MEMORANDUM

Date: May 4, 2016

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

From: C.H. Huckelberry
County Administrator

Re: **Goldwater Institute Lawsuit Related to World View Enterprises**

Today, the County filed the attached Motion to Dismiss the Goldwater Institute's lawsuit against the County related to our economic development incentives for World View Enterprises. The County will continue to aggressively defend against this biased and ill-founded litigation, and we expect to prevail.

Continuing research into the Goldwater Institute's litigation against Pima County has a clear bias against southern Arizona. This bias is evident when comparing similar recent economic development incentives provided to metropolitan Phoenix businesses by the Cities of Mesa and Scottsdale and the Town of Gilbert, as well as Senate Bill (SB) 1531, the recent proposal by the Arizona Legislature to use the State's credit to guarantee loans made to private, for-profit charter schools.

The following are examples of creative economic-development transactions that the biased, Phoenix-centric Goldwater Institute ignored in favor of targeting Pima County:

- City of Mesa. The City of Mesa constructed a manufacturing facility for Able Engineering at the Mesa Gateway Airport. The facility cost approximately $20 million, and the City of Mesa will only recover its cost through a lease agreement with Able Engineering on a for-profit manufacturing facility.

  Able Engineering is not dissimilar from World View, as Able was a small aerospace manufacturer needing to expand. The City of Mesa provided the capital to construct Able's new facility and will recover the cost through a 20-year lease/purchase. This arrangement is virtually identical to the arrangement Pima County has with World View.

  The Goldwater Institute filed no litigation against the City of Mesa.

- City of Scottsdale. The City of Scottsdale is building two hangars and an aero-business center for Gemini Air Group, a private, for-profit corporation. The City will construct and finance the facilities costing in excess of $25 million and will recover this cost through a lease with Gemini. Scottsdale's own financial

analysis indicates they will recover only $2.7 million above the total principal and interest cost to construct the facilities, which will be approximately $36.8 million. The City staff presentation to the Scottsdale Mayor and Council shows the lease revenues that offset the City's principal and interest costs; approximately $22 million for hangar rent recovery and over $13.8 million in "miscellaneous revenues." Relying on such a large percentage (38 percent) of cost recovery from miscellaneous revenues indicates there is some risk that revenues will not always cover the City's debt service.

The Goldwater Institute criticizes the World View venture as "a plaything for the rich." It should be noted the primary business of the Gimini Air Group leasing the Scottsdale Facility is to provide luxury Canadian charter air service.

The Goldwater Institute filed no litigation against the City of Scottsdale.

- Town of Gilbert. In 2015, the Town of Gilbert designed and constructed a four-year liberal arts campus for the private Saint Xavier University, which opened a branch academic center on Town-owned property. The cost of developing the 87,000 square foot, four-story building was $35 million. This campus was paid for and financed by the Town of Gilbert, and the campus facilities are leased to the University. The stated economic development benefits of this proposal were primarily related to attracting a university and students – not jobs – and certainly not export-based employment paying 150 percent over the median wage, as is the case with World View. As noted, Gilbert financed this campus for Saint Xavier University by issuing revenue bonds that are expected to be repaid by the university through its lease payments. An economic analysis conducted for the project estimates the university will employ only 65 people by 2020. At the November 13, 2013 meeting in which the Gilbert Mayor and Council approved the development agreement for the project, Town staff acknowledged that the scope of the furniture, fixtures and equipment; onsite improvements and offsite improvements were unknown at the time of approval.

  The Goldwater Institute filed no litigation against the Town of Gilbert.

In the above three cases, all of the economic development benefits are centered in the Phoenix metropolitan area. No objections were raised by the Goldwater Institute for these economic development incentive packages involving significant sums of money, greater than the Pima County expenditure for World View. All of these metropolitan Phoenix cases are based on the assumption that costs will be recovered over a 20-year lease/purchase – similar to the County's lease-purchase arrangement with World View.

