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FOR RELEASE May 6, 2009

Auditor of State David A. Vaudt today released a reaudit report on the City of Fort Dodge, Iowa for the period July 1, 2005 through June 30, 2006. The reaudit also covered certain items to determine practices applicable to the years ended June 30, 2005 and June 30, 2007. The reaudit was performed at the request of citizens pursuant to Chapter 11.6(4)(c) of the Code of Iowa.

The reaudit report addressed concerns regarding public bidding and potential conflicts of interest for services provided to the City of Fort Dodge by McClure Engineering and MER Engineering. Vaudt determined, based on an Iowa Attorney General's letter of advice dated October 10, 2008, the City has not utilized a proper quantitative competitive bidding process. The letter of advice states, in part, "The conflict of interest exceptions in subsections 362.5(4) and (5) (of the Code of Iowa) each refer to contracts made upon competitive bid in writing, publicly invited and opened. We do not believe that the qualitative selection process which is described constitutes a competitive bid procedure for purposes of section 362.5."

Vaudt recommended the request for qualification process be addressed and clarified and the City should review its competitive bidding ordinance for consistency with Iowa Code Chapter 26.

Other issues addressed in the reaudit report include tax increment financing (TIF) accounts, balances and uses. Since the City does not appear to be in compliance with Chapter 403.19 of the Code of Iowa, Vaudt recommended the City reduce its certified indebtedness by the balances held in TIF trust accounts when it completes the 2009 TIF certification.

Vaudt also addressed concerns pertaining to the Gwendolyn E. Scharfenberg Bequest transferred to the W.H. Johnston Foundation, including related investments subsequently made by the Foundation, which remain unresolved. Vaudt recommended the City resume custody and control of the Bequest and direct the Foundation to invest these public funds in accordance with the statutory requirements of Chapter 12B of the Code of Iowa until this issue has been resolved.

The City responded favorably to the recommendations included in the reaudit report. A copy of the reaudit report was filed with the Webster County Attorney for his review and determination of further action, if any.

A copy of the reaudit report is available for review in the City Clerk's Office, in the Office of Auditor of State and on the Auditor of State's web site at <http://auditor.iowa.gov/specials/specials.htm>.

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CITY OF FORT DODGE
AUDITOR OF STATE'S REPORT ON REAUDIT
FOR THE PERIOD
JULY 1, 2005 THROUGH JUNE 30, 2006

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City of Fort Dodge

Officials

<u>Name</u>	<u>Title</u>	<u>Term Expires</u>
(Before January 2006)		
William Patterson	Mayor	Jan 2006
Tom Salvatore	Mayor Pro Tem	Jan 2006
John Hale	Council Member	Jan 2006
Richard Inman	Council Member	Jan 2006
Richard Nelson	Council Member	Jan 2006
Curt Olson	Council Member	Jan 2006
Dan Payne	Council Member	Jan 2006
Don Wilson	Council Member	Jan 2006
Jane Burleson	Council Member	Jan 2008

(After January 2006)

Terry Lutz	Mayor	Jan 2010
Dan Payne	Mayor Pro Tem	Jan 2008
Jane Burleson	Council Member	Jan 2008
Cynthia Litwiller	Council Member	Jan 2008
Curt Olson	Council Member	Jan 2008
Don Wilson	Council Member	Jan 2008
Matt Bemrich	Council Member	Jan 2010
Richard Inman	Council Member	Jan 2010

City Officials

David Haggard	Interim City Manager	Sep 2006
David Fierke (Appointed Oct 2006)	City Manager	Indefinite
Penny Clayton	City Clerk	Indefinite
Scott Hook	Deputy Clerk/Treasurer	Resigned Aug 2006
Michelle Hefley (Appointed Oct 2006)	Deputy Clerk/Treasurer	Indefinite
Maurice Breen	Attorney	Indefinite

City of Fort Dodge



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Auditor of State's Report on Reaudit

To the Honorable Mayor
and Members of City Council:

We received a request to perform a reaudit of the City of Fort Dodge (City) under Chapter 11.6(4)(c) of the Code of Iowa. As a result, we performed a review of the fiscal 2006 audit report and workpapers prepared by the City's certified public accounting firm to determine whether the CPA firm may have addressed any or all of the specific issues identified in the request for reaudit during the annual audit of the City. Based on this review and our review of the preliminary information available, we determined a partial reaudit was necessary to further investigate specific issues identified in the request for reaudit. Accordingly, we have applied certain tests and procedures to selected accounting records and related information of the City of Fort Dodge for the period July 1, 2005 through June 30, 2006. We also inquired and performed procedures for certain items applicable to the years ended June 30, 2005 and 2007.

The procedures we performed are summarized as follows:

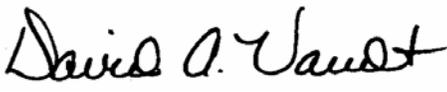
1. We reviewed the City's minutes to identify and review City Council approval of engineering contracts and to identify City Council approval for transfers of tax increment financing (TIF) special revenue funds to other funds of the City and to identify other TIF-related actions.
2. We inquired about the City's policies and procedures pertaining to competitive bidding.
3. We obtained and reviewed all City contracts with McClure Engineering Company and MER Engineering Company for fiscal years 2006 and 2007.
4. We obtained printouts of amounts paid to McClure Engineering Company and MER Engineering Company in fiscal years 2006 and 2007.
5. We obtained and reviewed the Webster County Attorney's request for informal advice from the Iowa Attorney General pertaining to the City's contracts with McClure Engineering Company.
6. We requested and obtained informal advice from the Iowa Attorney General pertaining to the City's contracts with MER Engineering Company.
7. We received informal advice from the Iowa Attorney General pertaining to conflict of interest issues.
8. We obtained and reviewed the City's TIF certification documents as of December 1, 2004, 2005 and 2006.
9. We obtained and reviewed the Webster County Auditor's reconciliation forms for each TIF district within the City of Fort Dodge.
10. We reviewed and tested selected transfers for propriety and proper City Council approval.
11. We reviewed the terms and conditions of the Gwendolyn E. Scharfenberg last will and testament.

12. We reviewed correspondence from legal counsel retained by the City Library and from the City Attorney to the Director of the Fort Dodge Public Library pertaining to the Gwendolyn E. Scharfenberg bequest.
13. We obtained the most recent financial report for the W. H. Johnston Foundation (Foundation) to determine the amount of public funds held by the Foundation and whether the public funds were invested pursuant to the requirements of Chapter 12B of the Code of Iowa.
14. We requested and obtained informal advice from the Iowa Attorney General pertaining to public funds and the propriety of actions taken by the Fort Dodge Library Board of Directors regarding the Gwendolyn E. Scharfenberg bequest.
15. We reviewed the City Council minutes and other related documents to determine the propriety of an \$18,000 construction loan to City Council Member Don Wilson pursuant to the U.S. Department of Housing and Urban Development, Neighborhood Initiative Grant to the City of Fort Dodge.
16. We reviewed documentation relating to the disposal of aluminum benches at the Oleson Park Bandshell to determine if the benches were disposed of properly.
17. We reviewed documentation relating to allegations of improper handling of money at the City's Parks and Recreation Department.
18. We reviewed the City's Local Option Sales and Services Tax (LOSST) referendum to determine the allowable uses of LOSST receipts.
19. We reviewed City documents and inquired of City officials to determine if the City has definitive plans regarding use of unspent LOSST receipts.

Based on the performance of the procedures described above, we identified instances of non-compliance and have developed various recommendations for the City. Our recommendations and the instances of non-compliance are described in the Detailed Findings of this report. Unless reported in the Detailed Findings, items of non-compliance were not noted during the performance of the specific procedures listed above.

The procedures described above are substantially less in scope than an audit of financial statements made in accordance with U.S. generally accepted auditing standards, the objective of which is the expression of an opinion on financial statements. Accordingly, we do not express an opinion. Had we performed additional procedures, or had we performed an audit of the City of Fort Dodge, additional matters might have come to our attention that would have been reported to you. A copy of this reaudit report has been filed with the Webster County Attorney.

We would like to acknowledge the assistance extended to us by personnel of the City of Fort Dodge. Should you have any questions concerning any of the above matters, we shall be pleased to discuss them with you at your convenience.


DAVID A. VAUDT, CPA
Auditor of State


WARREN G. JENKINS, CPA
Chief Deputy Auditor of State

October 13, 2008

Detailed Findings

City of Fort Dodge

Detailed Findings

July 1, 2005 through June 30, 2006

- (A) Public Bidding – The City contracts for professional services with various engineering and architectural companies. Although the City uses other architectural and/or engineering firms, a substantial number of contracts and payments have been made to McClure Engineering Company and MER Engineering Company.

McClure Engineering Company: In January 2006, Terry Lutz, an officer with McClure Engineering Company, one of the engineering firms which the City contracts with for engineering services, took office as Mayor of the City. Mayor Lutz asked for a legal opinion from the Legal Department of the City to address the issue of a conflict of interest which would interfere with or void contracts between the City and McClure Engineering Company. In Opinion #06-01 dated January 17, 2006, Maurice Breen, City Attorney, cited Chapter 362.5 of the Code of Iowa, interest in public contract prohibited – exceptions, which states, in part, “A city officer or employee shall not have an interest, direct or indirect, in any contract or job performed for the officer’s or employee’s city” unless one of 13 conditions is met. A copy of the January 17, 2006 opinion is included as **Exhibit 1**.

According to City Attorney Breen’s January 17, 2006 opinion, “It is my opinion that you (Mayor Lutz) have a conflict of interest, and that conflict of interest could impact any contractual relationship between the City of Fort Dodge and McClure Engineering Company.” City Attorney Breen also advised completion of existing contracts would be permitted, but those contracts could not be renewed.

In regard to future contracts, City Attorney Breen stated, “contracts made by a city upon competitive bid in writing, publicly invited and opened’, may be applicable. While engineering contracts are not ‘competitively bid’, this fact is recognized in the statute at the end of exception five ‘the competitive bid qualification...does not apply to a contract for professional services not customarily awarded by competitive bid.’ It is my interpretation of 362.5 and its exceptions, that the ‘competitive and public’ nature of the contract award is what is critical to qualifying for the exemption. A publicly invited, publicly opened, and publicly competitively-awarded professional services contract, based upon qualitative criteria, would likewise qualify.”

City Attorney Breen also stated, in part, “McClure Engineering Company could validly submit proposals for engineering service contracts with the City of Fort Dodge under the following conditions:

- a. Proposals must be publicly invited from all qualified engineering firms.
- b. All proposals submitted must be publicly opened.
- c. The award of a contract must be publicly made, based upon the effectiveness of the proposals and the **qualifications of the proponent** (emphasis added).
- d. If McClure Engineering Company were a proponent, you (Mayor Lutz) could take no part at all for either party (total recusal).
- e. The current City of Fort Dodge procurement ordinance, 3.04.150 FDMC, must be amended to require competition for all professional service contracts, unless expressly waived in advance by the City Council.”

Pursuant to City Attorney Breen’s advice, on March 6, 2006 the City Council adopted Ordinance No. 2049 (to amend/replace City procurement ordinance 3.04.150 FDMC) which re-established procedures for the obligation and expenditure of municipal funds. Ordinance No. 2049 became effective on March 16, 2006. Section VIII.c of Ordinance No. 2049 includes, in part, a formal competitive bid requirement for all purchases of supplies, material, equipment, improvements or contractual services with an estimated value of more than \$25,000 pursuant to the provisions of Division VI of Chapter 384 of the Code of Iowa.

Chapters 384.95 to 384.102 of the Code of Iowa, which were included in Division VI, were repealed by Chapter 1017, section 41, of the Laws of the Eighty-first General Assembly, 2006 Session and were replaced by Chapter 26 of the Code of Iowa effective January 1, 2007. Division VI of Chapter 384 of the Code of Iowa required formal competitive bidding procedures for public improvements, including advertisement for bids.

Chapter 26.4 of the Code of Iowa states “Architectural or engineering design services procured for a public improvement are not subject to sections 26.3 (competitive bids for public improvement contracts) and 26.14 (competitive quotations for public improvement contracts).”

The City has not amended Ordinance No. 2049 to replace the competitive bidding provisions of Division VI of Chapter 384 of the Code of Iowa with the requirements of Chapter 26 of the Code of Iowa. As such, the competitive bidding requirements of Chapter 384 appear to be required by the City for contractual services with an estimated value of more than \$25,000.

The City typically utilizes a request for qualifications (RFQ) when soliciting engineering services. The factors considered in evaluating the request for qualifications include qualifications of the firm and personnel assigned to the project, proposed scope of work, previous experience and other (non-specified) considerations. The RFQ does not require firms to submit competitive pricing for engineering services. Accordingly, the engineering firm selected by the City is determined on a subjective basis using qualitative criteria and, according to the RFQ, the successful engineer is expected to negotiate a contract with a “not-to-exceed” total price for professional services.

Subsequent to March 16, 2006, the City entered into four contracts with McClure Engineering Company and amended one of those contracts as summarized in the following chart. The contracts were not signed by Mr. Lutz as Mayor of the City of Fort Dodge or on behalf of McClure Engineering. City officials represented Mayor Lutz did not take part in the contracts on behalf of either party.

Date	Contract	Award Amount	Payments through 09/30/07
09/11/06	Wastewater Treatment System Facility Evaluation and Improvement Project, (Phase I)	\$ 899,200	
05/14/07	Amendment (Phase I)	<u>540,000</u>	
	Total WWT System Facility Evaluation (Phase I)	1,439,200	\$ 1,145,628
11/13/06	Water System Facility Evaluation	64,500	53,350
01/08/07	Water Pollution Control Facility Rehabilitation (Phase II)	600,000	487,600
09/11/07	2007 Hydrogeologic Study	10,000	-

According to City documents, informal bids were required and the City sent requests for proposal (requiring competitive pricing) to ten engineering firms and received two proposals for the 2007 Hydrogeologic Study. According to the proposal documents, McClure Engineering Company submitted the low price for the 2007 Hydrogeologic Study.

Phase I of the Wastewater Treatment System Facility Evaluation and Improvement Project and the Water System Facility Evaluation resulted from the RFQ process. However, the amendment to Phase I and the Water Pollution Control Facility Rehabilitation (Phase II) of the Wastewater Treatment System Facility Evaluation and Improvement Project were awarded under the Phase I RFQ. The City did not utilize requests for proposal or solicit competitive bids/competitive pricing for these projects.

MER Engineering Company: Eldon Rossow served as interim City Engineer through an agreement between the City and MER Engineering Company. Mr. Rossow is a Director and President of MER Engineering Company. In January 2004, MER Engineering Company submitted a proposal to provide professional engineering service to the City. In March 2004, by an executive order, the Mayor appointed Eldon Rossow to act as a “temporary interim City Engineer” and the City and Mr. Rossow entered into an agreement for licensed engineering services at agreed-upon hourly rates for a period not to exceed 90 days. Mr. Rossow billed and received approximately \$5,000 per month for his services as interim City Engineer for a period exceeding 90 days and continued as the interim City Engineer until the City appointed a City Engineer in March 2008. We did not find evidence of any contractual agreement and/or City Council approval between the City and Mr. Rossow for Mr. Rossow to act as interim City Engineer beyond June 2004.

Subsequent to March 16, 2006, the City entered into two contracts with MER Engineering Company, dated October 2, 2006 for the 32nd Street Project (amended) and February 12, 2007 for the Tate & Lyle Lift Station and Force Main Project. Both contracts were signed by Mr. Rossow on behalf of MER Engineering Company.

Of the two contracts, the contract dated October 2, 2006 for the 32nd Street Project (5th Avenue South to 10th Avenue North) for \$195,000, with an amendment for \$12,000, did not follow procedures identified in Ordinance No. 2049 for architectural or engineering contractual services with an estimated value of more than \$25,000.

A memorandum dated September 25, 2006 from David Haggard, former Interim City Manager, states, in part, “A considerable amount of work has been done on the project by MER Engineering (as supported by the letter from former Mayor William Patterson) but the agreement has never been ratified by the Council.” An undated letter from Mr. Rossow states, in part, “The street subcommittee asked me (Eldon Rossow) to submit a Proposal” to complete the project and contact ex-Mayor Patterson for documentation for the work already completed. There are three (3) copies of the proposed agreement with fixed fees listed for services through the bid letting with attachments.”

