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IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

DARCIE SCHIRES; ANDREW AKERS; and GARY WHITMAN,

Plaintiffs,

vs.

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,

Defendants.

Case No. CV 2016-013699

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

(The Honorable Sherry K. Stephens)

INTRODUCTION

Both parties agree that no material fact is in dispute and that this case is proper for summary judgment. Indeed, the only facts material to resolving the question of whether the City of Peoria (the "City") violated the Gift Clause when it executed Economic Development Agreements ("EDAs") with Huntington University ("Huntington") and Arrowhead Equities LLC ("Arrowhead") are those regarding the language of the challenged contracts themselves. That language shows that the City receives nothing in exchange for the money it spends under these contracts: it does not buy a university; it does not obtain any public services or goods; it does not guarantee education or use of facilities for the people of Peoria. In short, the City receives no Gift Clause consideration.

To reiterate an important point: *Gift Clause consideration*, as referred to in cases such as *Wistuber v. Paradise Valley Unified Sch. Dist*., 141 Ariz. 346, 349 (1984), is not the same as consideration in ordinary contract law, because Gift Clause consideration must be *received by the government* in proportionate exchange for the tax dollars the government spends. Hypothetically, in contract law, consideration exists wherever there is even a minor change of position on either party's part. *Stovall v. Williams*, 100 Ariz. 1, 4 (1966). But that is *not* enough to satisfy the Gift Clause, because *Gift Clause consideration* must be "received by the public." *Wistuber*, 141 Ariz. at 349.

The City does not contend that it receives something in exchange for the money that it spends under the EDAs. Instead, it contends that the EDAs result in overall social and economic benefits to the City. The only factual disagreements between Plaintiffs and Defendants here relate to the size of those benefits. But that disagreement does not create a *material* or *factual* dispute for trial, because *as a matter of law*, that sort of overall social or economic benefit does not qualify as consideration as required by the Gift Clause. *Turken v. Gordon*, 223 Ariz. 342, 351 ¶ 41 (2010). As *Turken* makes clear, where the economic value that the government receives in exchange for its money is zero, the Gift Clause is violated for lack of adequate consideration. *Id*. at 347 ¶ 17.

Thus, even under a generous reading of the contracts, and even if the overall social or economic benefit to the City is high, that value is not received by the taxpayers, and therefore cannot legitimize these agreements. Plaintiffs are therefore entitled to judgment as a matter of law.[1]

The City is correct that legislative acts are entitled to a presumption of constitutionality, but that presumption is rebuttable. In fact, in one its first Gift Clause cases, the Arizona Supreme Court struck down a statute authorizing the state to pay interest on mortgagors' loans, where the state had lent money to landowner mortgagors to reconstruct a broken dam that had destroyed their property. *Rowlands v. State Loan Bd. of Ariz.*, 24 Ariz. 116 (1922). When a construction company failed to rebuild the dam, however, the landowners could not obtain water for their crops and therefore could not pay the interest on their loans. *Id.* at 118. Despite the presumption of constitutionality, the Court invalidated the legislature's attempt to pay the interest on the loans from the general fund because that expenditure was "a donation, a pure and simple gratuity." *Id*. at 123 In other words, the state received no consideration in exchange for the money it was spending.

The same is true in this case. Plaintiffs have overcome the presumption of constitutionality because the EDAs do not serve a public purpose and lack adequate Gift Clause consideration *as a matter of law*, either of which provides sufficient grounds for invalidating the deals.

I. The City's Expenditures Fail the Gift Clause Test Because There is No Gift Clause Consideration

A. Because There is No Consideration Received Directly by the City under the Agreements, Plaintiffs are Entitled to Summary Judgment

As a threshold matter, the City is incorrect in arguing that this Court should ignore the Gift Clause's adequacy of consideration requirement in this case. Def.'s Resp. to Pls.' Mot. Summ. J. at 3. The City contends that if the EDAs lack consideration, they are not contracts but are instead more like gratuitous expenditures of government funds—and consequently that the agreements cannot be analyzed under the ordinary Gift Clause test. *See id.* at 3, 5, & 12. It argues that the *Turken* Court "expressly stated that adequacy of consideration is only evaluated when the public entity makes a payment 'under a

[1] Of course, if the City is correct that the Huntington and Arrowhead EDAs are not contracts on the grounds that they lack *any* consideration, even *contract law* consideration, then the contracts would still violate the Gift Clause, because the City cannot constitutionally spend public funds for invalid contracts.

contract,'" *id.* at 12 (citing *Turken*, 223 Ariz. at 347 ¶ 16), and since the City now argues that the EDAs are not contracts, consideration should not be a factor.

