Clerk of the Superior Court
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08/22/2023 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-005658 08/21/2023

HONORABLE DEWAIN D. FOX

CLERK OF THE COURT
J. Eaton
Deputy

BRAMLEY PAULIN, et al.

v.

CITY OF PHOENIX, et al.

JONATHAN RICHES

DANIEL J INGLESE

BRETT W JOHNSON
JUDGE FOX

UNDER ADVISEMENT RULING ON
CROSS MOTIONS FOR SUMMARY JUDGMENT

Pending before the Court are the following motions:

- Plaintiffs/Taxpayers'[1] Cross-Motion for Summary Judgment ("Taxpayers' MSJ"), filed September 12, 2022; and
- Intervenor-Defendant 6th & Garfield Owner, LLC's ("Garfield") Cross-Motion for Summary Judgment ("Garfield's MSJ"), filed January 20, 2023.

Defendants City of Phoenix (the "City") and Jeff Barton, in his official capacity as City Manager, joined in Garfield's MSJ. Both motions have been fully briefed. The Court held oral argument on the motions on June 23, 2023, at which time the matter was taken under advisement. For the reasons explained below, the Court will deny Taxpayers' MSJ and grant Garfield's MSJ.

[1] "Taxpayers" refers to Plaintiffs Bramley Paulin ("Paulin"), Mat Englehorn ("Englehorn"), Paulin's companies, Austin Shea [Arizona] - 7th Street and Van Buren LLC and Culver Park - 1129 North First Street LLC, and Englehorn's company, Hopelessly Urban, LLC.

Factual Background

The factual background of this case is set out in detail in the Court's December 20, 2022 Under Advisement Ruling on Motions to Dismiss, Cross Motions for Summary Judgment and Application for Preliminary Injunction (the "December 20 Ruling"). The factual background is incorporated herein.

At a public meeting on October 7, 2020, the City Council approved the construction of a luxury apartment complex on the southeast corner of 6th Street and Garfield in downtown Phoenix (the "Garfield Project"). The property is located within an area of downtown Phoenix previously designated by the City as slum and blighted. The Council enacted Ordinance S-46966 (the "Ordinance"), which authorized the City to enter into a Government Property Lease Excise Tax ("GPLET") transaction with Garfield. The Ordinance provides (among other things):

> Upon completion of construction and satisfaction of other conditions required of the Developer, Developer shall title the property and improvement to the City and the City shall lease back the property and improvements to the Developer for up to eight years, with no extensions of the lease term. The lease shall be subject to [GPLET] treatment, with up to eight years of abatement of GPLET. At the conclusion of the lease term, the City shall transfer the property and improvements back to the Developer.

(Taxpayers' Ex. 4, at ¶ B).

On May 14, 2021, Garfield and the City entered into the Disposition and Development Agreement (the "Development Agreement"). The principal terms of the transaction include: (1) Garfield will construct the apartment complex on vacant property it owns; (2) upon completion of construction and issuance of a certificate of occupancy, Garfield will convey title to the City; (3) the City will then lease the property back to Garfield for eight years (the "Lease"); and (4) during the Lease term, the Garfield Project, as municipal-owned property, will be exempt from *ad valorem* property taxes, but will be subject to GPLET taxes, which the City agreed to abate during the eight-year Lease term (the "GPLET Transaction"). (Taxpayers' Ex. 1, Development Agreement, at §§ 103, 202.1, 202.2, 202.3, 202.6, 202.9, 303, Ex. C to Ex. 1, Lease, at §§ 1.2, 4.6).

The Development Agreement and Lease require Garfield to reserve 10% of the apartment units for low-income workforce housing. (Taxpayers' Ex. 1 at § 311; Ex. C to Ex. 1 at § 6.4). Garfield also agreed to make donations to local schools and the City's Affordable Housing Trust Fund. (*Id.* at §§ 309, 312). In addition, under the Lease, Garfield will be required to pay rent to the City totaling $525,000 over the eight-year term. (*Id.* at Ex. C Art. 3). Garfield also will be required to pay the City a $9 million "Minimum Direct Benefit Amount" for construction transaction

privilege taxes, use taxes and property taxes prior to commencement of the Lease. (*Id*. at Ex. C § 4.7).

