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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-001742 05/09/2018

HONORABLE DAVID B. GASS

CLERK OF THE COURT
L. Stogsdill
Deputy

MAT ENGLEHORN, et al. JONATHAN RICHES

v.

GREG STANTON, et al.

KRISTIN L WINDTBERG

RULING

**Statement of the Case**

This matter involves a high-rise multifamily residential building development in downtown City of Phoenix (the City) called Derby Roosevelt Row. As part of the Derby Roosevelt Row development process, the City approved City Ordinance S-42353. Ordinance S-42353 authorized the City and the developer, Amstar/McKinley LLC (Amstar), to enter into the Disposition and Development Agreement (the DDA) and a related Unsubordinated Development Lease (the DDA Lease) (collectively the Agreements). As a result of the Agreements, the City abated some of Amstar's future tax obligations related to Derby Roosevelt Row under Arizona's Government Property Lease Excise Tax law (GPLET statute). *See* A.R.S. § 42-6209(A).

Plaintiffs' complaint includes six counts challenging the City's actions in adopting Ordinance S-42353 and entering into the Agreements:

Count 1 Gift Clause (Ariz. Const. art. 9, § 7);

Count 2 Uniformity Clause (Ariz. Const. art. 9, § 1);

Count 3 Special Law Clause (Ariz. Const. art. 4, pt. 2, § 19);

Count 4 Conveyance to Evade Taxation (Ariz. Const. art. 9, § 2(12);

Count 5 Mandatory Competitive Bidding (A.R.S. § 9-402); and

Count 6 Arbitrary and Capricious Blight Designation (A.R.S. § 42-6209 and 36-1471).

The complaint does not involve a challenge to the underlying Derby Roosevelt Row project. The City filed six separate motions for judgment on the pleadings, seeking dismissal of each of the six counts.

**Summary of Decision**

The City seeks dismissal of each of the counts, arguing Plaintiffs cannot prevail on any of the claims. The City does not meet its burden as to three counts:

Count 1: Gift Clause (Ariz. Const. art. 9, § 7);

Count 4 Conveyance to Evade Taxation (Ariz. Const. art. 9, § 2(12); and

Count 6 Arbitrary and Capricious Blight Designation (A.R.S. § 42-6209 and 36-1471).

The City meets it burden on the remaining three counts:

Count 2 Uniformity Clause (Ariz. Const. art. 9, § 1);

Count 3 Special Law Clause (Ariz. Const. art. 4, pt. 2, § 19); and

Count 5 Mandatory Competitive Bidding (A.R.S. § 9-402).

Counts 2, 3, and 5, therefore, will be dismissed.

**Issues**

As to Count 1, because the Agreements involve a 25-year, relational contract between the City and Amstar governing the long-term development and operation of the Derby Roosevelt Row project, are the Agreements—including the GPLET provision—subject to challenge under

Arizona's Gift Clause to determine whether (1) the Agreements have a public purpose, and (2) the consideration the City received is "grossly disproportionate?"

As to Count 2, is the City's waiver of the GPLET subject to Uniformity Clause analysis because the Agreements involve an excise tax under the GPLET statute, not an ad valorem property tax under Ariz. Const. art. 9, § 1?

As to Count 3, does the exception to Arizona's Special Law Clause—when a general law cannot be made applicable—apply to Ordinance S-42353 because the City could not enter into the Agreements for the "appropriation, acquisition, sale or lease of public property" under Phoenix Charter Chapter IV, § 12 without first acting through an ordinance?

As to Count 4, does Amstar's planned transfer of the Derby Roosevelt project to the City for 25 years so Amstar can secure the benefit of Arizona's GPLET statute potentially violate Arizona's prohibition on conveying property to evade taxation?

As to Count 5, do the Agreements relating to the City's disposal of its real estate for the Derby Roosevelt Row project (1) involve a matter of statewide concern and (2) conflict with Arizona's competitive bidding statute (A.R.S. § 9-402(B)), which is a state law of general application and concern?

As to Count 6, is the City's reliance on the 1979 designations of Slum area and Blighted area sufficient to establish the City acted with a rational basis when approving Ordinance S-42353 in 2016 regardless of any alleged changes to the City's Downtown Redevelopment Area and the City's Central Business District during the intervening 38 years merely because Arizona law does not mandate updated designations?

## **Burden of Proof**

Arizona is a notice pleading state. *See Coleman v. City of Mesa*, 230 Ariz. 352, 356, ¶ 9 (2012). A petition or complaint will survive dismissal if it states a claim on which relief can be granted. *See id.* All well-pled allegations are presumed true and all reasonable inferences are drawn from those alleged facts, "but mere conclusory statements are insufficient." *See id.*

A motion for judgment on the pleadings, like a motion to dismiss, "tests the sufficiency of the complaint." *See Giles v. Hill Lewis Marce*, 195 Ariz. 358, 359, ¶ 2 (App. 1999). In evaluating a motion for judgment on the pleadings, "all of the allegations of the opposing party's pleadings must be accepted as true." *See Wenrich v. Household Fin. Corp.*, 5 Ariz. App. 335, 338 (1967); *Mobile Cmty. Council for Progress v. Brock*, 211 Ariz. 196, 198, ¶ 2 (App. 2005). A

motion for judgment on the pleadings must be denied unless "the complaint fails to state a claim for relief." *See Giles*, 195 Ariz. at 359, ¶ 2.

