

Gila County Attorney's Office

Comments

March 8, 2016

Request for Rental Fee Waiver for 4-H and FFA

The University of Arizona Gila County Cooperative Extension 4-H Program ("4-H") and the Globe FFA program ("FFA") have requested that the Gila County Board of Supervisors ("Board") waive the rental fees of \$31,746.00 and \$775.00, respectively, for use of the Gila County Fairgrounds facilities.

The question presented is whether a fee waiver to this private entity for this private activity would violate the Gift Clause of the Arizona Constitution. Ariz. Const. art. 9, § 7:

Neither the state, nor any county, city, town, municipality, or other subdivision of the state *shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation*, or become a subscriber to, or a shareholder in, any company or corporation, or become a joint owner with any person, company, or corporation, except as to such ownerships as may accrue to the state by operation or provision of law or as authorized by law solely for investment of the monies in the various funds of the state.

(Emphasis added.)

Governmental expenditure does not violate the Gift Clause if: 1) it has a public purpose, and 2) in return for its expenditure, the governmental entity receives consideration that is not so inequitable and unreasonable that it amounts to an abuse of discretion, thus providing a forbidden subsidy to the private entity. *Meyer v. Turken*, 223 Ariz. 342, 224 .3d 158 (2010).

First the expenditure must be for a public purpose. Cases interpreting public purpose have given it an expansive meaning. *Id.* For example, the court, in *Town of Gila Bend v. Walled Lake Door Co.*, 107 Ariz. 545, 490 P.2d 551 (1971), found public purpose in the construction of a water line serving only one factory. In *Meyer*, the court stated: “we have repeatedly emphasized that the primary determination of whether a specific purpose constitutes a ‘public purpose’ is assigned to the political branches of government, which are directly accountable to the public.” Absence of public purpose is found only in rare cases where the governmental body’s discretion has been unquestionably abused. *Id.*

The purposes of the proposed 4-H and FFA activities are to prepare members to become better citizens and teach them to give back to the community.

Second is the comparison of the consideration to be exchanged. “Consideration” is a performance or return promise that is bargained for in exchange for the promise of the other party; it is what one party to a contract obligates itself to do, or forbear from

doing, in return for the promise of the other contracting party. Courts do not ordinarily examine the proportionality of consideration between parties contracting at arm's length, leaving such issues to the marketplace. However, in Gift Clause analysis, adequacy of consideration is examined because paying far too much for something creates a forbidden subsidy by the public. The potential for a forbidden subsidy is heightened when a public entity enters into a contract without the benefit of competitive proposals. *Id.*

In *Meyer v. Turken*, the court considered the agreement by the City of Phoenix to pay as much as \$97.4 million to a developer to set aside 2,980 parking garage spaces for the non-exclusive use of the general public and 200 spaces for the exclusive use of drivers in commuting programs. The payments by the city were conditioned on the developer constructing the garage spaces and at least 1.02 million square feet of retail space. The court said the comparison of what each party was giving could not include the *indirect* benefits to be given by the developer such as the anticipated sales tax revenue, denser development, decreased pollution, and employment opportunities for city residents. Only the "objective fair market value of what the private party has promised to provide in return for the public entity's payment" could be considered. "[T]he most objective and reliable way to determine whether the private party has received a forbidden subsidy is to compare the public expenditure to what the government receives under the contract. When government payment is grossly disproportionate to what is received in return, the payment violates the Gift Clause." *Id.* The court said the exchange likely violated the Gift Clause.

4-H and FFA are offering to obligate themselves to conduct activities at the county facility in exchange for the county's promise to waive the rental fees involved. 4-H and FFA receive free rent. What does the government receive? Under A.R.S. § 11-251(24), the Board may [a]cquire and hold property for the use of county fairs, and conduct, take care of, and manage them." 4-H and FFA activities which assist the Board in conducting, caring for, and managing a county fair, would directly benefit the Board with a project it has statutory authorized to perform.

Let us examine the consideration going both ways. The objective fair market value of the normal rental fee is \$31,746.00 for 4-H and \$775.00 for FFA. The objective fair market value to the county of the direct benefits of 4-H and FFA in connection with conducting, caring for, and managing a county fair is to be compared to that. (The anticipated *indirect* benefits to the county of the value of the members of 4-H and FFA becoming good citizens cannot be counted in the consideration analysis.)

Therefore, the duty of the board, to avoid violating the Gift Clause, is to make the following determinations:

1. the 4-H and FFA activities proposed to be held at the fairgrounds serve a public purpose, and
2. the objective fair market value of the direct benefits to the county of the 4-H and FFA activities proposed to be held at the fairgrounds is not grossly disproportional to the consideration given by the county, which is \$31,746.00 and \$775.00.

Insurance

Another issue that the board needs to address is the liability insurance.

The application for use of the fairgrounds requires the user to have a liability insurance policy that provides two million dollars in coverage. 4-H has a policy that provides one million dollars in liability coverage.

The board of supervisors would have to reduce the liability insurance coverage requirement from two million dollars to one million dollars in this instance in order for 4-H to use the facility.

FFA has not yet provided insurance verification. When it does, if it is below two million dollars, the Board will have to take the same action in order for FFA to use the facility.