COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

BRAMLEY PAULIN; AUSTIN SHEA [ARIZONA] – 7TH STREET AND VAN BUREN LLC; AND CULVER PARK – 1129 NORTH FIRST STREET, LLC; MAT ENGLEHORN; HOPELESSLY URBAN, LLC, Plaintiffs / Appellants / Cross-Appellees, v. CITY OF PHOENIX, a municipal corporation of the State of Arizona; JEFF BARTON, in his official capacity as City Manager of the City of Phoenix, Defendants / Appellees / Cross-Appellants, 6TH & GARFIELD OWNER, LLC, a limited liability company, Intervenor / Appellee / Cross-Appellant.	No. 1 CA-CV 24-0086 Maricopa County Superior Court No. CV 2022-005658

JOINT REPLY BRIEF IN SUPPORT OF CROSS APPEAL OF INTERVENOR/APPELLEE/CROSS-APPELLANT 6TH & GARFIELD OWNER LLC, AND DEFENDANTS/APPELLEES/ CROSS-APPELLANTS CITY OF PHOENIX AND JEFF BARTON

Brett W. Johnson
Tracy A. Olson
Ian Joyce
SNELL & WILMER L.L.P.
One E. Washington, 27th Floor
Phoenix, AZ 85004
(602) 382-6000
bwjohnson@swlaw.com
tolson@swlaw.com
ijoyce@swlaw.com
Counsel for Intervenor/Appellee/Cross-Appellant 6th & Garfield Owner LLC

Daniel Inglese
OFFICE OF THE CITY ATTORNEY
JULIE KRIEGH, City Attorney
200 West Washington, Suite 1300
Phoenix, Arizona 85003-1611
daniel.inglese@phoenix.gov
Counsel for Defendant/Appellees/Cross-Appellants City of Phoenix & Jeff Barton

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

This Court can and should resolve this appeal by affirming the superior court's conclusions that Taxpayers' claims are barred by laches and that Taxpayers failed to state a Gift Clause Claim. But even if Taxpayers' claims are not barred on those grounds, they are barred by the statute of limitations in A.R.S. § 12-821. Taxpayers do not dispute that (a) the Taxpayers knew about the 6th and Garfield Project since at least October 2020, (b) sent two letters to the City in 2020 and 2021 claiming the 6th and Garfield Project violated the Arizona Constitution, (c) Taxpayers allege this violation *started* with the passage of the Ordinance No. S-46966, enacted in October 2020, and (d) the Taxpayers still waited until May 2022 to file this lawsuit.

Accordingly, because Taxpayers were on notice of, and actively investigating, the City-Garfield Transaction by October 2020, this is when their claims accrued, and the A.R.S. § 12-821 one-year statute of limitations clock began. By filing their Complaint in May 2022, Taxpayers filed this lawsuit too late.

Taxpayers' counterarguments, premised on unsupported assertions, and out-of-state case law, or other unpersuasive authorities, are unavailing.

First, Taxpayers argue that its claims accrued on the date the Development Agreement was signed (May 14, 2021). Taxpayers cite to no authority that

supports signing as the appropriate accrual date. And the facts and circumstances of this case dictates otherwise. The City and Garfield signed the Letter of Intent ("LOI") in September 2020—which outlined all the key terms of the transaction. Moreover, the City enacted Ordinance No. S-46966 in October 2020 which, in conjunction with the LOI, (1) committed the City to enter into the Development Agreement and (2) required the Development Agreement to contain the material terms central to Taxpayers claims. And importantly, Taxpayers also seek to invalidate Ordinance No. S-46966 under the Gift and Evasion Clauses, signifying that the violation of the Constitution started with the Ordinance—not the Development Agreement.

Second, Taxpayers argue that a Gift Clause claim continuously re-accrues every time an "illegal" payment is made. But the "continuing violation" exception to statute of limitations only applies to "continual unlawful acts, *not* … continual ill effects from an original violation." *See Ward v. Caulk,* 650 F.2d 1144, 1147 (9th Cir. 1981) (emphasis added). As such, even assuming the City-Garfield Transaction somehow violated the Gift Clause (and it did not), any subsequent "subsidies" rendered to Garfield in accordance with that transaction were the continuing "ill effects from the original violation," not new causes of action.

