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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' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(The Honorable Sherry K. Stephens)

Plaintiffs respectfully request that the Court deny Defendants' Motion for Summary Judgment ("Motion") because the City's $2.6 million payments under the agreements at issue in this case do not serve a public purpose, and the contractual consideration received by the City in exchange for those payments is grossly disproportionate. Economic impact is not consideration under the Gift Clause because it is not promised to or received by the City per the contracts. And because it is not promised to or received by the City, economic impact does not measure the value of what the City receives under the contracts. The City receives assurances under the contracts, but those assurances have zero market value. Likewise, Huntington's decision to locate in the City is not consideration under *Turken v. Gordon*, 223 Ariz. 342 (2010). In addition, the City's contention that the Arrowhead deal requires no consideration is flatly contradicted by the text of the Gift Clause and binding precedent. Finally, the City's stated reasons for executing the agreements do not satisfy the requirement that expenditures of public money must actually serve a public purpose.

ARGUMENT

I. The City Does Not Receive Adequate Consideration Under the Huntington and Arrowhead Agreements.

Defendants got it right in their Motion when they stated that this Court "must compare what the public receives in the contract to what the public must pay under the contract." Defs.' Mot. for Summ. J. ("Defs.' Mot.") at 8. Unfortunately, Defendants misconstrued "what the public receives in the contract" and focused instead on their expert's estimate of "economic impact," which is nothing more than a prediction of changes in the local economy that might result from the Huntington project. Plaintiffs' Supplemental Statement of Facts ("PSSOF") ¶ 1. Economic impact is not consideration under the Gift Clause because it is not promised to the City nor received by the City under the contracts. *Turken*, 223 Ariz. at 350 ¶ 33; Pls.' Mot. for Summ. J. ("Pls.' Mot.") at 12 n.6; PSOF ¶¶ 101–102. And because economic impact is not received by the City, logically it cannot be the value of what the City receives. *See* PSSOF ¶ 2. Only the value of what the City actually receives under the contracts is relevant. *Turken*, 223 Ariz. at 348 ¶ 22. The City receives *nothing* under the contracts. Even assuming *arguendo* that the City receives Huntington's promise to open and operate its campus in Peoria—and Arrowhead's promise to provide the campus building—as consideration for $2.6 million in public funds, *Turken*

forecloses the notion that Huntington's decision to locate within city boundaries is consideration. Indeed, the Gift Clause was enacted to prevent cities from doing this very thing.

A. Economic Impact Is Not Consideration Under the Gift Clause.

"Consideration is a 'performance or return promise' that is bargained for in exchange for the other party's promise." *Cheatham v. DiCiccio*, 240 Ariz. 314, 321 ¶ 29 (2016) (citations omitted). And "anticipated indirect benefits…when not bargained for as part of the contracting party's promised performance…are not consideration." *Turken*, 223 Ariz. at 350 ¶ 33. The City's expert, Mr. Cook, predicted the Huntington project would create an economic impact of $11.3 million. Defs.' Mot. at 11. However, neither Huntington nor Arrowhead *promised* this result to the City under their respective agreements. PSOF ¶¶ 101–102; PSOF, Ex. 15.

At best, the $11.3 million is an anticipated indirect benefit of the contracts—and therefore not consideration under *Turken*—because no one has promised to give the City $11.3 million as part of their performance. PSOF ¶¶ 101–102. This is because economic impact cannot be promised or guaranteed. PSOF ¶ 115 (The City's expert testified to this fact.); *See also* PSSOF ¶ 3. Moreover, the City does not *receive* $11.3 million in economic impact under the contracts or as an indirect byproduct of the promises. PSSOF ¶ 4. "When a public entitxsy purchases something from a private entity, 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* under the contract." *Turken*, 223 Ariz. at 348 ¶ 22 (emphasis added). Economic impact is not *received* by any person or entity. PSSOF ¶ 3. Something that is neither promised nor received cannot be consideration, and therefore the City receives no consideration in exchange for its $2.6 million payments to Huntington and Arrowhead.

