ARIZONA COURT OF APPEALS

DIVISION ONE

DANIEL POPE, Plaintiff/Appellant, v. CITY OF PHOENIX, Defendant/Appellee.	Court of Appeals Division One No. 1 CA-TX 20-0006 1 CA-TX 21-0004 (Consolidated) Arizona Tax Court No. TX2018-000759
RACHEL ROBERTS, Plaintiff/Appellant, v. CITY OF PHOENIX, Defendant/Appellee.	Arizona Tax Court No. TX2020-000833

DEFENDANT/APPELLEE CITY OF PHOENIX'S ANSWERING BRIEF AND APPENDIX

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INTRODUCTION

These consolidated cases address the constitutionality of a $6 facility charge for car rental companies' use of the rental car facility at Phoenix Sky Harbor Airport.

Arizona's judicial system has been dealing with challenges to these types of laws for fifteen years in multiple cases brought by the same principal attorneys. The courts have uniformly rejected the challenges, both on standing grounds and on the merits. *See Karbal v. ADOR*, 215 Ariz. 114 (App. 2007) (standing); *Saban Rent-A-Car LLC v. ADOR*, 246 Ariz. 89 (2019), *cert. denied* __ U.S. __, 140 S. Ct. 195 (2019) (merits). The Tax Court correctly dismissed both of the present cases because they run directly into those controlling precedents.

The plaintiffs' claims fail for several independent reasons, any one of which is sufficient to affirm: (1) Pope filed an untimely appeal, (2) the plaintiffs filed an invalid notice of claim, (3) these plaintiffs lack standing, and (4) the facility charge does not violate the Constitution.

This Court should affirm.

STATEMENT OF FACTS AND CASE

By the early 2000s, rental car operations at Phoenix Sky Harbor Airport were running out of space. The airport provided space to car rental companies within the Terminal buildings, parking garages, and adjacent areas. [Roberts-IR-7, Ex. C at 20-21 (APP223-24).] But the rental car business was growing, the facilities were too small, and there was nowhere for them to expand nearby. [*Id.* at 21 (APP224).] Many car rental companies responded by bussing their passengers to remote facilities. [*Id.* (APP224).] This created its own problems: increased congestion at the terminal curb; costly, inefficient operations for car rental companies; and poor customer service. [*Id.* (APP224); Roberts-IR-7, Ex. B at 12 (APP219).]

To address these problems, Phoenix built a consolidated rental car facility that would be accessed via a common transportation system. [Roberts-IR-7, Exs. B-C (APP204-25).] This concept had been developed at other airports and was supported by the industry and an environmental assessment. [*Id.* (APP204-25).]

Phoenix issued bonds to finance the construction of the facility. It repays those bonds with revenues from the facility charge, a fee of $6 per transaction day for rentals that use the facility. *See* City Code § 4-79 (copy at

APP096). The car rental companies pay the facility charge to Phoenix and must attempt to collect it from their customers at the facility. *See id.*

The two plaintiffs, Daniel Pope and Rachel Roberts, each filed separate lawsuits, alleging that they rented vehicles at the rental car facility and paid the facility charge ($36 for Pope, $30 for Roberts). [Pope-IR-9, ¶ 8 & Ex. A (APP120, 132); Roberts-IR-1 ¶¶ 7-8 & Ex. A (APP187, 199).] On behalf of putative classes, they claim that using the revenues from the rental car facility charge to maintain the rental car facility violates Article IX, § 14 of the Arizona Constitution, which prohibits road-user fees from being diverted to other uses:

> No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on the public highways or streets or to fuels or any other energy source used for the propulsion of vehicles on the public highways or streets, shall be expended for other than highway and street purposes . . . .

Ariz. Const. art. IX, § 14 (copy at APP098).

The Tax Court dismissed Pope's suit because his "argument has already been addressed squarely and rejected by the Court of Appeals," on standing and the merits. [Pope-IR-21 at 1 (APP177).] It did not reach the validity of his notice of claim. On March 10, 2020, the Tax Court entered

judgment against Pope. [Pope-IR-24 (APP178).] On May 22, 2020, Pope filed an untimely notice of appeal. [Pope-IR-32 (APP180).]

About two months later, Roberts sued. As with Pope, the Tax Court held that "Roberts's position has been considered and rejected by the Arizona Court of Appeals," on standing and the merits. [Roberts-IR-14 at 1 (citing *Kabal* and *Saban*) (APP235).] The court also held that Roberts's notice of claim was invalid, for reasons that apply equally to Pope. [*Id.* at 1-2 (APP235-36).] Roberts appealed. [Roberts-IR-30 (APP237).] This Court consolidated both appeals.

STATEMENT OF THE ISSUES

1. By statute, a Tax Court judgment is final unless appealed within 30 days. Pope appealed more than 30 days after judgment was entered. Was his appeal timely?

2. The notice of claim statute requires a claimant to provide "facts supporting" the amount for which that person's individual claim can be settled. The plaintiffs provided no facts connecting the amount they paid in facility charges ($36 and $30, respectively) to the amounts for which they would settle their individual claims ($4.5 million and $4.8 million, respectively). Did they comply with the statute?

3. To have standing to challenge a government fee, a plaintiff must, among other things, bear the legal incidence of the fee; allege that the fee itself is unlawful; and have an injury that the court can redress. Here, the legal incidence of the facility charge falls on the car rental companies, not customers such as the plaintiffs; the plaintiffs do not challenge the legality of the fee, but only Phoenix's subsequent expenditures; and they are not eligible for a refund or any other remedy. Do they have standing?

4a. The anti-diversion provision applies only to fees imposed as a prerequisite to, or triggered by, the legal operation or use of a vehicle on a public road. There is not a single public road in Arizona for which paying the facility charge is a prerequisite or trigger. Does the anti-diversion provision apply to the facility charge?

4b. When the anti-diversion provision applies, it prohibits road user fees from being diverted to other purposes. The airport spends facility charge proceeds on the rental car facility that generated them. Is this diversion?

4c. Federal statutes prohibit diverting airport revenue to non-airport uses. If Article IX, § 14 reaches the facility charge, do the federal statutes preempt Article IX, § 14?

ARGUMENT

I. Pope's appeal must be dismissed as untimely.

A. Pope filed an untimely notice of appeal.

The Court should dismiss Pope's appeal for lack of jurisdiction because he filed an untimely notice of appeal. Phoenix previously moved to dismiss on this basis. This Court denied the motion without prejudice to Phoenix raising the timeliness issue in the answering brief. (APP258.) Phoenix incorporates the arguments in its prior briefing in this Court. *See* motion filed on July 1, 2020 (corrected on July 21, 2020) (APP239) and reply filed on July 23, 2020 (APP245).

By statute, in Tax Court "[t]he judgment is final unless within thirty days after the entry of the judgment a notice of appeal is filed with the clerk of the tax court." A.R.S. § 12-170(C). In other words, "a final judgment of the tax court becomes absolute and unreviewable if no notice of appeal is filed within the 30 days following its entry." *Devenir Assocs. v. City of Phoenix*, 169 Ariz. 500, 503 (1991) (citation omitted).

The Tax Court entered final judgment on March 10, 2020. [Pope-IR-24 (APP178).] Consequently, the deadline for filing a notice of appeal lapsed on April 9, 2020. Pope filed his notice of appeal on May 22, 2020. [Pope-IR-

32 (APP180).] His appeal is untimely and should be dismissed for lack of jurisdiction. *See Edwards v. Young*, 107 Ariz. 283, 284 (1971) ("[W]here the appeal is not timely filed, the appellate court acquires no jurisdiction other than to dismiss the attempted appeal.").

B. Pope's motion for new trial did not extend the deadline.

Pope also filed a motion for new trial on March 24, 2020, which the Tax Court denied on May 7, 2020. [Pope-IR-26 (motion); Pope-IR-30 (ruling) (APP179).] Pope previously argued that his motion for new trial extended the appeal deadline under ARCAP 9(e). But ARCAP 9's deadlines do not apply when "the law provides a different time." ARCAP 9(a). For example, certain election appeals must be filed within five days after entry of judgment. *See* A.R.S. §§ 16-351(A), 19-122(A); *see also* ARCAP 10. Similarly, a judgment of the Tax Court is "final"—or in the Supreme Court's words, "absolute and unreviewable"—if not appealed within 30 days. A.R.S. § 12-170(C); *Devenir*, 169 Ariz. at 503 (citation omitted). The judgment's finality does not depend on whether a party has moved for a new trial.

This straightforward reading of § 12-170(C) does not create a conflict with ARCAP 9. Courts read rules and procedural statutes in harmony whenever possible. *State v. Forde*, 233 Ariz. 543, 575, ¶ 145 (2014). By

allowing "the law" to "provide[] a different time," ARCAP 9(a) allows the Legislature to set a finality deadline, as the Legislature did in § 12-170(C).

Pope cannot argue that because § 12-170(C) does not mention time-extending motions, it allows them to extend the deadline to appeal. Courts "are not at liberty to rewrite [a] statute under the guise of judicial interpretation." *Tucson Unified Sch. Dist. v. Borek ex rel. Cnty. of Pima*, 234 Ariz. 364, 368, ¶ 11 (App. 2014) (citation omitted). Under § 12-170(C), a Tax Court "judgment is final unless" appealed "within thirty days after the entry of the judgment." Under Pope's interpretation, a judgment would not necessarily be final 30 days after the entry of judgment, contrary to § 12-170(C)'s command. Pope's interpretation would effectively add a whole new clause: "or if a motion for new trial is filed." But the Legislature did not write those words, and this Court may not add them.

Pope previously argued that the clause "unless the law provides a different time" in ARCAP 9(a) does not apply to the immediately preceding clause, which allows extensions "as otherwise provided in this rule." But the word "unless" comes after the 30-day deadline and the time-extending clause; it therefore applies to both. Moreover, Pope cannot explain why the Supreme Court would allow the Legislature to alter the standard appeal

period but not the time-extending effect of certain motions. Pope's appeal should be dismissed as untimely.

II. The plaintiffs filed invalid notices of claim.

This Court should affirm the dismissals because both plaintiffs filed invalid notices of claim. The Tax Court dismissed Roberts's claim on this basis and this Court should affirm. [Roberts-IR-14 at 2 (APP236).] Phoenix also challenged Pope's notice of claim below. [Pope-IR-10 at 5-9.] Although the Tax Court did not reach this issue as to Roberts, this Court may affirm on any basis supported by the record. *Leflet v. Redwood Fire & Cas. Ins. Co.*, 226 Ariz. 297, 300, ¶ 12 (App. 2011).

A. The plaintiffs' notices of claim contain no facts supporting the amount claimed, as required by statute.

Before suing a public entity, a plaintiff must file a notice of claim, identifying "a specific amount for which the claim can be settled and the facts supporting that amount." A.R.S. § 12-821.01(A). A putative class representative satisfies this requirement by identifying the amount and supporting facts pertinent to her individual claim, not the class she hopes to represent. *City of Phoenix v. Fields*, 219 Ariz. 568, 573, ¶ 18 (2009) ("the putative class representatives cannot make a claim on behalf of the class,"

because "at the time of filing the notice, each representative is authorized to act only on his own behalf").

The "facts supporting" requirement is a low bar—"as long as a claimant provides facts to support the amount claimed," courts do not scrutinize the sufficiency of those facts. *Backus v. State*, 220 Ariz. 101, 106-07, ¶ 23 (2009). But the facts provided must still "support"—*i.e.*, have some logical connection to—"the amount claimed." *Id.* at 107.

The plaintiffs did not comply with this requirement to provide facts supporting their individual claims. According to the receipt Pope attached to his notice of claim, he paid $36 in facility charges. [Pope-IR-9, Ex. C at 24, 35 (APP154, 165).] Pope told Phoenix he would settle his individual claim for $4.5 million, which is 125,000 times his alleged damages and would have resulted in a windfall of $4,499,964. [Pope-IR-9, Ex. C at 22 (APP152).] Pope's notice contains zero "facts supporting that amount." A.R.S. § 12-821.01(A).

The only other facts in this section of Pope's notice of claim are (1) the number of transaction days at the rental car center in fiscal year 2016 and (2) the dollar amount of facility charges collected in fiscal year 2016. [Pope-IR-9, Ex. C at 22 (APP152).] Those facts simply have nothing to do with the

value of Pope's individual claim. Indeed, the notice of claim does not even attempt to suggest that these facts (or any others) support his individual claim of $4.5 million.

Roberts's notice of claim is similarly lacking.[1] Her receipt states that she paid $30 in facility charges, a bit less than Pope. [Roberts-IR-1, Ex. A (APP199).] She demanded more—"$4.8 million to settle her individual claim." [*Id.* at 5, ¶ 4.4 (APP231).] The demand section of Roberts's notice of claim contains mostly legal argument, and only two facts: the facility charge revenues in fiscal year 2018-19 and the expected facility charge revenues for fiscal year 2019-20. [*Id.* at ¶ 4.2 (APP231).] But there is no logical connection between these aggregate revenue amounts and Roberts's individual demand. Nor does the notice of claim attempt to draw a logical connection between the two. The revenues are a non sequitur. It is as if Roberts demanded $4.8 million because she has blue eyes. The color of her eyes may

[1] The Court may consider the contents of the notice of claim because, although Roberts did not file it with her Complaint, her Complaint incorporates it by reference [Roberts-IR-1 ¶ 10 (APP187)], and it is in the record as an exhibit to the City's motion to dismiss [Roberts-IR-7, Ex. D (APP227)].

be a fact, but it is not a "fact[] supporting that amount." A.R.S. § 12-821.01(A).

The Tax Court therefore properly held that "Roberts' notice of claim fails to provide facts supporting the amount for which she claims the claim could be settled." [Roberts-IR-14 at 2 (APP236).]

B. The plaintiffs fail to identify any supporting facts.

Contrary to what the plaintiffs suggest (at 57), Phoenix does not contend that the notice of claim statute limits the amount a plaintiff can demand. Rather, as the statute requires, the notice must identify *some* facts that support—i.e., that have a logical connection to—whatever amount the plaintiffs choose to demand. Neither plaintiff identified any such facts, so their notices failed the statutory requirement.

The plaintiffs argue (at 57) that Roberts's demand is supported by the fact that Phoenix had collected more than $48 million in FY 2018-19 and anticipated collecting a similar amount in FY 2019-20, and that these amounts would have to be refunded to the putative class if Roberts was successful in suing on behalf of that class. But the possibility that Phoenix might have to pay some other people a lot of money does not explain why

Roberts's "individual claim" is worth "$4.8 million." [Roberts-IR-7, Ex. D at 5, ¶ 4.4 (APP231).]

Consider a municipal employee with an unpaid-wages claim. If the employee's notice of claim sets forth facts supporting her claim to $500 in unpaid wages, but then offers a $5 million "specific amount" to settle her claim, then the notice does not satisfy the requirement to state "the facts supporting that amount," A.R.S. § 12-821.01(A), without resorting to "unrealistic exaggerated demands." *Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 296, ¶ 9 (2007) (citation omitted). Here, likewise, a notice of claim with facts supporting a *class* claim followed by an arbitrary *individual* "specific amount," with no linkage between the two, and zero facts supporting the individual amount, does not satisfy § 12-821.01(A).

The plaintiffs make a telling concession while attempting to defend their defective notices. They say (at 58) that Roberts did not "intend[] to keep the money for herself, but to precipitate discussion of class settlement," because "[o]bviously the City is not going to pay millions of dollars for no protection from class actions." In other words, the plaintiffs *know* that the facts they provided, purportedly to support Roberts's individual claim,

relate only to the claims of *other people* in the putative class. Those facts were therefore not "facts supporting" the plaintiffs' individual demands.

The plaintiffs cite (at 58) *Donovan v. Yavapai Cnty. Cmty. Coll. Dist.*, 244 Ariz. 608 (App. 2018), claiming that a public entity can respond to an unreasonable notice of claim by initiating settlement negotiations. True—but that does not allow a plaintiff to ignore the statutory requirement to identify "facts supporting th[e] amount" claimed in the first place. A.R.S. § 12-821.01(A). That statutory requirement was not at issue in *Donovan*, which was not about putative class actions, either.

The plaintiffs also rely (at 58) on *Havasupai Tribe v. Ariz. Bd. of Regents*, 220 Ariz. 214 (App. 2009), but it does not help them. In *Havasupai*, the Tribe alleged that Arizona State University had repeatedly misused blood samples from tribal members. ASU argued that the Tribe's demand for $50 million was not supported by the facts in its notice of claim. The Court of Appeals rejected this argument because "[t]he injury that naturally flows from the purported privacy invasions . . . is necessarily subjective, deeply personal and may not be quantifiable except by a jury," and "a notice may not be deemed invalid merely because the amount demanded is not objectively quantifiable." *Id.* at 227, ¶ 45.

By contrast, the plaintiffs have not alleged that their injuries are "necessarily subjective" or "deeply personal." *Id.* To the contrary, their claims *are* objectively quantifiable. Roberts's alleged injury is $30 and Pope's is $36.

The plaintiffs argue (at 59-61) that class actions are important and that the notice of claim statute should not be used to make it harder to prosecute class actions against the government. But the Arizona Supreme Court rejected that policy argument in *Fields*: "The [notice of claim] statute applies to '*all* causes of action'; there is no exemption for putative class claims. The legislature has the ultimate authority to regulate claims against public entities, and we are not free to ignore the language of the statute it has enacted." 219 Ariz. at 573, ¶ 17 (citation omitted). Although the plaintiffs complain about opportunities to "pick off" claimants, any such effects flow, if at all, from the Legislature's choices in § 12-821.01(A), as interpreted by the Supreme Court in *Fields*. The statute does not conflict with Rule 23. The plaintiffs' concerns about the *practical* effects flowing from the interplay between § 12-821.01(A) and Rule 23 do not justify departing from the controlling statute. The Court should affirm.

III. The Tax Court correctly ruled that the plaintiffs lack standing.

This Court should also affirm the Tax Court's dismissal based on standing. Arizona courts have, "as a matter of sound judicial policy, required persons seeking redress in the courts first to establish standing, especially in actions in which constitutional relief is sought against the government." *Bennett v. Napolitano*, 206 Ariz. 520, 524, ¶ 16 (2003).

Here, the plaintiffs lack standing for three independent reasons. First, as the Tax Court correctly ruled, the "legal incidence" of the facility charge falls on car rental companies, not customers. [Pope-IR-21 (APP177); Roberts-IR-14 at 2 (APP236) (both citing *Karbal*, 215 Ariz. at 116-18, ¶¶ 11-18).] This is because car rental companies are the ones who are "liable for the payment" of the facility charge to Phoenix. *Karbal*, 215 Ariz. at 117, ¶ 11. Thus, while car rental companies may have standing to sue Phoenix, the plaintiffs do not.

Second, regardless of where the legal incidence of the facility charge falls, the plaintiffs lack standing to make the constitutional challenge they have brought, which challenges Phoenix's *expenditures* of funds obtained through the facility charge. The plaintiffs were not injured by how Phoenix spends the funds—i.e., the plaintiffs allege no "injury resulting from the putatively illegal conduct." *Sears v. Hull*, 192 Ariz. 65, 70-71, ¶ 23 (1998).

Neither plaintiff alleges that they are City residents or otherwise have a stake in the condition of City roads.

Third, regardless of the nature of the plaintiffs' alleged injuries, they lack standing because the *remedies* they seek are unavailable to them. The plaintiffs cannot obtain a refund because that would not "redress[]" the wrong they allege. *Karbal*, 215 Ariz. at 118, ¶¶ 19-20. And they cannot obtain declaratory or injunctive relief because they allege no "actual, concrete harm which will come to [them] as a result" of Phoenix's allegedly unlawful expenditure of their $66. *Klein v. Ronstadt*, 149 Ariz. 123, 124 (App. 1986).

The plaintiffs also cannot assert that they have standing as a "taxpayer" under common law. To begin with, the facility charge is not a tax—it is a fee paid by the car rental companies in exchange for a specific service (use of the rental car facility). The plaintiffs are also not taxpayers for purposes of the facility charge because they were not "liable for the payment" of the charge to Phoenix. *Karbal*, 215 Ariz. at 117, ¶ 11. Moreover, because the plaintiffs do not allege that they are Phoenix residents or have any enduring connection to Phoenix, they do not have an "equitable ownership" of Phoenix's funds or "liability to replenish the public treasury," as required for common-law taxpayer standing. *Smith v. Graham Cnty. Cmty.*

Coll. Dist., 123 Ariz. 431, 432 (App. 1979). And, even if they had standing as taxpayers under common law, a refund would still be unavailable to them.

A. The plaintiffs lack standing to challenge the facility charge because its legal incidence is not on customers.

1. The Tax Court correctly held that the legal incidence falls on the car rental companies.

The Tax Court correctly determined that this case is controlled by *Karbal v. ADOR*, 215 Ariz. 114 (App. 2007). *Karbal* involved a "car rental surcharge" on the business of renting or leasing cars. A.R.S. § 5-839.[2] The amount of the surcharge was based on the number of rentals or leases ($2.50 per rental or lease), unless a company's proceeds or income exceeded a certain amount. *Id.* § 5-839(B). The surcharge was collected monthly, and companies were required to report the number of their rental or lease transactions. *Id.* § 5-839(A), (F).

A car rental company passed the surcharge on to a customer, who then sued the State. *Karbal*, 215 Ariz. at 115, ¶¶ 2-4. This Court held that the customer lacked standing because the "legal incidence" of the surcharge fell on the car rental company. *Id.* at 116, ¶ 11. The Court explained that, though

[2] A.R.S. § 5-839 was amended in 2010, after *Karbal* was decided. The amendment is not relevant here. This brief cites the current version.

the customer paid extra because of the surcharge, the customer was "not liable for the payment" to the State, and instead the car rental company was the one "filing the returns and remitting" the surcharge to the State. *Id.* at 117 ¶ 11.

So too here. The facility charge is a surcharge on car rental companies for the benefit of using the rental car facility at Sky Harbor Airport. City Code § 4-79(A). The amount of the surcharge is based on the number of transaction days for rentals at the airport rental car facility. *Id.* The surcharge is collected monthly, and car rental companies are required to report the number of their rental transactions. *Id.* § 4-79(C).

Although the plaintiffs may have paid the facility charge because they chose to rent a car at the facility, they were not "liable for" payment of the facility charge to Phoenix. *Karbal*, 215 Ariz. at 117, ¶ 11. Rather, under the City Code, car rental companies are liable. The car rental companies "shall collect a daily customer facility charge," hold the charges in trust, and remit them to Phoenix each month. City Code § 4-79(A)-(C). They must remit not only the surcharges that they "collected" from customers, but also any surcharges that "should have been collected." *Id.* A car rental company's failure to "strictly comply" with its obligation to pay Phoenix is a material

breach of its "authorization to do business at the airport." *Id.* A car rental company's failure to pay the City might also be a crime. *See* Phoenix City Code § 4-80 ("[A] violation of the requirements of this article shall be deemed a Class 1 misdemeanor.").

Unlike the car rental company, the plaintiffs had no legal obligation to pay anything. The City Code governs the rental companies, not their customers. If the car rental company had failed to collect the facility charge from the plaintiffs, the legal consequence would have fallen on the car rental company, not the plaintiffs. The City Code provides Phoenix with no remedy against a customer from whom the car rental company fails to collect payment.

The plaintiffs do not dispute that the car rental companies pay Phoenix. Indeed, they attached to their complaints sample monthly reports from car rental companies to Phoenix, which specify (1) the number of transaction days, and (2) the amount "owed to the City of Phoenix." [Pope-IR-9, Ex. B (APP134); Roberts-IR-1, Ex. C (APP201).]

Courts in other jurisdictions have similarly dismissed refund suits brought by persons who were not liable for payment to the government. *See, e.g.*, *Cnty. Inmate Tel. Serv. Cases*, 48 Cal. App. 5th 354, 360 (2020) (affirming

dismissal of refund claim because plaintiffs had "not paid the tax to the taxing authority" and had "no legal responsibility to do so"); *Galamet, Inc. v. Dir. of Revenue*, 915 S.W.2d 331, 335-36 (Mo. 1996) (affirming denial of purchaser's refund claim because purchaser had no "legal obligation" to pay tax "directly" to state); *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. IRS*, 845 F.2d 139, 142 (7th Cir. 1988) (affirming dismissal of purchaser's refund claim because "only the person legally liable for paying a given federal tax may bring a refund suit"); *Dow Jones & Co. v. U.S.*, 128 F. Supp. 748, 749-50 (Ct. Cl. 1955) (dismissing purchaser's refund claim because "the purchaser is not liable for the tax, and is not the taxpayer").

The Tax Court therefore properly held that "[t]he requirement under the code section falls on the rental car companies, not the customers" and properly dismissed the complaint. [Roberts-IR-14 at 2 (APP236).]

2. The plaintiffs cannot overcome the controlling test.

The plaintiffs try to distinguish *Karbal* by contending (at 54) that, in this case, the legal incidence of the fee is on the customers, who "must pay the fee." But the plaintiffs cite no provision of the City Code that governs rental customers and actually requires them to pay the facility charge. Instead, the City Code places obligations only on the car rental companies;

any obligation that the customers have arises from their contracts with the car rental companies. And pursuant to those contracts, customers pay the car rental companies, not Phoenix—just like in *Karbal*. "The mere fact that Arizona hotels and car rental agencies may pass their taxes to customers does not shift the legal incidence of the tax or confer standing on [customers]." *Karbal*, 215 Ariz. at 118, ¶ 18.

The plaintiffs also argue that the car rental company is merely a "collection agent[] for taxes ultimately imposed on consumers." *Id.* at 118, ¶ 16 (quoting *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 461 (1995)). But in fact, the car rental companies are not mere "collection agents" under *Oklahoma*. That case held that fuel distributors were "collection agents" for a tax borne by retailers because (1) the statute specified that the distributors remitted the tax "on behalf of a licensed retailer," (2) the distributors did not bear the ultimate risk of loss (they could deduct uncollected amounts from future payments), and (3) the distributors were compensated "for their services as agents of the state for tax collection," because they could "retain a small portion of the taxes they collect." *Oklahoma*, 515 U.S. at 461-62 (brackets, citations, and quotation marks omitted). None of those factors are present here: (1) the City Code does not

state that car rental companies remit the tax on behalf of their consumers, (2) the car rental companies bear the ultimate risk of loss (they must remit charges that were "or should have been collected"), and (3) the car rental companies cannot retain anything. City Code § 4-79. They are not mere collection agents.

Indeed, *Oklahoma*'s comparison of the fuel retailers (who bore the legal incidence) with consumers shows why, in this case, the car rental companies bear the incidence of the facility charge:

- "No provision sets off the retailer's liability when consumers fail to make payments due," *id.* at 462, just as no provision sets off the car rental company's liability if customers fail to pay the facility charge.
- "[N]either are retailers compensated for their tax collection efforts," *id.*, nor are car rental companies.
- "Oklahoma's law imposes no liability of any kind on a consumer for purchasing, possessing, or using untaxed fuel," *id.*, just as Phoenix's City Code imposes no liability on a customer for failing to pay the facility charge.
- "[T]he legislation makes it unlawful for distributors or retailers" to sell fuel "while delinquent in the payment of any excise tax due the state,'" *id.* (citation omitted), just as "[f]ailure to strictly comply with [remission obligations] shall be considered a material breach of the vehicle rental company's authorization to do business at the airport." City Code § 4-79(C).

