

**Scharf-Norton Center for Constitutional Litigation at the
GOLDWATER INSTITUTE**

Timothy Sandefur (033670)

Jonathan Riches (025712)

500 E. Coronado Rd.

Phoenix, AZ 85004

(602) 462-5000

litigation@goldwaterinstitute.org

Attorneys for Plaintiffs

**IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF PIMA**

RICHARD RODGERS; SHELBY
MAGNUSON-HAWKINS; and DAVID
PRESTON,

Plaintiffs,

vs.

CHARLES H. HUCKELBERRY, in his
official capacity as County Administrator of
Pima County; SHARON BRONSON, RAY
CARROLL, RICHARD ELIAS, ALLYSON
MILLER, and RAMÓN VALADEZ, in their
official capacities as members of the Pima
County Board of Supervisors; PIMA
COUNTY, a political subdivision of the
State of Arizona,

Defendants.

Case No.: C20161761

**PLAINTIFFS' PROPOSED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

(Assigned to the Honorable
Paul E. Tang)

I. Findings of Fact

A. Plaintiffs

1. Plaintiffs (collectively, “Taxpayers”) are Pima County residents and taxpayers. They have standing to maintain their Gift Clause challenge in this lawsuit (Joint Pretrial Statement (“JPTS”) ¶ A.1.)

B. World View

2. World View, Enterprises, Inc. (“World View”) is a for-profit corporation that seeks to commercialize a unique near-space balloon technology. In 2015, it sought to initiate “private space exploration” by charging \$75,000 for persons to ride on near-space balloons. (Pls.’ Statement of Facts in Support of Nov. 13, 2019 Cross-Mot. for Summ. J. (“PSOF”) ¶ 1; JPTS ¶ A.2.

3. In mid-2015, World View and the County entered into negotiations with the goal of World View staying in Pima County rather than relocating elsewhere. Defs.’ Statement of Facts in Support of Defs.’ Oct. 23, 2019 Mot. for Summ. J. (“DSOF”), Ex. 2 (Jan. 19, 2016 memo to Board of Supervisors); JPTS ¶ A.3.

4. Pursuant to these negotiations, World View and the County entered into two agreements: the Lease-Purchase Agreement and the Operating Agreement (collectively, the “World View agreements”). JPTS ¶ A.2.

C. The World View Agreements

1. Agreement to build

5. The Lease-Purchase Agreement required the County to construct a build-to-suit

facility (the “Building”)—customized with furniture, fixtures, and special equipment—so that World View can manufacture its balloons. JPTS ¶ G.2 at §§ 1.1, 1.3, 5, 5.2–5.7; JPTS ¶ G.3 § 4; JPTS ¶ A.2.

6. The completed Building is approximately 142,000 square feet in size, and is located on a 12-acre parcel of County-owned land (the “Building Parcel” and, together with the Building, the “Improved Parcel”). JPTS ¶¶ A.4, A.21.

7. The Lease-Purchase Agreement required the County to construct the facility on an accelerated timeline because World View’s decision to remain in Arizona was contingent upon the completion of the building by the end of 2016. JPTS ¶ G.2 at § 1.3, 1.7.

8. The Operating Agreement also required the County to custom-build, to World View’s specifications, a launch pad (“Launchpad”)—so that World View can launch its balloons. JPTS ¶¶ A.9 and ¶ G.2 at § 4. *See also* Letter from Jayne Poynter to Chuck Huckelberry, Dec. 23, 2015, attached as Exhibit 4 to PSOF and Pls.’ Oct. 13, 2019 Cross-Mot. for Summ. J. at 2.

9. The Launchpad was constructed on a 16-acre parcel of County-owned land (the “Launchpad Parcel”) adjacent to the Improved Parcel. JPTS ¶ A.9.

10. The Building Parcel and Launchpad Parcel were part of a larger parcel acquired by the County for approximately \$16,000 per acre. JPTS ¶ A.13.

11. The County spent a total of \$13,107,722 to design, build, and equip the Building. This includes \$1,171,178 of off-site utility improvements, for \$584,049 of which the County was reimbursed by utility providers. The County spent a total of \$2,179,369 to design, build and

equip the Launchpad. JPTS ¶¶ A.14, A.15.

12. World View exercised substantial control over the entire process of contract formation and design and construction of the Building and Launch Pad. JPTS ¶ G.2 at §§ 5, 5.2–5.7. *See also* PSOF, Ex. 3 (Jan. 9–10, 2016 Email string between J. Moffatt and C. Huckelberry attached as Ex. 3); *Id.* Ex. 4 (Dec. 23, 2015 Letter to C. Huckelberry from J. Poynter); *Id.* Ex. 5 (Nov. 2, 2015 Memorandum to T. Burke from C. Huckelberry); *Id.* Ex. 6 (Oct. 23, 2015 Letter to J. Poynter from C. Huckleberry).

2. Financing construction

13. The County stated that it was “front-ending the capitalization of the [World View] building and facilities” and that it would “finance this facility.” JPTS ¶ A.17.

