

Innovation Isn't Free: Arizona's Public Universities' Legal Battle over Commercial Transactions

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I. INTRODUCTION

In November 2019, the Arizona Superior Court handed another victory to the nation's "Most Innovative University,"¹ dismissing four claims on procedural grounds in a case brought by the State alleging that Arizona State University's ("ASU") recent real estate projects were illegal.² But had the court considered the merits, it should have concluded, as this Comment shows, that the disputed transactions innovatively mitigated the university's funding crisis.

Arizona's public education system ranks forty-ninth in the country.³ Since the 2008 recession, many states have experienced chronic funding cuts.⁴ When comparing all fifty states, Arizona suffered the nation's

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1. *U.S. News & World Report* has named Arizona State University ("ASU") the "Most Innovative University" for six consecutive years. Emma Greguska, *ASU Ranked No. 1 in Innovation for 6th Year by US News and World Report*, ASU NEWS (Sept. 13, 2020), <https://asunow.asu.edu/20200913-asu-news-us-news-world-report-no-1-innovation-sixth-year>; Robert Morse & Eric Brooks, *Most Innovative Schools Methodology*, U.S. NEWS & WORLD REP. (Sept. 13, 2020), <https://www.usnews.com/education/best-colleges/articles/most-innovative-schools-methodology>.

2. Minute Entry by the Honorable Christopher Whitten, *Arizona v. Ariz. Bd. of Regents* No: TX 2019-000011 (Ariz. Tax Ct. Nov. 8, 2019), www.courtminutes.maricopa.gov/viewerME.asp?fn=Tax/122019/m8961851.pdf [hereinafter Nov. Minute Entry]; see also Rachel Leingang, *Judge Rules Against Arizona Attorney General on ASU-Omni Hotel Deal*, USA TODAY (Nov. 27, 2019, 10:15 PM), <https://www.usatoday.com/story/news/local/arizona-education/2019/11/27/asu-omni-hotel-deal-judge-rules-against-arizona-attorney-general-brnovich/4323766002/>.

3. Adam McCann, *States with the Best & Worst School Systems*, WALLETHUB (July 27, 2020), <https://wallethub.com/edu/e/states-with-the-best-schools/5335> (comparing the quality and safety of each state and the District of Columbia's school systems).

4. MICHAEL MITCHELL ET AL., *CTR. ON BUDGET & POL'Y PRIORITIES, STATE HIGHER EDUCATION FUNDING CUTS HAVE PUSHED COSTS TO STUDENTS, WORSENEDED INEQUALITY passim* (Oct. 24, 2019), <https://www.cbpp.org/sites/default/files/atoms/files/10-24-19sfp.pdf>. School-

largest budget cuts to its schools, especially its universities.⁵ Consider that in 2008, state funding covered approximately seventy-five percent of tuition for Arizona residents; in 2018, however, the state covered only thirty-four percent.⁶ After the recession, Arizona degraded into the lowest per-student higher-education spender in the nation.⁷ Consequently, Arizona's public universities and their managing body, the Arizona Board of Regents ("ABOR"),⁸ have continued to search for alternative sources of revenue,⁹ including exercising ABOR's statutory authority in pursuit of funding. For instance, ABOR may "[p]urchase, receive, hold, make and take leases and long-term leases of and sell real and personal property for the benefit of this state and for the use of the institutions under its jurisdiction."¹⁰

Under this provision, ABOR has engaged in multiple commercial real estate transactions. In 2013, it leased twenty acres of land along Tempe Town Lake in Tempe, Arizona, ("Tempe") for the development of commercial office space known as Marina Heights.¹¹ The project was intended to provide funding for the renovation of ASU's Sun Devil Stadium.¹² Since breaking ground at Marina Heights, the university has completed a five-year renovation of the stadium, resulting in updated

financing difficulties have plagued most states long before the recession. See Melissa C. Carr & Susan H. Fuhrman, *The Politics of School Finance in the 1990s*, in EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 136, 146 (1999) (examining how states have tried to remedy funding issues since the early 1980s).

5. MITCHELL ET AL., *supra* note 4, at 6; see also Kathleen B. Kunz, *A Closer Look at Arizona's Funding for Higher Education*, TUCSON LOC. TIMES (July 31, 2018), https://www.tucsonlocalmedia.com/back_to_school/article_d77578f0-89f8-11e8-a856-f33110f6df79.html.

6. Kunz, *supra* note 5 (citing an Arizona Board of Regents ("ABOR") news release).

7. MITCHELL ET AL., *supra* note 4, at 4.

8. The Arizona Constitution created ABOR as a corporate body mandated to manage the state's three public universities. ARIZ. CONST. art. XI, §§ 2, 5. Arizona's Legislature has passed laws conferring powers to ABOR. See generally ARIZ. REV. STAT. ANN. § 15-1626 (2021) (providing ABOR's general powers and duties).

9. Some scholars advise that "[i]n order to overcome the inequities created by the dependence on the local property tax to finance education, states must . . . redistribute state and local funds, increase state revenues, or cap education expenditures in wealthy districts." Carr & Fuhrman, *supra* note 4, at 138. ABOR has looked beyond these traditional approaches for raising revenue.

10. ARIZ. REV. STAT. ANN. § 15-1625(B)(4).

11. Thomas Hawthorne & Dianna M. Nañez, *\$600 Million Tempe Town Lake Project Begins*, AZCENTRAL (Aug. 1, 2013, 11:14 AM), <http://archive.azcentral.com/community/tempe/articles/20130731tempe-lake-project-begins.html#protected>.

12. *Id.*

sports facilities and the new home of ASU's Pat Tillman Veterans Center, Global Sports Institute, and Public Service Academy.¹³

In 2016, ABOR authorized ASU to lease land at the corner of University Drive and Mill Avenue in Tempe for the development of a twenty-story high-rise senior living facility known as Mirabella at ASU.¹⁴ ASU envisions the project leading to an expansion of ASU programs and coursework, including research into art therapy and Alzheimer's disease.¹⁵ Most recently, ABOR and ASU planned to lease 1.6 acres of land near Mirabella at ASU for the development of a four-diamond hotel and conference center ("Omni Deal").¹⁶ ABOR believes the project will lead to a ninety-nine-million-dollar net profit for ASU that will benefit the university's mission.¹⁷

The State, however, perceived these projects (collectively "Real Estate Deals") as violations of the Arizona Constitution and filed a lawsuit against ABOR on January 10, 2019, alleging that the transactions were an unlawful tax scheme.¹⁸ The State filed an amended complaint on April 3, 2019, further claiming the Omni Deal separately violated article IX, section 7 of the Arizona Constitution ("Gift Clause"),¹⁹ which prohibits gifts from the government to private businesses.²⁰

This Comment is the first to examine the legal battle over the Real Estate Deals and the implications of the State's case for university and nonprofit funding. Part II provides an overview of ABOR's power,

13. Jeff Metcalfe, *ASU Completes Five-year Sun Devil Stadium Renovation*, AZCENTRAL (Aug. 12, 2019, 8:50 AM), <https://www.azcentral.com/story/sports/college/asu/2019/08/08/asu-completes-five-year-sun-devil-stadium-renovation/1956917001/>.

14. Mary Beth Faller, *ASU Breaks Ground on Mirabella Project*, ASU NOW (Feb. 21, 2018), <https://asunow.asu.edu/20180221-arizona-impact-asu-breaks-ground-mirabella-project>.

15. *Id.*

16. FAC Exhibits 1–9 at 250–55, *Arizona v. Ariz. Bd. of Regents*, No: TX2019-000011 (Ariz. Tax Ct. Apr. 3, 2019).

17. Press Release, Larry Penley, Statement from ABOR Chair Larry Penley on AZ Superior Court Ruling on AG Lawsuit (July 2, 2019), https://www.azregents.edu/sites/default/files/news-releases/Statement%20from%20ABOR%20Chair%20Larry%20Penley%20on%20AZ%20Superior%20Court%20Ruling%20on%20AG%20Lawsuit_July%202%202019.pdf.

18. First Amended Civ. Complaint for Declaratory, Injunctive, Special Action, & Quo Warranto Relief, *Arizona v. Ariz. Bd. of Regents*, No: TX2019-000011 (Ariz. Tax Ct. Apr. 3, 2019) [hereinafter Amended Complaint].

19. *Id.* at 2–3.

20. ARIZ. CONST. art. IX, § 7.

relevant tax statutes, and the Gift Clause. Part III offers background on the disputed transactions and the procedural history of the lawsuit. Part IV argues that ABOR lawfully executed the Real Estate Deals to supplement state funding and that other educational, religious, and charitable institutions may develop similar, innovative funding models.

