Memorandum

To: Housing Subcommittee Members

From: City Attorney’s Office

Meeting Date: July 22, 2019

Re: Legal Limitations on Direct Assistance Programs: Gift of Public Funds

Issue

This memorandum provides an overview of the constitutional prohibition on the gift of public funds and provides options for the Housing Subcommittee to establish various direct assistance programs for tenants suffering hardship in the City of Milpitas.

Brief Answer

If the Housing Subcommittee wants to establish some level of direct financial assistance for tenants suffering hardship in the City, in order to ensure any such assistance program is consistent with the constitutional prohibition on the gift of public funds, options for the Housing Subcommittee include:

1. Establishing a direct rental assistance program, but requiring that the individuals receiving direct assistance provide some level of consideration back to the City in exchange for the assistance. This could take the form of a volunteer program with the City where those receiving assistance agree to volunteer a certain number of hours with the City. This type of program could be burdensome on City staff to administer and may place a heavier burden on the individual receiving the assistance who may not have time to volunteer hours with the City.

2. Provide funding to a non-profit that provides broad services to prevent homelessness in Milpitas that may include as one component, a direct assistance program. If the City chose this option, we would need to document a public purpose consistent with the purpose of the City or Housing Authority and ensure the non-profit uses the funds consistent with that public purpose. This could be solidified through a grant agreement.

3. The City Attorney’s office is still researching whether federal funding, if received by the City or Housing Authority, could be used more liberally and not be restricted by the constitutional gift of public funds. This is because under federal law, certain types of federal funding may be
available for more direct assistance type programs. The City Attorney’s office anticipates solidifying this research in the coming weeks.

**ANALYSIS**

**OVERVIEW OF THE LAW**

The California Constitution prohibits cities from making a gift of public funds, which is a payment that does not serve a public purpose or for which the city does not receive adequate consideration. (Cal. Const., art. XVI, § 6.) This prohibition does not preclude expenditures or disbursements for public purposes, even if a private citizen or organization is benefitted. The courts will defer to the sound discretion of the legislative body unless that decision is “totally arbitrary” The courts try to avoid analyzing the economic or wisdom of a board’s decision, only analyzing the legal propriety. It is important to note that the prohibition on the gift of public funds does not apply to charter cities.

In determining whether an expenditure is a prohibited gift, a few questions should be considered as follows:

- Are the funds being used for a public or private purpose?
  - If for a public purpose, is it a purpose of the agency making the expenditure?
  - If not for a public purpose, is adequate consideration being provided in exchange so it does not amount to a gift?

Generally, an appropriation of public funds is invalid as an unlawful gift if it is for a wholly private purpose, as opposed to a public purpose. The public purpose rule is not destroyed, however, if private persons receive special or incidental benefits from the expenditure. (San Bernardino County Flood Control District v. Grabowski (1989) 205 Cal.App.3d 885, 903.)

California courts have held that the following expenditures were not gifts of public funds:

1. Public housing projects for low-income families are public uses and purposes for which public money may be expended and private property acquired. (Housing Authority of City of Los Angeles v. Shoecraft, (1953) 116 Cal.App.2d 813.)
2. Sale of public property to a nonprofit organization below market value because low-income housing to be provided by the nonprofit was a public purpose. (Winkelman v. City of Tiburon (1973) 32 Cal.App.3d 834.)

3. Lease of a building by a public agency to a nonprofit at below market rates because the building would provide a rest and recreation center for members of the armed forces and merchant marine. (People v. City of Long Beach (1959) 51 Cal.2d 875.)

Please note that a grant of public funds, including in-kind resources, to a private organization may still be considered a gift of public funds to and for the benefit of a private organization even though the organization is thereby enabled to promote some public purpose. This may occur if a donation of public funds to a private organization is primarily a donation and only incidentally promotes some public purpose. A public entity may only donate public funds to a private organization if the primary purpose of the donation is to promote a specific public purpose. All other donations shall be considered a gift, prohibited by Article XVI, Section 6 of the California Constitution.

APPLICATION TO CITY OF MILPITAS

There does not appear to be any case law or Attorney General opinions finding that a direct financial assistance program for tenants facing hardship has a public purpose. On that basis, it would be more defensible to require consideration from the tenants in exchange for financial assistance. This could be in the form of a volunteer program or other program where consideration is exchanged between the tenants needing assistance and the City. Another option would be to provide funding directly to a non-profit that includes a direct assistance program as one component in a larger program that addresses homelessness prevention in Milpitas. It is likely that the City and Housing Authority can justify a public purpose in providing funding to a non-profit that has an overall goal of preventing homelessness of Milpitas residents as the City and Housing Authority have a purpose of ensuring the public health, safety and welfare. Preventing homelessness in the City would be consistent with that overall purpose.

Finally, the City Attorney’s office is analyzing whether certain types of federal funding would allow for the Housing Authority to establish a direct financial assistance program. This is because under federal law, certain types of federal funding may be available for more direct assistance type programs. The City Attorney’s office anticipates solidifying this research in the coming weeks.