The plaintiffs briefly cite (at 54-55) two other cases that held that when a statute requires or economically compels a seller to pass a tax onto a purchaser, the legal incidence is on the purchaser. But those cases predated *Oklahoma*, which is authoritative on this issue. Under *Oklahoma*, the legal incidence of the facility charge falls on the car rental companies, not their customers. Thus, under *Karbal*, customers like the plaintiffs are not the "actual taxpayer" and therefore "lack[] legal standing to bring this suit." 215 Ariz. at 117, ¶ 11.

B. Phoenix's *expenditures* do not injure the plaintiffs.

In addition, regardless of where the legal incidence falls, the plaintiffs lack standing to bring this challenge to Phoenix's *expenditures* of funds obtained through the facility charge because they are not injured by how Phoenix spends the funds.

It is important to distinguish between two questions: whether Phoenix may lawfully *impose* the facility charge, and whether Phoenix may lawfully *spend* facility charge funds for certain purposes. The first question involves Phoenix's power to levy fees. The second involves Phoenix's choice of how to spend money.

This case addresses only the second question. They do not challenge Phoenix's authority to *impose* the facility charge. They claim only that Phoenix's *expenditures* of the resulting funds violates the anti-diversion provision. The anti-diversion provision is a limit on spending power, not on the power to levy fees, because it governs how certain funds "shall be expended." Ariz. Const. art. IX, § 14.[3]

"To have standing to bring a constitutional challenge, however, a plaintiff must allege injury resulting from the putatively illegal conduct." *Sears*, 192 Ariz. at 70, ¶ 23. In other words, the plaintiffs must allege that they have been "injured by the alleged [constitutional] violation." *Id.* at 71. This requirement "assure[s] that the [plaintiff] has 'a personal stake in the outcome of the controversy.'" *State v. Herrera*, 121 Ariz. 12, 16 (1978) (citation omitted).

The plaintiffs fail this requirement. They do not allege that they were injured by how Phoenix spends the facility charge funds. Although Pope alleges that Phoenix's expenditure of funds for non-road purposes has led to

[3] In contrast, other constitutional provisions limit taxing power. *See, e.g.*, art. IX, § 13 (prohibiting taxes on certain property); art. IX, § 24 (prohibiting new taxes on sale of real property).

"[c]rumbling streets," he never alleges that he resides in Phoenix (or anywhere in Arizona), that he regularly drives in Phoenix, or that he otherwise has a personal stake in the condition of Phoenix's roads. [Pope-IR-9, ¶ 7 (APP119).] Nor does Roberts, who appears to live in Colorado. [Roberts-IR-1, Ex. A (APP199).] Because the plaintiffs allege no personal stake in the condition of Phoenix's roads, they lack standing to challenge Phoenix's alleged failure to spend money on those roads.

Put another way, the "interest sought to be protected by the complaint[s]" are not "within the zone of interests to be protected or regulated by" the anti-diversion provision. *City of Scottsdale v. McDowell Mountain Irrigation & Drainage Dist.*, 107 Ariz. 117, 121 (1971). The purpose of the anti-diversion provision is to prevent the diversion of road user fees to non-road uses. (*See* Argument § IV.A.1.) But the plaintiffs have no interest in how Phoenix maintains its roads. They are therefore outside the zone of interests that the anti-diversion provision seeks to protect.

The plaintiffs likewise cannot claim to have suffered "wallet injury" by paying an extra $30 (Roberts) or $36 (Pope) because of the facility charge. Even if *imposing* the facility charge—which unquestionably is lawful—caused that injury, the *expenditure* did not cause wallet injury. Harm caused

by imposing a charge does not confer standing to challenge the expenditure. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 134 (2011) (rejecting "the general proposition that an individual who has paid taxes has a 'continuing, legally cognizable interest in ensuring that those funds are not used by the Government in a way that violates the Constitution'"); *Ranck v. Mt. Hood Cable Regul. Comm'n*, 2017 WL 3016032, at *3 (D. Or. July 7, 2017) ("Here, plaintiff only challenges how the . . . fees are spent, which does not affect the amount of taxes that plaintiff must pay. Therefore, plaintiff's tax burden is not fairly traceable to defendant's challenged conduct.").

The plaintiffs have not even alleged that they intend to use City roads someday. *See Sears*, 192 Ariz. at 70-71 (standing focuses on what plaintiffs "alleged"). And even if they had, "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support" standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564 (1992); *accord Karbal*, 215 Ariz. at 117-18, ¶¶ 12-13, 19 (applying *Lujan*).

C. The plaintiffs lack standing because their requested remedies are unavailable.

Regardless of the nature of their alleged injury, the plaintiffs lack standing for an additional reason: they cannot obtain any remedy.

For standing, a plaintiff's injury must be "likely to be redressed by the requested relief." *Bennett*, 206 Ariz. at 525, ¶ 18 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). This requirement focuses judicial resources on cases where courts can provide actual redress, not issue advisory opinions.

The plaintiffs fail this separate standing requirement. None of the remedies they request is available to redress the wrong they allege.

1. A refund is not available to the plaintiffs.

The plaintiffs primarily seek a refund. [*See, e.g.*, Pope-IR-9 ¶¶ 37-38 (APP126-27); Roberts-IR-1 ¶¶ 44-48 (APP194-95).] But a refund is unavailable for two reasons.

First, refunds are not available in challenges to *spending* power. Again, the plaintiffs do not claim that Phoenix *took* money unlawfully. They claim Phoenix *spent* unlawfully. If they were right, the only proper remedy would be to enjoin the unlawful expenditure.

For example, after the Ohio Supreme Court held that an expenditure violated Ohio's anti-diversion provision, the Court explained that "the state may still collect the revenue[s]" because "the Constitution does not forbid the imposition of the [tax] itself," and agreed that the "appropriate remedy is to prospectively enjoin the expenditure." *Beaver Excavating Co. v. Testa*, 983 N.E.2d 1317, 1327-28, ¶¶ 40-41 (Ohio 2012).

Likewise, the Michigan Court of Appeals explained that Michigan's anti-diversion provision is "not a limitation on the amount of taxes which may be collected" but instead "a limitation on the use of the revenues once they are collected," so the proper remedy would be "to prevent by some appropriate judicial means the improper distribution." *Michigan Transp. Auth. v. Sec'y of State*, 304 N.W.2d 846, 854-55 (Mich. App. 1981).

The plaintiffs sought a refund on the theory that governments must "refund an illegal tax to the payors of that tax." [Pope-IR-9, ¶ 12 (APP120); Roberts-IR-1 ¶ 14 (APP188) (citing *Copper Hills Enters., Ltd. v. ADOR*, 214 Ariz. 386, 391 (App. 2007), and *Pittsburgh & Midway Coal Mining Co. v. ADOR*, 161 Ariz. 135, 139 (1989)).]

The problem with the plaintiffs' refund theory is that they do not claim Phoenix "illegally collected" funds, as in *Copper Hills*. 214 Ariz. at 391

(capitalization altered). Nor do they claim Phoenix was "not entitled" to funds, as in *Pittsburgh & Midway Coal*, 161 Ariz. at 139. Nor do they claim Phoenix illegally "imposed" a tax, as in *Tucson Elec. Power Co. v. Apache Cnty.*, 185 Ariz. 5, 21 (App. 1995), another case they cited in prior briefing.

In those cases, a refund made sense because the government *never had* a right to take money in the first place. That is not this case.

Second, even if refunds were available, any refunds from Phoenix would go to car rental companies, not the plaintiffs. As explained above, car rental companies submitted the payments to Phoenix. *See* City Code § 4-79(C); Pope-IR-9, Ex. B (APP134); Roberts-IR-1, Ex. C (APP201). "Arizona law provides no mechanism requiring the . . . car rental companies to return to [the customer] any sum collected for the payment of taxes." *Karbal*, 215 Ariz. at 118, ¶ 20.

Thus, even if "a favorable decision could lead to a refund for the rental car companies," there is "no requirement that they pass along the refund to the plaintiff class." *Id.* This is a separate reason why the plaintiffs' alleged injury cannot be "redressed by a favorable decision." *Id.* at 118, ¶ 19.

2. The plaintiffs lack standing to seek declaratory or injunctive relief.

When a plaintiff alleges that he or she was injured once and seeks a court order preventing future injuries, the plaintiff must show "that he is realistically threatened by a repetition of his experience." *City of L.A. v. Lyons*, 461 U.S. 95, 109 (1983); *see also Haase v. Sessions*, 835 F.2d 902, 910-11 (D.C. Cir. 1987) (applying *Lyons* to bar claim for declaratory relief).

Here, the plaintiffs have not alleged that they are "realistically threatened by a repetition of [their] experience" of allegedly (1) paying extra to a car rental company in Phoenix and (2) not having Phoenix use the resulting funds for road purposes. *Lyons*, 461 U.S. at 109. They allege no plan to return to Phoenix, and even if they did, "[s]uch 'some day' intentions—without any description of concrete plans," are not enough. *Lujan*, 504 U.S. at 564; *see also, e.g.*, *Haase*, 835 F.2d at 911 ("[I]t will not do for Haase to assert generally that he might one day return to Nicaragua. More immediate and concrete plans are necessary.").

Thus, the plaintiffs' injury, whatever it is, is not "likely to be redressed by" an order directing Phoenix how to use funds from facility charges

collected in the future. *Bennett*, 206 Ariz. at 525, ¶ 18 (citation omitted). They therefore lack standing to seek declaratory or injunctive relief.

D. The common-law doctrine of taxpayer standing does not apply to the plaintiffs.

To salvage their suit, the plaintiffs may argue that they have standing as "taxpayers" under Arizona common law, pursuant to *Smith v. Graham Cnty. Cmty. Coll. Dist.*, 123 Ariz. 431 (App. 1979). But that argument would fail for three reasons.

1. The plaintiffs are not liable for paying Phoenix.

As explained above (Argument § III.A), the plaintiffs were not "liable for the payment" of the facility charge to Phoenix. *Karbal*, 215 Ariz. at 117, ¶ 11. As a result, under Arizona law they were "not the actual taxpayer." *Id.* Consequently, as in *Karbal*, the plaintiffs cannot rely on taxpayer standing.

2. The plaintiffs do not have equitable ownership of City funds or liability to replenish Phoenix's treasury.

The plaintiffs cannot rely on common-law taxpayer standing for another reason. Taxpayer standing to challenge public expenditures "is based upon the taxpayer's equitable ownership of such funds and his liability to replenish the public treasury for the deficiencies caused by the

misappropriation." *Smith*, 123 Ariz. at 432-33. This means that common-law taxpayer standing is restricted in two ways. The plaintiffs satisfy neither restriction.

First, common-law taxpayer standing does not apply to fees voluntarily paid in exchange for services. In cases of taxpayer standing, the taxpayer has no choice but to pay the tax, and he receives nothing specific in return. The plaintiffs, in contrast, had a choice whether to pay the car rental company; they could have opted not to rent a car at Sky Harbor. Unlike a typical taxpayer, they received something specific in return for their payment: use of the rental car center.

Taxpayer standing is unavailable in these types of circumstances. For example, the argument that paying subway fares confers standing to challenge the subway's award of a contract was "borderline frivolous" because "[a] fare to ride a subway is not a tax; it is the consideration *voluntarily* given in return for the service provided." *Cornelius v. L.A. Cnty. Metro. Transp. Auth.*, 49 Cal. App. 4th 1761, 1777 n.6 (1996).

Likewise here. That the plaintiffs voluntarily paid a car rental company in exchange for a specific benefit does not give them "equitable

ownership" of Phoenix's funds or "liability to replenish" its treasury. *Smith*, 123 Ariz. at 432-33.

Second, common-law taxpayer standing is limited to those who reside in, or at least regularly pay taxes to, the public entity. In *Smith*, for example, the individual plaintiff had standing to challenge expenditures of the Graham County Community College District because he was "a local resident and taxpayer"—i.e., "a taxpayer *in the* community college district." *Id.* (emphasis added).

In contrast, the organizational plaintiff in *Smith* did *not* have standing to challenge expenditures because it was "not a taxpayer *in the* community college district." *Id.* (emphasis added). Although the organizational plaintiff paid taxes to the *State*, which in turn gave funds to the district, that connection was "too remote" to confer "equitable ownership" of district funds or "liability to replenish" the district's treasury. *Id.*

Here, the plaintiffs have not alleged that they reside in Phoenix or regularly pay taxes or charges to Phoenix (or have paid anything beyond the money they gave the car rental company). They have no "equitable ownership" of Phoenix's funds or "liability to replenish" its treasury. *Id.* at 432-33.

The Texas Supreme Court faced a similar situation in *Williams v. Lara*, 52 S.W.3d 171 (Tex. 2001). There, two individuals brought a challenge to a county program as county "taxpayers." *See id.* at 178. One was a "property taxpayer" in the county; the other merely paid "sales tax." *Id.* The Court held that the property taxpayer had standing, but not the sales taxpayer. *Id.* at 179-83. Permitting a sales taxpayer to challenge government expenditures "would allow a person with virtually no stake in how public funds are expended to come into court and bring the government's actions under judicial review." *Id.* at 180; *see also Jacob v. State*, 685 N.W.2d 88, 93-96 (Neb. App 2004) (following *Williams*); *Glickert v. Loop Trolley Transp. Dev. Dist.*, 2014 WL 1672005, at *5 (E.D. Mo. Apr. 28, 2014) (rejecting taxpayer standing based on sales tax).

The Texas Court of Appeals then applied *Williams* on an issue nearly identical to this one: A county imposed a "motor-vehicle rental tax" to fund a project, and an individual who paid it sued, claiming the county's expenditures were illegal. *Teneyuca v. Bexar Cnty. Performing Arts Ctr. Found.*, 2012 WL 2053534, at *1, 3 (Tex. App. June 6, 2012). The rental taxpayer lacked standing because "extending taxpayer standing to someone who has paid a 'visitor' tax would allow a person with virtually no personal stake in how

public funds are expended to come into court and bring the government's actions under judicial review." *Id.* at *3; *see also Marshall v. Cnty. of Cook*, 51 N.E.3d 27, 32 (Ill. App. 2016) (individual who paid court fees lacked standing to challenge use of fees).

So too here. Even if the plaintiffs were "liable for" payment of the facility charge to Phoenix (which they were not), extending taxpayer standing to them would allow persons with "virtually no personal stake" in how Phoenix's funds are spent to drag Phoenix into court. That is not what taxpayer standing was designed for. *See Henderson v. McCormick*, 70 Ariz. 19, 25 (1950) (courts should not "encourage disgruntled citizens to resort to the courts in the guise of taxpayers' suits, thereby, in effect, taking over and throttling the administration of municipal affairs").

3. Refunds are not available in suits based on common-law taxpayer standing.

Even if the plaintiffs had standing as taxpayers under common law, a refund would not be available. When taxpayer standing applies, it merely allows municipal taxpayers to "*enjoin* the illegal expenditure of municipal funds." *Ethington v. Wright*, 66 Ariz. 382, 386 (1948) (emphasis added); *see also, e.g., George v. Baltimore Cnty.*, 205 A.3d 950, 961 n.8 (Md. 2019)

("[T]axpayer standing presupposes that only declaratory and injunctive relief will be permitted, and not money damages or attorney's fees."); 18 McQuillin, *The Law of Municipal Corporations* § 52:18 (3d ed.) (listing various types of remedies available in taxpayer suits without mentioning refunds). In *Smith*, for example, the taxpayers sought injunctive and declaratory relief only. 123 Ariz. at 432.

It is especially important to limit taxpayer standing to equitable remedies in cases like this, where the plaintiffs challenge Phoenix's *expenditures*, not its authority to *impose* the charge. A refund would therefore not redress the alleged wrong.

This Court should affirm the dismissal based on lack of standing.

IV. The facility charge does not violate the anti-diversion provision.

On the merits, the Tax Court correctly dismissed the case because the facility charge does not violate the anti-diversion provision.

The anti-diversion provision has two clauses. The "sources clause" defines the revenue sources that implicate the provision: "fees, excises, or license taxes relating to . . . the . . . operation, or use of vehicles." The "expenditures clause" then defines the permissible spending purposes: "highway and street purposes." Article IX, § 14.

The facility charge violates neither clause. The Supreme Court has announced the authoritative interpretation of the sources clause. The facility charge does not fall within that definition because it is not a prerequisite to, or triggered by, the legal operation or use of a vehicle on a public road. (Argument § IV.A.) Even if it falls within the sources clause, it does not violate the expenditures clause because the clauses should be interpreted harmoniously to prohibit diversion, and the facility charge diverts no funds. (Argument § IV.B.)

A. The facility charge does not violate the source clause.

1. The Supreme Court limited the sources clause to fees imposed as a prerequisite to, or triggered by, the legal operation or use of a vehicle on a public road.

This is not an issue of first impression. The Arizona Supreme Court has already interpreted the sources clause and squarely announced an authoritative interpretation of the sources clause: "'[F]ees, excises, or license taxes relating to . . . the . . . operation, or use of vehicles' are ones imposed as a prerequisite to, or triggered by, the legal operation or use of a vehicle on a public road." *Saban Rent-a-Car LLC v. ADOR*, 246 Ariz. 89, 99, ¶ 39, *cert. denied*, 140 S. Ct. 195 (2019).

In reaching this interpretation, the Supreme Court carefully analyzed the history and purpose of the anti-diversion provision, beginning with the Federal Aid Road Act in 1916 and the Hayden-Cartwright Amendment in 1934. Through these statutes, only states that used "motor vehicle registration fees, licenses, gasoline taxes, and other special taxes on motor-vehicle owners and operators" for highway purposes could receive federal highway money. Pub. L. No. 73-393, § 12, 48 Stat. 993, 995 (1934) (copy at APP113); *see also Saban*, 246 Ariz. at 96, ¶ 24.

To ensure that Arizona received federal funding, Arizona voters passed the "Better Roads Amendment" by referendum in 1952, which adopted Article IX, § 14. *See Saban*, 246 Ariz. at 96, ¶ 25. The publicity pamphlet clarified that the purpose was to avoid diverting "road user" revenues away from "road uses." Ariz. Sec'y of State, 1952 Publicity Pamphlet 3 (1952), http://azmemory.azlibrary.gov/digital/collection/statepubs/id/10641 (copy at APP099); *see also Saban*, 246 Ariz. at 96, ¶ 25. The publicity pamphlet explained that "[i]f used for road purposes, the *road user taxes* are fair because they are based on benefits received by the taxpayer. *The user pays as he drives*." [APP102 (emphases added).]

When the voters passed the Better Roads Amendment, Arizona already imposed a tax on "gross income" from "automobile rental services." 1935 Ariz. Sess. Laws 310, 319, ch. 77, art. 2, § 2(f)(2) (copy at APP109). The revenues from that tax did not go toward highway purposes, yet no one—including the federal government—hinted that the tax would fall within the Hayden-Cartwright Act and would jeopardize federal highway funds. The voters were told that Arizona "is not now diverting its road user taxes," and passing the amendment "will entail no change in the source or expenditure of highway revenues." [APP103.] For that to be true, the tax on automobile rental services necessarily was not a road-user tax covered by the anti-diversion provision. *See also Saban*, 246 Ariz. at 97, ¶ 31.

The publicity pamphlet identified the non-fuel-related fees covered by the anti-diversion provision as "registration fees, unladen weight fees on common and contract motor carriers, and motor carrier taxes based on gross receipts" that are all "derived from road users." [APP101.] *See also Saban*, 246 Ariz. at 97, ¶ 30.

After thoroughly analyzing the text, history, and purpose, the Supreme Court concluded that the constitutional text included only taxes "imposed as a prerequisite to, or triggered by, the legal operation or use of a

vehicle on a public road." *Saban*, 246 Ariz. at 99, ¶ 39. This interpretation "gives meaning to all terms" in the constitutional provision. *Id.* at 97, ¶ 28.

As more fully explained below (Argument § IV.A.3.a), the Supreme Court rejected broader interpretations of the text, including several of the expansive interpretations offered by the plaintiffs here. *Saban*, 246 Ariz. at 95, ¶ 22. The Supreme Court rejected these expansive interpretations because they would make superfluous other parts of the constitutional text, would sweep in fees and taxes that no one thinks should be included, and generally "provide[] no limitation" to the provision's scope. *Id.* at 98, ¶ 36.

2. The facility charge is not a prerequisite to, or triggered by, the legal operation or use of a vehicle on a public road.

(a) The facility charge is triggered by using the rental car center, not by using the public roads.

Arizona courts "presume [a] statute is constitutional and will uphold it unless it clearly is not." *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 5, ¶ 11 (2013). The City Code "should be interpreted in a way that avoids placing its constitutionality in doubt." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 247 (2012). In particular, "when the relevant text allows, we construe statutes to comply with constitutional requirements." *Garcia v. Butler*, 251 Ariz. 191, 194-95, ¶ 18 (2021).

The facility charge is not a prerequisite for using the public roads. Rather, the facility charge is just what it sounds like: a fee for using a facility owned, operated, and maintained by the city's airport. The statute's title and text both confirm that it imposes a "facility charge." The title is "Rental car customer *facility charge*"; the text requires collecting "a daily customer *facility charge*." City Code § 4-79 (emphases added); *see State v. Super. Ct.*, 128 Ariz. 535, 537 (1981) (Although titles are not part of the law, "we can nevertheless refer to titles and captions in the legislative bills for indications of legislative intent.").

The conduct that triggers the tax is either (1) for on-airport car rental companies, "leas[ing] space at Phoenix Sky Harbor International Airport"; or (2) for off-airport car rental companies, "obtain[ing] customers through the Sky Harbor Rental Car Center." City Code § 4-79(A). Using the *airport's facilities*, not using the *roads*, triggers the charge. Decisively, as with the tax in *Saban*, the facility charge "is not required to be paid before a rental vehicle can be legally operated on roads." 246 Ariz. at 98, ¶ 33.

Consider the taxes and fees that fall within the anti-diversion provision. The highway fund receives money from several fees that relate to the registration, operation, or use of a vehicle:

- Vehicle registration and title fee (A.R.S. § 28-2003)
- Driver license fee (A.R.S. § 28-3002)
- Commercial registration fee and gross weight fee (A.R.S. §§ 28-5432 to -5433)
- Highway use fee (A.R.S. § 28-5471)
- Light motor vehicle fee (A.R.S. § 28-5492)
- Motor carrier fee (A.R.S. §§ 28-5852, -5854)

Any vehicle owner or user who lawfully registers, operates, or uses a vehicle on the highways must have paid these taxes or fees. If any such applicable fee or tax has not been paid, then the driver cannot lawfully operate the vehicle on the public highways. *See, e.g.*, A.R.S. §§ 28-3151 ("a person shall not drive a motor vehicle or vehicle combination on a highway without a valid driver license"), 28-2153(A) ("A person shall not operate . . . on a highway a motor vehicle, trailer or semitrailer unless [it] has been registered"). By contrast, a driver may legally operate a rental car on the public highways, even one rented from the rental car center at the airport, regardless of whether the airport's facility charge has been paid. Failure to pay the facility charge simply does not prevent legal operation of the vehicle.

Moreover, and like the tax in *Saban*, all of the above fees that do trigger the anti-diversion provision already have been paid for rented cars. The car

rental companies themselves have paid vehicle registration fees, and the drivers have paid all necessary license fees (whether to Arizona or to their home jurisdictions). *See Saban*, 246 Ariz. at 98, ¶ 33 (citing A.R.S. §§ 28-2153(A), 28-2157, 28-3151, 28-3158(B) (registration and license fees)). Payment or non-payment of the facility charge simply does not affect whether the car and driver are fully fit to drive on the public roads.

(b) Supreme Court precedent confirms the nature of airport user fees.

The Supreme Court recently analyzed similar trip fees for commercial ground transportation providers at the airport. The Supreme Court characterized those fees "as 'authorized-user fees' paid in exchange for the providers' *privilege to use Airport property*, including dedicated curb space, for conducting business with Airport travelers." *State ex rel. Brnovich v. City of Phoenix*, 249 Ariz. 239, 245, ¶ 26 (2020) (emphasis added).

In reaching this conclusion, the Supreme Court expressly relied on two out-of-state cases concerning rental-car-related fees. *See id.*, ¶¶ 25-26. In one case, the court explained that the fee charged to car rental companies "is for Alamo's *use of all of the [airport]'s facilities* which benefit Alamo by generating its business." *Jacksonville Port Auth. v. Alamo Rent-A-Car, Inc.*, 600 So. 2d 1159,

1162 (Fla. Dist. Ct. App. 1992) (emphasis added). In the other case, the court explained that "Ace Rent-A-Car must pay a fee to [the airport] only if it uses and benefits from *the airport facilities* which the fee supports." *Ace Rent-A-Car, Inc. v. Indianapolis Airport Auth.*, 612 N.E.2d 1104, 1108 (Ind. Ct. App. 1993) (emphasis added). Like in *Brnovich* and the out-of-state cases cited therein, the facility charge here is a fee for using a specific airport-owned facility, not for using public roads.

For all these reasons, under binding Supreme Court precedent, the facility charge does not fall within the sources clause. The Tax Court properly dismissed the plaintiffs' claims.

3. The plaintiffs' arguments ignore controlling precedent and focus on irrelevant factors.

(a) The plaintiffs urge interpretations already rejected by the Supreme Court.

Saban squarely forecloses the plaintiffs' claim. The plaintiffs' opening brief either ignores or misconstrues *Saban*, all in an attempt to have this Court broadly interpret the sources clause in a manner contrary to *Saban*'s controlling holding.

The opening brief's argument begins (at 26-28) with the premise that the Court should simply apply the text without considering any other source

of interpretive guidance. But the Supreme Court already held that "we cannot discern the meaning of 'relating to' from the language of the anti-diversion provision alone"; consequently the Court "consider[ed] its text in conjunction with the history and purpose of the provision." *Saban*, 246 Ariz. at 96, ¶ 22. In arguing otherwise, the plaintiffs cite the single-justice concurrence/dissent, sometimes without even indicating that the quoted passage comes from the concurrence/dissent (e.g., at 28). But the majority has spoken. The Supreme Court's interpretation of the anti-abrogation provision is binding on this Court.

The plaintiffs urge the Court (at 29) to construe "relating to" as having "'a broad scope,' an 'expansive sweep,' and as 'deliberately expansive.'" But the Supreme Court rejected a broad scope, *Saban*, 246 Ariz. at 95, ¶ 22, and instead held that the "text supports a narrower interpretation," *id.* at 97, ¶ 28.

The plaintiffs specifically urge the Court (at 28-31) to interpret "related to" as meaning "a connection with or reference to." But the Supreme Court *unanimously* rejected this definition. The majority held that "interpreting 'relating to' as having any *connection to* the use or operation of vehicles on the public highways would encompass revenues that voters clearly did not intend to be covered," *Saban*, 246 Ariz. at 95, ¶ 22, and "the provision's text

supports a narrower interpretation of the disputed phrase than one meaning 'connected to' or benefitting from road usage," *id.* at 97, ¶ 28. The plaintiffs cannot even find support in the concurrence/dissent, which "agree[d] with the majority that the Plaintiffs' principal assertion that 'relating to' means 'connected to' is unpersuasive." *Id.* at 100 n.1 (Bolick, J., concurring/dissenting).

The plaintiffs later (at 41) acknowledge this holding and try to shoehorn the facility charge into the test *Saban* announced. But they nevertheless repeatedly urge the Court to adopt "connected to" as the meaning of "related to," despite the Supreme Court having decisively and unanimously rejected it.

