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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2013-014458 11/01/2017

HONORABLE DANIEL J. KILEY

CLERK OF THE COURT
C. Mai
Deputy

MARK STUART, et al. SCOTT H ZWILLINGER

v.

CITY OF SCOTTSDALE, et al. ERIC C ANDERSON

UNDER ADVISEMENT RULING

## FINDINGS OF FACT

1. Plaintiff Mark Stuart brings this action as a taxpayer and resident of Scottsdale, Arizona pertaining to the Tournament Players Club golf course facility (the "TPC Scottsdale" or the "Facility"). The Facility consists of two eighteen-hole golf courses, each with its own clubhouse and related amenities, in Scottsdale, Arizona. The Facility has been a Professional Golfers' Association ("PGA") Tour facility since it began operating in 1986.

2. Defendant City of Scottsdale ("the City" or "Scottsdale") is a Municipal Corporation in the State of Arizona. The individual Defendants are either members of Scottsdale's City Council or officers of the City whose relevant actions were undertaken in their official capacities.

3. TPC Scottsdale, Inc. ("TPC") is a wholly-owned subsidiary of PGA Tour Golf Course Properties, Inc. ("PGAGCP"). PGAGCP is responsible for, among other things, managing and licensing premier private, resort, and daily fee golf properties under the "TPC" and "PGA" brands.

4. The Facility has been operated by TPC since the Facility opened in 1986. What is currently known as the Waste Management Phoenix Open (the "Tournament" or the "Event")[1] is an annual golf tournament played at the Facility as part of the PGA Tour's FedEx Cup. Apart from the fourteen days per year[2] devoted to the Tournament, the Facility is operated as a daily fee, resort style public golf course and associated amenities, all of which are managed by the TPC.

5. The United States Bureau of Reclamation ("BOR") executed a Recreational Land Use Agreement with the City in June 1985 for a fifty-year term. The BOR land that the City was permitted to use pursuant to this agreement had been acquired by BOR for flood control purposes. The Facility was largely constructed on this land, and BOR therefore owns a substantial percentage (at least 85%) of the acreage on which the Facility was built. A portion of the Facility, however, including two holes of the Stadium Course and its clubhouse, are located on land owned by the City.

6. The TPC Scottsdale is leased from the City and managed by the TPC as tenant pursuant to a Lease and Management Agreement (the "LMA" or the "Agreement") originally entered on December 10, 1984. *See* Exhibit 1. The term of the LMA is 50 years, from June 10, 1985 to June 9, 2035, with TPC having the right to renew the lease under the same terms and conditions for an additional 25 years. Exhibit 1 at pp. 12-13; Exhibit 2 at p. 2.

7. The LMA called for the City to construct two eighteen-hole public golf courses and related amenities and lease them to TPC, which was to "operate and oversee" the property "as a golf facility open to the general public," and to "maintain" the golf facility "in first-class operating condition." Exhibit 1 at pp. 2, 14, 22. The two golf courses were referred to in the LMA as the "Stadium Course" and the "Scottsdale Course," *id*. at pp. 28-29, although the latter is now known as the "Champions Course."

8. The LMA required TPC to pay the City annual rent equal to 10% of "Golf Course Income" and 2% of Sales Income. Exhibit 1 at p. 13. "Golf Course Income" was defined as including, *inter alia*, green fees, cart fees, and driving range fees, while "Sales Income" was defined as including income derived from the sale of food and beverages, as well as pro shop sales. Exhibit 1 at pp. 5, 10. The LMA also required TPC, and not the City, to pay the operating expenses of the Facility. *Id*. at p. 13.

[1] Waste Management Corporation took over as title sponsor in 2010 and remains so today.

[2] Testimony at trial suggested that fewer than fourteen days are devoted to the Tournament at TPC Scottsdale each year, and therefore that the Facility is closed to public play for less than fourteen days per year. The "fourteen days per year" figure is set forth in Paragraph 25 of the Stipulations of Material Fact and Law section of the Joint Pretrial Statement.

9. The LMA further obligated PGA Tour, Inc. ("Tour") "to sanction and co-sponsor" a PGA tour event, the Phoenix Open, at the Facility each year for ten years, commencing in 1987. Exhibit 1 at pp. 38-39. The LMA authorized TPC to "suspend play by the general public at the Stadium Course for a period…not longer than fourteen (14) days per annum" for the purpose of holding this tournament. *Id*. at p. 30.

10. At the time the LMA was entered into, the Phoenix Open was a PGA Tour golfing event which was held in Phoenix, Arizona.

11. The City's initial construction cost for the two courses and associated facilities was approximately $14 million.

12. A total of six amendments to the LMA have modified some of the original terms between the City, TPC, and PGA.

13. The City receives roughly $900,000 per year in rent payments (*i.e*., the City's share of Golf Course Income and Sales Income revenue) from TPC. *See* Exhibit 8 at p. COS-STUART-004796.

14. Section 7.1.2 of the LMA provided that the TPC, as tenant, "shall make all capital repairs and/or capital replacements to the Golf Facility," and went on to provide for a "Capital Improvement Fund" from which the cost of capital improvements were to be paid. Exhibit 1 at pp. 31-32. The Capital Improvement Fund was to be funded in part by a percentage of Golf Course Income and in part by "a one time subsidy" from the City of $100,000. *Id*. at p. 31.

15. The requirement of a Capital Improvement Fund was eliminated when the parties amended the LMA for the second time in 1987. *See* Exhibit 3. Section 7.1 of the "Second Amendment" provides simply, "Tenant shall make all capital repairs and/or capital replacements to the Golf Facility at its sole expense, subject to the availability of Net Operating Revenue." Exhibit 3 at p. 5. It is undisputed that, over the years, TPC has spent between $10 million and $13 million in capital repairs and replacements at the Facility.

16. The Second Amendment also added a provision regarding the parties' maintenance obligations after course completion. Pursuant to the Second Amendment, upon completion of the construction of the Facility, "Tenant shall, at its sole cost, repair and replace the Golf Facility FFE, subject to the availability of Net Operating Revenue, as and when Tenant deems necessary or desirable and maintain the Golf Facility in a first-class condition at least equal to that of the Tournament Players Club at Sawgrass." Exhibit 3 at p. 4. "Golf Facility FFE" was defined in the LMA as "all furniture, fixtures, equipment and any other

items of personal property used in connection with the operation of the Facility…" Exhibit 1 at pp. 6-7.

17. The December 4, 1995 "Fourth Amendment" to the LMA again obligated TPC to "sanction and co-sponsor the Phoenix Open or another regular tour event" at the Facility for a period of 10 years, expiring in 2006. Exhibit 5 at p. 5.

18. On December 3, 2012, the City, TPC, and PGA Tour, Inc. ("Tour") entered into the "Sixth Amendment" to the LMA. The Sixth Amendment is the focus of the Plaintiff's two claims that are at issue in this case.

