COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DARCIE SCHIRES; ANDREW AKERS; and GARY WHITMAN, Appellants, v. CATHY CARLAT, in her official capacity as Mayor of the City of Peoria; VICKI HUNT, in her official capacity as City of Peoria Councilmember for the Acacia District; CARLO LEONE, in his official capacity as City of Peoria Councilmember for the Pine District; MICHAEL FINN, in his official capacity as Councilmember for the City of Peoria for the Palo Verde District; JON EDWARDS, in his official capacity as Councilmember for the City of Peoria for the Willow District; BRIDGET BINSBACHER, in her official capacity as Councilmember for the City of Peoria for the Mesquite District; and BILL PATENA, in his official capacity as Councilmember for the City of Peoria for the Ironwood District; CITY OF PEORIA, a municipal corporation of the State of Arizona, Appellees.	No. 1 CA-CV 18-0379 Maricopa County Superior Court No. CV 2016-013699

APPELLANTS' OPENING BRIEF

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Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Constitutional Provisions

INTRODUCTION

The City of Peoria ("City") has agreed to pay Huntington University ("Huntington") $1.75 million to operate its business in the City under the "Huntington Agreement." It will pay Arrowhead Equities LLC ("Arrowhead") $737,596 to renovate its own property for Huntington's use under the "Arrowhead Agreement." The City hopes Huntington and Arrowhead will create "economic development," which is the purpose of the contracts, but the contracts do not require Huntington and Arrowhead to do so. The contracts merely require Huntington and Arrowhead to operate their own businesses.

Appellants Darcie Schires, Andrew Akers, and Gary Whitman ("Taxpayers") challenge the City's payments to Huntington and Arrowhead as unconstitutional gifts under the Arizona Constitution's "Gift Clause", which provides that "[n]either the state, nor any county, city, town, municipality, or other subdivision of the state *shall ever*…make any donation or grant, by subsidy *or otherwise*, to any individual, association, or corporation." ARIZ. CONST. art. IX, § 7.[1] An expenditure of taxpayer money violates the Gift Clause if it fails to serve a public purpose or the government does not receive adequate value in return for the expenditure. *Turken v. Gordon*, 223 Ariz. 342, 348, ¶¶ 21–22 (2010). The City's

[1] Unless otherwise noted, internal quotations and citations have been omitted and emphasis has been added for all citations in this brief.

payments to Huntington and Arrowhead violate the Gift Clause because economic development in *this* context does not serve a public purpose, and the City does not receive adequate value from two private businesses operating themselves.

STATEMENT OF THE CASE

Taxpayers filed this action in Maricopa County Superior Court on October 12, 2016, challenging the City's payments to Huntington and Arrowhead as unconstitutional gifts of public funds under the Gift Clause and seeking declaratory and injunctive relief plus costs and attorney fees. IR.1. Both parties filed motions for summary judgment. Following oral argument on April 26, 2018, the trial court granted the City's motion for summary judgment and denied Plaintiffs' motion, ruling that the City's payments to Huntington and Arrowhead do not violate the Gift Clause. IR.79. The trial court entered final judgment on May 9, 2018. IR.81. Taxpayers then filed this timely appeal, and the Court has jurisdiction pursuant to A.R.S. § 12-2101.

STATEMENT OF FACTS

Huntington is a private, Indiana-based university that "exists to carry out the mission of Christ in higher education," integrating prayer into its classes and requiring all full-time faculty and staff to sign a statement of faith. IR.64 ¶¶ 20–26. At its Peoria campus, Huntington offers only one field of study, Digital Media Arts, taught through the "lens of the Christian worldview." *Id.* at ¶¶ 15–16, 23.

According to the City's consultant, the market for higher education in Digital Media Arts is a "niche market." *Id.* ¶ 17. Thus, Huntington's narrow focus makes it more likely it will enroll a majority of its students from outside of Peoria. *Id.* ¶ 18.

As a private college, moreover, Huntington is not generally open to Peoria residents—unlike a public park or library. *Id.* ¶¶ 12–14. And Peoria residents do not receive admission preference or reduced tuition. *Id.* If they wish to use the campus, Peoria residents must apply, be accepted, enroll, and pay tuition like anyone else, or pay Huntington to lease space, or request Huntington's permission to otherwise use the property, but even then there is no guarantee Huntington will provide them access. *Id.* And because Huntington is privately owned, Peoria officials exercise no control over its operations; rather, Huntington's Board of Trustees in Indiana makes decisions for the Peoria campus. *Id.* ¶¶ 10–11, 27–29.

On July 7, 2015, the City executed a contract with Huntington providing that, in exchange for City payments totaling up to $1.875 million over three years, Huntington will operate its business, as measured by three performance thresholds. These thresholds are the only promises that are "directly tied" to the payments. *Id.* ¶ 30; IR.44 ¶¶ 17–20; IR.65 at ep.7–8. *See also* IR.53 at 3–12.

In exchange for $900,000 under the first performance threshold, Huntington had to appoint leadership at the Peoria campus, obtain approval for its degree programs, obtain federal approval for student financial aid, submit a marketing and

enrollment plan to the City, submit a list of undergraduate programs to the City, enter a seven-year lease for a facility in Peoria, submit a faculty and staff plan with enrollment estimates to the City, execute an articulation agreement with the Maricopa County Community College District, accept students for the 2016–2017 academic year, and submit an accounting of its expenses to the City. IR.64 ¶ 33; IR.44 ¶¶ 21–22.

In exchange for up to $550,000 under the second performance threshold, Huntington had to offer coursework to 100 students for the 2017–2018 academic year and submit an accounting of its expenses to the City. IR.64 ¶ 38; IR.44 ¶¶ 23–24.

In exchange for up to $425,000 for the third performance threshold, Huntington must offer coursework to 150 students for the 2018–2019 academic year and submit an accounting of its expenses to the City. IR.64 ¶ 42; IR.44 ¶¶ 26–27. Under the second and third thresholds, Huntington will receive a *pro rata* amount of the available funds if it enrolls fewer than 100 or 150 students, respectively. IR.65 at ep.10–11.

The Huntington Agreement also provides that Huntington will participate in undefined economic development activities with the City and contribute $2.5 million dollars to its own campus. IR.64 ¶¶ 59, 68–69; IR.44 ¶ 30. However, unlike the performance thresholds, these requirements are *not* "directly tied" to the

"financial incentive package." IR.65 at ep.7; Apr. 26, 2018 Reporter's Transcript of Proceedings, Motions for Summary Judgment ("MSJ Tr.") 16:24–17:5. In other words, Huntington will not receive a financial incentive for participating in activities with the City or investing in its business. Instead, the $1.875 million incentive is an exchange for Huntington's operation of its own business, as measured by the performance thresholds.

In December 2015, Huntington leased a building from Arrowhead, on property located in one of Peoria's "greatest spots" for "vibrancy and activity," to use as its campus. IR.64 ¶ 139; IR.44 ¶ 37. Huntington's landlord, Arrowhead, is a single-purpose entity created solely for the acquisition and ownership of the Huntington campus; Arrowhead testified that the purpose of these acquisitions is to "make money" for its private investors. IR.64 ¶¶ 116–119, 136. Arrowhead also testified that its parent company, Glenwood Development, typically has no trouble raising private funds for its commercial real estate projects, which can and do succeed without receiving money from the City. *Id.* ¶¶ 137–138. Nevertheless, on March 15, 2016, the City executed a contract with Arrowhead providing that, in exchange for payments totaling $737,596, Arrowhead will complete "Tenant Improvements," "Program Criteria," and "Performance Criteria." IR.67 at ep.109–10; IR.64 ¶ 122. *See also* IR.53 at 12–16.

For Tenant Improvements, Arrowhead had to renovate its own property (a former salon and spa) so that Huntington could "open for business" no later than October 15, 2016. IR.67 at ep.109; IR.64 ¶¶ 122–123. The Program Criteria required Arrowhead to submit proof of its expenditures, to complete tenant improvements in accordance with approved plans and specifications, to pass fire and building inspections, and to make its property ready for Huntington. IR.64 ¶ 124. The ongoing Performance Criteria require Arrowhead to comply with applicable laws, to comply with applicable building, fire, and safety requirements and pass corresponding inspections, to comply with its lease to Huntington, and to comply with its contract with the City. *Id.* ¶ 125.

