Clerk of the Superior Court
*** Electronically Filed ***
12/21/2022 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2022-005658 12/20/2022

HONORABLE DEWAIN D. FOX

CLERK OF THE COURT
J. Eaton
Deputy

BRAMLEY PAULIN, et al.

JONATHAN RICHES

v.

CITY OF PHOENIX, et al.

DANIEL J INGLESE

BRETT W JOHNSON
TRACY A OLSON
THOMAS GEORGE STACK
JUDGE FOX

UNDER ADVISEMENT RULING ON MOTIONS TO DISMISS, CROSS MOTION FOR SUMMARY JUDGMENT AND APPLICATION FOR PRELIMINARY INJUNCTION

Pending before the Court are the following motions/applications:

- Plaintiffs/Taxpayers'[1] "Application For A Temporary Restraining Order (With Notice) And Motion For Preliminary Injunction" (the "TRO Application") filed May 4, 2022;

- "City Defendants'[2] Motion To Dismiss For Failure To State A Claim" (the "City Motion") filed May 26, 2022;

[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.

[2] "City Defendants" refers to Defendants City of Phoenix and Jeff Barton, in his capacity as City Manager of the City of Phoenix.

- Intervenor-Defendant Garfield's[3] "Motion To Dismiss" (the "Garfield Motion") filed August 11, 2022;

- Garfield's "Motion For Judicial Notice" filed August 11, 2022; and

- "Plaintiffs' Cross-Motion For Summary Judgment" ("Taxpayers' MSJ") filed September 12, 2022.

Except for Taxpayers' MSJ, the above motions are fully briefed. During the September 29, 2022 Status Conference, the Court suspended the time for responding to Taxpayers' MSJ until further order of the Court following a decision on the other motions. On October 21, 2022, the Court heard oral argument on the motions.[4] For the reasons explained below, the Court concludes that (i) Count One (Gift Clause) must be dismissed, and (ii) Count Two (Evasion Clause) states a viable claim.

Factual Background

On December 27, 2019, Garfield responded to the City of Phoenix's (the "City") request for proposals for urban and mixed-use development and redevelopment projects on private property within the Downtown Redevelopment Area. Garfield's proposal (the "Proposal") requested abated Government Property Lease Excise Tax ("GPLET") treatment for a 26-story, 309-unit luxury apartment building (the "Project") to be built at the southeast corner of 6th Street and Garfield Street, in the Roosevelt Row neighborhood of downtown Phoenix. The Proposal included pro forma estimates that: (i) the Project would be subject to approximately $825,000 to $980,000 in *ad valorem* real estate taxes per year over the course of 10 years without GPLET treatment; (ii) the Project would generate around $4.8 million to $6.4 million a year in net operating income without GPLET treatment; and (iii) the Project would generate around $5.6 million to $7.4 million a year in net operating income with GPLET treatment.

In short, the proposed transaction consisted of the following terms: (1) Garfield would build the Project on property that it owned; (2) upon issuance of a certificate of occupancy ("C of O"), Garfield would convey title of the Project to the City; (3) the City would lease the Project back to Garfield for a period of eight years; (4) during the eight-year lease, the Project would not

[3] "Garfield" refers to Intervenor-Defendant 6th & Garfield Owner, LLC, which owns the project at issue in this action.

[4] The Court allowed oral argument on Taxpayers' MSJ only to the extent it addressed issues within the scope of the City Motion and the Garfield Motion.

be subject to *ad valorem* property taxes and instead would be subject to the abated GPLET (the "GPLET Transaction").

On September 22, 2020, Garfield and the City entered into a letter of intent ("LOI") for the Project. The LOI provided that the City will recommend GPLET treatment for the Project on the following terms (among others):

(i) upon receipt of the C of O and an acceptable title report, Garfield will convey the site and improvements (the "Property") to the City at no cost to the City;

(ii) the City will lease the Property to Garfield for an 8-year term with rent payable to the City in the amount of $25,000 per year for Years 1 and 2, $50,000 per year for Years 3 and 4, $75,000 per year for Year 5, and $100,000 per year for Years 6, 7 and 8 (the "Lease Rent");

(iii) Garfield may purchase the Property and terminate the lease at any time during the lease term for a purchase price of $100,000;

(iv) the Property will be eligible for abatement of GPLET during the lease term;

(v) Garfield guarantees to pay the City (and other governmental entities) construction transaction privilege taxes, rental transaction privilege taxes, other transaction privilege taxes, use taxes and property taxes in accordance with applicable laws, and the Lease Rent, in the total minimum aggregate amount of $6,625,000 (the "Minimum Direct Benefit Amount");

(vi) Garfield guarantees to pay a minimum of $3,600,000 of the Minimum Direct Benefit Amount through payment of construction transaction privilege taxes prior to commencement of the lease term;

(vii) the unpaid balance of the Minimum Direct Benefit Amount shall be determined upon termination of the lease, and Garfield guarantees payment of the balance in equal minimum annual payments of property taxes over the succeeding eight years; and

(viii) Garfield will make donations of $2,000 per year to the Phoenix Elementary School District and the Phoenix Union High School District during the lease term.