II. BACKGROUND

The Arizona Constitution and other statutes enabled ABOR to create a new method of raising revenue. Understanding the development of ABOR and these laws is necessary to find the Real Estate Deals constitutional. Section A explains ABOR's broad power to manage Arizona's universities. Section B discusses the types of property exempt from taxation, such as government-owned property. Section C shows how the Arizona Supreme Court determines whether transactions violate the Gift Clause.

A. ABOR's Authority

The first territorial Legislature of Arizona established a board in 1864 to govern the University of Arizona.²¹ In 1945, the Arizona Legislature expanded the board's oversight to include the two state colleges in Tempe and Flagstaff, Arizona.²² Today, article XI of the Arizona Constitution vests in ABOR "the general conduct and supervision" of the state's three public universities: the University of Arizona, ASU, and Northern Arizona University (collectively "Universities").²³

State law also authorizes ABOR to "exercise the powers necessary for the effective governance and administration" of the Universities.²⁴ More specifically, ABOR exists to "ensur[e] access for qualified residents of Arizona to undergraduate and graduate institutions;

21. *Mission, Vision, History*, ARIZ. BD. OF REGENTS, <https://www.azregents.edu/about/mission-vision-history> (last visited Mar. 28, 2021). Unlike the framers of the U.S. Constitution, members of the first Arizona Legislature ensured that public education would be an unalienable right for all citizens by guaranteeing it in the Arizona Constitution. See Rebecca White Berch et al., *Celebrating the Centennial: A Century of Arizona Supreme Court Constitutional Interpretation*, 44 ARIZ. ST. L.J. 461, 482 (2012).

22. *Mission, Vision, History*, *supra* note 21.

23. ARIZ. CONST. art. XI, §§ 2, 5.

24. ARIZ. REV. STAT. ANN. § 15-1626 (2021).

promot[e] the discovery, application, and dissemination of new knowledge; extend[] the benefits of university activities to Arizona's citizens outside the university; and maximiz[e] the benefits derived from the state's investment in education."²⁵ As a corporation, ABOR has "complete control in the management of its affairs, including the expenditure of its funds," according to the Arizona Supreme Court, so long as the funds are "used for the purpose for which they were appropriated."²⁶

Because ABOR is the managing body of the Universities, it possesses substantial autonomy to exercise its power. Subsection 1 describes ABOR's role in raising revenue for the Universities. Subsection 2 examines ABOR's authority to conduct commercial business.

1. ABOR's Authority To Fund Arizona's Public Universities

The Legislature vests ABOR with broad power to manage the funding of the Universities.²⁷ The Arizona Constitution provides that state property taxes may fund their operation and growth.²⁸ However, in *Board of Regents v. Sullivan*,²⁹ the Arizona Supreme Court emphasized that while "the educational institutions of the state must be maintained and adequately developed and improved by taxation," state taxes may be supplemented.³⁰ Because the Court determined the Legislature must "make whatever provision is necessary for the functioning of these institutions,"³¹ ABOR may exercise its "right" to

25. *Mission, Vision, History*, *supra* note 21.

26. *State v. Miser*, 72 P.2d 408, 411 (Ariz. 1937).

27. When raising revenue, ABOR is required under article XI, section 6 of the Arizona Constitution to make tuition "as nearly free as possible." ARIZ. CONST. art. XI, § 6. In 2017, the State filed a lawsuit against ABOR, claiming that "ABOR's tuition-setting policies and practices violated the Arizona Constitution's requirement that 'the instruction furnished [at the university and all other state educational institutions] . . . be as nearly free as possible.'" *State ex rel. Brnovich v. Ariz. Bd. of Regents*, No. 1 CA-CV 18-0420, 2019 WL 3941067, at *1 (Ariz. Ct. App. 2019). The Arizona Supreme Court affirmed the lower court's decision to dismiss the case for lack of standing, bypassing whether ABOR's tuition-setting policies are constitutional. *See id.*; *State ex rel. Brnovich v. Ariz. Bd. of Regents*, 476 P.3d 307, 309, 314 (Ariz. 2020) (finding the lower court "prematurely" dismissed the claim that ABOR illegally subsidized tuition for students without legal immigration status).

28. ARIZ. CONST. art. IX, § 6.

29. 42 P.2d 619, 626 (Ariz. 1935).

30. *Id.*

31. *Id.*

find other sources of revenue provided that the Legislature consents.³² For instance, the Legislature has consented to ABOR supplementing state taxes by receiving federal funding, issuing bonds, and imposing other fees.³³ ABOR, therefore, has traditionally relied on the Legislature's grant of power and consent to raise money by different methods.

2. *ABOR's Authority To Engage in Real Estate Deals*

As a "general power,"³⁴ ABOR may "[p]urchase, receive, hold, make and take leases and long-term leases of and sell real and personal property for the benefit of this state and for the use of the institutions under its jurisdiction."³⁵ The Legislature has also passed three other statutes that expand ABOR's ability to hold, lease, and tax property. Section 15-1636 grants ABOR the power to develop university research parks.³⁶ The Legislature subsequently authorized ABOR to lease healthcare institutions under its control to nonprofit corporations under section 15-1637.³⁷ Then the Legislature in section 48-4202 authorized

32. *Id.*

33. ARIZ. REV. STAT. ANN. tit. 15, ch. 13 (2021).

34. ARIZ. REV. STAT. ANN. § 15-1625.

35. § 15-1625(B)(4).

36. ARIZ. REV. STAT. ANN. § 35-701 ("Research park" means an area of land that has been designated by [ABOR] as a research park for a university and that, at the date of designation, is owned by this state or by [ABOR]."). The Legislature enacted the statute in 1981 pursuant to ASU's effort to transform the use of land that the college used as an experiential farm since its purchase in 1956. *Our History*, ASU RES. PARK, <https://asuresearchpark.com/#Our-History> (last visited Mar. 28, 2021). Pursuant to the statute's grant of power, in 1984, ASU converted the farm into the ASU Research Park, a nonprofit research park that today holds "twenty-four different lessees in twenty-six buildings totaling 2.2 million square feet" and employs more than 6,000 Arizonans. *Id.*

37. ARIZ. REV. STAT. ANN. § 15-1637. A nonprofit corporation, exempt from paying taxes on land that it rented from ABOR for the management of a university medical center that was previously managed by ABOR, was likewise exempt from paying property tax on six parcels it acquired that were off campus. *Univ. Med. Ctr. v. Dep't of Revenue*, 36 P.3d 1217, 1219 (Ariz. Ct. App. 2001) ("None of the nonprofit's earnings could benefit or be distributed to its members, directors, officers, or any other individuals except for reimbursement of corporate expenses, payment of reasonable compensation for services of persons other than members of the board of directors, and payments in furtherance of the nonprofit's purposes."). The court of appeals emphasized that other statutes authorized the nonprofit to acquire other land to establish healthcare institutions and that it was undisputed that the land was "not used or held for profit" pursuant to article IX, section 2(2) of the Arizona Constitution. *Id.* at 1221.

ABOR to create a “tax levying public improvement district” on land owned by ABOR to fund university athletic facilities.³⁸

In the following decade, the Legislature continued to broaden ABOR’s power to raise revenue for the Universities. In 2006, the Legislature amended section 15-1682 to give ABOR the power to “[a]cquire, if authorized by the [L]egislature, any project or projects, or any combination thereof, and to *secure indirect or third-party financing* for or own, operate[,] and maintain the same and establish, own, operate[,] and maintain a system of building facilities.”³⁹ ABOR may execute this power through contracts and leases.⁴⁰ The Legislature also added section 15-1682.02, explaining that ABOR may “secure indirect or third[-]party financing” for these projects by seeking joint committee review.⁴¹

In 2007, the Legislature further amended section 15-1682.02 to address commercial developments. Under the revised section, a venture “commercial in nature” where “the majority of the project’s business is anticipated to come from the non[-]university population, [ABOR] shall report on the scope, purpose[,] and estimated cost of the project” before the agreement is executed.⁴² Moreover, the Legislature amended its definition of “indirect and third[-]party financing” to exclude projects “intended to be commercial in nature and if the majority of the project’s business is anticipated to come from the non[-]university population.”⁴³ In other words, the Legislature amended the statute to give itself more oversight of some ABOR actions. Before executing a development agreement, ABOR must now inform the Legislature of the deal’s “scope, purpose[,] and estimated cost” months in advance unless the agreement is with a commercial party and most of the funding is not from the university’s population, like students.

38. ARIZ. REV. STAT. ANN. § 48-4202 (2021).

39. ARIZ. REV. STAT. ANN. § 15-1682 (emphasis added).

40. *Id.*

41. § 15-1682.02. “Indirect and third[-]party financing” is an agreement between ABOR and “an institution, a nonprofit organization[,] or a private developer” where the third party “pays for, issues bonds for[,] or enters into lease or lease-purchase agreements for” capital projects intended to benefit the Universities. § 15-1681.

