CONSTITUTIONAL LAW; FINANCE AUTHORITY; STATE OFFICERS AND DEPARTMENTS; CORPORATIONS: Agency authority to create non-profit corporation and irrevocably transfer funds to it. U.S. Const. art. I, § 10; Iowa Const. art. III, §§ 24, 31; art. VIII, §§ 3, 12; Iowa Code §§ 8.39, 12.10, 16.2(1), 16.2(1)(g), 16.2(8), 16.3(10), (11), 16.5, 16.5(9), 16.10, 16.10(1), 16.12(1), 16.13(1), 16.15(4), 16.26(5), 16.27(1), (2), (6), 16.31(1), (4), 16.35, 16.100, 28E.4, 28E.5, 28E.8, 491.39, 504A.2(9), 504A.28, 504A.99 (1997); 524 IAC 15, 15.3, 15.4(2), 15.8 (2/8/89) (Osenbaugh to Churchill, State Representative, 1-21-98) #98-1-3

There is no constitutional bar to the creation of nonprofit corporations by state agencies, although state agencies cannot hold stock in a corporation under Iowa Constitution, Art. VIII, § 3. The legislature may authorize the creation of corporations so long as it grants the corporations no special benefits or privileges.

Given the broad grant of powers to the Iowa Finance Authority (IFA), a court might find it had implied authority to establish a nonprofit corporation to carry out its purposes under chapter 220. However, we strongly recommend that any agency seeking to create a corporation obtain express legislative authority.

It is not per se unlawful to transfer public funds to a non-profit corporation. However, the transfer cannot be a pure donation but must meet a public purpose. A transfer cannot delegate away a future board's authority to allocate public funds. Further, the transfer cannot exceed the agency's statutory authority or violate other mandatory requirements.

A court would likely find that Iowa Housing Corporation must be treated as a public, rather than private, corporation whose unencumbered assets remain subject to legislative control. Otherwise, the transfer to it may be voidable as an impermissible gift to a private entity, an improper delegation of government functions, or an impermissible conflict of interest.

The legislature expressly reserved authority to terminate the Finance Authority and any of its programs or activities and provided that the net earnings of the Authority shall not enure to the benefit of any person other than the State. Iowa Code § 220.2(1)(g), (8). The legislature could arguably by appropriate legislation terminate the corporation, re-structure the corporation, or order it to utilize excess funds for any proper legislative purpose. Any legislative action must not impair valid, existing contracts.

Department of Justice

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January 21, 1998

The Honorable Steven Churchill
State Representative
Statehouse
L O C A L

Dear Representative Churchill:

You have requested an opinion of the Attorney General concerning the authority of a state agency to create a non-profit corporation and to irrevocably transfer state funds to the corporation.

Although this opinion is confined to resolution of issues of law, your question requires examination of the statutory authority of the agency in question. We will address specifically the establishment of the Iowa Housing Corporation by the Iowa Finance Authority. This analysis is informed by IFA and IHC documents and other agency and legislative records provided to us by the Legislative Fiscal Bureau. The opinion process cannot resolve disputed issues of fact, and this opinion does not purport to do so.

Historical Background

In March 1990, members of the board and the executive director of the Iowa Finance Authority (IFA) incorporated the Iowa Housing Corporation under Iowa Code ch. 504A (nonprofit corporations) pursuant to an IFA board resolution. During the fiscal year ending June 30, 1991, the Authority paid "an $8,000,000 grant" to the Housing Corporation. This money was "surplus monies" transferred from bond accounts [the Single Family Mortgage Purchase Program Funds, 1977 Series A and Series A (1979)] to IFA's general fund. Peat Marwick, Iowa Finance Authority Financial Statements, June 30, 1991 and 1990, p. 22 (Notes to Financial Statements).[1]

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[1]In the fiscal years ending June 30, 1990, and June 30, 1991, the legislature did not appropriate monies for the IFA general fund but did appropriate about $ 2.9 million to the Authority for the Housing Assistance Program Fund. Peat Marwick, IFA Financial Statements at pp. 4, 5, 23. The Housing Assistance Program Fund

The transfers of funds were authorized by IFA board resolutions on March 7, 1990, the board authorized a transfer of $ 5 million. The resolution was amended to make the transfer "irrevocable" on July 11, 1990. On October 3, 1990, the board authorized the transfer of $ 3 million. At the time the transfers occurred, the same person, Larry Tuel, was both president of IHC and executive director of IFA. On May 8, 1990, and again on June 5, 1991, Tuel signed the corporation's annual reports as President of the IHC. Tuel signed as IFA board secretary the July 11, 1990, resolution and the October 3, 1990, resolution transferring funds. The same date the Iowa Finance Authority and the Iowa Housing Corporation signed a one paragraph agreement providing that five million dollars would be transferred to the Corporation at such time as the Internal Revenue Service ruled that the Corporation was tax exempt under section 501(c)(3) of the Internal Revenue Code. That agreement was signed by Tuel as president of the Iowa Housing Corporation and by James W. Balmer, Chair of the Iowa Finance Corporation. The incorporators of IHC were Tuel and two members of the IFA board, Beth Colby-Plautz and James W. Balmer.[2]

The creation of the corporation was publicly announced by the Governor, and IHC staff testified before the legislature on the role of the corporation in 1993. Letter from IHC President Larry L. Tuel to Ted Chapler, Iowa Finance Authority, Feb. 5, 1997. The Authority by law was required to file an annual report to the General Assembly. Iowa Code § 220.7 (1989).[3] IFA obtained a letter from private counsel advising on the general question whether IFA could create a private corporation and provide grants to it. That advice did not specifically address what requirements such a corporation or any grants to it must meet.

IFA's transfer of eight million dollars to IHC occurred in the fiscal year ending June 30, 1991. That year the General Assembly transferred the ending balance in 28 special funds to

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paid out $ 138,438 in grants and aid in the fiscal year ending June 30, 1990, and $ 1.2 million in the year ending June 30, 1991. Id. The only other grant made by IFA in those two fiscal years was the eight million dollar transfer to IHC.

[2]A letter from Iowa Housing Corporation President Larry L. Tuel to Ted Chapler, Executive Director, Iowa Finance Authority, dated Feb. 5, 1997, states that IFA funded IHC in November 1990, hired a CEO in December 1990, and hired additional staff in 1991. It is unclear when Tuel became a paid employee of IHC.

[3]Iowa Code chapter 220 (1989) is now Iowa Code chapter 16 (1997). Its numbering and contents remain largely unchanged today.

the general fund and reduced many appropriations in order to balance the general fund. See 1992 Op. Att'y Gen. 8. The legislature also reduced previous IFA appropriations for the housing assistance program from $2,000,000 to zero and the Rural Community 2000 program from $1,600,000 to zero and transferred almost two million dollars from the 1990 fiscal year appropriation to the general fund. 1991 Iowa Acts, ch. 264, §§ 506, 507, 509, 1101.

In the six years ending in fiscal year 1996, the Iowa Housing Corporation received a total revenue of $13,470,730, of which $1,393,431 was from "contributions" and the remainder was the 8 million dollar grant, interest, and investment gain. The IFA grant of eight million dollars of bond proceeds constituted about 85 percent of the $9,393,431 principal received by the corporation.

According to figures from the Legislative Fiscal Bureau, the Iowa Housing Corporation made no donations or grants and about $100,000 of loans in its first two years. In the first six fiscal years, it paid out approximately $ 506,000 in grants. Almost two-thirds of its total expenditures of $ 3.6 million in those six years was $ 2.2 million in salaries and benefits; the remainder of expenses consisted of overhead, professional services and consulting, and loans ($1.2 million in FY 1996).

IFA Authority to Establish a Corporation

State agencies cannot hold stock in a corporation under Iowa Constitution Art. VIII, § 3, however, there is no constitutional bar to the creation of nonprofit corporations by state agencies.[4] Iowa nonprofit corporations are not authorized to have or issue shares of stock. Iowa Code section 504A.26 (1997). The legislature may authorize the creation of corporations by a state agency or by statute so long as it grants the corporations no special benefits or privileges. 1986 Op. Att'y Gen. 19.

The Iowa legislature has, in many instances, expressly authorized the creation of a nonprofit corporation to carry out public functions. These include the Sesquicentennial Commission, § 7G.1; First in the Nation in Education, §§ 257A.1, 257A.4; World Trade Center corporation, § 15C.4; Iowa Business

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[4]We will assume that IFA could not hold shares of corporate stock because of the prohibition in Article VIII, § 3, of the Iowa Constitution. See Train Unlimited Corp. v. Iowa Railway Finance, 362 N.W.2d 489, 495 (Iowa 1985) (construing Iowa Code ch. 307B creating similar "authority" as not authorizing IRFA board to offend this constitutional provision).

Investment Corporation, § 15E.169; Community Health Management System, § 144C.3; and community mental health centers, § 230A.12. Other legislation expressly authorizes state agencies to create nonprofit foundations, including a public policy research foundation, § 7D.15; Wallace technology foundation, § 15E.161; Terrace Hill foundation, § 18.8A; Iowa State Fair Foundation, § 173.22; public broadcasting, § 256.88; Board of Regents, § 262.9(8); Historical Society, §§ 303.7, 303.9; and arts and cultural enhancement endowment foundation, §§ 303C.2, 303C.8.

The fact that the legislature has expressly authorized specific agencies to create or participate in nonprofit corporations under certain statutes implies that a state agency lacks the authority to establish a nonprofit corporation in the absence of express authority to do so. Expressio unius est exclusio alterius (expression of one thing precludes another). Marcus v. Young, 538 N.W.2d 285, 289 (Iowa 1995). Further, state agencies are not listed as "persons" eligible to incorporate a corporation under chapter 504A. §§ 504A.2(9), 504A.28. Cf. 1978 Op. Att'y Gen. 818 (state corn promotion board is an association, not a state agency, and therefore a "person" which could incorporate itself under chapter 504A). The omission of state agencies as "persons" eligible to incorporate a nonprofit, when coupled with the lack of express authority in an agency's enabling statute, creates a strong argument that any such agency would not have the authority to create a nonprofit corporation.

State agencies exercise only that authority expressly or implicitly granted by statute. However, Iowa Code section 220.5(1989) granted broad general powers to IFA:

> The authority has all of the general powers needed to carry out its purposes and duties, and exercise its specific powers, including but not limited to the power to:
>
> 5. Make and execute agreements, contracts and other instruments, with any public or private entity . . . .

The Iowa Supreme Court construed a similar grant of general powers as authorizing the Board of Regents to sell WOI-TV without specific statutory authority to do so. The Court stated that the grant of broad policy-making powers to a state agency carries with it the powers to execute those policies and that ". . . the authority of agencies with broad policy-making functions is broad and plenary in the absence of statutory limitations." Iowans for WOI-TV, Inc. v. Iowa State Bd. of Regents, 508 N.W.2d 679, 685 (Iowa 1993).

Given the broad grant of powers to IFA, a court might conclude that the IFA board could legally establish a nonprofit corporation to carry out its purposes under chapter 220. See Utah Op. Att'y Gen. 87-001 (1997 WL 272582) (implied authority for state university to create non-profit corporation which must, however, be strictly accountable to university). Compare Ky. Op. Att'y Gen. 81-242 (serious doubt whether Kentucky housing agency could create another housing corporation without express authority). However, we strongly recommend that any agency seeking to create a corporation or other separate entity obtain express legislative authority and not rely on implied statutory authority.

IFA Authority to Transfer Monies to Corporation

Assuming that IFA could create the Iowa Housing Corporation, it is necessary to determine whether it could transfer eight million dollars of surplus bond proceeds to it. Section 220.26(5) states that "any balance of [bond] proceeds and interest earned or realized on the investments [after satisfaction of the escrow requirements] may be returned to the authority for use by it in any lawful manner."

In 1980 Op. Att'y Gen. 726, this office opined that state law did not prohibit a county from transferring federal revenue sharing funds to a private, non-profit development corporation pursuant to its home rule authority under Article III, § 39A.

It is not per se unlawful to transfer public funds to a non-profit corporation. However, the transfer cannot be a pure donation but must meet a public purpose. Further, the transfer cannot exceed the agency's statutory authority or violate other mandatory requirements.

On the facts as we understand them, it would appear that IHC could likely be found to be a public, rather than private, corporation whose unencumbered assets remain subject to legislative control. Otherwise, the transfer to it may be voidable as an impermissible gift to a private entity, improper delegation of government functions, and / or impermissible conflict of interest. Further, as a creation of IFA without express legislative authority, IHC has no greater power than that of IFA. The legislature expressly reserved the authority to terminate IFA and any of its programs and to divert any assets except as it would impair the obligation of contract. If, indeed, the only source of authority for the transfer is to carry out IFA's powers and if excess funds traceable to the State remain, the legislature could likely by appropriate legislation dissolve the corporation or order it to utilize excess funds for any proper legislative purpose.

Appropriation of State Funds

You asked whether this transfer was subject to Iowa Code section 8.39, which prohibits the use of an appropriation for any other purpose than that for which it was made except as an authorized intradepartmental transfer.

The Iowa Constitution, Article III, § 24, prohibits withdrawal of money from the treasury except by legislative appropriation. The legislature may, however, constitutionally create a standing appropriation to permit monies to be used for specified purposes. Frost v. State, 172 N.W.2d 575, 579 (Iowa 1969) (primary road fund); Graham v. Worthington, 259 Iowa 845, 146 N.W.2d 626, 637-638 (Iowa 1966) (statute authorizing tort claims to be paid from general fund); Prime v. McCarthy, 92 Iowa 569, 61 N.W. 220, 222-223 (1894) (executive council authority to pay claims for "necessary and lawful" expenses); 1990 Op. Att'y Gen. 88.