(Motion For Judicial Notice, Exhibit 4).

On October 7, 2020, after extensive review and public comment, the City passed Ordinance S-46966 (the "Ordinance") approving and codifying the GPLET Transaction. 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.

(Complaint, Exhibit 3, ¶ B).

Garfield and the City entered into transaction documents authorized by the Ordinance effective May 14, 2021. In addition to the terms described above, the Development Agreement: (i) provided that, during the term of the lease, 10% of the residential units shall be available for workforce housing; and (ii) required Garfield to donate $100,000 to the City's Affordable Housing Trust Fund prior to issuance of a construction permit for the Project. (Complaint, Exhibit 4 at 23, §§ 311, 312).

Garfield has broken ground and completed significant construction on the Project to the point that it no longer is viable to abandon the Project.

On May 4, 2022, Taxpayers filed their Verified Complaint for Declaratory and Injunctive Relief (the "Complaint"). The Complaint asserts two claims: Count One for a violation of Article 9, Section 7 (the "Gift Clause") of the Arizona Constitution; and Count Two for a violation of Article 9, Section 2 (the "Evasion Clause") of the Arizona Constitution. Garfield and the City Defendants (collectively, "Defendants") seek dismissal of Taxpayers' claims, arguing that: (i) Taxpayers' claims are time-barred under the applicable statute of limitations and laches; and (ii) Taxpayers' claims under the Gift Clause and the Evasion Clause fail to state claims upon which relief can be granted.

Judicial Notice

Garfield initially asks the Court to take judicial notice under Arizona Rule of Evidence 201 of the following Exhibits:

1. The Agenda Report for the October 7, 2020 City of Phoenix City Council Formal Meeting;

2. The Meeting Agenda for the September 14, 2020 Central City Village Planning Committee;

3. The "Village Planning Committee Meeting Summary" for the September 14, 2020 Central City Village Planning Committee meeting;

4. The City of Phoenix Community and Economic Development Department's September 22, 2020 letter to John T. McLinden with Attachment B ("Lease Rent Schedule");

5. The Summary Minutes of the Workforce and Economic Development Subcommittee's September 23, 2020 meeting;

6. A City of Phoenix document titled "Results – City Council Formal Meeting";

7. An interactive map published by the City of Phoenix detailing the Downtown Redevelopment Area;

8. A Phoenix New Times article titled *New Apartments Planned for Roosevelt Growhouse Site in Roosevelt Row*, published on December 17, 2019;

9. The Downtown Voices Coalition agenda for its August 8, 2020 meeting;

10. A 91.5 KJZZ article titled *Downtown Developer Offers $100,000 Before Phoenix Council Tax Vote*;

11. A September 24, 2020, Phoenix Business Journal article titled *Phoenix Approves Controversial Tax Incentive for Proposed Downtown Tower*;

12. Phoenix Development News Forum from website https://skyscraperpage.com;

13. An October 1, 2020 article from the Rose Law Group Reporter; and

14. An October 6, 2020, AZBEX article titled *26-Story Apt. Tower in PHX Gets Subcommittee Nod*.

Taxpayers object to the Court taking judicial notice of Exhibits 3, 5, and 7 through 14. Taxpayers argue that these exhibits do not meet the standards of reliability and authenticity for judicial notice, and Exhibits 8 through 14 are news articles and media publications that are "categorically excluded from the scope of material that is proper for judicial notice." (Response at 1:11-12).

Arizona Rule of Evidence 201(b) permits a court to take judicial notice of "a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Garfield argues that Exhibits 1 through 14 "are all appropriate for judicial notice because they 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.'" (Motion For Judicial Notice at 9:15-17).

A court may take judicial notice of acts and records of a state agency. *See Jarvis v. State Land Dept. City of Tucson*, 104 Ariz. 527, 530 (1969); *Adams v. Bolin*, 74 Ariz. 269, 271 (1952); *Hernandez v. Frohmiller*, 68 Ariz. 242, 258 (1949). This principle extends to taking judicial notice of state agencies' websites. *See Arizonans for Second Chances, Rehabilitation, and Public Safety v. Hobbs*, 249 Ariz. 396, 403 ¶ 12 n.1 (2020); *Arizona Public Integrity Alliance v. Fontes*, 250 Ariz. 58, 65 ¶ 28 n.2 (2020). Importantly, whether to take judicial notice is discretionary. *See State v. Rojers*, 216 Ariz. 555, 560 ¶ 25 (2007).

