Clerk of the Superior Court
*** Filed ***
06/19/2020 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-001742 06/18/2020

HONORABLE CHRISTOPHER COURY

CLERK OF THE COURT
L. Stogsdill
Deputy

MAT ENGLEHORN, et al.

JONATHAN RICHES

v.

GREG STANTON, et al.

KRISTIN L WINDTBERG
DENNIS I WILENCHIK

UNDER ADVISEMENT RULING/VERDICT

The Court has reviewed and considered all evidence presented during the Trial held from June 1 through 9, 2020, including all testimony, admitted exhibits, deposition testimony designated by the parties, and the Phoenix City Council information filed June 9, 2020, of which the Court took judicial notice. After deliberations, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FACTUAL BACKGROUND AND POSTURE OF THE CASE.

A. RELEVANT HISTORICAL FACTS

1. On January 30, 1979, the Phoenix City Council passed Resolution No. 15128, finding that a "slum area" exists in downtown Phoenix, and designating the area a redevelopment area, referred to as the "Downtown Redevelopment Area" (the "Downtown RDA").

2. The Downtown RDA is a discrete area generally bounded by McDowell Road on the north, Lincoln Street on the south, 7th Avenue on the west, and 7th Street on the east.

3. On September 9, 1987, the Phoenix City Council passed Resolution No. 17093, designating an area in and around downtown Phoenix as a "Tax Incentive District" located within a "Central Business District" (hereinafter "Central Business District").

4. The Central Business District is located within the area made up of the Downtown RDA on the east and the Government Mall Redevelopment Area, established in 1985 by Resolution No. 16709, on the west.

B. THE CITY'S REQUEST FOR PROPOSALS & AMSTAR'S PROPOSAL

5. In 2012, Defendant City of Phoenix (the "City") issued a Request for Proposals for properties in the Downtown RDA (the "Downtown RDA RFP").

6. The Downtown RDA RFP was posted on the City's website starting with its issuance in 2012, with updates in 2013, 2015, 2016, and 2017.

7. In September 2015, Amstar/McKinley LLC ("Amstar") submitted a proposal in response to the Downtown RDA RFP, in which it proposed to develop a 19-story residential tower that included 211 furnished apartment units averaging 401 square feet (called "micro-units"), 120 structured parking spaces, and 4,500 square feet of commercial space, on a 14,157 square foot site located at the corner of 2nd Street and E. McKinley Street. The proposed project was called Derby Roosevelt Row (the "Derby Project").

8. The Derby Project was to be constructed on two adjacent parcels located in the Downtown RDA and Central Business District.

9. The Derby Project was considered Type-1, high rise, vertical construction, meaning that it was to be constructed with steel framing, and the tower was to be over eight stories tall.

10. The cost to develop the Derby Project was budgeted at nearly $36,000,000.00.

11. The high cost of the proposed building, among other factors, made the proposed development an expensive and risky investment for Amstar.

12. Amstar explained in its proposal that "the market rents in Phoenix today do not support the development of Type-1, high rise, vertical construction without the level of requested assistance from the City of Phoenix." The City's own understanding of the market rents in the Downtown RDA at the time was consistent with Amstar's determination.

13. In light of the risks involved with the Derby Project, Amstar required a minimum yield-on-cost of 7.0% in order to achieve its investment objectives.

14. Based on Amstar's calculations, the Derby Project would only produce a yield-on-cost of 6.1%.

C. THE GPLET DESIGNATION FOR THE DERBY PROJECT

15. To make up the difference between 6.1% and 7.0% yield-on-cost and allow the Derby Project to proceed, Amstar requested in its proposal that the City take title to the Derby Project after construction was complete and then lease the Derby Project back to Amstar for a 25-year period, thus subjecting Amstar to the Government Property Lease Excise Tax ("GPLET"), under A.R.S. §§ 42-6209 through 42-6210. Amstar also requested that the City abate the GPLET for the first eight years of the lease.

16. On March 2, 2016, the City passed Ordinance S-42353, authorizing the City Manager, or his designee, to enter into a Disposition and Development Agreement (the "Agreement") with Amstar.

17. On June 23, 2016, the City and Amstar entered into the Agreement.

18. Under the Agreement, Amstar was to construct the Derby Project, in its entirety, "at its sole cost of not less than $36,000,000." Upon completion of construction, Amstar would convey the Derby Project to the City, whereupon the City would immediately convey a leasehold interest to Amstar for a 25-year period pursuant to the lease agreement included as Exhibit C to the Agreement (the "Lease").