If the parties raise matters outside the pleading, the motion to dismiss becomes a motion for summary judgment. *See Coleman*, 230 Ariz. at 356, ¶ 9. However, exhibits to a complaint or related public records are not outside the pleading, so such documents do not convert "a Rule 12(b)(6) motion into a summary judgment motion." *See id.* Dismissal is appropriate "only if as a matter of law Plaintiff would not be entitled to relief under any interpretation of the facts susceptible of proof." *See Coleman*, 230 Ariz. at 356, ¶ 8.

Arizona has long recognized only well-pleaded facts will defeat a motion at the pleading stage. *See Dockery v. Central Ariz. Light and Power Co.*, 45 Ariz. 434, 439 (1935). Plaintiffs may not rely on "allegations consisting of conclusions of law, inferences or deductions that are not necessarily implied by well-pleaded facts, unreasonable inferences or unsupported conclusions from such facts, or legal conclusions alleged as facts." *Jeter v. Mayo Clinic Arizona*, 211 Ariz. 386, 389, ¶ 4 (App. 2005).

Summary judgment is appropriate only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Ariz. R. Civ. P. Rule 56(a); *Orme School v. Reeves*, 166 Ariz. 301, 305 (1990); *Hourani v. Benson Hosp*., 211 Ariz. 427, 432 ¶ 13 (App. 2005). All facts must be viewed in the light most favorable to the nonmoving party. *See Grain Dealers Mutual Insurance Co. v. James*, 118 Ariz. 116 (1978); *Farmers Ins. Co. v. Vagnozzi*, 138 Ariz. 443, 448 (1983). The moving party bears the burden of demonstrating through admissible evidence that no genuine issue of material fact exists. *See Nat'l Hous. Indus., Inc. v. E.L. Joes Dev. Co.*, 118 Ariz. 374, 377 (App. 1978); *Sanchez v. City of Tucson*, 191 Ariz. 128, 130, ¶ 7 (1998); *Nat'l Bank of Ariz. v. Thurston*, 218 Ariz. 112, 115, ¶ 12 (App. 2008).

Summary judgment is not appropriate if there is a genuine disputed issue of material fact or even the "slightest doubt" as to the facts. *Vagnozzi*, 138 Ariz. at 448. Additionally, "summary judgment is not proper where possible inferences to be drawn from the circumstances are conflicting." *Executive Towers v. Leonard*, 7 Ariz. App. 331 (App. 1968).

## Findings of Fact

On January 30, 1979, the City designated some areas as a Slum area under A.R.S. § 36-1474 (as in effect at the time). The City contemporaneously designated the Slum area as falling within the City's Downtown Redevelopment Area. *See* A.R.S. § 48-571 (amended in 2003 to change "Redevelopment area" to "Slum or Blighted area"). Because the parties' filings use the term Redevelopment area, this ruling will as well.

On September 9, 1987, the City designated some areas as the City's Central Business District. *See* A.R.S. § 42-6209(A)(1)(c). The City's Central Business District is located entirely within the City's Downtown Redevelopment Area. The City has not engaged in any analysis or reconsideration of the City's Downtown Redevelopment Area or the related Slum area designation since 1979.

As of March 3, 2016, the property for the Derby Roosevelt Row project was undeveloped and had been vacant for a long time. Before entering into the Agreements, Amstar owned the property on which the Derby Roosevelt Row was to be developed—the "northwest corner of East McKinley Street and North 2nd Street" in the City. *See* Ordinance S-42353. The property is located in both the City's Downtown Redevelopment Area and the City's Central Business District.

On March 3, 2016, the City Council approved Ordinance S-42353. Ordinance S-42353 authorized the City manager or designee to enter into the Agreements with Amstar. Ordinance S-42353 specifically authorized the City manager to enter into the Agreements with Amstar to build a high-rise, multifamily residential building on the Derby Roosevelt Row property. Ordinance S-42353 also authorized the City manager to use the GPLET statute as part of the Agreements. The City manager entered into the Agreements, including the GPLET provision.

Under the Agreements, Amstar will develop the Derby Roosevelt Row project. When complete, Amstar will transfer the Derby Roosevelt Row project to the City. The City will lease the Derby Roosevelt Row project to Amstar under a 25-year lease. Under the Agreements, Amstar is subject to GPLET and a GPLET abatement. The Agreements say the Derby Roosevelt Row project: (1) is located in the City's Downtown Redevelopment Area and the City's Central Business District and (2) is needed for redevelopment in the public interest under A.R.S. Title 36, chapter 12, article 3.

## **Principles of Law**

"The cardinal rule of constitutional construction is to follow the text and the intent of the framers." *Fain Land & Cattle Co. v. Hassell,* 163 Ariz. 587, 595 (1990). The plain language of the provision controls. *Jett v. City of Tucson,* 180 Ariz. 115, 119 (1994). "Each word, phrase, clause, and sentence must be given meaning so that no part will be void, inert, redundant, or trivial." *City of Phoenix v. Yates,* 69 Ariz. 68, 72 (1949). "The provisions of [Arizona's] constitution are mandatory, unless by express words they are declared to be otherwise." Ariz. Const. art. 2, § 32.

