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

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,

vs.

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,

and

6TH & GARFIELD OWNER, LLC, a limited liability company,

Intervenor-Defendant.

Case No. CV2022-005658

PLAINTIFFS' CONSOLIDATED REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO INTERVENORS' CROSS-MOTION FOR SUMMARY JUDGMENT

(Oral Argument Requested)

(Assigned to
The Honorable Dewain D. Fox)

Plaintiffs Bramley Paulin, Mat Englehorn, *et al.* ("Taxpayers") file this consolidated (1) Reply to the City of Phoenix's ("City") and 6th and Garfield Owner, LLC's[1] Responses to Taxpayers' Motion for Summary Judgment and (2) Response to the Garfield's Cross Motion for Summary Judgment and the City's Joinder. There is no genuine dispute of material fact and judgment should be entered in favor of Taxpayers as a matter of law. The Garfield Project was conveyed to the City to evade *ad valorem* property tax Garfield would otherwise owe, and the GPLET abatement therefore violates the Evasion Clause.

INTRODUCTION

All property not exempt under the Arizona Constitution or the laws of the United States "is subject to taxation." Ariz. Const. art. IX, § 2(A). Only a few categories of property are entirely exempt from taxation. These include "federal, state, county and municipal property," *id*. § 2(C)(1), but "[p]roperty that has been conveyed to evade taxation is *not* exempt." *Id.* § 2(B) (emphasis added) (the "Evasion Clause").

The transaction at issue here is a simple matter. The City wanted to subsidize Garfield by exempting it from the taxes it would otherwise have had to pay. So, the City and Garfield made a contract whereby Garfield would convey its property to the City on paper, while retaining *de facto* ownership, including the right to get back title to the property at any point in time in Garfield's sole discretion. Then, since the property would, on paper, be legally considered City property, it would qualify for a municipal tax exemption—an exemption Garfield would not otherwise enjoy.

This artifice cannot withstand legal scrutiny, because "what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows … [with] thing[s], not the name[s]." *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1866). Here, the property was conveyed to evade taxation, no matter what euphemisms or

[1] "Garfield" and "Hubbard" refer to the same entity, both in this brief and in previous briefing.

rationalizations the Defendants might use, and the transaction is therefore unconstitutional.

To begin with, "laws exempting property from taxation are to be strictly construed and interpreted in light of the presumption that tax exemptions are not favored." *Kunes v. Samaritan Health Serv.,* 121 Ariz. 413, 415 (1979). That is because tax exemptions "violate the policy that all taxpayers should share the common burden of taxation." *State ex rel. Ariz. Dep't of Revenue v. Capitol Castings, Inc.*, 207 Ariz. 445, 447 ¶ 10 (2004). Thus, the Defendants here bear the burden of proving the legitimacy of the exemption here. *See McElhaney Cattle Co. v. Smith*, 132 Ariz. 286, 291 (1982) ("taxpayers have the burden of establishing the right to an exemption from taxation"); *Kunes v. Mesa Stake of Church of Jesus Christ of Latter-Day Saints*, 17 Ariz. App. 451, 452 (1972) (purportedly exempt party bears the burden even where exemption is provided by the Constitution).

The Defendants contend that the Evasion Clause only prohibits transactions that include "nefarious … intent" or a "criminal[]" motive. City Resp. at 4; Garfield Resp. at 14. But the Evasion Clause does not contain these words, and nothing in its plain language limits it to such circumstances. Instead, the plain meaning of "evade"—both at the time the Clause was written, and today—refers to a legal artifice or circumvention, and does not require any criminal or corrupt motive. Moreover, the purpose of that provision was to *decrease* the number of properties exempt from taxation, not to *increase* them. To require some showing of criminality or turpitude before the Clause can apply would defeat that purpose.

What "evade" really turns on in the context of property taxation is not some corrupt *mens rea,* but the question of substantive or *de facto* ownership. Here, the conveyance of the property was an *artifice* designed to escape taxation. *Actual* property ownership means the right to use, control, and dispose of property. *Cutter Aviation, Inc. v. Ariz. Dep't of Revenue*, 191 Ariz. 485, 490 (App. 1997); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 170 (1998). But the City's "ownership" of the Garfield Project is pretextual—that is, artificial. The City retains *none* of the essential rights of property ownership—

none of the "sticks in the bundle"—because Garfield enjoys the rights to use, control, and dispose of the Project even after the purported conveyance. The Project enjoying a *municipal* tax exemption is to be used as a for-profit high-rise luxury apartment building over which Garfield maintains *complete* control, *including the right to have the Project conveyed back to Garfield in its sole discretion*. Focusing on substance, not shadows—on things, not names—shows that the Project is not and will never be "municipal" property. It was conveyed on paper only, as a *de jure* matter, so that this one *private* Project would qualify for a *municipal* tax exemption that it would otherwise not enjoy.

The only word for such a transaction is *evasion*.

Defendants argue that because they purportedly complied with the GPLET statutes, this transaction does not violate the Evasion Clause. Garfield Resp. at 16; *see also* City Resp. at 5. But superficial compliance with the statute is simply irrelevant to whether this transaction is unconstitutional. Statutory compliance obviously does not establish constitutional compliance. *Fann v. State,* 251 Ariz. 425, 434 ¶ 24 (2021). And, again, the GPLET statutes were written to put *government*'s property *on* the tax rolls, not to take *private* property *off* the tax rolls.

Finally, Garfield's attempt to relitigate its laches defense also fails. That argument is barred by the law of the case doctrine, because this Court has already rejected it, and Garfield has offered no new reason for this Court to reconsider. This case was filed within a reasonable time after good faith efforts to avoid litigation were rebuffed by the City, and Garfield has not proven that it suffered any prejudice based on when it was filed.

