

WHAT'S THAT SMELL: SEPTIC SYSTEMS AND IOWA'S TIME OF TRANSFER LAW

*Matthew G. Sease**

I.	Introduction.....	343
II.	Septic Systems	344
III.	Iowa Time of Transfer Law	346
IV.	Other Time of Transfer Laws	349
	A. Minnesota and the Local Method.....	349
	B. Massachusetts and the State Method.....	351
V.	Analyzing Iowa's Time of Transfer Law.....	354
VI.	Conclusion	357

I. INTRODUCTION

On July 1, 2009, a new Iowa law took effect which greatly affects home purchases in rural Iowa.¹ Specifically, Iowa Code Section 455B.172 was amended to require an inspection of a home's septic tank prior to transferring title.² The overall goal of this note is to examine Iowa Code Section 455B.172 and provide an analysis of its potential pitfalls. Part II begins with an overview of septic tanks generally: who uses them and how they work. Part III of the note provides an in depth examination of Iowa Code Section 445B.172 and its limited legislative history. Part IV looks at similar state statutes and municipal codes to see how Iowa's statute compares. The final section, Part V, will critique the Iowa statute and outline the several questions left open by the language of 455B.172.

* J.D., Drake University Law School, 2010. Author is a member of Kemp, Sease & Dyer in Des Moines, IA.

1. IOWA CODE § 455B.172(11) (2011).

2. *Id.*

II. SEPTIC SYSTEMS

Septic tanks were reportedly first used by the French in the 1870s.³ The United States was not far behind, using septic systems beginning in the 1880s.⁴ Nearly 150 years later, septic systems are still widely used throughout the United States. As of 2007, nearly twenty percent of all homes (approximately 26.1 million) have a septic system to remove waste from the home.⁵ The number of homes using septic tanks has increased over 1.5 million homes from 1985.⁶ The total number of homes using these systems is divided almost equally amongst rural homes and suburban homes.⁷ Nearly half of all septic tanks in the United States can be found in the Southern States, and the remainder is spread throughout the rest of the country.⁸

The septic system is fairly straight forward. A single pipe, carrying all of the wastewater from a house, runs into a large tank.⁹ This large tank, the septic tank, is buried into the ground and is typically made of concrete, fiberglass, or plastic.¹⁰ Septic tanks can either be one chambered or two chambered.¹¹ The solid waste (“sludge”) sinks to the bottom, where it begins to decompose, and oils and greases rise to the top (“scum”).¹² A wastewater layer forms between the sludge and scum, which flows from the septic tank into a large drain field, or leach field.¹³ The wastewater enters the drain field from perforated plastic piping that releases the wastewater over a large area.¹⁴ This plastic piping is laid over washed gravel which provides the first layer of purification.¹⁵ The wastewater

3. See *History of the Septic Tank System*, NEWTECHBIO, www.newtechbio.com/article/s/history_of_the_septic_system.htm (last visited Aug. 19, 2011).

4. *Id.*

5. U.S. ENVTL. PROT. AGENCY, OFFICE OF WASTEWATER MGMT., EPA No. 832-F-08-057 OCT. 2008, SEPTIC SYSTEMS FACT SHEET (2008), available at http://www.epa.gov/owm/septic/pubs/septic_systems_factsheet.pdf (last visited Aug. 19, 2011).

6. *Id.*

7. *Id.*

8. *Id.*

9. U.S. ENVTL. PROT. AGENCY, OFFICE OF WATER, A HOMEOWNER’S GUIDE TO SEPTIC SYSTEMS 2, available at http://www.epa.gov/owm/septic/pubs/homeowner_guide_long.pdf [hereinafter A HOMEOWNER’S GUIDE TO SEPTIC SYSTEMS].

10. *Id.*

11. Inst. of Water Research, Mich. State Univ. Extension, *Septic System*, INTRODUCTORY LAND AND LEARNING MODULE, <http://www.iwr.msu.edu/edmodule/water/wtrfrm21.htm> (last modified Jan 28, 1997).

12. See A HOMEOWNER’S GUIDE TO SEPTIC SYSTEMS, *supra* note 9, at 2.

13. *Id.*; DAN RAMSEY & JUDY RAMSEY, IF IT’S BROKE, FIX IT! (2004).

