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 RESPONSE BRIEF AND 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

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INTRODUCTION

Taxpayers filed this case too late. There is no dispute that they were aware that the City of Phoenix ("City") and 6th & Garfield Owner LLC ("Garfield") planned on entering into a development agreement and lease related to a "26-story, 309 unit" apartment building on 6th Street and Garfield Street (the "6th and Garfield Project") since at least *October 2020*. There is no dispute that they sent two letters to the City in 2020 and 2021 claiming that the 6th and Garfield Project violated Article IX, Section 7 of the Arizona Constitution (the "Gift Clause") and other provisions of the Arizona Constitution. And there is no dispute they possessed the *executed* Development Agreement ("Agreement") since at least June 2021. Despite this, Taxpayers chose to wait until May *2022* to file this lawsuit. During Taxpayers' delay, Garfield incurred over $32 million in construction costs that could have been avoided if Taxpayers had filed earlier.

For this reason, the Superior Court correctly ruled that Taxpayers' claims as a whole are barred by laches *See* APP.369-373[1]; *see also Prutch v. Town of Quartzsite*, 231 Ariz. 431, 435 ¶ 13 (App. 2013) (laches applies where a party unreasonably delays in filing suit, causing prejudice to the opposing party). Yet, in their 58-page Opening Brief ("O.B."), Taxpayers treat this dispositive issue as a side show, addressing it for the first time on page 46 and recycling the exact same fact-based

[1] Citations to "APP" are to Taxpayers' Appendix. Citations to "SUPPAPP" are to Garfield and the City's Supplemental Appendix. Citations to "IR" are to the Electronic Index of Record.

arguments the Superior Court correctly rejected. These recycled arguments do not show that the Superior Court abused its discretion in finding laches and dismissing this case, and this Court can uphold the Superior Court's ruling on that ground alone.

Should the Court choose to evaluate the Gift Clause or Article IX, Section 2(B) of the Arizona Constitution (the "Evasion Clause") here, Taxpayers' claims also fail. Arizona has long used and valued public-private partnerships to support public projects or address policy objectives. *See, e.g.*, *Fact Sheet*, H.B. 2504, Forty-ninth Leg., 2d Reg. Sess. (2010).[2] Today, part of that public policy is achieved through Government Property Lease Excise Tax or "GPLET" transactions. In a GPLET transaction, a municipality acquires land and any improvements on that land from a developer within a slum or blighted area (thus rendering the land and improvements immune from ad valorem taxes but subject to the GPLET) then lease the land and improvements back to a private developer for eight years, during which time the municipality abates the GPLET. *See* A.R.S. § 42-6201 *et seq.* In short, in a GPLET transaction, the Legislature has authorized a tax policy that allows a city to incentivize development within slum or blighted areas by providing private developers favorable tax treatment.

In 2017, the City sought to utilize this economic development tool to revitalize the blighted and underdeveloped downtown area. To that end, the City published a

[2] https://www.azleg.gov/legtext/49leg/2r/summary/s.2504fin_asenacted.doc.htm

request for proposals ("RFP"), offering GPLET status to interested parties. Garfield answered that RFP, offering to build an apartment building on land in the area designated as blighted. After years of work, negotiation, and collaboration the parties entered into the Agreement in 2021.

Taxpayers have never argued that the GPLET statutes are unconstitutional or that the 6th and Garfield Project violated those statutes. Rather, they attack the Agreement itself—crafting a narrative that this Agreement was some nefarious deal that "zeros out" Garfield's tax liabilities and that by entering into the Agreement the City has chosen "winners and losers" in the free market. This is not correct. Like all GPLET transactions, the City and Garfield's transaction only eliminates potential *future* ad valorem taxes—it does not refund taxes that Garfield has already paid. Further the RFP was open to any business willing to develop the blighted area and the Agreement was amply supported by substantial consideration.

For these reasons, as the Superior Court correctly decided, Taxpayers cannot show that the 6th and Garfield Project violates the Gift Clause or Evasion Clause.

First, the Gift Clause does not apply at all because the City does not "own" future yet-to-be-collected taxes and therefore could not "gift" these taxes to Garfield. *See Maricopa Cty. v. State*, 187 Ariz. 275, 280 (App. 1996) (Gift Clause does not apply to measures where "the taxing entity forgoes revenues that it could have chosen to collect *in the future*" (emphasis added)); *Kotterman v. Killian*, 193 Ariz.

273, 288 ¶ 52 (1999) (tax credits are not subject to the Gift Clause because "[o]ne cannot make a gift of something that one does not own").

Second, even if the Gift Clause applied and Taxpayers did not face an insurmountable laches problem, the record fully supports a finding that the transaction does not violate the Gift Clause. The bargained-for Agreement serves several documented public purposes and represents a fair trade between the City (agreeing to abate 8 years of GPLET) and Garfield (agreeing to give more than $9 million in guaranteed direct benefits).

Third, on the Evasion Clause, the Superior Court correctly concluded that the word "evade" suggests a level of subterfuge not present here. The City and Garfield followed the applicable tax statutes to the letter. And if the law of so-called "sham" transactions applies at all, the transaction clearly has sufficient substance to pass muster.

For all these reasons, this Court should affirm the Superior Court's rulings on laches, the Gift Clause and the Evasion Clause.

This Court should also consider correcting the Superior Court's legal error related to the statute of limitations defense. Namely, the Superior Court erred in concluding that Taxpayers' claims did not accrue until the Agreement was executed. Rather, under well-established case law, Taxpayers' claims accrued when they had reason to investigate a claim—which occurred more than one year prior to the filing

of this lawsuit.

COMBINED STATEMENT OF THE CASE

Taxpayers filed this lawsuit on May 4, 2022. APP.005-021. Count I of the Complaint asserted that the 6th and Garfield Project violated the Gift Clause. APP.016-017 at ¶¶ 87-100. Count II of the Complaint asserted that the 6th and Garfield Project violated the Evasion Clause. APP.018 at ¶¶ 101-05.

On August 11, 2022, Garfield moved to dismiss the Complaint on the grounds that: (1) Taxpayers' claims were barred by the one year statute of limitations in A.R.S. § 12-821 because they were on notice to investigate their claims by at least October 7, 2020; (2) Taxpayers' claims were barred by laches; (3) Taxpayers' Gift Clause claim failed as a matter of law because GPLET transactions were not subject to the Gift Clause or in the alternative the 6th and Garfield Project did not violate the Clause; and (4) Taxpayers' Evasion Clause Claim was foreclosed under *State v. Arizona Board of Regents*, 253 Ariz. 6 (2022) because government-owned property is not subject to taxation. IR 48, 60. The City moved for dismissal on similar grounds, but also argued that the Evasion Clause did not apply to statutorily-authorized tax "avoidance" schemes. IR 27 at 1.

On December 21, 2022, the Superior Court partially granted and partially denied the motions to dismiss. APP.279-95. The Court agreed that GPLET transactions are not subject to the Gift Clause, and thus dismissed Count I of the Complaint. APP.291-93. On the other hand, the Court concluded that the statute of

limitations did not bar Taxpayers' claims because they did not "accrue" until the Agreement was signed on May 14, 2021. APP.287. However, due to "factually contested issue[s]," the Court declined to dismiss the Complaint based on laches. APP.288. And, the Court determined that Taxpayers had sufficiently alleged a claim that the Agreement violated the Evasion Clause. APP.293-94.

After brief discovery regarding Taxpayers' Preliminary Injunction Motion, Garfield and the City filed separate motions for summary judgment on Count II. IR 72-78, 86-87. Garfield's motion for summary judgment asserted that, based on the record, Taxpayers' suit was barred by laches. APP.323-28. Both Garfield and the City also argued that Count II failed as a matter of law because the Agreement was an example of permissible tax avoidance rather than impermissible tax evasion. APP.309-11; APP.328-31.

In response, Taxpayers argued among other things: (1) that Garfield's laches argument was previously decided in at the motion to dismiss and therefore prohibited by the law of the case doctrine, SUPPAPP0102; (2) that the two letters they sent to the City constituted "bilateral" negotiations that tolled the laches period, SUPPAPP0103-104; (3) that Garfield's argument was barred by the doctrine had "unclean hands", SUPPAPP0105; and (4) that the Evasion Clause applied because the supposed "sole purpose" of the transaction was to "evade property taxes." SUPPAPP0105-18.

The Superior Court granted summary judgment in favor of Garfield and the City on August 22, 2023. APP.368-79. Three aspects of that ruling are relevant here.

First, in response to Taxpayers' argument that the Superior Court had already decided the question of laches, SUPPAPP0102, the Superior Court explained that at the motion to dismiss stage "the Court did not actually decide the laches defense, but instead opted to address the Motion to Dismiss on the merits." APP.371.

On a "more complete record," the Court determined that laches *did* apply. *Id.* Taxpayers' "delay in filing suit was not reasonable" because they "knew all of the terms of the Agreement in June 2021" yet waited to file suit until well after construction began. APP.371-72. "Taxpayers' letters to the City do not justify the delay." APP.372. The Superior Court also had no trouble finding that this delay prejudiced Garfield, as the "record established that … Garfield spent more than $32 million on construction by the time the suit was filed" at which point "it was too late for Garfield to back out of or renegotiate the deal with the City." APP.373.

Second, the Superior Court ruled that "Taxpayers have not established that the City and Garfield have unclean hands…." *Id.* "The fact that Garfield began construction even though it was aware of a possible legal challenge is not unconscionable or bad faith conduct." *Id.* Moreover, "Garfield's agreement to indemnify the City for any legal challenges … is not unconscionable." *Id.*

Third, although unnecessary in light of its laches ruling, the Superior Court

ruled that "openly employing lawful methods of avoiding taxation do[es] not implicate the Evasion Clause." APP.376. Because the City and Garfield transaction was a "lawful method" to avoid taxes, Count II failed as a matter of law. APP.377. The Court also explained that the "sole purpose" of the transaction was not just to avoid taxes, but also to "to facilitate development in blighted areas." APP.378.

This appeal followed. This Court has jurisdiction under A.R.S. § 12-2101(A)(1).

COMBINED STATEMENT OF FACTS

I. The Slum Clearance and Redevelopment Act and the GPLET Statute.

The Slum Clearance and Redevelopment Act grants municipalities the power to declare areas "slum or blighted" when certain conditions are satisfied. *See* A.R.S. § 36-1473; *see also id.* § 36-1471(2) (defining "blighted area"), § 36-1471(18) (defining "slum area"). Once such a condition has been declared, the Act authorizes municipalities to acquire, sell, lease, exchange, transfer, or otherwise encumber or dispose of property to carry out "redevelopment projects" within the area, including GPLET transactions. *Id.* §§ 36-1474(3)(a)-(h), 42-6209.

Broadly, GPLET transactions incentivize development within slum or blighted areas by reducing a private developer's property tax liabilities. *See* APP.280-82.

For background, government-owned land is generally not subject to ad valorem taxation. Ariz. Const. Art. IX, § 2(C)(1). But parties that lease "building[s] … for which the title of record is held by a government lessor" *are* subject to the

GPLET. *See* A.R.S. §§ 42-6202(A) (parties that lease "government property improvements" subject to GPLET), 42-6201(2) (defining "government property improvements").

In light of the importance of revitalizing "slum or blighted" areas, the Legislature has allowed cities or towns to abate the GPLET for up to eight years for any party that leases a government property improvement that is "located entirely within a slum or blighted area" and meets certain other requirements. A.R.S. § 42-6209(A)(1)-(2).

Typically, GPLET transactions take advantage of this legal tax benefit through a series of well-defined steps.

