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SPECIAL ASSESSMENTS FOR PUBLIC IMPROVEMENTS IN IOWA

PART IV—JUDICIAL REVIEW

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Previous articles in this series have discussed various aspects of administrative and judicial review in special assessment proceedings incidental to examination of the steps to be taken in these proceedings. At this stage it seems appropriate to concentrate on the various methods of judicial review which may or may not be available to the governmental unit, interested taxpayers, and creditors (contractors or bondholders).

A. The Governmental Unit Making the Assessment.

Commonly, administrative review is conducted by that part of the governmental unit which is charged with making and levying assessment. As a

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** This portion of the material appeared as Part I of this Article, in 12 DRAKE L. REV. 3-40 (1962).

*** This portion appeared as Part II, in 13 DRAKE L. REV. 25-51 (1963).

**** This portion appeared as Part III, in 14 DRAKE L. REV. 3-35 (1964).

result, the unit ordinarily has no reason to object to the assessment or to procedure, and often has no need to appeal to the courts. Appeal may be necessary if administrative review by the State Comptroller has been obtained by objecting taxpayers.[1] But the unit may want judicial review when it fears there may have been defects in procedure and that subsequent attacks by affected property owners could succeed, or that prospective purchasers will not buy the bonds which must be sold to finance the project. Perhaps an action for declaratory judgment might be available to resolve doubtful questions—this will be considered more fully in exploring taxpayers' remedies. Or a "test" suit might be brought by an affected property owner who wanted the project to be completed.[2] Two code chapters provide another approach—they enable the governmental unit to obtain court review before contracts are awarded.

The oldest of these has enabled the City of Des Moines, since April 11, 1929, to petition the District Court in Polk County for review of the resolution of necessity, schedule of assessments, and plans and specifications, and for confirmation of the assessments.[3] In this action, the burden of proof is upon objecting property owners.[4] It is not clear that Des Moines is required to use this procedure for special assessments,[5] but generally it does.

An attempt was made in 1951 to extend the benefits of court confirmation to other Iowa municipalities; as a result Chapter 391A gives cities utilizing that chapter for special assessment procedure the option of seeking court confirmation.[6] As Chapter 391, which contains the procedure followed in this state for many years, was not repealed, most cities have followed the "tried and true" methods of that chapter, and the option under 391A seems to have little use.

Although nearly every project in Des Moines since 1927 has involved action in the District Court, only two resulted in appellate decisions; both were resolved in the objectors' favor on the points at issue.[7] This procedure does increase the work of the city legal staff; it may prevent the more serious consequences of procedural errors.[8]

At one time Iowa law permitted levying special assessments against the property owner as well as against the property. This is no longer the case.[9]

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1 See Town of Mechanicsville v. State Appeal Board, 253 Iowa 517, 111 N.W.2d 317 (1961); 12 DRAKE L. REV. 3, 28-29 (1962).

2 See Green v. City of Mt. Pleasant, ... Iowa ....., 131 N.W.2d 5 (1964), apparently a test case involving constitutionality of IOWA CODE c. 419 (1962), on municipal support of industrial projects.

3 IOWA CODE § 417.28 (1962), originating in Iowa Laws c. 194 (1929).

4 *Ibid.*

5 See 12 DRAKE L. REV. 3, 6 (1962); 13 DRAKE L. REV. 25, 51 (1963); 14 DRAKE L. REV. 3, 12 (1964).

6 IOWA CODE § 391A.18 (1962), originating in Iowa Laws c. 156 (1951).

7 *In re* Petition of City of Des Moines, 240 Iowa 64, 35 N.W.2d 571 (1949) (objection to omission by city of certain property from assessment, sustained both by district and supreme courts); *In re* Assessment for Walnut Street Bridge, 220 Iowa 55, 261 N.W. 781 (1935) (street railway objected to assessment which conformed to provision in its franchise ordinance but conflicted with provision in statute thereafter enacted; district court confirmed assessment as made but Supreme Court reversed).

8 See 12 DRAKE L. REV. 3, 4 n. 3 (1962), describing the postponement by Des Moines of a "three-year" program of street paving because of procedural errors which occurred before contracts were let.

9 14 DRAKE L. REV. 3, 33 (1964).

Since the change there has been little reason for the governmental unit to bring action against the property owner, except where court confirmation procedures are followed.

B. Interested Taxpayers.

The costs of an improvement may be borne partly through special assessment and partly from other funds available to the governmental unit. A taxpayer who is not subject to special assessment but feels that the assessment is too low and burdens him by increasing general taxes can obtain review only by first appealing to the State Comptroller, under Code Chapter 23.[10] Most objecting taxpayers are those whose property has been subjected to special assessment. What review procedures are available to them? Can they pay and sue for refund, ask for declaratory judgment, or pursue special remedies such as replevin, mandamus, certiorari or injunction? Or are they limited to an administrative review from which appeal may be taken to the district court? To what extent can estoppel arguments be used to limit the review to which a taxpayer might otherwise be entitled?

1. Action for Refund

McQuillan states that "[s]pecial assessments may not be recovered back, though paid under protest, except in accordance with the statute. And it is well settled that voluntary payment of special assessments cannot be recovered, even though the assessment be void."[11] Iowa decisions do not clearly support this view.

Several early Iowa cases permitted recovery of taxes or assessments paid, without discussing the need of statutory authority—in one the payment recovered appears not even to have been paid under protest.[12] Soon thereafter the Court took the position that a voluntary payment, even though under protest, could not be recovered absent statutory authority—only if the assessment was void and payment "compulsory" would recovery be allowed.[13] Eight years later the Court talked as though payment under protest would not be voluntary,[14] but four years later it held that a payment to redeem a lot from tax sale to enforce special assessments was a voluntary payment even though paid "under protest".[15] By 1913 the Court recognized that its earliest decisions

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[10] 14 MCQUILLAN, MUNICIPAL CORPORATIONS § 38.333 (3d ed. 1950).

[11] Husson v. City of Oskaloosa, 240 Iowa 681, 37 N.W.2d 310 (1949).

[12] Robinson v. City of Burlington, 50 Iowa 240 (1878) (allowed to recover first installment, even though not paid under protest, where work was done without property owner being aware its cost would be specially assessed; some work was done after the payment so he could not recover all of the later installments); Tallant v. City of Burlington, 39 Iowa 543 (1874) (one installment of assessment paid, under protest, could be recovered). In Thomas v. City of Burlington, 69 Iowa 140, 28 N.W. 480 (1886), and Winger v. City of Burlington, 68 Iowa 279, 27 N.W. 241 (1886), general property taxes paid under protest because the property was agricultural land which by statute was exempt were recoverable. All four cases involve the City of Burlington which at that time was a special charter city, and its charter may have provided for refund of payments made under protest; but none of the opinion mentions this point.

[13] Newcomb v. City of Davenport, 86 Iowa 291, 53 N.W. 232 (1893); see Dittoe v. City of Davenport, 74 Iowa 66, 36 N.W. 895 (1888).

[14] Hawkeye Loan & Brokerage Co. v City of Marion, 110 Iowa 468, 81 N.W. 718 (1909) (lower court had given property owner judgment on the pleadings, despite absence of allegations that the payment was under protest or that tax void; reversed for trial).

[15] Anderson v. Cameron, 122 Iowa 183, 97 N.W. 1085 (1904) (action was against

were out-of-step and difficult to harmonize, and suggested that recovery might be allowed when the assessment was void because the property involved should not have been assessed, but would not be where the procedure followed in assessing was "illegal".[16] And, in 1944, the Court suggested that an action to compel refund of drainage assessments would not lie because even if the assessment was void the refund would come from general funds of the county[17] (which may mean that the supervisors could be required to reassess the property in the district to get funds to refund the wrongfully paid assessment).

The principal relevant statute provides that "the board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid. . . ."[18] This is not statutory authority for recovery of assessments paid under protest; it may be of little help in special assessment matters. But apparently some refund action may still lie, at least if the assessment was "void" in that the property involved should not have been assessed.

2. Special Remedies—Replevin, Mandamus, Certiorari, Injunction

(a) Replevin

An early Iowa case, *Buell v. Ball*,[19] in 1866, utilized a replevin action to test legality of special assessments. The action was against a marshal who had seized certain personal property of plaintiff to satisfy a liability for general city taxes, plus sidewalk and grading charges asserted against plaintiff's land. The Court held that replevin could be used "when there is want of authority to levy" but not "when there is authority irregularly exercised;" it could therefore be used because the city had no power to make the property owner personally liable for the charges.

As replevin will lie only to recover specific personal property,[20] and there ordinarily is no authority to seize personal property to satisfy special assessments, the remedy may be available but usually cannot be used.

(b) Mandamus

Mandamus can be used in special assessment proceedings to compel a public officer to perform some duty, a duty which is clear and not of such a nature that the officer has discretion whether to act or not. At common law it was a legal remedy rather than equitable; Iowa by statute has made it triable as an equitable action, and it is not available when there is a plain, speedy and adequate remedy in the ordinary course of the law, unless specially so provided.[21]

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tax sale purchaser to whom city had paid over the amount tendered by plaintiff to redeem his property).

[16] First Nat'l Bank of Red Oak v. Kelly, 159 Iowa 312, 139 N.W. 564 (1914) (discussing some of the cases cited in notes 12-14, *supra*).

[17] Whisenand v. Nutt, 235 Iowa 301, 15 N.W.2d 533 (1944).

[18] IOWA CODE § 445.60 (1962).

[19] Buell v. Ball, 20 Iowa 282 (1866), which relied upon dictum in Macklot v. City of Davenport, 17 Iowa 379 (1864) (an injunction action). Macklot cited Merford v. Unger, 8 Iowa 82 (1859), which allowed replevin without discussing whether it would lie.

[20] 77 C.J.S., *Replevin* § 1 (1952); MATTLAND, THE FORMS OF ACTION AT COMMON LAW 48 (1936 ed.); CARRUTHERS, HISTORY OF A LAWSUIT § 55 (8th ed., Gilreath and Aderholt, 1963).

[21] IOWA CODE, ch. 661 (1962); 2 MESSER & VOLZ, IOWA PRACTICE-METHODS OF PRACTICE §§ 2701-2716 (1957); see also CARUTHERS, HISTORY OF A LAWSUIT § 607 (8th ed., Gilreath & Aderhold, 1963); KARDEN, PRIMER OF PROCEDURE 145 (1950).