19. The Agreement further provides that upon conveyance of the leasehold interest to Amstar, Amstar must:

    a. Make specific lease payments to the City on an annual basis over the course of 25 years in accordance with the Lease terms;

    b. Provide annual certification that it "has satisfied its obligations under its agreement with the Phoenix Elementary School District to mitigate the fiscal impact of the Lease";

    c. Enter into a Parking Agreement and pay a parking study contribution of $30,000 to the City; and

    d. Cap the rent for ten of the apartment units at $840 per month for a period of five years to make them affordable for workforce housing.

20. Upon conveyance of the Derby Project to the City by Amstar, it would no longer be subject to *ad valorem* taxes. City-owned property is exempt from *ad valorem* taxation. ARIZ. CONST., Art. 9, § 2(1).

21. Upon the City's conveyance of the leasehold interest in the property to Amstar, Amstar would be subject to the GPLET as provided by A.R.S. § 42-6202(A) *et seq.* Excise taxes historically have been lower than *ad valorem* property taxes.

22. During the first eight years of the Lease period (beginning when the certificate of occupancy is issued), the City will "abate" the GPLET owed by Amstar, as provided by A.R.S. § 42-6209. Rephrased, Amstar would pay no GPLET during the eight-year period of abatement.

23. Amstar may terminate the Lease and re-acquire the Derby Project at any time and for any reason for a $20,000 payment to the City.

24. If at any point there is a breach of the Agreement, the Derby Project in its entirety reverts to Amstar's ownership.

25. At the end of the 25-year Lease period, the City must re-convey the entire Derby Project back to Amstar.

26. Once the Derby Project is transferred back to Amstar (via a breach or other termination of the Agreement, or due to the expiration of the term of the Lease), Amstar will pay *ad valorem* taxes on the Derby Project. Amstar currently pays *ad valorem* property taxes on the two parcels where the Derby Project will be constructed.

D. THE PRESENT LAWSUIT

27. Plaintiff Mat Englehorn is a resident and taxpayer in Phoenix and co-owner of Plaintiff Hopelessly Urban, LLC, an Arizona company founded in 2011 doing business as Angel's Trumpet Ale House at 810 & 814 N. 2nd St., Phoenix, AZ 85004, adjacent to the planned Derby Project. Plaintiff Hopelessly Urban, LLC pays *ad valorem* property taxes to the City of Phoenix. Plaintiff Mat Englehorn also personally pays *ad valorem* property taxes to the City.

28. Plaintiff Flying E, LLC, is an Arizona company founded in 2011. Plaintiff Flying E, LLC owns the real property at 810 & 814 N. 2nd St., Phoenix, AZ 85004, adjacent to the planned Derby Project. Plaintiff Flying E, LLC rents the property at 810 & 814 N. 2nd St., Phoenix, AZ 85004 to Hopelessly Urban, LLC.

29. Plaintiff Bramley Paulin is a resident and taxpayer in Phoenix and owner of Plaintiffs Culver Park - 1129 North First Street, L.L.C., and Austin Shea [Arizona] - 7th Street and Van Buren, L.L.C., which own properties in the City and pay *ad valorem* property taxes to the City. Plaintiff Bramley Paulin pays *ad valorem* property taxes to the City.

II. PLAINTIFFS' FIRST CLAIM FOR RELIEF – ALLEGED VIOLATION OF THE GIFT CLAUSE OF THE ARIZONA CONSTITUTION.

30. The Arizona Constitution provides that a municipality may not "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." ARIZ. CONST., Art. 9 § 7. This provision is commonly known as the "Gift Clause."

31. Pursuant to the Gift Clause, a government expenditure will be upheld if a two-pronged test is met: (1) the expenditure 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, 318 ¶ 10 (2016).

32. During the trial, the Court determined as a matter of law that the first prong of this test had been proven – namely, that a public purpose existed for the City's actions.

33. The determination of whether the Agreement for the Derby Project is prohibited by the Gift Clause hinges on an analysis of the second prong of the aforementioned test: namely, the adequacy of consideration.

34. 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. *Turken v. Gordon*, 223 Ariz. 342, 350 ¶ 33 (2010).

