Drake Law Review

Vol. No. 12 DECEMBER, 1962 No. 1

SPECIAL ASSESSMENTS FOR PUBLIC IMPROVEMENTS IN IOWA:

PART I—FROM BIRTH OF THE IDEA TO SOLICITING BIDS

*Edward R. Hayes**

In one small Iowa city a number of the streets have been torn up for more than a year, residents have found use of these streets difficult if not impossible at times and see no prospect for improvement soon, and the contractor who started work on these streets and paved others of the city's streets is wondering if he will ever be paid for his work. This happened because a lawyer uncovered a wrinkle in the state's street improvement laws which many, including the Attorney General's office, thought did not exist.[1]

Although municipalities have been financing street, sewer and sidewalk construction through special assessments for years, this is an area which many lawyers, representing both affected taxpayers and affected municipalities, approach with some trepidation. For each city there are alternative statutes from which to choose, offering sometimes quite different procedures. The Iowa Reports are replete with cases in this area. Special assessments may be used only where statutory authority exists,[2] and any exceeding of authority or incorrect following of statutory procedure presents problems for the affected property owner, the local body authorizing the improvement

* Professor of Law, Drake University Law School.

[1] In Town of Mechanicsville v. State Appeal Board, 111 N.W.2d 317 (Iowa 1961), the State Appeal Board was held to have jurisdiction to review on the merits a council's decision to make street improvements and to halt improvements which the Board thought the community should not undertake, under the circumstances. The Attorney General, in an opinion dated May 10, 1961, had held that the Appeal Board had no jurisdiction to do this. A newspaper story headlined "Bitter Feud over Town's Mud Streets", appeared in the Des Moines Sunday Register, Oct. 7, 1962, p. 1-L, col. 1.

[2] City of Fairfield v. Ratcliff, 20 Iowa 396 (1866) (express authorization in city charter to improve sidewalks and levy annual tax therefor not basis to imply power to use special assessments to improve sidewalks).

or the action, the contractor building the improvement, and the lenders who purchase bonds or improvement certificates.[3] To produce bonds than can readily be sold requires careful attention and adherence to many statutory requirements, usually with advance consultation with the attorneys whose opinion as to the validity of the issue will be required.

It is the purpose of this paper to explore the subject of special assessments in Iowa, to consider in what situations they may be used in making local improvements, the procedure to be followed in deciding to make the improvement, in undertaking it, in ascertaining the costs to be assessed, in making and levying the assessment, in creating a lien, in reviewing the various decisions and acts of the public authorities and the contractors, and, where improprieties have occurred, to consider what opportunities are available to correct them or to overcome their effects. In addition, the distribution of the tax liability between various parties interested in property subject thereto, such as landlord and tenant, or mortgagor and mortgagee, will be discussed. Because of the wide scope of this subject, it is necessary to present this discussion in several parts, and for convenience principal consideration is given to the use of special assessments in connection with street, sewer and sidewalk improvements although other types of improvements or activities are similarly financed.[4]

"[A special assessment] is a special imposition or liability arising out of the benefit conferred upon the property assessed."[5] Special assessments are

---

[3] In 1961 Des Moines initiated a "three-year" program of street paving, on an area basis, that would involve some 70 miles of streets in 7 areas. Apparently one or more procedural errors occurred in the handling of the second area, before letting of contracts. As a consequence, no contracts were let and all plans for 1961 paving under this scheme, except in the first area, were abandoned. The apparent errors caused expense to the city and substantial loss of time to the paving program. Des Moines Register, May 16, 1961, p. 1, col. 1.

[4] Many provisions of the IOWA CODE (1962) deal with other types of improvement projects which must or may be financed on a special assessment or equivalent basis. These include: §§ 389.17-.18 (street lighting); c. 311 (secondary road districts), 357 (benefited water districts), 357A (benefited fire districts), 358 (sanitary districts), 390 (parking districts), 395 (flood control systems), 401 (water main extension), 455-67 (drainage districts), 467A-467C (soil conservation and flood control districts). In addition, for reasons of health, safety, or taxation, there are certain situations in which the owner of property may be ordered to act or to have the government or someone else act at his expense, and the cost collected from him in a manner similar to collection of special assessments. These include: c. 100 (fire hazards), 113 (partition fences), 317 (weeds), 318 (highway hedges), 409 (subdivision plats), 433 (telephone and telegraph line maps); and §§ 135.34, 137.12-.16 (health nuisances), 266.8-.23 (diseased bees), 267.17 (crop pests), and 368.33 (snow removal). IOWA CODE § 162.17 (1962), dealing with examination of alleged diseased registered stallions or jacks, provides that the cost shall be collected from the owner if the animal is found to be diseased. § 170.47, relating to inspection of hotels, restaurants or food establishments, as the result of complaints, provides that the cost of inspections is to be collected from the establishment if the complaint is justified, and from the complainer if it is not. Neither statute indicates how collection is to be made, and neither brings into play the usual machinery of tax assessment that is invoked in special assessments. § 82.29, providing for the governmental making of maps of coal mines if not done by the operators, does not invoke special assessment proceedures for the cost, as c. 433, above, does, but calls for the country to sue for the expenses. The duty to map, in the case of gypsum mines, is apparently not followed by governmental mapping in case of breach, but by invoking of criminal penalties. IOWA CODE c. 83 (1962).

[5] Chief Justice Lowe, in City of Fairfield v. Ratcliff, 20 Iowa 396, 398 (1866). In Warren v. Henly, 31 Iowa 31, 40, 42 (1871), Justice Beck suggested that a special

taxes for some purposes,[6] but not necessarily for others.[7] Constitutional provisions relating to taxation and to debt limits are not applicable, although those relating to due process and to uniformity of laws of general applicability must be considered.[8] With minor exceptions no statute is of general application to all special assessment situations.[9] There is no uniform procedure to be followed for all types of projects, and in the principal area of discussion various alternative procedural steps are available for a particular type of project.

I—For What Projects May Special Assessments Be Used?

The ability to provide for public improvements without increasing local property tax millage rates (for which there are statutory ceilings),[10] without raising debt limit problems except to the extent that the municipality assumes part of the cost,[11] and often without consent of affected property owners,[12]

---

assessment was but one form of general taxation and was independent of special benefit. His theory has not prevailed in this state. *In re* Trust of Shurtz, 242 Iowa 448, 46 N.W.2d 539 (1951); Chicago, R.I. & P. Ry. v. City of Ottumwa, 112 Iowa 300, 83 N.W. 1074, 51 L.R.A. 763 (1900); Trustees of Griswold College v. City of Davenport, 65 Iowa 633, 635, 22 N.W. 904, 906 (1885); City of Sioux City v. Independent School Dist., 55 Iowa 150, 7 N.W. 588 (1880); Robinson v. City of Burlington, 50 Iowa 240 (1878). It is usually rejected elsewhere. Comment, 45 MINN. L. REV. 182, 183 (1960); see 2 ANTIEAU, MUNICIPAL CORPORATION LAW § 14.00 (1961); 14 McQUILLAN, MUNICIPAL CORPORATIONS § 38.01 (1950).

[6] Wallace v. Gilmore, 216 Iowa 1070, 250 Iowa 105 (1933) (such tax that when delinquent must be listed for tax sale, or lien is divested); City of Muscatine v. Chicago, R.I. & P. Ry., 79 Iowa 645, 44 N.W. 909 (1890); Casady v. Hammer, 62 Iowa 359, 17 N.W. 588 (1883) ("taxes" which tenant must pay, per lease). See *In re* Trust of Shurtz, 242 Iowa 448, 46 N.W.2d 559 (1951); Chicago, R.I. & P. Ry. v. City of Ottumwa, 112 Iowa 300, 83 N.W. 1074, 51 L.R.A. 763 (1900).

[7] Cornelius v. Kromminga, 179 Iowa 712, 161 N.W. 625 (1917) (not "lien or encumbrance" in contract to convey, where ordinary tax would be); Munn v. Board of Supervisors, 161 Iowa 26, 141 N.W. 711 (1913) (property owner entitled to vote for only one member of board not unconstitutionally taxed without representation); Allen v. City of Davenport, 107 Iowa 90, 77 N.W. 532 (1898) (not "taxation for any city purpose", so statutory exemption of agricultural property from municipal taxation inapplicable); Farwell v. Des Moines Brick Mfg. Co., 97 Iowa 286, 66 N.W. 176, 35 L.R.A. 63 (1896) (same); City of Sioux City v. Independent School Dist., 55 Iowa 150, 7 N.W. 488 (1880) (exemption from taxation for school property inapplicable); Ankeny v. Henningsen, 54 Iowa 29, 6 N.W. 65 (1880) (method for collecting delinquent taxes). See note 4, *supra;* 2 ANTIEAU, MUNICIPAL CORPORATION LAW § 14.00 (1961).

It should be noted that some so-called "special taxes" are general taxes rather than special assessments, and may involve different procedures for levy and review. Dubuque & S.C. R.R. v. Mitchell, 152 Iowa 187, 131 N.W. 25 (1911) (special tax for light and water purposes levied on all property in city).

[8] U.S. CONST. amend. XIV, § 1; IOWA CONST. art. III, § 30, and art. IX, § 3 (1857). The provisions of article 30 relating to assessing and collecting taxes are inapplicable, but the provisions requiring laws of a general nature to be made general and of uniform operation throughout the state do apply. For examples of cases on the effect of the debt limit, see: Grunewald v. City of Cedar Rapids, 118 Iowa 222, 91 N.W. 1059 (1902); Allen v. City of Davenport, 107 Iowa 90, 77 N.W. 532 (1898).

[9] IOWA CODE c. 618 (1962) deals with publication and posting of notices in general, and would apply to notice requirements of special assessment statutes unless inconsistent with the particular statute.

[10] IOWA CODE §§ 404.2, 404.6-.12 (1962).

[11] Where a project benefits both adjacent property owners and the community as a whole, it is not unreasonable for part of the cost to be borne by the municipality and paid for from funds derived from general taxation or from allocations

makes use of special assessment financing attractive to a municipality's governing body. Overindulgence in its use is to some extent curbed by fear of voter reaction, by procedural complexities and uncertainties inherent in the various alternative statutory methods for certain types of projects and by the limited types of projects for which special assessments may be used. (Primarily, special assessments can be used for work on streets and highways, sidewalks, sewers and water mains, drainage districts, and certain other projects mainly involving health and safety.)

Some years ago portions of primary highways in rural areas were built through special assessments.[13] Today, except for certain rural secondary road districts,[14] control of hedges along highways,[15] and some highway drainage projects,[16] street and highway improvement using special assessments is limited to work within cities and towns. Any city or town acquiring land necessary for an improvement utilizes the provisions of Iowa Code Chapter 389, which incorporates by reference certain provisions of Chapter 391. Any city or town improving streets or sewers may use either the provisions of Chapter 391, or those of Chapter 391A. Chapter 391A offers two alternative procedures which may be followed, one of which is quite similar to that provided in Chapter 391, and the other quite similar to that permitted the City of Des Moines in Chapter 417. Chapter 417 is by its terms limited to cities over 125,000 in population, which at the present means Des Moines. Chapter 417 procedure is quite different from that provided in Chapter 391. However, the Code does not in literal language prevent Des Moines from utilizing either Chapter 391 or 391A, and apparently when that city acquires land under Chapter 389, it must follow applicable portions of 391. Procedural variations available to the few special charter cities remaining in Iowa can be found in Chapter 420.[17]

---

to the city of its share of road use tax funds under IOWA CODE c. 312 (1962). Use of special assessment financing is not mandatory for some types of public improvements. See IOWA CODE §§ 389.3, 391.38-.43 (1958); Carey v. City of Fort Dodge, 133 Iowa 666, 111 N.W. 6 (1907) (although ordinance provided for assessing costs of paving intersections and parts of streets abutting city and government property to other owners of property abutting the entire project, city could pay these costs out of funds obtained by general taxation; McAllen v. Hamblin, 129 Iowa 329, 105 N.W. 593, 5 L.R.A. N.S. 434 (1906). If the city elects to use its own funds, it cannot plan to reimburse itself through special assessments, and thereby avoid debt limit problems. Allen v. City of Davenport, 107 Iowa 90, 77 N.W. 532 (1898).

[12] Objections by affected property owners may serve to increase the number of the council necessary to approve the project, rather than to prevent approval. *E.g.*, IOWA CODE §§ 391.23, 391A.14 (1962). But objection by a substantial number of affected owners may induce the council to abandon or modify the proposed project. See Wise v. Board of Supervisors, 242 Iowa 870, 48 N.W.2d 247 (1951).

[13] IOWA CODE § 4697 (1924), repealed by Iowa Laws c. 101 (1927). Refund of all special assessments levied for this purpose was authorized by § 22 of c. 101. Two cases involving these assessments are: Paul v. Marshall County, 204 Iowa 1114, 216 N.W. 736 (1927); and Chicago, M. & St. P. Ry. v. Board of Supervisors, 199 Iowa 457, 202 N.W. 370 (1925).

[14] IOWA CODE c. 311 (1962); *In re* Secondary Road Dist. No. 11, 213 Iowa 988, 240 N.W. 910 (1932).

[15] IOWA CODE c. 318 (1962).

[16] *Id.* c. 460.

[17] Although IOWA CODE § 389.1 (1962), a part of the chapter on streets and public grounds, gives cities and towns power to establish and improve streets, and §§ 391.2 and 391A.2 also contain grants of power to improve streets and apparently duplicate § 389.1 in part, no grant of power is set out in c. 417.

Street improvements for which special assessments may be used include opening a new street,[18] or extending an old one,[19] surfacing,[20] resurfacing,[21] adding curb and gutter separately or as part of a surfacing project,[22] repair work,[23] oiling,[24] boulevarding,[25] and providing connections for public utilities.[26] The only case involving street sprinkling permitted a city to assume the entire cost of the work, apparently over objections that it should have been specially assessed.[27] Special assessments for street work may be used even though the work does not abut on any assessable property.[28]

---

[18] IOWA CODE § 389.1 (1962); Franquemont v. Munn, 208 Iowa 528, 224 N.W. 39 (1929); Royal v. City of Des Moines, 195 Iowa 23, 182 N.W. 188, 191 N.W. 377 (1923).

[19] IOWA CODE § 389.1 (1958); Hauge v. City of Des Moines, 197 Iowa 907, 196 N.W. 68 (1924) (objectors relieved of assessment on basis of no benefit to them, where they lived several miles from the extension, though within the area established by the council as the benefitted district); Peterson v. Town of Stratford, 190 Iowa 45, 180 N.W. 13 (1920) (wrong procedure followed, so assessment levy enjoined); Runner, Wickersham & Wycoff v. City of Keokuk, 11 Iowa 543 (1861); State *ex rel.* Hiatt and Harbin v. City of Keokuk, 9 Iowa 438 (1859).

[20] IOWA CODE §§ 389.1, 391.2, 391A.1-.2 (1962).

[21] Noble v. City of Des Moines, 191 Iowa 12, 174 N.W. 44 (1921); Coates v. City of Dubuque, 68 Iowa 550, 27 N.W. 750 (1886); Koons v. Lucas, 52 Iowa 177, 3 N.W. 84 (1879). In City of Burlington v. Palmer, 67 Iowa 681, 25 N.W. 877 (1885), a resurfacing became necessary when the street was torn up to construct a storm sewer. The Court held the surfacing was properly part of the sewer project and therefore should not be done solely at the cost of the property owners adjacent to the resurfaced street.

[22] IOWA CODE §§ 391.2, 391A.1(4)(c) (1962); Durst v. City of Des Moines, 164 Iowa 82, 145 N.W. 528 (1914) (curb and gutter separate project from later paving); Bailey v. City of Des Moines, 158 Iowa 747, 138 N.W. 853 (1912) (not separate project); Higman v. City of Sioux City, 129 Iowa 291, 105 N.W. 524 (1906) (separate project).

[23] IOWA CODE §§ 389.1, 391.2, 391A.2 (1958). At one time cities did not have the power to use special assessments for repair work, and one assessment was upheld on the basis that the project involved reconstruction, rather than repair. Koons v. Lucas, 52 Iowa 177, 3 N.W. 84 (1879). Later, after the law was changed, an assessment was unsuccessfully attacked on the ground that though the project was begun as "repair", it was actually "resurfacing"—the Court thought that, even if it was "resurfacing", the assessment was proper. Noble v. City of Des Moines, 191 Iowa 12, 174 N.W. 44 (1921).

[24] IOWA CODE §§ 391.1(7), 391.2, 391A.1(4)(c), 391A.1(11) (1962). In Jackson v. City of Creston, 206 Iowa 244, 220 N.W. 92 (1928), a project which the council treated as "oiling" was held not to be that, but "resurfacing", and therefore to require some proceedural steps which had been omitted.

[25] IOWA CODE § 391.2 (1962). In Downing v. City of Des Moines, 124 Iowa 289, 99 N.W. 1066 (1904), the city, having constructed outer curbs on a street with a twenty-foot center strip which was used as parking, at the expense of abutting property owners, was able to order the parking to be curbed, also at their expense. The Court relied heavily on the power of the city "to improve any street by . . . parking." This power is presently granted under § 391.2, but not specifically granted in c. 391A or 417.

[26] IOWA CODE §§ 391.8-.10, 391A.4; see § 417.8 (1962); Seymour v. City of Ames, 218 Iowa 615, 255 N.W. 874 (1934) (limit on number of connections that can be required for one property); Toben v. Town of Manson, 192 Iowa 1127, 185 N.W. 984 (1922).

[27] McAllen v. Hamblin, 129 Iowa 329, 105 N.W. 593, 5 L.R.A. N.S. 434 (1906). See IOWA CODE § 420.252 (1962), relating to special charter cities.

[28] Wolf v. City of Keokuk, 48 Iowa 129 (1878) (statute authorized assessment on lots fronting upon or lying along the street, but only the intersection was being paved; dissent argues no lots front upon intersection). In Carey v. City of Fort Dodge, 133 Iowa 666, 111 N.W. 6 (1907), an ordinance, authorizing assessment of all property owners abutting the improvement not only for the cost of the part abutting their property but also the cost of paving intersections and spaces in front of city and government property, was held not to be mandatory.