First, a municipality designates a particular area "slum or blighted." *See* A.R.S. §§ 42-6209(A)(2), 36-1473.

Second, a private developer purchases land within that slum or blighted area. *See generally* SUPPAPP00006.

Third, the private developer and the municipality enter into an agreement to engage in a GPLET transaction. *See generally* SUPPAPP0096-97.

Fourth, the developer constructs a building on the property. *See generally*, APP.008 at ¶ 25.

Fifth, the City acquires title to the building and the property from the developer. *See* A.R.S. § 42-6209(A). Because the property is now owned by the City,

it is not subject to ad valorem taxes. *See* Ariz. Const. Art. IX, § 2(C)(1).

Sixth, the developer leases the building from the municipality for a period of eight years. A.R.S. § 42-6209(G). Assuming that the building satisfies the criteria of A.R.S. §§ 42-6209 and 42-6201, the municipality may "abate" the GPLET during the lease term. *See* A.R.S. § 42-6209(A).

Seventh, at the conclusion of the eight-year lease term, the city or town conveys the property back to the developer. *See* APP.008-009 at ¶¶ 24-27. At this point, the property is once again subject to ad valorem taxation.

II. The 6th & Garfield Project.

Taxpayers' challenge concerns a GPLET transaction between the City of Phoenix and Garfield (broadly referred to as the "City-Garfield Transaction" or "Transaction").

A. Garfield Purchases Property in a Slum or Blighted Area and Requests a GPLET Transaction to Build an Apartment Building.

In 1979, the City designated the "Downtown Redevelopment Area" in downtown Phoenix a slum or blighted area. *See* SUPPAPP0077 at ¶¶ 11, 16; APP.339 at ¶¶ 11, 16. In 2017, the City issued RFP Number RFP-CED17-DD, which sought "proposals for the opportunity to develop, finance, construct, and manage urban and mixed-use development and redevelopment projects on private property within the Downtown Redevelopment Area." SUPPAPP0077 at ¶12-13; APP.339 at ¶¶ 12-13. The RFP referenced the opportunity to enter into a GPLET transaction and

explained that it was "intended to reduce the time needed for the private sector to present realistic, buildable, and appropriate urban and mixed-use development and streamline the request for City assistance on these proposals." SUPPAPP0077 at ¶¶ 14-15; APP.339 at ¶¶ 14-15.

Garfield went under contract on 813, 817, and 821 N. 6th Street, Phoenix, Arizona in 2019. SUPPAPP0077 at ¶ 17; APP.340 at ¶ 17. These properties are located within the Downtown Redevelopment Area. SUPPAPP0077-78 at ¶ 18; APP.340 at ¶ 18.

On December 27, 2019, Garfield, through a subsidiary, submitted a response to the RFP requesting that the City enter into a GPLET transaction to build a "26-story, 309 unit" apartment building on 6th Street and Garfield Street (the "6th and Garfield Project"). SUPPAPP0078 at ¶¶ 19-20; APP.340 at ¶¶ 19-20. Garfield would not have submitted a response to the RFP if GPLET treatment was not available for the project. SUPPAPP0078 at ¶ 21; *see* APP.340 at ¶ 21.[3]

B. The City Evaluates Garfield's RFP Proposal at Several Public Meetings, Including Ones Attended by Taxpayers.

In early 2020, an "evaluation panel, consisting of a representative from the Downtown Voices Coalition and City staff" reviewed Garfield's RFP proposal and

[3] Taxpayers "dispute" this fact because they are personally "unaware of … reasons Garfield may or may not have submitted an RFP response." APP.340 at ¶ 21. However, Taxpayers have failed to produce any contrary *evidence* that undermines the evidence showing that Garfield only submitted an RFP response because it believed GPLET treatment was available.

recommended that the City begin negotiations with Garfield. SUPPAPP0078 at ¶ 22; APP.340 at ¶ 22.

On September 14, 2020, the Central City Village Planning Committee held a public meeting during which it discussed amending certain zoning codes to accommodate the 6th and Garfield Project. SUPPAPP0078 at ¶ 23; APP.340 at ¶ 23. Plaintiff/Appellant Bramley Paulin admits that he attended this meeting. SUPPAPP0083-84 at ¶ 42; APP.342 at ¶ 42. The public records from that meeting reflect that Paulin "stated that he likes the proposed project," inquired about the terms of the proposed GPLET agreement, and asked "how [the 6th and Garfield Project] will not be unconstitutional like the Derby case." SUPPAPP0084 at ¶ 43; *see also* APP.283-84 (taking judicial notice of statements in September 14, 2020 Central City Village Planning Committee meeting minutes).

On September 21, 2020, Taxpayers' counsel in this case, copying Paulin, wrote a letter to Phoenix Mayor Kate Gallego and the Phoenix City Council stating that: "To the extent the City intends to enter another GPLET arrangement that abates *ad valorem* property taxes, or substantially reduces those taxes as a means of subsidizing the developers of the … [6th and Garfield Project], or other similar private developments, such action violates the Arizona Constitution … By approving such deals, the City is exposing itself to another round of litigation by aggrieved

taxpayers, including our clients." APP.025-026; SUPPAPP0084 at ¶ 45; APP.342 at ¶ 45.

On September 22, 2020, Garfield and the City entered into a letter of intent ("LOI") for the 6th and Garfield Project, which "summariz[ed] the proposed business terms" between the parties. SUPPAPP0078 at ¶ 24; APP.340 at ¶ 24. Among other things, the LOI explained that the City "will recommend the use of [GPLET] treatment for the [6th and Garfield Project]." SUPPAPP0079 at ¶ 26; APP.340 at 3 ¶ 26. "Upon receipt of the Certificate of Occupancy ('C of O') for the [6th and Garfield Project] … [Garfield] will convey the Site and improvements thereon (together, the 'Property') to City, at no cost to City. City will contemporaneously lease the Property to [Garfield] (the 'Lease') for a term commencing on the date of the Lease and ending 8 years thereafter (the 'Lease Term')." SUPPAPP0079 at ¶ 26; APP.340 at ¶ 26. The LOI also contained three "Attachments." SUPPAPP0093-95. Relevant here, "Attachment B" listed the anticipated "Lease Rent Schedule" and "Attachment C" explained that Garfield would pay a "minimum direct benefit amount" to the City. SUPPAPP0093-95.

The Phoenix Workforce and Economic Development Subcommittee approved the 6th and Garfield Project at its September 23, 2020, Meeting. SUPPAPP0079-80 at ¶ 28; APP.340 at ¶ 28. Paulin "virtually attended" this meeting. SUPPAPP0084 at ¶ 46; APP.342 at ¶ 46. In "approximately October 2020," Plaintiff/Appellant Mat

Englehorn "became aware that the City was considering providing GPLET tax treatment for the [6th and Garfield Project]." SUPPAPP0085 at ¶ 49; APP.342-43 at ¶ 49.

C. The City Approves the Project, Garfield Completes Its Purchase of the Property, and Construction Begins.

The City Council approved the 6th and Garfield project at its October 7, 2020, Formal Meeting. SUPPAPP0080 at ¶ 31; *see* APP.340 at ¶ 31. In approving the 6th and Garfield Project, the City Council also enacted Ordinance S-46966, which explicitly authorized the City to enter into a GPLET transaction with Garfield. SUPPAPP0080 at ¶¶ 32-33; *see* APP.341 at ¶¶ 32-33. Ordinance No. S-46966 also outlined the material terms of the Transaction, including the fact that the 6th and Garfield Project would be conveyed to the City, leased for a period of eight years during which time the GPLET would be abated, and then re-conveyed back to Garfield at the end of the lease period. SUPPAPP0096-97. Paulin attended this meeting and understood that Ordinance S-46966 "authoriz[ed] City officials to enter negotiations" related to the 6th and Garfield Project. SUPPAPP0084-85 at ¶¶ 47-48; APP.342 at ¶¶ 47-48.

Garfield completed its purchase of 813, 817, and 821 N. 6th Street in November 2020. SUPPAPP0077 at ¶ 17; APP.340 at ¶ 17.

On November 4, 2020, a month after Ordinance S-46966 had been enacted, the City responded to Taxpayers' September 21, 2020, letter. SUPPAPP0085 at ¶ 50;

APP.343 at ¶ 50. The City explained that the 6th and Garfield Project "compl[ies] with Arizona law." SUPPAPP0085 at ¶¶ 51-52; APP.343 at ¶¶ 51-52. Taxpayers did not provide any response to the City's November 4, 2020, letter, or attempt to engage in any other "negotiation" efforts at that time.

Pursuant to Ordinance S-46966, the City and Garfield executed a Disposition and Development Agreement (i.e., the "Agreement") on May 14, 2021. SUPPAPP80 at ¶ 34; APP.341 at ¶ 34. Exhibit C to the Agreement was a proposed lease between the City and Garfield ("Lease"). APP.099-179.

Garfield began construction on the 6th and Garfield Project on May 24, 2021. APP.370.

Paulin "received a copy" of the Agreement "on or about June 14, 2021." SUPPAPP0085 at ¶ 53; APP.343 at ¶ 53. Plaintiff Mat Englehorn "became aware of the terms of the [Agreement] … in approximately September 2021." SUPPAPP0085 at ¶ 54; APP.343 at ¶ 54.

Well after the Agreement was signed and after construction had already begun, Taxpayers sent another letter to the City on October 29, 2021. SUPPAPP0085 at ¶ 55; APP.343 at ¶ 55; APP.022-047. This second letter did not propose any negotiation or good-faith settlement offer. *See* APP.022-023. Rather, it flatly asserted that the "the GPLET subsidy provided for the Garfield Development violates the Gift Clause" and urged the City "to disapprove this GPLET tax abatement or other forms

of favorable GPLET tax treatment for this project…." APP.022-023; SUPPAPP0085 at ¶ 56; APP.343 at ¶ 56.

After waiting six months, Taxpayers filed this lawsuit on May 4, 2022. *See* APP.005-021. By May 20, 2022, Garfield had already spent or incurred over $32.3 million developing the 6th and Garfield Project. APP.336 ¶ 14; SUPPAPP0083 at ¶ 39; *see* APP.342 at ¶ 39. At that point, it was no longer viable for Garfield to renegotiate the agreement with the City. APP.336-337 ¶ 15; SUPPAPP0083 at ¶ 40; *see* APP.342 at ¶ 40.

D. Material Terms of the Agreement and Lease.

As is typical for GPLET transactions, in the Agreement and Lease, Garfield agreed to develop the 6th and Garfield Project and convey the property to the City; the City agreed to lease the property back to Garfield for eight years; and after the eight-year lease term, the City agreed to re-convey the 6th and Garfield Project back to Garfield. SUPPAPP0081 at ¶ 36(a)-(c); APP.341 at ¶ 36(a)-(c). The City agreed to abate the GPLET during the lease term. SUPPAPP0081 at ¶ 36(d); APP.341 at ¶ 36(d).

Section 101 of the Agreement, titled "Purpose of Agreement," explains that the "development of the Site pursuant to this Agreement, and the fulfillment generally of this Agreement, are in the vital and best interests of City and the health, safety, and welfare of its residents." SUPPAPP0082 at ¶ 36(j); APP.341 at ¶ 36(j); APP.378. Section 101 also explains that the City "considered the potential economic

benefits of the Project to the City, Maricopa County and the State of Arizona in connection of its approval of the Project ….” SUPPAPP0082 at ¶ 36(k); APP.341 at ¶ 36(k).

