

## Legal Alert

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### NEW GIFT CLAUSE OPINION

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In a new opinion, the Court of Appeals held that Phoenix violated the gift clause in the Arizona constitution through its “release time” arrangement with a Phoenix Police association. (*CHEATHAM v. PLEA*, Ariz. Ct. App. 8/11/2015.) For decades, the city has had a Memorandum of Understanding with the Police Law Enforcement Association through which officers were paid by the city but “released” from official duty to allow them to perform other tasks. On behalf of two taxpayers, the Goldwater Institute filed suit. The trial court held the gift clause was violated. In its new opinion, the Arizona Court of Appeals has affirmed.

This is the first notable gift clause case since the Supreme Court decided *Turken v. Gordon* in 2010. It sheds some new light on issues raised but not clarified by *Turken*. The court held that the City received insufficient consideration for the release time. (The other requirement of the gift clause—the existence of a valid public purpose—was raised but not addressed). The opinion underscored *Turken’s* emphasis on what a contract specifically promises to give to the government. The Court explained that the *Turken* decision hinged on the fact that the in the CityNorth development agreement “the developer was not obligated to produce the tax revenue for the City’s benefit.”

The court thus confirmed our belief that consideration must be weighed based upon the promises made in a development agreement. The Court of Appeals also stated (more than once) that consideration must be weighed based upon notions of “fair market value”—something that becomes uncertain when a developer “promises” benefits such as the creation of jobs, cleaner air, etc. The court also confirmed that the adequacy of consideration must be weighed at the time the contract is made, not later.

<http://www.azcourts.gov/Portals/0/OpinionFiles/Div1/2015/1%20CA-CV%2013-0364.pdf>

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