19. In 2011, representatives of the City had discussions with representatives of TPC and Tour about the conditions of the Stadium Course and its continuing suitability to host a significant PGA Tour Event. Many of the concerns expressed by TPC to the City's representatives had originated with complaints from PGA tour players.

20. Among the things discussed was the fact that there had not been substantial upgrades or improvements to the Stadium Course and Clubhouse since their original construction, while the Tournament had grown substantially over the same period of time. The desire was expressed to make the Stadium Course more challenging - - by relocating bunkers and tee boxes, for example - - and to add features, such as spectator mounds, to accommodate the many visitors who attend the Event. In addition, the clubhouse for the Stadium Course, including the restaurant, were no longer able to accommodate the players, their coaches, and other attendees of the Event.

21. James Triola, Chief of Operations for PGA Tour Golf Course Properties, testified at the Preliminary Injunction hearing in this matter that PGA golfers choose the events in which they want to compete, and that, over the years, competition to attract PGA players has grown among events. Transcript of May 1, 2014 Hearing at pp. 12, 20. Mr. Triola stated that "[t]he players are much more focused on the conditions that they play," and that they "want a good competition" and therefore "expect good conditions." *Id*. at p. 20. Failure to provide the conditions expected by top golfers risks losing their participation in a tournament. *Id*. at p. 15. Mr. Triola specifically noted the concerns expressed by players about security at the Stadium Course clubhouse, an issue that "wasn't really a concern" when "this place was built in the late '80s." *Id*. at p. 29. He explained that a larger clubhouse was necessary to allow for "separation between the players and others who may have clubhouse access." *Id*. at p. 29.

22. The City representatives understood from their discussions with Tour and TPC representatives that infrastructure improvements were necessary to assure that the annual PGA Tour Event would continue to be held at the TPC-Scottsdale. At this time, City officials were

aware that the PGA was no longer contractually obligated to continue to hold a Tour Event at TPC Scottsdale (the prior Event Commitment having expired in 2006), and believed that there was a substantial risk that the PGA Tour would move to another jurisdiction if Scottsdale would not make improvements to upgrade the Stadium Course and Clubhouse. The PGA's original relocation of the Tournament from Phoenix to Scottsdale in the 1980s, and the more recent relocation of two professional sports teams (the Arizona Cardinals and the Phoenix Coyotes) to Glendale from other municipalities, served as a reminder to City officials, if any such reminder were needed, that the City could not take the Tournament's continued presence in Scottsdale for granted.

23. The testimony presented at trial establishes that the City's concerns about the possible relocation of the Event out of Scottsdale were not groundless. When asked whether the management ever considered moving the Event from the TPC-Scottsdale, Bill Grove, the former General Manager of TPC-Scottsdale who retired in 2013, acknowledged, "We always explored our options." He explained that whether to relocate the Event to a different site was a topic of internal discussions among management officials on a regular basis, including during the 2011 and 2012 time period. He acknowledged, however, that these discussions never progressed to the point that other municipalities were ever contacted to initiate negotiations.

24. Further evidence showing that the City's concerns about the possible relocation of the Tournament out of Scottsdale were not groundless is found in Mr. Triola's testimony at the Preliminary Injunction hearing, when he identified by name a number of TPC golf courses around the country that once hosted, but then lost, an annual tournament. Transcript of May 1, 2014 Hearing at pp. 17-19.

25. During this entire time, the PGA and TPC were in good standing with their agreement with the City and the City did not consider either to be in default under the agreement.

26. After a period of negotiations, representatives of the City, TPC, and the PGA reached an agreement on the terms of the Sixth Amendment.

27. The Recitals to the Sixth Amendment provide in part as follows:

> Due to changing needs of the parties, City, [TPC] and Tour have decided to update their relationship as defined by the [LMA]. Accordingly, City, [TPC] and Tour have now mutually determined that the purposes of the [LMA] can be better achieved by further amending the [LMA] to:
>
> 1. Extend the period during which the Regular TOUR Event will be

> held at the Golf Facility.
>
> 2. Require [TPC] and Tour to provide television coverage as set forth herein in connection with the Regular TOUR Event.
>
> 3. Provide for City construction and funding of certain capital repairs and replacements at the Golf Facility.
>
> 4. Provide for City's verification and auditing of the Net Operating Revenue under the [LMA].

Exhibit 7 at pp. 1-2.

28. The Sixth Amendment required the City to undertake certain renovations of the Facility at a cost of up to $15 million. *See* Exhibit 7 at p. COS-STUART-004166.

29. Specifically, the Sixth Amendment required the City, at its own expense, to undertake a "major renovation" of the Stadium course at a cost of up to $10,870,000, to include "replac[ing] the irrigation system," construction of a "new cart and trail system," and "lake bank repair to protect from erosion." Exhibit 7 at p. COS-STUART-004166.

30. The Sixth Amendment further required the City, at its own expense, to undertake a "major renovation" of the clubhouse at the Stadium course at a cost of up to $4,130,000, to consist of "expand[ing] the men's locker room" and "the current patio and meeting room areas." Exhibit 7 at p. COS-STUART-004166.

31. The Sixth Amendment increased, from 10% to 12.5%, the amount of Golf Course Income that TPC was obligated to pay the City each year for a period of 20 years. Exhibit 7 at p. 3.

32. As noted above, TPC's contractual obligation to hold the Phoenix Open at the Facility (*i.e.*, the "Event Commitment") had expired in 2006. Paragraph 10 of the Sixth Amendment provides in part as follows:

> Tour is not obligated to conduct the Regular TOUR event at the Golf Facility each year. However:
>
> 10.1.1 If Tour fails to conduct the Regular TOUR Event at the Golf Facility during any year prior to 2016 because Tour did not have a sponsor of the Regular TOUR Event or the sponsor did not substantially

> perform (collectively a "Sponsor Failure"), then City shall have the right to terminate this Agreement unless Tour pays to City a certain payment (the "Sponsor Failure Payment") for each such year in which a Sponsor Failure occurs.
>
> 10.1.2 If more than one Sponsor Failure occurs during the years 2016 through 2022, then City shall have the right to terminate this Agreement unless Tour pays to City a Sponsor Failure Payment for each such year in which a second or subsequent Sponsor Failure occurs.
>
> * * *
>
> 10.1.4 If Tour fails to conduct the Regular TOUR Event because of Tour Event Force Majeure, then City shall not have the right to terminate this Agreement or collect a Sponsor Failure Payment.

Exhibit 7 at p. COS-STUART-004164. The Sixth Amendment therefore made clear that, in the event Tour did not conduct the event at TPC Scottsdale, the City's right to terminate and/or collect a Sponsor Failure Payment depended on whether the failure to conduct the tournament was due to Sponsor Failure or Force Majeure.

33. The amount of the Sponsor Failure Payment was fixed at 80% of the annual debt service on bonds issued by the City to fund the capital projects, up to $900,000 per year. Exhibit 7 at p. COS-STUART-004164.