Accordingly, mandamus should not be available to compel refund of assessments collected, or to review an assessment proceeding.[22] However, it has been permitted where a board of supervisors refused to order necessary repairs to an existing drainage system, even though those objecting to the refusal could have appealed from the refusal and the Code provided that such appeal was to be the exclusive remedy.[23] It has also been used to compel assessment in one drainage district for work done in another, where the cost should be apportioned between the two districts.[24]

(c) Certiorari

The writ of certiorari has been used on occasions to determine whether conduct of a council or board in special assessment proceedings was legal, or within its jurisdiction.[25] In an early case the Court reversed a decision for assessed property owners, on appeal, observing that their action to review irregularities should have been by certiorari.[26] In a later case the Court indicated that either certiorari or appeal could be used, to test whether a board of supervisors could vote to exclude land from an already established drainage district.[27] Certiorari cannot be used to question the merits of a decision to establish a drainage district or to undertake an improvement;[28] it appears to be little used although perhaps still available to raise questions of jurisdiction.[29] Ordinarily there would seem to be no advantage to using certiorari in preference to appeal, except possibly where the assessment has already been confirmed by a court and the matters questioned occur after confirmation.

Certiorari has also been used successfully in two instances in attempts

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[22] Whisenand v. Nutt, 235 Iowa 301, 15 N.W.2d 533 (1944).

[23] Wise v. Board of Supervisors, 242 Iowa 870, 48 N.W.2d 247 (1951) (Board found repairs necessary, but too costly; Court says there was duty to order repair, and mandamus will lie as long as no affirmative action was taken by the Board); see Welch v. Borland, 246 Iowa 119, 66 N.W.2d 866 (1954) (duty to keep ditches in repair; mandamus will lie). In State *ex rel.* Hiatt and Harbin v. City of Keokuk, 9 Iowa 438 (1859), the city, which was extending a street across petitioners' land, had commissioners appointed to determine damages to be assessed against adjacent property benefitted thereby; the mayor and council rejected the commissioners' report as too high and appointed new commissioners, although ordering work to proceed. Mandamus was used to compel the mayor and council to act on the first commissioners' report, as long as they had proceeded to have the street extended.

[24] *E.g.*, Board of Trustees v. Board of Supervisors, 236 Iowa 690, 19 N.W.2d 196 (1945); Board of Supervisors v. Board of Supervisors, 234 Iowa 123, 12 N.W.2d 259 (1943); Board of Supervisors v. Board of Supervisors, 214 Iowa 655, 241 N.W. 14 (1932).

[25] See 2 MESSER & VOLZ, IOWA PRACTICE—METHODS OF PRACTICE § 2351 (1957).

[26] Runner, Wickersham & Wycoff v. City of Keokuk, 11 Iowa 543 (1861).

[27] Estes v. Board of Supervisors, 204 Iowa 1043, 217 N.W. 81 (1927).

[28] Goeppinger v. Boards of Supervisors, 172 Iowa 30, 152 N.W. 58 (1915); Gilcrest v. McCartney, 97 Iowa 138, 66 N.W. 103 (1896).

[29] The most recent case successfully using certiorari involved proceedings to assess damages to land which would be condemned for drainage purposes. Miller v. Palo Alto Board of Supervisors, 248 Iowa 1132, 84 N.W.2d 38 (1957). Other cases allowing use of certiorari to review action of an administrative body are: Estes v. Board of Supervisors, 248 Iowa 1132, 84 N.W.2d 38 (1957); Kneebs v. City of Sioux City, 156 Iowa 607, 137 N.W. 944 (1912) (plaintiff's property held not assessable because not abutting, even though it was part of platted lot that did abut, and was within one hundred fifty feet—only abutting property could be assessed, at this time); Gray v. Anderson, 140 Iowa 359, 118 N.W. 526 (1908) (can adjourn and reconvene meeting without notice to interested property owners); Ross v. Board of Supervisors, 128 Iowa 427, 104 N.W. 506 (1905); Tod v. Crisman, 123 Iowa 693, 99 N.W. 686 (1904); Oliver v. Monona County, 117 Iowa 43, 90 N.W.

to get Supreme Court review of actions of a district court;[30] each involved unusual factual situations, and lower court handling of special assessment proceedings usually is reviewed by appeal.

(d) Injunctions and other equitable proceedings

Iowa lawyers have attempted on many occasions to obtain judicial review of special assessment proceedings through injunctions and other equitable proceedings. If the statute involved has no appeal or review provision, there is no adequate remedy at law and the equitable remedy can appropriately be asserted.[31] Although the special assessment statutes most often in use today contain appeal provisions, it is surprising to note the instances in which injunctions are sought; in several instances a complainant uses both appeal and injunction to review.[32] Reliance on the equitable remedy alone has proved to be unwise in many cases.

Injunctions may be sought at various stages in the proceedings. They are used frequently in an attempt to cancel the special assessment levy or to enjoin making of the levy.[33] There have also been attempts to enjoin letting of contracts,[34] establishing of drainage districts,[35] doing the pro-

510 (1902); Polk v. McCartney, 104 Iowa 567, 73 N.W. 1067 (1898); Richman v. Board of Supervisors, 70 Iowa 627, 26 N.W. 24 (1885).

[30] Board of Supervisors v. District Court, 209 Iowa 1030, 229 N.W. 711 (1930) (action by holder of drainage district bonds against Board and District, brought in county where bonds were payable rather than county where District located; certiorari lies to review refusal to grant change of venue); Hartshorn v. District Court, 142 Iowa 72, 120 N.W. 479 (1909) (trial court's action, on appeal, to establish smaller district than engineer recommended, after Board voted to establish no district, held on certiorari to be beyond its powers).

[31] Fort Dodge Elec. L. & P. Co. v. City of Fort Dodge, 115 Iowa 568, 89 N.W. 7 (1902). See Lightner v. Greene County, 145 Iowa 95, 123 N.W. 749 (1909).

[32] Sunset Golf Club v. City of Sioux City, 242 Iowa 739, 46 N.W.2d 548 (1951); Cheny v. City of Fort Dodge, 157 Iowa 250, 138 N.W. 549 (1912); Reed v. City of Cedar Rapids, 137 Iowa 107, 111 N.W. 1013 (1908). In Mayne v. Board of Supervisors, 215 Iowa 221, 241 N.W. 29 (1932), and Walter v. City of Ida Grove, 203 Iowa 1068, 213 N.W. 935 (1927), pleadings in equity were treated as if appeals from the assessment action of the council or board. Bates v. City of Des Moines, 201 Iowa 1233, 207 N.W. 793 (1926), states the two actions are available to annual assessments which are jurisdictionally defective.

[33] *E.g.*, Kerr v. Chilton, 249 Iowa 1159, 91 N.W.2d 579 (1958); Jackson v. City of Creston, 206 Iowa 244, 220 N.W. 92 (1928); Morrison v. Hershire, 32 Iowa 271 (1871).

[34] Injunction granted, where council rejected lowest responsive bid because bidder offered to use material specified "or equal". Miller v. City of Oelwein, 155 Iowa 706, 136 N.W. 1045 (1912). Injunction was denied in: Richardson v. City of Denison, 189 Iowa 426, 178 N.W. 332 (1920) (resolution of necessity recited "a concrete paving, (7) seven inches in thickness"; plans and specifications called for either six or seven inches thickness, and contract was for six inch thickness); Swan v. City of Indianola, 142 Iowa 731, 121 N.W. 547 (1909) (objecting to type of material to be used, as too expensive; to council "junket" at contractor's expense to view similar pavings in other cities, after contract awarded; and that other improvements should have been given priority).

[35] Town of Carpenter v. Joint Drainage Dist., 198 Iowa 182, 197 N.W. 656 (1924) (Court did not enjoin establishment, but did enjoin most of district's proposed work inside town, essentially as usurping town's function of developing storm sewer system); Hoyt v. Brown, 153 Iowa 324, 133 N.W. 905 (1911) (appeal is conclusive remedy, unless utter want of jurisdiction).

posed work,[36] paying for improvements from general funds of the city,[37] reassessment after a successful appeal,[38] issuing bonds,[39] holding tax sales or issuing tax sale certificates or deeds,[40] paying contractors,[41] and entering on land to make improvements.[42] Injunctions have also been sought, successfully, to compel drainage district trustees to make repairs,[43] and unsuccessfully to compel them to assess people outside the district for work done in it.[44]

The Court appears unwilling to treat the availability of appeal as "an adequate remedy at law" sufficient to prevent any resort to injunctions.[45] However, from its holdings, an injunction can be asserted successfully only if there is some "jurisdictional" defect in the proceedings, or fraud or bad faith is involved. The Court has had difficulty defining what is "jurisdictional",

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[36] In Converse v. Town of Deep River, 139 Iowa 732, 117 N.W. 1079 (1908), and Burget v. Town of Greenfield, 120 Iowa 432, 94 N.W. 933 (1903), sidewalk work at owner's expense was enjoined, where the bed of the walk had not been brought to permanent grade by the city. In Maasdam v. Kirkpatrick, 214 Iowa 1388, 243 N.W. 145 (1932), and Smith v. Monona-Harrison Drainage Dist., 178 Iowa 823, 160 N.W. 229 (1916), improvement work in existing districts was enjoined, as new construction rather than repairs. See also Town of Carpenter v. Joint Drainage Dist., *supra*, note 35. But property owners downstream on a natural watercourse below the outlet of the proposed drain, who had no standing to appeal establishment, were told they could not enjoin it and their only remedy was to create another district to improve the stream in their area. Maben v. Olson, 187 Iowa 1060, 175 N.W. 512 (1919).

Attempts to enjoin making street improvements on various grounds were unsuccessful in: Wigodsky v. Town of Holstein, 195 Iowa 910, 192 N.W. 916 (1923); Saunders v. City of Iowa City, 134 Iowa 132, 111 N.W. 529 (1907); and Gallaher v. City of Jefferson, 125 Iowa 324, 101 N.W. 124 (1904).