The plaintiffs also claim (at 29) that "relating to" means having a "reference to." In other words, "relating to registration, operation, or use of vehicles on the public highways" would mean "[having a reference to] registration, operation, or use of vehicles on the public highways." But again, the Supreme Court has authoritatively interpreted "related to," and this Court cannot replace that interpretation. Moreover, the Court of Appeals rejected this interpretation in *Saban I*. *See Saban Rent-A-Car LLC v. ADOR*, 244 Ariz. 293, 298, ¶¶ 10-13 (App. 2018) (*Saban I*), *aff'd* 246 Ariz. 89

(*Saban*). The Supreme Court "agree[d] with the court of appeals' interpretation." *Saban*, 246 Ariz. at 97, ¶ 27. There can be no doubt on this point: the statute in *Saban* expressly *referred to* "vehicles . . . designed to operate on the streets and highways of this state." A.R.S. § 5-839(C). If *referring to* operation of vehicles on the highway were enough to implicate the anti-diversion provision, then the plaintiff in *Saban* would have prevailed. It did not.

Elsewhere (at 38-41), the plaintiffs (under the guise of analyzing history and purpose) reword the test to use the phrase "*on account of* their road use." They do not explain why the Court should use "on account of" instead of the controlling "a prerequisite to, or triggered by" test.

In sum, the Supreme Court and Court of Appeals have already rejected "connected to" and "related to," and the plaintiffs do not even try to justify "on account of." The Supreme Court has already adopted a specific interpretation of the sources clause and has rejected interpreting the clause broadly and expansively. This Court should follow the controlling test and reject the plaintiffs' improper attempts to relitigate this issue.

(b) The plaintiffs' argument that the facility charge satisfies the controlling test misconstrues the test and the charge.

When the plaintiffs confront the controlling test from *Saban*, they repeatedly run afoul of the long-settled principle that "when the relevant text allows, we construe statutes to comply with constitutional requirements." *Garcia*, 251 Ariz. at 194-95, ¶ 18. Despite the reasonable interpretation of City Code § 4-79 that renders the facility charge constitutional, the plaintiffs urge the Court to interpret the City Code in the way *most likely* to find a constitutional violation. But as the United States Supreme Court explained more than a century ago, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *U.S. v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909); *see also* Scalia & Garner at 247. Moreover, in advancing the supposedly problematic interpretations, the plaintiffs misrepresent the facility charge and skip important steps.

For example, they claim (at 29) that the facility charge "requires the payment of a daily fee as a prerequisite to renting a car." However, the relevant test is not whether a fee is a prerequisite to renting a car, but

whether the fee is a prerequisite to "the legal operation or use of a vehicle on a public road." *Saban*, 246 Ariz. at 99, ¶ 39.

The plaintiffs also rely on the misleading reductionism (at 29) that "[t]hose who rent cars at the airport are road users" (or rephrased as "car renters rent vehicles to use the roads"). This too, cannot be the test. People who buy car tires and windshield wipers "are road users," too, so why not include taxes on those items? People who park cars in parking garages necessarily use roads to get to and from the garage, so throw them in, too. More directly, a car rental is merely a short-term lease. The tax imposed on a two-year lease from Camelback Toyota does not violate the anti-diversion provision, and neither would a tax on a short-term lease. Nor does a fee for renting a car—let alone a fee for using airport facilities, which is even further attenuated. As *Saban* explained, if this reductionism were the test then "no principled reason exists not to apply [the provision] to fees and taxes levied against car sale dealers, automotive repair shops, and the like." *Saban*, 246 Ariz. at 98, ¶ 33. Those customers all "are road users," too. (Opening Br. at 29.)

Next, the plaintiffs claim (at 29) that "unless the fee is paid, these road users are not allowed to rent a car to drive on the roads." They cite (at 31)

City Code § 4-80, which makes violating Title 4, Article IV of the City Code a misdemeanor. But as explained above (Argument § III.A.1), the City Code does not obligate an individual customer to pay the facility charge. Instead, the car rental company must remit the facility charge to Phoenix, regardless of whether the customer has paid it. If the customer has not paid, the consequence is that the *company* must pay (City Code § 4-79(C) (requiring the company to pay charges that were collected "or should have been collected")), and if the company does not pay, then the *company* may have committed a misdemeanor (City Code § 4-80). Nothing in the City Code would prevent a customer from legally driving for failure to pay the facility charge.

Moreover, even if § 4-79 obligated customers to pay, and even if § 4-80 applied to them, failing to pay the facility charge still would not prevent someone from driving on the public highways, just like nothing stops someone from driving after skipping out on paying tax on a pack of gum—even though both violations are class 1 misdemeanors. *See* A.R.S. § 13-1805(H) (shoplifting <$1,000 "is a class 1 misdemeanor"). This stands in stark contrast to the fees that actually trigger the sources clause. If the license or registration fee has not been paid, it is not legal to drive, period. *See* A.R.S.

§§ 28-3151 ("a person shall not drive a motor vehicle or vehicle combination on a highway without a valid driver license"), 28-2153(A) ("A person shall not operate . . . on a highway a motor vehicle, trailer or semitrailer unless [it] has been registered").

The plaintiffs later assert (at 42) that their "pre-suit investigation" revealed that as a *practical* matter, the car rental companies "will [not] rent to someone who refuses to pay the" facility charge. But as the plaintiffs acknowledge (at 42), an airport customer can "avoid the fee" simply by "leav[ing] the airport by other means and rent[ing] a car elsewhere." That shows why the facility charge is not a "legal prerequisite" to using the roads. A person can legally drive without paying it, unlike a vehicle registration or driver's license fee.

Moreover, the anti-diversion provision applies to *legal* prerequisites, not *practical* ones, particularly practical ones dependent on private companies' decisions. Even though no store would sell tires to a driver who refused to pay a transaction privilege tax (or even a direct sales tax), and even though a driver cannot "get[] on the roads" without tires, those taxes do not violate the anti-diversion provision. Likewise, a "Sky Harbor Airport customer" (Opening Br. 42) who parks in an airport parking garage cannot

exit without paying the garage fee, but that does not mean that the garage fee violates the anti-diversion provision. If the customer leaves without paying, the customer may still legally drive on the public roads, despite continuing to owe Phoenix money. Contrary to the plaintiffs' suggestion (at 42), this analysis is not about "avoid[ing] the toll by taking a different route." The point is that even if the fee is owed, failing to pay it does not affect the right to drive on the public highways.

These types of mistakes fill the opening brief. The brief claims (at 30) without citation or explanation that "the CFC is imposed on *both* car *and* driver." On the next page (at 31), the plaintiffs correctly state that "the CFC is a fee imposed for 'the privilege or benefit of using something,'" but then mistakenly claim that the "something" is "a rental vehicle, on the roads." Not so. The facility charge is for the privilege of using the rental car facility to rent a vehicle, regardless of how or where the renter subsequently uses it.

Elsewhere (at 38), the plaintiffs contend that the facility charge "is just like a road 'toll.'" But a road toll is for the privilege of using a road or bridge. There is not a single road or bridge in Arizona that a renter is prohibited from driving on if the renter leaves the rental car center without paying the

charge. The facility charge is for using the airport's rental car *facilities*. Unlike a road toll, it has nothing to do with the privilege of using a road.

As for the plaintiffs' argument (at 29-31) that "relating to" means has a "reference to" or "refers to," this Court already rejected that interpretation and the Supreme Court did not adopt it, as explained above (Argument § IV.A.3.a). But even if that were the test, the facility charge would not meet it, because it does not "refer to" the use of the roads. Instead, it refers to the use of the rental car center. *See* City Code § 4-79(A) (car rental companies shall collect the facility charge if they "lease space at Phoenix Sky Harbor International Airport" or "obtain customers through the Sky Harbor Rental Car Center"). By contrast, the statutes requiring license and registration fees actually refer to using a vehicle on the highways. *See* A.R.S. §§ 28-3151 ("a person shall not drive a motor vehicle or vehicle combination on a highway without a valid driver license"), 28-2153(A) ("A person shall not operate . . . on a highway a motor vehicle, trailer or semitrailer unless [it] has been registered").

The plaintiffs claim (at 31) that the facility charge "'*refers to*' the number of days the rental car is '*use[d]*' as the basis for determining the amount to be charged . . . ." Not so. Contrary to their contention, the facility charge does

not refer to the number of days the car is "use[d]." The facility charge is based on the number of "transaction day[s] per vehicle." City Code § 4-79(A). But referring to the number of transaction days is not the same thing as referring to "registration, operation, or use of vehicles on the public highways." Article IX, § 14.

The plaintiffs' argument also fails because it implicitly relies on the false premise that a vehicle necessarily gets "use[d]" on each "transaction day." No evidence supports that implicit premise, and common sense destroys it. A business traveler headed to a conference at the convention center might rent a car at the airport, drive to the Sheraton downtown, and leave the car in the hotel garage for the week-long conference, leaving it undriven for five days. Another traveler might drive a rented car to the Phoenician for a golf trip, stay on-resort for meals and golf, and leave the car in the hotel garage the whole time. In that situation, as in *Saban I*, "the surcharge is imposed regardless of whether, how much or how often the customer drives the car." 244 Ariz. at 300, ¶ 17.

Moreover, contrary to the plaintiffs' suggestion, the facility charge is not a tax on renting a car for a certain number of days. A transaction privilege tax "is not a tax upon sales," but is rather a tax on the privilege of

operating a business, the *amount* of which is "measured" by sales. *Indus. Uranium Co. v. State Tax Comm'n*, 95 Ariz. 130, 132 (1963) ("We have stated the nature of this tax repeatedly."). Although the facility charge is not a transaction privilege tax, the structure is similar. The charge is for the privilege of using airport facilities, the *amount* of which is measured by transaction days. *See also Saban*, 246 Ariz. at 98, ¶ 33 ("[T]he surcharge, like the transaction privilege tax, is imposed on the business of renting vehicles and is not required to be paid before a rental vehicle can be legally operated on roads."). That makes the facility charge, like the charge in *Saban*, doubly removed from the use of the roads.

(c) The plaintiffs' attempts to distinguish *Saban* mischaracterize the holding.

In addressing *Saban* (at 32-38), the plaintiffs try to limit the holding to transaction privilege taxes such as the car rental surcharge at issue in that case. The plaintiffs claim that the facility charge is not a tax on the privilege of doing business. *Saban* discussed this aspect of the surcharge principally in connection with the 1935 transaction privilege tax on car rental businesses that existed at the time the voters adopted the anti-diversion provision. *See* 246 Ariz. at 97-98, ¶¶ 31-35. It was understood that the revenues from that

tax were not road user revenues governed by the anti-diversion provision. *See id.* The similarity between the 1935 tax and the surcharge confirmed that the Court was correct in concluding that the surcharge was not governed by the anti-diversion provision. The facility charge is structurally similar to a transaction privilege tax—it is imposed for the privilege of conducting a business (here, operating a rental business at the airport; in *Saban*, operating a rental business in Maricopa County)—and then *measured* by the volume of activity (here, the number of transaction days; in *Saban*, the number of rentals or the gross proceeds on rentals). Thus, *Saban's* analysis of the 1935 transaction privilege tax confirms that the facility charge does not generate road user revenues governed by the anti-diversion provision.

In any case, *Saban*'s holding did not depend on the fact that the surcharge at issue was a transaction privilege tax. Instead, the Court held more generally that only "a tax or fee that is a prerequisite to, or triggered by, the legal operation or use of a vehicle on a public thoroughfare" falls within the anti-diversion provision. *Id.* at 97, ¶ 27. A transaction privilege tax does not meet that definition because a driver can operate and use a vehicle on a public road without having paid the tax. So too with the facility charge, as explained above.

The plaintiffs try to make the facility charge seem more closely related to the anti-diversion provision by claiming (at 33-37) that unlike the *Saban* surcharge, "the legal incidence and the economic burden" of the facility charge supposedly falls on drivers. It does not, as discussed above. (Argument § III.A.1.)

Moreover, the anti-diversion section of *Saban* mentions neither legal incidence nor economic burden; those concepts simply are not part of the Court's test. Nor could they be. Under the plaintiffs' argument, a *direct* tax (paid by the driver) on car tires or windshield wipers would violate the anti-diversion provision, even though *Saban* held that a transaction privilege tax on the seller of those items would not. That cannot be the rule—paying a tax on tires or windshield wipers is not a prerequisite to or triggered by the legal operation or use of a vehicle on a public road. Although a transaction privilege tax is even further attenuated than a direct tax, even a direct tax does not violate the anti-diversion provision unless it satisfies *Saban*'s test. And the facility charge is not even a direct tax on road users, as discussed above.

As part of this argument, the plaintiffs make up (at 36-37) yet another test not adopted by the Supreme Court—that "the anti-diversion provision

does not cover general business-privilege taxes *of the type* that existed when the amendment was adopted . . . ." Once again, this is not the Court's holding. Although the Court relied on the history of these taxes in confirming its interpretation, that is not the test the Court announced.

Moreover, the facility charge is at least as attenuated from a tax on road users as the *Saban* surcharge, if not more so. The *Saban* surcharge was not about lawfully using or operating a vehicle on public roads; it was about the privilege of operating a particular type of business. Likewise, the facility charge is about the privilege of using a particular airport facility.

The plaintiffs additionally claim (at 35) that who a fee is "aimed at" matters. Contrary to the plaintiffs' suggestion, the Supreme Court never adopted an "aimed at" principle. The Court discussed that principle only in rejecting a similar argument that Saban made (i.e., that the surcharge was more "aimed at" rental car customers than the 1935 tax). *See* 246 Ariz. at 98, ¶¶ 32-33. In *rejecting* this argument ("We disagree"), the Court did not endorse Saban's manufactured "aimed at" theory. *Id.*, ¶ 33.

Because the facility charge does not violate the sources clause of the anti-diversion provision, this Court should affirm the dismissal.

B. Spending the facility charge where the revenues initiated does not violate the anti-diversion provision.

1. The expenditures part of the anti-diversion provision must be interpreted as broadly or narrowly as the fees part of the same provision.

The "expenditures" clause of Article IX, § 14 specifies that funds that trigger the sources clause may only be spent on "highway and street purposes." Article IX, § 14.

As explained above, the facility charge does not implicate the sources clause of the anti-diversion provision. That means that the Court need not reach the expenditures clause. If the Court disagrees, then the Court should hold that spending the revenues right where they were generated does not violate the expenditures clause.

The reason is simple. All parts of the anti-diversion provision should be interpreted harmoniously. "The text must be construed as a whole." Scalia & Garner at 167. The Court should not interpret one clause broadly and another clause narrowly.

The facility charge implicates the anti-diversion provision only if the sources clause is interpreted extremely broadly, in which case the expenditures clause should be interpreted equally broadly.

2. The Tax Court correctly held that the facility charge does not violate the expenditures provision.

The expenditures clause states that the revenues from the applicable fees must be spent on "highway and street purposes," and then provides a list of examples of permissible expenditures. Article IX, § 14. The list of permissible expenditures is inclusive, not exclusive. "Highway user revenues may fund any activity that promotes such 'highway or street purposes' *even if the activity does not fall within one of the enumerated categories*." *John E. Shaffer Enters. v. City of Yuma*, 183 Ariz. 428, 433 (App. 1995) (emphasis added).

This Court previously ruled that "[i]f an expenditure furthers 'highway or street purposes,' then it is permitted by the Arizona Constitution." *Id.* A "highway or street purpose" can include "general administrative and operating costs" related to such a purpose. *Id.* Similarly, "maintenance" of roads "is not restricted literally to the manual labor of repairing existing roads," but "has a broader meaning and includes the doing of everything necessarily and appropriately connected with and incidental to the laying out, opening, and the construction of public roads and the maintenance of an efficient road system." *Id.*

Citing this authority, the Tax Court correctly concluded that "even if the anti-diversion clause did apply, the funds are not being diverted to the extent they are being raised at the facility to maintain the facility." [Roberts-IR-14 at 2 (APP236).]

The revenues from the facility charge go toward the "consolidated rental car facility . . . and for the costs of related transportation facilities and equipment." City Code § 4-79(C)(1). These costs include "planning, design, equipping, construction," plus "operating costs" and "other related costs." *Id.*

Phoenix built the rental car facility primarily to address "[c]ongestion of Airport roadways, parking areas, and curbsides." [Roberts-IR-7, Ex. B at 12 (APP219).] Rental car activity previously took place within the airport terminal complex, which "place[d] high demand on the terminal roadways." [*Id.* (APP219).] The rental car facility was designed to remove this "significant strain on the Airport terminal roadway." [*Id.* (APP219).] As a City Council report recognized, the facility would alleviate those traffic issues by consolidating all car rental companies in one centralized location and by implementing a "common bussing operation" to mitigate congestion on the streets in and around the Airport. [Roberts-IR-7, Ex. C at 20-22

(APP223-25).] These activities are "necessarily and appropriately connected with and incidental to the laying out, opening, and the construction of public roads and the maintenance of an efficient road system" for the airport. *Shaffer*, 183 Ariz. at 433.

Moreover, the entire purpose of the anti-diversion provision is to prohibit *diversion*—i.e., raising revenues from one activity and spending them on an unrelated activity. Here, the revenues go right back where they came from, *without any diversion*. Those who use the airport's rental car facilities and transportation system pay the fee, and the revenues of the fee go *right back* where they came from, to fund the acquisition, construction, maintenance, and operation of those facilities. No diversion. As the anti-diversion provision's publicity pamphlet explained, these types of closed loops are fair: "[i]f used for road purposes, the road user taxes are fair *because they are based on benefits received by the taxpayer*." [APP102.] Those who pay the facility charge benefit from the facility charge, exactly as the anti-diversion provision intended.

3. The plaintiffs' arguments on the expenditure clause misrepresent the text, caselaw, and purpose.

The plaintiffs argue that spending the money right where it came from violates the expenditures clause.

In making this argument, the plaintiffs omit key parts of the constitutional text and misrepresent settled authorities. The sole relevant limitation in the expenditures clause is that the funds must be used for "highway and street purposes." Although the plaintiffs sometimes quote this correct standard, they use a misleading quotation (at 45) that omits (via ellipsis) this controlling phrase (and the word "including"). They use this misleading omission to contend (at 46) that the quoted list of permissible uses "was exhaustive," and that "[*e*]*verything* excluded from the list is strictly prohibited." Not so. "'[I]ncluding' means not limited to and is not a term of exclusion." A.R.S. § 1-215(14); *accord U.S. v. Wyatt*, 408 F.3d 1257, 1261 (9th Cir. 2005).

The overwhelming weight of authority shows that the plaintiffs are wrong about whether the examples are exhaustive and exclusive. This Court explained that "the enumeration of specific purposes in Section 14 *does not circumscribe* the more general restriction to expenditures for 'highway and

street purposes.'" *Shaffer*, 183 Ariz. at 433 (emphasis added). It squarely held that "Highway user revenues may fund any activity that promotes such 'highway or street purposes' *even if the activity does not fall within one of the enumerated categories*." *Id.* (emphasis added). The Attorney General agreed, twice. *See* Ariz. Op. Att'y Gen. I05-003 (2005) ("This list of the permissible uses of HURF in Article IX, § 14 monies is not exhaustive."); *accord* Ariz. Op. Att'y Gen. I92-004 (1992). The central premise of the plaintiffs' argument is simply false.

The plaintiffs' out-of-state authorities fare no better. They principally rely (at 48-49) on *Rogers v. Lane Cnty.*, 771 P.2d 254, 257 (Or. 1989), which held that using highway funds for an airport parking garage and walkway violated Oregon's Constitution. This case provides little insight for several reasons. First, the constitutional text is narrower in Oregon than in Arizona. Although Arizona permits spending on "highway and street *purposes*," Oregon narrowly limits the expenditures "exclusively for the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas." Or. Const. art. IX, § 3a(1). Arizona voters deemed a *magazine* to be a "highway and street purpose[]." Article IX, § 14. In addition, Arizona voters chose to include

"state enforcement of traffic laws and state administration of traffic safety programs," whereas Oregon voters amended the Constitution specifically to exclude "state police, parks, and other 'highway-related programs.'" *Rogers*, 771 P.2d at 258. Oregon's sources clause is narrower than Arizona's, so a narrower interpretation of its expenditures clause makes more sense. Oregon authorities have little bearing on Arizona's Constitution in light of these important differences in text and history.

Moreover, Oregon voters were motivated by an existing "*raid on the Highway Fund*." *Id.* at 257. *Rogers* involved diverting "highway fund monies" to an airport parking garage and pedestrian walkway, *id.* at 255, which implicates these concerns of "raiding" funds from one source to use on a different source. Consider instead if the funds used for the garage came directly from garage parking fees. That would involve no raid, and surely would be allowed.

These issues plague all of the plaintiffs' out-of-state citations. The cases from Massachusetts and Washington involve classic diversion, where earmarked highway funds get diverted for non-highway uses—they do not involve the kind of self-contained system at issue here, where the funds get spent right where they originated. The Oregon Attorney General Opinion

again addresses meaningfully different constitutional text, where the funds must be spent on the highway itself, not on "highway and street *purposes*," as in Arizona.

The plaintiffs also attempt to limit the holding of *Shaffer* by claiming (at 50-51) that the Court's test was not used "to determine whether a 'road or highway purpose' existed" for the challenged expenditure. This makes no sense. The entire section of the opinion was devoted to determining precisely that question. The test, which the plaintiffs concede is "admittedly broad" (at 50), is straightforward: "If an expenditure furthers 'highway or street purposes,' then it is permitted by the Arizona Constitution." *Shaffer*, 183 Ariz. at 433.

The plaintiffs completely fail to grapple with the fundamental contradiction in their argument. To implicate the anti-diversion provision, they urge an expansive interpretation of the sources clause, but then advocate for a narrow interpretation of the expenditures clause. They contend that the facility charge is a "road user" fee for the sources clause, but that building and maintaining the facility is not a "road purpose" for the expenditures clause. They cannot have it both ways. If using the rental car facility is a road use, then building and maintaining it serves a road purpose.

Any other interpretation would lead to absurd results. For example, the plaintiffs' proposed interpretation of the sources clause could sweep in the parking fees charged in a municipal parking garage, and their interpretation of the expenditures clause would prohibit the municipality from using those parking fees to operate the parking garage. The anti-diversion provision prohibits *diverting* funds from road users to non-road use. It would be absurd to prohibit spending the funds right where they were raised.

In sum, if the Court holds that the facility charge does not implicate the sources clause, then it need not reach how broadly to construe the expenditures clause. But if the Court reaches the issue, then it should give the sources clause and expenditures clause equal breadth to prohibit diversion without invalidating a levy like the facility charge, which involves no diversion at all.

C. Any contrary ruling would cause federal law to preempt Arizona's anti-diversion provision.

1. In a conflict, state law must yield to federal law.

The Court should also affirm because of federal preemption. Any ruling that the facility charge violates the anti-diversion provision would

cause Article IX, § 14 to conflict with three federal statutes concerning airports, 49 U.S.C. §§ 40116(d)(2)(A)(iv), 47133(a), and 47107(b)(1). In such a conflict, the state constitutional provision must yield.

Under the Supremacy Clause, "the Laws of the United States . . . shall be the supreme Law of the Land," and have effect despite any contrary provision in "the Constitution or Laws of any State." U.S. Const. art. VI, cl. 2. Under "conflict preemption," a state law or constitutional provision must give way "where state law stands as an obstacle to the achievement of a federal statute's purpose, or when compliance with both federal and state laws is impossible." *Ansley v. Banner Health Network*, 248 Ariz. 143, 151, ¶ 33 (2020).

This case involves a potential conflict between two types of anti-diversion provisions. On the one hand, Arizona's anti-diversion provision prohibits diverting revenue from road users to non-road uses. On the other hand, the three federal statutes prohibit airports from diverting certain airport-derived revenue to non-airport uses. The Court should not construe the anti-diversion provision in a way that brings it into conflict with the federal statutes as applied to the facility charge. Although Phoenix did not

raise this issue below, the Court may affirm on any basis supported by the record. *Leflet*, 226 Ariz. at 300, ¶ 12.

2. 49 U.S.C. § 40116(d)(2)(A)(iv).

Under 49 U.S.C. § 40116(d)(2)(A)(iv), "[a] State, political subdivision of a State, or authority acting for a State or political subdivision may not . . . levy or collect a tax, fee, or charge . . . exclusively upon any business located at a commercial service airport or operating as a permittee of such an airport other than a tax, fee, or charge *wholly utilized for airport or aeronautical purposes*." (Emphasis added).[4]

This provision applies to the facility charge. Because the federal statute uses "levy or collect," the above disputes about the legal incidence of the charge do not affect this analysis; the City Code requires the *companies* to pay the charge to Phoenix. City Code § 4-79(C). In addition, the facility charge applies to "on-airport rental car companies who lease space at Phoenix Sky Harbor International Airport," City Code § 4-79(A), which are "business[es] located at" the airport. It also applies to "off-airport rental car

[4] "[A]lthough 'federal laws are presumed not to preempt state laws, courts do not invoke that presumption when the federal statute contains an express preemption clause,'" such as § 40116(d)(2)(A)(iv). *Conklin v. Medtronic, Inc.*, 245 Ariz. 501, 504, ¶ 8 (2018).

companies who obtain customers through the Sky Harbor Rental Car Center," *id.*, which requires picking up passengers at the Rental Car Center, *id.* § 4-77(B)(9), and in turn requires a permit, *id.* §§ 4-68(A) (permit), 4-67 (definitions), and therefore applies to "a permittee of such an airport," 49 U.S.C. § 40116(d)(2)(A)(iv). Consequently, federal law prohibits spending revenue from the facility charge on anything except "airport or aeronautical purposes." *Id.*

The plaintiffs, however, argue that Phoenix must spend facility-charge revenue on "highway and street purposes." Article IX, § 14. This state-law requirement "cannot coexist with the federal prohibition" against spending the funds on anything other than airport or aeronautical purposes. *Ansley*, 248 Ariz. at 152, ¶ 36. As applied to the facility charge, therefore, the plaintiffs' interpretation of Arizona's anti-diversion provision would be preempted by, and must yield to, federal law.

Even if it is possible to comply with both provisions, 49 U.S.C. § 40116(d)(2)(A)(iv) would still preempt because the Article IX, § 14, if applied to the facility charge, "stands as an obstacle to the achievement of a federal statute's purpose . . . ." *Ansley*, 248 Ariz. at 151, ¶ 33. Under federal policy, airports must be "as self-sustaining as possible," and therefore

federal law prohibits diversion. 64 Fed. Reg. 7696, 7696 (Feb. 16, 1999). Section 40116(d)(2)(A)(iv) is one of many statutes aimed at this purpose, as are 49 U.S.C. §§ 47133(a) and 47107(b) (discussed below).

Sky Harbor achieves this goal in part by ensuring that facilities like the Rental Car Center and common transportation system are as internally self-sustaining as possible, meaning that the revenues directly fund the capital expenses (including bond payments) and operating costs. *See* City Code § 4-79(C)(1) (facility charge revenue "shall be used" for costs (including "debt service") of "rental car facility" and "related transportation facilities").

Requiring Phoenix to divert these revenues to another use would create "an obstacle to the achievement of a federal statute's purpose" of self-sustaining airport infrastructure and therefore would be preempted. *Ansley*, 248 Ariz. at 151, ¶ 33; *see also Ariz. v. U.S.*, 567 U.S. 387, 411 (2012) (holding that Arizona statute "pose[s] an obstacle to the framework Congress put in place").

