

Finally, not enough emphasis can be given to the importance of cooperation between local government and the Washington State Gambling Commission. Since the legislature has given the Commission sole power to regulate gambling activities, the Commission feels it is especially important that it work closely with local government so that those regulations which it does adopt will provide local government with the tools needed to perform their unique law enforcement tasks. To further this end, a vigorous two way communication must be undertaken between concerned levels of local government and the Gambling Commission.

PUBLIC CORPORATIONS CREATED UNDER CH. 37, LAWS OF 1974,
1st Ex. Sess. - CONSTITUTIONAL IMPLICATIONS UNDER ARTICLE VIII,
§ 7 OF THE WASHINGTON STATE CONSTITUTION; AND INITIATIVE NO 276 -
CURRENT DEVELOPMENTS - POSSIBLE RESPONSIBILITIES OF CITY ATTORNEYS

by

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Despite any possible inferences to the contrary, the purpose of my talk is not to suggest that Ch. 37, Laws of 1974, 1st Ex. Sess., is actually unconstitutional in any respect. Rather, I will be discussing certain constitutional questions that may arise under the chapter and suggest various ways in which its provisions should be utilized to avoid any unconstitutional applications. The guiding rule to follow in such matters is stated in Soundview Pulp Co. v. Taylor, 21 Wn.2d 261, 150 P.2d 839 (1944), namely, that when there are two possible ways of construing a statute, one of which would render it constitutional and the other unconstitutional, we must adopt that construction which will render the statute constitutional.

I will begin with a brief summary of the act and its major provisions and then discuss the nature and permissible uses of public corporations under that chapter.

Section 1 simply recognizes, as a fact of life, the increasing number of federal grants and programs available to municipalities and the desirability of our taking the best advantage of such opportunities in this state. Section 2 contains four subsections giving specific authority to cities and counties to take certain actions for the proper utilization of federal or private grants, including the creation of public corporations, commissions or authorities.

Section 3 declares the public policy of the state and grants broad powers to cities and counties to enter into agreements with the United States and with state agencies to ". . . receive and expend federal or private funds for any lawful public purpose . . ."

Section 4 provides that powers granted by this chapter to cities are to be exercised solely within the city limits of such city unless otherwise provided by contract between the city and another city or county.

Section 5 directs cities, towns, and counties having created public corporations, commissions or authorities to exercise control over such entities, and further grants certain powers to such entities.

Section 6 makes provision for dissolution of such created entities and limits liabilities.

Section 7 grants a tax exempt status to public corporations, commissions, or authorities created under the chapter.

Section 8 contains an emergency clause making the act take effect immediately.

For purposes of this discussion, § 2 contains the substance of the act, and to set the stage, I will first talk about subsection (4) of that section authorizing cities, towns and counties to:

"(4) Create public corporations, commissions, and authorities to administer and execute federal grants or programs; to receive and administer private funds, goods, or services for any lawful public purpose; and to limit the liability of such public corporations, commissions, and authorities to the assets and properties of such public corporation, commission, or authority in order to prevent recourse to such cities, towns, or counties or their assets or credit."

The idea of creating public corporations as extensions of state agencies or of municipal entities, is not a brand new one. My first acquaintance with such a creature was with Century 21, Inc., which the legislature created as an adjunct to the World's Fair Commission to conduct the Seattle World's Fair in 1962. In a subsequent case, Petschl v. Century 21 Corp., 61 Wn.2d 276, 377 P.2d 991 (1963), the supreme court recognized (but did not decide) that the corporation thus created was a public agency. Again, in Oceanographic Commission v. O'Brien, 74 Wn.2d 904, 447 P.2d 707 (1968), the court considered, but did not decide, the nature of a nonprofit corporation formed by a state agency (the Oceanographic Commission) to assist in the exercise of its powers. More recently we have the example of the Expo '74 Commission and its express authority to function through a nonprofit corporation, Expo '74, Inc. See, for a discussion of the nature of Expo '74, Inc., as a state agency, our unpublished opinion to Representative Hurley, dated September 22, 1971.¹

