

**BEFORE THE AUDITOR, RECORDER AND TREASURER  
OF SCOTT COUNTY, IOWA**

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**IN THE MATTER OF JOHN MAXWELL,  
SCOTT COUNTY SUPERVISOR**

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**STATEMENT OF JAMES C. LAREW**

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Good evening.

My name is Jim Larew. In my capacity as an attorney, it is my privilege to represent two individuals in this proceeding, each of whom have been instrumental in formatting the petitions that were filed, giving rise to today's proceeding:

- Matt Trimble is a life-long resident of Scott County, and currently resides at 21 Oak Lane, Davenport. For more than twenty years he has worked as an IT professional, focused primarily in the healthcare and education fields. He spearheaded one of the petition drives which, when submitted to you, triggered the requirement, under Iowa law, for today's hearing to be convened.
- Carlton Wills, a resident of Davenport, Scott County, Iowa, for more than 63 years, he now resides at 1828 Dixwell Street. He is retired from his work at the International Brotherhood of Electrical Workers (IBEW) after forty years in the trade. He headed another of the petition efforts and those signatures, too, have been submitted to you.

Before addressing the question that is before you, I propose to list a series of facts concerning which I believe there will be no genuine dispute, and concerning which I think your deliberations should consider:

First, Scott County, Iowa, a political jurisdiction created by the Iowa General Assembly, is one of 99 counties and is governed by a five-member Board of Supervisors, each of whom serve four-year terms of office. Iowa law establishes the office of County Assessor, whose purpose is to value and assess property in the county for the purpose of taxation.

Second, under Iowa Code § 44.2, and pursuant to administrative rules published by the Iowa Department of Revenue, the Scott County Conference Board serves as the governing board for the office of the county assessor. The Conference Board has the responsibility of appointment members of the examining board, members of the board of review and the assessor. It is charged with: establishing and adopting an annual budget for the county assessor; approving the position of deputy assessor and the number of deputy assessor; and reappointing the assessor and employing appraisers and other technical help.

Third, Membership of the County Conference Board consists of three units: the first unit is comprised of mayors of all incorporated cities whose property is assessed by the county assessor; the second unit is comprised of representatives from the boards of directors of each high school district that has property in the county—including North Scott Community School District; and third unit is comprised of the members of the Scott County Board of Supervisors.

Fourth, each unit has one vote, and, at least two members of each voting unit must be present in order for the unit to cast a vote. In the event the vote of the members of a voting unit ends in a tie, that unit shall not cast a vote on the particular matter before the Conference Board. Two of the three units must agree in order to pass a vote on any related matter. The chairperson of the Scott County Board of Supervisors acts as the chairperson of the County Conference Board; the assessor serves as clerk.

Fifth, the City of Davenport, Iowa, is a municipality, one of nearly 950 cities in the State of Iowa, but its third largest. It is one of only seven cities in Iowa to have its own assessor's office. As such, and also pursuant to Iowa Code § 441.2, it also has its own Conference Board which governs the operations of the Davenport City Assessor's office.

Sixth, as required by state Code, Davenport's Conference Board's membership is analogous to, but, in at least one important way involving school board representation, different from, that of the County Conference Board. That is, the first unit of Davenport's Conference Board is comprised of all members of the Davenport City Council. The second unit is comprised of representatives of school boards that have property in the city limits—which includes the North Scott Community School District. In contrast to the County Conference Board, however, by state administrative

rule, the City Conference Board must consist of the *entire* board of directors of each school district whose property is assessed by the city assessor. IAC 701—71.19(2)(b). As with the County Conference Board, the third unit is comprised of all five members of the Scott County Board of Supervisors.

Seventh, voting and governance of the City Conference Board is comparable to the County Conference Board. The chairperson is the City's Mayor. Voting is by unit and two of three units must agree to the passage of any vote.

Eighth, the North Scott Community School District, one of 333 such public school districts located in the State of Iowa, is comprised of geographical areas located in northerly Scott County and the southern edge Clinton County.

Ninth, John Maxwell, a resident of rural northern Scott County, lives at 10600 275<sup>th</sup> Street, Eldridge IA, which is located in the North Scott Community School District ("NSCSD").

