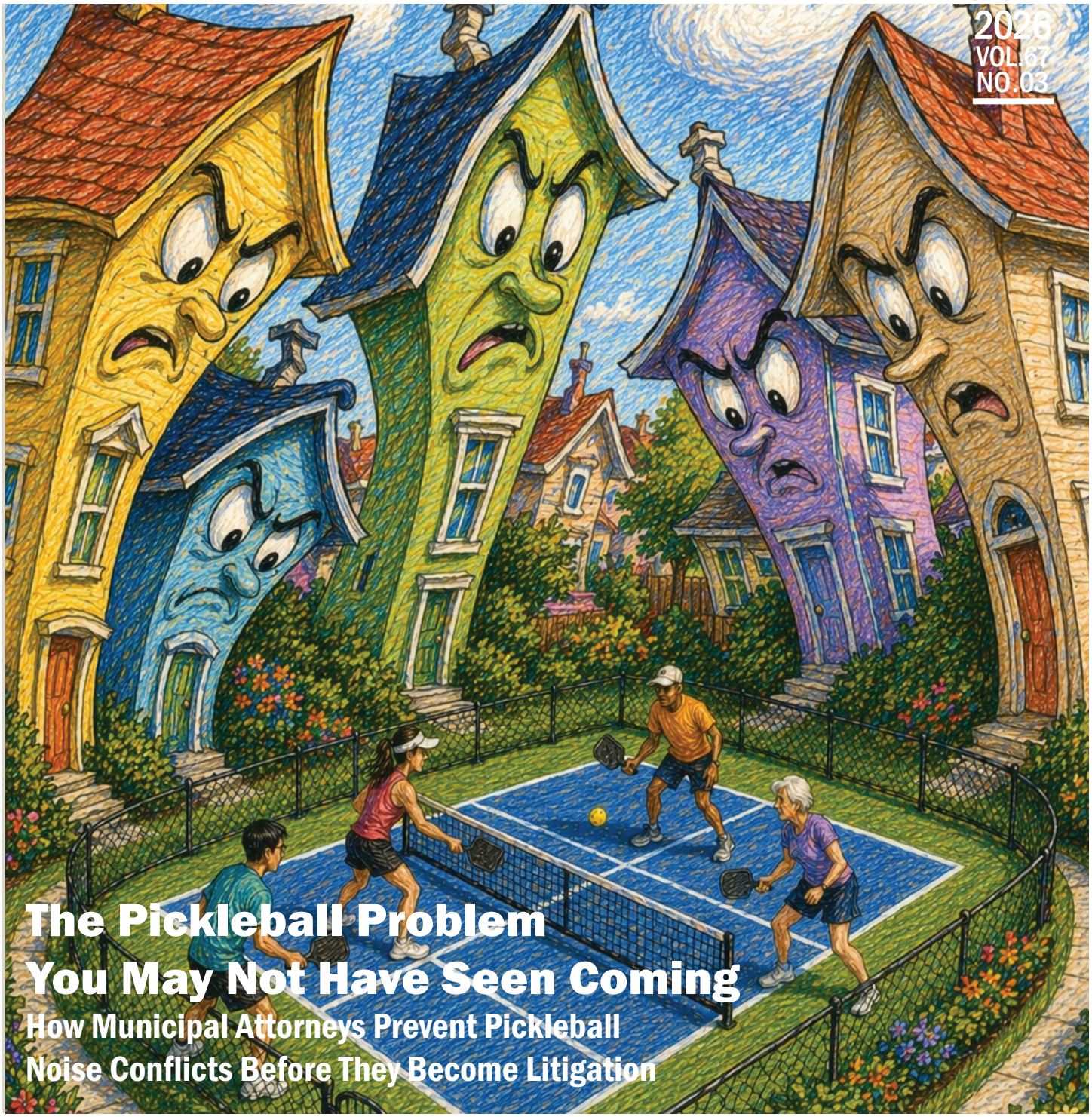
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The Pickleball Problem You May Not Have Seen Coming

How Municipal Attorneys Prevent Pickleball Noise Conflicts Before They Become Litigation

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NADIA SARKIS, Miller Barondess LLP, Partner
JAMES NIKRAFTAR, Miller Barondess LLP, Associate
Case v. Montana (Supreme Court Merits)
Issue: Whether probable cause required for community caretaker warrantless entry, or is objectively reasonable belief sufficient.