[37] Fullerton v. City of Des Moines, 147 Iowa 254, 126 N.W. 159 (1910) (contending the payment would be for "extra work" not covered in contract; Court held the work was included); Shelby v. City of Burlington, 125 Iowa 343, 101 N.W. 101 (1904) (contending more of cost should be specially assessed; held this is discretionary).

[38] Chicago, M. & St. P. Ry. v. Mosquito Drainage Dist., 190 Iowa 162, 180 N.W. 170 (1920) (plaintiff's appeal from first assessment resulted in $4,000 reduction; total costs exceeded assessment, and reassessment was made apparently dividing excess on basis of original assessment, which resulted in $3,850 additional charge to plaintiff; Court refused to enjoin).

[39] Bradley v. Appanoose County, 199 Iowa 317, 200 N.W. 216 (1925) (unsuccessful; contention bonds being issued in excess of amount needed to pay for the work).

[40] Warn v. Tucker, 236 Iowa 450, 19 N.W.2d 201 (1945) (tax sale procedure seems to have been invalid, and Court seems to say tax deed here would be void but owner has to make the sale purchaser whole as a condition to equitable relief); Fisk v. City of Keokuk, 144 Iowa 187, 122 N.W. 896 (1909) (unsuccessful); Gallaher v. Garland, 126 Iowa 206, 101 N.W. 867 (1904) (successful, city's procedure in handling project void because of inclusion of improper grading costs).

[41] See Waller v. Prichard, 201 Iowa 1364, 202 N.W. 770 (1926); Wingert v. Snouffer & Ford, 134 Iowa 97, 108 N.W. 1035, 111 N.W. 432 (1907).

[42] Simpson v. Board of Supervisors, 180 Iowa 1330, 162 N.W. 824 (1917) (unsuccessful as to 85 foot right-of-way engineer's report originally proposed to take, but successful as to additional 35 feet which soil conditions were later shown to require). See Beim v. Carlson, 209 Iowa 1001, 227 N.W. 421 (1920).

[43] Hogue v. Monona-Harrison Drainage Dist., 229 Iowa 1151, 296 N.W. 204 (1941).

[44] Mayne v. Board of Supervisors, 215 Iowa 221, 241 N.W. 29 (1932) (Commissioners to assess benefits had held there was none to upstream district).

[45] Kerr v. Chilton, 249 Iowa 1159, 91 N.W.2d 579 (1958) (successful, involved cost of repairing lateral drain, which trustees proposed to assess to all land in district regardless of benefit); Sunset Golf Club v. City of Sioux City, 242 Iowa 739, 46 N.W.2d 548 (1951); Bates v. City of Des Moines, 201 Iowa 1233, 207 N.W. 793 (1926); Guenther v. City of Des Moines, 197 Iowa 414, 197 N.W. 326 (1924); Security Sav. Bank v. Carroll, 131 Iowa 605, 608, 109 N.W. 212, 214 (1906) ("If illegal and void, its [the special assessment] collection may be enjoined in equity, even if there

and has narrowed its concept of the term in recent years.[46] Attempts to do work or to assess for work beyond that authorized by statute,[47] total failure to perform steps in procedure required by statute (including failure to adopt resolutions or give notice or have hearings),[48] assessing for work not

be a tribunal provided for reviewing the same. It is only in cases where the tax is irregular or erroneous that the remedy by appeal is exclusive; where the tax is void, the party is not obliged to proceed by certiorari."); Smith v. Peterson, 123 Iowa 672, 99 N.W. 552 (1904). *But cf.* Kerr, Seabury v. Adams, 208 Iowa 1332, 225 N.W. 264 (1929).

[46] See Andre v. City of Burlington, 141 Iowa 65, 117 N.W. 1082 (1909), where the author of the opinion says members of the Court can't agree on what constitutes jurisdictional defects. See also Estate of Meijerink v. Lindsay, 203 Iowa 1031, 213 N.W. 934 (1927); Landis v. City of Marion, 176 Iowa 240, 157 N.W. 841 (1916).

[47] Following are examples of jurisdictional defects of the type referred to in the text. Enlarging dimensions of drain was authorized by county engineer without Board approval. Monaghan v. Vanatta, 144 Iowa 119, 122 N.W. 610 (1909). Street work on privately owned land: Beim v. Carlson, 209 Iowa 1001, 227 N.W. 421 (1930); Bradley v. City of Centerville, 139 Iowa 599, 117 N.W. 968 (1908). Assessing lots outside town for cost of sewer in boundary street. Turner v. Cobb, 195 Iowa 831, 192 N.W. 847 (1923). Assessing land more than three hundred feet from street improvement, without use of district method of assessment. Bates v. City of Des Moines, 201 Iowa 1233, 207 N.W. 793 (1926). Assessing for sidewalk work at street intersections. Myrah v. Dana, 199 Iowa 801, 202 N.W. 748 (1925). Ordering property owner to make necessary connections for gas, water and sewers before street work completed, which he failed to do; then putting in more than one of each such connection for his property and attempting to assess for all. Seymour v. City of Ames, 218 Iowa 615, 255 N.W. 874 (1934); Toben v. Town of Manson, 192 Iowa 1127, 185 N.W. 984 (1922). Doing a street improvement without resolution of necessity and notice and hearing, on theory it is "oiling", when Court finds it is not "oiling". Jackson v. City of Creston, 206 Iowa 244, 220 N.W. 92 (1928). Doing work not within the scope of the resolution of necessity. Manning v. City of Ames, 192 Iowa 998, 184 N.W. 347 (1921); Bennett v. City of Emmetsburg, 138 Iowa 67, 115 N.W. 582 (1908).

Paving a street at other than the legally established grade was held to be a jurisdictional defect in F. M. Hubbel, Son & Co. v. Bennett Bros., 130 Iowa 66, 106 N.W. 375 (1906). Later cases have held otherwise where there was deviation from the established grade. Landis v. City of Marion, 176 Iowa 240, 157 N.W. 841 (1916). A more recent case appears to treat as jurisdictional the failure to establish any grade, although the case was handled as though it were an appeal from assessment. Walter v. City of Ida Grove, 203 Iowa 1061, 213 N.W. 935 (1927).

Including costs of grading when notice failed to indicate this would be done was treated as jurisdictional in Guenther v. City of Des Moines, 197 Iowa 414, 197 N.W. 326 (1924), and Gallaher v. Garland, 126 Iowa 206, 101 N.W. 867 (1904). Some doubt on this is cast by Estate of Meijerink v. Lindsay, 203 Iowa 1031, 213 N.W. 934 (1927).

At one time a city could assess costs of reconstructing streets but not costs for repairing. An assessment for "repair" work would then be jurisdictional. See Fuchs v. City of Cedar Rapids, 158 Iowa 392, 139 N.W. 903 (1913).

[48] Sometimes the Court thinks of "jurisdictional" in the sense of the council or board obtaining legal power to proceed, as in the case of a court acquiring jurisdiction to hear a case. Clifton Land Co. v. City of Des Moines, 144 Iowa 625, 123 N.W. 340 (1909). There are a number of instances of failure to give notice. Jackson v. City of Creston, 206 Iowa 244, 220 N.W. 92 (1928); Chicago & N.W. Ry. v. Sedgwick, 203 Iowa 726, 213 N.W. 435 (1927) (no notice of proposal to establish served on plaintiff; plaintiff's filing of objections at hearing on assessment held, 4-3, not waiver of jurisdictional defect); Peterson v. Town of Stratford, 190 Iowa 45, 180 N.W. 13 (1920) (street extension); Lade v. Board of Supervisors, 183 Iowa 1026, 166 N.W. 586 (1918) (widening and deepening of existing drain); Shaver v. J. W. Turner Improvement Co., 155 Iowa 492, 136 N.W. 711 (1912); Smith v. Peterson, 123 Iowa 672, 99 N.W. 552 (1904) (drain statute unconstitutional because no requirement for notice to non-abutting benefited property owners subject to assessment); Beebe v. Magowan, 122 Iowa 94, 97 N.W. 986 (1904) (same); Hawley v. City of Fort Dodge, 103 Iowa 573, 72 N.W. 756 (1897); Belie v. City of Webster City, 94 Iowa 393, 62 N.W. 796 (1895); Gatch v. City of Des Moines, 63 Iowa 718, 18 N.W. 310 (1884) (sewer, neither statute nor ordinance required notice and

covered by resolutions,[49] adoption of resolutions by insufficient vote,[50] are clearly jurisdictional defects.[51] Most instances of defective attempts to comply

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none given); Roche v. City of Dubuque, 42 Iowa 250 (1875). Trustees of Griswold College v. City of Davenport, 65 Iowa 633, 22 N.W. 904 (1885), reaching the same result as *Gatch*, and talking in terms of due process, thought that the *Gatch* case had stated the rule too broadly. The *Shaver* case also says, for street improvements, that a preliminary resolution of necessity is jurisdictional. See Benshoof v. City of Iowa Falls, 175 Iowa 30, 156 N.W. 898 (1916). See also Starr v. City of Burlington, 45 Iowa 87 (1876), where there was no resolution ordering the improvement, and consequently no publication thereof. The *Lade* case is somewhat limited by Breiholz v. Board of Supervisors, 186 Iowa 1147, 173 N.W. 1 (1919).

A notice so incomplete that it fails to alert a reasonable property owner to the possibility his property will be assessed is jurisdictionally defective. Dunker v. City of Des Moines, 160 Iowa 567, 142 N.W. 207 (1913), 156 Iowa 292, 136 N.W. 536 (1912). See also Benshoof v. City of Iowa Falls, *supra*. Also, a notice failing to indicate that grading costs would be assessed was fatally defective. Gallaher v. Garland, 126 Iowa 206, 101 N.W. 867 (1904).

Several cases held that publishing notice for fewer times than required by statute was jurisdictional. Bennett v. City of Emmetsburg, 138 Iowa 67, 115 N.W. 582 (1908); Comstock v. City of Eagle Grove, 133 Iowa 589, 111 N.W. 51 (1907). Later the Court said it was jurisdictional but could be waived. Gilcrest & Co. v. City of Des Moines, 157 Iowa 525, 137 N.W. 1072 (1912). Today it might not be considered jurisdictional.

