COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RICHARD RODGERS, et al., Plaintiffs-Appellants, v. CHARLES H. HUCKELBERRY, et al., Defendants-Appellees.	No. 2 CA-CV 2021-0072 Pima County Superior Court Case No. C2016-1761

APPELLANTS' OPENING BRIEF

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INTRODUCTION

In 2016, Pima County entered into an unusual contract with World View (WV), a business devoted to "space tourism"—i.e., taking passengers on rides to the stratosphere in special balloons. ROA154 ep.18. Seeking to persuade WV to base its operations in Tucson, the County spent about $15 million to build tailor-made facilities for WV—consisting of a headquarters building, a balloon manufacturing facility, and a launchpad for the balloons—on land the County owned. Then it let WV occupy and use the building for 20 years, with WV making monthly payments, which are supposed to eventually pay the County back for the cost of constructing the facilities. After twenty years, WV takes title to the headquarters, the manufacturing facility, and the underlying land, for a token $10 payment. The County also gave WV a $4 million tax exemption.

WV swiftly abandoned its "space tourism" idea, limiting itself to sending up "stratolites" instead.[1] *Id.* ep.53. When WV did launch stratolites, it did so from locations other than Tucson, such as Page, nearly 400 miles away.[2] Only in 2018 did it launch a balloon from Pima County—and that balloon exploded on takeoff,

[1] A stratolite is like a satellite—machinery, often weather-monitoring equipment—but attached to a balloon.

[2] Wall, *Spaceport Tucson Takes Flight with World View 'Stratollite' Balloon Launch*, Space.com, Oct. 2, 2017.

causing half a million dollars in damage to the County-owned facilities.[3] WV never met the employment targets required by its agreement with the County, and actually laid off much of its workforce by February 2019.[4]

Then came the pandemic. The County let WV postpone monthly payments for more than a year[5]—and then, on July 6, 2021, unilaterally amended the deal[6] to lower the total amount of monthly payments.

In short, the deal at the center of this case is a fiasco.

This appeal addresses the unconstitutionality of the County's subsidies to WV. Arizona's Constitution forbids the County from lending or giving taxpayer resources to any private company "by subsidy or otherwise." Ariz. Const. art. 9 § 7. Yet the arrangement with WV is a massive group of subsidies.

That arrangement consists of two contracts: the Lease-Purchase Agreement (LPA) and the Spaceport Operating Agreement (SOA).[7] These required the

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[3] Wichner, *World View Balloon Explosion Caused Nearly Half a Million Dollars in Damage*, Tucson.com, Aug. 5, 2018.
[4] Villarreal, *Worldview Announces Layoffs*, KGUN 9, Feb. 15, 2019.
[5] Foust, *World View Delays Plans and Furloughs Staff Because of Pandemic*, Space News, Apr. 17, 2020.
[6] The modification is attached as Appendix A. It is subject to judicial notice pursuant to Ariz. R. Evid. 201, and is self-authenticating pursuant to Ariz. R. Evid. 902. It is on the County's website: https://documentcloud.adobe.com/link/track?uri=urn:aaid:scds:US:67815687-58ec-444f-8d77-45a88814114f#pageNum=1. Appellants move that this Court take judicial notice of this document and its contents.
[7] The LPA can be found at ROA147 ep.18–47, and the SOA at *Id.* ep.49–61.

County to build the facilities to WV's specifications, and pay for it by borrowing about $15 million. ROA184 ep.4. The facilities would be owned by the County so WV would enjoy a Government Property Lease Excise Tax (GPLET) tax abatement—meaning WV pays no property taxes, *id.* ep.2–3—and WV would use the building for 20 years, paying rates below market rent for at least the first decade. *Id.* ep.22–23. If WV makes all its payments, the County's construction costs would be repaid after 20 years, *id.* ep.4, at which time, WV acquires title to the building—which will still be worth about $14 million, *see id.* ep.19 n.22[8]—and the underlying land, for a mere ten dollars. *Id.* ep.2.

This arrangement violates the Gift Clause in five ways:

- First, this is a *loan of credit*: the County borrowed money, then turned around and built facilities for WV with that money, and WV pays back that start-up cost through monthly payments.

- Second, *the GPLET tax exemption* is a *gift*; because the County and WV designed the LPA to ensure that WV would pay zero taxes—a subsidy for which WV pays nothing.

- Third, *the construction of the launchpad*—a tailor-made facility for WV's exclusive use—is a *gift* because it represents the spending of $2 million of tax dollars on a facility that WV uses for its own private profit, with no proportional obligation on its part.

[8] Because the Superior Court engaged in extensive mathematical analysis, it's important to emphasize that the parties *agree* on two relevant values: the monthly payments added together and reduced to present value are worth $11,725,000. ROA169 ep.19. And they agree the WV building is worth approximately $14 million, and will still be worth that at the end of the 20-year period. *Id.*

- Third, the *option* to buy a $14 million building for $10 at the end of the 20-year period represents a *gift* because ten dollars is grossly disproportionate to $14 million.

- Finally, the *monthly payments* represent a gift to WV because the company enjoys below-market rent for at least a decade.

As noted above, the County altered the agreement on July 6, 2021, while this appeal was pending. Those alterations do not remedy the illegality of the County's conduct. This brief focuses primarily on the original contract terms, which were the subject of the Superior Court's judgment, but where those terms are modified by the July 6 changes, this brief will note those distinctions.

In some ways, this is a case of first impression, because no existing precedent involves a combination of lease, purchase, loan, and subsidy quite like this. But in other ways, this case is simple. The Gift Clause merely requires the Court *first* to determine if the County lent its credit to WV, in which case this arrangement is unconstitutional, and *second*, with respect to the $10 option, the GPLET tax break, the launchpad, and the monthly payments, to compare "what the public is giving and getting…and then ask[] whether the 'give' so far exceeds the 'get' that the government is subsidizing a private venture." *Schires v. Carlat*, 480 P.3d 639, 644 ¶14 (Ariz. 2021). The loan of credit and the four other subsidies WV got here *vastly* exceed what the public got.

STATEMENT OF THE CASE

This case was filed in 2016. It alleged three causes of action, and the first two—involving the hiring of the contractors and the leasing of the underlying land—were resolved in previous litigation.[9] This final stage of the case concerns the constitutionality of the WV subsidies.

The parties presented cross-motions for summary judgment in 2019. The Superior Court denied both motions in April 2020. After delays due to the pandemic, the Court held a trial on stipulated facts in November. On March 21, 2021, it ruled in favor of Defendants. This timely appeal followed.

STATEMENT OF FACTS

The WV Agreements

The County and WV signed the LPA and the SOA on January 19, 2016. The SOA sets the terms under which WV operates. The LPA set out the terms of the construction, use, and purchase of the facilities.

The LPA required the County to build, on County-owned land, facilities designed to WV's specifications. These consisted of a 142,000 sq. ft. headquarters building and manufacturing facility for balloons, and a launchpad, all of which cost the County approximately $15 million. As County Administrator Huckelberry

[9] *Rodgers v. Huckelberry*, 243 Ariz. 427 (2017); *Rodgers v. Huckelberry*, 247 Ariz. 426 (2019).

explained, the County was "front-ending the capitalization of the building and facilities" for WV. ROA184 ep.4.

To pay for this, the County borrowed money by issuing "Certificates of Participation" which it must repay in 15 years. The principal and interest of this debt come to $19,444,134. *Id.* As collateral for that loan, it used County-owned buildings.

The "lease" payments

For its part, WV agreed to occupy the facilities for 20 years and make monthly payments.[10] But while the County calls these rent or "lease" payments, they are not. They are *loan* payments, "designed" as the County put it, "to ensure that [Pima County] [will] get back its investment in the construction." *Id.* As Administrator Huckelberry stated, the payments were structured so the County could "finance [the WV] project" and "recover [its] capital outlay with interest" from WV "over a 20-year period." *Id.* n.6. The payments were never intended to be actual lease payments, which is why they are not pegged to the fair market rental rate. In fact, *the County never bothered to determine the fair market rental*

[10] WV also agreed to hire a certain number of employees. WV has never met its hiring targets, and these have been dramatically reduced in the July 6 modification. But these targets are irrelevant here, because the County does not contend they are consideration given by WV for the benefits it receives. Instead, it argues, and the court below held, that WV's payments are the consideration. *Id.* at 21.

rate. ROA175 ep.6 ¶24. And the payments are below the market rental rate for at least the first half of the 20-year period—because these are actually purchase payments calculated to pay back the County for the construction costs (while WV enjoys use of the property). The parties' experts disagree on when exactly the County would be repaid—Taxpayers' expert said 2032, the County's expert said 2027—but either way, the County anticipated that after 20 years, WV would have repaid the County for the loan the County took out to build the facilities for WV, whereupon WV obtains title to the building and land. That is, assuming WV survives that long; the County acknowledged that it was "taking a big risk for the first ten years of the lease," and that "the County is still in the hole until virtually the end of the 20-year term." ROA169 ep.14 ¶E.2.[11] At the end of that period, WV obtains fee simple title to the facilities for a token payment. ROA184 ep.9.

The tax abatement

WV and the County also agreed that the County would retain ownership of the facilities for the 20-year period so WV would enjoy a tax break pursuant to the GPLET statutes. ROA184 ep.2–3. As government-owned "aviation" property, the facilities are subject to *zero* property tax. Yet the property is "owned" by the

[11] Even in its July 6 modification to the WV deal, Administrator Huckelberry continues to say that the arrangement will eventually "compensate the County for its investment in the facility"—*not* that the monthly payments are equivalent to market rent. *See* Appendix A at 1, below.

County in name only. By virtue of the LPA, WV is the constructive owner during the course of the lease, and its official owner at the end of the lease, when WV buys the property for a nominal fee. The value of the GPLET tax break is estimated at $4 million. *Id.* ep.23. In exchange for this, WV pays nothing.

The launchpad

The County agreed to build a balloon launchpad for WV. Although it is owned by the County, and remains such, there's no public demand for a balloon launchpad. The launchpad cost the County $2.3 million to build, *Id.* ep.24, and although it is purportedly public, the SOA gives WV exclusive use of it, unless in its exclusive discretion, it believes use by another is "commercially reasonable." *Id.* ep.3. WV may charge others if and when it does let them use the launchpad. *Id.* No other balloon business has ever used it. ROA169 ep.4 ¶12.

The option

In addition to the repayment structure, the LPA also allows WV to buy the building and underlying land after repayment of the $15 million plus interest. ROA184 ep.2. At that time, the building will be worth $14 million and will still have 30 years of remaining utility. *Id.* ep.9, 21. But WV will pay only $10 to acquire title. *Id.* ep.2. In its July 6 modification of the WV agreements, the County increased the price of this option to $5 million, offsetting its decrease in the monthly payments. *See* Appendix A at 4.

