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MEMORANDUM

DATE: March 17, 2020

TO: State Agencies and Local Governments

FROM: Bob Ferguson, Attorney General

SUBJECT: **Guidance on Analyzing Issues Related to Gifts of Public Funds During the COVID-19 Pandemic**

In recent weeks our Office has received a number of inquiries related to steps state agencies and local governments can take to combat the COVID-19 pandemic. Some agencies and local governments have questioned whether certain steps being considered would violate the prohibitions in Washington's Constitution against making gifts of public funds (those steps range from making payments to nonprofits to support childcare services to providing employees with paid leave when they are ordered not to come to work, to give just a few examples). To provide helpful guidance to state agencies and local governments about how to analyze these types of issues in this time of crisis, we are sharing a brief overview of our Office's expert guidance on this question.

In general, constitutional restrictions on use of public funds should not be an impediment to state and local efforts to combat COVID-19, because expenditures being made in furtherance of this effort in this time of crisis further fundamental public purposes, such as protecting the public health and welfare.

Article VIII, sections 5 and 7 of the Washington Constitution each restrict government from giving or loaning public funds to private individuals, companies, or associations. The purpose of the provisions is to prevent public funds from being used to benefit private interests where the public interest is not primarily served. *CLEAN v. State*, 130 Wn.2d 782, 797, 928 P.2d 1054 (1996).

Washington courts "use a two-pronged analysis to determine whether a gift of public funds has occurred." *In re Recall of Burnham*, 194 Wn.2d 68, 77, 448 P.3d 747 (2019); *Brower v. State*, 137 Wn.2d 44, 62, 969 P.2d 42 (1998). "First, courts must ask whether the funds were expended to carry out a fundamental purpose of the government." *Burnham*, 194 Wn.2d at 77. If they were used to carry out a fundamental public purpose, the analysis ends, and there is no gift of public funds. *Id.*; *Brower*, 137 Wn.2d at 62. If they were not used to carry out a fundamental public

ATTORNEY GENERAL OF WASHINGTON

March 17, 2020

Page 2

purpose, then the court asks whether the funds were given with donative intent, and what the public received in exchange. *CLEAN*, 130 Wn.2d at 797-98.

While we cannot endeavor to address every situation which may implicate this issue, protecting public health is without question a fundamental purpose of government. *See, e.g., Hudson v. City of Wenatchee*, 94 Wn. App. 990, 995, 974 P.2d 342 (1999) (describing “the preservation of the public health” and “promotion of the public welfare” as fundamental purposes of government). Given the public health crisis our state is facing, there is a strong basis for state and local governments to make expenditures for the primary purpose of protecting and promoting public health which may have an incidental benefit on private citizens and entities.

To give just a few examples, if a local government is concerned about ensuring that healthcare providers or first responders have childcare in order to enable them to continue working to protect the public during the COVID-19 crisis, it seems clear that it would further a fundamental purpose of the government to subsidize childcare for those individuals, whether by contracting with a childcare provider or otherwise. Similarly, if a local government wants to use public funds to subsidize healthcare screening or testing for community members during the COVID-19 pandemic, that would likewise further a fundamental purpose of government. Similarly, if a local government owned underutilized property and wanted to temporarily lend it to a local healthcare facility so that it could expand its capacity to deal with this crisis, that would further a fundamental purpose of government.

This memo is not intended to provide legal advice about any specific factual situation, but rather is intended to highlight that, in general, state agencies and local governments have broad authority to make expenditures to fight the COVID-19 pandemic without fear of violating the constitutional prohibition on gifts of public funds.

Sincerely,

A handwritten signature in blue ink that reads "Bob Ferguson". The signature is written in a cursive, flowing style with a long horizontal tail on the "g".

BOB FERGUSON
Attorney General

RWF/jlg