Before executing either contract, the City hired a consultant to estimate the fiscal and economic impact of the Huntington deal. IR.44 ¶ 46. "[F]iscal impact" is an estimate of tax revenue the City might receive into its coffers. IR.55 at ep.5 ¶¶ 15–16. IR.67 at ep.36 at 71:16–21. "[E]conomic impact" is a "prediction of changes in the local economy." IR.55 at ep.4 ¶ 11. The consultant predicted a $15.7 million economic impact within the greater region and a fiscal impact of $206,630 in Peoria. IR.44 ¶ 49; IR.64 ¶ 77.

During the course of litigation, the City and Taxpayers consulted their own respective experts to determine the monetary value of the consideration the City receives under each contract. IR.55 at ep.3 ¶¶ 2–4; IR.48 at ep.6 ¶¶ 1–4. As a

matter of law and for Gift Clause purposes, a contract is valued by the goods, materials, property, and services bargained for *on the face of the contract*. *Turken*, 223 Ariz. at 348 ¶ 22. *See also Yeazell v. Copins*, 98 Ariz. 109, 112 (1965). Yet the City's expert witness opined that the best way to measure the value of both contracts to the City is by estimating the overall economic impact of Huntington's operation, which he predicted to be $11.3 million within the City (rather than $15.7 within the region). IR.48 at ep.8 ¶ 15; IR.55 at ep.3 ¶ 7. However, the City's expert testified that this "economic impact" is an estimate and cannot be guaranteed. IR.67 at ep.33 at 47:17–49:25. Moreover, as a factual matter, neither contract *requires* Huntington or Arrowhead to create economic impact within the City. IR.65 at ep.6–19; IR.67 at ep.58–95.

This is why Taxpayers' expert did not use economic impact to measure the value of the contracts. IR.55 at ep.5 ¶¶ 14, 17. Instead, the *fiscal* impact—$206,630—is a better estimate of value because it represents tax revenue the City might tangibly receive into its coffers because of Huntington's operation. *Id.* at ep.5–6 ¶¶ 16–18. Fiscal impact is therefore *the legally required* valuation method. However, neither contract requires Huntington or Arrowhead to generate *any* tax revenue for the City. IR.65 at ep.6–19; IR.67 at ep.58–95. Thus, Taxpayers' expert measured the value of both contracts as zero because "Huntington and Arrowhead

have not *promised* to give the City any direct economic return." IR.55 at ep.6 ¶¶ 21–22.[2]

STATEMENT OF THE ISSUES

1. Is paying private businesses in the hope of stimulating "economic development" a valid public purpose under the Gift Clause when economic development does not primarily, tangibly, and directly benefit the public and is not a traditional government function?
2. Is a private business's promise to operate in the City valid consideration under the Gift Clause when the City does not otherwise receive any direct and tangible value—including economic impact—from the promise?
3. Is a private business's promise to renovate its own property valid consideration under the Gift Clause when the City does not otherwise receive any direct and tangible value—including economic impact—from the promise?

STANDARD OF REVIEW

The court "determine[s] *de novo* whether…the trial court properly applied the law" and "view[s] the facts and inferences drawn from those facts in the light

[2] It is a question of law whether Huntington's operation of its own business and Arrowhead's renovation of its own property are valuable consideration under the Gift Clause.

most favorable to the party against whom judgment was entered." *Korwin v. Cotton*, 234 Ariz. 549, 554 ¶ 8 (App. 2014). "[T]he interpretation and application of constitutional provisions [is] *de novo*." *Cheatham v. DiCiccio*, 240 Ariz. 314, 318 ¶ 8 (2016).

AN INTRODUCTION TO THE GIFT CLAUSE

In the nineteenth century, government officials copiously subsidized railroads because they believed railroads were "*critical* for economic development." Matthew Schaefer, *State Investment Attraction Subsidy Wars Resulting From a Prisoner's Dilemma: The Inadequacy of State Constitutional Solutions and the Appropriateness of a Federal Legislative Response,* 28 N.M. L. REV. 303, 312 (1998). They also subsidized "thousands of corporations, including banks, insurance companies, and manufacturing firms." Brian Libgober, *The Death of Public Purpose (And How to Prevent It)*, Fellows Discussion Paper No. 63, HARV. L. SCH. at 8 (2016). In the Territory of Arizona specifically, there was "a long history of direct involvement by [government] officials" in "railroad[s]…and other private ventures." John D. Leshy, *The Making of the Arizona Constitution*, 20 ARIZ. ST. L.J. 1, 13 (1988). But the pursuit of economic development with public aid eventually resulted in waste, corruption, overbuilding, failure to generate projected revenues, and economic crises. David E. Pinsky, *State Constitutional Limitations on Public Industrial Financing: An Historical and Economic*

Approach, 111 U. PA. L. REV. 265, 278 (1963); Richard Briffault, *Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 912 (2003); Libgober, *supra*.

Consequently, many states amended their constitutions to include public-aid limitations because the people believed "government should not be engaged in economic pursuit of *any* kind." Libgober, *supra*, at 14. In Arizona, the framers wrote the Gift Clause to change the "thrust of taxation" away "from a tool of capital enhancement and attraction." Leshy, *supra*, at 79. The Clause provides that "[n]either the state, nor any county, city, town, municipality, or other subdivision of the state *shall ever*…make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation." ARIZ. CONST. art. IX, § 7. This prohibition "represents the reaction of public opinion to the orgies of extravagant dissipation of public funds…in aid of the construction of railways, canals, and other like undertakings," and "it was designed *primarily* to prevent the use of public funds…in aid of enterprises apparently devoted to *quasi* public purposes, but actually engaged in private business." *Turken*, 223 Ariz. at 346 ¶ 10.

Although the text of the Clause, in simple terms, bans government donations and grants in any form ("by subsidy *or otherwise*"), courts often struggled to determine whether a particular expenditure constituted a forbidden gift. So the Arizona Supreme Court crafted a two-prong test to determine whether a challenged

government expenditure violates the Gift Clause. An expenditure is unconstitutional if (1) it fails to serve a public purpose, and (2) the consideration the government receives in exchange for the expenditure is "grossly disproportionate to the amounts paid to the private entity." *Cheatham*, 240 Ariz. at 318 ¶¶ 9–10. An expenditure violates the Gift Clause if it fails either prong of the test. Here, the challenged expenditures fail both prongs.

ARGUMENT

I. THE HUNTINGTON AND ARROWHEAD EXPENDITURES ARE UNCONSTITUTIONAL BECAUSE PAYING PRIVATE BUSINESSES TO OPERATE THEMSELVES IN THE HOPE OF STIMULATING "ECONOMIC DEVELOPMENT" IS NOT A VALID PUBLIC PURPOSE UNDER THE GIFT CLAUSE

The City argued below that the ultimate purpose of the Huntington and Arrowhead expenditures is "economic development." IR.43 at 10; IR.59 at 9; IR.61 at 8–9. However, the trial court did not determine whether economic development serves a public purpose. Instead, it deferred to the city council's determination that the expenditures serve a public purpose and concluded, without analysis, that the council did not abuse its discretion in making that determination. IR.79 at 6.

The trial court erred in its conclusion for two reasons. First, regardless of any deference that may be owed to government officials, "determining whether governmental expenditures serve a public purpose is ultimately the province of the

judiciary." *Turken*, 223 Ariz. at 346 ¶ 14. *See also Ariz. Ctr. For Law In Pub. Interest v. Hassell*, 172 Ariz. 356, 367, 369 (App. 1991) ("[R]eviewing court must be independently satisfied" that an expenditure satisfies both prongs of the Gift Clause and "must not merely rubber-stamp the [city council's] decision.").

Second, the Gift Clause test is not *whether the city council abused its discretion* in determining the expenditures serve a public purpose. The test is *whether the expenditures* actually *serve a public purpose*. Although two of the most recent Gift Clause cases note that an expenditure lacks a public purpose when the government abuses its discretion, neither case conducted an *abuse of discretion* analysis.[3] Instead, the Supreme Court in both cases ultimately performed a public-purpose analysis by comparing the expenditures at issue in those cases to examples in Gift Clause precedent. *Turken*, 223 Ariz. at 346 ¶¶ 12–13 and 348–49 ¶¶ 25–27; *Cheatham*, 240 Ariz. at 320 ¶ 22.