Although a sidewalk is by definition a part of the street, at one time the only provisions of the Iowa Code which were deemed to apply to sidewalk construction were those now found in a separate part of Chapter 389.[29] For some time Chapters 391A and 417 have been applicable, and in 1959 the Legislature repealed the applicable provisions of Chapter 389 and made Chapter 391 applicable. However, the 1961 Legislature reenacted the former provisions of Chapter 389.[30] Thus, there are four statutory methods for sidewalk construction, of which only one may be applicable to special charter cities. Because Chapter 389 did not and does not specify all procedures necessary for sidewalk work using special assessments, it is common for those cities relying on this chapter only to adopt an ordinance detailing the additional necessary procedure.[31]

Improvements to sidewalks may include new construction, reconstruction,[32] so-called "temporary" construction,[33] and, under some circumstances,

---

IOWA CODE § 420.252 (1962), applicable only to special charter cities, would require such costs to be assumed by the city. § 391.38, somewhat confusingly worded, may limit how much of such costs can be assessed to other property owners.

More commonly, assessable property abuts on the project, but in addition property which does not abut but is within a certain distance may be assessable. This will be discussed in a later article. See IOWA CODE § 391.39 (1962); *In re* Petition of City of Des Moines, 240 Iowa 64, 35 N.W.2d 571 (1949); Paul v. Marshall County, 204 Iowa 1114, 216 N.W. 736 (1927); Walter v. City of Ida Grove, 203 Iowa 1068, 213 N.W. 935 (1927); Brown v. City of Creston, 189 Iowa 1111, 179 N.W. 617 (1920).

[29] IOWA CODE §§ 389.31-.38 (1962). § 389.31 states that cities and towns have power "to provide for the construction, reconstruction, and repair of permanent sidewalks upon any street . . . and to assess the cost thereof on the lots or parcels of land in front of which the same shall be constructed." See also IOWA CODE § 321.1(51) (1958). A sidewalk is "a part of the street exclusively reserved for pedestrians, and constructed somewhat differently from other portions of the street, made use of by animals and vehicles generally. It is paved differently, so that the public may be better served, by maintaining the two portions of the way separately. Whatever may be the difference, the sidewalk constitutes a part of the street." Central Life Assur. Soc'y v. City of Des Moines, 185 Iowa 573, 576, 171 N.W. 31, 32 (1919).

[30] Iowa Laws c. 286 (1959) repealed §§ 389.31-.36, leaving only power to construct temporary sidewalks and to repair in IOWA CODE c. 389, (1958). This act also added power to provide for sidewalks to c. 391. The sections of c. 389 that had been repealed were reenacted, in Iowa Laws c. 206 (1961). There are no provisions relating to sidewalks in c. 420, applicable only to special charter cities. See Northern Light Lodge v. Town of Monona, 180 Iowa 62, 161 N.W. 78, L.R.A. 1918A, 150 (1917), holding an older version of c. 391 inapplicable.

[31] See Martin v. City of Oskaloosa, 126 Iowa 680, 102 N.W. 529 (1905), involving use of ordinances for street improvements. At an early time, a city charter giving power to "regulate and improve all streets, alleys, sidewalks, drains and sewers" was claimed to support an ordinance for sidewalk improvements by special assessment. The Court refused to imply this power, on the thought it was unnecessary since the charter expressly authorized the city to levy an annual tax for this purpose. Perhaps the power to use special assessments in street improvement would have been implied. City of Fairfield v. Ratcliff, 20 Iowa 396 (1866).

[32] IOWA CODE §§ 389.31, 391.2(1), 391A.2 (1962).

[33] IOWA CODE § 389.37 (1962); Monroe v. Pearson, 176 Iowa 283, 157 N.W. 849 (1916); Converse v. Town of Deep River, 139 Iowa 732, 117 N.W. 1078 (1908); Hartrick v. Town of Farmington, 108 Iowa 31, 78 N.W. 794 (1899); see IOWA CODE § 391A.3 (1962). The cases seem to regard a sidewalk as "temporary" when the permanent grade of the street has not yet been established, or the street has not been brought to an established grade. At first a city had no power to compel building of a temporary sidewalk except at the natural grade, but § 389.37 does permit regulation of grade.

A property owner's argument that a plank sidewalk was but a temporary improvement, unlike "paving", and that there was no authority for such work,

repairs.[34] Apparently a sidewalk assessment can be made only upon property abutting the work.[35] In addition, costs of removal of ice and snow are assessable.[36]

II—Pre-Assessment Procedure

A. Initiating Consideration of a Proposed Improvement

1. By petition of affected property owners, or on motion of the appropriate governmental body?

Before a proposed public improvement is considered by the governmental body responsible for ordering its construction, its need or desirability must come to the attention of that body. At times this must be done in a formal manner prescribed by statute—usually by a "petition" by some or all of the property owners who would be affected by or assessed for the cost of the proposed work. When are petitions required? What should they contain? Who should sign? May signers withdraw their signature? With whom should petitions be filed and by whom should their sufficiency be determined? What additional documents must be filed with a petition? When may objections to defects in petitions be raised? What should be shown in the minutes of the governing body concerning these petitions?

Where an improvement may be constructed and assessment therefor levied only after establishment of an improvement district and order for the work by a county board of supervisors, ordinarily a petition for that action must first be filed.[37] Petitions are required for similar action by other bodies with quite limited powers.[38] But where the body ordering action is a city or

---

was rejected, as not necessarily temporary work, in Burlington & M.R. R.R. v. Spearman, 12 Iowa 112 (1861).

[34] IOWA CODE §§ 389.31, 391.2(1) and 391A.1-.2 (1962) provide for repairs in the same terms as for construction. § 389.38 also permits repairs to be made without notice to the property owner, and subsequently be assessed therefor. Under c. 391A, notice of proposed repairs is necessary. It is not clear whether c. 391 requires notice prior to repair, although that chapter does require notice before reconstruction, and defines repair to include reconstruction. IOWA CODE §§ 391.1(2), 391.18 (1962). The only reported case dealing with the notice problem is Farraher v. City of Keokuk, 111 Iowa 310, 82 N.W. 773 (1900). An ordinance authorized the city engineer to repair sidewalks when and as he deemed necessary, the cost to be assessed. The work involved in this case was held to be reconstruction rather than repair, and the assessment invalidated because the council did not follow the procedure now directed in c. 391, which called for notice and approval of the specific project by at least 75% of the council unless a sufficient number of affected property owners petitioned for the work.

[35] IOWA CODE § 391.39 (1962) states that "such assessment for permanent sidewalk improvements shall be confined to privately owned property in front of which same shall be constructed." There is no similar limitation in either c. 389 or 391A. In Mason v. City of Onawa, 199 Iowa 430, 200 N.W. 306 (1925), construction of sidewalks from their intersection to the adjacent curb was held to be sidewalk extension, or crosswalk, not made part of a street paving and thus not assessable as such; as the city had not followed the provisions of its sidewalk ordinance, neither could the assessment be sustained as one for construction of a sidewalk.

[36] IOWA CODE § 368.33 (1962); see *Injuries from Ice and Snow on Sidewalks*, 8 DRAKE L. REV. 149, 153 (1959).

[37] IOWA CODE §§ 311.1, 357.1, 357A.1, 358.2, 455.7, 457.1, 458.1, 459.1-.2, 461.1-.2, and c. 466 (1962).

[38] *Id.* §§ 401.2 (water main extensions, handled by local board of waterworks trustees, or by city council if no board), 467A.5 (soil conservation districts, created by state soil conservation committee) (1962). In addition, fence viewers deal with controversies over partition fences only upon written request of one of the landowners, § 113.3; a board of supervisors may sell limestone from the county

town council, formal petitions usually are not necessary, though if the council acts on its own motion more members of the council may have to concur in the action. If a street, sidewalk or sewer improvement is petitioned for by a majority of the affected property interests, passage of the resolution of necessity by a majority of the council usually is sufficient; if not petitioned for, three-fourths of the council (or two members of a three-man council) must vote for passage.[39] However, under one alternate method three-fourths of the council must approve whether a petition is filed or not;[40] and under the Des Moines chapter there is no statement of the percentage required for approval.[41] Unanimous approval by the council may be required, if a sufficient number of affected property owners file written objections to the project.[42] Even though a proper petition has been filed, if the council purports to act on its own motion the petition may be given no legal effect.[43]

No statute prescribes the form of the petition, although some (non-street, sewer, sidewalk ones) which require petitions specify part of the contents and the essential number of signatures.[44] Petitions should be addressed to the body being called upon to take action,[45] indicating the particular improvement desired,[46] and the action requested,[47] stating the desirability or necessity of the requested improvement,[48] and signed by the requisite number of signers.[49] It is helpful for the petition to indicate what

---

quarry on an assessment basis only upon the purchaser's application with written notice to and written consent of any holder of liens on the purchaser's lands, § 202.4; and the state apiarist may examine bees in a locality which are suspected of contagious diseases, only upon written request of one or more beekeepers in the county, § 266.12.

[39] IOWA CODE §§ 389.31 (sidewalks; owners of majority of linear feet of property fronting on improvement), 391.26 (street, sewer; majority of resident owners of property to be assessed) (1962).

[40] IOWA CODE § 391A.14 (1962).

[41] *Id.* c. 417.

[42] *Id.* §§ 391.23 (60% of owners, subject to 75% of assessable cost), 391A.14 (owners subject to 75% of assessable costs).

[43] Nelson v. City of Sioux City, 208 Iowa 709, 226 N.W. 41 (1929); Bailey v. City of Des Moines, 158 Iowa 747, 138 N.W. 853 (1912). *But see* Seymour v. City of Ames, 218 Iowa 615, 255 N.W. 874 (1934), where a resolution of necessity was adopted by vote of four of a council consisting of six members plus a mayor; the Court suggests that had plaintiff petitioned for the work he would be estopped to object to the insufficient vote.

[44] IOWA CODE §§ 311.6, 357.1, 357A.1, 358.1, 395.3, 401.2, 455.7, 458.1, 461.2, 467A.5 (1962).

[45] A petition for a drainage district was addressed to the board of supervisors of one county, requesting only work in that county. Engineering studies indicated that property in an adjoining county should be included and work should also be done there. An exact duplicate of the original petition was then filed in the other county, and the two boards of supervisors, acting jointly, proceeded to establish the district. But, in Hoyt v. Board of Supervisors, 199 Iowa 345, 202 N.W. 98 (1925), the boards were held not to have jurisdiction to act, since the petitions as filed were addressed only to the board of the first county and prayed only for work to be done in that county.

[46] This is required in IOWA CODE §§ 311.6, 357.1 and 455.9 (1962).

[47] *Id.* §§ 358.2 and 467A.5 require election by affected property owners, so the petition should request this action.

[48] *Id.* §§ 357.1, 357A.1, 358.2, 455.9, and 467A.5. § 455.9 requires both a statement that lands in the district are subject to overflow, too wet for cultivation, or subject to erosion or flood damage, and that the proposed improvement will promote public benefit, utility, health, convenience, or welfare.

[49] IOWA CODE §§ 311.6 (35% of landowners within proposed district, or 35% of landowners therein who reside in the county); 357.1 (25% of resident property owners in district); 357A.1 (same); 358.1 (25% or more qualified resident voters

property each signer owns.[50]

Some statutes limit the levy of special assessments against a tract, for any one project, to a percentage of the assessed value of that tract.[51] Where the cost to be assessed is likely to exceed this statutory limit, the owner may waive his right to the protection of that limit, in advance. The governing body may insist that the petition contain such waivers, before it takes action thereon.[52]

Before proceeding to act, the governing body should ascertain whether the requisite number of signers have signed. Several cases involving the matter of number of signers arose under earlier statutes, and are of little current significance,[53] but one indicates that once a petition is filed, a signer may not retract his signature.[54]

Most of the statutes do not specify the official with whom a petition is to be filed. Petitions addressed to a city council could be filed with the council itself, at its meeting, or with the mayor or the city clerk. One case arising at a time when street improvement procedure was governed by local ordinance involves misfiling or misreference of petition.[55]

Opportunities of the property owner for administrative or judicial review of all phases of assessment procedure will be discussed in greater detail later. Objections to the form, contents, signing and handling of the petitions should be raised before the governmental body at or prior to its first public hearing on the matter after the objectionable events occur, although it may be possible to raise them at a later hearing.

If the power of the council to act in the manner it does is dependent on the filing of a valid, sufficient petition, the minutes of the council should contain the necessary jurisdictional facts. At a minimum the substance of the petition or some other statement to identify it, and a finding that it was signed by the requisite number of qualified signers, should be included.[56]

---

in district); 389.31 (owners of majority of linear feet of property fronting on sidewalk improvement); 391.26 (majority of resident property owners to be assessed—streets and sewers); 395.3 (100 resident taxpayers); 401.2 (75% of resident property owners subject to assessment); 455.7 (2 or more owners of land included in proposed district); 458.1 (1 landowner); 461.2 (owners of ⅓ of lands benefitted); 467A.5 (25 owners, and 20% of owners of land in proposed district) (1962).

[50] In the case of jointly-owned property, it would seem that all owners must be considered; unless the signers must be voters, it would seem that corporate owners could qualify as signers. These questions have not been litigated in special assessment cases. See Oliver v. Monona County, 117 Iowa 43, 90 N.W. 510 (1902); Seibert v. Lovell, 92 Iowa 507, 61 N.W. 197 (1904). Hedge v. City of Des Moines, 141 Iowa 4, 119 N.W. 276 (1909), deals with the authority of relatives, trustees, and corporate presidents to sign.

[51] *E.g.*, IOWA CODE § 391.48 (1958).

[52] As indicated in note 43, *supra*, if the council then decides to act on its own motion, it waives the waiver.

[53] Prichard v. Board of Supervisors, 150 Iowa 565, 129 N.W. 970 (1911); Wormley v. Board of Supervisors, 108 Iowa 232, 78 N.W. 824 (1899). In Hager v. City of Burlington, 42 Iowa 661 (1876), the council's internal improvement committee, recommending approval of a petition, failed to point out that it was signed by exactly half instead of a majority of affected property owners, the latter being required by city ordinance.

[54] Seibert v. Lovell, 92 Iowa 507, 61 N.W. 197 (1904).

[55] Hager v. City of Burlington, 42 Iowa 661 (1876).

[56] Richman v. Board of Supervisors, 70 Iowa 627, 26 N.W. 24 (1885). Where the body may act on its own motion, but must have a higher percent of its members approve, the record should show that it acted on petition, if that higher percent

2. Preliminary Investigation.

Once a board, council, or other governmental body has decided, either on its own motion or as the result of a petition, to consider whether a project should be undertaken, two steps usually follow with few exceptions.[57] A preliminary investigation must be made which may cover the need for the project, the area that will be affected, possible construction, estimated total cost, and estimated assessments, and then a public hearing on the proposal must be called.

As most projects involve construction, the preliminary investigation usually entails an engineering study.[58] Some statutes imply that engineering studies will be made,[59] but others are specific on the point,[60] and the drainage statutes are quite detailed,[61] perhaps because of the unique legal status of a drainage district once it is established, and the county's complete lack of responsibility for its costs. Most of the cases in which defective preliminary investigations were alleged involve drainage districts.[62] For types of projects other than drainage districts, it is at least advisable to have cost estimates available;[63] these may be based on rough studies by an engineer, and sometimes, but rarely, are by city employees (other than the city engineer) or by members of the council. There is no requirement that the work relating to streets and sewers be done be an engineer, although customarily one does it;[64] this may be less customary when the project is a sidewalk.[65] Where street

was not obtained. Bennett v. City of Emmetsburg, 138 Iowa 67, 115 N.W. 582 (1908); Hardwick v. City of Independence, 136 Iowa 481, 114 N.W. 14 (1907).

57 IOWA CODE §§ 357.6, 357A.5 (1962), relating to benefited water and fire districts, contemplate establishment of the district before an engineer (disinterested and competent) is appointed to study the proposed improvement, prepare plats and plans, and make a cost estimate.

58 One exception is the sanitary district, IOWA CODE c. 358 (1962).

59 IOWA CODE §§ 391.20, 391A.5, 401.6, 417.8, 455.135, 467A.5 (1962); see also § 395.3.

60 *Id.* § 311.8.

61 *Id.* §§ 455.12-.18, 457.2-.4, 460.5, 467.1 (1962).

62 *E.g.*, Harris v. Board of Trustees, 244 Iowa 1169, 59 N.W.2d 234 (1953); Town of Carpenter v. Joint Drainage Dist. No. 6, 198 Iowa 182, 197 N.W. 656 (1924); Chicago & N.W. Ry. v. Board of Supervisors, 196 Iowa 447 (1923). In a street paving case it was held that a resolution of necessity could not be attacked in certiorari proceedings on the ground that the contract with the engineer was illegal because his fee was based on a percentage of cost. McMurray v. City of Pella, 246 Iowa 313, 67 N.W.2d 620 (1954).

63 IOWA CODE §§ 311.6, 391.20, 391A.5, 395.3, 401.6, 401.7, 417.10 (1962). Under § 391.49, no special assessment against any lot may be more than 10% in excess of estimated cost. See also § 357.6. In Miller v. City of Glenwood, 188 Iowa 514, 176 N.W. 373 (1920), an action to enjoin the carrying out of a paving contract, one ground on which the contract unsuccessfully was attacked was that actual cost would exceed estimated cost.

64 See Hager v. City of Burlington, 42 Iowa 661 (1876). Where extension of a street is involved, under IOWA CODE § 389.6 (1962), the cost of acquiring the needed land not already owned by the city is ascertained either by private negotiation or through condemnation proceedings, before any resolution of necessity can be filed under § 391.18. In State *ex rel.* Hiatt and Harbin v. City of Keokuk, 9 Iowa 438 (1859), the council, deciding that the amount of damages assessed by their appointed commissioners was too high, purported to reject the commissioners' report and to appoint new commissioners, but had the extension begun. The property owners compelled the city to act on the basis of the first report, by mandamus. (One defense by the city was that the first commissioners were unqualified, but the Court held it estopped to challenge their qualifications, as they had been chosen by the council.)