JOHN J. KORZEN,
Wake Forest University School of Law Appellate Advocacy Clinic, Director
First Choice Women's Resource Centers, Inc. v. Platkin (Supreme Court Merits)
Issue: Whether constitutionally-based challenges to state or local administrative subpoenas can be heard in federal court before state proceedings have concluded.
The Summit Church-Homestead Heights Baptist Church, Inc. v. Chatham County (Fourth Circuit)
Issue: Whether a court can require a local government to enact a rezoning requested by a church, despite the fact that zoning is the province of the legislature.

MEAGHAN VERGOW, O'Melveney & Myers LLP, Partner
ALYSSA NEGVESKY, O'Melveney & Myers LLP, Associate
NINA OAT, O'Melveney & Myers LLP, Associate
Pung v. Isabella County (Supreme Court Merits)
Issue: Whether taking/selling home to satisfy government debt and keeping surplus violates Takings Clause when sale is artificially depressed auction price; whether taking of real estate worth more than debt and sold for fraction of fair market value is excessive fine under Eighth Amendment.

CHARLES B. GALVIN, FBT Gibbons LLP, Partner in Charge
YAZAN S. ASHRAWI, FBT Gibbons LLP, Partner
STEPHEN J. SMITH, FBT Gibbons LLP, Partner
JESSE J. SHAMP, FBT Gibbons LLP, Managing Associate
ANTHONY R. SEVERYN, FBT Gibbons LLP, Associate
City of Cleveland v. Pickett (Supreme Court Petition)
Issue: Whether non-injured residents can be included within a proposed class consistent with the requirements of CPLR 23A.

AMY HOYT, Best, Best & Krieger LLP, Partner
GREGG KETTLES, Best, Best & Krieger LLP, Partner
Estate of Johnson v. Rakes (Supreme Court Petition)
Issue: Whether officer's incorrect statement about length of husband's hospital stay, after which wife returns home and is killed by husband, is state created danger.

STEPHANIE A. ANGOLKAR, Lockridge, Grindal, Nauen PLLP, Partner
Hanneman v. Wells/Estate of Locke (Supreme Court Petition)
Issue: Whether SCOTUS can consider BWC footage blatantly contradictig plaintiffs' facts; whether QI can be based on decedent's pointing gun outwards, but not at officer, and was QI adequately pleaded.

T. PETER PIERCE,
Richards, Watson & Gershon, Shareholder & Chair of Litigation
SOSE TEZYAN, Richards, Watson & Gershon, Associate
Nyarecha v. County of Los Angeles (Supreme Court Petition)
Issue: Whether 13-hour period of failure to check on at-risk inmate is "custom or practice" sufficient to satisfy Monell standards for Section 1983 liability.

SEBASTIAN WAISMAN, Husch Blackwell LLP, Senior Counsel
DANIEL G. SOLOMON, Husch Blackwell LLP, Senior Associate
SPENCER TOLSON, Husch Blackwell LLP, Senior Associate
ALYSSA M. LEROY, Husch Blackwell LLP, Associate
Salter v. City of Detroit (Supreme Court Petition)
Issue: Whether police officer's use of single photo to identify defendant / use of line up photo without defendant is protected by QI; whether Brady violation gives rise to Sectiion 1983 police officer liability for damages, whether police officer is responsible for evidentiary decisions by prosecutor or judge.

CHRIS BALCH, Balch Law Group, Partner
City of Milton v. Chang (Georgia Supreme Court)
Issue: Whether design/placement of objects in right of way is ministerial or discretionary/governmental duty; whether planter in right of way is "defect" in roadway.

KATIE BERAN, Hausfeld LLP, Partner
DANIEL WEICK, Hausfeld LLP, Partner
B. ANNABELLE EMUZE, Hausfeld LLP, Associate
ZELLY ROSA, Hausfeld LLP, Associate
Diemert v. City of Seattle (Ninth Circuit)
Issue: Whether content/comments in DEI program constitute harassment; whether City's response to complaints of harassment are retaliation.

RANDY AUTIO, New Mexico Local Government Law LLC, Attorney
ROBERT KIDD, New Mexico Local Government Law LLC, Attorney
RANDALL VAN VLECK, New Mexico Local Government Law LLC, Attorney
Hill v. City of Santa Fe (New Mexico Court of Appeals)
Issue: Whether Excise tax on residential sales over $1 million is permissible services charge under Home Rule powers.

NATHAN INKS, Bloom Slugget PC, Attorney
ERIC D. WILLIAMS, Attorney
Peninsula Township v. Wineries of the Old Mission Peninsula Association (Sixth Circuit)
Issue: Whether Township's ordinances limiting wineries' commercial activities and requiring local produce in wines served violate due process, Dormant Commerce Clause, etc.