Indeed, the Tennessee Attorney General concluded that using tax revenues from car rentals subject to "an airport access fee for an airport consolidated facility charge" to fund an NBA arena would violate the federal statute. Tenn. Op. Att'y Gen. No. 01-089 (2001) ("This attempt to tax airport

businesses is in direct conflict with the plain language of AHTA and, accordingly, would not, in our opinion, withstand judicial scrutiny.").

3. 49 U.S.C. §§ 47133(a), 47107(b)(1).

If Article IX, § 14 reaches the facility charge, then two other federal statutes also preempt this application. The two statutes also limit spending airport revenues:

> [T]he revenues generated by an airport that is the subject of Federal assistance *may not be expended for any purpose other than* the capital or operating costs of—
>
> (1) the airport;
>
> (2) the local airport system; or
>
> (3) any other local facility that is owned or operated by the person or entity that owns or operates the airport that is directly and substantially related to the air transportation of passengers or property.

49 U.S.C. § 47133(a) (emphasis added). 49 U.S.C. § 47107(b)(1), is substantially similar.

The facility charge is "revenue[] generated by an airport that is the subject of Federal assistance."[5] The FAA interprets this phrase broadly,

[5] Sky Harbor has received substantial federal assistance. *See, e.g.*, FAA, Airport Grants Announced on September 1, 2020, https://www.faa.gov/airports/aip/2020_aip_grants/media/FY20-AIP-Grants-Announced-September_012020.pdf ($21.7 million grant).

including "[r]evenue from air carriers, *tenants, lessees*, purchasers of airport properties, airport *permittees making use of airport property* and services, and other parties." 64 Fed. Reg. 7696, 7716 (Feb. 16, 1999) (emphases added). This includes revenues from "the right to conduct an activity on the airport or to use or occupy airport property." *Id.*

These definitions sweep in the facility charge, which is imposed on companies who "lease space at" or "obtain customers" through airport property. City Code § 4-79(A). Consequently, Phoenix cannot use these revenues for anything other than the airport-related items listed in §§ 47133(a), 47107(b)(1).

The state-law requirement to spend on "highway and street purposes," if it applies, "cannot coexist with the federal prohibition" on spending these funds, or in the alternative (as explained above), "would create "an obstacle to the achievement of a federal statute's purpose" of self-sustaining airport infrastructure. *Ansley*, 248 Ariz. at 151-52, ¶¶ 33, 36. As applied to the facility charge, therefore, Article IX, § 14 is also preempted by 49 U.S.C. §§ 47133(a), 47107(b)(1).

4. The Court should avoid preemption by holding that the facility charge does not violate Arizona's anti-diversion provision.

The Court should construe state and local law in a way to avoid creating a conflict with federal law. Avoiding federal preemption, or even the risk of federal preemption, is easy in this case. The conflict between state and federal law arises only if the Court adopts an overly expansive interpretation of the sources clause of Article IX, § 14, and overly narrow interpretation of the expenditures clause. If the Court instead follows Arizona Supreme Court precedent and properly construes Article IX, § 14, then the facility charge does not violate that provision and Phoenix may safely satisfy its federal obligations to spend airport revenue at the airport.

Fundamentally, the four anti-diversion provisions in this case—the state provision in Article IX, § 14, and the three federal statutes—illustrate precisely why the kind of self-contained system at issue here, where the funds get spent right where they originated, does not violate *any* anti-diversion provision.

The federal statutes were motivated by the same thing that motivated Arizona's anti-diversion provision—the concern that revenues should not be generated in one place and then diverted to another purpose. Congress, for

example, was concerned about "revenue diversion," i.e., "the spending of revenues generated by an airport for purposes other than the development or operation of the airport." H.R. Rep. No. 103-240 (1993).

Conceptually, the anti-diversion provisions are simple. Revenues raised from road users should be spent on road uses. Revenues raised at an airport should be spent at the airport. Spending the money right where the money was raised simply does not divert revenue at all. For these reasons, when all the laws are properly construed, the facility charge does not violate Article IX, § 14, or the three federal statutes.

ARCAP 21 REQUEST FOR ATTORNEYS' FEES

Phoenix requests attorneys' fees under A.R.S. §§ 12-349, 12-341.01.

CONCLUSION

The Court should affirm.

RESPECTFULLY SUBMITTED this 19th day of November, 2021.

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APPENDIX
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* The appendix page number matches the electronic PDF page number. Counsel has added emphasis to selected pages in this Appendix using yellow highlighting to assist the Court with its review of the record. Some record items included in the Appendix contain only a limited excerpt. This Appendix complies with the bookmarking requirements of ARCAP 13.1(d)(3).

Sec. 4-79. Rental car customer facility charge.

A. All on-airport rental car companies who lease space at Phoenix Sky Harbor International Airport, and all off-airport rental car companies who obtain customers through the Sky Harbor Rental Car Center ("RCC"), shall collect a daily customer facility charge ("CFC") of six dollars per transaction day per vehicle from all Sky Harbor Airport customers. A transaction day means a car rented for twenty-five or fewer hours for the first transaction day, and every twenty-four hours for each transaction day thereafter. The CFC shall not apply to rentals that originate from fixed base operators.

B. All CFC's collected by all vehicle rental companies are and shall be trust funds held by the vehicle rental companies for the benefit of the City. Vehicle rental companies and their agents hold only a possessory interest in the CFC's, and no legal or equitable interest. All vehicle rental companies shall segregate, separately account for and disclose all CFC's as trust funds in their financial statements, and shall maintain adequate records that account for all CFC's charged and collected. Failure to segregate the CFC's shall not alter or eliminate their trust fund nature. The City shall have the right to audit the CFC records upon reasonable notice.

C. All vehicle rental companies shall remit all CFC's that were collected or should have been collected from its airport customers on a monthly basis to the City together with the monthly statement of transactions and transaction days to a lockbox location designated by the City. The CFC's shall be remitted by the last day of the month following the month the CFC's were collected. Failure to strictly comply with this subparagraph shall be considered a material breach of the vehicle rental company's authorization to do business at the airport.

1. The CFC's shall be used to pay, or reimburse the City, for the costs associated with the RCC consolidated rental car facility which shall be located in Sky Harbor Center, and for the costs of related transportation facilities and equipment. Any or all of the CFC's may be pledged to the punctual payment of debt service on obligations issued by or on behalf of the City for the cost of the consolidated rental car facility RCC and related transportation facilities and equipment, and to create and maintain reasonable reserves. Eligible costs for the consolidated rental car facility RCC shall include all costs, fees, and expenses associated with the planning, design, equipping, construction, other related costs for the development or acquisition of the RCC consolidated car rental facility, and for capital improvements to the RCC. Eligible costs for the related transportation facilities and equipment shall include operating costs in addition to the foregoing costs. Any or all of the CFC's may be deposited with an eligible depository or held in trust by a trustee pending application as authorized by this Section.

D. The RCC consolidated rental car facility and related improvements are designated as "special purpose facilities" for purposes of Ordinance No. S-21974, as amended, Master Airport Revenue Refunding Bond Ordinance.

E. This Section is hereby adopted pursuant to the laws of the State of Arizona, including, without limitation, Arizona Constitution, Article XIII; Title 9 and Article 6, Chapter 25, Title 28, Arizona Revised Statutes, as amended; and the City of Phoenix Charter. (Ord. No. G-4375, § 2, 2001; Ord. No. G-4418, § 3, 2002; Ord. No. G-4530, §§ 1, 2, 2003; Ord. No. G-4764, § 1, 2005; Ord. No. G-5272, § 1, 2008; Ord. No. G-5360, § 1, 2009)

The Phoenix City Code is current through Ordinance G-6868, passed June 16, 2021.

Disclaimer: The City Clerk's Office has the official version of the Phoenix City Code. Users should contact the City Clerk's Office for ordinances passed subsequent to the ordinance cited above.

Note: This site does not support Internet Explorer. To view this site, Code Publishing Company recommends using one of the following browsers: Google Chrome, Firefox, or Safari.

City Website: www.phoenix.gov
Code Publishing Company

Arizona Constitution art. 9 § 14

§ 14. Use and distribution of vehicle, user, and gasoline and diesel tax receipts

Section 14. No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on the public highways or streets or to fuels or any other energy source used for the propulsion of vehicles on the public highways or streets, shall be expended for other than highway and street purposes including the cost of administering the state highway system and the laws creating such fees, excises, or license taxes, statutory refunds and adjustments provided by law, payment of principal and interest on highway and street bonds and obligations, expenses of state enforcement of traffic laws and state administration of traffic safety programs, payment of costs of publication and distribution of Arizona highways magazine, state costs of construction, reconstruction, maintenance or repair of public highways, streets or bridges, costs of rights of way acquisitions and expenses related thereto, roadside development, and for distribution to counties, incorporated cities and towns to be used by them solely for highway and street purposes including costs of rights of way acquisitions and expenses related thereto, construction, reconstruction, maintenance, repair, roadside development, of county, city and town roads, streets, and bridges and payment of principal and interest on highway and street bonds. As long as the total highway user revenues derived equals or exceeds the total derived in the fiscal year ending June 30, 1970, the state and any county shall not receive from such revenues for the use of each and for distribution to cities and towns, fewer dollars than were received and distributed in such fiscal year. This section shall not apply to moneys derived from the automobile license tax imposed under section 11 of article IX of the Constitution of Arizona. All moneys collected in accordance with this section shall be distributed as provided by law.

PLEASE READ CAREFULLY

STATE OF ARIZONA

INITIATIVE AND REFERENDUM

PUBLICITY PAMPHLET

1952

Containing a Copy of the

PROPOSED AMENDMENT TO THE CONSTITUTION

REFERENDUM

Referred to the People

by the Legislature

and

INITIATIVE MEASURES

Proposed by Initiative Petition of the People

To be Submitted to the Qualified Electors of the State of Arizona for their approval or rejection at the

REGULAR GENERAL ELECTION

to be held on

THE FOURTH DAY OF NOVEMBER, 1952

Together with the Arguments filed favoring certain of said measures

Compiled and Issued by

WESLEY BOLIN

Secretary of State

13

(Publication Authorized under Paragraph 60-107, Chapter 60, Article 1, Arizona Code Annotated, 1939)

To be submitted to the qualified electors of the State of Arizona for their approval or rejection at the

REGULAR GENERAL ELECTION

to be held

ON NOVEMBER 4, 1952

Referred to the People by the Legislature and filed in the office of the Secretary of State, March 14, 1952, and printed in pursuance of Paragraph 60-107, Chapter 60, Article 1, Arizona Code Annotated, 1939.

WESLEY BOLIN, Secretary of State

(On Official Ballot Nos.100-101)

HOUSE CONCURRENT RESOLUTION NO. 2

A CONCURRENT RESOLUTION PROPOSING AN AMENDMENT OF THE CONSTITUTION OF ARIZONA RELATING TO THE EXPENDITURE OF REVENUES FOR HIGHWAY PURPOSES.

Be it Resolved by the House of Representatives of the State of Arizona, the Senate concurring:

1. The following amendment to the Constitution of Arizona, to be known as article IX, section 14 thereof, is proposed, to become valid as a part of the Constitution when approved by a majority of the qualified electors voting thereon and upon proclamation of the governor:

Section 14. No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on the public highways, or to fuels used for the propulsion of such vehicles, shall be expended for other than cost of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, cost of construction, reconstruction, maintenance and repair of public highways and bridges, county, city and town roads and streets, and for distribution to counties, incorporated cities and towns in an amount not less than that as provided by law on July 1, 1952, to be used by them only for the purposes permitted by law on that date, expense of state enforcement of traffic laws, and payment of costs for publication and distribution of Arizona Highway Magazine, provided, however, that this section shall not apply to moneys derived from the automobile license tax imposed under section 11 of Article IX of the Constitution of Arizona.

2. The proposed amendment (approved by a majority of the members elected to each house of the Legislature, and entered upon the respective journals thereof, together with the ayes and nayes thereon) shall be by the secretary of state submitted to the qualified electors at the next regular general election (or at a special election called for that purpose), as provided by article XXI, Constitution of Arizona.

Passed by the House March 3, 1952, by the following vote: 38 Ayes, 21 Nays, 6 Absent, 7 Excused.

Passed by the Senate March 14, 1952, by the following vote: 15 Ayes, 2 Nays, 2 Not voting.

Filed in the Office of the Secretary of State - March 14, 1952.

WESLEY BOLIN, Secretary of State

The following is the form and number in which the question will be printed on the Official Ballot:

PROPOSED AMENDMENT TO THE CONSTITUTION
PROPOSED BY THE LEGISLATURE

HOUSE CONCURRENT RESOLUTION NO. 2

PROPOSING AN AMENDMENT OF THE CONSTITUTION OF ARIZONA RELATING TO THE EXPENDITURE OF REVENUES FOR HIGHWAY PURPOSES

If you favor the above law, vote YES; if opposed, vote NO.

100 YES ☐ 128,094

101 NO ☐ 48,409

AFFIRMATIVE ARGUMENT
REASONS WHY
THE BETTER ROADS AMENDMENT SHOULD BE APPROVED
BY VOTING 100 YES ☒

100 YES, RELATING TO THE EXPENDITURE OF REVENUES FOR HIGHWAY PURPOSES, a proposed amendment to the Arizona Constitution, is being submitted to the people by Resolution of the Legislature.

POPULARLY CALLED THE BETTER ROADS AMENDMENT, its purpose is to INSURE THE EXPENDITURE OF ALL REVENUES DERIVED FROM ROAD USERS TO ROAD USES ONLY. These road uses (highway purposes) are delineated in the amendment. They include costs of building and repairing public highways, streets, and roads in the state, counties, cities, and towns and costs attendant thereto such as: administration, refunds, bonding, traffic enforcement, and the ARIZONA HIGHWAYS magazine.

REVENUES IN ARIZONA are derived from state gasoline and diesel taxes, registration fees, unladen weight fees on common and contract motor carriers, and motor carrier taxes based on gross receipts. Road users in the fiscal year '51-52 paid $13,545,135. in motor fuel taxes and $5,620,930. in motor vehicle excise taxes. 100 YES would not apply to revenues from the

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automobile license property tax (in lieu tax) which goes to state, county, city, and school general funds and is not included in the above figures.

BY AN AVERAGE OF 2-⅜ to 1, the citizens of 21 states, including seven neighboring western states, have already adopted amendments to their constitutions earmarking all road user taxes for roads.

100 YES CARRIES THE ENDORSEMENT OF a variety of ARIZONA'S CITIZEN GROUPS, such as:

Arizona Automobile Associations
Arizona Automobile Dealers Assn.
Ariz. Bottlers of Carbonated Beverages
Arizona Cattle Growers' Assn.
Ariz. Chambers of Commerce Mgrs. Assn.
Arizona Citrus Exchange
Arizona Cotton Growers' Assn.
Arizona Dairymens' League
Arizona Farm Bureau Federation
Arizona Good Roads Association
Arizona Highway Commission
Arizona Hotel Association
Arizona Milk Producers Assn.
Arizona Motor Hotel Assn.
Arizona Motor Transport Assn.
Arizona Petroleum Industries Com.
Ariz. Rural Letter Carriers Assn.
Arizona Small Mine Owners Assn.
Arizona Supervisors and Clerks Assn.
Arizona Tire Dealers Assn.
Arizona Vegetables Growers Assn.
Arizona Woolgrowers Assn.
Associated Equipment Distr.
Associated General Contractors
Central Ariz. Cattle Feeders Assn.
Desert Citrus Growers Assn.
Implement Dealers Assn.
Maricopa County Farm Bureau
Portland Cement Assn.
Retail Lumber & Bldg. Supply Assn.

WHY DO SO MANY DIFFERENT PEOPLE WANT THE BETTER ROADS AMENDMENT? Because they, and we, all share a common problem—the need for better roads: (1) to secure needed improvements in our highway transportation system; (2) to reduce our accident toll; (3) to alleviate traffic congestion in urban areas; (4) to reach standards of economical operation and convenient use in suburban and rural areas; (5) to strengthen lines of communication in Arizona, whether needed for business such as: farm-to-market, or for vacationing pleasure.

THE ONLY WAY TO BE SURE WE HAVE BETTER ROADS is to be sure of our revenues for roads.

IF USED FOR ROAD PURPOSES, the road user taxes are fair because they are based on benefits received by the taxpayer. The user pays as he drives. If not used for road purposes, these user taxes become unfair because they are not based on benefits received, ability to pay, or the taxpayer's interest. Congress, in passing the Hayden-Cartwright Amendment of 1934, declared: "It is unfair and unjust to tax motor vehicle transportation unless the proceeds of such taxation are applied to the construction, improvement, or maintenance of highways."

OF PARAMOUNT IMPORTANCE to the United States as a nation is its network of highways—arteries of commerce in peacetime, the lifeline of defense in wartime. The federal government grants aid to the states for construction of primary, secondary, and urban highways. This aid in Arizona is 72¢ for each 28¢ spent for construction by state, county, or city, but only if the Arizona user tax revenues are used exclusively for public highway, street, and road purposes.

SINCE SO MUCH of the land area of Arizona, fifth largest state in the nation, is owned or controlled by the federal government, the need for federal help is great. WHY JEOPARDIZE FEDERAL AID BY ALLOWING ANY DIVERSION OF ROAD USER TAXES TO OTHER THAN ROAD PURPOSES?

PUBLIC POLICY IN ARIZONA has consistently opposed diversion, although there have been CONSTANT THREATS TO HIGHWAY FUNDS in bills introduced from time to time in the legislature. In the meantime, in other states not having a Better Roads Amendment, diversion of road user funds MORE THAN DOUBLED IN THE FOUR YEAR PERIOD FROM 1946 - 1950, from $97,579,000. to $217,038,000.

ARIZONA IS IN A PARTICULARLY FAVORABLE POSITION TO ADOPT 100 YES this year, because it is not now diverting its road user taxes.

THEREFORE 100 YES WILL ENTAIL NO CHANGE in the source or expenditure of highway revenues. Nor will it make any change in provisions of the initiated measure allocating gas taxes to the state, 3½¢; counties, 1¢; cities, ½¢ per gallon.

WITH A STABILIZED SOURCE OF highway revenue, 100 YES will insure the continuity of improvement needed to complete such desirable roads as the Black Canyon Highway. This vital, 100-mile North-South link from Phoenix to Prescott and the Camp Verde leg to Flagstaff will connect with East-West traffic in and thru Arizona. The Prescott leg has required five years to construct at an average cost of $50,000. a mile. Arizona will spend $1½ million in its construction, while the federal government will grant $3½ million.

OVER 50% OF THE COMMUNITIES in our state have no rail or airport facilities. For welfare, security, growth, and prosperity, the citizens of these communities depend upon highway transportation. Whether they truck to the nearest railroad point or haul all the way to market, whether their production is industrial, agricultural, or mineral, these citizens must have better roads. Arizona's growth demands their needs be met.

THE NEWEST BUSINESS IN THIS BABY STATE is the $200,000,000. tourist industry. The vacationing public is attracted to those states which have better roads. Those states which neglect their roads thru diversion of revenues, will be neglected by tourists—more than 75% of whom travel by automobile or bus. Arizona must provide good roads not only into and thru the state, but also to vacation spots and scenic and historic points of interest within the state.

SIGNIFICANTLY, 45% OF THE RECEIPTS from the gas tax in Arizona is paid by out-of-state motor vehicle owners. This large tax on non-residents may be justified by using their moneys for the roads they use.

ARIZONA'S GEOGRAPHY IS such that most Arizonans depend upon motor transportation in order to reach their work, markets, and recreation. They have a right to expect that the taxes they pay give them their money's worth in good roads.

MANY ARIZONA CITIZENS ARE EMPLOYED IN ROAD WORK. Because road construction cost is 90% labor, road work is as desirable in bad times as good.

THE VERY SORT OF PEOPLE who, years ago, did not want to pay for needed highways out of general funds of the state, and so devised the gas tax, now look longingly at the highway fund and all to often bring pressures in the legislature to appropriate these revenues to other than highways.

AS SO MANY STATES have discovered in the past ten years, there is only one sure way to put an end to diversion, or the threat of diversion—that is, by the ADOPTION OF A CONSTITUTIONAL AMENDMENT SUCH AS THIS BETTER ROADS AMENDMENT, Proposition 100, Relating to the Expenditure of Revenues for Highway Purposes. KEEP PACE WITH ARIZONA'S PROGRESS. VOTE 100 YES, AT THE TOP OF THE BALLOT ON THE RIGHT HAND SIDE.

ARIZONA BETTER ROADS COMMITTEE
/s/
A. J. Fram
Chairman

To be submitted to the qualified electors of the State of Arizona for their approval or rejection at the

REGULAR GENERAL ELECTION

to be held

ON NOVEMBER 4, 1952

Referred to the People by the Legislature and filed in the office of the Secretary of State, March 10, 1952, and printed in pursuance of Paragraph 60-107, Chapter 60, Article 1, Arizona Code Annotated, 1939.

WESLEY BOLIN, Secretary of State

(On Official Ballot Nos. 300-301)

HOUSE CONCURRENT RESOLUTION NO. 4

A CONCURRENT RESOLUTION

ENACTING AND ORDERING THE SUBMISSION TO THE PEOPLE OF A MEASURE REPEALING AN INITIATIVE MEASURE PROPOSED BY INITIATIVE PETITION, ENTITLED: "AN ACT TO ESTABLISH A

A C T S
Resolutions and Memorials

OF THE

REGULAR SESSION
Twelfth Legislature

OF THE

STATE OF ARIZONA
-1935-

Regular Session Convened January 14th, 1935.

Regular Session Adjourned Sine Die March 21st, 1935, Legislative Day of March 14th, 1935.

expenses of the members of the house of representatives herein provided for shall be presented to the speaker of the house by the members thereof, to be by said speaker audited, and when so audited shall be by the speaker approved and submitted to the state auditor and state treasurer for payment.

The legislative committee expenses of the members of the senate herein provided for shall be presented to the president of the senate by the members thereof, to be by said president audited, and when so audited shall be by the president approved and submitted to the state auditor and state treasurer for payment.

Sec. 4. EMERGENCY CLAUSE. To preserve the public peace, health and safety it is necessary that this act shall become immediately operative. It is therefore declared to be an emergency measure, and shall take effect upon its passage in the manner provided by law.

Approved March 23, 1935.

CHAPTER 77

(House Bill No. 118)

AN ACT

RELATING TO EXCISE TAXATION, AND TO IMPOSE A LICENSE FEE AND A PRIVILEGE TAX UPON THE PRIVILEGE OF ENGAGING IN CERTAIN OCCUPATIONS AND BUSINESS; AND DECLARING AN EMERGENCY.

Be It Enacted by the Legislature of the State of Arizona:

ARTICLE 1

Section 1. SHORT TITLE. This act may be cited as "The excise revenue act of 1935."

ARTICLE II.

PRIVILEGE TAX

Section 1. DEFINITIONS. (a) When used in this article, the term "person" or the term "company", herein used interchangeably includes any individual, firm, co-partnership, joint adventure, association, corporation, municipal corporation, estate, trust, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is disclosed by the context.

(b) The terms "tax commission" and "the commission" mean the tax commission of the state of Arizona, and any board, commission, official, or officials upon whom the duties and powers exercised by said state tax commission under existing laws may hereafter devolve.

(c) The term "tax year" or "taxable year" means either the calendar year, or the taxpayer's fiscal year when permission is obtained from the tax commission to use same as the tax period in lieu of the calendar year.

(d) The term "sale" or "sales" includes the

exchange of properties as well as the sale thereof for money, every closed transaction constituting a sale.

(e) The word "taxpayer" means any person liable for any tax hereunder.

(f) The term "gross income" means the gross receipts of a taxpayer derived from trades, business, commerce or sales and the value proceeding or accruing from the sale of tangible personal property, or service, or both, and without any deduction on account of losses.

(g) The term "business" when used in this article shall include all activities or acts engaged in (personal and corporate), or caused to be engaged in with the object of gain, benefit or advantage either direct or indirect, but shall not include casual activities or sales.

(h) The term "gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property without any deduction on account of the cost of property sold, expenses of any kind, or losses; provided, however, that cash discounts allowed and taken on sales shall not be included as gross income. But the terms "gross income" and "gross proceeds of sales" shall not be construed to include goods, wares or merchandise. or value thereof, returned by customers when the sale price is refunded either in cash or by credit; nor the sale of any article accepted as part payment on any new article sold, if and when the full sale price of the new article is included in the "gross income" or "gross proceeds of sales", as the case may be.

(i) The term "engaging" as used in this article with reference to engaging or continuing in business shall also include the exercise of corporate or franchise powers.

(j) The term "auditor" as used in this article means the auditor of the state of Arizona.

(k) The term "retail" when used in this article, shall mean the sale of tangible personal property for consumption and not for resale.

(l) The term "wholesaler" or "jobber" when used in this article shall mean any person who sells tangible personal property for resale and not for consumption by the purchaser.

Sec. 2. IMPOSITION OF THE TAX. From and after the effective date of this act, there is hereby levied and shall be collected by the tax commission for the purpose of raising public money to be used in liquidating the outstanding obligations of the state government and to aid in defraying the necessary and ordinary expenses of the same and to reduce or eliminate the annual tax levy on property for state purposes and to reduce the levy on property for public school education to the extent hereinafter provided, annual privilege taxes measured by the amount or volume of business done by the persons on account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, in accordance with the following schedule:

(a) At an amount equal to one per cent of the gross proceeds of sales or gross income from

(f) At an amount equal to two per cent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the following businesses:

1. Operating or conducting theatres, operas, shows of any type or nature, exhibitions, concerts, carnivals, circuses, amusement parks, menageries, fairs, races, contests, games, billiard and pool parlors and bowling alleys, dance, dance halls and any business charging admission fees for exhibition, amusement or instruction, other than projects of bona fide religious or educational institutions. Provided, however, moving picture shows which exhibit pictures as a major attraction at any performance shall be taxed at a rate equal to one per cent of the gross income of such shows.

2. Hotels, guest houses, dude ranches and resorts, rooming houses, apartment houses, automobile rental services, automobile storage garages, parking lots, tourist camps or any other business or occupation charging storage fees or rents and adjustment and credit bureaus and collection agencies.

(g) At an amount equal to one-fourth of one per cent of the gross proceeds of sale or the gross income from the business upon every person engaging or continuing within this state in the following businesses:

Compounding, packing, preserving, processing and/or selling any tangible personal property whatsoever at wholesale.

[CHAPTER 585.]

AN ACT

Making receivers appointed by any United States courts and authorized to conduct any business, or conducting any business, subject to taxes levied by the State the same as if such business were conducted by private individuals or corporations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any receiver, liquidator, referee, trustee, or other officers or agents appointed by any United States court who is authorized by said court to conduct any business, or who does conduct any business, shall, from and after the enactment of this Act, be subject to all State and local taxes applicable to such business the same as if such business were conducted by an individual or corporation: *Provided, however*, That nothing in this Act contained shall be construed to prohibit or prejudice the collection of any such taxes which accrued prior to the approval of this Act, in the event that the United States court having final jurisdiction of the subject matter under existing law should adjudge and decide that the imposition of such taxes was a valid exercise of the taxing power by the State or States, or by the civil subdivisions of the State or States imposing the same.

Approved, June 18, 1934.

[CHAPTER 586.]