42. § 15-1682.02.

43. § 15-1681.

B. Property Subject to Taxation

Article IX, section 2 of the Arizona Constitution provides that all property is subject to taxation unless an exemption exists under the law.⁴⁴ Furthermore, any property “conveyed to evade taxation” is never exempt.⁴⁵ Under article IX, section 2(1), all government-owned property is exempt from taxation.⁴⁶ But article IX, section 2(2) exempts property owned by “educational, charitable[,] and religious associations or institutions” only if they are “not used or held for profit.”⁴⁷

Another form of property tax exemption, which has led to new developments across the state similar to the Real Estate Deals, is the government property lease excise tax (“GPLET”).⁴⁸ GPLET taxes are collected in lieu of property taxes for certain government-owned property.⁴⁹ Specifically, the Treasurer may collect taxes from land that “a city, town, county[,] or county stadium district” leases to a “prime lessee,” meaning “any person, partnership, corporation, company, limited liability company, joint venture[,] or other organization or association.”⁵⁰

44. ARIZ. CONST. art. IX, § 2(13). The Maricopa County Treasurer then collects property taxes and spends approximately seventy-five percent of the collection money to fund education. *FAQ - Regarding Your Property Tax*, MARICOPA CNTY. TREASURER’S OFF., <https://treasurer.maricopa.gov/Pages/LoadPage?page=FAQGeneral> (last visited Mar. 28, 2021). At the core of Arizona property tax law is “universality and uniformity.” Robert Clark, *The Government Lease Excise Tax: Challenging the Excise-Property Tax Distinction*, 29 ARIZ. ST. L.J. 871, 872 (1997).

45. ARIZ. CONST. art. IX, § 2(12).

46. ARIZ. CONST. art. IX, § 2(1).

47. ARIZ. CONST. art. IX, § 2(2). Many states exempt public university land from taxation because it supposedly provides “public benefit.” Note, *Alternatives to the University Property Tax Exemption*, 83 YALE L.J. 181, 182 (1973).

48. ARIZ. REV. STAT. ANN. § 42-6202 (2021).

49. *Id.*

50. *Id.* See generally Christopher Koester, *Redefining Blight in Arizona’s Government Property Lease Excise Tax (GPLET) Abatement*, 50 ARIZ. ST. L.J. 1319, 1319 (2018) (“The GPLET—controversial in both pronunciation and practice—has played a major role in financing some of Arizona’s most prominent commercial developments, including Phoenix’s CityScape and Renaissance Square and the Hayden Ferry Lakeside office complex in Tempe. The Arizona Legislature enacted the GPLET . . . primarily as an economic development tool. The GPLET incentivizes development by reducing developers’ tax burdens by removing incentivized projects from the property tax rolls. Instead, developers pay an excise tax to the local government based on the type of project, and eligible projects in central business districts can be completely exempt from the excise tax for eight years.”).

C. Arizona's Gift Clause

The Gift Clause imposes restrictions on public spending, providing that “[n]either the state, nor any . . . other subdivision of the state shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual . . . [or] corporation.”⁵¹ Framers of the Arizona Constitution drafted the Gift Clause nearly verbatim from Montana’s Gift Clause⁵² as an outcome of “orgies of extravagant dissipation of public funds” for the development of projects like canals.⁵³ Arizona courts have determined that public spending is proper when (1) a public purpose exists, and (2) “in return for its expenditure, the governmental entity receives consideration that ‘is not so inequitable and unreasonable that it amounts to an abuse of discretion, thus providing a subsidy to the private entity.’”⁵⁴

This test was first established in *Wistuber v. Paradise Valley Unified School District*.⁵⁵ Even though the Gift Clause does not include a public

51. ARIZ. CONST. art. IX, § 7.

52. See generally Clint Bolick, *Vindicating the Arizona Constitution's Promise of Freedom*, 44 ARIZ. ST. L.J. 505, 510 (2012) (examining the Arizona Supreme Court’s approach to interpreting the Gift Clause).

53. *Thaanum v. Bynum Irr. Dist.*, 232 P. 528, 530 (Mont. 1925). When considering whether a violation of their Gift Clause has occurred, Montana courts only analyze whether a public purpose exists. *Id.*

54. *Turken v. Gordon*, 224 P.3d 158, 161 (Ariz. 2010) (en banc) (quoting *Wistuber v. Paradise Valley Unified Sch. Dist.*, 687 P.2d 354, 357 (Ariz. 1984) (in banc)); Bolick, *supra* note 52, at 510 (discussing the “landmark” decision that “demand[ed] direct consideration by private entities in return for public payments”).

55. 687 P.2d at 357. The Arizona Supreme Court granted review of *Wistuber* after the court of appeals inconsistently held that public spending only needs a public purpose to satisfy the Gift Clause in *Heiner v. City of Mesa* but later decided that public spending is unconstitutional unless a public purpose exists and “the consideration received” is equitable and reasonable in *City of Tempe v. Pilot Properties*. *Heiner v. City of Mesa*, 515 P.2d 355, 361 (Ariz. Ct. App. 1973); *City of Tempe v. Pilot Properties, Inc.*, 527 P.2d 515, 522 (Ariz. Ct. App. 1974) (holding that if consideration “‘is so inequitable and unreasonable that it amounts to an abuse of discretion,’” then it constitutes a “gift or donation by way of a subsidy”). The Arizona Supreme Court later criticized the *Heiner* approach. *Turken*, 224 P.3d at 163 (“[R]eliance on public purpose alone left open the possibility that government payments made under a contract, even if for a public purpose, might so greatly exceed the consideration received in return as to amount to a subsidy to a private entity.”). The Court noted that the Constitution’s tax clause already mandates that tax revenues only be used for a public purpose, rendering the Gift Clause under the *Heiner* approach redundant. *Id.*

purpose provision, in *Wistuber*, the Arizona Supreme Court interpreted constitutional public spending to require a public purpose.⁵⁶

The Court emphasized the Gift Clause “was intended to prevent governmental bodies from depleting the public treasury by giving advantages to special interests.”⁵⁷ In furtherance of this principle, the Court concluded “the Constitution may still be violated if the value to be received by the public is far exceeded by the consideration being paid by the public.”⁵⁸ This decision, therefore, required courts to assess the public purpose and consideration of public spending under the Gift Clause. Two years later, in *Kromko v. Arizona Board of Regents*,⁵⁹ the Court examined whether ABOR improperly leased a hospital and its underlying land to a nonprofit organization.⁶⁰ In deciding that ABOR did not unconstitutionally give or donate land, the Court held government entities may not spend funds “to foster or promote the *purely private or personal interests of any individual*.”⁶¹ The Arizona Court of Appeals subsequently interpreted this statement in *Turken v. Gordon*⁶² to impose a third-prong on the *Wistuber* test.⁶³

In *Turken*, a developer contacted the City of Phoenix (“City”) when it concluded that it needed financial assistance to complete the construction of CityNorth, a mixed-use space in Phoenix, Arizona.⁶⁴ A proposed agreement required the City to pay a sum in return for the developer to provide parking garage spaces available for public use.⁶⁵ The City determined the project would increase tax revenue.⁶⁶ In fact, the City and an independent consultant made findings that the anticipated tax revenue would exceed the amount of its anticipated payment for parking garage spaces.⁶⁷ Moreover, if the City refused to offer financial assistance, the project may never be finished.⁶⁸

56. *Wistuber*, 687 P.2d at 357.

57. *Id.*

58. *Id.*

59. 718 P.2d 478 (Ariz. 1986) (in banc).

60. *Id.*

61. *Id.* at 480 (quoting *Town of Gila Bend v. Walled Lake Door Co.*, 490 P.2d 551 (Ariz. 1971) (in banc)).

62. 224 P.3d 158, 164 (Ariz. 2010) (en banc).

63. *Id.*

64. *Id.* at 160.

65. *Id.* at 161.

66. *Id.* at 160.

67. *Id.* at 160–61.