A letter dated August 12, 2006 from former Mayor William Patterson to interim City Engineer Eldon Rossow states, in part, “The City’s Engineering Department was originally going to do the design of this project but after gathering all of the field measurements they became very busy with other pressing projects and could not find time to begin the design work.” Also, according to the letter from former Mayor Patterson, Mayor Patterson met with interim City Engineer Rossow and City staff and it was “determined that MER Engineering would do the design work on this street using the field data collected by City staff and I (Mayor Patterson) assume that a lot of the design work had been completed.” Former Mayor Patterson concluded “It would be a waste of City money to have another engineering firm start all over again.”

It is unclear how, if or when MER Engineering was initially engaged to provide the design work and related engineering services on the 32nd Street Project. We also did not find documentation of an actual bid letting as referenced in interim City Engineer Rossow's undated letter. However, on October 2, 2006 the City entered into a contract with MER Engineering to perform design, construction administration, construction staking, construction inspection and any other engineering services required or advisable to accomplish the project. The compensation for the design phase was a fixed fee of \$195,000. Compensation for the other phases was to be determined according to the October 2, 2006 contract. On November 17, 2006, the City paid MER Engineering \$58,500 for services performed for this project from project start through October 2006, which represents 30% completion of the project.

Since the City Council did not approve the 32nd Street Project engineering agreement with MER Engineering until October 2, 2006, it appears MER Engineering performed some, if not all, of the design work for the 32nd Street Project prior to Council approval and, therefore, in non-compliance with Ordinance No. 2049.

Iowa Attorney General's Letter of Advice – At the request of City Attorney Breen, the Webster County Attorney requested an informal opinion (letter of advice) from the Iowa Attorney General. A copy of the request is included as **Exhibit 2**. Since the request addressed only the Mayor's potential conflict of interest, our Office requested the Iowa Attorney General to expand its review and advice to address the potential conflict of interest with MER Engineering. A copy of the Auditor of State's Request for Informal Advice – Conflicts of Interest is included as **Exhibit 3**.

The Iowa Attorney General responded in a letter of advice dated October 10, 2008. A copy of the Iowa Attorney General's letter of advice is included as **Exhibit 4**.

Recommendation – Based upon the Iowa Attorney General's letter of advice dated October 10, 2008, the City has not utilized a proper quantitative competitive bidding process. The letter of advice states, in part, "The conflict of interest exceptions in subsections 362.5(4) and (5) (of the Code of Iowa) each refer to contracts made 'upon competitive bid in writing, publicly invited and opened.' We do not believe that the qualitative selection process which is described constitutes a competitive bid procedure for purposes of section 362.5."

The letter of advice further states, in part, "Although chapter 362 (of the Code of Iowa) does not define what is meant by 'competitive bid,' the concept of competitive bidding as a method for awarding public contracts is not new or unique and the term has a well-established definition in the context of government contracting.... As described by the court and detailed in Chapter 26 (of the Code of Iowa), the competitive bidding process does not preclude the consideration of the qualifications of bidders within the bid review, but once qualified bidders are identified the contract award must be passed on price. Iowa Code chapter 26 sets forth the current competitive bidding requirements for public construction projects. This statute requires a contract let under competitive bidding to be awarded to the 'lowest responsive, responsible bidder'."

The Iowa Attorney General also noted while Chapter 26.4 of the Code of Iowa exempts architectural and engineering design services from the competitive bidding requirements of Chapter 26 of the Code of Iowa, it does not result in an exception to the requirements of Chapter 362.5(4) of the Code of Iowa which provides an exception for "Contracts made by a city, upon competitive bid in writing, publicly invited and opened." The letter of advice states, in part, "A contract which is awarded under an alternate process which does not include price-based competitive bidding, simply will not qualify for this exception."

As a result of the letter of advice dated October 10, 2008, City Attorney Breen issued a letter dated October 13, 2008. A copy of City Attorney Breen's letter is included as **Exhibit 5**. In his letter, City Attorney Breen states, in part "... it was my opinion that a "RFQ (request for qualifications) would not qualify but that a request for proposal (RFP) would...". Regardless, based on the information provided during the reaudit, the City continued to utilize a request for qualifications (RFQ) process which did not include a request for proposed cost of services.

For example, a request for qualifications for the City's Wastewater System dated June 29, 2006 states, in part, under the "Compensation" section, "The successful engineer will be expected to negotiate a contract with a 'not-to-exceed' total price for professional services.... At this time, please do not place a proposed cost of your services within the proposal for services. The City will determine a firm with which to negotiate a contract, based upon the firm's qualifications." Six firms responded to the RFQ. The project was awarded to McClure Engineering based on the recommendation of interim City Engineer Rossow.

Specifically in regard to MER Engineering, the letter of advice in **Exhibit 4** states, in part, "Regardless of whether Mr. Rossow was technically an employee or officer of the City, he was serving as the acting city engineer and performing services for the city for a four year period. From that position we assume that he had access to all relevant information about city projects and was responsible for advising the city when needed engineering services exceed his current capacity and availability. Any attempt by MER to contract for these additional services seems fraught with the potential for organizational conflicts of interest." "If Mr. Rossow was, on the one hand, advising the City whether it needed to contract for additional outside engineering services, or assisting with preparation of the project descriptions or terms for the engineering contract, or assessing the quality of the engineering work performed for the City by all vendors, and, on the other hand, acting on behalf of MER Engineering in competing for or providing those outside services or profiting from the contract work awarded to MER, then a conflict of interest did exist – regardless of whether his position as interim City Engineer is viewed as that of an employee or of an independent contractor."

In the letter of advice, the Iowa Attorney General also stated "... there is a strong argument that the former interim city engineer was in violation of Iowa Code section 68B.2A(1)(c) by engaging in outside employment subject to his official control, inspection, review or audit."

City Ordinance No. 2049 is more restrictive than Chapter 26 of the Code of Iowa. As a result, the City should follow all provisions of Ordinance No. 2049 requiring formal competitive bids for all purchases of supplies, material, equipment, improvements or contractual services with an estimated value of more than \$25,000.

Chapter 721.11 of the Code of Iowa addresses "Official Misconduct" and "interest in public contracts." This section states "Any officer or employee of the state or of any subdivision thereof who is directly or indirectly interested in any contract to furnish anything of value to the state or any subdivision thereof where such interest is prohibited by statute commits a serious misdemeanor. This section shall not apply to any contract awarded as a result of open, public and competitive bidding."

Conflicts of interest may only be determined definitively by a court of law. However, pursuant to Chapters 362.5 and 721.11 of the Code of Iowa, and consistent with the Iowa Attorney General's letter of advice and City Attorney Breen's legal advice, the City should competitively bid contracts for engineering services to avoid a potential conflict of interest between the City and Mayor Lutz of McClure Engineering and/or Eldon Rossow of MER Engineering.

The City should consult legal counsel to determine whether Ordinance No. 2049 should be revised for consistency and compliance with Chapter 26 of the Code of Iowa.

We were unable to determine the propriety of the payments made to and the contracts and agreements between the City and McClure Engineering and MER Engineering since the City did not comply with its formal competitive bidding requirements and did not address the potential conflict of interest with these engineering firms.

This matter is being referred to the Webster County Attorney for his review and determination of the propriety and disposition of these contracts, including payments made and or pending under these agreements, whether the interim City Engineer was in violation of the provisions of Chapter 68B.2A(1)(c) of the Code of Iowa, whether the provisions of Chapter 721 of the Code of Iowa, "Official Misconduct," specifically Chapter 721.2 of the Code of Iowa pertaining to "nonfelonious misconduct in office," are applicable in this matter, and to determine further action, if any.

Response – In January 2006 it became apparent to the City that it had a potential section 362.6 conflict of interest problem. The newly elected Mayor was a principal of McClure Engineering Company, a company that actively sought and secured engineering contracts with the City. The City Attorney's opinion and recommendation was requested by the Mayor and received and Section 3.04.110 of the Fort Dodge Municipal Code "exceptions to bidding procedures" was adopted by the City Council. The singular purpose required in the opinion and implemented in the ordinance change was to ensure that while this "conflict" existed all professional services contracts would be let on a "competitive" basis.

The City followed the widely used practice of RFQ's, request for qualifications, in the solicitation and award of contracts for professional services. After the RFQ's were received, a committee reviewed them, interviewed the firms and ranked the firms based on qualifications. Negotiations then commenced for not-to-exceed amount contract for services.

McClure Engineering: Wastewater Treatment System Facility Evaluation and Improvement Project. In the spring of 2006, requests for qualifications were mailed to nine firms. On June 26, 2006 the Utility Sub-Committee met to review the responses. Due to the limited number of responses that were received, the Sub-Committee instructed staff to solicit for RFQ's again. On June 29, 2006 RFQ's were mailed to nine firms and responses were received from six. The RFQ's were evaluated and interviews were conducted with McClure ranking highest.

On July 17, 2006 the Utility Subcommittee met to review the results and concurred with the recommendations of Interim City Engineer Eldon Rossow and Interim City Manager Dave Haggard to negotiate a contract with McClure. On July 24, 2006 the City Council approved a contract with McClure for the study, design, and cost of service analysis/rate study of the Wastewater Treatment Facility Evaluation and Improvements Project in the amount of \$23,200. On September 11, 2006 a Council workshop was held regarding the results of the study. Based on the amount of work already done, the need for construction to begin as soon as possible to accommodate a large industrial user, and because McClure scored as the most qualified firm, Council amended the agreement with McClure to include the preliminary and final design, advertising, bidding and contract award in the amount of \$876,000. Design was completed and a construction contract was awarded. On May 14, 2007 the Council amended the agreement to include the construction administration, staking, resident project engineer, soil boring coordination, erosion control monitoring, record drawings and SRF loan application and

administration services for an amount not-to-exceed \$540,000. Phase II of the Wastewater Treatment System Facility Evaluation and Improvement Project was a continuation of work started in Phase I. It did not seem to make sense to change engineers in mid-stream.

McClure Engineering: the Water System Facility Evaluation Project began on August 30, 2006 when RFQ's were mailed to ten firms. Responses were received from four firms at the office of the Interim City Manager. The Interim City Manager, Senior Planner, Water Plant Superintendent, and the Executive Director of MIDAS reviewed the RFQ's and recommended the selection of McClure as the most qualified firm. On October 2, 2006 the Utility Subcommittee recommended to the full Council the selection of McClure. On November 13, 2006 a fixed fee contract was issued to McClure in the amount of \$64,500.

The City took the necessary actions to ensure the removal of the effects of the statutory conflict of interest. Additionally, the City Council utilized MIDAS, the regional Council of Governments, to evaluate the firms. This was done to remove even the appearance of a conflict of interest.

MER Engineering: Interim City Engineer. In March 2004, the City contracted with MER for services as city engineer. Those services were provided by Eldon Rossow. The City Council viewed this service as an independent contractor, rather than as an employee or official of the City of Fort Dodge. The contract interim engineer was a part time assignment. The position did not have supervisory authority over the Engineering Department. Continued service was approved by executive order in January 2006.

MER Engineering: 32nd Street Project. The project began as an in-house engineering project in the summer of 2004, when the City applied and secured partial funding from the IDOT. Field survey work was done in the summer of 2005. In the fall of 2005, once it became evident that the workload was not going to accommodate a project of this size with the limited staff, Mayor Patterson instructed Eldon Rossow, as MER Engineering to finish the design work that was started by City staff. In January 2006, a new administration took office. That instruction from previous Mayor Patterson was not ratified by Council until October 2, 2006 when an agreement was approved. When the finance department was approached regarding payment for work completed, payment was denied because there was no contract.

Public Bidding Summary - The City is in a very delicate situation in regards to selecting professional civil engineering services in that the Mayor and then Contract City Engineer held principal ownership positions in two local firms. Both of whom are very technically qualified in their areas of specialty. The City worked very carefully in awarding engineering contracts and did not intentionally violate State or City Code. Additionally, the City took every measure possible, short of eliminating the most qualified firm, to remove the effects of the statutory conflict of interest. The City took extra measures to remove even the perception of a conflict of interest and to preserve the public trust. The public trust is best preserved by demonstrating that the City hired the most qualified firm to design and supervise the construction of the large projects.

Additionally, several of the contracts in question do not lend themselves to a bid or proposal type selection process because the entire scope is not known until the completion of the study portion of the contract.

As recommended, the City will review Ordinance #2049 to determine if a revision is necessary. Furthermore, the City will follow State and City Code in the award of all agreements for professional services.

Conclusion – Response acknowledged. As previously noted, based upon the Iowa Attorney General’s letter of advice dated October 10, 2008, the City has not utilized a proper quantitative competitive bidding process. The letter of advice states, in part, “The conflict of interest exceptions in subsections 362.5(4) and (5) (of the Code of Iowa) each refer to contracts made ‘upon competitive bid in writing, publicly invited and opened.’ We do not believe that the qualitative selection process which is described constitutes a competitive bid procedure for purposes of section 362.5.”

Given Mayor Lutz’s position as major stockholder and officer in McClure Engineering, the exemption to the general law on void contracts set forth in Iowa Code section 362.5(5) is inapplicable. This exemption states, in part, “The competitive bid qualification of this subsection does not apply to a contract for professional services not customarily awarded by competitive bid.” The City’s response suggests some of the engineering design contracts awarded after the Mayor took office were not appropriate for competitive bid. However, even if that were so, the contract could not be awarded to the Mayor’s firm without a competitive bid that would satisfy the provisions of Iowa Code section 362.5(4).

The City should review its competitive bidding ordinance for consistency with the provisions of Iowa Code Chapter 26. However, the exemption from competitive bids for engineering design services in Iowa Code section 26.4 is not an exemption applicable to Iowa Code section 362.5(4), pursuant to the Iowa Attorney General’s informal advice letter. A decision to forego competitive bidding for engineering design services that fall under Iowa Code section 26.4 would, accordingly, not allow a contract with the Mayor’s firm.

- (B) Tax Increment Financing (TIF) Actions and Activities – The City has two TIF districts, Downtown Urban Renewal Area and Industrial Park Urban Renewal Area. These were combined and expanded as described in a legal document prepared by Dorsey & Whitney LLP, Attorneys (TIF legal counsel) in July 2004 and approved by City Council Resolution No. 04-08-149, dated August 9, 2004.

On November 20, 2000, the City passed Resolution No. 00-11-121 which created two urban renewal tax increment revenue trust accounts, citing subsection 2 of Chapter 403.19 of the Code of Iowa. This Code section provides a municipality may determine by ordinance that taxes levied on taxable property in an urban renewal area each year shall be allocated to a special fund to pay the principal and interest on loans, moneys advanced to, or indebtedness, whether funded, refunded, assumed, or otherwise, and to provide assistance for low and moderate income family housing as provided in Chapter 403.22 of the Code of Iowa.

The resolution created two trust accounts within the Industrial Park Urban Renewal Area Tax Revenue Fund, identified as the Industrial Development Tax Increment Revenue Trust Account and the Riverfront Improvement Tax Increment Revenue Trust Account. The funds in these trust accounts are to be used only for urban renewal projects and activities within the Industrial Park Urban Renewal Area and may not be transferred to any other City fund or account.

The following chart summarizes the balances of these accounts and total TIF funds held by the City as of June 30, 2006 and 2007, as reported by the City Clerk:

	June 30,	
	2006	2007
Downtown Urban Renewal Area	\$ 31,289	187,085
Industrial Park Urban Renewal Area	<u>178,718</u>	<u>358,485</u>
Total Urban Renewal Area Accounts	<u>210,007</u>	<u>545,570</u>
Industrial Development Tax Increment Revenue Trust	224,177	231,984
Riverfront Improvement Tax Increment Revenue Trust	<u>944,854</u>	<u>977,734</u>
Total Trust Accounts	<u>1,169,031</u>	<u>1,209,718</u>
Total TIF account balances	<u>\$ 1,379,038</u>	<u>1,755,288</u>

Chapter 403.19 of the Code of Iowa provides a municipality shall certify indebtedness to the County Auditor. Such certification makes it a duty of the County Auditor to provide for the division of taxes to generate dollars to repay the certified indebtedness. There is nothing in Chapter 403.19 of the Code of Iowa which allows a municipality to establish a trust fund and set aside taxes divided for tax increment purposes for future urban renewal projects. With only an exception for assistance for low and moderate income family housing discussed in Chapter 403.22 of the Code of Iowa, indebtedness incurred is to be certified to the County Auditor and then the divided taxes are to be used to pay the principal of and interest on that indebtedness. In addition, Chapter 403.19(5)(b) requires the City to certify the amount of reductions to the County Auditor resulting from reduction in debt or for any other reason.