34. Paragraph 10 of the Sixth Amendment also sets forth a Television Coverage Commitment, providing in part,

> [TPC] and Tour shall cause national coverage of the annual Regular TOUR Event to occur as described in their existing contracts with the Golf Channel and CBS for broadcast of the Regular Tour Event through at least 2021.

Exhibit 7 at p. COS-STUART-004165.

35. The Scottsdale City Council considered whether to approve the Sixth Amendment at a council meeting on December 3, 2012.

36. City staff presented the City Council with a report detailing the provisions of the Sixth Amendment for the Council's consideration in determining whether or not to approve

it. *See* Exhibit 9. The report stated in part that, "[a]s part of the [Sixth Amendment], the [C]ity will obtain an extended PGA tour event guarantee, a national television coverage guarantee, and an increased percentage of golf revenue payments." *Id*. at p. 1. "In exchange, the City will commit to fund improvements to the Stadium golf course and clubhouse." *Id.*

37. The report prepared by City staff set forth the value to the City of the Sixth Amendment as follows:

a. The increase in Golf Course revenues from 10% to 12.5% was "estimated to result in approximately $173,000 of additional revenue annually for a twenty year period." Exhibit 9 at p. 4.

b. The Event Commitment was valued at $1.4 million for year, a figure that was calculated by equating the City's original cost to construct the Facility ($14 million) and the length of the original Event Commitment (i.e., 10 years). "Equating these two commitments provides an annual value to the City of $1.4 million." *Id.*

c. The Television Coverage Commitment was valued at $15.9 million per year. *Id*. This figure was derived from "the results of a media value analysis prepared by Repucom that places an annual value on this extensive national media coverage for Scottsdale." *Id*. The report noted that "TPC analyzed the Repucom findings and estimated the total annual direct benefit of media coverage to the City of Scottsdale to be approximately $15.9 million." *Id.* The report provided specific data regarding the extensive national coverage that the Tournament receives: "Coverage in 2011 included 13 hours on the Golf Channel and 6 hours on CBS. Ratings in 2011 showed the Golf Channel coverage reaching 600,000 households and the CBS coverage reaching 2,000,000 households." *Id.*[3]

[3] At trial, Mr. Worth testified that the City's determination of the $15.9 million per year value of the Television Coverage Commitment was based on "equivalent value, if we were to go out and buy that coverage." He explained that the $15.9 million figure was originally based on the findings of Repucom, a media coverage valuation company, in a report prepared for the PGA. Mr. Worth testified that he provided Repucom's findings to the Scottsdale Convention and Visitors Bureau, which is "in the business of buying advertising, to analyze" Repucom's findings. He further testified that the Scottsdale Convention and Visitors Bureau "largely confirmed" the accuracy of Repucom's findings "based on comparables, if we were to buy similar media coverage from an advertising agency in the form of 30 or 60 second spots, it would have equated to" the $15.9 million figure.

38. At the December 3, 2012 meeting, the Scottsdale City Council voted to approve the Sixth Amendment. *See* Exhibit 10.

39. The City financed the $15 million cost of the improvements with a voter-approved bond issuance in 2015. When asked if debt service would bring the total cost of the improvements to $21 million, Lee Guillory, the City's Finance Director at the time, testified that she was not certain, but admitted that the total cost would be "about that" amount.

40. The improvements were completed in 2014 or 2015.

41. It is undisputed that the Stadium Course and its clubhouse, including the improvements, are available for use by the general public all but two weeks of each year.

42. The Event has continued to be held annually at the Scottsdale TPC and televised by the PGA as contemplated in the Sixth Amendment. It is undisputed that the weekly total attendance at the Tournament in 2017 was a record 655,434 spectators. The 2017 Tournament marked the 31st consecutive year of a PGA Tour event being held at TPC Scottsdale. The Tournament is the second-longest-running event, behind the PGA tournament held at TPC Sawgrass for the 33rd consecutive year in 2017. Joint Pretrial Statement at p. 5, ¶¶ 26-27.

43. The Plaintiff presented evidence, through the testimony of Doug Terry, that the terms of the Sixth Amendment compare unfavorably with terms that other municipalities have in contracts with the managers of their golf courses. Mr. Terry testified, for example, that the share of golf course revenues received by the city of Pasadena is more than three times the 12.5% of golf course revenues that Scottsdale receives, and that Pasadena receives additional revenues for certain items, such as parking fees, for which Scottsdale receives no revenue. Likewise, Mr. Terry testified that Maricopa County receives a higher percentage of revenue from its golf courses than Scottsdale receives from TPC even though Maricopa County, unlike Scottsdale, did not pay for any of the improvements to the golf facilities.

44. Mr. Terry testified that he compared TPC Scottsdale's arrangement with the City with the arrangements that comparable high-end golf courses have with other municipalities, including, for example, Harding Park in San Francisco and Torrey Pines in San Diego. He testified that, after making this comparison, he concluded that TPC Scottsdale's arrangement with the City is an "outlier" based on "what the market will bear." He explained, for example, that TPC, which manages Harding Park, is allowed to keep none of the profits from the Harding Park golf facilities; all of those profits go instead to the municipality. By contrast, he testified that TPC keeps "all of the profits" from TPC Scottsdale while bearing "none of the costs." Mr. Terry concluded that Scottsdale is receiving "well below" "what the marketplace would bear."

45. Mr. Terry's testimony that TPC bears "none of the costs" of operating the Facility overlooks the fact that TPC is responsible for routine maintenance and operating expenses, including, but not limited to, the cost of watering the golf courses, other lawn maintenance, salaries for greens keepers, and the like. Exhibit 1 at pp. 7-8. Mr. Terry testified, based on his review of tax returns, that TPC spends approximately $1 million per year on "utilities" at the Facility, including water. He also acknowledged that he has not attempted to compare the water costs and other expenses incurred by TPC for operating TPC Scottsdale with comparable expenses incurred at other municipal golf courses located in less arid parts of the country.

46. Although Mr. Terry testified that the roughly $900,000 that the City receives annually from TPC Scottsdale compares unfavorably with that received by other municipalities from their privately-managed golf facilities, the City presented evidence that its contractual agreement with TPC compares favorably with similar agreements that other municipalities have entered into. For example, San Francisco is contractually obligated to pay the operating expenses of Harding Park golf course, including the manager's payroll expenses. In contrast, the City bears no responsibility for paying the operating expenses of TPC Scottsdale; that responsibility is TPC's alone. Likewise, Pierce County, in Washington, bears financial obligations for the operating expenses of Chambers Bay golf course that the City does not bear with respect to TPC Scottsdale.