For all these reasons, if this Court reaches the issue, it should hold that Taxpayers' Complaint was untimely under A.R.S. § 12-821 and reverse the

superior court's contrary conclusion.[1]

ARGUMENT

A "cause of action accrues, and the statute of limitations commences, when one party is able to sue another." *Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am.*, 182 Ariz. 586, 588 (1995). "The ability to sue arises when the act underlying the legal action occurs, 'even though the plaintiff may be unaware of the facts underlying his or her claim…." *Satamian v. Great Divide Ins. Co.,* 257 Ariz. 136, 545 P.3d 918, 924 ¶ 11 (2024) (quoting *Gust, Rosenfeld & Henderson*, 182 Ariz. at 588).

Under the "discovery rule," however, accrual is tolled until the "plaintiff knows or with reasonable diligence should know the facts underlying the cause." *Doe v. Roe*, 191 Ariz. 313, 322 ¶ 29 (1998). But the plaintiff "need not know *all* the facts underlying the cause of action to trigger accrual." *Walk v. Ring*, 202 Ariz. 310, 316 ¶ 22 (2002) (emphasis in original) (quotation omitted). The mere ability to "identify that a wrong occurred and cause injury" is enough. *Doe*, 191 Ariz. at 323 ¶ 32.

Although Taxpayers quibble (at 37 n.8) with the proper definition of the term "investigate" for accrual purposes, they do not dispute that they were on

[1] "O.B." refers to Taxpayers Opening Brief, "A.B." refers to Defendants' Joint Response Brief and Cross-Appeal, and "R.B." refers to Taxpayers Reply Brief. For brevity, this brief uses the same definitions for terms and concepts used in the Defendants' Joint Response Brief.

notice of, and actively investigating, the City-Garfield Transaction by October 2020. The only question remaining, then, is whether Taxpayers could have sued in October 2020. On this point, Taxpayers make two unpersuasive arguments: First, Taxpayers argue that until the Development Agreement was signed its terms and conditions could have changed, and thus their claims were not actionable until May 2021. Second, Taxpayers argue that every single "subsidy" provided to Garfield under the Development Agreement constitutes a new, actionable, Gift Clause violation. Neither position succeeds.

I. Taxpayers Could Have Filed Suit in October 2020.

Taxpayers (at 29-34) primarily argue that until the Development Agreement was signed in May 2021, "it inflicted no appreciable, non-speculative harm on Taxpayers." This argument, however, ignores the plain text of both the LOI and Ordinance, as well as prior case law interpreting the Gift Clause.

A. The LOI and Ordinance Locked in All Relevant Terms of the Development Agreement that Taxpayers Would Later Challenge.

Taxpayers (at 30) first argue that "[u]ntil the Garfield Agreement was signed by both parties, it was tentative only; it might never have been signed—and it was expressly subject to change until then." (emphasis omitted). Not so.

Contrary to Taxpayers' suggestion (at 31-32), the LOI did not merely authorize City staff to begin non-binding "negotiations." Rather, it made clear that the "terms and conditions" reflected in the LOI "will be presented to the Phoenix

City Council to obtain authorization to enter into a Development Agreement." SUPPAPP0087. "Once approved, *the terms and conditions of this Letter shall be reflected in a DA* that is mutually approved by City and Developer." *Id.* (emphasis added). The "terms and conditions" in the LOI included all of the provisions of the Development Agreement that Taxpayers would later claim violated the Gift Clause and Evasion Clause, including: (1) the requirement that the project would receive GPLET treatment; (2) the requirement that Garfield would pay a set "minimum direct benefit amount;" and (3) the total year-by-year lease payments Garfield would make as part of the Agreement. SUPPAPP0087-95; A.B. 60-61.