The remaining question before the Court is purely a legal one. No material facts are in dispute, and judgment should be entered in favor of Taxpayers finding that the artificial, *de jure* conveyance of a private real estate project to the City to qualify for a tax exemption that applies only to "municipal" properties violates the Evasion Clause.

ARGUMENT

I. Laches does not apply.

Garfield reiterates its laches arguments—arguments this Court already rejected in its December 20, 2022 Order on the Motion to Dismiss. 12/20/22 Order at 9–10. Such arguments are barred by the law of the case, and they fail on the merits.

A. Law of the case bars Garfield's reiterated laches defense.

The law of the case doctrine "provide[s] that the decision of a court in a case is the law of that case on the issues decided throughout all subsequent proceedings in both the trial and appellate courts, provided the facts, issues and evidence are substantially the same as those upon which the first decision rested." *Dancing Sunshines Lounge v. Indus. Comm'n of Ariz.*, 149 Ariz. 480, 482 (1986). While the Court may reconsider nonfinal rulings, *Davis v. Davis*, 195 Ariz. 158, 162 ¶ 14 (App. 1999), it should apply the law of the case doctrine to Garfield's laches defense because this Court has already held that "[o]n this record" laches does not apply. 12/20/22 Order at 10. In its Response, Garfield offers *no* new evidence to support its affirmative defense. Because the "issues and evidence are substantially the same" as before, Garfield's repeated laches argument fails.

B. Garfield's laches defense fails on the merits.

The equitable principle of laches is disfavored and may only be invoked "to prevent injustice." *Prutch v. Town of Quartzsite*, 231 Ariz. 431, 435 ¶ 13 (App. 2013) (citation omitted). The laches defense is only available if the Defendant can *prove*, by a preponderance of evidence, that there was: (1) unreasonable delay *and* (2) that delay prejudiced the Defendant. *Id.*; *Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶ 8 (2000). Yet Garfield has (still) offered *no* evidence that Taxpayers *unreasonably* delayed, and *no* evidence that it was prejudiced based on *when* this case was filed. It simply repeats its rejected arguments. Because Garfield has not even tried to meet its burden of proof, its argument should be rejected again.

To avoid unreasonably taking up the Court's time, Taxpayers will briefly respond to Garfield's repeated argument and refer the Court to previous briefing for greater detail.

See Taxpayers' Resp. to Intervenor's Mot. to Dismiss at 6–12; Taxpayers' Reply to City's Resp. to Appl. for TRO at 7–10.

First, laches only applies if a plaintiff delayed filing a lawsuit in a manner that was "*unreasonable* under the circumstances," *McComb v. Superior Ct.*, 189 Ariz. 518, 525 (App. 1997) (emphasis added). But there was no unreasonable delay here, because Plaintiffs tried—as responsible citizens are supposed to do—to persuade their government not to enter into an illegal transaction. They sent *multiple* communications to City officials protesting this transaction. Pls.' Supplemental Statement of Facts ("PSSOF") ¶ 54. "[P]rotests, complaints and negotiations" like this are "indications of *reasonable* delay," not *unreasonable* delay. *McComb,* 189 Ariz. at 526 (emphasis added). And then, despite *repeatedly* telling Taxpayers it would "get [them] a response," Compl. Exs. 10, 12, the City ignored them and never responded. PSSOF ¶ 55. Instead, it chose to proceed with this transaction, *knowing* of this Court's earlier ruling in *Englehorn v. Stanton*, No. CV 2017-001742, 2020 WL 7487658 (Ariz. Super. June 19, 2020). And Garfield knew of Taxpayers' constitutional objections because the City shared those concerns with Garfield. PSSOF ¶ 56. Yet Garfield/Hubbard not only took no steps to resolve them, but brazenly pressured the City to proceed with this illegal transaction despite the *Englehorn* ruling. *See* PSSOF ¶ 57. It did so even though, as this Court observed earlier, it could have "fil[ed] its own declaratory judgment action" to resolve the transaction's constitutionality. 12/20/22 Order at 10. Indeed, in the GPLET Lease *itself*, Garfield specifically understood and agreed that it could file "any declaratory action against [a] Person regarding the validity of the [GPLET] Lease," including filing such an action after construction on the Garfield Project was *already completed*, when the GPLET Lease commenced. PSSOF ¶ 80–81.

Garfield disparages Taxpayers' good faith attempts to petition their government as a "sparse letter writing campaign." Garfield Resp. at 11. But it's hard to see what Garfield (a private business that intervened in this public interest challenge to government activity) would expect citizens do when they have a grievance against their government.

Taxpayers exercised their constitutional right to petition the government, in a good-faith effort to resolve their concerns without litigation. *Cf. United Bank of Ariz. v. Sun Valley Door & Supply, Inc*., 149 Ariz. 64, 67 (App. 1986) ("Public policy favors settlement."). It's wrong to trivialize that, and Garfield offers no proof to support its argument that Taxpayers' efforts at resolution constituted *unreasonable* delay.

Second, Garfield fails—again—to prove that it suffered any prejudice based on when this case was filed. Garfield bears that burden, *Prutch*, 231 Ariz. at 435 ¶ 13, meaning it must prove not only that it was prejudiced by when this case was filed, but that it changed its circumstances as a result of the delay. *Rash v. Town of Mammoth*, 233 Ariz. 577, 583 ¶ 18 (App. 2013). But even though Garfield's authorized representative submitted a declaration after this case was filed, Garfield's Separate Statement of Facts ("GSOF"), Ex. 3, neither that declaration nor anything else Garfield has submitted provides any evidence of prejudice. Garfield has simply produced *no* evidence that it changed its position on anything—or suffered any detriment—based on when this case was filed.