In Zalesky v. City of Cedar Rapids, 118 Iowa 714, 92 N.W. 657 (1902), a property owner given personal notice to construct a sidewalk was upheld in his contention that failure to publish the notice (as required by ordinance) was jurisdictional. See also, on failure to give notice to construct sidewalk, Hawley v. City of Fort Dodge, 103 Iowa 573, 72 N.W. 756 (1897), and Zelie v. City of Webster City, 94 Iowa 393, 62 N.W. 796 (1895).

Several cases involve defective notices to bidders or other defects in taking bids and letting contracts. In Koontz v. City of Centerville, 161 Iowa 627, 143 N.W. 490 (1913), the Court held that if there was less than the statutory ten days between notice to bidders and opening of bids, this was not a jurisdictional defect which would defeat a special assessment. (Query, could awarding the contract have been enjoined?) The Court observed that to the extent the *Bennett* and *Comstock* cases, *supra*, sustained the proposition that where jurisdiction was acquired, it could be lost by subsequent error or irregularity, they had been overruled. Previously the Court had treated rejection of a law, responsive bid as jurisdictional, in Miller v. City of Oelwein, 155 Iowa 706, 136 N.W. 1045 (1912), and a notice to bidders not containing matters required by statute as jurisdictionally defective, in Coggeshall v. City of Des Moines, 78 Iowa 235, 41 N.W. 617, 42 N.W. 650 (1889). See also Gallaher v. Garland, 126 Iowa 206, 101 N.W. 867 (1904). Atkinson v. City of Webster City, 177 Iowa 659, 158 N.W. 473 (1916), although an appeal, may support the approach taken in *Miller*. But Hoffman v. City of Muscatine, 212 Iowa 867, 232 N.W. 430, 77 A.L.R. 680 (1931), reaches an opposite conclusion from *Coggeshall*, possibly due to changes in statutory requirements. Shaver v. J. W. Turner Improvement Co., 155 Iowa 492, 136 N.W. 711 (1912), states that irregularities in notice to bidders do not amount to a jurisdictional defect.

Failure to comply with statutory methods as to the manner of assessing (or, assessing property not subject to assessment), is jurisdictional. Bates v. City of Des Moines, 201 Iowa 1233, 207 N.W. 793 (1926); Northern Light Lodge v. Town of Monona, 180 Iowa 62, 161 N.W. 78 (1917); Cavanaugh v. City of Des Moines, 179 Iowa 739, 162 N.W. 17 (1917). See Altman v. City of Dubuque, 111 Iowa 105, 82 N.W. 461 (1900).

[49] Jackson v. City of Creston, 206 Iowa 244, 220 N.W. 92 (1928); Guenther v. City of Des Moines, 197 Iowa 414, 197 N.W. 36 (1924); Manning v. City of Ames, 192 Iowa 998, 184 N.W. 347 (1921); Fuchs v. City of Cedar Rapids, 158 Iowa 392, 139 N.W. 903 (1913); Bennett v. City of Emmetsburg, 138 Iowa 67, 115 N.W. 582 (1908); Gallaher v. Garland, 126 Iowa 206, 101 N.W. 867 (1904). See also Starr v. City of Burlington, 45 Iowa 87 (1876).

[50] Seymour v. City of Ames, 218 Iowa 615, 255 N.W. 874 (1934).

[51] In Smith v. City of Des Moines, 106 Iowa 590, 76 N.W. 836 (1898), an assessment was enjoined as to two of three platted lots, where only the third abutted the street, although all three were used for plaintiff's residence.

A project partly to be paid for from general funds was enjoined because it would result in violation of the constitutional debt limit. Allen v. City of Davenport,

with procedural requirements, however, do not result in jurisdictional defects.[52] Fraud has been asserted in a number of cases, sometimes success-

107 Iowa 90, 77 N.W. 532 (1898). See City of Davenport v. Allen, 120 Fed. 172 (C.C. S.D. Iowa 1903), *reversed, sub. nom.*, Allen v. City of Davenport, 132 Fed. 209 (8th Cir. 1904).

A similar argument failed, in Miller v. City of Glenwood, 188 Iowa 514, 176 N.W. 373 (1920), when the Court found the limit would not be exceeded.

Use of the front foot rule in calculating assessments was upheld, in the *Allen* case, but later was deemed a jurisdictional defect, in Iowa Pipe & Tile Co. v. Culbahan, 125 Iowa 358, 101 N.W. 141 (1904). See Norwood v. Baker, 172 U.S. 269 (1898). But see Hedge v. City of Des Moines, 141 Iowa 4, 119 N.W. 276 (1909); Reed v. City of Cedar Rapids, 137 Iowa 107, 111 N.W. 1013 (1908).

[52] Sunset Golf Club v. City of Sioux City, 242 Iowa 739, 46 N.W.2d 548 (1951) (incorrect legal description of objector's property used in preliminary steps); Baldozier v. Mayberry, 226 Iowa 693, 285 N.W. 140 (1939) (no notice re drain ditch repair); Keokuk Waterworks Co. v. Keokuk, 224 Iowa 718, 277 N.W. 291 (1938) (specifications); Hoffman v. City of Muscatine, 212 Iowa 867, 232 N.W. 430, 77 A.L.R. 680 (1931) (specifying patented product); Parrott v. Balkema, 211 Iowa 764, 234 N.W. 240 (1931) (manner of signing resolution; conflict of interest); Seabury v. Adams, 208 Iowa 1332, 225 N.W. 264 (1929) (spreading cost of repair of lateral ditch over entire district); Dashner v. Woods Bros. Construction Co., 205 Iowa 64, 217 N.W. 464 (1928) (Board delegating to engineer determination of exact work needed); Walter v. City of Ida Grove, 203 Iowa 1068, 213 N.W. 935 (1927) (disproportionate assessments); Estate of Meijerink v. Lindsay, 203 Iowa 1031, 213 N.W. 934 (1927) (compensation to officials); Meyerholz v. Board of Supervisors, 200 Iowa 237, 204 N.W. 452 (1925) (repair drain, without notice); Myrah v. Dana, 199 Iowa 801, 202 N.W. 748 (1925) (sewer assessment in excess of statutory maximum per linear foot); Lytle v. City of Sioux City, 198 Iowa 848, 200 N.W. 416 (1924) (exceeding 25% of value); Wigodsky v. Town of Holstein, 195 Iowa 910, 192 N.W. 916 (1923) (permitting correction of obvious error in bids; adding type of finish, after notice to bidders published, which was not specifically enumerated in resolution of necessity); Lundberg v. City of Lake City, 194 Iowa 136, 187 N.W. 438 (1922) (project extended after contract let); Manning v. City of Ames, 192 Iowa 998, 184 N.W. 347 (1921) (type of material used; no statement of specific location and terminal points of street repair work); Petersen v. Sorensen, 192 Iowa 471, 185 N.W. 42 (1921) (drain repair without notice; classification for assessments); O'Shonessy v. City of Sioux City, 192 Iowa 396, 184 N.W. 728 (1921) (late performance of contract without formal approval by council); Messer v. Marsh, 191 Iowa 1144, 183 N.W. 602 (1921) (time of mayor's signing resolutions, and publishing notice); Meader v. Town of Sibley, 191 Iowa 1139, 183 N.W. 610 (1921) (adopting two resolutions on one vote); Noble v. City of Des Moines, 191 Iowa 12, 174 N.W. 44 (1921) (resurfacing, under resolution to repair); Interurban Ry. v. City of Valley Junction, 190 Iowa 189, 180 N.W. 288 (1920) (property owner misnamed); Brown v. City of Creston, 189 Iowa 1111, 179 N.W. 617 (1920) (defects in work); Miller v. City of Glenwood, 189 Iowa 514, 176 N.W. 373 (1920) (cost exceeds estimate; number of papers in which notice published); Breiholz v. Board of Supervisors, 186 Iowa 1147, 173 N.W. 1 (1919) (repair drain without notice; manner of assessing; compare Lade v. Board of Supervisors, 183 Iowa 1026, 166 N.W. 586 (1919)); Burroughs v. City of Keokuk, 181 Iowa 660, 165 N.W. 83 (1917) (following old law on assessment when new law effective before resolution of necessity adopted); Ellyson v. City of Des Moines, 179 Iowa 882, 162 N.W. 212 (1917) (repair or reconstruction); Landis v. City of Marion, 176 Iowa 240, 157 N.W. 841 (1916) (paving deviates from established grade); Durst v. City of Des Moines, 164 Iowa 82, 145 N.W. 528 (1914) (non-resident got no personal notice; value of property and extent of benefit); Cheny v. City of Fort Dodge, 157 Iowa 250, 138 N.W. 549 (1912) (departure from original plans and specifications); Dubuque & S.C. R.R. v. Mitchell, 152 Iowa 187, 131 N.W. 25 (1911); Durst v. City of Des Moines, 150 Iowa 370, 120 N.W. 168 (1911) (value of lots; assessing intersection costs without resolution so stating); Dubbert v. City of Cedar Falls, 149 Iowa 489, 128 N.W. 947 (1910) (resolution not completely specific, and perhaps unclear; modification of specifications); Collins v. City of Keokuk, 147 Iowa 233, 124 N.W. 601 (1910) (contract filing; resolution signing); Lightner v. Greene County, 145 Iowa 95, 123 N.W. 749 (1909) (notices published in paper owned by one petitioning for district; readvertisement for bids published only once); Clifton Land Co. v. City of Des Moines, 144 Iowa 625, 123 N.W. 340 (1909); Monaghan v. Vanatta, 144 Iowa 119, 122 N.W. 610 (1909) (cost and length

fully[53] and sometimes not.[54]

Although it is sometimes suggested that waiver of a jurisdictional defect cannot be asserted as a defense to an injunction proceeding,[55] the Iowa Court has recently permitted waiver to bar injunctions. In several instances an election of remedies was involved.[56] Petitioner may also be denied this