AN ACT

To increase employment by authorizing an appropriation to provide for emergency construction of public highways and related projects, and to amend the Federal Aid Road Act, approved July 11, 1916, as amended and supplemented, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of increasing employment by providing for emergency construction of public highways and other related projects there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $200,000,000, which shall be apportioned by the Secretary of Agriculture immediately upon the passage of this Act under the provisions of section 204 of the National Industrial Recovery Act, approved June 16, 1933 (in addition to any sums heretofore allocated under such section), in making grants under said section to the several States to be expended by their highway departments pursuant to the provisions of such section, and to remain available until expended: *Provided*, That the Secretary of Agriculture shall act upon projects submitted to him under his apportionment of this authorization, and his approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto: *Provided further*, That not less than 25 per centum of the apportionment to any State shall be applied to secondary or feeder roads, including farm to market roads, rural free delivery mail roads, and public-school bus routes, except that the Secretary of Agriculture, upon request and satisfactory showing from the highway department of any State, may fix a less percentage of the apportionment of such State for expenditure on secondary or feeder roads: *And provided further*, That any funds allocated under the provisions of section 204 (a) (2) of such Act shall also be available for the cost of any construction that will provide safer traffic facilities or definitely eliminate existing hazards to pedestrian or vehicular traffic.

86637°—34——63

SEC. 2. To further increase employment by providing for emergency construction of public highways and other related projects, there is hereby also authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $24,000,000 for allotment under the provisions of section 205 (a) of the National Industrial Recovery Act, approved June 16, 1933 (in addition to any sums heretofore allotted under such section), to be expended for the survey, construction, reconstruction, and maintenance of highways, roads, trails, bridges, and related projects in national parks and monuments (including areas transferred to the National Park Service for administration by Executive order dated June 10, 1933), national forests, Indian reservations, and public lands, pursuant to the provisions of such section, and to remain available until expended.

SEC. 3. Not to exceed $10,000,000 of any money heretofore, herein, or hereafter appropriated for expenditure in accordance with the provisions of the Federal Highway Act shall be available for expenditure by the Secretary of Agriculture, in accordance with the provisions of the Federal Highway Act, as an emergency relief fund, after receipt of an application therefor from the highway department of any State, in the repair or reconstruction of highways and bridges on the system of Federal-aid highways, which he finds, after investigation, have been damaged or destroyed by floods, hurricanes, earthquakes, or landslides, and there is hereby authorized to be appropriated any sum or sums necessary to reimburse the funds so expended from time to time under the authority of this section.

SEC. 4. For the purpose of carrying out the provisions of the Act entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes", approved July 11, 1916, and all Acts amendatory thereof and supplementary thereto, there is hereby authorized to be appropriated out of any money in the Treasury not otherwise appropriated, the following sums, to be expended according to the provisions of such Act as amended: The sum of $125,000,000 for the fiscal year ending June 30, 1936; and the sum of $125,000,000 for the fiscal year ending June 30, 1937.

All sums authorized in this section and apportioned to the States shall be available for expenditure for one year after the close of the fiscal year for which said sums, respectively, are authorized, and any sum remaining unexpended at the end of the period during which it is available for expenditure shall be reapportioned among the States as provided in section 21 of the Federal Highway Act.

SEC. 5. For the purpose of carrying out the provisions of section 23 of the Federal Highway Act, approved November 9, 1921, there is hereby authorized to be appropriated for forest highways, roads, and trails, the following sums, to be available until expended in accordance with the provisions of said section 23: The sum of $10,000,000 for the fiscal year ending June 30, 1936; the sum of $10,000,000 for the fiscal year ending June 30, 1937.

SEC. 6. For the purpose of carrying out the provisions of section 3 of the Federal Highway Act, approved November 9, 1921, as amended June 24, 1930 (46 Stat. 805), there is hereby authorized to be appropriated for the survey, construction, reconstruction, and maintenance of main roads through unappropriated or unreserved public lands, nontaxable Indian lands, or other Federal reservations other than the forest reservations, the sum of $2,500,000 for the fiscal year ending June 30, 1936, and the sum of $2,500,000 for the fiscal year ending June 30, 1937, to remain available until expended.

SEC. 7. For the construction, reconstruction, and improvement of roads and trails, inclusive of necessary bridges, in the national parks, monuments, and other areas administered by the National Park Service, including areas authorized to be established as national parks and monuments, and national park and monument approach roads authorized by the Act of January 31, 1931 (46 Stat. 1053), as amended, there is hereby authorized to be appropriated the sum of $7,500,000 for the fiscal year ending June 30, 1936, and the sum of $7,500,000 for the fiscal year ending June 30, 1937.

SEC. 8. For construction and improvement of Indian reservation roads under the provisions of the Act approved May 26, 1928 (45 Stat. 750), there is hereby authorized to be appropriated the sum of $4,000,000 for the fiscal year ending June 30, 1936, and the sum of $4,000,000 for the fiscal year ending June 30, 1937.

SEC. 9. The term "highway" as defined in the Federal Highway Act, approved November 9, 1921, as amended and supplemented, shall for the period covered by this Act be deemed to include such main parkways as may be designated by the State and approved by the Secretary of Agriculture as part of the Federal-aid highway system.

SEC. 10. Section 19 of the Federal Highway Act, approved November 9, 1921, is hereby amended to read as follows:

"SEC. 19. That on or before the first Monday in January of each year the Secretary of Agriculture shall make a report to Congress, which shall include a detailed statement of the work done, the status of each project undertaken, the allocation of appropriations, an itemized statement of the expenditures and receipts during the preceding fiscal year under this Act, and itemized statement of the traveling and other expenses, including a list of employees, their duties, salaries, and traveling expenses, if any, and his recommendations, if any, for new legislation amending or supplementing this Act. The Secretary of Agriculture shall also make such special reports as Congress may request."

SEC. 11. With the approval of the Secretary of Agriculture, not to exceed 1½ per centum of the amount apportioned for any year to any State under sections 1 and 4 of this Act may be used for surveys, plans, and engineering investigations of projects for future construction in such State, either on the Federal-aid highway system and extensions thereof or on secondary or feeder roads.

SEC. 12. Since it is unfair and unjust to tax motor-vehicle transportation unless the proceeds of such taxation are applied to the construction, improvement, or maintenance of highways, after June 30, 1935, Federal aid for highway construction shall be extended only to those States that use at least the amounts now provided by law for such purposes in each State from State motor vehicle registration fees, licenses, gasoline taxes, and other special taxes on motor-vehicle owners and operators of all kinds for the construction, improvement, and maintenance of highways and administrative expenses in connection therewith, including the retirement of bonds for the payment of which such revenues have been pledged, and for no other purposes, under such regulations as the Secretary of Agriculture shall promulgate from time to time: *Provided*, That in no case shall the provisions of this section operate to deprive any State of more than one-third of the amount to which that State would be entitled under any apportionment hereafter made, for the fiscal year for which the apportionment is made.

SEC. 13. The limitations in the Federal Highway Act, approved November 9, 1921, as amended and supplemented, upon highway construction, reconstruction, and bridges within municipalities and

upon payments per mile which may be made from Federal funds, shall hereafter not apply.

SEC. 14. No deductions shall hereafter be made on account of prior advances and/or loans to the States for the construction of roads under the requirements of the Federal Highway Act or on account of amounts paid under the provisions of title I of the Emergency Relief and Construction Act of 1932 for furnishing relief and work relief to needy and distressed people.

SEC. 15. To provide for the continuation of the cooperative reconnaissance surveys for a proposed inter-American highway as provided in Public Resolution Numbered 104, approved March 4, 1929 (45 Stat. 1697), and for making location surveys, plans, and estimates for such highway, the Secretary of Agriculture is hereby authorized to expend not more than $75,000 to pay all costs hereafter incurred for such work from any moneys available from the administrative funds provided under the Act of July 11, 1916 (U.S.C., title 23, sec. 21), as amended, or as otherwise provided.

SEC. 16. Acts or parts of Acts in any way inconsistent with the provisions of this Act are hereby repealed and this Act shall take effect on its passage.

Approved, June 18, 1934.

[CHAPTER 587.]

AN ACT

To amend section 35 of the Criminal Code of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 35 of the Criminal Code of the United States, as amended (U.S.C., title 18, secs. 80, 82, 83, 84, 85, and 86), be, and the same is hereby, amended to read as follows:

"SEC. 35. Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder; or whoever shall take and carry away or take for his own use, or for the use of another, with intent to steal or purloin, or shall willfully injure or commit any depredation against, any property of the United States, or any branch or department thereof, or any corporation in which the United States of America is a stockholder, or any property which has been or is being made, manufactured, or constructed under contract for the War or Navy Departments of the United States; or whoever shall enter into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, by obtaining or aiding to obtain the pay-

POPE ET AL., VS CITY OF PHOENIX

Electronic Index of Record
MAR Case # TX2018-000759

No.	Document Name	Filed Date
1.	COMPLAINT FOR REFUND OF RENTAL CAR FACILITY CHARGE [PHOENIX CITY CODE 4-79]	Jun. 12, 2018
2.	COVERSHEET	Jun. 12, 2018
3.	CERTIFICATE OF SERVICE	Jun. 15, 2018
4.	SUMMONS	Jun. 15, 2018
5.	STIPULATION TO STAY PROCEEDINGS AND PLACE MATTER ON PENDING APPEALS CALENDAR	Jul. 10, 2018
6.	CREDIT MEMO	Jul. 17, 2018
7.	ORDER	Aug. 1, 2018
8.	NOTICE OF STATUS OF APPEAL IN RELATED MATTER AND STATUS REPORT	May. 21, 2019
9.	AMENDED COMPLAINT FOR REFUND OF RENTAL CAR FACILITY CHARGE [PHOENIX CITY CODE 4-79]	Jun. 5, 2019
10.	[PART 1 OF 2] MOTION TO DISMISS FIRST AMENDED COMPLAINT	Aug. 2, 2019
11.	[PART 2 OF 2] MOTION TO DISMISS FIRST AMENDED COMPLAINT	Aug. 2, 2019
12.	STIPULATION TO EXTEND DATE FOR RESPONSE TO MOTION TO DISMISS FIRST AMENDED COMPLAINT	Aug. 13, 2019
13.	ORDER GRANTING STIPULATION TO EXTEND DEADLINE TO RESPOND TO DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT	Aug. 23, 2019
14.	PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN RESPONSE TO DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT	Oct. 30, 2019
15.	NOTICE OF FIRST AGREED-UPON EXTENSION FOR REPLY BRIEF	Nov. 8, 2019
16.	APPLICATION TO SUBSTITUTE COUNSEL	Nov. 15, 2019
17.	NOTICE OF FIRST EXTENSION OF TIME TO REPLY IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED COMPLAINT	Nov. 15, 2019
18.	ORDER FOR SUBSTITUTION OF COUNSEL	Nov. 21, 2019
19.	REPLY IN SUPPORT OF MOTION TO DISMISS	Dec. 20, 2019

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MAR Case # TX2018-000759

No.	Document Name	Filed Date
20.	**ME: ORAL ARGUMENT SET [12/30/2019]**	**Jan. 2, 2020**
21.	**ME: RULING [01/22/2020]**	**Jan. 29, 2020**
22.	NOTICE OF LODGING UNOPPOSED PROPOSED FORM OF JUDGMENT	Feb. 6, 2020
23.	**ME: HEARING VACATED [02/19/2020]**	**Feb. 20, 2020**
24.	JUDGMENT	Mar. 10, 2020
25.	**ME: JUDGMENT SIGNED [03/10/2020]**	**Mar. 11, 2020**
26.	PLAINTIFF'S MOTION FOR NEW TRIAL UNDER RULE 59(A)(1)(H)	Mar. 24, 2020
27.	DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR NEW TRIAL UNDER RULE 59(A)(1)(H)	Apr. 13, 2020
28.	NOTICE OF CHANGE OF ADDRESS	Apr. 23, 2020
29.	REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR NEW TRIAL UNDER RULE 59(A)(1)(H)	Apr. 27, 2020
30.	**ME: RULING [05/06/2020]**	**May. 7, 2020**
31.	STIPULATION FOR ENTRY OF SIGNED ORDER	May. 13, 2020
32.	NOTICE OF APPEAL	May. 22, 2020

APPEAL COUNT: 1

RE: CASE: UNKNOWN

DUE DATE: 06/19/2020

CAPTION: POPE ET AL., VS CITY OF PHOENIX

EXHIBIT(S): NONE

POPE ET AL., VS CITY OF PHOENIX

Electronic Index of Record
MAR Case # TX2018-000759

LOCATION ONLY: NONE

SEALED DOCUMENT: NONE

DEPOSITION(S): NONE

TRANSCRIPT(S): NONE

COMPILED BY: chestangc on June 15, 2020; [2.5-17026.63]
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CERTIFICATION: I, JEFF FINE, Clerk of the Superior Court of Maricopa County, State of Arizona, do hereby certify that the above listed Index of Record, corresponding electronic documents, and items denoted to be transmitted manually constitute the record on appeal in the above-entitled action.

The bracketed [date] following the minute entry title is the date of the minute entry.

CONTACT INFO: Clerk of the Superior Court, Maricopa County, Appeals Unit, 175 W Madison, Phoenix, AZ 85003; 602-372-5375

Clerk of the Superior Court
*** Electronically Filed ***
T. Hays, Deputy
6/5/2019 4:05:00 PM
Filing ID 10529754

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SUPERIOR COURT FOR THE STATE OF ARIZONA

ARIZONA TAX COURT

DANIEL POPE, individually and on behalf of all others similarly situated who paid the Rental Car Facility charge at Phoenix Sky Harbor Rental Car Center,

Plaintiffs,

v.

CITY OF PHOENIX, a municipal corporation of the State of Arizona,

Defendant.

Case No. TX 2018-000759

AMENDED COMPLAINT FOR REFUND OF RENTAL CAR FACILITY CHARGE (PHOENIX CITY CODE § 4-79)

(Assigned to the Honorable Christopher Whitten)

I.

1. In 1952, by a margin of over 2½ to 1, the people of Arizona adopted the "Better Roads Amendment" to their state constitution, which required that all fees relating to the operation of a motor vehicle must be used for street and highway purposes.

2. The amendment—Art. 9, § 14 of the Arizona Constitution—"insure[d] the expenditure of all revenues derived from road users [on] road uses only," *State of Ariz. Initiative & Referendum Publicity Pamphlet, Proposed Amendment to the Constitution* at 3 (1952), "a purpose so important that the voters made it part of our state's organic law." *Hall v. Elected Officials' Ret. Plan*, 241 Ariz. 33, 57 (2016) (Bolick, J., dissenting) (referring to Art. 29, § 1 (Pension Clause)).

3. Since 1940, voters in over 20 other states—including Oregon, Washington, Colorado, and other neighboring western states—have adopted similar amendments to their constitutions.

4. In this action, Plaintiffs request the refund of Rental Car Facility Charges ("CFCs") paid to the City of Phoenix. Under Phoenix City Code ("PCC") § 4-79, the City imposes the CFC directly on all rental car *customers*—not rental car companies—at the Phoenix Sky Harbor Consolidated Rental Car Center ("Center").

5. The City collects over $45 million annually in CFCs from rental car customers at the Center. Based on available records, those customers drive over 225 million miles annually on our state's highways and the City's streets.

6. But, even though the City collects the CFC directly from road users, the City spends none of these road-use revenues on public roads. Instead, the City diverts all CFC revenue to the Center and related transportation facilities at Sky Harbor airport.

7. The result of this massive diversion of road funds by the City? Crumbling streets—precisely the outcome prohibited by the Arizona voters who approved the Better Roads Amendment over 65 years ago.

II.

8. Plaintiff and the Class. On July 16, 2017, Daniel Pope paid the CFC when he rented a motor vehicle at the Center (located at 1805 E. Sky Harbor Circle South, Phoenix). See Exh. A (copy of receipt).

9. Because the rental car companies doing business at the Center must, under PCC § 4-79, "collect a daily customer facility charge ("CFC") of six dollars per transaction day per vehicle from all Sky Harbor Airport customers[,]" and the legal incidence of the tax falls on the rental car customer, only the rental car *customer* (not the rental car company) has standing to seek the refund. See, e.g., *Karbal v. Arizona Dep't of Revenue*, 215 Ariz. 114 (App. 2007).

10. In letters dated August 30, 2017 and January 3, 2018, Plaintiffs notified the City of their claim. Exh. C. In letters dated October 27, 2017 and March 2, 2018, the City denied their claim. Id. Plaintiffs thereby complied with the requirements of A.R.S. § 12-821.01. Cf. *Arizona Dep't of Revenue v. Dougherty*, 200 Ariz. 5151, 519 (2001) (approving administrative class action procedure in which a single representative claim satisfying A.R.S. § 42-1118 was used); *Kerr v. Killian*, 207 Ariz. 181, 186 (App. 2004) ("[A] class action can be used as a vehicle for bringing and exhausting certain administrative claims.").

11. Defendant City of Phoenix. Every month, the rental car companies doing business at the Center remit to, and the Aviation Department of the City of Phoenix collects, the CFC paid by every rental car customer at the Center. See Exh. B (examples of Rental Car Customer Facility Charge Report Forms (February 2011 and October 2013 (redacted))).

12. Under Arizona law, the governmental unit that collects must also refund an illegal tax to the payors of that tax. *Copper Hills Enter., Ltd. v. Arizona Dep't of Revenue*, 214 Ariz. 386, 391 (App. 2007) ("Generally, of course, once a tax is held invalid under Arizona law, the government must refund the money collected."); *Pittsburgh & Midway Coal Mining Co. v. Arizona Dep't of Revenue*, 161 Ariz. 135, 139 (1989) ("An honorable government would not keep taxes to which it is not entitled[.]"). Accordingly, here, the City of Phoenix stands liable for refund of the CFCs to the taxpayers.

III.

13. History of the Rental Car Facility Charge. In July 2001, the Phoenix City Council approved the Customer Facility Charge Ordinance (No. G-4375) (codified at PCC § 4-79). Under the Ordinance, rental car companies located in or who obtain customers at the Center must charge and collect the CFC from their customers. The companies must then remit those receipts to a financial institution designated by the City for use in funding the construction, operation, and maintenance of the Center (and related transportation facilities and equipment).

14. On June 1, 2002, the City imposed the CFC at the rate of $3.50 per transaction day. On September 1, 2003, the City increased the rate to $4.50 and, on January 1, 2009, increased the CFC to $6.00 per transaction day. Today, every rental car customer at the Center pays the CFC at the rate of $6.00 per transaction day to the City.

15. In fiscal year 2016, customers at the Center generated over 7.828 million transaction days, which resulted in their payment of CFCs in the amount of $46.944 million. In the fiscal year ending June 30, 2018, rental car companies collected CFCs in the amount of (at least) $48.765 million from their customers at the Center.

16. Use of the Rental Car Facility Charge receipts for construction of the Center (rather than street and highway purposes). In 2004, the City issued and sold bonds to investors in the amount of $260 million. With the proceeds of those bonds, the City constructed the Center on a 141-acre site immediately west of Sky Harbor Airport, within the City's 550-acre Phoenix Sky Harbor Center, an industrial development area. In 2006, following completion of construction, at a cost of $285 million, the Center opened.

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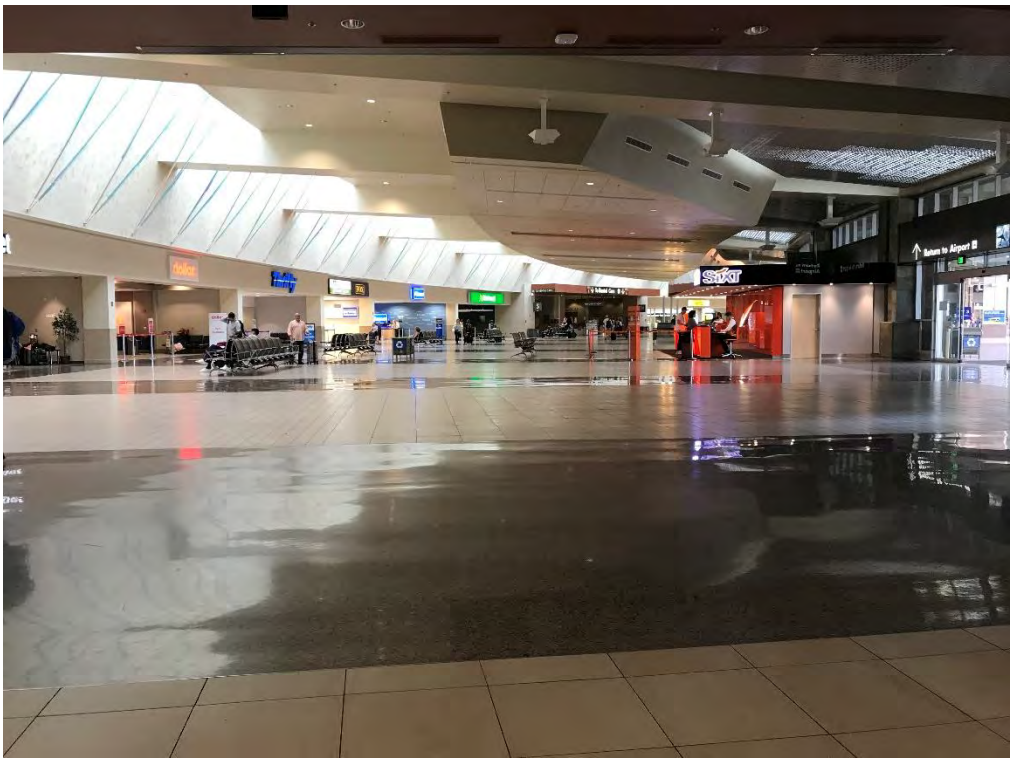
17. Today, the Center houses 14 rental car brands owned by 6 rental car companies. At 2.3 million square feet, with a footprint of just over 40 acres, the Center is the largest covered structure in the state of Arizona and one of the largest rental car centers in the United States. The four-story facility has three levels of parking, with approximately 5,600 ready/return garage spaces for rental cars, and 12 cast-in place ramps, one for each rental company, along with vehicle servicing areas. The Center accommodates only Sky Harbor rental car companies, their counters, and vehicles.



18. Atop the three-level parking garage, on the fourth level of the structure, the City built a 125,000 square-foot customer-service lobby (above); counters for each of the 14 rental car agencies; and, spaces for display of local artwork. The City finished the entire fourth level with Terrazzo tile and Venetian plaster.

19. PCC § 4-79 recites that the CFCs "shall be used to pay, or reimburse the City, for the costs associated with the RCC consolidated rental car facility which shall be located in Sky Harbor Center, and for the costs of related transportation facilities and equipment."

20. Today, only the revenue from CFCs pays the holders of the outstanding Rental Car Facility Charge Revenue Bonds, Series 2004, issued to fund construction of the Center.

21. Every year, from the $48 million or so received in CFCs from rental car customers, the City pays approximately $21 million in principal and interest to holders of the outstanding Revenue Bonds issued to fund construction of the Center. On June 30, 2017, approximately $175 million in principal remained to be paid to those bondholders. In 2029, after payment of over $315 million in principal and interest, the bondholders will have been repaid.

22. Use of the CFCs for the PHX Sky Train® at Sky Harbor Airport. The City directs the remaining $27 million or so in annual CFC revenues to Center operations, debt reserve, and "the costs of related transportation facilities and equipment[,]" PCC § 4-79, especially construction of the PHX Sky Train® at Sky Harbor Airport.

23. For example, receipts from the CFCs fund about 40% of the $740 million cost to extend the PHX Sky Train® from Airport Terminal 3 to the Center. In October 2016, the Phoenix City Council approved construction of this 2.5-mile extension, which, when completed in 2022, will allow the existing PHX Sky Train® to operate from all airport terminals to the Center. The City will pay for this project with CFCs and airline Passenger Facility Charges.

IV.

24. Under *Saban*, the CFCs fall within the Anti-Diversion Provision of Arizona's constitution. The Customer Facility Charge in PCC § 4-79 violates the Anti-Diversion Provision of the Arizona Constitution, Art. 9, § 14, by diverting road-user taxes—the CFCs—to pay for non-road uses—the Center and PHX Sky Train®.

25. In *Saban Rent-a-Car LLC v. Arizona Dep't of Revenue*, 246 Ariz. 89 (2019), plaintiffs challenged the constitutionality of A.R.S. § 5-839, which imposed a surcharge on car rental companies in Maricopa County to fund Arizona Tourism and Sports Authority construction projects. The *Saban* court upheld the tax and held that "fees, excises, or license

taxes relating to . . . the . . . operation, or use of vehicles" under Art. 9, § 14 "are ones imposed as a *prerequisite to*, or *triggered by*, the legal operation or use of a vehicle on a public road." 246 Ariz. at ¶ 39 (emphases added). The CFC falls squarely within this definition and therefore violates Art. 9, § 14.

26. 'Prerequisite to the legal operation or use of a vehicle.' Under PCC § 4-79(A), "**[a]ll** on-airport rental car companies who lease space at Phoenix Sky Harbor International Airport, and **all** off-airport rental car companies who obtain customers through the Sky Harbor Rental Car Center ("RCC"), **shall collect** a daily customer facility charge ("CFC") of six dollars per transaction day per vehicle **from all** Sky Harbor Airport customers (emphases added)." Under the Ordinance, every rental car company must collect—and every customer at the Center must therefore first pay—the CFC before any customer drives—that is, uses—any rental vehicle from the Center. Failure to do so results in the commission of a Class 1 misdemeanor. See PCC § 4-80.

27. Thus, in the formulation adopted by the *Saban* court, by the express terms of PCC § 4-79, the City imposes the CFC as 'a prerequisite to' every rental customer's 'legal operation or use of a vehicle on a public road.' In every case, that is, payment of the CFC is a 'prerequisite to' the rental car customer's legal operation or use of a motor vehicle on Arizona's streets and highways because a rental car company may not lawfully rent a vehicle to the customer without first collecting the CFC. And, the customer must first pay the CFC (as a 'prerequisite') before he or she may 'use' the vehicle. Otherwise, under PCC § 4-80, the rental company and its customer violate § 4-79—and thereby commit a Class 1 misdemeanor. See PCC § 4-80 (providing that violation of the requirements of Chap. 4, article IV of the City Code "shall be deemed a Class 1 misdemeanor.").

28. 'Triggered by the legal operation or use of a vehicle.' Every rental car company operating at the Center must collect the CFC on every rental customer's transaction. A recent investigation confirms that no rental car company at the Center will waive or otherwise refuse to collect the CFC. See Exh. D (excerpt (p. 2) of report by Christina Dougherty (R3 Investigations)). The rental car companies keep only rental

vehicles at the Center. As a result, every rental car company at the Center requires every customer first to pay the CFC before the company hands over the keys to every vehicle exiting the Center. Every rental car customer who pays the CFC immediately 'uses' a vehicle on a public road—after all, no one rents a vehicle for any reason other than to drive it. Thus, payment of the CFC is—in the words of the *Saban* court—'triggered by . . . use of a vehicle on a public road.'

29. The City spends the CFCs on impermissible uses. In 1952, the voter publicity pamphlet for the Better Roads Amendment declared that revenues derived from road users must be used for road purposes. *State of Ariz. Initiative & Referendum Publicity Pamphlet, Proposed Amendment to the Constitution* at 3. Otherwise, "if not used for road purposes, these user taxes become unfair because they are not based on benefits received, ability to pay, or the taxpayer's interest." Id. at 4.