A. CONSIDERATION RECEIVED BY THE CITY

35. Much of this case hinges on the value of benefits received by the City that the Court is permitted by law to consider (a "Benefit") when determining whether the Agreement is supported by fair consideration.

36. It is uncontested that, as a result of the Derby Project, the City will receive Benefits of $5,488,967, broken down as follows:

a. Lease payments from Amstar	$3,190,000
b. Parking study	$ 30,000
c. GPLET Payments	$2,268,967

37. In addition to the foregoing, it is uncontested that the City also required Amstar to donate $372,000 to the Phoenix Elementary School District ("PESD"). *Id*. This was reflected in the Agreement. These donations are part of a separate contract over which the City has no control or authority, but which is intended to help offset the tax revenue PESD will lose because Amstar does not pay *ad valorem* property taxes under the Agreement. Exh. 4 at COP000313 § 309. No portion of the PESD payments go to the City; instead, they go directly to PESD. PESD is an intended, third party beneficiary and, consequently, the amounts paid to PESD is properly

deemed to be a Benefit. After including the PESD payment, the City and its intended beneficiary will receive Benefits in the amount of $5,860,967 in connection with the Derby Project.

38. The City urged that the following additional amounts constitute Benefits to the City and encouraged the Court to include these sums when calculating consideration:

    a. Anticipated sales tax on tenant lease payments and utilities during the 25 year GPLET term: $5,640,260; and

    b. Anticipated sales and property tax payments after the lease expiration (i.e. beginning in year 26): $25,000,000 (approximately).

    Under Arizona law, "indirect benefits, such as projected sales tax revenue" are not consideration. *Turken*, 223 Ariz. at 350 ¶33. Consequently, neither of these amounts legally qualifies as a Benefit received by the City when evaluating consideration.

39. The City also argued that the economic impact of the Derby Project constituted a Benefit to the City. The City's expert, Mr. Bryan Cook, calculated the economic impact of the Derby Project to be approximately $74.5 million. This amount does not qualify as a Benefit for two separate and independent legal reasons. First, these are indirect and speculative benefits, and therefore cannot legally constitute a Benefit. *Id.* Second, there is no evidence in the record that these economic impact benefits were considered or bargained for by the City Council when it approved the Amstar Agreement. The Arizona Supreme Court has "clarified that indirect benefits, when 'not bargained for as part of the contracting party's promised performance,' do not satisfy the 'consideration' prong of the Gift Clause analysis." *Cheatham*, 240 Ariz. at 324 ¶42 (quoting *Turken*, 223 Ariz. at 350 ¶33). The economic impact benefits calculated by Mr. Cook using the IMPLAN study – benefits that were not considered by the City Council – cannot legally constitute a Benefit when evaluating consideration.

40. The City also argued that, if the entire economic impact could not be considered, two discrete amounts identified as part of the economic impact should be included as Benefits: construction sales taxes and the value of the building.

41. The City estimated that the construction of the Derby Project would generate taxes of approximately $370,000. Exh. 64, at COP000170. Although *future* construction taxes would be speculative, indirect benefits at the time of the Agreement (and therefore could not constitute Benefits), the Court can envision how the Agreement could have been drafted to recognize the *exact amount* of construction sales taxes Amstar had paid to the City in connection with the construction of the Derby Project. Had the Agreement been written in this way, construction sales taxes paid may well qualify as a Benefit.[1] However, this did not occur here. Consequently, the speculative, future payment of construction taxes for the Derby Project legally cannot constitute a Benefit.

42. Finally, the City urged the Court to consider "the value of the building" – or $36,000,000 – to be a Benefit received by the City. By contrast, Plaintiffs urge the Court that the Derby Project has $0 value to the City. Taking a panoptic view of the evidence, as this Court is required to do, both parties are correct to some degree. Amstar unquestionably undertook an obligation to spend $36 million to build the 19-story Derby Project. This $36 million building and its underlying real property would be transferred to the City under the Agreement. However, upon transferring the Derby Project to the City, the City immediately leased the Project back to Amstar. Pursuant to the Lease, for all intents and purposes, once the leasehold interest in the Derby Project was conveyed to Amstar, the Derby Project belonged to Amstar. Amstar had the exclusive right to manage and control the property, to borrow against the property, and even to transfer the Lease (and the rights to residual ownership) of the property. And, upon termination of the Lease (voluntarily, due to expiration of its term, or because of a default), the Derby Project was required to revert to Amstar's ownership. In this context, the City did not gain a $36 million asset. Instead, the value of the building to the City, in effect, was the value to the City of Amstar's leasehold interest during the time the City held title to the Derby Project. There is no evidence in the record that the value of this possessory interest amounted to anything besides the Lease payments which Amstar contracted to pay