Nor does the anticipated economic impact measure the *value* of Huntington's decision to locate in Peoria. PSSOF ¶ 5. The economic impact in this case, which Mr. Cook calculated using the IMPLAN input-output model, is a prediction of *change in the local economy that could result* from the project, which is quite different from a benefit the City actually receives. PSSOF ¶ 6. Economic impact is a nebulous concept that is ultimately irrelevant to a valuation of what the City actually receives under the contracts because the impact is neither promised to the City nor received by it.

It is also worth noting that an IMPLAN analysis always spits out a positive number, regardless of

a project's true feasibility, because IMPLAN fails to address many "important economic factors necessary for a true understanding of the actual costs" of a project and therefore "does not and cannot calculate a return on investment for any given expenditure of money." PSSOF ¶ 7. *See also* PSOF ¶¶ 107–110. For example, IMPLAN predicted an economic impact of nearly $200 million over five years from the establishment of Trine University in Peoria. PSSOF ¶ 8. Yet Trine closed its doors in its fourth year of operations with an enrollment of 168 students instead of the anticipated 2180 (one of the assumptions IMPLAN used to predict economic impact), so the $200 million impact never materialized. *Id.* ¶ 9. Thus, economic impact not only fails to measure what the City actually receives, but IMPLAN can also generate a wildly inaccurate prediction of changes in the economy.

B. Huntington's Decision to Locate in the City Is Not Consideration Under *Turken*.

Defendants contend the City receives "an accredited four-year university within the geographic boundaries of the City." Defs.' Mot. at 11. But the City does not actually *receive* a university, since it does not own or operate the private university, and Huntington does not operate on the City's behalf. PSOF ¶¶ 10–11 & 130; PSSOF ¶ 10. Therefore, Huntington's decision to locate in the City is not consideration under *Turken*.

In *Turken*, the City of Phoenix executed a parking agreement with a commercial developer ostensibly to procure public parking spaces[1] in exchange for payments equal to half of certain taxes generated by the project over 11 years, up to $97.4 million. 223 Ariz. at 344–45 ¶¶ 2–5. The parking spaces were to be located at the developer's proposed commercial project, CityNorth—comprising office space, luxury hotels, residences, parking garages, and high-end retail space—and payments were conditioned on the construction of the parking spaces *and* 1.02 million square feet of retail space. *Id*. The underlying reason Phoenix executed the agreement, however, was to ensure that the developer would complete the project as proposed, and the developer needed financial assistance to do so. *Id.* at ¶¶ 3–4. In fact, the City passed an ordinance stating that "the project would not locate in the City in the same time, place, or manner" without a financial incentive. *Id.* at ¶ 4. This language is also stated in the

[1] The agreement provided for 2,980 spaces for non-exclusive use by the public and 200 for exclusive use by commuters for 45 years. 223 Ariz. at 345 ¶ 5.

parking agreement itself. PSSOF ¶ 14. Likewise in this case, the City has emphasized that Huntington would not have located in Peoria without financial incentives. Defs.' Mot. at 5. The similarity between the parking agreement at issue in *Turken* and the agreements at issue today is inescapable.

In *Turken*, the City of Phoenix was looking beyond the bargained-for parking spaces and envisioning many other indirect benefits it believed the CityNorth project would generate. The City "desire[d] to obtain those public benefits which w[ould] accrue from the development of the Site, particularly from the Retail Center." PSSOF ¶ 15. Such benefits included "the creation, retention and expansion of retail uses and employment in the community, stimulation of economic development in the City…and generation of substantial additional sales tax revenues, all of which w[ould] contribute to the improvement or enhancement of the economic welfare of the inhabitants of the City." *Id.* ¶ 15. These desires were lofty, understandable even, and the trial court found them persuasive.

The City of Phoenix prevailed at the trial level because "the superior court viewed the relevant consideration as not only the value of the parking places obtained by the City, but also indirect benefits, such as projected sales tax revenue," yet the "court erred in that analysis." *Turken*, 223 Ariz. at 350 ¶ 33. The City had argued that because the developer "may have been unable to complete its planned retail component absent the Agreement, the transaction w[ould] serve to increase the City's tax base" and "produce denser development, decreased pollution, and employment opportunities." *Id.* at 348 ¶ 24. Absent the parking agreement, the project would not locate in the City and bring with it all those indirect benefits. Nevertheless, the Arizona Supreme Court admonished that "[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." *Id.* at 350 ¶ 33 (emphasis added).