IFA's enabling act conferred upon the board significant independent management powers. The Iowa Supreme Court has stated that IFA, although a state agency, ". . . is a corporate entity, separate and distinct from the state, with the power to sue and be sued in its own name, make by-laws for its management, contract, issue bonds and notes, and exercise all those general powers specified in § 220.5, The Code." John R. Grubb, Inc. v. Iowa Housing Finance Authority, 255 N.W.2d 89, 97 (Iowa 1977).

Although Grubb held that IFA is a state agency and public instrumentality, its financial control differs from most state agencies. Its ability to deposit and invest funds was expressly excepted from Iowa Code chapters 452 and 453 (1989), governing deposits of public funds. § 220.5(9) (1989). IFA was audited by outside auditors of its choice although still subject to examination by the State Auditor. §§ 12.10, 220.27(6), 220.31(1), (4). Further, the Authority was authorized to deposit its money in a financial institution of its choice, rather than the State Treasury, and the money could be withdrawn on the order of the person authorized by IFA. § 220.31(1) (1989).

Section 220.26(5) states that "any balance of [bond] proceeds earned or realized on the investments [after satisfaction of the escrow requirements] may be returned to the authority for use by it in any lawful manner." Chapter 220 authorized the authority to make loans, § 220.12(1); to provide down payment grants "to the extent funds are available," § 220.13(1); and to provide financing assistance for housing units from bond proceeds or other monies available by appropriation or otherwise, § 220.15(4). Section 220.10(1) stated that surplus monies not required to service bonds, pay administrative expenses, or accumulate reserves, "shall be used

by the authority to provide grants, subsidies, and services to lower income families and very low income families through the programs authorized in this chapter or to provide funds for the residential mortgage interest reduction program. . . ."

To the extent to which the transfer to IHC fits within one of the authorities provided in chapter 220, it appears that the legislature intended these authorities to act as a standing appropriation -- i.e., to authorize IFA to provide loans, grants, and services without the need for an annual appropriation of monies coming from bond surpluses and other such sources. Whether the IFA transfer in fact fits within any of the programs authorized in the chapter is an issue of fact, not ascertainable by an attorney general's opinion.

Legislative Control

Although the IFA was given broad authority to spend surplus bond proceeds and other monies without the need for specific appropriation, IFA monies remained subject to legislative control. The legislature specifically reserved the power to terminate any programs of the authority and expressly provided that IFA's net earnings shall not enure to the benefit of any person other than the State. § 220.2(1)(g), (8).

The State of Iowa included Iowa Finance Authority funds within the State reporting entity for financial reporting purposes. This is based on the conclusion of the State Auditor that IFA is an authority "for which oversight responsibility is exercised by the State's executive, legislative, and judicial branches" under specified criteria. State of Iowa Comprehensive Financial Report for the Fiscal Year Ended June 30, 1991 [CAFR], p. 17. By contrast, component units and funds not accounted for in the State reporting entity included the Iowa Insurance Guaranty Association and various University related non-profit corporations receiving funds primarily through private sources. 1991 CAFR, p. 17.

IFA was subject to the preaudit and central accounting systems of the State. In 1990, the legislature passed, but the Governor vetoed, a provision exempting the Iowa Finance Authority from the preaudit and central accounting systems of the Department of Revenue and Finance. 1990 Iowa Acts, ch. 1256, § 20. In vetoing the item, the Governor stated:

> It is important that the Iowa Finance Authority continue to operate within the preaudit and central accounting systems of state government. Information about the financial transactions of the Authority should be handled in a manner which is

> consistent with the rest of state government in order to assure integrity in the expenditure of public funds. Additionally, the establishment of separate preaudit, payroll, and accounting systems for the Authority would be expensive and inefficient.

Item veto message printed in 1990 Iowa Acts, p. 675.

The fact that the money was in a special fund, rather than part of the general fund, would not alone prevent legislative appropriation of the monies for a different purpose. The General Assembly has power to transfer money from special funds to the general fund unless the transfer would violate a constitutional provision, impair a contractual right such as a trust or bond agreement, or would violate statutory language expressly restricting the use of funds to a specific and no other purpose. Des Moines Metropolitan Solid Waste Agency v. Branstad, 504 N.W.2d 888, 890 (Iowa 1993); 1992 Op. Att'y Gen. 8. Examples of restricted funds included the Road Use Tax fund (by constitutional limitation) and the Special Railroad Facility Fund, created pursuant to section 307B.23 which stated that the monies in the Fund "shall not be considered as part of the General Fund of the state, are not subject to appropriation for any other purpose by the General Assembly . . . ." Several statutes creating revolving funds from user fees or contributions contained restrictions that the funds shall be used only for the purposes for which those fees and contributions were made. 1992 Op. Att'y Gen. 8.

Subsections 220.27(1) and (2) expressly restricted monies in the IFA bond reserve fund to be "used as required solely for the payment of" bonds. However, excess monies beyond those required to pay bonds and meet escrow requirements could be transferred by the authority "for use by it in any lawful manner," § 220.26(5), and "to any other funds or accounts of the authority. . . ." § 220.27(2). Thus, the statute did not so restrict the excess bond revenue funds to a specific use as to preclude legislative transfer to the general fund.[5]

IFA's enabling act expressly reserved legislative authority to divert net earnings of the authority. Twice in section 220.2(1)(g) and (8) (1989) the legislature specifically provided that the net earnings of the authority "shall not inure to the

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[5]Diversion could still be impermissible if it violated other legal requirements such as the Internal Revenue Code provisions authorizing tax exempt status for the bonds in question or violated binding trust or contractual commitments.

benefit of any person other than the state" and are subject to the reserved power of the state to ". . . alter, amend, repeal, or otherwise change the structure, organization, programs or activities of the authority, including the power to terminate the authority . . ." except that no law shall be passed that would unconstitutionally impair the obligation of contracts. Section 220.2(8) also provided that all property of the authority, including net earnings, shall vest in the state upon termination of the authority.

Thus, when the surplus bond proceeds were transferred into the IFA general fund, the monies were subject to legislative diversion. However, the legislature had authorized IFA to spend the funds in any lawful manner -- i.e., for any expenditures authorized in chapter 220 and not otherwise unlawful.

Donation Prohibition

The Iowa Constitution would prohibit the Board 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.

The General Assembly has not approved the appropriation of funds by IFA for private purposes and a gift to the benefit of a private individual would clearly be for private purposes. John R. Grubb, 255 N.W.2d at 93-94; see also Gritton v. City of Des Moines, 247 Iowa 326, 73 N.W.2d 813, 817 (1955) (city without power to transfer land to charity for inadequate consideration); 1986 Op. Att'y Gen. 113.

Section 220.3(10) (1989) included a legislative finding that "[i]t is necessary to create a state finance authority to encourage the investment of private capital and stimulate the construction and rehabilitation of adequate housing through the use of public financing." Section 220.3(11) (1989) further stated that "[a]ll of the purposes stated in this section are public purposes and uses for which public monies may be borrowed, expended, advanced, loaned, or granted." (Emphasis added).

The Supreme Court has held that the housing purposes set forth in chapter 220 are public purposes. Grubb, 255 N.W.2d at 93-95. Thus, grants carrying out those purposes could meet the public purpose test. In reviewing whether the transfers to IHC met the public purpose test, a court would likely consider the

reasons given by the Authority for the grant, the consideration for the grant, the reasonableness of the IHC program to meet housing needs, any evidence tending to show that the transfer was in fact for a private purpose or permitted favoritism in the granting of governmental benefits. See 1986 Op. Att'y Gen. 113, 118 (discussing local grants for economic development).

The critical question is whether the transfers assured that the property will indeed be utilized for those public purposes. In Op. Att'y Gen. 95-10-1, this office concluded that a lease for ten dollars per year to a private nonprofit corporation was not a prohibited gift because the lease provisions required the corporation to provide health care services and to maintain the property, provided services in consideration of the lease to the city, and provided for reversion of the property to the city upon termination of the lease. We concluded that ". . . the city has contractually ensured that its property will only be used for providing health care services to and for the benefit of the public."

Another opinion concluded 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. 1980 Op. Att'y Gen. 701 (80-5-7(L)). A gift without assurance of continued use for the public purpose would be impermissible. See also, 1986 Op. Att'y Gen. 113, 118.

The IFA Board placed general restrictions on the use of the granted funds. The two resolutions authorizing the transfer of the eight million dollars simply provide:

> It is hereby determined it is necessary and advisable to irrevocably pay over [eight] million dollars to the Iowa Housing Corporation ("Corporation") to be used by the Corporation to provide grants, loans, subsidies, assistance, administration, and services to provide safe, decent, and affordable housing for lower and very low income Iowans.

Article III of the IHC articles of incorporation states that its purposes are to maintain a fund to use and apply exclusively for charitable, literary, scientific and educational purposes pursuant to section 501(c)(3) of the Internal Revenue Code "and more specifically to undertake programs which assist in the attainment of adequate housing for lower and very low income families."

The provisions on termination of IHC in its articles of incorporation do not require the funds to revert to the State or the Finance Authority upon dissolution.[6]

It would be an issue of fact whether IHC has spent these funds for the public purposes specified in the resolutions.

Delegation of Board Discretion

The resolutions transferred control of eight million dollars to IHC with only a general statement of the uses to which the money must be put. In so doing, the board delegated its discretion to decide how best to utilize the monies to meet housing needs to the board of directors of the corporation.[7] In 1992 Op. Att'y Gen. 104, addressing whether regulatory functions could be delegated to a private entity, we stated that ". . . any contract which delegates the powers and responsibilities of a state agency to a private actor must be scrutinized with some care."

In 1990 Op. Att'y Gen. 11, we held that a county hospital board of trustees could not turn over future control of hospital assets to a private foundation to administer and control for the purpose of providing health care scholarships. Because the control of hospital assets was a duty of the hospital board and the exercise of a government function, the current board lacked authority to bind future boards from controlling these assets by placing them in a foundation.

When the Board transferred the monies to the corporation, it transferred to another body the discretion to decide how the money was to be spent. An "irrevocable" transfer of the bond proceeds could also divest future legislatures of the ability to appropriate these funds. Indeed, this may have been one of the

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[6]The Iowa Finance Authority, Iowa Housing Corporation Proposal Briefing Paper dated February 1990, in a section entitled "Legal," stated that, in the instrument transferring IFA funds to the corporation, ". . . it is essential to direct what the funds be used for. If the Corporation is ever dissolved, its funds must revert to the Iowa Finance Authority or the State. There are no shareholders of a Chapter 504 corporation." (p. 11).

[7]In the initial years, the IHC board would include two members of the IFA board and the IFA executive director. IFA's board, however, has nine members. Iowa Code § 220.2(1) (1989). Thus, the transfer would even initially delegate these functions to a small minority of the board.

reasons for creating the corporation.[8] The IFA staff briefing paper recommending creation of a housing corporation stated:

> The establishment of a Housing Corporation would guarantee that any excess Iowa Finance Authority bond-generated dollars would go to housing. Through the Corporation, housing funds would be protected from diversion for other purposes and a housing fund that will live in perpetuity will be created. . . .

Iowa Finance Authority, Iowa Housing Corporation Proposal Briefing Paper, Feb. 1990, p. 4-5.

Statutory Authority to Provide Grants

Whether the transfer to IHC is a lawful grant would depend on the adequacy of the consideration or benefit received for the funds and compliance with statutory and regulatory requirements.

The Finance Authority had broad authority to provide grants to private entities to carry out the purposes of chapter 220. Section 220.10 (1989) authorized the authority to establish a loan and grant fund from surplus bond funds and other sources.[9]

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[8]In its resolution approving the second transfer of three million dollars to the Corporation on October 3, 1990, the Board stated it had determined that it was "necessary and advisable" to pay over an additional three million dollars [in addition to the previous five million]. Yet in all of fiscal years 1991 and 1992, the Corporation made no grants and paid out a total of $ 135,862 and $ 400,469 in FY 1990 and FY 1991 respectively in salaries and expenses. The total of outstanding loans by IHC at the end of FY 1991 was less than $100,000.

[9]Section 220.17, entitled "Emergency housing fund," stated that IFA may make grants and temporary loans to defray the local contribution requirement for housing sponsors, to defray temporary housing costs resulting from disasters, and to defray a portion of the expense to develop and initiate housing which deals creatively with housing problems of low-income families, elderly families, and families with persons with disabilities. Section 220.40 authorized a housing program fund within the State Treasurer's office for specific programs.

Iowa Code section 220.10(1) stated that surplus monies ". . . shall be used by the authority to provide grants, subsidies, and services to lower income families and very low income families through the programs authorized in this chapter or to provide funds for the residential mortgage interest reduction program . . . ." It would be an issue of fact whether the Authority reasonably determined that the grant to IHC provided grants, subsidies, and services to lower income families through the programs authorized in the chapter.

Section 220.100 created a more general housing trust fund and authorizes financial assistance including grants for the programs authorized in that section. That section also required that IFA establish rules for the financial assistance programs.

