

**SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION  
GOLDWATER INSTITUTE**

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Attorney for Plaintiffs

**IN THE SUPERIOR COURT OF ARIZONA  
FOR THE COUNTY OF MARICOPA**

**MEYER TURKEN, KENNETH D. )  
CHEAUVRONT, JAMES IANNUZO, )  
JUSTIN SHAFER, ZUL GILLANI, and )  
KATHY ROWE, )**

**Plaintiffs, )**

**v. )**

**PHIL GORDON, in his official capacity as )  
Mayor of the City of Phoenix; DAVE )  
SIEBERT, in his official capacity as member )  
of the Phoenix City Council and Vice Mayor;) )  
PEGGY NEELY, in her official capacity as )  
member of the Phoenix City Council; )  
PEGGY BILSTEN, in her official capacity as )  
member of the Phoenix City Council; TOM )  
SIMPLOT, in his official capacity as member )  
of the Phoenix City Council; CLAUDE )  
MATTOX, in his official capacity as member )  
of the Phoenix City Council; GREG )  
STANTON, in his official capacity as )  
member of the Phoenix City Council; )  
MICHAEL JOHNSON, in his official )  
capacity as member of the Phoenix City )  
Council; FRANK FAIRBANKS, in his )**

**No. \_\_\_\_\_**

**COMPLAINT**

**(DECLARATORY AND  
INJUNCTIVE RELIEF)**

**official capacity as City Manager of the City )  
of Phoenix; and CITY OF PHOENIX, )  
 )  
Defendants. )  
\_\_\_\_\_ )**

**Introduction**

1. For some time, local governments Arizona have been engaged in an increasingly frenzied competition to bestow subsidies, in the form of tax incentives and otherwise, upon private developers and retail businesses to increase the odds that certain retailers locate within their boundaries. Such subsidies distort the normal and fair operation of market forces and impose substantial burdens upon taxpayers. Fortunately, the framers of the Arizona Constitution, fresh from the experience of rampant corporate subsidies in their own time, crafted several provisions in our state’s organic law intended to prevent such mischief.

2. The CityNorth subsidy at issue in this case, which provides a nearly \$100 million subsidy to a Chicago developer who is building a high-end mall in an affluent community, exemplifies the type of subsidy the framers of the Constitution intended to prohibit. The Plaintiffs are Phoenix taxpayers who are among the scores of business owners who do not receive government subsidies, yet who are forced to bear the cost for, and in some instances to compete with, businesses that do receive subsidies. The Plaintiffs seek to enforce the Arizona Constitution’s guarantees that limit the exercise of

government power to truly public purposes and that prevent unjust enrichment of favored interests to the detriment of the taxpaying public.

### **Parties, Jurisdiction, and Venue**

3. Plaintiff Meyer Turken is a Phoenix taxpayer and president and chief executive officer of Turken Industrial Properties, a full-service real estate development and management company founded in 1973. The company's primary focus is industrial real estate development and portfolio management, with specialization in multi-tenant industrial product. Since its inception, Turken Industrial Properties has developed over two million square feet of industrial real estate and industrial parks.

4. Plaintiff Kenneth D. Chevront is a Phoenix resident who has owned Chevront Wine and Cheese Cafe, a downtown bistro, since 2003, and Chevront Construction, a Phoenix-based general contracting firm, since 1989. Chevront has served as a member of the Arizona legislature for 14 years, in the House of Representatives from 1994 to 2003, and in the Senate since 2003.

5. Plaintiff James Iannuzo is a Phoenix resident and taxpayer who is owner of Sign-a-Rama Paradise Valley, which is a limited liability corporation located in Phoenix that manufactures and sells signs. He has owned the company since 2003 and has resided in Phoenix since 1988.

6. Plaintiff Justin Shafer is a Phoenix resident who has owned Hava Java, a Phoenix neighborhood coffee shop, for 16 years. Hava Java provides employment to

approximately ten people. He also has owned Bead World in Phoenix for three years.

7. Plaintiff Zul Gillani is a Phoenix resident and owner of Tropicana/Swensen's, a shop that sells ice cream and other refreshments in the Paradise Valley Mall in Phoenix, which he has owned since 2003.

8. Plaintiff Kathy Rowe is a Phoenix resident and taxpayer. She owns Music Together, a limited liability corporation located in Phoenix that provides music and movement for families with infants through kindergartners. Music Together has been in operation since 1999, and she has resided in Phoenix between 1968 and 1989 and from 1999 to present.

9. Defendant Phil Gordon is the Mayor of the City of Phoenix and its chief executive officer. He is sued in his official capacity only.