Yes, it had "beg[u]n construction" on the project when this case was filed, Resp. at 12, but *it* chose to do that on May 24, 2021—a mere *ten days* after the Agreement became effective, PSSOF ¶ 58—and the City did not even provide Taxpayers with a copy of the GPLET Agreement until June 14, 2021, twenty-one days *after* construction started.[2] *Id*. Thus, Taxpayers *could not* have ethically filed a Complaint before construction began, because they did not have the Agreement for nearly a month after that. If Taxpayers had immediately rushed to Court rather than attempt, as they did, to petition the City to

[2] This, too, was probably illegal. Arizona law requires that public records be produced "promptly." A.R.S. § 39-121.01(D). When records are "available for immediate production," Arizona courts have required disclosure "at once." *W. Valley View, Inc. v. Maricopa Cnty. Sheriff's Off.*, 216 Ariz. 225, 230 ¶ 21 and n.8 (App. 2007). Here, Taxpayers asked for a copy of the Agreement on April 16, 2021. *See* PSSOF ¶ 59. Yet the City delayed <u>*60 days*</u> before providing it to Taxpayers, eeven though the records were "available for immediate production."

withdraw from its unconstitutional arrangement with Garfield, that would not have caused any party to change its position.

Finally, Defendants have unclean hands, which is a complete bar to a laches defense, *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 841 (9th Cir. 2002), because they signed this contract even after this Court had already ruled that such a contract is illegal; indeed, they discussed that previous ruling and *explicitly* decided to defy it. Indeed, the GPLET Lease *itself* has an indemnity provision that proves that Garfield anticipated litigation not only after construction *began*, but even after construction was *completed*. The GPLET Lease commences *after* construction is complete and the Garfield Project is conveyed to the City. PSSOF ¶ 77–78. In the Lease, Garfield agrees "to indemnify, defend, and hold harmless" the City for any challenge pertaining to the Lease, including "*use of GPLET treatment* for the Property" *Id.* at ¶ 79. Thus, Garfield knew of the possibility of a legal challenge to the GPLET Agreement *even after the Project was completed*, and expressly agreed to indemnify the City for that risk *even after the Project was completed*. Thus, the record shows that Garfield intended to proceed with the GPLET Agreement, regardless of whether *or when* Taxpayers filed suit. Garfield's persistence in pursuing a deal it knew to be illegal does not show prejudice—it shows the opposite. "One who seeks equity must do equity," *Arizona Coffee Shops, Inc. v. Phoenix Downtown Parking Ass'n*, 95 Ariz. 98, 100 (1963), and based on these facts, Garfield is *totally disqualified* from asserting a laches defense.

II. This transaction violates the Evasion Clause.

A. The plain language of the Evasion Clause does not require a showing of criminality or "nefarious intent."

Defendants attempt to add words to the Evasion Clause that aren't there. The City contends that "the Evasion Clause suggests a level of nefarious or underhanded intent," City Resp. at 4, but no such "nefarious or underhanded intent" requirement exists in the Constitution, and this court should not add those words to it.

The Evasion Clause's authors chose their words carefully. That Clause was added to article 9 in 1968.[3] That same year, the Fourth Edition of *Black's Law Dictionary* was published. It defined "evasion" as "[a]n act of eluding *or avoiding*, ***or*** avoidance by *artifice*"—or "a subtle endeavoring to set side truth." *Black's Law Dictionary* 654 (4th ed. 1968) (citations omitted; emphasis added). Thus, at the time of enactment, the meaning of "evade" did not imply "nefarious intent," as the City claims. Resp. at 4.

The City cites *Black's* definition of "tax evasion," from the 2019 edition (*id.*), but that's not the same thing as the word "evade." "Tax evasion" is a term of art referring to a statutory crime. But the Constitution does not typically specify crimes. Instead, Article IX is devoted to tax policy. Nor does the Evasion Clause use this term of art. The concepts of "conveyances to evade taxation" and "tax evasion" are simply different, and the City is therefore committing the fallacy of "category error"—no different than if it tried to interpret the "just compensation" clause by consulting the dictionary definition of "worker's compensation law," or to interpret traffic statutes by looking up "drug trafficking."[4]

Garfield goes even further in rewriting the plain language of the Evasion Clause, contending that "the word 'evade' means to *criminally* avoid paying *owed taxes.*" Resp. at 14 (emphasis in original). This is obviously incorrect, not only for the reasons above, but also because criminal tax evasion is a statutory offense—so interpreting the Evasion Clause as applying only to criminal avoidance would render the Clause redundant. Tax evasion was illegal when the Evasion Clause was adopted in 1968, PSSOF ¶ 61, and indeed, has been illegal since territorial days. *Id.* ¶ 62. If the Evasion Clause was really just restating that criminal evasion transactions are void and unenforceable, the framers of

[3] The amendment was Proposition 101. *See* PSSOF ¶ 60.

[4] The City also cites a 1989 Merriam-Webster definition of "evade" that includes "escape from by trickery or cleverness." Resp. at 4. That phrase accurately describes the Defendants' conduct in this case. But Webster's *current* definition of "evade" describes exactly the nature of the conveyance in this case: "to avoid the performance of: dodge, circumvent." https://www.merriam-webster.com/dictionary/evade. Here, Garfield transferred the property to the City to "dodge" and "circumvent" the payment of taxes that would otherwise be due.

that provision would have had no need to add it to the Constitution in 1968. Courts presume that lawmakers "[do] not intend to do a futile act by including a provision … that is inert and trivial … [or] superfluous." *Patterson v. Maricopa Cnty. Sheriff's Off.*, 177 Ariz. 153, 156 (App. 1993). Garfield's effort to make the Evasion Clause redundant of the state's anti-tax evasion statutes must therefore fail.