The Finance Authority adopted rules in 1989. 524 IAC 15, published as IAB Vol. XI, No. 16 (2/8/89) p. 1491, ARC 9651. Entitled "Housing Assistance Fund Board," the rules stated that the program included monies allocated from funds created by several statutory sections, including sections 220.10 and 220.100. 524 IAC 15.3. That rule stated:

> It is the intent of the authority to administer funding available through these various funds for use in supporting eligible projects and activities as defined in 524-15.7 (220) of these rules and in the statutes creating these funds, thereby avoiding the need to create, and the confusion caused by several smaller, single-purpose, minimally funded assistance programs.

524 IAC 15.3 (2/8/89). The rules also established criteria for eligible and ineligible projects, application rating criteria, and administrative requirements.[10]

Those rules in 1990 limited the amount a single project could receive to the lesser of $400,000 or 25 percent of the funds available from the fund program at any given time. 524 IAC 15.4(2), as amended by IAB Vol. XII, No. 15 (1/24/90) pp. 1369-1379, ARC 613A. Section 220.100 prohibited any of the funds provided to a "housing sponsor" under the section to be used for the costs of administration. See also 524 IAC 15.8 (2/8/89).

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[10]Eligibility criteria for grants are generally void and unenforceable if not adopted pursuant to the rulemaking procedures of chapter 17A, the Iowa Administrative Procedures Act. 1980 Op. Att'y Gen. 715.

Significant issues therefore exist concerning whether the IHC transfer would be authorized under the specific grant authorities in chapter 220 (1989).

Limitations of Implied Authority

Because the authority to create IHC and transfer funds to it is not express but implied from the powers of IFA to do all that is necessary and proper to carry out its duties, it would appear that the corporation would only be authorized to act for the benefit of IFA and in accordance with IFA's powers. In Formal Opinion No. 87-1001, the Utah Attorney General held that a university foundation created without express statutory authority could only act to benefit the university and within the powers of the official creating it. 1987 WL 272582, p. 15. That opinion concluded that any corporation so created must be purely incidental to the functions of the parent agency, must be ultimately accountable to the parent agency, and must turn over any excess funds to the parent agency on a regular basis.

IFA's enabling act expressly reserved legislative power to terminate IFA programs and to divert surplus funds to any other purpose. Iowa Code §§ 220.2(1)(g), (8) (1989). A court could well find that IFA had no power to prevent legislative control of those public funds by creating a new entity to hold them and that IHC held the funds subject to this express statutory reservation.

Joint Undertaking

While a public body cannot contribute funds to a private charitable corporation, it can enter into a true joint or cooperative undertaking with a private agency under section 28E.4. However, the public body should be involved in management of the joint undertaking and receive a benefit from it. 1976 Op. Att'y Gen. 634.

IFA could not likely rely on chapter 28E as authority for IHC unless it filed a 28E agreement with the Secretary of State as required by Iowa Code section 28E.8. Cf. City of Windsor Heights v. Spanos, __ N.W.2d ___ (Iowa 12/24/97) (city attorney lacked de jure authority to prosecute county offenses where 28E agreement was never recorded but prosecution upheld as de facto officer).

Further, a public agency "could not delegate more power than it had" to a separate entity created under section 28E.5.[11]

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[11]This is not to say that a separate corporate entity created by government bodies does not have significant differences in legal treatment from that of the creating entities. For example,

Barnes v. Dep't of Housing and Urban Development, 341 N.W.2d 766, 768 (Iowa 1983) (city could not give 28E housing agency authority to act without statutorily required city council approval). In Goreham v. Des Moines Metropolitan Area Solid Waste Agency, 179 N.W.2d 449, 455 (Iowa 1970), upholding chapter 28E against constitutional challenge, the Court stated:

> The legal 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 already have the power to do.

Ultra Vires Contracts

State contracts made pursuant to legislative authority are binding upon the State. AFSCME v. State, 484 N.W.2d 390, 392 (Iowa 1992); Kersten Co. v. Dept. of Soc. Services, 207 N.W.2d 117, 118 (Iowa 1973). However, a contract which improperly binds future legislative functions is ultra vires and void.[12] Marco Development Corp. v. City of Cedar Falls, 473 N.W.2d 41, 44 (Iowa 1991) (agreement between city and developer to not charge developer for future street widening). See also Frost v. State, 172 N.W.2d 575, 583 (Iowa 1969) (holding statute unconstitutional which prohibited legislature from diminishing power of commission while bridge bonds outstanding). A contract may also be void if entered into in violation of mandatory statute. Everds Bros. v. Gillespie, 126 N.W.2d 274, 277 (Iowa 1964). A municipal or public corporation is not bound by a contract which is beyond the scope of its corporate powers or ultra vires, especially where the party claiming under the contract was aware of the incapacity or failed to use due diligence to determine whether the entity had the power to enter into the contract. State ex rel. Wadsworth v. Board of Supervisors of Linn County, 232 Iowa 1092, 6 N.W.2d 877, 880 (1942) (county long-term lease of courthouse space to abstract company void).

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creating entities are not liable for debts of the new corporation. Allis-Chalmers Corp. v. Emmett County Council of Governments, 355 N.W.2d 586, 590 (Iowa 1984).

[12]In United States v. Winstar Corp., __ U.S. __, 135 L. Ed. 2d 964, 999-1000, 116 S. Ct. 2432 (1996), the Supreme Court held that the Government could be liable to pay compensation if it entered into a contract to preserve the regulatory status quo. The opinion recognized that, to be liable, the agency entering into the contract must have had authority to do so.

Conflict of Interest

The executive director of IFA and members of its board could only serve on the IHC board and participate in the transfer of monies to a corporation they incorporated if IHC served a public purpose. See 1988 Op. Att'y Gen. 70. The transfer of funds would likely be void if the public duties of the three IFA officials were in conflict with their interests as officers of IHC.[13]

At common law, the existence of a personal financial interest would constitute an impermissible conflict of interest, rendering the transfers void. Wilson v. City of Iowa City, 165 N.W.2d 813, 820 (Iowa 1969). Further, in Wilson, the Court held that a University of Iowa employee was barred from voting as an Iowa City council member on urban renewal issues because of the University's interest in those decisions. 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.[14] Goreham, 179 N.W.2d at 462.

Section 220.35 contained a specific conflict of interest provision which provided that a resolution of the authority is not invalid "because of a vote cast by a member" in violation of the interest prohibition unless the vote was decisive in the passage of the resolution. The Court might find that this section preempts the common law of conflict of interest. See Helmke v. Board of Adjustment, 418 N.W.2d 346, 349 (Iowa 1988) (legislative definition of disqualifying amount of stock ownership superseded "any interest" test in Wilson). However, if the facts established an organizational conflict of interest in the development of the transfer proposal as well as in the vote on the resolution approving the transfer, a court might read the statute narrowly so that section 220.35 supplanted the common law solely when the member's only participation was in voting for the

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[13]Private legal counsel had advised that common membership on the IFA and IHC boards would not alone violate the conflict of interest provisions in section 220.35 in so much as the corporation was to serve the same public purposes as the Finance Authority itself. That letter advised that the executive director of IFA could not obtain additional compensation from the Housing Corporation.

[14]The mere fact that government officials serve on the board of a nonprofit corporation does not convert that corporation to a governmental body, where the corporation is not exercising a function of the governmental body. City of Dubuque v. Dubuque Racing Association, 420 N.W.2d 450, 453 (Iowa 1988).

resolution. Compare Medco Behavioral Care Co. v. State Dep't of Human Services, 553 N.W.2d 556, 566-568 (Iowa 1996) (holding remedy of disqualification of bidder required as a matter of law where sister company drafted request for proposals).

Impairment of Contracts

The legislature reserved the right to terminate any program or activities of IFA and expressly stated that the net earnings of the authority "shall not inure to the benefit of any person other than the state." Iowa Code § 220.2(1)(g), (8). This legislation pre-existed the transfer of funds to IHC.

The corporation and its members acquired no vested right to be free of pre-existing legislative limitations on IFA funds. See Hunziker v. State, 519 N.W.2d 367, 371 (Iowa 1994). This express reservation of legislative rights in IFA's enabling law would make it very difficult for IHC to assert that the IFA resolutions transferring funds to IHC gave it a vested right to use any unencumbered public funds free from legislative action. Compare Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat) 518, 4 L.Ed. 629 (1819).[15]

The legislature did not reserve authority to impair the obligation of contracts in section 220.2(1)(8). See United States v. Winstar Corp., __ U.S. __, 135 L. Ed. 2d 964, 999-1000, 116 S. Ct. 2432 (1996). On the other hand, if IFA merely donated eight million dollars to the Iowa Housing Corporation and lacked power to "irrevocably" grant these monies or if the Corporation has not met the conditions of the original agreement, then it is unlikely that the corporation or its officers could successfully assert that legislative action terminating or restructuring the corporation or diverting any unencumbered assets deriving from IFA funds was an unconstitutional impairment of contracts in violation of the United States Constitution, Art. I, § 10, cl. 1, and the Iowa Constitution, Art. I, § 21.[16]

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[15]Iowa Constitution, Art. VIII, § 12, and Iowa Code sections 491.39 and 504A.99 also expressly reserve the power of the state legislature to repeal or amend the articles of a corporation. Thus, the principles of Dartmouth College that the State has granted corporations a vested right to continued existence do not apply in Iowa. Woodbine Savings Bank v. Shriver, 212 Iowa 196, 236 N.W. 10 (1931), aff'd., 285 U.S. 467, 76 L. Ed. 884, 52 S.Ct. 430 (1931); Blue Cross of Iowa v. Foudree, 606 F. Supp. 1574, 1581 (S.D. Iowa 1985)

[16]The Housing Corporation has entered into contracts, loans, and grants based on the transfer of these assets in 1990. The legislature has not exercised control over those assets, and third

The Housing Corporation was created by a state agency to carry out state functions under a statute which provided that public funds should not enure to the benefit of any person other than the State. Legislative action changing a corporate structure may be permissible where it does not substantially impair private contractual relationships or it serves a significant and legitimate public purpose. Significant factors include both the degree of private expectation of freedom from regulation and the public interest served by the regulation. Blue Cross of Iowa v. Foudree, 606 F. Supp. 1574, 1580-1582 (S.D. Iowa 1985) (upholding legislation requiring majority of health insurance corporation board to be paid subscribers). Thus, the Wisconsin Attorney General opined that the legislature could impose new controls on public purpose corporations, including provisions for appointment and removal of officers, state procurement, ethics, compensation, and audit requirements. Wis. Op. Att'y Gen. 32-85 (1985 WL 257970).

A political subdivision or municipal corporation lacks standing to challenge the constitutionality of state law. Polk County v. Iowa State Appeal Bd., 330 N.W.2d 267, 271 (Iowa 1983). This rule applies to state officials as well. 1984 Op. Att'y Gen. 66; 1980 Op. Att'y Gen. 42, 48. Governmental entities cannot object to legislative power to transfer funds created through legislative authority. City of Des Moines v. Dist. Court, 241 Iowa 256, 263-264, 41 N.W.2d 36, 40 (1950) ("[w]hat the state gives it can as readily, take away."); Scott County v. Johnson, 209 Iowa 213, 221-222, 222 N.W. 378, 380 (1928) (legislative amendment diverting interest on county funds to state sinking fund).

The original members of the corporation were state officers or employees at the time the corporation was created. IFA's only authority to create the corporation was to carry out IFA's duties as a state agency. The legislature expressly reserved power to terminate any IFA program. The great majority of the IHC assets are traceable to state agency funds in which the legislature had expressly reserved rights. For these reasons, a court might find that IHC or its members lacked personal interests sufficient to preclude legislative termination or re-structuring of the corporation and transfer of the unencumbered funds traceable to

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parties have contracted with the Corporation in reliance on its authority over these assets. In determining whether there are vested rights which would be impaired by a diversion of funds, it would be necessary to examine the contractual rights of third parties with whom the Corporation has contracted in the ordinary course of business. This would include examination of the extent to which those funds have been pledged as security for housing loans.

the IFA funds or legislative action compelling IFA to take action to assure that the purposes of the transfer are met. See In re Los Angeles County Pioneer Society, 257 P.2d 1, 7-8 (Cal. 1953) (Traynor, J) (transferring assets to another charitable corporation rather than distributing among members not violative of constitutional rights since members never had a right to receive the property as individuals); Hanshaw v. Day, 120 S.E.2d 460, 464 (Va. 1961) (members of charitable corporation acquired no property rights in corporate assets during its lifetime or upon dissolution; otherwise would convert a charitable corporation "into a vehicle for the personal pecuniary gain of the members.").

To the extent that IHC has funds received by private donation subject to limitations on their use, those would be subject to a trust and not subject to legislative diversion from that use. See Des Moines Metropolitan Solid Waste Agency v. Branstad, 504 N.W.2d 888, 890 (Iowa 1993); 1992 Op. Att'y Gen. 8.

Conclusion

On the facts known to us, it would appear that the Iowa Housing Corporation, created without express statutory authority by the Iowa Finance Authority to carry out its duties and largely funded by bond proceeds, would constitute a program or activity of the Iowa Finance Authority. It could therefore be subject to legislative termination according to the legislative reservation of rights in the Finance Authority's enabling act. Unencumbered funds traceable to IFA monies could be subject to legislative diversion where diversion would not impair contractual obligations or violate trust conditions. IFA funds transferred to the Housing Corporation would remain subject to the public trust and conditions imposed in the transfer documents.

