

> The question before us is whether or not the restriction contained in section 275.10 is effective as to section 275.11 to 275.23 inclusive. This question has only been before this court incidentally. It was directly considered in an Attorney General's opinion. 1955 Attorney General's Opinions, page 69. The opinion directs attention to the fact that there are two methods of school district reorganization: one in section 275.10; the other in sections 275.11 to 275.23. The opinion states: "For this reason the restriction [12 months] on resubmitting the question contained in section 275.10 would have no application to a reorganization under sections 275.11 to 275.23. Cook v. Consolidated School District, 240 Iowa 744, 38 N.W.2d 265."
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> The following statement appears in support of the opinion: "That said sections provide distinct, separate, and independent procedures is further borne out by reference to their legislative forbears. Section 275.10, Code 1954, is derived from section 274.16, Code 1950. Sections 275.11 to 275.23 are derived from Chapter 276, Code 1950. That the procedure in Chapter 276 was independent of any method in Chapter 274 was expressly held in Cook v. Consolidated School District, supra." We do not consider this opinion in the nature of a judicial precedent, but it is entitled to weight. This is especially true since we agree with the opinion.[21]

The foregoing illustrates that the Court looks to the precedent cited in an Attorney General's opinion rather than the fact that it happens to appear on a Department of Justice letterhead in determining what weight it should be given. It would, therefore, be dangerous in the matter at hand to rely exclusively on the Attorney General's opinion for the reason that it cites no case precedents but, neither should it be ignored.

2. *The Municipal Code Bills of 1951* is a special pamphlet published by the West Publishing Company in 1951 as a supplement to the Iowa Code Annotated. For the purpose of arguing that House File 380, as enacted by the 60th General Assembly, was the culmination of twelve years of objectively-manifested intent on the part of the General Assembly to grant cities and towns an increasing measure of "home rule" the following quotation is taken from Chapter one, page one of said pamphlet:

> Twenty-seven bills were prepared and recommended to the Fifty-fourth General Assembly by the Municipal Statutes Study Committee. One of the fundamental principles endorsed by the committee and incorporated in the bill was the principle of "home rule". "Home rule" is a term of varying import. It means, in general, power of the governing body of a municipal corporation to exercise discretion in dealing with matters of purely local concern. The report of the committee recognized that "it is impossible for the state, acting through the state legislature, to anticipate all of the local problems that are the by-product of changing conditions and advancements in living standards and to grant specific authority to municipal corporations to enable them to successfully cope with such problems." The Committee, therefore, recommended that "municipal corporations should be given broader powers of self-determination in the regulation of local affairs."

[21] Wall v. Board of Education, 249 Iowa 209, 217-18, 86 N.W.2d 231, 236 (1957).

Also see *Report of the Municipal Statutes Study Committee,* published by the State of Iowa in 1950, Section III, I (2, 3) at page 20. This report was held admissible in evidence for the purpose of showing legislative intent.[22] One of the bills forming a part of the recommendations of the Municipal Statutes Study Committee was Senate File 163 (54th General Assembly) relating to the general powers of municipal corporations. As *introduced* Senate File 163 contained the following provision, which was section 7 of the *introduced* bill:

> Sec. 7. Interpretation. Sections two (2) to six (6) are intended to confer broad powers of self-determination, as to purely local affairs, upon municipal corporations. No other section of the Code which grants any specific power or powers to municipal corporations shall be construed as narrowing or restricting said broad powers, nor shall said sections be construed as narrowing or restricting each other. However, sections which provide a manner or procedure for carrying out or exercising a given power shall be interpreted as providing the exclusive manner or procedure, where no alternative is specified, but failure to provide any express manner or procedure for exercising a conferred power shall not prevent its exercise.