The City's actions document the City's intent to set aside money to pay for future urban renewal projects within the Industrial Park Urban Renewal Area. However, the trust accounts created by the City do not meet the definition of debt listed in subsection 2 of Chapter 403.19 of the Code of Iowa, as noted above. In addition, the City has not reduced its TIF debt certification to the County Auditor for the balances in the Trust Accounts, as required.

In addition, based on the information available, the City appears to have collected TIF revenue in excess of current TIF debt repayment requirements in the Downtown Urban Renewal Area.

According to the City's June 30, 2006 and 2007 audit reports, the City had \$1,219,821 and \$1,737,772, respectively, in its Special Revenue, TIF Fund. We did not attempt to determine the reasons for the variances between the balances according to the City Clerk and those reported in the audits. However, the City should investigate and resolve these variances to ensure complete and accurate reporting before its next TIF indebtedness certification.

Recommendation – The City should adjust its requests for additional tax increment revenues in its next and future TIF debt certifications to the Webster County Auditor until the TIF account balances are consistent with current requirements for the debt outstanding. The City should review and determine the excess cash on hand in the Downtown Urban Renewal Area, if any, for repayment to the County. In addition, the City should review and determine the reasons for the variances between the TIF

balances reported by the City compared to the balances reported by its independent auditors.

Response –

Trust Accounts: Please see the attached response from the City’s TIF Counsel, Robert Josten of Dorsey & Whitney. (A copy of this response is included as **Exhibit 14** on pages 68-69.)

TIF balances: The balances reported in the 2006 and 2007 audit reports are correct. The amounts reported by the Clerk were taken from the June 2006 and June 2007 clerk’s reports before auditor’s adjustments.

Downtown Urban Renewal Area: The City consolidated its two urban renewal areas into one urban renewal area with Resolution No. 04-08-149 on August 9, 2004. We did this to make the repayment of debt eligible from the revenues of both areas due to a large TIF project. We continued to certify TIF debt for each area separately, but fully intended to use revenues from the Downtown Urban Renewal Park Area to repay debt originating from a project in the Industrial Park Urban Renewal Area. Therefore, we do not feel a repayment is due the County. Additionally, as of the December 1, 2008 TIF debt certification we filed a single certificate for the consolidated urban renewal area.

Conclusion – Response acknowledged. City bond counsel’s explanation regarding the Trust Accounts states “... the City is not required to have specific statutory authority to create trust accounts and to establish the accounts as debt which may be paid from incremental property tax revenues.” While we respectfully disagree trust “accounts” fit within the statutory definition of “bonds” (debt) provided by section 403.17 of the Code of Iowa, we concur with City bond counsel’s explanation stating “These trust accounts were created in conformance with the requirements of Chapter 403 as evidences of debt to be paid from future incremental property tax revenues.” That is, the City’s obligation to fund the trust accounts would seem to fit within the statutory definition of “bonds” (debt) provided by Chapter 403.17 of the Code of Iowa, as long as the City had incurred debt prior to certifying and collecting tax increment financing revenues.

The underlying concern of this finding was whether the City had, in fact, collected tax increment revenues in excess of the debt certified at the time the trust accounts were established and whether the trust account balances had been appropriately considered in the City’s annual TIF certifications to the County Auditor. Chapter 403 of the Code of Iowa has since been revised and the TIF certification process and related forms have since been redesigned to help preclude entities from collecting TIF revenues in excess of the amount of TIF debt which has been certified.

The City decertified cash balances on hand of \$540,009 in its 2008 TIF certification. However, the City Finance Officer confirmed the City did not reduce the certified indebtedness for the balances held in the TIF trust accounts in its 2008 TIF certification. As such, the City does not appear to be in compliance with Chapter 403.19 of the Code of Iowa. The City should reduce its certified indebtedness by the balances held in the TIF trust accounts when it completes the 2009 TIF certification. The reason why this is critical is because, except for very rare instances relating to low and moderate income family housing, the amount of TIF cash on hand cannot exceed the amount of TIF debt certified. County Auditors are required to direct taxes to a special fund to pay for outstanding certified debt. However, if there is no outstanding certified debt, the Code of Iowa requires all tax collections to be apportioned to the various funds of the affected taxing districts.

- (C) Tax Increment Financing (TIF) Special Revenue Fund – In fiscal years 2006 and 2007, \$40,000 was transferred each year from the Tax Increment Financing Special Revenue Fund to reimburse the General Fund for time spent on TIF projects. This does not appear to be an approved use of TIF funds.

As a result of the reaudit, the City requested an opinion from its TIF legal counsel regarding the legality of using tax increment financing revenues produced from urban renewal areas to pay a portion of the salary of a City employee for duties related to urban renewal projects. According to TIF legal counsel's opinion:

“Chapter 403 of the Code of Iowa (the ‘Urban Renewal Law’) authorizes cities to plan and carryout urban renewal projects and to spend tax increment revenues for those purposes. The Urban Renewal Law recognizes that this authority may be exercised in a number of ways, including the use of city employees.

One of the very specific statutory references is found in Section 403.12, which sets out certain powers of a city in ‘planning, undertaking or carrying out an urban renewal project.’ In addition to the general language ‘Do any and all things necessary to aid...an urban renewal project,’ this Section authorizes providing administrative and other services to the city.

Accordingly, it is our opinion that employee salary expenditures included in a city's budget may be paid from tax increment revenues. It is important to document what portion of an employee's time is directly related to work on urban renewal projects, however, because only that portion would qualify to be paid from tax increment revenues.”

The transfers of \$40,000 each year were budgeted by the City and consisted of a portion of wages for five employees. Of the five employees, one documented actual hours and the other four employee wages were allocated to TIF by applying varying percentages representing the estimated time spent on TIF projects.

Recommendation – Based on TIF legal counsel's advice, the City should require employees to document actual hours “directly related to work on urban renewal projects.” Accordingly, the City should consult TIF legal counsel to determine if the allocation basis is an acceptable basis for use of TIF and, if not, the General Fund should reimburse the Special Revenue, Tax Increment Financing Fund for the transfers made and not supported by actual hours directly related to work on urban renewal projects.

Response – Transfer for Salaries: While it is accurate that because of the re-audit we requested a written legal opinion from TIF legal counsel, we had already received verbal approval prior to implementing the practice. Due to the complexity of the TIF law, we ask for approval from TIF counsel prior to each major decision we make regarding TIF. A major role of the Business Affairs and Community Growth Department is to facilitate economic development, primarily in the Downtown and Industrial Park Urban Renewal Areas of our community. We based our allocation on the percentage of work within the areas and determined that an allocation of \$40,000 was reasonable. We did not expect that we would recover all our administrative costs with this transfer. We now require employees to document actual hours and recorded expenses of \$62,842.91 in fiscal year 2008.

Conclusion – Response accepted.

- (D) Gwendolyn E. Scharfenberg Bequest to the Fort Dodge Public Library – The Fort Dodge Public Library was named as a beneficiary in the last will and testament of Gwendolyn E. Scharfenberg (Bequest). We were unable to definitively ascertain the date and amount of the Bequest. The Library Board retained private legal counsel who provided legal advice to the Fort Dodge Public Library Director in a letter dated September 20, 2002. A copy of the letter is included as **Exhibit 6**. The letter states, in part:

“The third paragraph of Chapter 392.5 of the Code of Iowa provides as follows: A library board may accept and control the expenditure of all gifts, devises, and bequests to the library. Section 2.64.050 of the Fort Dodge City Code provides, among other things, that the Public Library Board of Trustees shall have and exercise the following powers and duties: (9) To have exclusive control of the expenditure of all funds allocated for library purposes by the council, and of all moneys available by gift or otherwise for the erection of library buildings, and of all other moneys belonging to the library including fines and rentals collected, under the rules of the board and (10) To accept gifts of real property, personal property, or mixed property, and devises and bequests, including trust funds; ... and to expend the funds received by them from such gifts, for the improvement of the library.”

According to the letter, Library legal counsel concluded “... if the trustees choose to do so, they may transfer the bequest received from the Scharfenberg estate to the W. H. Johnston Foundation.”

According to the Library Board minutes dated September 23, 2002, Board action was taken to “accept the very generous gift from the Gwen Scharfenberg Estate.” In addition, a motion was passed “for the proceeds of the Gwen Scharfenberg Estate be turned over to the W.H. Johnston Foundation to form an endowment.” Based upon the information provided to us during the reaudit, the Trustees of the Fort Dodge Public Library Board (Library Board) gave the proceeds of approximately \$1.3 million from the Bequest to the W. H. Johnston Foundation (Foundation) during the year ended June 30, 2003. Article IV of the Articles of Incorporation of the Foundation state, in part, “the purpose and objective of the Foundation shall be to actively solicit and receive donations, gifts, and grants to provide supplementary funding to strengthen and enrich the Fort Dodge Public Library.” Upon learning of the Library Board’s action, the City questioned if it was appropriate for the Library Board to give the proceeds of the Scharfenberg Estate to the Foundation.

City Attorney Breen subsequently provided legal advice to the Library Board of Trustees and the Library Director in a letter dated January 31, 2003. A copy of City Attorney Breen’s letter is included as **Exhibit 8**. The letter states, in part, “The Library Board is empowered to accept and control the expenditure of gifts such as this, but such gifts are ‘public funds’ and must be accounted for, deposited and invested as such pursuant to Chapters 12B and 12C of the Code of Iowa and Rules of the City.” City Attorney Breen advised the Board to deposit the Bequest with the City and to expend the funds as directed by the Board.

The City also requested assistance from the State Auditor’s Office verbally in June 2003 and again in a letter dated May 9, 2005 included as **Exhibit 9**. Copies of our responses dated January 30, 2003 and June 22, 2005 are included as **Exhibits 7 and 10**.

In an effort to resolve this issue, the City Clerk sent a letter to the President of the Fort Dodge Public Library Board of Trustees dated June 28, 2005 requesting the Board President to coordinate the deposit of these (Bequest) funds with the City Treasurer. A copy of this letter is included as **Exhibit 11**.

As of June 30, 2007 and the date of this report, the Fort Dodge Library Board of Trustees had not directed and the Foundation has not remitted the remaining proceeds of the Bequest to the City of Fort Dodge, including all income derived from the investment of the Bequest.

Chapter 384.20 of the Code of Iowa states, in part, “A city shall keep accounts which show an accurate and detailed statement of all public funds collected, received, or expended for any city purpose, by any city officer, employee or other person and which show the receipt, use, and disposition of all city property.”

Iowa Attorney General’s Letter of Advice – At the request of the City Clerk, we requested a letter of advice from the Iowa Attorney General regarding the Bequest and the propriety of the Fort Dodge Library Board of Trustees giving the proceeds from the Bequest to the Foundation. A copy of our request is included as **Exhibit 12**.

The Iowa Attorney General issued a letter of advice dated April 22, 2008. The letter of advice is included as **Exhibit 13**. The letter of advice states, in part:

“... I do not believe that a city library board may simply donate funds received from private donors to a private non-profit organization to use and invest as the nonprofit organization sees fit. Unless the library board retains the ability to oversee expenditures and to demand return of the funds in the event that future trustees do not agree with that delegation of control over the funds, the transaction violates the public purpose and non-delegation principles discussed above. Further, even if safeguards are put in place to assure ongoing oversight and control, I believe that the funds continue to be ‘public funds,’ subject to the deposit and investment standards contained in Code sections 12B and 12C (of the Code of Iowa) and that the funds must be earmarked and spent for the purpose for which the gift was given. A 28E agreement may provide a vehicle to facilitate joint public and private influence over the use of gifts received by a governmental body, by incorporating ongoing public oversight and accountability to the joint undertaking.”

Recommendation – Based upon the Iowa Attorney General’s letter of advice, the proceeds and related income from the Gwendolyn E. Scharfenberg Bequest are public funds. A 28E agreement, as described in the advice letter, does not exist.

Regardless, as addressed in the letter of advice and our letters to the City dated January 30, 2003 and June 22, 2005, we are not aware of any statutory authority for the Library Board and/or the City to relinquish their fiduciary responsibility over the public funds Bequest to a separate nonprofit organization.

The City should recover the remaining proceeds of the Gwendolyn E. Scharfenberg Bequest held by the Foundation, including all income derived from the investment of the Bequest from the time it was turned over to the Foundation. In addition, the City should require an immediate accounting for these public funds from the date of the gift.

City Attorney Breen provided clear and specific corrective action required in his January 31, 2003 directive to the Library Board of Trustees and the Library Director. Since corrective action has not yet been taken, this matter is being referred to the Webster County Attorney for his review and determination as to whether the provisions of Chapter 721, “Official Misconduct”, and specifically, Chapter 721.2 of the Code of Iowa pertaining to “Nonfelonious Misconduct in Office”, are applicable in this matter.

Response – The City Council and staff have been requesting the return of the funds since 2003. We were postponing litigation pending the results of an opinion from the Iowa Attorney General’s Office.

We will continue to request the return of the bequest, utilizing every legal recourse afforded us under the law and receive a full accounting therefore.

The Council will decide, at a future date, whether to withdraw the funds now or wait until the market recovers.

Conclusion – Response accepted.

- (E) W. H. Johnston Foundation (Foundation) Investments – Chapter 12C.1(2) of the Code of Iowa defines public funds to include moneys of a political subdivision of the state, including a municipality or any agency, board or commission of a political subdivision. Chapter 12B.10(5) (previously Chapter 452.10) of the Code of Iowa specifies political subdivisions of the state shall purchase and invest only in obligations of the United States government, its agencies and instrumentalities; certificates of deposit or other evidences of deposit at federally insured depository institutions approved by the City Council; prime eligible bankers acceptances; certain high rated commercial paper; perfected repurchase agreements; certain registered open-end management investment companies; certain joint investment trusts; and warrants or improvement certificates of a drainage district.”

According to page 6 of the Foundation’s audit report, at June 30, 2006 the Foundation had marketable securities with Paine Webber with a fair market value of \$2,474,577, including \$305,363 in corporate bonds and \$1,768,123 in equities. These types of investments are not included in the list of allowable investments of public funds identified above.

Recommendation – Based upon the Iowa Attorney General’s letter of advice, the proceeds and related income from the Gwendolyn E. Scharfenberg Bequest are public funds subject to the deposit and investment requirements of Chapters 12B and 12C of the Code of Iowa. Based upon the percentage of Bequest funds, the Foundation’s investments clearly include public funds invested in non-compliance with Chapter 12B.10(5) of the Code of Iowa.

The Fort Dodge Library Board of Directors, through its action to give these public funds to the Foundation during the year ended June 30, 2003, has put these (Bequest) public funds at risk since the Library Board of Directors and the Foundation have not invested and accounted for the proceeds from the Bequest, including all income derived from the investment of the Bequest, as required by Chapter 12B.10(5) of the Code of Iowa and Chapter 384.20 of the Code of Iowa (referred to in item (D) above).

Until the issue is resolved as to the deposit of public funds from the Bequest, the Library Board should direct the Foundation to invest the remaining proceeds from the Bequest, including all income derived from the investment of the Bequest, as required by Chapter 12B.10(5) of the Code of Iowa.

As previously noted, City Attorney Breen provided clear and specific corrective action required in his January 31, 2003 directive to the Library Board of Trustees and the Library Director. Since corrective action has not yet been taken, this matter is being referred to the Webster County Attorney for his review and determination as to whether the provisions of Chapter 721, “Official Misconduct”, and specifically, Chapter 721.2 of the Code of Iowa pertaining to “Nonfelonious Misconduct in Office”, are applicable in this matter.

Response – Until the issue is resolved as to the deposit of public funds from the Bequest, we will direct the Library Board to request the Foundation invest the bequest and future earnings in accordance with Chapter 12B.10(5).

Conclusion – Response accepted.