What's more, courts will not "restrict … [constitutional] guarantee[s] by adding words of limitation contrary to the plain language used." *State v. Patel*, 251 Ariz. 131, 135 ¶ 17 (2021) (citation & internal marks omitted). Here, the Constitution guarantees that all property shall be "subject to taxation," Ariz. Const. art. IX, § 2(A), unless exempt, and further provides that "[p]roperty that has been conveyed to evade taxation is *not* exempt." *Id.* § 2(B) (emphasis added). By adding a criminality element to this Clause, Garfield is adding words of limitation that do not exist in the Constitution. Had the framers of Article IX § 2 intended to confine its terms to criminal acts, they would have done so. They did not—and this Court cannot do so. *See State v. Osborn*, 16 Ariz. 247, 251 (1914) ("This court has power to determine…what the Constitution contains, but not what it should contain." (citation omitted)).

Garfield's addition of a "criminality" element to the Evasion Clause also fails because Arizona law uses the word "evade" as synonymous with "avoid" in many non-criminal contexts. For example, Arizona law uses the word "evade" in family law matters wholly unrelated to criminal conduct. *See, e.g.,* A.R.S. § 25-112 ("Parties residing in this state may not *evade* the laws of this state relating to marriage by going to another state or country for solemnization of the marriage."). Arizona courts consistently use the words "evade" and "avoid" interchangeably in the context of "evading" service of process, which is non-criminal. *Walker v. Dallas*, 146 Ariz. 440, 444 (1985) ("[W]e believe that a lawsuit should not be halted by the simple expedience of leaving the state and *avoiding* service of process. *Evading* substituted service of process is not at all difficult to do."). Courts also use the word "evade" when determining whether a moot case will proceed, which obviously has no criminal dimension. *Prutch*, 231 Ariz. At 435 ¶ 10(Arizona

courts may consider an appeal that has become moot if there is an issue "capable of repetition yet *evading* review.").

In short, the word "evade" does *not* imply any kind of criminality, as Garfield claims. Instead, it merely means any conveyance which is an artifice to avoid taxation.

B. The Evasion Clause was designed to prevent opportunistic exploitations of the tax exemption, such as that in which Defendants engaged.

That interpretation is supported by the "context, subject matter, historical background, effects and consequences, and spirit and purpose" of the Clause. C*alik v. Kongable*, 195 Ariz. 496, 500 ¶ 16 (1999) (citation and internal marks omitted). The Clause was not aimed at criminal tax evasion—rather, it was part of Arizona's constitutional policy of preventing artificial conveyances that would reduce tax revenue, including artifices intended to subsidize private interests with public resources; the kind of subsidy happening here.

In 1910, the framers of the original Article IX took great care over its language, and were stingy in the exemptions they were willing to allow. *See* PSSOF ¶ 63. They were especially concerned with preventing the use of tax exemptions as a form of business subsidy.[5] Thus, they specified exemptions within narrow limits—to "charitable" institutions and other "institution[s] *not used or held for profit.*" Ariz. Const. art. IX § 2 (emphasis added). For-profit companies like Garfield were not to be exempt under any circumstances. *See also State v. Yuma Irr. Dist.,* 55 Ariz. 178, 182 (1940) (tax exemptions for government property under art. IX, § 2 do not apply to "irrigation districts and similar public corporations" because "[t]heir function is purely business and economic, and not political and governmental.").

Nothing in the ballot initiative that became the Evasion Clause (Prop. 101 in 1968) indicates any intent to undo that design. The Clause's wording actually appears to have

[5] *See, e.g.,* PSSOF ¶ 64 (delegate Baker: "by all means make these railroads and corporations pay their full and just rate of taxation."); *id.* ¶ 65 (delegate Cunniff: "I want to come under taxation those [corporations] that are maintained for private or corporate profit."); *id.* ¶ 66 (delegate Ellinwood: "I do not approve of exempting or permitting the legislature to exempt railroads from taxation.").

originated in Massachusetts, where over a century ago, statutes provided tax exemptions for widows, who in that day were presumed to be at an economic disadvantage. *See Report of the Commission on Taxation* 117 (1908).[6] That, however, created an obvious risk of a loophole, that widows or others might exploit the system to obtain a financial advantage outside the scope of the exemption's charitable purpose. Thus, the law specified that exemptions would not apply if tax assessors determined that the property had been conveyed to evade taxation. *See also State St. Tr. Co. v. Stevens*, 209 Mass. 373, 379 (1911) ("[t]he policy of the law is, that the owner of property shall not defeat or evade the tax by any form of conveyance or transfer.").[7]

When Arizonans adopted the Clause in 1968, they did so as part of a similarly charitable undertaking: to create exemptions for honorably discharged military servicemembers and their widows. This, again, created the risk of exploitation through artifice—necessitating a limitation, which the Clause provides. Since 1968, Arizonans have added new exemptions to this section—yet they have always preserved the prohibition on transfers entered into for purposes of evasion.[8] In other words, the intent in passing the Evasion Clause was never to *expand* the number of properties exempt from taxation; it was to *restrict* tax exemptions—and ensure that private parties did not manipulate the system to obtain exemptions through some sham transfer of property.

Indeed, despite its litigation position here, that the GPLET tax abatement is "a key economic development tool," City Resp. at 6, the City used to understand that the Evasion Clause applied to tax abatements to private real estate developers. At a City Council meeting on April 3, 1987, the issue of the "City's experience with tax abatement" was on the agenda. PSSOF ¶ 67. There, City official Bob Logan stated that "tax abatement was

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[6] https://tinyurl.com/ysm67b3s. This law is still on the books today. *See* Mass. Gen. Laws ch. 59 § 5.

[7] Note that neither that statute nor any Massachusetts case required a showing of criminal intent.

[8] In 1996, voters approved HCR 2003, which reorganized section 2 into 12 subsections and moved the Evasion Clause to subsection 11. As a result of that change, the Evasion Clause now applies to *any* exemption within section 2, including exemptions for government property.

complicated by the constitutional provision that no property could be conveyed to the City for the sole purpose of evading taxation." *Id.* ¶ 68. He went on to say that "in light of this complexity, the City does not foresee many developers being able to use tax abatement." *Id.* In other words, the City previously viewed tax abatements for private developers as unconstitutional, because they involve conveyances of property for the purpose of evading taxes.

