

THE IOWA DISTRICT COURT IN AND FOR BLACK HAWK COUNTY

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| <p>LOWE’S HOME CENTERS, LLC,</p> <p>Petitioner,</p> <p>vs.</p> <p>IOWA PROPERTY ASSESSMENT APPEAL BOARD,</p> <p>Respondents,</p> <p>And</p> <p>BLACK HAWK COUNTY BOARD OF REVIEW</p> <p>Intervenor.</p> | <p>Case No. CVCV138154</p> <p>ORDER</p> |
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On August 8, 2019, Lowe’s Home Centers, LLC (“Lowe’s”), filed a petition for review of the Iowa Property Assessment Appeal Board’s (“PAAB”) decision issued July 29, 2019 in PAAB Docket No. 2017-007-00376C, affirming the assessment by the Black Hawk County Board of Review. On September 3, 2019, the Board of Review intervened with the Court’s permission. The parties filed briefs. On February 6, 2020, the Court held a hearing and heard arguments from counsel. The Plaintiff appeared by counsel by Attorney Ryan Gibbs, the Defendant appeared by counsel Attorney Jessica Braunschweig-Norris and the Intervenor appeared by counsel, Attorney Michael Treinen. Upon careful review of the filings and applicable caselaw, the Court now enters the following order.

FACTS AND PROCEDURAL HISTORY

Lowe’s challenged the 2017 assessment of its commercial property located at 400 E. Tower Drive, Waterloo, Black Hawk County, Iowa, and identified as parcel number 8813-10-124-004 (“subject property”). The subject property includes a large commercial retail store built in 2002, with an adjacent fenced outdoor sales and garden center area. The store’s gross building area is approximately 137,643 square feet. The subject property also includes 284,000 square feet of concrete paving. The subject property is occupied by a single occupant, Lowe’s, and is used as a home improvement store.

The property’s January 1, 2017 assessment was set at \$8,898,760. Lowe’s protested to the Board of Review. The Board of Review denied the petition and affirmed the assessment. Lowe’s appealed to PAAB, again arguing the value of the subject property was over assessed, and

contended the correct value was \$5,762,106. *Agency Record*, pg. 3. An evidentiary hearing was held on October 18, 2018.

At the hearing, PAAB heard the testimony and received the appraisal reports of two (2) appraisers, Lawrence Allen on behalf of Lowes, and Russ Manternach on behalf of the Board of Review. The following table summarizes the appraised value of the property by Allen and Manternach:

| | Comparable Sales Approach | Income Approach | Cost Approach | Final Opinion |
|------------|---------------------------|-----------------|---------------|---------------|
| Allen | \$5,490,000 | \$5,460,000 | N/A | \$5,480,00 |
| Manternach | \$9,080,000 | \$9,240,000 | \$9,080,000 | \$9,100,000 |

First, PAAB examined Allen's appraisal. PAAB found the following issues with Allen's comparable sales approach: (1) failure to adjust upward for restrictive covenants in certain comparables, (2) failure to adjust for land-to-building ratio differences, (3) failure to adjust for duress or distressed sales, (4) failure to account for the subject property's garden center, (5) including sales where property was converted from single-tenant use to multi-tenant use after purchase and (6) failure to adjust upward for post-sale expenditures. *PAAB Decision*, pg. 7–8, 34–37 (July 29, 2019). Ultimately, PAAB concluded Allen's comparable sales approach failed to account for the property's current use, and undervalued the property. *Id.* at 34–37.

As for Allen's income approach, PAAB found the following issues: (1) lack of information on the rent comparables as well as on the terms of their leases, (2) failure to account for the subject property's garden center, and (3) including a significant number of store closures, namely Kmart closures, when calculating the capitalization rate. *Id.* at 9–12. Allen assumed the building was not leased, i.e. vacant, for his income approach. *Id.* at 13. PAAB concluded Allen's assumption that the property was vacant inflated the risks associated with the property. *Id.* at 38–39. Due to the above issues, PAAB concluded Allen's income approach undervalued the property at its current use as a single-tenant home improvement store. *Id.*