City of Fort Dodge Reaudit

Exhibits

City of Fort Dodge

City Attorney's Opinion: Conflict of Interest

January 17, 2006



CITY OF FORT DODGE, IOWA 50501
LEGAL DEPARTMENT

Opinion #06-01

January 17, 2006

The Honorable Terry Lutz, Mayor
Municipal Building
819 1st Avenue South
Fort Dodge, Iowa 50501

RE: McClure Engineering Company Conflict of Interest

Dear Mr. Mayor:

I have, at your request, researched the issue of whether you, as Mayor, and McClure Engineering Company, of which you are an officer, may have a conflict of interest which would interfere with or void contracts between the City of Fort Dodge and McClure Engineering Company. I find, in relation thereto, the following:

1. Do you, as Mayor, have a conflict of interest in dealing with any issues involving McClure Engineering Company, of which you are an officer and substantial owner?

It is my opinion that you do have a conflict of interest, and that that conflict of interest could impact any contractual relationship between the City of Fort Dodge and McClure Engineering Company.

2. What impact would the conflict have on the contractual relationship?

The general rule of conflicts of interest, as set out in Section 362.6 of the Code of Iowa, states in part, "Conflict of Interest. A measure voted upon is not invalid by reason of conflict of interest in an officer of a city, unless the vote of the officer was decisive to passage of the measure..." As Mayor, you have no vote, but you do have a veto that can be overridden by a two-thirds majority of the City Council. It is, therefore, my opinion that you should take no part in any measure before the City Council involving McClure Engineering Company, and any such measure would have to pass the City Council with no less than five votes to preclude any issue of your veto power being decisive.

City of Fort Dodge

City Attorney's Opinion: Conflict of Interest

January 17, 2006

3. Further, and more critically, the Code of Iowa provides specific rules with regard to contracts between a city and an officer or employee of that city, or a company in which the officer or employee has a financial interest; any such contracts are VOID, unless they fall within the thirteen statutory exceptions to the rule.

Section 362.5 of the Code of Iowa
"Interest in public contract prohibited – exceptions.

When used in this section, "contract" means any claim, account, or demand against or agreement with a city, express or implied.

A city officer or employee shall not have an interest, direct or indirect, in any contract or job of work, or material or the profits thereof or services to be furnished or performed for the officer's or employee's city. A contract entered into in violation of this section is void. The provisions of this section do not apply to:

- (1) The payment of lawful compensation of a city officer or employee holding more than one city office or position, the holding of which is not incompatible with another public office or is not prohibited by law.
- (2) The designation of a bank or trust company as a depository, paying agent, or for investment of funds.
- (3) An employee of a bank or trust company, who serves as treasurer of a city.
- (4) Contracts made by a city, upon competitive bid in writing, publicly invited and opened.
- (5) Contracts in which a city officer or employee has an interest solely by reason of employment, or a stock interest of the kind described in subsection 9, or both, if the contracts are made by competitive bid in writing, publicly invited and opened, or if the remuneration of employment will not be directly affected as a result of the contract and the duties of employment do not directly involve the procurement or preparation of any part of the contract. ~~The competitive bid qualification of this subsection does not apply to a contract for professional services not customarily awarded by competitive bid.~~
- (6) The designation of an official newspaper.

City of Fort Dodge

City Attorney's Opinion: Conflict of Interest

January 17, 2006

- (7) A contract in which a city officer or employee has an interest if the contract was made before the time the officer or employee was elected or appointed, but the contract may not be renewed.
 - (8) Contracts with volunteer fire fighters or civil defense volunteers.
 - (9) A contract with a corporation in which a city officer or employee has an interest by reason of stockholdings when less than five percent of the outstanding stock of the corporation is owned or controlled directly or indirectly by the officer or employee or the spouse or immediate family of such officer or employee.
 - (10) Contracts not otherwise permitted by this section, for the purchase of goods or services by a city having a population of more than two thousand five hundred, which benefit a city officer or employee, if the purchases benefiting that officer or employee do not exceed a cumulative total purchase price of one thousand five hundred dollars in a fiscal year.
 - (11) Contracts not otherwise permitted by this section for the purchase of goods or services by a city having a population of two thousand five hundred or less, which benefit a city officer or employee, if the purchases benefiting that officer or employee do not exceed a cumulative total purchase price of two thousand five hundred dollars in a fiscal year.
 - (12) Franchise agreements between a city and a utility and contracts entered into by a city for the provision of essential city utility services.
 - (13) A contract that is a bond, note, or other obligation of the city and the contract is not acquired directly from the city, but is acquired in a transaction with a third party who may or may not be the original underwriter, purchaser, or obligee of the contract."
4. It is my opinion that any existing or future contracts for engineering services between the City of Fort Dodge and McClure Engineering Company would be voided or void unless they fall within one or more of the statutory exceptions.
- a. With regard to existing contracts, as provided in exception number seven (7) above, completion of the contracts would be permitted, but could not be

City of Fort Dodge

City Attorney's Opinion: Conflict of Interest

January 17, 2006

renewed and must be completed in accordance with main paragraph 2 above.

- b. With regard to future contracts, either new or renewal of existing, they must fall within one of the other twelve exceptions in order to be valid. An analysis of 362.5, (1)-(13), reveals that none of the exceptions are applicable for various apparent reasons, except numbers (4), (5), and (9). (5) and (9) would apply if your interest in McClure Engineering Company was de minimus, which it is not.

Exception (4), "contracts made by a city upon competitive bid in writing, publicly invited and opened", may be applicable. While engineering contracts are not "competitively bid", this fact is recognized in the statute at the end of exception five "the competitive bid qualification...does not apply to a contract for professional services not customarily awarded by competitive bid." It is my interpretation of 362.5 and its exceptions, that the "competitive and public" nature of the contract award is what is critical to qualifying for the exemption. A publicly invited, publicly opened, and publicly competitively-awarded professional services contract, based upon qualitative criteria, would likewise qualify.

- 5. It is, therefore, my opinion that McClure Engineering Company could validly submit proposals for engineering service contracts with the City of Fort Dodge under the following conditions:
 - a. Proposals must be publicly invited from all qualified engineering firms.
 - b. All proposals submitted must be publicly opened.
 - c. The award of a contract must be publicly made, based upon the effectiveness of the proposals and the qualifications of the proponent.
 - d. If McClure Engineering Company were a proponent, you could take no part at all for either party (total recusal).
 - e. The current City of Fort Dodge procurement ordinance, 3.04.150 FDMC, must be amended to require competition for all professional service contracts, unless expressly waived in advance by the City Council.

Yours respectfully,

Maurice C. Breen
City Attorney

MCB:ts

City of Fort Dodge

Webster County Attorney's Request for Informal Opinion

February 7, 2008

WEBSTER COUNTY ATTORNEY

RICKI L. OSBORN *FIRST ASSISTANT*
SARAH LIVINGSTON SMITH *ASSISTANT*
JENNIFER BONZER *ASSISTANT*
CORI KUHN COLEMAN *ASSISTANT*
ROBBIE MICHEHL *VICTIM/WITNESS*
 COORDINATOR



Law Enforcement Center
702 1st Avenue South
Fort Dodge, Iowa 50501
Phone: (515) 573-1452
Fax: (515) 573-1468

February 7, 2008

Chris Scase
Iowa Attorney General's Office
2nd Floor
Hoover State Office Building
Des Moines, IA 50319

Dear Ms. Scase:

Enclosed please find a letter from Fort Dodge City Attorney Maurice Breen asking that I request an informal opinion from your office as to whether the Fort Dodge mayor has a conflict of interest in contracting with the City of Fort Dodge for engineering services. As we discussed, the State Auditor has recently done an audit that is at least in part related to this issue.

Fort Dodge Mayor Terry Lutz was elected Mayor in 2005. He is an officer and the largest shareholder (49%) of McClure Engineering Company of Fort Dodge. For many years McClure Engineering has done engineering work for the City of Fort Dodge, and the company regularly bids on engineering contracts with the city. It is my understanding that the Mayor does obtain financial benefits from contracts with the City of Fort Dodge in the form of a division of profits during the year. It is also my understanding that McClure Engineering either has been or in the future will be preparing and presenting any contract proposal to the city without the participation of the Mayor.

Mr. Breen wrote an opinion to the Mayor in 2006 that I am enclosing. It was Mr. Breen's opinion that the only applicable exception under Iowa Code Section 362.5 would be section (4), requiring competitive bidding. Mr. Breen opined that competitive bidding based upon qualitative criteria (not based on price) might also qualify for this exception.

It is my understanding that the services provided by McClure Engineering are generally "professional services" contracts which are generally not "competitively bid" based on price but are awarded on a more subjective, qualitative basis.

It seems clear that there is no conflict if a contract is made "upon competitive bid in writing, publicly invited and opened," as set out in paragraph (4). However, because the contracts involved here are generally not competitive bid contracts, I believe some interpretation of paragraph (5) is also needed.

The questions that we would like to have addressed in an informal opinion are the following:

1. Does the mayor's situation as the largest shareholder of his company disqualify him from the excepting language in paragraph (5) "... in which a city officer or employee has an interest solely by reason of employment..."

City of Fort Dodge

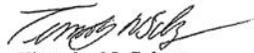
Webster County Attorney's Request for Informal Opinion

February 7, 2008

2. Would the profit sharing arrangement of the mayor's company constitute "remuneration of employment", thus disqualifying him from the exception in the second half of paragraph (5)?
3. Do the competitive bid exceptions of either paragraph (4) or (5) allow for a competitive bid professional services contract based upon qualitative criteria, rather than the requirements of Chapter 26?
4. Recently enacted Iowa Code Section 26.4 exempts architectural and engineering design services from the competitive bidding requirements of Iowa Code Chapter 26. Does this exemption in any way change the conflict analysis under 362.5?

Thank you for your assistance. Please feel free to contact me if you have any further questions.

Sincerely,



Timothy N. Schott
Webster County Attorney

City of Fort Dodge

Auditor of State's Request for Informal Advice:
Conflict of Interest

March 26, 2008



OFFICE OF AUDITOR OF STATE
STATE OF IOWA

State Capitol Building
Des Moines, Iowa 50319-0004

Telephone (515) 281-5834 Facsimile (515) 242-6134

David A. Vaudt, CPA
Auditor of State

March 26, 2008

Christie J. Scase
Assistant Attorney General
Iowa Attorney General
2nd Floor
Hoover State Office Building
LOCAL

RE: Request for Informal Advice – Conflicts of Interest

Dear Ms. Scase:

This is a request for informal advice pertaining to competitive bidding and potential conflicts of interest. We are aware you are reviewing a matter pertaining to conflicts of interest pursuant to a request from the Webster County Attorney dated February 7, 2008. In addition to the potential conflict of interest between the City and elected official, we request you consider the potential conflict of interest and competitive bidding requirements pertaining to a City and its contractual relationships with an appointed City Engineer. Specifically, does a conflict of interest exist if the City Engineer's firm performs engineering services pursuant to a contract competitively bid, and public invited?

We also ask your advice as it pertains to the competitive bidding requirements of Chapter 362.5(4) of the Code of Iowa in conjunction with former Chapters 384.95 – 384.102 of the Code of Iowa and current requirements at Chapter 26 of the Code of Iowa and interest in public contracts pursuant to Chapter 721.11 of the Code of Iowa. Specifically, does a request for qualifications (RFQ) meet the intent and requirements for competitive bidding? The RFQ requires qualitative information from potential engineering firms but does not result in providing the entity with pricing. Instead, compensation is determined by the successful engineer negotiating a contract with a not-to-exceed total price for professional services.

If you have any additional questions, please contact me at 515-281-5464.

Sincerely,

Handwritten signature of Susan D. Battani in cursive.

Susan D. Battani, CPA
Director

City of Fort Dodge

Iowa Attorney General's Letter of Advice:
City of Fort Dodge - Conflict of Interest Issues

October 10, 2008



THOMAS J. MILLER
ATTORNEY GENERAL

Department of Justice

ADDRESS REPLY TO:
HOOVER BUILDING
DES MOINES, IOWA 50319
TELEPHONE: 515/281-5164
FACSIMILE: 515/281-4209

To: Susan D. Battani, CPA
Director, Financial Audit Division
Office of Auditor of State

Timothy N. Schott
Webster County Attorney

From: Pamela D. Griebel 
Assistant Attorney General

Date: October 10, 2008

Re: City of Fort Dodge – conflict of interest issues

You have each requested informal advice regarding conflict of interest issues surrounding the procurement of engineering services by the City of Fort Dodge. Your request was initially directed to Christie J. Scase in her capacity as the assistant attorney general assigned to represent the Auditor of State. Ms. Scase has now left our office, but her research and analysis is reflected in this memorandum.

County Attorney Schott's inquiries relate to potential conflicts arising from the fact that the city's mayor, Terry Lutz, is an officer and shareholder of McClure Engineering Co. of Fort Dodge. The Auditor of State's office echoes the questions presented by the county attorney regarding the ability of the city to contract with McClure Engineering Co. while Mr. Lutz serves as a city officer. In addition, the Auditor's office asks us to address the potential conflict of interest and competitive bidding issues arising from the fact that a second engineering firm, MER Engineering, Inc., continued to contract to provide engineering services during an extended period of time while Eldon Rossow, a director and officer of that firm, was serving as interim city engineer under contract with the city.

Conflict principles governing city officers and employees:

Iowa Code section 362.5 establishes a broad general prohibition upon city officers and employees contracting with the city. "A city officer or employee shall

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not have an interest, direct or indirect, in any contract or job of work or material or the profits thereof or services to be furnished or performed for the officer's or employee's city." Iowa Code § 362.5 (2007). The prohibition is, however, subject to a number of exceptions, including the following:

The provisions of this section do not apply to:

* * *

4. Contracts made by a city, upon competitive bid in writing, publicly invited and opened.

5. Contracts in which a city officer or employee has an interest solely by reason of employment, or a stock interest of the kind described in subsection 9, or both, if the contracts are made by competitive bid in writing, publicly invited and opened, or if the remuneration of employment will not be directly affected as a result of the contract and the duties of employment do not directly involve the procurement or preparation of any part of the contract. The competitive bid qualification of this subsection does not apply to a contract for professional services not customarily awarded by competitive bid.

* * *

7. A contract in which a city officer or employee has an interest if the contract was made before the time the officer or employee was elected or appointed, but the contract may not be renewed.

* * *

9. A contract with a corporation in which a city officer or employee has an interest by reason of stockholdings when less than five percent of the outstanding stock of the corporation is owned or controlled directly or indirectly by the officer or employee or the spouse or immediate family of such officer or employee.

Iowa Code § 362.5(4), (5), (7), (9). "The exceptions listed in section 362.5 are the only lawful means by which a city officer or employee may do business with that city." 1994 Iowa Op. Att'yGen. 11 (#93-4-8(L)) [1993 WL 137167]. In the absence of an applicable exception, "the general prohibition in section 362.5 against city officers or employees having a direct or indirect interest in contracts with a city applies even if they abstain from awarding the contracts." 1994 Iowa Op. Att'yGen. 119 (#94-7-4) [1994 WL 470450].

"Statutory conflict-of-interest provisions reveal legislative intent to engender public confidence in the operation of government. The principle underlying this policy is that a government employee or official cannot serve two masters at the same

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time, and the public interest should not be entrusted to an official with interests in conflict with the public interest.” T & K Roofing Co., Inc. v. Iowa Dept. of Education, 593 N.W.2d 159, 163 (Iowa 1999) (citations omitted). As this office has previously observed, the following well-settled principles arise from Iowa case law to guide the conflict of interest analysis: “that the applicable laws have a practical focus, that they demand complete loyalty to the public, that they encompass situations in which the mere possibility of conflict exists, and that they seek to promote confidence in the integrity and impartiality of public officers.” Id., citing Bluffs Development Corp. v. Bd. of Adjustment, 499 N.W.2d 12, 15 (Iowa 1993); Borlin v. City of Council Bluffs, 338 N.W.2d 146, 150 (Iowa 1983); Wilson v. Iowa City, 165 N.W.2d 813, 822-23 (Iowa 1969); Bay v. Davidson, 133 Iowa 688, 111 N.W. 25, 26 (1907); also 10A McQuillan, *Law of Municipal Corporations* § 341, at 916-17 (1990); 63A Am.Jur.2d *Public Officers and Employees* § 322, at 989-99 (1984).

