



MEMORANDUM

Date: February 24, 2021

To: The Honorable Chair and Members
Pima County Board of Supervisors

From: C.H. Huckelberry
County Administrator 

Re: **Goldwater Institute World View Litigation**

I am enclosing the February 22, 2021 ruling of the Arizona Superior Court related to the County's economic development transaction with World View who located their headquarters in Pima County. The County constructed a facility for their use and entered into a 20-year lease purchase agreement with World View under which the County would recover our expenses—in the neighborhood of \$14 million—through rent payments over the agreement's term totaling over \$24 million dollars.

Shortly after the County entered into our economic development agreements, the County was sued by the Goldwater Institute claiming that the County violated the Arizona Constitution's gift prohibition, leased the property using the wrong statute, and improperly employed the project's architect and contractor. The County prevailed on the latter two issues with rulings from the Court of Appeals in favor of the County. The last legal issue remaining was the gift clause claim, which is resolved in the County's favor in the attached minute entry. Indeed, the County prevailed on every single argument.

The Goldwater Institute could appeal this ruling as well, and likely will. But the court's reasoning is compelling and should withstand any further challenge by the Goldwater Institute.

We hope this action now closes a chapter of 5 years of litigation with the Goldwater Institute which has been costly and lengthy for both the County and the Goldwater Institute.

CHH/dym

Attachment

c: Jan Leshar, Chief Deputy County Administrator
Andrew Flagg, Chief Civil Deputy, Pima County Attorney's Office
Regina Nassen, Deputy County Attorney, Pima County Attorney's Office
John Moffatt, Director, Economic Development Office

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. PAUL E. TANG

CASE NO. C20161761

DATE: February 22, 2021

**RICHARD RODGERS,
SHELBY MANGUSON-HAWKINS, and
DAVID PRESTON**
Plaintiffs

VS.

**CHARLES H HUCKLEBERRY,
SHARON BRONSON,
RAY CARROLL,
RICHARD ELIAS,
ALLYSON MILLER,
RAMON VALADEZ, and
PIMA COUNTY**
Defendants

R U L I N G

IN CHAMBERS UNDER-ADVISEMENT TRIAL RULING

Pending is a dispute brought by taxpayers charging that Pima County's expenditure in building a headquarters, plant and launchpad for World View Enterprises, Inc. ("World View"), a near-space exploration company manufacturing high-altitude balloons for scientific research and tourism, violates art. IV, Sec. 7 of the Arizona Constitution's Gift Clause. The remaining count of taxpayers' complaint seeks declaratory and injunctive relief. Essentially, the core argument advanced is that Pima County's expenditures in constructing World View's corporate headquarters in conjunction with a 20-year lease purchase agreement and option to purchase (i) fails the requirement that tax monies advance a public purpose, (ii) amounts to a loan of credit or subsidy, and (iii) the private company's consideration in return is grossly disproportionate to Pima County's outlay. For trial, the parties stipulated to evidence and exhibits, which the Court has considered, along with the arguments of counsel, the record, and each party's proposed findings of fact and conclusions of law. This ruling follows, with the Court detailing factual findings first.

FACTS

The parties

Plaintiffs are Richard Rodgers, Shelby Magnuson-Hawkins, and David Preston. They are taxpayers and residents of Pima County ("Taxpayers" or "Plaintiffs").¹ They filed a complaint in Pima County Superior Court on April 14, 2016 ("Complaint") naming the following: Charles H. Huckelberry, in his official capacity as the County Administrator of Pima County; Sharon Bronson, Ray Carroll, Richard Elias, Allyson Miller, and Ramón

¹ The parties stipulated that Plaintiffs have standing. See Joint Pretrial Statement ("JPS") ¶ A.1.

RULING

Valadez, in their official capacities as members of the Pima County Board of Supervisors (“Supervisors”); and Pima County (“County”), a political subdivision of the State of Arizona (these parties are referred collectively as “Defendants” or “County Defendants”).

The World View Agreements

On January 19, 2016, the Supervisors approved a Lease Purchase Agreement (“Lease Purchase”) and an Operating Agreement (collectively, “Agreements”) between the County and World View, a Tucson-based private company that developed—and had plans to commercialize—a unique near-space balloon technology. World View serves commercial customers around the world. By a 4-1 vote (Allyson Miller dissenting), the board approved the Agreements for economic development purposes under A.R.S. § 11-254.04,² based on findings that the transaction would benefit the local economy, and World View would have relocated elsewhere but for the County’s decision to enter into the Agreements.

Under the Lease Purchase, as amended, the County was obligated to construct a 142,000³ sq. ft. building (“Building”) on a 12-acre parcel it already owned (“Improved Parcel” or “Building Parcel”) and to lease such land with improvements to World View for use as a headquarters and plant for manufacturing high-altitude space balloons. The Lease Purchase requires World View to pay the County \$24,850,000 in rent over 20 years, commencing December 23, 2016. Rent is \$59,166.67 a month the first five years, or \$710,000 yearly, increasing in five-year increments thereafter on a graduated scale.

Notably, under the pact, World View also holds an option to purchase the Improved Parcel consisting of the Building and underlying 12 acres of property for \$10 at the end of the Lease Purchase’s 20-year term. World View’s obligations include maintenance, repair, and insurance coverage for the Building, and payment of applicable taxes. Additionally, World View is responsible for paying the 0.5% transactional privilege tax levied by the Regional Transportation Authority, such tax which the County otherwise would pay on any rental income generated.

Notably, title to the property is held by the County. Accordingly, the Improved Parcel is constitutionally exempt from property taxes since title remains with the County. ARIZ. CONST. art. IX, § 2; A.R.S. § 42-11102(A) (“Federal, state, county and municipal property is exempt from taxation...”). However, as the Agreements involve improved government property subject to a lease with a governmental entity as lessor, the property is subject to excise tax—unless it is found to be exempt or subject to abatement. A.R.S. §§ 42-6201 *et*.

² A.R.S. § 11-254.04 provides:

- A. In addition to the authority granted under section 11-254, a board of supervisors may appropriate and spend public monies for and in connection with economic development activities.
- B. To fund economic development activities under this section, a county shall not impose a new fee or tax on a single specific industry or type of business.
- C. For the purposes of this section, "economic development activities" means any project, assistance, undertaking, program or study, whether within or outside the boundaries of the county, including acquisition, improvement, leasing or conveyance of real or personal property or other activity, that the board of supervisors has found and determined will assist in the creation or retention of jobs or will otherwise improve or enhance the economic welfare of the inhabitants of the county.

³ On May 2, 2017, the County and World View amended the Lease Purchase to reflect the actual square footage of the completed facility from 135,000 to 142,000 sq. ft. *See* Exh. 4.

RULING

seq. Government Property Lease Excise Tax (“GPLET”).⁴ In this regard, when governmental property is utilized for aviation-related purposes, the property is exempt from GPLET’s excise tax. *See* A.R.S. § 42-6208(5).⁵ In the Lease Purchase, the County acknowledged without promising or warranting its belief that an exemption to the GPLET excise tax would apply to the near space balloon company. Still, the County concurred it would “cooperate with World View in pursuing any defense of the GPLET exemption, and participate as needed in such defense, at no out-of-pocket cost to [the] County” in the event of a challenge, and beyond this, World View stipulated to remit the GPLET excise tax if found to be not exempt.

Under the Agreements, the County also on World View’s behalf approved constructing a “publicly available” launchpad (“Launchpad”) on adjacent, County-owned land consisting of 16 acres (“Launchpad Parcel”) for “launching [...] high-altitude balloons.” Under the Operating Agreement, World View must at its own expense maintain and operate the Launchpad, and “make the [Launchpad] available to others for the permitted uses whenever [it] is not being actively utilized by World View itself.” Although World View may charge a user fee, this fee cannot exceed a reasonable portion of the company’s cost in maintaining and operating the Launchpad. Also, “World View will have sole but commercially reasonable discretion to issue criteria...for the use by third parties of the [Launchpad].” Importantly, according to the Agreements, the County retains ownership of the Launchpad Parcel as title never transferred.

World View has entered into a letter of intent with Vector Launch, another aerospace company in Pima County, regarding anticipated use of the Launchpad, and has held similar discussions with Raytheon. County staff have also discussed possible uses for the Launchpad with representatives of the University of Arizona Aerospace and Mechanical Engineering department as well as collaborating with the Vice President of Strategic Business Initiatives to fund a Deloitte study on the Space Ecosystem in Arizona. To date, however, World View has been the sole entity to launch balloons from the Launchpad.

The Project

The County originally acquired the land for the Building Parcel and Launchpad Parcel as part of a larger tract purchase for approximately \$16,000 per acre. The County paid roughly \$192,000 (12 acres x \$16,000/acre) for the unimproved land beneath what is now the Building. To design, build, and equip the Building, the County spent \$13,107,722 -- a figure that includes \$1,171,178 in off-site utility improvements, of which the County got reimbursed \$584,049 from utility providers. Total costs to the County for, *inter alia*,

⁴ Under GPLET, the Government Lessor is authorized to own and operate government improved property and lease to a so-called Prime Lessee if the property is either: 1) subject to “Government Property Lease Excise Tax” or GPLET; 2) found to be exempt; or 3) the GPLET is procedurally abated for a period of time. *See* A.R.S. A.R.S. §§ 42-6202, -6208, -6209. Government-owned land is constitutionally exempt from property taxes. *See* ARIZ. CONST. art. IX, § 2; A.R.S. § 42-11102(A). “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 or a political subdivision of this state 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 uses.” A.R.S. § 42-6201(2). A Prime Lessee is defined in Sec. 42-6201(4).