Note the similarity between the 1951 language and section 1 of House File 380 of the Sixtieth General Assembly. (They had the same draftsman.) It should be noted that section 2 of Senate File 163, 54th General Assembly, referred to in section 7, is identical with Code section 368.2, the present code section amended by House File 380, Sixtieth G.A. The point of all this is that had the quoted section 7 been enacted by the 54th G.A., the Report of the Municipal Statutes Study Committe would have been admissible under the precedent of the *Yarn* and *Alexander* cases to show it was intended to confer some measure of "home rule". By reason of the similarity in language between the 1951 bill as introduced and the 1963 version contained in section 1 of House File 380, said report should be admissible to show that the legislative intent of the 1963 version was to confer some measure of "home rule".

3. The special pamphlet continues:

> In the United States, cities and towns are creatures of the legislature and, as such, possess only those powers the legislature sees fit to delegate. The Supreme Court of the United States has held that "a municipal corporation in the exercise of all its duties, *including the most strictly local and internal,* is merely a department of the state. The legislature may give it all the power such a being is capable of receiving, making it a miniature state within its locality . . . (Barnes v. District of Columbia, 91 U.S. 540, 23 L. Ed. 440) . . . . The powers of municipal corporations are derived solely from the state through the legislature." (Southern Iowa Electric Co. v. Chariton, 255 U.S. 539, 41 S. Ct. 400, 65 L. Ed 764).[23]

The foregoing quotations and citations would support the contention that the General Assembly *has power* to give cities and towns "home rule" and that such powers can be given by statute (rather than constitutional amendment) by reason of the phrase "solely from the state through the legislature" in the *Chariton* case.

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[22] Yarn v. City of Des Moines, 243 Iowa 991, 996, 54 N.W.2d 439, 442 (1952); Alexander v. Town of Montezuma, 243 Iowa 251, 254, 51 N.W.2d 456, 458 (1952).

[23] The Municipal Code of Bills of 1951, ch. III, p. 20.

4. Probably the most effective argument and the best hope for upholding an exercise of sweeping "home rule" power by a municipality under House File 380 would stem from the principle that the law is not a static body of immutable rules but a living thing that changes with conditions. This principle has been recently illustrated in action by the numerous state supreme courts that have discarded the ancient and honorable rule of municipal governmental immunity from tort liability. (A concurring opinion from our Court indicates that several of its judges are ready to do likewise at the first opportunity.[24])

In the case of *Molitor v. Kaneland Community School District*, the Supreme Court of Illinois said:

> The doctrine of school district immunity was created by this court alone. Having found the doctrine to be unsound and unjust under present conditions, we consider that we have not only the power, but the duty to abolish that immunity. "We closed our doors without legislative help and we can likewise open them."[25]

There is a principle to which much lip service is given nowadays that says "for every delegation of responsibility there should be a commensurate delegation of authority."

Therefore, if the doctrine of immunity is to be abolished in the name of progress, thereby increasing the burdens of municipalities, why should not "Dillon's rule", which is similarly court-made, also be abolished in the interest of furnishing the "commensurate measure" of authority to make up for increased responsibility resulting from loss of immunity. The Court could well say:

> The doctrine that cities and towns are creatures of statute with only those powers conferred by statute was created by this court alone. Having found that doctrine to be unsound and unjust under present conditions, we consider that we have not only the power but the duty to abolish that restriction. We closed the door without legislative help and we can likewise open it.

Of course, the Court could, were it so minded, have said that very thing without the enactment of House File 380 for, as hereinabove pointed out, the language of section 368.2, on its face, read quite well without the amendment added by House File 380.

CONCLUSION

In conclusion, proper and prudent use of House File 380, Acts of the 60th General Assembly, by city attorneys, appears to be as follows:

1. In advising city councils of their powers under the new act, quote the cases and analysis contained in the first part of this article and take the approach that the act confers little, if any, "home rule".

2. In the event that your council acts without or contrary to such advice and is sued, cite the attorney general's opinion and the cases, history and arguments contained in the latter part of this article, *and hope for the best.*

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[24] See concurring opinion in Moore v. Murphy, 119 N.W.2d 759, 762 (Iowa 1963).
[25] 18 Ill.2d 11, 25, 163 N.E.2d 89, 96 (1959).