But governments cannot escape the consideration requirement of the Gift Clause's robust two-part test simply by declaring their expenditures to be non-contractual.[2] That argument would render the Gift Clause toothless. It would mean the government could evade the Gift Clause by saying that the recipients of government funds are not making any promises to the government—but the whole *point* of the Gift Clause is to ensure that government does not spend taxpayer money in ways that do not result in the public receiving adequate and enforceable direct benefits. *Turken,* 223 Ariz. at 345–47 ¶¶ 10–14.

The Gift Clause was written to forbid gratuitous expenditures of taxpayer money: that is, gifts. Outright *giving* of money for little or no benefit received in return would be a gift, which would be prohibited by the Clause. "The state 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 for goods, materials, property and services." *Yeazell v. Copins*, 98 Ariz. 109, 112 (1965). Thus, if, as the City argues, the EDAs at issue here are *not* contracts, then Plaintiffs are entitled to summary judgment.

On the other hand, there are cases in which government signs what appears to be a contract with a private party, but that contract is in reality a gift—a simple gratuity—either because the government receives nothing in exchange for the money or because what it receives is so tiny in relation to the money it spends that, in substance, the contract is still just a gift. That is what happened in *Turken.* And that is what happened here. The City receives no direct benefit in exchange for its expenditures under the agreements—only the sort of indirect benefits that *Turken* found insufficient. 223 Ariz. at 350 ¶ 33.

The City's contention that footnote 4 of *Turken* erased the consideration requirement of the Gift Clause when a private party does not promise anything in return for a public expenditure is unsupported by law and logic, and must be rejected. *See* Pls.' Resp. to Def.'s Mot. for Summ. J. at 10–11. Such an argument is question-begging and would lead to the absurd result that deals pledging taxpayer money in

[2] Indeed, the City admits that if Arizona's courts were to abandon the *Turken* test, Arizona's Gift Clause—like Montana's—would be redundant of the Tax Clause. Def.'s Resp. to Pls.' Mot. Summ. J. at 2. But unlike Montana, Arizona has not repealed its Gift Clause, nor have her courts declined to enforce the Gift Clause simply because the Constitution also includes a Tax Clause.

exchange for *scant* consideration would violate the Constitution, but expenditures guaranteeing *nothing of value* in return to taxpayers would evade the Gift Clause entirely. That rule would eviscerate the Gift Clause and create a perverse incentive for cities to craft deals with the *least possible* benefit to the taxpayers—the very thing the Gift Clause was intended to prevent.

B. Because the City Receives no Direct Benefit, The Expenditures Do Not Serve a Public Purpose and Violate the Gift Clause.

An expenditure of public money serves a public purpose if it primarily, tangibly, and directly satisfies the need or contributes to the convenience of the people at large and involves a traditional government function. *City of Tombstone v. Macia*, 30 Ariz. 218, 224 (1926) (citation omitted); *Turken*, 223 Ariz. at 346 ¶ 12. But here, the City is not subsidizing Huntington or Arrowhead to provide traditional governmental services; it is subsidizing them to "achiev[e] the economic development goals of the City." Def.'s Resp. to Plfs.' Mot. Summ. J. at 6.

Public purpose is distinguished from private purpose: the government is barred from spending taxpayer money in a way that solely benefits a private person or entity. For example, money spent to provide clerical services for the governor's own personal use violates the public purpose requirement. *Proctor v. Hunt*, 43 Ariz. 198, 209–10 (1934). Here, the EDAs benefit Huntington and Arrowhead's *private* purposes.

The City relies in its defense on social and economic benefits that it hopes will flow from a successful performance of the Huntington and Arrowhead EDAs. The City expects the Huntington project will "'increase the daytime foot traffic' [ ] and 'enhance the overall quality of life.'" Def.'s Resp. to Plfs.' Mot. Summ. J. at 12–13. Indeed, that is the whole purpose of the project. But under *Turken*, such vague "anticipated indirect benefits" are not sufficient to satisfy the Gift Clause. 223 Ariz. at 350 ¶ 33. Although *Turken* held that economic improvement can be one relevant consideration in answering the public purpose question *if* the City is getting some measurable thing under the contract, *id.*, it did not overturn the previous rule that the gratuitous contribution of money to a private entity, which retains those private profits, will fail the public purpose prong.