68. *See id.*

Following these findings, the City agreed to make payments totaling up to 97.4 million dollars to the developer in exchange for the developer “set[ting] aside, for [forty-five] years, 2,980 parking garage spaces for the non-exclusive use of the general public and 200 spaces for the exclusive use of drivers participating in commuting programs.”⁶⁹ The agreement further required the developer to construct “at least 1.02 million square feet of retail space.”⁷⁰ In response, Arizona taxpayers filed a lawsuit against the City, claiming the agreement violated the Gift Clause.⁷¹

The Arizona Supreme Court ultimately clarified in *Turken* the proper approach to interpreting Gift Clause violations.⁷² The Court determined the court of appeals improperly read *Kromko* as adding a third-prong to the *Wistuber* test.⁷³ Therefore, the Court rejected the “‘primary/incidental benefit’ Gift Clause test, forbidding transactions in which the private entity is the primary beneficiary.”⁷⁴ Imposing the current test, the Court provided that no violation occurs if public spending (1) has a public purpose, and (2) “in return for its expenditure, the governmental entity receives consideration that ‘is not so inequitable and unreasonable that it amounts to an abuse of discretion, thus providing a subsidy to the private entity.’”⁷⁵ The Court interpreted public purpose broadly, holding that it will only find a violation when “the governmental body’s discretion has been ‘unquestionably abused.’”⁷⁶ Because the City received “indirect” benefits, the Court in *Turken* determined the agreement between the City and the developer sufficiently met the public purpose requirement.⁷⁷

Regarding the “consideration” requirement, the Court found “the most objective and reliable way to determine whether the private party

69. *Id.* at 161.

70. *Id.*

71. *Id.*

72. *Id.* at 161, 168.

73. *Id.* at 164 (clarifying that the court of appeals misread *Kromko* as requiring courts to identify the *Wistuber* factors and examine whether spending “unduly promot[es] private interests”).

74. *Id.*

75. *Id.* at 161 (quoting *Wistuber v. Paradise Valley Unified Sch. Dist.*, 687 P.2d 354, 357 (Ariz. 1984) (in banc)).

76. *Id.* at 165 (quoting *City of Glendale v. White*, 194 P.2d 435, 441 (Ariz. 1948)).

77. *Id.* (holding that the transaction would increase tax revenue and offer employment opportunities).

has received a forbidden subsidy is to compare the public expenditure to what the government receives under the contract.”⁷⁸ Thus, courts must compare “the objective fair market value of what the private party has promised to provide in return for the public entity’s payment.”⁷⁹ If the public benefit is “grossly disproportionate” to the public spending, then the transaction is unconstitutional.⁸⁰ Furthermore, courts may not consider “indirect benefits” to the public as part of this balance.⁸¹

When the Court evaluated whether the City’s payment to the developer outweighed the expected public benefit, it determined the agreement failed to satisfy the consideration requirement.⁸² First, it deemed irrelevant the “indirect benefits” that were noted in the public purpose analysis.⁸³ Second, emphasizing that the payment by the City was based on anticipated tax revenue, the Court pointed out that any taxes raised from the project were products of law, not the contract,⁸⁴ which meant the only benefit was the use of parking garage spaces.⁸⁵ The Court noted the City only had exclusive use of 200 spaces, and CityNorth customers could occupy the other 2,980 spaces.⁸⁶ Given these facts, the Court found it “quite likely” the transaction violated the Gift Clause.⁸⁷

78. *Id.* at 164.

79. *Id.* at 166.

80. *Id.* at 164–165.

81. *Id.* at 166; see Marianne M. Jennings, *From the Courts*, 39 REAL EST. L.J. 82, 85 (2010) (“The court’s focus on what the city received for its payments is critical because the nature of the transaction necessarily excludes competition.”).

82. *Turken*, 224 P.3d at 166.

83. *Id.*

84. *Id.*

85. *Id.* The Court also provided an analysis that concluded the deal may satisfy statutory law but not necessarily satisfy constitutional law because “statutory compliance does not automatically establish constitutional compliance.” *Id.* at 167–68.

86. *Id.*

87. *Id.* at 160. Although the superior court had improperly evaluated whether the \$97.4 million payment was fair market value for the parking garage spaces and other indirect benefits, the Court, noting that it is not a trier of fact, did not make the final determination that the agreement violated the Gift Clause. *Id.* at 160, 168 (“Although we conclude that the agreement quite likely violates the Gift Clause, because language in our previous opinions could well have led the City to conclude that the agreement was constitutional, we today clarify our Gift Clause jurisprudence and apply our decision prospectively only.”); see Jennings, *supra* note 81, at 84 (criticizing the decision and outlining its implications).

III. HISTORY OF ABOR'S REAL ESTATE DEALS AND THE LAWSUIT

After the recession hit and state funding plummeted, ABOR relied on its statutory power to make commercial deals to raise revenue for the Universities. But this new path forward led to a publicized legal battle over the constitutionality of the transactions. Section A discusses ABOR's first deal, Marina Heights. Section B reviews the terms of ABOR's second deal, Mirabella at ASU. Section C provides information about the third deal, the Omni Deal. Section D gives the case history of the State's lawsuit against ABOR for making these transactions.

A. Marina Heights

In 2013, ABOR announced plans to lease 19.85 acres of land for construction of two-million square feet of mixed-use space.⁸⁸ The transaction constituted the "first major step in the campaign to fund new and renovated sports facilities" for ASU.⁸⁹ Given that university property is tax-exempt under the agreement, ABOR would lease the land to a third party for commercial use for ninety-nine years in exchange for a fee "up to the amount that could be charged for property taxes."⁹⁰ In other words, the contract provided lessees would be exempt from paying property taxes. Furthermore, if the agreement was found unlawful, at the lessees' demand the City could take title of the land and decide to impose a GPLET.⁹¹

Construction of Marina Heights finished in 2017.⁹² Reflecting on the deal, the Tempe mayor praised the project for benefiting Arizona's economy and workforce.⁹³ Members of the ASU community also

88. Skip Derra, *New State Farm Office Facility at ASU*, ASU Now (May 24, 2013), <https://asunow.asu.edu/content/new-state-farm-office-facility-asu>. The plan aimed to develop office, retail, research, and residential space.

89. *Id.* The leased property is adjacent to Sun Devil Stadium along Tempe Town Lake. *Id.*
90. *Id.*

91. Amended Complaint, *supra* note 18, at 10.

92. Derra, *supra* note 88. The completed project included five office buildings. *Id.*

93. *Iconic Marina Heights Completes Construction of Final Building for State Farm*, COM. EXECUTIVE MAG. (Apr. 5, 2017), <https://cem-az.com/iconic-marina-heights-completes-construction-of-final-building-for-state-farm/>. The project allowed for employment of thousands of Arizona residents. *Id.*

credited the project for helping fund the completion of ASU's 307 million dollar renovation of Sun Devil Stadium, considering that "it was unlikely ASU could have gotten state funds to build or improve a stadium" during the recession.⁹⁴ The Arizona Tax Research Association, a Phoenix-based tax watchdog, however, condemned the project, asserting the deal protects private parties from paying 12.1 million dollars in property taxes.⁹⁵

B. Mirabella at ASU

In 2016, ABOR approved leasing 1.9 acres of land for ninety-nine years to the ASU Foundation⁹⁶ for the development of a senior retirement community on the southeast corner of Mill Avenue and University Drive in Tempe.⁹⁷ The project is a joint venture between the ASU Foundation and Pacific Retirement Services ("PRS")⁹⁸ to create a "Lifelong Learning Center" for senior citizens that will provide an "onsite continuum of care, including home services, assisted living, skilled nursing and rehabilitation, and memory care."⁹⁹ ASU claims the project will benefit the university in numerous ways by connecting residents with students, faculty, and alumni to foster research and learning opportunities.¹⁰⁰ Moreover, the facility includes a lecture hall and multi-purpose space, which ASU can use.¹⁰¹

94. Catherine Reagor & Rachel Leingang, *New ASU Developments Will Fund Sun Devil Stadium, Other Athletic Facilities*, AZCENTRAL (Sept. 30 2018, 6:00 AM), <https://www.azcentral.com/story/news/local/tempe/2018/09/30/new-arizona-state-university-novus-corridor-fund-sun-devil-stadium-other-athletic-facilities/1352937002/> (quoting ASU's Chief Financial Officer Morgan Olsen about how Marina Heights was "an avenue for self-help" for funding the renovation of ASU's Sun Devil Stadium); see also Metcalfe, *supra* note 13.

95. SEAN MCCARTHY, ARIZ. TAX RES. ASS'N, ABOR TAX FREE ZONES 5 (2017), http://www.arizonatax.org/sites/default/files/publications/special_reports/file/special_report_abor_tax_free_zones.pdf.

96. The ASU Foundation is a nonprofit organization that raises money for ASU. *About Us*, ASU FOUNDATION, <https://www.asufoundation.org/aboutus.html> (last visited Mar. 28, 2021).

97. FAC Exhibits 1–9, *supra* note 16, at 16.

98. *Exceptional Communities Exceptional Locations*, PRS, <https://www.retirement.org/> (last visited Mar. 28, 2021). PRS is an Oregon-based nonprofit organization that develops and manages retirement communities in six states. *Id.*

99. FAC Exhibits 1–9, *supra* note 16, at 16.

100. *Id.* at 39–42.

