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IOWA LEGISLATIVE INTERIM CALENDAR AND BRIEFING

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Thursday, November 6, 2014

Local Government Public Records Study Committee
10:00 a.m., Room 116, Statehouse

Friday, November 7, 2014

Local Government Mandates Study Committee
9:00 a.m., Room 103, Supreme Court Chamber, Statehouse

Tuesday, November 18, 2014

Administrative Rules Review Committee
9:00 a.m., Room 116, Statehouse

Iowa Legislative Interim Calendar and Briefing is published by the Legal Services Division of the Legislative Services Agency (LSA). For additional information, contact: LSA at (515) 281-3566.

AGENDAS

INFORMATION REGARDING SCHEDULED MEETINGS

Local Government Public Records Study Committee

Co-Chairperson: Senator Mary Jo Wilhelm

Co-Chairperson: Representative Bobby Kaufmann

Location: Room 116, Statehouse

Date & Time: Thursday, November 6, 2014, 10:00 a.m.

Contact Persons: Rachele Hjelmaas, Legal Services, (515) 281-8127; Ed Cook, Legal Services, (515) 281-3994; Andrew Ward, Legal Services, (515) 725-2251.

Tentative Agenda: Presentations concerning state and local public records and record retention guidelines and policies with a focus on email, and make recommendations.

Internet Page: <https://www.legis.iowa.gov/committees/committee?ga=85&session=2&groupID=21382>

Local Government Mandates Study Committee

Co-Chairperson: Senator Mary Jo Wilhelm

Co-Chairperson: Representative Bobby Kaufmann

Location: Room 103, Supreme Court Chamber, Statehouse

Date & Time: Friday, November 7, 2014, 9:00 a.m.

Contact Persons: Andrew Ward, Legal Services, (515) 725-2251, Ann Ver Heul, Legal Services, (515) 281-3837; Rick Nelson, Legal Services, (515) 242-5822.

Tentative Agenda: Presentations concerning local government fee structures, document retention policies, county offices and colocation with state agencies, and notice and publication requirements.

Internet Page: <https://www.legis.iowa.gov/committees/committee?ga=85&session=2&groupID=21381>

Administrative Rules Review Committee

Chairperson: Senator Wally Horn

Vice Chairperson: Representative Dawn Pettengill

Location: Room 116, Statehouse

Date & Time: Tuesday, November 18, 2014, 9:00 a.m.

Contact Persons: Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.

Agenda: Published in the Iowa Administrative Bulletin:

<https://www.legis.iowa.gov/IowaLaw/AdminCode/bulletinSupplementListing.aspx>

Internet Page: <https://www.legis.iowa.gov/committees/committee?endYear=2014&groupID=705>

ADMINISTRATIVE RULES REVIEW COMMITTEE

October 14, 2014

Chairperson: Senator Wally Horn

Vice Chairperson: Representative Dawn Pettengill

SECRETARY OF STATE, *Emergency Rulemaking Filings: Technical and Editorial Corrections.*

Background. Iowa Code §17A.4(3)(a) requires that the committee approve “emergency” rule filings if the committee finds good cause that notice and public participation would be unnecessary, impracticable, or contrary to the public interest.

Commentary. In this review the Secretary of State proposed a variety of editorial and nonsubstantive revisions to election forms and instructions. Members questioned the need to adopt a rule without notice simply because it was nonsubstantive; members noted there was no actual need to have the rule in immediate effect.

Action. Emergency filing not approved.

ECONOMIC DEVELOPMENT AUTHORITY, *Economic Development Region Initiatives, 09/17/14 IAB, ARC 1628C, ADOPTED.*

Background. Iowa Code §15E.351 requires the authority to establish and administer a business accelerator program.

Commentary. Amendments to the existing rules stated that the authority “may” establish an accelerator program. Committee members were concerned this change implied that the program was discretionary, instead of a mandate. The committee imposed a 70-day delay on this filing to allow for additional study.

Action. Seventy-day delay, further review at the committee’s November 18 meeting.