To serve these purposes, statutes governing conflicts must be strictly interpreted and applied to protect the public interest and the integrity of government function. As our highest court explained in a leading modern era case addressing the subject:

We doubt if any rule of law has more longevity than that which condemns conflict between the public and private interests of government officials and employees nor any which has been more consistently and rigidly applied. The high standards which the public requires of its servants were set by common law and adopted later by statute. It is almost universally held that such statutes are merely declaratory of the common law. These rules, whether common law or statutory, are based on moral principles and public policy. The demand complete loyalty to the public and seek to avoid subjecting a public servant to the difficult, and often insoluble, task of deciding between public duty and private advantage.

Wilson v. Iowa City, 165 N.W.2d at 822. With these principles in mind, we turn to the specific facts underlying your inquiries.

Potential conflicts arising from contracts with McClure Engineering Co.:

We have the following understanding of the facts with regard the mayor, based upon the background information provided. Mayor Lutz was elected in 2005. He is an officer and the largest shareholder (49%) of McClure Engineering. For many years, McClure Engineering has performed engineering work for the City of Fort Dodge and the company regularly bids on engineering contracts with the city. The

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mayor receives financial benefit from contracts with the city in the form of division of the company profits.

Shortly after he took office, Mayor Lutz requested and received advice from the city attorney regarding whether his service as mayor would create a conflict of interest which would interfere with or void contracts between the city and McClure Engineering. The mayor was advised that contracts which were in place prior to the mayor taking office were permitted to be completed. The city attorney concluded that future contracts between the city and McClure Engineering would present an impermissible conflict under Iowa Code 362.5, unless they fit within one of the enumerated exceptions to the general conflict rule. After examining the exceptions, he advised that McClure could be awarded engineering services contracts during Mayor Lutz's term pursuant to Code subsection 362.5(4), if the contracts were made "upon competitive bid in writing, publicly invited and opened" and the mayor took no part in the process on behalf of either the city or McClure. Given that professional services, including engineering services are generally not subject to traditional competitive bidding, the city attorney opined that a competitive qualification process would qualify for the exception

Against this background, County Attorney Schott has requested advice addressing Iowa Code sections 362.5(4), 362.5(5), and 26.4. Specifically, he asks:

1. Does the mayor's situation as the largest shareholder of his company disqualify him from the excepting language in paragraph (5) ". . . in which a city officer or employee has an interest solely by reason of employment."
2. Would the profit sharing arrangement of the mayor's company constitute "remuneration of employment," thus disqualifying him from the exception in the second half of paragraph (5)?
3. Do the competitive bid exceptions of either paragraph (4) or (5) allow for a competitive bid professional services contract based upon qualitative criteria, rather than the requirements of Chapter 26?
4. Recently enacted Iowa Code Section 26.4 exempts architectural and engineering design services from the competitive bidding requirements of Iowa Code Chapter 26. Does this exemption in any way change the conflict analysis under 362.5?

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The Auditor of State's office asks also asks whether "a request for qualifications (RFQ) meets the intent and requirements of competitive bidding." The RFQ process is described in the Auditor's office request as a request for submission, and comparison of, qualitative information from a potential engineering firm. Pricing information is not requested or considered during the vendor selection process. Instead, compensation is determined by the successful firm negotiating a contract with the city with a not-to-exceed total price for professional services.

County Attorney Schott's first two questions relate to the applicability of the exception in subsection 362.5(5). He asks whether the mayor's stock ownership or receipt of profits from contracts with the city disqualify him from the exception. These facts disqualify the mayor from taking advantage of the exception set forth in this subsection. Subsection 5(5) allows contracts in which a city officer or employee has an interest *only if* the affected city officer or employee's interest arises "solely by reason of employment, or a stock interest of a kind described in subsection 9 [i.e. stockholding of less than five percent of outstanding stock], or both." Under the facts presented here, Mayor Lutz is far from being a mere employee and/or minor stockholder of McClure Engineering. He is the corporation's largest stockholder (owning 49% of outstanding shares), he receives a share of the profits deriving from contracts with the city, and he is identified as the president of the corporation on its most recent biennial report which was filed with the Iowa Secretary of State in April of this year. We agree with the City Attorney's characterization of subsection (5) as applying when a city officer or employee's interest in a contract is indirect and de minimus. Given the role Mayor Lutz has with the corporation, this subsection does not apply to contracts between the city and McClure Engineering.

The county attorney's third question and the question posed by the Auditor of State's office both seek guidance regarding whether solicitation of qualitative information from potential vendors and the selection of a vendor based upon responses to the RFQ constitutes competitive bidding in the context of the exceptions set forth in section 362.5. The conflict of interest exceptions in subsections 362.5(4) and (5) each refer to contracts made "upon competitive bid in writing, publically invited and opened." We do not believe that the qualitative selection process which is described constitutes a competitive bid procedure for purposes of section 362.5.

Although chapter 362 does not define what is meant by "competitive bid," the concept of competitive bidding as a method for awarding public contracts is not new or unique and the term has a well-established definition in the context of government contracting. When terms are not defined by statute, "we look to prior decisions of [the courts], similar statutes, dictionary definitions, and common usage." Iowa Association of School Bds. v. Iowa Dept. of Education, 739 N.W.2d 303, 309 (Iowa

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2007), quoting Gardin v. Long Beach Mortgage Co., 661 N.W.2d 193, 197 (Iowa 2003). "In addition, 'we consider the context of the provision[s] at issue and interpret the provision[s] consistent with the entire statute of which [they are] a part.'" Id., quoting State v. Kamber, 737 N.W.2d 297, 299 (Iowa 2007). Black's Law Dictionary defines "bid" as "[a] buyer's offer to pay a specified price for something that may or may not be for sale." *Black's Law Dictionary* 153 (7th ed. 1999). "Competitive bid" is defined as "a bid submitted in response to public notice of an intended sale or purchase." Id. at 154.

The purpose and benefits of competitive bidding have frequently been addressed by our court. The requirements protect the public by securing "competition among bidders, the best results at the lowest price, and . . . forestall fraud, favoritism and corruption in the making of contracts." Eleview Construction Co., Inc. v. North Scott Community Sch. Dist., 373 N.W.2d 138, 142 (Iowa 1985), quoting Istari Construction, Inc. v. City of Muscatine, 330 N.W.2d 798, 800 (Iowa 1983). "The paramount purpose of the competitive bidding statute is to protect the public as taxpayers . . ." Master Builders of Iowa, Inc. v. Polk County, 653 N.W.2d 382, 394 (Iowa 2002). The process is designed to "provide a [city] with the *best* results at the lowest possible price." Id. at 395 (emphasis original). As described by the court and detailed in chapter 26, the competitive bidding process does not preclude the consideration of the qualifications of bidders within the bid review, but once qualified bidders are identified the contract award must be based on price. Iowa Code chapter 26 sets forth the current competitive bidding requirements for public construction projects. This statute requires a contract let under competitive bidding to be awarded to the "lowest responsive, responsible bidder." Iowa Code §§ 26.9, 26.10 (2007).

Sound logic supports limiting the exceptions to the conflict of interest rule to contracts which follow this form of competitive bidding. The exceptions set forth in section 362.5 are designed to allow contracts to proceed, despite a potential conflict of interest, when the timing of the contract or process used to select the vendor provides assurance that the potential conflict will not impact selection of the vendor or when the potential benefit to the public official or employee is minimal. If an objective, price-based competitive bidding process is utilized, the danger of a city employee or officer with a conflicting interest having undue influence over the award process is virtually eliminated. The same is not true if contracts are awarded solely upon subjective qualification criteria. The RFQ process, as it is described in the State Auditor's correspondence, bases the selection of a vendor upon comparison of qualitative information submitted by potential engineering firms, without consideration of pricing information. The city then negotiates a contract and the cost of the services with the successful firm. This process simply cannot fairly be classified as a competitive bid award process.

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Finally, County Attorney Schott points to Code section 26.4, which exempts architectural and engineering design services from the competitive bidding requirements of Iowa Code Chapter 26 and asks whether this provision changes the conflict analysis under 362.5. We do not believe that it does. Section 26.4 removes engineering design services from the general requirement for competitive bidding, but does not preclude the use of competitive bidding for such services.

Subsection 362.5(4) provides a broad exception making the general conflict of interest prohibition inapplicable to all contracts which are made by the city "upon competitive bid in writing, publicly invited and opened," regardless of the nature of interest a city officer or employee may have in the contract. Given the breadth of the exception, its terms must be strictly construed to protect the public. A contract which is awarded under an alternate process which does not include price-based competitive bidding, simply will not qualify for this exception. As we reasoned when applying a similar conflict provision to architectural services, "[i]n the absence of competitive bidding, the sale of these services by officials will be prohibited." 1992 Iowa Op. Att'yGen. 192 (#92-12-2) [1992 WL 470390].

Potential conflicts arising from contracts with MER:

The State Auditor's office has also asked that we consider potential conflicts of interest and competitive bidding requirements pertaining to the city and its contractual relationships with an appointed engineer. The Auditor's staff has provided the following information. Eldon Rossow is president and serves on the board of directors of MER Engineering, Inc. of Fort Dodge. According to amended articles of incorporation for the company, Mr. Rossow and one other individual are the sole shareholders and directors of the corporation. In January of 2004, MER Engineering, through correspondence from Eldon Rossow, submitted a proposal to provide professional engineering services to City of Fort Dodge. In March of 2004, an executive order was issued by the mayor appointing Mr. Rossow to act as a "temporary interim city engineer" for the city and the city entered into an agreement with MER Engineering for the corporation to provide licensed engineering services at agreed upon hourly rates, to assist the engineering department for a period not to exceed 90 days.

It is our understanding that Mr. Rossow continued to serve as the "interim city engineer" until a permanent city engineer was appointed in March of 2008. During this four year period, Mr. Rossow billed and was paid an average of approximately \$5,000 per month for services provided as the city engineer. Also during this time, MER Engineering was awarded additional contracts to perform project specific

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engineering services for the city. Against this background, the Auditor's office asks: "does a conflict of interest exist if the City Engineer's firm performs engineering services pursuant to a contract competitively bid, and publicly invited?"

The outcome of this inquiry, like nearly all conflict of interest issues, is controlled by the specific facts and circumstances presented and can not be definitively resolved through advice or opinion from this office. Resolution of this issue is partially dependent upon whether Mr. Rossow's appointment as the interim city engineer made him an officer or employee of the city for purposes of section 362.5. If so, then the provisions of Code section 362.5 are applicable and it is possible MER Engineering could legitimately contract with the city if the contract was awarded through a price-based competitive bidding process as allowed by subsection 362.5(4).

We believe, however, that even if the terms of subsection 362.5(4) are technically applicable, the overall relationship between Mr. Rossow, his engineering firm, and the city was quite troubling. Regardless of whether Mr. Rossow was technically an employee or officer of the city, he was serving as the acting city engineer and performing services for the city for a four year period. From that position we assume that he had access to all relevant information about city projects and was responsible for advising the city when needed engineering services exceeded his current capacity and availability. Any attempt by MER to contract for these additional services seems fraught with the potential for organizational conflicts of interest. See Medco Behavioral Care Corp. of Iowa v. Iowa Dept. of Human Services, 553 N.W.2d 556, 563-66 (Iowa 1996) (discussing federal procurement rules regarding organizational conflicts).

As stated above, the principle underlying conflict of interest policies is recognition of the fact "that a government employee or official cannot serve two masters at the same time, and the public interest should not be entrusted to an official with interests in conflict with the public interest." T & K Roofing Co., Inc. v. Iowa Dept. of Education, 593 N.W.2d at 163. If Mr. Rossow was, on the one hand, advising the city whether it needed to contract for additional outside engineering services, or assisting with preparation of the project descriptions or terms for the engineering contract, or assessing the quality of the engineering work performed for the City by all vendors, and, on the other hand, acting on behalf of MER Engineering in competing for or providing those outside services or profiting from the contract work awarded to MER, then a conflict of interest did exist – regardless of whether his

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position as interim city engineer is viewed as that of an employee or of an independent contractor.¹

Conclusion: We are hopeful that this advice will be useful to you as you work to resolve these conflict of interest issues. Please note, however, that the discussion set forth herein represents the analysis of Christy Scase and myself, and is not an opinion of the Attorney General.

¹ In addition to the conflict of interest concerns, there is a strong argument that the former interim city engineer was in violation of Iowa Code section 68B.2A(1)(c) by engaging in outside employment subject to his official control, inspection, review or audit. Section 2.08.090 of the Fort Dodge City Code (from the city code chapter entitled "City Officers") defines the duty of the city engineer to include superintending public property, streets, and improvements and construction and improvement of these assets. The fact scenario provided indicates Mr. Rossow was appointed by the Mayor to fill the city engineer position on an interim basis until a new engineer could be hired and that his firm received compensation for these services. If the MER firm was providing engineering services to the city while Mr. Rossow was acting city engineer and such services fell under the scope of his supervisory responsibility, section 68A.2A may have been implicated. Unlike the situation in T&K Roofing, Mr. Rossow was not a volunteer, unpaid consultant. He was instead a "person who serves or is employed by" the city. Iowa Code § 68B.2A(1).

City of Fort Dodge

City Attorney's Letter:
Conflict of Interest

October 13, 2008



CITY OF FORT DODGE
LEGAL DEPARTMENT

October 13, 2008

Pamela D. Griebel
Assistant Attorney General
Hoover Building
Des Moines, IA 50319

RE: The City of Fort Dodge conflict of interest issues letter dated October 10, 2008 to Susan Battani, Officer State Auditor and Timothy Schott, Webster County Attorney

Dear Ms. Griebel,

I am in receipt of a copy of your above referenced advisory letter. As you are aware apparently I have not previously opined on the MER issue but have on the McClure issue.

In your advisory letter you indicate that I previously opined "the city attorney opined that a competitive qualification process would qualify for the exception (sic Section 362.5)4 Code of Iowa". On the contrary it was my opinion that a "RFQ would **not** qualify but that a request for proposal (RFP) would (Opinion 06-01 Paragraph 5 [Attached]). The difference between an RFQ and an RFP is extensive. An RFQ only reviews the qualifications of the competitor, an RFP not only reviews the qualifications of the competitor but the cost and functional effectiveness of what the competitor is proposing. A "bid" proposes a cost for a known function, a proposal establishes a proposed cost and function for a known project, that is why engineers, architects, and other professionals use proposals rather than bids because the scope of work is not pre-established, none the less competitive costs are solicited and compared. Further in consultation with our bond counsel, I recommended and the city council concurred that we should not limit this requirement for competitive proposals to circumstances of "conflict", but require all professional service contracts to be awarded on a competitive proposal basis.

Whether the criteria of my opinion and Section 3.04.110 of the Fort Dodge Municipal Code (Ord 2049 Section 11, 2006) were complied with I do not know due to my ill health and medical leave status from the fall of 2006 through the spring of 2008.

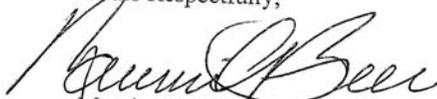
I hope that this explanatory letter is of use to you and the recipients of your letter.

City of Fort Dodge

City Attorney's Letter:
Conflict of Interest

October 13, 2008

Yours Respectfully,



Maurice C. Breen
City Attorney

cc: Mayor and City Council with Attachments and Opinions
David Fierke, City Manager
Penny Clayton, City Clerk
Timothy Schott, Webster County Attorney
Susan D. Battani, CPA Office of the State Auditor
Jerilyn Maher, CPA Cornwell & Associates, City Auditor
Mark Crimmins, Attorney at Law

City of Fort Dodge

City Attorney's Letter:
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October 13, 2008



CITY OF FORT DODGE, IOWA 50501
LEGAL DEPARTMENT

Opinion #06-01

January 17, 2006

The Honorable Terry Lutz, Mayor
Municipal Building
819 1st Avenue South
Fort Dodge, Iowa 50501

RE: McClure Engineering Company Conflict of Interest

Dear Mr. Mayor:

I have, at your request, researched the issue of whether you, as Mayor, and McClure Engineering Company, of which you are an officer, may have a conflict of interest which would interfere with or void contracts between the City of Fort Dodge and McClure Engineering Company. I find, in relation thereto, the following:

1. Do you, as Mayor, have a conflict of interest in dealing with any issues involving McClure Engineering Company, of which you are an officer and substantial owner?

It is my opinion that you do have a conflict of interest, and that that conflict of interest could impact any contractual relationship between the City of Fort Dodge and McClure Engineering Company.