14. Inst. of Water Research, *supra* note 11.

15. *Id.*

then percolates and purifies through the natural soil, where it then enters the groundwater supply.¹⁶

The size of a septic tank and drain field depends largely on the size of the household.¹⁷ A properly maintained septic tank must be drained every few years.¹⁸ The frequency at which a septic tank is drained depends largely on the size of the tank and the number of individuals living in the attached household.¹⁹ Failing to properly maintain a septic tank can result in horrible consequences for both the homeowner and the environment.²⁰

First, a blocked or clogged outlet in a septic tank can result in all of the contents of the septic tank being pushed back into the house, known as back-flow.²¹ Another typical problem is sewage running into the yard.²² These problems, while equally horrible, are easily noticed by the homeowner and can be repaired in a relatively quick manner.²³ If taken care of immediately, they will have minimal health and environmental hazards.²⁴ However, failing to quickly resolve the problem, will result in various environmental and health concerns.²⁵

The more problematic septic system failure occurs when there is no sign of failure to the homeowner. The most common of these discreet failures is when the septic system leaks into well and groundwater, affecting the drinking water supply.²⁶ The wastewater from the tank can contain up to 100 million colony forming units of bacteria per 100 milliliters.²⁷ Chemicals used throughout the home can also run from the septic tank into the ground.²⁸ Faulting septic sys-

16. *Id.*

17. Cecil Hammond & Tony Tyson, Univ. of Ga. Cooperative Extension Serv., *Septic Tank Design and Construction*, U. GA. C. FAM. AND CONSUMER SCI., <http://www.fcs.uga.edu/pubs/current/C819-2.html> (last visited Aug. 19, 2011).

18. RAMSEY & RAMSEY, *supra* note 13.

19. *Id.*

20. See BRAD LEE ET AL, DEP'T OF AGRONOMY AND DEP'T OF AGRIC. AND BIOLOGICAL ENG'G, PUB. NO. HENV-1-W, PURDUE UNIV. EXTENSION, SEPTIC SYSTEM FAILURE (2005), *available at* <http://www.ces.purdue.edu/extmedia/HENV/HENV-1-W.pdf>.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. See *What is Septic System Failure?*, Mich. St. U. Extension, http://www.msue.msu.edu/objects/content_revision/download.cfm/revision_id.499684/workspace_id.-4/01500606.html/ (last updated June 24, 2003) (last visited Aug. 19, 2011) [hereinafter *What is Septic System Failure?*].

27. IOWA DEP'T OF NATURAL RES., FREQUENTLY ASKED QUESTIONS ABOUT SEPTIC SYSTEM INSPECTIONS 1, *available at* http://www.iowadnr.gov/portals/idnr/uploads/water/faq_septic.pdf [hereinafter FREQUENTLY ASKED QUESTIONS].

28. *What is Septic System Failure?*, *supra* note 26.

tems can leak harmful substances such as nitrogen and phosphorous.²⁹ The release of these materials into the environment can create serious environmental and health concerns, ranging from the contamination of the water to the spread of bacteria and viruses.³⁰ With all of the potential problems from faulty septic tanks, it is understandable why legislatures enact laws attempting to prevent these issues.

III. IOWA TIME OF TRANSFER LAW

In April 2008, the Iowa legislature passed Senate File 261—which plays a new role in the regulation of septic tanks.³¹ This law requires the inspection of any septic tank prior to transferring the title land.³² It is estimated that Iowa has over 100,000 septic systems that do not function properly.³³ The goal of the new law is to eliminate septic tanks which do not have drain fields, instead depositing “raw sewage directly into a road ditch or tile drain that flows to a ditch or stream.”³⁴ Because these tanks put harmful waste material directly into the water, these types of systems are illegal and have been for a long time.³⁵

Iowa Code Section 455B.172(11)(a) states:

A building where a person resides, congregates, or is employed that is served by a private sewage disposal system shall have the sewage disposal system serving the building inspected prior to any transfer of ownership of the building. The requirements of this subsection shall be applied to all types of ownership transfer including at the time a seller-financed real estate contract is signed. The county recorder shall not record a deed or any other property transfer or conveyance document until either a certified inspector’s report is provided which documents the condition of the private sewage disposal system and whether any modifications are required to conform to standards adopted by the department or, in the event that weather or other temporary physical conditions prevent the certified inspection from being conducted, the buyer has executed and submitted a binding acknowledgment with the county board of health to conduct a certified inspection of the private sewage disposal system at the earliest practicable time and to be responsible for any required modifications to the private sewage disposal system as identified by the certified inspection. Any type of on-site treatment unit or private sewage disposal system must be inspected according to rules developed by the department. For the purposes of this subsection,

29. A HOMEOWNER’S GUIDE TO SEPTIC SYSTEMS, *supra* note 9, at 4.

30. *Id.* at 4–5.

31. *See, e.g., Iowa’s Time of Transfer Inspection Program*, IOWA DEP’T NAT. RES., <http://www.iowadnr.gov/InsideDNR/RegulatoryWater/PrivateSepticSystems/TimeofTransfer.aspx> (last visited Aug. 19, 2011).

32. *See* IOWA CODE § 455B.172(11) (2011).