Here, Exhibits 8 through 14 are news articles and media publications. The Court agrees with Taxpayers that these are not sources whose accuracy cannot reasonably be questioned. Even assuming that these exhibits meet the standard for judicial notice, however, the Court in the exercise of its discretion declines to take judicial notice of Exhibits 8 through 14. But the Court disagrees with Taxpayers as to Exhibits 3, 5 and 7. Exhibit 3 is a summary (akin to minutes) of a City of Phoenix village planning meeting, and Exhibit 5 is the minutes from a Phoenix City Council subcommittee meeting. Exhibit 7 is an interactive map, which the City of Phoenix prepared following its survey of the downtown redevelopment area pursuant to A.R.S. § 42-6209(F) to determine if it still qualifies as a slum or blighted area. The Court determines that Exhibits 3, 5 and 7 are documents capable of judicial notice.

The Court will grant Garfield's request to take judicial notice of Exhibits 1 through 7, and deny Garfield's request to take judicial notice of Exhibit 8 through 14.

Statute of Limitations

The parties agree that the applicable statute of limitations is A.R.S. § 12-821, which provides that "[a]ll actions against any public entity or public employee shall be brought within one year after the cause of action accrues and not afterward." Taxpayers filed their Complaint on May 4, 2022. As such, Taxpayers' claims are untimely if they accrued before May 4, 2021.

Defendants contend that Taxpayers knew, or reasonably should have known, all pertinent facts underlying their claims by at least October 7, 2020--the day the City passed the Ordinance approving the GPLET Transaction. Defendants rely on (among other things): (i) Paulin's attendance at the September 14, 2020 public meeting of the Planning Committee, where Paulin asked whether the GPLET Transaction would violate the Gift Clause; and (ii) Taxpayers' counsel's

September 21, 2020 letter warning the City that the GPLET Transaction violates the Gift Clause and threatening litigation if the City approved the GPLET Transaction. Taxpayers counter that their claims did not accrue--and they could not sue--when the Ordinance was passed, because the Ordinance merely authorized the City's staff to negotiate the terms of the GPLET Transaction with Garfield. Taxpayers assert that their claims accrued when the GPLET Transaction documents became effective on May 14, 2021--making their claims timely under A.R.S. § 12-821.

Defendants cite to the Arizona Court of Appeals' decision in *State v. Arizona Board of Regents*, 251 Ariz. 182 (App. 2021) ("*ABOR I*"). There, the Arizona Attorney General's Office ("AGO") sued to enjoin an agreement between the Arizona Board of Regents ("ABOR") and a private company to build and operate a hotel and conference center on state property. The tax court found that AGO's Gift Clause claim was untimely under A.R.S. § 12-821 and granted summary judgment for ABOR on that claim. The Court of Appeals affirmed, concluding that "the AGO had notice to investigate any Gift Clause claim long before April 3, 2018 (one year before the AGO filed its amended complaint)", because "[t]he AGO first questioned whether ABOR's commercial development implicated the Gift Clause on January 11, 2018, when senior AGO attorneys circulated an internal legal memorandum and an opinion editorial on the topic" and "one of the AGO's attorneys specifically called the transaction 'pretty suspicious.'" *Id.* at 187 ¶ 15.

The problem with Defendants' reliance on *ABOR I* is that the Supreme Court vacated that opinion three months before Defendants cited it. *See State v. Arizona Board of Regents*, 253 Ariz. 6, 15 ¶ 35 (2022) ("*ABOR II*"). In *ABOR II*, the Supreme Court held that A.R.S. § 35-212(E) "creates an exception for public-monies claims brought by the Attorney General that . . . supplants the one-year limitations period in § 12-821 with a five-year limitations period. . . ." *Id.* at 12 ¶ 23.[5]

Nevertheless, Defendants urge the Court to follow the analysis in *ABOR I*. Defendants contend that, although "[t]he Supreme Court ultimately determined that a different statute of limitations not relevant to this proceeding . . . governed the Gift Clause claims at issue," "[t]he Supreme Court opinion did not discuss the Court of Appeals [sic] accrual analysis under A.R.S. § 12-1821 [sic]." (Garfield Motion at 9:26-28 n.2). In essence, Defendants contend that *ABOR II* left the accrual analysis portion of *ABOR I* intact. But that is not the law. If the Supreme Court intended to leave part of *ABOR I* intact, then it would have vacated only part of the opinion in *ABOR I* rather than vacating the entire opinion. And it is well-settled that "[v]acated cases have no precedential value." *Wertheim v. Pima County*, 211 Ariz. 422, 426 ¶ 17 n.2 (App. 2005) (citing

[5] A.R.S. § 35-212(E) provides that "[i]f the action [to recover the illegal payment of public monies] is brought by the attorney general, the action must be brought within five years after the date an illegal payment was ordered and § 12-821.01 does not apply to the action." Here, the Attorney General has not filed an action to recover the illegal payment of public monies. As such, neither A.R.S. § 35-212(E) nor the statute of limitations analysis in *ABOR II* applies here.