101. *Id.* at 17; see Marshall Terrill, *First Residents Move into Mirabella*, ASU NEWS (Dec. 31, 2020), <https://herbergerinstitute.asu.edu/news/first-residents-move-mirabella>.

Under the agreement, ASU would receive an up-front lease payment from the ASU Foundation for seven million dollars.¹⁰² Additionally, the ASU Foundation would make semi-annual payments to ASU in the amount that would be equal to property tax dependent on the facility's occupancy.¹⁰³ ASU estimated payments of 500,000 to 600,000 dollars at full occupancy.¹⁰⁴ The estimated cost of the facility was 270 million dollars.¹⁰⁵ Construction of Mirabella at ASU began in 2018, and its first residents moved into the new structure in December 2020.¹⁰⁶ Despite its cost to residents,¹⁰⁷ the complex sold all 304 units by January 2018.¹⁰⁸

C. Omni Deal

ASU has envisioned developing a conference center and hotel near its Tempe campus for years.¹⁰⁹ In fact, ASU presented to ABOR its plans for the development of a hotel and conference center on the southeast corner of Mill Avenue and University Drive during ABOR's June 8–10, 2016, meeting.¹¹⁰ ASU and the City of Tempe then executed a term sheet with the Omni Hotels Corporation/Omni Tempe, LLC ("Omni") on November 10, 2016.¹¹¹ The same week, ASU presented information

102. INDUS. DEVELOP. AUTH. OF THE CITY OF TEMPE, ARIZ., SUPPLEMENT DATED DECEMBER 18, 2017 TO PRELIMINARY OFFICIAL STATEMENT DATED DECEMBER 3, 2017 2, 8 (Dec. 18, 2017), <https://www.munios.com/munios-archive.ashx?e=2BSKR> [SUPPLEMENT TO MIRABELLA AT ASU PROJECT] (relating to Mirabella at ASU Project).

103. *Id.* at 8.

104. FAC Exhibits 1–9, *supra* note 16, at 20.

105. Amended Complaint, *supra* note 18, at 12.

106. Faller, *supra* note 14; Terrill, *supra* note 101.

107. Residents pay \$378,500 for a one-bedroom unit and a monthly fee that starts at \$4,195. SUPPLEMENT TO MIRABELLA AT ASU PROJECT, *supra* note 102, at 35, 210.

108. Lindsay McKenzie, *Retirees To Embrace Campus Life*, INSIDE HIGHER ED (Jan. 9, 2019), <https://www.insidehighered.com/news/2019/01/09/high-demand-retirees-live-campus-arizona-state-university>.

109. Mike Sunnucks, *ASU Still Wants To Bring Hotel, Conference Center to Failed USA Place Site*, PHX. BUS. J. (June 23, 2015, 10:22 AM), <https://www.bizjournals.com/phoenix/news/2015/06/23/asu-still-wants-to-bring-hotel-conference-center.html>.

110. *Minutes of a Meeting June 8–10*, ARIZ. BD. DIRECTORS 1, 8, <https://public.azregents.edu/Board/2016-06-Approved-Board-Meeting-Minutes.pdf> (last visited Mar. 28, 2021). ASU also announced its intent to build a senior housing facility (now Mirabella at ASU) during this meeting. *Id.*

111. Statement of Material Facts in Support of Motion for Summary Judgment on Count IV of FAC at 3–4, *Arizona v. Ariz. Bd. of Regents*, No: TX2019-000011 (Ariz. Tax Ct. Sept. 16, 2019) [hereinafter Facts for MSJ on Count IV].

about the Omni Deal to ABOR's Business and Finance Committee.¹¹² At ABOR's regular meeting the following day, ASU requested approval to move forward with the development plan.¹¹³

After considering ASU's request and its accompanying executive summary of terms, ABOR authorized ASU to execute a ground lease for the planned development.¹¹⁴ ASU, the City of Tempe, and Omni executed a term sheet on March 14, 2017, replacing the November 10, 2016, terms.¹¹⁵ The non-binding agreement included the following material terms:¹¹⁶

1. ASU will lease to Omni 1.6 acres of land on the southeast corner of Mill Avenue and University Drive for sixty years;
2. Omni will develop and operate a "first-class hotel" with a minimum of 330 rooms, featuring "a conference center facility with at least 30,000 square feet";
3. Omni will pay "prepaid rent" for the sixty-year ground lease "equal to \$85 per square foot . . . representing the fair market value," approximately \$5.9 million;¹¹⁷
4. "Omni will pay to ASU on a semi-annual basis an in lieu payment in the form of additional rent . . . for the initial year shall equal \$1,090,000 and such amount shall increase by 2–5% . . . for the payments in the 2nd through 11th year of the

112. *Minutes of the Business and Finance Committee*, ARIZ. BD. OF REGENTS (Nov. 16, 2016), <https://public.azregents.edu/Finance%20Capital%20and%20Resources/2016-11-16-Approved-Business-and-Finance-Committe-Minutes.pdf>.

113. Facts for MSJ on Count IV, *supra* note 111, at 6.

114. *Id.* at 5–7.

115. *Id.* at 6–8.

116. FAC Exhibits 1–9, *supra* note 16, at 250–55. The March 2017 Term Sheet also provided that ASU and the City of Tempe would receive other benefits, including rights to use the conference center for "a number of days," and rights for marketing and naming. *Id.* at 253–54.

117. Motion To Dismiss No. 5 (Count IV Fails To State a Claim upon Which Relief Can Be Granted and Fails To Join a Necessary Party), *Arizona v. Ariz. Bd. of Regents*, No: TX2019-000011, at 8 (Ariz. Tax Ct. Apr. 23, 2019) [hereinafter Motion To Dismiss No. 5]. The State argued that \$85 per square foot is not fair market value, pointing out that "parcels for hotels less than [two] blocks away [from the planned Omni Hotel & Convention Center] were sold for \$216 and \$212/sf within three months of when ASU and Omni executed the option." Amended Complaint, *supra* note 18, at 17.

term and by 9% for each 5 year period thereafter until the end of the term”;¹¹⁸

5. “ASU and [the City of] Tempe have agreed in concept to provide total economic incentives in an amount not-to-exceed the [net-present-value] of \$49M (the ‘Economic Incentives’), which represent incentives approximately equal to the NPV of \$28M from ASU¹¹⁹ and the NPV of \$21M from Tempe.”

In December 2017, ABOR disclosed terms of the agreement to the Legislature.¹²⁰ On January 11, 2018, the Tempe City Council authorized the Tempe mayor to execute an agreement with Omni, which approved the development of the hotel and conference center.¹²¹ An independent third-party law firm analyzed “whether the [Omni Deal] . . . is likely to generate more benefit for the City of Tempe than the amount of incentive provided to [Omni]” and determined the Omni Deal “will directly raise more revenue and generate other fiscal and economic benefits than the amount of the incentive within the duration of the agreement.”¹²²

118. “ASU will collect a minimum of \$118 million in additional rent payments over the course of [sixty] years.” Motion To Dismiss No. 5, *supra* note 117, at 8 (citing FAC Exhibits 1–9, *supra* note 16, at 180–81).

119. This amount included the cost for the construction of the conference center, which should not exceed \$19.5 million, in addition to the indirect benefit to Omni for the use of 275 parking spaces of a parking structure that ABOR will develop, which is estimated to cost \$30 million. FAC Exhibits 1–9, *supra* note 16, at 17–18, 33; Amended Complaint, *supra* note 18, at 22.

120. Facts for MSJ on Count IV, *supra* note 111, at 10–13.

121. *Id.* at 16. The development agreement emphasized that “[i]n addition to the creation and retention of jobs within Tempe, construction of the [i]mprovements will foster increased tourism within Tempe, all of which will redound to the economic benefit of the residents of Tempe.” FAC Exhibits 1–9, *supra* note 16, at 258.

122. Memorandum from Aaron N. Gruen, Principal, Gruen Gruen + Associates LLC to Alex Smith, Real Estate Development Manager, City of Tempe (Oct. 26, 2017), <https://www.tempe.gov/home/showdocument?id=60837>. In performing its analysis, the firm relied on terms of the agreement and concluded that “the incentives estimated to be provided to Omni are estimated to total \$52.3 million on a nominal (non–discounted to present value) basis over the first [thirty] years following substantial completion of the Omni Hotel and Conference Center of the [sixty] [-] year term.” *Id.* Conversely, the “benefits estimated to accrue directly to the City of Tempe over a [sixty][–]year period . . . are estimated to total \$188.6 million on a cumulative undiscounted basis.” *Id.*

ASU and Omni executed an Option to Lease on February 28, 2018.¹²³ When executed, the Ground Lease will serve as the effective, binding date for the Omni Deal.¹²⁴ The unsigned Ground Lease specified the following material terms:¹²⁵

1. ABOR will retain title to the land, which shall remain exempt from property taxes during the term period;
2. ASU will have access to use the conference center for seven days each year at no cost.