- Lending the State's Credit by Legislative Act to Private For-profit Charter Schools. The Goldwater Institute has also been conspicuously silent on SB 1531, which is basically the State's" loaning of credit" to private charter schools. SB 1531 would set aside $100 million in State funds to guarantee repayment of loans made to private charter schools; schools that are permitted by law to operate as for-profit entities. The State, as guarantor of these loans, guarantees payment of the debt if the borrowing entity defaults. The only "protections and remedies" the State receives "in exchange" is the same right any guarantor has (see Page 6 of HB 1531, § 15-2156(D)): (1) the right to recover the advanced funds from the defaulting borrower, which generally is not worth much by the time there has been a default; and (2) the right to be repaid from the proceeds of a foreclosure sale of any property securing the loan, in the unlikely event any such proceeds remain after the lender is paid off.

  In addition, although SB 1531 has been characterized by the State as giving schools "the ability to expand so that they can offer a great education to more students," it does not require that the borrowed funds be used to build new educational facilities.

  The Goldwater Institute has not threatened litigation against the State if SB 1531 is signed into law.

Based on these few examples, it would appear the Goldwater Institute believes economic development incentives are appropriate and reasonable in the Phoenix metropolitan area, but Constitutional violations in the other 14 Arizona counties.

CHH/mjk

Attachment

c: Tom Weaver, Chief Civil Deputy County Attorney
Regina Nassen, Deputy County Attorney
Andrew Flagg, Deputy County Attorney
Dr. John Moffatt, Director, Office of Strategic Planning

BARBARA LAWALL
PIMA COUNTY ATTORNEY
CIVIL DIVISION
Regina L. Nassen, SBN 014574
Andrew L. Flagg SBN 25889
Deputy County Attorneys
32 North Stone Avenue, Suite 2100
Tucson, Arizona 85701
Telephone: 520-740-5750
Regina.Nassen@pcao.pima.gov
Andrew.Flagg@pcao.pima.gov
Attorneys for Defendants

ARIZONA SUPERIOR COURT
PIMA COUNTY

Richard Rodgers, et al., Plaintiffs, vs. Charles H. Huckelberry, et al., Defendants.	Case No. C20161761 **MOTION TO DISMISS** **(Oral Argument Requested)** (The Honorable Catherine Woods)

Defendants respectfully request the Court to dismiss all four counts of Plaintiffs' Complaint because they fail to state a claim for which relief may be granted. Ariz. R. Civ. P. 12(b)(6).

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs' Complaint contains a number of factual inaccuracies and mischaracterizations. Those inaccuracies do not, however, prevent the filing of this Motion. Even if the relevant facts stated in Plaintiffs' Complaint are taken as true, Plaintiffs have failed to state a valid legal claim.

Defendants acknowledge that Pima County (the "County") did in fact issue $15 million of "COPs" (a type of revenue bond) to raise funds for the construction of a light-manufacturing facility (the "County Facility"); that the County agreed to lease-sell the County Facility to a for-profit company, World View Enterprises ("World View"), over a

20-year term; that the County is also building, adjacent to the County Facility, a public high-altitude-balloon launch pad (the "Launch Pad"), which World View has agreed to maintain and operate at its own expense in exchange for the right to utilize it on a non-exclusive basis; and that the Pima County Board of Supervisors (the "Board") awarded contracts for the design and construction of the County Facility and Launch Pad without following normal competitive procurement procedures. All of those actions were perfectly legal, however, and Plaintiffs are not entitled to the relief they have requested.

1. The Gift Clause requires that a transaction involving public assets be conducted by the government entity for a public purpose, and that the private party to the transaction provide the government entity with consideration that is not "grossly disproportionate" to the government entity's obligations. Pima County's transaction with World View satisfies those requirements on its face.

Count One of Plaintiffs' Complaint asserts that the Lease-Purchase Agreement (the "Lease") and the Space Port Operating Agreement (the "Operating Agreement") between the County and World View, which were approved by the Board on January 19, 2016, violate Ariz. Const. art 9, § 7 (the "Gift Clause"). Copies of those two contracts (the "World View Agreements") are attached as Exhibits A and B to this Motion.[1] A review of the two contracts, the interpretation of which is a matter of law for this Court, is enough to demonstrate that Plaintiffs' Gift Clause claim is without merit.