[1] Recognizing that Amstar received no benefit (i.e. no substitution of GPLET for *ad valorem* property taxes) until construction of the Derby Project had been completed, it follows that it would have been possible for both Amstar and the City to know the exact amount of construction taxes paid to the City at the time of the transfer to the City. Because the amount of construction taxes paid could be quantified at the time of the transfer to the City, the Court believes it would have been possible to structure the Agreement in such a way that Amstar's payments under the Agreement would reflect the exact amount of construction taxes paid, thereby making the exact amount of construction taxes a Benefit that legally could be considered.

to the City in the Agreement. Consequently, the value of the building provides no additional Benefit to the City that the Court legally can consider.

43. The record is devoid of evidence of other Benefits that the Court legally can consider when evaluating the consideration the City would receive pursuant to the Agreement.

44. **Consequently, the Court concludes that the total Benefit the City was to receive from Amstar pursuant to the Agreement for the Derby Project is $5,860,967.**

B. CONSIDERATION RECEIVED BY AMSTAR

45. The Benefit to the City must be weighed against the benefits received by Amstar.

46. From time to time during the trial, testimony focused on the portion of the *ad valorem* taxes received by the City of Phoenix only, as opposed to Amstar's total *ad valorem* tax bill. This view is too narrow, and does not comport with ARIZONA CONSTITUTION, Art. 9 § 2, which contains no such limitation. Consequently, the Court believes the appropriate inquiry focuses on the total *ad valorem* taxes that Amstar would avoid paying pursuant to the Agreement, as opposed to only the City of Phoenix's portion of Amstar's *ad valorem* taxes.

47. During the trial, evidence was presented concerning three different projections of the amount of *ad valorem* taxes Amstar would avoid paying over the 25 years of the Lease:

    a. The City of Phoenix's 2016 estimate that Amstar would avoid paying $14,566,807 in *ad valorem* property taxes.

    b. The estimate of the City's expert, Mr. Cook, that Amstar would avoid paying $20,590,033 in *ad valorem* property taxes.

    c. The estimate of Plaintiffs' expert, Mr. Kevin McCarthy, that Amstar would avoid paying $27,014,911 in *ad valorem* property taxes.

48. *Ad valorem* property taxes are calculated by measuring a combination of: (1) the Limited Property Value ("LPV") of a particular piece of property and (2) the

combined tax rate in effect. Both of the experts were in substantial agreement about the Year 1 FCV, LPV, and *ad valorem* property taxes for the Derby Project.

49. The estimates made by Mr. Cook and Mr. McCarthy about the benefits of the Agreement to Amstar are more credible than the City's estimates. **The Court concludes that, for purposes of evaluating consideration, Amstar received nominal benefits between $20.5 million[2] and $27 million[3] from the Agreement.**[4]

C. EVALUATION OF EACH PARTY'S BENEFITS

50. The total nominal benefits received by Amstar over the life of the Agreement substantially exceed the total nominal Benefits that the City would receive under the Agreement. The total nominal Benefits that the City is scheduled to receive over 25 years amount to $5.8 million**.** Amstar is scheduled to receive total nominal benefits over 25 years in an amount ranging between $20.5 million and $27 million. Consequently, Amstar is receiving **a net nominal benefit ranging between $14.2 million and $21.2 million** by constructing the Derby Project.

51. The Court does not believe that it is appropriate to consider the present value in this case. However, if the total benefits to Amstar are considered in terms of the present value (in lieu of the nominal value), and using (without adopting) Mr. Cook's calculations only for the sake of illustration, **the present value of Amstar's total**

[2] Exh. 67, Schedule 3, at COP000768 (Total Property Tax).

