
Coates' Canons Blog: Donating Property: Beware of Constitutional Constraints

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The old school administration building has been renovated and there is furniture and shelving that can be sold as surplus property. A board member has raised the possibility of donating them to the local arts council. She notes that G.S. 160A-280 authorizes donations to nonprofit organizations. Can the school make this donation? The answer is no. The North Carolina constitution constrains local government authority to make donations.

What is a donation? Using the Webster's Dictionary definition, a donation is "the making of a gift especially to a charity or public institution; a free contribution." So when I use the term donation, I'm assuming there is no monetary payment or other value – no "consideration," in legal terminology – coming back to the local government in exchange for the donation. That turns out to be the main issue under the constitution. Under North Carolina law, local governments can't *donate* property.

Article I, section 32, titled "Exclusive emoluments" says: "No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services."

This provision has been interpreted by the North Carolina courts in several contexts, including economic development, appropriations of public funds, and the use and conveyance of public property. The core principle is that public money must be used for purposes benefitting the public. So when there is authority to contract with or convey property to a private entity, there must be some consideration flowing back to the government entity, whether in monetary form, or in the form of services that benefit the public. This is the constitutional limitation on making donations – a public benefit must be received in return.

In 1945, the North Carolina Supreme Court decided a case involving property that the City of Charlotte conveyed to a Recreation Authority for the purpose of creating a recreational facility for WWII veterans. There was no monetary consideration for the conveyance. The court noted that the facility would be used for the benefit of the many veterans who lived in the area and who had provided important service to their country. The court held that the provision of services to veterans under this scenario was a public benefit sufficient to constitute consideration under the Exclusive Emoluments clause. *Brumley v. Baxter*, 251 N.C. 691, 700 (1945). But there was a problem with the conveyance, and in the end, the court ruled against the city, invalidating the deed.

The problem with the deed in *Brumley* was that it did not restrict the use of the property to service for veterans. In fact, the deed provided that "in the event the grantee determines the public purpose has failed, or the recreational facilities placed thereon for veterans are not being sufficiently used, the grantee may dispose of the property in its discretion and apply the proceeds to such charity as it may elect." Charlotte's failure to restrict the use of the property to a public purpose exceeded its statutory and constitutional authority.

The *Brumley* case establishes two key principles for interpreting the Emoluments Clause: First, if a conveyance of property is without monetary consideration then there must be consideration in the form of an enforceable promise to provide public services that benefit the taxpayers in the jurisdiction. Second, if the consideration is in the form of public service, the conveyance must be conditioned on the continued use for that purpose, which must include reversion to the grantor in the event that the grantee ceases to use it for a public purpose.

Most local governments are required to follow specific statutory procedures for disposing of surplus property. These are primarily found in Article 12 of Chapter 160A, which applies directly to cities, and applies to counties under G.S. 153A-176,

and to local school administrative units under G.S. 115C-518(a). The general rule is that local governments must use the applicable procedures, which are designed to maximize the recovery of tax dollars when disposing of government assets. Several provisions modify that standard, providing specific authority to use the conveyance of property to promote specific statutory purposes, such as economic development (G.S. 158-7.1), historic preservation (G.S. 160A-266(b)), and redevelopment (G.S. 160A-514).

The legislature has given cities and counties broad authority in G.S. 160A-279 to convey property to nonprofit organizations. This statute incorporates the constitutionally mandated standards by requiring a promise to use the property for a purpose for which the local government has authority to appropriate funds. It further provides that “[t]he city or county shall attach to any such conveyance covenants or conditions which assure that the property will be put to a public use by the recipient entity.” This statute applies only to cities and counties, and not to any other unit of government that is otherwise governed by the property disposal provisions in that article. Although some may refer to conveyances under this statute as donations, it’s clear that they cannot be donations in the “gift” sense of the word, and that there must be some consideration, whether monetary or the promise to use the property for a public purpose.