Under Gift Clause precedent, paying private businesses to operate themselves in the hope of stimulating economic development does not serve a public purpose because economic development, in this context, does not primarily,

[3] In fact, no Gift Clause case has ever performed an abuse of discretion analysis to determine whether an expenditure lacks a public purpose. Instead, an expenditure lacks a public purpose if it does not benefit the public. That may *also* be an abuse of discretion, but an expenditure does not lack a public purpose *because* it is an abuse of discretion.

tangibly, and directly benefit the public, nor is it a traditional government function. *See City of Tombstone v. Macia*, 30 Ariz. 218, 222–24 (1926).

A. A public purpose primarily, tangibly, and directly benefits the public at large and involves a traditional government function

Under Gift Clause precedent, a public purpose exists when the government spends money on something that primarily, tangibly, and directly benefits the public at large and involves a traditional government function. And although "[p]ublic purpose is a phrase perhaps incapable of definition, and better elucidated by examples," the "true test" for public purpose is "that the work should be *essentially* public, and…the purpose must be *primarily* to satisfy the need, or contribute to the convenience, of the people of the city at large." *Tombstone*, 30 Ariz. at 222, 224.[4] *Tombstone* is the "seminal Tax Clause case…approvingly cited in subsequent Gift Clause cases" for its elucidation-by-example method, and it establishes the framework for public-public purpose analysis under the Gift Clause. *Turken*, 223 Ariz. at 346 ¶ 12.

In *Tombstone*, the court held that "the manufacture and sale of ice *by a city* to its inhabitants," 30 Ariz. at 225, served a public purpose because in 1926 ice was a "necessity" in the "torrid climate" of Arizona and would be "offer[ed] to the

[4] Examples of public purpose include "maintenance of an adequate police department," "opening, maintaining, and paving a system of public streets," and "providing a system for the disposal of sewage." *Id.* at 222.

public without discrimination." *Id.* at 228–29. In other words, everyone in town—the *public*—would have direct access to the ice, a tangible benefit provided by the city itself and therefore a traditional government function. This makes sense in light of the actual meaning of the word public: "1. Of, relating to, or involving *an entire community*, state, or country. 2. Open or *available for all* to use, share, or enjoy." *Public*, BLACK'S LAW DICTIONARY (10th ed. 2014).

A public purpose, therefore, is not a *private* purpose. A private purpose is providing aid to private businesses to operate themselves for private profit and is equivalent to purchasing land "to aid a private enterprise in holding annual fairs" or "assisting a company to embark in the manufacture of linen fabrics," which are "*clearly* recognized as not belonging to [the public-purpose] category." *Tombstone*, 30 Ariz. at 222–23.

Consequently, the court below erred when it deferred to the City's assertion that the Huntington and Arrowhead expenditures serve a valid public purpose simply because "[b]enefitting a single company does not violate the Gift Clause." IR.79 at 6. In reaching that conclusion, the court cited *Town of Gila Bend v. Walled Lake Door Co.*, 107 Ariz. 545 (1971). In that case, however, the town promised to construct a water line from a water tank to a private company for the purpose of *fire protection*. *Id.* at 547. The company's plant had recently burned to the ground, and it refused to rebuild unless the town provided water. *Id.*

The court concluded that supplying water "for purposes of preserving and protecting lives and property is a public purpose" because it "provides a *direct* benefit to the *public at large*." *Id.* at 550. This is because water is a tangible public benefit provided by the town itself and therefore a traditional government function even though "an individual may *indirectly benefit* from [the] public expenditure." *Id.* Also, "ownership and control over the water line [were] to remain in the Town." *Id.* at 549. Thus, the purpose of the expenditure in *Walled Lake Door* was public despite—not *because*—a single company would "*indirectly benefit* from [the] public expenditure." *Id.* at 550. Supplying water for fire protection is "*essentially public,* and for the general good of *all the inhabitants* of the city." *Tombstone*, 30 Ariz. at 224.

This case is the exact opposite. Here, the expenditures directly and essentially benefit Huntington and Arrowhead, and the City merely anticipates that it will *indirectly* benefit the public. Ownership and control of the property and money vest entirely in Huntington and Arrowhead, not the City. And paying private businesses to operate themselves is not a traditional government function, as explained below. In short, *Walled Lake Door* stands for the proposition that a *public* expenditure does not become private merely because a private company indirectly benefits from the expenditure. In contrast, this case is about whether an

expenditure becomes public merely because a private company, operating its private business, might indirectly benefit the public.

B. Paying private businesses to operate themselves in the hope of stimulating economic development is not a valid public purpose because economic development does not primarily, tangibly, and directly benefit the public at large and does not involve a traditional government function

Although the City is correct that Arizona courts have found a public purpose "in a wide variety of contexts," IR.59 at 8, no Arizona court has ever held that secondary, intangible, and indirect benefits—such as economic development—satisfy the public-purpose prong of the Gift Clause. On the contrary, economic development is notably different from any other purpose courts have deemed "public" under the Gift Clause. In fact, the City's "modern" examples of court-approved public purposes support *Taxpayers*' case by distinguishing truly public purposes from the private purpose of paying Huntington and Arrowhead in the hope that their businesses will stimulate economic development. *See id.* at 8–9 (citing *Cheatham*, 240 Ariz. at 320 ¶ 22–23; *Turken*, 223 Ariz. at 348; *City of Glendale v. White*, 67 Ariz. 231, 240 (1948); *Humphrey v. City of Phoenix*, 55 Ariz. 374 (1940); and *Walled Lake Door Co.*, 107 Ariz. at 549–50).

For example, in *Cheatham*, the Supreme Court found that a city's employment agreement with police officers, "in its entirety," served a public purpose because it "procure[d] police services *for the City*" (*i.e.*, the public at

large) despite also providing certain private benefits to a police union. 240 Ariz. at 320 ¶ 23 & 324 ¶ 43. Likewise, in *Turken*, a city's agreement with a private developer to secure free parking for the *public* served a public purpose. 223 Ariz. at 348 ¶ 23. In *White*, the city's membership in a private municipal league devoted to improving municipal administration served the public purpose of "improving the quality of service…[to] its own taxpayers." 67 Ariz. at 237, 240. In *Humphrey*, slum clearance to eradicate crime and disease served a public purpose. 55 Ariz. at 387. And in *Walled Lake Door*, supplying water to preserve and protect lives and property served a public purpose and "provide[d] a direct benefit to the public at large." 107 Ariz. at 550.

Securing police services and free public parking, improving taxpayer service, eradicating crime and disease, and providing water for fire protection all primarily, tangibly, and directly benefit the public at large. For example, the public is the *primary* beneficiary of police services, free parking, and fire protection. And police officers provide a *tangible* service to the public (*e.g.*, responding when any member of the public calls for help); the same is true for fire protection. Free parking spaces are also tangible. Finally, the public can *directly* access police services and fire protection with a phone call or a visit to the police or fire station, and all members of the public may directly access free parking spaces.

In contrast, paying Huntington and Arrowhead to operate themselves in the hope they will stimulate economic development does not primarily, tangibly and directly benefit the public. Instead, it *primarily* benefits Huntington and Arrowhead, which receive the payments, whereas the public receives nothing from their operation (*e.g.*, free or reduced tuition for a general education, use of a public facility, or access to a universal service like fire protection). IR.55 at ep.2 ¶ 13, 22; IR.65 at ep.6–19; IR.67 at ep.58–95. Likewise, paying Huntington and Arrowhead to operate themselves in the hope they will stimulate economic development *tangibly* benefits Huntington and Arrowhead, which receive taxpayer dollars, whereas the public is not guaranteed to receive even *intangible* benefits from the deal. IR.55 at ep.5–6 ¶ 13, 22.

Unlike police services, fire protection, and free parking, economic development is not a tangible public benefit. The City argues that economic development is quantifiable through "economic impact." IR.43 at 11–12; IR.59 at 14–15; IR.61 at 2–4. However, economic impact is merely a "prediction of changes in the local economy." IR.55 at ep.4 ¶ 11. When predicting this anticipated change (*i.e.*, economic development), the City's consultant for the Huntington project stated that his "estimates and assumptions are subject to uncertainty and variation" such that he could "not represent them as results that will be achieved" because "[s]ome assumptions *inevitably will not materialize* and unanticipated

events and circumstances may occur; therefore, the *actual results achieved may vary materially* from the *forecasted* results." IR.66 at ep.19. The City's expert witness agreed with these statements and testified that economic impact is an estimate and cannot be guaranteed. IR.67 at ep.33 at 47:17–49:25. An uncertain estimate that predicts a change in the economy that may never materialize is not a tangible public benefit. (This is addressed more fully in Part II.B. below.)

