

The Honorable Jean Hough McGrath
Arizona House of Representatives

December 17 , 1999
Nº 199-028 (R99-022)

Questions Presented

You have asked whether: (1) a State university may require purchasers of certain tickets for intercollegiate athletic events conducted in State-owned facilities to also contribute a specified amount to a booster foundation created to support the university's athletic program; and (2) such a practice violates the "gift prohibition" in article IX, § 7 of the Arizona Constitution

Summary Answer

A State university may require purchasers of certain athletic tickets to also contribute to a booster foundation created to support the university's athletic programs, and this practice would not violate the gift prohibition in article IX, § 7 of the Arizona Constitution provided that the benefit the public receives is adequate.

Background

Although your opinion request poses a general question concerning contributions to booster foundations that benefit a State university, because your request specifically references the Sun Angel Foundation ("Sun Angels"), this background on the Sun Angels is provided to establish a framework for the analysis. The Sun Angels is a private non-profit charitable corporation whose purpose is "to assist Arizona State University in the accomplishment of its athletic and educational objectives." Amended and ReStated Bylaws of the Sun Angel Foundation, art. I (May 24, 1997) (hereinafter "Sun Angel Bylaws"). The Sun Angels is one of several private non-profit organizations that are "financially related" to ASU and subject to university oversight. The Arizona Board of Regents (ABOR) requires external audits of organizations such as the Sun Angels. Arizona Board Of Regents Policy Manual, § 5-209(E)(5) ("ABOR Policy") (Revised Aug. 1, 1996). The National Collegiate Athletic Association ("NCAA") also requires that independent organizations have annual audits and makes the university responsible for their acts promoting the university's intercollegiate athletic program. 1998-99 NCAA Division I Manual, Constitution, §§ 6.2.3; 6.4 (effective Aug. 1, 1998). The Sun Angels assists ASU by raising money to support the university's programs, and the Sun Angels itself relies on ticket sales to athletic events as a major fund-raising tool. When buying tickets to ASU football games, for example, a purchaser pays the ticket price directly to ASU and, for certain seats, the purchaser is also required to pay a separate amount to the Sun Angels. 1999 Arizona State University Brochure, 1999 Sun Devil Football Season Tickets. The amount of the required contribution to the Sun Angels varies depending on the seat location. *Id.* Sun Angel contributors receive a variety of benefits, in addition to the right to purchase certain tickets, based on the amount of their contribution. The benefits may include, for example, priority for ASU bowl tickets, preferred parking, and, for major contributors, complimentary tickets to annual athletic banquets and travel to an away-game. Sun Angel Foundation, Arizona State University, 1999 Donor Manual 7, 8 (1999). According to the Sun Angels Donor Manual, when a donor receives a 'right to purchase' seating with a contribution to the Sun Angels, the donor may take an eighty percent tax deduction, after subtracting the value of the other benefits received from the contribution amount. *Id.* at 11; see also Internal Revenue Service T.A.M. 122293-98 (July 7, 1999) (discussing tax implications of contribution to university foundation for right to purchase sky box seating). The Sun Angels uses the funds it collects through this process and other fund-raising efforts to fulfill "ongoing commitments with the University including coaches support, capital improvements, grants, scholarships and miscellaneous athletic gifts." Deloitte & Touche, LLP, Sun Angel Foundation,

Financial Statements at 7 n. 4 (years Ended June 30, 1998 and 1997) ("Sun Angel Financial Statements").

Analysis

A. ABOR Policy Allows a University to Require Purchasers of Athletics Tickets to Contribute to a Booster Foundation That Supports University Programs. Under Arizona's Constitution, the ABOR is responsible for "the general conduct and supervision" of State universities. Ariz. Const. Art. XI, § 2. In recognition of the ABOR's constitutional responsibilities, enabling legislation establishes that ABOR "shall have and exercise the powers necessary for the effective governance and administration of the institutions under its control." A.R.S. § 15-1626(A)(1). Intercollegiate athletics is part of the educational mission of the State universities and is subject to the oversight of the ABOR. See ABOR Policy 5-209(A) (athletic policies). Although there are no statutes governing ticket policies to events at university facilities, the ABOR has established policies on this subject. ABOR Policy 5-209(H)(4). ABOR policies provide that "there is no implication of any obligation or responsibility on the part of the institutions to provide the public at large with entertainment." ABOR Policy 5-209(H)(5). According to ABOR policy, the price of admission to athletic events, and the policies as to seating and concessions are to be determined "by the appropriate university authorities on the basis of the best interests of the institutions and without regard to pressure from outside interests." ABOR Policy 5-209(H)(4). University presidents are responsible for enforcing the ABOR athletic policies. ABOR Policy 5-209(F). Thus, each university has the authority to establish ticket prices and seating requirements that are in the best interests of the institution. On its face, a contribution to a booster foundation dedicated to supporting the university's athletics programs is not inconsistent with this policy.