10. Defendant Dave Siebert is a member of the Phoenix City Council, which is the legislative body for the City of Phoenix, and serves as its Vice Mayor. He is sued in his official capacity only.

11. Defendant Peggy Neely is a member of the Phoenix City Council, and is sued in her official capacity only.

12. Defendant Peggy Bilsten is a member of the Phoenix City Council, and is sued in her official capacity only.

13. Defendant Tom Simplot is a member of the Phoenix City Council, and is sued in his official capacity only.

14. Defendant Claude Mattox is a member of the Phoenix City Council, and is sued in his official capacity only.

15. Defendant Greg Stanton is a member of the Phoenix City Council, and is sued in his official capacity only.

16. Defendant Doug Lingner is a member of the Phoenix City Council, and is sued in his official capacity only.

17. Defendant Michael Johnson is a member of the Phoenix City Council, and is sued in his official capacity only.

18. Defendant Frank Fairbanks is City Manager for the City of Phoenix, and is authorized to remit payments under certain contracts on behalf of the City of Phoenix. He is sued in his official capacity only.

19. Defendant City of Phoenix is a municipal corporation organized under the laws of the State of Arizona.

20. Jurisdiction is proper pursuant to A.R.S. § 12-123.

21. Venue is proper pursuant to A.R.S. § 12-401.

### **Facts Common To All Claims**

22. On March 7, 2007, the Phoenix City Council, which is the governing body for the City of Phoenix, adopted Ordinance S-33743 (“Ordinance”), denominated “An Ordinance Adopting Findings; Authorizing the City Manager to Enter Into a Parking Space Agreement with Thomas J. Klutznick Company for City North; and Authorizing

the City Controller to Disburse Funds.”

23. The City Council Report from the staff for the proposed ordinance recited that the CityNorth Project (“Project”) is being developed by the Chicago-based Thomas J. Klutznick Company (“Developer”) as an “upscale mixed-use \$1.8 billion development, which will feature 1.2 million square feet of retail space and restaurants including four major department stores, 2 million square feet of office space, up to 2,000 residential units, two hotels and five parking garages.” The development is located on the northwest corner of Loop 101 and 56<sup>th</sup> Street in north Phoenix, between Desert Ridge Marketplace and the JW Marriott Desert Ridge Resort & Spa.

24. The Ordinance, *inter alia*, made findings that (A) the City Council had adopted a notice of intent to enter into a parking space use agreement with Klutznick; (B) “the Project is anticipated to raise more revenue for the City than the total amount of the City payments within the duration of the Agreement”; and (C) “In the absence of the Agreement, the Project would not locate in the City in the same time, place or manner.”

25. The findings in the Ordinance appear to have been based in whole or part upon one or more of the three following documents: (1) a report by Elliott D. Pollack & Company entitled *Economic and Fiscal Impact of the Proposed City North Project*, which Plaintiffs are informed was financed by the Developer; (2) a “Review of CityNorth Project” by Keyser Marston Associates, Inc., which recites that it was prepared “[a]t the request of the City of Phoenix,” and which reviews the Pollack report data; and (3) a two-

page letter from Applied Economics, which was “contracted by the City of Phoenix,” reviewing the Pollack and Keyser Marston reports.

26. Despite repeated requests, Plaintiff’s attorney was unable to obtain a copy of the Pollack report from the City of Phoenix.

27. The Keyser Marston report disagreed with a number of the economic premises and conclusions apparently underlying the Pollack report. For instance, the report notes that the Developer estimated a “feasibility gap” for the entire CityNorth Project at \$117.4 million, while Keyser-Marston estimates the gap at \$25.3 million. The report described the “overall site costs” and the “development management and commissions” as “extremely high.” The report referred to the residential portion of the Project as “extremely high end” and “quite risky.”

28. The Ordinance authorized Defendant City Manager Fairbanks to enter into an Agreement with the Developer containing, *inter alia*, certain specified terms: (A) the Developer shall dedicate a minimum number of spaces in the parking structures for long-term use by the public at no charge; (B) the City’s payments shall begin after 1.2 million square feet of retail space has been completed and is open for business; (C) the City’s use payments shall be prepaid in annual installments over a period not to exceed 11 years, 3 months or until the City has paid a total of \$97.4 million, whichever first occurs; and (D) the amount of prepayment installments shall equal 50 percent of the sales tax collected by the City from the retail portion of the project.