Garfield began construction around May 24, 2021, shortly after the Development Agreement became effective. After a brief halt, construction resumed in earnest on July 19, 2021. This lawsuit was filed by Taxpayers on May 4, 2022, nearly a year after construction began.

In the December 20 Ruling, the Court dismissed the Taxpayer's Gift Clause claim (Count One). The Court denied the City's and Garfield's Motions to Dismiss the Evasion Clause claim and ordered briefing on Taxpayers' MSJ only as it pertained to the Evasion Clause claim (Count Two). The Taxpayers now ask the Court to grant summary judgment in their favor finding that the GPLET Transaction violates the Evasion Clause as a matter of law. Garfield and the City ask the Court to deny the Taxpayer's MSJ and grant summary judgment in their (Garfield and the City's) favor under the doctrine of laches and because the GPLET Transaction does not violate the Evasion Clause as a matter of law.

Analysis

Laches

In the December 20 Ruling, on the record that existed at the time, the Court declined to dismiss this action based on the laches doctrine. The Court noted that although Taxpayers waited almost a year after execution of the Development Agreement to file this action, the Court would not resolve the factually contested issue of whether the delay was reasonable and opted to decide the action on the merits.

Garfield again argues that Taxpayers' Evasion Clause Claim is barred by laches. It is undisputed that by May 20, 2022, Garfield already had spent over $32 million on the Garfield Project. It is no longer feasible for Garfield to abandon the project or renegotiate with the City.

Contrary to what Taxpayers argue, Garfield's laches defense is not barred by the law of the case doctrine. The law of the case doctrine "provide[s] that the decision of a court in a case is the law of that case on the issues decided throughout all subsequent proceedings in both the trial and appellate courts, provided the facts, issues and evidence are substantially the same as those upon which the first decision rested." *Dancing Sunshines Lounge v. Indus. Comm'n of Ariz.*, 149 Ariz. 480, 482 (1986). The doctrine does not apply when "the issue was not actually decided in the first decision." *Id.* at 483. Similarly, the doctrine "does not deprive a judge of the power to change his or her own nonfinal rulings …." *Davis v. Davis*, 195 Ariz. 158, 162 ¶ 14 (App. 1999).

The Court did not actually decide the laches defense, but instead opted to address the Motions to Dismiss on the merits. As such, the laches defense is not barred by the law of the case. The Court now will address the merits of the laches defense on a more complete record.

Laches "is an equitable counterpart to the statute of limitations, designed to discourage dilatory conduct*." Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶ 6 (2000). The equitable principle of laches is disfavored and may only be invoked "to prevent injustice." *Prutch v. Town of Quartzsite*, 231 Ariz. 431, 435 ¶ 13 (App. 2013). The laches defense is only available if the defendant can prove, by a preponderance of evidence, that there was: (1) unreasonable delay; and (2) that delay prejudiced the defendant. *Id.*

Taxpayers argue that that their delay in filing suit was reasonable because they were trying "to persuade their government not to enter into an illegal transaction." (Reply at 5:6-7). Taxpayers cite to letters and emails with the City stating their objections to the Garfield Project.

To evaluate whether a delay is unreasonable, courts "examine the justification for delay, including the extent of plaintiff's advance knowledge of the basis for challenge." *Harris v. Purcell*, 193 Ariz. 409, 412 ¶ 16 (1998). "'[P]rotests, complaints and negotiations' [are] indications of reasonable delay." *McComb v. Superior Court*, 189 Ariz. 518, 526 (App. 1997) (*quoting Restatement (Second) of Torts* § 939 cmt. c (1977)); *see Southern Grouts & Mortars, Inc. v. 3M Co.*, 2008 WL 4346798, at *3 (S.D. Fla. Sept. 17, 2008) ("Although Plaintiff is correct that time spent in a *good faith* attempt to settle the matter outside of the courts should not count toward laches, no such attempt was made here, and no negotiations, or even attempt to begin negotiations were undertaken." (emphasis in original)); *A.C. Aukerman Co. v. Miller Formless Co., Inc*. 693 F.2d 697, 700 (7th Cir.1982) (To toll the laches period, "negotiations must ordinarily be continuous and bilaterally progressing, with a fair chance of success, so as to justify significant delays.").

