



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



DARCIE SCHIRES, et al. v. CATHY CARLAT, et al.,
No. CV-20-0027 (Mem. Dec.)

PARTIES:

Petitioners: Darcie Schires, Andrew Akers, and Gary Whitman (collectively “**Taxpayers**”).

Respondents: Mayor Cathy Carlat, the City of Peoria, and the individual Peoria City Council Members (collectively “**The City**”).

Amici curiae: (1) Arizona Tax Research Association; (2) the State of Arizona; (3) Americans for Prosperity Foundation – Arizona; and (4) Public Integrity Alliance.

FACTS: In 2010, pursuant to ARS § 9-500.11 (Version 1), the City of Peoria’s city council adopted an Economic Development Implementation Strategy (“**EDIS**”) that identified “business activities and industries desirable to the City.” The council also authorized the “creation and implementation of an economic development incentive and investment program that sets forth in detail the types of public incentives and investments that the City is authorized and willing to make . . . in furtherance of retaining existing businesses and attracting certain targeted businesses and industries identified in the EDIS as desirable to Peoria.”

The council then developed and formally adopted an Economic Development Incentive and Investment Policy (“**EDIIP**”). The EDIIP identified the targeted industries that the City of Peoria wished to attract, including industries involved in “the utilization of high technology or innovative techniques” and “higher education.” It set out minimum project qualifications for projects the City would invest in, including a minimum capital investment of \$250,000, the creation of at least ten full-time jobs with average yearly salaries of \$50,000 with benefits, and the intention to “economically reposition unused or underutilized properties.”

The City specifically was interested in attracting development to an area between Loop 101 and Bell Road that it had designated the P83 District, so the council adopted the “P83 Program” designed to “encourage a more diverse use of existing vacant buildings” in the District. Under the P83 Program, eligible property owners could apply for a matching funds grant from the City for interior tenant improvements “upon acceptable performance.” Any property owner who failed to comply with the program would forfeit the balance of the grant; any property owner who failed to remain in full operation for the term of the grant would be required to repay the City all funds received. Arrowhead Equities, LLC was one property owner that applied for a grant.

In 2012, the City began negotiating with Huntington University (“**HU**”), a fully accredited, nationally-recognized, four-year private Christian university based in Indiana, to open a satellite campus in Peoria. HU proposed to bring an undergraduate digital media arts program to the City. An economic and real estate consulting firm retained by the City produced a study that concluded

an agreement with HU would have an economic impact on the City and surrounding area of over \$15.6 million over the first 5 years of the agreement.

The city council approved entering an agreement with HU. It was finalized in July 2015 and amended in 2016. The court of appeals summarized the HU and Arrowhead agreements:

Under the HU agreement, Peoria agreed to provide financial incentives to HU over a three-year period after HU opened and operated a campus in Peoria. The agreement required HU to achieve detailed performance thresholds before receiving any payments. The performance thresholds required, among other things, obtaining approvals from various regulatory agencies, entering into a long-term lease with Arrowhead for a facility owned by Arrowhead in the P83 district, and enrolling a minimum number of students for in-person (not online) coursework in the digital media arts program. The first performance threshold (to be achieved in the first academic year) required HU to appoint campus leadership and submit to Peoria “a University approved and funded faculty and staff plan.” The agreement also required HU not to engage in any similar project with any other Arizona municipality for seven years and to participate in “economic development activities” with Peoria. The agreement required HU to contribute \$2.5 million to the development of the Peoria campus in the first three years. The maximum amount of reimbursements available to HU under the agreement if it met the performance thresholds was \$1,875,000.

The HU agreement stated that “[the] City has concluded that the Project [developing the HU Peoria campus] will benefit the public interest and promote the public welfare of the citizens in the City and that the City and its residents will receive an equitable or proportional economic return in exchange for the incentives that will be provided by the City under this Agreement”

HU then entered into a lease with Arrowhead for a facility in the P83 district. As a result, Arrowhead applied for a grant under the P83 program in 2016. Peoria approved the grant request and entered into an agreement with Arrowhead. Under the agreement, Peoria agreed to reimburse Arrowhead over several years for the tenant improvement expenses it would incur in converting its property for HU’s use. The maximum amount Peoria agreed to reimburse Arrowhead was \$737,596. HU opened its doors in Peoria in fall of 2016. The parties do not dispute that HU would not have opened a campus in Peoria if not for the HU agreement. HU “ultimately received the full amount of the funding [from Peoria] to develop and operate the HU campus.”

