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MEMORANDUM

TO: Dean Brault, Pima County Public Defense Services
FROM: Farhang & Medcoff, PLLC
DATE: July 2, 2019
RE: Permissibility of Pima County's Funding of a Non-Profit Bonding Agency

This memorandum analyzes whether a political subdivision of the State of Arizona can legally make a grant to a non-profit organization for the purposes of funding a bail bond agency to serve indigent persons. In completing our research, we identified and analyzed four areas which could raise concern: (1) Arizona's Gift Clause; (2) regulations and licensing requirements for surety and bail bond agents; (3) restrictions on a government's ability to make grants to non-profit organizations; and (4) powers afforded to a county under state law.

Based on our comprehensive review and analysis below, we conclude that Pima County's proposed program is not prohibited under our interpretation of current federal and state law.

Summary of Background Information

Pima County currently conducts initial appearances for criminal cases twice a day. Pretrial Services ("PTS"), under the direction of the Pima County Superior Court, utilizes an evidence-based, nationally accepted risk assessment tool to evaluate the risk of non-appearance and re-offending. Based on this risk assessment, PTS makes one of four recommendations for an individual: (1) to be released on his or her own recognizance; (2) to be released to the third-party custody of PTS; (3) to be released to the third-party custody of PTS with enhanced supervision; or (4) not to be released on his or her own recognizance. The rate at which the initial appearance judge adopted the PTS recommendation was approximately 86% in 2017.¹

If the initial appearance judge requires that an individual post a bond as a condition of release and the individual is unable to do so, the individual's attorney will often file a motion to modify the client's conditions of release and seek an accelerated hearing. If an individual is indicted, an average of 24 days or more pass between the date of arrest until the assigned judge may hear the motion to modify. Such motions to modify are almost always granted in cases where PTS recommended some form of release. Individuals whose charges are dismissed pre-indictment and who are unable to post bond, usually remain in jail for an average of 10 days.²

This inability to pay the bond has led to an estimated \$2.4 million in unnecessary bed days (assuming a second and subsequent rate of \$95.00 per day). To address this financial burden, Pima County is considering funding

¹ Brault Memorandum, dated July 2, 2018.

² *Id.*



FILED 07/02/2019 10:08 AM



a program in which one or more non-profit organizations would serve as a bail bond agency to post bond for individuals (without collateral) who meet certain criteria. Pima County proposes that individuals would be eligible to participate in the program if they have agreed to be bound by PTS's conditions to release and they meet the following criteria: (i) the bond is set at \$30,000 or less, and (ii) the charges were not under A.R.S. Title 13, Chapters 11, 14, or 35.1 (homicide, sex and child pornography cases).³ By implementing such a program, Pima County estimates that it could save over \$2 million dollars and reduce the jail population by 5.2% (based on 2017 figures).⁴

Gift Clause

Arizona's Gift Clause (the "Gift Clause") provides that "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." Ariz. Constr. Art. 9, §7.

Arizona's long-standing jurisprudence holds that "a government body may disburse funds only for a public purpose." *Wisturber v. Paradise Valley Unified School District*, 141 Ariz. 346, 348, 687 P.2d 354, 356 (1984) (citing *Proctor v. Hunt*, 43 Ariz. 198, 201, 29 P.2d 1058, 1059 (1934)). The *Wisturber* Court determined that the transfer of public funds to a private entity does not violate the Gift Clause if (i) the transfer of funds serves a public purpose, and (ii) the consideration paid through public funds far exceeded the public benefit received. 141 Ariz. at 348-50, 687 P.2d at 356-58.

The Arizona Supreme Court upheld the *Wisturber* two-prong test in 2010, confirming 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." *Turken v. Gordon*, 223 Ariz. 342, 349, 224 P.3d 158, 165 (2010) (citing *Wisturber*, 141 Ariz. at 349, 687 P.2d at 357). In so holding, *Turken* clarified that a public purpose would only be found absent in "those rare cases in which the governmental body's discretion has been 'unquestionably abused.'" *Id.* at 349, 224 P.3d at 165 (citing *Glendale v. White*, 67 Ariz. 231, 237, 194, P.2d 435, 439 (1948)).