29. On or about July 3, 2007, City Contract No. 121803, denominated “Parking Space Development and Use Agreement” (henceforth “Agreement”) was executed by Donald L. Maxwell, Director of the Community and Economic Development Department, on behalf of Defendant Fairbanks and the City of Phoenix; and by Steven R. Rudolph, authorized representative of NPP City North, LLC, a Delaware limited liability company. Among the recitals in the contract, “The City desires to obtain those public benefits which will accrue from the development of the Site, particularly from the Retail Center,” including creation of retail uses, employment, economic development, infrastructure improvements, and sales tax revenue. The Agreement provides for the developer to construct and make available for the general public 3,180 garage parking spaces, including at least 200 to be designated for public transportation or carpool riders. The general terms reflect those set forth in the authorizing Ordinance. The Agreement specifies that defendant City Manager is authorized to execute and perform the terms of the contract without further action by the City.

30. Paragraph 49(b) states that if the Agreement is challenged and a court of competent jurisdiction makes an adverse finding regarding the City’s authority to legally make payments pursuant to the Agreement, the City’s obligations to make such payments under the Agreement shall cease. Paragraph 49(c) states that during the pendency of such a legal challenge, the City may elect to hold required payments in trust for the developer.

31. The Desert Ridge area of northeast Phoenix in which the CityNorth Project is

being developed is an area of intense commercial and residential growth. The project's website (<http://www.citynorthaz.com/location.php>) states that "it is accessible from all four directions more quickly and conveniently than any other site in the Northeast Valley"; that more than one-quarter million cars pass by the site daily; and that nearly one million people can reach CityNorth in 25 minutes or less. All of those factors make Desert Ridge, in the words of the CityNorth website, "one of the fastest-growing and most demographically desirable communities in the country" ([http://www.citynorthaz.com/desert\\_ridge.php](http://www.citynorthaz.com/desert_ridge.php)).

32. The project is located adjacent to an existing shopping center, the Desert Ridge Marketplace. The marketplace is a 1.2 million square foot retail, dining, and entertainment center, with 110 stores and restaurants, which had more than 25 million retail visitors in 2004. Within the surrounding Desert Ridge area, 6,500 homes and condominiums are under construction, with 10,000 more to be built within five years. *Id.* Desert Ridge Marketplace is a highly successful commercial venture.

33. On or about August 29, 2006, Nordstrom, Inc. announced that it signed a letter of intent with CityNorth to open a store in CityNorth in fall 2009.

34. On or about April 17, 2007, CityNorth announced it had obtained \$379 million in financing for the first phase of its project.

35. The CityNorth website correctly describes the northeast Phoenix area in which it is located as "affluent."

36. Ordinarily, retail development accompanies residential development, and particularly affluent residential development, as a matter of course, through market forces and sound planning practices. In fact, retail development in Desert Ridge has been abundant, without the necessity of public subsidies.

37. In the absence of the CityNorth project, other retail developers would be attracted by the obvious opportunities to create profitable projects and would construct retail, commercial, and/or residential developments that would generate substantial jobs and tax revenues.

38. Generally, development in Arizona is made to pay its own way. Toward that end, Arizona law provides for the assessment by municipalities of development impact fees, which are calculated to recover increased costs for public services attributable to new development. See A.R.S. § 9-463.05.

39. Ordinarily, retail developers provide their own parking facilities for use by the general public. Other retailer developers in the Desert Ridge area have provided, or for future developments will provide, parking for the general public.

40. The vast majority of retail, commercial, and residential developments in Arizona take place without public subsidies.

41. The vast majority of businesses in Arizona pay their full share of taxes.

42. All of the plaintiff business owners have worked very hard to create and sustain successful enterprises. All of the businesses generate tax revenues and

employment opportunities. They have not sought nor received special treatment from the City through tax incentives or otherwise.

43. The CityNorth Project is approximately six miles, due north on Tatum Boulevard, from the Paradise Valley Mall in which Plaintiff Zul Gillani's ice cream shop is located. When Desert Ridge Marketplace (adjacent to CityNorth) opened, it drew some shoppers away from Paradise Valley Mall. CityNorth also may draw shoppers away from Paradise Valley Mall, which could reduce Plaintiff Gillani's sale potential. The prospect of heightened competition is an omnipresent risk in business. The risk and potential losses are artificially increased, however, when business owners are forced to help subsidize a project that will draw away customers and house competing businesses.

44. Likewise, CityNorth's restaurants may draw customers from Plaintiff Chevront's bistro and Plaintiff Shafer's coffee shop, although as taxpayers they will be forced to subsidize the mall's development.

45. The retail sales tax in the City of Phoenix is 8.1 percent, of which 1.8 percent is the portion assessed by the City of Phoenix. In September 2007, the City of Phoenix will ask voters to approve a .2 percent increase in the sales tax to fund police and fire services, which amounts to an 11 percent increase in the City's portion of the sales tax. If enacted by the voters, the sales tax increase will generate roughly \$48.2 million per year, less than half of what the City of Phoenix has agreed to give to the Developer of City North through sales tax rebates.