Next, PAAB examined Manternach's appraisal. Similar to Allen's, PAAB also found several issues with Manternach's comparable sales approach. These were, namely, failure to make adjustments for distressed transactions and age, and including a land sale. *Id.* at 39–40. After excluding the dissimilar sales, PAAB concluded the remaining comparables supported a market value of \$9,680,000. *Id.* at 40. Ultimately, PAAB concluded the problems with Manternach's analysis were significant, but less severe than Allen's. *Id.*

As for Manternach's income approach, he also did not include a lot of information on his rent comparables. *Id.* at 20. Nonetheless, when calculating the capitalization rate, unlike Allen, he did not include distressed transactions. *Id.* at 22, 41. Additionally, Manternach did account for the

garden center. *Id.* at 41. Most importantly, unlike Allen, Manternach valued the property at “stabilized occupancy” or “stabilized vacancy.” *Id.* at 14, 21. He explained that he assumed the building was neither vacant nor completely occupied. *Id.* at 14; *Agency Record*, pg. 217, 466, 472–77. Ultimately, PAAB concluded Manternach’s income approach most closely reflected the market value of the property at its current use. *PAAB Decision*, pg. 41.

Lastly, neither Manternach nor PAAB gave much weight to Manternach’s cost approach. *Id.* Lowes does not contest PAAB’s decision to give no weight to Manternach’s cost approach, and so the Court does not address it any further.

After consideration of the evidence, PAAB affirmed the assessment.

Lowes now petitions the district court for review of PAAB decision. Lowes alleges PAAB failed to determine the market value of the subject property as required by Iowa Code section 441.21(1)(b)(1) on the following grounds: (1) PAAB did not value the subject property as vacant and free and clear of all leases; (2) PAAB improperly considered the subject property’s current use; (3) PAAB improperly performed a value in use, instead of value in exchange, assessment; and (4) PAAB violated Lowes’ due process rights by applying the wrong valuation standard. *Petition for Judicial Review*, pg. 1 (Aug. 8, 2019); *Petitioner’s Brief*, pg. 13–25 (Nov. 25, 2019); *Petitioner’s Reply Brief*, pg. 3 (Dec. 26, 2019).

PAAB, and Intervenor¹ resist.

STANDARD OF REVIEW

A party aggrieved by the final decision of PAAB may petition the district court for judicial review as provided in Chapter 17A. Iowa Code § 441.37B(1). New grounds in addition to those set out in the appeal to PAAB cannot be plead, and additional evidence may not be introduced. Iowa Code § 441.37B(2)–(3).

Under Chapter 17A, the court may “affirm the agency action or remand to the agency for further proceedings.” Iowa Code § 17A.19(10). If any of the grounds enumerated in section 17A.19(10)(a)–(n) are established, the court shall reverse, modify, or grant other appropriate relief from agency action. *Id.* The following grounds are potentially at issue in this case:

c. Based upon an erroneous interpretation of a provision of law whose interpretation has not clearly been vested by a provision of law in the discretion of the agency.

¹ Intervenor’s Brief essentially joins PAAB’s position and arguments. *Intervenor’s Brief*, pg. 1–4 (Dec. 16, 2019). In order to reduce redundancy, the Court will simply refer to PAAB’s arguments and position, instead of also noting Intervenor’s. Uniquely, Intervenor attaches a secondary source, “Commercial Big-Box Retail: A Guide to Market-Based Valuation,” in support, and Lowes objects to its inclusion. *Id.* at 2; *Petitioner’s Reply Brief*, pg. 16. Ultimately, the Court has given it little weight in light of ample relevant primary source, i.e. caselaw.

m. Based upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency.

n. Otherwise unreasonable, arbitrary, capricious, or an abuse of discretion.

Iowa Code § 17A.19(10)(c), (m), (n).

The standard of review of a final agency action depends upon the precise claim of error. The Iowa Supreme Court explained as follows:

If the claim of error lies with the agency's findings of fact, the proper question on review is whether substantial evidence supports those findings of fact. If the findings of fact are not challenged, but the claim of error lies with the agency's interpretation of the law, the question on review is whether the agency's interpretation was erroneous, and we may substitute our interpretation for the agency's. Still, if there is no challenge to the agency's findings of fact or interpretation of the law, but the claim of error lies with the ultimate conclusion reached, then the challenge is to the agency's application of the law to the facts, and the question on review is whether the agency abused its discretion by, for example, employing wholly irrational reasoning or ignoring important and relevant evidence.