Tenth, Mr. Maxwell, on September 8, 2015, was first elected to serve on NSCSD's Board of Directors for a four-year term of office, during which time he served as its president.

Eleventh, while in the middle of that term of office, Mr. Maxwell, in 2018, also ran for, and, on November 6, 2018, was elected to serve on, the Scott County Board of Supervisors. He took office for that position on January 2, 2019. [Exhibit A, attached].

Twelfth, while seated mid-term on his Board of Supervisors seat, in November 2019, Mr. Maxwell then ran successfully for re-election to his seat on the NSCSD's Board of Directors. That Board held its organizational meeting, and, per Iowa Code § 227.38, Mr. Maxwell was sworn in to serve a new term as one of its members, on November 25, 2019. [Exhibit B, attached].

Under these facts, the question before you is whether a person—in this instance, Mr. Maxwell—may be elected, by two separate constituencies, in two separate elections, to serve simultaneously in elective offices governing two separate political jurisdictions—the North Scott Community School District and the Scott County Board of Supervisors—when, among other matters, each such office has

authority over independent—yet over-lapping and entangled—taxing and spending powers.

The answer to that general question is a simple, straight forward: no. That “no” answer comes in two separate parts:

First, a person may not—as Mr. Maxwell has done--serve in both of those elected offices simultaneously because they are what Iowa law characterizes as “incompatible” positions—that is to say, all of the duties of each of those offices cannot be fulfilled by the same person at the same time; and

Second, Iowa law is clear that when a person attains and occupies two incompatible offices in sequence, the taking the second office creates a vacancy in the first. That matter firmly re-affirmed and settled by our Iowa Supreme Court, in 1965, when it held, in *State ex rel LeBuhn v White*, 133 N.W. 2d 903 (Iowa 1965), that “if a person, while occupying one office, accepts another incompatible with the first, he *ipso facto* vacates the first office and his title thereto is terminated without any other act or proceeding.” Therefore, when Mr. Maxwell, already seated as an incumbent member of the Scott County Board of Supervisors, then, in November of 2019, ran for, was elected to, and, on November 25, 2019, took a seat as a member of the North Scott Community School District, by operation of law, the first seat, the one on the Board of Supervisors, became “vacant.”

Upon answering the question presented to you—that, “no,” Mr. Maxwell could not legally occupy two incompatible positions simultaneously—and by determining that, on November 25, 2019, upon the moment of his doing so, by operation of law, it is necessarily the case that a vacancy was created on the Board of Supervisors, thereby requiring this body, next, to name a successor to that vacated seat.

That this proceeding is unique should not create the impression that the legal and policy issues are difficult. The uniqueness of the situation is created by the boldness of Mr. Maxwell’s action. Iowa is a common-sense state where, wisely and pragmatically, power has always been dispersed amongst persons holding layers of different offices across a multiplicity of political jurisdictions.

As a result, very few persons in Iowa, over the years, and, apparently, nobody ever before in Scott County, have attempted to do what Mr. Maxwell has done in this instance, and that which Iowa law prohibits: to run for and to occupy

simultaneously two separate elective offices in two separate, over-lapping legal jurisdictions, whose separate legal duties and responsibilities are so problematic as to be characterized as “incompatible.”

That there are multiple conflicting interests that make service in these two elective positions simultaneously irreconcilable, and not merely a theoretical matter adversely affecting good government. The problems posed by the situation were made most visibly to the public at a recent, regularly-scheduled meeting of the City of Davenport’s Conference Board, whose powers and governing rules I have just briefly described.

On that day, February 9, 2021, the start of the City’s Conference Board’s meeting, Mr. Maxwell initially appeared as a part of the unit created by members of the Scott County Board of Supervisors. When there was not a sufficient showing of the school district representatives to form a unit, Mr. Maxwell indicated his intent to remove himself from the Board of Supervisors’ voting unit and to become a member, instead, of the school board of directors’ unit.

The intended action was diverted when a cautionary objection was made by a person in attendance and when another school district representative appeared, thereby establishing the needed quorum.