47. Mr. Terry suggested that, in entering the Sixth Amendment, the City improperly agreed to assume an obligation to fund for capital improvements that had previously been the responsibility of the TPC. Under the LMA, TPC was obligated to "make all capital repairs and/or capital replacements" at the Facility, to be paid for our of a Capital Improvement Fund that was partly funded by the City. Exhibit 1 at pp. 31-32. The Second Amendment deleted the provision for the Capital Improvement Fund, providing instead simply that "[TPC] shall make all capital repairs and/or capital replacements to the Golf Facility at its sole expense, subject to the availability of Net Operating Revenue." Exhibit 3 at p. 5. At trial, the City disputed that capital improvements - - as opposed to capital repairs and replacements - - were ever the tenant's responsibility, asserting that the phrase "capital repairs and/or capital replacements" in the LMA and the Second Amendment refers to maintenance but not capital improvements.

48. Mr. Terry also concluded that the City will never recover the amount of money that it has put into the Facility, and instead that he expects the City to lose over $49 million over the 50-year term of the LMA.

49. Mr. Terry testified about the profitability of the TPC Scottsdale to TPC (and even suggested that TPC earns profits that are greater than those reflected on its income tax returns). This testimony is not, however, relevant to a Gift Clause or Anti-Subsidy Clause

analysis. An analysis under the Gift Clause and the Anti-Subsidy Clause evaluates the consideration received by the government in exchange for its expenditure, and does not depend on the profitability of the private entity (excluding transactions in which the governmental entity provides support for the needy, a circumstance not present here).

50. The Plaintiff presented evidence, in the form of testimony of Gene Krekorian, that the arrangement between the City and TPC is not fair and equitable to the City. He opined that the City was not receiving adequate compensation in view of the fact that the City funded all capital investment at the Facility. He noted, for example, that the City's share of "Food and Beverage" revenue is 2% even though a higher rate - - in the range of 6% to 8% - - is "standard" for municipal-owned golf courses. He faulted the City, among other things, for not insisting that TPC pay a "Site Fee" for hosting the Tournament and for not insisting that golf course revenues be used to pay for the lease fees that the City pays to BOR, either in the form of higher rent to the City or in the form of direct payments from TPC to BOR.

51. Mr. Krekorian faulted the City for not insisting on a "renegotiation" clause that would require the parties to renegotiate, or perhaps arbitrate, changes to the arrangement periodically over the term of the contract as circumstances change. Such "renegotiation" clauses are, he stated, "standard" in the industry. He further opined that the Sixth Amendment is sufficiently profitable to TPC that TPC should have been expected to share in the costs of the capital improvements contemplated by the Sixth Amendment.

52. The evidence presented by the City includes the testimony of David Wells, Ph.D., who testified as the Plaintiff's expert witness at the Preliminary Injunction Hearing on April 30, 2014. Dr. Wells testified that the "total value" of the media time for covering the Phoenix Open, i.e., the Television Coverage Commitment, is $89 million. Transcript of Hearing on April 30, 2014 at p. 95. He reached this figure by applying advertising rates to the broadcast time of the Tournament, a method of valuing broadcast time which is, he testified, a "standard methodology" in the broadcasting industry. *Id*. at pp. 94-95. Using data from 2011 and 2011, Dr. Wells testified that broadcasters "are able to get" $20 million "in terms of revenue by selling advertising time for the Phoenix Open." *Id*. Assuming that each televised hour includes "11 minutes for advertising and 49 minutes of programming," and therefore that overall programming time for the Tournament is "about 4 and a half" times longer than advertising time, Dr. Wells calculated that "the time…when the golf tournament is actually being covered ends up being valued at 4 and a half times" the $20 million that broadcasters are paid for advertising time. *Id*. This, in turn, led Dr. Wells to find "an $89 million total value for that media time of covering the, the Phoenix Open, the golf tournament." *Id*. at p. 95.

53. Prior to the Preliminary Injunction hearing, Dr. Wells testified at a deposition that the "net media value" of the televised tournament to the City was $93.46 million.

Transcript of April 21, 2014 Deposition of David Wells at pp. 38, 41.

54. Dr. Wells testified again at another deposition shortly before Trial. This time, he testified that, while "there's some value of all that hours and hours of coverage that Scottsdale gets some exposure as a consequence of it," valuing that programming time is "challenging" and "highly subjective" because "[n]obody's actually really selling that piece of it." Transcript of September 8, 2017 Deposition of David Wells at pp. 35, 42. The designated portions of the transcript of his deposition do not make clear, however, what his opinion was of the value of the media time, or how he arrived at that opinion.

## CONCLUSIONS OF LAW

1. Article 9, Section 7 of the Arizona Constitution (*i.e.*, the "Gift Clause") provides in relevant part as follows:

> Neither the state, nor any county, city, town, municipality, or 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, association, or corporation…

Ariz.Const., Art. 9, § 7.

2. Article I, Section 3, Item O of the Scottsdale City Charter (i.e., the "Anti-Subsidy Provision") provides as follows:

> The City shall not give or loan its credit in aid of, nor make any donation, grant or payment of any public funds, by subsidy or otherwise, to any individual, association, or corporation, except where there is a clearly identified public purpose and the City either receives direct consideration substantially equal to its expenditure or provides direct assistance to those in need.

Scottsdale City Charter, Art. I, § 3, Item O.

3. A governmental expenditure does not violate the Gift Clause if (1) the expenditure "serves a public purpose" and (2) in return for the expenditure, the government 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." *Wistuber v. Paradise Valley Unified School Dist.*, 141 Ariz. 346, 348, 349, 687 P.2d 354, 356, 357 (1984) (citation and internal quotations omitted).

4. In evaluating Gift Clause challenges, "a panoptic view of the facts of each transaction is required." *Cheatham v. DiCiccio*, 240 Ariz. 315, 318, 379 P.3d 211, 215 (2016) (citation and internal quotations omitted). "[C]ourts must not be overly technical and must give appropriate deference to the findings of the governmental body." *Id*. (citation and internal quotations omitted)

5. One of the fundamental rules of contract construction is that the contract should be construed to give effect to the intention of the parties. *See, e.g., Harris v. Harris*, 195 Ariz. 559, 562, 991 P.2d 262, 265 (App. 1999). Further, "whatever is expected by one party to a contract, and known to be so expected by the other, is deemed a part or condition of the contract." *Id*.

6. The determination of the first prong of the *Wistuber* test, *i.e.*, whether a particular expenditure is for a "public purpose," is largely discretionary with the governing body. *See Turken v. Gordon*, 223 Ariz. 342, 349, 224 P.3d 158, 165 (2010) ("[W]e have repeatedly emphasized that the primary determination of whether a specific purpose constitutes a 'public purpose' is assigned to the political branches of government, which are directly accountable to the public."); *Cheatham*, 240 Ariz. at 320, 379 P.3d at 217 ("For Gift Clause purposes, a public purpose is lacking only in those rare cases in which the governmental body's discretion has been unquestionably abused.") (citation and internal quotations omitted). "[A]nticipated indirect benefits" resulting from a particular expenditure "may well be relevant in evaluating whether spending serves a public purpose…" *Turken*, 223 Ariz. at 350, 224 P.3d at 166.