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greater than estimate); Nixon v. City of Burlington, 141 Iowa 316, 115 N.W. 239 (1909) (Sunday notice; record of council vote; notice to bidders may be defective; enlarging project after start); Howard v. County of Emmet, 140 Iowa 527, 118 N.W. 882 (1908) (reassessment for non-abutting owners who had not had notice of orignal assessment); Reed v. City of Cedar Rapids, 137 Iowa 107, 111 N.W. 1013 (1908) (defective description of streets to be improved; frontage involved in assessment; filing of plat and schedule); Mackay v. Hancock County, 137 Iowa 88, 114 N.W. 552 (1908) (description of area of drainage improvement); Hardwick v. City of Independence, 136 Iowa 481, 114 N.W. 14 (1907); Thompson v. Mitchell, 133 Iowa 527, 110 N.W. 901 (1907); Owens v. City of Marion, 127 Iowa 469, 103 N.W. 381 (1905) (time for filing objections not properly stated in notice; extent and nature of projcet; value; benefits); Diver v. Keokuk Sav. Bank, 126 Iowa 691, 102 N.W. 542 (1905) (contract provisions; conflict of interest); Allen v. City of Davenport, 107 Iowa 90, 77 N.W. 532 (1898) (establishment of grade after contract awarded; grading changes; contract provisions); Smith v. City of Des Moines, 106 Iowa 590, 76 N.W. 836 (1898) (assessing both property and owner); Butts v. Monona County, 100 Iowa 74, 69 N.W. 284 (1896); Newcomb v. City of Davenport, 86 Iowa 291, 53 N.W. 232 (1892); Grimmell v. City of Des Moines, 57 Iowa 144, 10 N.W. 330 (1881). See also Harris v. Board of Trustees, 244 Iowa 1169, 59 N.W.2d 234 (1953); Shaver v. J. W. Turner Improvement Co., 155 Iowa 492, 136 N.W. 711 (1912); Trustees of Griswold College v. City of Davenport, 65 Iowa 633, 22 N.W. 904 (1885); Gatch v. City of Des Moines, 63 Iowa 718, 18 N.W. 310 (1884); Hatch, Holbrook & Co. v. Pottawattamie County, 43 Iowa 442 (1876); Morrison v. Hershire, 32 Iowa 271 (1871).

[53] Kaynor v. District Court, 178 Iowa 1055, 158 N.W. 557 (1916); Atkinson v. City of Webster City, 177 Iowa 659, 158 N.W. 473 (1916) (contractor's performance at least constructive fraud); Kaynor v. City of Cedar Falls, 156 Iowa 161, 135 N.W. 564 (1912) (city sidewalk assessment, where city refused to tell property owner proper grade unless he would build to curb at intersection); Wingert v. Snouffer & Ford, 134 Iowa 97, 108 N.W. 1035, 111 N.W. 432 (1907) (contractor substantially deviated); McCain v. City of Des Moines, 128 Iowa 331, 103 N.W. 979 (1905) (same; city officials accepted work despite complaints, and told complainants to go to court); Mason v. City of Des Moines, 108 Iowa 658, 79 N.W. 389 (1899) (contractor deviated; city inspectors failed to discover this). See Bennett v. City of Emmetsburg, 138 Iowa 67, 115 N.W. 582 (1908).

[54] Husson v. City of Oskaloosa, 240 Iowa 681, 37 N.W.2d 310 (1949); Estate of Meijerink v. Lindsay, 203 Iowa 1031, 213 N.W. 934 (1927) (some compensation to public officials); Lytle v. City of Sioux City, 198 Iowa 848, 200 N.W. 416 (1924) (assessment exceeds 25% of value); Lundberg v. City of Lake City, 194 Iowa 136, 187 N.W. 438 (1922) (contractor used softer brick than specified); Noble v. City of Des Moines, 191 Iowa 12, 174 N.W. 44 (1921) (manner of performing work); Brown v. City of Creston, 189 Iowa 1111, 179 N.W. 617 (1920) (same); Plagmann v. City of Davenport, 181 Iowa 1212, 165 N.W. 393 (1917) (same); Ellyson v. City of Des Moines, 179 Iowa 882, 162 N.W. 212 (1917) (same); Clifton Land Co. v. City of Des Moines, 144 Iowa 625, 123 N.W. 340 (1909); Swan v. City of Indianola, 142 Iowa 731, 121 N.W. 547 (1909) (letting of bid); Andre v. City of Burlington, 141 Iowa 65, 117 N.W. 1082 (1909) (some other lots omitted from assessment).

In several cases the Court commented on fraud, collusion or undue influence as a ground for injunction, but apparently these were either not claimed or not shown. Dashner v. Woods Bros. Construction Co., 205 Iowa 64, 217 N.W. 464 (1928); Town of Carpenter v. Joint Drainage Dist., 198 Iowa 182, 197 N.W. 656 (1924); Wigodsky v. Town of Holstein, 195 Iowa 910, 192 N.W. 916 (1923); Miller v. City of Glenwood, 188 Iowa 514, 176 N.W. 373 (1920); Durst v. City of Des Moines, 164 Iowa 82, 145 N.W. 528 (1914); Dubbert v. City of Cedar Falls, 149 Iowa 489, 128 N.W. 947 (1910); Gallaher v. City of Jefferson, 125 Iowa 324, 101 N.W. 124 (1904).

[55] See 14 McQUILLIAN, MUNICIPAL CORPORATIONS § 38.268 (2d ed. 1950).

[56] Wilcox v. Marshall County, 229 Iowa 865, 294 N.W. 907 (1940) (filing objections but not appealing from overruling thereof; paying some of assessment); Franquemont v. Munn, 208 Iowa 528, 224 N.W. 39 (1929) (appeal, taken to district court and lost there); First Nat'l Bank v. Kelly, 159 Iowa 312, 139 N.W. 564 (1913)

remedy if he admits that some amount is due and fails to tender what is due.[57]

3. Appeal

Judicial review by direct appeal from action of a council or board in authorizing a special assessment project or in levying assessment therefor is available only where specifically provided for by statute.[58] The Iowa statutes are quite varied. As previously observed, some

> have no provision for any appeal to district court, some provide for appeal only after the decision to improve, others only after levy of assessment for the work done, some provide for appeal at several stages, one permits appeal at several stages but in addition permits the city to seek court confirmation, and another requires the city to seek court confirmation so fails to provide for appeal.[59]

Where appeal is authorized, it is usually not the exclusive method for review, but generally a failure to appeal will bar successful attempts to use other methods.[60] This section is concerned with the steps that must be taken before a district court has jurisdiction to consider an appeal, and other procedural aspects of appeals.

The Court has insisted on strict compliance with statutory appeal provisions.[61] This requires careful observation of the particular statute; of the ten code chapters dealing with appeals, three adopt by reference the provisions for appeal in the drainage district chapter,[62] one provides for appeal within twenty days from assessment "in the manner now provided by law",[63] and

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(payment under protest; no objections to council; this involves the project held to be jurisdictionally defective in Bennet v. City of Emmetsburg, 138 Iowa 67, 115 N.W. 582 (1908); Cheny v. City of Fort Dodge, 157 Iowa 250, 138 N.W. 549 (1912) (failure to object to council). But, in Chicago & N.W. Ry. v. Sedgwick, 203 Iowa 726, 213 N.W. 435 (1927), a 4-3 decision, majority held that filing other objections to assessment did not waive Railway's objection that the Board establishing the district had no jurisdiction over the Railway.

[57] Myrah v. Dana, 199 Iowa 801, 202 N.W. 748 (1925); Grimmell v. City of Des Moines, 57 Iowa 144, 10 N.W. 330 (1880). In Gallaher v. Garland, 126 Iowa 206, 101 N.W. 867 (1904), where the assessment was invalidated because grading costs were included and notices did not so state, it was not clear what the amount exclusive of such costs was, and plaintiff offered to pay whatever might be properly due but made no tender. The Court thought this was enough but then said no tender was needed because the entire assessment was void.

Warn v. Tucker, 236 Iowa 450, 19 N.W.2d 201 (1945), was an action to cancel a tax sale certificate because of improprieties in the sale. The Court seems to say that a tax deed here would be void, but as a condition to equitable relief complainant had to pay the sale price plus "legal interest" to the purchaser. The Court held such interest to be 5%, rather than the interest and penalties due under the statute covering redemption from tax sale, IOWA CODE § 447.1 (1962).

[58] 14 MCQUILLAN, MUNICIPAL CORPORATIONS § 38.231 (3d ed. 1950). See Reed v. City of Cedar Rapids, 137 Iowa 107, 111 N.W. 1013 (1908); Ft. Dodge Elec. L. & P. Co. v. City of Fort Dodge, 115 Iowa 568, 89 N.W. 7 (1902).

[59] 12 DRAKE L. REV. 3, 30 (1962). The quoted comment is supported by notes 196-201.

[60] IOWA CODE § 455.106 (1962) states that appeal is the exclusive remedy for that chapter. Section 391A.31(3) specifically saves other remedies. See text here at pp. 4-5, supported by notes 33-54, as to appeal or injunction; text at pp. 6-11, supported by notes 22-24, as to appeal or mandamus; text at p. 5, supported by notes 25-29, as to appeal or certiorari. See also Security Sav. Bank v. Carroll, 131 Iowa 605, 109 N.W. 212 (1906).

[61] See Fuller v. Town of Rolfe, 249 Iowa 80, 86 N.W.2d 249 (1957); *In re* Paving Assessments, 193 Iowa 1234, 188 N.W. 780 (1922).

[62] IOWA CODE §§ 357.33 (water districts), 358.23 (sanitary districts), 459.4 (drainage districts which include towns) (1962).

[63] *Id.* § 395.3 (flood protection districts).

the others differ in many respects from each other.[64] All, however, contemplate timely service of some notice of appeal on behalf of a proper party to appeal; most call for filing a cost bond, and many require filing of some pleadings.

A timely notice of appeal will be served within fifteen, twenty, or thirty days after the levy of assessment or final order complained of, depending on the chapter involved.[65] Mr. Loth states that the notice must be completely served within the period specified, and that delivery in that period to the sheriff for service will not alone satisfy the requirement for timely service.[66] The caption of the notice should name the appealing party as plaintiff,[67] and the city, county or district and board of supervisors, or other appropriate party, as defendant,[68] and usually should state it is a notice of appeal.[69] The notice must also be addressed—to the defendant, and in some instances also to a specific public official.[70] Under Code section 391.88 notice should be served

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[64] *Id.* §§ 100.16 (fire marshal), 113.23 (fence viewers), 311.24 (secondary road), 391.88 (streets, sewers, etc.), 391A.31 (streets, sewers, etc.).