A. The Board made a specific finding that the World View Agreements, by inducing World View to locate its expanded operations in Pima County,

[1]Because the documents are absolutely central to Plaintiffs' Complaint and, moreover, are public records, attachment of them does not convert the instant Motion to Dismiss to a motion for summary judgment. *See Belen Loan Inv'rs, LLC v. Bradley*, 231 Ariz. 448, 452, ¶ 6 (App. 2012) (attachment of appraisals that were central to complaint did not convert motion to dismiss to a motion for summary judgment); *Strategic Dev. & Const., Inc. v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 64, ¶¶ 13-14 (App. 2010) (a motion to dismiss is not converted to a motion for summary judgment when it refers to a document that is a public record or one that "although not appended to the complaint, [is] central to the complaint").

would "have a significant positive impact on the economic welfare of Pima County's inhabitants." This satisfies the public purpose requirement of the Gift Clause test.

The Gift Clause first requires that the public contract at issue be entered into for a "public purpose." The Arizona Supreme Court has directed courts to defer to a political body's determination of what constitutes a public purpose and how best to pursue it:

> [W]e have repeatedly emphasized that the 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. We find a public purpose absent only in those rare cases in which the governmental body's discretion has been "unquestionably abused."

Turken v. Gordon, 223 Ariz. 342, 349, ¶ 28 (2010) (citations omitted); *see also City of Glendale v. White*, 67 Ariz. 231, 237 (1948) (court will not substitute its judgment for that of the local governing body regarding public purpose).

The Board in this case approved the transaction with World View as an economic development initiative based on the employment opportunities that World View's operation will create. While such "indirect" public benefits do not constitute consideration for purposes of the second part of the Gift Clause test, the Arizona Supreme Court has stated, quite unequivocally, that indirect benefits *do* establish a public purpose sufficient to satisfy the first part of the test. *Turken*, 223 Ariz. at 349, ¶¶ 25-28. In fact, that Court has specifically recognized economic development, and—even more specifically—the issuance of bonds to finance economic development projects, as a legitimate public purpose. *Id.* at 349, ¶ 27.

Plaintiffs question the *wisdom* of the Board's action in this case, characterizing the transaction with World View as "support of an unproven, for-profit luxury adventure-tourism business" (Compl., ¶ 52) and claiming that the issuance of the COPs to fund the project "[p]lac[es] county-owned buildings at further risk" (Compl., ¶ 54). But they have alleged no facts indicating that the Board's discretion was "unquestionably abused."

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PIMA COUNTY ATTORNEY
CIVIL DIVISION

A political body abuses its discretion when its members approve a transaction based on some sort of improper personal interest, or with no logical or factual basis to conclude that the transaction will further the purpose that is being pursued. *See, e.g.*, *Griffith Energy, L.L.C. v. Ariz. Dept. of Revenue*, 210 Ariz. 132, 136, ¶ 19 (App. 2005) ("The issue before the tax court was not whether ADOR reached the correct decision but whether its decision was reached after due consideration and upon a rational basis."); *City of Phoenix v. Landrum & Mills Realty Co.*, 71 Ariz. 382, 388 (1951) ("the showing must be that the contract was either tainted with fraud or so inequitable and unreasonable that it amounts to an abuse of discretion.").

The Board in this case made a specific finding that entering into the World View Agreements, in order to retain World View's operations in Pima County, would "have a significant positive impact on the economic welfare of Pima County's inhabitants." (Lease, § 1.8; Operating Agreement, § 1.7.) And it made that finding based specifically on "an economic impact study by Applied Economics, commissioned by Sun Corridor, Inc., which takes into account World View's anticipated employment and salary levels." (*Id.*) The Board therefore had a logical and factual basis for its finding, and there has been no allegation that the Board members had an improper personal pecuniary interest in the transaction. Even if this Court were to find the Board's action as fiscally objectionable as the Plaintiffs clearly do, no facts have been alleged that would allow this Court to substitute its judgment for that of the Board's regarding the purpose of the transaction.

B. It is apparent from a review of the World View Agreements that the consideration received by World View under those Agreements is not grossly disproportionate to the consideration it provides in exchange.