Sincerely,

Elizabeth M. Osenbaugh

ELIZABETH M. OSENBAUGH
Solicitor General

CITY OFFICERS AND EMPLOYEES; CONFLICT OF INTEREST: Interest in public contracts with private employer. Iowa Code §§ 15A.2, 362.5 (1997). Section 15A.2 indicates that city council members who work at one of their city's major industries, or whose spouses work there, may participate in council discussions on a proposed "economic development grant" involving the employer and vote on a resulting award of financial assistance to it. These council members should exercise great caution whenever an economic development measure involving the employer comes before the council for discussion or vote; disclose on the record the facts and general circumstances of their employment or a spouse's employment before the council discusses or otherwise considers any such measure; and consult with the city attorney before participating in any matter involving a financial benefit unique to the employer. Council members who wish to exercise caution in resolving conflicts of interest should abstain from participating in the decision-making process or voting on any resulting award of financial assistance to the employer in order to avoid an appearance of impropriety. Section 362.5 prohibits these council members from participating in council discussions on the employer's proposed purchase of vacated streets and alleys and from voting on any resulting contract with the employer. (Kempkes to Hahn, State Representative, 5-27-98) #98-5-3

May 27, 1998

The Honorable James Hahn
State Representative
State Capitol
LOCAL

Dear Representative Hahn:

You have asked for an opinion involving members of a city council who work for one of their city's major industries, which also employs the spouse of another member sitting on the seven-member council. You ask whether any of these council members have a conflict of interest that prevents them from either participating in council discussions on the employer's requests for city support of its development and expansion or voting on any measures involving the employer. The employer's requests involve an "economic development grant" and a purchase of vacated streets and alleys.

Your questions primarily implicate Iowa Code chapters 15A and 362 (1997). Regarding the proposed economic development grant, section 15A.2 indicates that the council members may participate in council discussions on it and vote on a resulting award of financial assistance to the employer. Regarding the proposed purchase of vacated streets and alleys, section 362.5 prohibits the council members from participating in council discussions on it and from voting on any resulting contract with the employer.

Preliminarily, we must point out that section 15A.2 diverges in several respects from the common law on conflicts of interest. Although the General Assembly may certainly supplant the common law

by statutorily defining such conflicts, council members should be wary that section 15A.2 may not, in fact, occupy the entire field of applicable prohibitions. Indeed, section 15A.2 does not purport to supersede any prohibitions. The council members should thus refer to all relevant sources of law on conflicts of interest to determine whether any other law, federal or state in origin, precludes their participation in matters relating to the grant to the employer. Even in the absence of any prohibition, council members who believe their employment or a spouse's employment precludes objective decision-making on the grant should abstain from participating in such decision-making.

We also note that legal counsel for the city must ensure that any award of a grant to the employer does not violate the constitutional prohibition against using public property for private purposes. See generally Iowa Const. art. III, § 31 (1857). A court could void a grant if it furthers private rather than public purposes. See, e.g., Gritton v. City of Des Moines, 247 Iowa 326, 73 N.W.2d 813, 820 (1955). It appears that the chances of court action would increase when more than one council member has links with the employer.

I.

Chapter 15A governs the Use of Public Funds to Aid Economic Development. See Iowa Code § 15A.1(1). Section 15A.2 provides:

> If a member of the governing body of a city . . . has an interest, either direct or indirect, in a private person for which grants, loans, guarantees, tax incentives, or other financial assistance may be provided by the governing board or the governmental entity, the interest shall be disclosed to that governing body or governmental entity in writing. The member or employee having the interest shall not participate in the decision-making process with regard to the providing of such financial assistance to the private person.
>
> Employment . . . by any other person having such an interest shall not be deemed an indicia of an interest by the employee or of any ownership or control by the employee of interests of the employee's employer.
>
> The word "participate" . . . shall be deemed not to include discussion or debate preliminary to a vote of a local governing body . . . upon proposed ordinances or

> resolutions relating to such project or any abstention from such a vote.
>
> . . . .
>
> The phrase "decision-making process" shall not be deemed to include resolutions advisory to the local governing body . . . by any citizens group, board, body, or commission designated to serve a purely advisory approving or recommending function for economic development.
>
> A violation of a provision of this section is misconduct in office . . . . However, a decision of the governing board or governmental entity is not invalid because of the participation of the member or employee in the decision-making process or because a vote cast by a member or employee in violation of this section unless the vote was decisive in the awarding of the financial assistance.

See generally Iowa Code § 4.1(20) ("person" includes corporation, limited liability company, business trust, partnership or association, "or other legal entity," unless otherwise provided by law), § 4.1(30)(a) ("shall" in statute normally imposes a duty), § 362.2(8) ("council" means the governing body of a city), § 362.2(9) ("council member" means a member of a council), § 362.2(17) ("person" includes firm, partnership, domestic or foreign corporation, company, association or joint stock association, trust, "or other legal entity"), § 364.2 (city power vests in council except as otherwise provided by state law).

Chapter 362 sets forth the City Code of Iowa. See generally Iowa Code § 362.9. "[B]eing necessary for the public safety and welfare," the City Code "should be liberally construed to effectuate its purposes." Iowa Code § 362.8.

Section 362.5 applies to a city officer's or employee's "contract" with the city and defines that term as "any claim, account, or demand against or agreement with a city, express or implied." Section 362.5 generally provides:

> 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.

See generally Iowa Code § 362.2(23) ("shall" in City Code imposes a duty), § 362.2(15). Section 362.5 then sets forth ten exceptions to this general rule. See Iowa Code § 362.5(1)-(10).

Section 362.6 provides: "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." See generally Iowa Code § 362.2(13); 1994 Op. Att'y Gen. 125, 128-29. Section 362.6 also provides: "For the purposes of this section, the statement of an officer that the officer declines to vote by reason of conflict of interest is conclusive and must be entered of record." See generally Iowa Code § 362.2(19).

II.

You have asked about a conflict of interest on the part of certain members of a city council. In this state, the common law as well as statutory provisions govern conflicts of interest. 1994 Op. Att'y Gen. 125, 125.

A "conflict of interest"

> is generally defined as existing "whenever a person serving in public office may gain any private advantage, financial or otherwise, from such service." "It is not necessary that this advantage be a financial one. Neither is it required that there be a showing the official sought or gained such a result. It is the potential for conflict of interest which the law desires to avoid."
>
> The determination . . . whether a conflict of interest exists in a given situation involves an analysis of the particular facts of a case and action taken by the office holder. [E]videntiary questions are not appropriately resolved in an Attorney General's opinion . . . .

1992 Op. Att'y Gen. 21 (#91-4-4(L)) (citations omitted). See generally Leffingwell v. Lake City, 257 Iowa 1022, 135 N.W.2d 536 (1965); Wayman v. City of Cherokee, 204 Iowa 675, 215 N.W. 655 (1927); Peet v. Leinbaugh, 180 Iowa 937, 164 N.W. 127 (1917); 1998 Op. Att'y Gen. ___ (#98-1-3); 1996 Op. Att'y Gen. ___ (#96-10-2(L)); 1976 Op. Att'y Gen. 81; Knox, "Contracts of Political Subdivisions in Iowa," 10 Drake L. Rev. 53 (1961).

Statutory and common-law prohibitions against public officers and employees having interests in public contracts generally extend to agreements "of any character" with their public employer. 10A

E. McQuillin, The Law of Municipal Corporations § 29.97, at 14 (1990); see Note, 55 Iowa L. Rev. 450, 451 (1969) ("any actions that are irreconcilable with the public welfare" generally constitute conflicts of interest under the common law). Such interests may be purely personal in nature, Bluffs Development Corp. v. Board of Adjustment, 499 N.W.2d 12, 15 (Iowa 1993); 1996 Op. Att'y Gen. ___ (#95-8-2); 1984 Op. Att'y Gen. 78, 80, and "very small," James v. City of Hamburg, 174 Iowa 301, 156 N.W. 394, 397-98 (1916). They need only affect the judgment and conduct of the public officers or employees either in making or enforcing the contracts. Id. Private employment "'has always been recognized as one source of possible conflict of interest'" for a public official, who may have to decide "between public duty and private advantage" with regard to a proposed contract involving the public entity and the private employer. 1988 Op. Att'y Gen. 21 (#87-1-15(L)) (citation omitted). See 1996 Op. Att'y Gen. ___ (#96-10-2(L)); see also Iowa Code § 68B.2A(1).

Our review of conflicts-of-interest questions implicates two somewhat divergent principles. First: Conflict-of-interest statutes imposing criminal penalties must be construed narrowly. 1982 Op. Att'y Gen. 496, 501. They must give public officers and employees "a clear and unequivocal warning" what action would expose them to liabilities or penalties. Id. Second: Public officers and employees must be held to "a strict accountability" in contracts with their public employer. 10A McQuillin, supra, § 29.97, at 13. The applicable laws have a practical focus, they demand complete loyalty to the public, they encompass situations in which the mere possibility of conflict exists, and they seek to promote confidence in the integrity and impartiality of public officers and employees. 1994 Op. Att'y Gen. 119, 121.

(A)

You have asked whether the council members may participate in council discussions on an economic development grant involving the employer and vote on any resulting award of financial assistance to it.

This question initially implicates chapter 15A, which, by its definition of "economic development" in section 15A.1(1), limits our discussion to "private or joint public and private investment involving the creation of new jobs and income or the retention of existing jobs and income that would otherwise be lost." Compare Iowa Code § 15A.1(1) with Iowa Code § 15.327(5) (defining "economic development area"). Cf. Iowa Code § 15.108 (identifying areas of responsibility for the Iowa Department of Economic Development). Although we cannot identify every project encompassed by this definition, we note it does not appear restrictive in its language. See generally Brady v. City of Dubuque, 495 N.W.2d 701, 706 (Iowa 1993). If chapter 15A does not apply to the project, discussions

and votes by the council members concerning the employer would remain subject to the general statutes and common-law rules governing conflicts of interest.

(1). Section 15A.2 provides that council members shall not "participate" in the decision-making process on an economic development grant resulting in financial assistance to a "private person" in whom they have an interest. Section 15A.2, however, also provides that the word "participate" "shall be deemed not to include discussion or debate preliminary to a vote" by the council "upon proposed ordinances or resolutions relating to" an economic development project. Section 15A.2 further provides that "[e]mployment . . . by any other person having such an interest shall not be deemed an indicia of an interest by the employee or of any ownership or control by the employee of interests of the employee's employer."

Through its specific definition of "participate," section 15A.2 does not itself prohibit discussions preliminary to a vote by the council members about an economic development grant involving their employer or a spouse's employer. See generally In re S.M.D., 569 N.W.2d 609, 611 (Iowa 1997) ("[a] statutory provision is ambiguous if reasonable minds could differ or be uncertain as to its meaning"). Although the council members may engage in preliminary discussions, a court might nevertheless conclude the council members have violated section 15A.2 if they help define the criteria for a grant involving the employer. See Medco Behavioral Care Corp. v. Iowa Dep't of Human Servs., 553 N.W.2d 556, 565-68 (Iowa 1996).

(2). Section 15A.2 does not, however, necessarily permit the council members to vote on any resulting award of financial assistance to the employer. It simply provides that employment "shall not be deemed an indicia" of a conflict of interest. We believe that this language means that factors other than mere employment may create a conflict of interest for the council members. Cf. Helmke v. City of Ruthven, 418 N.W.2d 346, 348-49 (Iowa 1988) (statute provided that a public servant's stock ownership of less than five percent in a corporation "shall not be deemed an indicia" of a conflict of interest; court noted that such ownership would not constitute a conflict "in the absence of any other evidence pointing to bias or prejudice"). We note that a person disqualified from voting on a contractual award under the common law could not participate in the steps preceding the vote. See Bay v. Davidson, 133 N.W.2d 688, 111 N.W. 25, 26 (1907); see also Medco Behavioral Care Corp. v. Iowa Dep't of Human Servs., 553 N.W.2d at 565-68.

Moreover, a court might find a violation of Iowa Code chapter 721, which governs Official Misconduct, when council members have an actual conflict of interest based upon their receipt of

remuneration from a private employer specifically in return for securing to it an economic development grant from the council. Such circumstances might also provide a basis for invalidating the grant. Compare Security Nat'l Bank v. Bagley, 202 Iowa 701, 210 N.W. 947, 951 (1926); Note, 55 Iowa L. Rev. 450, 451-52 (1969) with Norrell v. Judd, 374 S.W.2d 192, 193-94 (Ky. App. 1963); Woodward v. City of Wakefield, 210 N.W. 322, 323 (Mich. 1926). Cf. Iowa Code § 362.5(5) (creating exception to general prohibition against contracts between city officer or employee and city for contract in which, among other things, city officer or employee "has an interest solely by reason of employment" if "remuneration of employment will not be directly affected as a result of the contract" and if "the duties of employment do not directly involve the procurement or preparation of any part of the contract"); 1998 Op. Att'y Gen. ___ (#98-1-3) (in Wilson v. Iowa City, 165 N.W.2d 813 (Iowa 1969), "a University of Iowa employee was barred from voting as an Iowa City council member on urban renewal issues because of the University's interest in those decisions").

Indeed, it appears that this type of remuneration would offend Iowa Code chapter 68B, the Iowa Public Officials Act. See generally Iowa Code § 68B.2A(3). Section 68B.2A(1) provides that any person who serves a political subdivision of the state "shall not engage in any outside employment . . . which is in conflict with the person's official duties and responsibilities." Section 68B.2A(1)(b) further provides that "an unacceptable conflict shall be deemed to include" an official's outside employment that

> involves the receipt of, promise of, or acceptance of money or other consideration by the person, or a member of the person's immediate family, from anyone other than . . . the political subdivision for the performance of any act that the person would be required or expected to perform as a part of the person's regular duties or during the hours during which the person performs service or work for the . . . political subdivision
> . . . .