Under the Agreement and Lease, and consistent with the LOI, Garfield promised to make substantial payments to the City during the lease period, including: (1) $9 million in “Minimum Direct Benefit Amounts,” which includes $525,000 in net rent plus amounts for various transaction privilege, use, and property taxes; (2) a $100,000 donation to the City’s Affordable Housing Trust Fund; and (3) $2,000 yearly donations to Phoenix Elementary School District and Phoenix Union High School District. SUPPAPP0081-82 at ¶¶ 36(e)-(g), (i); APP.341 at ¶¶ 36(e)-(g), (i). Garfield also agreed to make ten percent of residential units available for “workforce housing” during the term of the Lease. SUPPAPP0081 at ¶ 36(h); APP.341 at ¶ 36(h).

Like a typical commercial tenant, Garfield is afforded significant control over the 6th and Garfield Project during the lease term. APP.377. However, the Lease clarifies that Garfield may not use the premises for any “purpose prohibited by this Lease,” which include operating the property as a “[l]iquor store,” an “[e]mployment agency,” or a [p]awn shop,” among other things. SUPPAPP0082 at ¶ 36(l)-(m); APP.341 at ¶ 36(l)-(m). During the Lease period Garfield is also required to “take good care of the Premises,” including by “maintain[ing] and keep[ing] the Premises

and the adjacent sidewalks, curbs, and landscaping in a safe and debris-free order, repair, and condition in accordance with the City standards and this Lease, whichever is more stringent." SUPPAPP0082 at ¶ 36(n); APP.341 at ¶ 36(n). If Garfield fails to "take good care" of the premises, the City retains "sole and absolute discretion" to "perform or have performed any and all such work … necessary to maintain or restore the Premises to its required condition." SUPPAPP0082-83 at ¶ 36(o); APP.341 at ¶ 36(o).

COMBINED STATEMENT OF THE ISSUES

1. Did the Superior Court correctly dismiss Taxpayers' claims based on the doctrine of laches, where: (a) Taxpayers were on notice of their claims by at least May 14, 2021, but waited until May 4, 2022, to file suit without any reasonable justification; and (b) in that time Garfield "spent more than $32 million on construction," APP.373, and construction had progressed to the point where it was too late to abandon the Project?
2. Did the Superior Court correctly determine that a GPLET transaction is not subject to the Gift Clause because a GPLET transaction only forgoes potential future tax revenues that the City does not yet own?
3. Did the Superior Court correctly determine that the GPLET arrangement between the City and Garfield does not violate the Evasion Clause where "the uncontroverted evidence shows that Garfield and the City … did not engage in any artifice or sham to use the GPLET statute to evade property taxes"?

APP.379.

4. Did the Superior Court err when it determined that Taxpayers' causes of action did not "accrue" until Garfield signed the Agreement with the City on May 14, 2021, even though Taxpayers were on notice to investigate their claims by at least October 7, 2020?

COMBINED STANDARDS OF REVIEW

Appellate courts "review a trial court's decision on laches for abuse of discretion," *McLaughlin v. Bennett*, 225 Ariz. 351, 353 ¶ 5 (2010). "An abuse of discretion exists when the record, viewed in the light most favorable to upholding the trial court's decision, is devoid of competent evidence to support the decision." *Hurd v. Hurd*, 223 Ariz. 48, 52 ¶ 19 (App. 2009) (quotation omitted).

Whether the Gift Clause applies to GPLET transactions is a question of law that is reviewed de novo. *See Gilmore v. Gallego*, 529 P.3d 562, 570 ¶ 23 (Ariz. App. 2023).

Whether the Transaction violated the Evasion Clause is a mixed question of law and fact; this Court reviews the questions of law de novo but "defer[s] to the trial court's factual findings." *See State v. Wyman*, 197 Ariz. 10, 13 ¶ 5 (App. 2000).

"The application of the statute of limitations, including the question of accrual, is also reviewed de novo." *Deutsche Bank Nat'l Tr. Co. v. Pheasant Grove LLC*, 245 Ariz. 325, 330 ¶ 15 (App. 2018).

RESPONSE TO TAXPAYERS' OPENING BRIEF

This Court should uphold the Superior Court's well-reasoned determinations that: (1) Taxpayers' claims were barred by laches; (2) that the Gift Clause does not apply to the Transaction; and (3) that the Evasion Clause does not apply to the Transaction.

I. The Superior Court Correctly Determined that Laches Applies.

The doctrine of laches "is an equitable counterpart to the statute of limitations, designed to discourage dilatory conduct." APP.371 (quoting *Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶ 6 (2000)). It bars claims where the defendant can show that: (1) the plaintiff unreasonably delayed in filing suit and (2) the delay prejudiced the defendant. *Id.* (citing *Prutch*, 231 Ariz. at 435 ¶ 13). The Superior Court correctly found that Taxpayers unreasonably delayed by waiting "nearly a year after construction began" to file suit, despite knowing "all of the terms of the Agreement in June 2021." APP.372. This delay was prejudicial because "[t]he record establishes that … Garfield spent more than $32 million on construction by the time the suit was filed" and that by that point "it was too late for Garfield to back out of or renegotiate the deal with the City." APP.373.

Taxpayers do not challenge any of these factual findings. Instead, they argue that (A) the laches ruling only applied to their Evasion Clause Claim (and not the Gift Clause Claim); (B) their delay was reasonable because they "diligently pursued non-litigation alternatives before suing" (a fact-based argument Taxpayers raised

unsuccessfully before the Superior Court); (C) Garfield's harm was only "speculative"; and (D) laches is barred under the unclean hands theory (another argument raised unsuccessfully at the Superior Court). All four positions fail.

A. The Superior Court's Laches Ruling Applied to Both Counts.

Taxpayers are incorrect (at 56-58) that the Superior Court's laches ruling only applied to their Evasion Clause claim, rather than to their Complaint as a whole. While it is true that the Superior Court's laches analysis in its summary judgment ruling was focused on the Evasion Clause claim only, this was because the Superior Court had already dismissed Taxpayers' Gift Clause claim. *See* APP.293.

There is no logical reason why the Superior Court's laches ruling would only have applied to the Evasion Clause claim. Taxpayers themselves admit (at 56-57), that the "facts and legal analysis" for laches "are the same" for both their Gift Clause and Evasion Clause Claims.[4] And the key facts underpinning the Superior Court's laches ruling were not specific to either Count, but instead broadly applied to Taxpayers' delay in filing *suit*. *See* APP.372 (ruling that Taxpayers delay was unreasonable because they "[k]new all of the terms of the … Agreement in June 2021" but waited until May 2022 to file suit); APP.373 (ruling that the "record established" that Garfield was prejudiced by the delay because it had spent more than

[4] If anything, Taxpayers' delay in filing their Gift Clause claim was more egregious because they expressed concern that the then-proposed City-Garfield GPLET arrangement violated the Gift Clause in a letter sent to the City as early as September 2020. *See* SUPPAPP0085 at ¶ 45; APP.342 at ¶ 45.

$32 million on construction by the time the suit was filed and could no longer back out of the Transaction).

Taxpayers (at 57-58) argue that the Superior Court "rejected the application of laches" on their Gift Clause Claim in its Motion to Dismiss ruling. In response to the same argument, the Superior Court explained that it had done no such thing: "The Court *did not actually decide the laches defense*" at that stage, "but instead opted to address the Motion to Dismiss on the merits." APP.371 (emphasis added). In particular, the Superior Court declined to address laches at the motion to dismiss stage due to the presence of "factually contested issues," like the potentially contested issue of whether Taxpayers had made good faith efforts to resolve the dispute before filing suit or whether Garfield could have mitigated its prejudice. *See* APP.288.

Contrary to Taxpayers' position there is nothing inherently contradictory about the Superior Court's decision to decline to rule on a laches argument at the Rule 12 stage, but later address it in summary judgment. This is because "[l]aches is a 'highly fact-based' inquiry" that is not often granted before discovery has occurred. *See Travers v. FedEx Crop.*, 567 F.Supp.3d 542, 551-52 (E.D. Pa. 2021) (quotation omitted) (declining to rule on laches defense in the absence of discovery).

Because the Superior Court's laches ruling applied to Taxpayers' entire suit, including both Gift Clause *and* Evasion Clause claims, their appeal must be rejected

unless the Superior Court abused its discretion in holding that laches applied. *See McLaughlin*, 225 Ariz. at 353 ¶ 5. It did not.

B. Taxpayers Unreasonably Delayed in Filing Suit.

The Superior Court's finding that Taxpayers unreasonably delayed in filing suit was not "devoid of competent evidence." *Hurd*, 223 Ariz. at 52 ¶ 19. Indeed, Taxpayers do not (and cannot) dispute the Superior Court's factual finding that they "knew all the terms of the [] Agreement in June 2021, at the latest, shortly after construction began." APP.372. Instead, they (at 47) argue that their delay was reasonable because they "diligently pursued resolution of this matter through the proper non-litigation channels." In particular, Taxpayers (at 49) cite to the two letters they sent to the City opposing the Transaction in September 22, 2020, and October 29, 2021 respectively, as well as associated follow-up emails. *See* SUPPAPP0084-85 at ¶¶ 45, 56; APP.342-43 at ¶¶ 45, 56.

Taxpayers made this exact argument to the Superior Court. SUPPAPP0103-104. The Superior Court correctly rejected it because the two letters did not constitute a "'continuous and bilaterally progressing,' good faith attempt to resolve this matter…." APP.372.

Because the Superior Court's factual finding was well-supported by the record, it did not abuse its discretion. Neither of Taxpayers' letters proposed a "non-litigation alternative" to filing suit; both asserted without compromise that the Transaction violated the Gift Clause and demanded that the City "disapprove" the

deal. *See* SUPPAPP0084 at ¶ 45; APP.342 at ¶ 45. Moreover, it was clear that the City disagreed with Taxpayers' view that the Transaction violated the Arizona Constitution. After Taxpayers sent their first letter on September 21, 2020, the City: (1) enacted Ordinance No. S-46966 on October 7, 2020; and (2) sent a response letter on November 4, 2020, explaining that the 6th and Garfield Project did *not* violate the State Constitution. SUPPAPP0080, 85 at ¶¶ 32, 50-52; APP.340, 343 at ¶¶ 31, 50-52. By the time Taxpayers sent their second letter on October 29, 2021, they were already in possession of the *executed* Agreement and construction on the 6th and Garfield Project had *already* begun. *See* APP.371-73. Thus, even if Taxpayers' letters had proposed a "good faith" non-litigation alternative to this litigation (they did not), Taxpayers had no justification for waiting six months after the second letter (and eleven months after the first letter) to file suit. *See* APP.372.

Taxpayers (at 49) state that they sent "three letters" to the City "over a four month period." Although Taxpayers imply that these "three letters" were sent "as soon as the City authorized negotiations with Garfield in October 2020," in actuality Taxpayers appear to be referencing their already-too-late October 29, *2021*, letter and two, very brief, status check follow-up emails that Taxpayers' counsel sent to the City on December 1, 2021, and January 1, 2022. *Compare* O.B. at 49 (citing to APP.022-48 and APP.051-52), *with* APP.022-24 (October 29, 2021 letter), APP.048-49 (December 1, 2021 Taxpayers' email to City counsel stating "Have you all had a

chance to review the attached? Let me know if you have any questions or would like to set up a call or meeting to discuss"), *and* APP.051-052 (January 5, 2022 Taxpayers' counsel's email to the City stating "We haven't received a response to this yet. Is one coming?").

The Superior Court's ruling was also in accord with other courts that have held that "sparse letter writing campaign[s]" like Taxpayers' do not toll the laches period. *See Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 823-24 (7th Cir. 1999); *S. Grouts & Mortars, Inc. v. 3M Co.*, No. 07-61388-CIV, 2008 WL 4346798, at *3 (S.D. Fla. Sept. 17, 2008) (declining to toll the laches period where "there is no indication that SGM took any steps beyond merely sending emails and letters" before filing suit).