The Arizona Supreme Court has indicated that it will not be as deferential to political judgments when it applies the second part of the test. Adequacy of consideration is to be determined based on a comparison of the objective market value of what each

party to the contract is providing the other, rather than a political judgment about a transaction's overall public desirability. *Turken*, 223 Ariz. at 350, ¶ 33. But even here there is flexibility. A transaction fails this part of the Gift Clause test only if the consideration provided by the private party is "*grossly disproportionate* to what is received in return" (*id.* at 348, ¶ 22), or "so inequitable and unreasonable that it amounts to an *abuse of discretion*" (*id.* at 349, ¶ 30). (Emphases added; internal quotation marks omitted.) That occurs only when the public entity pays "*far more* than the fair market value" for what the private entity is doing or providing in exchange. *Id.* at 350, ¶ 35 (emphasis added); *see also id.* at 351, ¶ 42 ("the remaining question is whether the $97.4 million that the City has promised to pay *far exceeds* the value of the parking places") (emphasis added). A review of the World View Agreements shows this has not occurred.

(i) The Board agreed to sell the County Facility to World View for a sum that exceeds the amount it is spending to build it. The Court cannot conclude that this is so unreasonable that it constitutes a gift of the County Facility.

The maximum cost for design and construction of the County Facility, which World View gets to use and ultimately take title to, is $14,500,000. (Lease, § 5.1.) The land on which the Facility is located is worth approximately $430,000. (Lease, § 1.2.) The consideration provided by World View under the Lease has two components: rent (Lease, § 6.1), and a promise to employ a specified number of people at specified minimum salary levels (*id*., § 4 & Exhibit E). Plaintiffs allege that the rent is insufficient to satisfy the Gift Clause because it is below the prevailing market rate, though they do not state what they believe the market rate is. (Compl., ¶ 57.) And they allege that the jobs to be created will not directly benefit Pima County or another public entity (Compl., ¶¶ 58-59) and therefore do not constitute legal consideration (Compl., ¶ 61). Plaintiffs also claim that the transaction is disproportionately risky for the County and that this somehow makes the consideration received inadequate. (Compl., ¶¶ 39, 54.) Plaintiffs are

wrong on all three points.

First, even if we assume for purposes of this Motion that the initial rental rate is below the prevailing market rate, it still provides the County a reasonable return on its investment overall. That is enough to satisfy the Gift Clause. *See Turken*, 223 Ariz. at 352, ¶ 47 (noting that courts should not take an "overly technical view" of a challenged transaction). The Court has no basis on which to find that the consideration received by the County is "grossly disproportionate" to what World View is receiving, or constitutes "an abuse of discretion."

The County Facility will have approximately 135,000 square feet of interior floor space. (Lease, § 5.) The annual per-square-foot rental rate for the first 5 years is $5.00; for the second 5-year period, $8.00; for the third 5-year period, $10.00; and for the final 5-year period, $12.00. (Lease, § 6.) World View has two options to purchase the County Facility. One can be exercised only during the last six months of the term. (Lease, § 6.3 & Exhibit C, § 2.4.) Closing must occur within 180 days (Lease, Exhibit C, § 3.5), which is approximately 6 months. Therefore, if this option is exercised, World View will have paid all or virtually all of the rent for the full term, which is approximately $23,625,000 (depending, of course, on the final square footage of the completed building):

$5.00 x 135,000 square feet x 5 years = $3,375,000
$8.00 x 135,000 square feet x 5 years = $5,400,000
$10.00 x 135,000 square feet x 5 years = $6,750,000
$12.00 x 135,000 square feet x 5 years = $8,100,000
$23,625,000

That is considerably more than the County's cost to construct, plus the value of the land.

The second option is an early-purchase option that can be exercised any time after the 9th year of the Lease term but before the mid-point of the 18th year. (Lease, Exhibit C, § 2.2.) In consideration of the early buy-out, the purchase price is lower. But it is still calculated in a manner that covers the principal and interest payments on $15 million of COPs (enough to cover both the construction of the County Facility and the land value),

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PIMA COUNTY ATTORNEY
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plus the time-value of the money used by the County to cover the portion of the COPs debt service that isn't covered by the rent payments during the early years of the Lease term. (*Id*., § 2.3.) Under either scenario, the County does not lose any money; it is made entirely whole.

Second, contrary to Plaintiffs' allegation, World View's specific contractual promises regarding employment and salary levels *do* constitute valid consideration, even though the economic impacts that the Board expects to flow generally from World View's operations are "indirect public benefits" that do not. *See* Turken, 223 Ariz. at 350, ¶ 33; 352, ¶ 48. The exact "fair market value" of that additional promise may be difficult to conclusively establish, but it does have a value.