JESSICA SKELTON, Pacifica Law Group LLP, Partner
Uber Technologies, Inc. / Maplebear, Inc. v. City of Seattle (Ninth Circuit)
Issue: Whether Seattle's app worker ordinance requires compelled speech by Uber/Instacart, violating the First Amendment.



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Northeastern Univ. School of Law, Boston, MA
Hometown: Tacoma, WA

Is There a Government Purpose in Providing Affordable Housing to Middle-Income Households?

While efforts have been made to provide housing for low-income and homeless families in major metropolitan cities, "middle-income" households are also having difficulties finding and keeping housing in city centers. Typically, "low-income" is considered a total household income that does not exceed 80% area median income (AMI).[1]

Recently, some Washington cities have proposed funding affordable housing for middle-income families, but there are doubts as to whether these public expenditures are constitutional. This memorandum will address Washington State's constitutional limits on the expenditure of public funds and discuss whether middle-income housing qualifies as an exception to Washington's constitutional prohibitions on gifts of public funds and the lending of public credit.

The Washington State Constitution Prohibits Gifts of Public Funds or Lending of Public Credit

Article VIII, Section 7 of Washington State's Constitution prohibits cities from making gifts of money or property or lending money or public credit except for the "necessary support" of the poor or infirm.[2]

Washington courts use a two-pronged test to determine whether a gift of public funds has occurred. First, the court asks whether the funds were expended to carry out a fundamental government purpose. If so, there is no gift of public funds.[3] Second, the court determines if the funds were given with "donative intent" and what the public received in exchange for the funds.[4] Courts have stated that a "fundamental governmental purpose" exists when the government plays a basic role, such as law enforcement, garbage collection or disposal, or public enforcement of child support.[5]

As discussed in more detail below, providing housing to middle-income households may constitute a fundamental governmental purpose, but this has not been examined by Washington courts.

The Washington Constitution Prohibits Gifts of Public Funds

In 1914, the Washington Supreme Court held in *Johns v. Wadsworth* that government donations, even to "worthy" charitable organizations, are unconstitutional gifts of public funds.[6] Since then, courts have approved transactions in which local governments have accepted a range of consideration from recipients of public spending. The current rule, as stated in *King Cnty. v. Taxpayers of King Cnty.*, is that "In the absence of donative intent or grossly inadequate return, the Court's review is limited to the legal sufficiency of the consideration…."[7] In sum, the review is limited to whether the government funder receives something it has determined to be of value, even if some would argue it "made a bad deal."[8] If a municipal government receives consideration for funds used to develop middle-income housing, even if the consideration is minor, there is no gift of public funds. For example, cities may be able to provide funding to non-profit organizations to develop affordable housing if the non-profit agrees to provide services to city residents as consideration in exchange for the funds.

Additionally, the government may spend for a public purpose and provide an "incidental benefit" to a private party. For example, building a road that would primarily benefit a private developer but also relieve traffic pressure is allowed.[9] It is permissible for a city to partner with a private developer to create affordable middle-income housing as long as the municipality receives consideration in exchange for the funds.

Despite Washington courts clarifying gifts issues, *Johns* has not been overturned. In each subsequent case, the court first looked to whether there was "donative intent" in the government program before turning to a flexible test for sufficiency of consideration.

Loans of Public Funds Are Prohibited Under the Washington Constitution

In a separate line of cases interpreting the prohibition on lending, Washington State's Supreme Court held in *Lassila v. City of Wenatchee* that municipalities lending money or credit for property transactions is illegal under Washington's Constitution regardless of the expectation of future public benefit.[10] A city "lends its credit" when it uses its governmental status or authority to enable a private corporation or individual to obtain property or money it would not otherwise acquire for the same price.[11] Although no case has overturned *Lassila* to hold that a future public benefit would justify a loan, subsequent case law has declined to follow *Lassila* and upheld a variety of transactions against assertions they were gifts of public funds because of expected future public benefit.[12]

In *Wash. State Hous. Fin. Comm'n. v. O'Brien* the Washington State Supreme Court found a legislature-established program allowing the state to use nonrecourse bonds to invest in, purchase, or pledge to purchase home mortgages to provide "decent, safe, sanitary, and affordable housing for eligible persons," including moderate-income persons, did not violate the Article VIII, Section 5 prohibition against the lending of state credit.[13] There, the court found there was a legitimate governmental purpose to benefit a "deserving" class, so that there was necessary "consideration" for the funds.[14] The Washington State Housing Finance Commission was also created with the purpose of fulfilling the "recognized governmental function to assist in making affordable and decent housing available throughout the state."[15]

Although the court did not consider whether the program at issue in *O'Brien* provided for the "necessary support to the poor and infirm," the court did state it would defer to legislative determinations of need:

> Nor should we be understood as taking upon ourselves the business of determining who belongs in the benefited

class. In early cases upholding aid to the "poor and infirm," we deferred to the legislative determination of what constituted need. Our only task is to assess the reasonableness of that determination.[16]

Lasilla and *O'Brien* are in conflict. A court may determine that a city's funding of affordable housing for middle-income households is an illegal lending of credit, because loans are unconstitutional regardless of whether there is a future public benefit, as in *Lasilla*. However, it is more likely that a court would allow a city to lend money for the development of affordable housing for middle-income households if the city could articulate the public benefit being obtained (such as increased housing availability), and if the benefit to a private developer, if any, was only incidental.

"Poor and Infirm" Means Really, Really Poor

Few Washington courts have interpreted the "necessary support" of the poor or infirm exception to the constitutional prohibition, but it is clear that to qualify for the exception, a household must be very poor. It is unlikely that a middle-income household would be poor enough to qualify for the exception.

In *Morgan v. Dep't of Social Security* the Washington State Supreme Court found an act authorizing financial assistance to seniors earning less than $480 per year was not unconstitutional.[17] Today, $480 would be an annual income of approximately $9,500. The Washington State Supreme Court later found in *State v. Guaranty Trust Co. of Yakima* that the act analyzed in *Morgan* was unconstitutional to the extent it funded funeral expenses if the senior left enough property to pay for his funeral.[18] The court further opined that the legislature has authority, "within reasonable limitations," to determine what income or resources provide the basis for need:

> It will be seen from what we have said in deciding the *Morgan* case that the only legal justification for the aid of citizens of the state is that those aided must be without resources or income and upon the basis of need alone. The lawmaking power of the state has the authority, within reasonable limitations, to declare what shall be deemed a resource or income, and it has done so in the act.[19]

Because legislatures can determine what resources are considered income, within reasonable limitations, if a city seeks a legislative finding that proving middle-income housing advances a city's governmental purpose, the finding should also include information on how resources are included in income calculations.

In a 1991 Washington State Attorney General's Office (AGO) opinion, the AGO opined that a single person with no dependents and an annual income of $30,000 would make too much money to qualify for financial assistance: "we cannot say precisely where the court will draw the line between assistance to the poor and an impermissible gift. In our view $30,000 is too high, certainly, it relates to an individual without dependents."[20] In 2025 dollars, $30,000 would be approximately $71,000, 65% of the Seattle AMI for a household of one.

It is clear that Washington courts consider "poor" to be significantly low income. As such, a household with a 120% AMI, the maximum middle-income income limit contemplated under the "2021 King County Countywide Planning Policies," is unlikely to qualify for the "poor" exception under Washington law.

Courts Have Not Determined Whether Affordable Housing Is a Fundamental Governmental Function

There are no Washington cases determining whether affordable housing is a fundamental governmental function; although Washington courts have stated that, "The adequacy of private housing and the health of the state's economy have traditionally been concerns of state government."[21]

In 2006, the AGO issued an opinion that a county making grants that aid individuals in moderate-income households with incomes in excess of 80% AMI would likely be considered a governmental function that would not violate Article VIII, Section 7 of the Washington Constitution.[22] The opinion arose following questions about RCW 82.246.075, which allows counties to impose real estate excise taxes for developing affordable housing. The taxes are limited to funding housing for "very low, low, and moderate-income persons."[23] The court compared the proposed grants to "entitlement payments," which are a form of public assistance that further, "an overriding public purpose or satisfy a moral obligation."[24]

While a court might find that a governmental interest is compelled by providing funding to high-income residents to build additional housing, a court may state that there is not a nexus between the benefited class of high-income individuals and the need for additional low and middle income housing.

Other States Have Determined Middle-Income Housing Is a Fundamental Governmental Purpose

Though Washington courts have not considered whether affordable housing is a legitimate governmental purpose, other states have concluded that promoting affordable housing is a governmental purpose. In California, a court found that an "inclusionary" zoning ordinance requiring 10% of newly constructed units to be dedicated to affordable housing was not facially invalid.[25] The court held that the ordinance would advance the important governmental interest of providing affordable housing to low and moderate income households.[26] Similarly, in New Jersey, the court upheld a department decision that conditioned a development permit on 10% of the housing units being dedicated to low-income residents and 10% to moderate-income residents. *In Matter of Egg Harbor Assoc.*[27] There, the court opined that restrictions on the use of property, in furtherance of a valid governmental purpose, are a proper exercise of police power and serve the public interest, even if they result in an economic disadvantage.[28]

