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MEMORANDUM

January 13, 2004

TO: Robin Pollard, Director
Economic Development Division, CTED, MS 42525

FROM: David Walsh, Special Assistant Attorney General
Attorney General's Office, MS 40100

SUBJECT: LCF Legal Issues

This is in response to your request for a short legal memorandum on CTED's LCF project facilitation role in the 7E7 siting agreement with Boeing. You indicated there have been some questions about whether this role complicates with state constitutional limitations regarding gifts of public funds and lending of credit. My analysis and conclusion is that CTED's role is consistent with its statutory authorization and does not violate the constitutional limitations.

I. CTED's Role.

Article VIII of the siting agreement provides that the state will have a facilitative type role to assist Boeing to explore and define an operating model for the LCF. Detailed steps include contracting with a consultant to work on the state's behalf with Boeing, aircraft modifiers, and cargo operators; assisting in the development and finalization of a business operational structure; working to identify a fund source; and ensuring that the LCF program is eligible for benefits under the 7E7 incentives program.

The duties are based on CTED's authority under RCW 43.330. The state has committed to allocate \$5 million for this commitment.

II. CTED's Authority.

The Legislature has given CTED broad authority regarding economic development in Washington, including "assistance to businesses" under RCW 43.330. CTED's specific authority is set forth in a number of sections in RCW 43.330, including:

- .005 - legislative intent regarding economic development in Washington; diversify the state's economy and export goods and services; provide greater access to economic opportunity; stimulate private sector investment and entrepreneurship.
- .050 - community and economic development responsibilities such as assisting the state's businesses to maintain and increase economic competitiveness; cooperate with and provide technical and financial assistance to businesses; conduct research and analysis in furtherance of the state's economic and community development efforts.

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- .060 - trade and business responsibilities such as promoting and marketing the state's products and services; working with Washington businesses that can use local, state and federal assistance.

Pursuant to this statutory authority, CTED has ongoing programs intended and designed to provide information, support and assistance to businesses.

III. Assistance Under the Siting Agreement is Consistent with this Statutory Authorization.

CTED's actions are consultative in nature and the information developed is available to be used by Boeing and other interested businesses at their option. The state team has agreed and will be available to work closely with Boeing in this role, but it is important to emphasize that the team is not serving as a subcontractor for Boeing, or performing services for or under the direction of Boeing or any other business. Furthermore, the state will not have any ownership interest in or operational responsibilities for the LCF service. It is assumed that Boeing will make its own business decision on whether and how to use LCF support for its mission. It is also assumed that Boeing will contract directly with the businesses providing services

The facilitative role in this matter benefits the state in many ways. The development of a cost effective model for transport may generate more 7E7 businesses which would benefit the community and the state and its other businesses. As importantly, CTED's activity may also help to develop business opportunities for the companies providing the LCF service. This could be particularly valuable for other Washington businesses which potentially might use the LCF transporters for export or other business purposes. This could potentially benefit a wider range of communities and businesses in Washington. The potential benefits to the state are entirely consistent with the legislative intent and goals regarding CTED's mission and authority.

IV. This Facilitative Role Does Not Violate the Constitutional Limitations on Gift of Public Funds or Lending of Credit.

Article VIII, § 5 of the Washington Constitution generally prohibits any gift or loan of public funds. (See also Article VIII, § 7). The purpose of these provisions is to prevent state funds from being used to benefit private interests where the public interest is not primarily served. See *Clean v State*, 130 Wn.2d 782 (1996).

The court in *Clean* explained that there is a two pronged test to determine whether a gift of public funds has occurred. First, the court examines whether the funds are being expended to carry out a fundamental purpose of government. If so, there is no gift of public funds. (See also *Brower v State*, 137 Wn.2d 44 (1998)).

If the expenditure of funds fails to satisfy this test, then the court will examine the consideration received or whether there is a donative intent of the governmental entity. If the expenditure is structured as a mutual obligation where the state receives a benefit in return for the expenditure of public funds, and it does not appear that there is an intent to donate a gift to the private entity, it will not violate the constitutional limitation.

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Regarding the siting agreement, there are strong arguments that the expenditure of funds by CTED in this role carries out a fundamental purpose of government. The expenditure is consistent with specific duties authorized by the Legislature, and economic development has become a mainstream program in state governments. There are clear benefits to the state through this expenditure.

There are also strong arguments that there is consideration for this expenditure and there is no donative intent as set forth in the court analysis. The expenditure is part of a comprehensive agreement between the parties, with the principal consideration being the economic benefits to the state of siting the program in Washington. There is no evidence of donative intent as the funds are appropriated to a state agency for work under its direction. Information developed for the siting agreement task could also be used for the benefit of the state by potentially assisting a wide range of businesses and communities.

Conclusion

My assessment is that CTED's role regarding the LCF project is consistent with its statutory authority and does not violate any constitutional limitations.

DEW/jlg