

**Scharf-Norton Center for Constitutional Litigation at the
GOLDWATER INSTITUTE**

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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA**

In re:) No. 2-09-bk-09488-RTB
)
DEWEY RANCH HOCKEY, LLC, COYOTES) Chapter 11
HOLDINGS, LLC, COYOTES HOCKEY, LLL,)
and ARENA MANAGEMENT GROUP, LLC,) (Jointly Administered)
)
Debtors.) AMICUS BRIEF OF GLENDALE
) TAXPAYERS
<u>This filing applies to all debtors.</u>)

Introduction

The Goldwater Institute represents the following City of Glendale taxpayers who oppose illegal City subsidies and concessions to new owners of the Phoenix Coyotes hockey team: Gary Livingston, Joe Cobb, Patrick McHugh, Kimberly Ruff, Adam Marsh, Susan Goyette Stevens, Tim Weaver, and Sarah Raybon. Each has a significant interest in the use of any public funds for a bidder because they will ultimately be accountable for those funds as taxpayers. The taxpayers submit this amicus brief to assist the Court in analyzing the constitutionality of agreements and negotiations associated with the sale of the team. Should the Court have any concern over the legality of a particular bid term or potential term, it may certify the question to the Arizona Supreme Court, as it has done before. *In re Krohn*, 203 Ariz. 205, 206, 52 P.3d 774, 775 (2002). Doing so is essential before approving a sale because a

1 questionable term is likely to undermine the security of any agreement that may be reached, and
2 result in further litigation and delays for the new owners.

3 **Discussion**

4 The Arizona Constitution categorically prohibits municipalities, and other governmental
5 entities, from “giv[ing] or loan[ing] its credit in the aid of, or mak[ing] any donation or grant, by
6 subsidy or otherwise, to any individual, association, or corporation.” Ariz. Const. Art. IX, § 7
7 (“Gift Clause”).¹ The “operative word” is “assist,” meaning “to give support or aid to,
8 especially in some undertaking or effort.” *City of Tempe v. Pilot Properties, Inc.*, 22 Ariz. App.
9 356, 362, 527 P.2d 515, 521 (1974) (involving assistance to facilitate the presence of spring
10 training in Tempe). In the context of the Gift Clause, “assist” “has connotations of the city
11 receiving less than the fair market value . . . thus resulting in aid or support.” *Id.*, 22 Ariz. App.
12 at 362, 527 P.2d at 521-22. For example, forgiving debts owed to government violates the Gift
13 Clause. *Puterbaugh v. Gila County*, 45 Ariz. 557, 564-66, 46 P.2d 1064, 1067 (1935). In short,
14 the Gift Clause not only prohibits direct subsidies, but also special tax districts, renegotiated
15 lease terms to reduce existing obligations, bond issues that provide financial assistance, and all
16 other forms of assistance, which boil down to indirect subsidies. This point of law is
17 particularly relevant to Glendale’s potential negotiations with the Coyotes team, which owes
18 payments to the City.

19 The Gift Clause also states that a government entity shall not “become a subscriber to, or
20 a shareholder in, any company or corporation, or become a joint owner with any person,
21 company, or corporation.” The clause “represents the reaction of public opinion to the orgies

22 ¹ Some other state constitutions make explicit exceptions for promotion of economic
23 development through grants, loans, or investments in private enterprises, *see, e.g.*, Okla. Const.
24 Art. 10, § 15(B), but ours does not.
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1 of extravagant dissipation of public funds by counties, townships, cities, and towns in aid of the
2 construction of railways, canals, and other like undertakings,” and “was designed primarily to
3 prevent the use of public funds raised by general taxation in aid of enterprises apparently
4 devoted to *quasi* public purposes, but actually engaged in private business’.” *State v.*
5 *Northwestern Mutual Ins. Co.*, 86 Ariz. 50, 53, 340 P.2d 200, 201 (1959) (citation omitted).
6 Hence the Gift Clause “was intended to prevent governmental bodies from depleting the public
7 treasury by giving advantages to special interests . . . or by engaging in non-public enterprises’.”
8 *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349, 687 P.2d 354, 357 (1984)
9 (citations omitted).

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11 A challenged subsidy must satisfy several factors, taking a “panoptic” view of the
12 transaction in question. *Id.* For example, an agreement violates the Gift Clause if it is not for a
13 public purpose or if “the value of the public money or property is not so much greater than the
14 value of the benefit received by the public that the exchange of the one for the other is
15 disproportionate.” *Maricopa County v. State*, 187 Ariz. 275, 279-80, 928 P.2d 699, 703-04
16 (App. 1996). Beyond any “surface indicia of public purpose . . . [t]he reality of the transaction
17 both in terms of purpose and consideration must be considered.” *Wistuber*, 141 Ariz. at 349,
18 687 P.2d at 357. Thus, the Gift Clause may not be circumvented by creative fund transfers; an
19 intent to provide public assistance, with that result, is categorically precluded.

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21 The private or personal interest served is relevant to determining whether a transaction
22 violates the Gift Clause. *Turken v. Gordon*, 220 Ariz. 456, ¶ 31, 207 P.3d 709, 720 (App. 2008)
23 (review pending in the Arizona Supreme Court, CV09-0042PR). A court also asks:
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26 Is money paid or property transferred to a private enterprise? What is the direct
27 object of the public payment, not just its indirect effects? Are the claimed
28 benefits merely the result of private activities, or do they directly result from the
government’s actions? Does the public expenditure purchase property that will

1 be owned or controlled by the government? Do the funds provide a public
2 service, or employ staff or agents who provide such a service? Do the payments
3 pay a private party to engage in private business?