In defense, Taxpayers (at 49-50) cite to *McComb v. Superior Court*, 189 Ariz. 518 (App. 1997), but that case only highlights how paltry Taxpayers' "efforts" to resolve this case were. In *McComb*, the plaintiffs challenged a June 1996 district board vote changing from an at-large voting system to a single member voting system. 189 Ariz. at 521. After the vote, the "[p]laintiffs *immediately* requested documents from the district and objected in the United States Justice Department Voting Rights Act approval process." *Id.* at 525 (emphasis added). After the DOJ approved the change in August 1996, the plaintiffs solicited an opinion from the Arizona Attorney General and "continued their non-judicial challenges to the board's

decision until the filed their complaint on November 25, 1996"—which was only five months after the board vote. *Id.* In contrast here, Taxpayers sent a grand total of two letters—the second of which was "sent more than six months before the suit was filed." APP.372.

Based on the evidentiary record, the Superior Court was well within its discretion in determining that Taxpayers correspondence with the City did not toll the laches period. *See Glen Elec. Capital Corp. v. Osterkamp*, 172 Ariz. 185, 188-89 (App. 1992) (appellate courts will not "second-guess" superior courts "determination[s] of disputed questions of fact").

C. Taxpayers' Delay Prejudiced Garfield.

Taxpayers do not dispute that in the context of laches, "[p]rejudice 'can take the form of … economic prejudice." APP.373 (quoting *Apotex, Inc. v. UCB, Inc.*, 970 F. Supp. 2d 1297, 1336 (S.D. Fla. 2013)). Nor do they challenge the Superior Court's finding that the "record establishes" that Garfield "spent more than $32 million on construction" in between the date they executed the Agreement (June *2021*) and when they ultimately filed suit (May *2022*). *Id.* Taxpayers thus cannot show the Superior Court abused its discretion in finding that their delay in filing prejudiced Garfield here. *See, e.g.*, *Clark v. Volpe*, 342 F.Supp. 1324, 1329 (E.D. La. 1972) (applying laches where party was aware of a proposed construction project but waited until "bulldozers and chain saws" had "stripped and leveled the land" and "vast sums of public money [had been] been expended" to bring suit); *Pittsfield v.*

Malcolm, 134 N.W.2d 166, 172-73 (Mich. 1965) (applying laches where plaintiffs were aware of notice of a proposed project but "waited over 10 months after construction" to file suit).[5]

Nevertheless, Taxpayers (at 50-53) argue that Garfield has only shown "speculative" economic losses. Taxpayers did not make this argument before the Superior Court, *see* SUPPAPP0039-40, 104-105, and therefore have waived it on appeal. *E.g.*, *Roebuck v. Mayo Clinic*, 536 P.3d 289, 294 ¶ 16 (App. 2023) ("If the argument is not raised below so as to allow the trial court such an opportunity, it is waived on appeal.").

Regardless, Taxpayers' position (at 52) misconstrues the declaration of John McLinden, Garfield's authorized representative. In that declaration, McLinden explained that had Taxpayers filed suit earlier, Garfield "*would have* been able to mitigate any potential losses and potentially renegotiate the agreement with the City." APP.336 at ¶ 15 (emphasis added). In other words, McLinden testified that: (1) Garfield would have been able to mitigate its losses had Taxpayers filed suit earlier and (2) these mitigation options could have "potentially" included renegotiation with the City. McLinden did not testify that the *only* way that Garfield could have mitigated its damages was through renegotiation. The Superior Court was

[5] *See also Chicago v. Grendys Bldg. Corp.*, 281 N.E.2d 708, 712 (Ill. App. 1972) (dismissing a claim based on the similar doctrine of estoppel where a party waited until after construction was completed to challenge project).

thus within its discretion to credit McLinden's testimony.

Moreover, the question is not whether Garfield could have "mitigated" its losses had Taxpayers filed sooner, but rather whether it has suffered "injury *or a change in position as a result of the delay*." APP.373 (quoting *In re Indenture of Trust Dated January 13, 1964*, 235 Ariz. 40, 48 ¶ 23 (App. 2014) (emphasis added)). Here, the record supports the finding that Garfield's position changed while Taxpayers waited months to file suit. *See* APP.372 (explaining that during the delay Garfield spent more than $32 million on construction costs).

At bottom, Taxpayers fail to show that the Superior Court erred in determining that they unreasonably delayed in filing suit and that Garfield suffered prejudice as a result.

D. Unclean Hands Does Not Apply.

In a last gasp effort, Taxpayers attempt to avoid the laches doctrine (at 53-56) by arguing that "Garfield is disqualified from seeking laches in the first place, due to unclean hands." The doctrine of unclean hands only applies where the party seeking equitable relief has engaged in "monstrously harsh" activities that are "shocking to the conscience." *Ariz. Coffee Shops, Inc. v. Phx. Downtown Parking Ass'n*, 95 Ariz. 98, 101 (1963). The Superior Court correctly ruled that unclean hands does not apply here, because "Taxpayers have not alleged any bad faith or unconscionable conduct by Garfield or the City." APP.373. On appeal, Taxpayers cite to only two pieces of "evidence" that supposedly undermines this conclusion. Neither is persuasive.

First, Taxpayers (at 54-55) point to a single, heat-of-the-moment, email from Garfield's counsel to the City during negotiations, which urged the City to move forward with the 6th and Garfield deal despite the Maricopa County Superior Court's then-recent ruling in *Engelhorn v. Stanton*, No. CV2017-001742, 2020 WL 7487658 (Ariz. Sup. Ct. June 19, 2020). Taxpayers allege (at 54-55) that this email shows that "Garfield's attorney was representing that the City would ignore the trial court's decision in *Englehorn* and proceed with a nearly identical subsidy."

Taxpayers' reliance on *Engelhorn* is unconvincing. Garfield was not a party to that case and it has no precedential value. Moreover, the GPLET transaction in *Engelhorn* was not "nearly identical" to the City-Garfield Transaction. Unlike the eight-year lease term here, APP.008 at ¶ 26, the *Englehorn* lease lasted 25 years, *Englehorn*, 2020 WL 7487658 at * 2 ¶ 15. Further, in *Englehorn* all parties agreed that the City would receive $5,488,967 and that the private developer would "avoid" at least $14,566,807 in ad valorem taxes. *See Englehorn*, 2020 WL 7487658 at *3-4 ¶¶ 36, 47. Here in comparison, there is no similar stipulation and the $9 million "Minimum Direct Benefit Amount" *exceeds* the amount of GPLET taxes abated or even the alleged $7,300,000 in ad valorem taxes Taxpayers allege Garfield will "avoid" through GPLET treatment. *See infra*, Section II.B; *see also* APP.010 at ¶ 38; APP.107-09 at § 4.7.

These differences are material. Even if the Gift Clause applies to GPLET

transactions (and it does not), the test to evaluate a Gift Clause violation is unique to the facts at hand, measuring among other things whether "the value to be received by the public is far exceeded by the consideration being paid by the public." *Wistuber v. Paradise Valley Unified School Dist.*, 141 Ariz. 346, 357 (1984). As such, every project is evaluated on a case-by-case basis. Indeed, during this litigation, the Pima County Superior Court *upheld* a GPLET transaction against a Gift Clause challenge in *Rogers v. Huckleberry*, No. C2016-1761 (Ariz. Sup. Ct. Feb. 22, 2021) (available at IR 61).[6]

Second, Taxpayers (at 56) argue that the City and Garfield were aware of the "likelihood of [a] lawsuit" yet "signed the [Development] Agreement anyway." But Taxpayers do not cite any authority supporting their view that merely being aware of a potential legal challenge to a transaction, yet moving forward anyway, somehow constitutes "monstrously harsh" behavior. *See Ariz. Coffee Shops*, 95 Ariz. at 101. Taxpayers thus cannot show that the Superior Court's factual determination that the "fact that Garfield began construction even though it was aware of a possible legal challenge is not unconscionable or bad faith conduct" was an abuse of discretion. APP.373.

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[6] That *Rogers* was ultimately overturned on appeal, Case No. 2 CA-CV 2021-0072, does not take away from the broader point that every Gift Clause challenge is fact specific or somehow mean that Garfield was obligated to abandon the 6th and Garfield Street Project in light of *Englehorn*, especially because the case was distinguishable based on a change in the law and the facts.

Accordingly, the Superior Court correctly ruled that the Complaint was barred on the basis of laches. This Court can uphold the Superior Court's ruling on this ground alone.

II. The City-Garfield Transaction Does Not Violate the Gift Clause.

Even if Taxpayers' laches problem could be overlooked, the Court should still decide this case in favor of Garfield and the City because the Transaction does not violate the Gift Clause. This is because: (1) the Gift Clause does not apply to the Transaction; and (2) even if the Gift Clause applies here, the Transaction satisfies the two-part test.

A. The Gift Clause Does Not Apply to the City-Garfield Transaction.

The Superior Court correctly concluded that the Gift Clause does *not* apply to the Transaction because it provides a prospective tax benefit. APP.293-94. Specifically, in *Maricopa Cty.*, 187 Ariz. at 280, this Court drew a distinction between two types of "legislative measures" for Gift Clause purposes. APP.291.

The first category are legislative measures that "result in tax benefits that take effect *prospectively*." *Id.* (emphasis added) (quoting *Maricopa Cty.*, 187 Ariz. at 280). In this category, "the taxing entity foregoes revenues that it could have chosen to collect[] in the future … so the taxpayers' obligation to pay never arises." *Id.* (quoting *Maricopa Cty.*, 187 Ariz. at 280). Because the government does not "own" future tax revenues, measures that fall within this category are not subject to the Gift Clause. *See* APP.291-92. Tax credits are an example of legislative measures falling

into this category: because the government does not "own" future taxes that have not yet been collected, tax credits are not subject to the Gift Clause. *See Kotterman*, 193 Ariz. at 288 ¶ 52 (holding that tax credits are not subject to the Gift Clause because "[o]ne cannot make a gift of something that one does not own").

The second category are legislative measures that "annul closed taxing transactions in order to confer tax benefits *retroactively*." APP.291 (quoting *Maricopa Cty.*, 187 Ariz. at 280 (emphasis added)). In this category, the "taxing entity modifies its laws to impose on itself an obligation to *refund* revenues that it collected lawfully in the past." *Id.* (quoting *Maricopa Cty.*, 187 Ariz. at 280 (emphasis added)). Because the government *does* "own" these revenues, but chooses to forgo them, these types of transactions are subject to the Gift Clause. *Id.*

Applying these principles, the Superior Court correctly determined that the Transaction falls into the first category. APP.293. This is because in the Transaction "the City did not give up *ad valorem* taxes already owned by Garfield." *Id.* "Rather, in exchange for Garfield's agreement to build the Project with Garfield's own funds on land that Garfield owned, the City agreed to GPLET treatment and abatement for *future* taxes." *Id.* (emphasis added). "As such, the City did not make a gift of public monies or property." *Id.*

Taxpayers (at 17-18) incorrectly argue that this finding was "erroneous both factually and legally." On the facts, Taxpayers argue (at 17) that the City has given

up ad valorem taxes "already owed by Garfield" because "Garfield currently pays ad valorem property taxes on the Property." However, the Transaction does not refund or permit the non-payment of ad valorem taxes already paid by Garfield. Rather, it eliminates eight years of future, yet-to-be-assessed, ad valorem tax liabilities while the property is instead subject to the GPLET. *See* APP.293.