Finally, paying Huntington and Arrowhead to operate themselves in the hope they will stimulate economic development *directly* benefits Huntington and Arrowhead, which receive the money, whereas the public may only receive *indirect* benefits from the deal. Unlike police services, fire protection, and free public parking, economic development is not directly accessible or "available for all *to use*, *share*, or *enjoy*." *Public*, BLACK'S LAW DICTIONARY (10th ed. 2014). Economic development is a "process in which an economy grows or changes and becomes more advanced." CAMBRIDGE DICTIONARY.[5] Of course, *all* successful businesses presumably contribute to this "process" in *some* manner. Coffee shops, fast-food restaurants, and massage parlors all presumably help the economy grow—*without* receiving public aid. Thus, if the Court construes public purpose this broadly, then paying a Starbucks or a McDonald's to operate would serve a

[5] http://dictionary.cambridge.org/us/dictionary/english/economic-development

public purpose. Yet the framers rejected this very practice, banning "any donation or grant, by subsidy or otherwise," to private businesses and railroads even though the latter were believed to be critical for economic development. *Turken*, 223 Ariz. at 346 ¶ 10; Schaefer, *supra*, at 312.

Arizona's Gift Clause was specifically written to ban public aid to private businesses, especially for the purpose of "economic development." It prohibits *all* donative forms of "capital enhancement and attraction," Leshy, *supra*, at 79, by *any* government body in Arizona to *any* private party for *any* purpose, including "any donation or grant, by *subsidy* or otherwise." ARIZ. CONST. art. IX, § 7. The second edition of *Black's Law Dictionary*, published the same year the Arizona Constitution was written, defines "subsidy" as "[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."[6] *Subsidy*, BLACK'S LAW DICTIONARY 1117 (2d ed. 1910). Thus, the framers intentionally crafted a provision that would ban *all* manner of government *aid* to private

[6] Today's definition also comports with this understanding. *See City of Tempe v. Pilot Properties, Inc.*, 22 Ariz. App. 356 at 362 (1974) ("Subsidy has been defined 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.")

entities—even those with "great potential for public benefit." Nicholas J. Houpt, *Shopping for State Constitutions: Gift Clauses as Obstacles to State Encouragement of Carbon Sequestration*, 36 COLUM. J. ENVT'L. L. 359, 381 (2011). It "was designed *primarily* to prevent the use of public funds…in aid of enterprises apparently devoted to *quasi* public purposes, but actually engaged in private business." *Turken*, 223 Ariz. at 346 ¶ 10. It is undisputed that Huntington and Arrowhead are engaged in private business and that the City is paying them to engage in their own private business. IR.64 ¶¶ 20–26 & 116–119; IR.65 at ep.6–19; IR.67 at ep.58–95. Therefore, the Huntington and Arrowhead expenditures do not serve a *public* purpose.

C. A.R.S. § 9-500.11 does not override the constitutional ban on subsidies

The City nevertheless argues that the Huntington and Arrowhead expenditures should be exempt from the Gift Clause because A.R.S. § 9-500.11(A)[7] states that "a city or town, may appropriate and spend public monies for and in connection with economic development activities." IR.43 at 10; IR.59 at 9–10; IR.61 at 9–10; MSJ Tr. 21:15–22:8. But "statutory compliance does not

[7] There are two versions of the statute. The City and Taxpayers refer to the shorter version, entitled "Expenditures for Economic Development; Definitions," because the other version does not apply to this case.

automatically establish constitutional compliance." *Turken*, 223 Ariz. at 351 ¶ 41. And a statute can never supplant the Gift Clause.

Furthermore, the City can encourage economic development under A.R.S. § 9-500.11 without paying businesses to operate themselves. For example, the City admitted that a faster permit process for all businesses would develop the economy. IR.66 at ep.3–4 at 17:21–20:19. Currently, however, most businesses in Peoria must pay for this privilege, whereas "targeted industries" like Huntington and Arrowhead receive priority permitting for free. *Id*. at ep.4 at 18:7–20. The City could "appropriate and spend money" under A.R.S. § 9-500.11 to develop a faster permit process for *all* businesses, which would contribute to economic development via a traditional government function (streamlining government services). But pursuing economic development by paying private businesses to do nothing more than operate themselves is not a traditional government function, nor does it serve the public.

This is why courts must look beyond the "surface indicia of public purpose" and consider the "reality of the transaction." *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349 (1984). According to the City, the purpose of the Huntington and Arrowhead expenditures is economic development. IR.43 at 10; IR.59 at 9; IR.61 at 8–9. In reality, however, the City is making payments "in aid of the promoters of [an] enterprise…in which the government desires to

participate" *in the hope* that it will intangibly "be of benefit to the public." *Subsidy*, BLACK'S LAW DICTIONARY (2d ed. 1910). In reality, the Huntington and Arrowhead expenditures do not provide tangible benefits to the public at large, nor do they even guarantee *indirect* benefits—as the City learned when it entered a similar arrangement with Trine University, which closed its doors in 2017 after failing to create the economic impact the City had anticipated. IR.55 at ep.4 ¶ 12. But regardless of the ultimate failure or success of the City's bets on economic development, like nineteenth-century bets on railroads and other private ventures, the Gift Clause was written to prohibit the pursuit of economic development with public aid and to change the "thrust of taxation" away "from a tool of capital enhancement and attraction." Leshy, *supra*, at 79. And the Court must read the Gift Clause in this context. *Day v. Buckeye Water Conservation & Drainage Dist.*, 28 Ariz. 466, 473 (1925).

In summary, paying private businesses in an attempt to stimulate economic development does not serve a public purpose *under the Gift Clause* because it does not primarily, tangibly, and directly benefit the public at large and is not a traditional government function. Because the expenditures fail the public-purpose prong of the Gift Clause test, Taxpayers were entitled to summary judgment on their claims, and this Court should reverse the trial court with instructions to enter judgment for Plaintiffs.

II. THE HUNTINGTON EXPENDITURE IS AN UNCONSTITUTIONAL DONATION, BY SUBSIDY, BECAUSE THE CITY DOES NOT RECEIVE ADEQUATE CONSIDERATION UNDER THE HUNTINGTON AGREEMENT

The Huntington expenditure also fails the consideration prong of the Gift Clause test because the City does not receive adequate consideration under the Huntington Agreement. "The [City] may not give away public property or funds; it must receive a *quid pro quo* which, simply stated, means that it can enter into contracts [with private parties] for goods, materials, property and services." *Yeazell*, 98 Ariz. at 112. And "the most objective and reliable way to determine whether [a] private party has received a forbidden subsidy is to compare the public expenditure to what the government receives under the contract." *Turken*, 223 Ariz. at 348 ¶ 22. In addition, "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." *Id.* at 350 ¶ 33. Courts also examine the "reality of the transaction" under a "panoptic view of the facts" instead of looking at contractual provisions in isolation. *Wistuber*, 141 Ariz. at 349.

The City argued below that (A) the primary consideration it receives under the Huntington contract is the university's operation within city limits, and (B) "economic impact" is the objective fair market value of Huntington's operation.

IR.43 at 11–13. Both contentions fail the consideration requirement of the Gift Clause. First, Huntington's operation of its own business in Peoria is not adequate consideration because the City does not receive any tangible value from the university's operation.[8] Second, "economic impact" is not the objective fair market value of Huntington's operation because Huntington did not promise it, the City did not bargain for it, and the City does not receive it. The objective fair market value must measure what the City actually receives under the contract. *Turken,* 223 Ariz. at 348 ¶ 22.

A. Huntington's operation of its own business in Peoria is not adequate consideration under the Gift Clause

Huntington's operation of its own business in Peoria is not a constitutional *quid pro quo* for tax-funded payments totaling up to $1.875 million because—unlike a contract for goods, materials, property, or services—the Huntington contract does not provide tangible value to the City or taxpayers. IR.58 at 3–7. Analyzing the contract "in its entirety" and in a light most favorable to the City, *Cheatham*, 240 Ariz. at 324 ¶ 43, Taxpayers established that the City does not receive *anything* constitutionally valuable from Huntington. IR.53 at 5–12.[9]

[8] Perhaps this is why the City relies on "economic impact" in valuing the contract rather than valuing the actual promises in the contract.

