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

MAT ENGLEHORN; HOPELESSLY URBAN, LLC d/b/a ANGEL'S TRUMPET ALE HOUSE; FLYING E, LLC; BRAMLEY PAULIN; CULVER PARK – 120 EAST WILLETTA, LLC; CULVER PARK – 1129 NORTH FIRST STREET, LLC; and AUSTIN SHEA [ARIZONA] – 7TH STREET AND VAN BUREN, LLC,

Plaintiffs,

vs.

GREG STANTON, in his official capacity as Mayor of the City of Phoenix; THELDA WILLIAMS, in her official capacity as City of Phoenix Councilmember for District 1; JIM WARING, in his official capacity as City of Phoenix Councilmember for District 2; DEBRA STARK, in her official capacity as Councilmember for the City of Phoenix for District 3; LAURA PASTOR, in her official capacity as Councilmember for the City of Phoenix for District 4; DANIEL VALENZUELA, in his official capacity as Councilmember for the City of Phoenix for District 5; SAL DICICCIO, in his official capacity as Councilmember for the City of Phoenix for District 6; MICHAEL NOWAKOWSKI, in his official capacity as Councilmember for the City of Phoenix for District 7; KATE GALLEGO, in her official capacity as Vice Mayor and Councilmember for the City of Phoenix for District 8; CITY OF PHOENIX, a municipal corporation of the State of Arizona,

Defendants.

Case No.
CV 2017-001742

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This lawsuit challenges the constitutionality of an $8 million gift to a private entity that creates unequal property tax rates and grants special or exclusive privileges, immunities, or franchises in the assessment and collection of taxes, in violation of Arizona Constitution article IX, sections 1 (Gift Clause), 2 (Conveyance to Evade Taxation) and 7 (Uniformity Clause) and article IV, part 2, section 19 (Special Law Clause).

2. The City of Phoenix has agreed to an elaborate shell game that allows Amstar/McKinley, LLC ("Developer"), to avoid payment of approximately $8 million in property taxes. The Developer has agreed to convey real property it owns in downtown Phoenix to the City, which has agreed to then lease the property back to the Developer in order to take advantage of the Government Property Lease Excise Tax ("GPLET") abatement provisions of A.R.S. § 42-6209.

3. Through this GPLET slight of hand, the Developer will owe no property taxes for 8 years, while other Arizona taxpayers—in Phoenix and beyond—will be forced to shoulder the difference. This is an inequitable and unconstitutional gift of taxpayer funds to subsidize a private entity.

4. The Developer expects to realize at least a 7% annual profit from the GPLET transaction, which is more than the profit it expects without the GPLET abatement.

5. The GPLET abatement is not necessary to make the Developer's project profitable.

6. The City has also not complied with the provisions of A.R.S. § 9-402 prior to agreeing to lease real property to Developer.

7. The City has also violated A.R.S. § 42-6209(A)(1)(c)(i) by granting a GPLET abatement to a property that is not within "a central business district … located entirely within a slum or blighted area that is established pursuant to [A.R.S. § 36-1471]."

PARTIES, JURISDICTION, AND VENUE

8. Plaintiff Mat Englehorn is a resident and taxpayer in Phoenix and co-owner of Plaintiff Hopelessly Urban, LLC, an Arizona company founded in 2011 doing business as Angel's Trumpet Ale House at 810 & 814 N. 2nd St., Phoenix, AZ 85004, adjacent to the planned Derby Development. Plaintiff Hopelessly Urban, LLC employs 42 people and pays ad valorem property taxes to the City of Phoenix. Plaintiff Mat Englehorn also personally pays ad valorem property taxes to the City of Phoenix.

9. Plaintiff Flying E, LLC, is an Arizona company founded in 2011. Plaintiff Flying E, LLC owns the Class 1 real property at 810 & 814 N. 2nd St., Phoenix, AZ 85004, adjacent to the planned Derby Development. Plaintiff Flying E, LLC rents the property at 810 & 814 N. 2nd St., Phoenix, AZ 85004 to Hopelessly Urban, LLC and collects ad valorem property taxes paid by Hopelessly Urban, LLC.