Memorandum Decision (“**Mem. Dec.**”) at ¶¶ 6-8.

In October 2016, Taxpayers filed their complaint against the City of Peoria (including its mayor and individual council members) seeking to enjoin payments to HU and Arrowhead. After Taxpayers filed suit, the City hired a second expert, who concluded the impact of the HU and Arrowhead agreements on zip codes within the City of Peoria was \$11.3 million. Taxpayers’ expert found that the agreements were worth zero.

The parties filed cross-motions for summary judgment. After briefing and oral argument, the superior court granted the City’s motion and denied Taxpayers’ motion.

Taxpayers appealed. The court of appeals reviewed the Taxpayers’ arguments that the HU and Arrowhead agreements violate the Gift Clause, where: (1) the expenditures the City was obligated to make do not serve a public purpose, and (2) the consideration the City will receive in exchange for its payments is grossly disproportionate.

Public purpose. The court of appeals noted that Arizona courts have taken an expansive view of public purpose within the meaning of the Gift Clause in Arizona’s Constitution and determined that it could not say the City “unquestionably abused” its discretion because “a public expenditure is not illegal just because a private entity will benefit from the expenditure,” citing *Town of Gila Bend v. Walled Lake Door Co.*, 107 Ariz. 545, 550 (1971).

Adequacy of consideration. The court of appeals majority said that when evaluating adequacy of consideration, courts give due deference to the decisions of elected officials, and challengers must prove gross disproportionality. *Cheatham v. DiCicco*, 240 Ariz. 314 (2016). It found that these agreements have a public purpose and the consideration the City received was not grossly disproportionate and therefore the agreements do not violate the Gift Clause.

Dissent. The dissenting judge believed that the superior court erred when it considered “indirect impact” to determine adequate consideration under the Gift Clause.

ISSUES (as phrased by the Court):

“1. Did the Court of Appeals err in holding that a private university’s promise to invest in its own business is adequate consideration under article IX, section 7 of the Arizona Constitution (the ‘Gift Clause’)?”

“2. Did the Court of Appeals err by holding that a commercial real estate firm’s renovation of its own property for its own private profit is adequate consideration under the Gift Clause?”

“3. Did the Court of Appeals err by concluding that economic development is a public purpose under the Gift Clause?”

DEFINITIONS:

A. The court of appeals recognized in this case that:

The Gift Clause of the Arizona Constitution provides in relevant part that “[n]either the state, nor any county, city, town, municipality, or other subdivision of the state shall ever . . . make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation” Ariz. Const. art. 9, § 7. The Gift Clause’s purpose is “to prevent governmental bodies from depleting the public treasury by giving advantages to special interests or by engaging in non-public enterprises.” *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349 (1984) (internal citations omitted).

Mem. Dec. at ¶ 12.

B. The *Wistuber* Court defined the appropriate test for avoiding a constitutional violation: the private entity must use public property or funds for a public purpose, and there must be consideration that is not so inequitable and unreasonable that the government's donation or grant of property amounts to an abuse of discretion. 141 Ariz. at 349. The burden of proof is on those who challenge the agreement to prove disproportion in consideration. *Id.* at 350. Just because the duties to be performed by the private entity might be those it would perform in any event, they still may be substantial and not so grossly disproportionate as to invoke the constitutional prohibition. *Id.*

C. ARS § 9-500.11, Version 1, is titled "Expenditures for economic development; definitions." It has four sections and applies to economic development activities of Arizona cities and towns. It provides:

A. In addition to any other powers granted to a city or town, the governing body of a city or town may appropriate and spend public monies for and in connection with economic development activities.

B. To fund economic development activities under this section, a city or town subject to the requirements of section 9-500.06 shall not impose a new fee or tax on a single specific industry or type of business.

...

D. For the purposes of this section:

1. "Economic development activities" means any project, assistance, undertaking, program or study, whether within or outside the boundaries of the city or town, including acquisition, improvement, leasing or conveyance of real or personal property or other activity, that the governing body of the city or town 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 city or town.

2. "Expenditure" includes any waiver, exemption, deduction, credit, rebate, discount, deferral or other abatement or reduction of the normal municipal tax liability that otherwise applies to similar existing business entities and properties in that city or town, however denominated, computed or applied, and that is generally understood as an inducement to locate a business facility or other operation in the city or town.

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