⁵ A.R.S. Sec. 42-6208(5) provides: The tax under this article Sec. 42-6206, subsection B and Sec. 42-6209, subsection C [GPLET...] do[es] not apply with respect to:

5. Property that is used for or in connection with aviation, including hangars, tie-downs, aircraft maintenance, sale of aviation related items, charter and rental activities, commercial aircraft terminal franchises, rental car operations, parking facilities and restaurants, stores and other services that are located in a terminal.

R U L I N G

acquiring, designing, constructing, and equipping the Building Parcel thus comes to \$12,715,673. For the Launchpad Parcel, the County spent \$256,000 (16 x \$16,000/acre) for the land, and an additional \$2,179,369 to design, build, and equip the Launchpad in accordance with World View’s specifications. Thus, the total expense for the Launchpad Parcel is \$2,435,369.

Financing Construction

To meet project costs, the County issued Certificates of Participation, Series 2016 B Taxable, in the principal sum of \$15,185,000 (“Certificates”). The County will pay an additional \$4,259,134 in interest on the Certificates. The principal and interest together come to \$19,444,134, payable over 15 years (“Total Financing”). Towards this end, the County restructured existing public debt which relies on public facilities as collateral to obtain \$15,185,000 from U.S. Bank National Association. The County will repay the Total Financing of \$19,444,134 through “rent payments the County makes on the [County’s own] facilities.” World View will make rental/lease payments to the County, such which are, according to the County, “designed to ensure that [the] County [will] get back its investment in the construction of the World View Building.” JPS ¶ A.18.⁶ Thus, the County indicated it was “front-ending the capitalization of the building and facilities” and “will finance this facility to be repaid by World View through annual lease and/or rent payments” over the 20-year period. JPS ¶ A.17. A temporary certificate of occupancy for the Building issued on December 23, 2016, which is also the date that World View took occupancy and commenced rent payment. On February 8, 2017, the Building received a permanent certificate of occupancy. World View is contractually bound under the Lease Purchase to pay the County \$24,850,000 in rent over a 20-year term, which started December 23, 2016. JPS, p. 5, ¶ 21.

Valuations

The Building Parcel and Launchpad Parcel were subject to appraisals prepared by James Bradley on behalf of Taxpayers and Thomas Baker for the County Defendants. Bradley’s report is dated April 30, 2019, as supplemented. Baker’s report is dated March 26, 2019. Each is experienced and certified and both utilized standard approaches for valuation: Sales or market comparison, cost and income. JPS ¶ A 37.

Taxpayers’ Appraiser James Bradley

According to his April 30, 2019 appraisal, Bradley appraised both the Building Parcel *and* Launchpad Parcel in fee simple, reaching the following market value conclusions as of the date of his inspection or April 19, 2019:

- Sales-Comparison Approach: \$14,700,000⁷
- Cost Approach: \$14,767,000
- Income Approach: \$14,645,000

⁶ County Administrator Huckelberry stated in a staff memo, “[W]e need to review the various financing mechanisms that could be made available to finance this project and enter into a lease/purchase agreement with World View over a 20-year period where we would recover our capital outlay with interest.” JPS ¶ A.19.

⁷ Building Parcel and Launchpad Parcel of \$14,700,000. *Bradley Appraisal*, p. 2, intro.

RULING

Bradley also assigned a value to the Launch Pad of \$1,235,000. *Bradley Appraisal*, p. 64. He calculated annual market rent of \$1,290,000 from the venture. *Id.* at p. 2, intro. He arrived at a net reversionary value, reduced to present value, of between \$3,323,790 and \$3,077,163. These opinions are summarized in this table from the JPS, without the substance of the footnotes:

Property Appraised	Interest Appraised	Valuation Date	Total Value	Unit Value
Improved Parcel and Launchpad Parcel	Fee Simple ¹	April 19, 2019	\$14,700,000	\$1.75 per square foot (land only)
Improved Parcel	Baker's Present Value of Income Stream plus Bradley's Present Value of Net Reversionary Value ²	April 19, 2019 ³	\$13,815,519 ⁴	N/A
Improved Parcel	Rental Value	April 19, 2019		\$8.40 per building square foot per year (assumed to increase 2.5% per year)
Improved Parcel	Net Reversionary Value	December 2036	\$16,800,000	N/A
Improved Parcel	Net Reversionary Value (Present Value)	April 19, 2019 ⁵	\$3,077,163 ⁶	N/A

With regard to his opinions, Bradley found the cost and income approaches carried the most weight. Bradley's Appraisal, p. 78. Bradley also opined, as noted above, that the fair-market rental rate for the Improved Parcel is \$8.40 per square foot per year, for 2019, with 2.5% annual increases.⁸ *Id.* at 79. In a supplemental opinion, Bradley added that the Improved Parcel would have a net reversionary value in December 2036, the end of World View's lease term, of \$16,800,000. Trial Exhs. 8, 10. Bradley stated in a deposition that there is no market for reversionary interests because such are not property interests that may be sold separately. A reversionary value is normally discounted to present value (with the discount rate being higher the further out the reversion is) and then added to the present value of the property's market-rate rent stream to determine the present value of the rental property. The result, according to him, is the net reversionary value or "NRV". During depositions, Bradley conceded that this was the first time he had been tasked to ascertain a net reversionary value, separate and apart from a discounted cash flow analysis, and initially, he did so without discounting it to present value. Bradley's Depo, p. 11; *see also* Trial Exh. 8. Calculating further, Bradley projected a present value NRV estimate of between \$3,323,790 and \$3,077,163, depending on discount rate. He arrived at a total present value of the Building Parcel—based on the present value NRV plus present value of a stream of rent payments based on a projected \$8.40 per square foot value, with 2.5% annual

⁸ Bradley initially opined that it would be appropriate to add an additional \$0.70 per square foot to the Improved Parcel's market rental rate to account for the value of the Launchpad Parcel as excess land. Bradley's Appraisal, p. 79 (Sales Comparison). Yet, in a supplemental report, he still used the \$8.40 rate for his calculations.

RULING

increases—of between \$13,815,519 and \$14,423,311. Bradley stated that the highest discount rate, which rendered the lowest present values for the income stream and reversion, was best.

Defendants' Appraiser Thomas Baker

Unlike Bradley's forecasts using a start date of April 30, 2019, Baker's opinions are projected from December 23, 2016, the date that World View took control of the premises. Also unlike Bradley, Baker did not value the Building Parcel and Launchpad Parcel together, due in part apparently as the Launchpad and underlying land remain owned by the County. His initial projections for the Building Parcel follow:

- Sales-Comparison Approach: \$14,200,000
- Cost Approach: \$13,940,000
- Income Approach: \$14,000,000

Considering these components, Baker arrived at a fee simple market value opinion for the Building Parcel of \$14 million as of December 23, 2016, World View's move in date. Baker gave heaviest weight to the cost approach. But he also calculated in the first instance the leased fee interest consisting of the value of the stream of rent payments under the Lease Agreement, reduced to present value using a discount rate typical for market conditions – something Bradley either overlooked or was not tasked to perform until asked to do so in depositions. He posited that the market value for the County's leased-fee interest as of December 23, 2016 was \$11,725,000, a figure according to him representing the value the County could sell its interest in the right to receive the stream of payments in the commercial market, encumbering the Building Parcel. World View's option to purchase the Improved Parcel at the end of the holding period results in a zero net reversionary value, according to Defendants' expert.⁹ Baker submits that the market rental rate for the Improved Parcel, as of December 23, 2016, was \$6.90 per sq. ft. per year.¹⁰ Baker also arrived at a market value cost approach to the County of the 12-acre Parcel, of \$12,885,000, a value which includes the 12-acre Parcel's land market value of \$1,016,000, the cost of construction of the Building, and the cost of furnishing the building, though it excludes "entrepreneurial profit" because a public entity like the County has no profit motive. Baker Appraisal, p. 35. Baker's square footage value of the Building Parcel in an unimproved state is \$1.95 per square foot, resulting in a total valuation of \$1,016,000 (520,542 sq. ft. x \$1.95, which comes to \$1,015,056.69 rounded up to \$1,016,000). Baker's projections are compiled in the following table extracted from the JPS without the substance in the footnotes:

⁹ "Assuming all lease payments are made, at the end of the 20-year lease, there will not be the typical building reversion as the tenant can purchase the building at that time for an additional payment of \$10." Baker Appraisal, p. 27.

¹⁰ Baker added that the rent paid by World View commences at below market rate, but later increases to above market, so the present-value of rent stream under the Lease Purchase would probably be similar to the present value of a stream of market-rate rent.

RULING

Property Appraised	Interest Appraised	Valuation Date	Total Value	Unit Value
Improved Parcel	Fee Simple ⁷	December 23, 2016	\$14,000,000	\$1.95 per square foot (land only)
Improved Parcel	Leased Fee ⁸	December 23, 2016	\$11,725,000	N/A
Improved Parcel	Actual Cost to the County ⁹	December 23, 2016	\$12,885,000	N/A
Improved Parcel	Rental Value	December 23, 2016		\$6.90 per square foot per year
Improved Parcel	Net Reversionary Value	December 2036	\$16,800,000	N/A
Improved Parcel	Net Reversionary Value (Present Value)	December 23, 2016 ¹⁰	Approx. \$2,500,000	N/A

Analysis of the Expert's Opinions

As noted, the appraisers both utilized the three standard approaches to valuation: market a.k.a. sales-comparison, cost, and income, and afforded the cost approach the most weight. Similarly, both concluded that when evaluating a fee simple interest under the cost approach, an entrepreneurial profit representing a seller/developer's profit expectation over and above its capital investment equal to 10% of costs is typically added in but this incentive is inapplicable to a governmental entity, the aims of which are for objectives other than profit. Neither included the value of off-site utility costs as such costs provide a benefit to the subject property along with others nearby, and such expenditures typically are accounted for in increased land values. Each analysis also concluded that any amounts spent on furniture, fixtures and equipment ought not be included as such typically fall under personal property rather than real property.