Meyer v. IBP, Inc., 710 N.W.2d 213, 219 (Iowa 2006).

When the application of law to facts has been clearly vested in the discretion of an agency, the court may only disturb the agency's application of the law to the facts of the particular case if that application is "irrational, illogical, or wholly unjustifiable." *Burton v. Hilltop Care Ctr.*, 813 N.W.2d 250, 256 (Iowa 2012); Iowa Code § 17A.19(10)(m). Accordingly, the agency's application of law to fact is entitled to "some degree of discretion in our review of this question, but not the breadth of discretion given to the findings of fact." *Meyer*, 710 N.W.2d at 219.

However, when reviewing an agency's interpretation of law and the authority to interpret that law has not been vested in the discretion of the agency, then the court is not bound by erroneous interpretations of law or legal conclusions. *Burton*, 813 N.W.2d at 256; *Meyer*, 710 N.W.2d at 219; Iowa Code § 17A.19(10)(c).

Lowes has the burden of proving the valuation is excessive. Iowa Code § 441.21(3)(b)(1); *see also* Iowa Code § 17A.19(8)(a).

PRINCIPLES OF VALUATION LAW

Property subject to taxation must be valued at its "actual value," or "market value," which is defined as "the fair and reasonable exchange in the year in which the property is listed and valued between a willing buyer and a willing seller, neither being under any compulsion to buy or

sell and each being familiar with all the facts relating to the particular property.” Iowa Code § 441.21(1)(a)–(b).

In determining market value, sales prices of comparable property in normal transactions and the availability of potential buyers must be taken in to consideration. *Id.* § 441.21(1)(b)(1). Factors to consider in determining whether sales of other property are comparable to the subject property include: size, use, location, and character, as well as the nature and timing of the sale. *Soifer v. Floyd Cty. Bd. of Review*, 759 N.W.2d 775, 784 (Iowa 2009). Comparable properties do not need to be identical, but only similar. *Id.* at 783. Abnormal transactions not reflecting market value must be either disregarded or adjusted to eliminate factors distorting market value. *Id.* at 784.

This valuation method is called the comparable sales approach, and is the preferred method for valuation. *Id.* at 779 n.2, 782. If the subject property’s market value cannot be readily established using the comparable-sales approach, then the appraiser may consider “other factors,” such as the income approach or cost approach. Iowa Code § 441.21(2); *Wellmark, Inc. v. Polk Cty. Bd. of Review*, 875 N.W.2d 667, 679 (Iowa 2016).

Under the other factors analysis, the appraiser may look to the property’s productive and earning capacity, industrial conditions, its cost, physical and functional depreciation and obsolescence and replacement cost, among other factors. Iowa Code § 441.21(2). When the other factors or approaches lead to similar conclusions as the comparable-sales approach, they validate and support each other. *Soifer*, 759 N.W.2d at 790 (citing *Heritage Cablevision v. Bd. of Review of City of Mason City*, 457 N.W.2d 594, 598 (Iowa 1990)).

Lastly, section 441.21(2) specifically prohibits the assessor from considering “[s]pecial value or use value of the property to its owner, and the good will or value of a business which uses the property as distinguished from the value of the property as property.” Iowa Code § 441.21(2). “Special value or use” means any use or value which are unique or peculiar to the present owner, and of no use or value to potential buyers. *Riso v. Pottawattamie Bd. of Review*, 362 N.W.2d 513, 516 (Iowa 1985) (Special value or use are “features and fancies added to a homestead for the personal delight of the owner but of no use or value to others are examples of special value or use that are not to be considered in valuation.”). If improvements to the property are valuable and can be used by a purchase, than their value should be included in the valuation. *Soifer*, 759 N.W.2d at 786 n.6.

Here, due to issues with the quality and reliability of comparable sales by both appraisers, PAAB decided the income approach should also be considered.² *PAAB Decision*, pg. 25–26.

² In its reply brief, Lowes argues, for the first time, that PAAB’s decision to also consider other factors, i.e. the income approach, was an error. *Petitioner’s Reply Brief*, pg. 18. The Court finds that this issue was not raised in the Petition nor Lowes’ initial brief. Further, Lowes submitted Allen’s appraisal, which included an income approach, and asked PAAB, and now the Court, to rely on said approach.

