

RISK REVIEW

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CityNorth decision not too bad from city or town perspective

By William J. Sims III • Moyes, Sellers & Sims

The Arizona Supreme Court recently decided a case – *Turken v. Gordon, et al* – that many in the development community thought left too much doubt and could jeopardize future development. What did the Court decide and how should cities and towns respond? The sky really is not falling. The case is not too bad from a city or town perspective.

The development agreement in the CityNorth case required the developer of a commercial development to set aside 2,980 parking garage spaces for non-exclusive use by the general public and 200 spaces for exclusive use by drivers in commuting programs. In return, for 11 years Phoenix must pay the developer annual payments equal to half of certain sales taxes generated by the development. This amount could be up to \$97.4 million.

The public dollars for parking spaces was challenged by Phoenix taxpayers based, in part, on what is known as the Arizona Gift Clause (Article 9, Section 7 of the Arizona Constitution):

“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, or become a subscriber to, or a shareholder in, any company or corporation, or become a joint owner with any person, company, or corporation . . .”

Even though the Supreme Court noted that the CityNorth development agreement “quite likely” violated the Gift Clause, the Court concluded that because of uncertainty that had been generated by earlier court decisions, the Court decided not to



rule that the CityNorth development agreement violated the Gift Clause. Instead, the Court attempted to lay down rules that cities and towns may follow. What can we learn from the decision?

Let your elected officials make the decision. The Court of Appeals had expressed concern about “rubber stamping” the decision of elected officials. The Supreme Court stepped back a bit and noted that “courts owe significant deference to the judgment of elected officials.” City and town staff should make sure that elected officials

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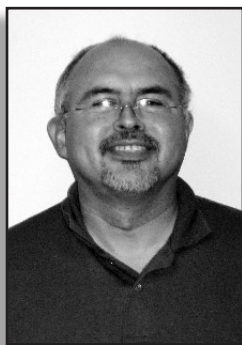
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Rudy Rodriguez
AMRRP President

LETTER FROM THE PRESIDENT

Dear AMRRP Members:

As many of you know, this is the time of year when elected officials are faced with annual budgetary challenges that have become even more difficult in light of Arizona's slumping economy and reduced tax base. Frustrated municipal finance directors throughout the state are being pushed harder than ever to stretch limited revenues as far as possible in order to continue vital municipal functions. Services are

becoming limited, overtime allowances are becoming rare and furloughs are becoming common, with many municipalities having gone to a four-day work week.

In the midst of these difficult economic times when every dollar counts more than ever, I'm extremely pleased to announce that the AMRRP Board of Trustees voted at our May meeting to approve a \$2.8 million dividend to be distributed among municipalities that are property/casualty pool Members as of July 15, 2010.

Each Member of the AMRRP retains an ownership interest in the Pool based on its length of membership, premium contributions and historical loss results. The dividend represents a portion of surplus funds in excess of amounts needed for payment of the Pool's current and estimated future property/casualty liabilities. The Board's declaration of a dividend reflects a means by which the Pool can thank its property/casualty Members for their continued loyalty and support and, a means by which those Members can enjoy the benefits of the Pool's continued success, especially in light of the economic challenges faced by municipalities throughout our state. Significantly, the 2010 dividend amount reflects a 40 percent increase over the \$2 million property/casualty dividends that the AMRRP Board has been distributing annually to Members dating back to the early part of this past decade. In considering the amount of this year's dividend, the Board recognized that now more than ever, it's important to demonstrate the financial advantages of being part of an Arizona-based, member-owned risk pool vs. purchasing an insurance policy from a profit-driven, out-of-state commercial carrier.

Also, in speaking about the benefits of AMRRP membership, on behalf of the Board of Trustees, I'm very pleased to welcome the Town of Tusayan as newest member of our property/casualty Pool. Located near the south entrance of Grand Canyon National Park, Tusayan residents voted to approve an incorporation initiative in March of this year and the Town became the AMRRP's 75th Member on April 15th. We wish the Tusayan Town Council and all of its citizens much success as they join the ranks of Arizona municipalities and we're very happy to have them become a part of our AMRRP family.