Critics have called the pending deal hurtful to taxpayers and an unwise government project.¹²⁶ However, both the Tempe Chamber of Commerce and the Tempe Tourism Office, which anticipate growth in tourism and visitor spending as outcomes of the deal, support the transaction.¹²⁷

D. Case History

On January 10, 2019, the State filed a complaint in Arizona Superior Court in the Arizona Tax Court against ABOR and subsequently amended the complaint on April 3, 2019.¹²⁸ The amended complaint alleged four counts.¹²⁹ In Counts I, II, and III, the State argued the Real Estate Deals illegally conferred tax-exempt status to commercial businesses, meaning the deals were not for “use of the institutions.”¹³⁰ The State specifically claimed in Count IV that the Omni Deal was an

123. Facts for MSJ on Count IV, *supra* note 111, at 25–26.

124. *Id.* at 26.

125. FAC Exhibits 1–9, *supra* note 16, at 100.

126. Facts for MSJ on Count IV, *supra* note 111, at 19; Jerod MacDonald-Evoy, *Tempe Approves \$21 Million Tax Break for Hotel and Conference Center*, AZCENTRAL (Jan. 11, 2018, 8:42 PM), <https://www.azcentral.com/story/news/local/tempe/2018/01/11/tempe-tax-break-hotel-and-conference-center-too-steep/1020421001/>.

127. Facts for MSJ on Count IV, *supra* note 111, at 19; MacDonald-Evoy, *supra* note 126.

128. Amended Complaint, *supra* note 18, at 31. The Amended Complaint alleged that the Omni Deal violated the Gift Clause. *Id.*

129. *See id.* at 26–34; Rachel Leingang, *Attorney General Sues Universities over Massive ASU Real Estate Deals*, AZCENTRAL (Jan. 10, 2019, 5:25 PM), <https://www.azcentral.com/story/news/local/arizona-education/2019/01/10/arizona-attorney-general-mark-brnovich-sues-over-asu-real-estate-deals/2537804002/>.

130. Amended Complaint, *supra* note 18, at 31.

illegal gift under the Gift Clause.¹³¹ ABOR responded by filing five motions to dismiss.¹³²

The tax court dismissed Counts I, II, and III, holding that the State lacked standing to sue.¹³³ The court also briefly reasoned the property leased in the Real Estate Deals is constitutionally exempt from taxation, finding that because ABOR is an administrative agency, all land owned by it is exempt as government property under article IX, section 2(1) of the Arizona Constitution.¹³⁴ Both parties then filed cross-motions for summary judgment on Count IV, and the court held oral argument.¹³⁵ Granting ABOR's motion for summary judgment, the court determined the State had notice of the alleged Gift Clause violation more than one year before filing the amended complaint and therefore the statute of limitations had expired.¹³⁶ With this decision, the tax court effectively dismissed all claims on non-meritorious grounds, leaving uncertain whether the projects lawfully raise revenue.

IV. MAKING THE CASE FOR CONSTITUTIONALITY

The cost and length of the contracts for ABOR's Real Estate Deals advanced a novel and innovative fundraising method for a public state university. But commercial transactions between universities and businesses are common throughout the country, given the broad tax

131. *Id.* at 33.

132. The tax court granted ABOR's motion to dismiss Counts I, II, and III, finding that the State lacked authority to sue because the application for *quo warranto* failed. Minute Entry by the Honorable Christopher Whitten, Arizona v. Ariz. Bd. of Regents, No. TX 2019-000011 (Ariz. Tax. Ct. 2019), www.courtminutes.maricopa.gov/viewerME.asp?fn=Tax/072019/m8786260.pdf [hereinafter June Minute Entry].

133. *Id.* The tax court also concluded because ABOR is an administrative agency of the government, the land is exempt from taxation so long as ABOR holds title, regardless if the property is leased to a third-party commercial business. *Id.* Furthermore, the tax court acknowledged that ABOR's "use" of the land, pursuant to section 15-1625(B)(4) of the Arizona Revised Statutes, is sufficient if the proceeds of a lease are given to the Universities. *Id.*

134. *Id.* at 4.

135. At issue was whether the State timely filed the Amended Complaint alleging Count IV before the one-year statute of limitations expired. Nov. Minute Entry, *supra* note 2, at 1.

136. *Id.* at 3. The tax court noted that under section 12-821 of the Arizona Revised Statutes, "the applicable statute of limitations for bringing a Gift Clause claim is one year from the date the cause of action accrues." *Id.*

exemptions universities enjoy.¹³⁷ By leasing its land to commercial businesses for payments in lieu of property taxes, ABOR merely tapped into a channel of revenue that other universities had already embraced.¹³⁸ Thus, even though the tax court dismissed Counts I, II, and III for lack of standing, Section A shows the court had the power to decide the case and properly concluded that ABOR, as a government entity, is constitutionally and statutorily authorized to lease tax-exempt land under article IX, section 2(1) of the Arizona Constitution. Section B evaluates the Omni Deal under the *Turken* test and posits that it is constitutional. Although the tax court properly decided in favor of ABOR, its decision also creates significant policy concerns for other educational, religious, and charitable institutions (collectively “nonprofit organizations”) because it remains unclear whether transactions by these groups are considered “for profit” under article IX, section 2(2). Section C, therefore, discusses the negative implications of the tax court’s decision and suggests the law permits nonprofit organizations to execute similar deals.

A. The Tax Court Properly Concluded Arizona Law Empowered ABOR To Execute the Real Estate Deals

Although the tax court dismissed the tax-related counts on procedural grounds, it correctly pointed out that ABOR may lease tax-exempt property.¹³⁹ Subsection 1 claims this case and potential future disputes over tax-exempt land leased to third parties pose justiciable questions for Arizona courts. Subsection 2 argues ABOR has statutory authority to execute the Real Estate Deals.

137. Wally Hilke & Amit Jain, *Public Interests, Private Institutions? Public Policy Challenges to Tax-Free Universities*, 127 YALE L.J. F. 94, 95 (2017) (challenging broad tax exemptions for private universities). For a compilation of state laws exempting from taxes real property used for “educational purposes,” see Evelyn Brody, *All Charities Are Property-Tax Exempt, but Some Charities Are More Exempt than Others*, 44 NEW ENG. L. REV. 621 *passim* (2010); see also Thomas A. Kelley & Christopher B. McLaughlin, *North Carolina’s Nonprofit Property Tax Exemption Conundrum*, 96 N.C. L. REV. 1769, 1780 (2018) for information on the controversies over university tax exemptions in New Jersey, Illinois, and Rhode Island.

138. See generally Hilke & Jain, *supra* note 137, at 95.

139. June Minute Entry, *supra* note 132, at 3.

1. Power To Decide

The tax court set proper precedent that the political question doctrine does not apply to these facts. According to ABOR, whether the Real Estate Deals illegally confer tax exemptions to private entities is a nonjusticiable, political question that the court cannot decide because no “judicially discoverable and manageable standard” exists under which the court can resolve the issue.¹⁴⁰ ABOR claimed the State asked the court to decide whether the Real Estate Deals “are of the right type of use,” under section 15-1625(B)(4).¹⁴¹ But the State intended for the court to conclude any use “for the purpose of establishing a commercial, for-profit enterprise” constituted a “for profit” use, which is expressly subject to taxation under article IX, section 2(2).¹⁴² Therefore, while ABOR may have properly argued the State failed to give a standard for how the court could decide whether the use was proper under section 15-1625(B)(4), the court did have authority to determine whether the Real Estate Deals came under the provision of article IX, section 2(2).