Significantly, under an income approach, the appraisers agreed that a key tool for valuing property involving a transaction with a lease purchase is the discount cash flow analysis ("DCFA") approach. A DCFA approach involves discounting to present value a market-value stream of income over the term of a lease and discounting a reversionary value at the end of the lease term to present value. The present value of the income stream (leased-fee interest), assuming market rents, plus the present value of the reversion (market value of property at the end of a lease term) equals the market value of a property. *See JPS*, p. 11, ¶ A 40. Put another way, for real property subject to lease, the sum of the present value of the net reversionary interest and the present value of a stream of income from rent payments (the leased-fee interest), assuming a market-rate rent during the lease term, should when added together, approximate the present fair market value of the parcel.

As noted, Baker found that the present value lease-fee interest is \$11,725,000, based on rents over the 20-year period of the lease term, applying a straight-line 7% present value factor to each year's stream of income. Baker Appraisal, pp. 27-29. A table of Baker's analysis follows:

RULING

Contract Rents			Δ Baker's		
			Leased Fee (Appraisal Report 03/26/19)		
			7%	Bldg. sq. ft.	
			Discount Factor	Price per/ sq. ft.	142,000
12/23/17	1	710,000	0.9346	663,566	4.67
12/23/18	2	710,000	0.8734	620,114	4.37
12/23/19	3	710,000	0.8163	579,573	4.08
12/22/20	4	710,000	0.7629	541,659	3.81
12/23/21	5	710,000	0.7130	506,230	3.57
12/23/22	6	1,136,000	0.6663	756,917	5.33
12/23/23	7	1,136,000	0.7228	707,501	4.98
12/22/24	8	1,136,000	0.5820	661,152	4.66
12/23/25	9	1,136,000	0.5439	617,870	4.35
12/23/26	10	1,136,000	0.5084	577,542	4.07
12/23/27	11	1,420,000	0.4751	674,642	4.75
12/23/28	12	1,420,000	0.4440	630,480	4.44
12/23/29	13	1,420,000	0.4150	589,300	4.15
12/23/30	14	1,420,000	0.3878	550,676	3.88
12/23/31	15	1,420,000	0.3624	514,608	3.62
12/22/32	16	1,704,000	0.3387	577,145	4.06
12/23/33	17	1,704,000	0.3166	539,486	3.80
12/23/34	18	1,704,000	0.2959	504,214	3.55
12/23/35	19	1,704,000	0.2765	471,156	3.32
12/22/36	20	1,704,000	0.2584	440,314	3.10
				11,724,145	

While Bradley did not take issue with Baker’s leased-fee interest calculation, he took a different road for deriving a present value NRV of the stream of income under a discount cash flow approach. Bradley assumed market rents increase 2.5% annually and applied a 9% terminal capitalization rate to the last year’s net operating income to project future sale price and a reversionary value, while also applying a 10% discount rate to arrive at a net reversionary value of \$3,323,790, discounted to present value.¹¹ Trial Exhs. 8, 10.

Baker originally opined a zero net reversionary value as of December 23, 2036.¹² At deposition, Baker derived a present value net reversionary interest of approximately \$2,500,000.¹³ See Baker Depo, p. 25.¹⁴

¹¹ Bradley calculated a fee simple net reversionary interest based on a discount cash flow analysis using a market rate of \$8.40 annually increasing at 2.50% for a stream of rent over 17 years (beginning in 2020) which resulted in the final year’s annual rent of \$1,768,062. Exh. 17. He then estimated net operating income using the final year’s rent of \$1,768,062 which resulted in \$1,610,235 NOI. He then forecast the future sales price using the NOI of \$1,610,235 by applying a terminal capitalization rate of between 9-9.5% resulting in a future sales price of approximately \$17,400,000 less closing costs \$609,000 (or 3.5%) resulting in a net reversionary value of \$16,800,000, approximately. Exh. 15. From there to reach present value he applied to \$16,800,000 a factor of 0.1978 (10% holding period 17 years) to arrive at a present net reversionary value of \$3,323,790.44. Exh. 17.

¹² “While there is typically a reversion at the end of the lease period, there is no reversion in this analysis due to the terms of the lease-purchase agreement.” Baker’s Appraisal, p. 27.

¹³ Baker based his present value net reversionary interest on a reversionary value of \$14,000,000 and applying a discount rate of 9% over a 20-year holding period (a factor of 0.1784) resulting in \$2,497,600, present value of net reversionary interest. Baker Depo, p. 25.

R U L I N G

Both appraisers estimate the building's economic life to be 50 years and fair market rental rates will rise annually somewhere between 1.5 and 2.5%. Baker's leased-fee calculation assumes exercise of the option to purchase at the end of the holding period and thus eliminates any reversionary value of the building or land.¹⁵ The following summarizes the gist of each appraiser's overall opinions:

Summary		
Approach	Plaintiffs	Defendants
	Bradley	Baker
Cost	\$ 14,767,000	\$ 13,940,000
Income Capitalization	\$ 14,645,000	\$ 14,000,000
Sales-Comparison	\$ 14,000,000	\$ 14,200,000

Taxpayers raise a number of challenges to the validity of the Agreements. Primarily, they argue the Agreements amount to an improper gift, loan of credit, subsidy, or otherwise constitute an expenditure of public money primarily benefiting a private party – impermissible activities under the constitution. Taxpayers also contend the financial arrangement fails to meet the two-prong test set out in *Turken v. Gordon*: “[a] governmental expenditure does not violate the Gift Clause if (1) it has a public purpose, and (2) in return for its expenditure, the governmental entity receives consideration that “is not so inequitable and reasonable that it amounts to an abuse of discretion, thus providing a subsidy to the private entity.” 223 Ariz. 342, 345, ¶ 7, citing *Wistuber v. Paradise Valley Unified School District*, 141 Ariz. 346 (1984).

Beyond this, Plaintiffs assert the criteria in *Wistuber/Turken et al* applies only to public expenditures and they contend, as the World View transaction is a disguised loan, the Agreements violate the credit portion of the Gift Clause. Assuming the transaction amounts to an expenditure, Taxpayers urge the Court to reject Defendants' claim that the Agreements meet the two-prong test restated as: “The expenditure will be upheld if (1) it has a public purpose, and (2) the consideration received by the government is not ‘grossly disproportionate’ to the amounts paid to the private entity.” *Cheatham v. DiCiccio*, 240 Ariz. 314 ¶ 10, 379 P.3d at 215 (2016) citing *Turken, supra*. Further, Taxpayers posit these additional challenges to the Agreements: First, the Lease Purchase grants World View an option to purchase the Building Parcel for \$10, when such property possesses a reversionary interest, discounted to present value, of over \$3 million. Next, the Agreements allow World View to pay an under-market rental rate for the first 10 years of the Lease Purchase. Third, the County impermissibly permitted World View, a private entity, to derive about \$4 million in property tax breaks. Finally, the County built a \$2.3 million Launchpad under the Agreements for nothing in return.

The County Defendants challenge the Taxpayers' proof, suggesting they failed to meet their burden going forward. Defendants counter too, that the Agreements meet the criteria in *Wistuber, Turken* and *Cheatham*, as clarified recently in *Schires, et al., v. Carlat, et al.*, No. CV-20-0027-PR, 2021 WL 538454 (Ariz.

¹⁴ Baker also arrived at a market value cost approach to the County of the Building Parcel of \$12,885,000, a value which includes the 12-acre's land market value of \$1,016,000, the cost of construction of the Building, and the cost of furnishing the building, though it excludes “entrepreneurial profit” because a public entity like the County has no profit motive. Baker Appraisal, p. 35

¹⁵ Bradley based his present value net reversionary interest on a reversionary value of \$14,000,000 and applying a discount rate of 9% over a 20-year holding period (a factor of 0.1784) resulting in \$2,497,600, present value of net reversionary interest. Baker Depo, p. 25.

RULING

February 8, 2021). Beyond this, Defendants argue that Taxpayers' strict reading of the Gift Clause is unsupported by law, including opinions preceding and following *Turken*. They maintain the Agreements not only meet the scope of *Turken*'s gross proportionality standard, as modified, but the Agreements' option to purchase, early below-market lease rate, tax exemptions and Launchpad limited uses amount to valid exercises that all pass constitutional muster.

Law:

The Arizona Constitution's "Gift Clause," is our starting point, providing:

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. Counties in Arizona are separate legal entities, whose power is derived from the state Constitution and statutes. *Home Builders Ass'n of Cent. Ariz. v. City of Maricopa*, 215 Ariz. 146, ¶ 5 (App.2007). A county's "authority is limited to those powers expressly, or by necessary implication, delegated to [it] by the state constitution or statutes." *Id.*; see also Ariz. Const. art. XII, § 4; A.R.S. §§ 11-201(A); 11-251; *Marsoner v. Pima County*, 166 Ariz. 486, 488 (1991); *Hart v. Bayless Inv. & Trading Co.*, 86 Ariz. 379, 384 (1959) ("The Board of Supervisors can exercise only those powers specifically ceded to it by the legislature.").