[3] Exh. 13, Table 2, at ENG000254 (Total Property Tax Estimate)

[4] The Court believes that the precise amount of Amstar's benefits falls somewhere within this range. Mr. Cook's estimates about future *ad valorem* property taxes on the Derby Project were understated due to his projections of property values and the property tax rates. Likewise, Mr. McCarthy's estimates of future *ad valorem* property taxes were overstated because, the Court believes, he overstated the annual increases in the property values and tax rates. Nonetheless, viewing the record in its entirety, and in light of the Court's findings that the value of the City Benefits are substantially less than Amstar's benefits, the Court believes that it is unnecessary for the Court to precisely identify the actual amount of the benefits Amstar received within the $20.5 million to $27 million range.

benefits under the Agreement exceeds the present value of the City's total Benefits by more than $8 million[5] and by as much as $11.2 million.[6]

52. Because the Agreement may be terminated at any time, no guarantee exists that the Agreement will endure for the full 25 years. Consequently, the Court believes an analysis of the benefits received during the first year merit evaluation. However, even if only the first year is considered – and recognizing that the parties are in substantial agreement with respect to the financial benefits to each party in the first year – the benefits to Amstar substantially exceed the benefits to the City. During the first year, both experts agree that Amstar will benefit from not paying $488,936 in *ad valorem* taxes. (Exh. 13, Table 2, at ENG000254; *accord* Exh. 67, Schedule 3, at COP000768). On the other hand, by the end of the first year, the City would receive a total of $44,000 in Benefits ($0 in GPLET taxes, $10,000 in lease payments, $4,000 in PESD payments, and $30,000 for a parking study). **Consequently, in the first year of the Agreement alone, Amstar will have received a net benefit of $444,936.**

53. The Court also believes that a comparison is warranted at the end of the first eight years of the Agreement (the years in which the City agreed to abate the GPLET, and that Amstar's Lease payments are the lowest).[7] During the first eight years of the Agreement during which GPLET is to be abated, Amstar will have avoided *ad*

[5] Using Mr. Cook's calculations – which are lower than what the Court believes to be credible – this amount is calculated using the present value of the $11,302,826 in *ad valorem* property taxes avoided by Amstar (Exh. 67, Schedule 3, at COP000768), and reducing this amount by $3,242,894 (the present value of the GPLET payments ($1,448,809), the Lease Payments ($1,571,163), the PESD donation ($192,922) and the Parking Study ($30,000)) (Exh. 67, Schedule 4, at COP000769). Again, as stated, the Court does not find Mr. Cook's calculations to be entirely credible and believes that the present value of Amstar's benefits are greater than Mr. Cook opines.

[6] This amount was calculated using Mr. Cook's present value calculations of Mr. McCarthy's opinions about the nominal amount of the benefits to Amstar. (Exh. 67, Schedule 10, at COP000789)

[7] The Court also notes that the first eight years are the only years that the City projected that Amstar's return on investment would achieve the 7.0% yield-on-cost benchmark that Amstar was seeking. (Exh. 81, at COP000736 (Tab 7 – CDD Analysis)).

valorem property taxes ranging between $4,668,907[8] and $4,847,927.[9] During the first eight years of the Agreement, the City will have received a total of only $362,000 in Benefits. **The analysis of the first eight years of the Agreement reveals that Amstar will have received a total net benefit ranging between $4.30 million and $4.48 million at the time its GPLET abatement ends and it begins to pay excise taxes.**

54. In summary, the net benefit / net incentive received by Amstar pursuant to the Agreement is as follows:

Period	Net Incentive / Benefit to Amstar
Year 1	$444,936
Years 1-8 (nominal amounts)	Between $4.30 million and $4.48 million
Years 1-25 (nominal amounts)	Between $14.2 million and $21.2 million
Years 1-25 (present value)	Between $8 million and $11.2 million

55. Irrespective of the period, or of whether nominal amounts or present values are considered, Amstar is receiving substantially greater benefits than Benefits the City receives pursuant to the Agreement.

56. The Court declines to accept the City's invitation to measure consideration and benefits to the City on a comparative basis versus the *status quo*. Essentially, the City requested the Court to compare the *ad valorem* taxes generated on the vacant parcels upon which the Derby Project was to be built, and compare that amount with the GPLET generated under the terms of the Agreement. The Court does not believe this is a credible comparison. Given the location of the Derby Project, and given the vibrancy of that area of downtown Phoenix, the Court does not find the assumption that the property would remain vacant – for the next 25 years – to be credible.

57. In sum, even after taking a panoptic view of the transaction and giving due deference to the decisions of Phoenix's officials as the law requires, the benefits received by

[8] Mr. Cook's calculations. Exh. 67, Schedule 3, at COP000768 (total of Property Tax figures for first 8 years).