10. Plaintiff Bramley Paulin is a resident and taxpayer in Phoenix and owner of Plaintiffs Culver Park - 120 East Willetta, L.L.C., Culver Park - 1129 North First Street, L.L.C., and Austin Shea [Arizona] - 7th Street and Van Buren, L.L.C. which own Class 1 and 2 properties in the City of Phoenix and pay ad valorem property taxes to the City of Phoenix. Plaintiff Bramley Paulin pays ad valorem property taxes to the City of Phoenix.

11. As City of Phoenix taxpayers, Plaintiffs are responsible for paying property, sales, and other taxes. Plaintiff taxpayers as a class have sustained or will sustain pecuniary loss and will bear a share of the burden for replenishing the public coffers of the City and State for revenues lost from the unlawful expenditures, gifts, and loans made by the City to or for the benefit of the Developer.

12. As City of Phoenix taxpayers, Plaintiffs' property is subject to a higher tax levy to offset the unlawful expenditures, gifts, and loans provided by Defendants to Developer.

13. Defendant Greg Stanton is the Mayor of the City of Phoenix and shares governing authority with the Phoenix City Council and is responsible for approving and executing the actions complained of in this action.

14. Defendants Thelda Williams, Jim Waring, Debra Stark, Laura Pastor, Daniel Valenzuela, Sal DiCiccio, Michael Nowakowski, and Kate Gallego are members of the Phoenix City Council, which is the governing body of the City. In that capacity they are responsible for approving and executing the actions complained of in this action and are sued in their official capacities.

15. Defendant City of Phoenix ("City") is a political subdivision of the State of Arizona.

16. Jurisdiction is proper pursuant to ARIZ. CONST. art. VI, § 14, and A.R.S. §§ 12-123, 12-1831, and 12-1801.

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

FACTS COMMON TO ALL CLAIMS

18. On September 22, 2015, Developer submitted a development proposal for a high-rise multi-family residential development called Derby Roosevelt Row. Exhibit 1 is an accurate copy of the proposal.

19. On or about March 3, 2016, the Phoenix City Council approved City Ordinance S-42353, authorizing the City Manager, or his designee, to enter into development, lease, and other agreements with Developer for the development of Derby Roosevelt Row. Exhibit 2 is an accurate copy of City Ordinance S-42353.

20. On June 16, 2016, Plaintiff Flying E notified the City that the contemplated GPLET abatement would be unconstitutional, would violate A.R.S. § 42-6209, and was unnecessary to make Derby Roosevelt Row profitable.

21. On June 23, 2016, the City and the Developer entered into a "Disposition and Development Agreement." Exhibit 3 is an accurate copy of the Disposition and Development Agreement.

22. On July 22, 2016, the City responded dismissively to the June 16, 2016 letter.

23. On August 9, 2016, Plaintiff Flying E delivered an A.R.S § 12-821.01 notice of claim to the City, reiterating and expanding on the concerns raised in its June 16, 2016 letter and explaining that a high-rise development adjacent to its property would cause monetary damage to Plaintiff Flying E.

24. The City's attorney wrote a letter rejecting the claims raised in the August 9, 2016 letter.

25. Derby Roosevelt Row is planned on a pair of Class 2 parcels, APNs 111-43-053 and 111-43-054, at the northwest corner of East McKinley Street and North 2nd Street in the Central Business District of Phoenix, Arizona.

26. The Developer owns parcels 111-43-053 and 111-43-054 and the Developer currently pays yearly property taxes totaling $13,821.06 ($7,198.08 and $6,622.98 for each parcel, respectively).

27. At a cost of $36,000,000, the Developer plans to construct a 19-story high-rise that includes 4,500 square feet of commercial space, 120 structured parking spaces, and 211 furnished micro-apartment rental units—ranging from 350 to 600 square feet and renting for an average of $1,350/month. The Development Agreement acknowledges, "All Project descriptions are approximate." Ex. 3, § 103.

28. The approximate yearly ad valorem property tax on parcels 111-43-053 and 111-43-054 after Derby Roosevelt Row is complete totals more than $500,000.

29. The Development Agreement requires the City to enter into the "Unsubordinated Development Lease" ("GPLET Lease") and "the intention of the Parties" is to thereby evade the

Developer's obligation to pay ad valorem property taxes and to provide the Developer with abatement of GPLET taxes. *See* Ex. 3, § 303; Article II; and Exhibit C.