However, following that meeting, Scott County Attorney Michael J. Walton, in an undated Memo, issued a brief written opinion that, because both the Board of Supervisors and the North Scott Community School District Board membership *require* membership on the Davenport City Conference Board, the two offices held by Mr. Maxwell are incompatible.

Mr. Walton’s opinion was consistent with Iowa common law, with applicable statutory language, and with administrative rules issued by the Iowa Department of Revenue. So, too, it was consistent with a series of advisory opinions that had been earlier issued by the Iowa Attorney General.

In one of those opinions, written in 1992 (AG Opinion 92-9-1), Iowa Attorney General Tom Miller had addressed an issue of potential incompatibility, but that opinion had had nothing to do with any conference board or with Iowa Code § 441.2—which is the circumstance, here.

However, a subsequent opinion issued by the same General Miller, this one less than a year later, in 1993, did exactly that: in it, he concluded that the offices of

mayor and county supervisors were incompatible because both offices required membership on the county conference board. (AG Opinion 93-4-8(L)). [Exhibit C, attached].

The successive legal opinions—first, the Iowa Attorney General, then the Scott County Attorney—clearly indicated that the required membership of the members of the Board of Supervisors and the members of the Board of the North Scott Community School District were in conflict, thereby placing Mr. Maxwell in an incompatible situation.

In fact, therefore, under controlling Iowa common law authority, by operation of law, by taking the oath to serve for a second term of office on the North Scott Community School District Board, Mr. Maxwell had created a vacancy on the Scott County Board of Supervisors.

In recognition of Mr. Maxwell's incompatibility predicament, summarized by County Attorney Walton's initial opinion, state legislators in Des Moines moved quickly, darkly and, for the reasons I shall explain, ultimately, ineffectively, to try to remedy the situation.

I have some experience with state law making. Two rules frequently apply to that process:

**Rule 1:** Sunshine is the best disinfectant. If you want to end up with a good law that stands the test of time, better to use processes that are visible to the public and parties whose interests will be affected.

**Rule 2:** When legislation is done in darkness and secrecy, the likelihood of legislative tripping and stumbling and markedly increased—even by those who are viewed as clever or powerful.

In Des Moines, in this session of the Iowa General Assembly, one bill more than most was the subject of public debate at the time that County Attorney Walton issued his first opinion: Senate File 413, whose formal caption was, "an Act relating to the conduct of elections, including absentee ballots and voter list maintenance activities, making penalties applicable, and including effective date and applicability provisions."

By those who opposed the bill, the proposed law was characterized as an act of voter suppression. Amidst the concerns, public hearings were held. On February

22, 2021, in the Old Supreme Court chamber, many citizens registered their opinions about the bill, as then written—most all of them in opposition to it.

Nowhere in the bill as written at the time of the public debate in that chamber was there anything said or mentioned in it about conference boards.

At no time, at the time of the public debate, or after, was the caption of the bill ever changed to alert legislators of any amendments to the bill related to conference bills.

However, on the day immediately after the public hearing, on February 23, 2021, a new section was added to the bill, in metaphorical darkness and in secrecy—from eyes of the general public, at least, who had come to the capitol to debate the bill—that included the following language:

Sec. 2. NEW SECTION. 3913 Conference boards—appointment – limitations.

....

2. If a person is a member of more than one body whose members make up a voting unit on the conference board, that person shall waive the person's position on the conference board for all but one of the bodies the person represents. A waiver pursuant to this subsection does not cause the person to vacate any elective office.

It is obvious from this text that the authors of this amendment correctly recognized that there is incompatibility problem in Scott County. They must have hoped, by attaching this amendment, that the person in this county causing the incompatibility problem could waive it, too—as if the interests of voters and tax payers meant nothing.

But, this deeply flawed “waiver” approach to resolving fundamental incompatibility problems, even if presumed, for the sake of argument, to be conceptually valid, and even if applied to the facts before you, can have no beneficial effect on Mr. Maxwell's dilemma because of the manner in which it was too hastily written and too poorly considered.

Legislators know how to make law retroactive and do so when a law does not involve criminal matters and other serious sanctions.

Express language in a bill, in appropriate circumstances, can be used to cause that retroactive effect.