Section 68B.2A(2) provides that in such a situation the official may cease the outside employment or "[p]ublicly disclose the existence of the conflict and refrain from taking any official action or performing any official duty that would detrimentally affect or create a benefit for the outside employment . . . ." Section 68B.2A(2)(b) defines "official action" or "official duty" to include "participating in any vote" and "taking affirmative action to influence any vote."

Further, section 15A.2 differs from other statutory provisions and common-law rules designed to guard against conflicts of interest on the part of public officers and employees. See generally Note, 22 Drake L. Rev. 600 (1973); Note, 55 Iowa L. Rev. 450 (1969). That the General Assembly enacted section 15A.2 may not, in itself, "immunize" those council members having actual conflicts of interest as employees. See Bay v. Davidson, 133 Iowa 688, 111 N.W. 25, 27 (1907) ("wholly untenable" for party to argue that conflict-of-interest statutes displaced common-law rules on conflicts of interest); 1994 Op. Att'y Gen. 119, 123 ("officer" -- partially defined in general conflict-of-interest statute as person serving a fixed term -- "might [still] encompass persons having all the attributes of statutorily defined officers except for their serving fixed terms, particularly since no reason exists for treating [such persons] differently for purposes of conflicts-of-interest laws than those persons statutorily defined as officers"); 1994 Op. Att'y Gen. 125, 125; see also Helmke v. Board of Adjustment, 418 N.W.2d 346, 349 (Iowa 1988); 1998 Op. Att'y Gen. ___ (#98-1-3) (a court "might find" that Iowa Code section 220.35 (1997) "preempts the common law of conflict of interest").

Last, where a particular state or local project depends in some way upon federal funds, see, e.g., 23 U.S.C. § 112(c), federal law may serve as a source of authority governing conflicts of interest and a basis for formally investigating allegations of impropriety. Note, 55 Iowa L. Rev., supra, at 455-56; see Medco Behavioral Care Corp. v. Iowa Dep't of Human Servs., 553 N.W.2d at 565-68. We take note of section 364.18, which provides:

> Subject to applicable state or federal regulations in effect at the time of the city action, a city may accept contributions, grants, or other financial assistance from the state or federal government. Upon a finding of public purpose, the city may disburse the assistance to any person to be used for economic development projects . . . .

(3). In view of the foregoing, we urge great caution on the part of the council members whenever an economic development measure involving the employer comes before the council for discussion or vote. Those council members should disclose on the record the facts and general circumstances of their employment or a spouse's employment before the council discusses or otherwise considers any such measure and should consult with the city attorney before participating in any matter involving a financial benefit unique to the employer. Council members who wish to exercise caution in resolving conflicts of interest should abstain from participating in the decision-making process or voting on any resulting award of financial assistance to the employer in order to

avoid an appearance of impropriety. See 1986 Op. Att'y Gen. 10 (#85-2-6(L)).

(B)

You have asked whether the council members may participate in council discussions on the employer's proposed purchase of vacated streets and alleys and vote on any resulting contract with the employer. See generally Iowa Code § 364.7 (setting forth procedures that govern disposal of city property). This question implicates chapter 362.

Little doubt exists that the employer's proposed purchase would involve a "contract" for purposes of section 362.5. Your specific question, however, does not require us to determine whether the contract likely falls within either the general prohibition in section 362.5 or any of its exceptions.

In 1994, we issued an opinion involving a council member with a partnership stake in an engineering firm that designed a road extension project and proposed to contract with the city for supervising its construction. See 1994 Op. Att'y Gen. 125. Assuming that section 362.5 did not prohibit the making of such a contract, we addressed "the remaining question [whether the council member could] participate in council actions on the project, as well as on other matters possibly affecting the availability of funding for [it]." Id. at 126.

After reviewing the seminal Iowa case on conflicts of interest, Wilson v. Iowa City, 165 N.W.2d 813 (Iowa 1969), we concluded:

> Partners occupy fiduciary relationships toward each other. Clearly, [this council member's] duties to the public and to his partnership may conflict, for council approval of the project will mean work for his partnership. It matters not whether a public official places one duty above the other, "it is the potential for conflict of interest which the law desires to avoid."
>
> Several of the questions you pose concern the extent to which the council member may participate in decisions related to the road extension project other than the ultimate vote to decide whether to fund the project. To the extent that a conflict exists, participation in the making of a contract by a public official or employee is not limited to the final contract decision. The deliberation,

> negotiation, discussions, reasoning, planning and quid pro quo which precedes the final decision are also deemed to be a part of the making of an agreement. To limit the application of a conflict to persons who participate only in the final formation of a contract would permit those who have a conflict to engage in the preliminary, but often crucial stages of a transaction, and then to insulate themselves from the conflict by withdrawing from the final decision. [See 1982 Op. Att'y Gen. 266; 1978 Op. Att'y Gen. 11; see also Iowa Code § 15A.2 (1993).]

1994 Op. Att'y Gen. 125, 127. See 1992 Op. Att'y Gen. 21 (#91-4-4(L)); 1990 Op. Att'y Gen. 37 (#89-8-2(L)); Note, 55 Iowa L. Rev., supra, at 458.

Thus, even if a conflict of interest does not exist here under section 362.5, the council members should neither participate in council discussions on their employer's proposed purchase of vacated streets or alleys nor vote on any resulting contract with the employer. We suggest that these council members disclose on the record their conflict of interest before the council discusses or otherwise considers measures involving such purchase. See 1992 Op. Att'y Gen. 77 (#92-2-5(L)). The foregoing also applies to the council member whose spouse works for the employer if the employment affects the council member's financial interests. See generally 1994 Op. Att'y Gen. 119, 122 (council members have a conflict of interest under the general prohibition in section 362.5 when their spouses' private employer seeks to contract with the city).

III.

In summary: (1) Section 15A.2 indicates the council members may participate in council discussions on the proposed economic development grant involving the employer and vote on a resulting award of financial assistance to it. Council members should, however, exercise great caution whenever an economic development measure involving the employer comes before the council for discussion or vote; disclose on the record the facts and general circumstances of their employment or a spouse's employment before the council discusses or otherwise considers any such measure; and consult with the city attorney before participating in any matter involving a financial benefit unique to the employer. Council members who wish to exercise caution in resolving conflicts of interest should abstain from participating in the decision-making process or voting on any resulting award of financial assistance to the employer in order to avoid an appearance of impropriety. (2) Section 362.5 prohibits these council members from participating in

council discussions on the employer's proposed purchase of vacated streets and alleys and from voting on any resulting contract with the employer.

Sincerely,

Bruce Kempkes
Assistant Attorney General

COUNTIES; DRAINAGE DISTRICTS; AGRICULTURE: Preemption of county manure line ordinance. Iowa Const. art. III, § 39A; Iowa Code §§ 4.7, 455B.172(5), 468.1, 468.2, 468.186, 657.11 (1997); Iowa Code § 331.304A, added by 1998 Iowa Acts, ch. ___, § ____ (H.F. 2494). A proposed county ordinance regulating manure lines crossing drainage ditches maintained by a drainage district is not preempted under new Iowa Code section 331.304A because a drainage ditch is not land used for animal production. Section 468.186 authorizes the governing body of a drainage district to protect the drainage improvement, but does not authorize an ordinance providing for a permitting scheme for livestock waste disposal which is exclusively regulated by the State under section 455B.172(5). Therefore, section 468.186 does not authorize county legislation like that proposed. The proposed ordinance is expressly preempted by, and conflicts with, section 455B.172(5) concerning livestock waste disposal. (Benton to Havens, Buena Vista County Attorney, 7-28-98) #98-7-6

July 28, 1998

Mr. Philip E. Havens
Buena Vista County Attorney
716 Lake Ave., P.O. Box 426
Storm Lake, Iowa 50588

Dear Mr. Havens:

You state that in response to a recent manure line leak which caused "extensive" pollution of a creek in Buena Vista County, the Buena Vista County Board of Supervisors is considering a county ordinance which would regulate the use of umbilical manure pumping lines which cross drainage ditch easements. You have requested our opinion as to the validity of this proposed ordinance under Goodell v. Humboldt County, 575 N.W.2d 486 (Iowa 1998).

Buena Vista County Ordinance No. 5.4 would apply to the installation, operation, and use of manure lines in Buena Vista County. According to section 2 of the proposed ordinance, its purpose is to "prevent activities determined to be injurious to drainage ditch improvements or interfere with the proper preservation, operation, or maintenance of drainage ditches, and to protect the public health and well-being by regulating the pumping of manure in drainage ditch rights of way."

The ordinance defines a "manure line" as "any hose, pipe, tube, conduit or other man-made conduit. . . used to drain, pump or otherwise transfer animal excreta or other animal waste." The term excludes any portion of a waste water system for which a construction permit has been issued by the Iowa Department of Natural Resources. An "umbilical pumping system" is defined as "manure lines, pumping stations. . . and other constructions. . . used for conducting manure." Under the ordinance, a "drainage ditch" means "any open ditch or waterway constructed or maintained by the governing body of a drainage district."

The ordinance has essentially two components. The first component establishes a permitting system for manure lines. Section 5 states:

> No person shall in Buena Vista County lay a manure line in any drainage ditch or cause such lines to be so laid or operate an umbilical pumping system in any drainage ditch or cause such system to be so operated except in accordance with a permit. . .

The ordinance would require that a permit applicant provide to the Buena Vista County Sanitarian, inter alia, the identity of the owner of the facility that is the source of the manure, the approximate quantity of waste that will be conveyed through the line or system, the precautions that will be taken to prevent discharge into the drainage ditch or other body of water, and a certification that, in its operation of the umbilical pumping system or manure line, the applicant will comply with the applicable standards of the Department of Natural Resources, the ordinance, and the manure line permit.

In addition to the permitting requirements, the ordinance would impose general restrictions on the operation of manure lines or umbilical pumping systems within any drainage ditch in Buena Vista County. Section 10 provides that a manure line must be laid at an angle of approximately ninety degrees to the direction of the water flow within the drainage ditch. Further, any portion of a manure line or umbilical pumping system within a drainage ditch shall be encased in a secondary containment system to prevent discharge. No conduit junction, coupling, or splice of any manure line shall be located in the drainage ditch, except when in a secondary containment system.

Section 13 of the ordinance states that, "[p]ursuant to Iowa Code § 468.149, any person who violates this Ordinance shall be guilty of a serious misdemeanor." Section 13 also states that, "the activity proscribed herein is declared a nuisance, and may be abated as such."

Ordinance 5.4 was written before the Iowa Supreme Court rendered its decision in Goodell. The Goodell case involved a challenge to four ordinances adopted by Humboldt County which attempted to regulate livestock confinement operations. The Court decided that the ordinances conflicted with various provisions of state law and were therefore invalid and unenforceable. Goodell, 575 N.W.2d at 508.

Your letter suggests however, that Ordinance 5.4 may be distinguished from the Humboldt County ordinances invalidated in Goodell because of the county's authority over drainage districts under Iowa Code chapter 468. Your opinion request requires that we examine whether the county's jurisdiction over drainage districts authorizes the proposed ordinance in light of the Goodell decision.

Before turning to the Goodell case, the proposed ordinance should be analyzed under legislation enacted by the 1998 General Assembly. In House File 2494, 77 G.A., 2d Sess., § 9 (Iowa 1998), the legislature expressly placed limitations on the authority of counties to regulate animal feeding operations. The statute, which took effect upon enactment, is now codified at Iowa Code section 331.304A.

Section 331.304A (2) provides:

> A county shall not adopt or enforce county legislation regulating a condition or activity occurring on land used for the production, care, feeding, or housing of animals unless the regulation of the production, care, feeding, or housing of animals is expressly authorized by state law. County legislation adopted in violation of this section is void and unenforceable and any enforcement activity conducted in violation of this section is void.

With the enactment of section 331.304A(2), counties are prohibited from adopting or enforcing county legislation, "regulating a condition or activity occurring on land used for the production, care, feeding or housing of animals." The restriction is keyed to a condition or activity which occurs on land used for the specified activities. By contrast, the proposed ordinance is limited to the extension of manure lines over drainage ditches, both as to the permitting requirement and the general conditions imposed on the manure lines. A drainage ditch as defined in the ordinance is not land used for the production, care, feeding or housing of animals.

When a statute is plain and its meaning clear, a court looks no farther than its express terms. State v. Allison, 576 N.W.2d 371, 373 (Iowa 1998). Accordingly, because the proposed Buena Vista County Ordinance is limited in scope to drainage ditches, it would not be preempted by section 331.304A(2).

Although the ordinance may survive the express preemption of section 331.304A, it remains subject to scrutiny as to whether it represents a valid exercise of the county's authority under Iowa

Const., Art.III, § 39A. This constitutional provision grants counties home rule power and authority "not inconsistent with the laws of the general assembly." In Goodell, the Court considered whether the Humboldt County ordinances regulating livestock confinement facilities were "inconsistent" with state law, and therefore beyond the county's authority to enact. The Court's analysis in Goodell must be applied to the ordinance under consideration in Buena Vista County.