14. During lease negotiations with World View, the County explained that it “is taking a big risk for the first ten years of the lease,” that the “lease payments for the first five years will be about *half* of the County’s expected debt service on” the \$15 million, that for “the next five years, there’s still an annual deficit,” 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.” JPTS ¶ E.2.

15. To fund its obligations under the agreements, the County restructured its existing public debt, which relies on public facilities as collateral, to obtain a \$15,185,000 loan from the U.S. Bank National Association (“U.S. Bank”). JPTS ¶ A.16.

16. The County issued Certificates of Participation, Taxable Series 2016B (“Certificates”), in the principal amount of \$15,185,000. Under this financing mechanism, the

County makes rent payments on certain public facilities to U.S. Bank, which holds either fee title or a leasehold interest in those facilities. *Id.*

17. The County will pay \$4,259,134 in interest on the loan it acquired to finance the Building and Launch Pad over the 15-year period. *Id.*

18. The County will repay a total of \$19,444,134 (principal plus interest) over 15 years. The County will fund this repayment through “rent payments the County makes on the [County’s own] facilities.” *Id.*

19. World View, in turn, makes rental/lease payments to the County (described below) which are, in the County’s words, “designed to ensure that Pima County [will] get back its investment in the construction of the World View Building.” JPTS ¶ A.18.

20. In a memo prepared before the County entered into its agreements with World View, County Administrator Huckelberry stated to County staff: “[W]e need to review the various financing mechanisms that could be made available to finance this project and enter into a lease/purchase agreement with World View over a 20-year period where we would recover our capital outlay with interest.” JPTS ¶ A.19.

21. The County elicited testimony from Taxpayers’ expert that “[w]hen the seller holds the note, that basically means the seller [the County] has lent the money to the purchaser [World View], and the purchaser is paying the seller back over time.” JPTS at ¶ H.b, page 20 and JPTS Ex. 2 at 62:22–63:14.

22. World View’s founder and CEO expressed gratitude for the “economic development deal” World View has with the state while noting that the “country was built on

public-private partnerships, dating back to the creation of our railroad network.” *See* Outline and Final Letter from Jayne Poynter to Mr. Crown, May 25, 2016, attached as Exhibit 10 to PSOF and Pls.’ Nov. 13, 2019 Cross-Mot. for Summ. J. at 22, n.18.

3. Terms of the agreements

23. The Lease-Purchase Agreement provides for the use of the Building by World View for use as a headquarters and balloon manufacturing in exchange for rental/lease payments. JPTS ¶¶ G.2 & G.3.

24. The County stated that it did not do a formal appraisal of market lease rates prior to execution of the World View Agreement. JPTS ¶ E.5.

25. World View agreed to make rental/lease payments on the Building and to hire a specified number of full-time employees at a specified average annual salary, starting on the first anniversary of the commencement date. JPTS ¶ G.2 §§ 4, 6.

26. World View is not, however, obligated to hire anyone from Pima County. *See* Ex. 24 to DSOF, Defs.’ Resp. to Pls.’ Second Set of Interrogs. and Req. for Admis. at pg. 15, RFA 1.

27. Under the Lease-Purchase Agreement, World View is required to provide insurance for the Building, maintain and repair it, and pay all applicable taxes on the Building or the County’s rental income. The County passes through to World View the 0.5% transactional privilege tax levied by the Regional Transportation Authority, which the County pays with respect to its rental income. JPTS ¶ A.6.

28. Because the leased property is owned by the County, it is exempt from property

taxes. Under A.R.S. §§ 42-6201 through 42-6210, government-owned property leased to a private entity is subject not to property taxes but to the Government Property Lease Excise Tax (“GPLET”). However, World View is not required to pay the GPLET either, because the County constructed the Launchpad adjacent to the Building, thus qualifying the facility for a GPLET tax exemption under A.R.S. § 42-6208(5), because the Improved Parcel will be “used for or in connection with aviation.” JPTS ¶¶ A.7, A.8.

29. The Lease-Purchase Agreement stated that the County did not warrant that World View would be exempt from taxation under GPLET, but specified that if this exemption were challenged, the County would “cooperate with World View in pursuing any defense of the GPLET exemption, and participate as needed in such defense, at no out-of-pocket cost to County.” JPTS ¶¶ A.8, G.2 § 6.4.1.

30. These tax exemptions last for the 20 year life of the agreements. At the end of this period, if World View exercises its \$10 option to purchase the premises, these exemptions would expire. JPTS ¶¶ A.5, A.8, G.2 § 6.3.

4. The Launch Pad

31. World View is required to maintain and operate the Launchpad at its own expense. JPTS ¶ A.10.

32. Pursuant to the agreements, the Launchpad “may only be used by World View, and by others with World View’s oversight, for launching of high-altitude balloons and associated payloads.” *Id. See also* Spaceport Operating Agreement (Ex. 4 to DSOF) at § 4.1. Section 1.4 of both the Lease-Purchase Agreement and the Spaceport Operating Agreement

describes the launch pad as “publically [*sic*] available,” but Sec. 4.1 of the Spaceport Operating Agreement, also provides that World View may charge other users a fee and may deny anyone the right to use the Launchpad in its “commercially reasonable discretion.” JPTS ¶ A.10.