ENVIRONMENTAL PROTECTION COMMISSION, *Animal Feeding Operations—NPDES Compliance, 09/17/14 IAB, ARC 1627C, ADOPTED.*

Background. This rulemaking implements the Work Plan Agreement (Work Plan) entered into between the Department of Natural Resources (DNR) and the federal Environmental Protection Agency (EPA) on September 11, 2013, relating to state enforcement of National Pollutant Discharge Elimination System (NPDES) standards for concentrated animal feeding operations (CAFOs). A CAFO is an animal feeding operation that confines animals for more than 45 days during a growing season, is located in an area that does not produce vegetation, and meets certain size thresholds set out in federal rules. Iowa Code §459.311 provides that CAFOs must comply with applicable NPDES permit requirements. The owner or operator of a CAFO must obtain an NPDES permit if the CAFO is designed, constructed, operated, or maintained such that a discharge will occur. Pursuant to Iowa Code §459.311(2), state rules implementing the NPDES permitting requirements “shall be no more stringent” than the requirements set out in EPA rules. The Work Plan requires that the DNR recommend to the Environmental Protection Commission (EPC) the adoption of certain rules, including the adoption by reference of “federal regulations necessary to fully implement the NPDES permitting program for confinement CAFOs that discharge to waters of the U.S.” Therefore, the EPC has adopted a rule that incorporates by reference the EPA’s CAFO regulation.

In addition, the amendments incorporate the Work Plan requirement that the DNR recommend to the EPC that it “adopt by reference federal regulations that fully implement the NPDES permitting program with respect to land application setback and separation distances for open feedlot CAFOs.” To ensure equivalency with the open feedlot program, the EPC has amended this setback requirement for confinement feeding operations as well.

The EPC also rescinded the outdated term “operation permit” from the confinement feeding operation rules. The amendments eliminate the need for operation permits in the confinement animal feeding operation program. The rulemaking includes other conforming changes as well.

By letter dated January 23, 2014, U.S. EPA Region 7 informed the DNR that the amendments “meet the requirements ... of the Work Plan and ensure that Iowa’s NPDES authorities are consistent with federal requirements.”

Commentary. An EPC representative explained the rulemaking and noted that it satisfies the statutory requirements that the state comply with federal NPDES permitting requirements, but not exceed them, and that the EPA has agreed to this proposal.

The committee heard public comment from approximately a dozen speakers in opposition to the rulemaking. Speakers asserted that DNR has inadequately enforced NPDES standards for CAFOs in the past and that the rulemaking is similarly inadequate. Speakers asked for a variety of changes they asserted would strengthen the rulemaking, including increased inspections, on-site inspections, increased fines for violations, a publicly available database of violations, requiring NPDES permits for all CAFOs, and increased penalties for habitual violators. Speakers also urged that the

(Administrative Rules Review Committee continued from Page 3)

law requiring that state NPDES permitting requirements be no more stringent than EPA requirements be amended, arguing that federal EPA standards were not meant to serve as a ceiling for state standards.

The DNR Director then spoke in support of the rulemaking. He explained that the rulemaking was the result of negotiation with the EPA, with input received from all stakeholders. The negotiations began in light of a petition filed with the EPA that sought the EPA's takeover of enforcement of the state's NPDES program. The Work Plan implemented by this rulemaking was agreed to as an alternative. He noted that the DNR had requested additional inspectors to implement the plan and has been able to hire seven additional inspectors. He explained how the DNR uses technology to conduct inspections without going on site. He also explained that the DNR is in regular contact with the Attorney General's Office regarding the NPDES program and refers cases to it for enforcement action.

Action. No action taken.

HUMAN SERVICES DEPARTMENT, *Child Development Homes—Emergency Contact Records, 10/01/14 IAB, ARC 1636C, ADOPTED.*

Background. This rulemaking requires that child development home providers have readily accessible accurate emergency contact information regarding the children in their care.