Although not limited to drainage ditches, the Humboldt County Ordinances involved both a permitting scheme and general requirements related to manure disposal. For example, Ordinance 22 required any person seeking to construct a large livestock confinement feeding facility to obtain a permit from the county. Goodell, 575 N.W.2d at 489. Ordinance 23 provided that no person could operate a large livestock confinement feeding facility within Humboldt County without providing financial assurance to the board of supervisors that funds necessary for cleanup of the site were available. Id. at 490. Ordinance 24 prohibited large livestock confinement feeding operations from applying manure on any land in Humboldt County that drained into an agricultural drainage well. Id. Ordinance 25 set forth minimum separation distances between regulated facilities and public areas or residences, and prohibited regulated facilities from any off-site emission of hydrogen sulfide concentrations above specified levels. Id.

The doctrine of preemption stems from the requirement that the exercise of a home rule power not be "inconsistent with the laws of the general assembly." Id. at 493. Preemption may be either express or implied. Id. Express preemption occurs when the general assembly has specifically prohibited local action in an area. Id. Implied preemption may take two forms: When an ordinance prohibits an act permitted by statute or permits an act prohibited by statute, the ordinance is considered inconsistent with state law and preempted. Id. Implied preemption may also occur when the legislature has covered a subject matter in such a manner as to demonstrate a legislative intention that the field is preempted by state law. Id. As to the latter form of implied preemption, the Court stated that extensive regulation in an area is not sufficient to find preemption absent "clear expression of legislative intent to preempt regulation of a field by local authorities, or a clear expression of the legislature's desire to have uniform regulation statewide." Id. at 500.

The Court stated that in determining what the legislature has permitted and prohibited, it would look to the legislative intent in enacting the state statutes and require that any local ordinance

remain faithful to this legislative intent as well as to the legislative scheme established in the relevant state statutes. Id.

Utilizing this analytical framework, the Court struck down the Humboldt County Ordinances.[1] The Court found that Ordinances 22 and 23, by imposing additional permit requirements over and above those required by state law, in effect prohibited what state law allowed and therefore conflicted with state permit requirements. Id. at 503, 504. The Court then invalidated Ordinance 24 on the ground that it conflicted with Iowa Code section 455B.172(5). Id. at 505. This statute provides in pertinent part:

> The department shall maintain jurisdiction over and regulate direct discharge to a water of the state. . . .
>
> The department shall by rule adopt standards for the commercial cleaning of private sewage disposal facilities, including but not limited to septic tanks and pits used to collect waste in livestock confinement structures, and for the disposal of waste from the facilities. . . . A person shall not commercially clean such facilities or dispose of waste from such facilities unless the person has been issued a license by the department. The department shall be exclusively responsible for adopting the standards and issuing licenses. (Emphasis added).

The Court in Goodell wrote:

> We hold there is a direct and irreconcilable conflict between ordinance 24 and section 455B.172(5). The legislature has expressly made the DNR exclusively responsible for regulating the disposal of livestock waste from confinement facilities. . . . The conclusion is inescapable that the legislature intended that no entity other than the DNR

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[1]The Court also decided that the ordinances enacted by Humboldt County were not an exercise of the county's zoning power, and therefore were not invalid under Iowa Code chapter 335. Id. at 507. The Court did not find implied preemption on the basis of extensive state regulation, because the legislature had not expressed a desire for statewide conformity or to otherwise preclude local regulation of the field. Id.

regulate waste disposal from animal confinement facilities. Id.

In a footnote, the Court stated, "[t]he legislature's expression of intent to preclude local action by resting exclusive responsibility in the State is, perhaps, more accurately characterized as express preemption." Id. fn. 16.

The ordinance proposed in Buena Vista County plainly attempts to regulate manure disposal. The permitting section of the ordinance requires a permit from the county before manure may be transported across a drainage ditch. The ordinance further regulates manure disposal by imposing requirements such as a secondary containment system for manure lines crossing a drainage ditch. Under Goodell, the proposed Buena Vista County ordinance would be invalid because it is expressly preempted by state law.

The fact that the definition of manure line in the proposed ordinance excludes any portion of a waste water system for which a construction permit has been issued by the DNR does not change this result. Section 455B.172(5) pertains generally to waste disposal without regard to whether a construction permit has been required. Unlike Humboldt County Ordinances 22 and 23, which were struck down because they conflicted with the state's construction permit requirements for animal feeding operations, (see, Iowa Code section 455B.173(13) and 567 IAC 65.3-6), the Buena Vista County ordinance fails because it has been expressly preempted by the State's general waste disposal provision.

Finally, the Court in Goodell found that Ordinance 25 must fail because it conflicted with Iowa Code section 657.11, restricting nuisance suits against animal feeding operations which comply with state requirements. Id. at 506. Ordinance 25 restricted off-site emissions of hydrogen sulfide from regulated facilities, and enabled the county to seek an order of abatement through a civil action in district court. Id. at 505. Section 657.11 places limitations on nuisance suits against animal feeding operations which have received all permits required under chapter 455B. The purpose of the restrictions is to protect animal agricultural producers who manage their operations "according to state and federal requirements." Iowa Code § 657.11(1).

In finding the conflict between Ordinance 25 and section 657.11, the Court reasoned that section 657.11 prevents an injunction against an animal feeding operation unless certain conditions are met. Because Ordinance 25 allowed the county the same relief without requiring the county to meet these conditions, the ordinance "permits what the state statute, § 657.11, prohibits." Id. at 506.

Section 13 of the Ordinance proposed in Buena Vista County provides in part "the activity prescribed herein is declared a nuisance, and may be abated as such." If an operation violates the terms of the ordinance, as for example failing to encase a manure line in a secondary containment system, the county could seek abatement of the operation of the manure line as a nuisance. Thus, by declaring a violation of the ordinance a nuisance and allowing the county to seek its abatement, the ordinance would allow relief against an animal feeding operation without the county meeting the conditions of section 657.11. The ordinance would permit what state law prohibits, and therefore under the analysis used in Goodell, would be found to conflict with state law.

Your letter notes that Iowa Code section 468.186 grants counties the authority to regulate those individuals seeking easements across drainage ditches, and suggests that this provision, as a special statute, may override the state's authority to regulate manure disposal. Where an irreconcilable conflict exists between a general statute and a special statute, the special statute prevails. Iowa Code § 4.7. An analysis of these provisions, however, indicates that section 468.186 may be reconciled with the state's exclusive authority to regulate manure disposal. See Polk County v. Iowa Natural Resources Council, 377 N.W.2d 236, 241 (Iowa 1985) (stating that both [former] chapter 455 relating to drainage and [former] chapter 455A relating to the environment should be applied and liberally construed to further the objectives of the legislature).

Section 468.186 should be examined together with other provisions within chapter 468 setting out the county's responsibility over drainage matters. Statutes which relate to the same subject matter must be construed together to provide a harmonious body of legislation. State v. McSorley, 549 N.W.2d 807 (Iowa 1996). County boards of supervisors have the authority to establish a drainage district and to construct whatever is necessary for the public health, convenience or welfare.[2] Iowa Code § 468.1. The drainage of surface waters from agricultural lands is presumed to be a public benefit. Iowa Code § 468.2. Once a drainage district has been established, the improvement remains under the control and supervision of the board of supervisors or a board of trustees, and the board has the duty to keep the improvement in repair. Hicks v. Franklin County Auditor, 514 N.W.2d 431, 435 (Iowa 1994).

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[2]Drainage districts are considered political subdivisions of the counties. Voogd v. Joint Drainage Dist., Kossuth & Winnebago Cos., 188 N.W.2d 387, 393 (Iowa 1971).

Section 468.186 governs easements across the right of way of any drainage district. The statute in subsection (1) provides in part:

> When any person proposes to construct a pipeline, electric transmission line, communication line, underground service line, or other similar installations on, over, across, or beneath the right of way of any drainage or levee district, such person shall, before beginning construction, obtain from the drainage or levee district an easement to cross the district's right of way. The governing body of the district shall require such person to agree to comply with subsection 3 of this section and may, as a condition of granting such easement, attach thereto such additional conditions as they deem necessary.

Subsection (3) of the statute provides standards for the replacement of tile drains left exposed during any installation for which an easement was obtained under subsection (1).

When viewed together with the county's authority to maintain and repair drainage improvements to accomplish its purpose, section 468.186 seems intended to insure that the physical integrity of the improvement, e.g., a drainage ditch, not be jeopardized by the easement. Thus, the "conditions" which the governing body is authorized to impose relate to preservation of the structure, ensuring that the pipelines or similar installations do not interfere with the drainage function. The easement is regulated to preserve drainage and not protect water quality.

Section 468.186 would nonetheless apply to the extension of a manure line across a drainage right of way. The manure line is a "pipeline" or "similar installation" for which an easement must be obtained. The statute authorizes the governing body to impose such conditions on the easement as it deems necessary to protect the physical integrity of the improvement. In granting an easement for a manure line, the board may impose those conditions necessary to insure the manure line does not interfere with the function of the drainage ditch.

On the other hand, section 455B.172(5) governing waste disposal is part of the state's regulatory scheme for protection of water quality. In addition to providing that the state has

"exclusive" jurisdiction over waste disposal, the statute provides that the department maintains jurisdiction over direct discharges to a "water of the State". The term "water of the state" is defined to include "any drainage system". Iowa Code § 455B.171(32).

Section 468.186 authorizes the governing body of a drainage district to protect the drainage improvement, but does not authorize an ordinance providing for a permitting scheme for livestock waste disposal. Therefore, the statute does not authorize county legislation like that proposed in Buena Vista County, and does not conflict with Iowa Code section 455B.172(5).

In conclusion, we advise that while not preempted by section 331.304A, the proposed ordinance would not survive under the analysis employed in Goodell. First, as a regulation of manure disposal, the ordinance would be expressly preempted by section 455B.172(5). Secondly, the ordinance would conflict with the nuisance protection afforded to animal feeding operations under section 657.11. Finally, section 468.186 authorizes the governing body of a drainage district to impose those conditions upon an easement crossing a drainage improvement as are necessary to preserve the improvement. Section 468.186 does not conflict with section 455B.172(5) granting the state exclusive authority over livestock waste disposal.

Sincerely,

Timothy Benton

TIMOTHY D. BENTON
Assistant Attorney General

COUNTY OFFICERS; PUBLIC RECORDS: Recording of plat survey. Iowa Code §§ 331.602, 331.607, 354.2, 354.4, 355.1, 355.7, 542B.16, 558.20, 558.41, 558.42, 558.49, 558.50, 558.51 (1997). For purposes of recording, a plat survey need not contain either the surveyor's acknowledgment or the property owner's signature. (Kempkes to Van Der Maaten, Winnishiek County Attorney, 9-2-98) #98-9-1

September 2, 1998

Mr. Andrew F. Van Der Maaten
Winnishiek County Attorney
212 Winnebago St.
Decorah, IA 52101

Dear Mr. Van Der Maaten:

Under the common law, government had no system for recording instruments affecting title to land. Rather, the maxim prior tempore potior jure -- first in time, preferred in right -- applied to claimants coveting the same title. See Annot., 26 A.L.R. 1546 (1923). To obviate frauds arising out of secret conveyances, however, states at an early date in this country's history enacted statutes requiring the filing of conveyances in order to render them valid against subsequent bona fide purchasers. See, e.g., Aetna Ins. Co. v. Hesser, 77 Iowa 381, 42 N.W. 325, 327 (1889).

You have requested an opinion on survey plats, which constitute part of Iowa's statutory recording system administered by the counties. Iowa's system functions much like a library of title-related documents, which include all the instruments previously employed in legal transactions affecting land and which county officials have taken time to "record" and include in a grantor-grantee index. In doing so they add to the library's collection. Someone wishing to discover the legal history of a particular piece of land -- who owns it and what encumbrances may attach to it -- may visit the library and use the official index system to identify and read the documents relating to the land.

This system only requires county officials to receive, copy, index, and return the documents in order to maintain the library

and leaves the more demanding work of searching, analyzing, and reaching legal conclusions from those documents about title status to the general public. To some extent, this system requires the "acknowledgment" of certain documents before a public official: an oral declaration made by the preparers of a document asserting its authenticity, and a written certificate from the public official attesting to this oral declaration. See 1 Am. Jur. 2d Acknowledgments § 1, at 636 (1994). Acknowledgments seek to protect against the recording of false instruments.

Against this background, you ask whether a surveyor must acknowledge a plat survey and whether the property owner must sign it before its recording. In this letter of informal advice, see 61 IAC 1.5(5), we conclude that neither acknowledgment by the surveyor nor signature by the owner is required for recording a plat survey.

I.

Among other things, chapter 331 governs county officers. Section 331.602(1) provides that the county recorder shall "[r]ecord all instruments presented to the recorder's office for recordation upon . . . compliance with other recording requirements as provided by law." See generally Iowa Code §§ 331.602(32), 331.607(7), 542B.16(3), 558.49-.51. Section 331.602(18) provides that the county recorder shall "[c]arry out duties relating to the platting of land as provided in chapter 354."

Chapter 354 is entitled "Platting -- Division and Subdivision of Land." It seeks, among other things, to "provide for accurate, clear, and concise legal descriptions of real estate" and "statewide, uniform procedures and standards for the platting of land." Iowa Code § 354.1(1), (3).

Chapter 354 defines various types of plats. See generally Iowa Code § 354.2(1) ("acquisition plat"), § 354.2(3) ("auditor's plat"), § 354.2(11) ("official plat"), § 354.2(17) ("subdivision plat"). Section 354.2(14) defines "plat of survey" as "the graphical representation of a survey of one or more parcels of land, including a complete and accurate description of each parcel within the plat, prepared by a registered land surveyor." Accord Iowa Code § 355.1. Section 354.4(1) requires that a plat of survey "shall be prepared in compliance with chapter 355 and shall be recorded." Section 354.4(1) also specifies that a plat of survey shall include parcel letters, names of proprietors, descriptions of parcels and total acreages, and the acreage of any portion lying within a public right-of-way.