2. What impact would the conflict have on the contractual relationship?

The general rule of conflicts of interest, as set out in Section 362.6 of the Code of Iowa, states in part, "Conflict of Interest. A measure voted upon is not invalid by reason of conflict of interest in an officer of a city, unless the vote of the officer was decisive to passage of the measure..." As Mayor, you have no vote, but you do have a veto that can be overridden by a two-thirds majority of the City Council. It is, therefore, my opinion that you should take no part in any measure before the City Council involving McClure Engineering Company, and any such measure would have to pass the City Council with no less than five votes to preclude any issue of your veto power being decisive.

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3. Further, and more critically, the Code of Iowa provides specific rules with regard to contracts between a city and an officer or employee of that city, or a company in which the officer or employee has a financial interest; any such contracts are VOID, unless they fall within the thirteen statutory exceptions to the rule.

Section 362.5 of the Code of Iowa
"Interest in public contract prohibited – exceptions.

When used in this section, "contract" means any claim, account, or demand against or agreement with a city, express or implied.

A city officer or employee shall not have an interest, direct or indirect, in any contract or job of work, or material or the profits thereof or services to be furnished or performed for the officer's or employee's city. A contract entered into in violation of this section is void. The provisions of this section do not apply to:

- (1) The payment of lawful compensation of a city officer or employee holding more than one city office or position, the holding of which is not incompatible with another public office or is not prohibited by law.
- (2) The designation of a bank or trust company as a depository, paying agent, or for investment of funds.
- (3) An employee of a bank or trust company, who serves as treasurer of a city.
- (4) Contracts made by a city, upon competitive bid in writing, publicly invited and opened.
- (5) Contracts in which a city officer or employee has an interest solely by reason of employment, or a stock interest of the kind described in subsection 9, or both, if the contracts are made by competitive bid in writing, publicly invited and opened, or if the remuneration of employment will not be directly affected as a result of the contract and the duties of employment do not directly involve the procurement or preparation of any part of the contract. The competitive bid qualification of this subsection does not apply to a contract for professional services not customarily awarded by competitive bid.
- (6) The designation of an official newspaper.

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- (7) A contract in which a city officer or employee has an interest if the contract was made before the time the officer or employee was elected or appointed, but the contract may not be renewed.
 - (8) Contracts with volunteer fire fighters or civil defense volunteers.
 - (9) A contract with a corporation in which a city officer or employee has an interest by reason of stockholdings when less than five percent of the outstanding stock of the corporation is owned or controlled directly or indirectly by the officer or employee or the spouse or immediate family of such officer or employee.
 - (10) Contracts not otherwise permitted by this section, for the purchase of goods or services by a city having a population of more than two thousand five hundred, which benefit a city officer or employee, if the purchases benefiting that officer or employee do not exceed a cumulative total purchase price of one thousand five hundred dollars in a fiscal year.
 - (11) Contracts not otherwise permitted by this section for the purchase of goods or services by a city having a population of two thousand five hundred or less, which benefit a city officer or employee, if the purchases benefiting that officer or employee do not exceed a cumulative total purchase price of two thousand five hundred dollars in a fiscal year.
 - (12) Franchise agreements between a city and a utility and contracts entered into by a city for the provision of essential city utility services.
 - (13) A contract that is a bond, note, or other obligation of the city and the contract is not acquired directly from the city, but is acquired in a transaction with a third party who may or may not be the original underwriter, purchaser, or obligee of the contract."
4. It is my opinion that any existing or future contracts for engineering services between the City of Fort Dodge and McClure Engineering Company would be voided or void unless they fall within one or more of the statutory exceptions.
- a. With regard to existing contracts, as provided in exception number seven (7) above, completion of the contracts would be permitted, but could not be

City of Fort Dodge

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renewed and must be completed in accordance with main paragraph 2 above.

- b. With regard to future contracts, either new or renewal of existing, they must fall within one of the other twelve exceptions in order to be valid. An analysis of 362.5, (1)-(13), reveals that none of the exceptions are applicable for various apparent reasons, except numbers (4), (5), and (9). (5) and (9) would apply if your interest in McClure Engineering Company was de minimus, which it is not.

Exception (4), "contracts made by a city upon competitive bid in writing, publicly invited and opened", may be applicable. While engineering contracts are not "competitively bid", this fact is recognized in the statute at the end of exception five "the competitive bid qualification...does not apply to a contract for professional services not customarily awarded by competitive bid." It is my interpretation of 362.5 and its exceptions, that the "competitive and public" nature of the contract award is what is critical to qualifying for the exemption. A publicly invited, publicly opened, and publicly competitively-awarded professional services contract, based upon qualitative criteria, would likewise qualify.

- 5. It is, therefore, my opinion that McClure Engineering Company could validly submit proposals for engineering service contracts with the City of Fort Dodge under the following conditions:
 - a. Proposals must be publicly invited from all qualified engineering firms.
 - b. All proposals submitted must be publicly opened.
 - c. The award of a contract must be publicly made, based upon the effectiveness of the proposals and the qualifications of the proponent.
 - d. If McClure Engineering Company were a proponent, you could take no part at all for either party (total recusal).
 - e. The current City of Fort Dodge procurement ordinance, 3.04.150 FDMC, must be amended to require competition for all professional service contracts, unless expressly waived in advance by the City Council.

Yours respectfully,

Maurice C. Breen
City Attorney

MCB:ts

City of Fort Dodge

City Attorney's Letter:
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October 13, 2008

PURCHASING

When the award is not given to the lowest bidder, a full and complete statement for the reasons for placing the order elsewhere shall be prepared and filed with the other papers relating to the transaction.

If there is a tie between lowest responsible bidders and the bids received are for the same total or unit price, quality and service being equal, the contract shall be awarded to the local bidder. If the tie is between outside bidders, the successful bidder shall be determined by drawing lots in public. (Ord. 2049 § 9, 2006).

3.04.100 Annualization.

Any supply, material, equipment, improvement or service or type of supply, material, equipment or improvement or service which could be consolidated for bid and which is likely to be purchased more than once in any fiscal year by a department, or citywide if directed by the manager, shall be bid for the entire year in the manner prescribed for the annualized total estimated dollar amount of the entire year's purchase. No contract or purchase shall be subdivided to avoid the requirements of this section or the dollar limitations of Sections 3.04.030, 3.04.060 and 3.04.070 of this chapter. Once an annualized bid has been awarded, reorders may be placed throughout the year by purchase requisition as set out in Section 3.04.030 of this chapter without further need for bid solicitation. (Ord. 2049 § 10, 2006).

3.04.110 Exceptions.

The foregoing procedures may not be applicable to any supply, material, equipment, improvements of less than twenty-five thousand dollars or contractual services which does not by its nature or by practice within the trade lend itself to competitive bidding or by its nature is available from a single source of supply. In such cases, solicitation of competitive proposals shall be secured. If not practical, exception shall be required from the city council in advance. The council may further establish by resolution a standard list of supplies, material, equipment, improvements and contractual services exempt from the bidding procedure. (Ord. 2049 § 11, 2006).

City of Fort Dodge Reaudit

City of Fort Dodge

Library Legal Counsel's Opinion:
Gwendolyn E. Scharfenberg Estate

September 20, 2002

JOHNSON, ERB, BICE
KRAMER, GOOD & MULHOLLAND, P.C.
Attorneys and Counselors at Law

Dean P. Erb
Thomas J. Bice
James L. Kramer
William J. Good
Nevan J. Mulholland
Stuart J. Cochrane
Eric J. Eide

809 Central Avenue, Suite 600
P.O. Box 1396
Fort Dodge, Iowa 50501

Telephone: (515) 577-
FAX:

Arthur H. Johnson
Of Counsel

September 20, 2002

Mrs. LaWanda Roudebush, Director
Fort Dodge Public Library
424 Central Avenue
Fort Dodge, IA 50501

Re: Gwendolyn E. Scharfenberg Estate

Dear LaWanda:

I am writing to follow-up on our recent conversations concerning the Scharfenberg estate.

As I understand it, Ms. Scharfenberg left the bulk of her estate to the Fort Dodge Public Library. Your question was whether the trustees of the Fort Dodge Public Library have the authority to transfer this bequest to the W. H. Johnston Foundation.

The third paragraph of Iowa Code Section 392.5 provides as follows:

"A library board may accept and control the expenditure of all gifts, devises, and bequests to the library."

Section 2.64.050 of the Fort Dodge City Code provides, among other things, that the Public Library Board of Trustees shall have and exercise the following powers and duties:

"(9) To have exclusive control of the expenditure of all funds allocated for library purposes by the council, and of all moneys available by gift or otherwise for the erection of library buildings, and of all other moneys belonging to the library including fines and rentals collected, under the rules of the board;

(10) To accept gifts of real property, personal property, or mixed property, and devises and bequests, including trust funds; to take the title to said property in the name of the library; to execute deeds and bills of sale for the conveyance of said property; and to expend the funds received by them from such gifts, for the improvement of the library;"

City of Fort Dodge

Library Legal Counsel's Opinion:
Gwendolyn E. Scharfenberg Estate

September 20, 2002

JOHNSON, ERB, BICE, KRAMER, GOOD & MULHOLLAND, P.C.
Attorneys and Counselors at Law

Mrs. LaWanda Roudebush, Director
Fort Dodge Public Library
September 20, 2002
Page 2

Article IV of the Articles of Incorporation of the W. H. Johnston Foundation provides as follows:

"ARTICLE IV

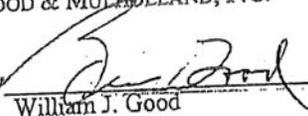
OBJECTS AND PURPOSES

The purpose and objectives of the W. H. Johnston Foundation shall be to actively solicit and receive donations, gifts, and grants to provide supplementary funding to strengthen and enrich the Fort Dodge Public Library, and to provide for the prudent management of such funds, in support of the facilities, services and collections of the Fort Dodge Public Library."

Based on the foregoing, it is my opinion that if the trustees choose to do so, they may transfer the bequest received from the Scharfenberg estate to the W. H. Johnston Foundation.

Sincerely yours,

JOHNSON, ERB, BICE, KRAMER,
GOOD & MULHOLLAND, P.C.

By 
William J. Good

WJG:djs

City of Fort Dodge

Auditor of State's Letter to City

January 30, 2003



OFFICE OF AUDITOR OF STATE
STATE OF IOWA

State Capitol Building
Des Moines, Iowa 50319-0004

Telephone (515) 281-5834 Facsimile (515) 242-6134

David A. Vaudt, CPA
Auditor of State

January 30, 2003

Penny Clayton
City Clerk/ Finance Director
819 First Avenue South
Fort Dodge, Iowa 50501

Dear Ms. Clayton:

You have requested information pertaining to requirements for public funds. Specifically, the City of Fort Dodge Public Library received a gift, which was subsequently given to the Library's Foundation. It is my understanding that the terms of the gift (last will and testament) specified the City of Fort Dodge Public Library as the beneficiary. It is also my understanding that the Library Foundation is a separate 501.C (3) nonprofit corporation.

Chapter 384.20 of the Code of Iowa states in part "A city shall keep accounts which show an accurate and detailed statement of all public funds collected, received, or expended for any city purpose, by any city officer, employee or other person and which show the receipt, use, and disposition of all city property."

Based upon the information provided to me, the money gifted to the City (public library) would be considered to be "public funds". Accordingly, these public funds are subject to the requirements and restrictions first of the trust itself and also with the Code of Iowa as applicable to other City funds. As such, these public funds are then subject to the deposit and investment provisions of Chapters 12B and 12C of the Code of Iowa. I have enclosed a copy of an article from the June 2001 "Cityscape" magazine regarding "Library Funding" for your review and information.

Chapter 392.5 of the Code of Iowa states in part "A library board may accept and control the expenditure of all gifts, devises, and bequests to the library." We are not attorneys, however, we are not aware of any statutory authority for the Library Board and/or City to relinquish its fiduciary responsibility over the public funds trust account to a separate nonprofit organization.

If you have any questions, please contact me at 515-281-5464.

Sincerely,

Handwritten signature of Susan D. Battani in cursive.

Susan D. Battani, CPA
Director

Enclosure

Cc: Maurice Breen, City Attorney

City of Fort Dodge

Auditor of State's Letter to City

January 30, 2003

Q & A

Library Funding

This article was written with the assistance of the State Library of Iowa and the Office of the Auditor of the State.

Q: What makes the financial operation of the library unique?

A: The majority of city libraries in Iowa are not only governed by a city council but also a library board of trustees that oversees the operation of the library, including financial decisions. The library board is an administrative agency operating in accordance with the provisions of chapter 392.5 of the *Code of Iowa*. Typically, the city's library ordinance grants the board exclusive control of all expenditures of funds allocated by the city council for library purposes and of all moneys received through gifts, fines and rentals. By virtue of this unique relationship — the city council determines the total amount of funding the library will get from the city, the board of trustees controls how it is expended — the board, city council, and library and city administrative staffs must work closely and cooperatively.

After the board approves library bills in the general operation of the library, the library director meets with the city finance officer to ensure the bills are added to the list of claims provided to the city council. This ensures the expenditures are published and the general ledger is kept current. While this is not mandated, both the auditor of the state and the State Library of Iowa encourage this preferred method. As with any other department, the library cannot spend more than has been allocated unless the budget is formally amended. Accordingly, the library and the city must work together to determine whether a formal budget

amendment is required to account for over expenditures or un-anticipated revenues.

Q: What is the minimum financial contribution for a city in support of the library?

A: The majority of funding for the library comes from the city's general fund, which is funded primarily by property tax. The *Code* Section 256.69 mandates, however, that cities and counties levy a minimum of \$.0675 per \$1,000 of assessed property valuations for support of a public library. Cities that do not operate a library are still required to provide this minimum funding, and typically, contract with another library in the area or support a county library.

The *Code* Section 384.12(21) allows cities to levy an additional tax to support the library of up to \$0.27 per \$1,000 assessed property valuation. This levy must be put to a vote and passed by a simple majority in order to be enacted.

Q: How are memorial donations and trusts handled?

A: Libraries are frequently the beneficiaries of memorial donations, gifts and even trust funds. While these moneys are given to directly benefit the library, the city must account for these funds in its financial reports. Because these gifts and funds are earmarked for a specific purpose, however, they need to be segregated from the operating funds. This allows the city to demonstrate compliance with the terms and conditions of the donation. In some cases, the library accounts for these funds on its own. The city's auditor may recommend having the city account for these funds and to have the city establish a separate trust fund. The benefit of a trust fund is that the moneys are still available to the library and do not revert to the general fund while at the same time, they are accounted for on the city's books and both the city and library gain a measure of internal control. This fund can be established by a resolution of the city council. Given the restrictions that can be attached to these kinds of donations, the resolution should also identify the donor's terms for the gift. This resolution provides a means to verify compliance and to provide a historical document for subsequent library boards

and city councils

Q: What about the establishment of a library foundation?

A: A separate, private foundation for a library is not legally required, but reasons, such as potential donors' unwillingness to give to tax-supported agencies, may compel its formation. Should a library pursue this course, it will need to consider forming a private, nonprofit corporation and seek 501(c)(3) status from the Internal Revenue Service to ensure that their donations are tax deductible. (Donations to cities are automatically deemed tax deductible if used for a public purpose.)

The establishment of a foundation transfers accountability for the funds from the city to the association, but it may not eliminate the financial reporting requirements. If the foundation provides a significant amount of financial support to the operation of the library, it may be considered a component unit required to include its financial information in the city's financial report.

Q: Can funds remaining in the library budget at the end of the fiscal year be "carried over" to the next fiscal year?

A: Yes, there are a couple of ways this can be addressed. Legally, funds that remain in a departmental budget at the end of the fiscal year are required to revert to the city general fund. The city council may adopt a resolution, however, to either give the library board the authority to carry these funds over to the next fiscal year or designate a trust fund into which the funds can be transferred. Again, this requires a resolution. Cities operating in compliance with GAAP can identify the funds to be carried over as a "designated fund balance" on the balance sheet. Regardless of the procedure, the city council and library board needs to work together to formulate an appropriate financial plan for the library.