33. FREQUENTLY ASKED QUESTIONS, *supra* note 27.

34. *Id.*

35. *Id.*

“*transfer*” means the transfer or conveyance by sale, exchange, real estate contract, or any other method by which real estate and improvements are purchased, if the property includes at least one but not more than four dwelling units.³⁶

This statute requires a certified inspector to inspect a septic system prior to the title transferring during the sale of a piece of property.³⁷ A septic system that is not inspected will prevent the local County Recorder from recording the transfer of title.³⁸ As can be seen from the language above, if the system fails inspection, it is the duty of the seller to pay for any repairs necessary to pass an inspection.³⁹ However, the potential buyer of the property can negotiate with the seller to pay for the necessary repairs.⁴⁰ If a seller wishes to complete an inspection prior to finding a buyer, the inspection will be valid for two years.⁴¹

The effective date of this bill was July 1, 2009.⁴² At the time, Iowa only had an estimated 160 certified inspectors.⁴³ On May 26, 2009, Gov. Culver vetoed a provision of Senate File 467 which would have delayed the effective date of this new law to July 1, 2010.⁴⁴ Several organizations, including the Iowa State Bar Association and the Iowa Association of Realtors, requested the delay of this bill to allow more inspectors to become certified.⁴⁵ The veto of this requested delay reinstated the effective date of Iowa Code Section 455B.172 to July 1, 2009.⁴⁶

As of May 25, 2011, there were just over 380 certified inspectors statewide, with the list continuously growing.⁴⁷ One of the primary concerns with the passage of this law, was that not every county had a certified inspector.⁴⁸ Currently, all counties have at least one certified inspector.⁴⁹

36. IOWA CODE § 455B.172(11)(a) (2011).

37. *Id.*

38. *Id.*

39. *See id.*

40. *Id.*

41. *Id.* § 455.B.172(11)(h).

42. FREQUENTLY ASKED QUESTIONS, *supra* note 27.

43. Bob Hartwig & Ronette Schlatter, Iowa Mortgage Association, Septic System Inspections Mandatory July 1, 2009, (2009) (unpublished report) (on file with the Drake J. of Agric. L.).

44. *Id.*

45. *Id.*

46. *Id.*

47. IOWA DEP'T NAT. RES., IDNR CERTIFIED ONSITE TIME OF TRANSFER INSPECTORS (May 25, 2011), available at http://www.iowadnr.gov/portals/idnr/uploads/water/Septic/tot_list.pdf [hereinafter TRANSFER INSPECTORS].

48. Hartwig & Schlatter, *supra* note 43; *see generally Iowa's Time of Transfer Inspection Program*, *supra* note 31.

49. TRANSFER INSPECTORS, *supra* note 47.

For an inspector to become certified, he/she must complete a fairly straightforward process. First, an application must be submitted to the Iowa Department of Natural Resources, showing either the completion of a “Basics of Onsite 101” course given by the Onsite Wastewater Training Center of Iowa or have two or more years of experience in “the operation, installation, inspection, design or maintenance of private sewage disposal systems (onsite wastewater treatment or septic systems).”⁵⁰ Second, if the application is accepted, the inspector must then take a three day Inspector Training class.⁵¹ This class is only offered by Des Moines Area Community College and costs \$300 to complete.⁵² At the end of the course, the inspector must take an exam, which costs an additional \$50.⁵³ If the exam is passed, the instructor becomes certified and must pay an additional \$300 for a two year certification ending on even years.⁵⁴

While the statute is broad to cover every type of residence which may have a septic tank, several exemptions exist, creating certain scenarios when a certification is not necessary.⁵⁵ If the transfer is due to a court order or is defaulted to the owner of the mortgage, an inspection is not necessary.⁵⁶ An inspection is also not required when the title passes during “the administration of a decedent’s estate, guardianship, conservatorship, or trust.”⁵⁷ Nor is an inspection necessary when title passes between joint tenants.⁵⁸ Finally, an inspection is not required when the title transfers from one spouse to another, even if through a dissolution proceeding.⁵⁹

One more important note should be made on the language of the statute. The law provides for a delay in the inspection process if weather or any other physical conditions prevent the inspection from occurring.⁶⁰ If the interested buyer wishes to still go through with the purchase, an agreement must be signed with the County Recorder stating that the inspection will be completed at the earliest possible time.⁶¹ If any repairs are required, the *buyer* must foot all costs.⁶²

50. *Iowa’s Time of Transfer Inspection Program*, *supra* note 31.

51. *Id.*

52. *Id.*

53. *Id.*

54. IOWA DEP’T OF NATURAL RES., CERTIFIED TIME OF TRANSFER INSPECTOR

APPLICATION FLOWCHART, available at <http://www.iowadnr.gov/portals/idnr/uploads/water/septic/flowchart.pdf> (last visited Aug. 19, 2011).

55. IOWA CODE § 455B.172(11)(a)(1)–(12) (2011).

56. *Id.* § 455.B.172(11)(a)(1)–(2).

57. *Id.* § 455.B.172(11)(a)(3).

58. *Id.* § 455.B.172(11)(a)(4).

