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Robert R. Corbin

August 22, 1990

Charles L. Miller, Director  
Department of Transportation  
206 South Seventeenth Avenue  
Phoenix, Arizona 85007

Re: I90-074 (R90-105)

Dear Mr. Miller:

In your letter of July 23, 1990, you asked whether the Arizona Department of Transportation (Department) may distribute monies in the state aviation fund to the City of Phoenix which will in turn loan the funds to America West Airlines for the purpose of financing the construction of a "Technical Support Center" at Sky Harbor Airport.

The State Aviation Fund is established by A.R.S. § 28-1706, which provides as follows:

§28-1706. Aviation fund; source of monies; administration; investments

A. There is established a state aviation fund. The state treasurer shall place to the credit of the fund:

1. All aviation fuel taxes or motor vehicle fuel taxes transmitted to the state treasurer by the department.
2. All monies transmitted to the state treasurer by the department as a result of the sale of an abandoned or seized aircraft.
3. The amount of flight property tax which has been transmitted to the state treasurer by the department of revenue pursuant to §42-705.

B. The department shall promptly remit to the state treasurer all monies received from the operation of airports under the provisions of this chapter, and the state treasurer shall credit such monies to the state aviation fund.

C. The department shall administer monies appropriated by the legislature out of the state aviation fund.

D. The state treasurer may invest inactive deposits of the state aviation fund in United States government bonds or interest bearing obligations of the United States for which the full faith and credit of the United States are pledged. The state treasurer shall credit all interest earned on aviation monies to the state aviation fund.

In the capital outlay bill, Laws 1990, (3rd Spec. Sess.) Ch. 8, § 2(J), the Legislature appropriated \$10,703,000 plus any balances in excess of the monies appropriated from the aviation fund in the general appropriations bill to the Department for planning, construction, development and improvement of state, county, city or town airports.

The monies appropriated from the aviation fund for capital outlay under A.R.S. § 28-1706(A) are subject to use restrictions set forth in A.R.S. §§ 28-1766 and 28-106 as follows:

§ 28-1766. Distribution of tax

Monies received from the taxes imposed under the terms of this article shall, not later than the fifteenth day of each month, be transmitted by the division of aeronautics to the state treasurer who shall deposit such funds in the state aviation fund for use in the construction, development and improvement of airports.

§28-106. Powers and duties of the [Transportation] board; definition

A. With respect to aeronautics, the transportation board shall distribute monies appropriated to the division from the state aviation fund for planning, design, development, acquisition of interests in land, construction and improvement of publicly owned and operated airport facilities in counties and incorporated cities and towns. The

transportation board shall distribute the monies according to the needs for such facilities as determined by the board.

F. For purposes of subsection A, a "publicly owned and operated airport facility" means an airport and appurtenant facilities in which one or more agencies, departments or instrumentalities of this state holds an interest in the land upon which the airport is located which is clear of any reversionary interest, lien, easement, lease or other encumbrance which might preclude or interfere with the possession, use or control of the land for public airport purposes for a minimum period of twenty years.

The authority for a city, town or county to establish an airport is set forth in A.R.S. § 2-301 as follows:

§ 2-301. Authority of cities, towns and counties, limitation

A. The governing body of a city or town or the board of supervisors of a county may acquire, establish, construct, own, control, lease, equip, improve, maintain, operate and regulate airports for the use of aircraft within or without the limits of the municipality, and for that purpose may use property suitable therefor which is or may hereafter be owned or controlled by the city, town or county.

Under A.R.S. § 2-302, the legislature has declared airports to have a public purpose by the following:

§ 2-302. Airports declared a public purpose

Lands acquired, owned, controlled or occupied by the department of transportation, in the operation and maintenance of the Grand Canyon National Park airport, cities, towns or counties for the purposes enumerated in § 2-301 are for a public purpose and for a public necessity.

Although the acquisition, establishment, construction equipment, control, lease, improvement, maintenance, operation and regulation of an airport may be a public purpose, this

declaration does not permit aviation fund monies to be used for all public airport purposes. The aviation fund may be used only for the purposes and subject to the restrictions set forth in A.R.S. §§ 28-1766 and 28-106. Under these statutes, aviation fund monies are restricted to the construction, development and improvement of publicly owned and operated airports. Additionally, the funds may not be used for a publicly owned and operated airport if the facility acquired or built by aviation fund monies subjects the land owned by a city, town or county to a reversionary interest, lien, easement, lease or other encumbrance which might preclude or interfere with possession, use or control of the land for public airport purposes for a minimum period of twenty years.

While A.R.S. §§ 28-106 and 28-1766 authorize distribution of the taxes for the purposes set forth in those statutes, the statutes make no declaration regarding the form of the distribution. Administrative agencies have powers which are either expressly delegated by statutes, or by implication conferred on them by the legislature. Cracchiolo v. State, 146 Ariz. 452, 457, 706 P.2d 1219, 1224 (Ct. App. 1985); Fund Manager, Public Safety Personnel Retirement System v. Tucson Public Safety Retirement System Board, 137 Ariz. 536, 540, 672 P.2d 201, 205 (Ct. App. 1983). We conclude that the Department's authority to distribute monies from the aviation fund necessarily implies authority to determine the form of distribution which will result in the best use of the funds. So long as the monies from the aviation fund are expended for constitutional purposes and subject to the restrictions contained in A.R.S. §§28-106 and 28-1766 the monies may be expended in any way the transportation board deems to be the best utilization of the funds.