Chapter 355 is entitled "Standards for Land Surveying." Chapter 355 imposes certain duties upon surveyors. In particular, section 355.7(15) provides that a plat of survey

> shall contain a statement by a surveyor that the work was done and the plat was prepared by the surveyor or under the surveyor's direct personal supervision, shall be signed and dated by the surveyor, and shall bear the surveyor's Iowa registration number and legible seal.

See Iowa Code ch. 542B.16(3); 193C IAC 1.30, 2.5(7)-(8).

Chapter 558 is simply entitled "Conveyances." Section 558.1 defines an "instrument affecting real estate" as "[a]ll instruments containing a power to convey, or in any manner relating to real estate." Section 558.1 also provides that

> no such instrument, when acknowledged or certified and recorded as in this chapter prescribed, can be revoked as to third parties by any act of the parties by whom it was executed, until the instrument containing such revocation is acknowledged and filed for record . . . .

Section 558.20 provides for the acknowledgment in this state of any deed, conveyance, "or other instrument in writing" purporting to convey or encumber real estate: such acknowledgement "must be before some court having a seal, or some judge or court thereof, or some county auditor, or judicial magistrate or district associate judge within the county, or notary public within the state." See generally Iowa Code §§ 558.24-.25. Sections 558.21, 558.22, and 558.23 provide for out-of-state acknowledgments. See generally Iowa Code §§ 558.26-30.

Section 558.41 provides:

> An instrument affecting real estate is of no validity against subsequent purchasers for a valuable consideration, without notice, or against the state or any of its political subdivisions during and after condemnation proceedings against the real estate, unless the instrument is filed and recorded in the county in which the real estate is located . . . .

(emphasis added).

With certain specified exceptions, section 558.42 provides: "It shall not be deemed lawfully recorded, unless it has been previously acknowledged or proved in the manner prescribed in this chapter or chapter 9E [the 'Iowa Law on Notarial Acts']. . . ."

II.

(A)

You have asked whether a plat survey must, as a condition to its recording, contain the surveyor's acknowledgement.

Section 558.41 prescribes the purposes and conditions for validating an instrument affecting real estate. Section 558.42 essentially limits lawful recordings to those in which the instrument has been previously acknowledged or proved in the manner prescribed in chapters 9E or 558.

The requirement in section 558.42 clearly applies to those instruments affecting real estate mentioned in section 558.41. The question arises whether a plat of survey is one of those instruments. See generally 66 Am. Jur. 2d Records and Recording Laws § 54, at 374, § 170, at 451 (1973). No Iowa court or commentator has answered that question. See Marshall's Iowa Title Opinions and Standards 2.1(K), at 46-47 (1978) (assuming, for purposes of question, that surveryor's certificate amounts to an instrument affecting real estate).

Ambiguity surrounds the word "instrument," which

> is not one susceptible to an exact, precise and inelastic definition. It is employed in many different contexts in our law and its meaning shifts, sometimes subtly, sometimes not, depending on the context. While in all cases the term serves to identify a class of paper writings, the type of document sought to be included in, or for that matter excluded from, the scope of a particular statutory enactment varies with the purpose that enactment seeks to serve.

People v. Bel Air Equip. Corp., 346 N.Y.S.2d 529, 531 (Ct. App. 1976). See Weisbrod v. Weisbrod, 81 P.2d 633, 637 (Cal. 1938).

We therefore focus on the context -- chapter 558 -- in which the General Assembly employed "instrument." See generally Iowa Code § 4.1(30) (statutory words and phrases "shall be construed according to context"). Under schemes similar to chapter 558, a person

> who records his interest in the proper records office is thereby protected against subsequent claimants and need not attempt to publicize that interest in any other way, and he is also protected against any prior claimants who by

> failing to record their interests had failed to provide notice in the prescribed manner.

Pelfresne v. Village of Williams Bay, 917 F.2d 1017, 1020 (7th Cir. 1990). See South Creek Assocs. v. Bixby & Assocs., 781 P.2d 1027, 1033 (Colo. 1989) (recording statutes seek to provide protection to purchasers of real estate against the risk of prior secret conveyances by the seller, promote prompt recordation, and create an accessible history of title that provides notice to subsequent purchasers concerning all instruments affecting title to property). Thus, for purposes of recording statutes, an "instrument" generally indicates a writing "signed and delivered by one person to another, transferring the title or creating a lien on property, or giving a right to a debt or duty." Hoag v. Howard, 55 Cal. 564, 565 (1880). Accord In re M'Intosh, 150 F. 546, 548-49 (9th Cir. 1907); see 1988 Op. Att'y Gen. 75 (#88-2-5(L)); 44 C.J.S. Instrument 420 (1945) ("instrument" may mean a "writing acknowledging or certifying to a claim, or recording the terms of a contract, deed, or grant").

An "instrument" affecting real estate has been construed to include the assignment of a real estate mortgage, Mulligan v. Snavely, 223 N.W. 8, 13 (Neb. 1929); a lease of personal property (mining equipment) to be attached to real property, Western Mach. Co. v. Graetz, 108 P.2d 711, 713 (Cal. 1940); a judgment docket, which creates a statutory lien against real estate, Pelfresne v. Village of Williams Bay, 917 F.2d 1017, 1020 (7th Cir. 1990); and a right of first refusal, Phipps v. CW Leasing, Inc., 923 P.2d 863, 867 (Ariz. App. 1996) (construing statute virtually identical to Iowa Code sections 558.41 and 558.42). See generally 1988 Op. Att'y Gen. 75 (#88-2-5(L) ("instrument unconditionally conveying real estate" in chapter 558 includes a notice of nonjudicial mortgage foreclosure).

In contrast, an "instrument" affecting real estate has been construed not to include a writ of attachment issued by a clerk of court to levy upon property exempt from execution, Dreifus v. Marx, 104 P.2d 1080, 1083 (Cal. 1940); a city's "unit development" plan, South Creek Assocs. v. Bixby & Assocs., 781 P.2d 1027, 1033 (Colo. 1989); a judgment itself, Pelfresne v. Village of Williams Bay, 917 F.2d 1017, 1020 (7th Cir. 1990); and a notice of rescission or "writ of any kind issued by a court, or officer, or any other authority," Hoag v. Howard, 55 Cal. 564, 565 (1880). In addition to this office, no court has construed "instrument" to include a plat survey for purposes of statutory schemes similar to chapter 558. See generally 66 Am. Jur. 2d Records and Recording Laws § 54 et seq. (1973); 44 C.J.S. Instrument 420-22 nn. 31, 35, 43 (1945); 21A Words & Phrases 520 et seq. (1960).

Whatever the exact parameters of "instrument" for purposes of chapter 558, we see no reason to include a plat survey within them. Chapter 558 purports to afford prospective buyers and encumbrancers

notice of every outstanding interest or title that may affect their rights. Chapter 558 thus focuses upon a class of documents -- such as deeds, contracts, and mortgages -- that may affect interests in real estate and may be susceptible to forgery. See 66 Am. Jur. 2d Records and Recording Laws § 54, at 374-75 (1973) ("it may safely be stated that in the majority of American jurisdictions" recording statutes encompass "any instrument by which the ownership of or title to land is affected"). A plat survey certainly may raise title issues, Marshall's, supra, 2.1(K), at 46, but it does not, by itself, create any rights or impose any duties between buyer and seller. Accordingly, we do not believe that it is an "instrument" affecting real estate for purposes of chapter 558.

(B)

You have asked whether a plat survey must, as a condition to its recording, contain the property owner's signature.

Section 354.4(1) only provides that a plat of survey shall include the "names of proprietors." Section 354.4(1) provides for the recording of a plat of survey and requires its preparation "in compliance with chapter 355 . . . ." See generally Iowa Code § 4.1(30)(a) (word "shall" normally imposes a statutory duty). Within chapter 355, section 355.7(15) requires a plat survey to contain (1) a prescribed statement of responsibility; (2) the surveyor's signature, see 1980 Op. Att'y Gen. 163 (#79-5-13(L)); (3) the date; (4) the surveyor's Iowa registration number; and (5) the surveyor's legible seal. Chapter 355 sets forth no other requirements for plat surveys.

We see nothing in chapters 354 and 355 that requires an owner to sign a plat survey. Similarly, we have not found any prior court cases or prior opinions that indicate an owner must sign a plat survey before its recording.

III.

For purposes of recording, a plat survey need not contain either the surveyor's acknowledgment or the property owner's signature.

Sincerely,

Bruce Kempkes

Bruce Kempkes
Assistant Attorney General

COUNTIES; TAXATION: Housing development. Iowa Code §§ 405.1 and 441.72 (1997); 701 IAC 71.1(8). The provisions of section 405.1 apply exclusively when an ordinance is adopted by the county board of supervisors freezing the classification of property acquired for housing development for three years or until the lot is sold for housing construction. Section 441.72 applies in all other instances whereby the assessment of individual lots is limited to the value of the property held for development as acreage or unimproved land for three years or until the lot is improved with permanent construction. (Miller to Mullin, Woodbury County Attorney, 10-28-98) #98-10-2

October 28, 1998

Thomas S. Mullin
Woodbury County Attorney
400 Courthouse
620 Douglas Street
Sioux City, Iowa 51101

Dear Mr. Mullin:

The Attorney General has received your opinion request concerning Iowa Code sections 405.1 and 441.72 (1997). In general, your question involves whether the two statutes can be harmonized in their interpretation.

Subsection 405.1(2), which pertains to counties with populations of 20,000 or more, states the following:

> The board of supervisors of a county with a population of twenty thousand or more may adopt an ordinance providing that property acquired and subdivided for development of housing shall continue to be assessed for taxation in the manner that it was prior to the acquisition for housing. Each lot shall continue to be taxed in the manner it was prior to its acquisition for housing until the lot is sold for construction or occupancy of housing or three years from the date of subdivision, whichever is shorter. Upon the sale or the expiration of the three-year period, the

> property shall be assessed for taxation as residential or commercial multifamily property, whichever is applicable.

(Emphasis added).[1]

Department of Revenue and Finance rule 701 IAC 71.1(8) explains section 405.1 as follows:

> *Housing development property.* A county board of supervisors may adopt an ordinance providing that property acquired and subdivided for development of housing be classified the same as it was prior to its acquisition until the property is sold or, depending on a county's population, for a specified number of years from the date of subdivision, whichever is shorter. The applicable time period is five years in counties with a population of less than 20,000 and three years in counties with a population of 20,000 or more. The property is to be classified as residential or commercial, whichever is applicable, in the assessment year following the year in which it is sold or the applicable time period has expired. For purposes of this subrule, "subdivided" means to divide a tract of land into three or more lots.

(Emphasis added). Section 405.1 allows the board of supervisors to adopt an ordinance effectively freezing the classification of property acquired for housing until the lot is sold for construction or occupancy, or held for the applicable three or five year time period, whichever is shorter. The statute does not freeze the valuation of the property, but only affects the manner in which it is assessed or classified for taxation purposes. As an example, if the acquired land had previously been assessed as agricultural land, the subdivided lots would continue to be assessed as agricultural land and the resulting valuation would reflect that classification. The lots would not be reclassified as residential or commercial until they were either sold or the applicable three or five year period elapsed. The actual valuation of the lots would continue to fluctuate as under normal assessment procedures for agricultural land.

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[1]Subsection 405.1(1) applies the same provisions to counties with less than 20,000 population except that the applicable period for maintaining the prior classification of the property is five years instead of three years.

Section 441.72 states the following:

> **Assessment of platted lots.**
> When a subdivision plat is recorded pursuant to chapter 354, the individual lots within the subdivision plat shall not be assessed in excess of the total assessment of the land as acreage or unimproved property for three years after the recording of the plat or until the lot is actually improved with permanent construction, whichever occurs first. When an individual lot has been improved with permanent construction, the lot shall be assessed for taxation purposes as provided in chapter 428 and this chapter. This section does not apply to special assessment levies.

(Emphasis added).

Section 441.72 specifically limits the valuation of subdivided lots in cases where a subdivision plat has been recorded pursuant to chapter 354 by limiting the assessment of individual lots within the subdivision in the aggregate for not more than the total assessment of the land as acreage or unimproved property. This limitation lasts for three years following the recording of the plat or until the lot is actually improved by permanent construction, whichever occurs first. Section 441.72 does not require an ordinance being passed by the board of supervisors, nor does it prohibit a change in classification if such a change is warranted.

Section 405.1 is an exception to section 441.72 and is applicable only for valuation purposes in situations where an ordinance has been adopted by the board of supervisors freezing the classification of property acquired for housing. Under these circumstances, the property will be assessed in the manner it was prior to its acquisition for housing development. Therefore, the assessed valuation of that property is limited only by the manner in which it was assessed prior to acquisition.

Once an ordinance has been passed freezing the classification of the property under section 405.1, the provisions of section 441.72 are no longer applicable. Because both statutes effectively restrict the assessed valuation of property held for development in different ways, they both cannot apply in valuing the same parcel of land. Absent an ordinance being passed, section 441.72 applies exclusively in limiting the valuation of the individual lots within the subdivision so that they will not be assessed at a greater value than the land valued as acreage or unimproved property. Obviously, how the land was assessed prior to acquisition for a housing development

will dictate if the developer seeks the adoption of an ordinance under section 405.1, thereby freezing the classification of the property, or proceeds under the automatic provisions of section 441.72 whereby the assessment of the lots will be limited to the value of the land as acreage or unimproved property.

