



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



***Meyer Turken, et. al, v. Phoenix Mayor Phil
Gordon and NPP City North LLC***
CV-09-0042-PR
[2008 WL 5341030](#)

PARTIES AND COUNSEL:

Petitioners: The City is represented by Tim Berg, Andy Federhar, Theresa Dwyer-Federhar, and Scott Shelley, of Fennemore Craig, and by Gary Verburg, Phoenix City Attorney. City North is represented by Lisa Hauser, Cameron Artigue, and Heather Boysel, of Gammage & Burnham.

Respondents: Clint Bolick and Carrie Ann Sitren, of the Scharf-Norton Center for Constitutional Litigation at the Goldwater Institute, filed a combined response to the two petitions for review on behalf of taxpayers and business owners Turken *et. al.*

Amicus Curiae: Valley Partnership is represented by Gary Birnbaum and Scot Claus, of Mariscal, Weeks, McIntyre & Friedlander.

FACTS:

This case concerns the constitutionality of a Parking Space Development and Use Agreement, under which the City agreed to pay City North part of the sales tax revenue generated by a 144-acre, mixed use development in the Desert Ridge master-planned community. Payment to City North under this Agreement could potentially amount to \$97.4 million in tax revenues over more than 11 years. In exchange for receipt of the tax revenues, which would support the City North construction, City North agreed to create 3,180 parking spaces, 200 of which would be dedicated for free public use as park and ride spaces. Sales tax payments to City North are authorized by A.R.S. § 9-500.11, as modified by A.R.S. § 42-6910 which took effect after this deal was finalized and which limits § 9-500.11 to metropolitan areas that exceed two million in population (Maricopa and Pinal Counties).

This litigation commenced after City North informed the City it could not develop the project as planned without financial assistance from the City. Wanting to maximize tax revenues by securing the large retail and mixed use development, the City adopted an ordinance to authorize the financial assistance. Respondents, taxpayers and business owners doing business or living in the City, filed suit to stop the City from making payments under the ordinance and Agreement, asserting, among other arguments not relevant to the petition for review, such payments would violate the Gift Clause of the Arizona Constitution, which prohibits donations or subsidies to private interests with public funds. *See* Ariz. Const., Article 9, § 7.

Ruling on cross-motions for summary judgment, the superior court granted summary judgment in favor of the City and City North. In rejecting Respondents' Gift Clause argument, the superior court determined that the Agreement served various public purposes, including: (1) the

creation, retention, and expansion of retail uses and employment in the community; (2) the stimulation of economic development; (3) the generation of substantial sales tax revenues; (4) the creation of significant, free public parking which will encourage use of public transportation; and (5) the development of an urban core, which will reduce congestion, traffic, and pollution. The court ruled that “taken individually, any of the stated benefits standing alone would likely qualify as a public purpose. Taken together, they undoubtedly do.” Because the project would produce millions of dollars in sales taxes, the court concluded that there was adequate consideration for the Agreement. Therefore, the court concluded, the Agreement satisfied the Gift Clause.

Respondents appealed. City North cross-appealed on the issue of Respondents’ standing.

The court of appeals reversed and remanded, ruling the Agreement violated the Gift Clause. The court applied a three-part test, examining (1) the Agreement’s public purpose, (2) consideration received by the City, and (3) whether private interests were served. The court determined the stated purposes of providing parking, increasing employment and tax revenue, and economic development constituted legitimate public goals; however, the only direct benefit the City would realize were the 200 parking spaces. Any public benefit from economic growth would be “filtered through” the success of private activities. Further, although the City would receive adequate consideration for payments it made as to 200 of the dedicated parking spaces, payments with respect to the remaining 2,980 spaces would far exceed what the City would receive in return. The court noted that the “public” users of those spaces would be City North’s customers and the payments would “foster or promote the purely private or personal interests” of those customers or of the development itself, which sought to attract tenants. Finally, although the Agreement was structured to prevent loss to the City, and payments were to be made after construction was completed, such payments were tantamount to the City subsidizing the project’s construction – a goal the Gift Clause is intended to prevent.

Because the court focused on who receives the funds and what they are used for, it expressly stated that it did not address tax incentives that may directly serve a public purpose. *See* A.R.S. §42-6010(D) (3), (4), (5), and (6) (2007) (defining tax incentives for redevelopment, reimbursement for public infrastructure, preserving historical buildings, and environmental cleanup). Presumably, that statute does not control this Agreement because, by its terms, the statute was not retroactive in effect.

Accordingly, the court affirmed the superior court’s judgment that the Agreement is valid with respect to the 200 park and ride spaces, reversed the judgment finding that the payments under the Agreement were valid in all other respects, and remanded to the superior court to enter judgment for Respondents. The court granted Respondent’s request for attorneys’ fees pursuant to the private attorney general doctrine.

ISSUES:

City’s Petition:

1. Does the Gift Clause of the Arizona Constitution prohibit a public expenditure that serves both public and private purposes, where the

conditions imposed on the expenditure guarantee that public purposes will be served and the expenditure is not disproportionate to the public benefits?

2. Should the court of appeal's interpretation of the Gift Clause be applied retroactively to invalidate the Agreement?"

City North's Petition:

1. Did *Wistuber* [*v. Paradise Valley Unified School Dist.*, 141 Ariz. 346, 687 P.2d 354 (1984),] establish this two-part test for determining if a donation or subsidy in violation of the Gift Clause has occurred: whether (1) it serves a public purpose and (2) there is adequate consideration?
2. May the *Wistuber* test be satisfied even though a private entity benefits?
3. Are the public benefits derived from expenditures to encourage economic development, including the generation of sales taxes, other revenue, and job growth too indirect to serve a public purpose?
4. Must courts give deference to legislative determinations of public purpose?

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