Washington Cities Should Seek Guidance from Legislatures or Courts

Although no Washington court has stated that affordable housing is a fundamental governmental purpose, there is an argument that providing middle-income housing is one. Washington courts have stated that legislatures are ultimately responsible for determining who belongs in the class of people to be benefited by a government-funded program. Therefore, it would be in a municipality's best interest to obtain a city council finding, a determination from the Washington State legislature, or a court ruling establishing that providing middle-income housing is a fundamental governmental purpose to avoid creating an unlawful gift of public funds or lending of public credit. ML

ENDNOTES

[1] *What is Area Median Income (AMI)?*, U.S. Department of Housing and Urban Development (Dec. 31, 2025), https://www.hud.loans/hud-loans-blog/what-is-area-median-income-ami/; *see also* Wash. Rev. Code §§ 35.21.685, 35.82.070; *see also King County Countywide Planning Policies (2021)*.

[2] Article VIII, Section 7 of Wash. State Const.

[3] CLEAN v. State, 928 P.2d 1054, 1061 (1996), as amended (Jan. 13, 1997).

[4] *Id*.

[5] *See e.g.* Hudson v. City of Wenatchee, 974 P.2d 342, 346 ("The police power is a fundamental purpose of government…It extends not only to the preservation of the public health, safety, and morals, but also to the preservation and promotion of the public welfare).

[6] Johns v. Wadsworth, 141 P. 892 (1914).

[7] King Cnty. v. Taxpayers of King Cnty., 949 P.2d 1260, 1269.

[8] *Id*. *See also* City of Tacoma v. Taxpayers of City of Tacoma, 743 P.2d 793 (1987) (upholding a program where the city paid for the installation of energy conservation devices in private buildings and received energy savings in return).

[9] Friends of N. Spokane Cnty. Parks v. Spokane Cnty., 184 Wash. App. 105 (2014).

[10] Lassila v. City of Wenatchee, 576 P.2d 54 (1978).

[11] Wash. Higher Educ. Facilities Auth. v. Gardner, 699 P.2d 1240, 1247 (1985).

[12] *See e.g.* U.S. v. Town of N. Bonneville, 621 P.2d 127 (1980) (holding that city's land acquisition to relocate city was not an unconstitutional loan; distinguishing from *Lassila* because no private developer stood to gain from city's loan).

[13] Wash. State Hous. Fin. Comm'n. v. O'Brien, 671 P.2d 247 (1983). Although Article VIII, Section 5 of the Washington State Constitution prohibits state funds from being given or loaned, as opposed to Section 7's prohibition on municipalities, courts have stated the two sections have identical meanings and should be interpreted the same. *CLEAN*, 928 P.2d 1054, 1061 (1996), as amended (Jan. 13, 1997). *Id*. at 249 (citing Laws of 1983, ch. 161, § 5, p. 697).

[14] *O'Brien*, 671 P.2d at 251.

[15] Wash. Rev. Code § 43.180.010.

[16] State v. Guaranty Trust Co. of Yakima, 148 P.2d 323 (1944).

[17] Morgan v. Dep't of Social Security, 127 P.2d 686, 692 (1942).

[18] State v. Guaranty Trust Co. of Yakima, 148 P.2d 323 (1944).

[19] State v. Guaranty Trust Co. of Yakima, 20 Wn.2d at 592, 148 P.2d at 325.

[20] 1991 Op. Wash. Att'y Gen. No. 7.

[21] *O'Brien*, 671 P.2d 247, 250 (1983). *See also* Hous. Auth. v. Seattle, 351 P.2d 117 (1960)

[22] 2006 Op. Wash. Att'y Gen. No. 12.

[23] Wash. Rev. Code § 82.46.075(1).

[24] 2006 Op. Wash. Att'y Gen. No. 12 (citing City of Seattle v. State, 668 P.2d 1266, 1270-71 (1983)). There is no gift of public funds when entitlement payments are made by a government carrying out its fundamental purposes. *City of Seattle*, 668 P.2d at 1270-71. The AGO stated, "there need only be a 'reasonable nexus between the recognized need and the persons to be benefited.'" 2006 Op. Wash. Att'y Gen. No. 12 citing *O'Brien*, 671 P.2d at 251.

[25] Home Builders Ass'n of No. Cal. v. City of Napa, 90 Cal. App. 4th 188 (1st Dist. 2001), as modified, (July 2, 2001).

[26] *Id*.

[27] *In Matter of Egg Harbor Assoc.*, 449 A.2d 1324 (App. Div. 1982), judgment aff'd on other grounds, 464 A.2d 1115 (1983).

[28] *Id*.

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