30. Section 3.1 of the GPLET Lease requires the Developer to make annual lease payments to the City beginning at $10,000 for years one through four, $50,000 in year five and increasing by $10,000 each year thereafter, up to $250,000 in the final year.

31. Due to the GPLET lease, the Developer will not owe and the City will not collect ad valorem property taxes that Developer currently owes and the City currently receives.

32. During the 25-year term of the GPLET Lease, the Developer will no longer pay ad valorem property taxes on parcels 111-43-053 and 111-43-054. *See* Ex. 3, § 303; Article II; and Exhibit C.

33. During the first 8 years of the GPLET lease, the Developer will pay no property taxes and no lease excise taxes in lieu of property taxes.

34. The value of the 8-year abatement is approximately $4 million.

35. The value of the favorable tax treatment created by the GPLET Lease is approximately $337,600 per year, on average, for 25 years, or $8.44 million.

36. But for the favorable tax treatment created by the GPLET Lease, the lease would not be entered into.

37. The favorable tax treatment created by the GPLET Lease is not generally available to other property taxpayers in the Central Business District or anywhere else in the City.

38. A.R.S. § 9-500.11 defines the term "expenditure" to include "any waiver, exemption, deduction, credit, rebate, discount, deferral or other abatement or reduction of the normal municipal tax liability that otherwise applies to similar existing business entities and properties in [the City], however

denominated, computed or applied, and that is generally understood as an inducement to locate a business facility or other operation in the city or town."

39. The favorable tax treatment created by the GPLET Lease is an economic development expenditure as defined by A.R.S. § 9-500.11.

40. GPLET abatements are only available to properties located in a Central Business District, which must be (1) a single and contiguous geographical area designated by resolution of the governing body of the city or town that is (2) located entirely within a slum or blighted area that is established pursuant to title 36, chapter 12, article 3, and is (3) geographically compact and no larger than the greater of five per cent of the total land area within the exterior boundaries of the city or town or six hundred forty acres. A.R.S. § 42-6209.

Count One—Gift Clause
ARIZ. CONST. art. IX, § 7

41. Plaintiffs incorporate the allegations in the preceding paragraphs.

42. Article 9, § 7 of the Arizona Constitution (the "Gift Clause") 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 ... ."

43. The Gift Clause "was intended to prevent governmental bodies from depleting the public treasury by giving advantages to special interests ... or by engaging in non-public enterprises." *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349, 687 P.2d 354, 357 (1984) (citations omitted). "[I]t is clear that the drafters of this provision intended that government property or funds were not to be given to private industry." *City of Tempe v. Pilot Properties, Inc.*, 22 Ariz. App. 356, 362, 527 P.2d 515, 521 (1974).

44. An agreement by the State or a subdivision violates the Gift Clause unless "(1) the agreement serves a public purpose and (2) there is neither donation *nor* subsidy to a private association." *Wistuber*, 141 Ariz. at 348, 687 P.2d at 356 (emphasis in original).

45. A government expenditure does not advance a public purpose if it is used "to foster or promote the purely private or personal interests of any individual." *Kromko v. Arizona Bd. of Regents*, 149 Ariz. 319, 321, 718 P.2d 478, 480 (1986).

46. The Derby development is entirely privately owned and is intended and expected to generate substantial profit for its owners and investors.

47. Taxpayer support for a privately owned high-rise apartment complex, for which the profits will inure completely to the benefit of private owners and investors, does not constitute a public purpose.

48. Many apartment buildings have been built in the City of Phoenix in the absence of a city subsidy.

49. By releasing the Developer from the obligation to pay and forgoing the collection of approximately $8.44 million in property taxes, the City has granted a subsidy and donation in that amount to the Developer.

50. Any benefits the Developer is contractually obligated to provide to the City are not equivalent to the benefits the City has provided, are grossly disproportionate, and are so inequitable and unreasonable as to amount to an abuse of discretion on the part of Defendants.

51. The rent payments required by the GPLET Lease will never exceed the value of the favorable tax treatment created by the GPLET Lease, are grossly disproportionate, and are so inequitable and unreasonable as to amount to an abuse of discretion on the part of Defendants.

52. Through the Development Agreement and GPLET Lease, the City gives advantages to the Developer, depletes the public treasury, gives funds to a private industry, and provides a donation, grant, and subsidy.