59. *Id.* § 455.B.172(11)(a)(5)–(6).

60. *Id.* § 455.B.172(11)(a).

61. *Id.*

62. *Id.*

IV. OTHER TIME OF TRANSFER LAWS

While this time of transfer law is certainly new to Iowa on a statewide basis, similar laws have been in existence for some time. Prior to the enactment of Iowa's time of transfer law, twenty-one of Iowa's ninety-nine counties had a similar inspection requirement prior to the transfer of title.⁶³ Rather than passing a statewide ordinance, other states allow counties to regulate septic systems through time of transfer laws. For example, Minnesota allows the individual counties or local governments to govern the management of septic systems.⁶⁴

A. *Minnesota and the Local Method*

In Minnesota, the seller of a property which contains a septic system is required to disclose, in writing, the existence of the septic system.⁶⁵ If a Minnesota local government wants to create a different method or have different requirements, Minnesota Statute section 115.55 allows the local ordinances to control.⁶⁶ Minnesota has a "Commissioner" who oversees the state's Pollution Control Agency.⁶⁷ "The local standards and criteria shall be submitted to the commissioner for comment prior to adoption to demonstrate that, based on local circumstances in that jurisdiction, they adequately protect public health and the environment."⁶⁸ The only inspections that are state required are those for the construction of new septic systems or the replacement of an existing system.⁶⁹ If a straight-pipe system (one where a pipe runs straight from a house into a drainage ditch or body of water without the use of a drainage field) is discovered by an inspector, the owner of the system is issued a citation, given a ten month notice to remove the straight-pipe system and replace it with a compliant septic system.⁷⁰ If a new system is not put in place or used of the straight-pipe system is not discontinued within the ten month period, the owner is fined "\$500 per month of noncompliance beyond the ten-month period."⁷¹ Interestingly, half of the fine money is given to the local government of the system not in compliance.⁷² Thus,

63. LOUISA COUNTY IOWA, TIME OF TRANSFER STEP BY STEP, *available at* <http://www.louisacountyiowa.org/louisa/sanitarian/Time%20of%20Transfer%20Step%20by%20Step.pdf> (last visited Aug. 19, 2011).

64. MINN. STAT. ANN. § 115.55(7) (West Supp. 2011).

65. *Id.* § 115.55(6).

66. *Id.* § 115.55(7).

67. *Id.* § 115.55(1)(e).

68. *Id.* § 115.55(7)(a).

69. *Id.* § 115.55(5)(a).

70. MINN. STAT. ANN. § 115.55(11) (West Supp. 2011).

71. *Id.*

72. *Id.*

it provides the local government incentive to rid the area of noncompliant systems.

Several Minnesota local governments require time of transfer inspections.⁷³ Local governments that have the time of transfer inspections are typically in areas where there is shoreland.⁷⁴ An example of a local government which has its own time of transfer requirement is Dodge County, Minnesota.⁷⁵ In 2000, Dodge County had a population of just over 17,700 people, which is roughly the size of the average rural county in Iowa.⁷⁶ Inspections of septic tanks are required before the sale or transfer of any property containing a septic system.⁷⁷ The inspection must be completed by an individual who has received a state license as a Designer I or Inspector.⁷⁸ If the septic system is in noncompliance the owner of the property *and* the County are notified of the noncompliance.⁷⁹ Then, if the septic system “presents an imminent threat to public health . . . the property owner must upgrade, replace, or discontinue use of the [septic system] within ten months of receipt of the notice.”⁸⁰ If the system merely fails to comply with septic system standards, but does not “present an imminent threat to public health,” the property owner has two years to bring the septic system into compliance.⁸¹

Unlike the Iowa law, Dodge County does not prohibit the actual transfer of the deed.⁸² Instead, Dodge County requires the submission of a “Sewage Responsibility Form” which is attached to the deed of the property.⁸³ The Sewage Responsibility Form simply marks the type of noncompliance at issue (i.e. imminent threat to public health or general noncompliance) and requires either the

73. MINNESOTA POLLUTION CONTROL AGENCY, WATER QUALITY/WASTEWATER NO. 6.11, GUIDE TO SUBSURFACE SEWAGE TREATMENT SYSTEM DISCLOSURE AT PROPERTY TRANSFER (2008), available at <http://www.pca.state.mn.us/publications/wq-wwists6-11.pdf>.

74. *Id.*

75. See *Environmental Services: On-Site Septic Systems*, DODGE COUNTY MINN. http://www.co.dodge.mn.us/eq_septicystems.html (last visited Aug. 19, 2011).