If such retroactive language had been used in this instance, on a bill amended under rays of legislative sunlight, whose caption had alerted legislators of its new language pertaining to changes in the manner in which Conference Boards operate, with the clearly-stated intent to relieve Mr. Maxwell of his incompatibility problem, perhaps, only then, could a colorable argument have been made, here, tonight that legislators had cured the dilemma for him and had removed the incompatibility issue from your jurisdiction altogether.

But that is not what happened. If that had been the goal of the amendment's legislative authors, operating in legislative darkness, after citizens had gone home from their public hearing, then the best that can be said is that the provision's authors stumbled and fell.

Instead, Section 73 of the bill sets forth an exact effective date, as follows: "This Act, being deemed of immediate importance, takes effect upon enactment." It was signed by the Governor of the State of Iowa on March 8, 2021. [Exhibit D, attached].

As a result, the bill can have no effect on the task that is before you now.

Three propositions have therefore been established:

First, that the two elective positions held by Mr. Maxwell are incompatible.

Second, when two elective positions held by the same person are legally incompatible, a vacancy, by operation of law, is created.

And, third, nothing done by the Iowa General Assembly in this session has cured Mr. Maxwell's incompatibility problem.

And, under *State ex rel LeBuhn v White*, 133 N.W. 2d 903 (Iowa 1965), the Iowa Supreme Court case earlier referred-to, a vacancy on the Scott County Board of Supervisors, the site of Mr. Maxwell's first incompatible position was created upon his taking of the second position, as Board member of the North Scott Community School District. So, exactly, when, in time, did vacancies occur? They happen by operation of law when, in real time, a specific set of facts take place—and not when this body later convenes to determine that those facts.



The language of Iowa's applicable statutes leads to that answer.

This issue of vacancy is expressly defined by the Iowa General Assembly in Iowa Code § 69.2(1) (2021). Here, our legislature has set forth a list of eight (that is "a" through "h") different kinds of events that, if any one of them should occur related to an elected office holder, by operation of law, constitutes a "vacancy." Those events include the following:

- a. A failure to elect at the proper election, or to appoint within the time fixed by law, unless the incumbent holds over.
- b. A failure of the incumbent or holdover officer to qualify within the time prescribed by law.
- c. The incumbent ceasing to be a resident of the state, district, county, township, city, or ward by or for which the incumbent was elected or appointed, or in which the duties of the office are to be exercised. This subsection shall not apply to appointed city officers.
- d. The resignation or death of the incumbent, or of the officer-elect before qualifying.
- e. The removal of the incumbent from, or forfeiture of, the office, or the decision of a competent tribunal declaring the office vacant.
- f. The conviction of the incumbent of a felony, an aggravated misdemeanor, or of any public offense involving the violation of the incumbent's oath of office.
- g. The board of supervisors declares a vacancy in an elected county office upon finding that the county officer has been physically absent from the county for sixty consecutive days except in the case of a medical emergency; temporary active military duty; or temporary service with another government service, agency, or department.
- h. The incumbent simultaneously holding more than one elective office at the same level of government. This subsection does not apply to the county agricultural extension council or the soil and water conservation district commission.**

In any one of such instances, should they occur with respect to a member of the Scott County Board of Supervisors, this body, either on its own motion, or upon the submission of 25 or more signatures of local citizens, is, under Iowa Code § 69.2(2) (2021), to assemble, and to make factual determinations as to whether the events giving rise, by operation of law, to the creation of a vacancy.

Before moving to sub-part “h”—a vacancy caused by “the incumbent simultaneously holding more than one elective office at the same level of government,” let us suppose, by way of reasoning, that another event had occurred creating a vacancy—the unfortunate and untimely death of a member of the Board of Supervisors.

In such an instance there would be little debate amongst you that a vacancy existed and that it had occurred not on your meeting date, but, rather, by operation of law, at the decedent-Supervisor’s moment of death.

Depending on the circumstances, you might require some evidence upon which to make your finding as to the actual date of death—for example, a death certificate. But, nobody would suppose that the vacancy had not occurred until this group had met and taken that vote. Rather, the date of death established the moment of vacancy.

That point is so obvious as to, almost, not require its recitation.