Still another, slightly different example, is the Washington State Higher Education Assistance Authority; a state agency which the legislature initially created as a ". . . corporate governmental agency . . ." See, RCW 28B.17.010 and RCW 28B.17.030. The constitutionality of that act is being tested on other grounds

¹ A subsequent opinion which concluded that Expo '74, Inc., no longer could be regarded as a state agency because of a preemption by the federal government. AGLO 1974 No. 58, dated May 24, 1974. A copy of these Attorney General's Opinions is available upon request.

in Washington State Higher Education Assistance Authority v. Graham, et al.,
Supreme Court No. 43124.

In the municipal area, you will recall, the legislature has authorized municipalities and other public agencies to form public corporations to administer joint programs under the Interlocal Cooperation Act. See, RCW 39.34.030(3)(b), as amended by § 1, chapter 81, Laws of 1972, 1st Ex. Sess.

To my knowledge, the supreme court of our state has never actually passed on the constitutionality of allowing a state agency or municipal corporation to form a nonprofit corporation as an extension of or an adjunct to its own powers. The constitutional provisions which would seem most likely to present problems are Article XI, § 10, as amended by Amendment 40 and Article XII, § 1 of the Washington State Constitution, which together prohibit the creation of either municipal corporations or private corporations by special act. I doubt, however, that chapter 37 violates either of these provisions because the type of corporations envisioned by that chapter are neither "municipal" nor "private" corporations. They are, I believe, mere subagencies of the various agencies which are authorized to create them. In view of the rule of construction cited earlier, that is the way we in the attorney general's office undoubtedly will regard them for all practical purposes.

By the same token, in my opinion, such creatures cannot be regarded as constitutionally independent beings; they must be regarded as agencies exercising delegated powers subject to the same restrictions on their activities as their "parent" municipalities or state agencies. I have already advised the state auditor's office, verbally, that the operations of any such entity created by a city or county is subject to audit by the state auditor's division of municipal corporations like other operations of that municipality, and as a part of the overall examination of the parent municipality.

Having stated my view of the nature of public corporations apparently contemplated by Ch. 37, supra, I shall now discuss the remaining three subsections of § 2.

Subsection (1) authorizes cities and counties, in order to carry out the purposes of that section, to transfer federally or privately granted funds and other assets ". . . to any public corporation, commission, or authority, with or without consideration, . . ."

Even disregarding the character of the "public corporation, commission, or authority," as I have just previously discussed, there is strong support for the constitutionality of such transfers, under appropriate conditions. In AGO 1970 No. 24, we pointed out that where federal grants are made to municipalities for specific grant purposes, such as the model cities program, and there is no commingling of the grant money with city funds, the funds could be regarded as nonpublic and could be passed on to others, pursuant to the terms of the grant, notwithstanding the constitutional inability of a city to expend its own funds for the same purpose. Similarly, if necessary, we could simply consider subsection (1), supra, as authority for cities and counties to act as conduits for federal grants made for specific programs not involving the direct or indirect use of cities' own funds. Under that theory, and those facts, subsection (1)

could be utilized constitutionally, to transfer funds even to private corporations.

Subsection (2) authorizes cities and counties to operate on behalf of the federal government, as coordinators or agents, in the organization of and participation in certain joint operations, etc. This, I think, should be regarded as a variation of the same "conduit" theory. It could present constitutional problems depending upon the specific facts of a particular venture, and I suggest a cautious look by you in advising a city whether a particular program is lawful. The question in each case is whether or not the city's participation would involve the utilization of city funds, directly or indirectly, for a purpose for which the city could not lawfully expend its own funds.

