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# ANNUAL CONFERENCE & EXHIBIT

## Providing Funds to Private Entities for Public Purposes

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Ahlers & Cooney, P.C.

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# Providing Public Funds to Private Entities for Public Purposes

**Nathan Overberg**  
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**September 29, 2022**



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## Client Alerts

### CDC Updates Masking Guidance

**February 27, 2022**

On Friday, February 25, 2022 the CDC updated its masking guidance for public and private school systems. The CDC no longer recommends universal indoor mask wearing in K-12 and early education settings in areas with a low or medium COVID-19 community transmission. Order: Wearing of face masks while on conveyances...

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### Attorney Timothy Whipple Joins Ahlers & Cooney

**February 24, 2022**

Timothy Whipple has joined the Ahlers & Cooney, P.C. law firm as Special Counsel and focuses his practice in the

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<a href="#">2022</a>	<a href="#">2017</a>	<a href="#">2012</a>
<a href="#">2021</a>	<a href="#">2016</a>	<a href="#">2011</a>
<a href="#">2020</a>	<a href="#">2015</a>	<a href="#">2010</a>
<a href="#">2019</a>	<a href="#">2014</a>	<a href="#">2009</a>
<a href="#">2018</a>	<a href="#">2013</a>	<a href="#">2008</a>



# Disclaimer

*Please note that this presentation is intended for informational and educational purposes and to provide general statements from federal law, state law, and agency guidance. Federal and state law may differ on particularized areas and this outline does not include all legal considerations. Each situation varies based on the individualized facts and the law is constantly evolving.*

*Please consult with your attorney for specific legal information, advice, or individualized inquiries.*



# Overview

- Importance of Identifying and Serving a Public Purpose
  - Iowa Constitution article III, section 31
  - Iowa Auditor of State's Recent Guidance
- What Is a Public Purpose?
- How to Demonstrate a Public Purpose Is Served
- Contracting with Private Parties to Provide a Public Purpose
  - Iowa Code Ch. 15A Economic Development Agreements
  - 28E Agreements
  - Service Contracts

*First...*

## Importance of a Public Purpose



# Importance of a Public Purpose

Article III, section 31 of the Iowa Constitution creates the constitutional hurdle cities must get over in order to give funds to private entities.



# Iowa Constitution, article III, section 31

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



# Interpreting the Constitutional Hurdle

“The body of section 31 is **emphatically prohibitive**. Its prohibition operates as a limitation of power, not only upon the Legislature, but upon every city council in the state.”

*Love v. City of Des Moines*, 230 N.W. 373, 378 (Iowa 1930).

# Article III, Section 31's Relation to Home Rule

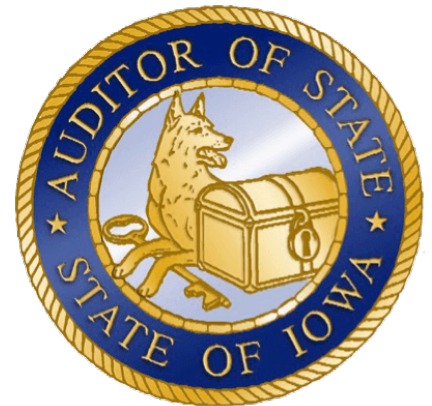
Home Rule does not alter Article III, Section 31's requirement that public funds be spent for the public benefit.

See Iowa Att'y Gen. Op. No. 75-2-2, 1975 WL 368691 (Feb. 6, 1975).

# Iowa Auditor of State's Recent Guidance

*“Best Practices” Advisory to Governments on Working with Non-Profits*,  
November 2021

- Aims to uphold and enforce Article III, section 31
- Issued in response to questions around dispersing public funds to non-profits, but pertains to private entities, generally



Demonstrates the State Auditor's continued attention to public funds dispersed to private entities in financial audits

Provides recommended approaches for cities to work with non-profits and private entities and overcome the constitutional hurdle

# Iowa Auditor of State's Recent Guidance

What is included in the Auditor's "Best Practices?"