PROCEEDINGS BELOW

Taxpayers argued that the WV arrangement violated the Gift Clause in five ways. The first violation involves a *loan;* the remaining four involve separate gifts and subsidies to WV.

First, the arrangement is an unconstitutional *loan of credit* to a private party. By borrowing money to build the WV facilities, and then turning around and letting WV buy them by repaying that cost in monthly installments, the County has lent its credit to WV. Taxpayers argued that this is unconstitutional because the Constitution forbids (separately) both gifts *and* loans of credit.

Second, Taxpayers argued that the GPLET tax break is a *gift* to WV, because WV gives nothing to the County in exchange for it. Under the legal test set out in cases such as *Turken v. Gordon*, 223 Ariz. 342 (2010), if government gives something of value to a private party and gets insufficient value in return, that is an unconstitutional gift. *Third*, Taxpayers argued that the construction of the launchpad also constitutes a gift to WV, because although the launchpad is purportedly a public infrastructure project, the reality of the transaction is that it exists solely for WV's benefit, and again, WV does not give back proportionate value for this benefit. *Fourth*, Taxpayers argued that the option to purchase the building for $10 is a gift, because $10 is grossly disproportionate to the value of the building. *Finally*, Taxpayers argued that even assuming the monthly payments

are rental payments, they are a gift, because they are far below market rates for at least a decade, and the payment structure imposes such a severe risk of default on taxpayers as to constitute a gross disproportionality in violation of the Constitution.

The Superior Court began by rejecting the argument that "loans" and "gifts" should be analyzed separately. Rejecting Taxpayers' argument that the *Turken* test is not appropriate for analyzing the constitutionality of *loans*, but only for analyzing the constitutionality of *purchases*, the court applied the *Turken* test to the loan, and concluded that because the County gets its money back, the arrangement does not violate the Gift Clause. ROA184 ep.14. It also concluded that the County's borrowing of funds on WV's behalf was not an unconstitutional loan because "technically speaking, the County is *not* giving or loaning *its* credit," but instead rearranging its debt so that the County's creditor (U.S. Bank) is repaid by WV through the monthly payments. *Id.*

As for the four direct subsidies, it held first that the GPLET tax break is not a gift because it "stem[s] from operation of Arizona law" as "a legal consequence of County ownership." *Id.* ep.23–24. It also ruled that tax exemptions are "indirect benefits," and are therefore "not considered" under the *Turken* test. *Id.* ep.24.

Second, it held that the launchpad was not a gift because it is "public infrastructure." *Id.* Third, it held that the option is not a gift because WV can only

exercise it after first repaying the County for the construction cost. *Id.* ep.22. Finally, it held that the below-market payments were not a gift because the income from the payments "[is] not grossly disproportionately low" compared to the value of the property. *Id.* ep.23.

STATEMENT OF THE ISSUES

1. The Constitution prohibits counties from "ever giv[ing] or loan[ing] [their] credit in the aid of, or mak[ing] any donation or grant, by subsidy or otherwise, to any individual, association, or corporation." Ariz. Const. art. 9 § 7. Does this separately prohibit *both* loans *and* gifts?

2. To determine whether or not something is a *gift,* courts compare "what the public is giving and getting from an arrangement and then asks whether the 'give' so far exceeds the 'get'" as to constitute a handout. *Schires*, 480 P.3d at 644 ¶14. But in the case of a *loan*, payments will always equal the debt. Nevertheless, the Superior Court ruled that as long as the repayment of a debt is proportional to that debt, there is no constitutional violation. Was this error?

3. Is the GPLET portion of the LPA, whereby WV and the County arranged for WV to enjoy a $4 million tax exemption—for which WV pays nothing—an unconstitutional subsidy?

4. Is the County's construction of a $2 million tailor-made launchpad for WV's exclusive use an unconstitutional subsidy?

5. Is the option, whereby WV acquires a $14 million building for $10 (now $5 million) an unconstitutional subsidy?

6. Is the repayment structure, whereby WV pays substantially below-market rates to use the facilities an unconstitutional subsidy?

STANDARD OF REVIEW

This is an appeal after judgment on the merits. This Court therefore defers to the Superior Court's factual findings, but decides legal questions *de novo*. *Korwin v. Cotton*, 234 Ariz. 549, 554 ¶8 (App. 2014).

ARGUMENT

I. The Gift Clause forbids both loans and gifts.

A. Background on the Gift Clause

The Gift Clause was written in response to the "dissipation of public funds" by government subsidizing private businesses in the nineteenth century. *State v. Nw. Mut. Ins. Co.*, 86 Ariz. 50, 53 (1959). Historians call that era "The Great Barbecue," because state governments "invited" "bankers and promoters and business men" to receive "rich gifts" of public resources—"in lands, tariffs, subsidies, favors of all sorts." 3 Parrington, *Main Currents in American Thought* 23 (2013). In short, states served as "fairy godmother[s]" for private businesses. *Id.*

The consequences were often ruinous: businesses in which government invested tax dollars went bankrupt, leaving taxpayers with the bills, and those that succeeded did so through favoritism instead of merit. *Indus. Dev. Auth. of Pinal Cnty. v. Nelson*, 109 Ariz. 368, 372 (1973) ("When the private corporations failed in their obligations, the municipalities were required to pay the obligations from public treasuries."). Even where they succeeded, such expenditures offended constitutional values because tax exemptions to private businesses meant people without political influence bore a heavier share of the tax burden—undermining equality principles. Jansen, *Arizona's Constitutional Restraints on the Legislative Powers to Tax and Spend*, 20 Ariz. St. L.J. 181, 199 (1988) ("A tax system with numerous complex exemptions tends to lose the faith of the taxpayers and is vulnerable to manipulation by 'special interests.'"). And since those tax exemptions were binding contracts, future lawmakers were barred from repealing them, *see*, *e.g.*, *In re Delaware R.R. Tax*, 85 U.S. (18 Wall.) 206, 225 (1873)—which undermined democracy.

Montana's territorial legislature was infamously preoccupied with subsidies to railroads. *See* Spence, *Territorial Politics and Government in Montana, 1864-89* at ch.6 (1975). Territorial lawmakers considered everything from bond issues to cash payments to tax exemptions. *See id.* at 125, 127. Most controversial was a proposal to exempt the Utah Northern Railroad from taxation for fifteen years.

Barrett, *Holding up a Territorial Legislature*, 8 Contributions to the Hist. Soc. of Montana 93–94 (1917); Athearn, *Union Pacific Country* 258-60 (1971). Thus the 1889 Montana Constitutional Convention adopted what was then the most far-reaching prohibition on gifts or loans in any Constitution, comprehensively forbidding "ever giv[ing] or loan[ing] [government's] credit in aid of, or mak[ing] any donation or grant, by subsidy or otherwise, to any individual, association or corporation." Mont. Const. art. XIII § 1 (1889). As one delegate explained, "[i]f you have got to coddle and fondle and caress these great capitalists in order to get them to come out here and invest their money…then…we don't want these enterprises, for home capital will produce them." *Proceeding and Debates of the [Montana] Constitutional Convention* 677 (1921).

This was the language Arizona's Constitutional Convention copied in 1910. During its territorial period, Arizona gave the Southern Pacific a tax-exempt charter, Avelar & Diggs, *Economic Liberty and the Arizona Constitution: A Survey of Forgotten History*, 49 Ariz. St. L.J. 355, 390 (2017), and Pima County had exchanged hundreds of thousands of dollars in bonds for stock in a private railroad, which failed, causing a national scandal. Wallwork & Wallwork, *Protecting Public Funds*, 25 Ariz. St. L.J. 349, 354–60 (1993). With that in mind, Arizona's constitutional framers borrowed the Montana language, adopting the strictest constitutional prohibition available.

B. The Gift Clause forbids loans, gifts, and all other subsidies.

The Constitution they wrote says no county "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.

Courts must give effect to every word of this provision, and not render any word surplusage. *City of Phoenix v. Yates*, 69 Ariz. 68, 72 (1949). The use of the word "or" indicates that this clause comprehensively forbids gifts *or* loans of public resources to private enterprises. *Rutledge v. Ariz. Bd. of Regents*, 147 Ariz. 534, 556–57 (App. 1985) (use of "or" means both items in the list must be separately given weight). And "by subsidy or otherwise" means "[p]ublic authorities may not do by indirection what they cannot do directly." *State v. Wienrich*, 170 P. 942, 944 (Mont. 1918).

According to the dictionary published the year the Constitution was written, a "subsidy" is "[a] grant of money made by government in aid of the promoters of any enterprise, work, or improvement in which the government desires to participate, or which is considered a proper subject for state aid, because likely to be of benefit to the public." *Black's Law Dictionary* 1117 (1910). *See also State Tax Comm'n v. Miami Copper Co.*, 74 Ariz. 234, 241 (1952) (defining subsidy as "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." (citation omitted)). A *loan* differs from a *gift* or a *grant* because grants and gifts are outright payments or gratuities, whereas *loans* are payments in expectation of future repayment. *Black's Law Dictionary* 540, 547, 733 (1910).

That distinction is important here because the Superior Court committed reversible legal error by applying the test from *Turken* to the entire arrangement between the County and WV. That was a mistake because the *Turken* test is for determining whether or not an apparent *purchase* is in reality a gift; it does not and cannot apply to *loans*. Nor is it, as the court below seems to have thought, a test for determining whether or not a gift is unconstitutional.

The *Turken* test exists because while the government may never *give* money to private entities, it can *buy* things—and this creates the risk that government might make an expenditure purportedly to buy something, but which actually constitutes a gift. For example, if it paid $1,000 for a $10 hammer, that would be a gift of $990. Courts therefore use the *Turken* test to determine whether what appears to be a *purchase* is actually a gift in disguise. They never use it to determine whether or not something is a *loan*.

In fact, the test is logically incapable of determining whether something is a loan. That test compares the amount government spends with the value it gets back, to see if there is a disproportionality—i.e., whether government is paying more than what the thing is worth (e.g., $1,000 for a $10 hammer). 223 Ariz. at

348 ¶22. But in a *loan* situation, a creditor *always* expects to recover *the entire* amount from the debtor. If John lends Richard $1,000, he expects to be repaid $1,000. Trying to use the *Turken* test on a loan makes no sense, therefore, because the return is always proportionate to the expenditure, by definition—John always expects to get back $1,000. Comparing "what the public is giving and getting"[12] in a loan situation *always* results in a 100 percent proportionality. Thus all loans would, by definition, *pass* the *Turken* test. Yet to conclude that this means all loans are constitutional would be an absurd result, because the Constitution expressly bans them.