This makes sense for three reasons. *First*, the Gift Clause was enacted to address this very type of situation. Even though railroad transportation was critical at the time the Gift Clause was enacted—perhaps more so than a private Christian university in a crowded field of many other choices for higher education today—the framers of our constitution chose to prohibit public expenditures to establish transportation corporations when their mere existence was the supposed consideration. Pls.' Mot. at 1–3; *Day v. Buckeye Water Conservation & Drainage Dist.*, 28 Ariz. 466, 473 (1925). *Second*, incentives do

not obligate a business to locate in a particular jurisdiction. They merely incentivize the business. An incentive is not an obligation, because the only consequence of non-performance is non-payment. This does not create a legal obligation; it merely creates a subsidy. *Third*, a city does not receive anything directly when a new business decides to operate within its boundaries. The city does not actually *receive* the business, since it does not own it in fee or operate it as a shareholder, and the business does not operate on the city's behalf. At most, the city receives the opportunity to pay for the services or products offered by that business, but the value of that opportunity is no more substantial than the value of other businesses that operate without taxpayer funding. *See* PSSOF ¶ 10.

This is why the Court must focus "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). Additionally, "[t]he reality of the transaction both in terms of purpose and consideration must be considered. A panoptic view of the facts of each transaction is required." *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349 (1984).

Under a generous and panoptic view of the contracts, the reality of the City's transactions reveals that the objective value of Huntington's promise to operate its campus in Peoria and Arrowhead's promise to help it do so is zero. It is *not* the value of every conceivable dollar that might possibly materialize in the economy as an indirect result of the promises but which was never actually promised in the contracts themselves—the projected $11.3 million economic impact. Nor is it the value of what the City might receive into its coffers as an indirect result of the promises but which also was never actually promised in the contracts themselves—the projected but inflated $206,630 fiscal impact. *Turken* expressly holds that neither economic nor fiscal impact count as consideration because neither is bargained for and promised in the contracts. 223 Ariz. at 350 ¶¶ 33–36. The harsh reality of the transactions is that the City has promised $2.6 million in taxpayer money, but Huntington and Arrowhead have not promised to provide anything to the City in return—other than to operate their own businesses for their own profit.

Defendants argue that *Turken* is distinguishable because the "developer approached the City of Phoenix *when the project was already well underway* and expressed concern that it would not be able to *finish* the development without financial assistance." Defs.' Mot. at 12 (emphasis added). They also

argue that the contract in *Turken* was only for parking, not to induce the project, which is why the court viewed only the parking spaces as consideration. *Id.* at 13. But this is incorrect. First, nothing in *Turken* suggests the developer approached the city only when the project was already underway. *Turken* merely states that the developer "approached the City of Phoenix, claiming it could not complete the project as planned without financial assistance." 223 Ariz. at 344 ¶ 3. Nor did the Court make any reference in its opinion to the project's stage of development or suggest that government gifts to private entities are acceptable at early stages but not at later ones. Instead, it held that "[t]he Gift Clause prohibits subsidies to private entities, and paying far more than the fair market value" of what the government gets directly in return "plainly would be a subsidy" in violation of the Arizona Constitution. *Id.* at 350 ¶ 35.

More importantly, the parking agreement in *Turken* was executed to induce the project to "locate in the City" with "the full proposed retail component." *Id.* at 344 ¶¶ 3–4. The agreement itself stated that "the project would not locate in the City in the same time, place, or manner" in "the absence of [the] Agreement and the City payments to be made pursuant to [the] Agreement." PSSOF ¶ 14. The parties understood that the public payments were conditioned on the construction of the parking spaces and the retail component (just as the parties in this case understand that the payments are conditioned on the construction of the campus building and the operation of the university). Nevertheless, the City of Phoenix had devised the parking agreement specifically to ensure completion of the entire project, *not* because it was on the prowl for parking spaces. But the *Turken* court focused on the parking spaces—despite its understanding that the city sought much more than parking from the contract—because nothing else had been *promised* to the city in the contract, notwithstanding the obvious *purpose* of the agreement, which was to ensure the project would "locate in the City." The court's ruling was based on the face of the contract and the reality of the transaction, not on the timing of the developer's request for incentives or the broader social benefits the city hoped to obtain. Phoenix had incentivized the developer to "locate in the City" with "the full proposed retail component" by paying too much money for parking spaces and therefore violated the Gift Clause. The same is true here: Peoria has incentivized Huntington to locate in the City by paying too much money for performance thresholds. *That* is the "reality of the transaction." *Wistuber*, 141 Ariz. at 349. And here, the City of Peoria doesn't even get public parking out of the deal.