Garfield also likens the Agreement to a situation in which a taxpayer participated in a program whereby the state makes a tax credit "available to all taxpayers," Garfield Resp. at 15, by providing some kind of tax credit. But this transaction is nothing like that. For one thing,[9] GPLET exemptions like this are *not* available to everyone. Private parties seeking GPLET tax treatment must apply to the City for a GPLET, Pls.' Separate Statement of Facts ("PSOF") ¶ 3, which is approved in the City's sole discretion. Compl. ¶ 41, City Answer ¶ 41. The City has exercised this discretion, "provid[ing] GPLET tax treatment to *some* property owners who have requested it and declin[ing] to provide GPLET tax treatment to other property owners who requested it." Compl. ¶ 63; City Answer ¶ 63. Thus, contrary to Garfield's assertion, the abatement in this case is *not* a legal tax avoidance strategy "available to all taxpayers." Resp. at 15. It's a special benefit given to one private party—Garfield—which would *not* have conveyed its property to the City "if the GPLET arrangement was not an option." GSOF ¶ 21.

C. This transaction violates the Evasion Clause because the Garfield Project is not actually "municipal property."

A transfer of property is a conveyance to evade taxation if it is an "artifice" designed to alleviate or prevent a tax that would otherwise apply. *Black's Law Dictionary* 654 (4th ed. 1968). As the Iowa Supreme Court put it, "the law will not uphold any mere manipulation, under the guise of disposition, the only effect of which is to defeat a tax." *Ransom v. City of Burlington*, 82 N.W. 427, 428 (Iowa 1900).

[9] For another, this is not a legal tax avoidance transaction, as explained in Section II.C below.

Garfield says businesses have a right to use "statutory provisions available to all taxpayers" to avoid taxes, and that this is not evasion. Garfield Resp. at 15 (citation omitted). Of course, it is true that "[a]ny one may so arrange his affairs that his taxes shall be as low as possible" using lawful means. *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934), but the law draws a line at pretexts or illusory transfers designed to defeat taxation. Thus, although a person may employ "legal method[s] … to avoid or diminish his tax liability," the government is "obliged to detect the artificialities by which the transfers are so often disguised. The refinements or technicalities of contracts and conveyances are not the true diagnostics of the taxability of a transfer." *Bank of N.Y. v. Kelly*, 38 A.2d 899, 901 (N.J. Prerog. Ct 1944).[10] Federal courts call this the "sham-in-fact doctrine"; it bars tax exemptions for "transactions that have been created on paper but which never took place" in reality. *Kirchman v. Comm'r of Internal Revenue*, 862 F.2d 1486, 1492 (11th Cir.1989).

That is what this case is about. Garfield transferred its property to the City *on paper* so that its private project would qualify for a municipal tax exemption—even though it is not, in substance, municipal property. Notwithstanding appearances, it is operated *solely* as a private enterprise, not a government one, and Garfield is its *de facto* owner. This is precisely the type of "artifice" the Evasion Clause forbids.

This Court already found, and Garfield concedes, that the reason Garfield conveyed the property to the City was so Garfield would qualify for the exemption. *See* 12/20/22 Order at 16 ("it is undisputed that the whole point of the GPLET Transaction is to avoid paying the *ad valorem* property taxes that otherwise would be due if the Property was not transferred to the City."). The Agreement says this explicitly: the "City acknowledges and agrees that the intention of the Parties is for the Project and all eligible improvements … to be subject to the GPLET (and not to *ad valorem* taxation) … and for

[10] The absence of criminal intent was irrelevant, said the *Kelly* court: "[t]he present transfer is one of a taxable character *regardless of the existence of a motive*, if any, to avoid or evade taxation." *Id*. at 902 (emphasis added).

the GPLET to be abated for a period of eight (8) years." PSOF ¶ 52.[11] And Garfield concedes that it "would not have moved forward with the 6th and Garfield Project to begin with if GPLET treatment were not available." Garfield Resp. at 12; GSOF ¶ 21. Thus, it is beyond debate that the entire purpose of the GPLET Agreement was to permit Garfield to convey its property to the City to avoid tax liability.

And the conveyance is an artifice, because the City does not actually own the Project or exercise any property rights to it, Garfield does. As Arizona courts have long made clear, "the *sine qua non* of [property] ownership is the right to control and dispose of the asset." *Cutter Aviation*, 191 Ariz. at 490; *see also Hardinge v. Empire Zinc Co.,* 17 Ariz. 75, 91 (1915) ("the essential attributes of ownership of property, real and personal, are the rights in the owner to control, handle, and dispose of the thing owned."). This definition comports with that from the U.S. Supreme Court—which has described its "longstanding recognition" that property ownership "consists of the group of rights which the so-called owner exercises in his dominion of the physical thing, such as the right to possess, use and dispose of it," *Phillips*, 524 U.S. at 170 (internal citations and marks omitted)—and *Black's*, which defined "ownership" as "[t]he bundle of rights allowing one to use, manage, and enjoy property, including the right to convey it to others." OWNERSHIP, *Black's Law Dictionary* (11th ed. 2019).