Taxpayers try to dodge this problem (at 18) by arguing that Garfield would pay future ad valorem taxes "but for the title-transfer in the Agreement." This logic is unavailing. A taxpayer would be liable for more taxes "but for" receiving a tax credit for a $500 donation to a charitable institution, yet, *Kotterman* had no difficulty finding that that kind of tax credit does not implicate the Gift Clause. *See Kotterman*, 193 Ariz. at 276-77, 288 ¶¶ 1, 51-52. Moreover, Taxpayers ignore the reality that developers often will not purchase properties *unless* they know they will receive a GPLET transaction in the future. *See* SUPPAPP0078 at ¶ 21; APP.340 at ¶ 21. In fact, there is no evidence in the record establishing that Garfield would have even owned the property in the future absent the Transaction or would have had any obligation to pay future ad valorem taxes.

On the law, Taxpayers make several arguments as to why the categories in *Maricopa County* and *Kotterman* should not apply here; all fail.

1. There Is No Distinction Between Benefits to "Particular Participants" Versus Benefits to the "General Public."

Taxpayers (at 21-22) most prominently argue that the Superior Court

committed "reversable error" in relying on *Kotterman* "to support its finding that the Gift Clause does not apply to this case." In particular, Taxpayers argue that *Kotterman* is inapplicable because it involved a "generally available public program" rather than a situation where "government zeroes out taxes for particular recipients to subsidize their operations." This argument fails for at least two reasons.

First, *Kotterman* establishes a general rule that the Gift Clause does not apply to situations where the government forgoes revenues it does not currently "own." *See* 193 Ariz. at 288 ¶¶ 51-52; *see also Maricopa Cty.* 187 Ariz. at 280 (applying similar distinction). Tax credits are one example of a government giving up future, currently unearned, tax revenues. But there are many other examples as well, like where a government forgoes future ad valorem taxation. *See* APP.293.

Second, outside of a citation to an academic article written by Taxpayers' counsel, Taxpayers do not point to any authority supporting their view that there is a meaningful distinction for Gift Clause purposes between tax benefits available to the "general public" and those available only to "particular recipients." This supposed distinction is not discussed in *Kotterman* or *Maricopa County*. And the plain language of the Gift Clause applies to credits, donations, or grants, made to "*any* individual, association, or corporation…." Ariz. Const. Art. IX, § 7 (emphasis added). Providing a credit, donation, or grant to "any individual," encompasses credits, donations, or grants given to members of the "general public" as well as

"particular recipients." While Taxpayers claim (at 21) that the *purpose* of the Gift Clause was to prevent favorable tax treatments given to "special interests," the policy behind the Clause cannot override its plain language. *See Heath v. Kiger*, 217 Ariz. 492, 494 ¶ 6 (2008) ("When the language of a provision is clear and unambiguous, we apply it without resorting to other means of constitutional construction.").

Taxpayers' preferred interpretation of the Gift Clause would also render a shockingly large swath of existing laws subject to Gift Clause scrutiny. *See Ruth v. Indus. Comm'n*, 107 Ariz. 572, 576 (1971) ("An absurd construction of a constitutional provision should be avoided."). Taxpayers seem to argue (at 21) that 6th and Garfield Project is subject to the Gift Clause because "the City … choose[s] who gets a GPLET subsidy"—as opposed to a situation where the "taxing authority doesn't choose winners and losers." But the Legislature has created many other tax credits and "subsidies" that are awarded to particular recipients, or "winners," after an application process. *See e.g.*, A.R.S. § 43-1162 (requiring corporations to apply for tax credits related to "processing qualifying forest products"); § 43-1164.04 (requiring qualifying corporations to receive "preapproval" before applying for tax credits for investing in expanding or locating certain facilities in Arizona); A.A.C. § R3-9-205 *et seq.* (allowing the Department of Agriculture to award grants to agricultural companies based on a "competitive … solicitation" process). There are likewise many other tax credits that only apply to specific taxpayers that meet certain

qualifying criteria. *See, e.g.*, A.R.S. § 43-1073.01 (income tax credits for taxpayers with dependents); A.R.S. § 43-1081 (tax credits limited to taxpayers "involved in the commercial production of livestock, livestock products" or other agricultural products); A.R.S. § 43-1082 (tax credit for "motion picture production compan[ies]" that film motion pictures in the State).

Even if *Kotterman* did draw a distinction between benefits applicable to the "general public" versus those provided to "particular recipients," the 6th and Garfield Project would still be immune from the Gift Clause analysis. The City's 2019 RFP inviting GPLET applications in the Downtown Redevelopment Area was open to any developer willing to "privately develop, finance, construct, and manage urban and mixed-use development and redevelopment projects" within the area. SUPPAPP0006. Taxpayers (like any member of the public) could have put their hats in that ring, but chose not to.

2. There Is No Distinction Between New Laws that Create Future Benefits and Existing Laws that Confer Future Benefits.

Next, Taxpayers argue (at 18) that *Maricopa County* is inapplicable because the City has "not 'chang[ed] its laws prospectively' so that Garfield's obligation to pay taxes never arises." Although not entirely clear, Taxpayers seemingly argue that the first category in *Maricopa County* only applies where a government enacts some *new* law that changes tax rates in the future. Taxpayers do not cite to any authority supporting this position. To the contrary, *Maricopa County* instructs that *any*

"legislative measure" that "foregoes revenues that [the government] could have chosen to collect[] in the future" is not subject to the Gift Clause. *Maricopa Cty.*, 187 Ariz. at 280. The Transaction here is a "legislative measure." *See* SUPPAPP0096-97.

3. Whether this Case Involves a Government "Expenditure" Is Irrelevant.

Taxpayers (at 11-16) also spend a significant amount of time arguing that "the [Gift] Clause prohibits" legislative measures "that do not involve outright expenditures." This is a red herring: the Superior Court did not draw a distinction between legislative measures involving "expenditures" and legislative measures that do not involve "expenditures." Instead, as explained, the Superior Court correctly distinguished between measures forgoing future, un-owned, revenues and measures "refund[ing]" revenues that the government does currently own.[7] *See* APP.291-93.

For this reason, Taxpayers' reliance on *Neptune Swimming Foundation v. City of Scottsdale*, 542 P.3d 241 (2024) is misplaced. In that case, the City of Scottsdale awarded a swimming club a license for "exclusive rights" to conduct competitive swimming programs at the City's aquatic centers. 542 P.3d at 246-47 ¶¶ 4, 13. In finding that the second prong of the Gift Clause applied to this transaction, the

[7] Taxpayers' discussion (at 15-16) of A.R.S. § 9-500.05 is irrelevant for the same reason. And even so, A.R.S. § 9-500.05 is not helpful to Taxpayers. Despite Taxpayers' representation otherwise (at 16), A.R.S. § 9-500.05 says nothing about authorizing "expenditures" or spending public money. Rather it authorizes municipalities to enter into development agreements (which is why it is referenced in the Agreement). The quoted language (at 16) actually comes from an entirely different statute, A.R.S. § 9-500.11.

Supreme Court explained that the license was "not like the tax credit challenged under the Gift Clause in *Kotterman*" because "the City *owns the property access rights* granted by the 2016 License." *Id.* at 250 ¶ 29 (emphasis added).

In other words, *Neptune Swimming* did not somehow overturn the "prospective" versus "retroactive" dichotomy established in *Maricopa County* and *Kotterman*; it reaffirmed it. It was only *because* the City currently owned the license that it fell under the auspices of the Gift Clause. *See Neptune*, at 250 ¶ 29.[8] Here, in comparison, the City does not "own" any future ad valorem tax payments on the 6th and Garfield Project. *See* APP.293.

The remaining authorities that Taxpayers cite (at 11-15) are similarly distinguishable because they all involved situations where the government gave up revenues that it "owned" and therefore fell under the second *Maricopa County* category. *Puterbaugh v. Gila County*, 45 Ariz. 557 (1935), *Rowlands v. State Loan Board of Arizona*, 24 Ariz. 116 (1922), *Pimalco, Inc. v. Maricopa County*, 188 Ariz. 550 (App. 1997), and *Maricopa County*, all involved the government forgiving currently-owed debts or refunding already-collected taxes. *See* APP.291-92; *Puterbaugh*, 45 Ariz. at 559; *Rowlands*, 24 Ariz. at 122-123; *Pimalco, Inc.*, 188 Ariz.

[8] *Neptune Swimming* also did not evaluate whether the Gift Clause applied to the exclusive license. *See Neptune Swimming*, 256 Ariz. at 250 ¶ 27 (evaluating whether the "consideration prong" of the Gift Clause test applies). Thus, even if the Court *had* "explicitly rejected" *Kotterman* as Taxpayers claim (and it did not), such a statement would have been dicta.

at 559; *Maricopa County*, 187 Ariz. at 280. In *City of Tempe v. Pilot Properties, Inc.*, 22 Ariz. App. 356 (1974), a governmental entity leased its own land at below market rates and therefore gave up revenues it was currently entitled to receive.[9] *See* APP.291; *City of Tempe*, 22 Ariz. App. at 371.

Taxpayers (at 10, 14-15) also cite to *Industrial Development Authority of Pinal County v. Nelson*, 109 Ariz. 368 (1973) ("*IDA*") and *State v. Arizona Board of Regents*, 253 Ariz. 6 (2022) ("*ABOR II*"), but neither case is relevant here. In *IDA* the Supreme Court held that the Gift Clause was *not* implicated where a government entity issued bonds to finance an air pollution project. *IDA*, 109 Ariz. at 374. And in *ABOR II*, the Supreme Court did not address whether the Gift Clause actually applied to the GPLET transaction challenged by the Attorney General; rather, the Court evaluated whether A.R.S. § 35-212(E) was a statute of limitations that applied to the AG's challenge. *See ABOR II*, 253 Ariz. at 12 ¶ 22.

4. The Term "Subsidy" Is Illustrative of the Types of Prohibited Gifts, Not a Stand-Alone Prohibition.

Taxpayers (at 13) argue that the Gift Clause prohibits "subsidies" and that a subsidy includes a "tax break." Again, this argument is contrary to *Kotterman*, which held that "tax breaks" do *not* implicate the Gift Clause.

Taxpayers also cite no case holding that the Gift Clause applies to all

[9] The Complaint did not allege, and there is no evidence in the record to suggest, that the rent paid by Garfield to the City during the eight-year lease term is below market value. *See* APP.012 at ¶¶ 39-59. Similarly, Taxpayers do not make that argument in their Opening Brief.

"subsidies." In context of the Gift Clause, the word "subsidy" is *illustrating* one type of prohibited credit, donation, or grant: "Neither the state nor any … city …. shall ever give or loan its credit in the aid of, or make any donation or grant, *by* subsidy *or otherwise*, to any individual…." Ariz. Const. Art. IX, § 7 (emphasis added). Even if the term "subsidy" were a separate category of prohibited "gifts," the scope of prohibited subsidies could not be as broad as Taxpayers claim, as the word "subsidies" is naturally limited by the inclusion of the preceding words "donations," "grants," and "credits"—all of which require the government to give away something it "owns." *See State v. Barnett*, 142 Ariz. 592, 596 (1984) ("[G]eneral words which follow the enumeration of particular classes of persons or things should be interpreted as applicable only to persons or things of the same general nature or class"). The term "subsidy" cannot override the rule that "[o]ne cannot make a gift of something one does not own." *Kotterman*, 193 Ariz. at 288 ¶ 52.

Taxpayers (at 13) cite to *City of Tempe*, but in that case this Court held it was not necessary to decide whether the word "subsidy" was "merely … illustrative or … an absolute prohibition along with 'grants', or 'donations'" because the key question for Gift Clause purposes is whether "*government property* or funds were … given to private industry." *City of Tempe*, 22 Ariz. App. at 362 (emphasis added). This analysis is consistent with the categories established in *Maricopa County* and *Kotterman* because it focuses on whether the government is gifting its *own* property.