65 See Clark v. Martin, 182 Iowa 811, 166 N.W. 276 (1918) (street committee authorized to decide when to repair existing walks or to order new walks; their

or sewer projects are involved, by the time the council decides that a resolution of necessity should be introduced,[66] a plat and schedule should be on file with the clerk covering the assessment district, the area to be improved, its proposed width, a cost estimate which covers each type of construction and material (including alternates that may be considered), each lot (and its value) proposed to be assessed, with the estimated assessment against each.[67]

3. Calling Public Hearing.

When the preliminary investigation has been satisfactorily completed, and the governmental body responsible for ordering the project to be done decides it merits further consideration rather than rejection, ordinarily the next step is to provide for a public hearing. This usually involves passage of a preliminary resolution of necessity, and the giving of notice of time, place and purpose of the hearing.[68] What vote is necessary to adopt the preliminary resolution? When must notice be given, and to whom? What is adequate notice? What must the body's records show? Are any other steps required? May the hearing be adjourned and the project ordered at a later time, without further hearing? When must objections to inadequacies of notice or other errors in calling hearings be raised?

Although approval of all or a high percentage of the council may be required for ultimate adoption of a resolution of necessity for a particular special assessment project, the decision to call a public hearing to discuss the project, including passage of the preliminary resolution, may be made by a majority of the body.[69]

The public hearing will not be of the town meeting type, at which the decision to undertake a project would be submitted to the electorate present. The power to decide remains with the council.[70] But owners of property affected do have an opportunity to discuss the project, its feasibility, desirability and necessity, possible alternates, whether the project is too large or too small. Objections may be raised; misunderstandings clarified. Notice of the meeting is necessary, and must be sufficient to acquaint interested persons with the general plan and scope of the project and put them on inquiry.[71] Therefore, notice does not have to spell out the exact kind or quality of material expected to be used,[72] and at the hearing the council

---

action held improper because committee did not refer it back to council for decision); Brewster v. City of Davenport, 51 Iowa 427, 1 N.W. 737 (1879).

[66] IOWA CODE § 391.20 (1962). See §§ 417.10, 417.25, 391A.5, 391A.11; Schumacher v. City of Clear Lake, 214 Iowa 34, 239 N.W. 71 (1932).

[67] IOWA CODE §§ 391.20, 391A.5-.11, 417.8, 417.24-.25 (1962). If c. 23 procedure is applicable, proposed plans and specifications and proposed form of contract are needed. See notes 189-193, *infra*, and supporting text.

[68] Among the exceptions specified in IOWA CODE (1962) are: §§ 100.13-.15, 113.3, 137.13-.14, 266.11-.15, 317.6, 318.2, 389.17, 389.31-.38, 409.27, 433.15. See, on sidewalks, Northern Light Lodge v. Town of Monona, 180 Iowa 62, 161 N.W. 78, L.R.A. 1918A, 150 (1917).

[69] Nixon v. City of Burlington, 141 Iowa 316, 115 N.W. 239 (1909).

[70] Under IOWA CODE § 358.5 (1962), the board of supervisors decides, as a result of the hearing, whether the question of establishing a sanitary district should be submitted to election or should be dropped. Compare §§ 357.5, 357.11-.12.

[71] Roznos v. Town of Slater, 116 N.W.2d 471 (Iowa 1962); Johnson v. Monona-Harrison Drainage Dist., 246 Iowa 537, 68 N.W.2d 517 (1955); Cardell v. City of Perry, 201 Iowa 628, 207 N.W. 775 (1926); *In re* Appeal of Apple, 161 Iowa 314, 142 N.W. 1021 (1913); and the cases in notes 72 and 73, *infra*.

[72] City of Bloomfield v. Standley, 174 Iowa 114, 156 N.W. 307 (1916).

may be able to amend its resolution to call for bids on a type of material not enumerated in the notice.[73]

Notice of intent to construct, where all the costs are to be paid from general taxation, is not required.[74] And in a few instances it is unnecessary even though special assessments are to be used.[75] Street and sewer opening, extension,[76] construction, reconstruction,[77] and most repairs require notice, but some repairs may not.[78] Sidewalk construction and repair may require no notice.[79] The statute on parking districts requires public hearing but has no provision for notice.[80] Municipal ordinances may require notice though not called for by statute.[81] At one point the Court stated that where a preliminary resolution and notice were needed, this requirement was jurisdictional, implying that their absence deprived the council of power to act.[82] Subsequent cases, holding the property owners estopped to challenge absence or inadequacy of notice, or that they had waived adequate notice, cast doubt on the jurisdictional nature of the notice requirements.[83] Explanation for differing notice requirements for drain, street and sidewalk repair is not clear.[84] In those instances where notice and hearing at this stage is not

---

[73] Vowles v. Town of Kenwood Park, 198 Iowa 517, 199 N.W. 1009 (1924).

[74] Dunn v. City of Sioux City, 206 Iowa 908, 221 N.W. 571 (1928); Dubuque & S.C. R.R. v. Mitchell, 152 Iowa 187, 131 N.W. 25 (1911).

[75] Under IOWA CODE § 455.135 (1962), repairs and revisions of an operating drainage system do not need notice, unless substantial in cost. See Kerr v. Chilton, 249 Iowa 1159, 91 N.W.2d 579 (1958); Jerrel v. Board of Supervisors, 247 Iowa 339, 73 N.W.2d 766 (1955). At one time, before the present statute was adopted, notice was unnecessary if the work could be characterized as "repair" rather than "new construction"; the Court faced several difficult characterization problems: McGuire v. Voight, 242 Iowa 1106, 49 N.W.2d 472 (1951); Haugen v. Humboldt-Kossuth Joint Drainage Dist. No. 2, 231 Iowa 288, 1 N.W.2d 242 (1942); Payne v. Missouri Valley Drainage Dist. No. 1, 223 Iowa 634, 272 N.W. 618 (1937); Nelson v. Graham, 198 Iowa 267, 197 N.W. 905 (1924); Bloomquist v. Board of Supervisors, 188 Iowa 994, 177 N.W. 95 (1920); Chicago & N.W. Ry. v. Board of Supervisors, 187 Iowa 402, 172 N.W. 443 (1919); Breiholz v. Board of Supervisors, 186 Iowa 1147, 173 N.W. 1 (1919); Lewis v. Pryor Drainage Dist., 183 Iowa 236, 167 N.W. 94 (1918); Smith v. Monona-Harrison Drainage Dist., 178 Iowa 823, 160 N.W. 29 (1916). See Maasdam v. Kirkpatrick, 214 Iowa 1388, 243 N.W. 145 (1932).

[76] Peterson v. Town of Stratford, 190 Iowa 45, 180 N.W. 13 (1920).

[77] Manning v. City of Ames, 192 Iowa 998, 184 N.W. 347 (1921) (involving relaying of substantial part of creosote wood-block paving).

[78] IOWA CODE §§ 391.18 (construction, reconstruction or resurfacing require notice), 391A.12, 417.8 (1962). But notice is not necessary for "oiling". Jackson v. City of Creston, 206 Iowa 244, 220 N.W. 92 (1928).

[79] IOWA CODE §§ 389.31-.36 (1962) require no notice, but an alternate method, under c. 391, requires notice. See Clark v. Martin, 182 Iowa 811, 166 N.W. 276 (1918); Northern Light Lodge v. Town of Monona, 180 Iowa 62, 161 N.W. 78, L.R.A. 1918A, 150 (1917). § 391A.1 includes sidewalks, and notice requirements of 391A.12 are applicable. Apparently notice is needed under c. 417, but this is not clear. See §§ 417.8-.9.

[80] IOWA CODE § 390.10 (1962).

[81] This may be common where sidewalk ordinances have been adopted and the council is not proceeding solely under c. 391 or 391A. Roche v. City of Dubuque, 42 Iowa 250 (1875), involves a general street construction ordinance, before the statutes were as detailed as at present.

[82] Shaver v. J. W. Turner Improvement Co., 155 Iowa 492, 136 N.W. 711 (1912).

[83] See notes 104, 138-41, and 152-53, *infra*, and supporting text; see also note 114 *infra*.

[84] Most sidewalk repairs are not costly; many street repairs are not costly and many are paid for from city street funds. But the drainage district is not a tax levying body and has no funds for repairs. However, in most instances repair costs in drainage district are divided in the same ratio as original assessments, which do not depend solely on property valuations.

required, due process requirements are satisfied if, before assessment procedures are completed, the opportunity for full hearing exists.

When notice is required, all persons having an interest in property that will be subject to assessment if the project is undertaken should be given notice.[85] This would include owners, lienholders, encumbrancers, at least those of record, and perhaps occupiers. Many statutes are not so demanding, however. The drainage district statutes[86] and some street and sewer improvement statutes[87] state what persons are to get notice, but others do not.[88] A general taxpayer, affected only as such because the city assumes part of the cost of the project, is not entitled to notice.[89] Using an incorrect legal description of a tract may not invalidate proceedings, where the owner receives notice and is not misled.[90] A landowner cannot object that his tenants got no notice.[91] Where property has been sold, but the record title does not show this, notice to the record owner does not render proceedings defective.[92]

Should notice be personally served, or is publication sufficient? How much notice is required? What is necessary for published notice? Considerable statutory variation exists. In those cases where a hearing is an essential step in the decision to act, the statutes usually require published notice but do not call for personal service,[93] although some call for both,[94] and one requires personal service but omits newspaper publication.[95] Notice by publication usually requires two publications in a newspaper published in the area,[96] the last to be not less than two nor more than four weeks prior

---

85 Roznos v. Town of Slater, 116 N.W.2d 471 (Iowa 1962). Beebe v. Magoun, 122 Iowa 94, 97 N.W. 986 (1904), held unconstitutional a statute requiring notice, in case of drainage districts, only to owners of property abutting on the proposed ditch or through which the ditch would run, where other property benefitted and was subject to assessment. In Smith v. Peterson, 123 Iowa 672, 99 N.W. 552 (1904), an abutting property owner who received notice was able to enjoin collection of his assessment under that statute. Compare Spalti v. Town of Oakland, 179 Iowa 59, 161 N.W. 17 (1917), with Dunker v. City of Des Moines, 156 Iowa 292, 136 N.W. 536 (1912). Iowa Code § 409.27 (1962), involving auditor platting of subdivisions, requires notice to "some or all of such owners". Reliance on this wording to support an assessment against an unnotified owner would seem unwarranted.

86 Iowa Code §§ 455.20-.24, 457.5, 459.2 (1962).

87 Iowa Code §§ 391A.13 (property owners), 417.9 (occupants, local agents of railways, and some property owners) (1962).

88 *Id.* §§ 311.12, 357.2, 357A.3, 358.4, 368.44, 391.24, 392.9, 395.5, 420.253.

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

90 Sunset Golf Club, Inc. v. City of Sioux City, 242 Iowa 739, 46 N.W.2d 548 (1951).

91 Goeppinger v. Boards of Supervisors, 172 Iowa 30, 152 N.W. 58 (1915).

92 Interurban Ry. Co. v. City of Valley Junction, 190 Iowa 189, 180 N.W. 288 (1920).

93 Iowa Code §§ 311.12, 357.4, 357A.3, 358.4, 368.44, 391.24, 392.9, 395.5, 401.4, 420.253, 467A.5 (1962).

94 *Id.* §§ 391A.13, 417.9, 455.20-.24, 457.5, 459.2.

95 *Id.* § 417.9 requires written notice be delivered to occupants of real estate subject to assessment, and to all owners of property in the benefitted district but beyond 300 feet from the improvement, and posting of written notice on vacant or unoccupied property within 300 feet—vacant includes property where owner, occupant, or member of either's family over 14 were absent when service or posting was made or attempted. If c. 23 procedure applies, notice published in a newspaper will still be needed. See notes 189-193, *infra*, and supporting text.

96 See the following sections of Iowa Code (1962): 311.12 (once each week for 2 successive weeks); 357.4 (2 successive issues); 357A.3 (same); 358.4 (once each

to the date of the hearing.[97] In some cases where no newspaper is published in the area, publication in one of general circulation therein is required;[98] in others, posting of the notice, usually in three public places, is called for.[99] But is published notice sufficient? In an early case the Iowa Court said yes, that even though a nonresident owner of property assessed for street improvements was notified only by publication, he had had due process.[100] On this the Court was reversed, as to the nonresident.[101] It has not recently dealt with such notices for resident owners, but the recent trend of decisions from other jurisdictions indicates that published notice alone is insufficient, and that notice must be given in a manner "reasonably calculated" to inform the owner of the proceedings.[102] If failure to appear and object at the hearing on necessity does not prevent the property owner's raising his objections at the later hearing on the assessment, and having them considered there, published notice at this point should satisfy due process. But, as will shortly be indicated, the owner may be unable to have his objections considered at the later hearing. It would seem essential, in nearly every instance where published notice is used, that each property owner also be given mailed notice (and perhaps be named in the notice, though this may be unnecessary[103]), and the use of registered or certified mail is a wise precaution. Where published notice is required, the Court has said giving such notice is jurisdictional

week for 2 consecutive weeks); 368.44 (2 publications); 391.24 (same); 391A.13 (once each week for 2 consecutive weeks); 392.9 (2 publications); 395.5 (same); 401.24 (2 weekly publications); 455.21 (once each week for 2 consecutive weeks); 457.5 (same); 459.2 (same). Section 420.253 requires 3 publications; § 392.9 requires publications in 2 newspapers, if that many are published in the city. C. 618 deals with publication and posting of notices in general, defines "newspaper", and calls for successive publications to be on the same day of the week, unless that is inconsistent with the provisions of another statute.

97 Exceptions in IOWA CODE (1962) are: §§ 311.12 (no time); 357.2 and 357A.3 (last publication not less than one week before hearing); 358.4 (20 days); 391A.15 (not less than 15 nor more than 25); 392.9 (no time); 395.5 (14 days); 417.9 (15 days); 420.253 (10 days); and 455.21, 457.5 and 459.2 (20 days). It may be necessary to have the first notice a specified number of days before the hearing. IOWA CODE §§ 358.4 and 368.44 (1962) require the first notice to be at least 20 days before the hearing. Durst v. City of Des Moines, 150 Iowa 370, 130 N.W. 168 (1911), involving street improvements when the applicable statute required 20 days notice and 4 publications, held that only one of the four publications had to be made 20 days before the hearing.

98 IOWA CODE §§ 311.12, 392.9, 401.4 (1962).

99 IOWA CODE §§ 357.4 (post 3 public places or publish), 357A.3 (same), 358.4 (post 5 copies), 391.24 (post 3 public places), 392.9 (if no local paper, publish in designated paper and also post in 3 public places including the mayor's office), 417.9 (post all affected vacant or unoccupied property) (1962).

100 Dewey v. City of Des Moines, 101 Iowa 416, 70 N.W. 605 (1897).

101 Dewey v. City of Des Moines, 173 U.S. 193 (1899).

102 Meadowbrook Manor, Inc. v. City of St. Louis Park, 258 Minn. 266, 104 N.W.2d 540, 45 MINN. L. REV. 182 (1960); Wisconsin Elec. Power Co. v. City of Milwaukee, 275 Wis. 121, 81 N.W.2d 298 (1967), prior opinion in 263 Wis. 111, 56 N.W.2d 784 (1953), remanded for reconsideration, 352 U.S. 948 (1956), in light of Walker v. City of Hutchinson, 352 U.S. 112 (1956). These cases build upon the decision in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). See 2 ANTIEAU, MUNICIPAL CORPORATION LAW § 14.06 (1961).

103 See Roznos v. Town of Slater, 116 N.W.2d 471 (Iowa 1962). Although IOWA CODE § 391A.13 requires mailing a copy of the notice by ordinary mail to the record owners of property, the form of notice, as set out in that section, does not require naming each property owner. § 455.20 seems to require naming record owners, lienholders and encumbrancers in the notice.

but may be waived,[104] publication may be on Sunday,[105] and unless formal proof of publication is required, proof may be oral.[106] Compliance with statutory requirements for proof of publication[107] with a proof showing proper publication compels anyone alleging publication was insufficient to introduce evidence to support his allegation or have the issue decided against him.[108]

Statutory provisions as to form and content of notice are many and varied. They range from no reference to notice,[109] no reference to form or content,[110] itemization of some matters to be included,[111] to prescribed form with some contents prescribed and blanks for inclusion of certain other matters if appropriate.[112] As the purpose of the notice is to alert owners of property that will be affected to the pendency of the proposal, and to put them on inquiry as to details, it should meet certain standards, whether prescribed or not, and should include: time and place of hearing,[113] general location of the proposed improvement,[114] and the nature of the work to be

---

104 Gilcrest & Co. v. City of Des Moines, 157 Iowa 525, 137 N.W. 1072 (1912) (what does "jurisdictional" mean? Court held only a few lot owners were not estopped or had not waived, and these could object to insufficient publication). See Roche v. City of Dubuque, 42 Iowa 250 (1875). See also Ross v. Board of Supervisors, 128 Iowa 427, 104 N.W. 506, L.R.A. N.S. 431 (1905) (record owner, served by publication, had died though Board didn't know this; his heir appeared at the hearing; held this appearance waived objections not only by heir but by others that proper notice had not been given); City of Chariton v. Holliday, 60 Iowa 391, 14 N.W. 775 (1883) (sidewalk ordinance requiring published notice; such notice is unnecessary when copy of resolution ordering construction is personally served on property owner).

105 Nixon v. City of Burlington, 141 Iowa 316, 114 N.W. 552 (1908).

106 Owens v. City of Marion, 127 Iowa 469, 103 N.W. 381 (1905).

107 Iowa Code §§ 311.12, 358.4, 455.21, 455.23, 622.92, 622.94 (1962). The two sections from c. 622 are of general application in all special assessment cases unless inconsistent with the statute applicable to the particular type of assessment; they permit proof to be made within 6 months of the last day of publication or the day of posting. See Illinois Cen. R.R. v. Town of Pomeroy, 196 Iowa 504, 194 N.W. 913 (1923). Where publication in two newspapers was required, proof of publication in but one was sufficient. Anderson-Deering Co. v. City of Fort Dodge, 201 Iowa 1129, 205 N.W. 984 (1926); Miller v. City of Glenwood, 188 Iowa 514, 176 N.W. 373 (1920).