Wetherill v. Basham, 197 Ariz. 198, 202 ¶ 7 n.1 (App. 2000)).[6] As such, the Court declines Defendants' invitation to rely on *ABOR I*.

Defendants also cite to *Cruz v. City of Tucson*, 243 Ariz. 69 (App. 2017)--a case on which the Court of Appeals relied in its accrual analysis in *ABOR I*. In *Cruz*, the Court of Appeals affirmed the trial court's ruling that the plaintiff's notice of claim asserting an abuse of process claim against the City of Tucson was untimely. Defendants cite to the Court of Appeals' statement that "'the 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.'" (Garfield Motion at 8:25-28 (citing *Cruz, supra* at 72 ¶ 8)). Significantly, the Court of Appeals' application of the discovery rule presumes that the plaintiff already was damaged or injured by the time the duty to investigate arose. *See Cruz, supra* ("[A] cause of action accrues when **the damaged party realizes he or she has been damaged** and knows or reasonably should know the cause, source, act, event, instrumentality or condition that caused or contributed to the damage.") (internal quotation and citation omitted) (emphasis added); *see also ABOR II, supra* at 13 ¶ 26 ("Statutes of limitations . . . typically begin to accrue '**after an injury occurs** and is (or reasonably should have been) discovered.'") (emphasis added).

"Accrue" means "'[t]o come into existence as an enforceable claim or right; to arise,' . . . and 'accrued right' as a 'matured right; a right that is ripe for enforcement.'" *City of Apache Junction v. Doolittle*, 237 Ariz. 83, 87 ¶ 17 (App. 2015) (citation omitted). Moreover, "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Madonna v. State*, 2018 WL 2111441 *2 ¶ 8 (App. 2018) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)); *see also Moore v. Bolin*, 70 Ariz. 354, 358 (1950) (claim was not ripe for adjudication because "[t]he allegations merely show an intent to do certain things in the future all of which are dependent upon future events and contingencies within control of the appellant.").

Here, the Ordinance authorized "[t]he City Manager or his designee to enter into a development agreement, lease agreement, easements and other agreements as necessary" under the terms generally set out in the Ordinance. (Complaint, Exhibit 3, § 1). Garfield had six months following the City's adoption of the Ordinance to enter into a Development Agreement with the City. (Motion For Judicial Notice, Exhibit 4 at 2, ¶ 3 ("Within six (6) months from the Phoenix City Council's authorization of the business terms set forth in this Letter, Developer shall enter into a DA with the City.")). Moreover, the LOI expressly emphasized the non-binding nature of the GPLET Transaction until the parties executed final transaction documents:

[6] Relying on an opinion that has been vacated on direct review by a higher court is different than relying on an opinion that subsequently has been overruled on other grounds (but not vacated) by a higher court in another unrelated case (*i.e.*, not on direct review).

> Binding agreements will not exist between the parties unless and until agreements containing all terms and provisions authorized by the Phoenix City Council are prepared, executed, and delivered by both parties. This non-binding Letter is not intended to, and does not, impose any obligation whatsoever on either party. The parties further acknowledge that either party may terminate the negotiation of the agreements for any reason or no reason and that neither party owes the other party any duty to negotiate formal, binding agreements. The parties acknowledge that this non-binding Letter does not address all essential terms of the transaction contemplated by it and that such essential terms will be the subject of further negotiation. Neither party may claim any legal rights against the other by reason of actions taken, or not taken, in reliance upon this non-binding Letter, including, without limitation, any partial performance of the transaction contemplated by it. No prior or subsequent correspondence or course of dealing between the parties may be construed to create any contract or to vest any rights in either party with respect to the transaction contemplated by this Letter. . . .

(*Id.* at 5-6).

As noted above, Garfield and the City executed final transaction documents authorized by the Ordinance effective May 14, 2021. The Court concludes that Taxpayers' claims challenging the GPLET Transaction did not accrue until that date. Taxpayers filed this action on May 4, 2022, within one year after their claims accrued. Accordingly, Taxpayers' claims are timely under A.R.S. § 12-821.