ANALYSIS

1. Claims Properly Before the Court

PAAB requests certain claims be excluded as not properly before the Court, and so the Court must first determine which grounds under section 17A.19(10) Lowes properly raised.

Section 17A.19(4) requires a petition for judicial review to contain, in part, a concise statement of “[t]he grounds on which relief is sought.” An opposing party is entitled to know the exact nature of the claimed errors, and each error must be separately and distinctly stated so an opponent can adequately prepare and respond to the issues being reviewed. *Kohorst v. Iowa State Commerce Comm’n*, 348 N.W.2d 619, 621 (Iowa 1984). In *Kohorst*, the petition was vaguely worded and not specifically tied to the statutory grounds of section 17A.19(10). *Id.* The Supreme Court held the district court was correct in requiring the petitioners to particularize the grounds upon which they sought relief. *Id.*

Here, Lowes’ Petition did not specifically cite to any grounds under section 17A.19(10), though it did partially quote section 17A.19(10)(m).³ In its initial brief, Lowes argued the first error, PAAB’s failure to value the subject property as vacant, is “an irrational, illogical, or wholly unjustifiable *interpretation* of Iowa law,” which would be a ground under section 17A.19(10)(c). *Petitioner’s Brief*, pg. 1, 15–18, 25 (emphasis added). As to the second error, consideration of the subject property’s current use, and the third error, consideration of value in use instead of value in exchange, Lowes argued they are “irrational, illogical, or wholly unjustifiable *application[s] of law to fact*,” which would be grounds under section 17A.19(10)(m). *Id.* at 1, 18–23, 25 (emphasis added). The last error, the violation of due process rights, is tied to the above erroneous interpretations or applications of law, and does not implicitly refer to any of the grounds under section 17A.19(10).⁴

PAAB, in its brief, argues the only ground properly raised by Lowes is the irrational, illogical, or wholly unjustifiable application of law to fact under section 17A.19(10)(m). *Respondent’s Brief*, pg. 5, 10 (Dec. 16, 2019). PAAB argues all other grounds under section 17A.19(10) are not properly raised, and should be dismissed.

In response, Lowes argues it was not required to explicitly quote or cite to the other grounds in its Petition, and resists PAAB’s request to limit Lowes’ argument or available relief. Lowes argues its Petition “made it absolutely clear that it was challenging PAAB’s *application of the law* related to issues of market value, fee simple ownership, and value-in-exchange versus current use.” *Petitioner’s Reply Brief*, pg. 3 (Dec. 26, 2019) (emphasis added). Lowes again fails to identify

³ “PAAB decision is an irrational, illogical, and wholly unjustifiable application of law and fact which violates [Lowes’] constitutional rights.” *Petition*, pg. 1.

⁴ Lowes’ brief also mentions “the unreasonable, arbitrary, capricious, and abuse of discretion” standard under section 17A.19(10)(n) at the beginning and at the end of its analysis. *Petitioner’s Brief*, pg. 1, 25. However, Lowes does not actually raise the issue in the body of its brief, nor provide any actual, separate argument on the issue. Accordingly, a challenge to PAAB decision under section 17A.19(10)(n) is not properly before the Court.

specific grounds under section 17A.19(10), but continues to generally allege erroneous interpretation and application of law.

Admittedly, Lowes' Petition is poorly worded and vague. The failure to specifically cite to the grounds of section 17A.19(10), both in Lowes' Petition and subsequent briefs, results in confusion as to the proper standard of review. As stated above, the standard of review, and thus the degree of deference, is substantially different between a section 17A.19(10)(c) challenge to an agency interpretation of law and a 17A.19(10)(m) challenge to an agency's application of law to fact.

However, after careful review, the Court concludes limiting Lowes' claims for failing to comply with section 17A.19(4) is not warranted. PAAB had notice of Lowes' legal arguments or claims of error, because Lowes argued the same claims in its brief before PAAB. *See Agency Record 265–91*. These claims were considered by PAAB in the underlying proceeding. The Court will consider all three of Lowes' arguments regarding the fee simple valuation (vacancy, current use, and value in use) under the application of law standard of section 17A.19(10)(m). Inevitably, when the analysis calls for determination of the applicable law, the Court will do so without deference to the agency.