By law, a county has the power to "[p]urchase and hold lands within its limits" and "[m]ake such contracts...as may be necessary to the exercise of its powers." A.R.S. Secs. 11-201(A)(2), (3). It also has the power to levy and collect taxes. *Id.* at (5). By statute, the Legislature has *inter alia*, empowered a county with the authority to buy real property for public purposes and to "[l]ease-purchase real property and improvements or real property for public purposes, provided that final payment is made not later than twenty-five years after the date of purchase."¹⁶

Under the Agreements, the County's authority for entering into its economic development transaction with World View lies in A.R.S. Sec. 11-254.04, providing:

- A. In addition to the authority granted under § 11-254, a board of supervisors may appropriate and spend public monies for and in connection with economic development activities.
- B. To fund economic development activities under this section, a county shall not impose a new fee or tax on a single specific industry or type of business.
- C. For the purposes of this section, "economic development activities" means any project, assistance, undertaking, program or study, whether within or outside the boundaries of

¹⁶ The statute goes on to require any increase in the final payment date from fifteen years up to the maximum of twenty-five years shall be made upon unanimous approval by the board of supervisors. See A.R.S. § 11-251. The issue of unanimous approval was not briefed by the parties, nor is it before the Court.

RULING

the county, including acquisition, improvement, leasing or conveyance of real or personal property or other activity, that the board of supervisors has found and determined will assist in the creation or retention of jobs or will otherwise improve or enhance the economic welfare of the inhabitants of the county.

A.R.S. § 11-254.04. The board of supervisor's authority includes spending up to \$1.5 million annually from general funds towards economic development activity.¹⁷ These statutes do not operate independently of our Constitution's Gift Clause, the purpose for which the Arizona Supreme Court noted recently:

We have frequently described the historical impetus for this provision and analogous ones that exist in many state constitutions. *See, e.g., Day v. Buckeye Water Conservation & Drainage Dist.*, 28 Ariz. 466, 473 (1925); *Indus. Dev. Auth. of Pinal Cnty. v. Nelson*, 109 Ariz. 368, 372 (1973); *Turken v. Gordon*, 223 Ariz. 342, 346 ¶ 10 (2010). In a nutshell, "the evil to be avoided was the depletion of the public treasury or inflation of public debt by [a public entity] engag[ing] in non-public enterprises," *State v. Nw. Mut. Ins. Co.*, 86 Ariz. 50, 53 (1959), or "by giving advantages to special interests," *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349.

Schires, 2021 WL 538454 at *4, ¶ 6. The Court reiterated the two-prong *Wistuber* test for ascertaining whether a public entity has violated the Gift Clause:

...First, a court asks whether the challenged expenditure serves a public purpose. *See id.* [*Wistuber*, 141 Ariz. at 349] . If not, the expenditure violates the Gift Clause, and the inquiry ends. *See id.* If a public purpose exists, the court secondarily asks whether "the value to be received by the public is far exceeded by the consideration being paid by the public." *Id.* If so, the public entity violates the Gift Clause by 'providing a subsidy to the private entity.'" *Id.*; *see also Turken*, 223 Ariz. at 345 ¶ 7, 347-48 ¶¶ 19-22 (applying the *Wistuber* test); *Cheatham v. DiCiccio*, 240 Ariz. 314, 318 ¶ 10 (2016) (same). The party asserting a Gift Clause violation bears the burden of proving it. *See Wistuber*, 141 Ariz. at 350.

Id. at pp. 4-5, ¶ 7. When addressing a challenge to governmental expenditures, courts must take a look at "[t]he reality of the transaction both in terms of purpose and consideration must be considered." *Wistuber*, 141 Ariz. at 349. "In evaluating Gift Clause challenges, '[a] panoptic view of the facts of each transaction is required,' and 'courts must not be overly technical. *Id.*

¹⁷A.R.S. Sec. 11-254 states, "In addition to any other provision of law, the board of supervisors may appropriate from the general fund each year up to one million five hundred thousand dollars for the purpose of economic development activity which is operated and maintained within the boundaries of the county and which the board determines is for the benefit of the public. Contributions may be made to any governmental agency or to a nonprofit corporation which enjoys and maintains federal tax-exempt status as long as all monies are utilized for the purpose determined to be public by the board. If more than one nonprofit corporation is selected for a fiscal year, the board shall determine the portion of the money that each will receive."

RULING

Application of the Turken test

Public Purpose

Regarding the first prong, courts find the absence of a public purpose “...only in those rare cases in which the governmental body’s discretion has been ‘unquestionably abused,’” and what constitutes a public purpose is “assigned to the political branches of the government, which are directly accountable to the public.” *Turken*, 223 Ariz. at 349, ¶ 28, 224 P.3d at 165 (quoting *City of Glendale v. White*, 67 Ariz. 231, 237, 194 P.2d 435, 439 (1948)). Notably, the court recognized that “determining whether governmental expenditures serve a public purpose is ultimately the province of the judiciary.” *Turken*, 223 Ariz. at 346, ¶ 14, 224 P.3d at 163. A court can consider both direct and indirect benefits of a government expenditure in deciding whether it serves a public purpose and thus satisfies the first prong of the *Wistuber* test. *Schires, supra, Wistuber, supra*. In *Schires*, the Supreme Court added that “...although economic development activities can fulfill a public purpose, the public entity must receive a bargained-for benefit as part of the private party’s performance, and the payment of public funds must not be grossly disproportionate to the fair market value of that benefit. *Schires*, 2021 WL 538454, at *6, ¶ 24.

For public purpose, the County asks that the Court “look no further” than the statute the County relied upon in entering into the World View Agreements: A.R.S. § 11-254.04, in which the Legislature has authorized counties to engage in “economic development activities.” See Findings of Fact, ¶ 3; see also n.2, *supra*. In the Agreements, the Supervisors specifically found the transaction served an economic development purpose by enhancing the economic welfare of county residents. In consideration for the County’s outlay in constructing a headquarters, manufacturing plant and Launchpad, World View agreed to provide jobs over the course of the Lease Purchase’s term. The Court in *Schires* provided instruction on defining “public purpose”:

Perhaps because of the difficulty in precisely defining “public purpose,” courts take “a broad view of permissible public purposes” and give significant deference to the judgment of elected officials, who are tasked with identifying and furthering such purposes. See *Turken*, 223 Ariz. at 346 ¶ 28 (“[T]he primary determination of whether a specific purpose constitutes a ‘public purpose’ is assigned to the political branches of government, which are directly accountable to the public.”); see also *White*, 67 Ariz. at 237 (affording the city council “some latitude” in deciding whether membership in a city league would benefit the city and refusing to interfere with that judgment absent adverse proof); *Wistuber*, 141 Ariz. at 349 (“[C]ourts must not be overly technical and must give appropriate deference to the findings of the governmental body.”). As we reiterated in *Turken*, “[w]e find a public purpose absent only in those rare cases in which the governmental body’s discretion has been ‘unquestionably abused.’” 223 Ariz. at 349 ¶ 28; cf. *White*, 67 Ariz. at 238 (characterizing a prior case as recognizing that public money spent to defeat a proposed amendment to the Workmen’s Compensation Law served a political purpose rather than a public purpose (citing *Sims v. Moeur*, 41 Ariz. 486 (1933))).

Schires, 2021 WL 538454, at * 5-6, ¶ 9. The Court’s guidance was based on numerous decisions.

For instance, the state supreme court affirmed a finding of public purpose in *Schires* stemming from a city’s decision to enter into a lease calling for various inducements to a private university to open a branch campus inside municipal borders. *Id.* at *1, ¶ 1. In *Turken*, Phoenix’s decision to enter into an agreement to

RULING

pay a developer \$97.4 million for public use of garage parking spaces in a mixed-use development served a public purpose. *Turken*, 223 Ariz. at 348, ¶ 23, 224 P.2d at 165. In *Wistuber*, the high court found no Gift Clause violation involving a school district's agreement with the teachers' association under which the association's president was exempt from teaching but still received compensation from both the district and union for providing district services through informational meetings with the superintendent and groups, the sum of which the district contended saved \$15,800 yearly in lieu of hiring a full-time person to perform such tasks. *Wistuber*, 141 Ariz. at 348. And, the court found a town's agreement to build a water line for a private business which threatened to move after its plant burned due to higher insurance premiums met the Gift Clause as fire safety directly benefits the public at large and the public body owned the waterline. *See Town of Gila Bend v. Walled Lake Door Co.*, 107 Ariz. 545, 547, 490 P.2d 551, 553 (1971).

Viewing the Agreements under a panoptic lens under *Schires*, *Turken* and *Wistuber*, the Agreements call on World View to provide direct benefits – jobs to the community over the Lease Purchase's twenty years. In view of the authority afforded a county to utilize public financing for purposes of economic development, and mindful of looking at the transaction with a panoptic view, the Court cannot say the County's identified public purpose for its decision to enter into the Agreements fails the public purpose prong under *Schires*, *Turken*, or *Wistuber*.

Despite this authority along with that under A.R.S. § 11-254.04, Taxpayers challenge the Agreements since the jobs need not be directed to residents. But a demand that economic development benefit solely those residing within the county's geographical parameters appears, in this Court's view, to be beyond the requirements of *Schires*, *Turken*, *Cheatham*, or *Wistuber*. Taxpayers also complain the transaction is too risky or speculative. However, the issue of the wisdom of the County's decision to enter the Agreements grounded in economic development is, from the Court's perspective, also beyond the scope of this examination. This is so as the dispute in question centers on the constitutional validity of the Agreements, as approved by the Supervisors, in contrast with the sagacity of the Board's decision, for which issues of accountability lie, of course, with the electorate.