Presently, there are no administrative rules that require providers to have a paper copy of emergency contact information, nor is there a clear requirement in the case of information saved in a mobile device. Therefore, regarding information saved in a mobile device, the emergency contact information may not be appropriately accessible to those who need it.

Commentary. Committee members expressed concern that the rulemaking as drafted could lead to the Department of Human Services (DHS) searching providers' mobile devices during inspections to ensure the content requirements for such devices are met. A DHS representative explained that the mobile device requirements in the rulemaking are less stringent than current requirements, that DHS would seek to enforce the mobile device requirements in a balanced way, and that DHS may only search mobile devices if deficiencies in emergency contact information are encountered repeatedly. The representative agreed with committee members that the language in the rulemaking may need further review. A motion was made for a 70-day delay of the effective date of the rulemaking to allow for such review. The motion carried.

Action. Seventy-day delay.

HUMAN SERVICES DEPARTMENT, *Emergency Plans, SPECIAL REVIEW.*

Background. The committee held a special review of 441 IAC 109.10(15), which requires that child care centers have written plans for responding to various emergency situations including fire, tornadoes, floods, intruders, and missing children. The plans must include information on transporting children, notifying parents, telephone numbers, building diagrams, and other matters. Certain information in the plan must be visibly posted by all program and outdoor exits. The rule also includes training and practice requirements.

Commentary. At issue was the requirement that child care centers post building diagrams for use during emergency situations. Schools are sometimes also used as child care centers, and the Department of Education (DE) prohibits the posting of building diagrams as required by the rule. Committee members inquired how the conflict among these requirements could be resolved.

A DHS representative explained that DHS was not aware of this conflict. DHS works with the State Fire Marshal to develop the emergency plan requirements for child care centers, and the posting requirement is one part of that process. The representative stated that DHS would work with DE, the State Fire Marshal, and members of the law enforcement community to resolve the conflict. Resolution is expected within approximately three months.

Action. No action taken.

Next Meeting. The next committee meeting will be held in Statehouse Room 116, on **Tuesday, November 18, 2014**, beginning at 9:00 a.m.

Secretary ex officio: Stephanie Hoff, Administrative Code Editor, (515) 281-3355

LSA Staff: Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.

Internet Page: <https://www.legis.iowa.gov/committees/committee?endYear=2014&groupID=705>

LEGAL UPDATES

Purpose. A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative affairs of recent court decisions, Attorney General opinions, regulatory actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. As with other written work of the nonpartisan Legislative Services Agency, although this briefing may identify issues for consideration by the General Assembly, nothing contained in it should be interpreted as advocating a particular course of action.

LEGAL UPDATE—IOWA INDEPENDENT EXPENDITURE COMMITTEES—CAMPAIGN FINANCE

Filed by the United States Court of Appeals for the Eight Circuit

June 13, 2013

Iowa Right To Life Committee, Inc. v. Megan Tooker

No. 12-1605, 717 F.3d 576 (2013)

<http://media.ca8.uscourts.gov/opndir/13/06/121605P.pdf>

Factual Background. Iowa Right To Life, Inc. (IRTL) is a nonprofit 501(c)(4) corporation, registered in Iowa, whose primary purpose is to provide factual information on a range of right-to-life issues. IRTL is not controlled by a candidate for public office, and less than half of its annual expenditures are dedicated to support the election or defeat of candidates or the passage or defeat of ballot issues. IRTL claims that it wants to make independent expenditures and contributions to support individual candidates for public office. During the 2010 election cycle, IRTL wanted to make an independent expenditure of \$750 to support the election of an Iowa Attorney General candidate. IRTL did not make this expenditure and claims that potential application and enforcement of Iowa law produced a chilling effect that prevented IRTL from making that independent expenditure. IRTL also wanted to make a direct \$100 contribution to that same candidate's campaign, but did not make this contribution as a result of Iowa's ban on direct corporate contributions.

Procedural Background. IRTL filed suit in the federal court for the Southern District of Iowa (District Court) seeking to enjoin the State of Iowa (State) from enforcing certain provisions of state campaign finance law as well as associated administrative rules and forms.

