

Board of Directors
Chelan Douglas Regional Port Authority
Meeting Minutes
Zoom Meeting
May 12th, 2020
9:00 am

Present:

Directors

JC Baldwin, Director (via Zoom)
Donn Etherington, Director (via Zoom)
*Rory Turner, Director

Jim Huffman, Director (via Zoom)
W. Alan Loeb sack, Director (via Zoom)
Mark Spurgeon, Director (via Zoom)

Staff

*Jim Kuntz, Chief Executive Officer
*Monica Lough, Director of Finance & Admin.
Ron Criddlebaugh, Director of Economic Development
Craig Larsen, Business Development Manager
Tricia Degnan, CTC Manager
Sarah Deenik, Communications Coordinator
Esther McKivor, Accounting Specialist

*Trent Moyers, Director of Airports
*Cami Harris, Executive Assistant
*Quentin Batjer, Legal Counsel
Stacie de Mestre, Property & Facilities Mgr.
Randy Asplund, Consultant
Ron Russ, Airport Operations Manager

*Commissioner Turner, Jim Kuntz, Monica Lough, Trent Moyers, Quentin Batjer, and Cami Harris in person; others via Zoom.

Guests:

Ray Dobbs, City of Chelan (via Zoom)
Jenny Rojanasthien, GWATA (via Zoom)
Lacey Price, Stage Kids (via Zoom)
Reilly Kneeder, Wenatchee World (via Zoom)
Gerry O'Keefe, WPPA (via Zoom)

The Chelan Douglas Regional Port Authority (CDRPA) Meeting was called to order at 9:00 am. Due to the Covid-19 virus outbreak, the meeting was held at the Confluence Technology Center via Zoom as previously posted in the required Public Meeting Notice.

Director Turner inquired how his fellow Directors are doing during COVID-19, and each Director gave a short report. Roll call was taken.

Conflict of Interest – None.

CDRPA CONSENT AGENDA:

The Consent Agenda consisting of minutes of the Chelan Douglas Regional Port Authority (CDRPA) meeting of April 28th, 2020; and check register pages #2020-10-#2020-12 including electronic transfers, was presented and the following action was taken:

Motion No.

Moved by:

Seconded by:

05-01-20 CDRPA

Mark Spurgeon

JC Baldwin

To approve the Chelan Douglas Regional Port Authority (CDRPA) Consent Agenda consisting of Minutes of April 28th, 2020 Meeting; and Check Register Pages #2020-10-#2020-12, including electronic transfers, as presented.

Motion passed 6-0.

Regional Port Economic Development Initiatives Related to COVID-19 (Third Party Resources) – Kuntz reviewed the COVID-19 grant programs which the CDRPA will administer on behalf of other agencies, including:

- Department of Commerce Working Washington Small Business Emergency Grants (the CDRPA is managing this program as the Chelan/Douglas County ADO)
- Chelan/Douglas County Community Development Block Grant
- Chelan County Grant
- City of Wenatchee – Community Development Block Grant
- City of East Wenatchee – Community Development Block Grant

Regional Port Economic Development Initiatives Related to COVID-19 (Regional Port Funding) –In addition to the above funds to assist small businesses in Chelan and Douglas Counties, CDRPA staff proposed a “Small Business Support Initiative” in the amount of \$200,000 to further assist businesses in the two-county region. Kuntz reviewed a list of proposed initiatives including:

- Small Business Marketing Fund
- Rent Participation Fund
- Getting Ready to Reopen Fund
- Need Cash Flow Now Fund

Discussions ensued and the Board directed staff to limit the initiatives to just two (Rent Participation Fund and Getting Ready to Reopen Fund). Each initiative will have an overall CDRPA budget cap of \$100,000 and a per business cap of \$1,000. The following action was taken:

Motion No.
Moved by:
Seconded by:

05-06-2020 CDRPA

JC Baldwin
Jim Huffman

To authorize staff to proceed with developing a Small Business Support Initiative to include a Rent Participation Fund, and a Getting Ready to Reopen Fund related to COVID-9, and establish an overall project budget of \$200,000.

Motion passed 6-0.

COVID-19 – Mid-Term Program Ideas to Support Chelan/Douglas County Small Business - Kuntz reviewed some additional ideas to support area small businesses including:

- Develop an E Commerce website
- Website development assistance
- A Greater Wenatchee Area “Bucks” program to be redeemed at a discount at local businesses
- Assistance to stimulate business for Alaska Airlines

In addition, Jenny Rojanasthien from GWATA reviewed a proposed program between GWATA and Microsoft to assist small businesses build websites.

CERB Planning Grant – Kuntz and Criddlebaugh provided information on a proposed CERB Planning Grant application concerning the former Giga Watt site. If approved, CERB Grant funds would be used to hire a consultant to determine if the existing buildings on site could be repurposed for other economic development opportunities. Discussion ensued and the following action was taken:

Motion No.
Moved by:
Seconded by:

05-07-20 CDRPA

Mark Spurgeon
JC Baldwin

To authorize the CEO to submit a CERB Planning Grant application concerning the former Giga Watt Site.

Motion passed 6-0.