In short, the *Turken* test is not, as the Superior Court apparently thought, a test for determining whether an expenditure is unconstitutional. Instead, it is for determining whether a purported *purchase* is actually a *gift*. Proportionality matters in making *that* determination—$1,000 is disproportionate to a $10 hammer—but whether or not something is a *loan* does *not* depend on proportionality, because repayment of a loan is always proportionate to the loan amount.

Instead, whether something is a loan depends on whether government has lent a private party some value that the party can use and return it later. The 1910 *Black's Law Dictionary* defined a loan as "delivery of an article [or sum of money]

[12] *Schires*, 480 P.3d at 644 ¶14.

by the owner to another person, to be used by the latter gratuitously and returned either in specie or in kind." *Id.* at 733.[13] And *Valley Nat'l Bank v. First Nat'l Bank*, 83 Ariz. 286, 294 (1958), explained that a loan occurs when "the [public] money must remain [with the private recipient] for a fixed period" before the government can demand it back. *See also Port of Longview v. Taxpayers of Port of Longview*, 527 P.2d 263, 268 (Wash. 1974) ("The word 'loan' imports an advancement of money…under a contract…whereby the person to whom the advancement is made binds himself to repay it at some future time."). If the government cannot demand its resource back *immediately*, but must wait for the recipient to repay it, then the transaction is a loan, and loans are unconstitutional. The arrangement here is a loan, because WV is contractually given 20 years to repay the County, and the County cannot immediately get back its $15 million.

The Superior Court's effort to apply the *Turken* test to this arrangement was putting a square peg in a round hole. The court said the amount WV pays the County is proportionate to the amount the County spent to build the facilities, and therefore the arrangement is constitutional.[14] *See* ROA184 at 21 ("the present

[13] *Cf. Black's Law Dictionary* 954 (11th ed. 2019) (defining loan as "a grant of something for temporary use.").

[14] The Superior Court rejected what it called "a strict reading of the Gift Clause," ROA184 ep.14, implying that under *Turken*, only *large* gifts are unconstitutional, but small gifts aren't. That is incorrect. The Constitution comprehensively forbids *all* gifts or loans. The *Turken* test is not for determining whether a gift is constitutionally excessive. It is for determining whether what appears to be a

value of the stream of income from rent…combin[ed] [with the]…net reversionary interest" is proportionate to the "fair market value" of the fee simple of the facilities). But in a loan situation, repayment is always proportionate. Under the Superior Court's analysis, a county could simply hand a private business *any* amount of money to use as it wants, as long as the business promises to repay it in ten, fifty, or a hundred years. That is not and cannot be the law. Instead, the question here is simply: *is the reality of this transaction that the County lent its credit to WV?* If so, the transaction is unconstitutional.

II. The arrangement between the County and WV is a loan of credit.

The answer to that question is yes. The arrangement with WV is a loan (accompanied by four outright gifts discussed in Section III below). Although the County tries to characterize the LPA as a "lease," courts in Gift Clause cases must attend to "the realities of the transaction," not semantics or technicalities, *Turken*, 223 Ariz. at 345 ¶8, and the reality of this transaction is that WV is not renting the property, but *buying it over time,* by repaying the County for the construction costs (while simultaneously occupying the facilities). Such an arrangement is a *loan of credit* disguised as a lease. *See Port of Longview*, *supra*; *State ex rel. Beck v. City of York*, 82 N.W.2d 269 (Neb. 1957); *State v. Town of N. Miami*, 59 So.2d 779

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government purchase is actually the government giving money away. If so, the gift is forbidden, no matter how small.

(Fla. 1952). But the Arizona Constitution forbids the County from loaning its credit to a private entity.

A. This is a sham lease designed to disguise a loan of credit.

Although there are no Arizona cases addressing precisely this situation, there are several from other jurisdictions with Gift Clauses that have addressed exactly this type of arrangement. In *Port of Longview*, the government engaged in a complex scheme to build pollution control facilities for a private corporation. First, it leased land from the corporation, so the corporation could use the proceeds of that lease to build a pollution control facility that it needed; then the city subleased the property back to the company, which made regular payments for the sublease, which reimbursed the city for the construction costs, whereupon the business gained ownership of the facility. 527 P.2d at 265.

The Court said this was not a true lease, but a loan of credit that violated the state's Gift Clause. "A true lease agreement contemplates the purchase by the lessee of a possessory estate *for a term*," it said. "A financing agreement, on the other hand, contemplates *[a] loan…to enable the latter to acquire an interest in the property*." *Id.* at 267 (emphasis added). The transaction, though called a lease, was actually "indistinguishable in function and operative effect from a loan of money with repayment of principal plus interest over a term." *Id.* at 266. The city "had no intention of asserting a possessory interest in the leased facilities"—

indeed, the facilities "could be of no separate value to the municipality"; rather, the city fashioned this "convoluted" "transaction" to build facilities for the private company, which would acquire those facilities by paying the city back. *Id.* at 267–68. Simply put, the city was "pay[ing] out money in exchange for the right to receive [f]uture repayment, together with interest," which was "clearly a loan" that violated the Gift Clause. *Id.* at 268.

That is precisely the situation here. Stripped of its complex terminology, the reality of this transaction is that the County borrowed $15 million to build facilities for WV, which WV purchases over time by paying off the $15 million. Indeed, the County has openly called its arrangement with WV a means of "financing" WV's building. ROA184 ep.4 n.6. The facilities are of no separate value to the County, which has no interest in asserting possessory interest over the property—on the contrary, it's selling the property. This arrangement is a loan of credit.

In *Port of Longview*, the city argued—as the County does here—that the bonds were not general obligation bonds, and imposed no debt on the city if the company failed to pay. 527 P.2d at 269. But the court said this technicality ignored the realities of the transaction. "[S]tripped of all its lease-sublease terminology, the municipality is simply borrowing money in its own name in the form of a municipal bond issue and loaning that same money to a private corporation." *Id.* at 266. It made no difference that "the ultimate source of the

funds is a commercial bank and the credit which the bank-bond purchaser relies upon is not that of the issuing municipality but that of the ultimate borrower, the private corporation." *Id.* at 270. The same holds here.

Similarly, in *City of York*, a private business built the facility, and the city bought that facility—using bonds for the purpose—then leased it back to the private business, which paid it off over time. 82 N.W.2d at 271. The court said this violated the Gift Clause. The city claimed the bonds "were not general obligations of the city," and were "payable solely out of revenues derived from the leasing of the project," so that it was not really a loan of credit. *Id.* But the court, emphasizing that the government "[may not] do by indirection the very thing it could not directly do," rejected this argument. *Id.* The Gift Clause, it said, was written to forbid "reckless financial involvement in private enterprises supposed to serve the public good but which are in fact dominated by private interest[s]," and "[t]o impose such a prohibition as a matter of constitutional policy on the State, only to have its beneficent purpose thwarted by a refinement of definition not contemplated by its framers, would be to avoid the very purpose for which it was intended." *Id.*

And in *North Miami*, a city sold what it called "certificates of indebtedness" to buy land and build a factory which it then leased to a private business. 59 So.2d at 780. This was challenged under Florida's Gift Clause. The certificates did not

create a debt against the town's treasury, but were instead to be paid out of the rent the business would pay for using the factory—but the court said this was immaterial. *Id.* The revenues from the sale of the certificates "belong[ed] to the Town and would be public funds," so using them to aid the private manufacturer was an unconstitutional loan of credit "for the use of a private corporation for private profit and private gain." *Id.* at 787. *Accord*, *Carothers v. Town of Booneville*, 153 So. 670 (Miss. 1934); *Ferrell v. Doak*, 275 S.W. 29, 29 (Tenn. 1925).

Here, the County sought to disguise the fact that it is selling the building to WV over time by characterizing WV's monthly payments as "lease" payments, but the reality of the transaction is that this is a loan. Genuine *rental* payments do not acquire a *fee simple* interest. *Port of Longview*, 527 P.2d at 267. But here, the payments *do* acquire a fee simple interest: WV acquires the property after 20 years (after a token payment) because WV is actually *buying* the property by paying off the loan, not renting it.

In *City of Phoenix v. Phoenix Civic Auditorium & Convention Ctr. Ass'n*,, 99 Ariz. 270, 287 (1965), the court found that an arrangement whereby one party[15] used property, made monthly payments to the owner, and in exchange "not only

[15] In *City of Phoenix*, the government was buying property from a private owner. Here, the government is selling property to a private owner.

receive[d] the use of the property during the term" but also "receive[d] all of the net profits therefrom…and the property itself at the end of the lease," was actually *not* a lease, but "nothing more than a purchase agreement." Exactly the same is true here: WV's monthly payments are not rental payments, but *purchase* payments, designed to repay the County for the costs of building the facilities—or, as the County admitted, to "get back [the County's] investment in the construction." ROA184 ep.4.

Because the County is letting WV use the building and buy it over time by paying the County back for the construction costs, "its designation as a 'lease' is a subterfuge and it is actually a conditional sales contract in which the 'rentals' are installment payments on the purchase price." *City of Phoenix*, 99 Ariz. at 290 (citations omitted). More bluntly, it is what the court in *Reasor v. City of Norfolk*, 606 F.Supp. 788, 798 (E.D. Va. 1984), called "a sham lease designed to disguise an extension of credit."

Reasor involved a deal whereby a city used eminent domain to acquire land, then built a parking garage on it with taxpayer money for the benefit (plaintiff alleged) of a private business, which the business paid for by leasing some of the parking spaces from the government. *Id.* at 790. The plaintiff claimed this was not actually a lease, but a mechanism whereby the company was repaying the city for

the cost of building the parking structure—and therefore a loan of credit in violation of the state's Gift Clause.[16]

The court ruled against the plaintiff for two reasons: first, the private company did not have an option in the contract "to buy those parking spaces for a nominal sum at the [end of the] lease," and second, "the rental payments are to be fixed at the market rate." *Id.* at 798.[17] For those two reasons, the deal was not "a sham lease." *Id.* But neither of those things is present here. WV *does* have an option to buy the facilities for a nominal sum at the end of the 20-year period—originally for $10, now $5 million, but either way, far below their actual value—and the payments are *not* fixed at the market rate. They were fixed at a rate designed to recoup the County's investment, instead. ROA184 ep.4 n.6. So this *is* a sham lease designed to disguise a loan of credit.