Third, Plaintiffs' focus on the risk that World View will default is misplaced. There is *always* a risk that a party to a contract will default and fail to meet its contractual obligations. A contract cannot secure the other party's *actual* performance; it simply makes the breaching party legally liable for the non-breaching party's contract damages, and/or at risk of having the contract terminated. This risk of nonperformance does not negate the value of what is promised, however; if it did, no contract would be valid. And we are aware of no Arizona case in which a court has invalidated a transaction on Gift Clause grounds because of a judicial assessment that the deal is "too risky." Like determinations of public purpose, risk/benefit determinations are best left to the political branches of government.

If World View misses its employment requirements by more than 10% (or by a lower percentage, if for reasons within World View's control (Lease, § 4.2.5)), fails to pay rent, or fails to fulfill another of its obligations under the Lease, and doesn't timely cure the breach, the County has the ability to terminate that Lease, retake possession of the County Facility, and redirect it to some other public use; its investment in the facility will not be lost. (Lease, §§ 11.1, 11.3.) *See* *Town of Gila Bend v. Walled Lake Door Co*.,

107 Ariz. 545, 549-50 (1971) (no gift clause violation by town that constructed a water line to serve a private company's property; court notes that the town would own and control the water line). In addition, World View will be liable to the County for normal contract damages. (Lease, § 11.3.1.)

(ii) World View pays the County nothing to use the Launch Pad, but it is required to maintain and operate it at its own expense and make it available to other users. Its rights are not grossly disproportionate to its obligations.

Under the Operating Agreement, World View gets to use the Launch Pad to launch its balloons. In exchange, World View must maintain and repair the Launch Pad at its own expense (Operating Agreement, § 4), and make it available to other users (i*d*., § 4.1). World View is authorized to set requirements that other users must meet as a condition of using the Launch Pad, but those requirements must be commercially reasonable. (*Id*.) It may charge other users a fee, but that fee must be "based on a reasonable apportionment of operating costs incurred by World View" (*id*., § 4.2); in other words, World View cannot pass along the costs that are reasonably apportioned to its own use of the Launch Pad, and must instead bear those costs itself.

The County thus has no costs associated with maintenance or operation of the Launch Pad, and it retains ownership of it, even after expiration of the Lease and the Operating Agreement. Even if the County itself operated the Launch Pad—a public transportation facility—it would not charge fees in excess of its costs of operation. *See* A.R.S. § 11-251.08(B) (fees and charges must do no more than defray county's expense of providing the service); *Stewart v. Verde River Irrigation & Power Dist.*, 49 Ariz. 531, 545-46 (1937) (noting that fees are for the purpose of off-setting the government's cost of rendering the service for which the fee is charged). Under the facts as alleged, and the terms of the Operating Agreement, there is no basis on which the Court could conclude that World View's right to use the Launch Pad is "grossly disproportionate" to its

obligation to maintain it and make it available to others.

2. Count 2 of Plaintiffs' Complaint is based on the premise that the County was required to comply with the leasing procedures set forth in A.R.S. § 11-256 when it leased the County Facility to World View. That premise is incorrect. The World View lease was done under the County's A.R.S. § 11-254.04 economic-development authority and was not subject to § 11-256 requirements.

Section 11-256 authorizes county boards of supervisors to lease county property. It requires the county to have the rental value of the property appraised, publish notice of the proposed lease and its material terms, hold an auction, and lease the property to the highest bidder for no less than 90% of the appraised value. *Id.* Correctly pointing out that the County did none of those things before the Board approved the Lease, Plaintiffs have asked this Court to declare the Lease invalid. (Compl., ¶¶ 66 - 81.)

This claim is faulty as a matter of law because the County entered into the Lease pursuant to the Board's authority under § 11-254.04 to engage in any "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," including specifically the "acquisition, improvement, leasing or conveyance of real or personal property." § 11-254.04(C). This specific authority to lease and convey County property for economic-development purposes makes compliance with § 11-256—which states that it is "supplementary to and not in conflict with other statutes governing or regulating powers of boards of supervisors" (§ 11-256(F))—unnecessary.