In a similar case, the Ohio Supreme Court found this issue justiciable. For instance, section 3345.17 of the Ohio Revised Code expressly exempts from taxation state university property that is “held for the use and benefit of any such institution.”¹⁴³ The Ohio Supreme Court determined under this law university land could be leased to a for-

140. Motion To Dismiss No. 4 (Counts II & III Present Non-Justiciable Political Questions), *Arizona v. Ariz. Bd. of Regents*, No: TX2019-000011 (Ariz. Tax Ct. Mar. 8, 2019) [hereinafter Motion To Dismiss No. 4]. Under the political question doctrine, Arizona courts will not resolve a question “where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.’” *Kromko v. Ariz. Bd. of Regents*, 165 P.3d 168, 170 (Ariz. 2007) (en banc); see also Christopher L. Hering, *Playing a Leading Role: How Recent Cases Are Thrusting the Arizona Courts into the State’s Budget Drama*, 52 ARIZ. L. REV. 173, 188 (2010). In *Kromko*, the Arizona Supreme Court determined that the “nearly free as possible” mandate under the Arizona Constitution is nonjusticiable. *Id.* In fact, many scholars conclude that school financing involves political questions that are best resolved by state legislatures. E.g., Bess J. DuRant, *The Political Question Doctrine: A Doctrine for Long-Term Change in Our Public Schools*, 59 S.C. L. REV. 531, 544 (2008); Joshua Seth Lichtenstein, *Abbott v. Burke: Reaffirming New Jersey’s Constitutional Commitment to Equal Educational Opportunity*, 20 HOFSTRA L. REV. 429, 449 (1991).

141. Motion To Dismiss No. 4, *supra* note 140, at 7.

142. Amended Complaint, *supra* note 18, at 28.

143. OHIO REV. CODE ANN. § 3345.17 (West 2021).

profit corporation and remain exempt from taxation.¹⁴⁴ This case emphasizes that the tax court rightfully decided Arizona courts have judicial power to review the legality of transactions like the Real Estate Deals.

2. *Legal Deals*

Exercising its power to decide the case, the tax court properly determined any land owned by ABOR is exempt from taxation under article IX, section 2(1). The State asserted the Real Estate Deals unlawfully confer tax-exempt status to property leased to third parties under article IX, section 2(2). State agencies, however, operate as government bodies.¹⁴⁵ ABOR, as a statutorily created agency with duties to govern and manage the Universities, therefore, acts as part of the state government. Consequently, any land owned by ABOR is state property and falls under article IX, section 2(1).

Because the Real Estate Deals are transactions governed by article IX, section 2(1), they are lawful. Article IX, section 2(1) expressly exempts “all” state property from taxation.¹⁴⁶ Therefore, any property ABOR holds title to is exempt. When a statute is clear and unambiguous, courts conclude that the plain language of the statute demonstrates the Legislature’s intent and will not look further for meaning.¹⁴⁷ Here, the plain language of article IX, section 2(1) clearly applies the exemption to agencies like ABOR as part of the state

144. See Karen Bond Coriell, *Chaos, Contradiction and Confusion: Ohio’s Real Property Tax Exemptions*, 53 OHIO ST. L.J. 265, 280 (1992). The Ohio Supreme Court’s opinion in *State for Use of Univ. of Cincinnati v. Limbach*, 553 N.E.2d 1056 (Ohio 1990) does not suggest that the parties disputed whether the issue was a political question. Regardless, Ohio courts must raise issues of justiciability *sua sponte* under article IV, section 4(B) of the Ohio Constitution. See *Stewart v. Stewart*, 731 N.E.2d 743, 745 (Ohio Ct. App. 1999). Therefore, in *Limbach*, the Ohio Supreme Court presumably concluded justiciability was not an issue because it was required to raise this issue without prompting by the parties before deciding the merits of the case. Given the court made a final ruling on the merits, the court must have concluded it did not present a political question.

145. See Ann Wise, *Louisiana’s Division of Administrative Law: An Independent Administrative Hearings Tribunal*, 30 J. NAT’L ASS’N ADMIN. L. JUDICIARY 95, 108 (2010) (“State agencies are not freely floating entities, and structurally tend to be ‘attached’ to some department of state government.”).

146. ARIZ. CONST. art. IX, § 2(1).

147. *Legacy Educ. Grp. v. Ariz. State Bd. for Charter Schs.*, No. 1 CA-CV 17-0023, 2018 WL 2107482 (Ariz. Ct. App. May 8, 2018) (citing *Hosp. Corp. of Nw., Inc. v. Ariz. Dep’t of Health Servs.*, 988 P.2d 168, 169 (Ariz. Ct. App. 1999)); see *Stein v. Sonus USA, Inc.*, 150 P.3d 773, 778 (Ariz. Ct. App. 2007).

government. The law does not dictate, however, that leasing government-owned property strips the land of its tax-exempt status. Because ABOR still owns the property leased under the Real Estate Deals, the land remains tax-exempt. The transactions, thus, do not evade taxes as alleged by the State. In other words, the Real Estate Deals constitutionally generate university funding.

B. The Omni Deal Does Not Violate State Law

Based on the substantial benefits the Omni Deal will provide ASU and the City of Tempe, no Arizona court should invalidate the transaction because it satisfies the Gift Clause. Under the *Turken* test, a transaction like the Omni Deal is harmonious with the Gift Clause when “(1) it has a public purpose, and (2) in return for its expenditure, the governmental entity receives consideration that ‘is not . . . inequitable and unreasonable.’”¹⁴⁸ Subsection 1 shows the development of the Omni Hotel and Convention Center has a public purpose because it will result in increased revenue for ASU and the City of Tempe. Subsection 2 suggests the agreement gives ABOR reasonable consideration for its contributions because ABOR will receive nearly 100 million dollars in net revenue from the deal.

1. Public Purpose

The Omni Deal irrefutably serves the public. A “public purpose” broadly means any government agreement that results in some “indirect” benefits to the public.¹⁴⁹ Courts “must give appropriate deference to the findings of a governmental body.”¹⁵⁰ The City of Phoenix satisfied this low threshold in *Turken* by showing a disputed development would increase taxes and create jobs.¹⁵¹

Here, the explicit terms of the Omni Deal and the report assessing the benefits of the agreement reveal the public purpose.¹⁵² The parties

148. *Turken v. Gordon*, 224 P.3d 158, 161 (Ariz. 2010) (en banc) (quoting *Wistuber v. Paradise Valley Unified Sch. Dist.*, 687 P.2d 354, 357 (Ariz. 1984) (in banc)).

149. *Id.* at 166.

150. *Id.* at 162; Jennings, *supra* note 81, at 84.

151. *Turken*, 224 P.3d at 165.

152. See *supra* notes 116–127 and accompanying text.

agree Omni must pay ASU a designated fee in the form of rent.¹⁵³ ABOR then has the authority to use the money for the operation of ASU. In effect, the state public university acquires more revenue to fulfill its duty to serve the public. Furthermore, ASU may use the convention center for seven days each year.¹⁵⁴ Though the State argued this is not truly beneficial, the allowance of use for any minimal amount of time is a direct benefit. Because “indirect” benefits are sufficient under *Turken*,¹⁵⁵ surely so is a direct benefit like the use of event space. Likewise, the agreement provides ASU will receive marketing rights within the hotel and convention center, which helps with student recruitment and fundraising.¹⁵⁶

Importantly, a report released to the public also indicates the Omni Deal “will directly raise more revenue and generate other fiscal and economic benefits” for the City of Tempe.¹⁵⁷ Despite criticisms that the transaction is “unwise” and helps businesses evade property taxes that would fund local schools and other government programs,¹⁵⁸ the data reveal the boom in tourism and visitor spending will raise significant revenue for the City of Tempe to use at its discretion.¹⁵⁹ Consequently, the benefits to both ASU and the City of Tempe satisfy the first prong of the *Turken* test.

2. Reasonable Consideration

Under the Omni Deal, ABOR receives valid consideration.¹⁶⁰ “Courts do not ordinarily examine the proportionality of consideration between parties.”¹⁶¹ However, a transaction violates the Gift Clause if a government entity receives consideration “so inequitable and unreasonable” it “render[s] the transaction a sham or subsidy.”¹⁶² In

153. *See supra* Part II.C.

154. *See supra* Part II.C.

155. *Turken*, 224 P.3d at 165.

156. *See supra* Part II.C.

157. *Supra* note 122 and accompanying text.

158. MacDonald-Evoy, *supra* note 126.

159. *See supra* Part II.C.

160. In contract law, “[a]ny performance which is bargained for is consideration.” *Sun World Corp. v. City of Phx.*, 800 P.2d 26, 29 (Ariz. Ct. App. 1990).

161. *Turken*, 224 P.3d at 165.