Moreover, although the *City of Tempe* court did not directly decide the question of whether the term "subsidy" is illustrative, it explained that the "[t]he question thus posed is 'Do the terms and conditions of the BFI lease bestow a grant or donation *in the form of* a subsidy?" *City of Tempe*, 22 Ariz. App. at 362 (emphasis added). This framing suggests that subsidy is illustrative, only.

5. A Pre-World War II Texas Court of Appeals Case Cannot Override *Maricopa County* or *Kotterman*.

Finally, Taxpayers argue (at 12) that this Court can simply ignore *Maricopa County* and *Kotterman* because in 1942 the Texas Court of Appeals supposedly held that "the prospective elimination of potential future liability can also be an unconstitutional subsidy." *Texas & N.O.R. Co. v. Galveston County*, 161 S.W.2d 530 (Tex. App. 1942). But *Galveston County* cannot override on-point binding authorities like *Kotterman* and *Maricopa County*. And *Galveston County* is not even persuasive authority because the specific Texas "gift clause"[10] at issue there broadly prohibits the government from "grant[ing] public money *or thing of value*, in aid of, or to any individual, association or corporation whatsoever…." Tex. Const. Art. III, § 52(a) (emphasis added); *Galveston Cty.*, 161 S.W.2d at 531. There is no similar provision in article IX, section 7, broadly prohibiting Arizona governmental entities from providing *any* thing of value. Rather, the Gift Clause only applies to "loan[s]" of credit, "donation[s] or grant[s]." Moreover, it does not appear that Texas courts draw

[10] Texas has several "gift clauses." *See* Tex. Const. Art. III, § 52.

the "prospective" versus "retroactive" distinction established in *Maricopa County*.

B. Alternatively, the City-Garfield Transaction Satisfies the Gift Clause Test.

Because the Superior Court ruled that the Gift Clause did not apply, it did not evaluate whether the Transaction satisfied the two-pronged Gift Clause test. APP. 292-93. Despite this, Taxpayers oddly devote eleven pages to the application of the Gift Clause. Though the Court need not reach this argument, if it does, it should reject Taxpayers' arguments on the merits and uncontroverted facts. To determine whether a Gift Clause violation exists, the Court will ask (1) "whether the challenged expenditure serves a public purpose" and, if so, (2) "whether 'the value to be received by the public is far exceeded by the consideration being paid by the public.'" *Schires v. Carlat*, 250 Ariz. 371, 374-75 ¶ 7 (2021). Both are true here.

1. The Transaction Serves a Public Purpose.

The public purpose inquiry asks whether the transaction "promotes the public welfare or enjoyment" and accounts for "both direct and indirect benefits of a government expenditure." *Schires*, 250 Ariz. at 375 ¶ 8. The court takes a broad approach to public purpose and will defer to the judgment of City officials unless they "unquestionably abused" their discretion. *Id.* at 375 ¶ 9 (quoting *Turken v. Gorden*, 223 Ariz. 342, 349 ¶ 28 (2010)).

Taxpayers argue (at 29-30) that the Transaction serves *only* private concerns, pointing to a single clause in the Agreement. Taxpayers completely ignore (and do

not challenge) the Superior Court's finding that the Agreement did not have a "sole purpose." *See* APP.378 (evaluating Taxpayers' Evasion Clause claim).

Indeed, the Agreement explains that:

- The "development of the Site … [is] in the vital and best interests of the City and the health, safety, and welfare of its residents." APP.063.
- The "City considered the potential economic benefits of the Project to the City, Maricopa County, and the State of Arizona in connection with its approval of the Project."[11] APP.064.
- Garfield promised to donate $100,000 to the City's Affordable Housing Trust and to make available 10% of residential units for workforce housing during the lease term equal to a $1,150,000 City benefit. APP.085 at § 311; APP.113 at § 6.4(E).
- Garfield promised to donate $4,000 annually to Phoenix school districts during the lease term. APP.084 at § 309; APP.111-114 at § 6.3–6.4.
- Further, the 6th and Garfield Project is being built on (and to improve) 813, 817, and 821 N. 6th Street, which have been designated as blighted or slum areas. *See* IR 76 at 28 ¶¶ 11, 16; APP.339-40 at ¶¶ 11, 16.

[11] This "includ[es], without limitation, as described in that certain 'Garfield & Sixth Streets Multi-Family Community Economic & Fiscal Impact Report Downtown, Phoenix, Arizona' prepared by Elliott D. Pollack & Company." APP.064. Among many other benefits to the City, the Pollack Report explains that "[d]evelopment will provide an immediate $124.9 million economic impact from construction activity" and generate "$1.4 million for the City." APP.257.

Any one of these facts would be enough to establish a public purpose.

Taxpayers' argument (at 30) that the City does not "control" the 6th Street Project during the lease term is factually wrong and legally irrelevant. Factually, although "the City's ownership rights are somewhat limited," these limitations "are typical of commercial leases," APP.377 (evaluating Taxpayers' Evasion Clause claim),[12] and in compliance with the GPLET statutes, *see* A.R.S. § 42-6201 *et seq.* Furthermore, there is no requirement in the Gift Clause requiring the City to "supervise" or "control" the property. Taxpayers' reliance (at 30) on *Kromko v. Arizona Board of Regents*, 149 Ariz. 319 (1986) to argue otherwise is unpersuasive. In *Kromko*, the city's "control and supervision" over the challenged project was just *one* example of a public purpose. 149 Ariz. at 321. There are many projects that serve a public purpose for Gift Clause purposes that are not "controlled" or "supervised" by the Government. *See Turken*, 233 Ariz. at 347 ¶ 23 (holding that

[12] Moreover, there are some restrictions on Garfield's use of the property, including: its obligation to insure the property, APP.109-110 at §§ 5.1-5.4; the prohibition on intentional waste of property, APP.111 at § 6.1; the requirement to make units available to low-income residents, *id.* § 6.4; the limitation of use to *only* the operation of a multi-family residential building and related uses, APP.115 at § 8.2; the express prohibition of certain uses, including retail sale of liquor or alcoholic beverages, APP.159; its obligation to maintain the property, including sidewalks and gutters on exterior of property APP.115 at § 8.3; the limitation on Garfield's rights to install additional improvements, APP.116 at § 8.5; the limitation on Garfield's ability to place a lien, encumbrance on the property, APP.118 at § 10.1; its obligations to indemnify the City APP.119-121 at § 12.1, among others.

payments made by a municipality to a private parking garage to set aside parking spaces for the public served a public purpose).[13]

2. The Transaction Is Supported by Sufficient Consideration.

The consideration inquiry asks whether the arrangement is supported by consideration that is "not so inequitable and unreasonable that it amounts to an abuse of discretion." *Wistuber*, 141 Ariz. at 349. The consideration inquiry is an objective test that compares the fair market value of the contractually enumerated (*i.e.*, "bargained-for") "direct" benefits received by the City with the value of the public expenditure *See Schires*, 250 Ariz. at 375 ¶¶ 14, 23, 24.

Taxpayers argue (at 24-28) that the relevant comparison is the foregone property tax in the amount of $7.9 million (the give) with the lease payments and school district payments equal to $557,000 (the get). There are two errors with this reasoning.

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[13] Taxpayers also cite out-of-state cases to support their argument that control is required. These cases do not help them. One case interpreted Montana's constitution which contains an express control requirement. *Veterans' Welfare Comm'n v. Dep't of Mont.*, 279 P.2d 107, 111 (Mont. 1963) (citing Mont. Const. art. V, § 35, which requires appropriations must be "under the absolute control of the state"). Another case concerns the private operation of a ferry service. *State ex rel. Washington Nav. Co v. Pierce County*, 51 P.2d 407, 411 (Wash. 1935). However, in Washington, state law authorizes counties to operate a ferry system or lease such service with "direction and control of the board of the county commissioners." *Id.* Finally, the Idaho case considers the validity of the state's payment of a utility's relocation costs. *See State ex rel. Rich v. Idaho Power Co.*, 346 P.2d 596, 612 (Idaho 1959). Like *Kromko*, level of control was one consideration weighed by the court. *Id.*

First, this argument ignores that Garfield contractually agreed to provide a minimum direct benefit in the amount of $9 million, including net rent, and guaranteed tax revenue. APP.107-09 at § 4.7. Unlike transactions where the amount of tax revenue or other economic development benefit was simply "anticipated," *see Schires*, 250 Ariz. at 377 ¶ 17, the parties here have bargained for and contractually guaranteed an over $9 million in economic benefit to the City, regardless of whether future tax obligations decrease. This benefit is a direct one.

Moreover, Garfield contractually agreed to donate $100,000 to the City's Affordable Housing Trust Fund, make available 10% of residential units for workforce housing for the lease term; make annual donations to City school districts for the duration of the least term; and convey title of the property to the City for no charge, during which the property is a capital asset of the City. *See* APP.085 at § 311; APP.111-14 at § 6.3-6.4.[14]

Accordingly, the Court should compare the more than $9 million in contractually-guaranteed direct benefits to the City with the alleged give in foregone tax property. Thus, the City's "give" is far less than its "get" and this transaction poses no infirmity under the Gift Clause.

[14] The transaction will also provide the City with an estimated $124.9 million economic impact from construction activity that would generate $1.4 million for the City. APP.257

Second, just as Courts have declined to analyze "anticipated" tax payments as a benefit to the public entity, *Schires*, 250 Ariz. at 377 ¶ 17, anticipated tax revenue foregone is an equally speculative benefit to the private party and should have no place in the Gift Clause inquiry. *Cf. Kotterman*, 193 Ariz. at 288 ¶ 51 ("One cannot make a gift of something one does not own."); *Coury Bros. Ranches, Inc. v. Ellsworth*, 103 Ariz. 515, 521 (1968) (speculative damages cannot for the basis of a judgment). Stated differently, if anticipated taxes generated do not count on one side of the ledger, the anticipated taxes foregone cannot count on the other side of the ledger. Even if the amount of taxes avoided is relevant, the Court should be considering the amount of taxes abated by the City (*i.e.*, the amount of GPLET taxes) rather than the amount of ad valorem taxes the property was subject to prior the conveyance of the land.

III. The City-Garfield Transaction Does Not Violate the Evasion Clause

Taxpayers' arguments that the Transaction violates the Evasion Clause all fail. The reason is simple: "evade" carries a plain meaning that includes a level of subterfuge or nefarious intent. Here, neither the City nor Garfield have tricked tax collectors. The GPLET statutes require the City to hold "title of record" to the property for GPLET to apply, and that is exactly what the City has agreed to do. A.R.S. § 42-6201(2). As the Superior Court correctly ruled, "the transaction does not 'evade' taxation because no secretive or deceptive scheme was employed." APP.378. There is no "sham" transaction here, but instead a carefully constructed bargained-for

exchange that includes a conveyance of property; Taxpayers' real complaint is with the *Legislature's* decision to allow municipalities to purchase private property and then abate GPLET taxes on that property. The Superior Court should be affirmed.

A. The Plain Meaning of the Term "Evade" Suggests Artifice or Subterfuge.

Municipal property is exempt from taxation. Ariz. Const. Art. IX, § 2(C)(1). However, under the Evasion Clause, property otherwise exempt from taxation is taxable if it was "conveyed to evade taxation." Ariz. Const. Art. IX, § 2(B). The term "evade" is not defined. This court is "obliged to interpret constitutional language according to its plain meaning." *Sun City Home Owners Ass'n v. Ariz. Corp. Comm'n*, 252 Ariz. 1, 7 ¶ 25 (2021). "Undefined words in a constitutional provision are to be interpreted as generally understood and used by the people, according to their natural, obvious, and ordinary meaning." *Airport Props. v. Maricopa Cty.*, 195 Ariz. 89, 99, ¶ 35 (App. 1999).