Here, the benefits of the EDA are purely private. Huntington is a private college organized for purposes of education in an exceptionally narrow range of disciplines: to offer degree programs in

Broadcast Fusion Media, Film Production, Graphic Design, Digital Animation, and Web Development. Pls.' Statement of Facts ("PSOF") ¶ 33. It is not a public university. Its facilities are not open to the public. Local residents receive no sort of special admissions privileges. They do not enjoy any tuition discounts. On the contrary, most of its students are likely to be from outside of Peoria. PSOF ¶ 18. It is a sectarian religious institution, PSOF ¶ 23, and is not organized to "supplement or take the place of public institutions." *Kotterman v. Killian*, 193 Ariz. 273, 280 ¶ 15 n.2 (1999) (citation omitted). It is not organized to aid the poor or homeless. *Cf. City of Phoenix v. Superior Ct. of Maricopa Cnty.*, 65 Ariz. 139, 146 (1946).

So while "a system of public education" is a public purpose, *Macia*, 30 Ariz. at222, that is not the situation here. First, the *state* provides for that purpose, not local governments, especially when the taxpayers of that municipality—who are paying Huntington and Arrowhead —receive no targeted opportunities or benefits in exchange. Second, Huntington's extremely narrow focus on broadcast, film, and web media production means that it comes nowhere near ensuring that "the coming generation may be adequately prepared for the performance of the functions of government," *Id.* at 222, or even receive a general liberal arts education.

Arrowhead is a single-purpose entity created for the acquisition of the building in order to "make money" for its private investors. PSOF ¶¶ 116–122, 133–136. It is a private property owner which reaps and retains all of the financial benefits of the agreement. It is not required to open its facilities to the public—indeed, it is required to lease its property exclusively to Huntington, PSOF ¶¶ 123–125—or to provide any kind of discount or access to members of the community. Instead, the *only* relationship between the government expenditures here and the anticipated economic benefits is *indirect*, just as in *Turken:* the City hopes that if Huntington is successful, that will result in a healthier economic climate that will benefit the community in the long run. That, however, is precisely what *Turken* deemed insufficient. There, the Court found that the agreement was unconstitutional because the city hoped that paying for a parking lot for a shopping mall would encourage business at the mall, which would indirectly result in public benefits such as increased revenue. Yet the Arizona Supreme Court ruled that while "anticipated indirect benefits may well be relevant in evaluating whether spending serves a public purpose, when not bargained for as part of *the contracting party's promised performance, such benefits*

are not consideration under…the *Wistuber* test [*i.e.*, the Gift Clause]." Instead, the Court should "focus[]…on the objective fair market value of what the private party has promised to provide in return for the public entity's payment." 223 Ariz. at 350 ¶ 33 (emphasis added). In other words, anticipated benefits such as increased foot traffic, which are not required by the parties in the EDA, do not count.

Because the EDAs do not serve a public purpose, they violate the Gift Clause.

II. Even if the City Receives Valid Contract Law Consideration, it is Grossly Disproportionate to the Expenditures and the Agreement Violates the Gift Clause.

If the agreements at issue here are not contracts, but mere gratuities, they fail the Gift Clause test. *Rowlands*, 24 Ariz. at 123. But if they are contracts, this Court must determine whether the contracts provide for the City to receive adequate direct benefits in exchange for the expenditure of taxpayer money. *Turken*, 223 Ariz. at 349–50 ¶¶ 31–32.

The EDAs certainly purport to be contractual: they include sets of promises between the City and Huntington, and between the City and Arrowhead. *See* Pls.' Mot. for Summ. J. at 7–12 & 15–16. Huntington promises to offer coursework and enroll students at its branch campus, etc., and the City promises to provide payments upon Huntington's performance of those promises. *Id.* at 7–12. Arrowhead promises to renovate and maintain the formerly vacant building it purchased for the Huntington project, and the City has promised to provide payments upon Arrowhead's performance. *Id.* at 15–16.

These agreements are not, as the City argues, akin to government assistance to low-income individuals, where such individuals are only eligible for government assistance so long as they are poor. In that example, the needy individual is not required to do anything in exchange for the assistance other than meet an income threshold. If an individual exceeds the income threshold, he is not in breach of contract. But here, the contract *does* require Arrowhead to do things: it must make improvements to (its own) property and maintain the property (exclusively) for Huntington's use, in exchange for taxpayer dollars. Its payments are therefore contractual in nature. Nor are the promises contained in the Arrowhead agreement merely criteria or "grant eligibility requirements." *See* Defs.' Resp. to Pls.' Mot. Summ. J. at 13.

The agreements also contain bargained-for promises: to cite just two examples, the May 17, 2016, agreement with Huntington states that "in consideration of the mutual promises contained [t]herein, the Parties agree to amend and restate the Original Agreement in its entirety" according to the terms that follow, where the terms that follow describe the City's payments. Huntington University EDA, Def.'s Statement of Facts ("DSOF"), Ex. 7 at 2. The City's agreement with Arrowhead similarly states, "In consideration of the mutual promises and representations set forth herein and in the recitals hereto, the City and Arrowhead agree," etc. Arrowhead EDA, DSOF, Ex. 13 at 3-4, §§ 2–3. Thus, the agreements meet the City's own test on the face of the contracts themselves.

