

GOLDWATER
I N S T I T U T E
in defense of liberty

CENTER FOR CONSTITUTIONAL LITIGATION

October 18, 2010

RE: October 19, 2010 Agenda Item 22R - Commercial Rehabilitation Program

Dear Mayor Barrett and Councilmembers:

We understand the Council may take action on a proposed Commercial Rehabilitation Program to provide approximately \$1.2 million to fund the “rehabilitation of eligible properties” downtown “in return for a 20-year façade easement.” This program violates the Gift Clause of the Arizona Constitution (Article IX, Section 7), and entering into Agreements pursuant to the program subjects the City to legal action.

As you know, the Gift Clause prohibits cities from giving gifts “by subsidy or otherwise” to private people and businesses. Although cities generally may use public funds to purchase goods and services, they must receive direct public benefits of roughly proportionate value in exchange; otherwise, the expenditure is an illegal gift. According to the most recent court ruling in the City of Phoenix CityNorth shopping mall case (which we litigated), “indirect” public benefits do not satisfy the Gift Clause.¹ Indirect benefits are things like anticipated tax revenues and jobs, which were discussed in connection with the proposed Commercial Rehabilitation Program. Indirect benefits also include aesthetics and preservation of the heritage of downtown areas. Although these are laudable goals for a city, they cannot serve as a legal basis to satisfy the Gift Clause.

The fact that the proposed program involves a limited easement does not change the analysis. The easement would merely give the City permission to temporarily enter the property solely for the purpose of rehabilitating it, which do not add any direct public benefit to satisfy the Gift Clause.

That the proposed program is limited to properties in a designated downtown area also does not change the analysis. Slum and blight, which are referenced in the program, does not enlarge a city’s power to subsidize private property.

Because the proposed Commercial Rehabilitation Program entails spending public funds purely for private benefit and without any direct, tangible public benefits, it violates the Gift Clause and we urge you to not to pursue it. Thank you for your consideration.

Very sincerely,



Carrie Ann Sitren

cc: Manager Carl Swenson, Attorney Steve Kemp

¹ *Turken v. Gordon*, 223 Ariz. 342, 224 P.3d 158 (2010).

Clint Bolick | DIRECTOR