The specific question you ask in this regard is "whether land developers are to automatically be given the benefit of the assessment rate for unimproved property for three years after the recording of the plat or should be advised to request the adoption of an ordinance to this effect." This question refers directly to the application of section 441.72. As seen from the discussion above, section 441.72 will automatically limit the valuation or assessment rate of individual lots so that their total value will not exceed the value of the land assessed as acreage or unimproved property. There is no requirement for an ordinance adopted by the board of supervisors in order to gain this benefit from section 441.72.

Your second question also concerns the application of section 441.72 and pertains to the effect of a classification change from agricultural to residential following the development of a subdivision. Specifically, you ask "if such classification change occurs, should the property be classified according to its current use and valued as unimproved at the same rate as other improved residential land or should the value be frozen at the previous agricultural assessment for three years regardless of the classification change."

Again, section 441.72 does not prevent a classification change from occurring if the actual use of the land changes as a result of the development of the subdivision. If a classification of the subdivision is changed from agricultural to residential, the value of individual lots cannot be in excess of the total assessment of the land valued as acreage or unimproved property until such lots are improved with permanent construction or held for three years, whichever occurs first. There is no authority under section 441.72 to freeze the valuation of the subdivision at the previous agricultural assessment. An ordinance adopted by the board of supervisors pursuant to section 405.1 would be required for the land to continue to be assessed and valued as agricultural land regardless of actual change in use. Even then, however, the assessed value as agricultural land would not be frozen as section 405.1 only determines the manner in which property is assessed and does not freeze the actual value of the property being assessed.

In conclusion, sections 405.1 and 441.72 are mutually exclusive from one another. Section 405.1 only applies when an ordinance has been adopted freezing the classification of the property, thereby determining the manner of that property's

valuation and making section 441.72 inapplicable. The provisions of section 441.72 apply exclusively in all other situations.

Sincerely,

JAMES D. MILLER
Assistant Attorney General

JDM:cml

CONSTITUTIONAL LAW: Item Veto. Iowa Const. art. III, sec. 16; amend. 27; Iowa Code § 3.4 (1997); H.F. 2496, §§ 46, 80; 1998 Iowa Acts, ch. __, §§ ___, ___. The Iowa Supreme Court has formulated a functional test for an appropriation bill: "the proper test is to review each bill on an ad hoc basis and determine whether the bill contains an appropriation which could significantly affect the governor's budgeting responsibility." If so, the governor "can exercise the item veto as to the appropriation of money." Junkins v. Branstad, 448 N.W.2d 480 (Iowa 1989). To the extent that our prior opinions set forth a definition of appropriation bill that focuses on the "the primary and specific aim" of the bill to determine whether it is an appropriation bill, these opinions must be overruled in light of the subsequent Supreme Court decision. Accordingly, definitions of an appropriation bill found at 1988 Op. Att'y Gen. 95 and 1980 Op. Att'y Gen. 864 are overruled.

House File 2496 makes changes to the public retirement systems which arguably would improve the solvency of the retirement systems and, thereby, "significantly affect" the governor's future "budgeting responsibilities." House File 2496, therefore, is an appropriation bill subject to item veto by the Governor. (Pottorff to Iverson, State Senator, and Corbett, and Gipp, State Representatives, 11-4-98) #98-11-1

November 4, 1998

Honorable Stewart Iverson
3020 Dows-Williams Road
Dows, IA 50071

Honorable Ron Corbett
321 30th Street S.E.
Cedar Rapids, IA 52402

Honorable Chuck Gipp
1517 185th Street
Decorah, IA 52101

Dear Senator Iverson and Representatives Corbett and Gipp:

Our office is in receipt of opinion requests from you concerning the constitutionality of an item veto of House File 2496, an act relating to public retirement systems. Sections 46 and 80 of this bill which were item vetoed created new disability benefits for special service members with an effective date of July 1, 1999. Senator Iverson and Representative Corbett ask whether House File 2496 is an appropriation bill subject to item veto. Representative Gipp asks whether the item veto of House File 2496 is constitutional without further elaboration about the grounds to which his question pertains. For reasons that follow, we conclude that House File 2496 is an appropriation bill.

The gubernatorial power to exercise an item veto is expressly provided in the Iowa Constitution:

> Item veto by Governor. The Governor may approve appropriation bills in whole or in part, and may disapprove any item of an appropriation bill; and the part approved shall become a law. Any item of any appropriation bill disapproved by the Governor shall be returned, with his objections, to the house in which it originated, or shall be deposited by him in the office of the Secretary of State in the case of an appropriation bill submitted to the Governor for his approval during the last three days of a session of the General Assembly and the procedure in each case shall be the same as provided for other bills. Any such item of an appropriation bill may be enacted into law notwithstanding the Governor's objections, in the same manner as provided for other bills.

Iowa Const. art. III, § 16, amend. 27. Under this provision the governor may disapprove "any item of an appropriation bill." Exercise of the item veto power, therefore, is limited to appropriation bills. See Turner v. Iowa State Highway Commission, 186 N.W.2d 141 (Iowa 1971).

In recent years our office, the General Assembly and the courts have focused on the scope of legislation which constitutes an "appropriation bill." In 1980 we issued an opinion defining an appropriation bill as a bill that has "the primary and specific aim" to make appropriations of money from the public treasury. 1980 Op. Att'y Gen. 864, 865-66. We drew this definition from a United States Supreme Court case construing a comparable provision in a foreign constitution. Bengzon v. Secretary of Justice and Insular Auditor of the Philippine Islands, 299 U.S. 410, 57 S. Ct. 252, 81 L. Ed. 312 (1937). At the time the 1980 opinion issued, other state courts had relied on this definition in construing item veto provisions in their own state constitutions. See, e.g., Cenarrusa v. Andrus, 99 Idaho 404, 582 P.2d 1082 (1978); Dorsey v. Petrott, 178 Md. 230, 13 A.2d 630 (1940).

Subsequently, in 1986 the General Assembly codified the definition of an "appropriation bill." Under the Iowa Code an "appropriation bill" is defined to mean "a bill which has as its primary purpose the making of appropriations of money from the public treasury." Iowa Code § 3.4 (1997). This statutory definition essentially mirrored the definition in our opinions drawn from case law, and we continued to apply this definition to determine whether a particular bill was subject to item veto. See, e.g., 1988 Op. Att'y Gen. 95.

When an item veto challenge came before the Iowa Supreme Court in 1988, the Court made very clear that the Court - not the General Assembly - must decide what constitutes an appropriation bill:

> Whatever purposes the legislative definition of "appropriation bill" may serve, it does not settle the constitutional question. In this case, determination of the scope of the governor's authority . . . will require a decision whether the bill involved here was an "appropriation bill" as that term is used in our constitution. This determination, notwithstanding the legislative definition, is for the courts.

Junkins v. Branstad, 421 N.W.2d 130, 135 (Iowa 1988). The Court ultimately remanded the case for further proceedings in the district court.

On a second appeal in 1989 following the remand, the Iowa Supreme Court expressly rejected the definition that had been codified by the General Assembly. Instead, the Court formulated a functional test for an appropriation bill: "the proper test is to review each bill on an ad hoc basis and determine whether the bill contains an appropriation which could significantly affect the governor's budgeting responsibility." If so, the governor "can exercise the item veto as to the appropriation of money." Junkins v. Branstad, 448 N.W.2d 480, 484-485 (Iowa 1989). To the extent that our prior opinions set forth a definition of appropriation bill that focuses on the "the primary and specific aim" of the bill to determine whether it is an appropriation bill, these opinions must be overruled in light of the subsequent Supreme Court decision. Accordingly, definitions of an appropriation bill found at 1988 Op. Att'y Gen. 95 and 1980 Op. Att'y Gen. 864 are overruled.

In order to apply the definition of an appropriation bill crafted by the Iowa Supreme Court in Junkins v. Branstad, it is necessary to examine the bill determined to be an "appropriation bill" under the facts of that case. The bill at issue in that case, Senate File 570, addressed judicial organization and procedures. 1985 Iowa Acts, 71st G.A., ch. 197. The Court referenced, but did not cite, three sections requiring allocation of "substantial state revenues" into the Judicial Retirement Fund as sufficient to make the bill an "appropriation bill." The Court was likely referring to sections 24, 25 and 27 of the bill. Section 24 significantly raised filing fees and costs for filing and docketing of a complaint or information. Section 25 allocated to the Judicial Retirement Fund three-tenths of all fees and costs for filing of a complaint or information or upon forfeiture of bail. Section 27 - item vetoed by the Governor - amended the percent of basic salary to be withheld from a judge's salary and contributed to the judicial retirement fund. 1985 Iowa Acts, ch. 197.

Reasoning that these sections improved the solvency of the Fund thereby preventing a "future bail out of an underfunded retirement plan" from the General Fund, the Court concluded the bill significantly affected the governor's "budgeting responsibilities" and, therefore, constituted an "appropriation bill" subject to item veto. Junkins v. Branstad, 448 N.W.2d at 485. From this analysis, we must conclude that "an appropriation which could significantly affect the governor's budgeting responsibility" need not directly impact the budget in the same fiscal year but may potentially impact future budgets.

With these principles in mind, we turn to House File 2496, the bill in issue. This lengthy bill - with one hundred pages and over one hundred sections - makes changes in public retirements systems, including the Public Safety Peace Officers' Retirement, Accident and Disability System and the Iowa Public Employees' Retirement System. Several sections in the bill indicate it is an "appropriation bill" within the meaning of Junkins v. Branstad. Various sections of this bill address contributions to the system by members. Sections 63 through 68 set forth the conditions and contributions required for members, including legislators, part-time county attorneys and veterans, to purchase additional service. H.F. 2496, §§ 63-68. Other sections impact calculation of benefit levels. See, e.g., H.F. 2496, §§ 1-6, 24, 29-30, 35-45.

In light of the definition of an "appropriation bill" in Junkins v. Branstad, we cannot say that these changes to the public retirement systems would not impact the solvency of the retirement systems and, therefore, "significantly affect" the governor's future "budgeting responsibilities." Although we consider whether House File 2496 is an appropriation bill to be a very close question, we conclude that House File 2496 is an appropriation bill for item veto purposes.

Our answer to your inquiry would be incomplete if we failed to point out that the decision raises a question whether the Court has redefined an "item" subject to item veto. In Junkins v. Branstad the Iowa Supreme Court specifically stated that, if the test for an appropriation bill is met, "the governor can properly exercise the item veto as to the appropriation of money." 448 N.W.2d at 485 (emphasis added). Limitation of item veto power to "appropriation of money" would be a significant departure from prior case law.

From 1971 the Iowa Supreme Court has held that item veto authority applies to any severable part of an appropriation bill. State ex rel. Turner v. Iowa State Highway Commission, 186 N.W.2d 141, 149-52 (Iowa 1971) ("Either by circumstance or design, our item veto amendment makes no reference to appropriations 'of money' in its provisions which enable a governor to approve appropriation bills in whole or in part, and permits the disapproval of any 'item' of an appropriation bill."). More recent case law and our own opinions have followed this principle. Colton v. Branstad, 372 N.W.2d 184, 188-89 (Iowa 1985) ("We [have] rejected the argument that an 'item,' which of course may be vetoed, must be one which appropriates money

. . . . "); 1988 Op. Att'y Gen. 117 (An "item" of an appropriation bill is not limited to an appropriation of money but is broadly defined to include any "part" of an appropriation bill.).

The en banc majority opinion in Junkins v. Branstad does not expressly overrule case precedent on this point. Nevertheless, a special concurrence suggests that the Court in fact rejected the argument under case law that all "items" in an appropriation bill are subject to item veto. Junkins v. Branstad, 448 N.W.2d at 486 (Carter, Neuman, JJ. concurring specially) ("I applaud the majority opinion for its rejection of the governor's argument that a single appropriation item in a bill makes all items in that bill subject to item veto . . . ."). Further, the Court states that this new test for determining whether a bill is an appropriation bill "takes into consideration the constitutional responsibility of both branches of government." 448 N.W.2d at 485. This suggests some "give and take" in the analysis: a significantly more broad definition of an "appropriation bill" in exchange for a significantly more narrow definition of an "item" subject to item veto.

Although the sections of House File 2496 which were item vetoed would not likely constitute "appropriations of money,"[1] we are not inclined to construe Junkins v. Branstad to have overruled prior case law in absence of clearer direction from the Court on this issue. We are constrained to follow Supreme Court precedent in our opinions and do not opine based on how we believe the Court may rule in future cases. See, e.g., 1986 Op. Att'y Gen. 35 [#85-6-7(L)] ("We question whether the present Iowa Supreme Court would reaffirm the definition of 'infamous crime' set out in State v. Haubrich if the issue were presented today in light of contemporary statutes and prison conditions . . . Unless and until the Court articulates a new definition of 'infamous crime,' however, we are bound by existing case law."). Accordingly, we confine our opinion to whether House File 2496 is an appropriation bill and conclude that it is.

Sincerely,

Julie F. Pottorff

JULIE F. POTTORFF
Deputy Attorney General

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[1] Section 46 creates new disability benefits for certain law enforcement personnel who are unable to continue in public safety due to a work-related disability and section 80 sets a future effective date of July 1, 1999.