In short, the Court is not convinced Taxpayers have met their burden of showing the Agreements fail *Turken's* public purpose prong. The preceding cases highlight the scope that activities have been found to meet the public purpose prong, and given their persuasiveness, the Court cannot say the Supervisors' decision to enter into the World View Agreements in the name of promoting economic development violates the Gift Clause. Indeed, as Justice Udall wrote in *White, supra*, where our supreme court ruled a municipality could expend funds for membership dues in the Arizona Municipal League, “Where there is no constitutional provision or law forbidding such action, we do not believe the court may substitute its judgment for that of the common council unless the latter's exercise of judgment or discretion is shown to have been unquestionably abused.” *White*, 67 Ariz. at 238, 194 P.2d at 439 (citations omitted). The Court is therefore persuaded that the Agreements involving World View's space exploration venture, in exchange for economic development, meet the public purpose prong. *Id.* at 236.¹⁸

¹⁸ Accord, *Humphrey v. City of Phoenix*, 55 Ariz. 374, 387, 102 P.2d 82 (1940) (slum clearance program served a public purpose). “[T]he term 'public purpose' . . . changes to meet new developments and conditions of times[.]” *City of Glendale*, 67 Ariz. at 236. “Our cases therefore find public purposes in many contexts that might not have been familiar to our Constitution's framers.” *Turken*, 223 Ariz. at 346 ¶ 13.

RULING

Loan of Credit or Subsidy

Beyond asserting the Agreements fail the public purpose prong, Taxpayers contend that *Turken's* two-pronged test as modified by *Schires* has no application, relying on the Gift Clause's "credit" language combined with general rules of construction, such which hold that words possess their ordinary meaning. In so doing, they rely on a strict reading of the Gift Clause stating a public entity "may not give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any...corporation..." ARIZ. CONST. art. IX, § 7. From this, they argue further that the *Turken* test is distinguishable as it applies only to an expenditure, in contrast with a transaction Plaintiffs liken to a pass-through loan, the analogy being the situation where a parent buys a car for an age eligible child without a credit history. Taxpayers add that as the County acknowledged the Lease Purchase is analogous to a carryback financing arrangement, it is *per se* unconstitutional.

At first blush, this argument has appeal. Still, the Court is unpersuaded of this strict interpretation for a number of reasons, including definitions from reference manuals of such terms. The phrase "give or loan its credit" refers to a public entity carrying out the act of 'giving,' which refers to transferring or handing over or allowing the transfer of..." WEBSTERS NINTH NEW COLLEGIATE DICTIONARY, p. 305 (1986). In addition, 'loaning,' means money lent at interest." *Id.* at 519. The term, 'its credit,' is defined as "time given for payment for goods or services sold on trust." *Id.* at 700. Under the plain meaning of these definitions, the County is not in fact, "giving" nor is it directly making a "loan" to World View. Rather, it restructured *its* existing debt obligation to U.S. Bank—thereby allowing for the project's financing through a funding mechanism involving the public sale of participation certificates, an investment means in which investors buy certificates, agreeing to repayment presumably with interest from lease income received from the lessee—World View.¹⁹ Thus, technically speaking, the County is *not* giving nor loaning *its* credit. Consequently, the suggestion that the transaction is effectively a pass-through loan is without merit. As noted by the County during argument, a lease-back agreement may be terminated on its own terms during annual review, and furthermore, the transaction *in fact* creates no debt on the County's ledgers.

Citing their appraiser's view,²⁰ Taxpayers insist the World View transaction is a disguised buy-back agreement in which a seller takes a note, secured by a deed of trust or mortgage, relying primarily on an opinion from the federal trial court in the Eastern District of Virginia. There, the judge wrote, "This Court's interpretation of the term 'credit' is not blind to the fact that credit can often be disguised as a lease." *Reasor v. City of Norfolk*, 606 F.Supp. 788, 798 (E.D.Va.1984). But the case is distinguishable as it is a takings case, which our courts indicate involves heightened scrutiny resulting from implications of the Fifth Amendment to the U.S. Constitution. *See e.g., Bailey v. Mesa*, 206 Ariz. 224, 76 P.3d 898 (App.2003); *see also Kohl v. United States*, 91 U.S. 367 (1875).

Taxpayers rely on *Reasor* for its definition of credit, referred to as the relationship where "money is borrowed to be repaid at a later date with interest." *Reasor*, 606 F.Supp. at 797. The Court takes no issue with this definition. However, the importance of this language is clear *dicta*. *Id.* at 797-98 ("This Court's interpretation of the term "credit" is not blind to the fact that credit can often be disguised as a lease. However,

¹⁹ Investors in participation certificates invest in a share of the lease revenues. Also, the certificates are secured by such lease revenues.

²⁰ Taxpayers challenge the financing arrangement, as according to their appraiser, Bradley, "When the seller holds the note, that basically means the seller has lent the money to the purchaser, and the purchaser is paying the seller back over time." JPS at ¶ H.1.b., p. 20; *see also* Ex. 2 at 62:22–63:14.

RULING

from an examination of the agreement *the Court concludes that the lease in question is not a sham lease designed to disguise an extension of credit...* the Court HOLDS that the challenged provisions of the Goodman-Segar-Hogan Agreement do not violate the credit clause of the Virginia Constitution. VA. CONST., art. X, § 10). Simply put, there is no evidence that the County's transaction with World View involves a note, mortgage, or deed of trust. Hence, the argument that the County is "giv[ing] or loan[ing] its credit" is unsupported.

Regarding disputes over public money outlays, *Turken* stated, "We adhere to that straightforward approach today. When a public entity purchases something from a private entity, the most objective and reliable way to determine whether the private party has received a forbidden subsidy is to compare the public expenditure to what the government receives under the contract. When government payment is grossly disproportionate to what is received in return, the payment violates the Gift Clause." *Turken*, 223 Ariz. at 348, 224 P.3d at 164; *see also Schires*, 2021 WL 538454 (Ariz. Feb. 8, 2021). This directive represents the Court's charge. Perhaps notably, Taxpayers cite not one case supporting their textual interpretation of the Gift Clause addressing circumstances like these. Also, mindful that Arizona's credit provision is derived from Montana's Constitution, Taxpayers point to no decision from that state, much less elsewhere, finding a Gift Clause violation involving a lease-purchase transaction like this.

In any event, to find invalid the financing methodology of participation certificates utilized to advance the Agreements would, in this Court's view, call into question the efficacy of similar financing methods, such as those used to finance projects through industrial development bond sales – an arrangement validated by our courts for Gift Clause purposes. *Cf. IDA of Pinal County v. Nelson, supra; see also Kotterman v. Killian*, 193 Ariz. 273, 288, 972 P.2d 606, 621 (1999) ("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."); *State ex rel. Corbin v. Superior Court In & For Cty. of Maricopa*, 159 Ariz. 307, 310, 767 P.2d 30, 33 (App.1988) ("We are persuaded that arbitrage earnings on the proceeds of industrial development bonds are public funds. Nevertheless, a loan or expenditure of the funds may be constitutionally permissible, even if some private individual or organization thereby derives a special benefit, as long a public purpose is thereby served.").

Finally, the criteria for resolving disputes over public money expenditures remains, at present, the test provided in *Turken* and its progeny, and until our appellate courts direct otherwise, the Court is obliged to follow this precedence while also analyzing the subject circumstances reasonably thereto. Thus, the Court is unconvinced that *Turken* is inapplicable to these facts. Taxpayers' strict constructionist interpretation of the credit clause is also tantamount to an invitation to the Court to create new law – a request the Court must respectfully decline. In short, the Court finds the Agreements meet the public purpose prong set forth in *Wistuber* and *Turken et seq.* and do not amount to the County's use of its credit in violation of the Gift Clause. The Court next turns to the adequacy of consideration under the Agreements.

Adequacy of Consideration

Recently, the Supreme Court in *Schires* described that *Wistuber's* second prong "acts as the primary check on government expenditures for Gift Clause purposes." *Schires*, 2021 WL 538454, at *7, ¶ 13. It added:

To reiterate, under that prong, an expenditure violates the Gift Clause if "the value to be received by the public is far exceeded by the consideration being paid by the public." *Wistuber*, 141 Ariz. at 349; *see also Turken*, 223 Ariz. at 350 ¶ 35 ("[I]f the City's payments to NPP under the

RULING

Parking Agreement are grossly disproportionate to the objective value of what NPP has promised to provide in return, the consideration prong of the *Wistuber* test has not been satisfied.”).

Id. Put another way, “The Gift Clause is violated when the consideration, compared to the expenditure, is ‘so inequitable and unreasonable that it amounts to an abuse of discretion.’” *Cheatham*, 240 Ariz. at 322, ¶ 35, 379 P.3d at 219-20 (quoting *Turken*, 223 Ariz. at 349, ¶ 35; *Wistuber*, 141 Ariz. at 349). The consideration paid by a public entity can be legally sufficient under contract law, though it does not necessarily follow that such is sufficient under the Gift Clause. *Schires*, 2021 WL 538454, at *7, ¶ 14. This is so as “paying far too much for something effectively creates a subsidy from the public to the seller.” See *Turken*, 223 Ariz. at 349-50, ¶ 32. The Supreme Court has cautioned:

Our inquiry, therefore, focuses on what the public is giving and getting from an arrangement and then asks whether the “give” so far exceeds the “get” that the government is subsidizing a private venture in violation of the Gift Clause. See *Yeazell v. Copins*, 98 Ariz. 109, 112 (1965) (“The state may not give away public property or funds; it must receive a quid pro quo which, simply stated, means that it can enter into contracts for goods, materials, property and services.”).

Schires, 2021 WL 538454, at *7, ¶ 14. Again, courts must take a panoptic view of the transaction in assessing consideration and not take an overly technical view. *Cheatham*, 240 Ariz. at 321–22, ¶ 30. Taxpayers again bear the burden of proof. *Id.* at 322–23, ¶ 35 (citation omitted). How is consideration viewed by our courts?