[9] Because the City argues that the primary consideration it receives is the location of the university within city limits, the City has not refuted Plaintiffs' argument that the other promises enumerated in the Huntington contract are not

The City does not own or control Huntington. IR.64 ¶¶ 10–11. *Cf. Walled Lake Door*, 107 Ariz. at 549 (town ownership and control of water line that was challenged as a gift to the private company); *Turken*, 223 Ariz. at 348 ¶ 20 (noting that in *Kromko v. Bd. of Regents*, 149 Ariz. 319, 321 (1986), the government retained "extensive control" over private company, and property reverted to government upon corporate dissolution). Nor is Huntington open to the public. If Peoria residents wish to use the campus, they must apply, be accepted, enroll, and pay tuition like anyone else; or pay Huntington to lease space; or request Huntington's permission to otherwise use the property. Even then, there is no guarantee Huntington will provide them access. IR.64 ¶¶ 12–14; IR.53 at 4–5. *Cf. Turken*, 223 Ariz. at 348 ¶ 20 (hospital government conveyed to private company "open to the public"). Nor does Huntington provide universal goods, materials, or services to the public. Unlike a public university, Huntington only offers one field of education (Digital Media Arts) geared toward those seeking a specific sectarian religious perspective. IR.64 ¶¶ 15–26. *Cf. Turken*, 223 Ariz. at 348 ¶ 23 (free public parking); *Cheatham*, 240 Ariz. at 320 ¶ 23 (police services).

Because the City and public do not receive *direct* (bargained for) and *tangible* value under the contract and Huntington did not promise to give the City

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consideration, or, if they are, that the promises have no value. IR.53 at 5–16; IR.59 at 11–15.

any direct economic return, there is no "objective fair market value" to analyze. Thus, the value of the Huntington contract is zero—not $11.3 million in hoped-for economic impact, as the City's expert opined. IR.55 at ep.5–6 ¶¶ 17–22; IR.67 at ep.48–49 at 34:3–18, 41:9–22. And of course, tax-funded payments to Huntington in exchange for zero value is by definition a gift—which is unconstitutional.

B. Economic impact is not consideration or the value of the actual consideration under the Gift Clause

Huntington did not promise an $11.3 million economic impact in its contract with the City, the City did not bargain for it, and Huntington does not have to achieve it to receive payments. IR.64 ¶¶ 101–102; IR.65 at ep.6–19. Thus, economic impact is not consideration under the Gift Clause. *Turken*, 223 Ariz. at 348 ¶ 22 and 350 ¶ 33. At best, the $11.3 million economic impact is an "anticipated indirect benefit" of the contract because it was "not bargained for as part of [Huntington's] promised performance." *Id.* at 350 ¶ 33. But as *Turken* clarified, "anticipated indirect benefits…when not bargained for as part of the contracting party's promised performance…are not consideration." *Id*. In fact, the whole point of *Turken*—its analysis and holding—is that indirect benefits *are not consideration* for Gift Clause purposes. *Id*. at 350–52 ¶¶ 33, 45–49. *See also* IR.58 at 1–7.

Because Huntington's operation of its own business in Peoria is not objectively or tangibly valuable to the City or taxpayers, the City urged the court below to look *beyond* the four corners of the contract and to instead value the anticipated "economic impact" the City hopes Huntington's operation will generate, IR.43 at 11–15, even though Huntington never promised to generate economic impact under the contract and is not required to do so to receive its payments. *See* IR.65 at ep.6–19. The trial court did not adopt the City's $11.3 million valuation but instead averred, without explanation, that Taxpayers failed to establish gross disproportionality of consideration. IR.79 at 6.

This is a legal error because *Turken* says that "anticipated indirect benefits…when not bargained for as part of the contracting party's promised performance…are not consideration." 223 Ariz. at 350 ¶ 33. It is undisputed that Huntington did not promise to create an $11.3 million economic impact. IR.65 at ep.6–19. In fact, economic impact, by its nature, *cannot* be promised or guaranteed, as the City's own expert witness admitted. IR.64 ¶ 115. *See also* IR.54 at ep.5 ¶ 3. Nor can the City *receive* it—even as an indirect byproduct of Huntington's operation—because economic impact is merely a prediction of change in the local economy. *Id.* ¶ 4; Part I(B) *supra*. Something that the City did not bargain for and that cannot be promised, guaranteed, or received cannot be

consideration. It logically follows that economic impact is not and cannot be the *value* to the City or to the public of Huntington's operation of its own business.

The City nevertheless proposes that this vague concept of "economic impact," which is a *prediction* of change in the local economy that *might* result indirectly from a private company's operation, should count as the *fair market value* of Huntington's operation in Peoria. IR.43 at 11–15.[10] That is a radical proposal, however, and would be a fundamental departure from Gift Clause jurisprudence, which plainly rejects the proposition that anticipated, indirect benefits are consideration. *Turken,* 223 Ariz. at 350 ¶ 33. This Court should reject such an argument.

C. The predicted $206,630 fiscal impact is not consideration under the Gift Clause, but it establishes that the $1.75 million Huntington expenditure is grossly disproportionate

The *fiscal impact* of Huntington's operation in Peoria, rather than its economic impact, is a better measure of objective fair market value because "fiscal impact" is an estimate of tax revenue the City is projected to receive from the Huntington deal. The City's consultant for the project estimated a fiscal impact of

[10] This is despite the fact that the City's own consultant for the Huntington deal explained to the City that economic impact "is based on…estimates and assumptions about long-term future development trends" that "are subject to *uncertainty and variation*" such that he would "*not* represent them as results that will be achieved" and even warned that "[s]ome assumptions *inevitably will not materialize*." IR.66 at ep.19.

$206,630.[11] IR.66 ep.8–9 at 67:5–70:17; IR.64 ¶ 77. Although the projected $206,630 fiscal impact is not consideration under Gift Clause precedent, because Huntington did not promise it and the City did not bargain for it under the contract, this number is the *only* number that quantifies what the City might tangibly receive because of Huntington's operation in Peoria. IR.55 at ep.5 ¶ 16. There is simply no other tangible value the City receives from Huntington's operation. *Id.* at ep.5–6 ¶¶ 16–22.

Because the City is not guaranteed to receive even $206,630 from the Huntington deal, however (as the City testified, IR.66 at ep.9 at 70:9–17), the most accurate value of Huntington's operation of its own business in Peoria is *zero*. IR.55 at ep.5–6 ¶ 16–22. And zero is grossly disproportionate to $1.875 million. But even if $206,630 were the proper number to measure the objective fair market value of Huntington's operation, that number is also grossly disproportionate to what the City is paying. *Compare Turken*, 223 Ariz. at 351 ¶¶ 42–43 (difficult for court to believe public's nonexclusive use of 3,180 parking spots for 45 years has a value anywhere near $97.4 million, so contract quite likely violates Gift Clause) *with Wistuber*, 141 Ariz. 346 (school district's payment of $19,200 salary to union president released from teaching duties to pursue a number of activities and

[11] This number is inflated, however. *See* IR.53 at 11–12.

undertake duties that inured to the district not so disproportionate as to invoke the constitutional prohibition) and *Burke v. Ariz. State Ret. Sys.*, 152 Ariz. 323, 326 (App. 1986) (public service of 22 years sufficient consideration for $45,525 pension).

Taking a panoptic view of the facts and considering the reality of the transaction, the Huntington expenditure is a "grant or donation, by *subsidy*," ARIZ. CONST. art. IX, § 7, because the City does not receive direct (bargained for in the contract) and tangible consideration in exchange for its $1.875 tax-funded aid to the private university. Giving money to a business to locate within city boundaries is merely a location subsidy, and the rampant location subsidies of the nineteenth century are what prompted the framers to draft the prohibition against public aid in the first place. For all these reasons, the Huntington expenditure fails the consideration prong of the Gift Clause.

III. THE ARROWHEAD EXPENDITURE IS AN UNCONSTITUTIONAL GRANT, BY SUBSIDY, BECAUSE THE CITY DOES NOT RECEIVE ADEQUATE CONSIDERATION UNDER THE ARROWHEAD AGREEMENT

The $738,000 Arrowhead expenditure also fails the consideration prong of the Gift Clause test because the City does not receive adequate consideration under the Arrowhead Agreement. Instead, Arrowhead's renovation of its own property, which it leases to Huntington for its own profit, inures to the benefit of *Arrowhead*

and *Huntington* rather than to the benefit of the City and taxpayers. IR.64 ¶¶ 130–135. And because Arrowhead and Huntington are the sole beneficiaries of the contract, the City receives no tangible value from the transaction. IR.53 at 12–16. Thus, the City's expenditure of public money "on what, as a matter of law, is merely a private [building] and not a public [building]" violates the Gift Clause. *See Graham Cnty. v. Dowell*, 50 Ariz. 221, 226 (1937) ("It is hardly necessary to state that," under the Gift Clause, the government may not "expend money upon what, as a matter of law, is merely a private right of way and not a public highway.").