46. Plaintiff Shafer's Hava Java includes the sales tax in the prices of its coffee and other goods, which means that any time the sales tax is increased, it either requires Hava Java to increase its prices or reduces its profits, tangibly affecting the business either way.

47. The City receives approximately \$437.8 million annually from its share of sales taxes. If the City pays the Developer under the Agreement on a proportionate annualized basis, its payment based on current sales tax revenue would total approximately \$8.85 million annually, which would account for roughly two of every hundred dollars collected in sales taxes by the City of Phoenix.

48. In May 2005, recognizing the destructive nature of competition among cities to provide subsidies to retail developers, defendant Mayor Gordon reportedly joined Tempe Mayor Hugh Hallman and Chandler Mayor Boyd Dunn in signing an agreement not to offer tax subsidies to retail developers along their common borders on Interstate 10. However, the agreement by its terms does not apply to the Desert Ridge area, and such subsidies have continued to proliferate across the state.

49. The City of Phoenix's subsidy of the CityNorth Project was considered sufficiently remarkable within the financial industry to prompt a feature story in the *Wall Street Journal*. Thaddeus Herrick, "Phoenix Retail Project's Subsidy Triggers Backlash," *Wall Street Journal* (Apr. 4, 2007), p. B6.

50. In its 2007 session, the Arizona Legislature passed, and Gov. Janet Napolitano signed into law H.B. 2515, which imposes a penalty upon certain municipalities that

provide tax incentives to private businesses. Specifically, A.R.S. § 42-6010(A) provides that certain municipalities, defined in terms of boundaries and population, “shall not offer or provide a tax incentive to a business incentive to a business entity as an inducement or in exchange for locating or relocating a retail business in the city or town.” Section 42-6010(B) provides that a “city or town that violates this section is subject to a penalty equal to the amount of the incentive realized by the taxpayer. . . .” Section 42-6010(G)(3) defines tax incentive as “any waiver, exemption, deduction, credit, rebate, discount, deferral or other abatement or reduction of the normal municipal tax liability of an individual taxpayer that otherwise applies to similar existing taxpayers and properties in the city or town, however denominated, computed or applied, and generally understood as an inducement for the taxpayer to locate a business facility or other operation in the city or town.”

51. The CityNorth Agreement was a primary motivation for the Legislature to enact H.B. 2515. The law by its terms would apply to the CityNorth Project had the contract been signed after the effective date of the new statute.

52. The law restricting incentives does not apply to all Arizona cities and towns; its scope is limited; and it imposes a financial penalty that actually may increase the burden on ordinary taxpayers in cities and towns that are covered by the statute that persist in granting subsidies to private businesses. As a consequence, the law is likely to reduce but not eliminate the practice of granting corporate subsidies.

53. The framers of the Arizona Constitution were keenly concerned about the widespread practice of granting corporate subsidies, and adopted multiple provisions that were designed to proscribe such subsidies. Those provisions of our State's organic law are directly implicated by the City's Agreement regarding CityNorth.

**Count One—Gift Clause**

54. As Phoenix taxpayers, Plaintiffs are responsible for paying and/or remitting sales and other taxes, and will bear a share of the burden for replenishing the coffers of the City of Phoenix for revenues lost from the payments to be made to the Developer pursuant to the Agreement.

55. Article 9, § 7 of the Arizona Constitution provides that neither the State nor any city “shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association or corporation. . . .”

56. A “subsidy” is “a grant of funds or property from a government, to a private person or company to assist in the establishment or support of an enterprise deemed advantageous to the public.” *State Tax Comm'n v. Miami Copper Co.*, 74 Ariz. 234, 241, 246 P.2d 871, 876 (1952).

57. By its findings, the City of Phoenix has determined that CityNorth is an enterprise deemed advantageous to the public. The CityNorth Project is entirely privately owned and is intended and expected to generate substantial profit for its owners and investors.

58. The facts and circumstances surrounding the adoption of the Agreement, along with the findings of the Ordinance and the terms of the Agreement, make clear that the scheduled payments to the Developer constitute a subsidy.

59. A payment by the State or a subdivision is proper under the gift clause only if “(1) the agreement serves a public purpose and (2) there is neither donation *nor* subsidy to a private association.” *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 348, 687 P.2d 354, 356 (1984).

60. Taxpayer support for the development of a high-end shopping mall in an affluent area, for which the profits will inure completely to the benefit of private owners and investors, does not constitute a public purpose.