“Consideration is a ‘performance or return promise’ that is bargained for in exchange for the other party’s promise.” *Schade v. Diethrich*, 158 Ariz. 1, 8 (1988) (citing RESTATEMENT (SECOND) OF CONTRACTS § 71 (2) (1981)). “Relevant ‘consideration’ means direct benefits that are ‘bargained for as part of the contracting party’s promised performance,’ and excludes ‘anticipated indirect benefits.’” *Schires*, 2021 WL 538454, at *3, citing *Turken*, 223 Ariz. at 350, ¶ 33. Critically, the “analysis of adequacy of consideration for Gift Clause purposes focuses...on the objective fair market value of what the private party has promised to provide in return for the public entity’s payment.” *Schires*, at 7, ¶ 14. citing *Turken*, 223 Ariz. at 350. Further, potential economic impact is not ‘consideration’ for purposes of the Gift Clause, *Turken*, 223 Ariz. at 350, ¶ 33. Thus, under the Agreements, a bargained-for consideration of economic development can meet *Wistuber*’s public purpose prong, though standing alone, it perhaps fails the consideration prong for Gift Clause purposes. Cf. *Schires*, 2021 WL 538454. This distinction was highlighted recently in *Schires*.

To encourage a private university to open a campus in its borders, the City of Peoria provided incentives to Huntington University totaling \$2.6 million. The incentives included reimbursements to a developer, Arrowhead Equities LLC, for tenant improvement expenses to modify buildings for the university’s use as a lessee. On a Gift Clause challenge, the trial court granted summary judgment to Peoria, finding no violation of the state constitution. The court of appeals affirmed in a divided decision, but the Supreme Court reversed, also remanding that judgment be entered in favor of taxpayers. The Court took issue with the lower courts’ finding of sufficient consideration based solely upon anticipated municipal economic impact, as opined by a city expert:

We agree with the court of appeals dissent that the economic impact from the agreements with HU and Arrowhead is an “anticipated indirect benefit” that is valueless under *Wistuber*’s second prong. See *id.* at *6 ¶¶ 27, 30 (Morse, J., dissenting). As *Turken* instructs, the adequacy of consideration under the second prong focuses on the value of “what the private party has

RULING

promised to provide in return for the public entity's payment." *Turken*, 223 Ariz. at 350 ¶ 33. Neither HU nor Arrowhead signed an enforceable promise to provide the City with any particular economic impact. Likewise, neither promised to provide the City with any goods or services, such as an ownership interest in the campus building or reduced tuition for Peoria residents. They simply promised to engage in their respective private businesses (educating and leasing).

In effect, HU and Arrowhead's promises are no different than a hamburger chain promising to operate in Peoria in exchange for monetary incentives paid by the City in hope of stimulating the local economy. A private business will usually, if not always, generate some economic impact and, consequently, permitting such impacts to justify public funding of private ventures would eviscerate the Gift Clause....It makes no difference that HU would not have opened a campus in Peoria, and Arrowhead would not have renovated and leased its building, absent public funding. The anticipated economic impact from the HU campus in the P83 district is irrelevant to *Wistuber's* second-prong inquiry.

Schires, 2021 WL 538454, at ¶¶ 16-17 (citations omitted).

The supreme court also rejected as insufficient consideration provided by HU and Arrowhead via the following: (1) HU was obliged to spend at least \$2.5 million to open its Peoria campus; (2) Arrowhead was obligated to make tenant improvements to its own building; and (3) HU agreed to refrain from opening a campus in other Arizona cities for a least seven years. *Id.* at ¶ 19. The court found these three reasons "provide no value to the City except to generate an anticipated positive economic impact in Peoria, which we have explained is an irrelevant indirect benefit." *Id.* at ¶ 20. The court added that although HU and Arrowhead's promise to invest in their own businesses and in HU's case to also forbear operating in other cities might be adequate consideration under contract law, it provide[s] no bargained-for direct benefit to the City and [is] therefor insufficient under the Gift Clause." *Id.* at ¶ 20, *citing Turken*, 223 Ariz. at 350, ¶ 33. It also rejected a fourth reason that HU agreed to help the City with "economic development activities" as this contractual provision was so lacking in definition and terms that the "term may be too indefinite to enforce, much less value." *Id.* at ¶ 21. Ultimately, the court in *Schires* refined the *Turken* and *Wistuber* standard relating to direct benefits while disapproving language in *Cheatham* that "courts must give due deference to the decisions of elected officials" when applying the second prong. *Id.* at ¶ 23. The Court pronounced that the "inquiry is an objective one and does not involve subjective policy decisions." *Id.*

In these facts, a preliminary inquiry associated with the second prong concerns an objective examination of the adequacy of consideration that is comprised of direct benefits as opposed to indirect benefits. *Id.*; *Turken, supra*. The Court must consider the value of "what the private party has promised to provide in return for the public entity's payment...." *Schires*, 2021 WL 538454, at *¶¶16-17; *see also Turken*, 223 Ariz. at 350, ¶ 33. The Lease Purchase requires World View to pay the County \$24,850,000 in contract rent over 20 years, starting December 23, 2016. Total costs to the County for acquisition, design, construction, and equipping of the Building Parcel was \$12,715,673 (and for the Launchpad Parcel, the expense came to \$2,435,369). The Court is persuaded the Agreements fulfill under an objective examination the criteria posited in *Schires*; World View's \$24,850,000 promise under the Lease Agreement is being provided in return for the County's payment. Unlike in *Schires*, the transaction benefiting the County is direct – actual lease payments over the term of the

RULING

lease. Such benefits are not indirect, like the economic development goals denounced in *Schires* or *Turken* (paying \$97 million for parking spaces, amounting to impermissible donations and subsidies).

The corollary to this adequacy of consideration component is whether the Agreements' benefits are grossly disproportionate to the objective value of what the County has promised to provide in return. *Schires*, at *7, ¶ 13 quoting *Turken, supra*. In other words, the "Court must ascertain whether the consideration, compared to the expenditure, is 'so inequitable and unreasonable that it amounts to an abuse of discretion.'" *Cheatham*, 240 Ariz. at 322 ¶ 35 (quoting *Turken*, 223 Ariz. at 349 ¶ 35; *Wistuber*, 141 Ariz. at 349). As noted, Taxpayers bear the burden. *Schires, supra*. Answering this question requires a review of the evidence, particularly the appraisals posited by the parties' respective experts. As will be explained, the Court is concerned whether Taxpayers sustained their burden.

Bradley's appraisal properly considered the three standard approaches for real property appraisal: Market (sales-comparison), income and cost. However, he valued all 28 acres making up the Building Parcel and Launchpad Parcel – when the latter is not subject to an option to purchase – much less a transfer and the County retains title to both.²¹

Bradley also conceded he performed no leased fee analysis as his client specifically sought an appraisal in fee simple, despite the World View transaction consisting of a lease purchase arrangement involving a stream of rental payments lasting 20 years. Relying simply on a fee simple approach is suitable for a transaction involving a transfer of legal and equitable title. But, in a lease purchase, there is no such transfer. Indeed, a default of the lease results in termination, meaning that a lessee hoping to get to a purchase option would never accordingly reach the opportunity to exercise it.

In any event, Bradley eventually compiled a leased fee analysis at his depositions, conceding this was the first time he had been requested to determine a present net reversionary value, separate and apart from a discounted cash flow analysis, and he did so without discounting to present value. The formula for calculating market value with a leased fee interest—a formula he agreed as applicable—requires that a net reversionary value interest or NRV be reduced to present value. Subsequently, he indicated the present value of the NRV was between 3,323,790 and \$3,077,163, depending on the discount rate. He arrived at a total present value of the Improved Parcel—based on the above present value of the NRV plus present value of a stream of rent payments using his \$8.40 per square foot value, with 2.5% annual increases— of between \$13,815,519 and \$14,423,311. Bradley stated that the highest discount rate, which rendered the lowest present values for the income stream and reversion, was best.

For this approach, Bradley's market value of lease rates came to \$8.40 per square foot, along with a 2.5% yearly escalator. As his calculations began April 19, 2019 – as opposed to World View's move in on December 23, 2016 – he based this analysis on an incorrect 17-year period, a term three years under the Lease Agreement's 20-year term. On the other hand, Baker not only used the December 23, 2016 commencement date, but his analysis is based upon the 20-year Lease Purchase, arriving at a fair market rental rate of \$6.90 per square foot yearly.

²¹ Bradley wrote, "The subject [28.16 acres of land] [1,226,649 sq. ft. land] [141,787 sq. ft. improved building] is currently leased but at the specific request of the client I have analyzed the fee simple interest in the property." Bradley Appraisal, p. 2.

RULING

Comparing leasehold interests similar to those with his designated ‘subject’ of 28 acres, Bradley ended up with leasehold interest comparisons requiring an upward adjustment of each comparable interest – a puzzling tactic in light of an appraiser’s role of seeking to bracket comparable values in order to arrive at an accurate approximation or gauge of leasehold property values. Further, Bradley’s analysis of the fee simple interest considered market rents based on an estimated typical 15-year lease and not the subject contract rents for a 20-year lease. Also, his discounted cash flow analysis capitalized the last year’s net operating income, and he came to a higher net reversionary interest at the end of the lease term.²²

Like Bradley, Baker also performed an analysis in fee simple utilizing the three standard approaches for appraisal technique. However, he valued the Building Parcel separately as a 12-acre site, utilizing similarly sized market comparisons. Even under this approach, in general his valuations do not differ that greatly from Bradley’s views. *See* attached Exhibits A and B. Yet, perhaps recognizing the limitations in performing a summary appraisal in fee simple to reach market value given the subject Lease Purchase, Baker performed a discount cash flow analysis for the income approach -- to which when deposed, Bradley indicated he was not adverse to the applicable formula. In this regard, Baker wrote, “Typically, the income approach in this type of analysis is based on the theory that the value of the property is the sum of the present worth of the income stream during the ownership period and the net present value of the reversion amount received at the end of the ownership period.” Baker Appraisal, p. 27. However, he also indicated, “Assuming all lease payments are made, at the end of the 20-year lease, there will not be the typical building reversion as the tenant can purchase the building at that time for an additional payment of \$10. Therefore, the lease fee value in this analysis is only the present value of the income stream, or lease payments, over the 20-year lease term.” *Id.*; *see also* n.26 *supra*. Thus, unlike Bradley’s opinion of perhaps over \$3 million, Baker concluded there was zero net reversionary interest at the end of the subject lease.

