



Rob McKenna

ATTORNEY GENERAL OF WASHINGTON

1125 Washington Street SE • PO Box 40100 • Olympia WA 98504-0100

July 17, 2008

The Honorable Fred Jarrett
State Representative, 41st District
P. O. Box 40600
Olympia, WA 98504-0600

Dear Representative Jarrett:

By letter previously acknowledged, you have asked for an opinion on a question I have slightly paraphrased as follows:

May a city operating under the Optional Municipal Code (RCW 35A), under its general authority set forth in RCW 35A.11.010 and any related statutes and constitutional limitations, donate surplus personal property to a qualified charity organized as a nonprofit organization, with a requirement that the donated assets be used for the benefit of the needy?

BRIEF ANSWER

I would answer your question in the affirmative: An optional municipal code city may lawfully donate surplus city property to an organization for use for the benefit of the needy.

ANALYSIS

As explained in your request, the background for your question is article VIII, § 7 of the Washington Constitution, which provides as follows:

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.

(Italics added.) Your question is whether an optional municipal code city may lawfully donate surplus property to an organization to be used for the benefit of the needy. I understand your question to have two aspects: (1) whether the city has sufficient statutory authority for the activity in question, and (2) whether the activity would be consistent with article VIII, § 7.

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Cities and towns in Washington may be organized under several different sets of laws. Many cities are now organized under the Optional Municipal Code, codified as RCW Title 35A, and your question concerns such cities. The Optional Municipal Code provides that, "All grants of municipal power to municipalities electing to be governed under the provisions of this title, whether the grant is in specific terms or in general terms, shall be liberally construed in favor of the municipality." RCW 35A.01.010. An optional municipal code city may "purchase, lease, receive, or otherwise acquire real and personal property of every kind, and use, enjoy, hold, lease, control, *convey or otherwise dispose of it for the common benefit.*" RCW 35A.11.010 (italics added).¹ Therefore, such cities have the general authority to acquire property and to dispose of it.

Furthermore, the legislative body of an optional code city "may adopt and enforce ordinances of all kinds relating to and regulating its local or municipal affairs and appropriate to the good government of the city" and "shall have all powers possible for a city or town to have under the Constitution of this state, and not specifically denied to code cities by law." RCW 35A.11.020. Code cities are limited in their powers by the state constitution, by the limits of the term "local or municipal affairs," and also by the "general law of the state where not inconsistent with this title". RCW 35A.11.030.

If you had expressed your question in more general terms, asking whether a city has statutory authority to donate city property to non-profit organizations, I would have given a generally negative answer. There is no general municipal authority to donate city property to private organizations, whether or not they are charitable organizations. Even under the poor and infirm exception of the constitution, an organization is not itself "poor and infirm". See, e.g., AGO 2005 No. 1 (county may not generally donate real property to a nonprofit organization); AGO 1973 No. 18 (county may not donate public funds to a nonprofit-operated senior center). However, you have asked whether an optional code city may dispose of *surplus* city property (personal property rather than real property) by donating it to a nonprofit organization for use for the benefit of the needy. As noted above, code cities have express authority to acquire property and to "dispose of it for the common benefit." RCW 35A.11.010. You have built into your question the assumption that the property in question is surplus to the city's needs, and it is reasonable to conclude that any city has authority to dispose of its unneeded property in some reasonable manner.²

¹ The case law confirms that the statutory powers of an optional code city are to be liberally construed in favor of the city. See, e.g., *Burns v. City of Seattle*, 161 Wn.2d 129, 164 P.3d 475 (2007) (city has broad authority to contract); *In re Petition of City of Long Beach*, 119 Wn. App. 628, 82 P.3d 259 (2004) (optional code city may condemn property outside city to build trail); *City of Edmonds v. Gen. Tel. Co. of Nw., Inc.*, 21 Wn. App. 218, 584 P.2d 458 (1978) (city has authority to require utility to reimburse for cost of placing telephone lines underground).

² This opinion does not analyze the extent to which a city could donate *non-surplus* property to a nonprofit organization for the benefit of the needy. Your question is based on the assumption that the property in question is no longer of use to the city, and the city can document that it has either no value or very slight value in terms of how the city might dispose of it.

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Furthermore, it does not appear that there is any general statute defining how optional code cities must dispose of their surplus property. RCW 39.33 authorizes cities and other municipalities to dispose of surplus property by transferring it to other governmental units, subject to certain limitations. However, this power “shall be deemed to provide an alternative method for the doing of the things authorized herein, and shall not be construed as imposing any additional condition upon the exercise of any other powers vested in the state, municipalities or political subdivisions.” RCW 39.33.010(2). In other words, these statutes give municipalities the option of making intergovernmental transfers but do not require that surplus property be disposed of in this manner. Donating surplus property for the benefit of the needy is not inconsistent with this or other general statutes. It is therefore within the statutory authority of an optional municipal code city.

The only remaining question is whether this practice is consistent with the state constitution. As noted above, the constitution generally prohibits gifts of municipal property “in aid of any individual, association, company or corporation”. Const. art. VIII, § 7. However, the provision contains a built-in exception for transfers of property “for the necessary support of the poor and infirm”. *Id.* Although the constitution at first blush appears to limit the exception to programs aiding persons who are both poor and infirm, case law establishes that the exception applies to either class of persons. *Washington Health Care Facilities v. Ray*, 93 Wn.2d 108, 605 P.2d 1260 (1980); *Morgan v. Dep’t of Soc. Sec.*, 14 Wn.2d 156, 127 P.2d 686 (1942). The *Morgan* opinion also recognizes that the term “poor” is essentially synonymous with the term “needy” and states, for instance, that the “support of the poor and needy is a recognized public governmental function.” *Morgan*, 14 Wn.2d at 169. Although your request speaks of benefiting the “needy” and the constitutional exception is for the “poor and infirm,” the common understanding of the term “needy” would encompass persons who meet the definition of “poor” and might also be infirm. As I understand your question, the nonprofit organization would be legally committed to using the city property received for the benefit of the “needy.”³ Therefore, it is not necessary to analyze whether the disposal program serves a fundamental governmental purpose, or whether the city is receiving sufficient consideration.⁴ However, a different question would be presented if the nonprofit organization were free to use the donated city property for purposes other than support of the poor and infirm.

Accordingly, I conclude that a program designed to benefit the needy, which is otherwise carried out in a lawful manner, is not barred by article VIII, § 7 of the state constitution.

³ Your letter makes reference to a nonprofit organization that serves both low and middle income persons. I doubt that middle income people would be classified as “poor” if the issue came before a court.

⁴ It would obviously be helpful for a city to adopt policies concerning the disposal of surplus city property. These policies could establish how the city determines which property is surplus, whether the property should be offered to another governmental entity or advertised for sale, and which city property might be appropriately disposed of in other ways (for example, the donation described in your request).

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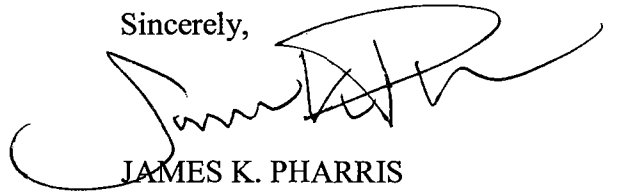
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I hope this information will prove helpful. This informal opinion will not be published in the compendium of official Attorney General Opinions.

Sincerely,

A handwritten signature in black ink, appearing to read 'James K. Pharris', with a large, stylized flourish at the end.

JAMES K. PHARRIS
Deputy Solicitor General
(360) 664-3027

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