To overcome such an obvious lack of consideration, the City argued in the court below that (A) the consideration it receives for the Huntington contract is also the consideration it receives for the Arrowhead contract. Alternatively, the City relied on a footnote in *Turken* to argue that (B) its payments to Arrowhead are exempt from the consideration prong of the Gift Clause because the Arrowhead expenditure is a noncontractual award of "grant funds." IR.43 at 14–15. The trial court did not adopt either of the City's arguments but instead averred, without explanation, that Plaintiffs did not establish gross disproportionality. IR.79 at 6. In doing so, the court erred as a matter of law because Arrowhead's renovation of its own property is not objectively valuable to the City or the public.

A. Consideration under the Huntington Agreement cannot serve as consideration for the Arrowhead Agreement

The City's first contention—that consideration under the Huntington contract is valuable consideration for the Arrowhead contract—fails because "[c]onsideration is a performance or return promise that is bargained for in exchange for *the other party's* promise." *Cheatham*, 240 Ariz. at 321 ¶ 29. In other words, only the parties to a contract can make contractual promises to each other, so Huntington's promise to operate its own campus under its own contract with the City cannot serve as Arrowhead's promise under Arrowhead's contract with the City. Additionally, *Turken* requires courts to "compare the public expenditure to what the government receives *under the contract*." 223 Ariz. at 348 ¶ 22. The City does not receive Huntington's operation of its own business under the *Arrowhead* Agreement. But even if the City were allowed to claim Huntington's performance as Arrowhead's consideration, Huntington's operation of its own campus in Peoria is worth zero to the City and the public, and zero is grossly disproportionate to the City's $737,596 expenditure under the Arrowhead Agreement.

Likewise, the projected economic impact of the Huntington deal cannot serve as consideration for the *Arrowhead* deal. Huntington did not promise economic impact, so economic impact is not consideration under the Huntington Agreement *or* the Arrowhead Agreement. The City may believe that Arrowhead's

renovation of its own property will contribute to the hoped-for economic impact of the Huntington project because it provides a customized campus for Huntington's operation, but, again, Huntington never promised to create economic impact. And Arrowhead never promised to help Huntington create economic impact—or to create economic impact itself. IR.67 at ep.58–95. The City and taxpayers simply do not receive any tangible value from Arrowhead's promise to renovate its own private property, so the value of that promise is zero. IR.55 at ep.5–6 ¶¶ 17–22. And zero is grossly disproportionate to the City's $737,596 expenditure under the Arrowhead Agreement.

B. The consideration prong of the Gift Clause applies to all public expenditures

The City's second contention not only fails to rescue the Arrowhead deal but also *supports* Taxpayers' Gift Clause claim that the Arrowhead expenditure is an unconstitutional donation by *grant*. Relying on *dicta* in footnote four of *Turken*,[12] the City essentially argues that the consideration prong of the Gift Clause does not apply to the expenditure and that the expenditure need only serve a public purpose because the City is not asking for any return consideration from Arrowhead. IR 61

[12] The entire text of footnote four states: "*Wistuber* did not, nor do we today, deal with non-contractual public expenditures, *such as* direct assistance to the needy. In such circumstances, the private party does not promise to do anything in return, and there thus is no occasion to analyze adequacy of consideration." 223 Ariz. at 348 ¶ 22, n.4.

at 4–6. But that interpretation of footnote four in *Turken* is wrong for many reasons.

First, *Turken* did not hold that the consideration prong does not apply to noncontractual expenditures. Rather, it stated *in dicta* that there would be no occasion to *analyze* the adequacy of consideration if there is, in fact, no consideration to analyze. 223 Ariz. at 348 ¶ 22, n.4. For example, "with non-contractual expenditures, such as direct assistance to the needy…[t]he private party does not promise to do anything in return," which means there is no consideration to analyze. *Id.* This does *not* mean the consideration prong does not apply or that an expenditure need only serve a public purpose to satisfy the Gift Clause. It only means that the court, in the case before it that day, would not make a legal conclusion about noncontractual expenditures "*such as* direct assistance to the needy." *Id.* This is not legal authority for the City's nearly $738,000 in "grant funds" to Arrowhead, which is managed by a group of commercial real estate investors for the sole purpose of making a profit. IR.64 ¶¶ 136–138.

Next, the City's interpretation of footnote four—that public expenditures need only satisfy the public-purpose prong of the Gift Clause—contradicts case law directly on point. In *Pilot Properties*, the court held "that merely because a private individual or a corporation uses public funds or property for a public purpose is not sufficient" to overcome the Gift Clause. 22 Ariz. App. at 362. Public

purpose alone simply does not "remove an expenditure of public funds from the constitutional prohibition against subsidizing private industry." *Id.* at 361. The court further noted that "to hold otherwise and say that a public purpose was the only criterion by which the validity of and appropriation of public funds is to be measured" would effectively abolish all limits on the government's power to "appropriate monies to a private corporation." *Id.* at 362.

Finally, the City's interpretation is nonsensical, because the Gift Clause says that cities may not "ever…make any donation or *grant*, by subsidy or otherwise, to any individual, association, or corporation." ARIZ. CONST. art. IX, § 7. A grant to a private association or corporation with *no* promise of anything in return is *by definition* a gift and thus a violation of the Gift Clause. *Yeazell*, 98 Ariz. at 113 (The City "can only part with its money or property by agreement and for a valuable consideration."). This is why the Arizona Supreme Court declared that even "state pensions cannot be sustained as constitutional unless anchored to a firmer basis than that of a gift." *Id.* at 112. It would simply "be absurd to suppose any sane [city council] intended to give away public money with no legal or moral consideration whatever." *Higgins' Estate v. Hubbs*, 31 Ariz. 252, 261 (1926).

Thus, it is plainly black-letter constitutional law that the consideration prong applies to all expenditures of taxpayer money.[13] *See also* IR.58 at 7–11.

The City has *admitted* that the Arrowhead expenditure is a "grant" to Arrowhead. IR.43 at 14. A grant of public money to a private party is unconstitutional *regardless* of its purpose because the plain language of the Gift Clause expressly forbids "any donation or *grant*, by subsidy or otherwise." ARIZ. CONST. art. IX, § 7. "Undefined words in a constitutional provision are to be interpreted as generally understood and used by the people, according to their natural, obvious and ordinary meaning." *Airport Properties v. Maricopa Cnty.*, 195 Ariz. 89, 99 ¶ 35 (App. 1999). The ordinary meaning of "subsidy" is "[a] grant of money made by government in aid of the promotors 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." *Subsidy*, BLACK'S LAW DICTIONARY (2d ed. 1910). The plain language of the Gift Clause thus prohibits any donation or grant regardless of its purpose.[14]

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[13] The City's interpretation of footnote four would also render the Gift Clause redundant of article 9, section 1, of the Arizona Constitution (the "Tax Clause"), which already requires that *all* public expenditures serve a public purpose. ARIZ. CONST. art. IX, § 1. When interpreting the constitution, courts must avoid a construction that would render any part of it redundant. *See City of Phoenix v. Yates*, 69 Ariz. 68, 72 (1949).

[14] "A court may go outside the plain language of a constitutional provision when the provision's intent is unclear, and, in that event, it will look to its context, effect,

CONCLUSION

Taking a panoptic view of the facts in this case and considering the reality of the Huntington and Arrowhead transactions, the City's $1.875 million expenditure for Huntington's operation of its own business is a donation by subsidy. And the City's $738,000 expenditure for Arrowhead's promise to renovate its own property for Huntington's benefit is a grant by subsidy. Because the City does not receive any direct (bargained for in the contracts) and tangible value under either contract, both expenditures violate the consideration prong of the Gift Clause. The expenditures also fail the public-purpose prong of the Gift Clause because paying businesses to operate themselves in the hope of stimulating economic development does not primarily, tangibly, and directly benefit the public and does not involve a traditional government function.