33. To date, only one other company has used the Launchpad, and it only did so for a photo shoot. JPTS ¶ A.12; *See* Exhibit 24 to DSOF at Interrog. 6.

34. The County and World View agreed to make the Launchpad “publically [*sic*] available” so that the County could get a grant from the Arizona Department of Revenue (“ADOT”) to reimburse itself for the cost of the Launchpad. JPTS ¶ E.3.

35. The County never received this grant because, among other reasons, “ADOT representatives expressed concern that the Launch Pad was not sufficiently ‘public’ for purposes of grant eligibility.” *Id.*

36. The Lease and Operating Agreements state that the Launchpad was required as part of the transaction. JPTS ¶ A.9; JPTS ¶ G.2 at §§ 1.3., 1.4, and 1.7; *See also* Spaceport Operating Agreement (Ex. 4 to DSOF) at § 4.1.

37. The County did not intend to construct any launch pads before it entered into its arrangement with World View and it would have never built the Launchpad if World View had not required it. JPTS ¶ E.4.

38. But for the agreements, the County would not have built the Launchpad to World View’s specifications. *See* Letter from Jayne Poynter to Chuck Huckelberry, Dec. 23, 2015, attached as Ex. 4 to PSOF.

39. The amounts the County spent to build the Launchpad and to acquire the land for

the Launchpad are \$2,179,369 and \$256,000, respectively. (Total: \$2,435,369). JPTS ¶ A.15.

40. The estimated market value of the Improved Parcel is between \$1.75 and \$1.95 per square foot (which yields a value of between \$1,235,689 and \$1,376,911 for the 16-acre parcel on which the Launchpad is located). JPTS ¶ A.22. JPTS ¶ G.7 and JPTS, Ex. 3 at 69.

41. World View has reported that it may spend \$12,800 annually to maintain the Launchpad. JPTS ¶ A.10, an amount that is potentially offset by \$3,685—the amount World View proposes to charge—each day that World View allows another company to use the Launchpad. *See* World View’s Proposed Basis for Fee Calculation, attached as Ex. 9 to PSOF.

42. The Launchpad has no market value. JPTS ¶ H.b. and JPTS Ex. 1 at 46:8-25.

43. The Launchpad is a “special use improvement” and beneficial to one user—i.e., World View. It is not beneficial to the community at large, but has a use value to World View. JPTS ¶ A.26.

5. World View’s payments

44. The agreements obligate World View to repay the County for the construction of the Building and the Launchpad, with interest, “through annual lease and/or rent payments” to the County over the course of 20 years. JPTS ¶ A.17.

45. World View and the County amended the Lease-Purchase Agreement, as required by § 5.9 of that agreement, to reflect the actual square footage of the completed facility (142,000 square feet), and hence the actual amounts due under the Lease Purchase Agreement, as well as the commencement date of the term. The Lease-Purchase Agreement, as amended, requires World View to pay the County \$24,850,000 over the 20-year term of the agreement, which

commenced on December 23, 2016. Payments due equate to \$710,000 per year, or \$59,166.67 per month. JPTS ¶ A.21.

46. These amounts are below-market for at least the first 10 years of the agreement, as both experts agreed, and as shown by the difference between the actual rental/lease rates and the market lease rates. JPTS ¶ H.1a at pg. 19.

47. The County's expert concluded that the market value of the building is \$14,000,000, while the market value of World View's rental/lease payments is \$11,725,000, a difference of \$2,275,000. *Id.*

48. Both experts agreed that it would be inappropriate to use a discount rate any lower than 6% or 7%. *Id.*

49. The Building received a temporary certificate of occupancy on December 23, 2016, and a permanent certificate of occupancy on February 8, 2017. JPTS ¶ A.20.

50. In the event that World View defaults on its payments, the County retains ownership of the Building, Launchpad and Improved Parcel, and remains liable for the total of \$19,444,134 owed to U.S. Bank. Joint Pretrial Statement ¶ G.2 at §§ 11 & 14.

6. The \$10 Option Provision

51. The Lease-Purchase Agreement allows World View to purchase the building for \$10 at the end of the lease period. JPTS ¶ A.5; JPTS ¶ G.2 at § 6.3 (and Exhibit C to Lease-Purchase Agreement).

52. At the end of the lease period, the Building will have at least 30 years of remaining utility and be worth between \$14,000,000 (according to Defendant's expert) and

\$16,800,000 (according to Taxpayers' expert). JPTS ¶¶ A.22, A.23, H.1.a at pg. 19. This latter figure is called the "net reversionary value" ("NRV").

7. Valuation

53. The fair market value of the Improved Parcel, as of December 23, 2016, is \$14,000,000. JPTS ¶ H.1.a. at pg. 18.

54. The fair market value of World View's lease/rental payments is \$11,725,000. JPTS ¶ H.1.a. at pg. 19.

(a) Building Value

55. The County's expert calculated that the actual cost to the County of the Improved Parcel is \$12,885,000. This amount includes the Improved Parcel's land value, the cost of constructing the Building, and the cost of furnishing the building, and does not include "entrepreneurial profit" because the County did not have a profit motive. This is referred to as the "actual cost plus land value." JPTS ¶¶ H1.a., n.13 and H.2.a. at pgs. 18, 22.