The predecessor to § 11-256 was enacted by the Arizona Legislature in 1939. *Johnson v. Mohave Cty.*, 206 Ariz. 330, 333, ¶ 12 (App. 2003). It was therefore already in place when the Legislature added § 11-254.04 in 1994. 1994 Ariz. Sess. Laws, ch. 280, § 3. The new law's specific reference to leasing and conveying property would be superfluous if it did no more than authorize counties to engage in those activities in the same way already permitted by existing statutes. It must therefore authorize counties to

lease and convey property for economic development purposes in a *different* manner. *See* *Johnson*, 206 Ariz. at 333, ¶ 11 (concluding that "the public auction requirement of § 11–256(C) is inapplicable to acquisitions or leases for public park purposes made pursuant to § 11–932").

And that makes sense; in order for those activities to serve an economic development purpose, common sense tells us that they *must* be done differently. There are various ways for a property lease or sale to promote economic development, but none of them are consistent with § 11-256 procedures (or, for sales, with the procedures set forth in § 11-251(9)). A lease or sale for economic development purposes will inevitably involve a specific party—not simply the highest bidder—and the terms of the lease or sale will likely be different than an arms-length transaction focused purely on price.

3. Arizona's procurement statutes allow local governments to procure services without following the otherwise-required competitive process "if a situation exists that makes compliance . . . impracticable, unnecessary or contrary to the public interest." Plaintiffs cannot challenge the County's procurement of architect and construction-manager-at-risk services and, in any event, the County properly exercised its discretion in procuring those services.

A.R.S. Title 34 sets out the procurement rules for construction of public improvements, including buildings. In general, Title 34 requires competition, whether that competition be based on the price of the work (*see* A.R.S. §§ 34-201, 34-221) or the qualifications of the contractor (*see* A.R.S. § 34-603(C)). But A.R.S. § 34-606, a statute enacted in 2000, allows a public entity to dispense with the usual formalities and instead procure services "with such competition as is practicable under the circumstances," in two different situations: when (1) "a threat to the public health, welfare or safety exists" *or* (2) "a situation exists that makes compliance with this title impracticable, unnecessary or contrary to the public interest." These rules are reflected in the Pima County Code. *See* Pima Cty. Code § 11.16.010(A) ("Procurement for construction shall be conducted in accordance with Arizona Revised Statutes Title 34."); *see also id.* § 11.12.060 (rules for

"[e]mergency and other limited competition procurement").

In Counts 3 and 4, Plaintiffs challenge the County's selection of Swaim Associates as architect and Barker Morrissey Contracting as construction-manager-at-risk for the County Facility, alleging that the County violated Title 34 and Pima County Code provisions requiring "competitive bidding."[2] (Compl., ¶¶ 87-88, 94.) Specifically, they contend that the need to construct the County Facility quickly was not sufficient justification for an emergency procurement under § 34-606 (Compl., ¶ 87; *see also id.* ¶ 94), and that the County failed to conduct a limited competition as required by the County Code. (Compl., ¶ 96.)

Plaintiffs' claims fail as a matter of law. First, Plaintiffs are barred from challenging the awards because the statutory scheme applicable here creates its own comprehensive remedial procedure, which does not allow for taxpayer suits or for invalidating contracts that have already been awarded. Moreover, even if Plaintiffs could challenge the awards, the facts they allege, even if true, would not show an unquestionable abuse of the County's discretion to determine when competition is "impracticable, unnecessary or contrary to the public interest." Finally, Plaintiffs did not file this suit until nearly three months after the awards.

a. Plaintiffs' attempt to invoke taxpayer standing in support of Counts 3 and 4 is inconsistent with a comprehensive statutory remedial scheme.

There is no dispute that the services procured here fall under Chapter 6 of Title 34; Count 3 of the Complaint cites only statutes from that portion of Title 34. (Compl., ¶¶ 83, 84, 87.) Chapter 6 was added to Title 34 in 2000 (2000 Ariz. Sess. Laws, ch. 135); it allows various types of services, including architect and construction-manager-at-risk services like those at issue in this case, to be procured other than by competitive bidding,

[2]Copies of the Swaim and Barker Morrissey contracts, less some voluminous exhibits, are attached as Exhibits D and E to this Motion. *See supra* n.1.