Here, as set forth below, Taxpayers' delay in filing suit was not reasonable. Taxpayers' communications with the City do not demonstrate a "continuous and bilaterally progressing," good faith attempt to negotiate a resolution of their Evasion Clause claim. In fact, there is no evidence Taxpayers ever raised the Evasion Clause issue with the City before filing this lawsuit.

On September 21, 2020, Taxpayers' counsel sent a letter to City Mayor Kate Gallego and the City Council asserting that the proposed GPLET arrangement violated the Gift Clause of the Arizona Constitution (the "September 21 Letter"). (Complaint Ex. 6). The September 21 Letter referred to the June 18, 2020 Minute Entry in *Englehorn v. Stanton*, CV2017-001742, 2020 WL 7487658 (Hon. Christopher A. Coury, June 18, 2020 Under Advisement Ruling/Verdict). Taxpayers pointed out that in *Englehorn*, Judge Coury found that the GPLET abatement arrangement in that case violated the Gift Clause of the Arizona Constitution. (*Id.*). The September 21 Letter did not mention any alleged violation of the Evasion Clause. In fact, Judge Coury had

previously ruled that the GPLET arrangement in *Englehorn* did not violate the Evasion Clause. *Englehorn v. Stanton*, CV2017-001742, 2019 WL 11505775 (Hon. Christopher A. Coury, August 30, 2019 Ruling).

The City responded on November 4, 2020, explaining its position that the Garfield Project was constitutional because it was different than the project in *Englehorn*. (Complaint Ex. 7). The City stated that it believed the Garfield Project satisfied Judge Coury's Gift Clause analysis.

The Development Agreement became effective May 14, 2021, and was recorded with the Maricopa County Recorder on May 17, 2021. There was no further communication between Taxpayers and the City before Garfield commenced construction on May 24, 2021.

Taxpayers received a copy of the Development Agreement on June 14, 2021. Taxpayers' counsel sent a second letter to the City on October 29, 2021 (the "October 29 Letter"). (Complaint Ex. 8). Taxpayers reiterated their position that the Garfield Project violated the Gift Clause, citing *Schires v. Carlat*, 250 Ariz. 371, 377 ¶ 18 (Ariz. 2021), a recent Arizona Supreme Court case holding that the proposed (non-GPLET) transaction violated Arizona Constitution's Gift Clause. (*Id*. at 2) Taxpayers urged the City to disapprove the GPLET tax abatement on the Garfield Project and all future projects. (*Id*.). The October 29 Letter did not alert the City to an alleged Evasion Clause violation.

On December 1, 2021, Taxpayers' counsel contacted the City's attorney by email to ask if the City had reviewed the October 29 letter. (Complaint Ex. 9). Assistant City Attorney Tom Stack advised that the City would be responding to the letter within a week or two. (Complaint Ex. 10). After receiving no response from the City, on January 5, 2022, Taxpayers' counsel again asked if the City was going to respond to the October 29 Letter. (Complaint Ex. 11). On January 6, 2022, Mr. Stack told Taxpayers' counsel that a response would be out in a week or two. (Complaint Ex. 12). It is undisputed that the City never responded to the October 29 Letter. On May 4, 2022, Taxpayers filed this suit.

Taxpayers' delay in asserting its Evasion Clause claim in this action nearly a year after construction began was not reasonable or justified. Taxpayers knew all the terms of the Development Agreement in June 2021, at the latest, shortly after construction began. They could have filed this suit then or shortly thereafter.

Taxpayers' letters to the City do not justify the delay. Taxpayers sent only two letters to the City complaining about the GPLET Transaction, the last of which was sent more than six months before the suit was filed. Taxpayers were not engaged in a "continuous and bilaterally progressing," good faith attempt to resolve this matter to justify the delay in filing suit while construction was underway. The Court finds that Taxpayers' delay in filing suit was unreasonable. The Court now must turn to the issue of prejudice.

