



Bob Ferguson

ATTORNEY GENERAL OF WASHINGTON

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April 6, 2016

The Honorable Jake Fey
State Representative, District 27
PO Box 40600
Olympia, WA 98504-0600

Dear Representative Fey:

By letter previously acknowledged, you have requested an opinion on the following questions:

1. **Is it legal and constitutional for a charter city in the State of Washington to create a municipally-owned bank for the purpose of depositing its own funds? Could the funds then be utilized to finance public infrastructure projects; make construction loans for affordable housing and infrastructure; make bond investments for affordable housing and infrastructure; refinance redeemable portions of the city's currently outstanding general obligation debt for the purpose of re-investing the proceeds into local development; and make participation loans in partnership with local lenders such as credit unions and local banks?**
2. **If a municipally-owned bank exists in a charter city, is the city allowed to deposit its own funds into the public bank rather than the current private bank?**

BRIEF ANSWER

With respect to your initial question, I conclude that state law probably does not authorize a charter city to create a bank because cities are not among the entities allowed to create banks under state law. Thus, it is unnecessary to address your second question.

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ANALYSIS

You ask specifically about the authority of a charter city¹ to establish its own bank. The state constitution authorizes any city with a population of at least ten thousand “to frame a charter for its own government, consistent with and subject to the Constitution and laws of this state[.]” Const. art. XI, § 10. A charter city is therefore governed by its own locally-developed charter, but remains subject to the general laws of the state. *State ex rel. Bowen v. Kruegel*, 67 Wn.2d 673, 676, 409 P.2d 458 (1965).

Your question could potentially implicate exceedingly difficult questions as to whether a charter city seeking to create its own bank would be operating in a governmental or proprietary capacity, which might impact its authority to create a bank. *See, e.g., Hugh D. Spitzer, “Home Rule” vs. “Dillon’s Rule” For Washington Cities*, 38 Seattle U. L. Rev. 809, 856-57 (Spring 2015) (discussing the nature of the legislative action necessary to preempt actions taken under different types of city powers). It is not necessary, however, to resolve your question on such complex grounds, as there is a simpler way to resolve the question.

State law specifies who may form a bank, limiting the authority to incorporate a bank to “persons,” or “natural persons.” RCW 30A.08.020, .010. The legislature has defined “person” for purposes of the banking laws to mean:

[A]n individual or an entity including, but not limited to, a sole proprietorship, firm, association, general partnership or joint venture, limited liability company, limited liability partnership, trust, or corporation, or the plural thereof, whether resident, nonresident, citizen, or not.

RCW 30A.04.010(13).

Although the definition provides that a “person” includes, but is not limited to, these listed entities, the best reading of the definition excludes cities or other municipalities. This is so because as a matter of statutory construction, the use of a general term in conjunction with listed specific terms “should be deemed only to incorporate those things similar in nature or ‘comparable to’ the specific terms.” *Simpson Inv. Co. v. Dep’t of Revenue*, 141 Wn.2d 139, 151, 3 P.3d 741 (2000). Local governments are markedly different from the types of companies listed in this definition. Moreover, where the legislature wanted to define local governments as “persons” under a particular chapter of the RCWs, it has typically done so explicitly. *See, e.g., RCW 42.17A.005(35)* (defining “persons” to include “an individual, partnership, joint venture,

¹ Organizing as a charter city is only one of several ways in which cities can be organized. *See* RCW 35.01.010 (first class cities, also known as charter cities); RCW 35.01.020 (second class cities); RCW 35.01.040 (towns). Most cities also have the choice to organize under the optional municipal code and become “code cities.” RCW 35A.01.035.

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public or private corporation, association, *federal, state, or local governmental entity or agency however constituted . . .* or any other organization or group of persons, however organized” (emphasis added)); RCW 70.105D.020(24) (defining “person” to mean “an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, state government agency, *unit of local government*, federal government agency, or Indian tribe” (emphasis added)). We therefore presume that its failure to list local governments here was intentional. *Ellensburg Cement Prods., Inc. v. Kittitas County*, 179 Wn.2d 737, 750, 317 P.3d 1037 (2014). Cities are therefore excluded from the class of entities authorized to incorporate a bank.²

This conclusion is bolstered by longstanding practice. Cities have been using private banks since statehood, a practice that has long been recognized by state law. Article XI, section 15 of the Washington Constitution (Deposit of public funds.) provides:

All moneys, assessments and taxes belonging to or collected for the use of any county, city, town or other public or municipal corporation, coming into the hands of any officer thereof, shall immediately be deposited with the treasurer, or other legal depositary to the credit of such city, town, or other corporation respectively, for the benefit of the funds to which they belong.

See also State ex rel. Graham v. City of Olympia, 80 Wn.2d 672, 676, 497 P.2d 924 (1972) (“The constitutional delegates unquestionably had banking institutions in mind as legal depositaries [for city funds] as evidenced by their knowledge of banking practices from the references to banking institutions in other sections of the constitution.”).