108 Anderson-Deering Co. v. City of Fort Dodge, *supra*, note 107.

109 Iowa Code § 390.10 (1962).

110 *Id.* §§ 357.4, 357A.3, 368.44, 401.4. Some statutes do not specify contents, other, perhaps, than time of hearing, but by implication indicate some matters to be included. §§ 391.24, 395.5, 467A.5. See Roznos v. Town of Slater, 116 N.W.2d 471 (Iowa 1962).

111 Iowa Code §§ 311.11, 358.4, 392.8, 417.10, 420.253 (limited prescription), 455.20, 457.6, 459.2, 461.7 (1962).

112 *Id.* § 391A.13.

113 Roznos v. Town of Slater, 116 N.W.2d 471 (Iowa 1962). This requires stating hour, day, month, year and place of meeting. A notice stating hearing would be "May 4th at 1:30 p.m." was jurisdictionally defective for failure to state the year. *In re* Secondary Road Dist., 213 Iowa 988, 240 N.W. 910 (1932).

114 A notice stating "Thirteenth District main sewer, as per plat, profiles and estimates now on file in the office of the city clerk," the plans showing both a main and several laterals, was jurisdictionally defective in its statement of location. Davenport Locomotive Works v. City of Davenport, 185 Iowa 151, 169 N.W. 106 (1919). In Roznos v. Town of Slater, 116 N.W.2d 471 (Iowa 1962), the *Davenport* case is explained as turning on the fact the resolution and notice together did not sufficiently identify the property to be assessed, so interested parties had to guess whether or not their property was involved. See Manning v. City of Ames, 192 Iowa 998, 184 N.W. 347 (1921); Williams v. City of Cherokee, 184 Iowa 899, 169 N.W. 110 (1918); Bennett v. City of Emmetsburg, 138 Iowa 67,

done.[115] Chapter 417 requires the notice to state that the city will petition the district court for confirmation of the assessment within ten days from final adoption of the resolution of necessity, and the court will set a hearing within thirty days from final adoption.[116] Other matters which are required by statute (or permitted, in some cases) include: statement of what preliminary documents are on file,[117] that property will be specially assessed,[118] legal description of boundaries or of land in the district,[119] record ownership of property involved,[120] estimated cost,[121] amount apportioned to each tract,[122] that the proposed plan may be amended before final action or at the

115 N.W. 582 (1908); Reed v. City of Cedar Rapids, 137 Iowa 107, 111 N.W. 1013 (1908).

115 See Roznos v. Town of Slater, *supra,* note 114; Cardell v. City of Perry, 201 Iowa 628, 207 N.W. 775 (1926). Even though the notice indicates that certain types of thicknesses of paving or of materials are being considered, consideration of additional types at the hearing may be proper. Vowles v. Town of Kenwood Park, 198 Iowa 517, 199 N.W. 1009 (1924); Wigodsky v. Town of Holstein, 195 Iowa 910, 192 N.W. 916 (1923); Richardson v. City of Denison, 189 Iowa 426, 178 N.W. 332 (1920); City of Bloomfield v. Standley, 174 Iowa 114, 156 N.W. 307 (1916).

116 IOWA CODE § 417.10 (1962).

117 *Id.* §§ 358.4 (petition on file, naming proposed district); 391A.13 (proposed resolution of necessity, estimate of cost, plat and schedule of proposed assessments); 455.20 (petition, favorable report by engineer, and board has approved as tentative plan). By implication in §§ 391.24 and 417.10 reference to the proposed resolution of necessity is in order, and would seem appropriate in other instances where one is involved. Some notices have incorporated the resolution, but this is not necessary. Roznos v. Town of Slater, 116 N.W.2d 471 (Iowa 1962). It was argued in Schumacher v. City of Clear Lake, 214 Iowa 34, 239 N.W. 71 (1932), that a required plat and schedule were not timely filed, but the Court thought the evidence showed timely filing. Proposed plans and specifications and form of contract may be necessary if c. 23 procedure is also applicable. See notes 189-193, *infra,* and supporting text.

118 This seems to be permitted, and desirable, in those notices not indicating the proposed assessment on each tract. A former requirement in the street improvement statute that the notice state "whether abutting property will be assessed" was held in Spalti v. Town of Oakland, 179 Iowa 59, 161 N.W. 17 (1917), not to invalidate a notice which failed to state that special assessments would be made. In Guenther v. City of Des Moines, 197 Iowa 414, 197 N.W. 326 (1924), a resolution of necessity, stating that costs of acquiring necessary ground for a new street would be assessed, was insufficient to permit assessment for cost of bringing the street to grade. Whether the notice should so state is not discussed. See Roznos v. Town of Slater, 116 N.W.2d 471 (Iowa 1962).

119 IOWA CODE §§ 311.11 (description of lands in district), 358.4 (intelligible description of boundaries), 392.8 (property to be assessed), 455.20 (implies each tract to be listed), 459.2 (boundaries of the part of territory within town) (1962). §§ 391.2(2), 391.13 and 391.39 indicate that improvement districts can be established which are larger than the territory usually permitted to be assessed for street and sewer improvements. This may be implied in §§ 391A.1, 391A.5, 391A.9-.14, 391A-25-.27, and perhaps in 417.9. Portions of Keosauqua Way, in Des Moines, were constructed under the district method scheme, and assessments therefor levied on property almost 2000 feet from the improvement. *In re* Appeal of Hume, 202 Iowa 969, 208 N.W. 285 (1926). See Bates v. City of Des Moines, 201 Iowa 1233, 207 N.W. 793 (1926). See also Snyder v. City of Belle Plaine, 180 Iowa 679, 163 N.W. 594 (1917). A defective legal description was held to be non-invalidating, in Sunset Golf Club, Inc., v. City of Sioux City, 242 Iowa 739, 46 N.W.2d 548 (1951), partly on a waiver theory. Where the notice description included only part of one farm, though it was intended to include all, the district was held to include only the part described. *In re* Appeal of McLain, 189 Iowa 264, 178 N.W. 817 (1920).

120 IOWA CODE §§ 311.11, 455.20 (1962); see §§ 459.2, 461.7; Spalti v. Town of Oakland, 179 Iowa 59, 161 N.W. 17 (1917).

121 IOWA CODE §§ 311.11, 417.10 (1962).

122 *Id.* § 311.11.

hearing, and may be adopted as changed,[123] who may object,[124] and to what,[125] whether objections must be in writing and filed beforehand or may be raised orally at the hearing,[126] and the effect of failure to make and file objections.[127] Notice may be addressed "To whom it may concern"; and should be signed by the appropriate official of the governing body—usually its clerk.

What should the record of the council's proceedings show? In connection with adoption of the preliminary resolution of necessity and calling public hearing it should show first whether the meeting was regular or special, and if special that it was duly called with proper notice to all councilmen, or that anyone not receiving notice has waived notice. It should show, by name, which members were present and which absent, the introduction of the preliminary resolution (setting it forth), the taking of a roll call thereon and its results. The preliminary resolution may specify time for hearing; if it does not, this should be determined and indicated in the record; and the clerk should be directed to publish appropriate notice. Delay of the clerk in transcribing the record of the meeting into the body's minute book is not a material defect,[128] but undue delay should be avoided. While some slight deviation from the indicated showing may be tolerated,[129] it is undesirable.[130]

---

123 *Id.* §§ 311.11, 358.4, 395.5, 455.20. Council adoption of alternates not indicated in the notice was upheld in Vowles v. Town of Kenwood Park, 198 Iowa 517, 199 N.W. 1009 (1924); Wigodsky v. Town of Holstein, 195 Iowa 910, 192 N.W. 916 (1923); City of Bloomfield v. Stanley, 174 Iowa 114, 156 N.W. 307 (1916). See Hampe v. Hamilton County, 146 Iowa 280, 125 N.W. 225 (1910).

124 Interested persons: IOWA CODE §§ 358.4, 391A.13, 417.10, 455.20 (1962). Owners of property subject to assessment: *Id.* §§ 391.22, 395.5.

125 *Id.* §§ 311.11(9), 358.4, 391.22, 391A.13, 395.5, 420.253, 455.20.

126 Objections must be in writing and filed by noon of the hearing day, under IOWA CODE § 311.11 (1962), or filed at or before the hearing, under § 455.20. Apparently they may be presented orally at the hearing, in other cases, but can be in writing and filed beforehand. See § 391A.13.

127 IOWA CODE §§ 311.11(10) (conclusive waiver), 391.19 (permits waiver provision to be included in notice), 455.22 (statute does not require notice to state this) (1962). At one time the street improvement statute required objections to be filed in writing within 20 days after publication of (apparently) the first notice. In Western Asphalt Paving Corp. v. City of Marshalltown, 203 Iowa 1324, 206 N.W. 956, 214 N.W. 687 (1927), the notice, published December 13, said objections were to be filed January 6, 25 days later. Objections filed January 5 were challenged as untimely, but the Court held that this filing on the 24th day was not a late filing that waived the filer's objections. In Moss v. Town of Hull, 249 Iowa 1178, 91 N.W.2d 599 (1958), the notice in connection with a sanitary sewer project said objections not filed were waived. The Court held that the ones asserted but not filed were waived, and perhaps that the city need not plead waiver to take advantage of the failure. See also Smith, Lichty & Hillman Co. v. City of Mason City, 210 Iowa 700, 231 N.W. 370 (1930).

128 Hardwick v. City of Independence, 136 Iowa 481, 114 N.W. 14 (1907) (resolution of necessity not recorded for one year after passage).

129 Nixon v. City of Burlington, 141 Iowa 316, 115 N.W. 239 (1909) (record shows all councilmen present, that a roll call was taken, but not the individual responses thereto, and that all were affirmative; the responses were recorded on a sheet for calling roll; held sufficient).

130 Cook v. City of Independence, 133 Iowa 582, 110 N.W. 1029 (1907). Here a record was insufficient which showed "members all present except O.... and B....", and on motion and adoption "each member of the council present voting aye. Absent, O.... and B....." It should show who was present, that roll was called, and that each member in turn voted aye. But what was adopted in *Cook* was an ordinance providing for construction of sewers, and by statute [now IOWA CODE § 366.4 (1962)] passage had to be by call of the yeas and nays, which must be recorded.

If by error the minutes do not accurately reflect the proceedings, later correction of the record to show what actually did occur is permissible.[131]

Are any other steps necessary before the hearing? In one case it was asserted that before the resolution of necessity for street paving could be adopted, and construction ordered, the council must also establish the grade for the project and have the street bed prepared for the paving. This is not an essential condition precedent to adopting the final resolution and ordering construction.[132]

The hearing should be held at the time set in the notice, and a quorum of the governmental body should be present. It is not required to reach its decision at that time, and may adjourn after hearing objections, without giving notice of the meeting at which it will reach a decision.[133] The motion to delay action need not specify when it will again come before the council.[134]

Except where the notice itself specifies otherwise, under the street and sewer improvemnts statutes a failure to file objections at or before the hearing on adoption of the proposed resolution of necessity is not a waiver thereof.[135] Appearance at the hearing has been deemed a waiver of defective notice.[136] Raising objections would probably serve to waive any other objections that could have been raised.[137] Objections not made at this time, and not waived, should be raised at the time of the hearing on the assessment; failure to raise by that time waives, except where fraud, or possibly "jurisdictional" defects, is involved.[138] The Court has had considerable difficulty defining what a jurisdictional defect is—while defective procedure has been treated as a jurisdictional defect,[139] today it perhaps includes only total failure to perform a required procedural step.[140] Jurisdictional defects may be

131 In Tod v. Crisman, 123 Iowa 693, 99 N.W. 686 (1904), an attempt to correct a record was nullified. Previously a 1900 attempt to levy an assessment for drainage ditch work had been enjoined, apparently for inadequate proceedings. Then the board amended its minutes for a September, 1899, meeting, to insert all necessary procedure as though accomplished at that meeting, and then relevied, unsuccessfully. Later, in In the Matter of Drainage Dist. No. 3, 146 Iowa 564, 123 N.W. 1059 (1910), the board's minutes were amended "to correct certain clerical errors therein", after appeal to the district court was taken from the board's establishment of the district, but before the appeal was heard. The Court allowed this correction, noting that this differed from *Tod* because here the board never asserted the original minutes were correct, and did not wait to change until after an adverse verdict.

132 Shaver v. J. W. Turner Improvement Co., 155 Iowa 492, 136 N.W. 711 (1912).

133 McMurray v. City of Pella, 246 Iowa 313, 67 N.W.2d 620 (1954); Schumacher v. City of Clear Lake, 214 Iowa 34, 239 N.W. 71 (1932); Harker v. Board of Supervisors, 182 Iowa 121, 163 N.W. 233 (1917); Patch v. Board of Supervisors, 178 Iowa 283, 159 N.W. 782 (1916).

134 Schumacher v. City of Clear Lake, *supra*, note 133 (adjourned to meet on call of mayor).

135 See IOWA CODE §§ 391.22-.24, 391A.13-.14 (1962).

136 Andre v. City of Burlington, 141 Iowa 65, 117 N.W. 1082 (1909).

137 Sunset Golf Club, Inc. v. City of Sioux City, 242 Iowa 739, 46 N.W.2d 548 (1951) (sidewalk); Andre v. City of Burlington, *supra*, note 136.

138 Nixon v. City of Burlington, 141 Iowa 316, 115 N.W. 239 (1909); Owens v. City of Marion, 127 Iowa 469, 103 N.W. 381 (1905).

139 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).

140 See Beim v. Carlson, 209 Iowa 1001, 227 N.W. 421 (1930) (failure of city to own or acquire land for street); Andre v. City of Burlington, 141 Iowa 65, 117 N.W. 1082 (1909). *But see: In re* Secondary Road Dist. No. 11, 213 Iowa 988, 240 N.W. 910 (1932). What "jurisdictional" means will be considered later, in discussing remedies available to property owners. See also cases cited in note 141, *infra*.

waived, however.[141]

One of the street and sewer statutes also permits the council to include in the notice a statement that unless the property owners have objections to the amount of the proposed assessment on file at the time the resolution is finally considered, they shall be deemed to have waived all objections thereto.[142] In *Moss v. Town of Hull* such a notice was held to waive objections to boundaries of the district, streets to be improved, nature of the improvements, and lots to be assessed and their valuation; but the owner could still object that the amount of the actual assessment was excessive, or that actual cost exceeded estimated cost by too much.[143] In one other case it was held that despite such provision in the notice, objections that the proposed assessment was too high in proportion to asesssed value could be raised later, that the owner could assume the council would later correct mistakes it had made in estimates such as the value of the lot, and could object when it was clear this had not been done.[144]

B. The Decision to Improve.

1. Making the Decision.

In most instances of construction of new improvements on a special assessment basis, and in some of repairs, appropriate procedure includes notice, hearing, the decision to act which frequently takes the form of a resolution of necessity,[145] and the ordering of construction. This may be followed by an opportunity for judicial review. Some statutes provide for judicial confirmation of the assessments before construction can be ordered. Subsequent sections consider judicial review and the order to construct; this section

---

141 Tjaden v. Town of Wellsburg, 197 Iowa 1292, 198 N.W. 772 (1924) (objection first raised in appeal to Supreme Court); Gilcrest & Co. v. City of Des Moines, 157 Iowa 525, 137 N.W. 1072 (1912) (petitioning for improvement; objecting to character and quality of work as it was done but not to procedural steps until after assessment hearing). See Monroe v. Person, 176 Iowa 283, 157 N.W. 849 (1916). *But see:* Beim v. Carlson, 209 Iowa 1001, 227 N.W. 421 (1930). Failure to appear and object was not held to be a waiver, in Bennett v. City of Emmetsburg, 138 Iowa 67, 115 N.W. 582 (1908) (also, no estoppel, on facts); *but see:* Collins v. City of Keokuk, 147 Iowa 233, 124 N.W. 601 (1910); Clifton Land Co. v. City of Des Moines, 144 Iowa 625, 123 N.W. 340 (1909).

142 Iowa Code § 391.19 (1962). In Reed v. City of Cedar Rapids, 137 Iowa 107, 111 N.W. 1013 (1908), a notice (in sewer improvement proceedings) calling only for written objections to be filed by a certain time, and setting no definite time for hearing, was upheld as not violating due process.

143 249 Iowa 1178, 91 N.W.2d 599 (1958).

144 Smith, Lichty & Hillman Co. v. City of Mason City, 210 Iowa 700, 231 N.W. 370 (1930) (a 5-4 decision; the dissent argued that the owner's failure to file objections at first hearing did waive as to valuation of the lot, but not as to the fact that the assessment was in excess of the appropriate percentage of lot valuation [25%]; the proposed assessment was $515, the final assessment by the council was $384.89, the proposed value was $1,200, and both sides concede actual value was $1,000; the majority would reduce the assessment to $250 while the dissent would reduce it to $300).

145 Resolutions of necessity are required by Iowa Code §§ 391.25, 391A.15, 417.16 and 420.267 (1962), relating to street and sewer improvements, and §§ 395.4 (flood protection), 401.4 (water main extension), and 460.3 (highway drainage district). § 392.4, relating to joint use of municipal sewers, specifically excludes use of resolutions of necessity, and § 390.10, relating to establishment of benefited parking districts, contemplates a finding of necessity but not a resolution. Apparently § 311.15 (secondary road assessment districts) does not require a resolution of necessity. See Northern Light Lodge v. Town of Monona, 180 Iowa 62, 161 N.W. 78, L.R.A. 1918A, 150 (1917). See also notes 157-81, *infra*, and text supported thereby.

is concerned with the making of the decision to proceed.