Prejudice "may be demonstrated by showing injury or a change in position as a result of the delay." *In re Indenture of Trust Dated January 13, 1964,* 235 Ariz. 40, 48 ¶ 23 (App. 2014) (*quoting League of Ariz. Cities & Towns v. Martin*, 219 Ariz. 556, 558 ¶ 6 (2009)). Prejudice "can take the form of … economic prejudice." *Apotex, Inc. v. UCB, Inc.*, 970 F. Supp. 2d 1297, 1336 (S.D. Fla. 2013). "Economic prejudice arises when a defendant and possibly others will suffer the loss of monetary investments or incur damages which likely would have been prevented by earlier suit." *Id*. (*quoting Integrated Cards, LLC v. McKillip Indus., Inc.*, 2009 WL 4043425 at *6 (N.D. Ill. Nov. 19, 2009)). In cases involving real estate development, courts have found that delays in bringing suit were unreasonable and caused substantial prejudice when the plaintiff had advance knowledge of the project but waited until after construction began before bringing suit to halt the project. *See, e.g., Clarke v. Volpe*, 342 F. Supp. 1324, 1329 (E.D. La. 1972) (applying laches where plaintiffs, who had notice of the project, waited until approximately six months after construction began before filing suit to enjoin the project); *Pittsfield Township v. Malcolm*, 134 N.W.2d 166, 172-73 (Mich. 1965) (suit brought more than ten months after building completion dismissed on equity grounds).

The record establishes that Garfield has been prejudiced by Taxpayers' delay. Garfield spent more than $32 million on construction by the time the suit was filed. By then it was too late for Garfield to back out of or renegotiate the deal with the City. Moreover, Garfield had no reason to file its own declaratory judgment action on the Evasion Clause before commencing construction because (among other reasons) Taxpayers never raised that issue before filing this action.

Finally, Taxpayers have not established that the City and Garfield have unclean hands to bar the laches defense. The unclean hands doctrine only applies where the party seeking equitable relief acted in bad faith or engaged in unconscionable conduct related to the same activity that is the basis for the claim. *See Ezell v. Quon*, 224 Ariz. 532, 538 ¶ 26 (App. 2010). Taxpayers have not alleged any bad faith or unconscionable conduct by Garfield or the City. The fact that Garfield began construction even though it was aware of a possible legal challenge is not unconscionable or bad faith conduct. Garfield's agreement to indemnify the City for any legal challenges pertaining to the Lease also is not unconscionable.

In short, it was unreasonable for Taxpayers to wait nearly a year after construction began to file this action asserting the Evasion Clause claim. As such, Taxpayers' Evasion Clause claim is barred by laches. But even if laches was not a bar to the Evasion Clause claim, as set forth below, the claim also fails on the merits.

Evasion Clause

"All property in this state that is not exempt under the laws of the United States or under this section is subject to taxation as provided by law." Ariz. Const. Art. IX, § 2.A. The Evasion

Clause provides that "[p]roperty that has been conveyed to evade taxation is not exempt." Ariz. Const. Art. IX, § 2.B.

The GPLET statute provides for an excise tax on government property leased to private parties. A.R.S. §§ 42-6201 to 42-6210. Because the property is owned by the government, it is exempt from *ad valorum* property tax. Ariz. Const. Art. IX, § 2.C.1. Lessees of "government property improvements" are instead subject to an excise tax for the "use or occupancy" of the improvements. A.R.S. § 42-6202(A).

The GPLET statute authorizes a city to "abate" the excise tax for no more than eight years after a certificate of occupancy is issued. A GPLET abatement is only permitted if the government property improvement[2]: (1) is located in a single central business district in the city and is subject to a lease or development agreement; (2) is located entirely within a designated slum or blighted area; and (3) will increase the property value by at least 100%. A.R.S. § 42-6209(A). To qualify for GPLET abatement, the city must lease the government property improvement to a prime lessee[3] for no more than eight years and convey title of the government property to the prime lessee "[a]s soon as reasonably practicable but within twelve months after the expiration date of the lease." A.R.S. § 42-6209(G).