The next issue which must be addressed is whether aviation fund of monies may be utilized for projects which benefit a private entity. In this context, we must first examine article IX, section 7 of the Arizona Constitution, which provides:

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.

Although article IX, section 7 prohibits public monies from being used as a loan, donation, grant, or subsidy to a private individual corporation, the Arizona Supreme Court has held that such payments are permissible where the transaction involves a public purpose and valuable consideration is received by the public for the payment. The Arizona Supreme Court has recognized that the public funds may be loaned to a private individual, corporation or association if there is a public purpose served by the expenditure or loan of funds and the value to be received by the public is not "far exceeded" by consideration being paid. In City of Glendale v. White, 67 Ariz. 231, 234, 194 P.2d 435, 437 (1948), the court acknowledged that the term "public purpose" is incapable of exact definition and may change to meet new developments and conditions.

No hard and fast rule can be laid down, for in determining whether a proposed expenditure of public funds is valid as devoted to a "public use or purpose" each case must be decided with reference to the object sought to be accomplished and to the degree and manner in which the object affects the public welfare.

The court concluded that it would not substitute its judgment concerning public purpose for that of the governing body unless its exercise of judgment or discretion was shown to have been "unquestionably abused." 67 Ariz. at 237, 194 P.2d at 439.

The court in Wistuber v. Paradise Valley Unified School District, 141 Ariz. 346, 349, 687 P.2d 354, 357 (1984) discussed the purpose of the constitutional prohibition against the loaning of credit and the giving of gifts:

The constitutional prohibition was intended to prevent governmental bodies from depleting the public treasury by giving advantages to special interests [citation omitted] or by engaging in non-public enterprises. Of course, either objective may be violated by a transaction even though that transaction has surface indicia of public purpose. The reality of the transaction both in terms of purpose and consideration must be considered. A panoramic view of the facts of each transaction is required . . . . The public benefit to be obtained from the private entity as consideration for the payment or conveyance from a public body may constitute a "valuable consideration" but the Constitution may still be violated if the value to be received by the public is far exceeded by the consideration being paid by the public. Of course, in

reviewing such questions, the courts must not be overly technical and must give appropriate deference to the findings of the governmental body.

(citations omitted).

In Wistuber the court referred to City of Tempe v. Pilot Properties, Inc., 22 Ariz. App. 356, 362, 527 P.2d 515, 520-21 (Ct. App. 1974), stating:

In Pilot Properties the city attempted to lease valuable property for a rental of \$1.00 per year to a professional baseball team in return for the lessee's agreement to build a ballpark for use, inter alia, as a municipal ballpark. At the end of the lease term the ballpark would revert to the city. The court found that the propriety of the transaction could not be decided in the abstract. The court stated that merely because the private entity "uses public funds or property for a 'public purpose' is not sufficient, in and of itself, to remove that use from the provisions" of the Constitution. There must also be "consideration" which is not "so inequitable and unreasonable that it amounts to an abuse of discretion", thus providing a subsidy to the private entity.

141 Ariz. at 349, 687 P.2d at 357 (citations omitted).

From the foregoing it may be generally concluded that where an agency or political subdivision of the state is authorized to loan public monies, the governmental entity may loan the funds to a private entity only if there is a direct, rather than abstract, public purpose in making the loan and the consideration received by the public in exchange for the loan is not so inequitable or unreasonable that it amounts to an abuse of discretion constituting a subsidy of the private entity. Furthermore, we conclude from the holdings in Wistuber and in City of Tempe that the public's right to receive compensation for a loan to a private entity must likewise be direct and reasonable. Therefore, the governmental entity may not agree to provisions of a contract which would unreasonably deprive the public of its value or consideration.

In examining the nonbinding Memorandum of Understanding for Financial Expansion of America West's Sky Harbor Technical Center, we note certain provisions which could cause a violation of the constitutional prohibition against gifts to private corporations:

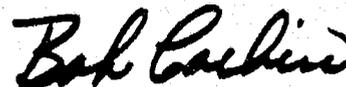
1. While America West remains a publicly traded company the state will be paid its lease payments only if the company's yearly reportable consolidated net income exceeds \$10 million. (MOU Item 11, page 6.)
2. The state's share of the lease payments will be payable without interest. (Id.)
3. The pledge of additional jobs in paragraph 8 is contingent, at least in part, upon enactment of no additional laws or regulations which would have "a material and adverse financial impact on America West" and upon "other events beyond the reasonable control of America West." (MOU Item 8, page 5.)

These provisions could be interpreted to mean that America West will not be required to fulfill its obligations under adverse financial conditions, thus placing the entire business risk of the project on the public. Also, because most private corporations in this state involve employment of state residents, employment alone may not be sufficient consideration for payment of taxpayer funds to private entities.

However, because the terms of the Memorandum of Understanding are intended to be a nonbinding summarization of the understanding of the parties, there may be terms or conditions to the actual contract which resolve the problems noted above. The Transportation Board must determine whether the funds are to be expended for purposes authorized by statute and whether the public is to receive sufficient consideration for the loan. If either restriction is not satisfied, the transaction is not authorized by law.

In summary, we conclude that due to the restrictions contained in A.R.S. §§ 28-106 and 28-1766, monies may not be expended from the state aviation fund for facilities of a private entity unless the facilities constitute an improvement of a publicly owned and operated airport facility. We also conclude that the Transportation Board must determine whether under article IX, section 7 of the Arizona Constitution the public is receiving sufficient public benefit for the loan. These factual matters must be determined by the Transportation Board prior to final review of the loan agreement by this office.

Sincerely,



BOB CORBIN  
Attorney General