76. *Compare Fact Sheet: Dodge County Minnesota-Census 2000 Demographic Profile Highlights*, U.S. CENSUS BUREAU, <http://factfinder.census.gov/> (follow “FACT SHEET” hyperlink; click field for “city/town, county, or zip”; then type “dodge”; then click field for “state” and select “Minnesota”; then click “GO”; then follow “Dodge County, Minnesota”; then follow “2000” tab) (last visited Aug. 19, 2011), with U.S. CENSUS BUREAU, TABLE 1: ANNUAL ESTIMATES OF THE RESIDENT POPULATION FOR COUNTIES OF IOWA: APRIL 1, 2000 TO JULY 1, 2008, (Mar. 19, 2009), available at <http://quickfacts.census.gov/qfd/states/19000lk.html> (follow hyperlink “Estimates for Iowa counties” under “Population Estimates” heading).

77. *Environmental Services: On-Site Septic Systems*, *supra* note 75.

78. *Id.*; see also MINN. STAT. ANN. § 115.55(1)(j) (West Supp. 2011).

79. *Environmental Services: On-Site Septic Systems*, *supra* note 75.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

buyer or seller to agree to make the system comply within the specified time period.⁸⁴ If the property is being transferred during a time of year where the ground is frozen and an inspection cannot occur, the inspection must occur by June 1 of the following year.⁸⁵ In addition:

The seller or buyer must establish an escrow account to be used to inspect and bring the septic system into compliance if determined to be failing or non-compliant. The account shall be established in a financial institution mutually agreed upon and may be jointly controlled by seller and buyer. The amount deposited in the escrow account shall be determined by the Environmental Services Department. Dodge County must be named in the escrow document as the release agent.⁸⁶

This stipulation requires a combination of allowing the parties to make the ultimate determination, while still providing some government oversight to the process.

B. *Massachusetts and the State Method*

Much like Iowa, Massachusetts uses a statewide method to govern septic systems.⁸⁷ The law governing time of transfer inspections in Massachusetts is known as Title 5.⁸⁸ Title 5 came into effect on January 1, 1996.⁸⁹

The purpose of Title 5, 310 CMR 15.000, of the State Environmental Code is to provide for the protection of public health, safety, welfare and the environment by requiring the proper siting, construction, upgrade, and maintenance of on-site sewage disposal systems and appropriate means for the transport and disposal of sewage.⁹⁰

Failing to comply with Title 5 can result in both civil and criminal penalties.⁹¹

Title 5 requires an inspection of a septic system within two years of an attempt of transferring title of a property.⁹² If the septic system has been emptied within three years and was inspected at that time, that is sufficient to allow a

84. See DODGE CNTY. MINN., DODGE COUNTY SEWAGE RESPONSIBILITY FORM (2005), available at <http://www.co.dodge.mn.us/documents/SewageResponsibilityFormNEW.pdf>.

85. *Environmental Services: On-Site Septic Systems*, *supra* note 75.

86. *Id.*

87. Compare IOWA CODE § 455B.172(11) (2011), with 310 MASS. CODE REGS. 15.301 (2011).

88. *About MassDEP: Bureau of Resource Protection (BRP)*, MASS DEP'T ENVTL. PROTECTION, <http://www.mass.gov/dep/about/organization/aboutbrp.htm#aboutt5> (last visited Aug. 19, 2011).

89. 310 MASS. CODE REGS. 15.100(2) (2011).

90. *Id.* 15.001(1).

91. *Id.* 15.001(2); see also MASS. GEN. LAWS ch. 21A, § 13 (2010).

92. 310 MASS. CODE REGS. 15.301(1) (2011).

transfer of title.⁹³ Similar to Iowa's time of transfer, several exemptions exist, including refinancing, adding or removing a spouse to the title, changes in guardianship.⁹⁴ If the title transfers through a will or intestacy, an inspection may be required depending on the beneficiary's relationship to the original title holder.⁹⁵ Interestingly, if a property owner establishes a life estate for an individual, an inspection must occur in order to transfer title of the property.⁹⁶ Also, if an individual is added to the title of the property, that is not a spouse, an inspection must occur.⁹⁷ As can be seen, Massachusetts' Title 5 is much more expansive for types of transfers covered, than Iowa's time of transfer code.⁹⁸

Much like other time of transfer laws, Massachusetts requires that the inspection must be performed by a certified inspector.⁹⁹ The qualifications to become a certified inspector in Massachusetts are much more restrictive than Iowa's requirements.¹⁰⁰ In Massachusetts, an inspector must be: (1) a Massachusetts Registered Professional Engineer; (2) a Board of Health Member or agent; or (3) an "individual[] certified as [an] on-site inspector[] by the National Sanitation Foundation or other certifying organizations approved by the [Massachusetts Department of Environmental Protection]."¹⁰¹ In addition to being one of these individuals, an inspector must complete a course in septic tank inspections and successfully pass an exam.¹⁰² Once an inspector becomes "certified" she, or he, must renew the certification every three years by filing the appropriate paperwork.¹⁰³ Currently, Massachusetts has 1607 certified Title 5 inspectors in-state and ninety-four certified inspectors living out-of-state.¹⁰⁴

Despite being in existence for over fourteen years Title 5 has not been a heavily litigated issue. This could be partly due to the allowance of "variances"

93. *Id.*

94. *Compare* IOWA CODE § 455B.172(11)(a)(1)–(12), with 310 MASS. CODE REGS. 15.301(2)(a)–(e) (2011).