Actually, the County has been candid about the fact that this is a loan of credit. It said it was "front-ending the capitalization of the [WV] building and facilities" *Id*. ep.4—i.e., it was "financ[ing] this facility," *id.*—and that the monthly

[16] The Superior Court said *Reasor* was distinguishable because it was an eminent domain case under the Fifth Amendment. ROA184 ep.14. That distinction is irrelevant, however, because the portion of the *Reasor* opinion Taxpayers are citing did not relate to condemnation or the Fifth Amendment, but to the *construction* of the parking structure, which the *Reasor* court analyzed under Virginia's Gift Clause. *See* 606 F. Supp. at 797–98.

[17] Remarkably, the Superior Court, in quoting this sentence of *Reasor*, omitted these two factors. *See* ROA184 ep.15.

payments WV makes were "designed to ensure that [Pima] County [will] get back its investment in the construction of the [WV] Building." *Id.* Administrator Huckelberry said the contract was designed so the County could "finance [the WV] project" and be "'repaid'…over the 20-year period." *Id.* ep.4 & n.6. The County said it was "taking a big risk for the first ten years of the lease," ROA169 ep.14 ¶E.2, that the "lease payments for the first five years will be about half of the County's expected debt service on" the $15 million, *id.*, that for "the next five years, there's still an annual deficit," *id.*, and that during the next five years "the lease payments at least cover the annual debt service, but the County is still in the hole until virtually the end of the 20-year term." *Id.* Even in the July 6 modification, Administrator Huckelberry said the payment schedule is "structured to fully compensate the County for its investment in the facility." *See* Appendix A.

In other words, WV's payments were designed to *repay the debt* the County incurred to build the facility—not to obtain anything like a market rental rate. Indeed, the County never bothered to determine what the market rate was! ROA169 ep.15 ¶E.5. That's because WV's payments are not true rental payments. They're loan payments. This is a "lease-back agreement[]" in which "the 'rentals' are installment payments on the purchase price." *City of Phoenix*, 99 Ariz. at 290 (citation omitted). But for the County to "front end capitalization" of

a facility for a private party, in expectation of future repayment, is by definition a loan of credit—and unconstitutional.

The Superior Court was misled by its erroneous use of the *Turken* test. It compared the "[t]otal costs to the County for acquisition, design, construction, and equipping" of the WV facilities with the amount that WV will "pay the County," and found no disproportionality. ROA184 ep.17. But *of course* not—because WV is paying back a *loan*, so it's naturally obligated to repay in full what the County lent. This is a loan of credit disguised by a sham lease. *Reasor*, 606 F.Supp. at 798. The County built the facilities on its own dime (actually, using money it borrowed), and is letting WV use them for 20 years while WV pays the County back, whereupon WV takes title. The reality of the transaction is therefore that this is a loan of credit, and consequently unconstitutional.

B. The nature of the bonds is irrelevant.

The Superior Court also said the arrangement was not a loan because the County did not lend its own resources to WV, but only "restructured *its* existing debt obligation to U.S. Bank—thereby allowing for the project's financing through a funding mechanism involving the public sale of participation certificates, an investment means in which investors [that is, U.S. Bank] buy certificates, agreeing to repayment presumably with interest from lease income received from [WV]." ROA184 ep.14. This is both irrelevant and untrue.

It is *irrelevant* because the Constitution forbids lending public resources "by subsidy or otherwise"—which means, under any pretext or in any form. The County may not do indirectly what it may not do directly. *Wienrich*, 170 P. at 944. And this is plainly a subsidy, because the County spent $15 million "in aid of the promoters of [an] enterprise, work or improvement" which the County "considered a proper subject for [its] aid." *Black's Law Dictionary* 1117 (1910) (defining "subsidy").

And it is *untrue* because Arizona courts have made clear that even bonds that "do not represent a general liability of the issuing authority" are "nonetheless subject to constitutional … restrictions governing the use of public funds." *State ex rel. Corbin v. Super. Ct.*, 159 Ariz. 307, 309 (App. 1988). Other states are in accord. The bonds in *Port of Longview* contained provisions whereby the city did not have to pay bondholders if the company failed to make its payments—and the court held that this technicality made no difference; it was still an unconstitutional loan of credit because the government cannot do indirectly what it cannot do directly. 527 P.2d at 265–66. The same thing happened in *City of York*, 82 N.W.2d at 271.

Thus, to the extent that the Superior Court believed "the County is *not* giving nor loaning *its* credit," ROA184 ep.14, such a "tehnical[ity]," *id.*, is no excuse for violating the Gift Clause. After all, courts are not supposed to rely on

"technical[ities]" in Gift Clause cases; they're supposed to attend to "the reality of the transaction." *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349 (1984). That realistic approach means the County cannot borrow money to construct facilities, then turn around and lend them to a private entity, and then claim that this is not technically a loan of credit. "It would be a narrow constitutional provision to hold [that the Gift Clause]…prohibited the creation of indebtedness by a municipality by a direct use of its credit for [a private] company, and yet permitted such creation by the indirect use of it for the same purpose." *Jarrolt v. Moberly*, 103 U.S. (13 Otto) 580, 585–86 (1880).

Whatever the semantics or technicalities, this was a deal where the County restructured its debt so it could borrow $15 million to build facilities solely for WV, which WV pays for over time, so the County can pay off $15 million. That is a loan of credit. And because loans of credit from government to private parties are unconstitutional, Taxpayers are entitled to reversal.

III. The four subsidies to WV are unconstitutional.

In addition to the *loan*, the County also gave WV four *gifts* in violation of the Constitution. In evaluating these, the *Turken* test *does* apply. That test requires the Court to ask two questions: first, is the expenditure for a public purpose?; and second, is the amount government pays proportionate to the benefit it receives

from the private party? More simply, the Court compares what the County gives with what it gets in return. *Schires*, 480 P.3d at 644 ¶14.

Here, the County is giving WV four gifts by (1) arranging the contracts so WV is exempt from $4 million worth of property taxes; (2) building a $2 million launchpad tailor-made to WV's needs, for WV's exclusive use and profit; (3) allowing WV to take title to the building, worth $14 million at the end of 20 years, for ten dollars (now $5 million); and (4) charging WV below-market rents for a decade.

A. The GPLET tax break is disproportionate to any benefit WV pays.

When bargained for as part of a contract between government and a private entity, tax exemptions are subject to the *Turken* test just like outright payments. *Pimalco, Inc. v. Maricopa Cnty.*, 188 Ariz. 550, 559–60 (App. 1997) (applying test to retroactive tax refund); *Maricopa Cnty.*, 187 Ariz. at 280–81 (same).[18] They must be for a public purpose, and must be proportionate to the value the private entity is contractually bound to give the public in return. *Id.* This comparison employs the objective fair market value of the respective contractual promises. *Schires*, 480 P.3d at 646 ¶23.

[18] The Maricopa County Superior Court recently ruled that GPLET tax exemptions were an unconstitutional gift when the private party gave nothing of value in exchange for them. *Englehorn v. Stanton*, No. CV 2017-001742, 2020 WL 7487658 (Ariz. Super. June 19, 2020).

In *Pimalco*, taxpayers who leased land on an Indian reservation sought refunds of property taxes pursuant to a statute that retroactively reclassified their properties so as to reduce their tax liabilities from 25 percent to one percent. 188 Ariz. at 553. County governments argued that the statute violated the Gift Clause because it eliminated tax liability without obtaining a proportionate benefit in return. *Id.* at 559. The court agreed that a reduction in taxes, if "disproportionately greater than the public benefit received," would violate the Gift Clause, *id.*, and it applied what is now called the *Turken* test: it said the tax break served a public purpose, *id.* at 560, and the value received by the property owners did not "disproportionately outweigh" the public benefits. *Id.*

Here, the opposite is true. Because the land and facilities are owned by the County until year 20, it is exempt from ordinary property tax, and subject instead to the GPLET tax under A.R.S. § 42-6201 *et seq*. (This despite the fact that the property is private, in every realistic sense: it is enjoyed and maintained by a single private user, for its own profit, with no government oversight of its operations, which provides no public services and is not obliged to allow the public onto the property.) And because it is "aviation" property, the GPLET tax is also inapplicable. *See* A.R.S. § 42-6208(5). Consequently, WV pays no taxes on the property for 20 years.

Although the precise amount of tax savings WV enjoys is not certain, the Superior Court accepted Plaintiffs' estimate of $4 million. ROA184 ep.23. This is a "subsidy," because it is a value conferred in aid of the promoters of an enterprise which the County considers a proper subject of aid. *Black's Law Dictionary* 1117 (1910).

The County and WV contemplated and expressly bargained for this tax exemption. ROA154 ep.10 ¶¶46-47; ROA147 ep.23 ¶6.4.1. They recited in the LPA that they "believe that the Premises is exempt from the state government property lease excise tax," and that the County would "cooperate with [WV] in pursuing any defense of the GPLET exemption." *Id.*

Even assuming this tax break serves a public purpose, it fails the proportionality prong of the *Turken* test because in exchange for this $4 million, WV promises *nothing*. True, WV makes monthly payments to the County, but those are for use of the facilities, not for the GPLET tax break. *See* ROA184 ep.21 ("the consideration received by [WV] is a leasehold interest…the corresponding consideration received by the County is the stream of contract rent payments.")[19]

[19] The LPA also requires WV to "use the Premises for, and only for, the operation of its business," ROA147 ep.23 ¶7.1 to "comply in all material respects with all government laws," *id.* ¶7.2, but these do not count as consideration because they are pre-existing legal duties. *Schires*, 480 P.3d at 645 ¶18 ("[a] business's obligation to pay taxes is independent of an economic development agreement" and is therefore "irrelevant to our analysis.").

Four million is obviously disproportionate to nothing. So the tax exemption "disproportionately outweigh[s]" what WV pays in return. *Pimalco*, 188 Ariz. at 560.

Even if the monthly payments *were* in exchange for the GPLET tax break, the amounts would still be grossly disproportionate, because WV enjoys $4 million in tax exemptions *in addition to* the use of the building it pays for monthly. In other words, WV is paying $11.7 million for (a) use of the building *plus* (b) the $4 million tax break, *plus* (c) the $2 million launchpad discussed below, *plus* (d) title to the $14 million building it obtains under the option. That is grossly disproportionate. *See* Section IV, below.