[65] Fifteen days: *id.* §§ 311.24, 391.88. Twenty days: *id.* §§ 113.23 (applying R.C.P. 357), 357.33, 358.23, 395.13, 455.94, 459.4, 391A.31. Thirty days: *id* § 100.16. In Fuller v. Town of Rolfe, 349 Iowa 80, 86 N.W.2d 249 (1957), an appeal within fifteen days from council passage of the resolution to levy, which the mayor never signed, was dismissed as prematurely filed because the resolution was not legally effective until after the notice was served.

[66] 5 LOTH, IOWA FORMS CIVIL PROCEDURE & PRACTICE 37 (1957). His comment is supported by Mazzoli v. City of Des Moines, 245 Iowa 571, 63 N.W.2d 218 (1954) (a 5-4 decision involving appeal from assessment of damages under chapter 472). It is possible that a different answer might be given, especially if proceedings are under chapter 391A, but why run the risk?

[67] In Christenson v. Board of Supervisors, 174 Iowa 724, 156 N.W. 810 (1916), a vendor of land who had agreed to pay the drain assessment had standing to appeal from that assessment. In Wright Construction Co. v. City of Des Moines, 202 Iowa 661, 210 N.W. 809 (1926), a paving contractor who had agreed to receive assessment certificates in payment attempted to appeal the assessment on seven lots as in excess of 25% of value. The lot owners had not appealed. Plaintiff was held not to have standing to appeal.

The question of standing to appeal also arises when the district court decides an appeal adversely to the city or the drainage district and the city or board of supervisors does not ask for Supreme Court review. See Chicago, B. & Q. Ry. v. Board of Supervisors, 206 Iowa 488, 221 N.W. 223 (1928) (interested landowners have no standing); Western Asphalt Paving Corp. v. City of Marshalltown, 203 Iowa 1324, 206 N.W. 956, 214 N.W. 687 (1927) (equity action by assignee of paving certificates to set aside district court decision on appeal; unsuccessful as to property owners); Lightner v. Greene County, 156 Iowa 398, 136 N.W. 761, 137 N.W. 462 (1912); Yockey v. Woodbury County, 130 Iowa 412, 106 N.W. 950 (1906).

[68] See IOWA CODE §§ 455.100, 459.4 (1962). Under § 455.99 the board of supervisors represents the district. At one time it was necessary to name as defendants some of the petitioners for establishment of the district. Poage v. Grant Township Dist., 141 Iowa 510, 119 N.W. 976 (1909). When the district is in more than one county, it may be necessary to include both counties or both boards of supervisors. See *In re* Appeal of Head, 141 Iowa 651, 118 N.W. 884 (1909). Defendants named in appeals from fence-viewing should include the other landowners involved. See § 113.23.

[69] See examples in 5 LOTH, *op. cit., supra,* note 66, §§ 72, 74-75.

[70] IOWA CODE § 391.89 (1962) requires the notice to be "directed to the defendant [city or town]". A notice *naming* the Town as defendant was held to be defective for not being otherwise "*directed* to the defendant". Harrington v. Town of Salix, 248 Iowa 1359, 85 N.W.2d 527 (1957); Clark v. Town of Salix, 248 Iowa 1364, 85 N.W.2d 830 (1957). In Fuller v. Town of Rolfe, 226 Iowa 604, 284 N.W. 455 (1939), a notice addressed to "X as clerk of the Town of Rolfe" was held not to comply with this statute. See also Barton v. City of Waterloo, 218 Iowa 495, 255 N.W. 700 (1934). At an earlier date, when the statute did not specify how the notice was to be directed but only that it be served on the mayor or clerk, the notice had to be directed at least to the person on whom service was made. *In re* Paving Assess-

on the mayor or city clerk in the manner an original notice is served.[71] Some statutes do not specify how the notice is to be served; others call for "filing" the notice with a particular official.[72] The notice should indicate that the plaintiff is appealing, and from what he appeals;[73] and, where required, that an appeal bond has been filed or is being filed with the proper party. With several exceptions, the notice does not have to set out the grounds for appeal.[74] If a petition must be filed, the notice should state that the petition is on file or the day by which it will be filed. The term or time when the appeal will be heard should be designated.[75] The notice should be signed by the plaintiff, his agent, or his attorney.

Nearly all statutes providing appellate procedure require the appellant to supply a cost bond of a specified amount.[76] A surprising number of appeals have failed because no proper cost bond was filed on time. The bond, to cover costs which may be assessable against plaintiff, should be at least for the amount specified in the application statute,[77] with proper sureties,[78] timely

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ments, 193 Iowa 1234, 188 N.W. 780 (1922); see Western Asphalt Paving Corp. v. City of Marshalltown, 203 Iowa 1324, 206 N.W. 956, 214 N.W. 687 (1912). See also Lundy v. City of Ames, 201 Iowa 186, 206 N.W. 954 (1926).

Notices complying with the requirements of § 455.94 should also be addressed to the county auditor or auditors involved. See 5 LOTH, *op. cit., supra,* note 66, § 72; *In re* Appeal of Head, 141 Iowa 651, 118 N.W. 884 (1909).

[71] Collinson v. City of Dubuque, 242 Iowa 986, 47 N.W.2d 839 (1951), reversing 45 N.W.2d 148, held that service of the notice by plaintiff's attorney was not proper service, because of IOWA R.C.P. 56, but that the action of the city clerk in signing an acknowledgement of service gave the district court jurisdiction to hear the appeal.

[72] Notice must be "filed" with the auditor, under IOWA CODE §§ 311.24, 357.33, 358.23, 455.94 (1962). Appeal was dismissed, in *In re* Appeal of Head, 141 Iowa 651, 118 N.W. 884 (1909), because notice was filed with the auditor of only one of the two counties in which the district lay. § 100.16 calls for filing with the fire marshal; Section 395.13 is unclear; Section 391A.31 does not refer to a notice of appeal; § 113.23 uses the procedure applicable to appeals from justice court decisions, under IOWA R.C.P. 357.

[73] Under IOWA CODE § 391A.31(2) (1962) appeal may be taken only from the amount of the assessment. § 391A.31(1) permits objections to regularity of proceedings by "a petition in equity".

[74] *Id.* § 311.24 requires the notice to point out specific objections with particularity. Section 455.96 states that the petition shall include a copy of "his . . . objections filed by him with the auditor." However, the form notice in 5 LOTH, *op. cit., supra,* note 66, § 72, does not set out objections.

[75] IOWA CODE §§ 100.17, 455.94 (1962).

[76] The principal exception is IOWA CODE § 391A.31 (1962), which requires a bond only if appellant also attempts to stay proceedings which he claims have been irregularly conducted.

[77] *Id.* § 100.16 requires a bond of $100, as apparently does § 113.23. Section 391.89 specifies an amount equal to 5% of the assessment appealed from but not less than $250. Others refer simply to a bond conditioned to pay all costs of appeal. Sections 311.24, 455.94. In Chicago, M. & St. P. Ry. v. Drainage Dist No. 9, 197 Iowa 131, 197 N.W. 91 (1924), where a $500 bond was tendered, the Court held that the bond must either be unlimited or for an amount determined by the county auditor. *Cf.* Mills v. Board of Supervisors, 227 Iowa 1141, 290 N.W. 50 (1940). A $200 bond filed within the statutory time, and amended to meet the $250 minimum of § 391.89 after the time had run, was held insufficient in Woodward v. City of Iowa City, 212 Iowa 326, 232 N.W. 806 (1931). See also *In re* Paving Assessments, 193 Iowa 1234, 188 N.W. 780 (1922).

[78] Neither an attorney nor a nonresident is eligible to act as surety, although if either attempts to do so he may be held liable on the bond. IOWA CODE §§ 621.7, 682.4-7 (1962); Buttolph v. Town of Postville, 230 Iowa 89, 296 N.W. 817 (1941) (nonresident; clerk cannot legally approve bond); Collins v. Board of Supervisors, 158 Iowa 322, 138 N.W. 1095 (1913) (attorney). Other property owners interested

filed[79] with the specified official[80] who may be required to approve the bond.[81]

Unless the statute specifies otherwise, formal pleadings are not contemplated in a statutory appeal process.[82] Many of the appeal statutes today do, however, require some petition in addition to the notice of appeal.[83] The petition usually cannot introduce objections other than those presented to the council or board, but may restate, amplify or make those objections more specific,[84] although it does not have to be as detailed as the objections presented originally.[85] Perhaps defendants are not required to file any responsive pleading, but prudence should result in filing answer or motion.[86]

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in the outcome of the appeal were held disqualified to be sureties in Oldenkamp v. Town of Hull, 249 Iowa 471, 87 N.W.2d 444 (1958). See also *In re* Secondary Road District, 213 Iowa 988, 238 N.W. 66 (1932).

[79] When a county appealed from a special assessment levied against its property, a written waiver of filing of appeal bond executed by the city officer then required to approve the bond was held ineffective. City of Fairfield v. Jefferson County, 168 Iowa 623, 151 N.W. 53 (1915). The bond is filed timely only if filed (and approved, where necessary) by the time the notice of appeal must be served. For this time, see note 65, *supra*. Cases involving timely filing of bonds are: *In re* Secondary Road Dist., 213 Iowa 988, 238 N.W. 66 (1932); McCord v. City of Cherokee, 180 Iowa 448, 161 N.W. 440 (1917); Van Meter v. City of Tipton, 178 Iowa 1201, 159 N.W. 171 (1917); Johannsen v. City of Colfax, 161 Iowa 502, 143 N.W. 500 (1913).

[80] Bond apparently is filed with the fire marshal, but sureties must be approved by the clerk of the court to which appeal is taken, under IOWA CODE § 100.17 (1962). Under § 113.23 it is filed with and approved by the township clerk who apparently then files it with the clerk of court. Under § 391.89 the bond is filed with and approved by the clerk of court. Filing with the county auditor is called for under §§ 311.24 (no approval specified), 357.33, 358.23, 455.94; he transcripts the bond to the clerk.