Per the face of the Huntington and Arrowhead contracts, the City merely receives assurances that Huntington will operate its campus and Arrowhead will renovate it by completing performance thresholds and meeting performance criteria, respectively. As set forth in Plaintiffs' Motion, the value of these assurances is zero. Pls.' Mot. at 6–8 & 14–16. Plaintiffs established in their Motion and reiterate here that the only number relevant to the value of Huntington's operation of its own campus in Peoria is the expected fiscal impact of the project to the City: $206,630. *Id.* at 10–12. *See also* PSSOF ¶ 11. Fiscal impact is a measure of *projected tax revenue* the City *might* receive into its coffers as an indirect consequence of the Huntington project. PSSOF ¶ 12; PSOF ¶¶ 76–78. Although this number is *not* consideration under *Turken*, 223 Ariz. at 350 ¶ 33, since neither Huntington nor Arrowhead promised it to the City, it does provide an estimate of what the City can expect to receive as an indirect consequence of Huntington's operation in Peoria. Pls.' Mot. at 10–12. Unfortunately, this number is inflated and inaccurate because it relied on assumptions that do not reflect what is promised under the agreements. *Id.*; PSSOF ¶ 13. Nevertheless, even $206,630 is grossly disproportionate to $2.6 million, and when "government payment is grossly disproportionate to what is received in return, the payment violates the Gift Clause." *Turken*, 223 Ariz. at 348 ¶ 22.

II. The Gift Clause Applies to *Any* Donation or Grant of Money, by Subsidy or Otherwise.

Under its Economic Development Activities Agreement with Arrowhead, the City will reimburse the private developer up to $737,596 for the cost of renovating the developer's own property. PSOF ¶ 122. The City characterizes this payment as a "grant" under its P83 Program, which it claims is analogous to the program for low-income housing projects and slum clearance upheld in *Humphrey v. City of Phoenix*, 55 Ariz. 374 (1940). Defs.' Mot. at 14. This is unavailing, however, because the payment here is not a grant. But even if it were, the Gift Clause applies to grants as surely as it applies to any other expenditure of taxpayer money, and the so-called "grant" at issue here is nothing like any program ever "approved by the Arizona Supreme Court." *Id.*

"Neither 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 (emphasis added). The Arizona Constitution does not mince words. The Gift Clause applies to all manner of public expenditures, and the City's argument that

expenditures "in the interest of the general public" or in which "the private party does not promise anything in return" are somehow exempt from that clause is without merit. Defs.' Mot. at 14.

To begin with, *all* expenditures of taxpayer money must be in the interest of the general public, not private parties. *Turken*, 223 Ariz. at 346 ¶ 11. Expenditures not in the general public's interest run afoul of the Tax Clause even when the Gift Clause does not apply. *See id*. Defendants quote the language in *Humphrey* that "sums spent [for slum-clearance projects] are not a gift or loan to anyone but an expenditure in the interests of the general public," 55 Ariz. at 387, but *Humphrey* justified the slum-clearance program based on its purpose only, not on its value, because the Arizona Supreme Court had not yet required a consideration analysis in Gift Clause cases. *See Turken*, 223 Ariz. at 351–52 ¶¶ 45–50 (Court would apply its holding prospectively because misunderstanding of the consideration test established in *Wistuber* in 1984 had abounded). Also, the plaintiff in *Humphrey*, without offering any supporting evidence, had merely complained the program authorized a loan of credit. The City of Phoenix had issued bonds to purchase the site on which the low-income housing projects would be built, and the bonds were to be payable solely from the rent garnered from the project and through grants from the federal government, never from city coffers. *Id.* at 385–86. The most we can take from *Humphrey* is that municipal bonds issued for slum clearance and low-income housing are in the interest of the general public and not a loan of credit under the Gift Clause, where consideration was not a factor.[2]