56. As set out below, the Court finds as a matter of law that for purposes of Gift Clause analysis, the Court should use the \$14,000,000 fair market value figure instead on the "actual cost plus land value" of \$12,885,000. *See Turken v. Gordon*, 223 Ariz. 342, 350 ¶ 33 (2010) ("analysis of adequacy of consideration for Gift Clause purposes focuses instead on the objective fair market value.")

57. The market rate of rent for the Building is between \$6.90 per square foot (according to Defendant's expert) and \$8.40 (according to Taxpayers' expert). The market rate of rent for the Building will increase over the next 20 years by between 2% (according to

Defendants’ expert) and 2.5% (according to Taxpayers’ expert). JPTS H.1.a. at pg. 19.

58. The reversionary value of the Improved Parcel at the end of the World View lease term (in December 2036) is \$16,800,000. *Id.*

59. Because World View can buy the property for \$10 at the end of the lease, World View receives the benefit of the \$16,800,000 reversionary value at the end of the lease.

(b) Lease/rental payments

60. The County acknowledges that \$11,725,000—that is, the fair market value of World View’s lease/rental payments—represents the “*market* value of the *County’s* interest in the property.” Defs.’ Oct. 23, 2019 Mot. for Summ. J. at 20–21.

61. Because, as described below, *Turken*, 223 Ariz. at 350 ¶ 33, requires this Court to assess the “*market* value of what [World View] has promised to provide” the County, this \$11,725,000 figure must be relied upon when evaluating the subsidy to World View with reference to the Building.

62. The difference between \$14,000,000 and \$11,725,000 is \$2,275,000. This is the amount of the “rent subsidy” discussed below.

63. The County’s argument that over the course of the 20-year period, it receives payments that exceed the value of the property is unpersuasive for the following reasons:

64. World View pays market rent for only 4 of the 20 years covered by the agreements, even according to the County’s own expert. County expert Baker testified that the market rate for the rental would be \$6.90 per square foot, which, multiplied by 142,000 square feet, yields \$979,800 per year. Taxpayer expert Bradley testified that the market rate would be

\$8.40 per square foot, which, multiplied by the slightly more precise figure of 141,787 square feet, yields \$1,191,011. JPTS ¶ H.1.a. at pg. 19.

65. Taxpayer’s expert (Bradley) testified that the market rate would be expected to increase by about 2.5% annually. Defendant’s expert (Mr. Baker) testified that he believed it would increase between 1.5% and 2% per year. *Id.*

66. Therefore, the estimated market rate for rental of the property—compared with World View’s actual payments—would be as follows¹:

Year	World View’s actual Payments	Market Rates (Bradley)	Market Rates (Baker +2.5%/yr.)	Market Rates (Baker +2%/yr.)	Market Rates (Baker +1.5%/yr.)
2017	\$710,000	\$979,800	\$979,800	\$979,800	\$979,800
2018	\$710,000	\$1,004,295	\$1,004,295	\$999,396	\$994,497
2019	\$710,000	\$1,029,402	\$1,029,402	\$1,019,384	\$1,009,414
2020	\$710,000	\$1,191,011	\$1,055,137	\$1,039,772	\$1,024,555
2021	\$710,000	\$1,220,786	\$1,081,515	\$1,060,567	\$1,039,923
2022	\$1,136,000	\$1,251,306	\$1,108,553	\$1,081,778	\$1,055,522
2023	\$1,136,000	\$1,282,588	\$1,136,267	\$1,103,414	\$1,071,355
2024	\$1,136,000	\$1,314,653	\$1,164,674	\$1,125,482	\$1,087,425
2025	\$1,136,000	\$1,347,519	\$1,193,791	\$1,147,992	\$1,103,736
2026	\$1,136,000	\$1,381,207	\$1,223,636	\$1,170,952	\$1,120,292
2027	\$1,420,000	\$1,415,738	\$1,254,227	\$1,194,371	\$1,137,096
2028	\$1,420,000	\$1,451,131	\$1,285,583	\$1,218,258	\$1,154,152
2029	\$1,420,000	\$1,487,409	\$1,317,723	\$1,242,623	\$1,171,464
2030	\$1,420,000	\$1,524,595	\$1,350,666	\$1,267,475	\$1,189,036
2031	\$1,420,000	\$1,562,709	\$1,384,433	\$1,292,825	\$1,206,872
2032	\$1,704,000	\$1,601,777	\$1,419,044	\$1,318,682	\$1,224,975
2033	\$1,704,000	\$1,641,822	\$1,454,520	\$1,345,056	\$1,243,350
2034	\$1,704,000	\$1,682,867	\$1,490,883	\$1,371,957	\$1,262,000
2035	\$1,704,000	\$1,724,939	\$1,528,155	\$1,399,396	\$1,280,930

¹ Further explanations for the numbers on this chart are provided in Plaintiffs’ Memorandum of Points and Authorities in Support of Plaintiffs’ Nov. 13, 2019 Cross-Motion for Summary Judgment at page 27.