Consistent with the LOI, the City passed Ordinance No. S-46966 in October 2020. This Ordinance authorized the City Manager to "*enter into* a development agreement" with Garfield. SUPPAPP0096 (emphasis added). Moreover, the Ordinance made clear that as part of the Development Agreement: (1) the "Developer *shall* title the property and improvement to the City;" (2) "the City *shall* lease back the property and improvements to the Developer for up to eight years;" (3) the "lease *shall* be subject to [GPLET] treatment" and (4) at the conclusion of the lease term, "the City *shall* transfer the property and improvements back to the Developer." SUPPAPP0096-97 (emphasis added).

When read together the LOI and Ordinance No. S-49699 ***required*** the City to enter into a development agreement with Garfield containing "all the provisions

the [Taxpayers] would later challenge." *See State v. Ariz. Bd. of Regents*, 251 Ariz. 182, 187 ¶ 15 (App. 2021) ("*ABOR I*"), *vacated on different grounds*, 253 Ariz. 6 (2022) ("*ABOR II*"). While the parties certainly envisioned some additional "negotiation" in between the passage of Ordinance No. S-46966 in October 2020 and the execution of the Development Agreement in May 2021, the terms of the Ordinance and LOI make clear that this "negotiation" would concern ancillary or technical issues and would not impact the key material terms of the deal. This is evidenced by the fact that Taxpayers *still* have not identified *any* material terms included within the Development Agreement that were not also listed in the LOI, or Ordinance.

At bottom, while it is true that the Development Agreement was not signed until May 2021, the September 2020 LOI and October 2020 Ordinance No. S-46966 made clear that the eventual execution of a development agreement containing the exact conditions Taxpayers challenge here was a "foregone conclusion."[2] *See* A.B. at 62 (quoting *Nationwide Mut. Ins. Co. v. Vintage Homes, LLC*, No. 06-CV-1801-RBP, 2006 WL8437401, at *2 (N.D. Ala. Dec. 1, 2006)). Taxpayers were not required to "await the consummation of threatened injury to obtain" the "preventative relief" they later sought in this court. *See Reg'l Rail*

[2] In arguing that their claims would not have been ripe in October 2020, Taxpayers ignore that ripeness is only a prudential doctrine in Arizona. S*ee Mills v. Ariz. Bd. of Technical Registration*, 253 Ariz. 415 423 ¶ 24 (2022).

Reorganization Act Cases, 419 U.S. 102, 143 (1974). Rather, because the parties committed to an agreement that Taxpayers knew about and believed violated the Constitution, in October 2020, by Taxpayers' own theory, the constitutional injury was complete at that time.

B. Taxpayers Were Injured Before the Development Agreement Was "Executed."

Taxpayers also argue (at 33) that "[i]t was only the Agreement … that injured Taxpayers and started the limitations clock." This position has clearly been adopted specifically to avoid the statute of limitations. In other aspects of this case, Taxpayers have argued that the Gift Clause applies to *any* action by the government that results in a "subsidy" to a private industry. *See* O.B. at 21-22. This is illustrated by the Complaint itself, which sought relief related to *Ordinance No. S-46966*, in addition to the Development Agreement. APP.018 ("Plaintiffs request that this Court … [d]eclare that City of Phoenix Ordinance S-46966 is unconstitutional and enjoin its further effect.").

Beyond the inconsistencies in Taxpayers' positions, they have failed to identify any authority supporting their position that a Gift Clause cause of action only accrues with the formal "execution" of a challenged public-private transaction. The text of the Gift Clause applies to any impermissible gift, "loan,"

"donation," or "grant," regardless of form.[3] *See* Ariz. Const. art. IX, § 7 (prohibiting gifts made by "subsidy or otherwise"). And at least two Arizona authorities recognize that a Gift Clause cause of action can exist even before the underlying development agreement is "executed." *See ABOR I*, 251 Ariz. at 187 ¶ 15 (holding that the Attorney General was on notice to investigate a Gift Clause claim in January, when it referred to a transaction as "pretty suspicious," even though the deal was not finalized until February); Minute Entry, *Englehorn v. Stanton*, No. CV2017-001742, 2020 WL 7487658 at *7 ¶ 57 (Mar. Cty. Sup. Ct. June 19, 2020) (holding that ordinance "authorizing" city to "enter into" a future development agreement violated the Gift Clause, in addition to the development agreement itself).[4]

ABOR I is particularly instructive, as that case held the Attorney General was on notice to investigate its Gift Clause claim when it first *questioned* the legality of an announced public-private transaction; here, Taxpayers sent correspondence to the City as early as *September 2020* claiming that City-Garfield

[3] As explained in the Answering Brief, GPLET tax treatment is not an impermissible "gift" for Gift Clause purposes because the City does not own future, not-yet-incurred, taxes. *See* A.B. 31-33.