In this case, there is no allegation of a loan—and no reason to believe the P83 District is a slum or blighted. The City is simply giving taxpayer money to Arrowhead, a gift that increases Arrowhead's profit margin by decreasing its renovation costs for the Huntington building. PSOF ¶ 135. It is

[2] In fact, the entire Gift Clause analysis in *Humphrey* is only one paragraph long:

> The next proposition is that the municipal housing law authorizes cities and towns to loan their credit to persons of low income in contravention of Section 7, Article IX of the Constitution. Plaintiff does no more than state this proposition. He presents no argument to sustain it, perhaps because there is none. If it be borne in mind that slum clearance projects are means adopted by society for self-protection against crime and disease, and that money spent to prevent or eradicate these enemies is for the public good and general welfare, even though the effect is felt by a given class more than by the community at large, it will be realized the sums spent are not a gift or loan to anyone but an expenditure in the interests of the general public.

55 Ariz. at 387.

Arrowhead that pockets the money it receives for renting its building; there is no loan as there was in *Humphrey*. The City fails to mention this aspect of *Humphrey* and focuses only on *Humphrey*'s conclusion that slum clearance and low-income housing are in the interest of the general public. But the P83 District, in which the Arrowhead building is located, is not a slum, is not blighted, and is in fact one of Peoria's "greatest spots" for "vibrancy and activity." PSOF ¶ 139. *See also* "Visit Peoria, AZ," *available at* https://www.visitpeoriaaz.com/ (last visited January 22, 2018) (P83 District "is a top destination for dining, hotels, shopping and entertainment.").

The City claims that, like slum clearance, "[g]rants made under the City's P83 Program are similarly designed to promote the 'public good and general welfare'" because it is "in the interest of all Peoria citizens to redevelop and repurpose unused or underutilized buildings, which could otherwise fall into blight and create risks to public health and safety." Defs.' Mot. at 15. In other words, because vacant buildings—solely by virtue of being vacant—might someday fall into blight and create risks to public safety, giving money to a private commercial developer to renovate a vacant building for lease to a private business is justified. That reading of *Humphrey* distorts a single conclusory paragraph of a pre-*Turken* decision and tears a gaping exception into the Gift Clause.[3]

Not only is the City's P83 Program not analogous to slum clearance and low-income housing projects, it is also unlike any other "programs previously approved by the Arizona Supreme Court." Defs.' Mot. at 14. For example, Peoria's subsidization of private commercial development is not analogous to subsidies for people left homeless by the abolition of state almshouses, as in *State Board of Control v. Buckstegge*, 18 Ariz. 277 (1916), where the state was to sell property already devoted to almshouse purposes and apply the proceeds to the same purposes. Nor is the Arrowhead subsidy analogous to emergency housing for veterans, where "[s]ubstantially the whole cost of the project was to

[3] Even if the Huntington/Arrowhead project were viewed as a "blight" or slum-clearance project, it would be unconstitutional. The prevention of potential future blight is not a constitutionally adequate public purpose for such projects. *Cf. 99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1130–31 (C.D. Cal. 2001) (redevelopment case rejecting the "novel legal proposition that the prevention of 'future blight' is a legitimate public use" for purposes of eminent domain, as that would mean "no redevelopment site can ever be truly free from blight because blight remains ever latent, ready to surface at any time. Such an untenable position…defies logic.").

be borne by the federal government," at issue in *City of Phoenix v. Superior Ct. of Maricopa Cnty.*, 65 Ariz. 139, 140 (1946). Goosing the profits of a private developer bears no resemblance to providing basic necessities to the most vulnerable among us.