More detailed information on the operation of libraries is located in the "Iowa Library Trustee's Handbook 1998" which is published by the State Library of Iowa. Copies of the handbook may be obtained by contacting (800) 248-4483. ▲



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City of Fort Dodge

City Attorney's Letter

January 31, 2003



CITY OF FORT DODGE, IOWA 50501

LEGAL DEPARTMENT

January 31, 2003

The President and Members of The Library Board of Trustees,
and The Library Director, Fort Dodge Public Library
424 Central Avenue
Fort Dodge, IA-50501

Re: Scharfenberg Bequest :

Gentlemen and Ladies:

I have reviewed the facts and circumstances of the above matter and in consultation with the City Clerk and Auditor of State FIND as follows:

That the Library received a substantial monetary gift from the Scharfenberg Estate as stated " I give all the remainder of my property, of whatever nature and wherever situated (called my ' residuary estate'), to the Fort Dodge Public Library, Fort Dodge, Iowa "

The Fort Dodge Public Library is a Municipal Administrative Agency created by the City of Fort Dodge, Ia. A Municipal Corporation (a political subdivision of the State of Iowa) pursuant to Section 392.5 of the Code of Iowa by Ord.No. 1518 and its predecessors.

The Library Board is empowered to accept and control the expenditure of gifts such as this , but such gifts are "public funds" and must be accounted for , deposited , and invested as such pursuant to Chapters 12B and 12C of the Code of Iowa and the Rules of the City.

I therefore advise the Board that the Bequest must be deposited with the City in the Library Memorial Account. Hold and invested by the City as by law required and expended by the City Treasurer as directed by the Library Board of Trustees.

City of Fort Dodge

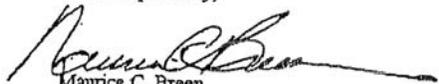
City Attorney's Letter

January 31, 2003

I have attached here to for you information a copy of the State Auditor's advise and Sections 392.5, 12B and 12C of the Code of Iowa.

This transaction should be coordinated through the City Clerk and City Treasurer. If you have any questions please let me know.

Yours respectfully,



Maurice C. Breen
City Attorney

CC: City Council, Mayor, Clerk and Treasurer

City of Fort Dodge Reaudit

City of Fort Dodge

Letter from City to Auditor of State

May 9, 2005



CITY of FORT DODGE

819 1st Avenue South

Fort Dodge, Iowa 50501

May 9, 2005

Mr. David A. Vaudt
Office of Auditor of State
State Capitol Building
Des Moines, IA 50319

Dear Mr. Vaudt,

As your office is aware, the Fort Dodge Public Library (a municipal administrative agency) received a large bequest from a decedent's estate. The Library Board of Trustees, in turn, deposited the proceeds of the bequest with its private not for profit supporting foundation, the W.H. Johnston Foundation.

Several questions arose from this transaction, may a public body commingle and invest their funds with that of a private not for profit, and two, may a public body, if it so decided, give or otherwise transfer ownership of its assets, cash or otherwise, to a private not for profit?

The City's 2004 Audit conducted by Cornwell and Company, P.C., when focusing on this said "it was noted that there may be some public funds held by an administrative agency of the City of Fort Dodge that are not accounted for, deposited or invested pursuant to Chapters 12B, 12C and 384.6 of the Code of Iowa".

My question is, what, if any, remedial action do you believe should be taken? And by whom?

Thank you for your attention to this matter. Please feel free to contact me if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Penny A. Clayton".

Penny A. Clayton
City Clerk/Finance Director

OFFICE OF THE CITY CLERK

515-576-4551

City of Fort Dodge

Auditor of State's Letter to City

June 22, 2005



OFFICE OF AUDITOR OF STATE
STATE OF IOWA

State Capitol Building
Des Moines, Iowa 50319-0004

Telephone (515) 281-5834 Facsimile (515) 242-6134

David A. Vaudt, CPA
Auditor of State

June 22, 2005

Penny Clayton
City Clerk/ Finance Director
819 First Avenue South
Fort Dodge, Iowa 50501

RE: Gwendolyn E. Sharfenberg Estate (Bequest)

Dear Ms. Clayton:

Mr. Vaudt asked me to respond to your letter dated May 9, 2005. As you know, I previously addressed this issue in a letter to you dated January 30, 2003. I have enclosed a copy of that letter which was also sent to the City Attorney.

On January 31, 2003, the City Attorney wrote a letter to the Library Board with a copy to the City Council. According to that letter, the City Attorney advised the Library Board (and City Council) the donation (Bequest) to the City of Fort Dodge Public Library would be public funds subject to the statutory requirements of all City/Library public funds. Specifically, the City Attorney advised "The Bequest must be deposited with the City in the Library Memorial Account. Held and invested by the City as by law required and expended by the City Treasurer as directed by the Library Board of Trustees." We did and still do concur with the City Attorney as there have been no statutory changes which would allow the Library Board to relinquish its fiduciary responsibility for these public funds and related compliance.

You also provided a copy of a letter from Mr. William J. Good, Attorney, to the Fort Dodge Public Library dated September 20, 2002. This letter was written prior to the advice and instruction provided by the City Attorney and this Office. While Mr. Good has referenced the appropriate statutes, we find nothing in his letter that leads us to conclude the Library Board may relinquish control of the Bequest entrusted to the City. We are not attorneys, and this should not be considered to be legal advice. However, as independent auditors, we question the propriety of the Library Board's actions. It is important to note, the "expenditure" of funds is not accomplished through a "transfer" of the funds. Expenditures result when the funds (cash) are exchanged for goods or services. The Board has merely "transferred" custody and control, its fiduciary responsibility, for these public funds for which we find no statutory authority.

You have asked if remedial action is necessary and, if so, by whom. In his letter, the City Attorney advised the Library Board and City Council of the statutory requirements and instructed the Board to coordinate the transaction (deposit of the Bequest with the City Treasurer) through the City Clerk and City Treasurer. The City (Council and Attorney) should take immediate action to recover these public funds from the Library Foundation. The City Attorney may need to pursue legal action if the Library Foundation fails to comply with the City's instructions.

City of Fort Dodge
Auditor of State's Letter to City
June 22, 2005

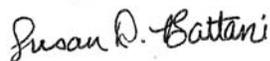
June 22, 2005
Page 2

Chapter 384.20 of the Code of Iowa is clear. This section states in part "A city shall keep accounts which show an accurate and detailed statement of all public funds collected, received, or expended for any city purpose, by any city officer, employee or other person and which show the receipt, use, and disposition of all city property." If the Library and/or Library Foundation have failed to provide the City with periodic reporting, it may be necessary to require an immediate accounting for these public funds.

We remain concerned with the City's inability to demonstrate compliance with the terms of the Bequest in that the funds were left to the City of Fort Dodge, not the W.H. Johnston Foundation. It would be unfortunate for the City to compromise this gift as a result of noncompliance with the Bequest and/or the Code of Iowa.

If you have any questions, please contact me at 515-281-5464.

Sincerely,



Susan D. Battani, CPA
Director

Enclosure

Cc: Maurice Breen, City Attorney

City of Fort Dodge

Letter from City to Library Board President

June 28, 2005



CITY of FORT DODGE

819 1st Avenue South

Fort Dodge, Iowa 50501

June 28, 2005

Mr. Richard Rhiner, President
Fort Dodge Public Library Board of Trustees
424 Central Avenue
Fort Dodge, IA 50501

RE: FY2004 Audit Deficiency

Dear Mr. Rhiner,

Please see the attached letters from the State Auditor's Office regarding the appropriate accounting of the Scharfenberg bequest. It would be unfortunate for all parties involved to litigate this matter, however it might be the only course of action available to the Council to remedy this significant deficiency.

Upon receipt, the funds will be placed in a Library Trust Account with the City to be invested by the City Treasurer at the direction of the Library Board of Trustees in accordance with the investment policy of the City.

Please coordinate the deposit of these funds with the City Treasurer and me to correct this significant accounting deficiency.

Respectfully,

A handwritten signature in cursive script that reads "Penny A. Clayton".

Penny A. Clayton
City Clerk

Cc: Mayor Patterson
City Council
City Attorney Breen

OFFICE OF THE CITY CLERK

515-576-4551

City of Fort Dodge

Auditor of State's Request for Informal Advice:
Gifts of Public Funds

March 26, 2008



OFFICE OF AUDITOR OF STATE
STATE OF IOWA

State Capitol Building
Des Moines, Iowa 50319-0004
Telephone (515) 281-5834 Facsimile (515) 242-6134

David A. Vaudt, CPA
Auditor of State

March 26, 2008

Christie J. Scase
Assistant Attorney General
Iowa Attorney General
2nd Floor
Hoover State Office Building
LOCAL

RE: Request for Informal Advice – Gifts of Public Funds

Dear Ms. Scase:

This is a request for informal advice pertaining to gifts received by governmental entities. Governmental entities periodically receive gifts from individuals through legal bequest or other means. Typically, the last will and testament or other legal document specifically names the governmental entity as the recipient of the gift and often stipulates how the gift may be used, for example, to a City or City Library Board of a governmental entity to be used for the purchase of Library books.

It has been the position of the State Auditor's Office, upon receipt, the gift becomes public funds, subject first to the legal terms of the gift and secondly to any applicable statutory requirements of the governmental entity, including the deposit and investment provisions of Chapters 12B and 12C of the Code of Iowa.

We first request your advice as to whether gifts from private donors to a governmental entity may be given to a private non-profit organization, such as a foundation. Secondly, if the answer is yes, we also ask whether the private non-profit organization must adhere to the terms of the gift and any applicable statutory requirements including the deposit and investment provisions of Chapters 12B and 12C of the Code of Iowa in regard to the principal and related income from the gift.

If the answer to the first question is no, do the provisions of Chapter 721.2 of the Code of Iowa apply pertaining to non-felonious misconduct in office?

If you have any additional questions, please contact me at 515-281-5464.

Sincerely,

Handwritten signature of Susan D. Battani in cursive.

Susan D. Battani, CPA
Director

City of Fort Dodge

Iowa Attorney General's Letter of Advice:
Transfer of Public Funds to Private Non-Profit Organization

April 22, 2008



THOMAS J. MILLER
ATTORNEY GENERAL

Department of Justice

ADDRESS REPLY TO:
HOOVER BUILDING
DES MOINES, IOWA 50319
TELEPHONE: 515/281-5164
FACSIMILE: 515/281-4209

To: Susan D. Battani, CPA
Director, Financial Audit Division
Office of the Auditor of State

From: Christie J. Scase *C. Scase*
Assistant Attorney General

Date: April 22, 2008

Re: Transfer of public funds to private non-profit organization

You have requested my advice regarding the disposition of gifts received by governmental entities. You explain that governmental agencies periodically receive gifts from individuals either through bequest or other means. Such gifts are often given with a stipulation that the funds or property be used for a specific purpose or purposes. We have recently discussed two separate situations in which testators willed funds to a city library or to a city to be used for library purposes and, upon receipt of the bequests, the city library board of trustees transferred the gifts to local nonprofit foundations.

In one case, in excess of \$ 1,000,000.00 was received and immediately transferred by the library board to a local private nonprofit foundation to form an endowment. According to the foundation's audited financial statement for the year ended June 30, 2006: the foundation was formed to raise funds to benefit the city public library; cash and certificates of deposits are maintained at several financial institutions and at times may exceed federally insured limits; and a majority of the foundation's net assets are invested in marketable securities. In the other case, approximately \$ 250,000.00 was bequeathed to a city to be used to "purchase books, periodicals and journals." The funds were given by the library board to a local private nonprofit foundation which serves a broad range of educational and charitable interests. At this time you do not know if the foundation has earmarked the funds received from the library board so that it can demonstrate compliance with the terms of the bequest.

In light of this background, you ask whether gifts received from private donors by a governmental body may be given by the governmental body to a private non-profit organization and, if so, whether the private non-profit organization must adhere to the terms of the gift and statutory requirements governing the deposit and investment of public funds found in Iowa Code

City of Fort Dodge

Iowa Attorney General's Letter of Advice:
Transfer of Public Funds to Private Non-Profit Organization

April 22, 2008

Susan Battani
Page 2

chapters 12B and 12C. It is my view that a governmental body may not simply donate funds received from private donors to a private non-profit organization, even if the organization intends to use the funds for the same purpose for which they were given to the governmental body. Although a governmental body can not irrevocably transfer public funds to a private non-profit organization, it can enter into a true joint or cooperative undertaking with a private agency under Iowa Code section 28E.4, as long as the government body retains the ability to oversee and control expenditure of the funds and ensures that use of the funds complies with any restrictions placed upon use of the gift and that the funds are managed in a manner consistent with the limitations on the deposit and investment of public funds contained in Code chapters 12B and 12C.

Past opinions of this office have consistently concluded that 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. See Iowa Op. Att'yGen. #00-8-2(L) (Kempkes to Bjomstad) [2000 WL 1576488] (concluding court might void transfer of funds by county board of supervisors to nonprofit organization created to serve as advisory group to county conservation board); 1990 Iowa Op. Att'yGen. 10 (#89-2-6(L)) [1989 WL 264884] (county hospital board may not transfer assets to a foundation if the effect is to deprive future boards of trustees of control over hospital assets); 1980 Iowa Op. Att'yGen. 701 (#80-5-7(L)) [1980 WL 25979] (county could not make appropriation to be used by private nonprofit historical society to construct building to house museum); 1978 Iowa Op. 369 (#78-1-3) [1978 WL 17335] (board of regents lacked authority to transfer funds to a non-profit foundation the board was statutorily authorized to create for the support of the institutions governed by the board); 1976 Iowa Op. Att'yGen. 31 (#75-2-2) (board of trustees of a municipal utility could not donate city funds to a private hospital clinic); 1976 Iowa Op. Att'yGen. 634 (#76-7-11) (city hospital could not directly contribute funds to a private corporation for purposes of providing medical education and clinic services within another city in the county); 1972 Iowa Op. Att'yGen. 395 (#72-3-16) (city council could not make a donation from city funds to a recreation center operated by private citizens). These opinions are based upon several legal principles.

Public nature of the fund: As you note in your letter to me, private gifts and bequests of money to a city or county, upon receipt and acceptance, "become public funds under the stewardship of the [city or] county." Op. #00-8-2(L) at p. 2, citing 10 E. McQuillan, *The Law of Municipal Corporations*, § 28.15, at 39-40 (1999). In addition to any restrictions or limitations imposed by the donor on use of the funds, all of the constitutional and statutory requirements regarding accounting for, depositing, investing, and expending public funds apply equally to funds received through taxation and funds received from private donors. "To paraphrase an earlier opinion, 'What cannot be lawfully done by a public agency cannot be delegated to a private entity.'" Op. #00-8-2(L) at p. 4, citing 1988 Iowa Op. Att'yGen. 112 (#88-10-2(L)) [1988 WL 247803] and 15 E. McQuillan, *The Law of Municipal Corporations*, § 39.47, at 164 (1995) (legislature may regulate the holding of public funds and local ordinance cannot change such regulation).

City of Fort Dodge

Iowa Attorney General's Letter of Advice:
Transfer of Public Funds to Private Non-Profit Organization

April 22, 2008

Susan Battani
Page 3

Political subdivisions and municipalities, including cities, counties, schools, and townships are municipal – governmental – entities. As governmental entities they are governed by elected bodies, are directly responsible to the public as a whole, and are subject to the limitations imposed on them by the state. Although a private organization may be formed to provide and support “public” services which are the same or similar to the services provided by government, the private organizations are not subjected to the same degree of public accountability and oversight as governmental entities. Whether a gift or bequest intended to support public services will be subject to the control of a government agency or a private organization is a choice made by the donor. A private donor can choose to leave gifts of money to a governmental entity or to a private organization. When a donor opts to give a monetary gift to a governmental entity, the funds become public funds and the governmental body receiving the funds must account for the deposit, investment, and expenditure of the funds.

Public purpose: The Iowa Constitution prohibits governmental bodies from making a gift to a private non-profit corporation. Article III, section 31 states: “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.” This provision has been found by the Iowa Supreme Court to be applicable to appropriations by city councils. 1986 Iowa Op. Att’yGen. 113 (#86-8-8) [1986 WL 79961], citing Love v. City of Des Moines, 210 Iowa 90, 101, 230 N.W. 373, 278 (1930); Willis v. City of Des Moines, 357 N.W.2d 567, 570, 572 (Iowa 1984).