Here, the City exercises *none* of the essential rights of ownership with respect to the Garfield Project, including the rights of use, control, or disposal:

- The City cannot use the Garfield Project for its own purposes during the term of the lease; instead, "During the Term of this Lease, Tenant shall have the right to

[11] *See Liberty Ins. Underwriters, Inc. v. Weitz Co., LLC*, 215 Ariz. 80, 83 ¶ 8 (App. 2007) ("If the contractual language is clear, we will afford it its plain and ordinary meaning and apply it as written."). *See also* PSSOF ¶ 82. ("The Parties acknowledge that they are sophisticated Parties, they have had an opportunity to negotiate the terms of this Agreement and that they have been represented by legal counsel at all relevant times during the negotiations of this Agreement. Therefore, the terms contained in this Agreement, including any terms later deemed ambiguous, are to be construed in accordance with their intended meaning ... .")

use the Premises for the purpose of the operation of a multi-family residential building." PSOF ¶ 11 and PSOF Ex. 1 § 8.2;

- The City does not manage or control the Garfield Project during the term of the Lease, Garfield does. *Id.* and PSOF ¶ 14 and PSOF Ex. 5, Resp. to ROG No. 3 ("the City will delegate a certain amount of 'control' over the property to Garfield as the City's lessee, particularly with respect to the day-to-day management of the Project."); *see also* PSSOF ¶¶ 73–74.
- The City cannot transfer title or any interest whatsoever in the Hubbard Project to any other party. *See* PSOF ¶ 12.
- The City has no right to possess the Garfield Project during the term of the Lease, or after. PSSOF ¶ 76.
- The City cannot place any liens or encumbrances on the Project. PSOF ¶ 13; PSSOF ¶ 75.
- Garfield may terminate the lease and acquire the property *at any time and for any reason*, for a $100,000 payment. PSOF ¶ 15.
- At the end of the eight years, the City conveys the Project back to Garfield. PSOF ¶ 16.

In short, the Project is not owned by the City in any meaningful way; it is owned, controlled, managed, and enjoyed by Garfield and conveyed back to Garfield at Garfield's full discretion, at any point. The City's ownership is therefore an artifice—on paper only—just as artificial as property that is conveyed to a nonprofit or religious organization but is actually owned and used as a for-profit enterprise or for non-religious purposes, or property that was conveyed to a disabled veteran but actually owned and used by an able-bodied civilian.

In *Syms v. Commissioner of Revenue*, 765 N.E.2d 758 (Mass. 2002), a company created a subsidiary to hold its intellectual property, receive royalties, and then hold them for a few weeks so it could pay the parent company with a tax-free dividend. *Id.* at 762. Throughout the transaction, the parent company continued to control the intellectual

property, chose who could use it, maintained its quality control, paid for all the advertising, etc. *Id.* The court, which applied Massachusetts' statutory version of an Evasion Clause, held that no tax exemption could be granted because a business cannot "claim[] the tax benefits of transactions that, although within the language of the tax code, are not the type of transactions the law intended to favor with the benefit." *Id*. at 763. This case is like *Syms*.

Arizona, like other states, determines genuine—as opposed to pretextual—ownership in the context of "taxation of property interests" by "focusing on the context in which the term ['owner'] is used and on the legislature's objective in enacting the subject legislation." *Cutter Aviation*, 191 Ariz. at 491. In *Cutter Aviation*, private parties, including Southwest Airlines, leased land from the City at Sky Harbor and built improvements on the City-owned land. The question arose as to who truly owned the land, and the court applied the traditional meaning of ownership that "includes the rights of control and disposal." *Id.* It found that Southwest was not the owner of the property because:

> The leases mandated the improvements to be built and the uses to which they could be put, and required the city's approval of the building specifications. … Neither Southwest nor Cutter were allowed to transfer any interest in their leaseholds, which would include any interest in the improvements, without the city's prior written consent. In addition, upon termination, the improvements were not subject to Southwest's or Cutter's removal or destruction but were to be the property of the city.

Id.

In other words, the lease in *Cutter* was exactly like the Agreement here, except the roles are reversed. Under the GPLET Agreement, the City *cannot* determine the Garfield Project's uses, *cannot* transfer any interest in the property (only Garfield can), and must *return* the property to Garfield at any time, at Garfield's request and upon lease termination. In short, under the analysis in *Cutter Aviation*, it is Garfield, not the City, that truly owns the Project. If the law deals with substance, not shadows, the conclusion is clear: Garfield is the true owner of the property notwithstanding the Agreement, just as

the company in *Syms* was the true owner of the intellectual property notwithstanding that purported conveyance. The agreement is an artifice to avoid taxation.

Garfield tries to argue otherwise by saying the City retains "control" over the property, but its examples are farcical: it cites only the fact that the property can't be used as a "'[l]iquor store,' an '[e]mployment agency,' or a [p]awn shop.'" Garfield Resp. at 17. These are not meaningful reservations of property use, management, control, or disposition. They actually show that there are *no* true rights of ownership vested in the City by this transfer, since it would be illogical and contrary to the interests of Garfield to turn its high-rise luxury apartment building into a pawn shop. Similarly, the City requires Garfield to "'take good care of the Premises,'" *id.*, but of course Garfield would do that anyway, since it is the sole occupant and the true owner of the Project.

How the Garfield Project is *actually used* also shows that Garfield is the true owner. Arizona courts have been clear that "[i]t is the use of the property itself" that is "decisive" in determining whether the property is exempt from taxation. *Tucson Jr. League of Tucson v. Emerine*, 122 Ariz. 324, 325 (App. 1979) (property was not tax-exempt as an educational or charitable institute when the property's rooms were not used for those purposes); *see also R.O.I. Props. LLC v. Ford*, 246 Ariz. 231, 235 ¶ 16 (App. 2019) (property lost its tax-exempt statute when it was no longer used for educational purposes). Here, there's no dispute that the Project will be used as "a multi-family residential building," PSSOF ¶ 70; City Resp. at 2 ("Garfield is developing a 26-story multi-family residential development in downtown Phoenix"); Garfield Resp. at 1 ("Garfield agreed to build a luxury apartment complex on 6thStreet and Garfield in Downtown Phoenix."). But that is not a "municipal" use. A municipal use is a public use, not a profit-making private enterprise. The Supreme Court recognized that when it said in *Yuma Irrigation Dist.,* 55 Ariz. at 182, that constitutional tax exemptions do not apply to entities whose "function is purely business and economic, and not political and governmental." *See also City of Phoenix v. Bowles*, 65 Ariz. 315, 317 (1947) ("Where … the city enters the field of private competitive business for profit, it divests itself of its

sovereignty pro tanto, takes on the character of a private corporation and thereby forfeits its immunity from taxation.").