2036	\$1,704,000	\$1,768,062	\$1,566,359	\$1,427,384	\$1,300,144
Total	\$24,850,000	\$27,863,616	\$25,028,663	\$23,806,564	\$22,656,538

67. As indicated by the boldfaced figures above, even relying upon the County’s own expert, there are only four years (2027, 2032, 2033, and 2034) during which World View will pay market rent. During all other years, World View will pay below-market rent.

68. These figures nevertheless fail to capture the full amount of the subsidy, because the County’s expert concluded that the fair market value of the Building is \$14,000,000, while the fair market value of the present-day market value of the payments World View is expected to make is only \$11,725,000, a difference of \$2,275,000. As explained above, *that* is the proper figure the Court will rely upon when (as the Court must) assessing “the objective fair market value of what the private party has promised to provide in return for the public entity’s payment.” *Turken*, 223 Ariz. at 350 ¶ 33.

69. Therefore, the “rent subsidy” from the County to Worldview is \$2,275,000.

70. The Court must also assess the Tax Break, the \$10 Option, and the Launchpad, discussed below.

(c) Tax Break

71. Because the County constructed the Launchpad adjacent to the Building, World View enjoys a complete property tax exemption. Under A.R.S. §§ 42-6201 to 42-6210, county owned property is exempt from property taxes and would normally be subject to GPLET instead. However, because the Launchpad was constructed adjacent to the Building, the entire Improved Parcel is exempt from GPLET as well, because the Improved Parcel will be “used for or in connection with aviation” Under A.R.S. § 42-6208(5). *See* JPTS ¶ G.2 at § 6.4.1.

72. The County did not warrant that the parcel would enjoy the “aviation” exemption, but asserted its belief that it would and agreed “to cooperate with World View in pursuing any [legal] defense of the GPLET exemption.” *Id.*

73. Plaintiffs’ expert (Mr. Bradley) estimated, were it not for these exemptions, the property taxes for the Building would be \$191,782 in 2018 and \$201,371 in 2019. JPTS ¶ A.29. It is logical to assume an increase in the assessed value of the property and property tax rates each year of the 20 year lease.

74. The tax exemption lasts for the life of the 20 year lease. Therefore, assuming the value of that exemption, World View receives a benefit in the form of tax exemptions of approximately \$4,000,000 (approximately \$200,000 x 20 years).

(d) Conclusions regarding property values

75. Whether the Court may adopt the “actual cost plus land value” (\$12,885,000) instead of the “fee simple fair market value” (\$14,000,000) of the World View Building Parcel for purposes of weighing the “objective fair market value of...the public entity’s payment,” *Turken*, 223 Ariz. at 350 ¶ 33, is purely a question of law.

76. *Turken* states, and the parties have stipulated, that the analysis of consideration focuses on the objective fair market value. JPTS ¶ B.7. Because courts must analyze the objective fair market value of what the private party receives under the agreement, and because both parties’ experts agree that the “fee simple value” represents the fair market value of the building, it is not proper for the Court to rely on the “actual cost plus land value.”

77. Objective fair market value means the price the property would bring from a

willing seller if the property were on the market. *State v. McDonald*, 88 Ariz. 1, 5 (1960).

Costs of construction are therefore not objective fair market value. Therefore, the Court should not rely upon the dollar figure suggested by the County (\$12,885,000, which it calculates by adding the County's cost of designing and constructing the Building, to the fair-market value of the land).

78. Instead, the proper figures to rely upon are:

- fair market value of the Improved Parcel: **\$14,000,000**. JPTS ¶ H1.a. at pg. 18.
- fair market value of World View's lease/rental payments: **\$11,725,000**. *Id.* at pg. 19.
- fair market value of Launchpad: **\$0**. JPTS, Ex. 5 at 77:5-6.
- cost to County of constructing Launchpad: **\$2,435,369**. JPTS ¶ A.15.
- fair market value of Building at end of the lease term: **\$16,800,000**. JPTS ¶ A.30.
- cost to World View of obtaining the Building at the end of the lease term: **\$10**. JPTS ¶ A.5.
- value of tax exemptions World View obtains: \$201,271 plus an increase in the assessed value of the property and property tax rates each year for a period of 20 years—thus totaling **approximately \$4,000,000**. JPTS ¶ A.29.

II. Conclusions of law

A. The Gift Clause Prohibits Both Loans and Subsidies.

79. Arizona Constitution's "gift clause," art. IX, § 7, provides, "Neither the state, nor any county, city, town, municipality, or other subdivision of the state shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or become a joint owner with any person, company, or corporation, except as to

such ownerships as may accrue to the state by operation or provision of law or as authorized by law solely for investment of the monies in the various funds of the state.”

80. This Clause prohibits (a) loans of credit, and (b) gifts of public funds, by subsidy or otherwise, to private for-profit entities. These are separate and distinct prohibitions, and are subject to different legal standards. *Indus. Dev. Auth. of Cnty. of Pima v. Maricopa Cnty.*, 189 Ariz. 558, 560 (App. 1997) (“Every word of a statute or constitutional provision is to be given meaning.”).

