

From: [Young, Alicia O. \(ATG\)](#)
To: [Otto, Wendy R \(ATG\)](#)
Cc: [Purcell, Noah Guzzo \(ATG\)](#); [Paradis, Kelly A \(ATG\)](#)
Subject: FW: Request for AGO opinion
Date: Thursday, January 11, 2024 4:00:27 PM
Attachments: [image001.png](#)

Question:

Would the airport noise and air pollution mitigation program proposed by HB 2103/SB 5955(2024) comply with the state constitutional prohibition against the gift of public funds?

From: Orwall, Rep. Tina <Tina.Orwall@leg.wa.gov>
Sent: Friday, January 5, 2024 12:31 PM
To: Bruce, Joyce (ATG) <Joyce.Bruce@ATG.WA.GOV>
Cc: Keiser, Sen. Karen <Karen.Keiser@leg.wa.gov>; Rosete, Marvin <Marvin.Rosete@leg.wa.gov>; Soderlind, Mary <Mary.Soderlind@leg.wa.gov>
Subject: Request for AGO opinion

[EXTERNAL]

Hi Joyce,

Senator Keiser and I introduced companion bills relating to using port tax revenue for mitigation for airport-impacted communities, [HB 2103/SB 5955](#).

I inquired with Kellen Wright, OPR staff, about the question of legality for the state to gift funds for mitigation purposes. Kellen provided the information following my signature below.

Senator Keiser and I request an opinion from the AGO on this matter.

Thank you and please let us know if you have any questions.

Sincerely,

Tina

Representative Tina L. Orwall, M.S.W.
33rd legislative district
tina.orwall@leg.wa.gov



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From: Wright, Kellen <Kellen.Wright@leg.wa.gov>
Sent: Thursday, January 4, 2024 6:05 PM
To: Orwall, Rep. Tina <Tina.Orwall@leg.wa.gov>
Subject: RE: Port bill

Good evening Representative Orwall,

They are correct that the constitution in Article VIII Section 7 prohibits local governments from gifting public funds (“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, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.”). I don’t know that it is straightforward that this program would be unconstitutional. Generally, in determining whether something is a gift of public funds the court asks 1) whether the funds are being expended to carry out a fundamental purpose of governments, and 2) if not, then whether there was donative intent by the government.

I think it could be argued that providing for public health (through air quality and sound mitigation) is a fundamental purpose of government. If so, there is no gift of public funds. The AGO has issued an opinion (albeit in 2006 and they did note that there was not any state case law directly on point), that providing for housing is “a governmental and perhaps a “fundamental” governmental purpose.” If that is the case, then ensuring that the housing mitigates the adverse health impacts of airport operations may also be a fundamental government purpose (though a court could likely find otherwise as well if it chose to view the program through the lens of providing mitigation equipment specifically – which probably isn’t a fundamental purpose of government – rather than as providing for public health and safety generally – which is). Here, the more evidence there is of negative public health and safety impacts from air and noise pollution from the airport (and the more directly their tied to the criteria in the statute – for example the 55 dbl level), the stronger this argument would likely be.

Similarly, entitlements (such as an old Seattle ordinance that provided for partial campaign funding for candidates) are not a gift of public funds. The state supreme court has described an entitlement like this: "Entitlements are a form of assistance provided to the public, or a segment of the public, as cash or services, in carrying out a program to further an overriding public purpose or satisfy a moral obligation. The overriding public purpose makes the private benefit incidental. Entitlements by their nature are equally available to anyone who qualifies under objective criteria." The court also said that "Where there is a close nexus to a government process or responsibility, cash payments may be made directly to those who comply with qualifying conditions." I think there would also be a case that the mitigation program qualifies here as well. The port (a local government) operates the airport, which in turn may cause adverse impacts to those who live near the airport. Mitigating those impacts could be seen as serving a public purpose or satisfying a moral obligation.

Even if the program was *not* a fundamental purpose of government, there would be the question of whether the port was acting with donative intent or whether the consideration received for the program is grossly inadequate. This analysis may be complicated by the fact that the actions are directed by the legislature rather than undertaken on the port's own initiative. However that may be, there are cases in which courts have found that Tacoma (for example) providing energy conservation measures to private homes was not a gift of public funds because there was no donative intent and the result would save Tacoma energy in the near-term. Examples of situations in which a gift of funds was found include the Port of Seattle using its funds to take shippers out to meals to attract their business (this was later changed by constitutional amendment in Article VIII, Sec. 8 so that this sort of thing would now be ok) and a county paying the expenses of a private fair association. It is not clear to me that the port would be receiving consideration here for the mitigation program (for example, they would not be receiving an easement), so proving adequate compensation could be difficult if the case were to get this far.

Finally, the port is already authorized to provide noise abatement measures in chapter 53.54 RCW, and those actions have not been found unconstitutional (though that might be complicated by the fact that they, as I understand it, were using federal funds for the programs – and it may help that the port received easements in exchange). This is not to say that the program here *could not* be found unconstitutional, but I don't think the case law indicates that it would necessarily be found to be an unconstitutional gift of public funds. If the port has a particular case that it believes this is analogous to, I would be happy to take a look, but from the cases that I am finding, it seems like there is at least a decent chance that it could be upheld.

I am sorry that I cannot be more definitive. If you have any other questions, please just let me know.

Thank you,

Kellen Wright - Counsel
House Local Government Committee
Office of Program Research
Washington State House of Representatives
(360) 786-7134

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