- 15A Economic Development Agreements
  - Reiterates the statutory factors in Chapter 15A for determining what falls within the meaning of "economic development" to meet the public purpose requirement
- Service Contracts
  - Provides instructions for contracting steps and terms to ensure public purpose requirement is met

*Next...*

What is a Public Purpose?



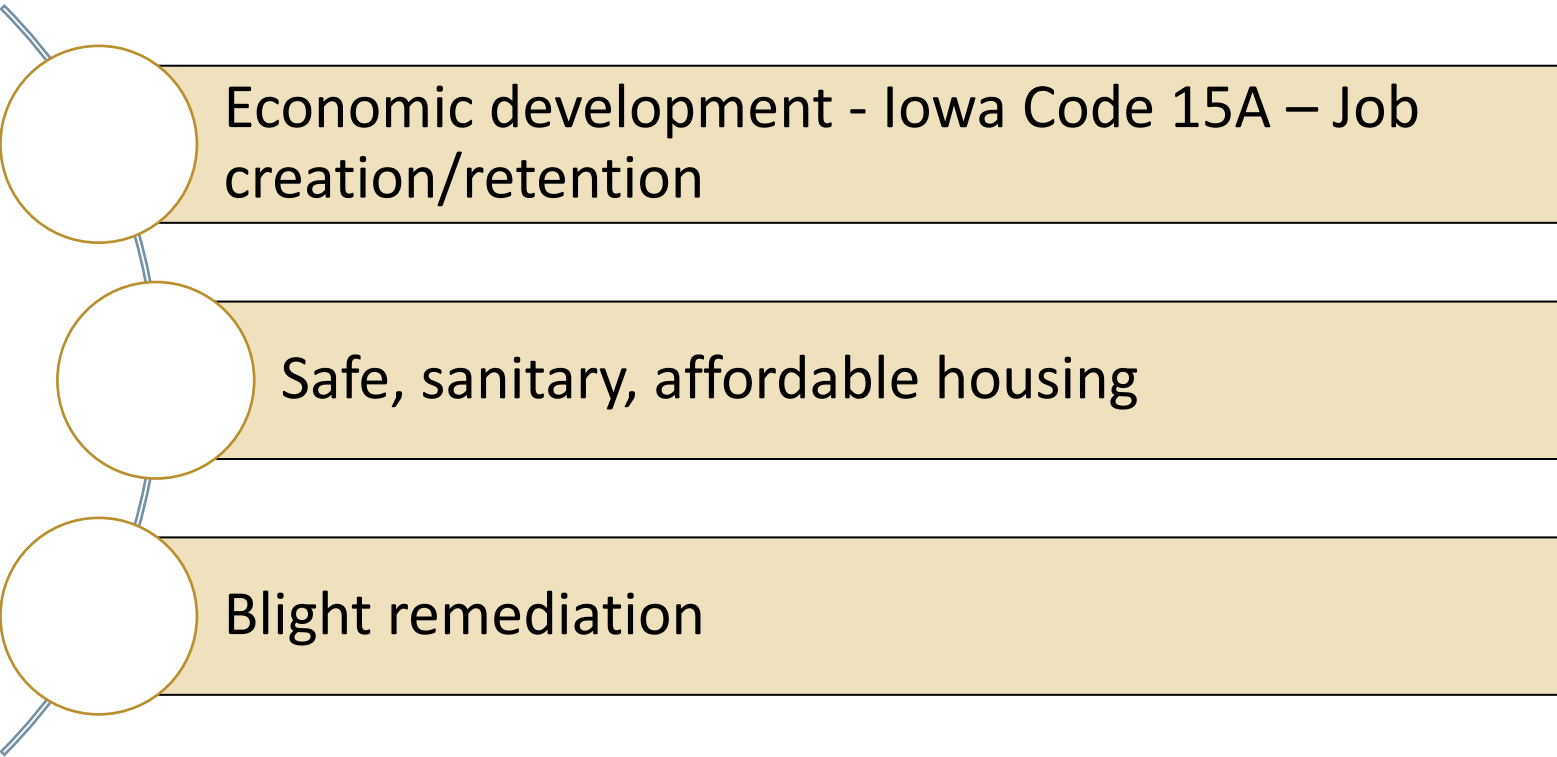
# What is a Public Purpose?