Laches

As an alternative to their statute of limitations argument, Defendants seek dismissal of this action under the doctrine of laches. Laches "is an equitable counterpart to the statute of limitations, designed to discourage dilatory conduct." *Sotomayor v. Burns*, 199 Ariz. 81, 83 ¶ 6 (2000). "Laches will generally bar a claim when the delay is unreasonable and results in prejudice to the opposing party." *Id.* "A laches defense, however, cannot stand on unreasonable conduct alone." *Id.* at ¶ 8. "A showing of prejudice is also required." *Id.*

To evaluate whether a delay in suing 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). 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) (internal quotation and citation omitted).

Laches is an affirmative defense on which the defendant bears the burden of proof. *See Jerger v. Rubin*, 106 Ariz. 114, 117 (1970). The defendant bears the burden of proving affirmative defenses by a preponderance of the evidence. *See Pfeil v. Smith*, 183 Ariz. 63, 65 (App. 1995).

Finally, laches is an equitable doctrine committed to the Court's sound discretion. *See Prutch v. Town of Quartzsite*, 231 Ariz. 431, 435 ¶ 12 (App. 2013). "Equity . . . 'does not encourage laches, and the doctrine may not be invoked to defeat justice but only to prevent injustice.'" *Id.* at ¶ 13.

On this record, the Court will not dismiss the action based on the doctrine of laches. Although Taxpayers waited almost one year after execution of the GPLET Transaction documents to bring this action, the Court declines to resolve the factually contested issue of whether the delay was reasonable.[7] On the issue of prejudice, although the Court accepts as true that construction of the Project already had progressed to the point where abandonment was not a viable option by the time Taxpayers filed this action, it was no secret that Taxpayers challenged the constitutionality of the GPLET Transaction. As such, if Garfield wanted certainty before it commenced construction and made a substantial investment in the Project, Garfield had the option of filing its own declaratory judgment action. Accordingly, the Court will decide this action on the merits.

Gift Clause

The Gift Clause provides:

> Neither the state, nor any county, city, town, municipality, or other subdivision of the state shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or become a joint owner with any person, company, or corporation, except as to such ownerships as may accrue to the state by operation or provision of law or as authorized by law solely for investment of the monies in the various funds of the state.

Ariz. Const. Art. IX, § 7.

Defendants seek dismissal of Count One on the basis that GPLET treatment is not a "gift," "loan," "donation or grant," or "subsidy", because private entities (like Garfield) entering into a GPLET transaction do not already owe *ad valorem* taxes. Defendants contend that Taxpayers'

[7] Taxpayers contend that they were engaged in non-litigation efforts to resolve their challenge to the GPLET Transaction. Defendants contend that it was clear that those efforts were unsuccessful long before Taxpayers filed this action.

Gift Clause claim "pre-supposes that [Garfield] *already owes* 'approximately $7,300,000' in *ad valorem* property taxes and that by entering into the GPLET Transaction the City has somehow forgiven this debt." (Garfield Motion at 14:16-18). Taxpayers counter that "Arizona courts have held for a century that the Gift Clause applies not just to outright expenditures, but to gifts, subsidies, and special advantages of all kinds, including the elimination of debts that a private party would otherwise owe." (Response to Garfield Motion at 13:9-12). Taxpayers also contend that the City is precluded under the doctrine of collateral estoppel from asserting that the GPLET Transaction is not subject to Gift Clause scrutiny.[8]

Issue Preclusion

The Court begins by addressing issue preclusion. Taxpayers contend that the City is precluded from asserting a position contrary to the ruling on the same issue in *Englehorn v. Stanton*, Maricopa County Superior Court Case No. CV2017-001742 (Hon. David B. Gass, May 10, 2018 Minute Entry). There, Englehorn (who also is a plaintiff here) and others sued the City and another developer (who is not a defendant here) to challenge a GPLET transaction called Derby Roosevelt Row. The City sought dismissal of the plaintiffs' claims under the Gift Clause and the Evasion Clause (and other claims).