95. 310 MASS. CODE REGS. 15.301(3)(c) (2011). If the transfer is to a spouse, children, or sibling, then no inspection is required. *Id.* If the transfer it to anyone else, however, an inspection is required. *Id.*

96. *Id.* 15.301(3)(d).

97. *Id.* 15.301(3)(i).

98. *Compare id.* 15.301, with IOWA CODE § 455.B.172(11) (2011).

99. 310 MASS. CODE REGS. 15.340 (2011).

100. *Compare id.*, with Iowa's Time of Transfer Inspection Program, *supra* note 31.

101. 310 MASS. CODE REGS. 15.340(1)(a)–(c) (2010).

102. *Id.* 15.340(4)–(5).

103. *Id.* 15.340(12).

104. MASS. DEP'T OF ENVTL. PROT., TITLE 5 SYSTEM INSPECTORS BY IN-STATE (2011) available at <http://www.mass.gov/dep/water/wastewater/t5sysins.pdf>; MASS. DEP'T OF ENVTL. PROT., TITLE 5 SYSTEM INSPECTORS BY OUT-OF-STATE (2011), available at <http://www.mass.gov/dep/water/wastewater/t5sysout.pdf>.

to Title 5. Variances allow a particular system to not fully comply with all aspects of Title 5.¹⁰⁵ In certain circumstances, a variance may not be granted, regardless of the situation.¹⁰⁶ A request for a variance must be made in writing,¹⁰⁷ show that failing to grant the variance “would be manifestly unjust” considering the individual’s specific situation, *and* the owner must “establish[] that a level of environmental protection that is at least equivalent to that provided under [Title 5] can be achieved without strict application of [Title 5].”¹⁰⁸ The application for a variance is reviewed by the “Local Approving Authorities.”¹⁰⁹ If a Local Approving Authority grants a variance, the grant of the variance must be transmitted to the Massachusetts Department of Environmental Protection where the application is again reviewed.¹¹⁰ If the Local Approving Authority denies a variance, the decision may be appealed “to any court of competent jurisdiction as provided for by the laws of the Commonwealth.”¹¹¹ If the Massachusetts Department of Environmental Protection makes the ultimate determination, however, or modifies the Local Approving Authority’s ruling, the decision is appealed through an adjudicatory hearing process.¹¹²

One commentator provided an analysis on whether or not Title 5 is an unconstitutional taking.¹¹³ After analyzing both United States Supreme Court case law and Massachusetts case law, Reilly believes that Title 5 may create an unconstitutional taking.¹¹⁴ Reilly acknowledged that, overall, Title 5 provides a benefit to the people of Massachusetts, but that benefit comes at a cost to persons who cannot afford to comply with Title 5’s stringent requirements.¹¹⁵ “[T]his imbalance violates Justice Holmes’ position that the burden must be borne by the population at large rather than a specific minority.”¹¹⁶ In order to bring a consti-

105. See 310 MASS. CODE REGS. 15.410 (2011).

106. *Id.* 15.415.

107. *Id.* 15.411(1)(a).

108. *Id.* 15.410(1)(a)–(b).

109. *Id.* 15.410(1).

110. *Id.* 15.412(1).

111. *Id.* 15.421.

112. *Id.* 15.422(1)–(2).

113. See generally Richard J. Reilly, *Flushing Money Down the Drain: Environmental Regulatory Takings and Title 5 of the Massachusetts State Environmental Code*, 32 SUFFOLK U. L. REV. 663 (1999).

114. *Id.* at 684–685 (“Title 5 regulations as applied to certain properties may be arbitrary and capricious and thus fall within the penumbra of unconstitutional regulatory takings.”).

115. *Id.* at 685.

116. *Id.*

tutional claim, however, one must first have standing to make the claim.¹¹⁷ “A Massachusetts homeowner subject to Title 5 has the right to challenge the ordinance but must first fail a Title 5 inspection and must exhaust all available remedies before challenging the ordinance. Such a homeowner would then have standing to bring a takings claim against the Commonwealth.”¹¹⁸ Given these high hurdles to overcome, it would be rather costly and time consuming to challenge Title 5. Thus, it is understandable why this suit has never been brought before either Massachusetts state courts or the Federal courts.