The income approach formula relied upon by the appraisers provides that for a parcel of leased real property, the aggregate of the present value of the net reversionary interest plus the present value of a stream of income from rent payments (the leased-fee interest) during the lease term, assuming a market-rate rent, when added together should approximate the present fair market value of the parcel. In this regard, Baker alone analyzed the lease-fee interest, which yielded a present value of \$11,725,000, a figure representing the present value of the stream of income anticipated from World View’s contract rents.

Relying on Baker’s analysis, the Court is persuaded that as of December 23, 2016, the County’s leased-fee interest in the Building Parcel possessed a market value of \$11,725,000; this represents the value for which the County could sell its interest in the stream of payments, in the commercial market.²³ Since Baker expects that World View obtains title to the Building Parcel at the conclusion of the Lease Purchase, this figure represents the value of the stream of rent payments, discounted to

²² The appraisers agree the building has a future value at the end of the lease. Bradley found that the future value of the building is \$16.8 million based on 17 years. *See* 09/19/19 Bradley Depo. p. 44. Baker countered the future value of the building is \$14 million based on the 20-year term of the Lease Purchase. JPS, p. 23 ¶ H.2.a

²³ The Court also is persuaded that the contract rate under the Lease Agreement approximates or represents a market rate, as elucidated in its discussion of the *Under-Market Rent Claim*, *infra*.

RULING

present value based upon a 7% discount rate for present value, with no net reversionary value.²⁴ In any event, the Court has reservations regarding the reliability of Bradley's various findings. Therefore, it has concerns as to whether Taxpayers met their burden of proof under the case law. That said, the Court finds Baker's opinions supported by the record. The Court now proceeds with the analysis under *Wistuber's* second prong as reiterated in *Turken* and *Schires*.

What the term, "grossly disproportionate" means is apparently undefined. County Defendants rely on *Wistuber* and its progeny, noting "As for 'gross disproportionality,' [t]he Gift Clause is violated when th[e] consideration [received by the public entity] is 'so inequitable and unreasonable that it amounts to an abuse of discretion,' thus providing a subsidy to the private entity." Findings of Fact, ¶ 35; see *Turken*, 223 Ariz. at 349 ¶ 30 quoting *Wistuber*, 141 Ariz. at 349.

The Court found various examples of application of the term. Defendants cite to the proportionality application in the context of a non-judicial foreclosure proceeding involving the acceptable minimum amounts of a credit bid at a trustee's sale in comparison with the fair market value of the property at sale. See *In re Krohn*, 203 Ariz. 205, 212, ¶ 29, 52 P.3d 774, 781 (2002). The U.S. Supreme Court has utilized the term in holding a civil government asset forfeiture invalid under the Excessive Fines Clause of the Eighth Amendment, voiding an asset-taking found to be "grossly disproportionate to the gravity of a defendant's offense it is designed to punish." *U.S. v. Bajakajian*, 524 U.S. 321, 334, ¶ III(A) (1998). And, the concept appears in the criminal arena in Eighth Amendment cases involving challenges to cruel and unusual sentences.²⁵ The term "proportionate" is additionally found in A.R.S. Sec. 9-463.05(B)(3), providing that a "development fee shall not exceed a *proportionate* share of the cost of necessary public services, based on service units, needed to provide necessary public services to the development." A.R.S. § 9-463.05(B)(3) (italics added). But there is little additional guidance defining "proportionate." The Court accordingly turns to resource materials.

The term "grossly" is, of course, derived from "gross." Black's Law Dictionary defines "gross" as "[o]ut of measure; beyond allowance; flagrant; shameful; as a gross dereliction of duty, a gross injustice, gross carelessness or negligence." BLACK'S LAW DICTIONARY, p. 632, (5th ed. 1979) (citation omitted). It adds: "Such conduct as is not to be excused." *Id.* "Disproportionate" comes from "disproportionate," meaning "lack of proportion, symmetry or proper relation." WEBSTERS NINTH NEW COLLEGIATE DICTIONARY, p. 365 (1986). Reasonably considering these terms, grossly disproportional

²⁴ The Court notes that on NRV, the JPS indicates: "The appraisers both agree that the World View building has a net reversionary value ("NRV") at the end of the lease:

- Bradley believes the present value of the NRV is **\$3 million**.
- Baker believes the present value of the NRV is **\$2.5 million** based on a reversionary value of the building of \$14 million). JPS, p. 23 ¶ H.2.a.

However, were the Court to use this \$2.5 million NRV, it still would meet the gross disproportionality standard. See *infra*.

²⁵ See e.g., *State v. Berger*, 212 Ariz. 473 (2006). "[T]he Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime." *Ewing v. California*, 538 U.S. 11, 21 (2003) quoting *Rummel v. Estelle*, 445 U.S. 263, 271 (1980); see *Solem v. Helm*, 463 U.S. 277, 284 (1983) (Eighth Amendment prohibits "sentences that are disproportionate to the crime committed."); see also *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) (There is "one governing legal principle" in Eighth Amendment jurisprudence: "A gross disproportionality principle is applicable to sentences for terms of years.").

RULING

in this view, is activity lacking in proportion, symmetry or proper relation, that crosses over into conduct which is out of measure, beyond allowance, flagrant and shameful; it is, as Black's notes, "Such conduct as is not to be excused." BLACK'S, *supra*. Mindful of these concepts, the Court turns to what World View agreed in return for the County's outlay.

Defendants suggest that the Court may look at various values for analyzing adequacy of consideration of the transaction.²⁶ However, since *Turken* directs the use of market values, the Court will rely on fair market valuations. Under the Lease Purchase, the consideration received by World View is a leasehold interest to the Building Parcel; whereas the corresponding consideration received by the County is the stream of contract rent payments. The Court finds appropriate, accordingly, to consider those values as part of a Gift Clause analysis. In order to compare apples to apples, those two values must be compared as of a specific date, which logically under these facts, is the commencement of the lease term or December 23, 2016.

For our purposes – and notwithstanding Taxpayers' expert valuing both the Building Parcel and Launchpad Parcel while also selecting an appraisal date other than the leasehold commencement date -- the parties agreed the fair market value of the Building Parcel as of December 23, 2016 is \$14 million. JPS, p. 12, ¶ 44. Baker analyzed the lease and calculated the present value of the stream of rent payments over the 20-year life of the Lease Purchase, finding as discussed, no reversionary interest at the end of the lease term, eventually arriving at his figure of \$11,725,000. This figure represents the price the County could sell for its interest in the stream of rental payments, discounted to present value that is based upon a discount rate which a commercial investor might reasonably use. Of equal import, this is the present value of the consideration received by the County. Even if only the present value of the Lease Purchase's stream of payments under an income approach, is divided by the Building Parcel's \$14 million fair market value, the resulting percentage stands at 84% -- an outcome that does not appear to be lacking in proportion, symmetry or proper relation, crossing over into something that is out of measure, beyond allowance, flagrant and shameful or, as Black's notes, "conduct as is not to be excused." Black's *supra*.

When hypothetically applying Baker's present value of the stream of income from rent of \$11,725,000 and combining this valuation to Bradley's bottom approximation of net reversionary interest, \$3,077,163, the total yields a sum of \$13,815,519 – again a figure the Court does not find to be grossly disproportionate when considering a fair market value of \$14 million.²⁷ Even when comparing

²⁶ For instance, World View is obliged under the Lease Purchase Agreement to pay over a 20-year term \$24,850,000 in rent to the County so that when assessed against the \$19,444,134 in debt service that the County is paying over 15 years for the Certificates issued to fund the World View project, there is seemingly little argument that the consideration obtained by the County is not so inequitable and unreasonable as to amount to an abuse of discretion as there does not appear to be any gross disproportionality as World View is paying more than the County's financial outlay. However, as this total at the conclusion of the lease has not been reduced to present value, it cannot be utilized as a comparison.

²⁷ Notably, Taxpayers' appraiser in valuing the entire 28 acres and producing a market value of \$14.7 million meant the Court could not consider this figure in terms of a discount cash flow analysis. In any event, the parties also stipulated that the fair market value of the Improved Parcel, as of December 23, 2016, is \$14 million. JPS, p. 12, ¶ A 44. Taxpayers asked the Court to deduct a value for the Launchpad Parcel, but the Court finds doing such simply to be too speculative.

the County's total actual investment of public funds in the Improved Parcel of \$12,715,673 to the \$14 million fair market value of the Building Parcel, the result does not strike the Court as grossly disproportionate.

Taxpayers counter that the 16% difference between the leased-fee value of \$11,725,000 and their stipulated \$14 million market value amounts to a Gift Clause violation. But assuming that Taxpayers have met their burden in the first instance, the Court is unpersuaded of this position, indisputably rooted in their strict constructionist perspective to the Gift Clause. Fundamentally, to accept this interpretation would render a nullity the gross disproportionality prong in *Wistuber* or *Turken*, as clarified in *Schires*. Further, the Court is legally obliged to follow this precedence. In short, the Court finds that the Agreements meet the adequate consideration second prong set forth in *Wistuber* or *Turken*, and like decisions.