B. Requiring Purchasers of Tickets to Athletic Events to Contribute to a Booster Foundation Does Not Violate the Gift Clause. You have also asked whether the practice violates Arizona Constitution's gift prohibition, which is intended to prevent government entities from depleting the public treasury by giving advantages to special interests. *Industrial Dev. Auth. v. Nelson*, 109 Ariz. 368, 372, 509 P.2d 705, 709 (1973); see also *Ariz. Atty. Gen. Op. 198-003* (application of gift clause to charter school laws). Arizona's gift prohibition provides, in part: 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. Const. art. IX, § 7. Arizona courts have applied article IX, § 7, not only to direct expenditures of public funds, *Wistuber v. Paradise Valley Unified School Dist.*, 141 Ariz. 346, 687 P.2d 354 (1984), but also to leases of public property, *City of Tempe v. Pilot Properties, Inc.* 22 Ariz. App. 356, 527 P.2d 515 (1974). By requiring a ticket purchaser to make a contribution to the booster foundation, the State university has arguably granted a "subsidy" to the foundation that implicates the gift clause. But cf. *Kotterman v. Killian*, 193 Ariz. 273, 288, 972 P.2d 606, 621 (1999), cert. denied, 67 U.S.L.W. 3671 (U.S. Oct. 4, 1999) (No. 98-1716) (allowing tax credit for contributions that support private schools does not implicate gift clause). For purposes of analyzing the issue presented, this Opinion will assume that the gift clause applies to the contribution requirement. The Arizona Supreme Court has established a two-part test to determine whether a transaction violates the gift prohibition in article IX, § 7. *Wistuber*, 141 Ariz. 346, 687 P.2d 354. First, the court must determine whether the transaction serves a public purpose. *Id.* at 349, 687 P. 2d at 357. Second, the court must evaluate the consideration involved because the constitution may be violated "if the value to be received by the public is far exceeded by the consideration being paid by the public." *Id.* The phrase "public purpose" is "incapable of exact definition," and its meaning changes to meet new developments and conditions. *Id.* at 348, 647 P. 2d at 356. Supporting State universities, including the universities' athletic programs, serves a public purpose. Thus, the first prong of the *Wistuber* test is satisfied. Where a transaction has a public purpose, a court must also assess the consideration involved. *Wistuber*, 141 Ariz. at 349, 687 P.2d at 357. The public benefit from the transaction is the "consideration" received in exchange for the "consideration" paid to the private entity (here, at least some of the contributions paid to the Sun Angels presumably could

otherwise be included as part of the ticket price collected by the university). The consideration involved cannot be "so inequitable and unreasonable that it amounts to an abuse of discretion." *Id.* at 349, 678 P.2d at 357. In determining if the public benefit "is far exceeded by the consideration being paid by the public," a court must adopt a "panoptic view of the facts" of the transaction, must not be overly technical, and must give "appropriate deference" to the findings of the governmental body. *Id.* Applying these principles to the issue of ticket premiums, a court would defer to the judgments of the universities regarding the most effective way to raise funds to support their programs. Unless the benefit to the private foundation is so disproportionate to the benefit the public receives that it amounts to an abuse of discretion, a contribution requirement to such an organization is constitutional. When a booster foundation is dedicated to supporting the university, it logically follows that the university would benefit from the foundation's fund-raising efforts. In fiscal year 1998, for example, the Sun Angels provided more than \$3 million in university support, which among other things, went toward support for university coaches, capital improvements, grants and scholarships. Sun Angel Financial Statements at 3. The same year Sun Angels received \$2.3 million in revenue from the premium on football tickets. Sun Angel Foundation, Ten-Year Financial History. This would plainly satisfy the requirement of adequate consideration for that time frame. In sum, assuming the gift clause applies, a requirement that, in order to purchase certain tickets to an athletic event, a person contribute to a booster foundation that supports university programs is constitutional provided that the public benefits adequately from the transaction.

Conclusion

Requiring a purchaser of certain tickets to also contribute to a booster foundation created to support a State university's athletic programs serves a public purpose and, provided that the benefit the public receives is adequate, this practice does not violate the gift prohibition of Arizona's Constitution.

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- 1) The Sun Angels' bylaws require that the president of ASU and the ASU athletic director serve as ex-officio members of the Sun Angels' board of directors. SUN ANGEL BYLAWS, art. II, § 1. Moreover, if Sun Angels were to dissolve, its assets would go to the ASU Foundation "for the benefit of intercollegiate athletics." *Id.*, art. XII.
- 2) ASU's "approved financially related organizations" include the ASU Foundation, ASU Alumni Association, ASU Research Park, Sun Angel Foundation, Sun Angel Endowment and the Collegiate Golf Foundation. Arizona State University Comptroller's Office Policies and Procedures Manual, COM 301-02: Deposits-ASU-Approved, Financially Related Organizations (revised July 1, 1999) ("ASU Policy Manual").
- 3) Until 1997, ASU sold tickets to the Sun Angels and other booster organizations, such as the Sun Devil Club, for resale at a premium. See Minutes of ABOR Meeting 12 (Feb. 14, 1997). In 1997, ASU established a task force to examine how to improve fund-raising efforts to support intercollegiate athletics ("the task force"). That task force recommended that a single entity be used for this fund-raising program, rather than various booster organizations. Arizona State University Intercollegiate Athletics, Resource Acquisition Task Force 3, 4 (1997). As a result of this task force's recommendations, the system for using tickets to athletic events to assist in fund-raising changed to the current system in which a purchaser pays the ticket price to ASU and, for certain seats, pays a separate amount to the Sun Angels.

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