30. Here, the City uses the CFCs for purposes well outside the scope of the road uses permitted by the Anti-Diversion Provision of the Arizona constitution: construction and operation of the Center and construction of Phase 2 of the PHX Sky Train® at the airport.

31. Although our own courts have not taken up this precise question, in *Rogers v. Lane County*, 307 Or. 534 (1989), the Supreme Court of Oregon considered a closely analogous question: whether the construction of an airport parking lot and a covered walkway from the parking lot to the airport terminal was a permissible highway use under the anti-diversion provision of the Oregon constitution. In that case, the Oregon Supreme Court found that the construction of an airport parking lot and walkway was "an expenditure primarily for the operational convenience of an airport, rather than for a project or purpose within or adjacent to a highway, road, street or roadside rest area right-of-way that primarily and directly facilitates motorized vehicle travel." 307 Or. at 545. The proposed expenditure was therefore not authorized by the Oregon Constitution. Id. at 545-46.

32. The same is true here. The City's construction of the Center and PHX Sky Train® have been solely for the operational convenience of Sky Harbor Airport and its customers rather than our public streets and highways. Cf. *Ariz. Att'y Gen. Op. No. 105-003 (R04-011)* (expenditure of HURF monies permitted only if the expenditure is "directly related" to a highway and street purpose).

33. In summary, by 2029, after having retired the Series 2004 bonds, the City will have paid over $315 million to bondholders. All of that money will have come from the CFCs. The City will also have directed at least $250 million in CFC revenues to the PHX Sky Train®. But not one dollar of CFC collections will have been spent for street or highway purposes—exactly the diversion that proponents of the Better Roads Amendment feared.

34. In short, the City diverts the CFCs—undoubted "excises" or, as the City itself concedes, "fees"—to the construction and improvement of the Center and PHX Sky Train®. The CFC therefore violates the Anti-Diversion Provision of the Arizona Constitution.

35. Arizona law compels the retroactive return of an illegal tax to taxpayers. This Court should therefore order the City to refund the CFCs to Mr. Pope and the Class.

V.

36. Protective class allegations. Daniel Pope represents himself and all similarly situated taxpayers. The City, its employees, and their family members are excluded from the Class.

37. Mr. Pope requests the refund of CFCs on behalf of himself and all other similarly situated persons or entities who paid the CFC during the period July 17, 2016 through the date collection ceases ("Refund Period").

38. This is a protective claim. Many taxing authorities, including the Arizona Department of Revenue, have recognized the operation of a protective claim as a continuing claim and established guidelines for filing protective claims in specific circumstances. See *McNutt v. ADOR*, 196 Ariz. 255 (App. 1998). Here, on behalf of the Class, Mr. Pope seeks the refund of all CFCs paid both before and after the date of his notice of claim for refund

and until the date collection of the CFCs ceases.

39. The Class is so numerous as to make joinder impractical. Phoenix is the third largest rental car market in the United States. About 1.4 million rental car transactions are processed every year at Sky Harbor. From July 2016 through June 30, 2018 alone, the rental companies operating at the Center remitted CFCs for over 23 million transaction days.

40. Mr. Pope's claims are typical of the claims of the Class Members; and, all claims are based on the same legal and remedial theories.

41. Common questions of law and fact predominate, including the following:

a. whether the City's use of the CFCs violates Article 9, § 14 of the Arizona Constitution; and,

b. whether Plaintiff and members of the Class are entitled to refunds and, if so, in what amount.

42. In the prosecution of this action, and in the administration of all matters related to the claims, Mr. Pope will fairly and adequately protect the interests of all Class Members.

43. Mr. Pope suffered injuries similar to those suffered by Class Members.

44. He retained counsel experienced in handling class action suits. Neither the named Plaintiff nor Plaintiffs' counsel have any interest that might cause them to refrain from vigorous pursuit of the refund.

45. Mr. Pope is representative of members of the Class and will, as the representative, fairly and adequately protect the interests of the entire Class.

46. The class action is superior to other available methods of adjudication because it will promote the convenient administration of justice and achieve a fair and efficient adjudication of the controversy given the number of potential class members.

47. The prosecution of separate actions by individual members of the Class would create a risk of:

a. inconsistent or varying adjudications that would confront the City with incompatible standards of conduct; and,

b. adjudications with respect to individual members of the Class that would as a practical matter substantially impair the

interests of other members of the Class, who are not parties, because of the doctrine of res judicata.

48. The case would be manageable as a class action because proofs are the same for all members of the Class on all major issues.

49. Amount sought by the Class. In view of the nature of the issues and the expense of litigation, the separate claims of the individual Class Members would be insufficient in amount to support prosecution of separate requests for refund.

50. It is highly probable that the amount that may be recovered by individual Class Members would be large enough in the aggregate in relation to the expense and effort of administering the action to justify a class action because, although individual amounts may not be large, the size of the Class should be sufficient to justify class administration.

51. Based on public reports of the CFCs remitted to the City, the aggregate amount sought by the entire Class, including interest, exceeds $140 million through June 30, 2018 and will increase during the period of time this case is pending before the Court.

52. Because the claim of the Class has been brought as a protective claim, that is, covering taxes paid both in the past and in the future, including receipts collected during the pendency of this action, the amount sought for the Refund Period may exceed $250 million.

53. Governing Arizona law compels the retroactive refund of the CFCs to the Plaintiff and the Class.

VI.

54. WHEREFORE, Plaintiff Daniel Pope and the Class request the following relief:

a. Certify this action as a class action, with Daniel Pope certified as the representative of the Class, and define the Class to include all persons and entities who paid and all those who will pay the CFC during the Refund Period and until either collection or the unlawful distribution of the monies ceases;

b. Find and declare that the CFC in PCC § 4-79 violates Art. 9, § 14 of the Arizona Constitution;

c. Order the refund of the CFCs that were collected under PCC § 4-79 during the Refund Period (that is, from July 17, 2016 and until either collection or the unlawful distribution of the

monies ceases);

d. Order the City to pay into a common fund for the benefit of Plaintiff and the Class the total amount of Refunds to which Plaintiff and the Class are entitled;

e. Appoint a trustee to manage and distribute in an orderly manner the common fund thus established;

f. Award Plaintiff and the Class the costs and expenses incurred in this action, including their reasonable attorneys', accountants' and other experts' fees;

g. Award pre-judgment interest on the amount refunded to Plaintiff at the rate of 10% per annum, see *Arizona State University Board of Regents v. Arizona State Retirement System*, 242 Ariz. 387 (App. 2017), except for the period during which the case was stayed, as the parties agreed; and,

h. Grant any other appropriate relief.

SHAWN AIKEN, PLLC

DATED: June 5, 2019.

By

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E-FILED with the Clerk of the Court and
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The Honorable Christopher Whitten
MARICOPA COUNTY SUPERIOR TAX COURT
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EXHIBIT A

Customer Receipt (Daniel Pope)

Enterprise Plus Emerald Club

enterprise

Rental Receipt - Thank you for your business

EC PURCHASING MEMBERS
DANIEL POPE

Contract Number: **442858026**
Receipt Date: **Jul 16, 2017**

Enterprise Location: 1805 E SKY HARBOR CIR S
PHOENIX, AZ 85034
US
Tel.: 8448164387

Driver: DANIEL POPE

Start Date:	End Date:	Make/Model	Start Miles	End Miles	Miles Driven
Jul 10, 2017 @ 7:28 pm	Jul 11, 2017 @ 1:26 pm	TOYO CAMR	22,929	23,004	75
Jul 11, 2017 @ 1:20 pm	Jul 16, 2017 @ 12:39 pm	HYUNDAI ELANTRA	34,907	35,042	135
		Total Miles			210

Charge Description	Quantity	Per	Rate	Total
Rate	1	Week	180.00	180.00
PREPAYMENT(RES-CREDIT)				(8.31)
			Subtotal:	USD 171.69

DUPLICATE

Taxes and Surcharges

CUSTOMER FACILITY CHARGE 6.00/DAY	36.00
MAINTENANCE FEE 0.81/DAY	3.66
CONCESSION RECOVERY FEE 11.11PCT	20.40
STADIUM SURCHARGE	7.80
VEHICLE LICENSE SURCHARGE 5 PCT	12.00
TRANS PRIV TAX	25.45
Subtotal:	USD 277.00
Total Charges:	USD 277.00

Payment Information

CREDIT CARD	VI	277.00
	Subtotal:	USD 277.00
Total Payment Amount:		USD 277.00

If you have any questions about this receipt please contact our support staff at 8448164387 or Email us

EXHIBIT B

Rental Car Customer Facility Charge Report Forms

@002

RENTAL CAR CUSTOMER FACILITY CHARGE REPORT FORM

(REVISED 07/08)

COMPANY NAME: Airport Rent A Car

ADDRESS: 2325 E. Washington St
Phoenix AZ 85034

CONTACT PERSON:

TELEPHONE:

EMAIL:

REQUIRED MONTHLY DATA

MONTH/YEAR WHEN CFC WAS COLLECTED: Jan 11

NUMBER OF TRANSACTIONS DURING MONTH: 131

NUMBER OF TRANSACTION DAYS DURING MONTH: 241

CFC AMOUNT OWED TO THE CITY OF PHOENIX: 1446.00
MULTIPLY TRANSACTION DAYS x $6

I certify this is a true and accurate statement of CFC collections in accordance with Section 4-79 of the Municipal Code.

SIGNATURE	TITLE	PHONE	DATE
	owner		2/17/11

BACKGROUND

The City of Phoenix Ordinance No. G-4410 requires all on-airport vehicle rental companies who lease terminal space at Phoenix Sky Harbor International Airport (Airport) and all off-Airport vehicle rental companies who obtain customers at the Airport to collect a daily customer facility charge (CFC) of six dollars per transaction day per vehicle from all Airport customers. All rental car contracts dated on or after June, 1, 2002 are subject to the CFC.

A transaction day is defined as a vehicle rented for twenty-five or fewer hours for the first transaction day, and every 24 hours for each transaction day thereafter.

INSTRUCTIONS*

1. The charge must be identified on the customer's invoice as either CFC or "Customer Facility Charge"
2. CFC Collections for a month must be remitted to the City of Phoenix by no later than the last day of the month following the collection month (the "Due Date")
3. The car rental company must send a separate check for CFC collections along with a completed and signed copy of the Customer Facility Charge Report Form.
4. The check must be made payable to the City of Phoenix and sent to the following address:

Aviation Department
City of Phoenix
PO Box 78235
Phoenix, AZ 85062-8235

*Failure to follow these instructions can result in the addition of delinquent fees to your account.

10 18 2013 10:00 FAX 602 ...

~~PSP~~ Propoitios 8056197779 p 6

City of Phoenix
AVIATION DEPARTMENT

RENTAL CAR CUSTOMER FACILITY CHARGE REPORT FORM

COMPANY NAME: Phoenix Airport Rent-A-Car

COMPANY ADDRESS: 2525 E Washington St
Phoenix

CONTACT PERSON: ______ (Please Print)

TELPHONE: ______

E-MAIL ADDRESS: ______

REQUIRED MONTHLY DATA – MUST FILL IN ALL BLANKS

MONTH / YEAR WHEN CFC WAS COLLECTED	Sept 2013
NUMBER OF TRANSACTIONS SUBJECT TO CFC	58
NUMBER OF TRANSACTION DAYS SUBJECT TO CFC	224
CFC OWED TO THE CITY OF PHOENIX (Multiply transaction days subject to CFC x $6.00)	$ 1344.00 (Enclose Check)

I certify this is a true and accurate statement of CFC collections in accordance with Ordinance Number G-4418 as amended by Ordinance Number 6-4530

C Eldwell — preparer — Phone — 10/19/13
Signature — Title — Phone — Date

BACKGROUND

The City of Phoenix Ordinance Number G-4418, as amended by Ordinance Number 6-4418, requires all on-airport vehicle rental companies who lease terminal space at Phoenix Sky Harbor International Airport and all off-Airport vehicle rental companies who obtain customers at the Airport to collect a daily customer facility charge (CFC) of Six dollars ($6.00) per transaction day per vehicle from all Airport customers for all rental car contracts dated on or after September 1, 2003.

A transaction day is defined as twenty-five or fewer hours for the first transaction day and every 24 hours for each transaction day thereafter. Customers who do not arrive at the Airport by an airline serving the Airport as evidenced by the customer's rental contract and an Arizona driver's license that both reference a personal residence within one of the Maricopa County zip codes that fall within a 30 mile radius of the Airport are exempt from paying the CFC. This "Non-Airport Customer Exemption" terminates on the date of beneficial occupancy of the planned Consolidated Rental Car Facility.

INSTRUCTIONS

- The charge must be identified on the customer's remittance advice as either "CFC" or "Facility Charge."
- CFC collections for a month must be remitted to the City of Phoenix by no later than the last day of the month following the collection month (the "Due Date").
- The car rental company must send a separate check for CFC collections along with a completed and signed copy of this Customer Facility Charge Report Form.
- The check must be made payable to the City of Phoenix and sent to the following address:

  Aviation Department
  City of Phoenix
  P.O. Box 29112
  Phoenix, AZ 85038-9112

- Delinquent CFC collections and activity data received 10 days after the Due Date will be subject to an 18% interest charge as required by Phoenix City Code Section 4-7.

EXHIBIT C

Claim letters from Plaintiff and denial of claim letters from City

City of Phoenix
OFFICE OF THE CITY ATTORNEY

BRAD HOLM
City Attorney

March 2, 2018

BY FACSIMILE

Shawn K. Aiken
AIKEN SCHENK HAWKINS & RICCIARDI P.C.
2390 E. Camelback Road, Suite 400
Phoenix, Arizona 85016

Re: *Daniel Pope v. City of Phoenix*
Refund Claim of Rental Car Facility Charge Under P.C.C. § 4-79.

Dear Mr. Aiken:

I write in response to your January 3, 2018 letter in which you assert Mr. Pope's claim for a refund of Rental Car Facility Charges (CFC) paid under PHOENIX CITY CODE § 4-79. For the following reasons (and the reasons in our October 27, 2017 letter, attached), the City denies your client's claim.

DISCUSSION

1. The claim fails to comply with A.R.S. § 12-821.01.

As the City explained in its October 27, 2017 letter, Mr. Pope's original notice failed to meet the requirements of ARIZ. REV. STAT. §12-821.01. Pope's second claim notice similarly fails to comply with ARIZ. REV. STAT. §12-821.01 and the cases interpreting the statute.

Section 12-821.01(A) states: "The claim shall contain facts sufficient to permit the public entity, public school or public employee to understand the basis on which liability is claimed. The claim shall also contain a specific amount for which the claim can be settled *and the facts supporting that amount*." ARIZ. REV. STAT. § 12-821.01 (emphasis added).

The January 3, 2018 claim provides no facts to support Mr. Pope's $4.5 million demand to settle his individual claim. Indeed, Pope alleges that he paid $36 for the Customer Facility Charge. A one-time charge of $36. That's it. A "refund" of $4.5 million would represent a $4,499,964 windfall to Pope, which in turn constitutes a 12.5 million percent (12,500,000%) return on his actual $36 out-of-pocket expense. Please don't tell us that you believe the claim provides facts to justify or support that patently unreasonable result. Accordingly, the claim notice is defective on its face.[1]

Because Mr. Pope's claim is invalid, the class claim notice is also invalid.[2]

2. PHOENIX CITY CODE § 4-79 establishes a constitutionally valid "customer facility charge"—not a tax.

For the reasons laid out in our October 27, 2017 letter, PHOENIX CITY CODE § 4-79 establishes a constitutional customer facility charge. For purposes of discussion, we recapitulate the City's analysis below. This letter, however, is not a waiver of any claim or defense that the City has or may have in response to your client's claim. The City expressly reserves all defenses, claims, or remedies available to it in law or equity.

Our Supreme Court has provided consistent guidance that a duly enacted statute is presumed constitutional until the contrary is established.[3] Pope's most recent claim notice fails to provide facts or law to rebut this presumption of validity.

P.C.C. § 4-79 expressly states its plain meaning: a CFC constitutes a fee imposed *for the use of the Rental Car Center—not* for the registration, operation, or use of a motor vehicle on the highways of this state. The CFC, therefore, does not fall within ARIZ.

[1] *See Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 296, 152 P.3d 490, 493 (2007).
[2] *City of Phoenix v. Fields*, 219 Ariz. 568, 573, 201 P.3d 529, 534 (2009) (holding that although one valid claim notice may suffice for a class action, the representative claim notice must comply with the requirements of A.R.S.§ 12–821.01(A).)
[3] *See, e.g., Baker v. University Physicians Healthcare*, 231 Ariz. 379, 387 ¶ 33, 296 P.3d 42, 50 (2013) ("Our analysis is guided by a 'strong presumption supporting the constitutionality of a legislative enactment and the party asserting its unconstitutionality bears the burden of overcoming the presumption.'" (quoting *Eastin v. Broomfield*, 116 Ariz. 576, 580, 570 P.2d 744, 748 (1977)).

CONST., art. 9 § 14. This reasonable interpretation of the ordinance preserves its constitutionality and ends the inquiry.[4]

Even if the CFC were found unconstitutional (and the City believes it will not be), any relief available to Mr. Pope must be *prospective* only.[5] A refund is simply unnecessary to address any "harm" alleged in his claim.

CONCLUSION

For the reasons stated here and in our October 27, 2017 letter, your client's claim lacks even a hint of merit. The City expressly reserves all of its rights, claims, interests, defenses, and privileges against Mr. Pope at law and in equity, regardless of whether expressed in this letter, including the right to seek attorneys' fees and costs against Pope.

Sincerely,

Carolina Potts

Carolina Potts
Assistant City Attorney

CLP:jmb 2023335v1
Enclosure

[4] *Automatic Registering Mach. Co. v. Pima County*, 36 Ariz. 367, 372, 285 P. 1034, 1036 (1930) ("It is our duty to hold a statute constitutional if it is possible to do so on any reasonable interpretation thereof.").

[5] *See Law v. Superior Court*, 157 Ariz. 147, 162 (1988); *Fain Land & Cattle Co. v. Hassell*, 163 Ariz. 587, 596-597 (1990); *Taylor v. Travelers Indem. Co. of Am.*, 198 Ariz. 310, 321 ¶ 30 (2000).

City of Phoenix
OFFICE OF THE CITY ATTORNEY

BRAD HOLM
City Attorney

October 27, 2017

VIA FACSIMILE TO: (602-248-8203)
AND U.S. MAIL

Shawn K. Aiken
AIKEN SCHENK HAWKINS & RICCIARDI P.C.
2390 E. Camelback Road, Suite 400
Phoenix, Arizona 85016

Re: Daniel Pope and Jerome Kruczek for themselves and on behalf of all others who paid the Rental Car Facility Charge at Phoenix Sky Harbor Rental Car Center during the past year and until collection ceases.

Notice of Individual and Class Claims for Refund of Rental Car Facility Charge Paid Under P.C.C. § 4-79.

Dear Mr. Aiken:

I write in response to your August 30, 2017 letter. The letter asserted a claim for a refund of Rental Car Facility Charges (CFC) paid in accordance with PHOENIX CITY CODE § 4-79. For the following reasons, the City of Phoenix denies your clients' claim.

DISCUSSION

1. The claim fails to comply with ARIZONA REVISED STATUTE § 12-821.01.

The claim is defective for two reasons. First, it is untimely as to Mr. Kruczek. Second, the claim fails to comply with the sum-certain requirement of the statute.

A party who asserts a claim against a public entity must serve a claim notice within 180 days after the cause of action accrues. A.R.S §12-821.01(A). Under the statute, a cause of action accrues when the damaged party knows or reasonably should know the cause, source, act, event, or condition that caused or contributed to the damage. A.R.S.

§12-821.01(B). A claim notice not served within 180 days after the claim accrues is untimely and barred by law. A.R.S. §12-821.01(A).

Based on the allegations in the notice itself, the claim is untimely. Mr. Kruczek rented his vehicle from December 29-31, 2016. Thus, the latest date to file a timely notice for that rental was June 29, 2017. Your notice was not served until August 30, 2017—two months late. Mr. Kruczek's claim is unquestionably time-barred.

Section 12-821.01 also requires a claim notice to include a statement of "a specific amount for which the claim can be settled." Our court of appeals has said that to satisfy this requirement, the claimant must state a definite and exact amount that if paid will completely discharge the government's liability:

> The plain meaning, purpose, and history of the sum certain requirement speak in unison. The claimant must present the government with a definite amount which he is willing to accept *as full satisfaction* of his claim. As long as the claimant states a definite and exact amount, and the government may *completely satisfy its liability by paying that sum*, the claim letter satisfies the sum certain requirement.[1]

In *City of Phoenix v. Fields*, the Supreme Court of Arizona held that a putative class claimant must satisfy the sum-certain requirement for himself first:[2]

> A class claim meets the settlement demand requirement of § 12–821.01(A) if it identifies the amount for which *an individual putative class representative would settle his own claim* and puts the governmental entity on notice of the claimant's intention to pursue a class action *if his claim does not settle*.[3]

---

[1] *Yollin v. City of Glendale*, 219 Ariz. 24, 29, 191 P.3d 1040, 1045 (App. 2008) (emphasis added).

[2] The Arizona Supreme Court in *Fields* held that A.R.S. § 12-821.01 applies to "all causes of action; there is no exemption for putative class claims." *Id.* (internal quotation marks omitted).

[3] Although the Supreme Court indicated that one valid claim notice may suffice for a class action, it also held that the representative claim notice must comply with the requirement of a "settlement demand for a sum certain as required by § 12–821.01(A)." *City of Phoenix v. Fields*, 219 Ariz. 568, 573, 201 P.3d 529, 534 (2009) (emphasis added) (holding that A.R.S. § 12-821.01 "applies to 'all causes of action'; there is no exemption for putative class claims").

Importantly, to meet the sum-certain requirement in the class-action context, the claimant must tell the City the specific amount to settle his individual claim, and if it does not settle, that the claimant will pursue a class action. Here, the claimants did precisely the reverse. Their claim says that the City must, *inter alia*, agree to class certification and settlement of an unstated amount for the entire class. [4] The claim continues that *only if* the City submits to a class action and pays an *as yet undetermined amount* for a purported class,[5] then the claimants will settle for a sum certain. These conditions to the ostensible sum-certain violate the statutory requirement and render the notice invalid.

Accordingly, the claimants failed to satisfy the *Yollin* and *Fields* sum-certain requirement as a matter of law. As explained in *Yollin*, a claim notice only complies with the sum-certain requirement if a municipality can *completely satisfy the claim* by paying a demanded sum "as full satisfaction" of a particular liability.[6] Rather than stating "a definite and exact amount" for which the City "may completely satisfy its liability by paying," the claim here makes it clear that there is *no amount* that may be paid at this point that would satisfy in full the City's alleged liability.

Indeed, the Court of Appeals just months ago held that this type of demand does not satisfy A.R.S. § 12-821.01. In *Yahweh v. City of Phoenix*, the court found a claim notice defective because the notice "included a series of ambiguous statements that merely informed the City of the amount Yahweh intended to demand in litigation, not a sum-certain settlement offer." As with your clients' claim, "[t]here were no words of intent in the NOC granting the City the power to settle all of Yahweh's claims *for a particular and certain amount of money*."[7] Your clients' claim only states how litigation must continue through class certification; it does not give the City an opportunity to settle all claims for any amount of money, let alone a definite and specific sum.

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[4] The Notice appears to further condition any putative settlement on the relief specified in Paragraph 8.5, which includes the appointment of a trustee to administer refund claims, finding the ordinance unconstitutional, and "any other appropriate relief." This patently does not comply with the sum-certain requirement.

[5] The notice states the amount sought by the class at some point "likely exceeds $100 million." Arizona courts have rejected precisely this type of ambiguous language. *See Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, 296, 152 P.3d 490, 493 (2007) (holding that statement in notice of claim that damages "are no less than" a particular amount failed to meet the sum-certain requirement).

[6] *Yollin*, 219 Ariz. at 29, 191 P.3d at 1045.

[7] *Yahweh v. City of Phoenix*, 243 Ariz. 21, 400 P.3d 445, 447 (Ct. App. 2017) (emphasis added).

Your clients' claims are barred for failure to meet the 180-day requirement as to Mr. Kruczek and in total for failure to meet the sum-certain requirement.

2. PHOENIX CITY CODE § 4-79 establishes a constitutionally valid "customer facility charge—not a tax.

The claim says that the CFCs are an "undoubted 'excise' under settled Arizona law." There is no such Arizona law. In fact, settled law makes clear that CFCs are user fees *not* taxes:

> The United States Supreme Court distinguished between a tax and a user fee, defining a tax as providing revenue for the general support of the government, while defining a user fee as imposing a specific charge for the use of publicly-owned or publicly-provided facilities or services. [8]

Here, the ordinance—titled the "Rental Car Customer Facility Charge"—expressly limits application to those "rental car companies who obtain customers through the Sky Harbor Rental Car Center." [9] In turn, those rental car companies are required to collect the fee "from all Sky Harbor Airport customers." Stated simply, the CFC is a fee for the use of the publicly owned Rental Car Center, and the fee is earmarked specifically to offset the costs of operating the Center. Customers can avoid paying CFCs by not using the Rental Car Center. Similar airport fees around the country have been specifically identified as a facility user fee and not an excise tax.[10]

Contrary to your clients' claim, whether this is a fee or a tax, Arizona Constitutional Art. 9, § 14 does not apply. That provision applies only to "moneys derived from *fees, excises, or license taxes relating to registration, operation, or use of*

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[8] *Jacksonville Port Auth. v. Alamo Rent-A-Car, Inc.*, 600 So. 2d 1159, 1162 (Fla. Dist. Ct. App. 1992) (citing *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621-622 (1981)); *see also Thrifty Rent-A-Car Sys., Inc. v. City & City. of Denver*, 833 P.2d 852, 855 (Colo. App. 1992) ("A fee is designed to defray the expense of operating and improving the facility upon which it is imposed, whereas a tax is used to defray general municipal expenses.").

[9] P.C.C. § 4-79(A).

[10] *See, e.g., Thrifty Rent-A-Car Sys., Inc.*, 833 P.2d at 855 ("Here, however, as noted, the proceeds generated by Stapleton's fees are used to defray costs associated with use of the airport, and these funds are not paid into the general fund. Consequently, the fee is not used to provide revenue for general expenses of government, and therefore, it does not constitute an excise tax.").

vehicles on the public highways or streets or to fuels or any other energy source used for the propulsion of vehicles on the public highways or streets."[11]

As you are aware, the court in *Saban v. ADOR*, TX2010-001089, analyzed a completely distinguishable *tax*. That court explained that article 9 § 14 does not apply to these types of airport fees, and the court distinguished user fees from the tax at issue in that case.[12] Relying on *Thrifty Rent-A-Car System, Inc. v. City and County of Denver*, 833 P.2d 852 (Colo. 1992), the *Saban* court stated that "the fee in question was effectively a payment for the use of airport property and so was properly allocated to airport operations."[13]

In *Thrifty* the court held that "the fees were not violative" of a Colorado constitutional provision nearly identical to art. 9 § 14:

> We find uncontroverted record support for the trial court's conclusion that the transaction fee imposed by the City and County of Denver is not used for "the operation of a motor vehicle." Specifically, we agree with the trial court that the transaction fee was charged to Thrifty for operating a business through the airport.[14]

The claim's reliance on *Rogers v. Lane County* is misplaced because that case actually demonstrates that an airport facility fee is not related to the use or operation of a vehicle.[15] There, no question existed that the money was generated from protected categories of taxation, *i.e.* "highway fund monies."[16] The question the court considered was whether the money could be used for airport facilities, *i.e.* whether using the money for a parking lot and walkway fell within the permissible uses of "construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas."[17]

The *Rogers* court held that the tax could not be properly spent on airport facilities because the facilities were not for the purpose of motor vehicle travel. Instead they were

[11] Ariz. Const. Art. 9, §14 (emphasis added).
[12] *See Saban v. ADOR*, TX2010-001089 (Tax Ct. 2010) (Minute Entry March 19, 2015).
[13] Although this decision is unpublished and not precedential, it provides notice that the legal position taken by the claimants is unsupportable.
[14] *Id.* at 856.
[15] 771 P.2d 254 (Or. 1989).
[16] *Id.* at 255.
[17] *Id.*

for the airport's operational convenience. *In other words, the Rogers court found an insufficient nexus between motor vehicle travel and airport facilities.*[18] Importantly, while the Rental Car Center is different from the airport facilities in *Rogers*, the user fee for the Center here similarly has *no nexus to motor vehicle travel*. It is a fee collected from customers for use of a particular airport facility.