As we move forward into a new fiscal year, the AMRRP Board of Trustees remains dedicated to assisting Arizona's cities and towns in finding the most cost-effective ways to transfer risk and control expenses while rewarding our Members' loyalty so that limited municipal resources can be focused as much as possible on helping the citizens we are all committed to serving.

Sincerely,

A handwritten signature in black ink that reads "R. Rodriguez". The signature is fluid and cursive.

Rudy Rodriguez
President, AMRRP Board of Trustees

Member Profile: *The City of Litchfield Park*

Litchfield Park is a planned residential community west of Phoenix just north of I-10. It was started as a ranch and the headquarters of the Southwest Cotton Co., which was formed as a subsidiary of the Goodyear Tire and Rubber Co. in a somewhat desperate attempt to provide a sufficient supply of long-staple cotton during World War I.

Egypt had been the major supplier of the cotton, which Goodyear needed to manufacture balloon tires, but a German blockade dried up that source. At the same time, a boll weevil infestation destroyed the crop on the Sea Islands off Georgia's coast. The war effort was also creating a huge demand for the cotton to make uniforms, observation balloons, airplane fabric and a host of other essentials.

Experiments conducted by the U.S. Department of Agriculture indicated that conditions in the Salt River Valley of Arizona could provide a viable option for growing the much-needed cotton. Goodyear dispatched a young executive named Paul W. Litchfield to Phoenix in 1916 with the goal of turning the Valley into a huge cotton farm. Litchfield acquired the Agua Fria Ranch, which was 16 miles west of the then-fledgling City of Phoenix, and established the Southwest Cotton Co. to handle Goodyear's farming interests. He also acquired tracts along the river so that what became known as Goodyear Farms ultimately covered 14,000 acres. Goodyear Farms was renamed for Litchfield in 1926.

Southwest Cotton Co. also acquired the 8,000-acre Goodyear Ranch south of Chandler and the 10,000-plus acre Marinette Ranch, where much of Sun City now stands. The Goodyear and Marinette ranches were sold off in the 1940s.

Goodyear officials often visited the Arizona operation, but housing was in short supply. Organization House was built during the winter of 1918-19 to meet that need, and many of the business guests began suggesting that it would be a great place to spend a winter vacation. Goodyear executives, who were occasionally accompanied by their families when visiting the farming operations, agreed. On Thanksgiving Day in 1929 "The Wigwam" officially opened its doors as a guest ranch with rooms for 24 guests, and it has evolved into the prestigious Wigwam Golf Resort and Spa. A portion of the original structure remains as the cornerstone of the resort's authenticity and southwestern charm. The Wigwam Golf Resort and Spa now features 331 guest casitas surrounded by

lush landscaped walkways, fragrant citrus tree-lined enclaves and floral and rose gardens.


From 1931 to 1944, the farming operation also served as a base for testing for Goodyear auto, truck and tractor tires.

In the 1960s, Goodyear designed a master plan for development of Litchfield Park, and the City was incorporated in 1987. An estimated 5,600 residents called it home in 2007.

Litchfield Park has a variety of community facilities including a library, swimming pool, three golf courses and six parks with baseball and soccer fields.

Nearby attractions include the White Tanks Regional Park, which covers nearly 30,000 acres and is the largest regional park in Maricopa County. Most of the park is made up of the rugged and beautiful White Tank Mountains, a range that rises sharply to over 4,000 feet and is serrated with ridges and canyons. Infrequent heavy rains cause flash floodwaters to plunge through the canyons and pour onto the plain. These torrential flows, pouring down chutes and dropping off ledges, have scoured out a series of depressions, or tanks, in the white granite rock below, thus giving the mountains their name.