53. As City of Phoenix taxpayers, Plaintiffs will bear a share of the burden for replenishing the public coffers of the City for public funds misused by Defendants for the benefit of the Developer.

54. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief preventing enforcement of City Ordinance S-42353, the Development Agreement, and the GPLET Lease.

Count Two—Uniformity Clause
ARIZ. CONST. art. IX, § 1

55. Plaintiffs incorporate the allegations in the preceding paragraphs.

56. Arizona's Uniformity Clause requires the government to tax equally all entities within the same class of property. It states, "[t]he power of taxation shall never be surrendered, suspended or contracted away ... [A]ll taxes shall be uniform upon the same class of property within the territorial limits of the authority levying the tax, and shall be levied and collected for public purposes only." ARIZ. CONST. art. IX, § 1.

57. Due to the GPLET Lease, parcels 111-43-053 and 111-43-054 will not be assessed at the same property tax rates as other similar parcels in the City of Phoenix.

58. GPLET is a substitute for ad valorem property taxes.

59. The GPLET abatement in A.R.S. § 42-6209 is only available to properties in a Central Business District, not throughout the territorial limits of the authority levying the tax.

60. The GPLET abatement in A.R.S. § 42-6209 is only available to properties in a Central Business District that have been granted an abatement by the taxing authority.

61. The GPLET abatement in A.R.S. § 42-6209 creates non-uniform tax rates among identically-used property in the same industry within the territorial limits of the authority levying the tax.

62. As City of Phoenix taxpayers, Plaintiffs will bear a share of the burden for replenishing the public coffers of the City for public funds misused by Defendants for the benefit of the Developer.

63. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief preventing enforcement of City Ordinance S-42353, the Development Agreement, and the GPLET Lease.

Count Three—Special Law Clause
ARIZ. CONST. art. IV, pt. 2, § 19

64. Plaintiffs incorporate the allegations in the preceding paragraphs.

65. Art. 4, pt., § 19 of the Arizona Constitution provides, "No local or special laws shall be enacted in any of the following cases," including "(9) Assessment and 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."

66. A municipal ordinance "has the force and effect of law." Sutherland Statutory Construction § 30:1 (6th ed.); *see also* A.R.S. § 9-240. The Special Law Clause has historically operated as a restraint on local government enactments. *E.g., Sherman v. City of Tempe*, 202 Ariz. 339, 341–42, 45 P.3d 336, 344–45 (2002); *see also City of Tucson v. Grezaffi*, 200 Ariz. 130, 138, 23 P.3d 675, 683 (App. 2001); *Smith v. City of Tucson*, 153 Ariz. 372, 373, 736 P.2d 1184, 1185 (App. 1987); *State v. Loughran*, 143 Ariz. 345, 347, 693 P.2d 1000, 1003 (App. 1985).

67. City Ordinance S-42353 is an impermissible special law unless "(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." *Town of Gilbert v. Maricopa County*, 213 Ariz. 241, 246, 141 P.3d 416, 421 (App. 2006).

68. City Ordinance S-42353 does not address a general matter related to the police powers of the City of Phoenix, but rather authorized Defendants to execute and implement an Agreement with a specific Developer in accordance with specified terms.

69. The Ordinance by its express terms creates an exclusive class of one, identifying a single corporation with which Defendants were empowered to negotiate under terms favorable to the Developer.

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

71. In order to secure the stated governmental objectives of the Agreement—specifically the effectuation of the Downtown Area Redevelopment and Improvement Plan—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.

72. 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 and receipt of special City benefits.

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

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

75. For all the foregoing reasons, the City's actions constitute a special law in violation of ARIZ. CONST. art. 4, pt. 2, § 19 (9), (13), and (20).

76. As City of Phoenix taxpayers, Plaintiffs will bear a share of the burden for replenishing the public coffers of the City for public funds misused by Defendants for the benefit of the Developer.

77. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief preventing enforcement of City Ordinance S-42353, the Development Agreement, and the GPLET Lease.

Count Four—Conveyance to Evade Taxation
ARIZ. CONST. art. IX, § 2(12)

78. Plaintiffs incorporate the allegations in the preceding paragraphs.

79. Article 9, § 2(12) of the Arizona Constitution provides that "No property shall be exempt which has been conveyed to evade taxation."