There can be "[n]o doubt the public officials who sought to spend public funds to ensure the construction of railroads and similar developments," like the City of Peoria, "were sincerely motivated by goals such as promoting economic development." *Turken v. Gordon*, 220 Ariz. 456, 471 ¶ 46 (App. 2008), *vacated by*

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consequences and the spirit of the law." *Airport Properties*, 195 Ariz. at 99 ¶ 35. Even if the Court finds it necessary to go outside the plain language of the Gift Clause, however, its historical context, consequences, and spirit leave no doubt regarding its intention to prohibit exactly the type of public expenditure at issue in the Arrowhead Agreement.

223 Ariz. 342 (2010). In this case, the City makes the same speculative arguments to justify providing nearly $2 million in public funds for Huntington to operate its own business and $738,000 to Arrowhead to renovate its own property for Huntington. But payments to private entities with the hope (but no guarantee) of creating some future "economic impact" are exactly what the Gift Clause intended to prohibit. To find that the expenditures in this case satisfy the Gift Clause would be equivalent to finding that subsidizing railroads for the purpose of economic development was constitutional. Considering the well-established purposes of the Gift Clause, this Court should not read it so broadly.

For all these reasons, Taxpayers respectfully request that this Court *reverse* the trial court's decision 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 September 4, 2018, by:

/s/ Veronica Thorson
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COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DARCIE SCHIRES; ANDREW AKERS; and GARY WHITMAN, Appellants, v. CATHY CARLAT, in her official capacity as Mayor of the City of Peoria; VICKI HUNT, in her official capacity as City of Peoria Councilmember for the Acacia District; CARLO LEONE, in his official capacity as City of Peoria Councilmember for the Pine District; MICHAEL FINN, in his official capacity as Councilmember for the City of Peoria for the Palo Verde District; JON EDWARDS, in his official capacity as Councilmember for the City of Peoria for the Willow District; BRIDGET BINSBACHER, in her official capacity as Councilmember for the City of Peoria for the Mesquite District; and BILL PATENA, in his official capacity as Councilmember for the City of Peoria for the Ironwood District; CITY OF PEORIA, a municipal corporation of the State of Arizona, Appellees.	No. 1 CA-CV 18-0379 Maricopa County Superior Court No. CV 2016-013699

CERTIFICATE OF COMPLIANCE

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Pursuant to Rule 14(a) of the Ariz. R. Civ. App. P., I certify that the body of the attached Opening Brief appears in proportionately spaced type of 14 points, is double spaced using a Roman font, and contains 9,200 words, excluding table of contents and table of authorities.

Respectfully submitted September 4, 2018 by:

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The undersigned certifies that on September 4, 2018, she caused the attached Appellants' Opening Brief to be filed via the Court's Electronic Filing System and electronically served a copy to:

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*** Electronically Filed ***
05/01/2018 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-013699 04/26/2018

HON. SHERRY K. STEPHENS

CLERK OF THE COURT
N. Johnson
Deputy

DARCIE SCHIRES, et al. CHRISTINA M SANDEFUR

v.

CATHY CARLAT, et al. SHANE HAM

MINUTE ENTRY

East Court Building – Courtroom 712

8:42 a.m. This is the time set for Oral Argument regarding the following motions:

- Plaintiffs' Motion for Summary Judgment, filed December 18, 2017;
- Defendants' Motion for Summary Judgment, filed December 18, 2017;
- Defendants' Motion to Strike, filed February 22, 2018; and the responsive pleadings.

Plaintiffs Darcie Schires, Andrew Akers, and Gary Whitman are represented by counsel, Veronica Thorson and Christina M. Sandefur. Defendants Cathy Carlat, Vicki Hunt, Carlo Leone, Michael Finn, Jon Edwards, Bridget Binsbacher, Bill Patena, and City of Peoria are represented by counsel, Shane M. Ham and Mary O'Grady.

Court Reporter, Hope Yeager, is present and a record of the proceedings is made digitally.

Oral argument is presented on the motions.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2016-013699 04/26/2018

IT IS ORDERED taking Plaintiffs' Motion for Summary Judgment, Defendants' Motion for Summary Judgment, and Defendants' Motion to Strike under advisement.

9:41 a.m. Matter concludes.

LATER:

The Court has considered Plaintiffs' Motion for Summary Judgment filed December 18, 2017, Plaintiffs' Statement of Facts filed February 18, 2017, Defendants' Response to Plaintiffs' Motion for Summary Judgment filed January 22, 2018, Defendants' Controverting Statement of Facts and Additional Facts filed January 22, 2018, Plaintiffs' Reply in Support of Motion for Summary Judgment filed February 20, 2018, Plaintiffs' Reply to Defendants' Controverting Statement of Facts and Additional Facts filed February 20, 2018, Plaintiffs' Corrected Statement of Facts filed February 20, 2018, the Notice of Errata Re Plaintiffs' Statement of Facts filed February 20, 2018, the Motion to Strike filed February 22, 2018, and the oral argument conducted on April 26, 2018.

The Court has also considered Defendants' Motion for Summary Judgment filed December 18, 2017, Defendants' Separate Statement of Facts in Support of Motion for Summary Judgment filed December 28, 2017, Plaintiffs' Response to Defendants' Motion for Summary Judgment filed January 22, 2018, Plaintiffs' Response to Defendants' Separate Statement of Facts and Plaintiffs' Supplemental Statement of Facts filed January 22, 2018, Defendants' Reply in Support of Its Motion for Summary Judgment filed February 20, 2018, and the oral argument conducted on April 26, 2018.

In the Complaint for Declaratory and Injunctive Relief filed October 12, 2016, Plaintiffs contend that the Huntington Economic Development Agreement and the Arrowhead Grant Agreement violate the Arizona Constitution's Gift Clause (Article IX, section 7 of the Arizona Constitution). Plaintiffs contend the City of Peoria has made an illegal donation or grant to Huntington University and Arrowhead Equities LLC. Specifically, Plaintiffs claim these expenditures of taxpayer funds violate the Gift Clause because these expenditures do not serve a public purpose and the consideration taxpayers will receive in exchange for their money is grossly disproportionate. As relief, Plaintiffs seek a determination that both the Huntington Agreement and Arrowhead Agreement constitute the unlawful gift of public funds and seek a permanent injunction that would prohibit Defendants from making payments or performing under either agreement. Plaintiffs also seek attorneys' fees and costs.

In Plaintiffs' motion for summary judgment, Plaintiffs seek summary judgment on their claims because there is no genuine issue of material fact and they are entitled to judgment as a matter of law. Plaintiffs contend the payments to Huntington University and Arrowhead LLC do

not serve a public purpose and the consideration received by the City of Peoria is grossly disproportionate to the payments it is making with taxpayer money.

In Defendants' motion for summary judgment, Defendants contend Plaintiffs' claims fail as a matter of law.

All parties agree no material fact is in dispute and the case is proper for summary judgment. All parties agree the Huntington University and Arrowhead Equities LLC agreements are related and should be considered together as one agreement would not exist without the other agreement.

There is a two prong test used to determine whether government expenditures violate the Gift Clause of the Arizona Constitution, Article 9, Section 7 (the state or its subdivisions may not 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). An expenditure of public funds 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. In evaluating Gift Clause challenges, the facts of each transaction will be reviewed and courts must not be overly technical and give appropriate deference to the findings of the governmental body. In determining whether a transaction serves a public purpose, court must consider the reality of the transaction and not merely surface indicia of public purpose. The primary determination of whether a specific purpose constitutes a public purpose is assigned to the political branches of government, which are directly accountable to the public. A public purpose is lacking only in rare cases in which the governmental body's discretion has been unquestionably abused. *Cheatham v. DiCiccio*, 240 Ariz. 314, (2016). The Gift Clause is violated when the consideration compared to the expenditure is so inequitable and unreasonable that it amounts to an abuse of discretion. The taxpayers have the burden of proving gross disproportionality. *Cheatham v. DiCiccio*, 240 Ariz. 314, 322 (2016) and *Wistuber v. Paradise Valley Unified Sch. Dist*., 141 Ariz. 346 (1984).

In October 2010, the City of Peoria approved a plan to achieve economic development goals established by the Peoria City Council. The City Council identified several public purposes for the plan including, stimulating the local economy by providing employment opportunities, promoting redevelopment or unused or underutilized properties, diversifying the local economy, expanding the tax base, and offering education and workforce training opportunities for Peoria residents. One part of the plan involves the P83 District Building Reuse Program. The purpose of the program is to encourage a diverse use of existing vacant buildings to include professional office, entertainment and retail tenants. A barrier to this plan is the extensive amount of tenant improvements costs necessary to convert unused buildings into suitable spaces. Some of these purposes are set forth in Section One of the agreement with Huntington University.