White Tanks Mountain Regional Park offers 40 individual camping sites with no water/electrical hook-ups. Each is a "semi-developed" site with a picnic table, barbecue grill and a fire ring. All sites are available on a first-come, first-served basis. The park also has approximately 25 miles of excellent shared-use trails, ranging in length from a mile to nearly eight miles and with a range of difficulty from easy to strenuous. Overnight backpacking, with a permit, is allowed in established backcountry campsites. Horseback and mountain bike riders are welcome, although caution is stressed as some of the trails may be extremely difficult.

Also nearby is Estrella Mountain Regional Park, which features a golf course along with camping, hiking and horseback riding facilities and the only grass picnic area in the Maricopa County Park System. These 19,840 acres of desert and mountains became the first regional park in the system in 1954. Located near the confluence of the Gila and Agua Fria rivers, the park includes a large wetland, or riparian, area. The majority of the park remains pristine desert, very similar in appearance to the landscape seen by the first settlers and explorers. 

Bills make changes to rights of law enforcement officers

The Arizona Legislature has made changes to Arizona Revised Statutes (A.R.S.) § 38-1101 outlining the rights of law enforcement officers and probation officers regarding interviews the employer reasonably believes could result in dismissal, demotion or suspension of the officer.

The changes were contained in **Senate Bill (SB) 1325**, which becomes effective Sept. 29 as do other bills passed during the 2010 regular session and signed by Gov. Jan Brewer.

A.R.S. § 38-1101 requires that if the employer reasonably believes that the interview could result in disciplinary action, the employer must provide the officer with a written notice describing the specific nature of the investigation. The officer must be informed of their status in the investigation, all allegations leading to the interview and the officer's right to have representation. The officer may request to have a representative from the same agency, who is not an attorney, present to act as an observer. Short breaks must be allowed during the interview to allow for consultation and the officer may consult with an attorney at that time. If the information presented by the officer differs from information already obtained during the investigation, the employer may require a polygraph examination. If a polygraph examination is administered, an audio recording must be produced and a copy must be provided to the officer. At the conclusion of the interview, the officer is entitled to make a statement not to exceed five minutes addressing specific facts or policies related to the interview.

SB 1325 states that statutory guidelines apply to employer interviews if the law enforcement officer or probation officer reasonably believes the investigation could result in a dismissal, demotion or suspension and specifies that if a representative from the same agency of the law enforcement officer or probation officer is not reasonably available to be present during the interview, the representative may be from the law enforcement officer's or probation officer's professional membership organization.

SB 1325 also requires that all data and reports from a polygraph examination of a law enforcement officer or probation officer are confidential and may only be used for the purposes of employment, certification or reactivation of certification or the administrative matter for which a polygraph was administered. The bill also requires that the data and reports from a polygraph examination be destroyed no later than three years and 90 days after the date of the administrative interview

or employment of the officer, except for a pre-employment polygraph in which an applicant was not hired or in the case of an active investigation or an appeal.

SB 1325 also changes the definition of "disciplinary action" to reduce the length of a potential suspension from 24 hours to 16 hours.

Another bill, **SB 1029**, prohibits a law enforcement officer from being subject to disciplinary action except for just cause. SB 1029 defines "just cause" as conduct that the officer should have reasonably known could result in disciplinary action.

SB 1029 requires that any disciplinary action:

- Is reasonably related to the standards of conduct for a professional law enforcement officer; the mission of the agency; the orderly, efficient or safe operation of the agency; or the officer's fitness for duty.
- Is supported by a preponderance of evidence.
- Is not excessive and is reasonably related to the seriousness of the offense and the officer's service record.

SB 1029 excludes officers who have not yet completed their probationary period, if one is required by their employer, and officers being dismissed due to administrative purposes.