80. The Development Agreement requires the City to enter into the GPLET Lease and "the intention of the Parties" is to thereby evade the Developer's obligation to pay ad valorem property taxes and to provide the Developer with abatement of GPLET taxes. *See* Ex. 3, § 303, Article II, and Exhibit C.

81. Exempting Derby Roosevelt Row from property taxes as required by the Development Agreement and GPLET Lease would violate Article 9, § 2(12).

82. As City of Phoenix taxpayers, Plaintiffs will bear a share of the burden for replenishing the public coffers of the City for public funds misused by Defendants for the benefit of the Developer.

83. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief preventing enforcement of City Ordinance S-42353, the Development Agreement, and the GPLET Lease.

Count Five—Mandatory Competitive Bidding
A.R.S. § 9-402

84. Plaintiffs incorporate the allegations in the preceding paragraphs.

85. A.R.S. § 9-402 mandates a process of competitive bidding when a city "sell[s] [or] convey[s] all or any part of its real or personal property, whether or not the property is devoted

exclusively to public use" in order to prevent favoritism, fraud, public waste, and unconstitutional subsidies by encouraging free and full competition.

86. Preventing favoritism, fraud, public waste, and unconstitutional subsidies by encouraging free and full competition is a matter of state-wide public concern.

87. Prior to agreeing to lease Derby Roosevelt Row to the Developer, the City did not publish an invitation for bids "as provided by § 39-204 and notice has [not] been posted in three or more public places within the city or town." A.R.S. § 9-402(B).

88. The City did not enter into the Development Agreement and the GPLET Lease in compliance with A.R.S. § 9-402(B).

89. As City of Phoenix taxpayers, Plaintiffs will bear a share of the burden for replenishing the public coffers of the City for public funds misused by Defendants for the benefit of the Developer.

90. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief preventing enforcement of the Development Agreement and the GPLET Lease.

Count Six—Arbitrary and Capricious Blight Designation
A.R.S. § 42-6209; A.R.S. § 36-1471

91. Plaintiffs incorporate the allegations in the preceding paragraphs.\

92. A.R.S. § 42-6209 allows GPLET abatements only to a property that is within "a central business district ... located entirely within a slum or blighted area that is established pursuant to [A.R.S. § 36-1471]."

93. "Slum area" means "an area in which ...There is a predominance of buildings or improvements, whether residential or nonresidential [and] The public health, safety or welfare is threatened because of" a number of statutory factors. A.R.S. § 36-1471(18).

94. "Blighted area" means "an area, other than a slum area, where sound municipal growth and the provision of housing accommodations is substantially retarded or arrested in a predominance of the properties by any of" a variety of statutory factors. A.R.S. § 36-1471(2).

95. The City did not make a contemporaneous decision that the area relevant to the Derby Roosevelt Row GPLET abatement is slum or blighted, but has relied on a 1979 declaration of slum and blight that is no longer applicable to the area.

96. The area relevant to the Derby Roosevelt Row GPLET abatement is not slum or blighted.

97. The City's reliance on the 1979 declaration of slum and blight is arbitrary, capricious, and an abuse of discretion.

98. The City did not enter into the Development Agreement and the GPLET Lease in compliance with A.R.S. § 42-6209.

99. As City of Phoenix taxpayers, Plaintiffs will bear a share of the burden for replenishing the public coffers of the City for public funds misused by Defendants for the benefit of the Developer.

100. Accordingly, Plaintiffs are entitled to declaratory and injunctive relief preventing enforcement of the Development Agreement and the GPLET Lease.

REQUEST FOR RELIEF

Plaintiffs request that this honorable Court award the following relief:

A. Declare that City of Phoenix Ordinance S-42353 is unconstitutional and/or illegal, and enjoin its further effect;

B. Declare the terms of the Development Agreement and the GPLET Lease exceed Defendants' powers and violate Plaintiffs' constitutional and statutory rights, and enjoin its enforcement;

C. Preliminarily and permanently enjoin Defendants from performing under the

Development Agreement and the GPLET Lease;

D. Award costs and attorney fees pursuant to A.R.S. § 12-341 and the private attorney general doctrine; and

E. Order such additional relief as may be just and proper.

RESPECTFULLY SUBMITTED this 1st day of March, 2017 by:

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