61. Taxpayer support for a parking garage to enable people to patronize a high-end shopping mall in an affluent shopping area, for which the profits will inure completely to the benefit of private owners and investors, does not constitute a public purpose.

62. Although denominated a lease for public parking, the Agreement is in fact a subsidy designed to assist in the establishment of the desired project.

63. The benefits derived from the Agreement by the City of Phoenix, if any, are not equivalent to the payments that the City has obligated itself to make to the Developer, and are so inequitable and unreasonable as to amount to an abuse of discretion on the part of Defendants.

64. For all those reasons, the payments pursuant to which the City is obligated

under the Agreement constitute a subsidy and an impermissible gift to a corporation, which exceeds Defendants' lawful powers in violation of Ariz. Const. Art. 9, § 7.

**Count Two—Equal Privileges or Immunities**

65. All of the Plaintiffs are owners of small businesses in the City of Phoenix.

66. Article 2, § 13 of the Arizona Constitution provides, “No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations.”

67. Pursuant to the Ordinance and Agreement, the Developer has been granted a privilege to receive retail sales tax rebates, and an immunity from paying what otherwise would be its full retail sales tax obligation, that are not available to other businesses within the City of Phoenix, even if those businesses generate substantial tax revenues and employment opportunities.

68. Plaintiff business owners are not eligible for, and do not receive, a rebate of retail sales taxes, and are obligated to remit their full share of retail sales taxes to the City of Phoenix.

69. Defendant City's actions discriminate among businesses in the City of Phoenix, depriving Plaintiffs privileges or immunities that have been made available exclusively to a Chicago-based Developer. The discriminatory treatment is not supported by rationally related to a legitimate governmental purpose.

70. Business owners who are adversely affected by the CityNorth Project will be paying taxes to subsidize unfair and unequal competition.

71. Accordingly, the terms of the Agreement violate Plaintiffs' right to equal privileges or immunities in violation of Ariz. Const. art. 2, § 13.

### **Count Three—Special Law**

72. Ordinance S-33743 does not address a general matter related to the police powers of the City of Phoenix, but rather authorized Defendant Fairbanks to negotiate an Agreement with a specific Developer in accordance with specified terms.

73. Art. 4, part 2, § 19 of the Arizona Constitution provides, “No local or special laws shall be enacted in any of the following cases,” including “(9) Assessment or collection of taxes”; “(13) Granting to any corporation, association, or individual, any special or exclusive privileges, immunities, or franchises”; and “(20) When a general law can be made applicable.”

74. An ordinance is not an impermissible special law if (1) the classification is rationally related to a legitimate governmental objective; (2) the classification is legitimate, encompassing all members of the relevant class; and (3) the class is elastic, allowing members to move in and out of it. See, e.g., *Gilbert v. Maricopa County*, 213 Ariz. 241, 246, 141 P.3d 416, 421 (App. 2006).

75. The Ordinance by its express terms creates an exclusive class of one, identifying a single corporation with which Defendant Fairbanks was empowered to

negotiate under terms favorable to the Developer.

76. For the reasons set forth above, the classification is not rationally related to a legitimate governmental objective.

77. In order to secure the stated benefits of the Agreement—specifically retail uses, employment, economic development, infrastructure improvements, and sales tax revenue—the classification consisting of a single Developer does not encompass all members of the relevant class; and the class is not elastic, allowing other members to move in and out of it.

78. The Ordinance and resulting Agreement create an exclusive class consisting of one Developer that is entitled to preferential treatment in the assessment or collection of taxes.

79. The Ordinance and resulting Agreement grant to a corporation special and exclusive privileges and immunities.

80. The purported public benefits identified in the Agreement can be secured through the application of a general law.

81. For all the foregoing reasons, the City's actions constitute a special law in violation of Ariz. Const. art. 4, part 2, §§ 19(9), (13), and (20).

### **Request for Relief**

For their relief, Plaintiffs request that this Court take the following actions:

A. Declare that City of Phoenix Ordinance S-33743 is unconstitutional, and enjoin

its further effect;

B. Declare that terms of the Parking Space Development and Use Agreement between Defendant City of Phoenix and NPP CityNorth, LLC, exceed Defendant City's legitimate powers and violate Plaintiffs' constitutional rights, and enjoin its enforcement;

C. Preliminarily and permanently enjoin Defendants from making any payments or otherwise expending and taxpayer funds whatsoever pursuant to the terms of the Agreement;

D. Award reasonable attorney fees pursuant to the private attorney general doctrine; and

E. Award such other and further relief as may be just and equitable.

Respectfully submitted,

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