COVID-19 and Pangborn Memorial Airport – Kuntz and Moyers provided information on health precautions at Pangborn Memorial Airport related to COVID-19. Kuntz reviewed what other airports and airlines are doing concerning mask requirements. Discussions ensued and the Board directed staff to strongly recommend passengers wear masks in the terminal building, but not make it a requirement.

CDRPA INFORMATIONAL ITEMS – COVID-19 RELATED:

COVID-19 “Early Opening” Letter of Support – Kuntz reviewed a request to draft a letter of support for the “early opening” of businesses in Chelan/Douglas Counties. Discussion ensued and it was agreed the Regional Port would only draft a support letter if Confluence Health, Chelan-Douglas Health District, and Columbia Valley Community Health were all supportive of an “early opening” plan.

FAA CARES Act Grant – Moyers provided an update on the FAA CARES Act Grant. The airport has not yet received the formal grant offer, but expect to receive it within the next two or three weeks.

Regional Port Tenant Rent Relief Update – Kuntz provided an update on Regional Port tenant’s rent relief requests. He will continue to provide updates at future meetings. Discussion ensued.

CDRPA INFORMATIONAL ITEMS:

US Forest Service Helipad – Russ provided an update on the helipad construction project. The project is expected to be complete by May 28th, 2020.

EPA Brownsfield Grant – De Mestre provided an update on the EPA Brownsfield Grant of \$600,000 awarded to the Regional Port. The Regional Port will work with the City of Wenatchee and the City of Rock Island to identify which projects to undertake with the grant funding.

Waterville Library Building – Kuntz provided an update on the potential purchase of the Waterville Library Building.

Airport Terminal Building Parking Lot Review - Kuntz advised the Board the current lease with REEF Parking ends in April 2021. Kuntz suggested staff explore options to determine the best parking lot management strategy moving forward.

First Quarter 2020 Budget vs. Actual – Lough provided a brief update on the First Quarter 2020 Budget vs. Actual. Discussion ensued.

Regional Port Authority Office Space Study Scope of Work – Kuntz reviewed a list of items to be included in a space study for the former Executive Flight Building. Board of Directors provided input on the scope of work.

STAFF REPORTS & UPDATES:

Kuntz provided information and updates including:

- Jack Penning from Volaire Aviation is scheduled to make a presentation at the June 9th, 2020 Regional Port meeting.
- Staffing needs.
- BLM and/or a subcontractor to BLM will lease the old Port of Chelan County building for 3-4 months during fire season this year.

Lough provided information and updates including:

- Update on the phased reopening of the Regional Port offices (safety items such as plexiglass at front desk, masks, gloves, and social distancing).

Moyers provided information and updates including:

- Annual FAA inspection scheduled for June.
- Installing plexiglass in areas of the terminal building is being considered.

OTHER:

Lacey Price, Managing Director of Stage Kids, inquired about leasing 2,000 sq. feet of storage space for costumes and props inside Building F at the Lineage Property. Discussions ensued and staff will proceed with leasing them space.

REVIEW CALENDAR OF EVENTS – The next scheduled Regional Port Meeting is May 26th, the day after Memorial Day. To give staff time to prepare, it was decided to move the meeting to Wednesday May 27th. It will be a "Special" meeting due to date change.

Public Comment – An opportunity for public comment was provided; however no public comments were received.

ITEMS FROM BOARD OF DIRECTORS: None.

The Chelan Douglas Regional Port Authority meeting was adjourned at 12:36 pm.

Signed and dated this 27th day of May, 2020.

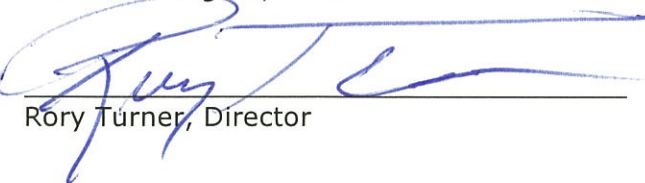
CHELAN DOUGLAS REGIONAL PORT AUTHORITY



JC Baldwin, Director



Donn Etherington, Director




Rory Turner, Director



Jim Huffman, Director



Mark Spurgeon, Director



W. Alan Loebsock, Director

**CHELAN DOUGLAS REGIONAL PORT AUTHORITY
RESOLUTION 2020-11**

**A RESOLUTION OF THE CHELAN DOUGLAS REGIONAL PORT AUTHORITY
DIRECTING THE CEO TO DEVELOP A GRANT PROGRAM TO TEMPORARILY ASSIST
REGIONAL BUSINESSES AND ADDRESS ECONOMIC IMPACTS CAUSED BY THE
COVID-19 PANDEMIC**

Whereas COVID-19, a respiratory disease that can result in serious illness or death to vulnerable or at-risk populations, is caused by the SARS-CoV-2 virus, which is a novel strain of coronavirus that had not been previously identified in humans and can easily spread from person to person; and

Whereas, on January 31, 2020, the United States Department of Health and Human Services Secretary declared a public health emergency for COVID-19, beginning on January 27, 2020; and

Whereas on February 29, 2020, Governor Jay Inslee proclaimed a state of emergency within the State of Washington due to COVID-19; and

Whereas, since February 29, 2020, Governor Inslee has issued a series of emergency orders in response to the crisis progressively limiting business and other activities to prevent the spread of the virus, including Proclamation 20-25, "Stay Home, Stay Healthy;" and