[9] Mr. McCarthy's calculations. Exh. 13, Table 2, at ENG000254 (total of Property Tax Estimate figures for first 8 years).

Amstar are grossly disproportionate to the Benefits received by the City. Therefore, City of Phoenix Ordinance S-42353, the Agreement, and the Lease violate ARIZONA CONSTITUTION, Article 9, Section 7.

58. Plaintiffs are entitled to judgment in their favor on the First Claim for Relief.

III. PLAINTIFFS' SIXTH CLAIM FOR RELIEF – ALLEGED ARBITRARY AND CAPRICIOUS USE OF ARIZONA'S GPLET STATUTES.

59. The terms "arbitrary, capricious and unreasonable conduct" can rise to the level of a manifest abuse of discretion and justify judicial intervention. However, this occurs only based on findings of unreasoning action, without consideration and in disregard for facts and circumstances. Where there is room for two opinions, an action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be determined that an erroneous conclusion has been reached. *Tucson Pub. Sch., Dist. No. 1 of Pima Cty. v. Green*, 17 Ariz. App. 91, 94 (1972); *accord Avila v. Arizona Dep't of Econ. Sec.*, 160 Ariz. 246, 248 (App. 1989) ("An abuse of discretion is characterized by arbitrariness or capriciousness and failure to conduct an adequate investigation into the relevant facts.").

60. Based on this case law, the Court must exercise a deferential standard. Plaintiffs have the burden to prove that the City officials did more than simply make a mistake or an erroneous decision.

61. When the City leases a government property improvement, the lessee is subject to an excise tax for using or occupying the property, called the GPLET. A.R.S. § 42-6202(A).

62. The GPLET is codified in A.R.S. §§ 42-6201 to -6210. The tax, as its name suggests, is a "non-ad valorem excise tax" on the activity of leasing a government property improvement. 1996 Ariz. Sess. Laws, Ch. 349, §§ 1, 5.

63. Pursuant to A.R.S. § 42-6209(F), prior to October 1, 2020, municipalities must "review the designation of each slum or blighted area that was originally designated before September 30, 2018 and in which a central business district is located," and must either "renew, modify or terminate the designation."

64. Pursuant to the 2003 amendments to A.R.S. § 36-1474(C), "[t]he designation of an area as a slum or blighted area terminates ten years after this designation unless substantial action has been taken to remove the slum or blighted conditions."

65. During the trial, the Court concluded that, as a matter of law, the 1979 slum designation for the Downtown RDA remained valid because the City had taken the requisite substantial action. Since 2003, the City has engaged in substantial action to remove slum and blighting conditions in the Downtown RDA, in accordance with the long-term objectives set forth in the City's 1979 Downtown Redevelopment Plan. These actions included, among others, the following:

a. Since 2003, the City has entered into several leases and development agreements with third parties for the express purpose of implementing the City's 1979 Downtown Redevelopment Plan. Exhs. 39-43, 45-48, 51-53, 57.

b. In 2001, City voters had approved a sales tax increase to fund a light rail connecting the Downtown RDA with other areas. Construction on the project began in 2005, and the light rail began operating in 2008.

c. In 2001, City voters had approved a $600 million expansion of the Phoenix Convention Center in the Downtown RDA; the expansion was completed in 2008.

d. In 2004, the City partnered with the University of Arizona, the Translational Genomics Research Institute (also known as TGen), and other entities to develop a Phoenix Biomedical Campus on City-owned land in the Downtown RDA.

e. In 2004, the City adopted the Downtown Phoenix Strategic Vision and Blueprint for the Future ("2004 Strategic Plan") setting forth "broad policy recommendations" and a strategic plan for continued development in downtown Phoenix. Exh. 36

f. In 2006, City voters approved a multi-million-dollar bond to fund construction of an Arizona State University campus in the Downtown RDA. In the following years, ASU developed a downtown campus.

g. In 2007, the City entered into a redevelopment agreement with a developer to build CityScape, a high-rise mixed-use development in downtown. Exh. 43.

h. In 2012, the City issued the Downtown RDA RFP to implement the City's strategic downtown vision and promote redevelopment in the Downtown RDA.

66. The City's redevelopment efforts have helped to remove dilapidated and deteriorating buildings, develop or improve vacant parcels, and assemble smaller parcels that were insufficient for modern construction needed in the Downtown RDA.