Other bills of interest to AMRRP members passed by the Legislature and signed by the governor include:

House Bill (HB) 2477, adds "leased employee" to the list of public employees authorized to perform any act or service on behalf of a state entity and who, under A.R.S. §12-820.02, would meet the criteria for qualified immunity. A "leased employee" is defined as a person providing services under a lease agreement and is not an independent contractor or temporary employee. At the request of the AMRRP Board of Trustees, this bill was strongly supported by the League of Arizona Cities and Towns which took an active role in advocating for the bill's passage.

HB 2336 allows escort vehicle operators with at least four hours of training in certified traffic control techniques and at least \$500,000 in liability insurance to perform traffic control and prohibits persons with escort vehicle certifications from other states from performing traffic control.

HB 2336 also changes the training and certification requirement frequency for traffic control flaggers from at least once every two years to once every four years. ❁

Personnel Perspectives

Featuring legal issues from the AMRRP Personnel Assistance Lifeline (PAL)

AMRRP Personnel Assistance Lifeline (PAL) Q&A

By Justin Pierce, Jackson Lewis, LLP

Question: We have an employee, Bob, who recently sent an e-mail to “all town employees” (we have a listserv that allows an employee to do that) expressing feelings about Senate Bill 1070. Although he did not use any vulgarities, several of our employees were offended by the position expressed in the e-mail, and felt the e-mail created a racially hostile work environment. We don’t have a clear policy pertaining to the content of e-mails over the listserv. It just says the listserv is “for business purposes,” but it’s not a policy we have enforced, i.e., others have used the listserv to notify employees of sales at particular stores, activities on the weekend and similar things that would be considered non-business related. Can we discipline the employee who sent the e-mail as a remedy for the alleged hostile work environment?

Answer: No. A very recent decision out of the Ninth Circuit (which covers Arizona) threw out a case brought by a class of plaintiffs who claimed a racially hostile work environment resulting from three e-mails sent by a college professor to all of the employees of the college district. The Court stated that the college district couldn’t have disciplined the professor for the e-mails because he had a First Amendment right to his speech. Likewise, as a government employer, if you take action against Bob, you certainly will be violating his First Amendment rights because you are disciplining him based on the content of his speech. While you should express empathy for the complaining employees’ feelings, I think the best approach would be to quote the Ninth Circuit to them: “Those offended by [the employee’s] ideas should engage him in debate or hit the ‘delete’ button when they receive his e-mails. They may not invoke the power of the government to shut him up.” ❁

Premiums, Dividends Based on Controlling Claim Costs

As Rudy Rodriguez noted in his Letter from the President, “...municipal finance directors throughout the state are being pushed harder than ever to stretch limited revenues as far as possible...,” which means AMRRP Members are taking a close look at all expenses including the premiums they pay for Pool coverages.

AMRRP Program Administrator Ed Bantel says Members should like what they see because their membership is paying dividends while their risk management endeavors are keeping premiums under control.

Since 2005, the number of claims filed by Members with Southwest Risk Services, the AMRRP’s administrator, has risen just slightly more than 2 percent from 1,577 claims in 2005 to 1,617 in 2009. At least part of this increased claim volume is attributable to the growth of AMRRP municipalities; with more exposures being insured, more claim volume will inevitably follow.

However, because of the success of the Pool’s underwriting and risk management efforts, the AMRRP Board of Trustees voted at its May meeting to approve a \$2.8 million dividend

to be distributed to property/casualty pool Members as of July 15. During 2009, the Board approved a \$2 million dividend for property/casualty pool Members and a \$1 million dividend for workers’ compensation Members. Those dividend dollars come from AMRRP Members’ surplus, which is money in excess of that which is needed to pay for the Pool’s current and estimated future liabilities. The amount of Members’ surplus available to pay dividends and control premium increases is based on a number of factors, including how much money the Pool needs to charge Members for covering their liability exposures and how much it has to pay out for its Members’ claims.