Whereas on March 11, 2020 the World Health Organization declared COVID-19 a global pandemic; and

Whereas Chelan and Douglas Counties have issued county-wide emergency declarations and access restrictions in response to the COVID-19 spread; the Chelan Douglas Health District has also formally activated its emergency response in response to the pandemic; and

Whereas, on March 17, 2020, the Washington Attorney General's Office issued a memorandum to state and local governments, attached as Exhibit A, clarifying that public funds may be spent "for the primary purpose of protecting and promoting public health which may have an incidental benefit on private citizens and entities" and that "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;" and

Whereas, on March 24, 2020, the Chelan Douglas Regional Port Authority adopted Resolution 2020-08 authorizing emergency powers and delegating certain authority to the CEO in response to the outbreak of COVID-19; and

Whereas, on April 6, 2020, the Attorney General's Office issued further guidance regarding the gifting of public funds, attached as Exhibit B, concluding that, during the pandemic, local governments may provide grants to small businesses to "prevent the region's economic

collapse from the unprecedented COVID-19 crisis and to ensure compliance with public health guidelines,” provided that the local government demonstrate either a “clear nexus” between the proposed grant and a fundamental government purpose, or a specific public benefit realized by the grant; and

Whereas, the economic shock from the pandemic in the region has been sudden and unprecedented. Within the span of a few weeks, many businesses shut down in Chelan and Douglas counties and local unemployment claims skyrocketed. See Exhibit C, attached; and

Whereas, the COVID-19 pandemic is expected to cause many regional small businesses to close permanently due to the hardship associated with a government-mandated closure, resulting in of continued layoffs and reduced hours for a significant percentage of our workforce; and

Whereas, the Board of Directors recognizes that, under RCW 53.08.245, it is a fundamental government purpose for all port districts to engage in economic development programs and to engage in acts relating to economic development; and

Whereas, the Board of Directors recognize that helping small businesses survive temporary closure will help reduce the economic hardship caused by the pandemic and encourage small businesses and employees to fully comply with public health guidance; and

Whereas, the Board of Directors determined that it is in the best interest of the CDRPA to provide emergency funding to certain businesses to ensure and stimulate economic development in the region.

Now, Therefore, Be It Resolved by the Board of Directors of the Chelan Douglas Regional Port Authority as follows:

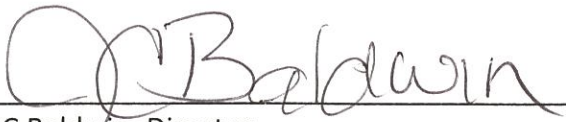
NOW THEREFORE, the Board of Directors of the Chelan Douglas Regional Port Authority resolves as follows.

Section 1. **Incorporation of Recitals.** The Board of Directors hereby adopts the recitals expressed above as Findings of Fact in support of this Resolution.

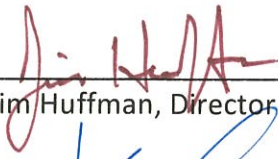
Section 2. **Establishment of Grant Program.** The Board of Directors authorizes and directs the CEO, or his designee, to establish a Regional Emergency Response Grant Program, the particulars of which will be approved by the Board.

Section 3. **Purpose.** Consistent with the Attorney General’s guidance and state law, the Regional Emergency Response Grant Program shall make designated funds available to eligible small businesses to address the economic impacts of the COVID-19 emergency. In issuing the grants to eligible businesses, the CDRPA will identify specific economic benefits that the public would receive and support those findings with evidence.

ADOPTED by the Board of Directors of the Chelan Douglas Regional Port Authority at a regular meeting this 12th day of May, 2020.



JC Baldwin, Director



Jim Huffman, Director



Donn Etherington, Director



Mark Spurgeon, Director



Rory Turner, Director



W. Alan Loebach, Director



Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON

Administration Division
PO Box 40100 • Olympia, WA 98504-0100 • (360) 753-6200

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

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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,



BOB FERGUSON
Attorney General

RWF/jlg



Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON

MEMORANDUM

DATE: April 6, 2020

TO: Local Governments in Washington

FROM: The Attorney General's Office

SUBJECT: **Legality of Options for Supporting Small Businesses and Low-Income Individuals During a Public Health Crisis**

I. INTRODUCTION

Washington State and the nation are in the midst of a public health and economic crisis related to COVID-19. The Governor recently ordered all non-essential businesses generally to cease operations. The Governor also ordered all people in Washington State to stay home, with limited exceptions. In the midst of this unprecedented crisis, our office has heard from many local governments looking for ways to help the residents and businesses in their communities.

Several local governments have contacted our office to seek guidance about their aid efforts. Our office recently published general guidance that constitutional restrictions on use of public funds should not be an impediment to local efforts to combat COVID-19, as local government expenditures made in furtherance of the effort to combat the virus further fundamental public purposes, such as protecting public health and welfare.

This memorandum follows up on that general guidance by evaluating two potential initiatives some are considering to assist low-income residents and small businesses affected by the crisis. The first initiative would provide cash assistance to low-income individuals who lost their jobs due to COVID-19, or who are struggling financially as a result. The second initiative would provide grants or loans to small businesses struggling to survive the closure of their businesses. The stated goal of the initiatives is to ensure compliance with public health guidelines and to prevent economic hardship in the region.