Taxpayers do not dispute that legal means to avoid taxes do not run afoul of the Evasion Clause. Taxpayers also do not challenge the facial constitutionality of the GPLET statute. They concede that GPLET arrangements can be made that to do not violate the Evasion Clause and that the GPLET statute is a valid means of avoiding *ad valorum* and GPLET taxes. Taxpayers' contention here is that this GPLET Transaction as structured in the Development Agreement violates the Evasion Clause.

Taxpayers contend that the GPLET Transaction violates the Evasion Clause because it was allegedly entered into for the sole purpose of allowing Garfield to evade *ad valorum* property taxes.

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[2] "'Government property improvement' means a building for which a certificate of occupancy has been issued, 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 … and that is available for use for any commercial, residential rental or industrial purpose, including, but not limited to, office, retail, restaurant, service business, hotel, entertainment, recreational or parking use." A.R.S. § 42-6201(2).

[3] "'Prime lessee' means any person, partnership, corporation, company, limited liability company, joint venture or other organization or association that enters into a lease directly with a government lessor to develop or occupy for at least thirty consecutive days a government property improvement…." A.R.S. § 42-6201(4).

Taxpayers argue that the conveyance of the Garfield Project to the City is a sham and in name only because the City will not enjoy all the rights of ownership of the Garfield Project.

The term "evade taxation" is not defined in the Arizona Constitution. Arizona courts must "interpret constitutional language according to its plain meaning." *Sun City Home Owners Ass'n v. Arizona Corporation 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 Properties v. Maricopa County*, 195 Ariz. 89, 99 ¶ 35 (App. 1999). "Arizona courts have frequently resorted to recognized, authoritative dictionaries of the English language on questions of the ordinary meanings of words contained in statutory provisions." *Id*. at ¶ 36. Because the Evasion Clause was added to the Arizona Constitution in 1968, it is appropriate to consider definitions used during that time. *See Matthews v. Industrial Comm'n of Arizona*, 254 Ariz. 157, 163 ¶ 33 (2022) ("Our examination of original public meaning starts with dictionary definitions from the time the provision was adopted.").

The City and Garfield cite to the 2019 edition of Black's Law Dictionary, which defines "tax evasion" as the "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). Non-legal dictionaries have similar definitions of tax evasion. *See, e.g., Merriam-Webster's New Universal Unabridged Dictionary* 670 (1989) ("to escape from by trickery or cleverness"; "to get around by trickery: to evade rules").[4]

Taxpayers assert that the Evasion Clause does not require a showing of criminality or nefarious intent. Taxpayers cite to the 1968 edition of *Black's Law Dictionary*. That edition defined "evasion" as "[a]n act of eluding or avoiding, or avoidance by artifice" – or "a subtle endeavoring to set aside truth or to escape the punishment of the law." *Black's Law Dictionary* (4th rev. ed. 1968). That edition further provided that "the words 'suppression,' 'evasion,' and 'concealment' mean to avoid by some device or strategy or the concealment or intentional withholding some fact which ought in good faith to be communicated." *Id*. Specifically regarding evading taxation, *Black's* 4th edition states that "[a]rtifice or cunning is implicit in the term as applied to contest between citizen and the government over taxation." *Id*. "Artifice" is "[a] clever plan or idea, esp. one intended to deceive."[5] *Black's Law Dictionary* (11th ed. 2019). In contrast,

[4] Garfield initially asserted that "evade taxation" means "to *criminally* avoid paying *owed taxes*." (Garfield's MSJ at 14:22-23). At oral argument, however, Garfield's counsel acknowledged that limiting the Evasion Clause to criminal conduct was a "stretch."

[5] Taxpayers' argument that "tax evasion" has a different meaning than "evade taxation" is not compelling.

"avoid" "has no sinister meaning, and does not imply subterfuge or artifice in escape." *Black's Law Dictionary* (4th rev. ed. 1968).