[81] If a sufficient bond is filed by the officer who should approve it, he is presumed to approve the bond (although the presumption may be overcome). IOWA CODE § 682.10 (1962). The presumption has been relied on successfully in several cases. Rivers v. City of Des Moines, 202 Iowa 940, 211 N.W. 415 (1926); Dickinson v. City of Des Moines, 202 Iowa 782, 211 N.W. 417 (1926); Bates v. City of Des Moines, 201 Iowa 1233, 207 N.W. 793 (1926). It was applied in Mills v. Board of Supervisors, 227 Iowa 1141, 290 N.W. 50 (1940), despite the auditor's failure to mark the bond "filed". It was recognized but not applied because the surety was disqualified, in Buttolph v. Town of Postville, 230 Iowa 89, 296 N.W. 817 (1941). Before adoption of the presumption, several bonds were held insufficient for lack of approval, even though "filed". St. Mary's Church v. City of Pella, 197 Iowa 205, 196 N.W. 949 (1924); Chicago, M. & St. P. Ry. v. Drainage Dist. No. 9, 197 Iowa 131, 197 N.W. 91 (1924); McCord v. City of Cherokee, 180 Iowa 448, 161 N.W. 440 (1917).

[82] Gilcrest & Co. v. City of Des Moines, 157 Iowa 525, 137 N.W. 1072 (1912).

[83] IOWA CODE §§ 391.89 (petition briefly stating grounds of complaint), 391A.31, 455.96 (1962). Section 455.96 also specifies that a filing fee must be paid, and that if the petition is not filed or the fee is not paid this shall be treated as waiver of appeal and the court shall dismiss the appeal.

[84] Flood v. Board of Supervisors, 173 Iowa 224, 155 N.W. 280 (1915). This rule may apply under IOWA CODE § 391A.31(1), although the statute does not so state and it has had no appellate interpretation as yet. In Lewis v. Pryor Drainage Dist., 183 Iowa 236, 167 N.W. 94 (1918), plaintiff was permitted to object on appeal to the Board's order establishing the district which deviated from boundaries recommended by the engineer—there had been no indication that the Board would do this, and as a result no opportunity to object to the Board. See also Hedge v. City of Des Moines, 141 Iowa 4, 119 N.W. 276 (1909).

[85] Dickey v. City of Burlington, 247 Iowa 116, 73 N.W.2d 96 (1955). See also Koontz v. City of Centerville, 161 Iowa 627, 143 N.W. 490 (1913); Lightner v. Greene County, 156 Iowa 398, 136 N.W. 761, 137 N.W. 462 (1912).

[86] There is no case in point. IOWA CODE § 455.97 (1962) says no answer is required unless an affirmative defense is to be raised, but answer may be filed. In Gilcrest & Co. v. City of Des Moines, 157 Iowa 525, 137 N.W. 1072 (1912), the Court held that the city could defend on grounds of estoppel without so pleading, but the statute governing appeal did not then require a petition by the appellants,

Ordinarily neither party should be able to raise counterclaims.[87]

Several statutes specify that certain appellate proceedings shall be triable as in equity.[88] As trial by jury may be available in others, if plaintiff wants jury trial he should so demand pursuant to Rule 177.

McQuillan states that in "proceedings to determine or test the validity of an assessment, the general rules of evidence apply."[89] There is little discussion in Iowa cases of the kind of evidence that is admissible, but apparently plaintiff is not limited to the evidence submitted to the council or board,[90] as he might be in appeals from an administrative agency's determination. Generally, plaintiff may not introduce new objections for the first time at this stage, when he neglected his opportunity to raise them below, although fraud or juridictional objections may still be available.[91] Two cases rejected, as untimely raised, objections first stated in appeal to the Supreme Court.[92]

4. Other Actions Available to the Assessed Property's Owner.

Two property owners have attempted to attack special assessment proceedings in actions to quiet title. One was unsuccessful,[93] but the other, asserting jurisdictional defects, had his title quieted as against the claim of a tax sale purchaser.[94]

5. Waiver by and Estoppel of Appealing Parties.

Attacks on special assessment proceedings are frequently met with the argument that the attacker cannot successfully assert his claim because of the doctrines of estoppel or waiver or of a somewhat similar defense. Occasionally estoppel and waiver are used interchangeably in this area, although the concepts do differ in that for estoppel the party asserting it should have relied on the act or omission to which he refers and should have been prejudiced thereby.[95]

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as § 391.89 does now; and Guenther v. City of Des Moines, 197 Iowa 414, 197 N.W. 326 (1924), indicates that waiver or estoppel defenses must be pleaded. Moss v. Town of Hull, 249 Iowa 1178, 91 N.W.2d 599 (1958), does not decide whether pleading waiver is needed, but holds that if it is, the Town's pleading adequately raised the issue.

87 Hedge v. City of Des Moines, 141 Iowa 4, 119 N.W. 276 (1909); City of Burlington v. Palmer, 67 Iowa 681, 25 N.W. 877 (1885). See Curtis v. Town of Dunlap, 202 Iowa 588, 210 N.W. 800 (1926).

88 IOWA CODE §§ 391.90, 391A.31, 455.101 (1962). Under § 455.101 all appeals are so triable except those concerning compensation for lands taken or damages to which claimant is entitled. Sisson v. Board of Supervisors, 128 Iowa 442, 104 N.W. 454, 70 L.R.A. 440 (1905), held this provision constitutional despite its effect of barring trial by jury. Section 391A.31 calls for petition in equity to object to regularity of proceedings after adoption of the resolution of necessity, but does not apply this to appeals from the amount of the assessment. Loth considers the first method to be an independent equitable action rather than appeal. 5 LOTH, *op. cit., supra,* note 66, 37.

89 14 MCQUILLAN, MUNICIPAL CORPORATIONS § 38.204 (3d ed. 1950).

90 See Flood v. Board of Supervisors, 173 Iowa 224, 155 N.W. 280 (1915).

91 *E.g.,* Chicago, R.I. & P. Ry. v. Town of Dysart, 208 Iowa 422, 223 N.W. 371 (1929); Andre v. City of Burlington, 141 Iowa 65, 117 N.W. 1082 (1909).

92 Tjaden v. Town of Wellsburg, 197 Iowa 1292, 198 N.W. 772 (1924); *In re* Appeal of Mayden, 156 Iowa 157, 135 N.W. 571 (1912).

93 Danielson v. Cline, 234 Iowa 167, 12 N.W.2d 254 (1943).

94 Carter v. Cemansky, 126 Iowa 506, 102 N.W. 438 (1905). Falik v. United States, 343 F.2d 38 (2d Cir. 1965), has held that the federal courts have no jurisdiction to hear quiet title suits to attack federal tax liens.

95 See 2 MCCARTY, IOWA PLEADING § 1440 (2d ed. 1953).

Both waiver and estoppel of certain defects in procedure may be present when the objector has signed a petition for the improvement, as the petition may expressly waive certain statutory limitations such as the rule that assessments may not exceed twenty-five percent of the value of the assssed property.[96] The petition or request for work may also ban argument that the work was unnecessary, its cost excessive in relation to benefit, or that the petitioner expected some different work to be done.[97] The Court may insist that reliance on the written waiver be shown,[98] and has indicated that objections not waived thereby may be asserted.[99] A petition signed by one of several tenants-in-common was held in one case not to be a waiver as to any of the property of which he was co-owner.[100]

Code section 391.19 permits the city to provide, in notice of hearing on a proposed resolution of necessity, "that unless property owners at the time of the final consideration of such resolution have on file with the clerk objections to the amount of the proposed assessment, they shall be deemed to have waived all objections thereto." The Court has held that despite such notice, and the failure to object, subsequent objections can be raised to certain defects.[101] Though no such notice is given, a failure to raise timely objections to defects before or at the appropriate hearing may act as waiver,[102] as will a failure to appeal to district court if raised objections are overruled.[103] And raising some objections may waive others.[104] But failure to object is not a

[96] Anderson-Deering Co. v. City of Fort Dodge, 201 Iowa 1129, 205 N.W. 984 (1926); *In re* Paving Floyd Park Addition, 197 Iowa 915, 196 N.W. 597, 197 Iowa 922, 196 N.W. 60 (1924); Bailey v. City of Des Moines, 158 Iowa 747, 138 N.W. 853 (1912). It is essential to show that the waiver was present when petitioner signed the petition. Guenther v. City of Des Moines, 197 Iowa 414, 197 N.W. 326 (1924). In Seymour v. City of Ames, 218 Iowa 615, 255 N.W. 874 (1934), the Court observed that plaintiff had not petitioned for the improvement, and that no other conduct equivalent to estoppel was shown.

[97] North View Land Co. v. City of Cedar Rapids, 185 Iowa 1032, 169 N.W. 644 (1919); Clifton Land Co. v. City of Des Moines, 144 Iowa 625, 123 N.W. 340 (1909), as interpreted in Northern Light Lodge v. Town of Monona, 180 Iowa 62, 161 N.W. 78 (1917); Preston v. City of Cedar Rapids, 95 Iowa 71, 63 N.W. 577 (1895); City of Burlington v. Gilbert, 31 Iowa 356 (1871) (change in grade resulted in deeper cut than petitioner expected, because he relied on an erroneous map in city engineer's office; held not to be fraud on city's part nor mutual mistake).

[98] Bailey v. City of Des Moines, 158 Iowa 747, 138 N.W. 853 (1912). Other cases in which reliance on petitioner's conduct was deemed necessary, and not shown to be present, are: Kelleher v. Joint Drainage Dist., 216 Iowa 348, 249 N.W. 401 (1933); Monaghan v. Vanatta, 144 Iowa 119, 122 N.W. 610 (1909); Osburn v. City of Lyons, 104 Iowa 160, 73 N.W. 650 (1897).

[99] Beim v. Carlson, 209 Iowa 1001, 227 N.W. 421 (1930). See North View Land Co. v. City of Cedar Rapids, 185 Iowa 1032, 169 N.W. 644 (1919).

[100] *In re* Secondary Road Dist., 213 Iowa 988, 238 N.W. 66 (1932).

[101] Moss v. Town of Hull, 249 Iowa 1178, 91 N.W.2d 599 (1958) (cost exceeds estimate, by more than 10%, or assessment exceeds benefits or 25% of actual value); Smith, Lichty & Hillman v. City of Mason City, 210 Iowa 700, 231 N.W. 370 (1930) (5-4; assessment exceeds 25%, but not valuation).

[102] Anderson-Deering Co. v. City of Fort Dodge, 201 Iowa 1129, 205 N.W. 984 (1926); First Nat'l Bank v. Kelly, 159 Iowa 312, 139 N.W. 564 (1913); Owens v. City of Marion, 127 Iowa 469, 103 N.W. 381 (1905).