Furthermore, the City's proposition that contracts in which "the private party does not promise anything in return" are somehow exempt from the Gift Clause per footnote 4 of *Turken* is not credible.[4] Defs.' Mot. at 14. First, the City's payments to Arrowhead are a *contractual* public expenditure under its Economic Development Activities Agreement with Arrowhead. Pls.' Resp. to Defs.' Separate Statement of Facts ¶ 41. That document states that "the activities described in [the] Agreement…are economic development activities within the meaning of the State of Arizona's laws concerning such matters" and "constitute the appropriation and expenditure of public monies for…economic development activities as defined in A.R.S. Section 9-500.11." Defs.' Statement of Facts ("DSOF"), Ex. 13 at 2, Recital H. Additionally, that document purports to have been made in compliance with the Gift Clause. *See id.*, Recital I (noting the City's belief that the benefits received by Arrowhead under the agreement "are not grossly disproportionate" to what the City receives). Finally, that document also specifically lists things that Arrowhead, a private party, promises to do in return for City payments. PSOF ¶¶ 122–128. *See also Wistuber*, 141 Ariz. at 349 (Court must consider the "reality of the transaction."). At minimum, the City is estopped by its own acts. *Valencia Energy Co. v. Arizona Dep't of Revenue*, 191 Ariz. 565, 577–78 ¶¶ 35–38 (1998). It cannot claim at this late hour that the contract it previously said was consistent with the Gift Clause is actually a welfare program exempt from the Gift Clause.

Additionally, Arrowhead is not "needy" within the meaning of footnote 4 of *Turken*. Arrowhead is a single-purpose entity created solely to acquire the building it renovated for Huntington so that its private investors can—in Arrowhead's own words—"make money." PSOF ¶¶ 116–122, 133–136. The principals who own Arrowhead typically have no problems raising funds for their commercial real-estate projects, which can succeed and have succeeded without receiving government subsidies. PSOF

[4] Footnote 4 states that "*Wistuber* did not, nor [does the Court] 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 (emphasis added). This case involves *contractual* public expenditures.

¶¶ 137–138. As implied above, people who live in government housing projects are "needy," a qualification of low-income housing programs, but they are not required to do anything in return for housing assistance. Children born to parents who cannot afford to feed them are "needy." *Cf. Buckstegge*, 18 Ariz. 277 (payments to homeless); *Humphrey*, 55 Ariz. at 387 (slum clearance and low-income housing); *Superior Ct. of Maricopa Cnty.*, 65 Ariz. 139 (emergency housing for veterans). *This* is what *Turken* meant by non-contractual direct assistance to the needy, a circumstance in which the private party does not promise to do anything in return for the assistance. Consideration is not analyzed in such circumstances because the arrangement is not a bargained-for exchange of promises. That simply is not the case here.

Finally, in response to the City's "alternative" argument that it received adequate consideration for the Arrowhead contract, Plaintiffs have already established that the City did not—even if the City were allowed to double-dip into the "economic impact" alleged to result from Huntington's operation in Peoria. *See* Part I *supra*.

III. The Huntington and Arrowhead Economic Agreements Do Not Serve a Public Purpose.

Subsidizing a business—here, a private Christian university—does not serve a public purpose and is not a traditional government function, regardless of the stated *reasons* for the subsidy. It is a truism that all businesses within a given city generate tax revenue, promote job creation, develop the economy, and present residents with an opportunity to pay for a distinct service. Grocery stores, coffee shops, liquor stores, massage parlors, marijuana dispensaries, and strip clubs all generate tax revenue, jobs, and economic impact while providing a service that is desirable to some portion of the population. They all develop the economy in some small way. Yet it would be a stretch to conclude that gifts to induce such businesses to operate in a given city thereby automatically serve a public purpose merely because city officials say they do.

The Gift Clause "was intended to prevent governmental bodies from depleting the public treasury by giving advantages to special interests or by engaging in non-public enterprises. Of course, either objective may be violated by a transaction even though that transaction has surface indicia of public purpose." *Wistuber*, 141 Ariz. at 349 (citations omitted). A contract merely asserting a public purpose is not the same as actually *serving* a public purpose, and the means by which a city pursues that

purpose is relevant to whether the contractual expenditure actually serves a public purpose. This is why courts must examine "the reality of the transaction." *Id*. However much "deference to the judgments of elected officials" a court may owe, it ultimately remains the *court's* responsibility to decide whether an expenditure actually serves a public purpose. *Turken*, 223 Ariz. at 346–47 ¶ 14. Moreover, when "determining whether a transaction serves a public purpose, courts consider the 'reality of the transaction' and not merely 'surface indicia of public purpose.'" *Cheatham*, 240 Ariz. at 320 ¶ 21 (quoting *Wistuber*, 141 Ariz. at 349).