2. Vacant

First, Lowes argues PAAB misapplied Iowa law by failing to assess the subject property as vacant. *Petitioner's Brief*, pg. 14–18. Specifically, Lowes contests PAAB's approval of Manternach's use of "stabilized occupancy" in his income approach. *Id.* at 16.

Lowes primarily relies on *I.C.M. Realty v. Woodward*, 433 N.W.2d 760 (Iowa App. 1988), to support his assertion that Iowa law requires the property must be valued as if vacant. However, *I.C.M. Realty* does not support Lowes' argument. *I.C.M. Realty* does not stand for the proposition that the property must be valued as if vacant, empty, and of no current use. Furthermore, *I.C.M. Realty* does not address the use of "stabilized occupancy" under the income approach.

In *I.C.M. Realty*, the Court of Appeals rejected a taxpayer's argument that the property should be assessed a lower value because the property was subject to an existing below-market lease. 433 N.W.2d at 762. The Court held property must be valued based upon its entirety, free and clear of any existing leases. *Id.* An existing lease is some evidence of the property's value, but the appraiser must ultimately determine the property's value independent of the existing lease. *Id.* (citing *Oberstein v. Adair Cty. Bd. of Review*, 318 N.W.2d 817, 821 (Iowa App. 1982)). Because the appraiser must consider the entirety of the rights to the property (both the lessee's and the lessor's), an existing below-market lease does not lower the value of the property. *Id.* Nowhere in its decision did the Court of Appeals hold the property must be valued as vacant.

The Court finds no error in PAAB's interpretation and application of law regarding vacancy or "stabilized occupancy." PAAB properly rejected Lowes' argument that use of stabilized occupancy departed from a fee simple valuation of the property. *PAAB Decision*, pg. 31.

PAAB correctly concluded Lowes interpreted *I.C.M. Realty* too narrowly, and correctly noted the ultimate question for the income approach was to determine the subject property's earning capacity if exposed to the market. *Id.* Further, PAAB was correct to criticize Allen's income approach for assuming the property vacant, and so overstating risk of the property relative to its current use. *Id.* at 38–39.

3. Current Use

Second, Lowes argues PAAB erred by considering the current use of the property, specifically that PAAB wrongly excluded properties with uses dissimilar to the subject property's current use as a single-tenant home improvement store. *Petitioner's Brief*, pg. 19–23. PAAB responds Iowa law permits consideration of the property's current use.

The Court agrees with PAAB. Under the comparable sales approach, the current use of the property is important in assessing comparable sales and their probative value in determining the property's value. *Soifer v. Floyd Cty. Bd. of Review*, 759 N.W.2d 775, 784–85 (Iowa 2009). In *Soifer*, the subject property's current use was as a fast-food, franchise restaurant, specifically a McDonald's. *Id.* at 784. The taxpayer argued sales of property used for non-franchise restaurants as well as non-fast-food restaurants should be considered in the valuation. Oppositely, the Board of Review argued only sales of fast-food, franchise restaurants should be considered comparable sales. The Court held, while sales of property with slightly dissimilar uses are admissible evidence of value, differences in use reduce the persuasiveness of the evidence. *Id.* at 785. In other words, sales of property with similar uses to the current use of the subject property are more comparable sales and more persuasive of its market value. *Id.*

Here, PAAB applied *Soifer* by discounting Allen's comparable sales approach for including sales of property with different current uses, such as vacant, empty stores, and stores converted from single-tenant use to multi-tenant use. PAAB also applied Iowa law when it criticized Allen's failure to adjust upward for restrictive covenants. *See Soifer*, 759 N.W.2d at 789 (the property must be valued independent of any restrictive deed covenant that the owner may impose in a hypothetical sale).

Similarly, the Supreme Court has approved the consideration of the property's current use in the context of the income approach. *Soifer*, 759 N.W.2d at 789 (“[S]ales of similar properties reflect the value of the property in its present use as a franchise restaurant.”); *Maytag Co. v. Partridge*, 210 N.W.2d 584, 590 (Iowa 1973) (“When an assessor considers the use being made of property, he is . . . recognizing the effect of the use upon the value of the property itself.”); *Wellmark, Inc. v. Polk Cty. Bd. of Review*, 875 N.W.2d 667, 683 (Iowa 2016) (“But we think the fact that the property is currently being successfully used as a single-tenant corporate headquarters cannot go unnoticed. Current use is an indicator that there is demand for such a structure.”).⁵ “We embrace the view that the property should be valued based on its current use.” *Wellmark*, 875

⁵ The Court also finds persuasive other authority cited by PAAB in its brief on pages 14–15 and 17–19, but does not cite further for brevity's sake.

