



MEMO

Legal Department

To: Mayor Haila, Ames City Council

From: Mark O. Lambert, City Attorney

Date: January 20, 2022

Subject: Legal issues regarding request from Ames History Museum

At the January 11, 2022 Ames City Council meeting, the Council directed the City Attorney to prepare a memo regarding the request of the Ames History Museum for the City to make a donation to its capital campaign for the expansion of the museum. Concerns were raised regarding the Iowa Public Bidding Law, that in many cases requires the bidding-law process to be followed if public money is used in construction projects.

PUBLIC BIDDING LAW:

Iowa Chapter 26, the Public Bidding Law, makes “public improvements” subject to requirements of public bidding for the construction of the project. Public improvements include not only actually building a structure, but also repair and maintenance work, so restoration or rehabilitation of a building would be included. **So, the key question is whether the City giving money to the museum would make the museum’s rehabilitation/restoration project a “public improvement.”** (For simplicity’s sake, I just use the word “construction” in this memo.) **The answer to that question is no:**

First, the Iowa Code defines “public improvement” in these relevant ways:

26.2(3) a. “Public improvement” means a building or construction work that is constructed under the control of a governmental entity and for which either of the following applies:

(1) Has been paid for in whole or in part with funds of the governmental entity.

(2) A commitment has been made prior to construction by the governmental entity to pay for the building or construction work in whole or in part with funds of the governmental entity.

b. **“Public improvement” includes a building or improvement constructed or operated jointly with any other public or private agency, but excludes all of the following: (1) Urban renewal demolition and low-rent housing projects. (2) Industrial aid projects authorized under chapter 419. (3) Emergency work or repair or maintenance work performed by employees of a governmental entity. (4) A highway, bridge, or culvert project....**

Also, section 26.2(5) defines “Under the control of a governmental entity” as “determining the construction work to be performed or establishing the specifications for a building or construction work to be occupied by the governmental entity.”

Regarding 3(a) this would not apply to the matter at hand, since the City would not be controlling the construction project by determining the work to be performed or establishing specifications for a building, nor would the City be occupying the building in the future.

Regarding 3(b), which defines public improvement as “building...constructed... jointly with any...private agency,” merely giving money toward the construction of the building would not be considered “constructing jointly” the building. As the City would only be providing funding and will be “hands off” regarding the specifications and construction, this section would not apply. An example of “jointly constructing” a project would be if the City and a nonprofit were going to

work together to build a building, and the building space would have both City offices and nonprofit offices in it.

In summary, because the City would not be controlling the construction, or jointly constructing, the building with the Ames History Museum, the City providing a contribution to the capital campaign for the expansion of the Ames History Museum would not be a “public improvement” subject to the bidding requirements of the Public Bidding Law.

However, there is another issue to consider:

IOWA CONSTITUTION ISSUE:

Article III, section 31 of the Iowa Constitution states in part: **“(N)o public money or property shall be appropriated for local, or private purposes**, unless such appropriation, compensation, or claim, be allowed by two-thirds of the members elected to each branch of the General Assembly.”

There have been six official Iowa Attorney General Opinions since 1972 that have concluded that, based on the above language in the Iowa Constitution, a governmental body may not donate public funds to a private entity, even if the entity is established for charitable or educational purposes and performs work which the government could perform directly.

The State Auditor recently has been aggressive in enforcing this constitutional provision and has issued a guidance and has also noted on audits of various cities and counties when he thought they were in violation of the constitutional provision. (The State Auditor's guidance is attached).

To be clear, cities in Iowa can still provide funds to nonprofit organizations, but that has to be done in the manner of a contract for services and has to be for a clearly-spelled-out public purpose.

Also, the Iowa Supreme Court has clarified that money allocated to private (nonprofit or for-profit) entities for economic development purposes constitutes a "public purpose" as the Iowa Legislature has declared it so in the Iowa Code.

An interesting wrinkle is that counties are specifically authorized by the Iowa Code to allocate money for "the use of a nonprofit historical society" organized under the Iowa NonProfit Corporation Act. Iowa Code 331.427(3). This seems to mean that counties may directly provide funds to a historical museum. But the lack of a similar provision for cities leads me to the conclusion that cities cannot simply allocate funds to a historical museum.

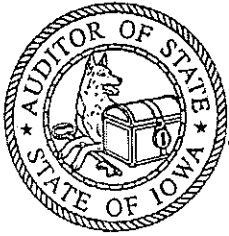
In summary, the Iowa Constitution prohibits the City from donating funds to the Ames History Museum. However, the City could provide funds to the Museum through a contract-for-services. Any such agreement would need to specify what services the City is purchasing, and clearly spell out the public purpose in doing so.

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ATTACHED:

State Auditor Statement

Iowa Attorney General Opinion from 1972, stating that it would be unlawful for a city to provide funds to a local recreation center.



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**AUDITOR SAND OFFERS "BEST PRACTICES" ADVISORY TO GOVERNMENTS ON
WORKING WITH NON-PROFITS**

November 2, 2021

Auditor of State Rob Sand today offered "best practices" advice to governments on how to legally and effectively work with non-profits. The issuance of this advice is in response to requests from governmental leaders seeking clarification on this matter.

Governments are prohibited from making direct donations and in-kind contributions to non-profits under Article III, Section 31 of the Iowa Constitution.

"Extra compensation-payment of claims-appropriations for local or private purposes. Section 31. No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; nor, shall any money be paid on any claim, the subject matter of which shall not have been provided for by pre-existing laws, and no public money or property shall be appropriated for local, or private purposes, unless such appropriation, compensation, or claim, be allowed by two-thirds of the members elected to each branch of the General Assembly."

