

BACKGROUND

RODGERS v. HUCKELBERRY

Executive Summary

Pima County residents work hard to provide for themselves and their families, so it's easy to understand why they would prefer that their tax dollars be spent to repair crumbling roads and infrastructure rather than on sweetheart deals with private companies. That is probably why voters overwhelmingly rejected \$815 million in bond proposals last November, including \$98 million slated for tourism promotion and \$91 million for economic development and workforce training.

Nevertheless, Pima County supervisors have voted to borrow \$15 million to fund the construction of a balloon launch pad and company headquarters for the private benefit of World View Enterprises, a company that intends to engage in luxury adventure tourism. World View plans to charge wealthy passengers \$75,000 per ticket to ride in a capsule strapped to a specialized weather balloon, high up into the atmosphere. The privately held, for-profit company hasn't actually transported any tourists yet. But Pima County has agreed to build the balloon facility for World View by November 2016. In return, the County gets below-market rent payments and a vague and unenforceable promise of jobs—if World View can get its tourism business started.

This agreement violates the Arizona Constitution—specifically, the “Gift Clause,” which forbids the government from giving or lending taxpayer money to private enterprises. The Pima County agreement serves no public purpose and it fails to provide the county with a fair return on investment. The deal is also illegal under state competitive bidding laws designed to encourage free and full competition by preventing favoritism, fraud, and public waste. The county shirked its duty to have its property appraised and offered at public auction before leasing it out, and to solicit competitive bids for design and construction. Instead, county staff negotiated with private firms in secret—even using a code name for these secret meetings, “Project Curvature”—and then awarded the design and construction contracts to preselected favorites.

The Problem

Ordinary entrepreneurs starting new ventures have a difficult task ahead of them: they must find investors and convince them to support their projects. Wise investors will not part with money if success seems unlikely. Because their own money is at stake, investors have a personal interest in making sure their money isn't wasted. Instead, they must carefully choose where to invest their money, knowing that they stand to reap the benefits of wise investments—and suffer the consequences of bad ones.

The picture is very different when the government acts like an investor. When bureaucrats make investment decisions, they don't put their own money on the line—and they're paid whether they make wise choices or foolish ones. When a deal falls flat decades after politicians leave office, it's taxpayers who pay the price. And if it succeeds, taxpayers rarely receive a fair share of the rewards. For example, if bureaucrats decide to spend millions of taxpayer dollars building a balloon launch pad, it's taxpayers who pay the cost if the venture fails—but it's the company that enjoys the benefits if it succeeds. That's what happened in New Mexico, where taxpayers sacrificed millions to build "Spaceport America," which has never been used for its intended purpose. Five years after its grand opening and a decade after its initial conception, it lies mostly vacant and gathering desert dust.¹ The taxpayers are out \$209 million for its construction.²

Taxpayers, unlike ordinary investors, are forced to invest in projects against their own better judgment. This is exactly what has happened in Pima County, where county officials have obligated \$15 million in public funds to build World View's 135,000 square-foot headquarters and a 700-foot diameter balloon pad—despite the fact that county residents rejected new debt and subsidies for tourism and economic development by an overwhelming two-thirds vote just two months earlier.

The “Balloondoggle”

On January 19, Pima County supervisors voted to approve an agreement to “front-end[] the capitalization”³ of facilities for World View, a company that, as the County Administrator wrote, “utilizes proprietary high-altitude balloon technology to lift people and scientific payloads as much as twenty miles above earth for purposes of space tourism, other commercial application, and scientific research.”⁴ At a ticket price of \$75,000—about three times the average annual income of Pima County residents—World View will take passengers up in a helium balloon attached to a luxury capsule, complete with light refreshments. To date, however, World View hasn't lifted even one passenger by balloon, nor has it received FAA approval to do so; but the county is placing a \$15 million bet on the company anyway. In addition to its fancy balloon rides, World View also provides other commercial applications and scientific research—all for its private profit, and all subsidized by taxpayer dollars.