[4] Taxpayers have routinely relied on this decision as persuasive authority. *See e.g.*, IR 32 at 5. Although *Englehorn* is illustrative of the reality that the Gift Clause's reach is not limited to only "executed" agreements, that decision has no applicability to the broader issues in this appeal as: (1) there was no indication in that case that the Gift Clause challenge was barred by laches and (2) the superior court assumed, without analysis, that the Gift Clause applied to GPLET agreements. *See Englehorn*, 2020 WL 7487958 at *3 ¶¶ 30-31.

Transaction violated the Gift Clause. *Compare See* APP.025-026 *with ABOR I*, 251 Ariz. at 187 ¶ 15. *See also Cruz v. City of Tucson*, 243 Ariz. 69, 72-73 ¶¶ 11-12 (App. 2017) (claim accrued on the date the plaintiff began to make the "precise claims" she would raise in the lawsuit). Taxpayers (at 35-36) attempt to avoid *ABOR I* by arguing the "Supreme Court reversed that decision and issued a ruling that supports [Taxpayers'] position." But *ABOR I* was vacated on appeal because the Supreme Court determined that the Attorney General's cause of action was subject to the five-year statute of limitations in A.R.S. § 35-212(E) rather than the one-year statute of limitation in A.R.S. § 12-821. *ABOR II*, 253 Ariz. at 12 ¶ 23. Because the Supreme Court concluded a different statute of limitations period applied for Attorney General actions, it remanded the case for further proceedings; it did not discuss this Court's analysis of the accrual issue. *Id.* at 14 ¶ 30.

Taxpayers also argue (at 33) that that the "mere passage of an ordinance is virtually *never* an injury for statute of limitations purposes." This position is again inconsistent with Taxpayers' requested relief against Ordinance No. S-46966: if it were true that the "mere passage" of an ordinance "is virtually never an injury" then Taxpayers have no standing to challenge Ordinance No. S-46966 to begin with. *See Sears v. Hull,* 192 Ariz. 65, 69 ¶ 16 (1998) ("To gain standing to bring an action, a plaintiff must allege a distinct and palpable injury."). Taxpayers exclusive focus on Ordinance No. S-46966 itself also ignores that the LOI, in addition to the

Ordinance, provided substantial notice to Taxpayers of their claims.

Regardless, neither out-of-state case cited by Taxpayers holds that the passage of an ordinance is "virtually never" an injury "for statute of limitations purposes." And both are easily distinguished. *Lindner v. Kinding*, 826 N.W.2d 868 (Neb. 2013) involved a challenge to an ordinance that allowed a city to adopt one of several funding sources; as such, the plaintiff's "claim of harm ultimately depend[ed] upon the funding mechanism actually employed" by the city. 826 N.W.2d at 873. And in *Gillmor v. Summit County*, 246 P.3d 102 (Utah 2010) the Utah Supreme Court determined that the statute of limitations did not apply to a challenge to an ordinance that was raised in a timely-filed regulatory proceeding. 246 P.3d at 106-07 ¶¶ 17-19.

Accordingly, because Taxpayers were (a) aware of and investigating the LOI and Ordinance in 2020, SUPPAPP0084-85 ¶¶ 45, 49, APP.342-43 at ¶¶ 45, 49 (b) these documents committed the City and Garfield to enter into a Development Agreement containing "all the provisions the [Taxpayers] would later challenge," *ABOR I*, 251 Ariz. at 187 ¶ 15, Taxpayers' filing of this case in May *2022* violated the one year statute of limitations in A.R.S. § 12-821.