1. Loans of Credit

81. In determining whether a challenged transaction violates the *credit* prohibition of the Gift Clause, the Court must determine not whether the County has effectively purchased goods or services from World View, but instead whether the County has provided World View with a value in exchange for future repayment. *Valley Nat’l Bank of Phoenix v. First Nat’l Bank of Holbrook*, 83 Ariz. 286, 294 (1958) (“The essential distinction between a deposit and a loan of public funds hinges on the right to demand the return of the money. If the money must remain for a fixed period there is a loan in the strict legal sense and not a deposit in the sense the term is ordinarily used.”).

82. Credit means “the provision of money, goods, or services with the expectation of future payment,” *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/credit>, or “[the] ability to borrow money ... the time that a seller gives the buyer to make the payment that is due ... [t]he availability of funds either from a financial institution or under a letter of credit.” CREDIT, *Black’s Law Dictionary* (11th ed. 2019).

83. The question of “gross disproportionality” has no place in determining whether the World View agreements violate the credit prohibition of the Gift Clause. This is because “gross disproportionality” is a method courts use to determine whether a government expenditure, ostensibly for goods or services, is in reality a gratuitous payment of funds (i.e., a subsidy) to the recipient. *Turken*, 223 Ariz. at 347 ¶ 16, 350 ¶ 34. In such a case, a court must determine whether the government is receiving value that is proportionate to its expenditure. *Id.* ¶ 33. But in the case of a *loan*, a borrower is always expected to return 100 percent of the borrowed funds, so that the issue of “gross disproportionality” does not arise.

84. Therefore, the proper inquiry in determining whether the World View agreements constitute an unconstitutional *loan of public credit*, is whether the government provided World View with capital for its operations which World View was required to repay in the future, and whether the County could demand the return of its investment. *Valley Nat’l Bank*, 83 Ariz. at 294.

85. Here, the County effectively loaned World View \$14,000,000 of public funds by capitalizing World View’s startup costs. This loan violates the Gift Clause because the County borrowed funds on its own credit in order to aid a private corporation. Ariz. Const. art. IX § 7.

2. The Lease-Purchase Agreement violates the credit prohibition of the Gift Clause

86. The World View agreements unconstitutionally lend the County’s credit to World View. The County arranged to borrow \$15,185,000, using its own property as collateral, which it then spent to construct the Building and Launchpad for World View, with the expectation that World View would repay \$15,185,000 plus interest to the County. This is therefore a “pass-

through” loan, equivalent to a private borrower obtaining a loan from a bank, and then lending the borrowed funds to a third party, with the expectation that the third party would repay the borrower so that the borrower can repay the bank. The purpose of the World View transaction was to aid construction of facilities for the benefit of a private company.

87. The County contemplated the World View agreements as a loan of credit at the time that it formed the agreements. Its stated purpose was “front-ending the capitalization of the [World View] building and facilities,” and “financ[ing] this facility.” JPTS ¶ A.17. County Administrator Huckelberry stated that the agreement was intended to enable the County “to finance this project and enter into a lease/purchase agreement with World View over a 20-year period where we would recover our capital outlay with interest.”) *Id.* ¶ A.19. To front-end capitalization for a private party in anticipation of future repayment is by definition a loan of credit.

88. Although described as “rental” or “lease” payments, the payments World View must make to the County are tantamount to commercial mortgage payments, because World View obtains title to the Building for a nominal sum at the end of the term. JPTS ¶ A.5.

89. The County also said the monthly payments were not fixed at a market rate but were “designed to ensure that Pima County [will] get back its investment in the construction of the World View Building.” JPTS ¶ A.18. To set repayment rates in order to recoup an investment, instead of setting them at the market rental rate, is indicative of a loan rather than an actual rental transaction.

90. Thus the lease/rental payments are not true rental payments at all, but are

payments toward ownership—a form of layaway or rent-to-own transaction—which is by definition a loan of credit. *Cf. Reasor v. City of Norfolk*, 606 F. Supp. 788, 798 (E.D. Va. 1984) (describing how “credit can ... be disguised as a lease.”).

91. The County cannot demand the return of its money or of the World View Building prior to the completion of the “lease” period. During the term of the lease, the County, and not Worldview, must repay U.S. Bank principal and interest totaling \$19,444,134. JPTS ¶ A.16. (In the event of World View’s default, the County must still repay this amount to U.S. Bank.) Because the County cannot demand the return of the money it pays to U.S. Bank from Worldview during the duration of the agreements, its arrangement with World View is a loan or a gift of credit. *See Valley Nat’l Bank*, 83 Ariz. at 294.

92. This conclusion is by itself sufficient grounds for awarding judgment to Taxpayers.

B. Subsidies

93. In the case of direct expenditures of government funds, by contrast, the Court applies a two-part test (“the *Turken* test”) in determining whether an expenditure of public money satisfies the gift clause: “The expenditure will be upheld if (1) it has a public purpose, and (2) the consideration received by the government is not ‘grossly disproportionate’ to the amounts paid to the private entity.” *Cheatham v. DiCiccio*, 240 Ariz. 314, 318, ¶ 10 (2016) (quoting *Turken*, 223 Ariz. at 348 ¶ 22).

1. Public purpose

94. Under the “public purpose” prong of the *Turken* test, the government may not use

public funds “to foster or promote the purely private or personal interests of any individual.”