7. "[W]e have repeatedly emphasized that the primary determination of whether a specific purpose constitutes a 'public purpose' is assigned to the political branches of government, which are directly accountable to the public. We find a public purpose absent only in those rare cases in which the governmental body's discretion has been unquestionably abused." *Turken*, 223 Ariz. at 349, 224 P.3d at 165 (citation and internal quotations omitted).

8. A governmental entity generally does not violate the Gift Clause when it makes improvements to its own property. *Town of Gila Bend v. Walled Lake Door Co*., 107 Ariz. 545, 549-50, 490 P.2d 551, 555-56 (1971) (rejecting argument that town's contract to construct a water main to a privately owned factory violated the Gift Clause, the Court noted that "ownership and control over the water line are to remain in the Town" and that "[t]here can be no doubt but that the supplying of water for purposes of preserving and protecting lives and property is a 'public purpose' and one which will provide a direct benefit to the public at large.").

9. Improving recreational facilities that are available for public use is a legitimate public purpose. *See Maricopa County v. Maricopa County Mun. Water Conserv. Dist. No. 1*, 171 Ariz. 325, 329, 830 P.2d 846, 850 (App. 1991) (noting that "[c]ities are often the proprietors of public parks, swimming pools or golf courses…"). *See also City of Tempe v. Pilot Properties, Inc*., 22 Ariz.App. 356, 362, 527 P.2d 515, 521 (1974) (acknowledging that a municipality's leasing of "its property to a private corporation for carrying on major league spring training" is "a public purpose") (internal quotations omitted).

10. The second prong of the *Wisturber* test requires an assessment of the consideration the public entity received in exchange for its expenditure. *See, e.g., Turken*, 223 Ariz. at 349, 224 P.3d at 165. A government payment "violates the Gift Clause" if it is "grossly disproportionate to what is received in return." *Id*. at 348, 224 P.3d at 164. The relevant question is, therefore, whether the governmental body 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." *Wistuber*, 141 Ariz. at 349, 687 P.2d at 357 (citation and internal quotations omitted). *See also Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 369, 837 P.2d 158, 171 (App. 1991) ("A public purpose…does not alone remove a challenged transaction from the prohibition of the gift clause. There must also be consideration that is not so inequitable and unreasonable that it amounts to an abuse of discretion.") (citation and internal quotations omitted).

11. "When a public entity purchases something from a private entity, the most objective and reliable way to determine whether the private party has received a forbidden subsidy is to compare the public expenditure to what the government receives under the contract. When government payment is grossly disproportionate to what is received in return, the payment violates the Gift Clause." *Turken*, 223 Ariz. at 350, 224 P.3d at 166.

12. "[A]nalysis of adequacy of consideration for Gift Clause purposes focuses…on the objective fair market value of what the private party has promised to provide in return for the public entity's payment." *Turken*, 223 Ariz. at 350, 224 P.3d at 166. "[A] city's purchase of a garbage truck would undoubtedly serve a public purpose," but "[p]urchasing the truck for twenty times its fair value…would constitute a subsidy to the seller," thereby violating the Gift Clause. *Id*. at 347, 224 P.3d at 163.

13. "Although anticipated indirect benefits may well be relevant in evaluating whether spending serves a public purpose, *when not bargained for as part of the contracting party's promised performance*, such benefits are not consideration under contract law or the *Wistuber* test." *Turken*, 223 Ariz. at 350, 224 P.3d at 166 (emphasis added, citation omitted).

14. When assessing a Gift Clause challenge, the value of non-monetary

consideration the government entity receives in the transaction may be assessed in light of what the government entity would have had to pay if it had purchased the non-monetary consideration directly. *See Wisturber*. In *Wisturber*, the defendant school district entered into a collective bargaining agreement that contained a provision allowing the teachers' association president to continue to draw her salary while being released from teaching duties to engage in other activities, such "providing information to a number of groups" and attending personnel meetings with district officials. 141 Ariz. at 348, 687 P.2d at 356. A group of taxpayers filed suit, alleging that the provision constituted an illegal gift of public funds to the teachers' union. *Id*. In rejecting the taxpayers' position, the Court cited evidence presented by the school district that if the association president were not released from her teaching duties to perform the other functions she was to perform under the agreement, the district would have to incur an even greater expense by hiring a Director of Employee Relations to perform those same functions. *Id*. at 348-50, 687 P.2d at 356-58.

The Plaintiff has offered no evidence, and does not contend, that the City has paid any money directly to TPC, Tour, or the PGA. Instead, the evidence establishes that the City paid $15 million to contractors to perform construction improvements to the City's own property, *i.e*., a clubhouse on property the City owns, and improvements to a golf course which is partly on the City-owned land and partly on land owned by BOR and licensed to the City. A municipality does not violate the Gift Clause when it makes improvements to its own property. *Walled Lake Door*, 107 Ariz. at 549-50, 490 P.2d at 555-56. Just as the City could spend $15 million to upgrade a public park or library without implicating the Gift Clause or the Anti-Subsidy Clause, the City's action in spending the same amount upgrading City-owned golf facilities that are available for use by members of the public for all but two weeks of every year does not implicate the Gift Clause or the Anti-Subsidy Clause.[4] Whether the expenditure of funds for that purpose was appropriate or wise is a decision entrusted to the voters, not the courts.

If a Gift Clause analysis were necessary, the Court finds that the Plaintiff has failed to establish that the expenditure for upgrades to the Stadium Course facilities was not for a public purpose. It is undisputed that the funds were spent to upgrade golf facilities that are open to the public all but two weeks out of each year. As noted above, improving recreational facilities that are available for public use is a legitimate public purpose. *Maricopa County*, 171 Ariz. at 329, 830 P.2d at 850.

[4] The Plaintiff argues that the City does not actually own the improvements because most of the land on which the Facility is located is owned by, and leased from, the BOR. This is not entirely accurate; the Stadium Course clubhouse is located on land owned by the City. In any event, the City has the right to occupy the land pursuant to its fifty-year lease with BOR, and has the right to continue to make use of the improvements it purchased throughout that period.

Additionally, the City's expenditure under the Sixth Amendment was made in exchange for TPC's promises to continue to hold and televise the Tournament in Scottsdale, which provides an important boost to tourism, the City's primary industry. Even if one were to consider the economic benefits of increased tourism to be "anticipated indirect benefits," such benefits nonetheless may be considered in determining whether the expenditure serves a public purpose. *Turken*, 223 Ariz. at 350, 224 P.3d at 166.

The Court therefore finds that the Sixth Amendment serves a public purpose, and that the first *Wistuber* factor is met here.