Based on these definitions, the Court concludes that the plain language of the Evasion Clause seeks to prevent secretive or deceptive artifices or schemes to escape taxation. On the other hand, openly employing lawful methods of avoiding taxation do not implicate the Evasion Clause. This is consistent with the decision in *Englehorn, supra*, 2018 WL 11252676 (Hon. Gass May 10, 2018 Ruling), in which Judge Gass ruled that the Evasion Clause "seeks to prevent evasion of otherwise lawfully owed taxes, not from the lawful transfer of property resulting in the application of an exemption." 2018 WL 11252676 at *9. Judge Gass "distinguished between a 'secretive attempt to **evade** the Arizona law' as opposed to acts 'done openly in an attempt to legally **avoid** the provisions of' Arizona law." *Id*. (*quoting Indus. Comm'n of Ariz. v. J. & J. Const. Co*., 72 Ariz. 139, 146 (1951) (emphasis in original)). Although Judge Gass ruled that the plaintiff's allegations in *Englehorn* were sufficient to survive a motion to dismiss, he noted that "plaintiffs will need to jump significant hurdles to show the City acted to evade taxes and may not survive summary judgment on the issue." *Id.* Indeed, Judge Coury ultimately granted the defendants' motion for summary judgment in *Englehorn*, concluding that:

> 9. Standing alone, the City's mere use of the GPLET redevelopment tool in strict compliance with Arizona law and the GPLET statutes, while unquestionably demonstrating an intent to engage in tax avoidance for Amstar, does not automatically constitute an intent to engage in tax evasion. Simply put, the additional element required to elevate tax avoidance to tax evasion does not exist simply from the City's mere use of the constitutional GPLET statutes.
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> 10. There is no genuine issue of material fact that the City had no improper intent, nor engaged in any conduct elevating its use of the GPLET statutes to tax evasion. Rather, the City merely utilized the GPLET statutes in this case, and complied with all requirements for the usage of these statutes. Consequently, the City's conduct does not rise to the level of tax evasion, and does not violate the Evasion Clause of the Arizona Constitution as a matter of law.

Englehorn, supra, 2019 WL 11505775 at *2 (Ariz. Sup. Ct. Aug. 30, 2019 Ruling).[6]

[6] There is nothing inherently wrong with using lawful methods available to avoid taxes. *See Matter of Shorter*, 570 A.2d 760, 765 n.10 (D.C. App. 1990) ("Tax codes are extraordinarily complex, and taxing authorities recognize that tax *avoidance*, as opposed to tax *evasion*, is perfectly lawful behavior." (quotation omitted) (emphasis in original)).

Here, as in *Englehorn*, there is no genuine, material dispute that the GPLET Transaction complies with all the requirements of the GPLET statute. The property on which the Garfield Project is located meets the requirements for GPLET abatement. The property is within the City's single central business district and subject to the Development Agreement and Lease. The Garfield Project also is within an area designated by the City as slum and blighted. Finally, the proposed improvement of the vacant land will increase the property value by more than 100%. *See* A.R.S. § 42-6209(A).

The structure of the GPLET Transaction also complies with the GPLET statute. The Development Agreement provides that upon completion of construction and issuance of a certificate of occupancy, Garfield will convey title to the Garfield Project to the City. The City will then lease the Garfield Project to Garfield for no more than eight years, during which time the GPLET will be abated. *See* A.R.S. § 42-6209(A). At the end of the lease, the City will convey title to the Garfield Project to Garfield. *See* A.R.S. § 42-6209(G). Although Taxpayers assert that the transaction does not fully comply with the GPLET statute, they fail to identify any provision of the statute that was not met.

Taxpayers argue that the GPLET Transaction evades *ad valorum* taxation because the City will not have the full rights of ownership of the Garfield Project during the lease term. Specifically, Taxpayers complain that the City will not have the right to possess or control the property or to transfer the property to a third party. Taxpayers assert that because the City will not have all rights of ownership, the conveyance of the Garfield Project to the City is illusory and a sham devised to evade property taxes, which is the kind of artifice the Evasion Clause was designed to prevent.

Garfield acknowledges that the City's ownership rights are somewhat limited. Many of the limits on the City's ownership, however, are typical of commercial leases. The Lease generally gives Garfield possession of the property and allows Garfield to operate the Garfield Project during the lease term. This is a typical arrangement in a commercial lease.[7] The Lease does not run afoul of the GPLET statute, which contemplates that the government improvement will be leased to and operated by a private enterprise. *See* A.R.S. §§ 42-6201(4), 42-6209.