We conclude that cash grants can be provided to low-income individuals consistent with our state constitution's restriction on gifts of public funds. We also conclude that grants or loans can likely be provided to impacted small businesses, so long as reasonable safeguards are in place to prevent fraud or abuse.

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II. ISSUES

1. Under article VIII, section 7 of the state constitution, may a local government provide cash assistance to low-income individuals who have lost their jobs or are struggling financially due to COVID-19?
2. Under article VIII, section 7 of the state constitution, may a local government provide grants or loans to small businesses struggling with the State-ordered closure of their businesses?

III. SHORT ANSWERS

1. Yes. Article VIII, section 7 of the state constitution allows local governments to give money to provide necessary support for the “poor.” Temporary cash assistance to low-income individuals who have lost their jobs or are struggling financially would fit in this category. More broadly, when government carries out its fundamental purposes with public funds, it does not violate article VIII, section 7. Preserving public health and promoting public welfare are fundamental purposes of government. Temporary financial assistance for low-income residents during a public health crisis advances public welfare, so a court would likely not consider it to be an unconstitutional gift.
2. Probably, with sufficient safeguards in place. Given the unprecedented health crisis that Washington faces, loans or grants are likely permissible if a local government can establish a clear nexus between such programs and either protecting the local economy or promoting compliance with public health guidelines.

IV. FACTUAL BACKGROUND

A. **The Governor Ordered People to Stay Home and Non-Essential Businesses to Close to Limit the Spread of COVID-19**

Washington State faces an unprecedented public health and economic crisis related to COVID-19. On January 21, 2020, the Centers for Disease Control and Prevention (CDC) and the Washington State Department of Health announced the first case of COVID-19 in the State. *See* 2019 Novel Coronavirus Outbreak (COVID-19), <https://www.doh.wa.gov/Emergencies/Coronavirus> (last visited April 6, 2020). Since then, the virus has spread rapidly throughout the State. As of April 4, 2020, the State Department of Health has documented 7,984 cases and 338 deaths. *Id.*

The Governor has acted to limit the spread of COVID-19. Most relevant here, on March 23, 2020, the Governor issued the Stay Home – Stay Healthy Proclamation 20-25. *See* Proclamation

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by the Governor Amending Proclamation 20-05. The proclamation described the virus's impact on public health and the economy: "the worldwide COVID-19 pandemic and its progression in Washington State continues to threaten the life and health of our people as well as the economy of Washington State, and remains a public disaster affecting life, health, property or the public peace." *Id.* at 1. The proclamation also described the challenges faced by the state's health care system: "models predict that many hospitals in Washington State will reach capacity or become overwhelmed with COVID-19 patients within the next several weeks unless we substantially slow down the spread of COVID-19 throughout the state." *Id.*

To slow the spread of COVID-19, the Governor ordered people to stop leaving their homes, with limited exceptions, and he ordered non-essential businesses to close:

All people in Washington State shall immediately cease leaving their home or place of residence except: (1) to conduct or participate in essential activities, and/or (2) for employment in essential business services. This prohibition shall remain in effect until midnight on April 6, 2020, unless extended beyond that date.

....

Effective midnight on March 25, 2020, all non-essential businesses in Washington State shall cease operations except for performing basic minimum operations. All essential businesses are encouraged to remain open and maintain operations, but must establish and implement social distancing and sanitation measures established by the United States Department of Labor or the Washington State Department of Health Guidelines. This prohibition shall remain in effect until midnight on April 8, 2020, unless extended beyond that date.

Proclamation by the Governor Amending Proclamation 20-05 at 3, 4. The Governor has since extended all provisions in this order through May 4, 2020. Proclamation by the Governor Amending Proclamations 20-05 and 20-25 at 2.

COVID-19 is also causing devastating economic effects in Washington and nationwide. During the two weeks from March 15 to March 28, Washingtonians filed 310,937 new claims for unemployment benefits. <https://www.esd.wa.gov/newsroom/news-releases?ReleaseYear=All> (last visited April 6, 2020). Across the nation, workers filed nearly ten million initial unemployment claims from March 15 to March 28. See <https://www.dol.gov/ui/data.pdf> (last visited April 6, 2020) Many small businesses in Washington have already announced plans to close permanently.

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B. State and Local Governments Are Looking for Ways to Combat 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 and its economic consequences. Our office recently published general guidance on these inquiries. *See* Guidance on Analyzing Issues Related to Gifts of Public Funds During the COVID-19 Pandemic (March 17, 2020), available at http://mrsc.org/getmedia/37fa7cc7-fb7f-4dc4-88d4-4ad6a8887318/w3agcorona_gopf.pdf.aspx. This memo analyzes two specific ideas some local governments are considering to further ameliorate the effects of the crisis: (i) providing cash assistance to low-income individuals who have become unemployed or are otherwise struggling financially due to COVID-19, and (ii) providing government grants to small businesses that are struggling with government-ordered shut downs.