A fundamental rule of statutory construction directs that when the legislature amends a law, the court "'must presume they intended to change existing law rather than perform a futile

act.'" *Rotter v. Coconino County*, 169 Ariz. 269, 274 (1991) (*quoting Lake Havasu City v. Mohave County*, 138 Ariz. 552, 558 (App. 1983)); *see also State v. Fell*, 209 Ariz. 77, 81, ¶ 14 (App. 2004), *aff'd*, 210 Ariz. 554, ¶ 14 (2005). The same rule applies when the legislature or the voters propose amendments to the Arizona Constitution. *See id.*

Additional principles applicable to the individual motions are discussed as part of the analysis below.

## Analysis

### *Count 1 Gift Clause (Ariz. Const. art. 9, § 7)*

The complaint alleges the Agreements violate Arizona's Gift Clause. *See* Complaint, ¶¶ 41-54. Defendants argue they do not. The briefing goes off on various tangents addressing broader facial challenges under the Gift Clause, but the issue here is narrower and more focused.

The City argues the Gift Clause does not apply here because when using a GPLET, the City is establishing "a tax policy to further economic and social purposes." *See Maricopa County v. State (Sherwood)*, 187 Ariz. 275, 279 (1990). To trigger Gift Clause analysis when establishing a tax policy, the government actor must make an expenditure of public funds. *See id.* The City also argues the Gift Clause analysis does not apply to a government actor's decision to forego income when establishing a tax policy. *See Kotterman v. Killian*, 192 Ariz. 273, 288, ¶ 52 (1999).

Whether true or not as it relates to a facial challenge of the GPLET statute, the City's argument does not carry the day in its motion for judgment on the pleadings. Plaintiffs do not raise a facial challenge to Arizona's GPLET statute. The issue is not whether the GPLET statute reflects "a tax policy to further economic and social purposes" and "whether the exchange of tax money for the public benefit is disproportionate" for GPLETs in general. *See Rowlands v. Loan Bd. of Ariz.*, 24 Ariz. 116, 121 (1922) (facial challenge). That issue is left to another day.

Here, the issue is whether City Ordinance S-42353 and the Agreements, standing alone, violate the Gift Clause. *See Sherwood*, 187 Ariz. at 280. The complaint alleges the City violated the Gift Clause when it enacted City Ordinance S-42353 and authorized the Agreements resulting in the tax abatement under the GPLET statute. *See* Complaint, ¶ ¶ 50-54. The complaint does not allege the GPLET statute facially violates the Gift Clause. Longstanding precedent establishes a government's decision to contract with a private party—such as entering into a lease—is subject to Gift Clause analysis. *See Kromko v. Arizona Bd. of Regents*, 149 Ariz. 319, 321 (1986) (discussing Ariz. Const. art. 9, § 1 in the context of a lease). The City's decisions to

enact City Ordinance S-42353 and enter into the Agreements, therefore, are subject to Gift Clause analysis. *See id.*

The Arizona Supreme Court recently explained Gift Clause analysis when the challenge is to an agreement between the government and a non-governmental entity such as City Ordinance S-42353 and the Agreements. *See Cheatham v. DiCiccio*, 240 Ariz. 314, 318, ¶ ¶ 9-10 (2016). In determining whether the City received adequate consideration, the analysis must consider as a whole, the City's actions of enacting City Ordinance S-42353 and authorizing the Agreements, including the tax abatement under the GPLET statute. *See id.* at 321-22, ¶ 30. *Cheatham* explains.

> The Gift Clause provides: "Neither the state, nor any county, city, town, municipality, or other subdivision of the state 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." Ariz. Const. art. 9, § 7. The clause has two primary purposes—preventing the "depletion of the public treasury or inflation of public debt by engagement in non-public enterprise" and protecting public funds against use for "the purely private or personal interest of any individual." *Kromko v. Ariz. Bd. of Regents*, 149 Ariz. 319, 320-21 (1986) (internal quotations, emphasis, and citations omitted); *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349 (1984) ("The constitutional prohibition was intended to prevent governmental bodies from depleting the public treasury by giving advantages to special interests[.]").
>
> A two-prong test determines whether a challenged government expenditure violates the Gift Clause. *See Turken v. Gordon*, 223 Ariz. 342, 348 ¶ 22 (2010); *Wistuber*, 141 Ariz. at 349. The expenditure will be upheld if (1) it has a public purpose, and (2) the consideration received by the government is not "grossly disproportionate" to the amounts paid to the private entity. *Turken*, 223 Ariz. at 345, 348 ¶ 7. In evaluating Gift Clause challenges, "[a] panoptic view of the facts of each transaction is required," and "courts must not be overly technical and must give appropriate deference to the findings of the governmental body." *Wistuber*, 141 Ariz. at 349.

*Id.* at 318, ¶ ¶ 9-10.