A later enacted statute, G.S. 160A-280 muddies the waters a bit. This statute specifically authorizes cities (and other units that are subject to the Article 12 provisions) to “donate” personal property to any other government or nonprofit anywhere in the United State, and to sister cities in other countries. The statute does not mention any requirement for consideration, nor does it include any restriction on the use of the property by the grantee. Nonetheless, since those requirements are necessary to avoid a violation of the constitutional bar against exclusive emoluments, local governments should assume that they apply, and should make sure that any conveyance under this statute is supported by some type of constitutionally valid consideration, and is restricted to use for a public purpose that benefits the taxpayers of the jurisdiction.

Now back to the school board member’s idea about donating property to the arts council. Can they do it? Well, based on what has been discussed so far, it might be argued that as long as the arts council uses the property for purposes that benefit the citizens in the school district, it would be ok. That would be the right answer if the grantor were the city or the county. But a different rule applies to schools –Article IX, section 7 of the North Carolina Constitution.

That provision says, “[A]ll moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.” In another case involving a conveyance of real property, this provision was interpreted by the North Carolina Supreme Court to limit the school’s ability to convey property without monetary consideration for a non-school use.

The case is *Boney v. Board of Trustees of Kinston Graded Schools*, 229 N.C. 136 (1948). The Court addressed the question of whether the Kinston school board could legally convey real property – without receiving monetary consideration – to the City of Kinston to construct an athletic stadium. The main issue in the case was whether this conveyance violated an earlier version of Article IX, section 7. The court noted that this provision was “designed in its entirety to secure two wise ends, namely: (1) To set apart the property and revenue specified therein for the support of the public school system; and (2) to prevent the diversion of public school property and revenue from their intended use to other purposes.” The transaction in *Boney* was authorized by the legislature in order to facilitate the issuance of bonds by the city for the construction of the stadium, since the school board had no authority to incur debt. Demonstrating a bit of inter-branch critique, the court noted: “This case provokes a judicial regret that practical considerations sometimes prevent the law makers from legislating upon the theory that a straight line is the shortest distance between two points in law as well as in geometry.” The shorter distance would have involved giving the school the authority to incur the debt. In taking the indirect approach, the court noted, the legislature might have run afoul of the constitutional limitation on the use of property purchase with school funds.

Ultimately, however, the court upheld the legislation and the conveyance because sufficient school use and control was guaranteed in both the statute authorizing the deal, as well as the actual agreement, which provided broad use by the schools as well as residual rights in the property. The lesson learned from the *Boney* case is that a local school unit must obtain monetary consideration, or nonmonetary consideration in the form of a promise of continued use and benefit to the school.

All this means that the school cannot legally donate the property to the arts council, and will be required to sell it using the applicable statutory procedures.

What about conveyances to other governmental units? Does this raise the same constitutional concerns? Perhaps not, at least for cities and counties. G.S. 160A-274 provides broad authority for local governments to convey property to other governmental units (defined in the statute), "with or without consideration." Of course, this should be read to mean "with or without *monetary* consideration," since some form of consideration is constitutionally required. It seems reasonable to assume that use by another North Carolina governmental unit constitutes sufficient constitutional consideration for cities and counties.

The separate constitutional requirement for schools, as interpreted in *Boney*, suggests that local school units must obtain monetary consideration when conveying property, even to other governmental units, unless the property will be used school purposes. G.S. 160A-274 may still be useful for school conveyances to other governmental units, since it provides a simplified procedure for these intergovernmental transactions. This statute also contains specific authority for local school units to lease real property to another governmental unit for \$1 per year. Like the donation provision in G.S. 160A-280, conveyances under this provision may not always satisfy the constitutional requirement that applies to schools. Nominal consideration of \$1 per year would not satisfy the requirement to obtain monetary consideration if the value of the lease exceeds that amount, and if the property will be used for non-school purposes, the conveyance will not meet the standard set in *Boney*.

Local school units do have authority to provide school facilities to charter schools free of charge under G.S. 115C-281.35. Since charter schools are public schools, this type of conveyance meets the constitutional requirement for use of school property for school purposes.

Links

- www.merriam-webster.com/dictionary/donation
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_160A/Article_12.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-176.html
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=115C-518
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