The Superior Court did not say the County receives a value from WV proportionate to the $4 million tax exemption. Instead, it said the exemption cannot be a gift because "tax savings are considered indirect benefits," and therefore do not factor into the *Turken* test. ROA184 ep.24. That is reversible legal error. First, *Pimalco* and *Maricopa Cnty.* said the elimination of a tax liability can be a gift. And that must be, because as a matter of basic economics, a reduction in liabilities is equivalent to an increase in income. *Hoffman v. Rauch*, 300 U.S. 255, 256 (1937) ("A discharge or reduction of a liability produces a corresponding increase in assets."). The value of the tax exemption is objectively

quantifiable ($4 million), and WV realizes it *directly*, without any action by any third party, which means it is not "indirect."

The court below based its assertion that tax exemptions are "indirect" benefits on a misreading of Paragraph 18 of *Schires*. *See* ROA184 ep.24 (citing *Schires*, 480 P.3d at 645 ¶18). *Schires* never said tax exemptions are indirect benefits. It said a business's promise to *pay* taxes is not Gift Clause consideration because (a) that is a preexisting legal duty, and (b) the general increase in tax revenue resulting from industrial development is too speculative and abstract. That is why paragraph 18 of *Schires* cited paragraph 38 of *Turken*. Paragraph 38 of *Turken* rejected the idea that a general increase in city revenue resulting from a mixed-use development should be weighed in the analysis, because that was too speculative, and was not something the private party contracted to deliver—so it was an indirect benefit. 223 Ariz. at 350 ¶38. But neither *Turken* nor *Schires* ever said that an *objectively quantifiable* contract provision *exempting a private entity from taxes*—such as in this case—is an indirect benefit, or that it cannot be factored into the *Turken* test.

On the contrary, *Pimalco* said tax exemptions can be a form of subsidy. Indeed, tax exemptions to private businesses were among the main reasons the Gift Clause was written. *See* Section I.A above. This tax exemption is therefore subject to the *Turken* test—which it fails because it's grossly disproportionate to

what WV gives the public in return (i.e., nothing). That exemption is an unconstitutional gift.

The Superior Court also said the tax break was not unconstitutional because it "is a legal consequence of County ownership," and therefore "stem[s] from operation of Arizona law." ROA184 ep.23–24. But that is irrelevant. The question is not whether the GPLET tax exemption stems from operation of law—of course it does; *all* tax exemptions are creatures of law. Rather, the question is whether that exemption is a gift "by subsidy or otherwise" to WV—that is, whether it is a financial benefit WV enjoys, without returning adequate consideration. The idea that a tax exemption cannot be a gift because it's a function of state law represents precisely the sort of "technical" approach that is inappropriate in Gift Clause cases. *Wistuber*, 141 Ariz. at 349.

Indeed, that idea would mean that *any* agreement whereby government gives a private entity a tax exemption would be immune from Gift Clause analysis, which cannot be the law. The tax rebates in *Pimalco*, 188 Ariz. at 559–60 and *Maricopa Cnty.*, 187 Ariz. at 280–81, also stemmed from operation of state law, but they were still subject to the Gift Clause. That Clause prohibits any gift from the government to a private entity, whether by operation of law or otherwise. Because WV promises nothing in exchange for $4 million in tax exemptions, those exemptions are an unconstitutional gift.

B. The launchpad is for WV's private benefit and is not public infrastructure.

The County paid $2,179,369 to build a balloon launchpad to WV's specifications. ROA184 ep.4. WV pays nothing for using it for 20 years (although it must maintain it, which costs $12,800 per year (ROA169 ep.3 ¶10)). Under the SOA, the launchpad "may only be used by World View, and by others with [WV]'s oversight." ROA147 ep.50 ¶4.1 Further, WV "may, in its commercially reasonable discretion, prohibit users who do not meet [WV's] criteria," and "may charge other users a fee" for using it. *Id.* ep.51 ¶¶4.1–4.2. In other words, WV has complete discretion over who else gets to use it. This explains why WV is the only company that has ever launched anything from the pad. ROA169 ep.4 ¶12.[20]

The Superior Court held that construction of the launchpad was not a gift because the County retains ownership of it when the 20-year period expires, and because the launchpad is "public infrastructure." ROA184 ep.24. That was reversible error. While it is true that the County retains ownership, that doesn't change the fact that for 20 years, WV enjoys exclusive use of a facility that has only one purpose, and was built at taxpayer expense to suit WV's specifications. During those 20 years, the launchpad is a benefit of public resources, which WV

[20] The only time it has been used by anyone other than WV was by a photographer who used it for a photo shoot. ROA154 ep.8 ¶35.

enjoys for its own profit, and for which the public receives no proportionate benefit.

As for the idea that the launchpad is "public infrastructure" like a freeway offramp or a public parking lot, that is an "overly technical" view that ignores "the realities of the transaction." *Turken*, 223 Ariz. at 345 ¶8, 352 ¶47. The reality is that there's only one high altitude balloon company in Pima County—nobody else has any use for a balloon launchpad (the parties agree there's no market for such a facility ROA169 ep.7 ¶A.26)—and it was built expressly for WV, to WV's specifications. *Id.* ep.15 ¶¶E.3-4. The reality is that WV enjoys exclusive use of the launchpad for two decades, and the notion that someday, in the future, other balloon companies might want to use it is fanciful speculation. The court below said it could not be expected to determine "how many people a public infrastructure project must serve" in order for it to qualify as legitimately public, ROA184 ep.24, and that's true—but no such line-drawing is needed here, because this unambiguously falls on the wrong side of the line. The reality of the transaction is that this is a special-use facility for WV's own use.

A similar question arose in *Sjostrum v. State Highway Comm'n*, 228 P.2d 238 (Mont. 1951), where the court ruled that a law whereby the government reimbursed a railroad for maintaining one of its bridges violated the Gift Clause. The legislature declared the bridge to be public infrastructure, *id.* at 239, but the

court found that "only the toll paying travelers using the railroad bridge and the railway company that built, owns and operates such bridge…may expect to benefit from the proposed contract." *Id.* at 241. The reality of the transaction was that it was a privately owned bridge maintained for private profit. It "did not lose its character as a [private] 'railroad bridge' and become a [public] 'toll bridge' upon which the moneys of the state highway fund may be expended by any such ingenious device as the enactment of Chapter 51." *Id.* Thus, the state's payment for the bridge was an unconstitutional subsidy to the railroad in violation of Montana's Gift Clause—which was identical to Arizona's.

Likewise here, the launchpad exists solely for WV's purposes, and the fact that it technically remains owned by the County after 20 years—and that, in theory, some other balloon company might use it someday, if such a company were ever to come into existence—cannot overcome "the realit[ies] of the transaction." *Wistuber*, 141 Ariz. at 349.

What's more, the decision below, if affirmed, would drastically undermine the Gift Clause, because it would mean that nothing bars a municipality from building a tailor-made facility for a single private business, then letting the business use it exclusively for 99 years, *for free*—as long the agreement says the facility reverts to the municipality after a century. The county could build a car dealership and lease it to a dealer for a dollar for a century, on the theory that the

lot might someday be converted into a parking lot, or used for "uses [that] remain to be explored" at some future date. ROA184 ep.24. Indeed, under the Superior Court's reasoning, the city in *Turken* could have simply built the mall *for* the private developer, and let the developer use it for free for a generation, because the government might put a post office and a community center in the mall…someday. That is plainly not what the Gift Clause permits. The reality of this transaction is that this is not "infrastructure"—it is, as in *Sjostrum*, government subsidizing a private business.

C. The Purchase Option is grossly disproportionate.

The LPA also provides that at the end of 20 years, WV gains title to the facilities and the underlying land for the token payment of ten dollars. *Id.* ep.2. At that time, the building will be worth $14 million and will have 30 years of remaining utility. *Id.* ep.9, 21.

Ten dollars is obviously grossly disproportionate to $14 million. Yet the Superior Court upheld the arrangement due to two overlapping legal errors. First, it said the $14 million had not been reduced to present value, and that the present value is only about $3 million. *Id.* ep.22. Second, it subtracted the monthly payments WV must make from the building's value before it made the comparison. That is, it concluded that the amount "the County will have received" from its

"stream of rent payments" in 20 years were roughly the same as the building's value. *Id.*

First, with respect to discounting to present value: the court said the value of the building, discounted to present value, would be about $3 million, *id.* ep.22 n.28, using the six or seven percent discount rate that both experts agreed upon. Fair enough—but ten dollars (or whatever $10 is, discounted to present value) is still grossly disproportionate to $3 million.[21]

Second, and more significantly, the court committed a fallacy by asking whether WV's monthly payments add up to the value of the building. That comparison is fallacious because the payments are allegedly *lease* payments, not *purchase* payments, whereas the option goes toward the *purchase*. The difference is that rental payments do not acquire any portion of the *fee simple* interest, whereas purchase payments do. *See Port of Longview*, 527 P.2d at 267 (explaining the difference between lease and purchase payments). If someone *rents* a house for twenty years, her monthly payments are in exchange for the right to *use* the house for that time—not to buy it. If, after 20 years, she wants to buy the house, negotiations over the price would be based on the value of the *fee simple*—she

[21] On July 6, the County changed the option price to $5 million. But $5 million discounted to present value by the 7% discount rate the Superior Court used, *id.* ep.20, is still only about $1.4 million, which is still half the discounted $3 million value.

could not take title for free just because she's paid rent for twenty years. Likewise, if WV's payments are truly *rental* payments, then they cannot be added to the $10 option to conclude that the option satisfies the proportional consideration requirement, as the Superior Court did. Instead, the correct analysis is to ask what the *fee simple* of the building is worth in 20 years—$14 million ($3 million discounted)—and compare that to what WV pays *for the fee simple interest*, which is $10.

The Superior Court did not do that because it said this would "overlook[]" the fact that WV "can only obtain title" after "performance of the contractual terms…at the end of [20 years], in which case the County will have received in return over the 20-year holding period a stream of rent payments $24,850,000," which is approximately $11,725,000 reduced to present value. ROA184 ep.22. But that is comparing apples and oranges, because the monthly payments are (supposedly) rental payments—that is, payments for the right to use the facilities, not to acquire the fee. Under that assumption, the $10 option is indefensible. If these are really *rental* payments, then the $10 option is simply that: a contract whereby WV acquires the fee simple of a building worth $14 million for a token value of $10. That is unconstitutional. The Superior Court therefore committed reversible error by adding the option, which acquires the fee, to the monthly payments, which (allegedly) do not, before applying the *Turken* test.

Of course, if the payments are actually *not* rental payments, but *purchase* payments—which is in fact the case—then the LPA is still an unconstitutional loan of credit, as explained in Section II above.