In determining each AMRRP Member’s premiums, many factors are considered, with the municipality’s claim history and commitment to loss control being among the most important. Merely submitting a claim to the Pool won’t affect a Member’s premium, especially if no payment is ever made. But, the amount the Pool pays to defend and indemnify the Member for a claim can have a negative affect on renewal premium. Members with good risk management programs

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are fully aware of the terms of proposed development agreements and are allowed to express their opinions and vote on such terms. Under the Supreme Court's CityNorth decision, courts will defer to those decisions. **Net impact: Positive.**

Courts will overturn the elected officials' decision in extreme circumstances. Underscoring the deference that courts will give decisions made by elected officials when applying the Gift Clause, the Supreme Court noted that courts will find a public purpose when elected officials decide to authorize expenditures of public funds in connection with development projects except "in those rare cases in which the governmental body's discretion has been 'unquestionably abused.'" Moreover, when evaluating whether or not a city or town has received adequate consideration for the public resources committed to the developer, the Court observed that it would only find the Gift Clause violated if the consideration given by the city or town was "grossly disproportionate" to the consideration given by the developer. Here we see the Arizona Supreme Court acknowledging that unelected justices should defer to the substantiated decision of elected officials. **Net impact: Positive.**

A deal is not invalid just because a private interest is benefited. When the Arizona Court of Appeals considered the CityNorth deal, it adopted a new test for assessing the constitutionality of development agreements under the Gift Clause. The Court of Appeals interpreted prior cases to require a determination as to "whether the payments to a private party unduly promote private interests." Every development deal will promote a private interest; otherwise the developers won't do the deals. The Arizona Supreme Court rejected the new test and instead applied the two-step test of a long line of Arizona cases: (a) is the expenditure for a public purposes, and (b) is the "public benefit to be obtained from the private entity as consideration . . . far exceeded by the consideration being paid by the public?" This test is easier to apply than trying to determine if a private person has been "unduly benefited. **Net impact: Positive.**

The city or town must be able to quantify the benefits received. When evaluating the consideration exchanged by the parties in the CityNorth deal, the Arizona Supreme Court decided not to count increased tax revenue and additional jobs as part of the consideration given by the developer. The Court established a somewhat blurry line by applying principles of contract law:

"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 under [the Gift Clause]." The CityNorth decision actually helps cities and towns when starting negotiations with a developer who rolls into town with all sorts of promises. The CityNorth case requires a city or town to contract for benefits if those benefits are to be counted when determining whether or not a deal satisfies the Gift Clause. If the benefits can be measured and enforced, then the CityNorth decision helps governments strike beneficial deals for their communities – exactly what the Gift Clause is intended to promote. This standard can be applied to many types of development agreements that cities and towns enter into, such as deals where the developer creates direct, discernable value in return for sales tax reimbursement. Reimbursing a developer, for example, for the cost of public infrastructure paid for by the developer and used by persons other than the developer would be permitted, such as additional streets, sewers and sidewalks built by the developer at a capacity greater than needed for the proposed development. **Net impact: Positive.**

Can increased tax payments ever be direct? Even though the CityNorth case has many positive impacts for cities and towns, the case does create a fair amount of uncertainty. Can taxes generated by development ever be counted as consideration? The Court seems to suggest that cities and towns may not count taxes by noting that a duty to pay taxes arises "from law applicable to all, not out of contract." All is not lost, however, if the goal is to try to use indirect benefits to show adequate consideration. For taxes, you could ask for a letter of credit to support a minimum payment on an annual basis. For jobs, you could require the developer to create a minimum number of jobs. **Net impact: Uncertain.**

Do you always need a contract? The CityNorth opinion contains language in footnote four that is helpful, but also confusing. The objective of this footnote seems to clarify that the opinion does not impose a Gift Clause limitation on the exercise of governmental powers such as providing assistance to the needy. The footnote, however, contains somewhat unnecessary language when it states that the Gift Clause analysis does not apply to "non-contractual public expenditures." Some have read this to mean that if a government decides to spend funds (for example, a contribution