The Iowa Attorney General has issued numerous opinions stating the same. However, there are two situations in which public funds may be provided to a non-profit.

- 1) When the payment is for economic development purposes as outlined in Chapter 15A of the Code of Iowa, specifically Chapter 15A.1(1)(a), 15A.1(1)(b), and Chapter 15A.2.
 - a. 15A.1(1)(a): "Economic development is a public purpose for which the state, a city, or a county may provide grants, loans, guarantees, tax incentives, and other financial assistance to or for the benefit of private persons."
 - b. 15A.1(1)(b): For purposes of this chapter, "**economic development**" means private or joint public and private investment involving the **creation of new jobs and income or the retention of existing jobs and income that would otherwise be lost.**"

- c. 15A.2: “Before public funds are used for grants, loans, tax incentives, or other financial assistance to private persons or on behalf of private persons for economic development, the governing body of the state, city, county, or other public body dispensing those funds or the governing body’s designee, **shall determine that a public purpose will reasonably be accomplished by the dispensing or use of those funds.** In determining whether the funds should be dispensed, the governing body or designee of the governing body shall consider any or all of the following factors:
- i. Businesses that add diversity to or generate new opportunities for the Iowa economy should be favored over those that do not.
 - ii. Development policies in the dispensing of the funds should attract, retain, or expand businesses that produce exports or import substitutes, or which generate tourism-related activities.
 - iii. Development policies in the dispensing or use of the funds should be targeted toward businesses that generate public gains and benefits, which gains, and benefits are warranted in comparison to the amount of the funds dispensed.
 - iv. Development policies in dispensing the funds should not be used to attract a business presently located within the state to relocate to another portion of the state unless the business is considering in good faith to relocate outside the state or unless the relocation is related to an expansion which will generate significant new job creation. Jobs created as a result of other jobs in similar Iowa businesses being displaced shall not be considered direct jobs for the purpose of dispensing funds.”

- 2) When the government enters into a contract for services with the non-profit.
- a. Agreements should be reduced to a written contract, not a verbal agreement or a motion or resolution in the minutes. However, the contract should then be approved in the minutes and the public purpose for the expenditure of the tax dollars in question should be clearly documented in the minutes.
 - b. The terms and conditions of each party to the contract should be plain, detailed, and unambiguous.

- c. There should be clear language as to how much the government is paying, the schedule of payments, and what the government (or the public) is receiving from the non-profit in return. Overall, consideration should be balanced for each party and the government should seek the highest value possible for taxpayers.
- d. When a government contracts with a non-profit and the non-profit is not providing a clear service directly to the government but rather the service is to the public, the public benefit will be the “consideration,” or benefit, the government receives under the contract. This consideration, how the public (as a whole) is benefitting should be made clear in the contract.
- e. The total cost of the contract and required supporting invoices and/or documentation should be clearly defined. The government should ensure it is not overpaying for the product or services received. For example, if, under the contract, the non-profit is to provide X number of meals to homebound people, the contract should clearly state how the public is benefitting as a whole and clearly state what documentation is required to support the number of meals provided.
- f. All contracts should include a requirement for the non-profit to account to the government for the public funds and how they are spent to meet the state public purpose requirement. The form and frequency of that accounting should be clear in the contract.
- g. The contract should be signed by a representative of the government and a representative of the non-profit.

Additional guidance for governments can be found on the Auditor of State website at <https://www.auditor.iowa.gov/faqs/>.

1972 WL 262301 (Iowa A.G.)

Office of the Attorney General

State of Iowa

Opinion No. 72-316

March 9, 1972

*1 CITIES AND TOWNS: Donations — Art. III, section 31, Iowa Constitution. A city may not make a donation for a private purpose. (Blumberg to Campbell, State Representative, 3/9/72)

Mr. Herbert Campbell
State Representative

You have requested an Attorney General's Opinion as to whether a town council may make a donation from town funds to a recreation center which is operated and funded by private citizens not responsible to the Town Council. In addition, the Council does not have any authority whatsoever in the operation of the center.

Under general principles of law, and the decisions of the courts of some of our neighboring states, such a donation would not be advised. As stated in 56 Am. Jur. 2d *Municipal Corporations* § 591:

“In a number of cases, the view has been taken that it is not within the power of a municipal corporation, even with express legislative authority, to donate funds in aid of a private institution, although it is devoted to charitable or educational work for which public funds might lawfully be expended by the municipality directly, if a private corporation or organization controls the institution, elects its own officers, manages its own affairs, and owes no duty to the state except that which arises from the nature of work undertaken by it.”

See also, *Washington Home v. Chicago*, 157 Ill. 414, 41 N.E. 893, *Farmer v. St. Paul*, 65 Minn. 176, 67 N.W. 990; *Curtis v. Whipple*, 24 Wis. 350.

Specifically, The Constitution of the State of Iowa, Article III, section 31, provides in part:

“[N]o public money or property shall be appropriated for local, or private purposes unless such appropriation, compensation or claim be allowed by two thirds of the members elected to each branch of the General Assembly” [emphasis added.]

Interpreting the above section, as it applies to limit the power of a city council, the Iowa Supreme Court in *Love v. City of Des Moines*, 1930, 210 Iowa 90, 94, 230 N.W. 373, said:

“One of the fundamentals of popular government is that the power of taxation and the expenditure of taxes shall not be exercised for private benefit or for the purpose of mere gratuities to private interests.”

It is our opinion, therefore, that a donation such as you describe in your letter would not be authorized.

Richard C. Turner
Attorney General

1972 WL 262301 (Iowa A.G.)