Town of Gila Bend v. Walled Lake Door Co., 107 Ariz. 545, 549 (1971).

95. Government aid to a private entity serves a public purpose only if the private entity’s “operations are ... subject to the control and supervision of public officials.” *Kromko v. Ariz. Bd. of Regents*, 149 Ariz. 319, 321 (1986).

96. A transaction may violate the Gift Clause “even though that transaction has surface indicia of public purpose. The reality of the transaction both in terms of purpose and consideration must be considered.” *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349 (1984).

97. An expenditure of public funds serves a public purpose if it is “*primarily* to satisfy the need, or contribute to the convenience, of the people ... at large,” and is “not ... undertaken merely *for gain or for private objects*,” or for “a private enterprise.” *City of Tombstone v. Macia*, 30 Ariz. 218, 224 (1926) (emphasis added).

98. A purpose that is truly public must “involv[e] an entire community” or be “[o]pen or available for all to use, share, or enjoy.” PUBLIC, *Black’s Law Dictionary* (11th ed. 2019).

99. As Arizona courts have set out, a public purpose is one that is “primarily [designed] to satisfy the need, or contribute to the convenience, of the people of the city at large.” *Tombstone*, 30 Ariz. at 224; *Turken*, 223 Ariz. at 346 ¶ 12. Traditional public functions satisfying the public purpose prong of the Gift Clause test include payment for the expenses of government officials injured in the line of duty, *Fairfield v. Huntington*, 23 Ariz. 528, 535 (1922); providing supplies for the governor’s public (but not private) use, *Proctor v. Hunt*, 43

Ariz. 198 (1934); providing water for fire-fighting purposes, *Walled Lake Door*, 107 Ariz. 545; providing for police services, *Cheatham*, 240 Ariz. at 320 ¶ 23, or supporting a hospital that is required to serve the public and is overseen by public officers, *S. Side Dist. Hosp. v. Hartman*, 62 Ariz. 67 (1944).

2. Proportionality

100. The “proportionality” prong of the *Turken* test requires that the County receive consideration in exchange for the public money or resources that it pays to a private entity. That consideration must be direct and bargained-for, and cannot be indirect, anticipated, abstract, or merely hoped-for. *Turken*, 223 Ariz. at 350 ¶ 33.

101. Also, the consideration that the County receives in exchange for its payment must be proportionate. *Id.* at 347 ¶ 18. This means the Court must compare the amount spent by the County with “the objective fair market value of what [World View] has promised to provide in return for [that] payment.” *Id.* at 350 ¶ 33. In other words, even if World View promised consideration to the County in exchange for the payment, the transaction can be an unconstitutional subsidy if the amount the County spends far exceeds the value of the consideration. *See Wistuber*, 141 Ariz. at 349 (the Clause “may be violated by a transaction even though that transaction has surface indicia of public purpose. The reality of the transaction both in terms of purpose and consideration must be considered.”).

102. The “analysis of adequacy of consideration for Gift Clause purposes focuses ... on the objective fair market value of what the private party has promised to provide in return for the public entity’s payment.” *Turken*, 223 Ariz. at 350 ¶ 33.

103. Indirect, speculative, “anticipated indirect benefits” such as general economic improvement or projected increases in tax revenue, do not count as consideration under the Gift Clause. *Id.*

104. Additionally, only what a party “obligates itself to do (or to forebear from doing) in return for the promise of the other contracting party” counts as consideration under the Gift Clause. *Id.* at 349 ¶ 31 (emphasis added).

3. Gifts of public funds

105. Separately from its prohibition on gifts or loans of credit, the Gift Clause also forbids the County from giving public funds, by subsidy or otherwise, to World View.

106. The World View agreements create four different subsidies: (1) the option whereby World View may purchase a \$14 million building for \$10 at the end of the lease period equates to a \$13,999,990 subsidy; (2) the below-market rent charged to World View creates a \$2,275,000 “rent subsidy”; (3) extending of the GPLET tax benefit—whereby World View is exempted from paying \$4,000,000 in property taxes—creates a \$4,000,000 subsidy; and (4) World View’s exclusive right to use and control the Launchpad for free equates to a \$2,000,000 subsidy.

107. In each of these four instances, the Court must determine whether the transaction is for a public purpose, and second whether the expenditure of funds or resources is proportionate to the value received in exchange for that expenditure. *Cheatham*, 240 Ariz. at 318 ¶ 10.

(a) Public Purpose

108. Courts must ensure that transactions challenged under the Gift Clause are genuinely undertaken for public purposes and are not “in aid of enterprises apparently devoted to quasi public purposes, but actually engaged in private business.” *Turken*, 223 Ariz. at 346 ¶ 10 (citation omitted).

109. Expenditures for traditional public functions such as police and fire services are essentially public and serve a public purpose (see above, ¶ 99). By contrast, expenditures to construct, e.g., a private road does not serve a public purpose. *Graham Cnty. v. Dowell*, 50 Ariz. 221 (1937).

110. Facilities for the housing of a private, for-profit company in operating a business that provides private, for-profit rides for persons or property on high-altitude balloons is not a traditional function of government.