*Cheatham goes on to* say:

> In analyzing the adequacy of consideration, courts also adopt a "panoptic view" of the transaction. *See id.*[*Turken*] at 352 ¶ 47 (noting that *Wistuber*'s language "was thus meant to reject an overly technical view of the transaction"); *State v. Nw. Mut. Ins. Co.*, 86 Ariz. 50, 54 (1959) (using term "panoptic" in rejecting contention that a mutual insurance company's return of excess premiums to its members, including a school district, established that the initial premium payments violated the Gift Clause). Such an approach is particularly appropriate with respect to a collective bargaining agreement, which is not merely an exchange of discrete promises, but instead is "a long-term relational contract" governing the whole employment relationship. *Int'l Union of Operating Eng'rs, Local 139, ALF–CIO v. J.H. Findorff & Son, Inc.*, 393 F.3d 742, 746 (7th Cir. 2004); *see Consol. Rail Corp. v. Ry. Labor Execs.' Ass'n*, 491 U.S. 299, 312, 109 S. Ct. 2477, 105 L.Ed.2d 250 (1989).

*See id.* at 321-22, ¶ 30.

Plaintiffs have alleged sufficient facts to dispute whether the City received adequate consideration for City Ordinance S-42353 and the Agreements under *Cheatham*. *See id.* Whether the consideration was adequate involves "a question of fact and places the burden of demonstrating disproportionality on the party challenging" the transaction. *See Sherman*, 187 Ariz. at 281. To prevail, plaintiffs must carry their burden of showing disproportionality. *See id.*

Accepting as true all of the allegations in the complaint, Count 1 survives dismissal under *Giles*. *See* 195 Ariz. at 359, ¶ 2; *see also Wenrich*, 5 Ariz. App. at 338; *Mobile Cmty. Council*, 211 Ariz. at 198, ¶ 2.

***Count 2 Uniformity Clause (Ariz. Const. art. 9, § 1)***

The complaint alleges the Agreements violate Arizona's Uniformity Clause. *See* Complaint, ¶¶ 55-63. Specifically, at paragraph 58 of the complaint, Plaintiffs allege, "GPLET is a substitute for ad valorem property taxes." The uniformity clause count is a facial attack on the GPLET statute based on *Miners & Merch. Bank v. Board of Supervisors of Cochise County*, 55 Ariz. 357, 360-61 (1940).

The City argues Arizona's Uniformity Clause cannot apply because the tax at issue is an excise tax, not a property tax. Unlike the Gift Clause challenge in Count 1, the City's motion for judgment on the pleadings establishes plaintiffs cannot prevail under Count 2 because the complaint does not state a claim on which relief can be granted under the Uniformity Clause. *See Giles*, 195 Ariz. at 359, ¶ 2.

Arizona's Uniformity Clause says, "all taxes shall be uniform upon the same class of property within the territorial authority levying the tax . . .." *See* Ariz. Const. art. 9, § 1. The Arizona Constitution goes on to exempt certain categories of property. *See* Ariz. Const. art. 9, § 2(1). Notably for purposes of the pending motions, Arizona's Constitution exempts from taxation of any type "all federal, state, county, and municipal property." *Id.* Plaintiffs cite no authority to suggest government-owned property is subject to taxation under a Uniformity Clause analysis because of the manner in which the government acquired title to the property.

The Uniformity Clause does not restrict the levying authority's legislative ability to create classes of property. *See Apache County v. Atchison, T. & S. F. Ry. Co.*, 106 Ariz. 356, 359 (1970). The Uniformity Clause also does not restrict the levying authority's ability to impose excise taxes, which are imposed for the privilege of engaging in certain activity. *See Gila Meat Co. v. State*, 35 Ariz. 194, 197 (1929). *See id.* However, longstanding precedent establishes the levying authority may not substitute an excise tax on property for an ad valorem property tax on the same private property. *See Miners & Merch. Bank v. Board of Supervisors of Cochise County*, 55 Ariz. 357, 360-61 (1940).

Plaintiffs rely heavily on *Miners*. *See id.* In *Miners*, the court considered a property tax and excise tax scheme subjecting privately-owned motor vehicles to different tax schemes depending on whether the privately-owned motor vehicle was licensed for operation on a public highway. *See id.* The ad valorem property tax applied if the motor vehicle was not licensed for operation on a public highway, and the excise tax applied if it was so licensed. *See id.* at 361. *Miners* said Arizona's legislature violated the Uniformity Clause by substituting the excise tax for the ad valorem property tax without constitutional authority. *See id.* at 361.

*Miners* is not controlling because it is not analogous. The excise tax in *Miners* did not involve otherwise exempt, government-owned property. Under the GPLET statute, ad valorem property taxes cannot be an issue. *See* A.R.S. § 42-6209(A). The GPLET statute allows the City to waive lease excise taxes, not ad valorem property taxes, but only if the City owns the property. *See id.* The property, therefore, is exempt constitutionally from ad valorem property taxes. *See* Ariz. Const. art. 9, § 2(1).

Because the City owns the property under the Agreements, the property is exempt. *See* Ariz. Const. art. 9, § 2(1). Plaintiffs, therefore, cannot prevail under a Uniformity Clause

challenge. *See id.* Even accepting as true all of the allegations in the complaint, Count 2 does not survive dismissal under *Giles* because it does not state a claim on which relief can be granted. *See* 195 Ariz. at 359, ¶ 2; *see also Wenrich*, 5 Ariz. App. at 338; *Mobile Cmty. Council*, 211 Ariz. at 198, ¶ 2.