“Generally speaking, it is vital to the legality of any and every payment or promise of public funds that there shall be a consideration therefor in the nature of a *public* benefit.” *Love*, 230 N.W. at 375–76.

The concept of ‘public purpose’ [is] to have [] flexibility and [an] expansive scope [as is] required to meet the challenges of increasingly complex social, economic, and technological conditions.” *John R. Grubb, Inc. v. Iowa Hous. Fin. Auth.*, 255 N.W.2d 89, 93 (Iowa 1977).

The Iowa Supreme Court has held it “will not find absence of public purpose except where such absence is so clear ‘**as to be perceptible by every mind at first blush.**’” *Id.*

# Examples of a Public Purpose



Economic development - Iowa Code 15A – Job creation/retention

Safe, sanitary, affordable housing

Blight remediation

*Next...*

## Demonstrating a Public Purpose



# Demonstrating a Public Purpose

## Council's Own Finding

- Motions clearly recorded in the Meeting Minutes
- Resolutions setting out the facts and rationale for how the public will benefit from the transfer of public funds to the private entity and properly adopted

Clearly identified in an agreement with the private entity, approved by resolution of the Council



# *Next...*

## Contracting with Private Parties (and Transferring Public Funds) for a Public Purpose

- Iowa Code Ch. 15A Economic Development Agreements
- 28E Agreements
- Service Contracts



# Iowa Code Ch. 15A Economic Development Agreements



# Iowa Code Ch. 15A Economic Development Agreements

Chapter 15A provides statutory authority to get over the constitutional hurdle to pursue economic development.

“Economic Development” is a PUBLIC PURPOSE for which a city may provide grants, loans, guarantees, tax incentives, and other financial assistance to or for the benefit of private persons.

- Supreme Court given seal of approval
  - *Brady v. City of Dubuque*, 495 N.W.2d 701 (Iowa 1993)

“Economic development” is specifically defined as investment involving the creation of new jobs and income or the retention of existing jobs and income that would otherwise be lost.

# How to Use the Power of 15A

City must determine (by Resolution) that public purpose will be accomplished by providing the incentive.

- Must consider any or all of factors in Code:
  - Diversify Economy
  - Exports/Tourism
  - Benefit Outweighs Funds Dispensed
  - Avoid Poaching Within State Unless Net Gain
- Can give more credit to development if in blighted area or brownfield area

State Auditor reiterated the necessity of considering these factors in recent guidance

# Other 15A Considerations

Must ensure no environmental issue

Must ensure no discrimination based on age, color, creed, national origin, race, religion, marital status, sex, physical disability, or familial status

Avoid conflict of interest

- Don't vote
- Action not void unless improper vote decisive

# Funding 15A Incentives

## **Existing funds**

- LOSST – If authorized by ballot language**
- Hotel/Motel Taxes – the percentage not limited to recreation/convention**

**Use UR / TIF**

**Borrow funds**

**Rebate city-only taxes on increased value derived from investment**

**Protect debt service and other dedicated levies**

# Development Agreement Basics

## Contract Law 101:

**Offer**

**Acceptance**

**Consideration**

- Something a party will do, or not do
- Something a party will pay for

# Development Agreements

## Typical obligations of a Developer/Private Entity:



Construct a new building

Renovate or expand existing building

Agree to Minimum Assessment Agreement  
(if in an Urban Renewal Area)

Create and/or retain jobs!  
• Required for 15A grants

# How to Include Job Requirements in Development Agreements

Terms setting a number of employees to hire by a certain date

- After building construction is complete, Developer will hire 20 new employees at the property by no later than January 1, 2020.