V. ANALYSIS

A. Background Principles Related to Gifts of Public Funds Under Washington's Constitution

Before addressing the specific policies at issue, this memorandum briefly summarizes the constitutional limits on local governments' ability to give or loan money to individuals or companies. Article VIII, section 7 of the state constitution reads:

No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm, or become directly or indirectly the owner of any stock in or bonds of any association, company or corporation.¹

Const. art. VIII, § 7.

¹ The state constitution places similar limits on the State's use of its "credit." *See* Const. art. VIII, § 5. "The credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation." *Id.* Because the present inquiry is from a local government, article VIII, section 7 applies, although courts interpret the two provisions "identically." *See Citizens for Clean Air v. City of Spokane*, 114 Wn.2d 20, 39 n. 8, 785 P.2d 447 (1990).

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Our Supreme Court has recognized that when the constitutional convention adopted article VIII, section 5, the related provision that limits the state's lending of credit, it did not intend to hinder state government from carrying out its "essential function to secure the health and welfare of the state's citizens." *See Wash. State Hous. Fin. Comm'n v. O'Brien*, 100 Wn.2d 491, 495, 671 P.2d 247 (1983). The purpose of article VIII, sections 5 and 7 is "to prevent state funds from being used to benefit private interests where the public interest is not primarily served." *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 653, 62 P.3d 462 (2003) (quoting *Japan Line, Ltd. v. McCaffree*, 88 Wn.2d 93, 98, 558 P.2d 211 (1977)). A government's use of public funds is presumed constitutional, and the burden of overcoming that presumption lies with the individual making the challenge. *City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 702, 743 P.2d 793 (1987).

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). First, the court asks whether the funds were expended "to carry out a fundamental purpose of the government." *Id.* If the answer to that question is yes, the analysis ends, and there is no gift of public funds. *Id.*; *CLEAN v. State*, 130 Wn.2d 782, 797-98, 928 P.2d 1054 (1996). If the answer to that question is no, the court asks whether the funds were given with donative intent, and what the public received in exchange (also called "consideration"). *CLEAN*, 130 Wn.2d at 797-98. The consideration that the public receives is the "key factor." *City of Tacoma*, 108 Wn.2d at 703 (quoting *Adams v. Univ. of Wash.*, 106 Wn.2d 312, 327, 722 P.2d 74 (1986)). Unless there is a proof of donative intent or a grossly inadequate return, courts do not inquire into the adequacy of consideration. *City of Tacoma*, 108 Wn.2d at 703.

State courts have not offered a complete list or definition of what constitutes a "fundamental purpose" of government. However, case law applying article VIII, sections 5 and 7 of the state constitution provides several examples. Fundamental purposes of government include collecting taxes, furthering higher education, acquiring real property, controlling floods, enforcing child support obligations, disposing of solid waste, providing and administering workers' compensation, and obtaining and defending guardians ad litem.² In contrast, building baseball

² *In re Burnham*, 194 Wn.2d at 77 (acquire real property); *Washington Pub. Ports Ass'n*, 148 Wn.2d at 653 (tax collection for use of public property); *Hadley v. Dep't of Labor & Indus.*, 116 Wn.2d 897, 907, 810 P.2d 500 (1991) (administer industrial insurance); *Citizens for Clean Air*, 114 Wn.2d at 39; *Johnson v. Johnson*, 96 Wn.2d 255, 263-64, 634 P.2d 877 (1981) (enforcing child support obligations); *Citizens Protecting Res. v. Yakima Cnty.*, 152 Wn. App. 914, 922, 219 P.3d 730 (2009) (flood control); *West v. Osborne*, 108 Wn. App. 764, 771, 34 P.3d 816 (2001) (obtaining guardians ad litem); *Major Prods. Co. v. Nw. Harvest Products, Inc.*, 96 Wn. App. 405, 410, 979 P.2d 905 (1999) (furthering higher education); *Dep't of Labor and Indus. v. Wendt*, 47 Wn. App. 427, 435, 735 P.2d 1334 (1987) (providing industrial insurance).

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stadiums, constructing parking garages, and allowing a railroad to use tracks rent free are not fundamental purposes of government.³

Entitlement payments are an acceptable means to accomplish a fundamental government purpose. “No unconstitutional gift of public property occurs when funds are expended as entitlement payments, made by the government in carrying out its fundamental purposes.” *City of Tacoma*, 108 Wn.2d at 702. The Court defines “entitlements” as “a form of assistance provided to the public, or a segment of the public, as cash or services, in carrying out a program to further an overriding public purpose or satisfy a moral obligation.” *Id.* at 702 n.15 (quoting *City of Seattle v. State*, 100 Wn.2d 232, 241, 668 P.2d 1266 (1983)). Examples of entitlement payments include payments for day-care services, vaccinations, fare-free bus zones, crime victim compensation, and relocation assistance payments to people or businesses displaced by condemnation. *Id.*

Article VIII, section 7 also allows local governments to give or loan money for the “necessary support of the poor and infirm.” The phrase “poor and infirm” in article VIII, section 7 is read in the disjunctive, meaning the benefitted individual must be “poor” or “infirm,” but does not need to be both. *Wash. Health Care Facilities v. Ray*, 93 Wn.2d 108, 116, 605 P.2d 1260 (1980). State courts generally do not assess who “belongs in the benefitted class” of the “poor and infirm.” *O’Brien*, 100 Wn.2d at 497. Instead, they defer to the legislative determination of what constitutes need, and they assess the reasonableness of that determination. *Id.*

Finally, courts will likely consider a local government’s motive when it gives or loans money, property, or credit to individuals or companies. When analyzing the Legislature’s actions under article VIII, section 5, our Supreme Court has stated that it gives great weight to the government’s stated declaration of purpose. *Id.* at 495–96. The Court does not accept the government’s declaration as conclusive, but it will accept it unless it is arbitrary or unreasonable. *Id.* at 496.