Taxpayers also complain that the City cannot transfer title or its interest in property to any third party and must reconvey title to Garfield at the end of the eight-year lease term. The restriction on the City's ability to transfer ownership is consistent with the GLPET statute. Under the GPLET statute, the City is required to convey the property to the lessee "[a]s soon as reasonably practicable but within twelve months after the expiration date of the lease." A.R.S. § 42-6209(G).

[7] Like a typical commercial tenant, Garfield has significant control over the Garfield Project during the lease term. The Lease, however, does restrict Garfield's use of the property and requires that Garfield maintain the property.

As such, the City understandably is precluded from transferring title to another party or placing any liens or encumbrances on the property during the lease term.

Taxpayers further argue that to comply with the GPLET statute in a way that does not violate the Evasion Clause, the property must already be owned by the government. Nothing in the GPLET statute, however, requires the City to own the property for any length of time prior to construction of the improvements or issuance of the certificate of occupancy.

And the provision allowing Garfield to terminate the lease at any time for a $100,000 payment does not indicate that the City's ownership is illusory. The GPLET statute provides that the lease term cannot exceed eight years. The statute does not prohibit a shorter lease period or earlier termination of the lease. Further, if the lease is terminated early, the property will no longer qualify for an *ad valorum* tax exemption or GPLET abatement, thus eliminating the tax benefits of the transaction.

Put simply, there is no evidence the GPLET Transaction was a sham or illusory. Rather, the evidence shows that it was a bargained for agreement between the City and Garfield, which (i) was publicly debated and approved by City Council, and (ii) complies with the GPLET statute. Although *ad valorum* taxes are avoided, the transaction does not "evade" taxation because no secretive or deceptive scheme was employed.

Taxpayers also are mistaken that the sole purpose of the GPLET Transaction was to allow Garfield to evade property taxes. In this regard, Taxpayers focus only on Section 303 of the Development Agreement. Section 303 provides that the "the intention of the Parties is for the Project and all eligible improvements subject to the Lease to be subject to the GPLET (and not to ad valorem taxation) during the term of the Lease and for the GPLET to be abated for a period of eight (8) years after the final certificate of occupancy …." (Taxpayers' Ex. 1 at § 303).

Although the City and Garfield clearly intended GPLET tax treatment, that was not the sole purpose of the transaction. Taxpayers overlook Section 101 of the Developer Agreement, which clearly sets forth the "Purpose of the Agreement." Section 101 states, in part, that the purpose of the Development Agreement is: "1) to put into effect the Downtown Area Redevelopment and Improvement Plan … by providing for the development of certain real property …; and 2) [to] facilitate the development of a mixed-use project on the Site including residential apartments, ground level commercial space, and parking spaces located in an integrated parking structure." (*Id.*). And the City acknowledged that the development of the vacant Garfield site was "in the vital and best interests of City and the health, safety, and welfare of its residents…." (*Id.*).

In short, the GPLET Transaction is intended to serve the City's interest in revitalizing a blighted portion of the downtown area and constructing new housing, including low-income

housing, in the City's central business district, which the City believes will help alleviate the lack of affordable housing in Phoenix. Moreover, the Development Agreement and the Lease provide other benefits to the City, including rental payments and at least $9 million in a Minimum Direct Benefit. The GPLET Transaction clearly does more than just provide Garfield the benefit of tax avoidance.[8]

The bottom line is that the uncontroverted evidence shows 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. Rather, the record shows that Garfield and the City complied with all the requirements of the GPLET statute in structuring the Development Agreement and Lease. Accordingly, the GPLET Transaction as structured does not violate the Evasion Clause as a matter of law.

Disposition

For the reasons set forth above,

IT IS ORDERED denying the Taxpayers' MSJ and granting Garfield's MSJ.

IT IS FURTHER ORDERED that Garfield and the City must lodge a proposed form of judgment and file any applications for attorneys' fees and costs by **September 12, 2023**.

[8] Even if the sole purpose of the GPLET Transaction was to provide a tax benefit to Garfield, it would not violate the Evasion Clause because, as discussed above, the GPLET Transaction is a lawful tax avoidance, not an artifice or sham to evade taxation.