Under Arizona law, the Supreme Court has provided consistent guidance that a duly enacted statute is presumed legal and constitutional until the contrary can be established.[19] Your clients cannot establish the ordinance's unconstitutionality under that standard. There is only one reasonable reading of P.C.C. § 4-79: as expressly stated in the ordinance, the CFC is a fee imposed for the use of the RCC and not for the registration, operation, or use of vehicles. The existence of such a reasonable interpretation—one that preserves the constitutionality of the ordinance—ends the constitutional inquiry.[20]

3. Although unlikely, any relief available to your clients must be prospective only.

If the Customer Facility Charge is held unconstitutional—an unlikely prospect indeed—any relief would be prospective only. And a refund to the class would be an inappropriate remedy.[21] Importantly, any relief—including prospectively prohibiting collection of the Customer Facility Charge—would negatively affect the rental car companies leasing space at the Rental Car Center. Under the agreements with the City, if the revenue from the Customer Facility Charge is not available, then the rental car companies and the City must address the financial impact by negotiating new business terms that likely would shift the cost to the rental car companies. All of those rental car companies affected by this claim, with one exception, are represented by you and your firm in separate litigation on art. 9 § 14.

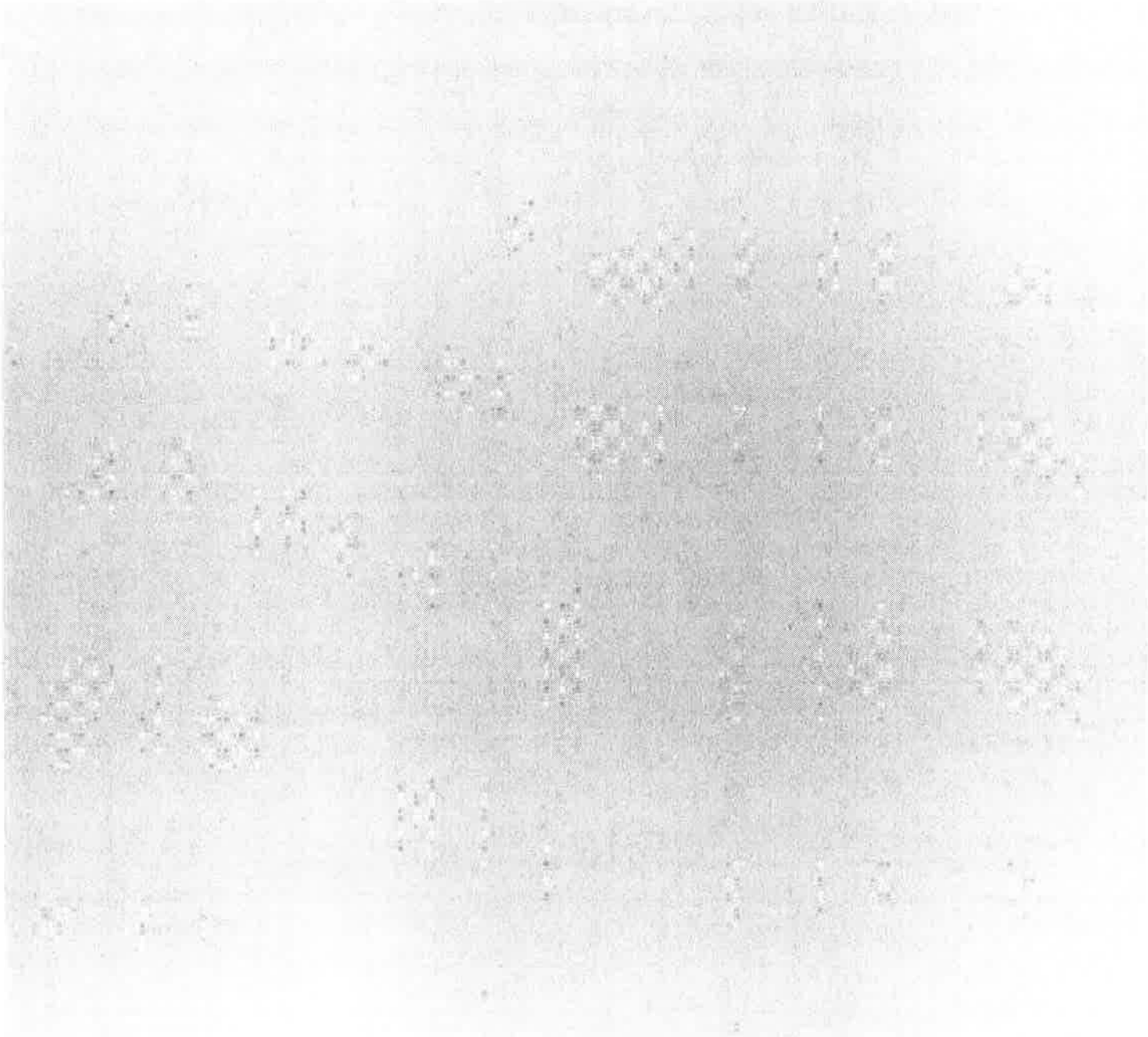
[18] *Id.* at 259.
[19] *See, e.g., Baker v. University Physicians Healthcare*, 231 Ariz. 379, 387 ¶ 33, 296 P.3d 42, 50 (2013) ("Our analysis is guided by a 'strong presumption supporting the constitutionality of a legislative enactment and the party asserting its unconstitutionality bears the burden of overcoming the presumption.'" (quoting *Eastin v. Broomfield*, 116 Ariz. 576, 580, 570 P.2d 744, 748 (1977)).
[20] *Automatic Registering Mach. Co. v. Pima County*, 36 Ariz. 367, 372, 285 P. 1034, 1036 (1930) ("It is our duty to hold a statute constitutional if it is possible to do so on any reasonable interpretation thereof.").
[21] *See Law v. Superior Court*, 157 Ariz. 147, 162 (1988); *Fain Land & Cattle Co. v. Hassell*, 163 Ariz. 587, 596-597 (1990); *Taylor v. Travelers Indem. Co. of Am.*, 198 Ariz. 310, 321 ¶ 30 (2000).

CONCLUSION

For the reasons above, your clients' claim is baseless. The City expressly reserves all of its rights, claims, interests, defenses, and privileges against your clients in equity and under law, regardless of whether stated expressly herein, including seeking attorneys' fees and costs.

Sincerely,

Carolina Potts
Assistant City Attorney



AIKEN SCHENK

January 3, 2018

VIA PERSONAL SERVICE;
CERTIFIED FIRST CLASS MAIL
Mr. Cris Meyer, City Clerk
CITY OF PHOENIX
City Clerk Department
PHOENIX CITY HALL
200 W. Washington St., 15th floor
Phoenix, Arizona 85003

VIA PERSONAL SERVICE;
CERTIFIED FIRST CLASS MAIL
Ms. Denise Olson, Chief Financial Officer
CITY OF PHOENIX
Finance Department
PHOENIX CITY HALL
251 W. Washington St., 9th floor
Phoenix, Arizona 85003

VIA PERSONAL SERVICE;
CERTIFIED FIRST CLASS MAIL
Mr. Ed Zuercher, City Manager
CITY OF PHOENIX
Office of City Manager
PHOENIX CITY HALL
200 W. Washington St., 12th floor
Phoenix, Arizona 85003

Re: *Daniel Pope for himself and on behalf of all others who paid the Rental Car Facility Charge at Phoenix Sky Harbor Rental Car Center during the past year and until collection ceases.*

Notice of Individual and Class Claim for Refund of Rental Car Facility Charge Paid Under P.C.C. § 4-79.

Dear Mr. Meyer, Ms. Olson, and Mr. Zuercher:

I represent Mr. Daniel Pope and, if litigation ensues, the putative class of all others who paid and all those who will pay the six dollar Rental Car Facility Charge described in Phoenix City Code § 4-79. For the reasons below, Mr. Pope for himself and members of the putative class notify the City of Phoenix of the claim for refund.

1. **Basis for the refund claim.**

1.1. In 1952, the voters of Arizona adopted Art. 9, § 14 of the Arizona Constitution, which prohibits the use of fees or excises relating to the operation of a motor vehicle for other than street and highway purposes.

1.2. Mr. Pope requests the refund of the Rental Car Facility Charges paid under Phoenix City Code § 4-79 ("CFCs") because those fees violate Art. 9, § 14 of the Arizona Constitution.

2. **Claimant Daniel Pope.**

2.1. On July 10 and July 11, 2017, Mr. Pope rented motor vehicles at the Phoenix Sky Harbor Rental Car Center (1805 E. Sky Harbor Circle South ("Center")). See Exh. A (copy of receipt for payment dated July 16, 2017). He files this notice within one hundred eighty days after the cause of action accrued. Cf. A.R.S. § 12-821.01(A).

2.2. Because the rental car companies doing business at the Center must, under P.C.C. § 4-79(A), "collect a daily customer facility charge ("CFC") of six dollars per transaction day per vehicle from all Sky Harbor Airport customers[,]" only rental car customers such as Mr. Pope (not the rental car companies from which they rented the vehicles) have standing to seek this refund. Cf. *Karbal v. ADOR*, 215 Ariz. 114 (App. 2007).

3. **The City's adoption of the ordinance and liability for retroactive refund of the CFC.**

3.1. In 2001, the Phoenix City Council passed the Customer Facility Charge Ordinance (P.C.C. § 4-79). Under that ordinance, rental car companies located in or who obtain customers at the Center must charge and collect the CFC from their customers. Every month, these rental car companies remit the CFC receipts to a financial institution designated by the Aviation Department of the City of Phoenix. See Exh. B (examples of Rental Car Customer Facility Charge Report Forms (February 2011 and October 2013 (redacted))).

3.2. Under long-standing Arizona law, the governmental unit that collects must also refund any illegal tax to the payors of that tax. See *Maricopa County v. Hodgin*, 46 Ariz. 247, 251 (1935) (in Arizona there is "one action for the recovery of the tax . . . against the taxing unit that collected the tax."). And, under decades-old federal decisional law, the governmental unit that collects the tax must retroactively (rather than only prospectively) return the receipts collected to the taxpayers. As a result, here, the City of Phoenix—which collected the CFCs under P.C.C. § 4-79—must refund the CFC receipts to Mr. Pope and other taxpayers.

3.3. Parenthetically, in her letter dated October 27, 2017, Ms. Carolina Potts speculates that "any relief would negatively affect the rental car companies leasing space at the Rental Car Center." She argues—without citation to the operative agreements—that the rental car companies represented by our firm would bear the burden of renegotiated leases. She then points out that our firm represents those same rental car companies (save one) in another case. First, in that other case, only the Arizona Department of Revenue has the opt-out notices. Other than the ADOR, therefore, no one (including Ms. Potts) knows the membership of the class in the other case that she mentions. More to the point, assuming the refund, several outcomes may develop: (a) the rental car companies may disagree with Ms. Potts' reading of the agreements; (b) the City may step in and service the debt; or, (c) the bondholders may renegotiate the terms of the debt repayments. These and other outcomes may obtain even with prospective-only relief.

4. **The City uses the Rental Car Facility Charge receipts for other than street and highway purposes: construction of and improvements to the Rental Car Center.**

4.1. Under P.C.C. § 4-79, the CFCs "shall be used to pay, or reimburse the City, for the costs associated with the RCC consolidated rental car facility which shall be located in Sky Harbor Center, and for the costs of related transportation facilities and equipment."

4.2. In 2004, the City issued and sold bonds to investors in the amount of $260 million in order to finance the construction of the Center.

4.3. In 2006, following completion of construction, the Center opened. Located on a 140-acre site west of Sky Harbor Airport, the Center today houses 14 rental car brands owned by 6 rental car companies.

4.4. At 2.3 million square feet, built on just over 40 acres, the Center is the largest covered structure in the state of Arizona and one of the largest rental car centers in the United States. The four-story facility—with three levels of parking, 7400 stalls, and 12 cast-in place ramps, one for each rental company, along with vehicle servicing areas on site—houses all Sky Harbor airport rental car companies, their rental counters, and vehicles.

4.5. On the fourth level of the Center, the City built a 160,000 square-foot customer service lobby; counters for each of the 14 rental car agencies; and, spaces for display of local artwork. The City finished this fourth level with Terrazzo tile and Venetian plaster.

4.6. To pay for the bonds sold to construct the Center, the City imposed the CFC on June 1, 2002 ($3.50) and, on September 1, 2003, increased the rate to $4.50 per transaction day. On January 1, 2009, the City increased the CFC to $6.00 per transaction day. Today, the CFC stands at $6.00 per transaction day.

4.7. The receipts from the CFCs pay investors who hold the bonds. The City has approximately $200 million in principal remaining to repay the bonds that were sold to finance construction of the Center.

4.8. Only CFCs are pledged to the repayment of those bonds and only $4.50 of the $6.00 CFC per transaction day is considered to be revenues pledged to service the bond debt. If the Aviation Enterprise Fund deposits the additional $1.50 of the CFC into the trustee's revenue fund, then those additional revenues become revenues pledged to re-pay the bond debt. In fiscal years 2012, 2013, 2014, 2015, and 2016, the City elected to deposit the entire CFC ($6.00) into the trustee's revenue fund for the benefit of bondholders. (The accounts holding CFC receipts as of January 1, 2017 are described on Exh. C.) Thus, for several years, and during the refund period, the CFC receipts have been paid to bondholders to service the debt incurred to finance construction of the Center.

4.9. In 2017, the City adopted the FY 2016-21 Aviation Capital Improvement Program (CIP). Every year, the City reviews and updates the five-year Aviation CIP. The

current Aviation CIP provides for over $310 million in capital improvements to Phoenix-Sky Harbor International, Goodyear, and Deer Valley Airports. The City expects to fund the Aviation CIP with, among other sources of funds, $15 million in "pay-as-you-go Customer Facility Charge (CFC) revenues[.]"

5. **Whether termed a "fee" or "tax," the City's collection and expenditure of the CFC violates the state constitution.**

5.1. The City's expenditure of the CFC—payment of the debt incurred for construction of and spending for improvements and tenant relocation at the Center—falls well outside the scope of the uses permitted by Art. 9, § 14 of our state constitution, that is, for only "highway and street purposes."

5.2. In *Rogers v. Lane County*, 307 Ore. 534 (1989), the Supreme Court of Oregon considered whether the construction of an airport parking lot and a covered walkway from the parking lot to the airport terminal were permissible highway uses under an analogous state constitutional provision. In that case, the Oregon Supreme Court found that the construction of the airport parking lot and walkway was "an expenditure primarily for the operational convenience of an airport, rather than for a project or purpose within or adjacent to a highway, road, street or roadside rest area right-of-way that primarily and directly facilitates motorized vehicle travel." 307 Ore. at 545. The same result holds here. The City constructed the Center for the operational convenience of the Sky Harbor Airport and its rental car customers rather than the construction or improvement of our public streets and highways.

5.3. Granted, only those who rent vehicles at the Center must pay the CFC—which, in the October 27the letter from Ms. Potts, the City terms a "user fee." But, the label does not matter. The plain text of our state constitution forbids the use of "moneys derived *from fees*" relating to the operation or use of vehicles on our public streets for other than "highway and street purposes."

5.4. Here, the City directs the CFCs—whether labeled "user fees" or "excises" or something else—to support the construction and improvement of an airport building, a plainly unconstitutional use of moneys collected by the City. See *Rogers v. Lane County*, 771 P.2d at 254 (tax could not be properly spent on airport facilities because the facilities were not for the purpose of motor vehicle travel).

5.5. The City's heavy reliance on decisions such as *Thrifty Rent-A-Car System, Inc. v. City and County of* Denver, 833 P.2d 852 (Colo. 1992), is deeply misplaced. In that case, the Colorado Court of Appeals held that a transaction fee imposed on car rental companies was a permissible user's fee rather than an illegal income tax because the fee was used to defray the expense of operating and improving the airport facility. Under Colorado law, this decision was not surprising. For years, under Colorado law, "an ordinance creating a special service fee will be upheld as long as the ordinance is reasonably designed to defray the cost of the particular service rendered by the municipality." *Bruce v. City of Colorado Springs*, 131 P. 3d 1187, 1190 (Colo. App. 2005)(citing Colorado decisions).

5.6. However, in this area, here in Arizona, our constitution makes no distinction between "fees," "user fees," or "excises." We have no "reasonable relation" test under Arizona law. To the contrary, our more restrictive constitutional provision prohibits (a) the use of *any* "moneys" derived from "*fees* or excises" (b) "relating to" the "operation[] or use" of "vehicles

on the public highways or streets" (c) for other than "highway and street purposes." The decision in *Thrifty Rent-A-Car*, over 25 years ago, by Colorado's intermediate appellate court, distinguishing "fees" and "taxes" under *Westrac, Inc. v. Walker Field, Colo., Public Airport Authority*, a 1991 decision by another division of the Colorado appellate court, offers no aid to the City here because, by the City's admission (in the October 27, 2017 letter from Ms. Potts) and under the plain text of the ordinance, the CFC is a "fee," that is, "a charge intended to defray, in whole or in part, the expense of regulating or providing a service, benefit or privilege." *New Mexico Mining Association v. New Mexico Mining Commission*, 122 N.M. 332, 338 (N.M. App. 1996)(citing authorities, including *Thrifty Rent-A-Car* and decisions from Utah and Ohio). And, our state constitution expressly forbids the use of "moneys derived *from fees*" relating to the operation or use of vehicles on our public streets for other than "highway and street purposes."

6. Statement of sum certain.

6.1. In fiscal year 2016, customers at the Center generated over 7.828 million transaction days, which resulted in the City's collection of CFCs in the amount of $46.968 million. Mr. Pope for himself and, if litigation ensues, the putative class gives notice of this claim for refund of the CFCs. Cf. *Andrew S. Arena, Inc. v. Superior Court (Pima County)*, 163 Ariz. 423, 426 (1990) (holding that "A.R.S. § 12-821 does not bar class actions against public entities" and that "a claim against a public entity may be presented as a class claim[ ]").

6.2. In *City Of Phoenix v. Fields*, 219 Ariz. 568, 571 (2009), the Court addressed the requirement of the notice of claim statute in the context of a class action: "We therefore hold that A.R.S. § 12-821.01(A) requires a putative class representative to include in his notice of claim a "specific amount" for which his individual claim can be settled. The notice should also include a statement that, if litigation ensues, the representative intends to seek certification of a plaintiff class. If a class is later certified, the notice of claim will serve as a representative notice for other class members." Here, in compliance with the holdings in *City of Phoenix v. Fields* and *Yollin v. City of Glendale*, 219 Ariz. 24, 29 (App. 2008), Mr. Pope confirms that he would settle his individual claim in return for the City's payment to him in the amount of $4.5 million. If litigation follows, Mr. Pope intends to seek certification of a plaintiff class.

Yours very truly,

AIKEN SCHENK HAWKINS & RICCIARDI P.C.

Shawn K. Aiken

Enclosures: Exhs. A, B, and C.

EXHIBIT A

Rental vehicle customer receipt
(Personal information redacted)

enterprise

Enterprise Plus Emerald Club

Rental Receipt - Thank you for your business

EC PURCHASING MEMBERS
DANIEL POPE

Contract Number: 442858026
Receipt Date: Jul 16, 2017

Driver: DANIEL POPE

Enterprise Location: 1805 E SKY HARBOR CIR S
PHOENIX, AZ 85034
US
Tel.: 8448164387

Start Date:	End Date:	Make/Model	Start Miles	End Miles	Miles Driven
Jul 10, 2017 @ 7:26 pm	Jul 11, 2017 @ 1:26 pm	TOYO CAMR	22,929	23,004	75
Jul 11, 2017 @ 1:26 pm	Jul 16, 2017 @ 12:39 pm	HYUNDAI ELANTRA	34,907	35,042	136
		Total Miles			210

Charge Description	Quantity	Per	Rate	Total
Rate	1	Week	160.00	160.00
PREPAYMENT(RES-CREDIT)				(0.31)
				Subtotal: USD 171.69

DUPLICATE

Taxes and Surcharges

CUSTOMER FACILITY CHARGE 6.00/DAY	36.00
MAINTENANCE FEE 0.61/DAY	3.66
CONCESSION RECOVERY FEE 11.11PCT	20.40
STADIUM SURCHARGE	7.80
VEHICLE LICENSE SURCHARGE 5 PCT	12.00
TRANS PRIV TAX	25.45
	Subtotal: USD 277.00
Total Charges:	USD 277.00

Payment Information

CREDIT CARD VI	277.00
	Subtotal: USD 277.00
Total Payment Amount:	USD 277.00

If you have any questions about this receipt please contact our support staff at 8448164387 or Email us

EXHIBIT B
Examples of Rental Car Customer Facility Charge Report Forms (February 2011 and October 2013 (Redacted))

@002

RENTAL CAR CUSTOMER FACILITY CHARGE REPORT FORM

(REVISED 07/08)

COMPANY NAME: Airport Rent A Car

ADDRESS: 2325 E. Washington St
Phoenix, AZ 85034

CONTACT PERSON:

TELEPHONE:

EMAIL:

REQUIRED MONTHLY DATA

MONTH/YEAR WHEN CFC WAS COLLECTED:	Jan 11
NUMBER OF TRANSACTIONS DURING MONTH:	131
NUMBER OF TRANSACTION DAYS DURING MONTH:	241
CFC AMOUNT OWED TO THE CITY OF PHOENIX:	1446.00 (MULTIPLY TRANSACTION DAYS x $6)

I certify this is a true and accurate statement of CFC collections in accordance with Section 4-79 of the Municipal Code.

SIGNATURE	TITLE	PHONE	DATE
	Owner		2/19/11

BACKGROUND

The City of Phoenix Ordinance No. G-4418 requires all on-airport vehicle rental companies who lease terminal space at Phoenix Sky Harbor International Airport (Airport) and all off-Airport vehicle rental companies who obtain customers at the Airport to collect a daily customer facility charge (CFC) of six dollars per transaction day per vehicle from all Airport customers. All rental car contracts dated on or after June, 1, 2002 are subject to the CFC.

A transaction day is defined as a vehicle rented for twenty-five or fewer hours for the first transaction day, and every 24 hours for each transaction day thereafter.

INSTRUCTIONS*

1. The charge must be identified on the customer's invoice as either CFC or "Customer Facility Charge"
2. CFC Collections for a month must be remitted to the City of Phoenix by no later than the last day of the month following the collection month (the "Due Date")
3. The car rental company must send a separate check for CFC collections along with a completed and signed copy of the Customer Facility Charge Report Form.
4. The check must be made payable to the City of Phoenix and sent to the following address:

Aviation Department
City of Phoenix
PO Box 78238
Phoenix, AZ 85062-8238

*Failure to follow these instructions can result in the addition of delinquent fees to your account.

City of Phoenix
AVIATION DEPARTMENT

RENTAL CAR CUSTOMER FACILITY CHARGE REPORT FORM

COMPANY NAME: Phoenix Airport Rent-A-Car
COMPANY ADDRESS: 3225 E Washington St
Phoenix
CONTACT PERSON: (Please Print)
TELPHONE: ( ) -
E-MAIL ADDRESS:

REQUIRED MONTHLY DATA – MUST FILL IN ALL BLANKS

MONTH / YEAR WHEN CFC WAS COLLECTED	Sept 2013
NUMBER OF TRANSACTIONS SUBJECT TO CFC	58
NUMBER OF TRANSACTION DAYS SUBJECT TO CFC	324
CFC OWED TO THE CITY OF PHOENIX (Multiply transaction days subject to CFC x $6.00)	$1944.00 (Enclose Check)

I certify this is a true and accurate statement of CFC collections in accordance with Ordinance Number G-4418 as amended by Ordinance Number S-4530

C Eldridge — preparer — 10/19/13
Signature — Title — Phone — Date

BACKGROUND

The City of Phoenix Ordinance Number G-4418, as amended by Ordinance Number S-4530, requires all on-Airport vehicle rental companies who lease terminal space at Phoenix Sky Harbor International Airport and all off-Airport vehicle rental companies who obtain customers at the Airport to collect a daily customer facility charge (CFC) of Six dollars ($6.00) per transaction day per vehicle from all Airport customers for all rental car contracts dated on or after September 1, 2005.

A transaction day is defined as twenty-four or fewer hours for the first transaction day and every 24 hours for each transaction day thereafter. Customers who do not arrive at the Airport by an airline serving the Airport as evidenced by the customer's rental contract and an Arizona driver's license that both reference a personal residence within one of the Maricopa County zip codes that fall within a 30 mile radius of the Airport are exempt from paying the CFC. This "Non-Airport Customer Exemption" terminates on the date of beneficial occupancy of the planned Consolidated Rental Car Facility.

INSTRUCTIONS

- The charge must be identified on the customer's remittance advice as either "CFC" or "Facility Charge."
- CFC collections for a month must be remitted to the City of Phoenix by no later than the last day of the month following the collection month (the "Due Date").
- The car rental company must send a separate check for CFC collections along with a completed and signed copy of this Customer Facility Charge Report Form.
- The check must be made payable to the City of Phoenix and sent to the following address:

  Aviation Department
  City of Phoenix
  P.O. Box 29112
  Phoenix, AZ 85038-9112

- Delinquent CFC collections and activity data received 10 days after the Due Date will be subject to an 18% interest charge as required by Phoenix City Code Section 4-7.

EXHIBIT C
Accounts Holding CFC Receipts as of January 1, 2017

CITY OF PHOENIX CIVIC IMPROVEMENT CORPORATION
RENTAL CAR FACILITY TRUSTEE ACCOUNT BALANCES

Trustee Account Number	Account Title	Balance as of June 30, 2016
785889000	Revenue Fund	$ -
785889001	Administrative Costs Fund	-
785889002	2004 Interest Account	6,011,831.35
785889003	2004 Principal Account	9,257,020.22
785889004	2004 Redemption Account	-
785889005	Debt Service Coverage Fund	5,337,711.85
785889006	2004 Debt Service Reserve Fund	21,428,788.37
785889007	Transportation O&M Fund	1,219,403.08
785889008	Transportation O&M Reserve Fund	7,547,640.35
785889009	Improvement Reserve/Surplus Fund	51,510,301.97

Revised January 2017

AIKEN SCHENK

August 30, 2017

VIA PERSONAL SERVICE;
CERTIFIED FIRST CLASS MAIL
Mr. Cris Meyer, City Clerk
CITY OF PHOENIX
City Clerk Department
PHOENIX CITY HALL
200 W. Washington St., 15th floor
Phoenix, Arizona 85003

VIA PERSONAL SERVICE;
CERTIFIED FIRST CLASS MAIL
Ms. Denise Olson, Chief Financial Officer
CITY OF PHOENIX
Finance Department
PHOENIX CITY HALL
251 W. Washington St., 9th floor
Phoenix, Arizona 85003

VIA PERSONAL SERVICE;
CERTIFIED FIRST CLASS MAIL
Mr. Ed Zuercher, City Manager
CITY OF PHOENIX
Office of City Manager
PHOENIX CITY HALL
200 W. Washington St., 12th floor
Phoenix, Arizona 85003

Re: *Daniel Pope and Jerome Kruczek for themselves and on behalf of all others who paid the Rental Car Facility Charge at Phoenix Sky Harbor Rental Car Center during the past year and until collection ceases.*

Notice of Individual and Class Claims for Refund of Rental Car Facility Charge Paid Under P.C.C. § 4-79.