V. ANALYZING IOWA’S TIME OF TRANSFER LAW

After examining how other jurisdictions handle septic systems, a proper analysis of the Iowa time of transfer law can be done. The purpose of Iowa Code Section 455B.172(11) “is to eliminate systems with no secondary treatment.”¹¹⁹ While this is certainly a valid concern, it is questionable whether this law accomplishes this goal. As mentioned previously, Iowa Code Section 455B.172(11) contains numerous exceptions when an inspection is not required.¹²⁰ Instead of allowing for all of these exceptions, Iowa could have adopted a code that is substantially similar to Massachusetts Title 5, which greatly limits the number of exceptions.¹²¹ This would have allowed the State to remove the problem tanks in a more rapid and efficient manner than the current process. Further, it is not difficult to imagine a situation where an old farmhouse passes, through a will or intestacy, to several generations and an inspection never occurs because it is exempted under the current statutory framework.¹²² This old farmhouse would continue to dump sewage in an environmentally hazardous way until title finally passed through a means which required an inspection. With this example, and the several other exemptions, it clear that the statute does a poor job of achieving its overall goal of removing all problem septic tanks.

Another significant problem with Iowa’s time of transfer law, is that it is overbroad. Unlike Minnesota’s county by county governance and Massachusetts’ Local Approving Authority, Iowa is missing any sort of local connection to the examination of septic systems. In fact, Iowa Code Section 455B.172(11)’s only connection to the local communities is the County Recorder, who is barred

117. See *Stark v. Wickard*, 321 U.S. 288, 304 (1944) (“It is only when a complainant possess something more than a general interest in the proper execution of the laws that he is in a position to secure judicial intervention.”); see also *Reilly*, *supra* note 113, at 682.

118. *Reilly*, *supra* note 113, at 682.

119. FREQUENTLY ASKED QUESTIONS, *supra* note 27.

120. See IOWA CODE § 455B.172(11)(a)(1)–(12) (2011).

121. Compare *id.*, with 310 MASS. CODE REGS. 15.301(2)(a)–(e) (2011).

122. See IOWA CODE § 455B.172(11)(a)(3) (2011).

from recording the transfer of title when a required inspection has not occurred.¹²³ Iowa has a diverse landscape ranging from the flat prairies of Northwest Iowa, to the rocky bluffs of Northeast Iowa, to the Loess Hills of Western Iowa, and lastly, to the rolling river valleys of Eastern Iowa. Each area will likely have different soil requirements and would be difficult to govern on a statewide basis. Allowing the local governments to provide oversight and greater control would create more variability to control land specific situations.

Another key feature missing from Iowa's time of transfer law is the ability to appeal or contest the final decision of the inspector.¹²⁴ Upon reviewing Iowa's current list of certified inspectors it becomes apparent that several, if not a majority, of the inspectors also work for companies which provide septic tank repair services.¹²⁵ The people who are certified inspectors are also the people who will be repairing any problems found with a homeowner's septic system. This creates an inherent conflict of interest.¹²⁶ The current code provisions do not provide a homeowner, who questions the reliability of the findings of an inspector, any ability to appeal or challenge those findings. Accordingly, the potential for abuse of the inspection process are readily apparent.

Massachusetts prevents this sort of problem in two ways. First, Title 5 limits who may become a certified inspector.¹²⁷ Second, Title 5 allows the decisions of these inspectors to be reviewed by more individuals, if there are any questions regarding their decisions.¹²⁸ If Iowa were to adopt at least one of these requirements, the potential for conflicts of interest, or unfair inspections, to occur would be greatly diminished.

Both Dodge County, Minnesota and Title 5 allow some flexibility to cover certain situations in which the governing code is not applicable, which is another feature missing from Iowa Code Section 455.172(11).¹²⁹ An example of the necessity of flexibility has already occurred in one Iowa community. Ameren UE Corp., a power company doing business in Illinois and Missouri, owned several thousand acres along the Mississippi River between Keokuk and Burlington,

123. *Id.* § 455B.172(11)(a).

124. *See id.* § 455B.172(11) (2011).

125. *See* TRANSFER INSPECTORS, *supra* note 47.

126. An analogous situation would be to require an individual to obtain an inspection on an automobile prior to transferring title of the vehicle, but the only individual available to perform the inspection is the mechanic who would also do the repair.

127. *See* 310 MASS. CODE REGS. 15.340 (2011).

128. *See id.* 15.421; *id.* 15.422.

129. *Compare* IOWA CODE § 455B.172(11) (2011), *with* 310 MASS. CODE REGS. 15.410 (2011), *and Environmental Services: On-Site Septic Systems*, *supra* note 75.