The hearing required before proceeding should be at a duly called meeting of the council, and each member should have, or waive, notice. The clerk,[146] and the mayor,[147] need not attend, but at least a majority of the council should be present, and more if action is to be taken at the meeting and more than a majority must approve. Apparently members who are not present at the hearing may participate in the decision to act, made at a later meeting.[148] After hearing objectors, and proponents, the council may act immediately or may defer action until a later meeting.[149] As part of its action, what findings should the council make? Must it act? What discretion may be exercised in acting? How should it act? What should the resolution of necessity or order state? What steps are required to adopt the resolution? Are there any other steps which should be taken before or simultaneously with adoption? What should the record show?

Before action or work may be done on a special assessment basis, in most instances certain findings of fact are required, expressly or by implication. Several exceptions exist, however.[150] The street improvements statutes require a finding only that the particular action is "necessary".[151] A statement in the resolution to this effect is sufficient; no separate statement of findings is necessary. Whether a failure to articulate a necessary finding invalidates action is not clear. In *Bennett v. City of Emmetsburg*, a failure to state in a resolution for constructing lateral sewers that they were necessary was one ground on which the Court based a holding of void procedure.[152] But this case has been discredited in various other aspects.[153] And two drainage district cases, one before and one after the *Bennett* decision, permit or seem to permit implication of the required finding from the board's other findings and action.[154] It has frequently been said in street cases that the council's action is essentially legislative;[155] this could mean that a statement of the findings is not jurisdictional to power to act. However, a finding recited in keeping with the statutory language would eliminate one ground of possible challenge.

---

146 Swan v. City of Indianola, 142 Iowa 731, 121 N.W. 547 (1909).

147 See IOWA CODE § 368A.2(7) (1962).

148 See McMurray v. City of Pella, 246 Iowa 313, 67 N.W.2d 620 (1954). IOWA CODE § 23.3 (1962) requires the council to enter its decision on objections "forthwith". If this section applies, it may not call for decision at the hearing. See notes 189-193, *infra*, and supporting text.

149 See cases cited in note 133, *supra*. Some statutes contemplate adjournments. IOWA CODE §§ 311.15, 358.5, 391A.14, 455.26-.27, 467.8, 467A.5 (1962).

150 The following seem to require no finding of fact: IOWA CODE §§ 311.51, 389.17, 389.31, 409.27 (1962). See also c. 113.

151 *Id.* §§ 391.25, 391A.15, 401.4, 417.16, 420.267, 460.3. § 467A.5 refers to need, in the interest of health, safety and public welfare. Other statutes require the finding that some socially undesirable condition exists, §§ 100.13, 137.13, 266.13, 267.7, 390.10, that the action will be conducive to public convenience and welfare, § 395.4, or that it will be conducive to public health, convenience, welfare, benefit or utility, and the cost is not excessive, § 455.28.

152 138 Iowa 67, 115 N.W. 582 (1908).

153 This will be discussed in greater detail in a later section. See, among other cases, Estate of Meijerink v. Lindsay, 203 Iowa 1031, 213 N.W. 934 (1927); and Koontz v. City of Centerville, 161 Iowa 627, 143 N.W. 490 (1913).

154 Prichard v. Board of Supervisors, 150 Iowa 565, 129 N.W. 970 (1911); Oliver v. Monona County, 117 Iowa 43, 90 N.W. 510 (1902).

155 The classic, often cited example is Swan v. City of Indianola, 142 Iowa 731, 121 N.W. 547 (1909). Similar comments are found in many other cases cited in notes 210-220, *infra*.

Assuming that the governmental body finds the situation required to exist does, must it order action to be taken? Suppose a council decides that a sewer extension is "necessary", must it take the further steps necessary to have the extension built? As the findings normally will not be recorded unless a resolution of necessity is adopted, usually no one is in a position to show the findings and nonaction. Most of the statutes have no appropriate provisions, and the sanction for such conduct seems to be primarily political rather than legal in nature. But where the government body has a statutory duty to act, if the appropriate findings are made, it may be compelled to perform its duty. An example is the requirement that drainage ditches be kept in repair, with the board permitted to avoid desirable action only in limited circumstances.[156]

The council's decision to proceed with the project usually is indicated by adopting a resolution of necessity for the project, accompanied or followed by an order for the improvement.[157] Sidewalk construction is peculiar; the resolution is required under some statutes but one alternative method has no requirement.[158] What should the resolution of necessity contain? How is it adopted?

In addition to the recitation of necessary jurisdictional facts, and the necessity for the project,[159], matters to be included in resolutions of necessity vary and may include: whether the improvement was petitioned for or not;[160] a description of the project;[161] reference to filed plats and schedules or

---

156 IOWA CODE § 455.135 (1962). Wise v. Board of Supervisors, 242 Iowa 870, 48 N.W.2d 247 (1951), permitted mandamus to compel work, where the board concluded repairs were necessary, from the engineer's report, but did not order the work to be done because many landowners objected to its cost. Zinser v. Board of Supervisors, 137 Iowa 660, 114 N.W. 51 (1908), was an attempt to compel the board to establish a drainage district, successful in the trial court but reversed by the Supreme Court on the basis that the engineer's survey was insufficient to support a finding in favor of establishment. In Temple v. Hamilton County, 134 Iowa 706, 112 N.W. 174 (1907), after ordering the establishment of the district the board had a change of membership and attempted to prevent establishment by withdrawing resistance to objector's appeal. This did not prevent an interested landowner from intervening and successfully supporting the order establishing the district. See also State *ex rel.* Hiatt and Harbin v. City of Keokuk, 9 Iowa 438 (1859).

157 IOWA CODE §§ 391.18, 391A.14, 395.4, 401.4, 417.16-.17, 420.267-.268 460.3 (1962).

158 *Id.* §§ 389.31.

159 A resolution under IOWA CODE § 395.4 (1962) should state that the flood control system is both necessary and advisable. All other sections require no more than a statement that it is necessary. Two cases involving establishment of drainage districts have implied a finding of the statutory necessity from the board's action. Prichard v. Board of Supervisors, 150 Iowa 565, 129 N.W. 970 (1911); Oliver v. Monona County, 117 Iowa 43, 90 N.W. 510 (1902). But saying it is necessary or repeating the statutory works of necessity is so simple, that reliance on implication is probably unsafe and unwarranted. See Bennett v. City of Emmetsburg, 138 Iowa 67, 115 N.W. 582 (1908).

160 If petitioned for, a simple majority of the council usually is sufficient for approval. See IOWA CODE § 391.26 (1962). At one time the Des Moines practice was to state that the improvement was not petitioned for, in every case, thus avoiding any challenge based in possible defects in petitions. In Bailey v. City of Des Moines, 158 Iowa 747, 138 N.W. 853 (1912), this statement was deemed a refusal to accept agreements to waive the statutory ceiling on assessments included in the petitions actually submitted. Even though the resolution fails to state whether petitioned for or not, if it is approved by the number of the council necessary in case no petition was filed, the failure to include that statement probably is not fatal. Bennett v. City of Emmetsburg, *supra*, note 159.

161 Statutes vary on this point. IOWA CODE § 391A.12 (1962) requires the resolu-

plans and specifications;[162] the manner of assessment;[163] estimated cost;[164] when the work is to be complete; terms of payment for the work; and provisions for publishing notice to bidders and the time when bids will be acted upon.[165] Where the resolution also doubles as the preliminary resolution, it will have additional matter.[166] Under one statute the city may also include notice that it intends to issue improvement certificates or bonds to be paid out of special assessments, or to provide that objections of property owners to the amount of their proposed assessment be filed by the time the resolution is finally considered or all such objections shall be deemed waived.[167]

---

tion to "describe briefly the proposed public improvement"; § 395.4 to describe it "in general terms"; and § 401.4 to designate "the streets upon which" the water main extension is to be made "and the terminal points thereof". But §§ 391.18, 417.17 and 420.267 call for reference to kinds of material proposed to be used, methods of construction, location and terminal points, and, if sewers, the kinds and size. Apparently, however, much detail can be omitted from the resolution if covered by plans and specifications incorporated by reference or by a general ordinance. See Turley v. Town of Dyersville, 202 Iowa 1221, 211 N.W. 723 (1927); City of Bloomfield v. Standley, 174 Iowa 114, 156 N.W. 307 (1916); Nixon v. City of Burlington, 141 Iowa 316, 115 N.W. 239 (1909) (resolution need not describe proposed improvement in minute detail, but should let public know its general character); Bennett v. City of Emmestburg, 138 Iowa 67, 115 N.W. 582 (1908) (resolution inadequate); Reed v. City of Cedar Rapids, 137 Iowa 107, 111 N.W. 1013 (1908) (resolution defective, but defect held waived); City of Chariton v. Holliday, 60 Iowa 391, 14 N.W. 775 (1883). See also § 389.6; In the Matter of Drainage Dist. No. 3, 146 Iowa 564, 123 N.W. 1059 (1910).

[162] IOWA CODE §§ 391.18, 391A.12, 395.4, and apparently 417.17 (1962) require the proposed plat and schedule to be on file at least from the time the notice of hearing is published. See also § 417.25. But see § 391A.15. This requirement seems to include not only a map showing the affected properties and a schedule showing record ownership, assessed value and estimated benefit to each lot and parcel, but also plans, specifications and estimated assessment for each lot. An earlier version of § 391.18 did not require these to be on file, and in City of Bloomfield v. Standley, *supra,* note 161, it was held that plans and specifications need not be filed until the resolution was adopted. See Bennett v. City of Emmetsburg, *supra,* note 161. See also § 389.6.

[163] IOWA CODE § 391.18 (1962) requires the resolution to state whether private property will be assessed, and what adjacent property is proposed to be assessed—perhaps in the latter case applying only to sewer improvement projects. § 417.17 incorporates § 391.18 by reference and adds that the resolution state whether the project is to be paid wholly or only in part by special assessment. The resolution, under § 391A.12, need only state that the preliminary plat and schedule show the proposed assessment. At least one resolution under § 391.18 has included a statement that some cost would not be borne by special assessment. Husson v. City of Oskaloosa, 240 Iowa 681, 37 N.W.2d 310 (1949). See also: Benshoof v. City of Iowa Falls, 175 Iowa 30, 156 N.W. 898 (1916) (resolution that abutting property owners would be assessed insufficient to allow assessing adjacent, non-abutting owners; statute permitting assessment of the latter was adopted after improvement proceedings were started); Durst v. City of Des Moines, 150 Iowa 370, 130 N.W. 168 (1911) (need not say that amount to be assessed will include costs of improving intersections); City of Chariton v. Holliday, 60 Iowa 391, 14 N.W. 775 (1883) (although sidewalk improvement resolution did not refer to assessment of costs, general sidewalk improvement ordinance did—this is enough); Kendig v. Knight, 60 Iowa 29, 14 N.W. 78 (1882) (cost will be assessed against "owner of the property" or "property holders" meets statutory requirement for statement whether cost will be assessed against "abutting property").

[164] Only IOWA CODE § 395.4 (1962) requires the estimated cost to be stated in the resolution; § 391A.12 requires the proposed resolution to state that the estimated cost is on file in the clerk's office, and the other procedures contemplate that plans and specifications on file will include an estimated cost.

[165] The latter three points are required only by IOWA CODE § 420.267 (1962), applicable to cities under special charter.

[166] *E.g.,* IOWA CODE §§ 391A.12, 401.4 (1962).

[167] *Id.* § 391.19. The waiver provision has been construed to cut off objections to

How are resolutions adopted? Public bodies act in formal meeting, upon a motion to adopt the resolution. How many members of the body must approve? Are the motives and interests of the members open to inquiry? Must the mayor approve? Can the resolution be withdrawn or repealed? May other actions be taken in connection with adoption?

In many situations approval of the resolution by majority vote is sufficient for its adoption. But in some situations where no adequate petition for the improvement has been submitted, and the council acts on its own motion, a higher than majority vote is needed,[168] and if sufficient objections have been filed, a unanimous vote may be necessary.[169] A "majority" probably means a majority of the members to which the council is entitled, despite vacancies in office; unanimous means all on the council and not just all present.[170] In most cities the mayor will not be a member of the council for this purpose, and is not counted in determining whether a majority or the necessary number has been determined; in case of equal division he cannot vote to break the tie.[171]

Swan v. City of Indianola takes the position that the council, adopting a resolution of necessity, is performing a legislative act, and therefore the motives of the council members cannot be inquired into, unless perhaps the act is oppressive or unreasonable.[172] However, the actions of a board of supervisors in establishing a drainage district do not receive similar treatment, the motives of the board members may be examined, and a board

---

boundaries of the project, plans and specifications, list of lots to be assessed, and value of lots; but the objections that the assessment as finally levied is excessive because cost is more than 10% greater than estimated cost or the assessment exceeds benefits or it exceeds 25% of actual value, are not waived. Moss v. Town of Hull, 249 Iowa 1178, 91 N.W.2d 599 (1958); Smith, Lichty & Hillman Co. v. City of Mason City, 210 Iowa 700, 231 N.W. 370 (1930) (5-4 decision).

[168] Iowa Code §§ 389.31, 391.26, 391A.14 (1962) (three-fourths, except in the case of a three-member council where two-thirds is sufficient). In Brewster v. City of Davenport, 51 Iowa 427, 1 N.W. 737 (1879), the Court presumed from entry of the resolution in the minutes as adopted that it had received at least three-fourths approval. See also Grimmel v. City of Des Moines, 57 Iowa 144, 10 N.W. 330 (1881). This attitude is no longer followed. Bennett v. City of Emmetsburg, 138 Iowa 67, 115 N.W. 582 (1908).

In the *Brewster* case it was also argued that the council was not sufficiently informed to act, but the Court presumed the council would have sufficient intelligence and information to decide whether to adopt the resolution.

[169] Iowa Code §§ 391.26, 391A.14 (1962). Under § 420.268, only three-fourths approval is required in this situation.

[170] Unless the council is divided into two equal rival factions, or so splintered a majority is unobtainable, filling vacancies can be done easily by council vote. Iowa Code § 368A.1(8) (1962). However, in State *ex rel.* Jebens v. Noth, 173 Iowa 1, 151 N.W. 822, 152 N.W. 639 (1915), a 4-3 vote to fill the eight council chair was held insufficient because by law at the time the mayor was a member of the council, though non-voting except to break a tie—this meant the total on the council was nine and five were required for a majority: See also Griffing v. Messenger, 114 Iowa 99, 86 N.W. 219 (1901).

[171] Doonan v. City of Winterset, 224 Iowa 365, 275 N.W. 640 (1937). See also cases cited in note 170, *supra*. At present, in cities under commission form the mayor is one of the council by definition, and in cities under council-manager form by popular vote the mayor is chosen from one of the elected councilmen. In either case he has a vote and must be deemed a member of the council. Iowa Code §§ 363B.1, 363B.2, 363C.1 (1962). See Seymour v. City of Ames, 218 Iowa 615, 255 N.W. 874 (1934) (less than ¾ vote even if mayor counted as one of council); Carbon Coal Co. v. City of Des Moines, 198 Iowa 371, 199 N.W. 170 (1924).

[172] 142 Iowa 731, 121 N.W. 547 (1909). See 2 Antieau, Municipal Corporation Law § 14.05 (1961).

member who derives benefit to his property from establishment of the district is disqualified to vote; but even though he did vote the order will not be invalid for this reason unless his vote was essential to its adoption.[173]

Before a resolution can become effective, it must be signed by the mayor. It can become effective if he refuses to sign it, and he permits fourteen days to elapse after refusal without calling a meeting of the council and returning the ordinance unsigned with his reasons for not signing. If he returns the unsigned ordinance within the time limit, his "veto" can be overridden by a two-thirds vote.[174] Under appropriate circumstances the mayor pro tem may sign in the mayor's stead.[175]

Repeal of resolutions of necessity, at least prior to any letting of contracts for construction or repair, would seem permissible. The only Iowa case dealing with this area arose when the mayor declared the repealer lost because, despite majority approval, it did not have approval of three-fourths, the number required and obtained to adopt the original resolution. Counsel conceded the mayor erred in his ruling, but argued that his decision was judicial and could not be collaterally attacked as a defense when a property owner was sued for the cost of the work (a sidewalk). The Court accepted the concession, did not decide whether it was correct, rejected counsel's argument and held for the property owner.[176]

Proposed improvements, such as street openings or extension, sewers, drainage ditches, may require taking of privately-owned land. If the owner will not donate the land, he is entitled to compensation. The cost of his compensation may be relevant to the decision whether to proceed. Iowa law permits municipalities to use a resolution of necessity in taking such land for street or sewer purposes and assessing the costs, after determining the costs either by private negotiation or through condemnation proceedings.[177] It would seem possible to combine in one resolution of necessity the acquiring of this property and the improvement. Drainage district statutes provide for delay in the establishment procedure until probable damages can be assessed by appraisers and reviewed by the board, and the final action on the order

---

173 Stahl v. Board of Supervisors, 187 Iowa 1342, 175 N.W. 772, 11 A.L.R. 185 (1920); see Chicago & N.W. Ry. v. Board of Supervisors, 196 Iowa 447, 194 N.W. 213 (1923) (involving assessment classification, rather than order to establish).

174 IOWA CODE § 366.5 (1962). At a time when the statute was different, one mayor took no action on a resolution, the improvement was made, six years later the council authorized his successor to sign, but the proceedings were held insufficient. Altman v. City of Dubuque, 111 Iowa 105, 82 N.W. 461 (1900). Also, an older statute did not require all mayors to sign resolutions. See Bennett v. City of Marion, 106 Iowa 628, 76 N.W. 844 (1898). If he is absent at the time the resolution is adopted, but signs it at a subsequent meeting, this is sufficient. Perrott v. Balkema, 211 Iowa 764, 234 N.W. 240 (1931).

175 IOWA CODE § 366A.2 (1962) permits the mayor pro tem to act when the mayor is absent from council meetings. See also Collins v. City of Keokuk, 147 Iowa 233, 124 N.W. 601 (1910).