But, I recite it because Mr. Maxwell and his supporters appear to suggest that no vacancy could occur until you have so found-it to exist. Rather, the express language of the provision makes it clear that the vacancy occurred, by operation of law, when Mr. Maxwell took office on the North Scott Community School District, on November 25, 2019, while simultaneously serving on the Scott County Board of Supervisors.

Within the last few days, on March 12, 2021, the office of County Attorney Walton, through Assistant Scott County Attorney Rob Cusack, issued another opinion, this one taking a position that was contrary to that office’s earlier opinion, one that had correctly cited the Iowa Supreme Court’s 1965 holding in *State ex rel. LeBuhn v White*, that, “...if a person, while occupying one office, accepts another incompatible with the first, he *ipso facto* vacates the first office and his title thereto is terminated without any other act or proceeding.” That Court decision has never been over-ruled. It clearly describes the operation of law that creates a vacancy in

the first office held the moment a second, incompatible office is assumed by the same person.

Sometimes, when it is the intent of the Iowa legislature to overturn a specific holding of a specific Iowa Supreme Court case, a bill will make reference to that case so that the intent is clear. No such language is found in the recent legislation and no explanation is provided by the County Attorney as to how a case relied upon in one opinion has disappeared from the second.

Apparently to support this pivot-in-position, reference is made by the Assistant County Attorney to an Iowa Supreme Court case issued 157 years ago, *Bryan v Cattell*, 15 Iowa 538 (1864), for the proposition that the Iowa legislature may add or change methods by which vacancies may occur and make such changes applicable to existing offices and those who hold them.

No exception, here, is made to that proposition. That has always been the case in Iowa. Indeed, the Iowa Code section referred to above, Iowa Code § 69.2(1) (2021), is one such example of how, over a period of years, the Iowa General Assembly has legislated criteria for determining when vacancies in public offices have occurred.

That *Bryan v Cattell* rationale, however, when combined with Senate File 413, does not salvage Mr. Maxwell's unfortunate situation. Here, a vacancy was created, by operation of law, before the recent bill was passed and the legislators chose not, for whatever reason, to make its terms and conditions retroactive. Under Iowa Code § 4.5, a statute is presumed to be prospective in its operation unless expressly made retrospective.

As written and passed by the Iowa General Assembly, there is not even a hint of retroactivity. The law is prospective, only, and has no application to a vacancy that was created when Mr. Maxwell, already an incumbent member of the Scott County Board of Supervisors, took his oath of office to serve for a term of office on Board of the North Scott Community School District, an incompatible office.

That proposition is more firmly stated in *Bryan v Cattell*—the case most recently cited by the County Attorney in its change-of-position Memo—than any other matter. What was said by the Iowa Supreme Court at that time speaks loudly today:

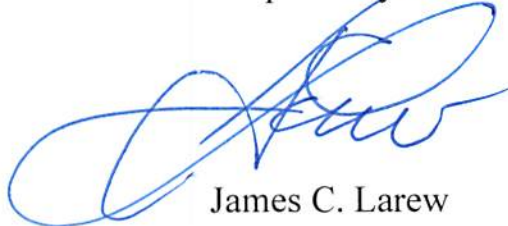
Our opinion is that we are not confined to the statutory causes or events in determining whether a vacancy exists. If a party accepts another office, which, within the meaning of the law and the cases, incompatible with that which he holds, we have no doubt but that the first one would become vacant....We have no statutory declaration, in general language, prescribing what offices, from their nature, are incompatible. Looking at the common law, we are of the opinion, that the incompatibility must be such as arises from the nature of the offices, or their relation so each other....The two offices are incompatible, where the holder cannot, in every instance, discharge the duties of each. And that incompatibility, as here used, must be such as arises from the nature of the duties, in view of the relation of the two officers to each other, seems to have found its foundation in reason.

*Id.* at 550. [Exhibit E, attached].

So, too, here. Reason and application of our law will provide the foundation for your decision.

Mr. Maxell's actions created a vacancy on the Board of Supervisors on the date he accepted an incompatible position. No subsequent legislation can save that. Pursuant to Iowa Code § 69.2(2), that position must now be filled by someone whose service will not be incompatible with any other office held by that person.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "James C. Larew", is written over a light blue rectangular background.

James C. Larew