In the context of taxation, the "natural, obvious, and ordinary meaning" of "evade" includes a level of illegality or deceit not present in this case. The current edition of *Black's Law Dictionary* defines tax evasion as a "willful attempt to defeat or circumvent the tax law in order to illegally reduce one's tax liability." *Black's Law Dictionary* (11th ed. 2019) (emphasis added). Non-legal dictionaries support this understanding. *See, e.g.*, *Tax Evasion*, Merriam-Webster.com (defining tax evasion as "a willful and especially criminal attempt to evade the imposition or payment of a

tax"); *see also Maricopa Cty. v. Rana*, 248 Ariz. 419, 422, ¶ 11 (App. 2020) (noting courts may "draw[] on authoritative dictionaries" to discern plain meaning). Simply, analyzing "evasion" in the tax context is important because the presence of deceit or trickery is what distinguishes tax evasion from tax avoidance.

Taxpayers explicitly recognize that tax "evasion" and tax "avoidance" are distinct concepts. *See* O.B. at 35 ("Obviously, tax avoidance is not tax evasion."). American law has long recognized that taxpayers are not "bound to choose that pattern which will best pay the Treasury." *Helvering v. Gregory*, 69 F.2d 809, 810 (2d Cir. 1934); *see also SLI Intern. Corp. v. Crystal*, 671 A.2d 813, 815 n.2 (Conn. 1996) ("Tax avoidance should be contrasted with tax evasion, which … 'is a crime denoting concealment and an attempt to escape by wrongdoing the payment of taxes due the government.'" (quoting *Jones v. Garner*, 158 S.E.2d 909 (S.C. 1968)). Thus, a transaction is permissible if it does "what was intended by" the applicable tax law. *Helvering*, 69 F.2d at 810.

Even outside the taxation context, the Arizona Supreme Court has explained that there is a difference between "a secretive attempt to evade" state law, and acts "done openly in an attempt to legally avoid the provisions of" state law. *Indus. Comm'n of Ariz. v. J. & J. Const. Co.*, 72 Ariz. 139, 146 (1951) (refusing to impose penalty for good-faith failure to comply with workmen's compensation laws). Thus, evasion requires a level of nefarious intent above and beyond mere avoidance.

For these reasons, the Superior Court correctly recognized, "openly employing lawful methods of avoiding taxation do[es] not implicate the Evasion Clause," APP.376, which is precisely what happened here. This Court should adopt that reasoning and hold that the Evasion Clause requires a level of subterfuge not present in this case.

Nevertheless, Taxpayers selectively quote the 1968 edition of *Black's* to suggest that the plain meaning of evasion is essentially synonymous with mere avoidance. O.B. at 35. But that version of *Black's* specifically clarifies that "[a]rtifice or cunning is implicit in the term [evasion] as applied to contest[s] between citizen and government over taxation." *Black's Law Dictionary* (4th ed. 1968). Thus, Taxpayers entirely ignore that "evasion" has special meaning when applied to taxation. Even if "evasion" is susceptible to Taxpayers' preferred interpretation in some contexts, tax evasion is not one of them.

B. The GPLET Transaction at Issue Complies with All Relevant Statutes.

As noted above, a transaction does not evade taxes if it does "what was intended by" the applicable tax law. *Helvering*, 69 F.2d at 810. And that is *exactly* the situation in this case.

As the Superior Court correctly noted, "the record shows that Garfield and the City complied with all the requirements of the GPLET statute in structuring the [] Agreement and the Lease." APP.379. By statute, GPLET applies to any

"government property improvement." A.R.S. § 42-6202(A). A "government property improvement" is a completed building "for which the title of record is held by a government lessor, that is situated on land for which the title of record is held by a government lessor … that is available for use for any commercial, residential rental or industrial purpose." A.R.S. § 42-6201(2). The GPLET owed by the prime lessee of any "government property improvement" may be abated for eight years if the improvement (1) is located within a designated "central business district," (2) is located within a designated redevelopment area and (3) "resulted or will result in an increase in property value of at least one hundred percent." A.R.S. § 42-6209(A). At the end of the eight-year period "the government lessor must convey to the current prime lessee title to the government property improvement and the underlying land." A.R.S. § 42-6209(G).

Here, there is no dispute that the City owns title of record, that the property is located in the central business district, that it is located within the City's redevelopment area, and that the building Garfield constructed improved the value of the underlying land by at least one hundred percent. *See* SUPPAPP0077-78 at ¶¶ 11, 16, 18; APP.339-40 at ¶¶ 11, 16, 18; APP.197 at ¶¶ 15, 17, 19 (Taxpayers' expert acknowledging that the 6th and Garfield Project increases the property's value from $619,905 to $58,978,157). There is thus no evasion of the tax laws because the tax laws have been complied with *to the letter*.

C. To the Extent it Is Relevant, the GPLET Transaction Has Sufficient "Economic Substance."

Citing to inapposite cases, Taxpayers repeatedly assert that Transaction lacks sufficient "economic substance" to qualify as a true conveyance of property. *See* OB at 34. But any analogy to the doctrine of "sham" transactions falls flat because—if that doctrine applies at all—the transaction in this case has "economic effects other than the creation of tax benefits." *Kirchman v. C.I.R.*, 862 F.2d 1486, 1491 (11th Cir. 1989).

As a preliminary point, Taxpayers' argument that the City does retain many of the traditional "sticks" in the ownership "bundle" is entirely irrelevant because the statutes at issue require *only* for the City to own "title of record" in order to apply GPLET treatment to a property. *See* A.R.S. § 42-6209; A.R.S. § 42-6201(2). As part of the Agreement, Garfield agreed to convey the property to the City, and the City agreed to return the property to Garfield after eight years. SUPPAPP0081 at ¶ 36(a)-(c); APP.341 at ¶ 36(a)-(c). This is all the statute requires, and should be the end of the inquiry.

Despite Taxpayers' repeated assertion that the City's ownership exists on paper only, it is uncontroverted that City actually holds legal title to the land, and it retains the rights typically enjoyed by a commercial landlord under the Lease.[15] Thus, Taxpayers' assertion that the City "enjoys none of the sticks in the bundle"

[15] *See*, *supra*, Footnote 12.

entirely ignores the terms of the Lease. O.B. at 37.

Taxpayers make much of language in the Agreement indicating that "the intention of the Parties" is for GPLET, and not ad valorem taxes, to apply. But the Superior Court saw through this argument, correctly finding that "[a]lthough the City and Garfield clearly intended GPLET tax treatment, that was not the sole purpose of the transaction." APP.378. In support, the Superior Court cited to Section 101 of the Agreement, which states the agreement's purposes, including (1) effectuating the City's Downtown Redevelopment and Improvement Plan, and (2) facilitating the development of the property. *Id.* The uncontroverted evidence shows that the Agreement is a multifaceted, multipurpose exchange of promises entered for more than just tax purposes.

Taxpayers also point to Garfield's ability to buy out the lease and take ownership of the property as evidence that the City's ownership is somehow a sham. But as the trial court explained, this provision "does not indicate that the City's ownership is illusory." *Id.* Although the GPLET statute provides that a lease term cannot exceed eight years, "[t]he statute does not prohibit a shorter lease period or earlier termination of the lease." *Id.* And of course, "if the lease is terminated early, the property will no longer qualify for an [ad valorem] tax exemption or GPLET abatement, thus eliminating the tax benefits of the transaction." *Id.* In other words, if Garfield were to exercise its buyout option, it would only be able to do so on pain of

paying property taxes, significantly lowering the value of the option to Garfield.

Taxpayers cite to no Arizona case applying the "sham doctrine" to an Evasion Clause case, and none of Taxpayers' out-of-jurisdiction cases regarding "sham" transactions is instructive. Most of the cited cases are obvious cases of self-dealing, where a taxpayer has contorted the facts on the ground in the hopes of creating fake gains or losses. *See, e.g.*, *Fashion Valley Mall, LLC v. County of San Diego*, 98 Cal. Rptr. 3d 327 (Ct. App. 2009) (amendment to transaction made explicitly "for tax purposes" caused transaction to "simultaneously exist in two different forms"); *Syms Corp v. Comm'r of Rev.*, 765 N.E. 2d. 758, 764 (Mass. 2002) (company created wholly-owned subsidiary and transferred intellectual property and royalties to it solely for tax purposes); *Coleman v. C.I.R.*, 16 F.3d 821, 826 (7th Cir. 1994) (lessor failed to retain "significant and genuine attributes of traditional lessor status" in complex equipment financing arrangement); *Bank of N.Y. v. Kelly*, 38 A.2d 899, 902 (N.J. Prerog. Ct. 1944) (purchase of annuity and life insurance in single transaction for significant up-front sum functioned as investment, and life insurance proceeds were thus not exempt from taxation). Here, the facts reflected in the documents match the economic reality: the City agreed to take ownership of the property, and to lease it back to Garfield for eight years. That the Lease contains certain restrictions on the City's use of the property does not make the City less of an owner.

Taxpayers baselessly assert that the use of the property is dispositive, and that

Garfield is somehow the "true" owner because it is the party actually in possession of the property. But although Taxpayers cite *Tucson Junior League of Tucson v. Emerine*, 122 Ariz. 324, 325 (App. 1979) and *R.O.I. Properties, LLC v. Ford*, 246 Ariz. 231, 235, ¶ 16 (App. 2019) in support of this argument, both of those cases involved tax statutes that *explicitly* look at the manner the property is used in determining whether an exemption applies. *Tucson Junior League*, 122 Ariz. at 325 (property must be "used for education" or "for relief of the indigent or afflicted"); *R.O.I. Properties*, 246 Ariz. at 235, ¶ 16 (property must be "used for education").

Taxpayers' citations to *State v. Yuma Irr. Dist.*, 55 Ariz. 178 (1940) and *City of Phoenix v. Bowles*, 65 Ariz. 315, 317 (1947) fare no better. *Yuma* decided the limited question of whether irrigation districts are municipal corporations. The court decided that an irrigation district lacks a "political and governmental" purpose sufficient to qualify as a municipal corporation. *Yuma*, 55 Ariz. at 182. The *Yuma* court did not hold, nor could it, that a municipality surrenders tax-exempt status when it engages in economic development activity. And although *Bowles* held that a city may subject itself to an *excise* tax through business conduct, the *Bowles* court presupposed that a city could not become subject to an ad valorem tax. 65 Ariz. at 317. Thus, the holding in *Bowles* is of no help to Taxpayers, and entirely undercuts their argument that the use of the property, not its owner, is dispositive. O.B. at 42. And of course, as the Superior Court noted, the use of the property *does* have a

municipal purpose, because it is part of the City's larger effort to clear slum and blight and spur economic activity downtown. APP.378.

Taxpayers cite *Cutter Aviation, Inc. v Arizona Department of Revenue*, 191 Ariz. 485 (1997), for the proposition that "ownership means the right to use, control, and dispose of property." O.B. at 37. But the *Cutter Aviation* court was tasked with construing the word "ownership" in the context of a particular tax statute, and that word is absent from the GPLET statute. Regardless, as the *Cutter Aviation* court recognized, the definition of the "owner" "will contract or expand according to the subject matter to which it is applied." 191 Ariz. at 491 (quotation omitted). Here, the City is only required to maintain "title of record" for GPLET to apply. A.R.S. § 42-6201(1). Of course, the City does have the right to "use, control, and dispose of" the property; it has simply agreed not to as part of the Lease.