This transaction is also nothing like the ordinary legal tax exemptions the government often offers taxpayers. For example, the tax exemption addressed in *Kotterman v. Killian*, 193 Ariz. 273 (1999), gave people a tax credit if they contributed money to a tuition scholarship organization. Participating in that program is a lawful form of tax avoidance *because the taxpayer must surrender the money* she contributes to the scholarship organization. This Agreement, by contrast, would be as if the taxpayer got the tax exemption for donating to the scholarship organization—and then also got back the money she donated, too. That would be unconstitutional. Garfield insists businesses may implement "ingenious schemes" to "avoid tax payments," and that's true. Garfield Br. at 15 (citation omitted). But they cannot engage in *artifices* and illusory transactions to evade taxation.

D. The GPLET statute is intended to put property on the rolls, not take property off the tax rolls through subsidizing private parties.

Garfield says the GPLET subsidy here does not violate the Evasion Clause because "the City and Garfield complied with all the requirements of the GPLET statute." Garfield Resp. at 16.; *see also* City Resp. at 5 (the City and Garfield "have followed the applicable laws perfectly."). But that is both irrelevant and false. It's irrelevant because the statute cannot trump the Evasion Clause of the Constitution. And it's not true because the GPLET statutes are written and intended to put *government* property *on* the tax rolls, not take *private* property *off* the tax rolls. Defendants' argument ignores the history and purpose of the GPLET statute and its predecessor statutes.

"[L]aws exempting property from taxation are to be strictly construed and interpreted in light of the presumption that tax exemptions are not favored." *Samaritan Health Serv.,* 121 Ariz. at 415. That's because tax exemptions "violate the policy that all taxpayers should share the common burden of taxation." *State ex rel. Ariz. Dep't of Revenue v. Capitol Castings, Inc.*, 207 Ariz. 445, 447 ¶ 10 (2004). Thus, Defendants bear

the burden of establishing the legitimacy of this exemption. *McElhaney Cattle Co.*, 132 Ariz. at 291.

Before 1985, municipalities and developers exploited the unequal tax treatment of government-owned property to promote local economic development. Robert Clark, *The Government Lease Excise Tax: Challenging the Excise-Property Tax Distinction*, 29 Ariz. St. L.J. 871, 874 (1997). Because municipal property is exempt from taxation, cities leased property to developers at below-market rates, thereby undercutting private lessors. *Id.* That not only reduced property tax revenue,[12] but also distorted the market because private lessors—having to incorporate the cost of property taxes into their leases—couldn't compete with untaxed government leases. *Id.* at 873–74.

So, in 1985, the legislature imposed an *ad valorem* tax on possessory interests in government property to address this problem, which by then "had reached a critical stage." *Id.* The tax court struck down that law in 1993, *id*. at 874–75, so in 1996, the legislature enacted the current GPLET framework, to "address[ ] the issues and deficiencies … in the prior law, the evident constitutional problems … and the concerns of the affected public and private parties" and "to make whole the taxing jurisdictions that depended on the revenues under the prior law." 1996 Ariz. Legis. Serv. Ch. 349, § 1 (Legislative intent) (S.B. 1116) (West). *See also* Arizona Fact Sheet, 2010 Reg. Sess., H.B. 2504 (describing the background of the GPLET framework).[13]

According to the sponsor of the 1996 GPLET law, "[t]he primary purpose of the tax on possessory interests, in both the old and new forms, was … to maintain the integrity of the tax rolls and prevent the disadvantaging of private-sector lessors." Clark, *supra,* at 880. In other words, the goal was to put government property *back on* the tax rolls, not to take them off. The statute was intended to prevent unfair competition against

[12] "The cost was borne by those government entities depending on property taxes, chiefly counties and school districts, whose tax bases shrank, and by private landowners who now faced competition from untaxed competitors." *Id.*

[13] To avoid the universality and uniformity problems inherent in the prior iterations of the law, the legislature imposed an *excise* tax on government property leases as a substitute for the former *ad valorem* tax on possessory interests in government property.

private lessees, not to create subsidized business ventures that unfairly compete with non-subsidized businesses.

Also absent from the legislative history of the current GPLET framework is any legislative intent to allow a private party to escape taxation by conveying property to the government *while retaining beneficial ownership*. Instead, the GPLET statutes ensure that a lawful tax is imposed on property that is *already* owned by the government[14]; they should not be exploited, as they are here, to give private businesses an artifice for defeating property taxes and thereby obtaining a subsidy.

In any event, compliance with the GPLET statute "cannot circumvent or modify" the limits of the Evasion Clause. *Fann,* 251 Ariz. at 434 ¶ 24; *see also Turken v. Gordon*, 223 Ariz. 342, 351 ¶ 41 (2010) ("[S]tatutory compliance does not automatically establish constitutional compliance." (citation omitted)). And the Legislature cannot authorize a tax exemption that the constitution prohibits. *Samaritan Health Serv.*, 121 Ariz. at 415 (1979) ("The legislature can exempt only that property the constitution provides it may exempt by law. It cannot do indirectly what it cannot do directly.") (citation omitted)).

III. Defendants' parade of horribles is baseless.

According to the City, if this Court declares that Garfield is "not exempt" in this case, then "this Court would have to hold that *any* transaction utilizing the GPLET abatement…is an impermissible evasion of taxes." City Resp. at 6. Garfield goes further, arguing that "every lawful transfer of land (or estate planning tactic) that resulted in lower tax liability would also qualify" as a conveyance to evade taxes). Garfield Resp. at 15. Not true.