A Gift Clause analysis next requires the Court to turn to the second *Wistuber* factor, *i.e.*, the consideration received by the City in exchange for the $15 million it agreed to expend in making the improvements.[5]

At trial, the City's Director of Public Works, Daniel Worth, and the City's Director of Parks and Recreation, Reed Pryor, testified that the improvements that were constructed were worth the $15 million that the City paid for them. As Mr. Worth testified, the City "spent $15 million," and "got $15 million worth of clubhouse and golf course improvements." The Plaintiff presented no controverting evidence to suggest that the City overpaid for the improvements that were completed.[6]

In challenging the testimony of Mr. Worth and Mr. Pryor about the value of the improvements, the Plaintiff pointed out that the improvements are a depreciating asset. The Court fails to understand the significance of this point; the fact that an asset depreciates over time doesn't mean that it wasn't worth what the owner paid for it when he bought it. And although the Plaintiff correctly noted at trial that the City had presented no appraisal of the value of the improvements, no such appraisal was necessary. Mr. Worth and Mr. Pryor are both amply

[5] Although the Plaintiff presented evidence at trial that the true cost of the improvements will total over $21 million after debt service is factored in, nothing in the Sixth Amendment required the City to finance the project by issuing bonds. *See generally* Exhibit 7. Instead, the Sixth Amendment merely required the City to expend $15 million. The fact that, after entering into the Sixth Amendment, the City made the decision to issue bonds to finance the project does not increase or alter the City's obligations under the Sixth Amendment, and therefore does not factor into an analysis of whether the Sixth Amendment violates the Gift Clause or the Anti-Subsidy Clause.

[6] This case does not, therefore, present a situation comparable to the hypothetical municipality discussed in *Turken* that purchased a garbage truck "for twenty times its fair value," thereby providing an improper subsidy to the seller. *Turken*, 223 Ariz. at 347, 224 P.3d at 163.

qualified by experience to estimate the value of the improvements to the Facility. Mr. Worth's varied career with the City has included service as City Engineer, General Manager of the Municipal Services Department, Director of the Public Works Division, and, for one year, Acting City Manager. Mr. Worth testified that, during his two and one-half year tenure as City Engineer, he was charged with executing the City's capital construction program and was responsible for designing and contracting for the construction of all public infrastructure projects. He further testified that he has had responsibility for the design and construction of golf course improvements both as part of his current employment with the City and with his prior employer, the United States Army.

Mr. Pryor testified that, from 2009 through 2015, he was directly responsible for overseeing the City's contracts for the operation of its five golf courses, including the two at TPC Scottsdale. While serving in that position, Mr. Pryor worked closely with TPC regarding a wide variety of issues affecting TPC Scottsdale, including "course conditions" and "clubhouse issues." Before he began his 12-year tenure with the City, he served for seven years as the Golf Administrator for the city of Indianapolis, a city that maintains 12 municipal golf courses, as well as Director of Parks and Recreation for the city of Clarksville, Indiana, which maintains one municipal golf course.

Mr. Worth and Mr. Pryor are both qualified to estimate the value of the improvements to the Facility. *Cf. Town of Paradise Valley v. Laughlin*, 174 Ariz. 484, 486, 851 P.2d 109, 111 (App. 1992) ("[A]n owner of property is always competent to testify as to the value of his property."). Both testified that the improvements were worth $15 million. The Court accepts their testimony, uncontroverted by any other evidence, that the improvements were worth the $15 million the City paid for them. Nothing more is required to establish the adequacy of the consideration the City received. *See Turken*, 223 Ariz. at 350, 224 P.3d at 166 ("When a public entity purchases something from a private entity, the most objective and reliable way to determine whether the private party has received a forbidden subsidy is to compare the public expenditure to what the government receives under the contract."). The Court finds that the second prong of the *Wistuber* test is met here.

In addition to improvements that were worth the cost of construction, the City received other consideration pursuant to the Sixth Amendment as well. First, the Sixth Amendment increased, from 10% to 12.5%, the share of Golf Course Income that the City was entitled to receive over a twenty year period. Based on gross revenues from prior years, City officials have calculated that the increased revenue share will result in additional income to the City of $173,000 per year, which amounts to more than $3.4 million over twenty years.

In addition, the Sixth Amendment imposes other obligations on TPC - - *i.e.*, the Event Commitment and the Television Coverage Commitment - - which were bargained for by the

parties.

Noting that Paragraph 10.1 of the Sixth Amendment begins, "TOUR is not required to hold a tournament," the Plaintiff argues that the Event Commitment is illusory. The Plaintiff acknowledges that Paragraph 10.1 provides for certain consequences if the Event is not held (*i.e.*, that the City may rescind the agreement, or TPC must pay a Sponsor Failure Fine), but notes that the consequences apply only under certain circumstances (*i.e.*, if the tournament does not occur due to Sponsor Failure rather than Force Majeure). The Plaintiff argues that "[t]he so-called event commitment is not actually a commitment to the City at all that the Tournament will be placed at TPC Scottsdale." Plaintiff's Findings of Fact and Conclusions of Law at p. 13

In narrowly interpreting the Event Commitment in the Sixth Amendment, the Plaintiff ignores other provisions of the Sixth Agreement in violation of the principle that a contract must be read as a whole to effectuate the intent of the parties. *Harris*, 195 Ariz. at 562, 991 P.2d at 265. The recitals to the Sixth Amendment makes clear the parties' intent to prolong the period of time in which the tournament would be held at TPC Scottsdale. To read the Sixth Amendment as imposing no such obligation on Tour would be inconsistent with that provision of the Sixth Amendment. Further, Tour clearly understood the Sixth Amendment to require it to continue to hold the Tournament at TPC Scottsdale for ten years; James Triola, Chief of Operations for PGA Tour Golf Course Properties, so testified at the Preliminary Injunction Hearing in this matter on May 1, 2014.[7] Moreover, it is undisputed that, since the Sixth Amendment was entered into, TPC has in fact continued to hold the Tournament at TPC Scottsdale, a fact that further evidences the parties' intent in entering the Sixth Amendment. *See Darner Motor Sales v. Universal Underwriters Ins. Co*., 140 Ariz. 383, 393, 682 P.2d 388, 398 (1984) (in determining intent of parties to an agreement, court may consider, *inter alia*, the parties' "subsequent conduct"); *Assoc. Students of Univ. of Ariz. v. Ariz. Bd. of Regents*, 120 Ariz. 100, 105, 584 P.2d 564, 569 (App. 1978) ("The acts of parties under a contract, before disputes arise, are the best evidence of the meaning of doubtful contractual terms.").

In any event, it is undisputed that the City understood Paragraph 10 as imposing a ten-year Event Commitment. *See* Exhibit 9, City Council Report dated December 3, 2012 at p. 2 ("As part of the lease amendment, the Tour is making a commitment to hold a tournament at the facility through 2022."). Because TPC and Tour were aware of the City's understanding of Paragraph 10, they were not free to disregard it. *Harris*, 195 Ariz. at 562, 991 P.2d at 265

[7] In his testimony discussing Paragraph 10 of the Sixth Amendment, Mr. Triola testified, "From our perspective, what we were saying is, and what we were agreeing with the City was, that we would have the tournament there for ten years, and if we didn't have the tournament there, this was the - - basically was a negative sort of covenant to have the tournament there." Transcript of May 1, 2014 Preliminary Injunction Hearing at p. 60.

