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To: Pima County Board of Supervisors
Jan Leshner, County Administrator
Ellen Moulton, Finance Director

From: Rachelle Barr, Deputy County Attorney

Date: November 8, 2022

Subject: Arizona Gift Clause – AZ Heroes Memorial

This memo addresses the question of whether the County can give \$170,000 of County funds to the AZ Heroes Memorial without receiving direct benefits. In short, no; the County cannot donate funds to this Memorial without likely violating Arizona's Gift Clause because there is inadequate consideration.¹

The Arizona Supreme Court developed a two-prong test to determine whether government expenditures violate the Arizona Constitution's Gift Clause. The first prong looks at whether the expenditure has a public purpose.² If the first prong is satisfied, the court will look to the second prong to see if the objective, fair market value to the individuals or entity (the "direct benefits" of the government expenditure) is grossly disproportionate to the consideration³ promised to the County.⁴ Government entities must satisfy both prongs to pass the test.

Under the first prong, public purpose may be found lacking only when the government's discretion has been "unquestionably abused."⁵ When determining if a valid public purpose exists, courts consider both direct and indirect benefits of the government expenditure.⁶

1 Ariz. Const. art. IX, § 7

2 *Schires*, 250 Ariz. at 374-75, ¶¶ 7-9 (2021).

3 "Consideration" is a performance or return promise that is bargained for in exchange for the promise of the other party; it is what one party to a contract obligates itself to do, or to forbear from doing, in return for the promise of the other contracting party. *Turken v. Gordon*, 223 Ariz. 342, 224 P.3d 158 (2010)

4 *Schires*, 250 Ariz. at 376, ¶¶ 13-14.

5 *Schires*, 250 Ariz. at 375 ¶ 9 (internal citations omitted); *Cheatham v. DiCiccio*, 240 Ariz. 314, 320 ¶ 21 (2016).

6 *Id.* at 8.

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At issue, the AZ Heroes Memorial will dedicate art, monuments, and landscaping to veterans, first responders, and healthcare workers. Donations to the non-profit will fund the park in Oro Valley, Arizona. Open to the public, the Memorial would be a place to “remember and learn” about those “who have dedicated their lives to ensuring our American values.”⁷ Here, the donation funds a public memorial and is agreeable for the use and benefit of the public.

Once the public purpose is satisfied, the court analyzes the provided consideration, giving no due deference to the decisions of elected officials. The County’s expenditure would likely violate the Constitution if deemed by a court to be grossly disproportionate to the quantifiable consideration it received in return.

Regarding the AZ Heroes Memorial donation proposal, the County does not appear to be receiving adequate consideration in exchange for the expenditure. The County cannot quantify the use of the public area as a direct benefit. Without direct consideration, a court would likely find the County expenditure is grossly disproportionate compared to the received benefit.

Based on this legal analysis, the Gift Clause will likely not be satisfied, and a court would likely find the donation is grossly disproportionate to benefits received by the public and violates the Gift Clause.

⁷ <https://www.azheroesmemorial.org/>