However, the *Turken* Court clarified that, for all future interpretations of the Gift Clause, the second prong of the *Wisturber* test requires that only direct benefits to the public be included in determining whether proportionate value was received by the public compared to the public funds expended. 223 Ariz. 342, 351-52, 224 P.3d 158, 167-68 (2010) (rejected the inclusion of projected future sales tax revenue and other indirect benefits when calculating value of benefit received).

In analyzing Pima County's proposed program under the *Wisturber* two-prong test, as clarified by *Turken*, it is not likely that the program violates the Gift Clause. Pima County has proposed to make a grant to a non-profit

³ *Id.*

⁴ Brault Memorandum, dated March 11, 2019.

organization operating a bail bond agency in order to assist its indigent citizens. In making its proposal, Pima County has determined that a public purpose is to prevent the loss of jobs, homes, custody of children, and personal property, which may result from an extended stay in jail.⁵ Under the broad discretion afforded the executive branch of the government in *Turken*, we do not believe a court could determine that Pima County “unquestionably abused” its discretion by creating a program which could prevent its constituents from spending unnecessary time in jail as a result of their indigent status. Thus, it is likely a court would find that Pima County’s proposed program meets the first prong of the *Wisturber* test.

The second prong of the *Wisturber* test requires Pima County to receive adequate consideration for its expenditure in order to pass muster under the Gift Clause. In making its proposal, Pima County has quantified actual costs to the public totaling \$2.4 million as a result of unnecessary bed days in jail. These costs, however, are the permissible, direct costs to the public, quantifiable through PTS and jail occupancy records, and do not include any of the indirect costs to the County and the individuals (e.g., prevention of loss of jobs, housing, and personal property as well as preventing custody issues for children who must become wards of the court or who otherwise must enter into the system when their primary caregiver cannot post bond to get out of jail). Even under this more restrictive *Turken* analysis, unless Pima County’s grant to a non-profit agency operating a bail bond company under the proposed program greatly exceeds the demonstrated direct benefit, it would not violate the Gift Clause.

Furthermore, the purpose of Pima County’s proposed disposition of public funds is to fund a non-profit operated bail bond company which would use the public funds as collateral for bond securing an individual’s appearance in court. If the individual appears in court as required, the bond will be exonerated and there will be no loss of public funds. If the individual fails to appear as required, then the bond will be forfeited to the court, but it will remain the property of Pima County, thereby resulting in no loss of public funds.

Although no loss of public funds will actually occur under either scenario, if anyone challenges Pima County’s proposed program, we foresee that challenge arising under the Gift Clause prohibition against a public entity loaning its credit in the aid of a private person of entity. However, this challenge would be governed by the same analysis described above, *i.e.*, was the loan used for a public purpose, as determined by Pima County, and did the loan of public funds greatly exceed the benefit to the public resulting from the loan.

Bail Bond Agent Requirements and Liability

In Arizona, a criminal defendant who is released on bond may employ a surety to post an appearance bond on that individual’s behalf. A surety is “a person or company, other than the defendant, who executes an appearance bond and agrees to pay the amount of the bond if the defendant fails to comply with its conditions.” 16A A.R.S. Rules Crim. Proc., Rule 7.1(g). A surety is liable for the amount of the bond if the defendant does

⁵ Brault Memorandum, dated July 2, 2018.

not appear in court; however, a surety is not responsible for the actions of the defendant, other than his/her obligations to appear.

A bail bond agent is “any person who engages in a bail transaction on behalf of a surety insurer or representative thereof.” ARIZ. ADMIN. CODE R20-6-601(B)(2). Bail bond agents are regulated by the Arizona Department of Insurance. Under A.R.S. § 20-340 and A.R.S. § 20-281, *et seq.*, a bail bondsmen must meet the following criteria: (i) be at least 18 years old, (ii) be an Arizona state resident, (iii) pass the state licensing exam, (iv) possess sufficient funds to pay the licensing fee and fingerprint processing fee, (v) provide proof of citizenship, work permit, or permanent residency, (vi) have no felony crime convictions, (vii) possess sufficient funds to satisfy surety obligations, (viii) not have violated any rules involving court orders within the past two years, and (ix) agree to maintain regular contact with defendants as a service to the court. A “professional bondsman” is “any person who is a surety simultaneously on more than 4 appearance bonds.” 16A A.R.S. Rules Crim. Proc., Rule 7.1(h).