The GPLET transaction in *Englehorn* is similar to the GPLET Transaction here:

> On March 3, 2016, the City Council approved Ordinance S-42353. Ordinance S-42353 authorized the City manager or designee to enter into the Agreements with Amstar. Ordinance S-42353 specifically authorized the City manager to enter into the Agreements with Amstar to build a high-rise, multifamily residential building on the Derby Roosevelt Row property. Ordinance S-42353 also authorized the City manager to use the GPLET statute as part of the Agreements. The City manager entered into the Agreements, including the GPLET provision.
>
> Under the Agreements, Amstar will develop the Derby Roosevelt Row project. When complete, Amstar will transfer the Derby Roosevelt Row project to the City. The City will lease the Derby Roosevelt Row project to Amstar under a 25-year lease. Under the Agreements, Amstar is subject to GPLET and a GPLET abatement. The Agreements say the Derby Roosevelt Row project: (1) is located in the City's Downtown Redevelopment Area and the City's Central Business District and (2) is

[8] Our courts typically use the more modern and descriptive term of "issue preclusion" in place of the "archaic phrase" of "collateral estoppel." *See Circle K Corp. v. Industrial Com'n of Arizona*, 179 Ariz. 422, 425 (App. 1993). Consistent with the modern trend, the Court uses the term "issue preclusion" in this ruling.

> needed for redevelopment in the public interest under A.R.S. Title 36, chapter 12, article 3.

Id. at 5.

Judge Gass rejected the City's argument that the Gift Clause did not apply to the *Englehorn* GPLET transaction, stating:

> Longstanding precedent establishes a government's decision to contract with a private party—such as entering into a lease—is subject to Gift Clause analysis. *See Kromko v. Arizona Bd. of Regents*, 149 Ariz. 319, 321 (1986) (discussing Ariz. Const. art. 9, § 1 in the context of a lease). The City's decisions to enact City Ordinance S-42353 and enter into the Agreements, therefore, are subject to Gift Clause analysis. *See id.*

Id. at 6-7. On June 19, 2020, following a bench trial, Judge Coury ultimately concluded that the GPLET transaction in *Englehorn* violated the Gift Clause. *Englehorn v. Stanton, supra* (Hon. Christopher A. Coury, June 19, 2020 Under Advisement Ruling/Verdict). No appeal was taken, and Judge Gass's and Judge Coury's rulings became final.

"Issue preclusion is a judicial doctrine that, when applicable, prevents a party from relitigating an issue of fact decided in a prior judgment." *Hancock v. O'Neil*, 253 Ariz. 509, 512 ¶ 10 (2022) (emphasis added). Defensive issue preclusion requires four elements: "(1) The issue at stake must be the same in both proceedings; (2) the issue must have been actually litigated and decided in the prior proceedings; (3) the party against whom the doctrine is to be invoked must have had a full and fair opportunity to litigate the issue; and (4) the issue must have been necessary to decide the merits of the prior action." *Id.* at ¶ 10 n.3.

"Offensive issue preclusion occurs when the party invoking the doctrine uses it as a sword against another party who lost on the issue in a prior judgment." *Id.* The United States Supreme Court and the Arizona Supreme Court have "noted that offensive issue preclusion is 'a situation that . . . present[s] different considerations' beyond the four elements state and federal law require for defensive issue preclusion." *Id.* at ¶ 10. Moreover, the Supreme Court recently recognized the unsettled state of Arizona law on the offensive, non-mutual use of issue preclusion:

> Although *Wetzel* [*v. Arizona State Real Estate Dept.*, 151 Ariz. 330 (App. 1986)] approved the use of offensive, non-mutual issue preclusion, the court noted that in Arizona, non-mutual issue preclusion "has been limited to the defensive use of the doctrine." *Id.* (*citing Standage Ventures, Inc. v. State*, 114 Ariz. 480, 562 P.2d 360 (1977)). Indeed, in *Standage Ventures*, this Court expressly prohibited offensive use of issue preclusion. 114 Ariz. at 484, 562 P.2d at 364. Other courts have noted

> that the law is unclear in Arizona. *Am. Fam. Mut. Ins. Co. v. Clancy*, 512 F. Appx 674, 676 (9th Cir. 2013) (noting disagreement between *Standage* and *Wetzel*). Because our rules, rather than the issue preclusion doctrine, govern here, this case does not require us to clarify this point.

Id. at 515 ¶ 23 n.9.

Here, Taxpayers invoke offensive issue preclusion. Although the City was a defendant in *Englehorn*, Garfield was not. As such, there is not complete mutuality. Given the lack of complete mutuality, the unsettled state of Arizona law on offensive, non-mutual issue preclusion, and that the applicability of the Gift Clause to GPLET transactions is a legal, not factual, issue, the Court declines to give *Englehorn* preclusive effect under the doctrine of issue preclusion.

Analysis of Gift Clause Cases

Next, the Court turns to the authorities cited by the parties to support or refute the Gift Clause's applicability to the GPLET Transaction.