N.W.2d at 682. This Court is not persuaded by Lowes' attempt to distinguish these cases.⁶ Accordingly, PAAB correctly applied Iowa law when it criticized Allen's income approach for failing to capture the market value of the property at its current use.

4. Value in Use

Third, Lowes argues PAAB erroneously completed a value in use, instead of a value in exchange, analysis. *Petitioner's Brief*, pg. 18–19. Lowes' argument here is in essence a regurgitation of its current use argument. Lowes argues Iowa law requires a value in exchange valuation, and consideration of current use is a value in use valuation, which deviates from Iowa law. *Id.*

PAAB responds the Iowa Supreme Court considered the concepts of value in exchange and value in use in *Wellmark*, and determined Iowa law requires consideration of current use. *Respondent's Brief*, pg. 16–17.

In *Wellmark*, the Supreme Court explained:

Value in exchange refers to the value to persons generally and focuses on market value based upon a willing buyer and willing seller. Value in use refers to the value a specific property has for a specific use. Value in use is based upon the value of the property as it is currently used, not on its market value considering alternative uses. If a value-in-use approach is applied, the fact that an overbuilt property has substantial value to the current user impacts valuation for purposes of taxation.

Wellmark, Inc. v. Polk Cty. Bd. of Review, 875 N.W.2d 667, 673–74 (Iowa 2016) (internal citations omitted).

After discussion of these concepts, the Supreme Court went on to approve the consideration of a property's current use, as it had also done in *Soifer*. *Id.* at 682–83. See the above discussion on current use.

Ultimately, PAAB's consideration of current use is the correct application of the caselaw. Lowes failed to demonstrate PAAB's application of law to the facts was "irrational, illogical, or wholly unjustifiable."

⁶ In particular, Lowes attempts to distinguish *Wellmark*. Lowes Brief, pg. 22. Certainly, the property at issue in *Wellmark* was more unique than the subject property here. However, the Supreme Court in *Wellmark* extensively explained Iowa valuation law, including general principles applicable here. Specific to *Wellmark* was the issue of how to value property which is so unique that there is almost no actual potential buyers. The Court concluded the courts must assume there is a hypothetical buyer at its current use. 875 N.W.2d at 683. From this Court's perspective, *Wellmark* extended the general rule of considering current use to extremely unique property. The Court is not convinced by Lowes' argument.

Furthermore, unlike *Wellmark*, *Soifer* did not involve a unique or distinctive property, but instead a McDonald's fast-food restaurant. Nevertheless, the Supreme Court considered its current use in the valuation process.

5. Due Process

Lastly, Lowes argues PAAB violated its due process rights by applying the wrong valuation standard. *Petitioner's Brief*, pg. 23–25. This argument is entirely reliant on Lowes' prior arguments regarding vacancy, current use, and value in use, and is not an independent argument. Because the Court concludes Lowes' arguments fail and PAAB made no error in its application of Iowa law, so too does Lowes' due process argument. PAAB gave Lowes notice and an opportunity to be heard. After the hearing, PAAB correctly applied Supreme Court precedent on property valuation. There is no due process issue.

CONCLUSION

Lowes failed to meet its burden. PAAB properly and reasonable applied Iowa law. The Iowa Property Assessment Appeal Board's decision issued July 29, 2019 is **AFFIRMED**.

Clerk to notify counsel and any party or agency entitled to notice and not represented by counsel.

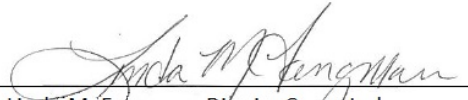


State of Iowa Courts

Type: OTHER ORDER

Case Number CVCV138154
Case Title LOWES VS IA PROP ASSMT APPEAL BOARD

So Ordered


Linda M. Fangman, District Court Judge,
First Judicial District of Iowa