

# GIVING FOR THE CITY

## CONSTITUTIONAL LIMITS ON MUNICIPAL ECONOMIC DEVELOPMENT PROGRAMS

**THE WASHINGTON LEGISLATURE** authorizes cities to engage in economic development programs, deeming such activity “in the public purpose” (RCW 35.21.703). However, the statute does not define “economic development,” and a city’s authority to engage in economic development activities may be tempered by restrictions contained in the State Constitution. Article VIII, Section 7, states: “No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation . . .”

Indeed, the State Supreme Court has not hesitated to strike down public grants made to private interests, adjudging them prohibited gifts under this provision. In 1914, for example, the Court disallowed a county grant to the nonprofit Puyallup Fair. While acknowledging the “good purpose” of the fair, the Court applied the clear provisions of the Constitution and referred to the concerns of the Constitution’s framers in 1889 that “the history of the time will show that many municipalities had become bankrupt because of liabilities incurred in aid of [private] railroads.”

Further, in *State ex rel. O’Connell v. Port of Seattle* (1965), the Court held that promotional hosting of private individuals other than pursuant to contract and without any corresponding legal obligation lacks valid legal consideration. Article VIII, Section 8 (Amendment 45, 1966) now provides ports with authority to engage in “industrial development,” including promotional hosting. But cities must still identify a fundamental purpose of government or some valid exchange of goods or services in supporting economic development.

### Fundamental Purpose of Government?

The courts have stated the test this way:

First, the court asks whether the funds are being expended to carry out a fundamental purpose of government. If the answer to this question is yes, then no gift of public funds has been made. If the answer is no, the court focuses on the consideration received by the public and the donative intent of the appropriating body (*CLEAN v. City of Spokane*, 1997).

The courts have struggled with what constitutes a fundamental purpose of government, or a public use. The ruling in *Miller v. City of Tacoma* (1963) called the words “public use” . . . neither abstractly nor historically capable of complete definition.” But one traditional area for public economic development is in urban renewal, such as the University of Washington “West Campus” and Tacoma’s Pacific Avenue redevelopment. A city may exercise urban renewal authority under chapter 35.81 RCW after adopting an ordinance or resolution finding that one or more blighted areas exist in the city and that the rehabilitation and/or redevelopment of such area or areas is necessary in the interest of the public health, safety, morals, or welfare of the residents of the city.

The most common (and defensible) example of economic development is the provision of utilities and infrastructure that supports the needs of private development. The City of *continued* →

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### Buyer Beware

The U.S. Supreme Court holds that promoting economic development is a long-accepted governmental function. In *Kelo v. City of New London* (2005), the Court upheld city condemnation of private property

and resale of the property to a private interest. In contrast, the Washington Supreme Court, in *Lassila v. Wenatchee* (1978), holds that purchase of property by a municipality “with an intent to resell it to a private party is prohibited. . . .

At acquisition a municipality must at very least intend a public purpose. . . . **A municipality is absolutely prohibited from acting as a financial conduit for private enterprise**” (emphasis added).



Edmonds recently determined to create a public fiber-optic network that will allow it to convert to a wireless water-meter system. Opponents claimed that the city's intent to make excess broadband capacity available to the community for private use violated the Constitution. In affirming the city's system, the court found that the city's continued ownership of the fiber-optic network and plans to charge private individuals or businesses to use the excess broadband capacity did not violate Article VIII, Section 7.

### **Is City Payment an Unauthorized Gift?**

When public use is not apparent, the courts examine whether there has been a gift (or donation). In a case affirming the City of Bellevue's right to reimburse city employees for tips expended for business meals, the Supreme Court construed the concept of "donation" under Article VIII, Section 7 as preventing the state "from assuming the attitude of the person who says: 'The cause is a good one, I will contribute to it'" (*City of Bellevue v. State*, 1979). Under this interpretation, tips were deemed not gifts, but payment for services.

Similarly, donative intent is not typically found when there is a contract for provision of goods or services to a city. In such cases, there is an exchange of consideration.

Consideration is here understood to mean the incurring of corresponding legal obligations. Although the courts employ a relatively liberal "legal sufficiency" test for determining consideration, some form of consideration must be provided. The Court of Appeals approved a contract between Pierce County and the Economic Development Board for Tacoma-Pierce County that provided for payment in exchange for specified services intended to increase capital development, stimulate employment opportunities, and enlarge the tax base (*Brigade v. Economic Dev. Bd.*, 1991). Elsewhere, the Supreme Court has upheld a program under which a city electric utility paid for installation of conservation devices in private structures, finding consideration in the expected savings to the utility (*Tacoma v. Tacoma Taxpayers*, 1987).

### **Conclusion**

Cities have express statutory authority to engage in "economic development programs." But such programs are not defined under state law. In exercising economic development authority, cities must be mindful of the constraints of the Constitution: they must either find a clear public purpose or receive some form of consideration for the city's payment to a private interest. **C**