To put it more simply, this case presents a dilemma: either (1) the County is *renting* the property to WV, in which case the monthly payments cannot acquire any part of the fee simple, and cannot therefore be added to the $10, which means the $10 option is grossly disproportionate to the $14 million fee simple interest—or (2) the County is *selling* the building by having WV pay back the construction costs over time, in which case it is an unconstitutional loan of credit.[22] Either way, this deal is unconstitutional.

The only way to conclude otherwise is to blur the distinction between rental and purchase—which the Superior Court did by invoking the phrase "panoptic view." ROA184 ep.22 (quoting *Turken*, 223 Ariz. at 352 ¶47). But that is not what "panoptic view" means. Panoptic means "all in one view…permitting everything to be seen." *Turken v. Gordon*, 220 Ariz. 456, 462 ¶15 (App. 2010) (quoting Webster's *Third New International Dictionary* 1631 (2002)). It means the Court "must look at all the pertinent circumstances before coming to a

[22] None of this is remedied by the July 6 alteration in the agreement. Under that alteration, WV will pay $5 million instead of $10 for a building worth $14 million. Discounting both amounts to present value, WV will pay about $1.4 million for a building worth between $3.9 million and $4.5 million. These amounts are still grossly disproportionate.

conclusion." *Maricopa Cnty.*, 187 Ariz. at 280. It does not mean the court ignores relevant details, blinds itself to the "realit[ies] of the transaction," *Wistuber*, 141 Ariz. at 349, latches onto "technical[ities]," *id.*, or "rubber-stamp[s] the legislature's decision." *Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 369 (App.1991).[23]

Turken used the word "panoptic" to "reject an overly technical view" which might lead courts to overlook "the realities of the transaction." 223 Ariz. at 352 ¶47, 345 ¶8. Here, the Superior Court *did* ignore the realities of the transaction. The reality of this transaction is that WV buys a building that the County spent $15 million to build by paying that $15 million back over the course of 20 years—through a "lease-back agreement[]" in which "the 'rentals' are installment payments on the purchase price." *City of Phoenix*, 99 Ariz. at 290 (citation omitted). These are *exactly* the criteria the *Reasor* court rightly saw as indicating a

[23] The word "panoptic" does not mean the Court should defer to the County here. We know this for three reasons. First, the term "panoptic" originated in a discussion of the *public purpose* prong of the Gift Clause analysis, not the *consideration* prong, which is what we are discussing here. The *Wistuber* court employed that word when addressing whether or not the "public benefit" obtained by a transaction was adequate. 141 Ariz. at 349. Second, *Turken* reiterated that deference was not appropriate when comparing the value obtained by the public with the value of taxpayer resources spent for it. The court went out of its way to counsel against deference on the *consideration* prong of the Gift Clause test, before "focus[ing] solely" on whether the payment for the parking spaces at issue there was disproportionate to their value. 223 Ariz. at 352 ¶46. Third, *Schires* expressly "disapprove[d]" of any implication that courts should defer on the question of proportionate return. 480 P.3d at 646 ¶23.

loan of credit disguised under a sham lease. 606 F.Supp. at 798. But even if that weren't true—and if we assume the payments are really *rental* payments, and even that they are proportionate to the value WV receives (which they are not, *see* Section III.D below)—then the purchase option is *still* an unconstitutional gift, because WV obtains a fee simple interest in a $14 million building for a fraction of that cost.

D. The monthly payments are grossly disproportionate to the market rental rate.

Even assuming the payments are actually rental payments, they are an unconstitutional gift because they are far below market rates.

1. Charging below-market rent for a decade, with a pledge to "make up the difference" later, is not constitutional.

The parties agree, and the Superior Court found, that "during the first 10 years," WV pays "below market" rent, "with the difference made up at the end." ROA184 ep.22–23. But that cannot satisfy the Gift Clause, because of the risk element. Recall that Gift Clause analysis is "panoptic" and focuses on the "realit[ies] of the transaction," not on "technical[ities]." *Wistuber*, 141 Ariz. at 349. The Superior Court said that because WV will pay the county back in full if it survives for twenty years, these bargain-basement monthly payments are not a gift. But the Court was wrong to ignore the *risk* that WV will fail and default. Even the County acknowledged that it was forcing taxpayers to "tak[e] a big risk for the first

ten years," and that they would "still [be] in the hole until virtually the end of the 20-year term." ROA169 ep.14 ¶E.2. That must be factored into the panoptic view here because the Gift Clause exists to protect public resources against "extravagant dissipation" in aid of private businesses, *City of Tempe v. Pilot Properties, Inc.*, 22 Ariz. App. 356, 360 (1974) (citation omitted), and in particular to protect against the investment of public resources in unreasonably "risky" ventures. *C.I.V.I.C. Grp. v. City of Warren*, 723 N.E.2d 106, 109 (Ohio 2000).

Allowing the County to lease at substantially below-market rates for at least a decade—probably more—in anticipation of making up the difference later, eliminates this protection. If *that* were the law, the County could make a 99-year lease of its property to a private business, charging one dollar for the first 98 years, and a large lump-sum at the end—thus placing on taxpayers the risk that the business will not survive for a century. That would render the Gift Clause essentially nugatory. In *Pilot Properties*, the City leased property to a baseball league for 99 years at a dollar per year. 22 Ariz. App. at 359. Acknowledging that the city "cannot lease its property to a private corporation…where the terms and conditions of the lease result in grant or donation in the form of subsidy," *id.* at 362, the court of appeals remanded for the trial court to determine whether the lease constituted a subsidy—a determination that should be made based on "the fair market rental value of the property, the benefits bestowed on the city by

obtaining title to a stadium, and *other factors* dealing with consideration received." *Id.* at 363 (emphasis added). *Cf.* *Bd. of Educ. of Lamar Cnty. v. Hudson*, 585 So.2d 683, 686–87 (Miss. 1991) (99 year lease for token payment was an unconstitutional gift). The "panoptic" view in Gift Clause cases requires courts to "look at all the pertinent circumstances." *Maricopa Cnty.*, 187 Ariz. at 280. Among those circumstances, *risk* must be a consideration, and failure to consider it was reversible legal error. The terms of this arrangement are so beneficial to WV for so long that they amount to a subsidy—and the theory that WV will make up the difference in two decades cannot remedy that basic constitutional flaw.

2. Even if the monthly payments were rent, and were at market rate, the arrangement still violates the Gift Clause.

The only evidence in the record below regarding the market rental rate was offered by Taxpayers, who showed that WV's payments fall below market rates for at least the first ten years, and would likely fall short of market rates for 16 years. *See* ROA175 ep.13–14 ¶¶66-67. The Superior Court, oddly, declared that this evidence was "not before the Court," ROA184 ep.23, but it nevertheless agreed that the monthly payments do fall below market rates for the first ten years. *Id.* ep.22–23. Yet because WV's payments in the later years are expected to make up the difference, the court concluded that "[WV]'s rent to the County approximates a market rate" over the course of two decades. *Id.* ep.23. But even if that is true, this arrangement is *still* unconstitutionally disproportionate, because use of the

property is not the only benefit WV gets in exchange for the monthly payments. It also gets millions of dollars in other benefits for which it does not provide adequate consideration.

The parties agreed, and the Superior Court held, that the total value of all payments WV makes to the County is about $24 million, which is $11,725,000 in today's dollars. *Id.* ep.21. Let us assume that this is equal to the market rental rate for use of the building. Even so, WV gets not only exclusive use of the building, but *also* exclusive use of the launchpad for 20 years (a launchpad that cost $2 million to build), *and* a GPLET tax exemption worth $4 million, *and* an option to buy the facilities and land for $10 when it will still have 30 years of utility left and will be worth $14 million.

This means the monthly payments are *still* grossly disproportionate to the benefits WV receives, because even if the rental payments do "approximate[] a market [rental] rate," *Id.* ep.23, WV gets not only the use of the property but *also* these additional benefits, totaling some $20 million. Thus what the County gives and what it gets are grossly disproportionate.

3. The July 6 alterations do not remedy the disproportionality of the payments.

On July 6, the County revised the agreement to reduce the amount due from WV. *See* Appendix A. Instead of requiring WV to pay its past-due payments, the County now charges only $25,000/mo. for July–Sept. 2021, $75,000/mo. for Oct.

2021–June 2022, $80,000/mo. for July 2022–Dec. 2022, and then $5,000 more per month for each succeeding year (i.e., $85,000/mo. in 2023, $90,000/mo. in 2024, etc.). Plugging these values into the discount-rate chart that the Superior Court found convincing, ROA184 ep.8,[24] yields a total income to the County, reduced to present dollars, of $9,379,214, which is obviously less than the approximately $11,725,000 which was the previous total of the monthly payments reduced to present value. Thus the July 6 modifications are even more disproportionate to the $14 million facility + $4 million tax break + $2 million launchpad.

The County says this reduction is made up for by increasing the option price from $10 to $5 million. But this makes no difference, since $5 million is still grossly disproportionate to $14 million. And aside from that, such an argument again depends on ignoring the difference between *renting* and *buying*. If we assume *arguendo* that the monthly payments are true rental payments, the $9,379,214 in rent cannot acquire *any* fee simple interest in the property—it can only acquire a *rental* interest, meaning that in 20 years, WV is just buying a building worth $14 million for $5 million, which is grossly disproportionate. But if the monthly payments are *not* true rental payments, but are actually *loan* payments toward the purchase of the building—which is in fact the case—then the arrangement is a loan of credit which violates the state Constitution for reasons

[24] *See* Appendix B.

given in Section II above. In no event do the July 6 alterations remedy the constitutional violations.

IV. The bottom line on consideration.

Laying aside the loan, which is unconstitutional by itself, we can sum up how the *Turken* test applies to this arrangement by comparing what the County gives WV with what it gets from WV.

County gives to WV:

1) Use of the building (which we will assume is equivalent to the fair-market rental rate of approximately $11,725,000), *and*

2) $4 million GPLET tax break, *and*

3) $2 million balloon Launchpad, *and*

4) fee simple of building worth $14 million ($3 million in today's dollars).

County gets from WV:

1) monthly payments totaling approximately $11,725,000 in today's dollars, ROA184 at 21, which is now reduced to $9,379,214, and

2) $10 option price, which is now $5 million (1.4 million in today's dollars).

Thus the County is giving some $20 million in objectively measurable direct benefits and getting, at most, half of that in return. By any measure, that's grossly disproportionate.

V. The WV arrangement is not for a public purpose.

Because the exchange of values here is so disproportionate, this Court need not address the public purpose prong of the *Turken* test. But the agreement also violates that requirement.