\$10 Option to Purchase

Taxpayers also challenge the Agreements as providing a subsidy to World View by virtue of the balloon agency's anticipated exercise of the \$10 option to purchase at the end of the Lease Purchase. Taxpayers cite to Bradley's opinion that at the end of the lease term, the Building Parcel will possess a net reversionary value of over \$3 million.²⁸ This position, however, overlooks that under the Lease Purchase, World View can only obtain title to the Building Parcel upon exercise of its option, and this event will not occur until performance of the contractual terms of the lease at the end of the lease term, in which case the County will have received in return over the 20-year holding period a stream of rent payments \$24,850,000. And, if World View breaches the Lease Purchase, the County still holds legal title to the Building Parcel, in which case, the option is without legal effect. Also, Baker assumes the net reversionary value is zero because he anticipates World View's reasonable exercise of the option, and as a result, at the lease term's end, there would be nothing left of interest to value.

Each appraiser agreed that a property's net reversionary value, at the end of a holding period, is reflected in its current fair market value. Separately valuing and comparing it only to the \$10 option price is contrary to this viewpoint and as the County notes in its papers, piecemealing out the option is opposite to taking a "panoptic view" of the transaction. The appropriate comparison is between the value of the Building Parcel as of the lease commencement date and the value of the stream of rent payments as of that date. As a consequence, the Court rejects Taxpayers' claim that the net reversionary value should be included in the consideration analysis, as it is unpersuaded that the Agreement's option to purchase violates the Gift Clause.

The Under-Market Rental Rate Claim

Furthermore, Taxpayers challenge the Lease Purchase contending that World View is paying an under-market rental rate. The appraisers agree that during the first 10 years of the Lease Purchase, the

²⁸ Although the appraisers concurred that the net reversionary interest at the end of the lease, December 23, 2036, is \$16 million, that is not an NRV reduced to present value.

RULING

rental rate is below market, with the difference made up at the end with above-market lease rates. According to the evidence for the first five years, the rent is \$59,166.67 a month or \$710,000 a year and increases in five-year increments thereafter on a graduated scale.

Recall that Bradley stated as of April 19, 2019, the fair market rental rate was \$8.40 per square foot per year, assuming 2.5% increase per year. Baker countered as of December 23, 2016 that the fair market rental rate was \$6.90 per square foot per year. Bradley's lease term was incorrect and he also used comps that were sized for parcels at or near 28 acres when the Building Parcel is 12 acres. As the Court noted, it accordingly finds Baker's opinion more reliable. Specifically, it finds that Baker utilized the proper date of value; whereas, Bradley did not. Further, Baker employed comparable lease rates that follow standard appraisal principles. Notably, on the other hand, Bradley's comparable lease rates *all* required upward adjustments and his adjustments were overall larger and more numerous than those performed by Baker. The Court finds that the fair market rental rate for the Improved Parcel or Building Parcel, as of December 23, 2016, was \$6.90 per square foot per year. Additionally, based on the parties' stipulation in the Joint Pretrial Statement, ¶ 43, the Court concludes it is appropriate to assume that the fair market rental rate would increase between 1.5% and 2.5% per year.

Further, to the extent that Taxpayers contend that the lease rate under the Agreements is not market rate over the course of the lease, that evidence is not before the Court. In any event, the values produced by the appraisers support a reasoned deduction that World View's rent to the County approximates a market rate. As noted, the present value of a stream of market-rate rent payments, plus the leased property's net reversionary value, discounted to present value, should equal the present market value for a parcel of property. When the lower of the two values offered by Bradley for the Building Parcel's present net reversionary value—\$3,077,163—is added to the present value of the stream of rent payments under the Lease Purchase—\$11,725,000—the aggregate is \$14,802,163. The fact that this is slightly higher by 6% than the estimated present market value of \$14 million for the Building Parcel tells us that the rent being paid by World View is, over the life of the lease, at or above market-rate rent.

In any event, Taxpayers cite to no case or authority other than their strict reading of the Gift Clause to support their contention. Overall, the Court is persuaded that the lease rates are not grossly disproportionately low or that the arrangement providing that World View early on pays an under-market rent with the difference made up of a higher market rate later, violates the Gift Clause. The Court therefore rejects Taxpayers' contention that the under-market rent in the Agreements is invalid under the constitution.

The Tax Break Claim

Plaintiffs complain further that World View will receive annually, according to Bradley, a tax break of \$200,000 a year, resulting in a \$4 million subsidy. Taxpayers argue the Court must include the value of property taxes World View is *not* paying. But the exemption from ad valorem taxes for the Building Parcel is a legal consequence of County ownership of the Building Parcel and

RULING

accordingly, the near-space balloon manufacturer's GPLET exemption is a result stemming from operation of Arizona law. Importantly, tax savings are considered indirect benefits, such which, under *Turken*, are not considered in a Gift Clause challenge to public expenditures. *Schires*, ¶ 18. The supreme court has stated:

Relatedly, the City asserts that its expectation of receiving \$206,630 in municipal tax revenue during the first five years of HU's presence in Peoria is a direct benefit that constitutes value for Gift Clause purposes. A business's obligation to pay taxes is independent of an economic development agreement. As with anticipated economic impact, fiscal impact is an indirect benefit that is irrelevant to our analysis. *See Turken*, 223 Ariz. at 350 ¶ 38 (rejecting argument that taxes generated from mixed-use development contributed to the value of the parking spaces provided to the public where the developer lacked any obligation "to produce a penny of tax revenue").

Id. As tax revenue from a tenant do not amount to being a direct benefit for Gift Clause purposes, so too does it seem to the Court that statutory exemptions from paying ad valorem taxes amount to an indirect benefit are relevant to such an analysis. In other words, if "indirect benefits" for the public in the form of a private party's payment of taxes do not amount to consideration on one side, then "indirect benefits" for a private party in the form of a tax exemption do not constitute consideration on the other side. As a result, the Court finds unpersuasive Taxpayers' contention that the property taxes that World View are exempt from paying by operation of law and the parties' Agreements violate the Gift Clause.

The Launchpad

Finally, Taxpayers charge the County improperly subsidized World View by agreeing to construct a \$2.3 million Launchpad without receiving consideration in return. Yet, whether at the end of the Lease Purchase, or in the event of a default, the County still retains ownership of the Launchpad and the accompanying underlying acreage. To be clear, this parcel was not transferred to World View. Under the Agreements, the Launchpad must remain a public-aviation facility owned by the County, meaning that as a county structure, it is public by definition. and serves a public purpose.

Taxpayers counter the Launchpad fails the public purpose definition given that the structure is a limited-use facility, useful only to World View. However, any public aviation facility will be limited to specific use. Admittedly, the County's current anticipation is that World View will be its primary user. Still, public infrastructure is no less public just because it is used by only a few members of the public. *See Town of Gila Bend, supra* (installing a water line at Town's expense to serve one commercial property in exchange for the property owner's promise to rebuild its burned-down factory did not violate the Gift Clause). The question of how many people a public infrastructure project must serve in order to justify governmental expenditure for a project is not a part of the analysis under *Wistuber* and its progeny, and the Court questions whether it may supplant the public entity's presumptively sound decision in this regard. Given that other uses remain to be explored, on this

RULING

record the Court is unable to find that the Supervisors decision to construct the Launchpad in conjunction with the Agreements is so inequitable and unreasonable that it amounts to an abuse of discretion. *Cheatham*, 240 Ariz. at 322 ¶ 35) (“...when the consideration, compared to the expenditure, is ‘so inequitable and unreasonable that it amounts to an abuse of discretion.’” quoting *Turken*, 223 Ariz. at 349 ¶ 35; *Wistuber*, 141 Ariz. at 349).

Conclusion

Relying on a strict reading of the Gift Clause, Taxpayers have argued eloquently that the County’s Agreements with World View amount to an improper gift, loan of credit, subsidy, or constitute an expenditure of public money primarily benefiting a private party, conduct that is proscribed by the Arizona Constitution. They also contend firmly that the subject Agreements violate the Gift Clause test set forth in decisions like *Wistuber*, *Turken*, *Cheatham* and recently, *Schires*.

However, the Court finds the County’s arrangement with World View meets the two-prong test set out in *Turken*: “[a] governmental expenditure does not violate the Gift Clause if (1) it has a public purpose, and (2) in return for its expenditure, the governmental entity receives consideration that “is not so inequitable and reasonable that it amounts to an abuse of discretion, thus providing a subsidy to the private entity.” 223 Ariz. at 345, ¶ 7, citing *Wistuber*, 141 Ariz. at 346. The Court is also not convinced that the Agreements amount to a disguised loan which violates the credit portion of the Gift Clause. In addition, the Court is unconvinced of Taxpayers’ assertions that the transaction (i) grants World View an option to purchase the Building Parcel for \$10, when according to them, the property possesses a reversionary interest, discounted to present value, of over \$3 million; (ii) allows World View to pay an impermissible under-market rental rate in violation of the state constitution; (iii) allows a private entity to derive impermissibly some \$4 million in property tax breaks; and (iv) results in the County’s construction of a \$2.3 million Launchpad without any consideration in return.

In light of the preceding,

IT IS ORDERED AS FOLLOWS:

- **Rejecting** Taxpayers’ application for declaratory judgment;
- **Rejecting** Plaintiff’s request for injunctive relief;
- **Finds** in favor of the County Defendants, directing that Taxpayers take nothing in this action; and
- **Finds** against Plaintiffs. accordingly.

The County is requested to lodge a final judgment containing Rule 54(c) language within 20 days of entry of the trial ruling.



HON. PAUL E. TANG

(ID: ff01aebc-1bf2-43eb-98ba-c52e920ca38a)

Law Clerk 1

R U L I N G

* Page 26 – Distribution only.

cc: Hon. Paul E. Tang
Andrew Lawrence Flagg, Esq.
Jonathan Riches, Esq.
Regina L. Nassen, Esq.
Timothy Sandefur, Esq.
Clerk of Court - Under Advisement Clerk