The District Court denied IRTL's motion for a preliminary injunction and both IRTL and the State moved for summary judgment. The District Court ruled against IRTL on all four counts of IRTL's complaint, which served as the basis by which IRTL sought to enjoin the State from enforcing the relevant laws, and IRTL appealed the decision to the United States Court of Appeals for the Eighth Circuit (Court).

Issues. The issues on appeal before the Court were as follows:

1. Whether IRTL had standing to make a First Amendment challenge related to the chilling effect created by the potential application of the terms "political committee" and "permanent organization" to IRTL which would result in imposing on IRTL political committee status and associated burdens.
2. Whether under Iowa law reporting and disclosure requirements related to independent expenditures are overly burdensome against the First Amendment.
3. Whether Iowa's ban on direct corporate contributions to individual candidates and candidate committees violates the First and Fourteenth Amendment.
4. Whether Iowa's requirements that a corporation's board approve an independent expenditure and that a corporate officer certify such approval are constitutional under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.

Opinion by Circuit Judge Benton. Judge Benton's decision, joined by Circuit Judges Smith and Melloy, affirmed in part, reversed in part, and remanded certain issues to the District Court. Judge Melloy agreed with the Court's opinion in its entirety, but also offered a concurring opinion.

IRTL Status. The Court affirmed the District Court's holding that IRTL lacked standing to challenge the definitions of the terms "political committee" and "permanent organization" contained in Iowa Code §§68A.102(18) and 68A.402(9) respectively. The Court relied upon a decision of the Iowa Supreme Court which held that, under Iowa law, when a corporation whose major purpose is not express political advocacy makes independent expenditures in Iowa it is considered an independent expenditure committee and not a political committee or permanent organization, both of which are subject to more stringent statutory requirements. The Court held that IRTL lacked standing to challenge the defini-

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tions of the terms “political committee” and “permanent organization” because those terms do not apply to IRTL and, therefore, there is no credible threat of IRTL being included, or facing prosecution, under those definitions.

Reporting and Disclosure Requirements. Iowa statutes require independent expenditure committees to file all of the following reports:

1. An independent expenditure statement and initial report within 48 hours of making an initial independent expenditure [Iowa Code §§68A.404(3) and 68A.404(4)(a)].
2. Ongoing reports periodically, regardless of activity [Iowa Code §68A.404(3)(a)].
3. Supplemental reports if certain specified activity occurs [Iowa Code §68A.404(3)(a)(1)].
4. A termination report [Iowa Code §68A.402B(3)].

The Court noted that while laws that burden political speech are generally subject to strict scrutiny, laws that require disclosure alone are, in most instances, subject to a less rigorous standard of exacting scrutiny because such laws do not limit activity or prohibit political speech itself. The Court upheld the Iowa statutory provisions that require filing of an independent expenditure statement and initial report within 48 hours of making an initial independent expenditure because there is a “substantial relation” between the disclosure requirements and the sufficiently important governmental interest in providing the public with timely information on the origins of speech within the “political marketplace”.

The Court stated, however, that ongoing reporting requirements that operate regardless of whether the organization makes additional independent expenditures hinder the free speech rights of IRTL and other groups whose major purpose is not nominating or electing candidates, and that there is not a sufficiently important governmental interest that justifies requiring ongoing reporting for such organizations. The Court then extended this reasoning to find unconstitutional the supplemental reporting requirements imposed upon independent expenditure committees, stating that the State “does not explain how requiring additional, redundant, and more burdensome reports fulfills a sufficiently important informational interest not already advanced by the independent expenditure statement.”

The Court also found that requiring independent expenditure committees to file a termination report, unrelated to disclosure of contributions and expenditures, is “part and parcel with the ongoing reporting requirements” and “fails to advance a sufficiently important government interest substantially related to the termination requirement.” The Court stated, however, that the termination report requirement could conceivably advance a corporate governance interest in protecting shareholders of certain corporations, but that such an interest could not apply to corporations, such as IRTL, that do not have shareholders. The Court therefore held that such provisions in Iowa law are unconstitutional under the First Amendment.