Summarizing these principles, when a local government gives or loans money, property, or credit to an individual or company, the courts are most likely to uphold the local government’s action if one of the following is true: (1) the action is necessary to accomplish a fundamental governmental purpose, (2) the public is receiving something in exchange, (3) the action is necessary to support the poor, or (4) the action is necessary to support the infirm. Additionally, it

³ *CLEAN v. City of Spokane*, 133 Wn.2d 455, 469, 947 P.2d 1169 (1997) (parking garage); *CLEAN*, 130 Wn.2d at 797-98 (baseball stadium); *Peterson v. Dep’t of Revenue*, 9 Wn. App. 2d 220, 228, 443 P.3d 818 (2019), review granted *sub nom. Peterson v. Port of Benton*, 194 Wn.2d 1001, 451 P.3d 326 (2019) (rent free use of railroad tracks).

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is advisable for the local government to state why it is taking the action, explain what it expects to accomplish, and describe the benefit the public will receive.

B. Cash Assistance to Low-Income Individuals Who Have Lost Their Jobs or Are Struggling Financially Due to COVID-19 Comply with Washington's Constitutional Limitations on Gifts of Public Funds

Local governments do not violate Washington's constitutional prohibition on gifts of public funds by providing cash assistance to low-income individuals who have lost their jobs or are struggling financially because of the COVID-19 crisis. This is clear for two independent reasons.

First, Washington's Constitution does not prohibit local governments from expending resources for "the necessary support of the poor." Const. art. VIII, § 7. If the local government's program uses reasonable means to assess who is "poor" when providing cash assistance, a court would almost certainly conclude that such assistance is "the necessary support of the poor" and so not barred by article VIII, section 7. The courts have not clearly defined what "poor" means for purposes of article VIII, section 7, but they generally defer to governmental determinations on this point. *O'Brien*, 100 Wn.2d at 497.

Even if financial assistance to low-income individuals affected by the COVID-19 pandemic would not qualify as "the necessary support of the poor," it would still not be a gift of public funds because it furthers a fundamental purpose of government. State courts have stated that a core purpose of government is ensuring public health and promoting public welfare. *See, e.g., O'Brien*, 100 Wn.2d at 495 (securing the health and welfare of the state's citizens is an essential government function); *Hudson v. City of Wenatchee*, 94 Wn. App. 990, 995-96, 974 P.2d 342 (1999) (describing "the preservation of the public health" and "promotion of the public welfare" as fundamental purposes of government).

Temporary cash assistance to the jobless can help to promote public welfare by lessening the financial impact caused by sudden job loss and preventing potentially more intractable problems like long-term unemployment, hunger, and homelessness. Our Supreme Court has concluded that cash assistance can accomplish a fundamental purpose of government when it "further[s] an overriding public purpose or satisf[ies] a moral obligation." *City of Tacoma*, 108 Wn.2d at 702 n.15 (quoting *City of Seattle*, 100 Wn.2d at 241). The overriding public purpose of temporary cash assistance in this context would be to ameliorate the economic hardship caused by the COVID-19 pandemic and the closure of non-essential businesses, which left many people

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without work, at least temporarily.⁴ This in turn could help address local governments' concerns about the economic collapse of the region.

C. Grants or Loans to Small Businesses That Are Struggling with Government Shutdowns Can Also Likely Be Provided in a Way that Complies With Washington's Constitution

This question is a closer call than the first one, but we believe there are ways that grants or loans to small businesses affected by the COVID-19 crisis could be provided that would likely comply with Washington's constitutional prohibition on gifts of state funds.

The reason this question is a closer call than the first one is that our state constitution explicitly recognizes the importance of government support for "the poor," but also expresses concern about improper gifts to private businesses. For example, our Supreme Court found a violation of article VIII, section 7 when a county gave money directly to a private corporation for an agricultural fair and maintained "no direct control over how the money was . . . spent." *CLEAN*, 130 Wn.2d at 798 (discussing *Johns v. Wadsworth*, 80 Wash. 352, 355, 141 P. 892 (1914)).