67. In sum, the City took "substantial action" to remove the slum and blight conditions within the Downtown RDA between 2003 and 2013, as required by A.R.S. § 36-1474(C). Accordingly, the 1979 designation of the Downtown RDA did not expire in 2013.

68. Under the GPLET statutes, a party leasing from a municipality may abate the tax in certain situations for redevelopment purposes for up to eight years if certain requirements are met (collectively, the "GPLET Requirements"), including:

a. The property must be "located in a single central business district" that is "located entirely within a slum or blighted area that is established pursuant to title 36, chapter 12, article 3" of the Arizona Revised Statutes. A.R.S. § 42-6209(A) (2016);

b. The property improvement must be "subject to a lease or a development agreement." *Id.*; and

c. The improvements to the subject property must result in "an increase in property value of at least one hundred percent." *Id.*

69. The Court reiterates its earlier ruling that A.R.S. § 42-6209 does not require the redevelopment area, nor the specific parcel in question, to *presently* meet the criteria for slum or blight in order to permit a municipality to utilize the GPLET or to abate the GPLET for up to eight years. Rather, A.R.S. § 42-6209 merely requires the

designation of the area as a slum or blighted area, and that such designation not to have expired, in order to utilize and abate the GPLET. (Minute Entry Order of June 27, 2019, at pg. 9 ¶ 12.) Concluding otherwise, as the Court ruled, would amount to re-writing the statute. The Court declines to do this.

70. Uncontested evidence substantiates that the City conducted due diligence, both by City staff and at the City Council level. Indeed, evidence demonstrates that inquiries about various aspects of the Derby Project were raised and considered before approval. Exh. 64.[10]

71. The City did not act arbitrarily or capriciously, nor did the Phoenix City Council abuse its discretion, when relying on its 1979 designation of the Downtown RDA for purposes of entering into the Agreement conferring the GPLET to the Derby Project, or by agreeing to abate the GPLET for eight years for the Derby Project, for the following reasons:

    a. The Derby Project met the GPLET Requirements.

    b. The City complied with the statute, which merely required that the area be established as "slum" or "blighted" – and not actually presently meet the definition of a "slum" or "blighted." A.R.S. § 42-6209(A) (2016).

    c. The Slum Clearance and Redevelopment Law empowers municipalities not only to eliminate slum and blighting conditions but also to "prevent[]" their "recurrence." A.R.S. §§ 36-1471(17)(a), 36-1472(4), 36-1474(3)(d), 36-1479(C), 36-1480(A).

    d. Although the face of downtown Phoenix has significantly changed between 1979 and 2010, a rational basis existed to support redevelopment in some parts of the Downtown RDA. This project was not being constructed on Rodeo Drive or on the Magnificent Mile or in the Arizona Biltmore. Instead,

[10] There is no evidence whatsoever of any ulterior motive from anyone associated with the City. To the contrary, the City representatives who testified and who were mentioned in the evidence demonstrated their care, concern, and interest for the City of Phoenix, its culture, and its citizens. The Court commends and thanks them for what the evidence demonstrates are tireless efforts and dedication to this City and its community.

it was being constructed on a parcel of land that had remained vacant since 1979.

e. This occurred at a time before the Arizona Legislature had required municipalities to review or update slum and blight designations. This requirement only became effective in the 2018 amendments to A.R.S. § 42-6209 when, for the first time, the Legislature required municipalities to review and update their slum and blight designations every ten years, beginning September 30, 2020.[11]

72. The Court assigns little weight to evidence that the Phoenix City Council adopted legal findings to recertify, update and expand the Downtown RDA boundaries on June 8, 2020. This determination is largely unpersuasive because the new boundaries of the Downtown RDA are not the same as those in place during 2016. Had the boundaries been the same, then perhaps this might have been more persuasive.[12]

73. Defendants are entitled to judgment in their favor on the Sixth Claim for Relief.

[11] It is not the province of this Court to rewrite statutes, nor is it proper for the Court to establish, or question, the wisdom of policy. Instead, this responsibility belongs to the other branches of government. So long as a statute passes constitutional muster, the Court cannot conclude that a party acted arbitrarily or capriciously, or abused the discretion conferred upon that party, when taking only the steps needed to comply with the law. Although the GPLET statute could be rewritten so as to require the diligence and the limitations that Plaintiffs now urge, that was not the state of the law in 2016 and the Court cannot hold Defendants to this higher standard while maintaining fidelity to the separation of powers set forth in the Arizona Constitution.