("[W]hatever is expected by one party to a contract, and known to be so expected by the other, is deemed a part or condition of the contract."). If nothing else, a decision by Tour to move the Tournament from TPC Scottsdale to another venue during the ten-year period referenced in Paragraph 10 would give rise to a claim by the City for breach of the implied covenant of good faith and fair dealing. *See, e.g., Garza v. Gama*, 240 Ariz. 373, 377, 379 P.3d 1004, 1008 (App. 2016) ("A party may breach the covenant of good faith and fair dealing without breaching an express term of the contract."); *United Dairymen of Ariz. v. Schugg*, 212 Ariz. 133, 138, 128 P.3d 756, 761 (App. 2006) ("A party can breach the implied covenant of good faith and fair dealing by acting in ways not expressly included in the contract but which nonetheless bear adversely on the other party's reasonably expected benefits of the bargain."). The Court therefore rejects the Plaintiff's assertion that the opening sentence of Paragraph 10.1 of the Sixth Amendment renders the Event Commitment illusory.

The Plaintiff likewise asserts that the Television Coverage Commitment is illusory because Tour was already obligated to televise the Tournament by its contracts CBS and/or the Golf Channel. Even if Tour had already been obligated, by its contracts with television networks, to televise the Tournament, those contracts certainly did not obligate Tour to televise the Tournament *from TPC Scottsdale*. The televising of the Tournament pursuant to Tour's pre-existing contracts with CBS and the Golf Channel would not benefit the City if the Tournament were relocated to a different venue. Taken together, the Event Commitment and the Television Coverage Commitment imposed real, and not illusory, obligations on Tour/TPC to continue to hold and televise the Tournament at the TPC Scottsdale for the next ten years. *See Leone v. Precision Plumbing & Heating of So. Ariz., Inc*., 121 Ariz. 514, 515, 591 P.2d 1002, 1003 (App. 1979) ("A promise lacks consideration if the promisee is under a pre-existing duty to counter-perform. The rule is inapplicable, however, if the promisee undertakes any obligation not required by the pre-existing duty, even if the new obligation involves almost the same performance as the pre-existing duty.").

Placing a value on the Event Commitment and Television Coverage Commitment is a more difficult matter.

Dr. Wells's testimony at the Preliminary Injunction hearing established that applying advertising rates to programming time indicates that the broadcast of the Tournament has a value of $89 million. At trial, the Plaintiff argued that applying advertising rates to programming time is not an accurate method of valuing programming time. The Plaintiff, however, offered no alternative method of valuing the Tournament's "air time," asserting that it has no value at all. The Court finds it indisputable that national television exposure has value to municipalities whose economy is based on tourism; numerous municipalities purchase advertising time as part of their tourism promotion campaigns. Scottsdale could certainly spend $15 million to directly purchase "air time" from TV networks to promote itself as a golf

destination without violating the Gift Clause. The Court sees no reason why spending that same amount to secure a nationally televised tournament broadcast from a Scottsdale golf course, watched for hours each year by golf enthusiasts around the country and the world, should be treated differently from direct advertising for Gift Clause purposes. *See Wisturber*, 141 Ariz. at 348, 687 P.2d at 356 (recognizing that the value of non-monetary consideration the government entity receives in disputed transaction may be assessed in light of what the government entity would have had to pay if it had purchased the non-monetary consideration directly). The Court finds Dr. Wells's testimony at the Preliminary Injunction hearing to be a reasonable measure of the value of the "air time" that the Tournament receives. In any event, whether one accepts the testimony of Dr. Wells or the trial testimony of Mr. Worth that the annual value of the Television Coverage Commitment is $15.9 million[8], the Court finds that the value of the national televising of the Tournament at TPC Scottsdale far exceeds the $15 million that the City agreed to expend pursuant to the Sixth Amendment.

Additionally, economist Elliot Pollack testified, based on his review of relevant reports and other data, including an economic impact study done in 2012 by Arizona State University's W.P. Carey School of Business, that, over the life of the Event Commitment, spending by tourists attending the Tournament will generate increased sales tax revenues with a discounted present value of "slightly more than $11 million."

In challenging Mr. Pollack's testimony, the Plaintiff noted that the 2012 study relied on by Mr. Pollack estimates the economic impact of the Tournament on the greater Phoenix metropolitan area as a whole, rather than simply the value to Scottsdale itself. The Plaintiff is correct on this point, and it is surely true that many of the tourists who come to the Tournament stay in hotels and eat in restaurants outside the borders of Scottsdale. For the Court to disregard, however, the economic impact of the Tournament simply because its impact extends beyond the boundaries of Scottsdale would be inconsistent with the "panoptic view" that the Court must adopt. *See Cheatham*, 240 Ariz. at 318, 379 P.3d at 215.

The Plaintiff further argues that any benefits in the form of tourist dollars that may be derived from hosting the Tournament at TPC Scottsdale are "anticipated indirect benefits" that, pursuant to *Turken,* cannot be considered in assessing the adequacy of consideration for Gift Clause purposes. *Turken* does not hold, however, that anticipated indirect benefits can *never* establish consideration under the *Wistuber* test. Instead, *Turken* holds that anticipated indirect benefits, "*when not bargained for as part of the contracting party's promised performance*,"

[8] As noted above, Mr. Worth's testimony on this point was based on the findings of the Repucom report, which was confirmed by "comparables" supplied by the Scottsdale Convention and Visitors Bureau of the cost "if we were to buy similar media coverage from an advertising agency in the form of 30 or 60 second spots."

do not constitute consideration for purposes of a Gift Clause analysis. 223 Ariz. at 350, 224 P.3d at 166 (emphasis added). Here, the Sixth Amendment does impose direct obligations on TPC/Tour, which were bargained-for by the parties, with respect to holding, and securing national television coverage of, an annual golf tournament at TPC Scottsdale. This bargained-for obligation distinguishes this case from *Turken*, in which the private entity had no obligation at all under its agreement with the municipality.[9]

In this respect, the Sixth Amendment is more akin to the agreement at issue in *Cheatham*, in which the Court rejected a Gift Clause challenge to a police union collective bargaining agreement that required a municipality to pay police officers for time spent on union activities. In so holding, the Court found that the municipality's payment of "release time" to the officers while they worked on union activities was supported by adequate consideration when taking into account all of the obligations the collective bargaining agreement imposed on the police union and the officers involved. *Cheatham*, 240 Ariz. at 324, 379 P.3d at 220. Like the collective bargaining agreement in *Cheatham*, and unlike the agreement with the developer in *Turken*, the Sixth Amendment imposes direct, bargained-for obligations on TPC/Tour to continue to hold and televise the Tournament at TPC Scottsdale. Pursuant to *Cheatham*, this direct, bargained-for obligation constitutes "consideration" for purposes of Gift Clause analysis.