If it were not so, city officials could justify any use of public money whatsoever by simply stating a public purpose for an expenditure regardless of whether the expenditure actually served that purpose or whether the expenditure did so through improper means. For example, any corporate subsidy would satisfy the public purpose requirement of the Gift and Tax Clauses if its stated purposes were to generate tax revenue, promote job creation, and develop the economy in Peoria. This would be true even if the corporate subsidy cost millions of taxpayer dollars but only created a handful of jobs that went to Glendale residents rather than Peoria residents and failed to generate more tax revenue than the amount of the subsidy. It would also be true even if those purposes were served in spades but only by violating the consideration prong of the Gift Clause.

This is why courts must look beyond the "surface indicia" of a transaction to determine whether an expenditure truly serves a public purpose by benefitting the interests of the general public. 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 of the city at large and involves a traditional government function. *City of Tombstone v. Macia*, 30 Ariz. 218, 222–224 (1926). For example, no one in *Turken* disputed that public parking serves a public purpose, 223 Ariz. at 348 ¶ 23,[5] because free public parking primarily contributes to the convenience of the people at large in a direct and tangible way. Clean air, potable water, electricity, public roads, and the like all satisfy a need or contribute to the convenience of the people at large, *Tombstone*, 30 Ariz. at 222–23, unlike a finite number of jobs, a

[5] Because everyone conceded that public parking serves a public purpose, the *Turken* Court did not address whether the project's indirect benefits—separate from the provision of free public parking—served a public purpose. *Id.* at 348–49 ¶¶ 23–29.

vague projection of general economic impact that mysteriously permeates into the local economy, or a specialized private university for a particular religious group. Those jobs are surely wonderful, but they only go to a few people. The ineffable economic impact is desirable, to be sure, but whether it tangibly and directly benefits the interests of the general public is dubious. This is why public expenditures must actually serve a public purpose and be scrutinized beyond their stated justifications, their "surface indicia of public purpose." *Cheatham*, 240 Ariz. 320 ¶ 21 (citing *Wistuber*, 141 Ariz. at 349).

The City states that its subsidy to Arrowhead, a private developer, serves a public purpose because the City believes vacant buildings should not be vacant, and subsidizing their non-vacancy "enhance[s] the overall quality of life for the City's residents." Defs.' Mot. at 14. There is no evidence to support this assertion. On the other hand, Plaintiffs have provided ample evidence that the City's subsidies to Arrowhead do not actually serve a public purpose regardless of their *stated* purposes. Pls.' Mot. 3–5 & 13–14. The City claims its subsidy to Huntington, a specialized sectarian university, serves a public purpose because officials believe it will "benefit the public interest and promote the public welfare of the citizens in the City." Defs.' Mot. at 9; DSOF, Ex. 7, Recital G. There is no evidence this is so, but Plaintiffs have provided ample evidence that the City's subsidies to Huntington do not *actually* serve a public purpose regardless of the reasons behind them. Pls.' Mot. 3–5.

If inducing a private university to locate in Peoria serves a public purpose because of hoped-for "economic impact" and other indirect benefits such as job creation and the opportunity to pay for a specialized education, then there is effectively no limit to the types of projects into which the City can pour its taxpayers' dollars (assuming adequate consideration)—today a private Christian university that offers only one field of study to like-minded students taught by like-thinking faculty, tomorrow a privately owned subsonic magnetic-rail train to service that university. This would certainly contribute to the City's plan to attract targeted STEM industries (Defs.' Mot. at 9), a goal shared by the City's long-ago counterparts, when the Gift Clause was first enacted to prohibit such endeavors.

CONCLUSION

A century ago, government officials believed that railroads, canals, and the like would improve the economy and benefit their constituents and that government should thus fund them with taxpayer dollars. The resulting economic ruin and government abuses prompted enactment of the Gift Clause to

"prevent the use of public funds raised by general taxation in aid of enterprises apparently devoted to quasi public purposes, but actually engaged in private business." *Day*, 28 Ariz. at 473. That is what is going on here, and it is unconstitutional.

Plaintiffs' Motion for Summary Judgment should be *granted*, and Defendants' Motion should be *denied*.

RESPECTFULLY SUBMITTED this 22nd day of January, 2018 by:

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CERTIFICATE OF SERVICE

ORIGINAL E-FILED this 22nd day of January, 2018, with a copy delivered via the ECF system and email to:

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