Subsection (3) carries the thought a step further, and expressly recognizes the constitutional problem involved. It grants general authority to cities and counties to continue federally-assisted programs, etc., after the exhaustion of federal funding, with a proviso cautioning against the use of that power in any manner contrary to Article VIII, § 7 of the Washington State Constitution. Again, the test of constitutionality is simple. If the continuation of the program by the city or county involved would involve an expenditure of city or county funds for any purpose, or in any manner, forbidden by Article VIII, § 7 of the Washington State Constitution (or any other constitutional provision), the authority is denied. Examples of permissible activity under that subsection would be expenditures in continuation of federal programs involving purely inter-governmental activity; e.g., a contract between a city and a county for law enforcement protection, street purposes, utility services, or something of that nature. Again, in the last analysis, the municipal attorney is going to have to examine each proposal on the basis of its own specific facts.

The Responsibility of the City Attorney under Initiative No. 276

The specific subject I was asked to discuss is the possible obligation of the city attorney to enforce the provisions of Initiative No. 276 (Ch. 42.17 RCW), particularly in situations where elected city officials may be found to have violated any provision of that act - such as § 24 (RCW 42.17.240).

The basis of possible enforcement responsibility on the part of city attorneys is found in § 40 (RCW 42.17.400), which provides in pertinent part as follows:

"(1) The attorney general and the prosecuting authorities of political subdivisions of this state may bring civil actions in the name of the state for any appropriate civil remedy, including but not limited to the special remedies provided in § 39 . . ."

Other subsections make the same reference to ". . . the prosecuting authorities of political subdivisions of this state . . ." Arguably, that phrase was meant to apply only to the prosecuting authorities of counties; if so, however, it would have been simple to have used the word "counties," instead of "political subdivisions." As I have indicated in earlier talks on the subject that, plus the use of the phrase "prosecuting authorities," coupled with the liberal construction clause of the act (RCW 42.17.470) indicates an intent to bring into the

enforcement picture all public attorneys who have law enforcement powers, including city attorneys. However, I doubt that the act would be construed as imposing upon city attorneys a mandatory duty to personally initiate a civil action in every case in which there is reason to suspect a violation may have occurred. Notably, RCW 42.17.400, supra, uses the permissive "may" rather than the mandatory "shall." Contrast that with RCW 42.17.370 which provides that the commission ". . . shall . . ." investigate and enforce the act. Obviously, those who wrote the initiative and presumably the people in passing it, intended that the commission should exercise primary enforcement powers, but that the city and county attorneys should have concurrent discretionary power to investigate and enforce. I doubt that the responsibility of a prosecutor or city attorney to enforce Initiative No. 276 is quite the same as that of a prosecuting attorney to enforce criminal laws. Chapter 42.17 RCW contains civil remedies only, and as I noted earlier, the act places primary enforcement responsibility upon a state agency, the Public Disclosure Commission.

I am not suggesting that you have no enforcement responsibility at all. I think a city attorney, given that specific authority, has at least a moral responsibility to encourage compliance with the law in his own jurisdiction and to concern himself with the matter of enforcement insofar as practicable. The substance of my conclusion is merely that the city attorney, when faced with real practical problems in enforcing this particular act, does have some discretion.

In final analysis, we all have to weigh carefully the public's interest and the critical need for confidence in government, and use both honesty and good sense in interpreting all laws, including Initiative No. 276.

CIVIL PENALTIES FOR VIOLATIONS
OF MUNICIPAL COMPETITIVE BIDDING LAWS
(Ch. 74, Laws of 1974, 1st Ex. Sess.,
Re-engrossed Senate Bill No. 2408)

by

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Ch. 74, Laws of 1974, 1st Ex. Sess., originally introduced in the January, 1974 session as Senate Bill No. 2408, was passed at the January, 1974, session, by the Senate on January 29, 1974, and by the House on February 7, 1974. It was signed by the Governor on February 15, 1974 and filed in the Office of the Secretary of State on February 15, 1974. It will take effect at one second past midnight on the morning of July 24, 1974, a day to which I, personally, have been looking forward since December of 1972, for reasons which will become very apparent later.

Ch. 74, Laws of 1974, 1st Ex. Sess., contains two sections, and, since the effects of Section 2 are the most obvious, I may discuss that section and dispose of it before getting into the more significant section one.