In nearly all the cases cited by Taxpayers, the transactions at issue clearly were subject to Gift Clause scrutiny because the transactions involved public funds or property--specifically, either (i) the elimination of debts or taxes currently owed to the state, or (ii) the sale or lease of public land. *See Arizona Center for Law in Public Interest v. Hassell*, 172 Ariz. 356 (App. 1991) (Gift Clause applied to legislation that substantially relinquished the state's interest in all lands in the beds of Arizona watercourses that were navigable when Arizona was admitted to the Union); *Kromko v. Arizona Board of Regents*, 149 Ariz. 319 (1986) (Gift Clause applied to a lease of state land and premises); *City of Tempe v. Pilot Properties, Inc.*, 22 Ariz. App. 356 (1974) (Gift Clause applied to a lease of city-owned property); *Rowlands v. State Loan Board of Arizona*, 24 Ariz. 116 (1922) (Gift Clause applied to elimination of interest owed to the state); *Puterbaugh v. Gila County*, 45 Ariz. 557, 564 (1935) (if "the state or the county should endeavor to release the parties from the debt [owed to the state or county], it is clearly a donation of the amount of his indebtedness to such individual, which, under section 7, article 9, of the Constitution, is forbidden").

In *Maricopa County v. State*, 187 Ariz. 275, 280 (App. 1996), the Court of Appeals drew a "distinction between legislative measures that result in tax benefits that take effect prospectively and those that annul closed taxing transactions in order to confer tax benefits retroactively." "In the first category, the taxing entity forgoes revenues that it could have chosen to collect in the future by changing its laws prospectively so the taxpayers' obligation to pay never arises. In the second category, however, the taxing entity modifies its laws to impose on itself an obligation to refund revenues that it collected lawfully in the past." *Id.* Only legislation in the second category --involving a refund of taxes collected lawfully in the past--is subject to Gift Clause scrutiny. *Id.*

Legislation in the first category is not. *Id.; see also Pimalco, Inc. v. Maricopa County*, 188 Ariz. 550, 559-60 (App. 1997) (subjecting to Gift Clause analysis a claim for refund of taxes previously paid after legislature retroactively reclassified property interest subject to tax).

In *Kotterman v. Killian*, 193 Ariz. 273 (1999), the plaintiffs challenged the constitutionality of Arizona's state school tax credit on several bases, including that it violated the Gift Clause. The Arizona Supreme Court flatly rejected the plaintiffs' contention that the tax credit was subject to Gift Clause scrutiny, stating:

> This constitutional provision was historically intended to protect against the "extravagant dissipation of public funds" by government in subsidizing private enterprises such as railroad and canal building in the guise of "public interest." . . . Such "evils" do not exist here. Neither do we agree with petitioners that a tax credit amounts to a "gift." **One cannot make a gift of something that one does not own**.

Id. at 288 ¶ 52 (citation omitted) (emphasis added).

None of the cases addressed above involved a GPLET transaction. Indeed, the parties have cited only two Gift Clause cases specifically addressing GPLET transactions--both of which are unpublished trial court decisions.

First, in its reply and at oral argument, Garfield urged the Court to follow the trial court's decision in *Rodgers v. Huckleberry*, Pima County Superior Court No. C2016-1761 (Feb. 22, 2021 Under Advisement Ruling), which upheld a GPLET transaction. (Garfield Reply at 7:19-21). On October 26, 2022, five days after oral argument, the Court of Appeals reversed the trial court's decision and concluded that the transaction "violate[d] the Gift Clause by granting an illegal subsidy to [a private entity] through the purchase option." *Rodgers v. Huckelberry*, 2022 WL 14972042 *6 ¶ 24 (Ariz. App. 2022).[9] Significantly, in *Rodgers*, "Pima County agreed to build an administrative and balloon manufacturing facility on a twelve-acre, county-owned parcel in the city of Tucson ('Leased Facility') and to lease it to World View for twenty years; the LPA also granted World View an option to purchase the improved parcel for $10 at the end of the term." *Id.* at *1 ¶ 3 (emphasis added). As such, unlike here, whether the transaction was subject to Gift Clause scrutiny was not a contested issue.

Second, Taxpayers urge the Court to follow *Englehorn, supra*. As set forth above, the Court declined to give *Englehorn* preclusive effect against Defendants. But the Court still needs to determine whether *Englehorn* is persuasive authority as to the GPLET Transaction here. With

[9] The trial court spelled the lead defendant's name as "Huckleberry," but the appellate court spelled it "Huckelberry."

due respect, the Court concludes that it is not. Citing *Kromko, supra*, the court in *Englehorn* concluded without any further analysis that "[l]ongstanding precedent establishes a government's decision to contract with a private party—such as entering into a lease—is subject to Gift Clause analysis." *Englehorn, supra* at 6-7. In *Kromko*, unlike here, the Board of Regents leased state property to a private party.