[12] If anything, the new boundaries of the Downtown RDA as approved and adopted by the Phoenix City Council on June 8, 2020, highlight the need for further Legislative consideration of the GPLET statutes. With the new boundaries of the Downtown RDA, it appears that the City has simply expanded the redevelopment area to include large areas to the south and west of downtown Phoenix – areas that may fairly be described as slum or blighted – in order to achieve a percentage or quota of parcels that meet the "slum" or "blight" definition within the Downtown RDA. If anything, the City's suggestion that the downtown Phoenix area (including Chase Field, CityScape, the Superior Court Complex, TGen, and Arizona State University's downtown Phoenix campus (to name a few locations)) are a "slum" or are "blighted" parcels of property highlights how the GPLET statutes, as presently written, may be used for unintended purposes. So long as the plain language of the GPLET statutes permit use of the GPLET without requiring a current assessment by government officials of whether the specific property in question actually meets the definition of slum or blight, the possibility of unintended consequences exists.

IV. QUESTIONS EVADING REVIEW.

It is the rare case where this judicial officer commends counsel for their exceptional skill in framing and presenting their cases. All parties were exceptionally served and well-represented by counsel in this case. However, partially due to the exceptional work of counsel – and recognizing the high likelihood that Arizona's appellate courts are going to be invited to review the decisions in this case – this judicial officer notes that the arguments of each side, if taken to their logical conclusions, raise important questions of law. It was unnecessary to reach these questions in this case given the facts here. However, having spent substantial time analyzing this case, this judicial officer raises the following considerations with respect to which appellate guidance would be helpful:

1. Although Plaintiffs argue that the GPLET statutes are not unconstitutional, the vitality of the GPLET as a useful redevelopment tool must be questioned. The GPLET framework is used to encourage developments that may be riskier by partnering with a developer to defray some of the developer's financial risks. However, if Arizona law prohibits grossly disproportional benefits to be paid to a developer, and if payments under a future GPLET agreement must more closely approximate the amount of *ad valorem* taxes, does the GPLET have any remaining usefulness to incent redevelopment? In other words, this judicial officer questions whether the death knell for the GPLET's usefulness has rung.

2. If Arizona's GPLET statute is not amended, and if the only inquiry required of government officials is whether the project in question meets the GPLET Requirements – including, specifically, the requirement of whether the property is located in an area that falls within a redevelopment area designated as a slum or blighted – does that not invite the use of public monies to redevelop areas that may not need redevelopment? Rephrased, by looking primarily at whether a parcel of property falls within a redevelopment area, does this not incent a municipality to gerrymander the boundaries of a redevelopment area? If a slum or blight designation merely requires a certain percentage of properties in an area to meet the criteria of a slum or blight, it follows that municipalities simply may expand the size of a redevelopment area, and then use the GPLET to incent development of the most desirable parcels in the area – even if such parcels, and the properties in their immediate vicinity, do not meet the definition of slum or blight.

VERDICT AND ADDITIONAL ORDERS

Good cause appearing,

IT IS ORDERED finding in favor of Plaintiffs, and against Defendants, as to Plaintiffs' First Claim for Relief. City of Phoenix Ordinance S-42353, the Agreement, and the Lease are declared to violate the ARIZONA CONSTITUTION, Article. 9, Section 7. Consequently, the City is hereby enjoined from enforcement of this Ordinance and from performance pursuant to the Agreement and the Lease.

IT IS FURTHER ORDERED finding in favor of Defendants, and against Plaintiffs, as to Plaintiffs' Sixth Claim for Relief.

IT IS FURTHER ORDERED directing the parties to confer with each other and to lodge an appropriate form of final Judgment with the Court no later than **July 10, 2020.** The form of Judgment should incorporate all claims in the case (even if previously decided) and shall include appropriate terms pursuant to Rule 54(c), *Arizona Rules of Civil Procedure.* Any and all requests for attorneys' fees and/or taxable costs shall be filed no later than July 10, 2020. Objections to the form of Judgment and/or to a request for fees and/or costs shall be filed no later than **July 31, 2020** (irrespective of when the form of Judgment is lodged).

DATED: June 18, 2020

_____
Christopher A. Coury
Superior Court Judge