162. *Id.* at 163; George Lefcoe, *Competing for the Next Hundred Million Americans: The Uses and Abuses of Tax Increment Financing*, 43 URB. LAW. 427, 471 (2011); Jennings, *supra* note 81, at 83.

other words, the consideration cannot be “grossly disproportionate.”¹⁶³ While indirect benefits can serve a public purpose, they are not examined under the second, and more stringent, prong of the *Turken* test.¹⁶⁴

Indeed, in *Turken*, when the Arizona Supreme Court examined the proportionality of consideration received by the City, it did not evaluate the anticipated tax revenue because it was an “indirect” benefit that was not bargained for.¹⁶⁵ Thus, the Court determined the only consideration received by the City was 200 parking garage spaces, which was “quite likely” “grossly disproportionate” to the city’s payment to the developer of 97.4 million dollars.¹⁶⁶

Unlike the City, ABOR will receive direct benefits proportional to its own contribution under the Omni Deal. First, Omni agreed to pay rent “equal to \$85 per square foot . . . representing the fair market value,” approximately 5.9 million dollars, for the land that ABOR agreed to lease.¹⁶⁷ The State claimed the amount is not fair, however, emphasizing two other hotels were sold three months later for 216 and 212 dollars per square foot.¹⁶⁸ This is irrelevant to the analysis though because the test only requires the consideration ABOR receive be proportional to the consideration given to Omni;¹⁶⁹ it does not require it to be proportional to an amount paid by other hotels elsewhere.

Second, Omni must make semi-annual rental payments to ABOR, totaling a minimum of 118 million dollars.¹⁷⁰ These payments are not anticipated or even expected like the tax revenue from the CityNorth development in *Turken*. Rather, the 118 million dollars is guaranteed. The parties bargained for these payments in lieu of Omni paying property taxes.¹⁷¹ In comparison, ASU agreed to pay 28 million dollars in economic benefits.¹⁷² Indeed, this means ASU will receive 90 million dollars in net revenue, not computing for the additional 5.9 million

163. *Turken*, 224 P.3d at 167.

164. *See supra* Part II.C.

165. *See supra* notes 83–85 and accompanying text.

166. *See supra* notes 86–87 and accompanying text.

167. *See supra* note 117.

168. Amended Complaint, *supra* note 18, at 17.

169. *See supra* notes 78–80 and accompanying text.

170. *See supra* note 118 and accompanying text.

171. *See supra* Part II.C.

172. *See supra* Part II.C.

dollars. Third, the Omni Deal assures ABOR will receive other direct benefits, like the use of the convention center for seven days each year and marketing rights within the hotel and convention center.¹⁷³ This is substantially different from *Turken* where the City's only benefit from the disputed transaction was revenue from use of parking garage spaces. Indeed, this is more like the consideration given to Omni.

In sum, these benefits collectively show the Omni Deal guarantees reasonable consideration to ABOR. Thus, the transaction does not violate the Gift Clause.

C. The Effect of the Tax Court's Decision on Nonprofit Organizations

Although the above sections reveal the law gives ABOR the authority to execute the Real Estate Deals as a government agency, the tax court's decision raises serious legal concerns for nonprofit organizations that likewise see the benefit of leasing property to private entities. Consider the revenue streams of a small nonprofit organization in Prescott, Arizona. The nonprofit heavily relies on donations in the form of cash gifts. And it certainly enjoys exemption from paying property taxes under article IX, section 2(2) of the Arizona Constitution. It does not receive added funding from the state like ABOR, but as discussed, those sources of revenue have been massively cut anyway.¹⁷⁴ Consequently, these institutions share similar funding models.¹⁷⁵ If a donor leaves two acres of his estate to both ABOR and the nonprofit, under the tax court's decision, ABOR clearly may lease the donated land to a third party for rental payments. But can the nonprofit, which has been struggling financially and would equally benefit from leasing the land?

Relying on the fact that ABOR is a state agency and therefore its land is wholly tax-exempt as government property under article IX, section 2(1), the tax court offered no standard for nonprofit organizations interested in executing, or already pursuing, similar deals. As the State pointed out in its amended complaint, under article IX, section 2(2), the tax exemption afforded to nonprofit organizations is

173. See *supra* notes 116–125 and accompanying text.

174. See *supra* notes 4–8 and accompanying text.

175. These institutions likely engage in other methods of resource-raising that are outside the scope of this example.

limited to property “not used or held for profit.”¹⁷⁶ Therefore, Arizona courts need to clarify that transactions like ABOR’s Real Estate Deals do not come under the meaning of “for profit” use.

Sections 42–11151 through 42–11153 of the Arizona Revised Statutes outline the process for nonprofit organizations to establish property they rent from other institutions should be tax-exempt.¹⁷⁷ But these laws do not offer any guidance on whether property owned by nonprofit organizations retain their tax-exempt status if they are leased to a commercial business.

*University Medical Center v. Department of Revenue*¹⁷⁸ is instructive. In *University Medical Center*, the Arizona Court of Appeals decided whether the nonprofit corporation that leased land owned by ABOR to operate a university hospital under section 15-1637 of the Arizona Revised Statutes was exempt from paying taxes on six parcels of land that it owned outside of the university’s campus.¹⁷⁹ The hospital used the parcels exclusively in furtherance of health care purposes and operation of the hospital.¹⁸⁰ Section 15-1637(D) provided “[a]ny nonprofit corporation which is a lessee as described in subsection A of this section is exempt from property taxation.”¹⁸¹ The Department of Revenue argued under this section that the only property exempt from taxation was property the nonprofit leased.¹⁸² The court of appeals disagreed, emphasizing the parties agreed that the parcels were not “used or held for-profit” under article IX, section 2(2). Thus, the parcels were tax-exempt because the Legislature did not “limit[] the exemption to property leased or conveyed to the nonprofit by [ABOR].”¹⁸³

University Medical Center implicitly shows if a nonprofit organization uses its property in furtherance of its original purpose, which the state previously approved under Sections 42–11151 through 42–11153, then it is not for profit. The State claimed the Real Estate Deals allow commercial businesses to earn profits by renting property

176. ARIZ. CONST. art. IX, § 2(2); Amended Complaint, *supra* note 18, at 6.

177. ARIZ. REV. STAT. ANN. §§ 42–11151 to 42–11153 (2021).

178. 36 P.3d 1217 (Ariz. Ct. App. 2001).

179. *Id.* at 1218.

180. *Id.* at 1219–20.

181. ARIZ. REV. STAT. ANN. § 15-1637(D).

182. *Univ. Med. Ctr.*, 36 P.3d at 1220–21.

183. *Id.* at 1221.

from ABOR that is shielded from property tax. But ABOR has shown, like the nonprofit's use of the parcels in *University Medical Center*, the disputed Real Estate Deals are used in furtherance of ABOR's role in raising revenue for the Universities.

As discussed, this is also the conclusion reached by the Ohio Supreme Court. It similarly decided because "the rent from the property went into the university's general operating fund," the transactions "support[]" the university and are properly exempt from taxation.¹⁸⁴ Thus, it should be decided that when a nonprofit organization uses property it owns by leasing it to a third party for rent, which helps fund the nonprofit organization's exempted purpose, the "use" is not considered "for profit" under article IX, section 2(2). Anything to the contrary would protect large, government agencies like ABOR while financially stripping nonprofit organizations, like the small nonprofit in Prescott, from similarly funding their missions.

V. CONCLUSION

If these Real Estate Deals or similar transactions by ABOR are challenged in the future, ABOR should prevail on the merits because it has constitutional authority to lease its tax-exempt land to private entities and, as it ensured with the Omni Deal, executes agreements that provide it reasonable consideration. However, the tax court's decision does raise substantial questions for nonprofit organizations that wish to make similar "entrepreneurial move[s]."¹⁸⁵ Arizona courts need to clarify that the tax court's decision here was not narrowly determined because ABOR is a government entity. Rather, the decision was based on the broad statutory language that confers ABOR and other nonprofit organizations the power to lease tax-exempt property.

The tax court's decision to dismiss the State's lawsuit against ABOR echoed ASU President Michael Crow's conjecture that the university and ABOR entrepreneurially, strategically, and legally raised money by

184. Coriell, *supra* note 144, at 277, 280. The Ohio Supreme Court concluded that "[p]ublic colleges and academies and all buildings connected with them, and all lands connected with public institutions of learning, not used with a view to profit" are exempt from taxation when leased to a for-profit corporation. *Id.* at 277.

185. Michael Crow, Opinion, *For the Last Time: Our ASU-Omni Hotel Deal Is Not a Dishonest Scheme*, AZCENTRAL (Nov. 25, 2019, 10:48 PM), <https://www.azcentral.com/story/opinion/op-ed/2019/11/19/asu-omni-hotel-deal-no-dishonest-scheme/4202984002/>.

executing the Real Estate Deals.¹⁸⁶ Developed by the “Most Innovative University” in America,¹⁸⁷ these projects created new streams of revenue for a public university suffering the country’s deepest cuts in state funding.¹⁸⁸

186. *Id.*

187. *Supra* note 1 and accompanying text.

188. *See* MITCHELL ET AL., *supra* note 4, at 3 (noting that Arizona decreased per-pupil higher education funding in 2019 by almost fifty-five percent and provides far less funding to higher education than it did in 2008).