II. The City-Garfield Transaction Does Not Fall Under the "Continuing Violation" Doctrine.

Finally, Taxpayers (at 34-37) argue that their injuries "will continue in the future when public funds are actually paid (or tax liabilities are actually zeroed

out).” In other words, Taxpayers take the position that every time Garfield does not pay *ad valorem* taxes in connection with the Development Agreement, Taxpayers suffer a new injury that generates a new Gift Clause claim. Although they do not use the term, Taxpayers are effectively invoking the “continuing violation” exception to the statute of limitations. *See generally O’Rourke v. City of Providence*, 235 F.3d 713, 730 (1st Cir. 2001) (explaining that a party may challenge actions that occurred after the statute of limitations period if the action is part of an “ongoing series” of illegal acts that began within the time period).

The problem with Taxpayers’ position is that a “continuing violation is occasioned by continual unlawful acts, not by continual ill effects from an original violation.” *See Ward*, 650 F.2d at 1147 (holding that continuing non-employment resulting from a single discriminatory action is not a continuing violation); *see also Sandutch v. Muroski*, 684 F.2d 252, 254 (3d Cir. 1982) (holding that continued incarceration resulting from false imprisonment is not a continuing violation), *abrogated on other grounds Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 186-91 (1997).

Here, even assuming that the City-Garfield Transaction is unconstitutional (and it is not), each individual “subsidy” provided by the City to Garfield in accordance with the LOI Ordinance, and Development Agreement is the “continual ill effect[]” of that Transaction—not a new, independent, cause of action that

would reset the limitations period. *See Ward*, 650 F.2d at 1147. "To hold otherwise would effectively abrogate the statute of limitations in situations such as the one now at issue" because a party could bring a Gift Clause claim against any public-private partnership years, or even decades, after the agreement was signed—as long as the private party continues to receive some "subsidy." *See Missouri Hosp. v. C.R. Bard, Inc.*, No. 1:07CV0031 TCM, 2008 WL 4104534, at *3 (E.D. Mo. Aug. 27, 2008).

Taxpayers' citation to *ABOR II* (at 34) for the position that "a taxpayer may bring a claim from 'the date of an illegal payment of public monies'" is out of context. When the Supreme Court stated that the Attorney General's cause of action in that case accrued upon the "illegal payment of public monies" it was referring to a claim brought under A.R.S. § 35-212(A)(1). *See ABOR II*, 253 Ariz. at 12 ¶ 24; *see also id.* at 503 ¶ 4. Importantly, § 35-212(A)(1) allows the *Attorney General* to file suit to "enjoin the illegal payment of public monies." *See Id.* at 506 ¶ 23. But § 35-212 does not authorize private parties to bring a lawsuit to collect the "illegal payment of monies" or apply the five-year statute of limitations to their lawsuits. Accordingly, *ABOR II* does not supplant the accrual standard for Gift Clause cases brought outside the scope of § 35-212.

Accordingly, Taxpayers' arguments attempting to tie the accrual date on or after "payment" are unpersuasive.

CONCLUSION

This Court should uphold the superior court's judgment based on the correct conclusions that Taxpayers' claims are barred by laches and that the Gift Clause does not apply to the City-Garfield Transaction. Should this Court not affirm the superior court's judgment, however, it should also reverse the superior court's conclusion that the Taxpayers timely filed their claims under A.R.S. § 12-821. There was nothing preventing Taxpayers from asserting their claims within one-year of the accrual of their claims. Because a lawsuit was not filed by October 2021, Taxpayers' claims are barred as a matter of law.

Respectfully submitted this 6th day of August, 2024.

SNELL & WILMER L.L.P.

By: */s/ Brett W. Johnson*
Brett W. Johnson
Tracy A. Olson
Ian Joyce
One East Washington St., Ste. 2700
Phoenix, Arizona 85004
Counsel for Intervenor/ Appellee/Cross-Appellant 6th and Garfield Owner

OFFICE OF THE CITY ATTORNEY

By: */s/ Daniel Inglese (w/permission)*
Daniel Inglese
Julie Kriegh, City Attorney
200 West Washington, Suite 1300
Phoenix, Arizona 85003-1611
Counsel Defendant/Appellees/Cross-Appellants City of Phoenix & Jeff Barton