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to the chamber of commerce), the government should do so without a contract in order for the deal to be insulated from Gift Clause scrutiny. Read literally, this language would suggest to never use a contract when committing public funds. That should not be the result. Governments are better served by using the rigor imposed by a contract to document and enforce the benefits that a government receives when expending public funds. **Net impact: Uncertain.**

Don't always assume that you need to own the improvement that is paid for with public funds. The CityNorth opinion suggests that ownership of an improvement paid for with public funds avoids Gift Clause scrutiny: "the City could have erected a parking structure of its own without violating the Gift Clause." The Gift Clause, however, is not the only guiding principle when evaluating development options. If the city or town (rather than the developer) owns the improvement, property taxes could be lost and the city or town will incur liability arising out of ownership such as capital repair, demolition and damages arising from injuries on the property. **Net impact: Mixed.**

Don't forget the procurement rules. When the Supreme Court evaluated the exchanged consideration in the CityNorth deal, the Court noted that "paying too much for something effectively creates a subsidy from the public to the seller." The Court observed that much greater scrutiny will be applied when "a public entity enters into the contract without the benefit of competitive proposals." The temptation is always there to try a sole source procurement; instead, use the language of the CityNorth opinion to justify competitive solicitations as often as you can when spending public funds. **Net impact: Positive.**

Remember that besides the Gift Clause, statutes must also be complied with. Our Legislature has been grappling with problems arising out of cities and towns competing with each other to attract development by rebating sales taxes. Slowly, the Legislature has adopted legislation to make it more difficult to rebate sales taxes. Don't forget to comply with these statutes (e.g., A.R.S. § 9-500.11). Compliance alone with the statute, however, does not necessarily mean that the Gift Clause has been satisfied. **Net impact: Neutral.**

Don't jump to the conclusion that we need a constitutional amendment. Some have said that to correct all of the perceived uncertainty arising out of the CityNorth decision, the Arizona Constitution must be amended to clearly allow cities and towns to provide the incentives that were challenged in CityNorth. When you consider the points raised above, the CityNorth case does not seem that troubling for cities and towns. It will require governments to be more discerning when expending public funds – not a bad outcome and one that probably would be looked upon favorably by the drafters of the Gift Clause at statehood. One should consider a recent example of the outcome when voters were asked to weigh in on land use issues. In 2006 the voters were asked (probably unnecessarily) to approve Prop 207, the Private Property Protection Rights Act, concerning city land use approvals. The result has produced confusing legislation that cities and towns must try to address. The better way to address the CityNorth decision is to try to implement the decision in a way that promotes the interests of Arizona cities and towns, the interests of both the governments and the citizens they represent and the interests of developers with the goal being a development that benefits all. ❁

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almost always experience lower claim counts and smaller dollar exposures on the claims they do submit to the Pool. This, in turn, allows them to enjoy lower premiums.

Bantel points out that claims are not the only factor used in determining a Member's premium. He says other factors include such things as a Member's budget, population, number of employees, miles of roads and streets maintained.

"Each Member is reviewed on an annual basis," Bantel says. "But a Member's commitment toward reducing claims and claim exposures generally translates into lower premiums which, in turn, frees up a municipality's money for other budget items. In today's difficult economy, a commitment to risk management is more important than ever so that scarce budget dollars can be spent on things besides rising insurance premiums". ❁

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Legal Counsel William J. Sims, III	Moyes Seller & Sims	(602) 604-2120

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14902 North 73rd Street
Scottsdale, AZ 85260

Telephone (602) 996-8810
Toll Free (888) 309-4339
FAX (602) 996-9045

www.amrrp.org

The AMRRP is a non-profit corporation created in 1987. Its primary purpose is to provide property and casualty coverages to incorporated cities and towns in Arizona. AMRRP is sponsored by the League of Arizona Cities and Towns. AMRRP is governed by a nine member board elected by representatives of participating cities and towns.

Risk Review is published by AMRRP in a continuous effort to inform and educate its member cities and towns. Suggestions for article topics are welcome. Contact AMRRP at the above address and phone number.