Even if the function of a private non-profit corporation fits within the scope of activities generally recognized as serving a public purpose, a critical question exists regarding whether funds or property transferred to a private entity will indeed be used for those public purposes. If adequate oversight provisions are included, a transfer of funds or property to a private non-profit entity may be allowable. See Iowa Op. Att’yGen. #98-1-3 [1998 WL 213719] (addressing restrictions placed upon use of fund transferred to non-profit Iowa Housing Corporation by the Iowa Finance Authority); 1996 Iowa Op. Att’yGen. 38, #95-10-1 [1995 WL 792842] (finding that a lease for ten dollars per year by city to a private non-profit corporation was not prohibited gift because the lease provisions required the corporation to provide health care services, to maintain the property, to provide services in consideration of the lease to the city, and provided for reversion of the property to the city upon termination of the lease); 1980 Iowa Op. Att’yGen. 701 (#80-5-7(L)) [1980 WL 25979] (concluding that a county could appropriate money to support a private historical society only upon conditions that assured that the property would continue to be used for the public purpose). Code chapter 28E authorizes a wide range of joint or cooperative public and private undertakings, but imposes significant public accountability measures to ensure that public funds contributed to the undertaking are used for the intended public purposes. Iowa Code §§ 28E.4, 28E.5, 28E.7 (2007); Iowa Code Supp. §§ 28E.6, 28E.8 (2007); see Goreham v. Des Moines Metropolitan Area Solid Waste Authority, 179 N.W.2d 449, 455 (Iowa 1970) (“The creation of a new body corporate and politic to jointly exercise and perform the duties and responsibilities of the cooperating governmental unit would not be unconstitutional so long as the new body politic is doing only what its cooperating members

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already have the power to do.”); Iowa Op. Att’yGen. #98-1-3 [1998 WL 213719]; 1976 Iowa Op. Att’yGen. 634, 636 (#76-7-11); (“Section 28E.4 provides that any public agency may enter into an agreement with a private agency for joint or cooperative action pursuant to that chapter. . . However, the city should have a hand in the management of the action and should received some benefit from it.”).

As the 1998 opinion concluded it is not *per se* unlawful to transfer public funds to a private entity, if adequate safeguards are built into the transaction. In the absence of adequate safeguards, a pure gift or donation to a private entity will not meet the public purpose requirements of Iowa law.

Delegation of control: The transfer of public funds to a private non-profit corporation also raises concerns regarding the delegation of the discretion of the governing body of the government entity over the use and expenditure of the funds. The cases underlying your inquiry each involve funds given to cities for support of the city libraries. Assuming, for purposes of this advice, that the libraries are established as city administrative agencies under Code chapter 392, they are governed by a library board of trustees.¹ The library trustees are explicitly authorized to “accept and control the expenditure of all gifts, devises, and bequests to the library.” Iowa Code § 392.5 (2007).² Control of library assets, including funds received by gift or bequest, is a duty of the board of trustees. They may not turn over future control of library assets to a private foundation to administer and control. As we stated with regard to a transfer of county hospital funds to a private foundation for the purpose of providing health care scholarships, “because control of the hospital assets was a duty of the hospital board and the exercise of a government function, the current board lacked authority to bind future board from

¹ Iowa Code section 392.5 provides that “[a] city library board of trustees functioning on the effective date of the city code shall continue to function in the same manner until altered or discontinued” upon approval of the voters of the city. Iowa Code § 392.5 (2007), as enacted by 1972 Iowa Acts, 64th G.A., ch. 1088, § 196 (pursuant to section 9 of the act, this provision was effective July 1, 1972, if adopted by resolution of city council, otherwise effective July 1, 1974).

² In many cases, city ordinances incorporate the functions afforded library boards under the statutes existing in 1972, as contemplated by the transition provisions in that act. These statutes vested control over budgeting and the allocation and spending of library funds with the board of trustees. Iowa Code § 378.10(8) (1973) (the “board of library trustees shall have and exercise the following powers: . . . [t]o have exclusive control of the expenditures of all portions of the municipal enterprises fund allocated for library purposes by the council, and of the expenditure of all moneys available by gift or otherwise for the erection of library buildings, and of all other moneys belonging to the library fund, including fines and rentals collected under the rules of the board of trustees”), see also Iowa Code § 378.10(5) (1973) (empowering the board of library trustees to “select and make purchases of books, pamphlets, magazines, periodicals, papers, maps, journals, furniture, fixtures, stationery, and supplies for [the] library”).

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controlling these assets by placing them in a foundation." 1990 Iowa Op. Att'yGen. 10 (#89-2-6(L)) [1989 WL 264884]; see also Iowa Op. Att'yGen. #98-1-3 [1998 WL 213719].

Donor restrictions: "It is well established that the donor of [a] gift may impress upon [the] gift such conditions and limitations as the donor sees fit." 1972 Iowa Op. Att'yGen. 303 (#71-11-21) (addressing school board obligation to comply with restrictions imposed by donor of gift to school district); see also 1986 Iowa Op. Att'yGen. 134 (#86-12-13) [1986 WL 79966]. With the statutory authority to accept and expend gifts afforded to library trustees comes the responsibility to ensure that the proceeds of the gift are spent in a manner consistent with any restrictions placed upon use of the gift by the donor. 1972 Iowa Op. Att'y Gen. at p. 304 ("The funds must be earmarked and spent for the purpose for which the gift was made.").

Deposit and investment restrictions: The statutory restrictions upon the deposit and investment of public funds act as a further barrier to the unrestricted donation of public funds to a private foundation. This office most recently addressed issues regarding the transfer of public funds to a private nonprofit corporation in an opinion addressing gifts received by a county to be used for conservation purposes. Iowa Op. Att'yGen. #00-8-2(L) [2000 WL 1576488] (copy attached). In that opinion we were asked whether a county board of supervisors could directly transfer money given by private donors for conservation purposes to a nonprofit organization which would use the funds for substantially the same functions as the county conservation board, but would invest the money in ways the county could not lawfully invest it. This opinion focused primarily upon the statutory provisions found in Code chapters 12B and 12C, which regulate the deposit and investment of public funds held by political subdivisions. As we stated, these statutes are part of

"a long standing state scheme [which] restricts the investment authority of counties and other political subdivisions." 1988 Op. Att'yGen. 87, 88 (#88-4-5) [1988 WL 247774]. The investment options available under this state scheme can be fairly describes as conservative in nature and protective of principal. See generally Iowa Code chs. 12B, 12C. Although these investments normally generate a relatively low rate of return, they further a presumably more important legislative purpose: guarding against a loss, great or small, of public funds.

Iowa Op. Att'yGen. #00-8-2(L) at p. 3.

Code section 384.20 provides, in relevant part, that each "[c]ity shall keep accounts which show an accurate and detailed statement of all public funds collected, received, or expended for any city purpose, by any city officer, employee, or other person, and which show the receipt, use, and disposition of all city property." Iowa Code § 384.20 (2007) (unnumbered par. 2). "A city may establish trust and agency funds for the [purpose of] . . . accounting for gifts received by the city for a particular purpose." Iowa Code § 384.6(2) (2007). Cities are directed

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to "keep all funds invested to the extent practicable and may invest the funds jointly with one or more cities" or other listed government entities. Iowa Code § 384.21 (2007). However, "[a]ll investments of funds shall be subject to sections 12B.10 and 12B.10A and other applicable law." Id.

Code section 12B.10 establishes investment standards applicable to public funds held by political subdivisions.

2. . . . political subdivisions of the state, when investing or depositing public funds, shall exercise the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use to attain the goals of this subsection. This standard requires that when making investment decisions, a public entity shall consider the role that the investment or deposit plays within the portfolio of assets of the public entity and the goals of this subsection. The primary goals of investment prudence shall be based in the following order of priority:

- a. Safety of principle is the first priority.
- b. Maintaining the necessary liquidity to match expected liabilities is the second priority.
- c. Obtaining a reasonable return is the third priority.

3. Investments of public funds shall be made in accordance with written policies. A written investment policy shall address the goals set out in subsection 2 and shall also address, but is not limited to, compliance with state law, diversification, maturity, quality, and capability of investment management.

The trading of securities in which any public funds are invested for the purpose of speculation and the realization of short-term trading profits is prohibited.

Iowa Code § 12B.10(2), (3) (2007). Political subdivisions of the state may purchase and invest in only the types of investments which are listed within subsection 12B.10(5). Similar parameters for the deposit of public funds, designed to prevent "the loss of public funds on deposit in a depository" are set forth in Code chapter 12C. Iowa Code § 12C.1(4) (2007).

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The deposit and investment standards carefully defined within chapters 12B and 12C, could be readily circumvented if a governmental body was allowed to give public funds to a private nonprofit corporation, which in turn were not subject to the standards.

Investment of public funds must strictly follow legislative commands, 63C Am. Jur. 2d *Public Funds* §§ 5, at 229 (1997), and a court, mindful of the public protections underlying chapter 12C, would likely scrutinize such a direct transfer to a county's apparent alter ego, see 1998 Op. Att'y Gen. ___ (#98-1-3); see also 1980 Op. Att'y Gen. 317 (#79-8-2(L)) (quasi-state agencies "may often find themselves bound by restrictions prescribed in laws affecting state agencies"). Cf. *Dyer v. City of Des Moines*, 230 Iowa 1246, 300 N.W. 562, 566 (1941) (city forced to take custody of funds possessed by private entity, who, on city's behalf, collected fees for automobile testing and placed them in bank of its own choice: such city-owned funds must be "handled in the same manner as in which all other funds of the city are handled"). We point out that public funds do not necessarily lose their public character merely because a private entity happens to possess them. See 1994 Op. Att'y Gen. 71 (#93-12-3(L)); see also 1998 Op. Att'y Gen. ___ (#98-1-3).

Iowa Op. Att'y Gen. #00-8-2(L) at p. 4. We concluded with regard the county conservation funds at issue in the 2000 opinion, "[a] court might void a county's direct transfer of county-owned funds to a nonprofit organization that, in addition to expending them on the county's behalf, would invest them in ways the county could not lawfully invest them." *Id.* at p. 5.

Conflict of interest: The donation of public funds to a private non-profit organization also raises concerns regarding conflicts of interest if members of the board governing the governmental agency, which opts to transfer the funds, also serve on the board of directors of the private organization. Whether a conflict actually exists is a fact-based determination which does not lend itself to easy resolution, but consideration should be given to potential conflicts of interest in any transaction of this nature. As discussed in our 1988 opinion, the transfer of funds from a governmental agency to a private corporation could be void if the public duties of the board members who developed and approved the transfer proposal were in conflict with their interests in the private corporation. 1988 Iowa Op. Att'y Gen. 112 (#88-10-2(L)) [1988 WL 247803], citing *Wilson v. City of Iowa City*, 165 N.W.2d 813, 820 (Iowa 1969). "By contrast, a government official who represents a governmental body on a separate 28E entity's governing board does not have an impermissible conflict of interest, at least absent litigation between the two entities." *Id.*, citing *Goreham v. Des Moines Metropolitan Area Solid Waste Agency*, 179 N.W.2d 449, 462 (Iowa 1970).

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Summary: Based upon examination of these authorities, I do not believe that a city library board may simply donate funds received from private donors to a private non-profit organization to use and invest as the nonprofit organization sees fit. Unless the library board retains the ability to oversee expenditures and to demand return of the funds in the event that future trustees do not agree with the delegation of control over the funds, the transaction violates the public purpose and non-delegation principles discussed above. Further, even if safeguards are put in place to assure ongoing oversight and control, I believe that the funds continue to be "public funds," subject to the deposit and investment standards contained in Code sections 12B and 12C and that the funds must be earmarked and spent for the purpose for which the gift was given. A 28E agreement may provide a vehicle to facilitate joint public and private influence over the use of gifts received by a governmental body, by incorporating ongoing public oversight and accountability to the joint undertaking.

I am hopeful that this advice is useful to you in addressing issues related to the transfer of public funds. Please note, however, that this memorandum represents my own analysis of these sections and is not an opinion of the Attorney General. Feel free to contact me if you would like to discuss the issues further.

City of Fort Dodge

Dorsey & Whitney LLP Response to Finding (B)



January 22, 2009

Penny Clayton
City Clerk/City Hall
819 1st Avenue S
Fort Dodge, IA 50501-4739

Re: Response to comments from State Auditor
Our File No. 419414-56

Dear Penny:

I have reviewed the portion of the Detailed Findings of the State Auditor for the period July 1, 2005 through June 30, 2006, found on pages 13 and 14 under the heading (B) "Tax Increment Financing (TIF) Actions and Activities.

The State Auditor is critical of the City's establishment of two trust accounts identified as the Industrial Development Tax Increment Revenue Trust Account and the Riverfront Improvement Tax Increment Revenue Trust Account, and the Findings state, in part, "There is nothing in Chapter 403.19 of the Code of Iowa which allows a municipality to establish a trust fund and set aside taxes divided for tax increment purposes for future urban renewal projects."

The Findings also state, in part, "... the trust accounts created by the City do not meet the definition of debt listed in Subsection 2 of Chapter 403.19 of the Code of Iowa...".

I disagree with these two statements, and I believe the City's actions in this matter were in compliance with state law.

Paragraph 2 of Section 403.19 of the Code of Iowa provides that incremental property tax revenues shall be used to pay the principal of and interest on "loans, moneys advanced to or indebtedness, whether funded, refunded, assumed or otherwise, including bonds ..., incurred by the municipality" to finance urban renewal projects. Paragraph 7 of Section 403.17 of the Code of Iowa includes a definition of "bonds," as follows: "bonds, including refunding bonds, notes, interim certificates, certificates of indebtedness, debentures or other obligations." Section 403.9 of the Code of Iowa provides that, before a municipality may issue bonds, as defined in Section 403.17, the municipality must publish notice and hold a public hearing on the proposed obligation.

City of Fort Dodge

Dorsey & Whitney LLP Response to Finding (B)



The City of Fort Dodge complied with these statutory requirements in establishing the two trust accounts. It is my opinion that the City is not required to have specific statutory authority to create trust accounts and to establish the accounts as debt which may be paid from incremental property tax revenues. These trust accounts were created in conformance with the requirements of Chapter 403 as evidences of debt to be paid from future incremental property tax revenues. A notice of hearing was published, and a hearing was held on November 20, 2000, on the matter of establishing the trust accounts. And, on November 20, 2000, the City Council adopted Resolution No. 00-11-121, entitled "Resolution Establishing Urban Renewal Tax Increment Revenue Trust Accounts, Pledging to the Payment of the Accounts Funds and Portions of Taxes Created Pursuant to the Authority of Subsection 2 of Section 403.19 of the Code of Iowa, for Urban Renewal Purposes of the City of Fort Dodge, Iowa."

The Resolution directs that funds from the City's Urban Renewal Tax Revenue Fund be transferred to the trust accounts in each year as long as projects remain to be undertaken in the Urban Renewal Area, and it provides that such transferred funds shall be used only for eligible urban renewal projects. It specifically prohibits moving any funds from the trust accounts to any other City fund or account, and it directs the City Council to make an annual determination as part of its budget of the amounts that should be transferred in the future. Finally, the Resolution states: "The City hereby pledges to make the annual payments into the Trust Accounts from the Urban Renewal Tax Revenue Fund." This language, and specifically the pledge to make future payments, creates "debt" within the definition of Paragraph 2 of Section 403.19 of the Code of Iowa.

This public hearing process and this Resolution were used specifically to comply with the requirements of Chapter 403 as they relate to the creation of debt that is eligible to be paid from incremental property tax revenues. It is my opinion, therefore, that the Resolution did legally establish the Trust Accounts and did create debt which meets the definition of "debt" found in Paragraph 2 of Section 403.19 of the Code of Iowa.

Very truly yours,

A handwritten signature in black ink, appearing to read 'R. Josten', written over a circular stamp or seal.

Robert E. Josten

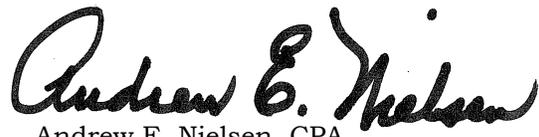
REJ:mlc

City of Fort Dodge

Staff

This reaudit was performed by:

Susan D. Battani, CPA, Director
Kay F. Dunn, CPA, Manager
Paul F. Kearney, CGFM, Senior Auditor
Delynne M. Kroeger, Assistant Auditor

A handwritten signature in black ink that reads "Andrew E. Nielsen". The signature is written in a cursive style with a large initial 'A' and a distinct 'E'.

Andrew E. Nielsen, CPA
Deputy Auditor of State