That said, context matters. The context for local governments' proposed programs of small business loans and grants here is not "to enhance the private sector's profit at the taxpayer's expense"—which is clearly impermissible under the state constitution—but to prevent small businesses from having to close permanently due to the hardship associated with government-mandated closure of their businesses. *O'Brien*, 100 Wn.2d at 495. "[T]he health of the state's economy [has] traditionally been [a] concern[] of state government." *Id.* at 496. "The range of remedies available to meet these state problems must necessarily be wide. We leave the wisdom of a chosen remedy in the legislative arena." *Id.*

Local governments' stated purposes for providing grants and loans to small businesses are to prevent the region's economic collapse from the unprecedented COVID-19 crisis and to ensure compliance with public health guidelines. A local government would need to provide a clear nexus between any proposed grants and loans to small businesses and public health and welfare to help explain to a reviewing court why these local efforts accomplish a fundamental government purpose. It seems reasonable to conclude that helping small businesses survive temporary closure will help reduce the economic hardship caused by this crisis and encourage small businesses to comply fully with public health guidelines, but including statements to that effect in authorizing legislation would be helpful. Because there is no case law directly on point,

⁴ This analysis is limited to the context of the COVID-19 crisis. A different analysis might apply if a local government wanted to provide cash assistance at another time.

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this conclusion is somewhat uncertain, but courts would likely recognize the unique circumstances here and the need for strong action.

If the court does not see small business grants and loans as accomplishing a fundamental government purpose, the court would next ask whether the funds were given with donative intent, and what the public received in exchange. *CLEAN*, 130 Wn.2d at 797-98.

A court would analyze the issue of donative intent by asking whether the local government intended to give money to small businesses without receiving anything in return for the public. A gift is a voluntary transfer of property without consideration. *City of Bellevue v. State*, 92 Wn.2d 717, 720, 600 P.2d 1268 (1979). “If intent to give a gift is lacking the elements of a gift are not present, and article 8, section 7 does not apply.” See *CLEAN*, 130 Wn.2d at 798 (quoting *Scott Paper Co. v. City of Anacortes*, 90 Wn.2d 19, 33, 578 P.2d 1292 (1978)). If the court found that the local government intended to receive something in return for the public, it would then ask whether what the public received was “grossly inadequate.” *CLEAN*, 133 Wn.2d at 469.

For the courts to analyze these questions, it would be helpful if local governments identified the specific economic benefits that the public would receive from the grants or loans. Local governments would be wise to ask any small business seeking funds for evidence of public benefit. This could include information like the number of jobs created or saved, the amount of tax revenue created or maintained, whether the business would pay wages or benefits to workers during the government shutdown, whether temporary funding would avoid risks like bankruptcy or permanent closure, or any other relevant information to assess public benefit. If a local government could document benefits to the public along these lines, a court could certainly find that state aid to this circumscribed class of the public (small businesses), in furtherance of legitimate state objectives, provided the necessary “consideration” for the aid. *Id.*