In sum, this Court should follow the Superior Court's well-reasoned conclusion that "Garfield and the City had no improper intent, and did not engage in any artifice or sham to use the GPLET statute to evade property taxes." APP.379. The Superior Court's findings were detailed and well-supported by the record before it. The judgment in the City and Garfield's favor on Taxpayers' Evasion Clause claim should be affirmed.

CROSS-APPEAL

Although the Superior Court correctly ruled that laches bars Taxpayers' claims and that the Gift and Evasion Clauses do not apply, it initially erred in concluding

that Taxpayers had filed their claims within the applicable one-year statute of limitations. *See* APP.284-87. Thus, even if this Court determines that Taxpayers have successfully shown that the Superior Court's laches, Gift Clause, and Evasion Clause rulings were incorrect, it should still hold that that Taxpayers' claims fail.

"All actions against any public entity or public employee shall be brought within one year after the cause of action *accrues* and not afterward." A.R.S. § 12-821 (emphasis added); *see also Flood Control Dist. of Maricopa Cty. v. Gaines*, 202 Ariz. 248, 251-52 ¶ 9 (App. 2002) (interpreting A.R.S. § 12-821 to apply to every action against public entities). Because "Taxpayers filed their Complaint on May 4, 2022," their "claims are untimely if they accrued before May 4, 2021." APP.284. The Superior Court determined that Taxpayers' claims were timely because they did not "accrue" until the Agreement was "executed" on May 14, 2021. APP.287. This was erroneous.

"[T]he 'core question' of when a claim accrued is not when the plaintiff was conclusively aware she had a cause of action against a particular party, but instead when 'a reasonable person would have been on notice to investigate.'" *Cruz v. City of Tucson*, 243 Ariz. 69, 72 ¶ 8 (App. 2007) (quoting *Walk v. Ring*, 202 Ariz. 310, 316 ¶ 23-24 (2002)). Thus, the plaintiff "need not know all of the facts underlying a cause of action to trigger accrual." *Doe v. Roe*, 191 Ariz. 313, 323 ¶ 32 (1998) (emphasis omitted).

Cruz is instructive. There, a plaintiff sued the City of Tucson related to a public records request. *Cruz*, 243 Ariz. at 71 ¶ 2. Starting in August 2013, the City began to "repeatedly state it had fully complied with Cruz's [public records] request, only to later disclose hundreds of additional documents" at a later date. *Id.* at 71-72 ¶¶ 3, 11. The superior court entered final judgment in the plaintiff's favor on April 28, 2015. *Id.* On October 6, 2015, Cruz sent a notice of claim to the City asserting that its actions in the first litigation constituted abuse of process, and later filed a second lawsuit against the City in December 2105. *Id.* at 71, 73 ¶¶ 4, 15. Because Cruz's notice of claim was sent after the 180-day deadline in A.R.S. § 12-821.01(A), the timeliness of the second case hinged on whether Cruz's claim "accrued" during the first lawsuit or only once the "final ruling was issued." *See id.* at 71 ¶ 5.

This Court held that Ms. Cruz's claims accrued in August 2013, as this was the date that "Cruz was first aware that the City had abused process and withheld public records." *Id.* at 72 ¶ 10. Indeed, Cruz "had been making the *precise claims she makes in this case* throughout the litigation in the public records case." *Id.* at 72 ¶ 11 (emphasis added). The Court also found it relevant that "Cruz was not merely on notice to investigate" in August 2013, but "in fact did so." *Id.* at 72-73 ¶ 12.

In a decision that was subsequently vacated on different grounds, this Court came to a similar conclusion in *State v. Arizona Board of Regents*, 251 Ariz. 182

(App. 2021) ("*ABOR I*"), *vacated on different grounds ABOR II*, 253 Ariz. 6.[16] There, "[o]n January 11, 2018, the City of Tempe reached a final agreement with Omni to develop a hotel and conference center on ABOR's property." *ABOR I*, 251 Ariz. at 185 ¶ 5. As part of the deal, "ABOR agreed to build a parking structure directly abutting the complex and granted Omni exclusive use of about one-fifth of the parking spaces." *Id.* at 185 ¶ 4. "On that same day, [Attorney General] attorneys internal circulated a letter to the editor of the Arizona Republic discussing the Omni transaction. One AGO attorney wrote that the Omni transaction sounded 'pretty suspicious.'" *Id.* "On February 28, 2018, ABOR and Omni signed an 'option to lease' allowing Omni to exercise the lease if ASU agreed to build the parking structure." *Id.*

The Attorney General filed an amended complaint in April 2019 claiming that the agreement violated the Gift Clause. *Id.* at 185, 187 ¶¶ 4, 15. Although the ABOR deal was not actually finalized until *February* 2018, this Court held that the AG was on notice to investigate its claim by *January* 11, 2018—because on that date "senior AGO attorneys circulated an internal legal memorandum and an opinion editorial on the topic" and referred to the ABOR deal as "pretty suspicious." *Id.* at 187 ¶ 15. This Court also found it relevant that the "term sheets outlining the transaction were

[16] As explained *supra*, the Supreme Court vacated *ABOR I* because it determined that the five-year statute of limitations for the Attorney General to file claims in A.R.S. § 35-212(E) governed the AG's Gift Clause claim instead of A.R.S. § 12-821. *ABOR II*, 253 Ariz. at 13 ¶¶ 26-30.

publicly accessible and the finalized option agreement, executed in February 2018, contained all the provisions the AGO would later challenge." *Id.*

Here, Taxpayers Bramley Paulin and Mat Englehorn admit they were "aware that the City was considering providing GPLET tax treatment for the [6th and Garfield Project]" by at least October 2020. *See* SUPPAPP0083, 85 at ¶¶ 41, 49; APP.342-43 ¶¶ 41, 49. Indeed, throughout September and October 2020, Paulin attended several City meetings where the Project was discussed; during at least one of those meeting he asked "how the [6th and Garfield Project] will not be unconstitutional…." SUPPAPP83-84 at ¶¶ 42-43, 46-47; APP.342 ¶¶ 42-43, 46-47. On September 21, 2020, Paulin and Taxpayers' counsel wrote a letter to the City explicitly arguing that the 6th and Garfield Project "violates the Arizona Constitution." *See* SUPPAPP0084 at ¶ 45; APP.342 ¶ 45; *see Cruz*, 243 Ariz. at 72 ¶ 11 (making the "the precise claims she makes in this case" in prior litigation is significant to accrual analysis). Given these facts, the record demonstrates that Taxpayers were aware of, and actively investigating, their claims that the 6th and Garfield Project violated the Gift and Evasion Clauses well before May 4, 2021.

Moreover, the key facts that Taxpayers would later challenge were all publicly available by October 2020. *See ABOR I*, 251 Ariz. at 187 ¶ 15. Among other things, by October 7, 2020 the following information was available to Taxpayers: (1) the 6th and Garfield Project would receive GPLET treatment, SUPPAPP0087-97; (2) the

proposed rent payments that Garfield would make over the eight-year lease term, SUPPAPP0094; (3) the 6th and Garfield Project would be subject to roughly $825,000 to $980,000 per year in ad valorem taxes absent GPLET treatment; APP.250; and (4) Garfield would pay additional compensation back to the City through a "minimum direct benefit amount," payments to local school districts, and by providing workforce housing, SUPPAPP0089, 95.[17] These facts ultimately gave rise to Taxpayers' claims. *See* APP.008-012 at ¶¶ 21, 25-27, 32-38, 42-59.

Despite this, the Superior Court concluded that Taxpayers' claims did not "accrue" until the Agreement was "executed" on May 14, 2021. *See* APP.286-287; *see also* SUPPAPP0034-36. The Superior Court reasoned that Taxpayers' claims were not ripe until that point because, until the Agreement was "executed," its terms could still have changed. *See* APP.286-287; *see also* SUPPAPP0034 (arguing that "Taxpayers could not have sued in October 2020" because the City and Garfield may not have entered into the Agreement). But by focusing on ripeness, the Superior Court improperly based the accrual analysis on when Taxpayers had a definitive *cause of action* rather than when on Taxpayers were *on notice to investigate*—in direct contravention of *Cruz*. *See Cruz*, 243 Ariz. at 72 ¶ 8.

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[17] The "minimum direct benefit" increased from $6,625,000 in the LOI to over $9,000,000 in the Agreement. *Compare* SUPPAPP0095, *with* SUPPAPP0081 at ¶ 36(f) *and* APP.341 at ¶ 36(f). This change could not have impacted Taxpayers' claims, however, because they have consistently argued that the "minimum direct benefit" does not qualify as compensation for Gift Clause purposes. *See* O.B. at 27-28.

Moreover, even if ripeness were a consideration in the accrual analysis, "[a]n action is ripe where enforcement of a law *is a foregone conclusion*." *Nationwide Mut. Ins. Co. v. Vintage Homes, LLC*, No. 06-CV-1801-RBP, 2006 WL8437401, at *2 (N.D. Ala. Dec. 1, 2006) (emphasis added) (citing, among others, *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974)).[18] Thus, a party need not "actually wait[] for enforcement" in order to file suit. *Id.* This is particularly true in Arizona given that ripeness is only a prudential consideration in any event. *See City of Surprise v. Ariz. Corp. Cmm'n*, 246 Ariz. 206, 209 ¶ 8 (2019). In this case, the execution of the Agreement was a "foregone conclusion" on October 7, 2020 when the City enacted Ordinance No. S46966, which "authorized" the City Manager to "enter into a development agreement, lease agreement … and other agreements as necessary" to perform a GPLET transaction with Garfield. SUPPAPP0096-97.

Because Taxpayers were on notice of the claims by at least October 2020, the Superior Court erred in finding that this case was filed within the one-year statute of limitations in A.R.S. § 12-821.

CONCLUSION

For the foregoing reasons, the Court should affirm the Superior Court's rulings regarding laches, the Gift Clause and Evasion Clause and reverse the Superior Court's ruling regarding the statute of limitations.

[18] Arizona courts find federal authorities "instructive" in deciding ripeness questions. *See Brush & Nib Studio, LC v. City of Phx.*, 247 Ariz. 269, 280 ¶ 36 (2019).

RULE 21 NOTICE OF ATTORNEYS' FEES AND COSTS

Pursuant to ARCAP 21 and A.R.S. § 12-349, Garfield and the City reserve the right to seek attorneys' fees incurred on appeal at the conclusion of this matter. Pursuant to A.R.S. § 12-341, Garfield requests its costs incurred on appeal.

Respectfully submitted this 7th day of June 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

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

Certificate of Compliance

Brett W. Johnson
Tracy A. Olson
Ian Joyce
SNELL & WILMER L.L.P.
One East Washington, Suite 2700
Phoenix, AZ 85004
(602) 382-6000
bwjohnson@swlaw.com
tolson@swlaw.com
ijoyce@swlaw.com
Counsel for Intervenor/Appellee/ Cross-Appellant 6th and Garfield Owner

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 Defendant/Appellees/Cross-Appellants City of Phoenix & Jeff Barton

1. This certificate of compliance concerns Intervenor/Appellee/Cross-Appellant and Defendants/Appellees/Cross-Appellants Joint Response Brief and Cross Appeal and is submitted under ARCAP 14(a)(5).

2. The undersigned certifies that the Brief to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains 13938 words in the Response portion and 1659 words in the Cross-Appeal portion.

3. The document to which this Certificate is attached does not exceed the word limit that is set by ARCAP 14(a)(3).

Respectfully submitted this 7th day of June 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