[103] Wilcox v. Marshall County, 229 Iowa 865, 294 N.W. 907 (1940); Clifton Land Co. v. City of Des Moines, 144 Iowa 625, 123 N.W. 340 (1909). In Guenther v. City of Des Moines, 197 Iowa 414, 197 N.W. 326 (1924), the City was barred from making this argument because it had not raised it in the district court.

[104] Sunset Golf Club v. City of Sioux City, 242 Iowa 739, 46 N.W.2d 548 (1951); Gilcrest & Co. v. City of Des Moines, 157 Iowa 525, 137 N.W. 1072 (1912). See Ashman v. City of Des Moines, 209 Iowa 1247, 228 N.W. 316, 229 N.W. 907 (1930).

waiver of "jurisdictional" objections, nor is it a waiver if fraud or excessive costs are involved, or if the defects are unknown to objector and he cannot be charged with constructive knowledge.[105] Appearing at the hearing, without filing objections, may also waive them.[106]

Against complaints of defective workmanship or deviation from plans and specifications waiver or estoppel may be asserted, based on the claim that objectors saw what was being done and failed to complain at the time. This has sometimes succeeded,[107] but more often fails because the objector is found not to be aware of the defect or the court concluds that he had no duty to complain.[108] If he has a duty, it must be because of his interest as owner of property subject to assessment. Is this enough?

Another frequently used basis for estoppel or waiver is payment of the assessment, or of one or more installments thereof. Usually the Court has treated payment as waiver,[109] but it has not done so consistently.[110] Other

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[105] Defects or invalid procedures were unknown in: Kelleher v. Joint Drainage Dist., 216 Iowa 348, 249 N.W. 401 (1933); Atkinson v. City of Webster City, 177 Iowa 659, 158 N.W. 473 (1916); Gilcrest & Co. v. City of Des Moines, *supra*, note 104; Wingert v. Stouffer & Ford, 134 Iowa 97, 108 N.W. 1035, 111 N.W. 432 (1907); Gill v. Patton, 118 Iowa 88, 91 N.W. 904 (1902); Arnold v. City of Fort Dodge, 111 Iowa 152, 82 N.W. 495 (1900); Osburn v. City of Lyons, 104 Iowa 160, 73 N.W. 650 (1897). Reference to jurisdictional defects or fraud is made in: *In re* Secondary Road Dist., 213 Iowa 988, 238 N.W. 66 (1932); Dashner v. Woods Bros. Constr. Co., 205 Iowa 64, 217 N.W. 464 (1928); Anderson-Deering Co. v. City of Fort Dodge, 201 Iowa 1129, 205 N.W. 984 (1926); *In re* Paving Floyd Park Addition, 197 Iowa 915, 196 N.W. 597 (1924); Gilcrest & Co. v. City of Des Moines, *supra*, (holds jurisdictional error may be waived); Owens v. City of Marion, 127 Iowa 469, 103 N.W. 381 (1905); Carter v. Cemansky, 126 Iowa 506, 102 N.W. 438 (1905); Gallaher v. Garland, 126 Iowa 206, 101 N.W. 867 (1904); Smith v. Peterson, 123 Iowa 672, 99 N.W. 552 (1904); Coggeshall v. City of Des Moines, 78 Iowa 235, 41 N.W. 617, 42 N.W. 650 (1889); Starr v. City of Burlington, 45 Iowa 87 (1876). In First Nat'l Bank v. Kelly, 159 Iowa 312, 139 N.W. 564 (1913), objections that other objectors had successfully contended were jurisdictional were held waived, in part, by the failure of these objectors to object to the council. This may reflect a shift in the Court's attitude on what is a jurisdictional objection.

[106] Ross v. Board of Supervisors, 128 Iowa 427, 104 N.W. 506 (1905). But appearance was not waiver of jurisdictional defects. *In re* Secondary Road Dist., 213 Iowa 988, 238 N.W. 66 (1932); Chicago & N.W. Ry. v. Sedgwick, 203 Iowa 726, 213 N.W. 435 (1927).

[107] Dashner v. Woods Bros. Constr. Co., 205 Iowa 64, 217 N.W. 464 (1928); Shelby v. City of Burlington, 125 Iowa 343, 101 N.W. 101 (1904); Aronld v. City of Fort Dodge, 111 Iowa 152, 82 N.W. 495 (1900).

[108] *In re* Secondary Road Dist., 213 Iowa 988, 238 N.W. 66 (1932); Lade v. Board of Supervisors, 183 Iowa 1026, 166 N.W. 586 (1918); Atkinson v. City of Webster City, 177 Iowa 659, 158 N.W. 473 (1916); Monaghan v. Vanatta, 144 Iowa 119, 122 N.W. 610 (1909); Wingert v. Snouffer & Ford, 134 Iowa 97, 108 N.W. 1035, 111 N.W. 432 (1907); Gallaher v. Garland, 126 Iowa 206, 101 N.W. 867 (1904); City of Muscatine v. Chicago, R.I. & P. Ry., 88 Iowa 291, 55 N.W. 100 (1893); Coggeshall v. City of Des Moines, 78 Iowa 235, 41 N.W. 617, 42 N.W. 650 (1889); Robinson v. City of Burlington, 50 Iowa 240 (1878); Hager v. City of Burlington, 42 Iowa 661 (1876).

[109] Wilcox v. Marshall County, 229 Iowa 865, 294 N.W. 907 (1940); Hawkeye Life Ins. Co. v. Munn, 223 Iowa 302, 272 N.W. 85 (1937); First Nat'l Bank v. Kelly, 159 Iowa 312, 139 N.W. 564 (1913) (even though paid under protest); Thompson v. Mitchell, 133 Iowa 527, 110 N.W. 901 (1907) (statute under which he paid was unconstitutional; however, the Legislature had corrected the defect and had authorized reassessment); Robinson v. City of Burlington, 50 Iowa 240 (1878) (where work was done after first installment paid but before later ones were paid, estoppel to recover the later installments but not the first one).

[110] Lade v. Board of Supervisors, 183 Iowa 1026, 166 N.W. 586 (1918) (landowners who deposited assessment with county treasurer under agreement it would be held subject to litigation over objections not estopped); Carter v. Cemansky, 126 Iowa 306, 102 N.W. 438 (1905) (jurisdictional; Court blandly observes that even

basis for estoppel or waiver have been asserted, some successfully,[111] and some not.[112]

C. Creditors

As indicated above, a creditor, as such, has no standing to appeal from council or board action to test whether irregularities or defects occurred during procedure or performance in connection with special assessments.[113] However, he may be able to obtain some judicial review of procedures and actions taken. If the council or board will not take steps which it should to enable a creditor to be paid for his work or on his certificate or bond, mandamus to compel it to act may lead to review of procedure or performance.[114] Several older cases which considered aspects of procedure were direct suits by contractor or certificate holder against a property owner.[115] As property owners are not now personally liable, this type of action should be little used.[116]

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if plaintiff or his predecessors in title had paid they would not be estopped); Robinson v. City of Burlington, *supra*, note 109; Tallant v. City of Burlington, 39 Iowa 543 (1874) (one installment paid under protest).

[111] Property owners actively acquiesced in formation of drainage district and did not challenge legality of its organization until twenty years later. Lincoln v. Moore, 196 Iowa 152, 194 N.W. 299 (1923). County, property owner, is estopped by receipt of benefit of work from objecting that contract therefor was invlaid because it required most of laborers to be local. Edwards & Walsh Constr. Co. v. Jasper County, 117 Iowa 365, 90 N.W. 1006 (1902). Objector purchased property from someone barred or estopped from objecting. Farwell v. Des Moines Brick Mfg. Co., 97 Iowa 286, 66 N.W. 176 (1896); Ford v. Town of North Des Moines, 80 Iowa 626, 45 N.W. 1031 (1890). IOWA CODE § 408.15 (1962) provides that the legality of bonds issued under chapter 408 may be questioned only by action brought within three month from the time they are ordered issued by the proper authority. See Waller v. Pritchard, 201 Iowa 1364, 202 N.W. 770 (1926); Plagmann v. City of Davenport, 181 Iowa 1212, 165 N.W. 393 (1917).

[112] Objector, who became city solicitor after adoption of the resolution of necessity, and as such approved the forms of contract used, not estopped to assert violation of the 25% rule. Bailey v. City of Des Moines, 158 Iowa 747, 138 N.W. 853 (1912). Objector purchasing property after assessment, and taking a deed which recited conveyance was subject "to all incumbrances of record", was permitted to quiet title against purchaser at tax sale; he took subject only to *valid* incumbrances of record. Carter v. Cemansky, 126 Iowa 506, 102 N.W. 438 (1905). Sale of land, under agreement by vendor to pay assessment, was not bar to vendor's appeal. Christenson v. Board of Supervisors, 174 Iowa 724, 156 N.W. 810 (1916).

[113] See note 67, *supra*. See also First Nat'l Bank v. Webster County, 204 Iowa 720, 216 N.W. 8 (1927); Western Asphalt Paving Corp. v. City of Marshalltown, 203 Iowa 1324, 206 N.W. 956, 214 N.W. 687 (1927).

[114] Snouffer & Ford v. City of Tipton, 150 Iowa 73, 129 N.W. 345 (1911); Ford v. City of Manchester, 136 Iowa 213, 113 N.W. 846 (1907); State *ex rel.* Hiatt and Harbin v. City of Keokuk, 9 Iowa 438 (1859). See also Deming v. Board of Supervisors, 237 Iowa 11, 21 N.W.2d 19, 162 A.L.R. 391 (1945).

[115] Snouffer & Ford v. Grove, 139 Iowa 466, 116 N.W. 1056 (1908) (quantum meruit); McManus v. Hornaday, 99 Iowa 507, 68 N.W. 812 (1896) (suit on paving assessment certificate; jurisdictional defects found); Tuttle v. Polk & Hubbel, 92 Iowa 433, 60 N.W. 733 (1894). See Talcott Bros. v. Noel, 107 Iowa 470, 78 N.W. 39 (1899). See also City of Muscatine v. Chicago, R.I. & P. Ry., 79 Iowa 645, 44 N.W. 909 (1890).

[116] See note 9, *supra*.