and it contains the exceptions in § 34-606 described above. When the Legislature enacted Chapter 6, it also included a remedy for violations: a $5,000.00 civil penalty for "knowing[] and intentional[]" violations of Chapter 6, to be collected by the Attorney General. A.R.S. § 34-613(A)(2), (B). The Attorney General can also bring an action to enjoin a *threatened* or *pending* violation of Chapter 6. § 34-613(B). Those remedies are exclusive, and they do not include private enforcement by taxpayers,[3] nor do they allow an already-awarded contract to be enjoined.[4] "[W]hen a statute creates a right and also provides a complete and valid remedy for the right created, the remedy thereby given is exclusive." *Valley Drive-In Theatre Corp. v. Super. Ct.*, 79 Ariz. 396, 400 (1955); *see also Hunnicutt Const. Inc. v. Stewart Title & Trust of Tucson Trust No. 3496*, 187 Ariz. 301, 304-05 (App. 1996) (equitable remedy unavailable in light of statutory lien). Given the exclusive nature of the § 34-613 enforcement mechanism, Plaintiffs cannot invoke taxpayer standing to challenge the awards. Counts 3 and 4 therefore must be dismissed.

b. The Board of Supervisors has substantial discretion to determine whether competition is "impracticable, unnecessary or contrary to the public interest." The facts alleged in the Complaint would not, if proved, show that the Board unquestionably abused that substantial discretion.

As noted above, § 34-606 applies when either (1) "a threat to the public health, welfare or safety exists *or* [(2)] . . . a situation exists that makes compliance with [Title

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[3]While the Arizona Court of Appeals has upheld taxpayer standing to challenge contracts that were not competitively bid under A.R.S. § 34-201, *Smith v. Graham Cty. Cmty. Coll. Dist.*, 123 Ariz. 431, 432-33 (App. 1979); *Secrist v. Diedrich*, 6 Ariz. App. 102, 104 (1967), that statute is not part of the later-enacted Chapter 6.

[4]In fact, it isn't entirely clear whether enjoining an already-awarded contract is ever an appropriate remedy for a Title 34 violation, even outside Chapter 6. *See Achen-Gardner, Inc. v. Super. Ct.*, 173 Ariz. 48, 55 n.5 (1992) (questioning whether an injunction was an available remedy for the Title 34 violation found in that case); *Secrist*, 6 Ariz. App. at 104 (declaratory judgment available, but no specific relief for a contract already largely completed).

34] impracticable, unnecessary or contrary to the public interest." (Emphasis added.) The Legislature's use of the word "or" demonstrates that either of the two situations will justify noncompliance. *See* *Rutledge v. Ariz. Bd. of Regents*, 147 Ariz. 534, 556-57 (App. 1985) (quoting *Black's Law Dictionary* 1246 (rev. 4th ed. 1968)) ("The word 'or' is defined as "[a] disjunctive particle used to express an *alternative* or *to give a choice of one among two or more things*.'") (emphasis and alteration in original). And the second situation is very broadly defined. No finding of a traditional "emergency" is necessary; compliance with competitive procedures is excused if such compliance is not feasible or necessary, or would not further the public interest. *See, e.g.*, *Imburgia v. City of New Rochelle*, 645 N.Y.S.2d 111, 114 (App. Div. 1996) (city charter provision allowing departure from competitive bidding upon finding by the city manager that it was "impossible or impracticable" did not require an "emergency").

The Pima County Board of Supervisors—the same entity that decides what is practicable, necessary, or in the public's interest in the first place—has the authority under § 34-606 to decide whether particular circumstances excuse Title 34 compliance. And the Board's decision must necessarily be the subject of substantial deference, else a court could substitute its judgment for that of the elected body responsible for the County's legislative decisions. A court must allow a local government's exercise of its discretion to stand unless that discretion has been "unquestionably abused." *Sulphur Springs Valley Elec. Coop. v. City of Tombstone*, 1 Ariz. App. 268, 272 (1965). Plaintiffs' allegations, even if true, provide no basis to find an unquestionable abuse of discretion. In entering into contracts with World View, the Board necessarily concluded that performance of those contracts was in the public interest (*see supra* Argument 1(A)). It was therefore justified in concluding that the compressed time frame for design and construction necessitated a departure from normal Title 34 requirements. And it was likewise justified in approving the particular departure it did—selection of Swaim and

Barker Morrissey as architect and construction-manager-at-risk. Because there is no basis on which to find an unquestionable abuse of discretion, even on the facts as alleged in the Complaint, Count 3 must be dismissed.