111. World View’s operations are not subject to the control and supervision of public officials.

112. During (and after) the period of the lease, World View operates the Building and the Launchpad at its discretion and for its private benefit. World View is not obligated to permit the public access to, or use, of the Building or the Launchpad. At the end of the lease period, World View obtains title to the Building for a nominal payment. Therefore, neither the Building nor the Launchpad “primarily...satisf[ies] the need, or contribute[s] to the convenience, of the people of [Pima County].” *Tombstone*, 30 Ariz. at 224.

113. The Launchpad is not a public facility, because World View is allowed to deny

any other party use of the Launchpad when it considers doing so “commercially reasonable,” and World View is also permitted to charge a fee for any private party it does allow to use the Launchpad.

114. The County’s expenditures to build the Building and Launchpad for World View are the equivalent of “land purchased to aid in a private enterprise in holding annual fairs” or “assisting a company to embark in the manufacture of linen fabrics,” which have been held violative of the Gift Clause. *Id.*, 30 Ariz. at 222-23. These expenditures do not serve a public purpose under the Gift Clause.

(b) Consideration

115. The World View agreements also violate the proportionality of consideration requirement of the Gift Clause.

116. When analyzing adequacy of consideration under the Gift Clause, the Court “focus[es] ... on the objective fair market value of what the private party has promised to provide in return for the public entity’s payment.” *Turken*, 223 Ariz. at 350 ¶ 33.

117. “When government payment is grossly disproportionate to what is received in return, the payment violates the Gift Clause.” *Id.*, 223 Ariz. at 348 ¶ 22. This does not mean that a disparity that is less than “gross” is permissible under the Gift Clause. Rather, a gratuitous payment of public funds to a private entity is “grossly disproportionate” and violates the Constitution.

118. A payment of public funds for which the public does not receive an equivalent fair-market value in return is unconstitutional under the Gift Clause. *City of Tempe v. Pilot*

Props., Inc., 22 Ariz. App. 356, 362-63 (1974).

(c) The Four Subsidies

119. The World View agreements create four separate forms of subsidy to World View: the \$10 Option to purchase the entire building, the Rent Subsidy, the Launchpad subsidy, and the GPLET Tax Benefit.

(i) The \$10 Option

120. The value of World View's option to purchase a Building valued at \$14,000,000 for the nominal fee of \$10 at the end of the lease is a significant subsidy to World View.

121. At the end of the lease period, the Building will be worth approximately \$14,000,000 and have 30 years of usable life left. World View can purchase the Building, and the County is contractually obligated to convey it to World View, at the end of the lease for \$10.

122. Thus, the benefit conveyed by the County to World View is a \$14,000,000 building for which the County is receiving a nominal option payment of \$10.

123. The \$10 option for the \$14,000,000 building is grossly disproportionate and violates the gift clause.

(ii) The Rent Subsidy

124. The payments World View makes to the County are below-market value. As explained above, World View must pay the County monthly payments that, discounted to present value, equate to \$11,725,000, in exchange for a building that is worth \$14,000,000.

125. The benefit conferred by the County on World View (\$14,000,000) and the benefit obtained by the County from World View (\$11,725,000) are disproportionate.

126. Therefore the below-market rent payments World View pays constitute a subsidy to World View of \$2,275,000.

(iii) GPLET tax benefit

127. The Improved Parcel, which World View operates and controls, is exempt from property taxes under the GPLET.

128. The agreements between the County and World View were designed for the purpose of extending this GPLET tax benefit to World View, which was expressly bargained for.

129. The amount of the benefit to World View is a waiver of approximately \$200,000 per year in both *ad valorem* property taxes and GPLET (that is, below what World View would have been required to pay but for the tax exemptions, JPTS ¶ A.29) over the 20-year lifetime of the agreements.

130. World View pays the County nothing in exchange for this benefit, over and above the rental payments already accounted for above.

131. The benefit conveyed by the County to World View (in the form of an approximately \$200,000/yr. tax reduction) is grossly disproportionate to the benefit conveyed by World View to the County in exchange (\$0).

132. Therefore the GPLET tax benefit constitutes a subsidy to World View of approximately \$4,000,000.

(iv) The Launchpad subsidy

133. Construction of the Launchpad is an expenditure of public funds that cost the

County \$2,179,369. The land cost \$256,000. The total cost to the County for the Launchpad is \$2,435,369.

134. World View receives full and exclusive use of the Launchpad, and is not required to allow the public to use it. The agreements state that World View shall make the Launchpad available to other users, but only on “commercially reasonable” terms and only for a fee. The Launchpad is a special use improvement tailor-made for World View, there is no market for balloon launch pads, and World View alone has used the Launchpad since its construction. Therefore, the Launchpad is not a truly public facility. World View is, however, obligated to maintain the Launchpad, which it claims costs \$12,800 annually. JPTS ¶ A.10.

135. Because the County expended \$2,435,369 in public funds for which it receives no return on property that has no market value, the Launchpad is a subsidy to World View of \$2,435,369.

DATED this ____ day of _____, 2020.

Honorable Paul E. Tang
Judge of the Superior Court