First, this case challenges one transaction—the tax-exempt status that resulted from the Garfield Agreement—and does so on a specific factual record. A ruling from this Court finding that this Project is not exempt from taxes would obviously apply only to this

[14] If the government already owns the property there *is not* a tax to evade by conveying it to a private party, as the Supreme Court observed in *State v. Arizona Board of Regents*, 253 Ariz. 6 (2022), and as this Court observed in its Order. 12/20/22 at 16. If a private party owns the property and transfers it to the government, there *is* a tax to evade.

Agreement. Any future contract would have to be challenged on its own merits. Taxpayers do not argue that the GPLET statute is facially unconstitutional—just that this Agreement is unlawful, given the facts.

Second, the City, or any other government entity, can use the GPLET statute in ways that do not violate the Evasion Clause. One way, as indicated above, is that if property is *already owned* by the government, and is conveyed to a private party, there is no tax to evade. *Ariz. Bd. Of Regents*, 253 Ariz. 6; Order 12/20/22 at 16. There are probably many other ways in which the City could use the GPLET statutes in a constitutional manner. And there are certainly many other "transfer[s] of land" or "estate planning tactic[s]," Garfield Resp. at 15, that do not implicate either the Evasion Clause or the GPLET statute.[15] But this case is not concerned with those hypotheticals. This is the easy case: where a private party has conveyed property to the government *in name only*, and retained all the real rights of ownership, and has engaged in this artifice for the sole purpose of receiving a tax exemption it is not entitled to, then the property is "not exempt." Ariz. Const. art. IX, § 2(B).

IV. The remaining question before the Court is a question of law on which there are no material factual disputes.

In addressing whether summary judgment is appropriate, the City and Garfield speak out of both sides of their mouths. On the one hand, the City says "the key facts underlying Plaintiffs' Evasion Clause claim are undisputed, and the remaining issues largely present questions of law." City Resp. at 2. On the other hand, it argues that "there is a fact dispute" over whether the Garfield Agreement "serves multiple purposes." *Id.* at 6. Similarly, citing the standard for summary judgment that "there are no genuine issues

[15] Taxpayers are also at a loss to determine what relevance A.R.S. § 41-1512 and A.R.S. § 41-3954, cited by Garfield (Resp. at 15-16), have to this case. Garfield suggests that a ruling on the Garfield Agreement under the Evasion Clause would "call into question other statutes that provide tax incentives to real estate developers." *Id.* at 15. But Section 41-1512 provides an income *tax credit* for the expansion of certain facilities in the state, and, as far as Taxpayers can tell, has nothing to do with property tax *exemptions* or the conveyance of property. Similarly, Section 41-3954 provides an income *tax credit* for projects that involve "low income" housing, which again, does not implicate a property tax exemption of the conveyance of land.

of material fact," Garfield asserts that summary judgment should be entered in its favor, Garfield Resp. at 8, and then says "disputed facts preclude summary judgment in Plaintiffs' favor." *Id.* at 16. In other words, the Defendants appear to argue that while there are no material factual disputes preventing judgment for them, the facts become disputed with respect to Taxpayers' Motion.

That's obviously untenable. The reality is that there are no material factual disputes, and judgment can be entered in favor of Taxpayers as a matter of law.

Defendants' first purported factual dispute is about whether there are other reasons the City might have entered into the GPLET Agreement apart from its desire to subsidize Garfield. Garfield Resp. at 15–16; City Resp. at 6–7. But to show that there's a factual dispute precluding summary judgment, the Defendants "must do more than simply show that there is some metaphysical doubt as to the material facts." *Burrington v. Gila Cnty.*, 159 Ariz. 320, 325 (App. 1988) (citation omitted). What the City *might have* done is also irrelevant to the legal question of whether the GPLET abatement violates the Evasion Clause, and certainly doesn't raise a material factual dispute. *Orme Sch. v. Reeves*, 166 Ariz. 301, 311 (1990) ("some dispute over irrelevant or immaterial facts" is not a basis on which to deny summary judgment).

The *legal* question under the Evasion Clause is whether the property "has been conveyed to evade taxation." Ariz. Const. art. IX § 2(B). Here the answer is yes, as shown above. Garfield's authorized representative even expressly testified that he would not have sought to enter into an Agreement with the City "if the GPLET arrangement was not an option." GSOF ¶ 21 and GSOF Ex. 3 ¶ 8. Thus, whatever *other* reasons the City may have had, it's undisputed that the City actually *did so* to provide the tax exemption to Garfield, and Garfield agreed for that reason. Those are the only material facts necessary to the Evasion Clause claim.

Garfield also says there is a factual dispute over whether the City exercises an ownership interest in the Garfield Project. Garfield Resp. at 17. It cites the GPLET Agreement, arguing that because the Project can't be used as a liquor store, employment

agency, or pawn shop, the City owns the Project. *Id.* But these facts are not disputed. Taxpayers do not contend that the GPLET Agreement doesn't prohibit Garfield to open a pawn shop or liquor store in place of its 26-story high rise luxury apartment building. Instead, Taxpayers say that is not material. And in any event, the GPLET Agreement speaks for itself. *Liberty Ins. Underwriters,* 215 Ariz. at 83 ¶ 8 (App. 2007) ("If the contractual language is clear, we will afford it its plain and ordinary meaning and apply it as written.").

"The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Burrington*, 159 Ariz. at 325. The Defendants' attempt to create a one-way-only factual dispute is untenable, and they have failed to show that there is any dispute of fact warranting trial. Accordingly, judgment should be entered on the sole remaining *legal* question in favor of Taxpayers.

CONCLUSION

Based on the foregoing, Taxpayers' Motion for Summary Judgment should be GRANTED, the Defendants' Cross Motion for Summary Judgment should be DENIED, and judgment should be entered in favor of Taxpayers finding that the GPLET abatement violates the Evasion Clause.

RESPECTFULLY SUBMITTED this 27th day of February, 2023.

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