***Count 3 Special Law Clause (Ariz. Const. art. 4, pt. 2, § 19(13)***

The complaint does not raise a facial challenge to the GPLET statute as a special law. Instead, the complaint alleges Ordinance S-42353 violates Arizona's Special Law Clause. . *See* Complaint, ¶¶ 64-77. The complaint specifically alleges the Ordinance lacks a rational basis and must fail because "[t]he Ordinance by its express terms creates an exclusive class of one, identifying a single corporation with which Defendants are empowered to negotiate under terms favorable to [Amstar]" *See* Complaint, ¶ 69.

The City argues Ordinance S-42353 is not subject to Special Law analysis, in part, because the City must enact an ordinance to enter any contract or agreement regarding the "appropriation, acquisition, sale or lease of public property." *See* Phoenix Charter Chapter IV, § 12. If plaintiffs prevail, the City could not enter into any contract or agreement regarding the "appropriation, acquisition, sale or lease of public property." *See id.* Because a general law cannot be made applicable to City ordinances relating to the Agreements under Phoenix Charter Chapter IV, § 12, Plaintiffs cannot prevail. *See* Ariz. Const. art. 4, pt. 2, §§ 19(13) & 19(20); *see also Giles*, 195 Ariz. at 359, ¶ 2.

Arizona has long recognized municipal ordinances are subject to challenge under Arizona's Special Law Clause. *See Petitioners for Deannexation v. City of Goodyear*, 160 Ariz. 467, 472 (App. 1989), *opinion approved of sub nom. Republic Inv. Fund I v. Town of Surprise*, 166 Ariz. 143 (1990) (citing numerous cases for proposition); *see also Bonito Partners, LLC v. City of Flagstaff*, 229 Ariz. 75, 82, ¶ 24 (App. 2012). Similarly longstanding precedent recognizes the City's charter gives the City the general power to enter into agreements, including leases. *See City of Phoenix v. Superior Court of Maricopa County*, 65 Ariz. 139, 145 (1946).

No controlling case suggests the City, or any other municipality for that matter, violates Arizona's Special Law Clause by entering into a lease or similar agreement, even if the municipality must do so by enacting an ordinance. In that regard, the issue has never been addressed in any published case.

The test under the explicit language of the constitution is whether "a general law can be made applicable." *Hernandez v. Frohmiller*, 68 Ariz. 242, 256 (1949). Plaintiffs can prevail only if the classification drawn by the City in entering into the Agreements with one party (Amstar) lacks any rational basis. *See Arizona Downs v. Arizona Horsemen's Foundation*, 130 Ariz. 550,

555 (1981) (rational basis for economic matters if no fundamental rights or suspect classes involved); *see also Chevron Chemical Co. v. Superior Court*, 131 Ariz. 431 (1982); *Eastin v. Broomfield*, 116 Ariz. 576 (1977). The City, therefore, need only show the Agreements bear a rational connection to a legitimate governmental interest. *See id.*

"A court, under the rational basis test, may consider 'either the actual basis on which the legislature acted or any hypothetical basis on which it might have acted.'" *Phoenix Newspapers, Inc. v. Purcell*, 187 Ariz. 74, 78 (App. 1996) (quoting *Church v. Rawson Drug & Sundry Co.*, 173 Ariz. 342, 350 (App. 1992), (quoting *Carr v. Beech Aircraft Corp.*, 758 F. Supp. 1330, 1334 (D. Ariz. 1991))).

The City establishes its rational basis by pointing to the pleadings. Ordinance S-42353 is part of the pleadings in this matter as Exhibit 2 to the complaint. The complaint itself recognizes the City's basis for Ordinance S-42353 was "specifically the effectuation of the Downtown Area Redevelopment and Improvement Plan." The fact that only one developer is involved in the project does not eliminate the City's rational basis of adopting Ordinance S-42353 to "put into effect the Downtown Area Redevelopment and Improvement Plan . . . ." *See* DDA at § 101 (Exhibit 3 to complaint).

The complaint alleges "the classification is not rationally related to a legitimate governmental objective." This conclusory assertion is insufficient to defeat the City's evidence as established by the complaint itself and the accompanying attachments. *See Jeter*, 211 Ariz. at 389, ¶ 4. Plaintiffs' legal conclusion regarding the City's rational basis does not necessarily or even reasonably flow from the facts. *See id.*

Even accepting as true all of the allegations in the complaint, Count 3 does not survive dismissal under *Giles* because it does not state a claim on which relief can be granted. *See* 195 Ariz. at 359, ¶ 2; *see also Wenrich*, 5 Ariz. App. at 338; *Mobile Cmty. Council*, 211 Ariz. at 198, ¶ 2.

***Count 4 Conveyance to Evade Taxation (Ariz. Const. art. 9, § 2(12))***

The complaint alleges the Agreements violate Arizona's prohibition on conveying property to evade taxation under Ariz. Const. art. 9, § 2(12). *See* Complaint, ¶¶ 78-83. The City argues Ariz. Const. art. 9, § 2(12) applies only to property conveyed to veterans and widows to secure exemptions under § 2(12), subsections (8), (9), (10) or (11). The City also argues using the statutorily authorized GPLET process cannot be viewed as conveying property to evade taxation.

Section 12 says, "No property shall be exempt which has been conveyed to evade taxation." The Arizona Constitution uses identical anti-conveyance language when discussing property of widowers and of "persons who are disabled" in art 9, §§ 2.1 & 2.2(C). The property addressed in art 9, § 2 is "property subject to taxation." Article 9, section 12 has been amended several times. The voter pamphlets for the various elections, which show the exact changes, are filed separately and made a part of the record to assist in understanding the amendments.