176 City of Chariton v. Holliday, 60 Iowa 391, 14 N.W. 775 (1883).

177 IOWA CODE §§ 389.1-.6 (1962). A case involving use of commissioners to assess damages, a former procedure, is State *ex rel.* Hiatt and Harbin v. City of Keokuk, 9 Iowa 438 (1859). See also Bennett v. City of Marion, 106 Iowa 628, 76 N.W. 844 (1898) (condemnation proceedings). If the city were to erect improvements on land it had not acquired, property owners would not be liable for the cost of that work. Bradley v. City of Centerville, 139 Iowa 599, 117 N.W. 968 (1908) (paving of alley previously vacated by ordinance).

establishing the district occurs after these steps.[178]

When ordering establishment of a drainage district, a board of supervisors has no power to deviate from the plan of the engineer which it is following. It seems to have some discretion when dealing with subsequent repairs or improvements.[179] A city council, dealing with proposed street work, has considerable discretion in combining improvements into one project and one resolution, or separating them into several—though abuse of this discretion has been found.[180] Other than in establishing drainage districts there is considerable discretion in reducing the scope of the project from that originally proposed, at the time the resolution of necessity or order is adopted.[181]

The resolution of necessity should be followed by an order to construct the improvement.[182] This order is discussed in a subsequent section. Apparently it is possible, at least in some street improvement cases, to adopt the resolution of necessity and the order to improve simultaneously, if all other procedural requirements for both steps are observed.[183] However, where court confirmation of assessments must be obtained, the order to construct must be deferred until the court has acted.[184]

The minutes of the body adopting the resolution should set out the resolution and show that it was lawfully promulgated. If action is based upon a petition, the minutes should show receipt of the petition and a finding that it was adequate in form and substance. In any case minutes should show calling, and due publication of notice, of any necessary hearing;[185] that any hearings and meetings to consider any necessary steps were properly constituted; adjournment of hearings or meetings, when appropriate; where the

---

178 IOWA CODE §§ 455.28-.33 (1962). Oliver v. Monona County, 117 Iowa 43, 90 N.W. 510 (1902), holding not jurisdictional to assessment of costs the failure of the board to award and pay damages for property taken, before locating a ditch, was prior to the adoption of this procedure.

179 Thorson v. Board of Supervisors, 249 Iowa 1088, 90 N.W.2d 730 (1958).

180 Bailey v. City of Des Moines, 158 Iowa 747, 138 N.W. 853 (1912) (separation of paving, and curbing and guttering, of same street into two projects held improper under circumstances). See also: Husson v. City of Oskaloosa, 240 Iowa 681, 37 N.W.2d 310 (1949); Kendig v. Knight, 60 Iowa 29, 14 N.W. 78 (1882) (two streets, two resolutions, one assessment); Grimmell v. City of Des Moines, 57 Iowa 144, 10 N.W. 330 (1881) (sewer project on several streets, one project); City of Burlington v. Quick, 47 Iowa 222 (1877); French v. City of Burlington, 42 Iowa 614 (1876).

181 See McMurray v. City of Pella, 246 Iowa 313, 67 N.W.2d 620 (1954).

182 *E.g.*, IOWA CODE § 391.25 (1962).

183 Meader v. Town of Sibley, 191 Iowa 1139, 183 N.W. 610 (1921) (although § 391.25 says "after the passage of the resolution of necessity, the council by another resolution may order the construction", literal compliance with the statute in this regard is unnecessary).

184 IOWA CODE §§ 391A.14-.18 (1962) contain no reference to order to construct, although § 391A.15 provides for resolution ordering engineer to prepare and file detailed plans and specifications and the engineer and city attorney to prepare and file a notice to bidders and form of contract, which is done, and bids obtained, before any attempt to have court confirmation. But, under § 417.49 the council must adopt a resolution ordering work upon receipt of the court's order entered in the confirmation proceedings.

185 In McMurray v. City of Pella, 246 Iowa 313, 67 N.W.2d 620 (1954), four of six councilmen were present for the hearing, decided to hold it in "executive session" in a rear room, at which session oral and written objections were presented; they then returned to the council chambers and voted to defer action until a later meeting when the full council was present. This was an adequate hearing.

number of objectors is relevant, a finding as to that number;[186]; the resolution itself,[187] properly introduced, adopted and signed. A statement that the councilmen unanimously approved, without setting forth the taking of a roll call vote or recording the individual vote, may be sufficient, but better practice is to recite the taking of the roll call vote, and it is desirable that the individual member's vote be recorded.[188] If Chapter 23 procedure is applicable, as discussed hereinafter, the record should also show the council's decision on objections raised before it.[188½]

2. Reviewing the Decision.

The decision, to improve or not, is made by the council. What can an objector do? Various remedies may be available; appeal to an administrative body now; appeal to court now or oppose a municipality's request for court confirmation of its program; appeal after the work is done and assessment levied; mandamus; certiorari; injunction; perhaps others. Often it is unnecessary for an objector to act until he has been assessed. All but the first two actions just mentioned will usually not be called for until after levy of assessment, and discussion of the later used actions will be postponed to a later article. What is considered here are those actions most likely to be used after the resolution is adopted but before the contract is let. This includes appeal to administrative agency, appeal to district court, and city request to district court for confirmation. When can these remedies be used? What is the scope of review in each? Can the challenger question procedural steps, the finding of necessity, the decision as to the type of work to be done, the determination of the property subjected to assessment, the proposed assessment, whether conditions precedent have been satisfied, and whether and to what extent the costs should be specially assessed?

It was long assumed that, with one possible exception in section 417.26, the right to administrative review of council decisions did not exist. Chapter 23 of the Code does provide that, before any city enters into a contract for a public improvement costing at least $5,000, certain procedures as to notice and hearing must be followed and a person dissatisfied by the council's conclusions can appeal to the State Appeal Board.[189] In *Schumacher v. City of*

---

186 See McMurray v. City of Pella, *supra*, note 185.

187 The resolution must meet all statutory requirements as to form and substance. Bennett v. City of Emmetsburg, 138 Iowa 67, 115 N.W. 582 (1908). Although Jones v. City of Sheldon, 172 Iowa 406, 154 N.W. 592 (1915), suggests the minutes do not have to set out the resolution verbatim, better practice is to set it forth therein.

188 The record does not have to show yeas and nays, on adopting resolutions of necessity for street or sidewalk improvements. Perrott v. Balkema, 211 Iowa 764, 234 N.W. 240 (1931); Meader v. Town of Sibley, 191 Iowa 1139, 183 N.W. 610 (1921) (however, it did); Preston v. City of Cedar Rapids, 95 Iowa 71, 63 N.W. 577 (1895); Grimmell v. City of Des Moines, 57 Iowa 144, 10 N.W. 330 (1881); Brewster v. City of Davenport, 51 Iowa 427, 1 N.W. 737 (1879). In Nixon v. City of Burlington, 141 Iowa 316, 115 N.W. 239 (1909), where at least three-fourths approval was needed, the record showed all councilmen present, a roll call taken, and that all were affirmative. The vote of each was not recorded in the minutes, but it was recorded on a separate roll call sheet. This was held to be sufficient.

188½ IOWA CODE § 23.3 (1962). See notes 189-193, *infra*, and supporting text.

189 IOWA CODE § 23.4 (1962). The Appeal Board includes the state auditor, treasurer and comptroller, the first two being officials elected at large and the latter being appointed to his office by the Governor. At an early stage in the history of this chapter most appeals were to be taken to the comptroller alone, who for many years was called "budget director". See 3 IOWA CODE ANN. §§ 23.1, 23.4.

Clear Lake the Court said Chapter 23 did not apply to special assessment projects, the Court using an assumed legislative objective to support its conclusion.[190] The Court did not discuss possible implications of the provision in what is now section 417.26, relating to special improvements in Des Moines, that "hearings on objections made to the [budget director[191]]" are to be held and decided before district court confirmation of assessments is sought. As Chapter 417 had no other provision for administrative appeal, it is suggestive that the Legislature assumed all special assessments could be appealed to the budget director, at the time of the *Schumacher* decision. Recently, without considering the implications of section 417.26, in *Town of Mechanicsville v. State Appeal Board*,[192] the Court changed its position substantially. It distinguished the *Schumacher* opinion factually, rather than formally overruling it, on the ground that the improvements there were intended to be financed entirely by special assessments and were paid for from the city's general fund only to the extent assessments were later reduced. Thus, the Court's present position seems to be that chapter 23 procedure, including the opportunity for an administrative appeal to the State Appeal Board, should be followed in any case where the city contemplates using both special assessments and general funds to construct an improvement. In view of the legislative history of Chapter 23 and section 417.26, the Court may at a later date indicate that Chapter 23 procedure should be followed in all municipal special assessment cases where improvements are expected to cost $5,000 or more.[193] Appeal to the State Appeal Board requires at least ten objectors.[194]

Section 417.26's reference to appeal to the comptroller might suggest that another administrative review exists for Des Moines projects. However, this reference seems to be the result of legislative oversight at the time that

---

190 214 Iowa 34, 239 N.W. 71 (1932). Objector, who waited until the work was done and the assessments levied, appealed therefrom on the ground the council should have followed c. 23 procedure in entering into the contract, and that its failure to do so meant there was no jurisdiction to assess. The Court thought the intent of the statute was to achieve economy in municipal contracts and that the requirements of the special assessment statutes served the same objective. Carlson v. City of Marshalltown, 212 Iowa 373, 236 N.W. 421 (1931), has a similar attitude toward the applicability of this chapter.

191 Section 417.26 presently refers to the "comptroller"; the change was made when the state's "budget director" was renamed "comptroller". See 22 IOWA CODE ANN. § 417.26.

192 111 N.W.2d 317 (Iowa 1961). The Attorney General, relying on the cases in note 190, *supra*, in an opinion dated May 10, 1961, had held that the Appeal Board had no jurisdiction in the Mechanicsville situation. In Husson v. City of Oskaloosa, 240 Iowa 681, 37 N.W.2d 310 (1949), where objectors complained because part of the project was to be paid for from the general fund, the Court observed that they should have utilized appeal procedures under § 23.4. These objectors were not subjected to special assessments, but were affected through general taxes.

193 Procedure with respect to notice, hearing, and preliminary steps, under chapter 23, does not differ substantially from that called for by special assessment statutes. It will require the council to adopt the proposed plans and specifications and proposed form of contract before the hearing on the proposed resolution of necessity, and to give notice of the hearing by publication in at least one newspaper of general circulation in the city at least ten days before the hearing. IOWA CODE § 23.2 (1962).

194 IOWA CODE § 23.4 (1962). More may be required, if ¼% of the total votes cast in the previous general election for the office of governor, in the municipality, is more than ten.

Chapter 23 appeal was changed from the comptroller to the Appeal Board, and it is doubtful that it offers a different review. There are no provisions in Chapter 417 describing review procedure and scope, if it is intended to provide for a review other than that under chapter 23.

In its review the Appeal Board is permitted to examine the entire record, and to approve the project if its finds that "the form of contract is suitable for the improvement proposed, that the improvement and the method of providing for payment therefor is for the best interests of the municipality and the taxpayers therein, and that such improvements can be made within the estimates therefor."[195] If it finds otherwise it may reject the whole program or recommend modifications for council consideration. Discussion of the scope of review in the district courts will indicate that the Appeal Board has a much wider scope of review. If the council's decision is to be challenged on the merits, "this is an unsound decision", only the Appeal Board can hear this argument. Whether the policy of permitting such a review by people not directly responsible to the electorate interested therein is a desirable one might well be examined by the Legislature.

Special assessment statutes are quite varied in the procedure provided for court review. Some have no provision for any appeal to district court,[196] some provide for appeal only after the decision to improve,[197] others only after levy of assessment for the work done,[198] some provide for appeal at several stages,[199] one permits appeals at several stages but in addition permits the city to seek court confirmation,[200] and another requires the city to seek court confirmation so fails to provide for appeal.[201] Nearly all these patterns can be found among the various street and sidewalk statutes. Where sidewalks are built under Iowa Code sections 389.31-.36, or street improvements in special charter cities, under Chapter 420, the Code contains no appeal provisions. In the case of street, sewer or sidewalk improvement under Chapter 391, appeal is available only after the assessment is levied.[202] Under Chapter 391A, an alternative method for handling such improvements, the city has the option of either proceeding with the project unless objectors appeal, or first seeking court confirmation of the assessment.[203] This Chapter permits appeal to the district court within twenty days from adoption of the resolution of necessity;[204] if this is not done the right to appeal at a later stage is curtailed in scope,[205] but it is possible that if the city later chooses to

---

195 *Id.* § 23.7.

196 IOWA CODE §§ 368.43-.46, 389.31-.38, 390.10, 409.27-.32, 420.250-.285, and c. 137, 266, 267, 317, 318, 319, 320, 357A, 392, 401, 417, 460, 461 and 467A (1962). See Lacy v. City of Des Moines, 113 N.W.2d 279 (Iowa 1962) (action against city and city officials for damages for destruction of plaintiffs' buildings as a nuisance, the defendants proceeding primarily under c. 137); Kane v. City of Marion, 251 Iowa 1157, 104 N.W.2d 626 (1960), 11 DRAKE L. REV. 7 (1961) (declaratory judgment proceedings involving c. 392).

197 IOWA CODE §§ 100.16, 113.23 (1962).

198 *Id.* §§ 311.24, 391.88, 395.13.

199 After any final action: *id.* §§ 357.33, 455.92, 459.4; after any proceeding: *id.* § 458.23; see also § 391A.31.

200 *Id.* §§ 391A.18, 391A.31.

201 *Id.* §§ 417.28-.40.

202 *Id.* § 391.88.

203 *Id.* §§ 391A.18, 391A.31.

204 *Id.* § 391A.31(a).

205 *Id.* § 391A.31(b). § 391A.31(c) says this does not deny the right to appeal

seek confirmation the objector may then have as wide a scope of review as if he had appealed immediately after the resolution was adopted. Des Moines, when proceeding under Chapter 417, will have taken bids by the time it considers the resolution of necessity, and it must go to court after adoption of that resolution to have the proposed assessments confirmed, before further action can be taken.[206] Chapter 417 does not provide for objector appeal to district court at any stage, but objectors will be heard in the confirmation action.

A court confirming an assessment, under either section 391A.18 or 417.28, apparently has no broader power to review than it would in an appeal from the council's action.[207] Analysis of this power will then require consideration of cases which arose on appeals from the levy of assessment, as well as those arising before any letting of contract, and will proceed along the lines of the challengeable issues suggested at the end of the first paragraph of this section.

Failure to comply with statutory procedural requirements, and irregularities in compliance, may be considered in the appeal to district court,[208] if

---

on the ground of fraud, nor the right to exercise any other remedies available by law.

[206] *Id.* § 417.28.

[207] The confirmation procedure is triable as in equity. IOWA CODE §§ 391A.18(6), 417.29 (1962). But the court has power only to correct irregularities or inequities in valuations or in the schedule of assessments, and to consider objections because of alleged illegal procedure or fraud, under § 391A.18(7). Under § 417.37 the same power is granted and in addition the court may consider whether benefitted property has been omitted, and whether the schedule of assessments is just and equitable between the public and the property assessed, and between the various lots assessed.

[208] Procedural defects caused reversal of board or council action in: Chicago & N.W. Ry. v. Sedgwick, 203 Iowa 726, 213 N.W. 435 (1927) (injunction, not appeal); Chicago & N.W. Ry. v. Board of Supervisors, 187 Iowa 402, 172 N.W. 443 (1919) (procedure for repair of established drainage system followed; this project involved adding lateral, and board should have followed procedure for creation of new district); Lewis v. Pryor Drainage Dist., 183 Iowa 236, 167 N.W. 94 (1918) (divergence from engineer's report); Dunker v. City of Des Moines, 156 Iowa 292, 136 N.W. 536 (1912) (resolution insufficient as to property to be assessed); Shaw v. Nelson, 150 Iowa 559, 129 N.W. 827 (1911) (divergence from engineer's report); Bennett v. City of Emmetsburg, 138 Iowa 67, 115 N.W. 582 (1908) (many defects, not only in pre-resolution procedure but also after adoption; this was appeal after levy). In Hartshorn v. Wright County Dist. Ct., 142 Iowa 72, 120 N.W. 479 (1909), following a board decision not to establish any district, the district court on appeal by petitioners for the district ordered its establishment, but only as a district smaller than recommended by the engineer. This action was annulled on certiorari.

Alleged procedural defects were held insufficient for reversal of board or council action, in: Husson v. City of Oskaloosa, 240 Iowa 681, 37 N.W.2d 310 (1949) (notice); Chicago, R.I. & P. Ry. v. Town of Dysart, 208 Iowa 422, 223 N.W. 371 (1939) (resolution statement of property to be assessed); Illinois Cen. R.R. v. Town of Pomeroy, 196 Iowa 504, 194 N.W. 913 (1923) (late proof of publication); Sullivan v. Board of Supervisors, 193 Iowa 739, 187 N.W. 575 (1922) (engineer also on commission to assess benefits); Schafroth v. Buena Vista County, 181 Iowa 1223, 165 N.W. 341 (1917) (engineer's report); Mapel v. Board of Supervisors, 179 Iowa 981, 162 N.W. 198 (1917) (insufficient evidence to show clearly that district improperly established); Kelley v. Drainage Dist. No. 60, 158 Iowa 735, 138 N.W. 841 (1913) (petition); Prichard v. Board of Supervisors, 150 Iowa 565, 129 N.W. 970 (1911) (petition, engineer's report); In the Matter of Drainage Dist. No. 3, 146 Iowa 564, 123 N.W. 1059 (1910) (petition, bond, engineer's report, clerical errors in minutes); Lightner v. Greene County, 145 Iowa 95, 123 N.W. 749 (1909) (publication of notice); Bennett v. City of Emmetsburg, *supra* (resolution doesn't indicate whether petitioned for or not); Reed v. City of Cedar Rapids, 137 Iowa

proper objections about these defects were made to the council before it adopted the resolution of necessity.[209] Some defects, especially with respect to notice, have been deemed waived by the objector's appearance before the council.[210] At one time the Court seemed willing to treat many procedural failures as "jurisdictional",[211] but it has receded from this position.[212] Thus, in a few cases it may be to the property owner's advantage to take no part in the hearing before the council and to reserve for a later battle his objections to procedure.[213]

Objections to the council that a proposed project is not "necessary" certainly are in order. But if the council finds the project necessary, or unnecessary, is its finding reviewable on appeal? In an early case, involving a sidewalk which objectors alleged was erected for the convenience of one person and was not needed by the general public, the Court said:

> Except for the want or authority or for fraud, the court can not interfere in the exercise of lawful municipal authority. It is made the duty of the city council to determine whether an improvement of this character is demanded by the public. With their determination, when fairly made in the exercise of competent authority, we cannot interfere.[214]

Most subsequent decisions, usually referring to the questioned action as

---

107, 111 N.W. 1013 (1908) (filing of plat and schedule); Ross v. Board of Supervisors, 128 Iowa 427, 104 N.W. 506, 1 L.R.A. N.S. 431 (1905) (effect on others of failure to serve notice on one property owner—who appeared, anyway); City of Chariton v. Holliday, 60 Iowa 391, 14 N.W. 775 (1883).