Count 4 largely duplicates Count 3, except that it alleges that the County failed to follow a "limited competitive process" as required by the County's Code. (Compl., ¶ 96.) This claim need not detain the Court for long. First, Pima County Code Title 11, as applied to construction contracts, merely implements A.R.S. Title 34 and does not impose additional restrictions: "Conditions for use. Procurement for construction shall be conducted in accordance with Arizona Revised Statutes Title 34. Provisions of this title and the procedures established pursuant thereto shall apply to construction-related procurement only to the extent these provisions are not inconsistent with state law." Pima Cty. Code § 11.16.010(A). Moreover, even assuming § 11.12.030(A)(1)(b) imposes an additional requirement on the County, the code also contains a comprehensive remedial procedure under which "[a]n interested party may file a protest regarding *any aspect* of a solicitation, evaluation, or *recommendation for award*." *Id.* § 11.20.010(A) (emphasis added). Plaintiffs plainly have not followed this procedure. While their failure to do so may not preclude them from challenging the awards under Arizona's procurement *statutes*, it surely does preclude them from challenging the awards solely under the County's code. *Cf. Minor v. Cochise Cty.*, 125 Ariz. 170, 172-73 (1980) (requiring a party to pursue administrative remedies before suing when administrative-review authority granted by statute). They simply cannot contend that the County failed to follow its own code at the same time they have failed to do so themselves. Therefore Count 4 of the Complaint must be dismissed.

c. Plaintiffs failed to sue until nearly three months after the Swaim and Barker-Morrissey contracts were awarded, which was an unreasonable and prejudicial delay. Therefore Counts 3 and 4 are barred by laches.

Even if Plaintiffs had standing and a winning position on the merits, their

unreasonable delay in bringing this suit bars them from seeking injunctive relief under the doctrine of laches. Laches bars a claim for equitable relief "when the delay is unreasonable and results in prejudice to the opposing party." *Sotomayor v. Burns*, 199 Ariz. 81, 83, ¶ 6 (2000).

Here, the Swaim and Barker-Morrissey awards were part of the Board's January 19, 2016, approval of the larger World View transaction, which generated significant local media attention. *See, e.g., Arizona Daily Star*, "Space exploration company to expand near Tucson airport, add 400 workers" (Jan. 14, 2016), available at http://tucson.com/business/local/space-exploration-company-to-expand-near-tucson-airport-add-workers/article_ee79d6e8-baef-11e5-9c98-1f5d44e5f418.html. Mr. Huckelberry's publicly available January 19 memorandum (attached as Exhibit E, *see supra* n.1) makes clear that the design and construction schedule for the County Facility would be compressed in order to complete it by November 2016. The approved contracts for Swaim and Barker Morrissey confirm this, establishing a total design and construction period of 11 months. (Swaim Contract, Exhibit A, at 3; Barker Morrissey Contract, Exhibit A, at 2.) Plaintiffs, though, did not file suit until April 14, nearly three months after the award, or about a quarter of the way through the design and construction period. Under the circumstances, Plaintiffs' delay was unreasonable and, given that Plaintiffs' requested relief would void contracts after performance is well under way, the challenge would prejudice the County.

RESPECTFULLY SUBMITTED May 4, 2016.

BARBARA LAWALL
PIMA COUNTY ATTORNEY
By: /s/ Regina L. Nassen
Regina L. Nassen
Andrew L. Flagg
Deputy County Attorneys

BARBARA LAWALL
PIMA COUNTY ATTORNEY
CIVIL DIVISION

BARBARA LAWALL
PIMA COUNTY ATTORNEY
CIVIL DIVISION

CERTIFICATE OF SERVICE

I hereby certify that on May 4th, 2016, I electronically transmitted the attached document to the Clerk's Office using the TurboCourt System for filing and transmittal of a Notice of Electronic Filing to the following TurboCourt registrants:

Honorable Judge Catherine Woods
Judge of Superior Court
110 W. Congress
Tucson, AZ 85701
Assigned Judge

James Manley, Esq
Veronica Thorson, Esq.
Goldwater Institute
500 E. Coronado Rd.
Phoenix, AZ 85004
Attorneys for Plaintiffs

By: S. Bowman