# How to Include Job Requirements in Development Agreements

Term requiring Developer to maintain a number of employees

- Developer will hire 5 full-time employees by January 1, 2019 and an additional 10 full-time employees by June 1, 2020, and *maintain a monthly average of 15 full-time employees* from June 1, 2020, until the Agreement ends.

# Steps for Entering into Development Agreements

Ask the Private Entity/Developer what they are requesting

- Get it in writing
- Depending on what Developer wants, the steps may be different

Determine if City wants to support the project

- And what incentives the City is willing to offer



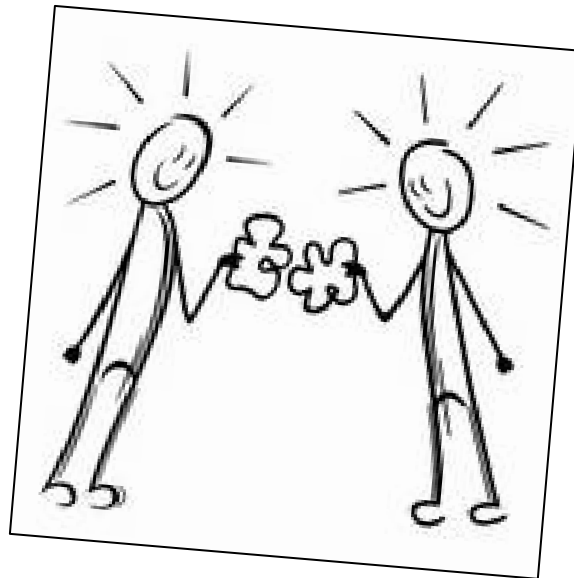
# 28E Agreements



# Purpose of 28E Agreements

“To permit state and local governments in Iowa to make efficient use of their powers by enabling them to provide **joint** services and facilities with other agencies and to cooperate in other ways of mutual advantage.”

Iowa Code § 28E.1.



# Enhance, But Not Expand, Powers

Chapter 28E only grants political subdivisions the authority to contract for the joint exercise of powers.

- Chapter 28E agreements can merely be for the provision of services. Iowa Code § 28E.12.

Chapter 28E does not provide authority to do something that is not otherwise permitted in the Code, or by the Iowa Constitution (i.e., still cannot provide public funds for a private purpose).

# Parties to a 28E

Must include at least one public agency

Parties are often two or more public agencies.  
Iowa Code § 28E.3

But 28E agreements may also be between a **public agency** and a **private agency**, like a nonprofit, a business, or an individual.  
Iowa Code § 28E.4.

The parties should also make sure they have independent authority to do all those things the 28E obligates them to do.

# Drafting and Governance

A Chapter 28E Agreement should be drafted carefully to include all the necessary statutory provisions.

A Chapter 28E Agreement can create a new entity. (e.g., solid waste agency). Iowa Code § 28E.5(2).

If a new entity is not created, the agreement must specify how it will be administered (administrator or joint board). Iowa Code § 28E.6(1)(a).

# Considerations for Transferring Public Funds to a Private Entity via 28E

Apply Auditor's general contracting guidance for 28E agreements

Requires the Government's ongoing involvement, management, and review to ensure compliance

28E agreement should provide for the Government authority to terminate the agreement and recover the public funds in the event the public entity violates the terms

Any depositing or investing of public funds must comply with Iowa Code chapters 12B and 12C

# Service Contracts



# Service Contracts

Governments may contract with private entities for the provision of services



# Recommendations for Service Contracts that Transfer Public Funds to Private Entities

1. Reduce agreements to writing
2. Clearly and plainly detail the terms and conditions
3. Spell out the term for the government's funding, including any schedule of payments, amount, and total cost to taxpayers
4. Make clear what the government is accepting in return for the funds — the bargain
  - The government may accept a general benefit to the public in exchange for the funds, but the contract should expressly recognize this intent.
5. Require the private entity to account to the government for its spending. Build in oversight and transparency.
6. Sign the agreement and keep proper records

# Questions?



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