The City's interpretation is too limited. The City argues subsection 12 applies only to property of veterans and widows. Subsection 12 has two sentences. The City is correct as to the second sentence of art. 9, § 2(12); it expressly applies only to subsections (8), (9), (10) or (11), all of which relate to veterans and widows. Up until 1996, the City would have been correct about the first sentence. When first enacted in 1968, the plain language supported the City's interpretation. The anti-conveyance clause was part of the subsection on property of veterans and widows, much like the current anti-conveyance language in art. 9, § 2.1 for "property of widowers" and § 2.4 for "property of persons who are disabled."

At this time, the plain language of art. 9, § 2(12)—as it has been amended over the years—does not support the City's argument. To fit the City's argument, the first sentence in art. 9, § 2(12), the anti-conveyance clause, would need to remain tied to the subsections on the property of veterans and widows in the same way the second sentence does. In 1996 the voters made the anti-conveyance language stand alone in what is now § 2(12). The voters are presumed to have "intended to change existing law rather than perform a futile act.'" *See Rotter*, 169 Ariz. at 274. The plain amended language of Arizona's prohibition on conveying property to evade taxation in § 2(12) no longer fits the City's argument. *See id.*

No published opinion has addressed the meaning of the phrase "conveyed to evade taxation." Indeed, when the voters first adopted the phrase, the phrase was not even mentioned in the voter pamphlet. *See Hood v. State*, 24 Ariz. App. 457, 464 (1975). One other case quotes the phrase, but offers no interpretation. *See Airport Properties v. Maricopa County*, 195 Ariz. 89, 98, n. 6 (App. 1999).

One Arizona case has addressed the distinction between evade versus avoid in a different context. *See Indus. Comm'n of Ariz. v. J. & J. Const. Co.*, 72 Ariz. 139, 146 (1951). *J & J Const.* distinguished between a "secretive attempt to ***evade*** the Arizona law" as opposed to acts "done openly in an attempt to legally ***avoid*** the provisions of" Arizona law. *See id.* (emphasis added) (addressing lawful and open acts taken to "avoid provisions of Arizona's Workmen's Compensation Act pertaining to the payment of premiums"). The distinction identified in *J & J Const.* is consistent with the City's interpretation. The City argues "to evade taxation" involves "escape from by trickery or cleverness." *See Defendant's Motion For Judgment on the Pleadings No. 4 (Count 4: Conveyance to Evade Taxation)* (Docket # 34), p. 4, ll. 19-21 (citing Merriam-

Webster's New Universal Unabridged Dictionary 670 (1989) and Black's Law Dictionary 594, 1501 (8th ed. 2004)). To that end, plaintiffs conceded "to evade" may mean something more than "avoid."

The plain language of art. 9, § 2(12), especially in light of the repetitive use of identical language in §§ 2.1, & 2.2(C), seeks to prevent evasion of otherwise lawfully owed taxes, not from the lawful transfer of property resulting in the application of an exemption. *See J. & J. Const.*, 72 Ariz. at 146. If the language extended to any transaction that resulted in avoiding taxes, the exception would apply to every lawful transfer as long as the transfer resulted in the application of an exemption under art. 9, §§ 2(12), 2.1, & 2.2(C).

The issue, therefore remains, whether the pleadings allege evasion or mere avoidance. The complaint alleges that because the DDA required the City to enter into the DDA Lease, "'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* Complaint, ¶ 80. When these allegations "are presumed true and all reasonable inferences are drawn from those alleged facts," plaintiffs have alleged a claim for which relief may be granted.

The issue under Count 4 is not the same as under Count 3. Count 4 alleges the City acted with a certain intent. Intent is a factual issue. *Chopin v. Chopin*, 224 Ariz. 425, ¶ 7 (App. 2010). The issue in Count 3 is rational basis, which is a legal conclusion. *See Phoenix Newspapers, Inc.*, 187 Ariz. at 78. As a result, Defendants prevail on Count 3 but not on Count 4 at this point.

Unlike the Count 3 conclusory allegations, the Count 4 allegations regarding the City's intent and the reasonable inferences that flow from them, support the claim. *See Jeter*, 211 Ariz. at 389, ¶ 4. Accepting as true all of the allegations in the complaint, Count 4 survives dismissal under *Giles*. *See* 195 Ariz. at 359, ¶ 2; *see also Wenrich*, 5 Ariz. App. at 338; *Mobile Cmty. Council*, 211 Ariz. at 198, ¶ 2. Nonetheless, plaintiffs will need to jump significant hurdles to show the City acted to evade taxes and may not survive summary judgment on the issue. *See J. & J. Const. Co.*, 72 Ariz. at 146.

***Count 5 Competitive Bidding (A.R.S. § 9-402)***

The complaint alleges the Agreements violate Arizona's competitive bidding requirement for selling and conveying property under A.R.S. § 9-402(B). *See* Complaint, ¶¶ 84-90. The City seeks judgment based on the longstanding precedent in *City of Tucson v. Arizona Alpha of Sigma Alpha Epsilon* (*Arizona ASAE*), 67 Ariz. 330, 336 (1948). The City takes the position its charter exempts the City from complying with A.R.S. § 9-402(B). Based on the controlling precedent in *Arizona ASAE*, the City is correct.