4 *Id.* at ¶ 33, 207 P.3d at 720-21. As the court observed in *Pilot Properties*, 22 Ariz. App. at 362,
5 527 P.2d at 521, “A donation of public property to a private corporation for a purpose that is
6 deemed by the city fathers to be for the public good, in our opinion falls squarely within the
7 prohibition of our constitution and the purpose of such a provision as determined by our
8 Supreme Court.”

9 In *Turken*, the Court of Appeals rejected finding a public purpose for a city’s \$97.4
10 million sales tax rebate for a multi-use retail, dining, and residential development that would
11 produce jobs, stimulate economic development, generate sales tax revenues, reduce traffic,
12 provide free public parking, and develop an “urban core.” *Turken*, 220 Ariz. at ¶ 34, 207 P.3d
13 at 721. The court found these benefits to be only indirect and “filtered through the operation
14 and success of those private activities.” *Id.* at ¶ 45, 207 P.3d at 723. “Even if the potential
15 benefits are great, they are not sufficient to overcome the prohibition in the Gift Clause against
16 donations or subsidies to private persons.” *Id.* at ¶ 47, 207 P.33d at 724.

17 Therefore, under *Turken*, it is irrelevant that the public benefits may allegedly outweigh
18 a potential subsidy or concession to incent new Coyotes owners to keep the team in Glendale.
19 As a threshold matter, the City’s expected public benefits from the team were drastically
20 overstated by perhaps as much as 50% (*compare* annual revenue projections from the arena and
21 surrounding commercial center in the current Arena Management, Use and Lease Agreement,
22 Exhibit A, *with* actual revenues received). Thus, Glendale’s actual losses if the team relocates
23 are significantly less than the City has asserted, and the City has not subtracted from anticipated
24 losses the potential revenues and benefits of using the arena for other purposes. Regardless of
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1 these facts, the Court of Appeals has foreclosed any argument that a subsidy passes the Gift
2 Clause test as long as the City comes out ahead in public benefits. When a city structures an
3 agreement as a 50% sales tax rebate so that it *necessarily* reaps revenues greater than zero, that
4 cannot satisfy the prohibition on gifts. *See Turken*, 220 Ariz. at ¶ 50, 207 P.3d at 724-25.
5 Therefore, any subsidies or concessions necessary to keep the Coyotes team in the City's arena
6 will not satisfy the Gift Clause by virtue of any projected or actual losses the City may
7 experience if the team relocates.

9 In addition to public purpose, which would not be present if the beneficiary is a private
10 for-profit entity, a court must also find adequate consideration. Arizona courts have expressly
11 rejected the argument "that what constitutes a 'substantial consideration' is within the
12 discretionary powers of the city council" *Pilot Properties*, 22 Ariz. App. at 362, 527 P.2d at
13 521; *accord*, *Wistuber*, 141 Ariz. at 349, 687 P.2d at 357. Rather, a court will evaluate the
14 exchange and "if the consideration . . . is 'so inequitable and unreasonable that it amounts to an
15 abuse of discretion,' a gift or donation by way of a subsidy has been bestowed . . . which is
16 prohibited by the Arizona Constitution." *Pilot Properties*, 22 Ariz. App. at 363, 527 P.2d at 522
17 (citation omitted).

19 As a threshold matter, the City must engage in due diligence to measure the adequacy of
20 consideration. It must act with "particularized information" to estimate the values exchanged in
21 any agreement. *Ariz. Center for Law in the Public Interest v. Hassell*, 172 Ariz. 356, 369, 837
22 P.2d 158, 171 (App. 1991). Of course, the consideration received by the City must be real and
23 not illusory. "A promise to do something which a party is already legally obliged to do is no
24 consideration for a contract." *J.D. Halstead Lumber Co. v. Hartford Accident & Indemnity Co.*,
25 38 Ariz. 228, 235, 298 P. 925, 927 (1931); *accord*, Ariz. Op. Att'y Gen. No. I80-027, 1980 WL
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1 28003, at *3 (Feb. 29, 1980). Likewise, it cannot be adequate consideration to satisfy the Gift
2 Clause. Because a lease agreement already exists between Glendale and the Coyotes team, it is
3 important to scrutinize any new provisions to determine whether the team is not doing anything
4 it was not already required to do.
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6 The *Turken* decision by the Court of Appeals is presently on appeal to the Arizona
7 Supreme Court. Should any deal before this Court present a question of public subsidy, the
8 taxpayers request that the Court certify the question to the Arizona Supreme Court. The last
9 thing any party to this transaction—especially the taxpayers, who are responsible for picking up
10 the tab but whose interests plainly are not represented by the City—should want is to have a
11 deal approved that will be the subject of extensive litigation. The fact that the City has insisted
12 on negotiating under cover of darkness suggests that it wants an agreement rammed through this
13 Court without airing the important legal issues such an agreement may raise. A bid that is
14 legally questionable cannot be an acceptable bid.
15

16 **Conclusion**

17 Glendale taxpayers request that this Court take note of Arizona's Gift Clause and
18 consider its potential implications when deciding on an acceptable bidder, and certify the
19 question of constitutionality of any subsidy or potential subsidy—including lease amendments,
20 tax districts, bond issues, or other forms of public assistance—to the Arizona Supreme Court
21 before placing its imprimatur upon a new owner, or alternatively proceed with bids from
22 potential owners who do not raise such questions.
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1 **RESPECTFULLY SUBMITTED** on this 31st day of August, 2009 by:

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7 **CERTIFICATE OF SERVICE**

8 ORIGINAL of the foregoing E-FILED and HAND-DELIVERED this 31st day of
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