In 2015, after three years of discussions, the Peoria City Council approved an agreement with Huntington University. There were two subsequent amendments to that agreement. These agreements provide that Huntington University will be eligible for cost reimbursement from the City of Peoria over a three year period in exchange for opening and operating a campus in Peoria. The agreements provide Huntington University must meet specific requirements each year in order to receive reimbursement from the City of Peoria. In addition, Huntington University agreed to participate in economic development activities with the City of Peoria to attract targeted industries. The agreement requires Huntington University to contribute $2.5 million to the development of the Peoria campus in the first three years. The maximum amount of cost reimbursement the City of Peoria would pay under the agreement is $1,875,000. The director of Huntington University's Arizona operation has testified Huntington University would not have opened a branch campus in Peoria without the cost reimbursement provisions in the Huntington University Agreement.

In December 2015, Huntington University entered into a lease with Arrowhead Equities LLC (Arrowhead) for a facility in the P83 area. In January 2016, Arrowhead submitted a grant application through the P83 program. The grant request was approved by the City of Peoria. The Arrowhead Grant Agreement provides that Peoria will reimburse Arrowhead over a period of several years for tenant improvement expenses incurred in converting its property for use by Huntington University. The maximum grant reimbursement amount to be paid by the City of Peoria is $737,596. The agreement with Arrowhead identifies public purposes to include increasing daytime foot traffic, enhancing the quality of life for Peoria residents, and promoting commercial reinvestment activities. In addition, the agreement states the P83 program is intended to reposition unused or underutilized properties and to encourage a more diverse use of existing vacant buildings.

During the negotiations with Huntington University, the City of Peoria contracted for a study of the economic impact of the proposed Huntington University campus. That study concluded the Huntington University Agreement would have an economic impact of $15,663,860 on Peoria and surrounding areas during the first five years of operation of the campus. Defendants hired another expert after this lawsuit was filed. That expert, Bryce Cook, opined that the value of Huntington University's promise to open and operate a branch campus in Peoria, including the promises to repurpose the building for a campus, is $11.3 million. This opinion focused on the economic impact of the Arrowhead and Huntington University agreements on the zip codes located within the City of Peoria.

Plaintiffs argue that the $11.3 million value is an anticipated indirect benefit of the contract and is not consideration under *Turken v. Gordon*, 223 Ariz. 342, 224 P.3d 158 (2010) since no one has promised to give the city $11.3 million. Plaintiff argues the court must focus on the objective fair market value of what Huntington University has promised to provide in return

for payment by the City of Peoria, citing to *Turken*, 223 Ariz. at 350. Plaintiffs contend the objective value of the promise to operate a campus in Peoria and Arrowhead's promise to help it do so is zero according to their expert. The City of Peoria receives nothing of any quantifiable or market value in exchange for its payments. Huntington University and Arrowhead did not promise to provide anything to the City of Peoria other than operate their own businesses for a profit. The Huntington University campus will not be used by the general public but only those who enroll in the university and pay tuition. There is no guarantee of admission. The mission of Huntington University is to educate men and women in the field of digital media arts with a curriculum that promotes the Christian worldview. Since Huntington is not a public university, government officials exercise no control over its operations. Thus, Plaintiffs argue there is no public purpose or a benefit to the general public. The agreements thus violate the Gift Clause because each provide a gift or subsidy to private industry.

Defendants argue that both the Huntington University and Arrowhead agreements have a public purpose: economic development. Both agreements support economic development and job growth and will have a positive economic impact on Peoria. In addition, the agreements will promote the P83 program which will involves infill development opportunities and encourages the use of existing vacant buildings. Further, Defendants claim the agreements will enhance the overall quality of life for Peoria residents. With regard to the second prong of the Gift Clause analysis, Defendants rely on the opinions of their expert that the economic impact of these agreements far exceeds the maximum investment due from the City of Peoria. If all criteria are met by Huntington University, thereby triggering cost reimbursement by the city of Peoria, the maximum payment by Peoria will be $1,870,000. The estimated economic impact for Peoria is $11.3 million. As to Plaintiffs' argument there is no direct benefit to the City of Peoria under the Huntington University Agreement, Defendants contend that Huntington University would not open a campus in Peoria without the incentives in that agreement. The agreement to build and operate a university campus within the City of Peoria is itself valuable consideration. The City Council of Peoria negotiated and entered into the agreements with Huntington University and Arrowhead because economic development will occur and the court must give deference to that legislative determination, citing to *Cheatham v. DiCiccio,* 240 Ariz. 314, 320 (2016).

Summary judgment is appropriate only if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Rule 56, Ariz.R.Civ.P., *Nat'l Bank of Ariz. v. Thruston*, 218 Ariz. 112 (App. 2008), *Colonial Tri-City Ltd. P'ship v. Ben Franklin Stores, Inc.*, 179 Ariz. 428, 432 (App. 1993) and *Johnson v. Earnhardt's Gilbert Dodge, Inc.*, 212 Ariz. 381, 385, 132 P.3d 825, 829 (2006). Thus, a motion for summary judgment should only be granted if the acts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense. *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). The facts must be viewed in a light most favorable to the

party against whom it was direct and summary judgment is inappropriate if there is any doubt as to whether an issue of material fact exists. *Lennar Corp. v. Transamerica Ins. Co.*, 227 Ariz. 238, 242 (App. 2011) and *Joseph v. Markovitz*, 27 Ariz.App. 122, 125, 551 P.2d 571, 574 (1976). A statement of facts is the only means by which a party opposing summary judgment may create a record showing the existence of those facts which establish a genuine issue of material fact or otherwise preclude summary judgment in favor of the moving party. See Rule 56, Ariz.R.Civ.P. Where the evidence or inferences would permit a jury to resolve a material issue in favor of either party, summary judgment is improper. *Comerica Bank v. Mahmoodi*, 224 Ariz. 289, 292 (App. 2010).

Given the quantum of evidence required to establish the claims in the complaint and, viewing the evidence in a light most favorable to Plaintiffs, the Court finds there are no genuine issues of material fact and summary judgment for Defendants is appropriate. The Peoria City Council determined there were public purposes in entering into the agreements with Huntington University and Arrowhead. Those purposes included economic development, promoting commercial reinvestment activities, stimulating the local economy by providing employment opportunities, promoting redevelopment of unused or underutilized properties, diversifying the local economy, expanding the tax base, and offering education and workforce training opportunities for Peoria residents. The Court should defer to the policy makers' determinations of public purpose which is an evolving and changing question to be considered in a wide variety of contexts. *City of Tombstone v. Macia*, 30 Ariz. 218 (1926) and *Cheatham*, 240 Ariz. at 320. There is no requirement that every taxpayer must benefit from an economic development agreement in order for there to be a public purpose. Benefitting a single company does not violate the Gift Clause. See *Town of Gila Bend v. Walled Lake Door Co.*, 107 Ariz. 545 (1971). Further, A.R.S. § 9-500.11 provides that the governing body of a city or town may appropriate and spend public monies for and in connection with economic development activities. The Court finds no abuse of discretion by the Peoria City Council in entering into these agreements. With regard to the consideration the City of Peoria will receive in exchange for payments to be made under the agreements with Huntington and Arrowhead, Plaintiffs have not met their burden of establishing gross disproportionality. The Court finds no violation of the Gift Clause under these facts and Defendants are entitled to judgment as a matter of law.

For the reasons stated,

IT IS ORDERED granting Defendants' Motion to Strike filed February 22, 2018.

IT IS FURTHER ORDERED granting Defendants' Motion for Summary Judgment and denying Plaintiffs' Motion for Summary Judgment.

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

DARCIE SCHIRES; ANDREW AKERS; and GARY WHITMAN, Plaintiffs, v. CATHY CARLAT, et al., Defendants.	Case No. CV2016-013699 **FINAL JUDGMENT** (Assigned to the Honorable Sherry Stephens)

Pursuant to this Court's Order dated May 1, 2018, and good cause appearing,

IT IS ORDERED, ADJUDGED, AND DECREED that Judgment be entered in favor of Defendants and against Plaintiffs on all counts of Plaintiffs' Complaint for Declaratory and Injunctive Relief.

IT IS FURTHER ORDERED that no further matters remain pending and that judgment is final and entered pursuant to Rule 54(c) of the Arizona Rules of Civil Procedure.

DATED: 5/8/18

Hon. Sherry K. Stephens
Maricopa County Superior Court