[209] IOWA CODE §§ 391.19, 395.5, 455.25 (1962); Moss v. Town of Hull, 249 Iowa 1178, 91 N.W.2d 599 (1958); Dickey v. City of Burlington, 247 Iowa 116, 73 N.W.2d 96 (1955); Smith, Lichty & Hillman Co. v. City of Mason City, 210 Iowa 700, 231 N.W. 370 (1930); Durst v. City of Des Moines, 164 Iowa 82, 145 N.W. 528 (1914); Lightner v. Greene County, 145 Iowa 95, 123 N.W. 749 (1909); City of Muscatine v. Chicago, R.I. & P. Ry., 79 Iowa 645, 44 N.W. 909 (1890). See Hedge v. City of Des Moines, 141 Iowa 4, 119 N.W. 276 (1909); Oliver v. Monona County, 117 Iowa 43, 90 N.W. 510 (1902); and dissenting opinion in Chicago & N.W. Ry. v. Sedgwick, 203 Iowa 726, 213 N.W. 435 (1927).

[210] Tjaden v. Town of Wellsburg, 197 Iowa 1292, 198 N.W. 772 (1924); Harker v. Board of Supervisors, 182 Iowa 121, 163 N.W. 233 (1917); Kelley v. Drainage Dist. No. 60, 158 Iowa 735, 138 N.W. 841 (1913); Hoyt v. Brown, 153 Iowa 324, 133 N.W. 905 (1911); Camp v. City of Davenport, 151 Iowa 33, 130 N.W. 137 (1911); Clifton Land Co. v. City of Des Moines, 144 Iowa 625, 123 N.W. 340 (1909); Andre v. City of Burlington, 141 Iowa 65, 117 N.W. 1082 (1909); Reed v. City of Cedar Rapids, 137 Iowa 107, 111 N.W. 1013 (1908); Higman v. City of Sioux City, 129 Iowa 291, 105 N.W. 524 (1909); Ross v. Board of Supervisors, 128 Iowa 427, 104 N.W. 506, 1 L.R.A. N.S. 431 (1905). See Oliver v. Monona County, *supra*, note 209; Ford v. Town of North Des Moines, 80 Iowa 626, 45 N.W. 1031 (1890).

Of course, defects in the procedure of adopting the resolution, occurring after the hearing, could be urged though no objections had been filed before the hearing. Lewis v. Pryor Drainage Dist., 183 Iowa 236, 167 N.W. 94 (1918).

[211] Bennett v. City of Emmetsburg, 138 Iowa 67, 115 N.W. 582 (1908).

[212] See cases cited in note 210, *supra*, and Durst v. City of Des Moines, 164 Iowa 82, 145 N.W. 528 (1914); Collins v. City of Keokuk, 147 Iowa 233, 124 N.W. 601 (1910). The *Andre* case, especially, shows the difficulty members of the Court had with the "jurisdictional" concept. See also Chicago, R.I. & P. Ry. v. Town of Dysart, 208 Iowa 422, 223 N.W. 371 (1929). Several of the cases comment that a showing of fraud could lead to a different result. In Collins v. City of Keokuk, *supra*, the Court commented at 238, 124 N.W. at 603: "The case of Bennett v. Emmetsburg . . . has been overruled in Clifton Land Co. v. Des Moines." It should be noted that the Shepard's Citators system uses the symbol for "criticized" rather than that for "overruled", in this connection.

[213] See Chicago & N.W. Ry. v. Sedgwick, 203 Iowa 726, 213 N.W. 435 (1927).

[214] Brewster v. City of Davenport, 51 Iowa 427, 430, 1 N.W. 737, 739 (1879).

a "legislative" type of decision, have refrained from reviewing the question of "necessity".[215] At one time the Court did seem ready to entertain examination of this question,[216] but recently it has been reluctant to do so.[217] However, it will consider whether fraud, corruption or other impropriety influenced the decision.[218]

Similar "legislative" treatment would seem appropriate for objections to the type of work determined by the council as appropriate to meet the neces-

---

[215] Gingles v. City of Onawa, 241 Iowa 492, 41 N.W.2d 717 (1950); Brenton v. City of Des Moines, 219 Iowa 267, 257 N.W. 340 (1934) (sewer); Brush v. Town of Liscomb, 202 Iowa 1155, 211 N.W. 856 (1927) (sidewalk); Illinois Cen. R.R. v. Town of Pomeroy, 196 Iowa 504, 194 N.W. 913 (1923) (street); Vinton v. Board of Supervisors, 196 Iowa 329, 194 N.W. 358 (1923) (refusal to establish drainage district in territory of existing district); Wood v. Honey Creek Drainage & Levee Dist. No. 6, 180 Iowa 159, 160 N.W. 342 (1917); *In re* Special Assessment Jefferson Street Sewer, 179 Iowa 975, 162 N.W. 239 (1917); Thomas v. City of Grinnell, 171 Iowa 571, 153 N.W. 91 (1915); Hoyt v. Brown, 153 Iowa 324, 133 N.W. 905 (1911) (drain); Camp v. City of Davenport, 151 Iowa 33, 130 N.W. 137 (1911) (street); Prichard v. Board of Supervisors, 150 Iowa 565, 129 N.W. 970 (1911); Collins v. City of Keokuk, 147 Iowa 233, 124 N.W. 601 (1910) (alley); Denny v. Des Moines County, 143 Iowa 466, 121 N.W. 1066 (1909) (board refused to establish drainage district, as unnecessary); Dewey v. City of Des Moines, 101 Iowa 416, 70 N.W. 605 (1897) (street); Coates v. City of Dubuque, 68 Iowa 550, 27 N.W. 750 (1886) (street resurfacing). The determination whether particular land should be included in a district has also been termed "legislative". In the Matter of Drainage Dist. No. 3, 154 Iowa 564, 123 N.W. 1059 (1910). What is meant by "legislative" is discussed in Stahl v. Board of Supervisors, 187 Iowa 1342, 175 N.W. 772, 11 A.L.R. 185 (1920), which invalidated an order establishing a district because one member of the board, whose vote was decisive, had an interest in the outcome. In the *Vinton* case the Court indicated that some decisions of a board may be judicial and reviewable, and some are legislative, but did not supply guide lines to differentiate. For other cases using a "legislative" approach, see cases collected in notes 217, 219-221, *infra*, and: Christensen v. Agan, 209 Iowa 1315, 230 N.W. 800 (1930); Maben v. Olson, 187 Iowa 1060, 175 N.W. 512 (1919); Mittman v. Farmer, 162 Iowa 364, 142 N.W. 991 (1913); Chicago, M. & St. P. Ry. v. Monona County, 144 Iowa 171, 122 N.W. 820 (1909); Lacy v. City of Oskaloosa, 143 Iowa 704, 121 N.W. 542, 31 L.R.A. N.S. 853 (1909); Temple v. Hamilton County, 134 Iowa 706, 112 N.W. 174 (1907); Ross v. Board of Supervisors, 128 Iowa 427, 104 N.W. 506, 1 L.R.A. N.S. 431 (1905). See 2 ANTIEAU, MUNICIPAL CORPORATION LAW § 14.05 (1961).

[216] In Bell v. City of Burlington, 154 Iowa 607, 134 N.W. 1082 (1912), an appeal from assessment for storm sewer construction, the Court said the question of necessity was not open *at that point*, which could imply that it would be reviewable in an appeal from adoption of the resolution of necessity. In Munn v. Board of Supervisors, 161 Iowa 26, 141 N.W. 711 (1913), and Mittman v. Farmer, 162 Iowa 364, 142 N.W. 991 (1913), board orders establishing a drainage district were upheld after Court consideration of necessity and other factors; in the latter case the trial court had reversed the board's order. See also Mapel v. Board of Supervisors, 179 Iowa 981, 162 N.W. 198 (1917). Necessity may have been considered in the Court's decision that a district was improperly established, in Anderson v. Board of Supervisors, 203 Iowa 1023, 213 N.W. 623 (1927).

[217] Johnson v. Monona-Harrison Drainage Dist., 246 Iowa 537, 68 N.W.2d 517 (1955); Gingles v. City of Onawa, 241 Iowa 492, 41 N.W.2d 717 (1950); Brenton v. City of Des Moines, 219 Iowa 267, 257 N.W. 340 (1934); Christensen v. Agan, 209 Iowa 1315, 230 N.W. 800 (1930) (finding is legislative in any event, so can't be reviewed).

[218] Johnson v. Monona-Harrison Drainage Dist., *supra*, note 217; Husson v. City of Oskaloosa, 240 Iowa 681, 37 N.W.2d 310 (1949); Brush v. Town of Liscomb, 202 Iowa 1155, 211 N.W. 856 (1927); Stahl v. Board of Supervisors, 187 Iowa 1342, 175 N.W. 772, 11 A.L.R. 185 (1920) (reversing board's decision because of conflict of interest factor); Camp v. City of Davenport, 151 Iowa 33, 130 N.W. 137 (1911); 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); Ford v. Town of North Des Moines, 80 Iowa 626, 45 N.W. 1031 (1890). See also IOWA CODE §§ 391A.18(7), 417.37 (1962).

sity it found. And insofar as council judgment on character or type of work in street, sidewalk and sewer cases is concerned, the Court has generally refused to review that judgment as being a legislative matter,[219] although occasionally it has also discussed the merits of the proposed scheme.[220] But it has a different attitude where drainage districts are involved. The merits of the proposed plan are usually considered, and orders establishing districts have been reversed because the Court believed the proposed work would not accomplish the desired objectives[221] No explanation for this diverse treatment is given.

In most early decisions involving inclusion or exclusion of particular land from an improvement district, the "legislative" tag was used to deny reviewability, where the land was not excludible by specific statutory language.[222]

---

219 Gingles v. City of Onawa, 241 Iowa 492, 41 N.W.2d 717 (1950); Collins v. City of Keokuk, 147 Iowa 233, 124 N.W. 601 (1910); Swan v. City of Indianola, 142 Iowa 731, 121 N.W. 547 (1909) (type of paving alleged to be too expensive; also that other improvements should have had priority); Downing v. City of Des Moines, 124 Iowa 289, 99 N.W. 1066 (1904); Brown v. Barstow, 87 Iowa 344, 54 N.W. 241 (1893) (where to improve street intersection); City of Muscatine v. Chicago, R.I. & P. Ry., 79 Iowa 645, 44 N.W. 909 (1890) (character of pavement, width, thickness). See Morrison v. Hershire, 32 Iowa 271 (1871); Warren v. Henly, 31 Iowa 31 (1871).

220 Dickinson v. City of Waterloo, 179 Iowa 946, 162 N.W. 242 (1917). In Bennett v. City of Marion, 106 Iowa 628, 76 N.W. 844 (1898), the decision of the council as to the amount of land needed for a sewer outlet was held open to review in a condemnation proceedings. And in Collins v. City of Keokuk, 91 Iowa 293, 59 N.W. 200 (1894), a landowner was permitted to enjoin construction of tile drains in a street project, to the extent it would increase or alter the flow of water onto his land. See also IOWA CODE §§ 391A.18(7), 417.37 (1962).

221 Johnson v. Monona-Harrison Drainage Dist., 246 Iowa 537, 68 N.W.2d 517 (1955); Vinton v. Board of Supervisors, 196 Iowa 329, 194 N.W. 358 (1923); Shaw v. Board of Supervisors, 195 Iowa 545, 192 N.W. 525 (1923) (objector's engineering witnesses proposed different scheme; the Court said he hadn't made a clear and satisfactory showing that the board's decision was wrong); Shay v. Board of Supervisors, 185 Iowa 282, 170 N.W. 393 (1919); Munn v. Board of Supervisors, 161 Iowa 26, 141 N.W. 711 (1913); Schumaker v. Edington, 152 Iowa 596, 132 N.W. 966 (1911) (alternate scheme proposed); In the Matter of Drainage Dist. No. 3, 146 Iowa 564, 123 N.W. 1059 (1910). In Sullivan v. Board of Supervisors, 193 Iowa 739, 187 N.W. 575 (1922), the Court said that the wisdom of constructing the drain partly in a natural watercourse was not open to challenge, in an appeal from the assessment. But in three drainage district cases the Court used the "legislative" argument in refusing challenges of this type: Christensen v. Agan, 209 Iowa 1315, 230 N.W. 800 (1930) (board refused to act on ground existing ditches were adequate); Maben v. Olson, 187 Iowa 1060, 175 N.W. 512 (1919) (injunction proceedings, by downstream landowners whose land was below the outlet of the proposed district, and who were not parties to its creation); Prichard v. Board of Supervisors, 150 Iowa 565, 129 N.W. 970 (1911). See also Mittman v. Farmer, 162 Iowa 364, 142 N.W. 991 (1913).

Reversals have come in: Anderson v. Board of Supervisors, 203 Iowa 1023, 213 N.W. 623 (1927); Hall v. Polk, 181 Iowa 828, 165 N.W. 119 (1917); Focht v. Board of Supervisors, 145 Iowa 130, 123 N.W. 769 (1909); *In re* Nishnabotna Improvement Dist. No. 2, 145 Iowa 130, 123 N.W. 769 (1909); Zinser v. Board of Supervisors, 137 Iowa 660, 114 N.W. 51 (1908). *Focht* and *Zinser* are distinguished to some extent, but not overruled, in Mapel v. Board of Supervisors, 179 Iowa 981, 160 N.W. 198 (1917).

222 Plummer v. Board of Supervisors, 191 Iowa 1022, 180 N.W. 863 (1921); Mittman v. Farmer, 162 Iowa 364, 142 N.W. 991 (1913) (exclusion from new district, of certain land of old district which was in a city, sustained as legislative even though that land is benefitted); Prichard v. Board of Supervisors, 150 Iowa 565, 129 N.W. 970 (1911) (inclusion of land from existing district); In the Matter of Drainage Dist. No. 3, 146 Iowa 564, 123 N.W. 1059 (1910); Chicago, M. & St. P. Ry. v. Monona County, 144 Iowa 171, 122 N.W. 820 (1909). See 2 ANTIEAU, MUNICIPAL CORPORATION LAW § 14.04 (1961).

In several cases noninterference was justified on other grounds.[223] In two cases where the decision to include seemed clearly unwarranted, the Court did interfere, and in one of these it said the matter was really quasi-judicial rather than legislative.[224]

Not only should included land be benefitted, it should receive benefit in addition to that received by land in the community generally. McQuillan, stating that special assessments are constitutional only when founded on special benefit, also indicates that the question of determining the area benfitted is generally held to be a legislative function, and the determination of benefit is usually conclusive and not subject to judicial interference unless arbitrariness, abuse or unreasonableness be shown.[225] Surprisingly, considering the usual willingness of the Iowa Court to treat necessity, type of work, and what land to include as legislative questions, the Court until recently had no compunction about reviewing the question whether an improvement was of special benefit to land included in the assessable area. At first it had even assumed that benefit was unnecessary, but soon rejected that approach.[226] For a short period of time drainage district statutes forbade con-

---

[223] Shaw v. Board of Supervisors, 195 Iowa 545, 192 N.W. 525 (1923) (benefitted but non-included land can be assessed because in old district; can argue whether should be included, but failed to prove); Hall v. Polk, 181 Iowa 828, 165 N.W. 119 (1917) (evidence insufficient); Mayne v. Board of Supervisors, 178 Iowa 783, 160 N.W. 345 (1916) (plaintiff's land shouldn't have been in the district as established; but he can't urge this on appeal from assessment for later improvements, because too late to raise); Kelley v. Drainage Dist. No. 60, 158 Iowa 735, 138 N.W. 841 (1913) (failed to raise by appeal from order establishing district). See Prichard v. Board of Supervisors, *supra*, note 222, which used "legislative" argument but also suggests that a clear showing of improper inclusion might justify reversal. In Dunker v. City of Des Moines, 160 Iowa 567, 142 N.W. 207 (1913), an appeal from a sewer improvement resolution was based on the failure to include in the assessment area property more than 150 feet from the sewer, even though it was benefitted. The exclusion, based on statute, was sustained; it is possible that an arbitrary and unreasonable exclusion of benefitted property that should be included would not be permitted. In Estes v. Board of Supervisors, 204 Iowa 1043, 217 N.W. 81 (1927), action by the board to exclude from an existing district the property of one of the board members, on the theory of no benefit, was successfully challenged.

[224] Thompson v. Board of Supervisors, 201 Iowa 1099, 206 N.W. 624 (1926); Hauge v. City of Des Moines, 197 Iowa 907, 196 N.W. 68 (1924). In *Thompson* a downstream drainage district was established, but before constructing its proposed improvement was enlarged to include the entire watershed, covering areas in fifty other districts, apparently primarily on the theory that the water came from those districts so they should share in the cost in the downstream area. While this might seem reasonable to a layman, especially one living downstream, it does not comport with the traditional view of the rights of the dominant landowner, and the enlargement was nullified. In *Hauge* the city had established an improvement district in connection with construction of University Avenue Bridge over the Des Moines River and extension of the Avenue from the Bridge to East 18th. The street was already in existence from that point to the east city limits. However, the resolution was amended to eliminate street work between East 9th and East 18th. Plaintiffs' properties were in the district as established, abutting or near the existing eastern part of the Avenue. The Court felt that these properties should not be included as long as there was no direct connection between the improvements and the part of the street near their properties.