The Gift Clause was written to forbid arrangements exactly like this, in which a private business obtains "benefits at public expense" when it is "conducting some enterprise of [its] own such as [is] usually conducted for profit and [is] commercial in nature." *City of Phoenix v. Michael*, 61 Ariz. 238, 241 (1944) (citation omitted). WV is, of course, conducting an enterprise of its own for its own commercial profit.

The Supreme Court has said "[p]ublic purpose" is "better elucidated by examples" than by bright-line definitions, but it has also made clear that "[b]onds issued…as a donation in assisting a company to embark in the manufacture of [a product]" fail the public purpose requirement. *City of Tombstone v. Macia*, 30 Ariz. 218, 222–23 (1926). Here, the County issued bonds to assist WV in embarking in the manufacture of balloons—or, as the County itself put it, to "front-end[] the capitalization" of WV's balloon manufacturing and launching business. ROA184 ep.4.

Macia said an expenditure serves a public purpose if it is "'essentially public, and for the general good of all the inhabitants'" of the locality, and that the

expenditure "'must not be undertaken merely for gain or for private objects,'" but "'must be primarily to satisfy the need, or contribute to the convenience, of the people…at large.'" 30 Ariz. at 224 (citation omitted). WV does not contribute to the public convenience or satisfy any need of the people at large. This case is not like the production of ice, which *Macia* said was a genuinely public purpose given the "severe" "climatic conditions in the warmer parts of Arizona." *Id.* at 225. There is no equivalent public need for high-altitude balloon flights. And even if there were, WV is not contractually obligated to provide that service.

Instead, the County's aid to WV is analogous to the railroad subsidies[25] that motivated adoption of the Gift Clause—worse, actually, since the public had a legally enforceable right to use the railroads, which were common carriers, whereas the public enjoys no right to use the WV facilities or ride on its balloons.

This case is also not like the installation of fire-protection equipment that the court found to be a public purpose in *Town of Gila Bend v. Walled Lake Door Co.*, 107 Ariz. 545 (1971). Fire prevention is obviously a public purpose that "provide[s] a direct benefit to the public at large," because it "preserv[es] and protect[s] lives and property." *Id.* at 550. Thus the fact that the Walled Lake Door Company benefitted especially from that public service did not mean the

[25] Indeed, WV's CEO recognized this parallel when she thanked the County for its subsidies while noting that the "country was built on public-private partnerships, dating back to the creation of our railroad network." ROA154 ep.10 ¶48.

installation of the water lines was a gift. But here, the government is not pursuing any benefit to the public from which WV just incidentally benefits. Rather, the reverse is true: the County approached WV—and only WV—and proposed the idea of spending $15 million of public money to build a facility uniquely tailored to WV's needs, which WV gets exclusive use of for 20 years, free of taxation, and then gets to buy for a token payment—and in exchange, WV provides no public services, no public transportation, and no public safety benefit such as was at issue in *Walled Lake Door*.

The Superior Court, citing *Schires*, said economic development is public purpose. ROA184 ep.12–13. But *Schires* did not say that *all* economic development is *always* a public purpose. It said the particular development agreements at issue *in that case* satisfied the public purpose requirement. 480 P.3d at 644 ¶12. Those agreements included express requirements that the businesses participate in economic development projects, including participating in meetings with business prospects, engaging in marketing activities, etc. *Id.* at 646 ¶21. WV made no such promises here. Here, the *sole* public purpose the County has cited is the approximately $11,725,000 in monthly payments that WV pays. But those payments only *repay* the County for the costs it incurred *for WV's benefit* in the first place. If *that's* a public purpose, then any expenditure by a government entity will automatically satisfy the public purpose requirement, as long as the private

recipient promises to pay it back. Yet *Macia* said that it violates the public purpose requirement to front-end capitalization of a private business—that is, to "assist[] a company to embark in the manufacture of [a product]." 30 Ariz. at 223.

True, Arizona courts have said that government funding for a private entity can satisfy a public purpose—but only where that private entity is "subject to the control and supervision of public officials." *Kromko v. Ariz. Bd. of Regents*, 149 Ariz. 319, 321 (1986). Such control is necessary to prevent the "private gain or exploitation of public funds envisioned by the drafters" of the Gift Clause. *Id.* But here, the County exercises no control or supervision whatsoever over WV's operations. It is a wholly private undertaking.

Schires did counsel deference to elected officials in determining what constitutes a public benefit. 480 P.3d at 643 ¶9. But while the County enjoys "some latitude" in determining public purpose, *id.* (citation omitted), that deference does not require the Court to blind itself to "the realit[ies] of the transaction" or to be guided by the mere "surface indicia" of public purpose. *Cheatham v. DiCiccio*, 240 Ariz. 314, 320 ¶21 (2016).

Courts defer with respect to "purely policy choices"—not "matters of constitutional interpretation." *State v. Bush*, 244 Ariz. 575, 599–600 ¶111 (2018). Whether the WV agreements serve a public purpose is not a "purely policy" question. Taxpayers are not arguing that the County should have contracted with a

different balloon company, or should have built a facility for a different manufacturing firm. *Those* would be policy questions. Instead, Taxpayers argue that for the County to spend its resources to "front-end[] the capitalization" of a purely private business, ROA184 ep.4, or to "assist[] [WV] to embark in the manufacture of [its balloons]," *Macia*, 30 Ariz. at 222–23, is not serving a public purpose.

Turken warned that the public purpose requirement is violated when government spends public money "in aid of enterprises *apparently* devoted to quasi public purposes, but *actually* engaged in private business." 223 Ariz. at 346 ¶10 (citation omitted; emphasis added). In distinguishing between apparent and actual, this Court must focus on the "realit[y] of the transaction." *Id.* at 345 ¶8. The reality of this transaction is that the County is using taxpayer money to front-end capitalization of a private, for-profit balloon manufacturing and launching company that provides no public services. The County is serving as "fairy godmother" for WV. Parrington, *supra*. That is not a public purpose.

The difference between public and private purpose is a qualitative distinction. Public projects serve "the public good and general welfare," *Humphrey v. City of Phoenix*, 55 Ariz. 374, 387 (1940), or "promote[] the public

welfare or enjoyment." *Schires*, 480 P.3d at 643 ¶8.[26] Not even the County contends that WV does that—because the public is not allowed to enjoy WV's services. Unless, of course, they *pay* for those services—but that's true of any restaurant or department store. As the Michigan Supreme Court observed, economic development may be important, but the "vague economic benefit stemming from a private profit-maximizing enterprise" is not itself a *public* purpose, because "'incidentally every lawful business'" will "'in some manner advance the public interest.'" *Cnty. of Wayne v. Hathcock*, 684 N.W.2d 765, 786 (Mich. 2004). If this project serves a public purpose, therefore, nothing is to stop the County spending taxpayer money to front-end capitalization of *any* private company. As the New Mexico Supreme Court asked, when it found that the state violated the Gift Clause by spending public funds to aid the agriculture industry:

[26] A similar "public" analysis applies to eminent domain cases—where courts determine whether an act is sufficiently public by considering such factors as: whether title to the property will be held by a private or public entity; whether the land will be used for private profit or to provide public services; what degree of control the government will exercise; whether the whole community will use it or only a few people; whether profit is the overriding motivation, etc. *Bailey v. Myers*, 206 Ariz. 224, 230 ¶24 (App. 2003). There's no "mechanical formula" for differentiating public and private, *id.* at 228 ¶15, but while "streets, jails, government buildings" and other things "the government will own or operate" are public, projects by "private developers for private commercial use" are not. *Id.* ¶16. Obviously "public use" for eminent domain purposes is not identical to "public purpose" for Gift Clause purposes, *Turken*, 223 Ariz. at 349 ¶29 n.5, but *Bailey*'s multifactor analysis is helpful for determining whether a government undertaking is public or private.

"if the appropriation now before us be upheld where will it stop?" *State ex rel. Mechem v. Hannah*, 314 P.2d 714, 721 (N.M. 1957).

However much the definition of public purpose has evolved, the corporate subsidy at issue here would "have been familiar to our Constitution's framers." *Turken*, 223 Ariz. at 346 ¶¶12–13. In fact, the Gift Clause was a direct response to—and prohibition of—exactly this type of public aid to private businesses. While some kinds of economic development are permitted under the Constitution, and while the County enjoys some deference in determining *how* to serve the public good, this arrangement exceeds that discretion. The County exercises no public oversight or control over WV's operations, *Kromko*, 149 Ariz. at 321—it is simply ""assisting [WV] to embark in the manufacture of [its balloons]," *Macia*, 30 Ariz. at 222–23. This agreement fails the public purpose requirement.

CONCLUSION

The decision should be *reversed*, with instructions to enter judgment for Plaintiffs.

NOTICE UNDER RULE 21(A)

Appellants request costs and attorney fees pursuant to A.R.S. §§ 12-341 and 12-348 and the private attorney general doctrine.

Respectfully submitted this 23rd day of August, 2021 by:

/s/ *Timothy Sandefur*
Timothy Sandefur (033670)
Jonathan Riches (025712)
Scharf-Norton Center for Constitutional Litigation at the
GOLDWATER INSTITUTE

APPENDIX A

Board of Supervisors Memorandum

July 6, 2021

World View Modification of Lease-Purchase Agreement

Introduction

Pima County and World View Enterprises entered into a lease-purchase agreement in 2016 under which World View leases from the County a headquarters and manufacturing facility at the County's Aerospace Research Campus. The rent under the agreement was structured to fully compensate the County for its investment in the facility and the 12-acre parcel of land on which it is located. It provides that, at the end of the 20-year term, after paying almost $25 million in rent, World View can take title to the property for a nominal payment--$10.00. The Board entered into the lease-purchase agreement as an economic-development activity under A.R.S. § 11-254.04.

COVID-19 Pandemic Impact on World View

World View is the owner of a proprietary high-altitude balloon technology that it was in the process of refining and commercializing when the pandemic struck last year, interrupting its capital fundraising and forcing it to lay off almost all of its employees. The County, as it did for many of its other tenants—indeed, as all landlords have had to do over the last year—made rent accommodations to help World View stay in business and weather the pandemic.
World View is now in the process of finalizing some reorganization and capital-fundraising efforts and is quickly ramping its workforce back up, hoping to employ 100 full-time employees by year end, with average annual wages far in excess of the community's median level. To assist it in that effort, and create a clear path forward, County staff have been working with World View to restructure the rent due under the lease-purchase agreement for the remainder of the term.

New Rent Structure and Option Price

That proposed restructuring is set forth in the Second Amendment being submitted to the Board of Supervisors for approval at its July 6 meeting. Unlike under the original agreement, which increased the rent every 5 years, the revised agreement increases the rent gradually over the remainder of the term, but keeps it relatively low for the next 12 months to help ensure that World View's resources can be focused on its employment efforts.

