

Gila County Attorney's Office

Comments

March 7, 2016

Request for Rental Fee Waiver for Class Prom

The Globe High School Class of 2017 ("Class") has requested that the Gila County Board of Supervisors ("board") waive the rental fee of \$1,075.00 for use of the Gila County Fairgrounds facilities for a Class Prom. The application for waiving the fee states that the general public purposes promoted by the Class are 'student government;' and the specific public purposes to be promoted by the event are "Globe High School Prom." The Class is a private unincorporated association without formal legal status.

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 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 this activity is to hold a high school prom. The letter from the Class president gives more specific purposes for the requested waiver: 1) the class being on a “tight budget” and 2) the desire to “have a school function out of the school area.”

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 Class is offering to obligate itself to provide a prom at the county facility in exchange for the county’s promise to waive the rental fee. The county is bargaining for the promise by the Class to provide a prom at the county facility. The benefit to the Class is saving the rental fee for use for other Class activities and to be able to hold an activity away from the school. 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 of the normal rental fee is \$1,075.00. The objective fair market value to the county of the prom being at a county facility is to be compared to that. The anticipated *indirect* benefits to the county of the value of the prom 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 prom 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 prom being held at the county facility are not grossly disproportionate to the consideration given by the county, which is \$1075.00.

## 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. The Class 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 the Class to qualify to use the facility.