To pay for what some are calling “the Balloondoggle,” the Board of Supervisors has approved a financing scheme known as Certificates of Participation or COPs, whereby the debt is repaid over fifteen years. COPs financing is a complicated way to establish what is essentially a mortgage on publicly owned buildings. Pima County is currently about \$1.35 billion in debt (twelve times that of Maricopa County⁵) but under the World View plan, it

1 Larry Baker, *13 Investigates: Spaceport America Spending Skyrockets, Complex Mostly Vacant*, KRQE NEWS 13 (May 15, 2015), <http://krqe.com/2015/05/05/spaceport-america-spending-out-of-this-world/>.

2 Elizabeth Howell, *Spaceport America: Space Launch Site*, Space.com (Mar. 21, 2016), <http://www.space.com/19258-spaceport-america.html>

3 Memo from County Administrator Chuck Huckelberry to Pima County Board of Supervisors, Jan. 19, 2016.

4 See Lease-Purchase Agreement, Pima County and World View Enterprises, Inc. (Jan. 19, 2016).

5 Sean McCarthy, *The Growing Debt You Probably Didn't Know Existed*, ARIZONA REPUBLIC (June 6, 2014), <http://www.azcentral.com/story/opinion/op-ed/2014/06/06/arizona-debt-voters/10066283/>. Pima County's debt increased by a whopping 340 percent from 2008 to 2014, all without voter approval. Pima County spends more

will use COPs to increase that debt even further, using several County-owned buildings, including the Public Works Building, the Legal Services Building, and the Adult Detention Center, as collateral.

Adding insult to injury, county officials also sidestepped competitive bidding laws that are meant to protect taxpayers. First, they failed to offer the property for lease at a public auction to the highest responsible bidder, as required by state law.⁶ Second, County officials awarded the design and building contracts without competitive bids that would have ensured full and fair competition. Instead, County Administrator Chuck Huckelberry spent six months negotiating in secret with two design and contracting firms—even using the codename “Project Curvature” for these behind-the-scenes meetings. Huckelberry later claimed that this secrecy was necessary to persuade World View not to move to New Mexico or Florida, but under the terms of a 2014 grant from the Arizona Commerce Authority, World View had already agreed to either remain in Arizona or build a significant portion of its operations in the state.⁷ As for the Board’s decision to evade competitive bidding requirements, the County claimed that it would be “impracticable” for contractors to complete the facility by November 16, 2016, thus invoking an exception in the competitive bidding rules. Yet that deadline was chosen by the County. There was no true emergency or “impracticability.”

The County claims that the World View project will benefit the community by creating jobs and because the company will pay to lease the headquarters building (the company gets to use the balloon pad for free). But the agreement provides no real guarantee of job-creation; the most the County can do if World View fails to employ the number of people called for in the contract is to cancel the agreement, leaving taxpayers holding a specialized facility that can’t be easily sold. This is something New Mexico has learned the hard way. And regardless of the county’s justifications, the actions it took to broker this deal were illegal and unconstitutional.

The Law

Gift Clause, Ariz. Const. art. IX, § 7.

The Arizona Constitution prohibits state or local government from subsidizing or lending money to private companies. The “Gift Clause” makes it illegal for the County to “give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any . . . corporation.”⁸ The Arizona Supreme Court made clear in a previous Goldwater Institute lawsuit that this means public expenditures must be for public purposes, not private—and when the government does pay a private entity with taxpayer money, the government must receive something of adequate value (“consideration”) in return. Indirect benefits—such as general economic improvement—are not enough to satisfy this rule.⁹

The World View deal fails this simple test. The company will charge \$75,000 for balloon pad per capita than Maricopa County and has a much higher tax rate as a result.

6 AR.S. § 11-256.

7 *Pima County Attorney Whips Out Goldwater Response*, ARIZONA DAILY INDEPENDENT (Apr. 7, 2016), <https://arizonadailyindependent.com/2016/04/07/pima-county-attorney-goldwater-response/>.