Here, the City did not give up *ad valorem* taxes already owed by Garfield. 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. As such, the City did not make a gift of public monies or property. *See Maricopa County, supra; Kotterman, supra*. Indeed, as the Arizona Supreme Court stated in *Kotterman*, "[o]ne cannot make a gift of something that one does not own." *Kotterman, supra*. Accordingly, the Court concludes as a matter of law that the GPLET Transaction is not subject to the Gift Clause.

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. All federal, state, county and municipal property is exempt from taxation. Ariz. Const. Art. IX, § C.1. The Evasion Clause provides that "[p]roperty that has been conveyed to evade taxation is not exempt." Ariz. Const. Art. IX, § 2.B.

Defendants rely almost exclusively on *ABOR II* to support their argument that Taxpayers' claim under the Evasion Clause fails to state a claim as a matter of law. Specifically, they quote the Supreme Court's holding that "for a conveyance to be made to *evade* taxation, there must be a tax to evade in the first place, and here there is none." *ABOR II, supra* at 10 ¶ 11 (emphasis in original). Taxpayers counter that the only reason the Project is to be transferred to the City is to avoid paying *ad valorem* property taxes, and under these circumstances, *ABOR II* supports their claim--not Defendants.

ABOR II is distinguishable and does not support Defendants. There, the Supreme Court described the transaction as follows:

> The Omni Deal includes construction of a new hotel, conference center, and parking lot **on land owned by ABOR** at Arizona State University's ("ASU") Tempe campus. The agreement gave Omni an option 1 to lease the hotel and conference center property from ABOR for sixty years and to purchase the property from ABOR at the end of the lease term for a nominal fee. **Because property owned by ABOR, as a state entity, is tax-exempt, Omni would not pay the property taxes a private hotel and conference center would otherwise pay during the lease term; instead, Omni would pay ABOR prepaid rent of $5.9**

> **million and annual rent during the lease term totaling more than $118 million**. ABOR also agreed to pay Omni up to $19.5 million towards constructing the conference center, which Omni would otherwise fund, in exchange for seven days' use of the center annually.

Id. at 9 ¶ 2 (emphasis added). Under this scenario, the Supreme Court rejected the Attorney General's claim under the Evasion Clause, because there was no "tax to evade in the first place" as the property already was exempt as state-owned property. *Id.* at 10 ¶ 11.

Here, unlike *ABOR II*, the Project is privately owned and subject to taxation under Article IX, Section 2.A. of Arizona's Constitution. As such, there *is* a tax to evade here by transferring title to the City. Indeed, it is undisputed that the whole point of the GPLET Transaction is to avoid paying the *ad valorem* property taxes that otherwise would be due if the Property was not transferred to the City. Accordingly, Count Two states a viable claim under the Evasion Clause.

TRO Application

Taxpayers sought a TRO and preliminary injunction to "enjoin the unconstitutional allocation of public resources" in the GPLET Transaction. (TRO Application at 17:8-10). During the August 11, 2022 Status Conference, the Court approved the parties' stipulation that Garfield would not transfer title to the Property to the City "until after the Court's ruling on the Motions to Dismiss and request for preliminary injunction." (8/11/2022 Minute Entry at 2). The Court declines to grant preliminary injunctive relief for two reasons.

First, in arguing the likelihood of success on the merits, Taxpayers focused exclusively on their Gift Clause claim. As set forth above, the Court concluded that the GPLET Transaction is not subject to the Gift Clause as a matter of law.

Second, although the Court concludes that Taxpayers have a viable claim under the Evasion Clause, the remedy under that clause is that the conveyed property "is not exempt." Ariz. Const. Art. IX, § 2.B. Put another way, a violation of this clause (unlike a violation of the Gift Clause) does not invalidate the transaction. And Taxpayers have a legal remedy (*i.e.*, Garfield will be liable for unpaid taxes) if they prevail on this claim. As such, Taxpayers cannot establish irreparable harm.

Disposition

For the reasons set forth above,

IT IS ORDERED:

1. **Granting** the Motion For Judicial Notice, in part, by taking judicial notice of Exhibits 1 through 7 to the Motion, and **denying** the Motion, in part, by declining to take judicial notice of Exhibit 8 through 14 to the Motion;

2. **Granting** the City Motion and the Garfield Motion, in part, by dismissing with prejudice Count One of the Complaint, and **denying** the City Motion and the Garfield Motion, in part, as to Count Two of the Complaint;

3. **Denying** the TRO Application; and

4. **Denying** Taxpayers' MSJ, in part, as it pertains to Count One, and directing Defendants to file a response to Taxpayers' MSJ only as it pertains to Count Two by **January 20, 2023**. The deadline for Taxpayers to reply will be determined under Arizona Rule of Civil Procedure 56(c)(2).