[225] 14 McQuillan, Municipal Corporations §§ 38.02, 38.31, 38.184 (1950).

[226] Warren v. Henly, 31 Iowa 31 (1871), followed in Morrison v. Hershire, 32 Iowa 271 (1871), was no longer followed as early as Robinson v. City of Burlington, 50 Iowa 240 (1878). But see Dewey v. City of Des Moines, 101 Iowa 416, 70 N.W. 605 (1897).

sideration of "no benefit."[227] Only during that period, with one exception later receded from,[228] has the Court refused to consider claims that land included in the district would receive no benefit. Most such claims have been unsuccessful, either on estoppel grounds, or because asserted too late,[229] but they have been tolerated and occasionally succeeded.[230] Until recently a similar pattern prevailed in the various municipal improvements.[231] But in the most recent case discussing the problem the Court said there is a con-

[227] IOWA CODE § 1947 (1913 Supp.), § 4790 (1919), providing the only appeal in most drainage district cases, said: "It shall not be competent to show that the lands assessed were not benefitted by the improvement." This statute was so applied in Ross v. Board of Supervisors, 128 Iowa 427, 104 N.W. 506, 1 L.R.A. N.S. 431 (1905). See also Wood v. Honey Creek Drainage & Levee Dist. No. 6, 180 Iowa 159, 160 N.W. 342 (1917); Kelley v. Drainage Dist. No. 60, 158 Iowa 735, 138 N.W. 481 (1913); Chicago, R.I. & P. Ry. v. Wright County Drainage Dist., 175 Iowa 417, 154 N.W. 888 (1916); Chicago, M. & St. P. Ry. v. Monona County, 144 Iowa 171, 122 N.W. 820 (1909). Some of the cases in note 230, *infra*, which considered whether benefits were present, arose while this statute was in effect.

[228] In Plummer v. Board of Supervisors, 191 Iowa 1022, 100 N.W. 863 (1921), a case with a somewhat peculiar fact situation suggestive that some benefit would be realized, the Court thought this was legislative and inclusion was conclusive as to some benefit. But in Thompson v. Board of Supervisors, 201 Iowa 1099, 206 N.W. 624 (1926), where benefit was probably absent, the Court thought the question quasi-judicial. See Chicago, M. & St. P. Ry. v. Monona County, *supra*, note 227.

[229] Estes v. Board of Supervisors, 204 Iowa 1043, 217 N.W. 81 (1927); Stewart v. Board of Supervisors, 183 Iowa 256, 166 N.W. 1052 (1918); Wood v. Honey Creek Drainage & Levee Dist. No. 6, 180 Iowa 159, 160 N.W. 342 (1917); Mayne v. Board of Supervisors, 178 Iowa 783, 160 N.W. 345 (1916); Chicago, R.I. & P. Ry. v. Wright County Drainage Dist., 175 Iowa 417, 154 N.W. 888 (1916).

[230] Successful challenges have included; Anderson v. Board of Supervisors, 203 Iowa 1023, 213 N.W. 623 (1927) (depending more on conclusion that benefits not shown to equal or exceed assessments, and that project inadequate); Thompson v. Board of Supervisors, 201 Iowa 1099, 206 N.W. 624 (1926). Unsuccessful challenges, some of which may have foundered in part on the statute referred to in note 227, *supra*, are: Shaw v. Board of Supervisors, 195 Iowa 545, 192 N.W. 525 (1923) (can raise issue, but hasn't proved it—statute may have been in effect but ignored); Harker v. Board of Supervisors, 182 Iowa 121, 163 N.W. 233 (1917); Schafroth v. Buena Vista County, 181 Iowa 1223, 165 N.W. 341 (1917); Prichard v. Board of Supervisors, 150 Iowa 565, 129 N.W. 970 (1911); In the Matter of Drainage Dist. No. 3, 146 Iowa 564, 123 N.W. 1059 (1910) (Court notes statute, and also finds benefit); Oliver v. Monona County, 117 Iowa 43, 90 N.W. 510 (1902) (need not be direct benefit). See also Zinser v. Board of Supervisors, 137 Iowa 660, 114 N.W. 51 (1908), an appeal from the board's refusal to establish a district where there was little if any evidence of special benefit.

[231] Brush v. Town of Liscomb, 202 Iowa 1155, 211 N.W. 856 (1927) (sidewalk; all witnesses admitted some benefit, and evidence supports); Tjaden v. Town of Wellsburg, 197 Iowa 1292, 198 N.W. 772 (1924) (some benefit found); Hauge v. City of Des Moines, 197 Iowa 907, 196 N.W. 98 (1924) (street project shown not to benefit, and appeal successful); North View Land Co. v. City of Cedar Rapids, 185 Iowa 1032, 169 N.W. 644 (1919) (sewer; estoppel, lack of evidence); *In re* Special Assessment Jefferson Street Sewer, 179 Iowa 975, 162 N.W. 239 (1917) (challenge to assessment proceedings too late; Court also says legislative and conclusive); Dickinson v. City of Waterloo, 179 Iowa 946, 162 N.W. 242 (1917) (sewer; appeal from assessment too late; some benefit; conclusive); Durst v. City of Des Moines, 164 Iowa 82, 145 N.W. 528 (1914) (paving; raised too late); Bell v. City of Burlington, 154 Iowa 607, 134 N.W. 1082 (1912) (sewer; raised too late; some benefit found); Camp v. City of Davenport, 151 Iowa 33, 130 N.W. 137 (1911) (street; resolution not conclusive, but Court finds some benefit); Andre v. City of Burlington, 141 Iowa 65, 117 N.W. 1082 (1909) (sewer; record doesn't sustain claim of no benefit); Hedge v. City of Des Moines, 141 Iowa 4, 119 N.W. 276 (1909) (paving; appellants petitioned for it, so are estopped); Bennett v. City of Emmetsburg, 138 Iowa 67, 115 N.W. 582 (1908) (sewers; Court finds some property not benefitted); Downing v. City of Des Moines, 124 Iowa 289, 99 N.W. 1066 (1904) (only if discretion clearly abused will court interfere).

clusive presumption of some benefit.[232] In that case this statement was dictum,[233] and the cases cited as supporting the proposition do not do so.[234] Even if the Court returns to its past willingness to consider benefit, few cases will succeed in an attempt to prove "no benefit". Proof that the improvement does not or will not increase market value is insufficient, and apparently irrelevant;[235] and liberal consideration to potential benefit has been the pattern.[236]

It may seem more appropriate to raise objections to the amount of an assessment after the levy. Where "confirmation" procedure is followed such objections must be raised at this point, however,[237] and may be raised now in other instances.[238] The schedule developed for council consideration usually

---

232 Moss v. Town of Hull, 249 Iowa 1178, 91 N.W.2d 599 (1958).

233 The notice of hearing on the resolution of necessity had said that objections not filed on or before time of hearing were waived; the "no benefit" objection was not filed, and the Court holds it was waived.

234 The Court cites: Dickey v. City of Burlington, 247 Iowa 116, 73 N.W.2d 96 (1955); Gingles v. City of Onawa, 241 Iowa 492, 41 N.W.2d 717 (1950); Brenton v. City of Des Moines, 219 Iowa 267, 257 N.W. 340 (1934); Tjaden v. Town of Wellsburg, 197 Iowa 1292, 198 N.W. 772 (1924); and Vail v. City of Chariton, 181 Iowa 296, 164 N.W. 297 (1917). In *Dickey* the challenge was, not "no benefit", but "benefit less than assessment"; this challenge was sustained and the assessment reduced. Both *Dickey* and *Brenton* say benefit is presumed, but the presumption can be overcome. *Gingles* was an appeal from the assessment, the opinion does treat the matter as legislative and apparently conclusively presumed correct, but relies only on other cases involving appeals from assessments. *Tjaden* finds the possibility of benefit; the trial court also excluded much of appellant's land from the assessment because not benefitted, and this was not challenged. *Vail,* which does say that the cases require presumption of some benefit, also indicates there was insufficient evidence of lack of benefit. The cases cited in *Vail* are Camp v. City of Davenport and Andre v. City of Burlington, referred to *supra,* note 228, in which the Court actually found evidence of benefit, and Owens v. City of Marion, 127 Iowa 469, 103 N.W. 381 (1905), an equitable action to cancel an assessment on various grounds, all of which could have been presented as objections to the council but were not. The Court in *Owens* suggests that the questions could have been asserted in a properly timed appeal. It is submitted that the authorities cited in *Moss* do not support the proposition it asserts.

235 Gingles v. City of Onawa, *supra,* note 234; North View Land Co. v. City of Cedar Rapids, 185 Iowa 1032, 169 N.W. 644 (1919); Hall v. Polk, 181 Iowa 828, 165 N.W. 119 (1917); *In re* Special Assessment Jefferson Street Sewer, 179 Iowa 975, 162 N.W. 239 (1917); Camp v. City of Davenport, 151 Iowa 33, 130 N.W. 137 (1911). In this position the Iowa Court does not follow the pattern often found in other states. See favorable comment on Iowa's position in 2 ANTIEAU, MUNICIPAL CORPORATION LAW § 14.11 (1961).

236 Brenton v. City of Des Moines, 219 Iowa 267, 257 N.W. 340 (1934); Tjaden v. Town of Wellsburg, 197 Iowa 1292, 198 N.W. 772 (1924); Illinois Cen. R.R. v. Town of Pomeroy, 196 Iowa 504, 194 N.W. 913 (1923); Schafroth v. Buena Vista County, 181 Iowa 1223, 164 N.W. 341 (1917); Dickinson v. City of Waterloo, 179 Iowa 946, 162 N.W. 242 (1917); Bell v. City of Burlington, 154 Iowa 607, 134 N.W. 1082 (1912); In the Matter of Drainage Dist. No. 3, 146 Iowa 564, 123 N.W. 1059 (1910); Oliver v. Monona County, 117 Iowa 43, 90 N.W. 510 (1902).

237 IOWA CODE §§ 391A.18, 417.28-.29 (1962).

238 *Id.* § 391.19 permits the proposed resolution of necessity to "provide that unless property owners at the time of the final consideration of" that 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." This provision has been construed in two cases, Moss v. Town of Hull, 249 Iowa 1178, 91 N.W.2d 599 (1958); Smith, Lichty & Hillman Co. v. Mason City, 210 Iowa 700, 231 N.W. 370 (1930). These cases indicate that a failure to object to the council, and possibly an objection but failure to appeal therefrom, waives objections as to whether a lot should be assessed and as to its value, but not as to whether the assessment exceeds benefits or the statutory limits of 25% of value. If the resolution does not contain such a notice, the failure to object would seem not to waive objections

contains a valuation figure for each tract to be assessed, and an estimated assessment. Questions which could be considered are whether the proposed assessment exceeds the benefits which objector's property will receive, whether it exceeds the value of the property or some percentage of that value where that percentage has statutory significance, and whether the assessments to the various properties are proportionate to the benefits they will receive. These questions will more frequently be raised in an appeal from the levy of the assessment, and discussion of them will be postponed to a later section.

If all procedural requirements have been met, and the necessary findings made, there are few conditions precedent to be satisfied. It is not necessary that the grade of a street be established by this time.[239] But, if an owner of property is ordered to build his sidewalk to a permanent rather than a temporary grade, he cannot be compelled to act until the city has brought the bed of the walk to the grade necessary so that the finished walk will be at proper grade.[240]

In drainage district cases, all costs must be assessed to benefitted properties, because there are no funds from general taxes available for this purpose (as long as federal or state grants-in-aid are unavailable). But a street project need not be entirely paid for through special assessment. However, decision of a council to handle a project entirely that way would probably be deemed legislative, and if not objectionable on grounds previously discussed would be upheld as long as no lack of authority, fraud or oppression could be shown.[241] If the council decides to pay part of the cost from the general fund, this too seems a legislative decision and not reviewable in court, though it can be appealed to the State Appeal Board.[242]

3. Ordering the Improvement to be Made.

Chapters 391 and 417 contemplate the adoption of a resolution, in addition to the resolution of necessity, which orders the construction or other work to be done.[243] Chapter 391A does not so provide, but does permit use of a resolution ordering the engineer to prepare and file with the clerk detailed

---

to valuation for a lot as indicated on the schedule, although it might foreclose a later objection that the lot should not be assessed at all. See Durst v. City of Des Moines, 164 Iowa 82, 145 N.W. 528 (1914).

[239] Peoples Inv. Co. v. City of Des Moines, 213 Iowa 1378, 241 N.W. 464, 79 A.L.R. 1310 (1932); Shaver v. J.W. Turner Improvement Co., 155 Iowa 492, 136 N.W. 711 (1912); Arnold v. City of Fort Dodge, 111 Iowa 152, 82 N.W. 495 (1900); Allen v. City of Davenport, 107 Iowa 90, 77 N.W. 532 (1898). See Turley v. Town of Dyersville, 202 Iowa 1221, 211 N.W. 723 (1927). See also, on sidewalks being brought to grade before duty of owner to comply with order to build, Bowman v. City of Waverly, 155 Iowa 745, 128 N.W. 950 (1912).

[240] IOWA CODE § 389.31 (1962); Converse v. Town of Deep River, 139 Iowa 732, 117 N.W. 1078 (1908).

[241] Coates v. City of Dubuque, 69 Iowa 550, 27 N.W. 750 (1886).

[242] See notes 189-195, *supra*, and supporting text. In Corey v. City of Fort Dodge, 133 Iowa 666, 111 N.W. 6 (1907), which arose before adoption of what is now IOWA CODE § 23.4 (1962), the Court sustained a council's decision to pay from the general fund all costs of paving intersections and parts of streets in front of city and governmental property rather than to assess these costs to privately owned property abutting the project, even though an ordinance provided that the costs should be so assessed.

[243] IOWA CODE §§ 391.25, 417.49 (1962). See Stutsman v. City of Burlington, 127 Iowa 563, 103 N.W. 800 (1905), which treated adoption of the resolution of necessity as sufficient compliance with this requirement.

plans and specifications, and the engineer and attorney to prepare and file a notice to bidders and form of contract.[244] Additional resolutions are not required by Chapter 389, for sidewalk improvements under that chapter, but may be called for by ordinances[245] and probably should be used if the property owner is given an opportunity to build the walk at his own expense as an alternative to the city's doing the work or contracting for it.[246]

There are few cases challenging assessment proceedings on the grounds of defective resolutions ordering work to be done, and challenges have rarely succeeded. The contents of this resolution are not specified by any statute. Section 391.27 requires call of the yeas and nays and recording of the result. Section 417.49 does not so provide, but does call for passage, remaining on file a week, and then final passage. No unusual majority requirement for adoption is specified.[248] While section 391.25 refers to adoption of the resolution after passage of the resolution of necessity, and doing so would seem better practice, the two may be adopted concurrently.[249] But under section 417.49 the order to improve may be adopted only after court confirmation of the assessments.

In the preceding pages we have considered procedure to be followed in connection with street, sewer and sidewalk programs financed through use of special assessments, to the stage where bids on the project will be solicited. (Actually, under Chapter 417, bids will have been obtained and evaluated before the court review and the ordering of the work.) Many aspects of public contracting have been discussed elsewhere in this Review.[250] Later articles, it is anticipated, will consider other aspects of contracting related to special assessment projects and such other problems of special assessment procedure as making and levying the assessment and further review.

---

[244] IOWA CODE § 391A.15 (1962).

[245] See Starr v. City of Burlington, 45 Iowa 87 (1876). IOWA CODE § 389.9 (1962) incorporates the provisions of c. 391 in connection with acquistion of property for street purposes.

[246] See Zalesky v. City of Cedar Rapids, 118 Iowa 714, 92 N.W. 657 (1902).

[247] Sunset Golf Club, Inc., v. City of Sioux City, 242 Iowa 739, 46 N.W.2d 548 (1951) (resolution gave incorrect legal description of objector's property; and the incorrect description was also used in another resolution ordering taking of bids, no description was used in the resolution accepting bids, the incorrect one used in resolution accepting work, but the correct description finally used in the resolution providing for notice and levy of assessment; *held,* objections waived, and also correct legal description not required); Messer v. Marsh, 191 Iowa 1144, 183 N.W. 602 (1921) (resolution signed by mayor pro tem); Meader v. Town of Sibley, 191 Iowa 1139, 183 N.W. 610 (1921) (adopted on same vote as resolution of necessity); Jones v. City of Sheldon, 172 Iowa 406, 154 N.W. 592 (1915) (adoption procedure); Stutsman v. City of Burlington, 127 Iowa 563, 103 N.W. 800 (1905) (no resolution other than resolution of necessity); Dittoe v. City of Davenport, 74 Iowa 66, 36 N.W. 895 (1888) (contents). Successful challenges for failure to give any notice of the order to construct sidewalks, are Kaynor v. City of Cedar Falls, 156 Iowa 161, 135 N.W. 564 (1912); Zalesky v. City of Cedar Rapids, 118 Iowa 714, 92 N.W. 657 (1902).

[248] Compare with this the requirements for adoption of the resolution of necessity, notes 168-171, *supra,* and supporting text.

[249] Meader v. Town of Sibley, 191 Iowa 1139, 183 N.W. 610 (1921); Jones v. City of Sheldon, 172 Iowa 406, 154 N.W. 592 (1915); see also Stutsman v. City of Burlington, 127 Iowa 563, 103 N.W. 800 (1905).

[250] *Contracts of Political Subdivisions in Iowa—Procedure, Defects, Recovery,* 10 DRAKE L. REV. 53 (1960).

Although the discussion has concentrated on the street, sewer and sidewalk improvements, it has touched on related problems in other situations where special assessments are used. A wide diversity of treatment for similar steps has been found. This seems unwarranted, as does the variety of alternative methods available for handling street, sewer and sidewalk projects. A more uniform treatment for similar steps seems desirable. Whether or not the special assessment machinery is re-examined and, if re-examined, overhauled, the Legislature may also wish to reconsider the role of the State Appeal Board.