The Goldwater Institute, a few months after the Board of Supervisors approved the lease-purchase agreement in January 2016, sued the County, challenging the legality of the agreement. That litigation has concluded in the trial court, which a few months ago entered final judgment in favor of the County. The County has prevailed in two previous appeals in the case. The final issue—whether the agreement violated the Arizona Constitution's "Gift Clause," which prohibits giving away public funds to private business entities—is currently before the Arizona Court of Appeals.

The revised rent structure is designed to ensure that the County's return is every bit as high as under the original lease and that it is therefore covered by the trial court's Gift-Clause

ruling. Over the entire term of the lease, taking into account what World View has already paid and what will be due under the amended lease for the remainder of the term, World View will pay slightly less total rent—approximately $23.4 million rather than $24.9 million. But the price for the purchase option at the end of the term will now be $5 million. If World View exercises the option, then the "present value" of World View's total payments, when calculated as of the lease-commencement date, is actually a little *higher* than it would have been under the original lease. If World View does not exercise the purchase option, then the County will still own the building and will have received approximately 90 percent of market-value rent over the term.[1]

World View has also agreed to give up a right of first refusal that it currently holds with respect to a 6-acre parcel of County-owned property adjacent to the leased property.

Employment & Salary Requirements

The Amendment also restates the employment and salary levels set out in the lease to reflect the reality of the current circumstances. It requires World View to grow to 125 full-time employees in 2022, a number that increases gradually each year thereafter until the original final goal of 400 employees is reached. The required minimum average salaries have been increased. The resulting total payroll actually surpasses that required under the original lease, starting in 2024.

Recommendation

The proposed Second Amendment to Lease Purchase Agreement restructures World View's rent in a manner that assists the company with its post-pandemic "reset," while providing taxpayers the same return as the current lease structure, therefore I recommend approval.

Sincerely,

C.H. Huckelberry
County Administrator

CHH/mp – June 29, 2021

Attachment

c: Jan Lesher, Chief Deputy County Administrator
Carmine DeBonis, Jr., Deputy County Administrator for Public Works
Francisco García, MD, MPH, Deputy County Administrator & Chief Medical Officer, Health and Community Service

[1] This is based on an appraisal of the market-value rent, as of the lease-commencement date, that was obtained during the litigation.

Pima County Department of Facilities Management

Lease: 1805 E. Aerospace Parkway

Tenant: World View Enterprises, Inc.

Contract No.: CTN FM 16*145

Contract Amendment No.: 02

Orig. Contract Term: 12/23/2016 – 12/22/2036	**Orig. Amount:** $23,625,000.00 Rev
Termination Date Prior Amendment: N/A	**Prior Amendments Amount:** $1,225,000.00 Rev.
Termination Date This Amendment: 12/31/2036	**This Amendment Amount:** ($1,438,333.32 Rev.)
	Revised Total Amount: $23,411,666.68 Rev.

SECOND AMENDMENT

The parties agree to amend the above-referenced lease agreement as follows:

1. **Background and Purpose.**

1.1. County and World View Enterprises, Inc. ("**World View**") previously entered into the above referenced lease agreement, which was effective as of January 19, 2016 (the "**Original Agreement**" and, as revised, the "**Lease Agreement**")). Capitalized terms used in this Second Amendment that are not defined have the meanings assigned by the Lease Agreement.

1.2. After construction of the facility to be leased was completed, World View and County amended the Original Agreement to establish the Commencement Date of the lease's Term as well as the final square footage and rent amount.

1.3. The Lease Agreement requires World View to pay a total of $24,850,000 in rent over its 20-year term.

1.4. County and World View also entered into an agreement (the "**Purchase Option**"), dated January 19, 2016, under which World View has the right to purchase the improved Building Parcel for a nominal amount after paying all sums due over the Term of the Lease Agreement. The parties recorded a Memorandum of Option Agreement in the Office of the Pima County Recorder, sequence no. 20160970576.

1.5. Pursuant to the Lease Agreement, County and World View also entered into an agreement (the "**Right of First Refusal**"), dated January 19, 2016, encumbering an adjacent parcel of County-owned property. The parties recorded a Memorandum of Right of First Refusal in the Office of the Pima County Recorder, sequence no. 20160970577.

1.6. World View developed and has been in the process of commercializing a proprietary high-altitude balloon technology.

1.7. The Covid-19 pandemic that struck in the first quarter of 2020 disrupted World View's progress and forced it to lay off most of its employees. It paid approximately 1/3 of its rent for 2020.

1.8. World View is in the process of ramping its work back up and anticipates being able to employ 100 people by the end of 2021. In order to facilitate that, World View has asked to restructure its lease payments to keep them lower in the near term.

1.9. The Board of Supervisors finds that facilitating World View's pandemic recovery will enhance the economic welfare of the County as a whole. And, by restructuring the rent over the remainder of the Term, and adjusting the Option Price at the end of the Term, as set forth in this Amendment, Pima County's economic return is the same as under the Original Agreement.

2. **Term**. The Term of the Lease Agreement is, for administrative convenience, extended from December 23, 2036, to December 31, 2036.

3. **Employment Targets**. The Employment Targets set forth in Section 4, and Exhibit E, of the Original Agreement are adjusted as follows:

Year	Required Number of FTE Employees	Required Average Annual Salary
2022	125	$60,000
2023 – 2032	25 more than the year before	$65,000
2033 – 2036	400	$70,000

4. **Rent**. World View will pay Rent for the remainder of the Term as follows:

4.1. From the effective date of this Second Amendment through September 2021: $25,000 per month.

4.2. October 2021 through June 2022: $75,000 per month.

4.3. July 2022 through December 2022: $80,000 per month.

4.4. The annual rent for 2023 will be $1,020,000 ($85,000 per month). Every year thereafter—2024 through the end of the term—the annual rent will be $60,000 more than the year before.

4.5. In addition to restructuring the rent due under the Original Agreement, this replaces all prior agreements regarding payment of back due amounts.

5. **Purchase Option.** The Purchase Option is amended as follows:

5.1. The First Option Term and First Option Price (as defined in the Purchase Option) are hereby eliminated.

5.2. The Second Option Price is $5,000,000.

6. **Right of First Refusal**. The Right of First Refusal is hereby terminated. The parties will, within 30 days after the Board's approval of this Amendment, execute and record a memorandum providing notice of the termination.

All other provisions of the Lease Agreement not specifically changed by this Amendment remain in effect and are binding upon the parties.

PIMA COUNTY

Sharon Bronson
Chair, Board of Supervisors

Date

ATTEST

Julie Casteneda
Clerk of the Board

Date

APPROVED AS TO FORM

Victoria Buchinger
Deputy County Attorney

Victoria Buchinger
Print DCA Name

June 25, 2021
Date

WORLD VIEW ENTERPRISES, INC.

Authorized Officer Signature

Printed Name and Title

Date

APPROVED AS TO CONTENT

Lisa Josker, Facilities Management Director

Date

6. **Right of First Refusal**. The Right of First Refusal is hereby terminated. The parties will, within 30 days after the Board's approval of this Amendment, execute and record a memorandum providing notice of the termination.

All other provisions of the Lease Agreement not specifically changed by this Amendment remain in effect and are binding upon the parties.

PIMA COUNTY

_____
Sharon Bronson
Chair, Board of Supervisors

_____
Date

ATTEST

_____
Julie Casteneda
Clerk of the Board

_____
Date

APPROVED AS TO FORM

_____
Deputy County Attorney

_____
Print DCA Name

_____
Date

WORLD VIEW ENTERPRISES, INC.

_____
Authorized Officer Signature

_____
Printed Name and Title

_____
Date

APPROVED AS TO CONTENT

_____
Lisa Josker, Facilities Management Director

6/25/2024
Date

APPENDIX B

This chart takes the chart adopted by the Superior Court on IR.184 at 8, and replaces the "contract rents" with the new "contract rents" specified in the July 6 modification.

Contract "rents" --	**7% discount factor**	**-- price per sq.ft. per year**	
July – Sept. 2021: $25,000/mo.	0.7130	$199,910	$1.40
Oct. 2021 - June 2022: $75,000/mo.	0.6663	$599,670	$4.22
July 2022 – Dec. 2022: $80,000/mo.	0.6663	$639,648	$4.50
2023: $85,000/mo.	0.7228	$737,256	$5.19
2024: $90,000/mo.	0.5820	$628,560	$4.43
2025: $95,000/mo.	0.5439	$620,046	$4.37
2026: $100,000/mo.	0.5084	$610,080	$4.30
2027: $105,000/mo.	0.4751	$598,626	$4.22
2028: $110,000/mo.	0.4440	$586,080	$4.13
2029: $115,000/mo.	0.4150	$572,700	$4.03
2030: $120,000/mo.	0.3878	$558,432	$3.93
2031: $125,000/mo.	0.3624	$543,600	$3.83
2032: $130,000/mo.	0.3387	$528,372	$3.72
2033: $135,000/mo.	0.3166	$512,892	$3.61
2034: $140,000/mo.	0.2959	$497,112	$3.50
2035: $145,000/mo.	0.2765	$481,110	$3.89
2036: $150,000/mo.	0.2584	$465,120	$3.28

Total monthly payments (adjusted to present value): $9,379,214

COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RICHARD RODGERS, et al., Plaintiffs-Appellants, v. CHARLES H. HUCKELBERRY, et al., Defendants-Appellees.	No. 2 CA-CV 2018-0161 Pima County Superior Court Case No. C20161761

CERTIFICATE OF COMPLIANCE

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Constitutional Litigation at the
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Litigation@goldwaterinstitute.org
Attorneys for Plaintiffs-Appellants

Pursuant to Rule 14(a) of the Ariz. R. of Civ. App. P., I certify that the body of the attached Appellants' Opening Brief appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and contains 13,953 words, excluding the table of contents and table of citations.

Respectfully submitted this 23rd day of August, 2021 by:

/s/ *Timothy Sandefur*
Timothy Sandefur (033670)
Jonathan Riches (025712)
Scharf-Norton Center for Constitutional Litigation at the
GOLDWATER INSTITUTE

COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

RICHARD RODGERS, et al., Plaintiffs-Appellants, v. CHARLES H. HUCKELBERRY, et al., Defendants-Appellees.	No. 2 CA-CV 2018-0161 Pima County Superior Court Case No. C20161761

CERTIFICATE OF SERVICE

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The undersigned certifies that on August 23, 2021, she caused the attached Appellants' Opening Brief to be filed via the Court's Electronic Filing System, and emailed a copy to:

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