Unemployment Insurance Initial Claims Weekly Dashboard - Washington State

Weekly initial claims - 2020

Initial claims by industry supersector

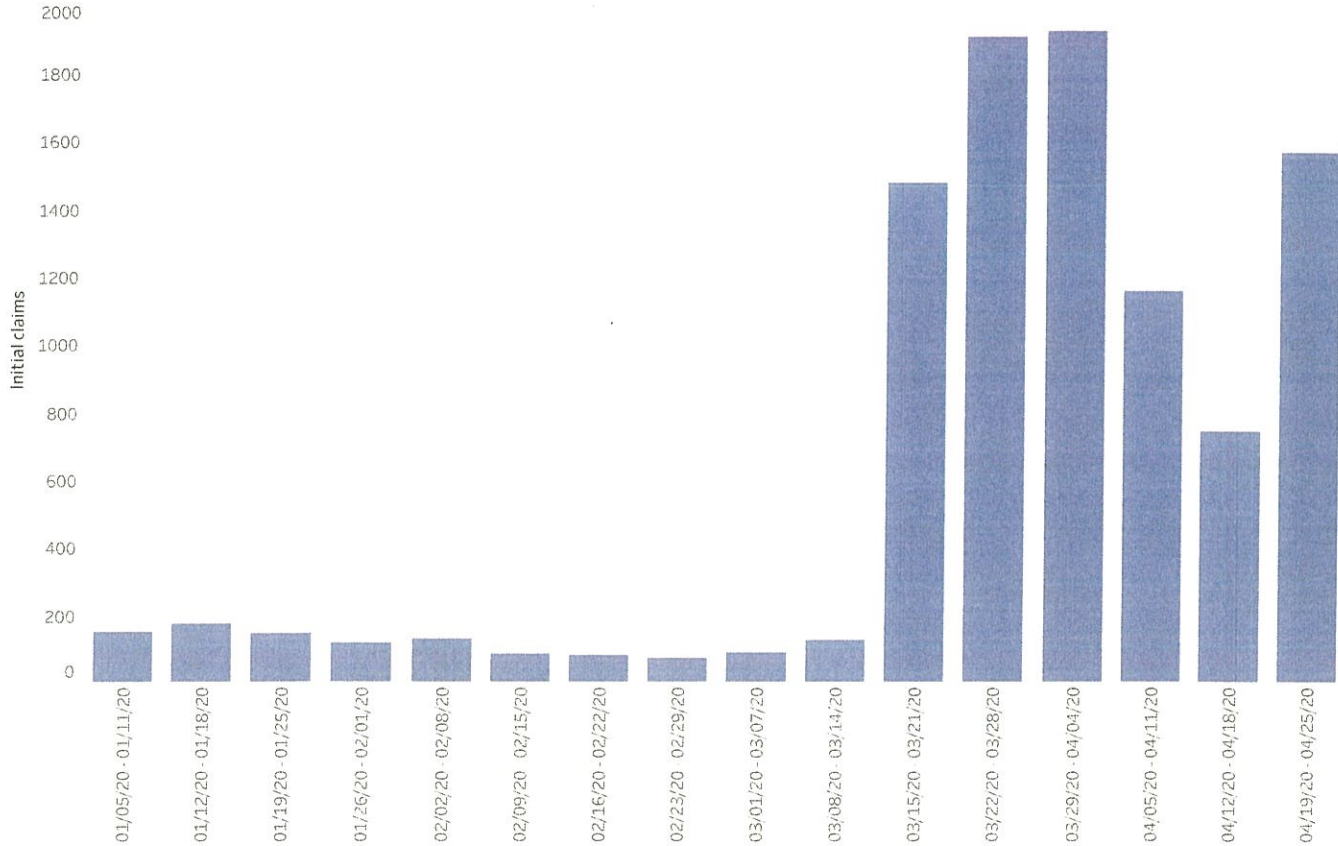
Initial claims by county - 2020

County initial claims by industry sector (3 digit NAICS)

Select County:
CHELAN

Select Year:
2020

Initial claims applications for CHELAN county by week - 2020



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Unemployment Insurance Initial Claims Weekly Dashboard - Washington State

Weekly initial claims - 2020

Initial claims by industry supersector

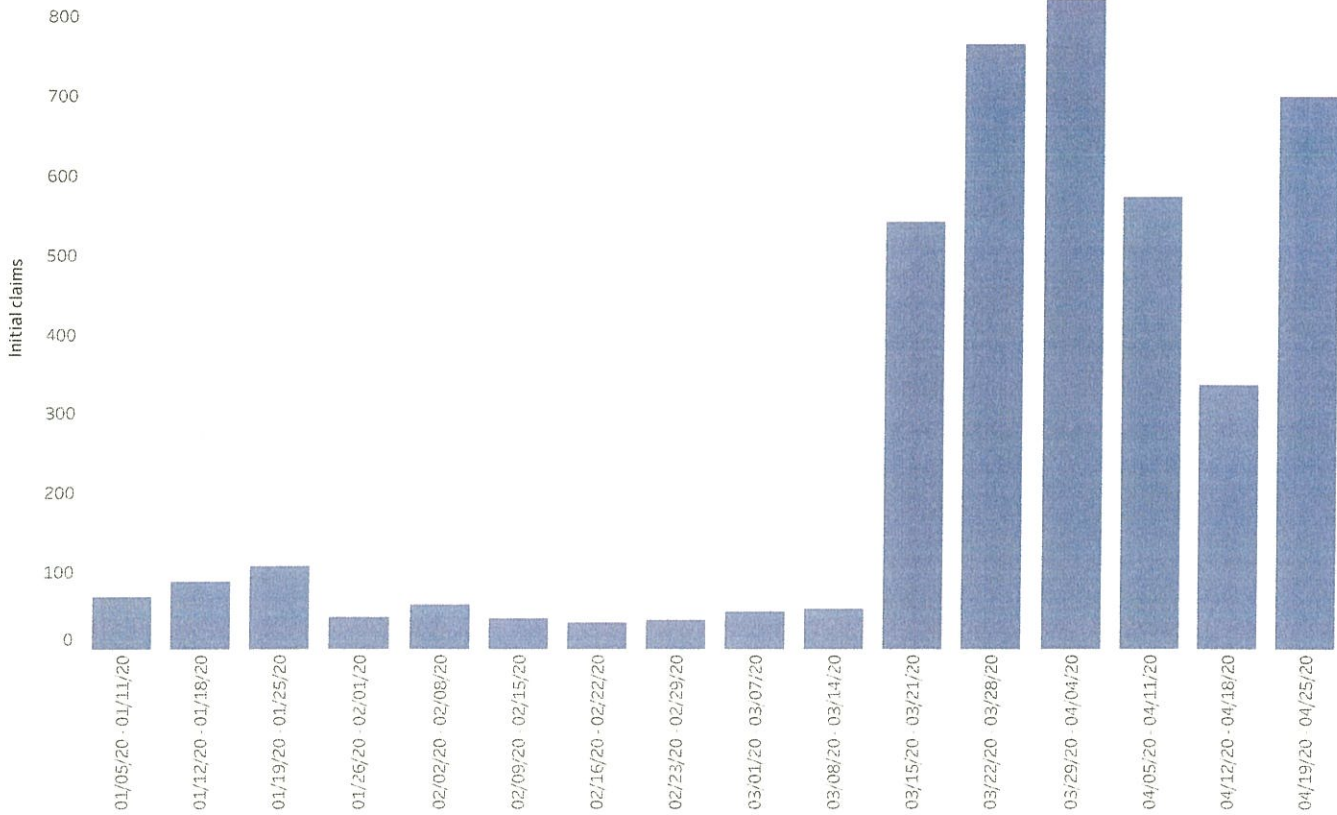
Initial claims by county - 2020

County initial claims by industry sector (3 digit NAICS)

Select County:
DOUGLAS

Select Year:
2020

Initial claims applications for DOUGLAS county by week - 2020



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