8 ARIZ. CONST. art. IX, § 7.

9 *Turken v. Gordon*, 223 Ariz. 342, 224 P.3d 158 (2010).

loon rides—well beyond the reach of most residents. This is beyond the reach of most residents, and will only benefit extremely wealthy passengers and World View itself—if it ever begins tourist operations—all at the taxpayers’ expense. And the jobs that World View has said it might create provide no direct benefit to the County, or its residents. As the Arizona Supreme Court has put it, “[t]he Gift Clause prohibits subsidies to private entities.”¹⁰ If the government pays money to a private business, and the payment “is grossly disproportionate to what is received in return, the payment violates the Gift Clause.”¹¹

The World View project is “grossly disproportionate.” The County is using public credit to finance a project at taxpayer risk for a private corporation that enjoys the benefits of the bargain risk-free. County taxpayers will be left with a \$15 million bill should World View default. And because World View’s rent is so low, the County doesn’t even expect a return on its investment until the 18th year of its 20-year agreement. Even if World View succeeds and either fulfills the lease or purchases the building, the consideration the County will receive is inadequate. The County will, at best, recover its investment capital plus a profit equal to or less than what other, safer investments would produce—all while subjecting taxpayers to enormous risks. Moreover, World View will have the exclusive right to control the balloon pad, including the ability to charge rent to other space balloon companies. All World View has to do is pay the maintenance costs created by its own use of the balloon pad.

Competitive Bidding: Design and Construction Contracts, A.R.S. § 34-606.

The county also violated state and county bidding requirements for awarding public contracts. Arizona law mandates a process of competitive bidding, contracting, and procurement to prevent favoritism, protect taxpayers, and promote government efficiency. These provisions require counties to publish notices when projects are available, compile a list of competing firms and negotiate with the firms on the list, or choose among submitted project proposals.¹² The only exception is when county officials make “emergency procurements” of architectural and construction services. But this is only allowed “if a threat to the public health, welfare or safety exists or if a situation exists that makes compliance with [the procurement laws] impracticable, unnecessary or contrary to the public interest.” Even then, emergency procurements must be “made with such competition as is practicable under the circumstances.”

There was no “emergency” or “impracticability” in this case. Instead, Pima County agreed to an accelerated design and construction schedule, and then excused itself from competitive bidding requirements on the ground that the deadline made competitive bidding “impracticable.” But this was caused solely by the County’s agreement to the accelerated schedule, not any actual emergency.

Competitive Bidding for Leasing County Buildings and Land, A.R.S. § 11-256.

Arizona statutes also mandate a process of competitive bidding when a county leases land to private companies. The law requires the county to appraise the property, hold a public auction, and lease it to the highest bidder—but never for less than 90 percent of the appraised value. Pima County made no effort to follow this statute.

Pima County taxpayers work hard for their money and their government shouldn’t make a mockery of that productiveness by financing a risky start-up. Their taxes are sup-

10 *Id.* at 350.

11 *Id.* at 348.

12 A.R.S. § 34-603.

posed to go to provide public services—not to “front-end the capitalization” of a private company’s custom-designed facility to provide balloon rides to the super-rich. The Goldwater Institute is ready to protect Pima County taxpayers.

Case Logistics

The plaintiffs in this case are Pima County residents, taxpayers, and business owners Richard Rodgers, Shelby Manguson-Hawkins, and David Preston. The defendants are Pima County, the Board of Supervisors, and County Administrator Chuck Huckelberry.

The case was filed in the Arizona Superior Court in Pima County on April 14, 2016.

The Legal Team

Jim Manley is a senior attorney at the Goldwater Institute’s Scharf-Norton Center for Constitutional Litigation. Before joining the Goldwater Institute, Jim served six years as a staff attorney at Mountain States Legal Foundation. In his first case after graduating from law school, he secured a victory at the Colorado Supreme Court protecting the right to self-defense on college campuses. His cases defending free speech, the right to keep and bear arms, taxpayer rights, and property rights have set important precedents in state and federal courts.

Veronica Thorson is a staff attorney at the Goldwater Institute’s Scharf-Norton Center for Constitutional Litigation. She earned her JD from the Sandra Day O’Connor College of Law at Arizona State University.