Iowa.¹³⁰ The land was originally purchased to allow for flooding after the building of the Keokuk hydroelectric dam.¹³¹ The land was originally purchased by the power company between 1910 and 1912.¹³² Beginning in the 1930s, Ameren leased some of the property to individuals to use for recreational purposes, including the building of summer cabins.¹³³ These cabins, roughly a dozen remain, contain no running water, no electricity and can only be reached by boat.¹³⁴ These cabins have never had any septic system, nor could they as water is located only two feet below the surface with solid rock below the water.¹³⁵ A serious question remains as to whether or not an inspection and compliance with Iowa Code Section 455.172(11) is required. Given that these cabins have never had any sewage disposal system, it is unlikely that an inspection would be required because Iowa Code Section 455B.172(11)(a) limits inspections to a building “that is served by a private sewage disposal system.”¹³⁶ Here, there is no preexisting private sewage system, thus making Iowa Code Section 455B.172(11)(a) inapplicable.¹³⁷ If the county recorder interpreted the statute differently, however, “Ameren may be forced to have cabin owners remove the buildings before the property can be divided and sold.”¹³⁸ This problem could be easily corrected with a review process similar to Massachusetts’s Title 5.¹³⁹

It cannot be doubted that Iowa’s time of transfer law has good intentions, i.e. removing outdated septic systems, and seeks to eliminate valid health concerns. With the current process, however, it is truly questionable whether the current statute provides the proper means for obtaining these goals. First, Iowa’s time of transfer law provides too many exceptions to properly address the problem in a timely and efficient manner. With the current exceptions in place, it may take several years, or generations, before a problematic septic system will be discovered and/or corrected.¹⁴⁰

Further, the exemption list continues to grow. Recently, the Iowa Legislature passed two more exemptions, which became effective on July 1, 2010.¹⁴¹ The first states that an inspection is not necessary when the consideration for the

130. Nicholas Bergin, *River Real Estate Sells*, THEHAWKEYE.COM, July 29, 2009, <http://www.thehawkeye.com/Story/ameren-072909>.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. IOWA CODE § 455B.172(11)(a) (2011).

137. *Id.*

138. Bergin, *supra* note 130.

139. *See* 310 MASS. CODE REGS. 15.421-22 (2011).

140. *See* IOWA CODE § 455B.172(11)(a)(1)–(12) (2011).

141. *Id.* § 455B.172(11)(a)(11)–(12).

deed is \$500 or less.¹⁴² The second new exception has even more concerns. Now, an inspection is not need when a family corporation (or other similar business entity) passes real property to the shareholders (or equivalent) for no consideration, other than the shares in the business.¹⁴³ This exemption creates a very similar situation to the will/intestacy situation already discussed, where it may be an extremely long time before an inspection will eventually occur. Following a method similar to Massachusetts's Title 5, would help prevent the unnecessary delay of removing problematic septic systems.

The second main problem is that Iowa's time of transfer law does not take into account the varying landscapes of Iowa or allow any local control. This process could easily be corrected following a combination of Massachusetts and Minnesota's format. The best method would be to follow Minnesota's model and allow the individual counties to control the actual requirements for each landscape.¹⁴⁴ The State of Iowa could still maintain control and provide oversight, however, by requiring the counties to report proposals and the methods directly to a governing agency, such as the Iowa Department of Natural Resources.

The third and final problem that needs to be addressed by the Iowa's time of transfer law, is the necessity for the allowance of variances. Allowing variances corrects two problems. First, if variances would be allowed, the number exemptions could be limited; allowing the truly problematic systems to be corrected in a more efficient manner. If a particular deed is not covered by an exemption, the buyer/seller could approach a board (or county supervisor) and request a variance to allow the transfer to proceed as is, or request certain modifications occur. Second, variances would provide for certain site specific issues to be addressed. If a particular landscape cannot sustain a properly functioning septic system, a variance would allow an exception to occur specifically for that specific site. This would allow for a site specific exception rather than having a State-wide exception and, as such, would provide a more effective means for correcting problematic systems on a state-wide basis.

VI. CONCLUSION

Septic systems that are malfunctioning, or drain directly into drainage fields or water, create serious and legitimate health concerns. These health concerns are the focus point of Iowa's new time of transfer law.¹⁴⁵ The current

142. *Id.* § 455B.172(11)(a)(11).

143. *Id.* § 455B.172(11)(a)(12).

144. MINN. STAT. ANN. § 115.55(11) (West Supp. 2011).

145. *See* FREQUENTLY ASKED QUESTIONS, *supra* note 27.

means of enforcing the law, however, have the potential to create serious problems. Not all title transfers are covered under the new laws which may allow for the continued use of many improper septic systems.¹⁴⁶ Further, the lack of certified inspectors and their potential for serious conflicts makes the inspection process cumbersome and potentially costly. This is further exemplified by the lack of a defined appeal/review process of the inspector's findings. In order to correct these changes, the Iowa General Assembly should rework the new time of transfer laws, following a combination of Minnesota's county methods and Massachusetts's Title 5. The ideal time of transfer law would allow for some county oversight, flexibility, and control of the inspections, with a review process to protect a property owner's rights in the land.

146. See IOWA CODE § 455B.172(11)(a)(1)–(12) (2011) (for a list of exceptions for required inspections).