Moreover, even if cities were among the entities generically authorized to incorporate a bank, and even if such an action were considered governmental rather than proprietary, we think such a decision would create serious legal risk absent a state law expressly authorizing the city’s activities. The reason is that, although city police powers are generally as extensive as those of the state,³ the city’s action must be reasonable, relate to a “local” subject matter, and not conflict with general laws. *Petstel, Inc. v. County of King*, 77 Wn.2d 144, 159, 459 P.2d 937 (1969).

² Your question asks about ability to form a bank generally, so the answer focuses on RCW Title 30A, which generally deals with commercial banks. State law, however, authorizes a variety of other types of entities that might generically be referred to as “banks,” such as “savings banks” and “credit unions.” *See generally* RCW Title 32 (savings banks); RCW 31.12 (credit unions). But we see nothing in the laws authorizing those types of institutions either, that would allow a city to create one. *See, e.g.*, RCW 31.12.035 (requiring that an application to form a credit union be filed by “[s]even or more natural persons who reside in this state”); RCW 32.08.010 (requiring that the “persons” forming a savings bank “must be citizens of the United States; at least four-fifths of them must be residents of this state, and at least two-thirds of them must be residents of the county where the bank is to be located and its business transacted”).

³ Article XI, section 11 (Police and sanitary regulations.) of the Washington Constitution provides: “Any county, city, town or township may make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws.”

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Here, there are extensive state laws regulating local governments' management of public funds. *See, e.g.*, RCW 35.38.010 ("The treasurer in all cities and towns shall . . . designate one or more financial institutions which are qualified public depositories . . . for the moneys required to be kept by the treasurer."); RCW 35.38.060; RCW 39.58 (creating the "qualified public depository" system that municipal treasurers must use). While we need not definitively resolve this issue here, the presence of these extensive regulations would raise serious questions about whether a city's attempt to create its own bank would conflict with the general laws or be considered "local." *See, e.g.*, Philip A. Trautman, *Legislative Control of Municipal Corporations in Washington*, 38 Wash. L. Rev. 743, 772 (1963); *Chem. Bank v. Washington Pub. Power Supply Sys.*, 99 Wn.2d 772, 793, 666 P.2d 329 (1983) ("[T]herefore, at least when the interest of the State is paramount to or joint with that of the municipal corporation, the municipal corporation has no power to act absent a delegation from the legislature." (internal quotation marks omitted) (quoting *Massie v. Brown*, 84 Wn.2d 490, 492, 527 P.2d 476 (1974))).

In short, based on the statutes governing who may form a bank, bolstered by longstanding practice and related statutes, we conclude that Washington cities currently are not authorized to form banks.⁴

That said, we recognize that the legislature may be interested in legislation that would authorize cities to form banks, so we offer a few observations that may assist you if you decide to pursue that option. Particularly given the unprecedented nature of a city-owned bank, we would recommend that if you wish for a city-owned bank to be able to engage in the various lending activities you described as among the possible motivations for creating a bank (e.g., making infrastructure loans, making construction loans for affordable housing), those activities be specifically allowed by any authorizing legislation. This is because it would be risky to assume that a general grant of authority for a city to create a bank to accept its own deposits necessarily would carry with it the power to engage in lending activities of the type that your letter describes.

Further, it would be advisable to carefully examine the policy objectives underlying such lending activities, and of the statutory mechanisms the legislature has already created for similar activities. Simply creating a bank and making deposits into it will not necessarily shield a city from constitutional restrictions on the use of those funds, such as the prohibitions against the

⁴ We are aware of no court decisions from anywhere in the United States holding that a city has the power to create a bank. It is our understanding that there are currently no city-owned banks in the United States. However, we are aware that the city of San Francisco is contemplating city legislation that would create a bank. *See* Ellen Brown, *Green Light for City-owned San Francisco Bank*, The Blog, Huffington Post (July 31, 2013), http://huffingtonpost.com/ellen-brown/green-light-for-cityowned_b_3678608.html. The nature of municipal authority upon which San Francisco's plans apparently rest is markedly different from that which our state has conferred upon Washington cities, and is thus not relevant to our analysis.

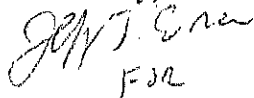
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lending of a city's money to private parties and investing city money in corporate stock. *See Okeson v. City of Seattle*, 159 Wn.2d 436, 447, 150 P.3d 556 (2007) (in exercising its statutory authority, municipality may not act contrary to constitutional limitations). The legislature has been quite deliberate in the manner in which it has provided city lending authority for economic development and similar activities, in large part to avoid constitutional issues involving gifts or loans of public funds or credit. *See, e.g.*, RCW 35.21.730-.755 (authorizing cities to create public corporations and specifying related powers and procedures), .757 (providing that "[n]othing in RCW 35.21.730 through 35.21.755 shall be construed in any manner contrary to the provisions of Article VIII, section 7, of the Washington state Constitution").

I hope the foregoing information will prove useful. This is an informal opinion and will not be published as an official Attorney General Opinion.

Sincerely,

Handwritten signature of Robert J. Fallis in cursive, with the initials 'R.J.F.' written below it.

ROBERT J. FALLIS
Assistant Attorney General
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