The Plaintiff argues that the TPC was already contractually required to remodel the Stadium Course and Clubhouse based on the provisions of the LMA and the Second Amendment requiring the TPC "to make all capital repairs and/or capital replacements to the Golf Facility at its sole expense, subject to the availability of Net Operating Revenue." However, neither the language nor the understanding of the parties supports the Plaintiff's interpretation that the parties' agreement required the tenant, rather than the landlord, to bear responsibility for making capital improvements to the property. Further, even if the TPC had such an obligation under the LMA and the Second Amendment, nothing in the LMA or any of its amendments required TPC to make the specific capital improvements called for by the Sixth Amendment. To make sure that those specific improvements were completed, the City was free to enter a new agreement with TPC, even if that new agreement amended the parties' prior agreements, as long as the new agreement did not violate the Gift Clause or the Anti-Subsidy

[9] In *Turken*, the Court held that the City of Phoenix's agreement to pay $94 million to a shopping center developer in exchange for the exclusive right to use 200 parking spaces at a new shopping center, and the non-exclusive right to use some 2,980 more parking spaces there, was not supported by consideration. *Id*. at 350-51, 224 P.3d at 166-67. In so holding, the Court noted that the agreement between the City of Phoenix and the developer did not even require the developer to construct the shopping center in the first place. *Id*. at 350, 224 P.3d at 166 ("The Agreement makes plain that [developer] has no contractual obligation to build the retail component…").

Clause. *See, e.g., Barrett v. Duzan*, 114 Ariz. 137, 139, 559 P.2d 693, 695 (App. 1977) ("[P]arties to a contract may by their mutual agreement modify a contract between themselves.").

The Plaintiff also argues that the Sixth Amendment violates the Anti-Subsidy Provision of the Scottsdale City Charter in part because the City's expenditures under the Sixth Amendment, including the pledge of its credit in connection with the bond issuance, do not serve the requisite "clearly identified public purpose." The Court finds a "clearly identified public purpose" in improvements made to City-owned golf facilities that are available for public use fifty weeks each year, particularly in light of the fact that, in connection with that expenditure, the City was able to secure a continuing commitment to hold and televise an annual PGA Tour event at TPC Scottsdale that provides millions of dollars of promotional value and economic impact to the City.

Based on the undisputed evidence that the improvements to the City's property were worth what the City paid for their construction, the Court finds that the City received "direct consideration substantially equal to its expenditure," thus satisfying the second prong of the Anti-Subsidy Clause. The additional revenue, in the amount of $3.4 million over 20 years, that the City will receive as a result of its increased share of Golf Course Income further bolsters the conclusion that the City received consideration sufficient to satisfy the Anti-Subsidy Clause.

The Court further finds that the value of the "air time" that the City receives as a result of the Television Coverage Commitment far exceeds what the City paid under the Sixth Amendment. Although the Plaintiff has suggested that the "direct consideration" language in the Anti-Subsidy Clause must be read narrowly to mean only direct monetary return, case law does not support interpreting the term "consideration" so narrowly. *See Carroll v. Lee*, 148 Ariz. 10, 13, 712 P.2d 923, 926 (1986) ("[M]onetary consideration is not always required as consideration."). *See also Kromko v. Ariz. Bd. of Regents*, 149 Ariz. 319, 322, 718 P.2d 478, 481 (1986) (in rejecting Gift Clause challenge to lease transaction between board of regents and corporation operating nonprofit hospital, the Court found that terms of transaction enabled board to "guarantee the perpetuation of the critical education relationship between the hospital and university medical school, a benefit which, [a]lthough…non-pecuniary…nonetheless be viewed as consideration"); *Hassell*, 172 Ariz. at 369, 837 P.2d at 171 (citing case law for the proposition that "moral consideration" may constitute consideration for Gift Clause analysis purposes).

The Court finds that the City of Scottsdale obtained adequate value for its expenditure for purposes of the Anti-Subsidy Clause.

The Plaintiff complains that City officials "conducted inadequate due diligence in analyzing the proposed terms of the Sixth Amendment." Plaintiff's Findings of Fact and Conclusions of Law at p. 12. The extent of a government entity's due diligence, however, has no bearing on a Gift Clause or Anti-Subsidy Clause analysis. Resolving a challenge to a governmental expenditure based on the Gift Clause or Anti-Subsidy Clause requires the Court to assess the terms of the transaction, not the adequacy of the due diligence performed before the parties entered the transaction.

In the Court's view, the challenge that the Plaintiff raises here is not directed at the Sixth Amendment, but at the LMA and other amendments that preceded the Sixth Amendment. The Plaintiff's position is, essentially, that from the outset the City granted TPC unnecessarily generous terms to manage the Facility, and that, as a result, TPC continues to reap excessive profits from its management of the City's property at the expense of the City's taxpayers.

Whether the original terms of the LMA and the amendments prior to the Sixth Amendment were unduly favorable to TPC at the expense of the City is not, however, the issue before the Court.[10] *See Stuart v. Lane*, 2017 WL 3765499 * 5 (Ariz.App., Aug. 31, 2017) (City's pre-existing financial obligations do not bear on Gift Clause analysis, "which focuses solely on whether the City is receiving proper consideration for its new expenditures"). Nor is the Court's role to determine whether the City unwisely agreed to the terms of the Sixth Amendment when it should have seized the opportunity to negotiate for more far-reaching modifications to the original terms of the parties' agreement that would have brought in more revenue to the City. Instead, the issue before the Court is whether the City violated the Gift Clause or the Anti-Subsidy clause by agreeing to pay for improvements on its own land (*i.e.*, land that it either owns outright or has the right to occupy and use under a 50-year lease with the federal government) in exchange for the promises made by the TPC. Because the evidence establishes (1) that the City did not overpay the contractors for the cost of the improvements made pursuant to the Sixth Amendment, but instead received $15 million worth of improvements for its money, (2) the improvements are available for use by the public all but two weeks of each year, and (3) the improvements belong to the City and will remain at the Facility even if TPC were to discontinue serving as operator of the Facility, the Court finds it clear that the City's performance of its obligations under the Sixth Amendment does not violate the Gift Clause or the Anti-Subsidy Clause.

The Court finds that the Plaintiff has failed to meet his burden of establishing that the Council of the City of Scottsdale violated the Gift Clause of the Arizona Constitution or the Anti-Subsidy Clause of the Scottsdale City Charter by entering into the Sixth Amendment.

[10] The Plaintiff also offered evidence of a bond issuance by the City in 2006 to pay for certain capital improvements at the Facility. This transaction, too, is not before the Court.

For the foregoing reasons,

**IT IS ORDERED** finding in favor of Defendants on all of Plaintiff's remaining claims. Plaintiff's case is dismissed with prejudice.