Of course, agreements that purport to be contracts must be tested to ensure that they do not contain unconstitutional gifts. *Turken*, 223 Ariz. 349 at ¶ 30. And, to repeat: *Gift Clause consideration* is not the same as *contract law* consideration. *Id*. at 34950 ¶ 32 (contrasting the two concepts). *Gift Clause consideration* must be "a *quid pro quo*" *received by the public* in exchange for tax dollars "mean[ing] that [the government] can enter into contracts for goods, materials, property and services." *Yeazell*, 98 Ariz. at 112. "[A]nalysis of adequacy of consideration *for Gift Clause purposes* focuses instead 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 (emphasis added). In other words, because Gift Clause consideration is different, courts *do* inquire into the adequacy of *Gift Clause* consideration—whereas they do *not* normally inquire into *contract* law consideration. *See id.* at 349–50 ¶ 32. Gift Clause consideration is inadequate "[w]hen government payment is grossly disproportionate to what is received in return." *Id.* at 348 ¶ 22. As the *Cheatham v. DiCiccio* Court explained, "Although courts do not normally scrutinize the adequacy of consideration between parties contracting at arm's length, we appropriately examine consideration when analyzing a contract under the Gift Clause 'because paying far too much for something effectively creates a subsidy.'" 240 Ariz. 314, 321 ¶ 29 (2016) (citation omitted).

Contracts are tested under the Gift Clause to ensure that the money spent by the government is not "grossly disproportionate" to the value it receives. That is because for the government to spend an extremely large amount of money in exchange for a tiny value would still be an unconstitutional gift, although disguised as a contract. As *Turken* put it, "When a public entity purchases something … the

most objective and reliable way to determine whether the private party has received a forbidden subsidy is to compare the public expenditure to what the government receives….When government payment is grossly disproportionate to what is received in return, the payment violates the Gift Clause." 223 Ariz. at 348 ¶ 22.

Here, the agreements fail the gross disproportionality test. "[F]ocus[ing]…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, the answer is clear: the promises that Huntington and Arrowhead made to the City have *no quantifiable or market value*, which means that the value received by the City ($0) is grossly disproportionate to the City's $2.6 million expenditure.

That means that, although the EDAs might contain enough *contract law* consideration to technically form a contract, that contract violates the Gift Clause, because the direct benefit received by the City is grossly disproportionate to the expenditure of public funds. There is no valuable "*quid pro quo*" received by the government in exchange for the money. *Yeazell*, 98 Ariz. at 112. In short, Plaintiffs do not contend, as the City claims, that as a matter of *contract law* the consideration in this case is merely nominal and that the agreements are invalid. Defs.' Resp. to Pls.' Mot. Summ. J. at 12. Rather, Plaintiffs have shown that—just as in *Turken* and similar cases, the "government payment is grossly disproportionate to what is received in return," and therefore "the payment violates the Gift Clause." 223 Ariz. at 348 ¶ 22.

Because the EDAs do not provide for adequate consideration, they violate the Gift Clause.

Conclusion

The only possible factual dispute here relates to the overall economic benefit that the City might receive as a consequence of the performance of the agreement. The City's expert, looking beyond the bargained-for promises in the agreements, predicts a change in the local economy that might result from the Huntington project. But *as a matter of law,* any such indirect economic consequences are insufficient to satisfy the Gift Clause.

The Gift Clause requires that the government *get something* for its money—either goods or services of some measurable value. It is *undisputed* here that the City does not *get* anything, except in a metaphorical sense, for its money. Rather, as in *Turken*, the City anticipates some vague overall

economic growth—such as an "'increase [in] the daytime foot traffic' [ ] and 'enhance[ment of] the overall quality of life.'" Def's Resp. to Pls.' Mot. Summ. J. at 12-13. That is not enough. The fact that what the City obtains or owns at the end of this deal is worth $0 is not in dispute. What is in dispute is a legal question: whether that is legal under the Gift Clause. The answer to that is no. *See Turken*, 223 Ariz. at 350 ¶ 33; *Yeazell*, 98 Ariz. at 112; *Rowlands*, 24 Ariz. at 118. Plaintiffs therefore respectfully request that the Court grant their Motion for Summary Judgment and deny the City's Motion.

RESPECTFULLY SUBMITTED February 20, 2018, by:

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CERTIFICATE OF SERVICE

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