

Gila County Attorney's Office

Comments

Request for Rental Fee Waiver for Vendor Appreciation Dinner and Rodeo

The Gila County Rodeo Committee ("Committee") has requested that the Gila County Board of Supervisors ("board") waive the rental fees, \$1,850.00, for use of certain Gila County Fairgrounds facilities for its annual vendor appreciation dinner and for its annual Copper Dust Stampede Rodeo. In the application for waiving the fees, the Committee states that the general public purposes promoted by the Committee are: "Promote Rodeo in Southern Gila County;" and the specific public purpose to be advanced by these activities is: "Promote Rodeo." The Committee is a private entity which enjoys tax exempt status.

The question presented is whether a fee waiver to this private entity for these activities 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 P.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 purpose of these activities are to extend appreciation to the applicant’s vendors and to promote rodeo in southern Gila County.

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 *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.

The Committee is offering to obligate itself to provide a vendor appreciation dinner and a rodeo at the county facility in exchange for the county’s promise to waive the rental fees. The benefit to the Committee is saving the rental fees. No *direct* benefit to the county is mentioned. There are no competitive proposals to the county.

Let us examine the consideration going both ways. The objective fair market value given by the county is the normal rental fees: \$1,850.00. The objective fair market value of what the government receives *directly* in benefits is to be compared to that. The anticipated *indirect* benefits to the county of the value of activities being held at a county facility 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 Committee’s vendor appreciation dinner and rodeo being held at a county facility serves a public purpose,
2. the objective fair market value of the direct benefits to the county of the activities being held at the county facility are not grossly disproportionate to the consideration given by the county, which is \$1850.00.