Direct Corporate Contribution Ban. Iowa Code §68A.503 prohibits corporations and certain financial institutions from making contributions directly to candidates or candidate committees (other than ballot issue committees). IRTL challenged the statute as unconstitutional under the First and Fourteenth Amendments. The Court, following First Amendment precedent established in *FEC v. Beaumont*, 539 U.S. 146 (2003), held that the contribution ban is constitutional because it is closely drawn to serve the compelling governmental interest of preventing quid pro quo corruption.

In its equal protection analysis, the Court found that the ban on direct contributions to candidates or candidate committees by corporations serves to prevent quid pro quo corruption and that the restriction is content neutral, meaning that it serves purposes that are unrelated to the content of what is being expressed. Under this analysis, the Court stated that the ban is constitutional under the Fourteenth Amendment. The Court further noted that the ban on direct contributions is not a complete ban because corporations may express support of candidates or candidate committees through formation of or contributions to political action committees (PACs). The Court held that the contribution ban that applied only to corporations and certain types of financial institutions and insurance companies but not to labor unions or other groups did not impermissibly differentiate between similarly situated speakers. The Court also held that the ban is “closely drawn to match a sufficiently important interest” and is, therefore, constitutional under United States Supreme Court precedent established in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

Corporate Requirements. Iowa Code §68A.503 requires the board of directors of a corporation to approve independent expenditures by the corporation and that an officer of the corporation certify the board authorization. The Court overturned the District Court ruling that IRTL did not have standing to raise the claim that the statute violates the First Amendment, finding that simply by “alleging an intention to engage in a course of conduct that is clearly proscribed by

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statute,” conferred standing on IRTL to make its First Amendment challenge. The Court then remanded the First Amendment claim to the District Court for consideration.

IRTL also raised two separate claims under the Equal Protection Clause of the Fourteenth Amendment: that the approval and certification requirements were content based and that the requirements impermissibly differentiate between similarly situated speakers. The Court remanded the question of whether the statutes entail content-based restrictions to the District Court for consideration along with the First Amendment claim because the District Court had dismissed this Fourteenth Amendment claim as duplicative of IRTL’s First Amendment claim.

The Court further held that the board authorization requirement relating to IRTL’s claim that the authorization and certification requirements differentiate between corporations, such as IRTL, and other similarly situated speakers, is constitutional under the Equal Protection Clause because the statute uses the word “entities” rather than “corporations” and, therefore, does not single out corporations for disparate treatment. The Court applied the same analysis to find that the language in Iowa Code §68A.404(5)(g), limiting the officer certification requirement to corporations only, is unconstitutional because it is not narrowly tailored to serve a compelling governmental interest. The Court stated that the State had failed to advance “any interest, compelling or otherwise” to justify applying the certification requirement only to corporations. The Court remanded the issue of severability of the certification requirement from the statute to the District Court for consideration in the first instance.

United States Supreme Court Consideration. On September 27, 2013, IRTL filed a petition for a writ of certiorari with the United States Supreme Court. In its petition for a writ of certiorari, IRTL presented two questions for review by the Supreme Court: 1) “[w]hether Iowa’s ban on political contributions by corporations (and enumerated business entities), but not by unions, violates Fourteenth Amendment equal protection”; and 2) “[w]hether this corporate-contribution ban violates the First Amendment.”

On April 7, 2014, the United States Supreme Court denied IRTL’s motion for certiorari, allowing the Eight Circuit opinion in the case to stand on those questions. *Iowa Right To Life Comm., Inc. v. Tooker*, 134 S.Ct. 1787 (2014).

Pending Actions. The District Court has not considered the First Amendment and Fourteenth Amendment claims or severability issues on remand from the Eight Circuit. Corrective legislation has not been introduced for consideration by the General Assembly.

LSA Contact: Andrew Ward, Legal Services, (515) 725-2251.