The City is a charter city under Arizona's Constitution. *See* Ariz. Const. art. 13, § 2. As a charter city, the City may "frame a charter for its own government consistent with, and subject to, the Constitution and the laws of the state." *See id.* The City's charter, however, may not "conflict with . . . general laws of the state not relating to cities." *See* A.R.S. § 9-284(B); *see also State ex rel Brnovich v. City of Tucson*, 242 Ariz. 588, 597, ¶ 39 (2017), *as amended* (Aug. 17, 2017).

*Arizona ASAE* addressed whether a charter city's sale and conveyance of land was subject to the statutory predecessor to A.R.S. § 9-402(B). *See id. Arizona ASAE* ruled "the manner and method of sale and disposal of real estate of a city is not a matter of state-wide public concern." *Id. Arizona ASAE's* precedent has not sat dormant. Its holding has been followed in the decades since. *See, e.g.*, *McMann v. City of Tucson*, 202 Ariz. 467, 472, ¶ 10 (App. 2002); *Scottsdale v. State*, 137 Ariz. 467, 471, ¶ 16 (App. 2015); *City of Phoenix v. Long*, 158 Ariz. 59, 63 n. 4 (App. 1988).

Plaintiffs argue the *Arizona ASAE's* longstanding precedent no longer applies because of our Supreme Court's recent holding in *State ex rel Brnovich*, 242 Ariz. at 600, ¶ 46. *State ex rel Brnovich*, however, affirmed the test used in *Arizona ASAE*. *See id.* at 600, ¶ 46. *State ex rel Brnovich* also cited *Arizona ASAE* for the very proposition Plaintiffs challenge here. In analyzing the challenge before it, *State ex rel Brnovich* said this "Court has held that the manner and method of disposal of real estate of a city is not a matter of state-wide public concern." *See id.* at 602, ¶ 57. *State ex rel Brnovich* went on to say *Arizona ASAE* did not involve "a clear conflict between a municipal law or action and a state law of general application and concern." Plaintiffs, nonetheless, assert that very conflict here. *See id.*

Plaintiffs correctly point to *State ex rel Brnovich* as a leading case on charter city authority. And *State ex rel Brnovich* said:

> In *Arizona ASAE*, for example, this Court determined that the state law at issue clearly "ha[d] no application to charter cities" and observed that other Arizona cities and towns have "no interest" in what Tucson's charter provides regarding "the manner and method of disposal of [a city's] real estate."

*See id.* at 602, ¶ 58 (quoting *Arizona ASAE*, 67 Ariz. at 335).

Because *Arizona ASAE* is controlling authority in which the Arizona Supreme Court recently reaffirmed the test and the holding in *Arizona ASAE*, Plaintiffs cannot prevail at this level on their claim the City's charter and the Agreements are subject to and violate Arizona's

competitive bidding statutes (A.R.S. § 9-402(B)). Plaintiffs must look to the Supreme Court if they seek a different outcome.

Even accepting as true all of the allegations in the complaint, Count 5 does not survive dismissal under *Giles* because it does not state a claim on which relief can be granted. *See* 195 Ariz. at 359, ¶ 2; *see also Wenrich*, 5 Ariz. App. at 338; *Mobile Cmty. Council*, 211 Ariz. at 198, ¶ 2.

***Count 6 Arbitrary and Capricious Blighted Area Designation (A.R.S. § 42-6209 and 36-1471)***

The complaint alleges the City cannot reasonably rely on the 1979 designation of Slum area and Blighted area to support the use of GPLET in 2016. *See* Complaint, ¶¶ 91-100. The City argues it need not undertake an updated analysis because Arizona law does not mandate it. Plaintiffs have alleged sufficient facts to challenge the reasonableness of the City's reliance on the 1979 designation and survive the City's motion on Count 6.

Plaintiffs do not dispute the City's 1979 determination was accurate at that time. Plaintiffs instead allege the City's reliance on the 1979 designation was without any rational basis in 2016 because City's Downtown Redevelopment Area and City's Central Business District have undergone changes over the 38 years since the 1979 designation. *See Big D. Constr. Corp. v. Court of Appeals for State of Ariz., Div. One*, 163 Ariz. 560, 566 (1990) (government action must be rationally related to a legitimate government interest).

The City does not dispute City's Downtown Redevelopment Area and City's Central Business District have changed since 1979, but the City does not concede any changes warrant an updated review. The City argues the GPLET statute law does not impose a schedule on which the City must update its declaration of Blighted area or Slum area. *See* A.R.S. § 42-6209. The statute on which the City relied to establish the 1979 Blighted area or Slum area designations also did not require an update on any set schedule. *See* A.R.S. § 36-1471.

Plaintiffs survive the City's motion on whether the City's 1979 designations reasonably support the City's actions in 2016. Plaintiffs articulate sufficient facts regarding the reasonableness of the City's actions based on nearly 40 years of changes to the City's Downtown Redevelopment Area and City's Central Business District.

A second issue arose after the oral argument. The second issue is the impact, if any, of the amendments to the relevant statutes since 1979, including the 2003 amendments to Title 36, article 12, chapter 3 Slum Clearance and Redevelopment. *See* 2003 Ariz. Legis. Serv. Ch. 246. The parties do not address whether a municipality may use the GPLET statute based on

designations made before the amendments. Until the impact of the 2003 amendments are briefed and argued, the City cannot prevail as a matter of law.