Under the proposed program, neither Pima County (nor any of its employees) would be acting as a bail bond agent (or even a surety). Instead, the non-profit would be responsible for compliance with all Arizona Department of Insurance licensing requirements, on behalf of itself and any bail bond agents it employs. In other words, even though Pima County would be funding the non-profit bail bond agency through a grant, Pima County would not qualify as nor be a bail bondsman. Nonetheless, and in an abundance of caution, we recommend that Pima County independently review and verify the bail bondsmen licensing compliance of any non-profit entity before making a grant to such entity.

Restrictions on Grants by Government Entities to Non-Profit Corporations

We have been unable to locate any federal prohibitions or restrictions on government entities making grants or donations to non-profit organizations. To the contrary, our research indicates that many non-profits rely on grants from federal, state, or local government grants to fund their programs, especially for human service and healthcare.⁶ The federal government has created www.grants.gov for organizations to apply for and monitor federal grants. There are currently 26 federal grant-making agencies and more than 900 federal programs within the federal government.⁷

County Powers Under State Law

State law affords counties, through their respective boards of supervisors, officers and agents, broad powers to serve their inhabitants, such as:

⁶ Joanne Fritz, How Nonprofits Generate Revenue Streams (Updated February 10, 2019), <http://www.thebalancesmb.com/where-do-nonprofits-get-their-revenue-2502011>.

⁷ Heather Stombaugh, Important Steps to Finding Government Grants for Nonprofits (Updated April 12, 2019), <http://www.thebalancesmb.com/government-grants-for-nonprofits-2502170>.

- The power to dispose of or use its property as the interests of the county inhabitants require (A.R.S. § 11-201(A)(4));
- The power to levy and collect taxes for purposes under [their] exclusive jurisdiction as are authorized by law (A.R.S. § 11-201(A)(5)); and
- The power to make and enforce all local, police, sanitary and other regulations not in conflict with general law (A.R.S. § 11-251(31)).

We have been unable to locate any state prohibitions or restrictions on a county making grants or donations to non-profit organizations (aside from our analysis of the Gift Clause, addressed above). Under A.R.S. § 11-201, Pima County is authorized to collect taxes from inhabitants, and use those tax dollars (its property) “as the interests of the inhabitants require.”

Here, Pima County has determined that the “interests of its inhabitants” include providing grants which will be used to support a bail bond agency to assist indigent persons with posting bond. Furthermore, Pima County’s proposed program may have the added benefit of maintaining the tax income of Pima County as individuals may be protected from an extended jail stay and, thus, may be able to maintain jobs (and pay taxes). While this analysis may not pass muster under the Gift Clause analysis because it involves indirect benefits, it can be included within Pima County’s determination to use its tax dollars to further the interests of its inhabitants.

Conclusion

Beyond the legal analysis discussed above, we have not analyzed the possible non-legal concerns raised by the proposed program, including:

- Is there public and/or political support for such a program?
- Could there be negative publicity for Pima County if program participants who are released on bond commit subsequent crimes?
- Will there be an expensive legal challenge to the proposed program by the bail bond industry?
- Will the program cause animosity between Pima County and its local judges whose may feel that their judgment is being overridden through the proposed program?

These questions raise legitimate business determinations as opposed to the legal issues addressed in this memorandum. In summary, based on the legal analysis above, we conclude that Pima County’s proposed program is not prohibited by our interpretation under current federal and state law. We are available to address any additional questions or concerns arising from your reading or interpretation of this memorandum. We are also available to discuss or present our findings to the appropriate people at Pima County, keeping in mind our desire to preserve and protect the attorney-client privilege to the full extent of the law (to that end, please do not forward this memorandum to anyone without consulting with us first or ensuring the recipient does not waive the privilege).