Among other things, the 2003 amendments imposed a two-thirds vote requirement for a municipality to exercise any powers under article 12. *See* A.R.S. § 36-1473(A). This vote requirement applies to a designation of Slum area or Blighted area. *See id.* The 2003 amendments also created a ten-year sunset provision for any Slum area or Blighted area designations, excepting only certain existing projects. *See* 2003 Ariz. Legis. Serv. Ch. 246 (amending A.R.S. § 36-1474(C)). Subsection 36-1474(C) says,

> The designation of an area as a slum or blighted area terminates ten years after this designation unless substantial action has been taken to remove the slum or blighted conditions. The termination does not affect existing projects as described in § 35-701, paragraph 7, subdivision (a), item (xi) that are within that designated area." The 2003 amendments also made changes to the definitions of Blight area and Slum area.

The parties have not addressed the impact of the 10-year sunset provision, if any, and whether the Derby Roosevelt Row project falls within the exception. The parties also have not addressed whether any amendments since 1979 to the definitions for Slum area and Blighted area impact the analysis.

Setting aside the statutory amendments issues for the present motion, Plaintiffs have alleged sufficient facts to dispute whether the City's reliance on the 1979 designation was reasonable in 2016. *See Big D. Constr. Corp.*, 163 Ariz. at 566.

Accepting as true all of the allegations in the complaint, Count 6 survives dismissal under *Giles*. *See* 195 Ariz. at 359, ¶ 2; *see also Wenrich*, 5 Ariz. App. at 338; *Mobile Cmty. Council*, 211 Ariz. at 198, ¶ 2.

## Conclusions of Law

As to Count 1, because the Agreements involve a 25-year, relational contract between the City and Amstar governing the long-term development and operation of the Derby Roosevelt Row project, the Agreements—including the GPLET provision—are subject to challenge under Arizona's Gift Clause to determine whether (1) the Agreements have a public purpose, and (2) the consideration the City received is "grossly disproportionate."

As to Count 2, the City's waiver of the GPLET is not subject to Uniformity Clause analysis because the Agreements involve an excise tax under the GPLET statute, not an ad valorem property tax under Ariz. Const. art. 9, § 1.

As to Count 3, the exception to Arizona's Special Law Clause—when a general law cannot be made applicable—applies to Ordinance S-42353 because the City could not enter into the Agreements for the "appropriation, acquisition, sale or lease of public property" under Phoenix Charter Chapter IV, § 12 without first acting through an ordinance.

As to Count 4, Amstar's planned transfer of the Derby Roosevelt Row project to the City for 25 years so Amstar can secure the benefit of Arizona's GPLET statute potentially violates Arizona's prohibition on conveying property to evade taxation.

As to Count 5, the Agreements relating to the City's disposal of its real estate for the Derby Roosevelt Row project (1) do not involve a matter of statewide concern and (2) do not conflict with Arizona's competitive bidding statute (A.R.S. § 9-402(B)), which is a state law of general application and concern.

As to Count 6, the City's reliance on the 1979 designations of Blighted area and Slum area may not be sufficient to establish the City acted with a rational basis when approving Ordinance S-42353 in 2016 because of alleged changes to the City's Downtown Redevelopment Area and the City's Central Business District during the intervening 38 years merely because Arizona law does not mandate updated designations.

## Rulings and Orders

**IT IS ORDERED** based on the above denying the following:

- Defendant's Motion for Judgment on the Pleadings No. 1 (Count 1: Gift Clause (Ariz. Const. art. 9, § 7)) (Docket # 37);

- Defendant's Motion for Judgment on the Pleadings No. 4 (Count 4: Conveyance to Evade Taxation (Ariz. Const. art. 9, § 2(12)) (Docket # 34); and

- Defendant's Motion for Judgment on the Pleadings No. 6 (Count 6: Arbitrary and Capricious Blight Designation (A.R.S. § 42-6209 and 36-1471)) (Docket # 38).

**IT IS FURTHER ORDERED** based on the above granting the following:

- Defendant's Motion for Judgment on the Pleadings No. 2 (Count 2: Uniformity Clause (Ariz. Const. art. 9, § 1)) (Docket # 36);

- Defendant's Motion for Judgment on the Pleadings No. 3 (Count 3: Special Law Clause (Ariz. Const. art. 4, pt. 2, § 19)) (Docket # 33); and

- Defendant's Motion for Judgment on the Pleadings No. 5 (Count 5: Mandatory Competitive Bidding (A.R.S. § 9-402)) (Docket # 35).

**IMPORTANT NOTICE REGARDING ONLINE PROFILE**

Judge Gass maintains an online profile that answers many questions about courtroom and division procedures. Litigants and their attorneys should familiarize themselves with the online profile. You can find the online profile at the following link:

https://www.superiorcourt.maricopa.gov/JudicialBiographies/judges/profile.asp?jdgID=260&jdgUSID=9111.

**NOTE: Effective June 25, 2018, this Division's calendar will be handled by Judge Christopher Coury, East Court Building, Courtroom 914, (telephone number: 602-372-3876), 101 West Jefferson, Phoenix, Arizona, 85003.**