Dear Mr. Meyer, Ms. Olson, and Mr. Zuercher:

I represent Mr. Pope, Mr. Kruczek, and all others who, over the past year, paid and all those who will pay, the six dollar Rental Car Facility Charge described in Phoenix City Code § 4-79. For the reasons below, my clients request that the City of Phoenix refund those taxes.

1. **Facts supporting the refund claim: introduction.**

1.1. In 1952, the voters of Arizona adopted Art. 9, § 14 of the Arizona Constitution, which prohibits the use of excises relating to the operation of a motor vehicle for other than street and highway purposes.

1.2. Over 30 other states—Oregon, Washington, Nevada, and Colorado, to name a few—have adopted similar anti-diversion laws.

1.3. My clients—Claimants and the Class—request the refund of the Rental Car Facility Charges paid under Phoenix City Code § 4-79 ("CFCs") because those excises violate Art. 9, § 14 of the Arizona Constitution.

1.4. Claimants for themselves and on behalf of all those similarly situated give notice of this claim for refund of the CFCs. Cf. *Andrew S. Arena, Inc. v. Superior Court (Pima County)*, 163 Ariz. 423, 426 (1990) (holding that "A.R.S. § 12-821 does not bar class actions against public entities" and that "a claim against a public entity may be presented as a class claim[ ]"); *Arizona Dep't of Revenue v. Dougherty*, 200 Ariz. 515, 519 (2001) (approving administrative class action procedure in which a single representative claim satisfying A.R.S. § 42-1118 was used).

2. Claimants.

2.1. Claimants paid the CFC in connection with the rental of a motor vehicle at the Phoenix Sky Harbor Rental Car Center (1805 E. Sky Harbor Circle South ("Center")). See Exh. A (copy of receipts).

2.2. Claimant Daniel Pope, who paid the CFC on July 16, 2017, files this notice for himself and behalf of the Class within one hundred eighty days after the cause of action accrued. See A.R.S. § 12-821.01(A).

2.3. Because the rental car companies doing business at the Center must, under P.C.C. § 4-79(A), "collect a daily customer facility charge ("CFC") of six dollars per transaction day per vehicle from all Sky Harbor Airport customers[,]" only rental car customers (not the rental car companies) have standing to seek this refund. Cf. *Karbal v. ADOR*, 215 Ariz. 114 (App. 2007).

3. Respondent City of Phoenix.

3.1. In 2001, the Phoenix City Council passed the Customer Facility Charge Ordinance (P.C.C. § 4-79). Under that ordinance, rental car companies located in or who obtain customers at the Center must charge and collect the CFC from their customers. Every month, these rental car companies remit the CFC receipts to a financial institution designated by the Aviation Department of the City of Phoenix. See Exh. B (examples of Rental Car Customer Facility Charge Report Forms (February 2011 and October 2013 (redacted))).

3.2. Under long-standing Arizona law, the governmental unit that collects must also refund any illegal tax to the payors of that tax. See *Maricopa County v. Hodgin*, 46 Ariz. 247, 251 (1935) (in Arizona there is "one action for the recovery of the tax . . . against the taxing unit that collected the tax."). As a result, here, the City of Phoenix—which unquestionably collected the CFCs under P.C.C. § 4-79—must refund the CFC receipts to Claimants and the Class.

4. Use of the Rental Car Facility Charge receipts for other than street and highway purposes: construction of and improvements to the Center.

4.1. Under P.C.C. § 4-79, the CFCs "shall be used to pay, or reimburse the City, for the costs associated with the RCC consolidated rental car facility which shall be located in Sky Harbor Center, and for the costs of related transportation facilities and equipment."

4.2. In 2004, the City issued and sold bonds to investors in the amount of $260 million in order to finance the construction of the Center.

4.3. In 2006, following completion of construction, the Center opened. Located on a 140-acre site west of Sky Harbor Airport, the Center today houses 14 rental car brands owned by 6 rental car companies.

4.4. At 2.3 million square feet, built on just over 40 acres, the Center is the largest covered structure in the state of Arizona and one of the largest rental car centers in the United States. The four-story facility has three levels of parking, with 7400 stalls, and 12 cast-in place ramps, one for each rental company, along with vehicle servicing areas on site. The Center houses all Sky Harbor airport rental car companies, their rental counters, and vehicles.

4.5. On the fourth level of the Center, the City built a 160,000 square-foot customer service lobby; counters for each of the 14 rental car agencies; and, spaces for display of local artwork. This fourth level was finished with Terrazzo tile and Venetian plaster.

4.6. The City imposed the CFC on June 1, 2002 ($3.50) and, on September 1, 2003, increased the rate to $4.50 per transaction day. On January 1, 2009, the City increased the CFC to $6.00 per transaction day. Today, the CFC stands at $6.00 per transaction day.

4.7. The receipts from the CFCs pay investors who hold the bonds. The City has approximately $200 million in principal remaining to repay the bonds that were sold to finance construction of the Center.

4.8. Only CFCs are pledged to the repayment of those bonds and only $4.50 of the $6.00 CFC per transaction day is considered to be revenues pledged to service the bond debt. If the Aviation Enterprise Fund deposits the additional $1.50 of the CFC into the trustee's revenue fund, then those additional revenues become revenues pledged to re-pay the bond debt. In fiscal years 2012, 2013, 2014, 2015, and 2016, the City elected to deposit the entire $6.00 CFC into the trustee's revenue fund for the benefit of bondholders. (The accounts holding CFC receipts as of January 1, 2017 are described on Exh. C.) In short, for several years, and during the refund period, the CFC receipts have been paid to bondholders to service the debt incurred to finance construction of the Center.

4.9. In 2017, the City adopted the FY 2016-21 Aviation Capital Improvement Program (CIP). Every year, the City reviews and updates the five-year Aviation CIP. The current Aviation CIP provides for over $310 million in capital improvements to Phoenix-Sky Harbor International, Goodyear, and Deer Valley Airports. The City expects to fund the Aviation CIP with, among other sources of funds, $15 million in "pay-as-you-go Customer Facility Charge (CFC) revenues[.]"

5. The City's violation of the state constitution.

5.1. The City's uses of the CFCs—payment of the debt incurred for construction of and spending for improvements and tenant relocation at the Center—fall well outside the scope of uses permitted by Art. 9, § 14 of our state constitution.

5.2. In *Rogers v. Lane County*, 307 Ore. 534 (1989), the Supreme Court of Oregon considered whether the construction of an airport parking lot and a covered walkway from the parking lot to the airport terminal were permissible highway uses under an analogous state constitutional provision. The Oregon Supreme Court found that the construction of the airport parking lot and walkway was "an expenditure primarily for the operational convenience of an airport, rather than for a project or purpose within or adjacent to a highway, road, street or roadside rest area right-of-way that primarily and directly facilitates motorized vehicle travel." 307 Ore. at 545.

5.3. The same is true here: the City constructed the Center for the operational convenience of the Sky Harbor Airport and its rental car customers rather than the construction or improvement of our public streets and highways.

5.4. In short, the City directs the CFCs—undoubted "excises" under settled Arizona law—to support the construction and improvement of an airport building, a constitutionally impermissible use.

5.5. Over the years, this unconstitutional diversion of road taxes has dramatically eroded the condition of our City's streets. Consider one measure: over 15 years ago, the City planned to replace our streets—the so-called arterial street maintenance cycle—every 15 years; today, the City plans to do so about every 65 years. In fiscal year 2008-09, total expenditures for the Street Transportation Department were at $61.158 million; in 2014-15, expenditures had increased at less than the rate of inflation to $66.954 million. Over that same period, the amount spent on street maintenance *decreased* (from $25.560 million to $24.556 million). And, over the last 5 years, the capital construction budget has decreased. Fortunately, starting January 2016, the Transportation 2050 sales tax revenues allow for an increase in the annual street maintenance and capital budgets. In any case, in the teeth of these eroding annual operating and capital budgets—together with the diversion of nearly $50 million annually in the taxes at issue here—the City's Street Transportation Department has done the best that it can to plan, design, construct, operate, and maintain nearly 5,000 miles of the City's streets and associated facilities.

6. Class allegations.

6.1. The Customer Facility Charges are invalid and should be refunded. If the City denies this claim, then Claimants and the Class intend to seek certification of a plaintiff class in the superior court. Cf. *City of Phoenix v. Fields*, 219 Ariz. 568, 573 (2009) ("If a class is later certified, the notice of claim will serve as a representative notice for other class members.").

6.2. Claimants represent themselves and all similarly situated taxpayers. The City, its employees, and their family members are excluded from the Class.

6.3. Claimants request the refund on behalf of themselves and all other similarly situated persons or entities who paid the CFC within one year of the date of this request and until collection ceases.

6.4. The rental car companies would have the precise number of rental car customers—that is, members of the Class—but, during the most recent fiscal year, the rental car companies operating at the Center remitted CFCs for over 7.8 million transaction days. In any event, the Class is so numerous as to make joinder impractical.

6.5. The claims are typical of the claims of the Class members; and, all claims are based on the same legal and remedial theories.

6.6. Common questions of law and fact predominate, including the following:

6.6.1. whether the City's use of the CFC receipts violates Art. 9, § 14 of the Arizona Constitution; and,

6.6.2. whether Claimants and Class Members are entitled to refunds and, if so, in what amount.

6.7. In the prosecution of this action, and in the administration of all matters related to the claims, Claimants will fairly and adequately protect the interests of all Class Members.

6.8. Claimants have suffered injuries similar to those suffered by the Class Members.

6.9. Claimants have retained counsel experienced in handling class action suits. Neither Claimants nor counsel have any interest that might cause them to refrain from vigorous pursuit of the refund.

6.10. Claimants are representative of members of the Class and will, as the representatives, fairly and adequately protect the interest of the entire Class.

6.11. The class action device is superior to other methods of adjudication because it will promote the convenient administration of justice and achieve a fair and efficient adjudication of the controversy given the number of potential class members.

6.12. The prosecution of separate actions by individual members of the Class would create a risk of:

6.12.1. inconsistent or varying adjudications that would confront the City with incompatible standards of conduct; and,

6.12.2. adjudications with respect to individual members of the Class that would as a practical matter substantially impair the interests of other members of the Class, who are not parties, because of the doctrine of *res judicata*.

6.13. The action would be manageable as a class action because proofs are the same for all members of the Class on all major issues.

6.14. In view of the nature of the issues and the expense of litigation, the separate claims of the individual Class Members would be insufficient in amount to support prosecution of separate requests for refund.

6.15. In fiscal year 2016, customers at the Center generated over 7.828 million transaction days, which resulted in the payment of CFCs in the amount of $46.968 million ($46.944 million net annual CFC revenue). Thus, the amount that may be recovered by individual Class Members will be large enough in the aggregate in relation to the expense and

effort of administering the action to justify a class action because, although individual amounts may not be large, the size of the Class should be sufficient to justify class administration.

7. **Statement of sum certain and other relief sought by Claimants and the Class.**

7.1. Claimants and the Class seek the refund of all CFCs paid within one year before the date of this notice of claim for refund. Cf. A.R.S. § 12-821 ("All actions against any public entity or public employee shall be brought within one year after the cause of action accrues and not afterward.").

7.2. This is a protective claim. Many taxing authorities, including the Arizona Department of Revenue, have recognized the operation of a protective claim as a continuing claim and established guidelines for filing protective claims in specific circumstances. See *McNutt v. ADOR*, 196 Ariz. 255 (App. 1998). Here, Claimants and the Class seek the refund of all CFCs paid both before *and after* the date of this notice of claim for refund and until the date collection of the CFCs ceases.

7.3. In *City Of Phoenix v. Fields*, 219 Ariz. 568, 571 (2009), the Court addressed the requirement of the notice of claim statute in the context of a class action. "We therefore hold that A.R.S. § 12-821.01(A) requires a putative class representative to include in his notice of claim a "specific amount" for which his individual claim can be settled. The notice should also include a statement that, if litigation ensues, the representative intends to seek certification of a plaintiff class. If a class is later certified, the notice of claim will serve as a representative notice for other class members."

7.4. Based on public reports of the CFCs remitted to the City during the refund period, the aggregate amount sought by the entire Class, including interest, exceeds $50 million.

7.5. The Claimants would be willing to settle their claim for the amount that each paid in CFCs provided that the superior court first certifies the Class and approves the settlement of each Claimant's individual claim *and the claims brought by the entire Class*. With that in mind, Mr. Pope would settle his claim in return for the sum of $36.00 (and Mr. Kruczek for the sum of $12.00) provided that the superior court first certifies the Class and approves the settlement of their individual claims and the claims brought by the entire Class.

7.6. Because Claimants and the Class have brought a protective claim, that is, covering receipts collected during the pendency of this matter, the amount sought by the entire Class at the conclusion of this action likely exceeds $100 million (depending upon the length of this action).

7.7. The controlling statute and governing Arizona law compel payment of the refund to Claimants and the Class retroactively.

7.8. WHEREFORE, Claimants and the Class request the following relief:

7.8.1. Certify the action and Claimants as the representatives of the Class;

7.8.2. Define the Class to include all persons and entities who paid the CFC within one year of the date of this request and all those who pay the CFC until either collection or the unlawful distribution of the monies ceases;

7.8.3. Find and declare that the CFC in P.C.C. § 4-79 violates the Arizona Constitution;

7.8.4. Order the refund of the CFCs to the Claimants and the Class that were collected under P.C.C. § 4-79 (a) within one year of this request and, (b) until either collection or the unlawful distribution of the monies ceases;

7.8.5. Order the City to pay into a common fund for the benefit of Claimants and all other members of the Class the total amount of compensatory damages to which Claimants and the Class are entitled;

7.8.6. Appoint a trustee to seize, manage, and distribute in an orderly manner the common fund thus established;

7.8.7. Award Claimants and the Class the costs and expenses incurred in the action, including their reasonable attorneys', accountants', and other experts' fees;

7.8.8. Award pre-judgment interest on the amount refunded to Claimants and the Class at the rate of 10% per annum (see *Arizona State University Board of Regents v. Arizona State Retirement System*, 2017 WL 1954807 (App. 2017)); and,

7.8.9. Grant any other appropriate relief.

Yours very truly,

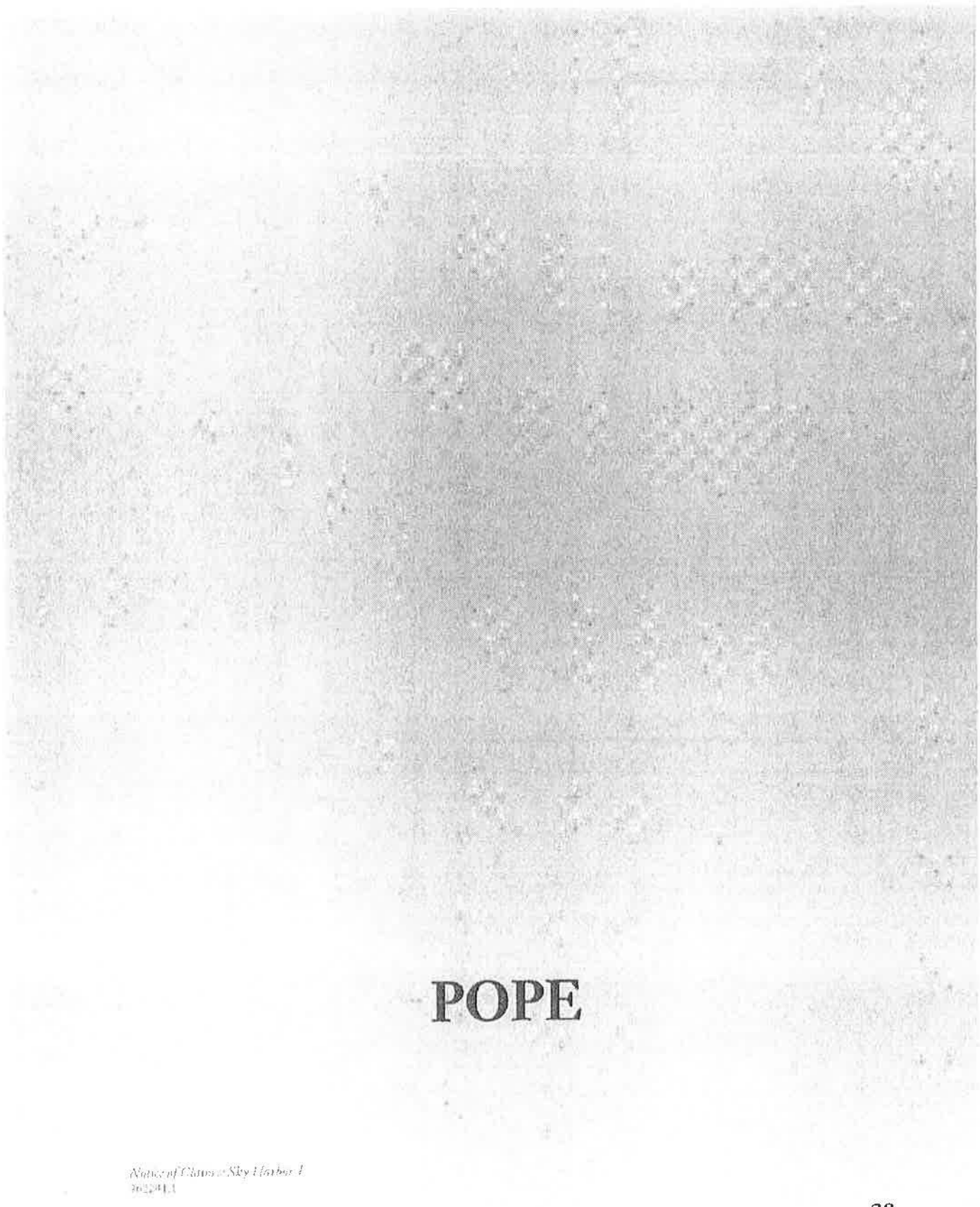
AIKEN SCHENK HAWKINS & RICCIARDI P.C.

Shawn K. Aiken

Enclosures: Exhs. A, B, and C.

EXHIBIT A

Rental vehicle customer receipts
(Personal information redacted)



Name of Class - Sky Harbor I
2022-01-3

Enterprise Rent-A-Car: Rental Cars at Everyday Low Rates

Enterprise Plus Emerald Club

enterprise

Rental Receipt - Thank you for your business

EC PURCHASING MEMBERS
DANIEL POPE

Contract Number: 442858026
Receipt Date: Jul 16, 2017

Enterprise Location: 1805 E SKY HARBOR CIR S
PHOENIX, AZ 85034
US
Tel.: 8448164387

Driver: DANIEL POPE

Start Date:	End Date:	Make/Model	Start Miles	End Miles	Miles Driven
Jul 10, 2017 @ 7:28 pm	Jul 11, 2017 @ 1:28 pm	TOYO CAMR	22,928	23,004	76
Jul 11, 2017 @ 1:28 pm	Jul 16, 2017 @ 12:39 pm	HYUNDAI ELANTRA	34,907	35,042	135
		Total Miles			210

Charge Description	Quantity	Per	Rate	Total
Rate		Week	160.00	160.00
PREPAYMENT(RES-CREDIT)				(8.31)
			Subtotal:	USD 171.69

DUPLICATE

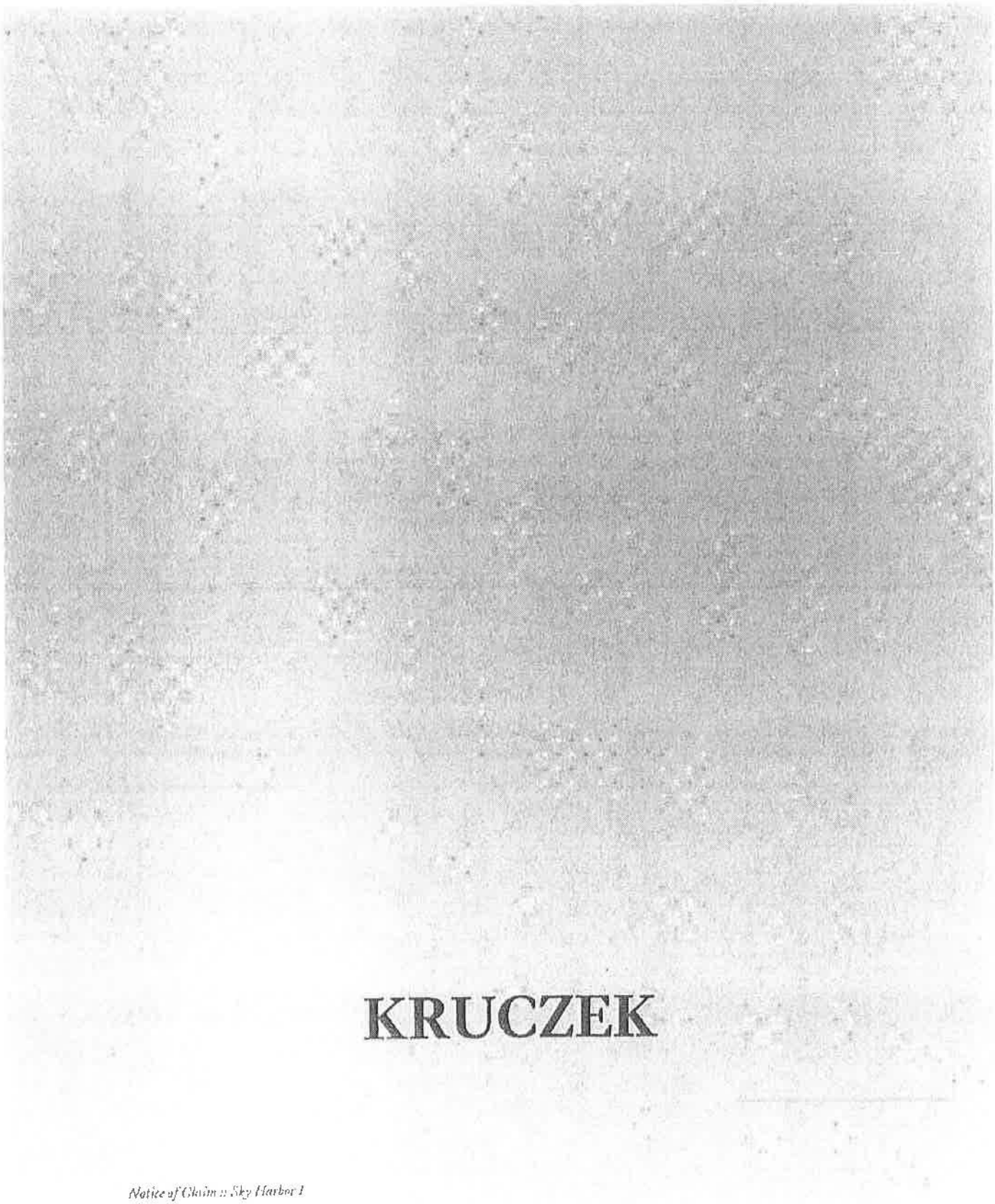
Taxes and Surcharges

CUSTOMER FACILITY CHARGE 6.00/DAY	36.00
MAINTENANCE FEE 0.61/DAY	3.66
CONCESSION RECOVERY FEE 11.11PCT	20.40
STADIUM SURCHARGE	7.80
VEHICLE LICENSE SURCHARGE 5 PCT	12.00
TRANS PRIV TAX	25.45
Subtotal:	USD 277.00
Total Charges:	USD 277.00

Payment Information

CREDIT CARD VI	277.00
Subtotal:	USD 277.00
Total Payment Amount:	USD 277.00

If you have any questions about this receipt please contact our support staff at 8448164387 or Email us.


KRUCZEK

AVIS

We are proud to feature a 100% smoke-free fleet!

RENTAL AGREEMENT NUMBER: 495844554

RECEIPT

Your Information

Customer Name:	JEROME KRUCZEK
Wizard Number:	
Avis Worldwide Discount:	
Customer Status:	AVIS PREF PLUS
Method of Payment:	AMEX

Your Vehicle Information

Vehicle Number:	92262460
Vehicle Group Rated:	Intermediate
Vehicle Group Charged:	Compact
Vehicle Description:	BLK VOLKSWAGEN JETTA
License Plate Number:	AZBAB3512
Odometer Out:	3904
Odometer In:	4009
Total Driven:	105
Fuel Gauge Reading:	Full

Your Rental

Pickup Date/Time:	DEC 29 2016 03:39PM
Pickup Location:	1805 E SKY HARBOR CIRCLE SOUTH PHOENIX SKY HARBOR AIRPORT PHOENIX,AZ,85034,US 602-261-5900
Return Date/Time:	DEC 31 2016 07:08PM
Return Location:	1805 E SKY HARBOR CIRCLE SOUTH PHOENIX SKY HARBOR AIRPORT PHOENIX,AZ,85034,US 602-261-5900

Additional fees may apply if changes are made to your return date, time and/or location.

Your Vehicle Charges (MIN 1 DAY / MAX DAY)

Rate Chart:	Free Miles:	Time and Mileage:	
Miles:	UNLIMITED	Your Discount:	
Hourly:	37.51	2 DY @ 50.00 *	100.00
Daily:	50.00		
Add day:	0.00	Time and Mileage:	100.00
Weekly:	300.00		
Monthly:	1200.00		

Your Optional Products/Services

Optional Services Total:	0.00

Your Taxable Fees

11.11% Concession Recovery Fee	12.78
CUSTOMER FACILITY CHG 6.00/D	12.00
ENERGY RECOVERY FEE 0.60/DY	1.20
MAINTENANCE FAC FEE 1.61/DY	3.62
EXTENSION FEE 10.00	10.00
Sub-total-Charges:	139.58
TAX 15.600%	21.77

Your Non-Taxable Products/Services

COUNTY SURCHARGE 3.25	4.53

Your Total Charges paid:	165.88
Prepayment	0.00
Net Charges:	USD 165.88
Your Total Due:	0.00

Thank you for renting with Avis.
For all other inquiries, please contact us at 1-800-352-7900 or www.Avis.com.
At Avis, we are committed to providing you with the best rental experience in the industry. We are in the business of treating people like people.
Thank you for renting with Avis. If you are a Avis preferred member in the AVIS loyalty program, please visit avis.com for more information.

Your vehicle was rented to you by DAVID. Your vehicle was checked in by ALBERT.

EXHIBIT B

Examples of Rental Car Customer Facility Charge Report Forms (February 2011 and October 2013 (Redacted))

@002

RENTAL CAR CUSTOMER FACILITY CHARGE REPORT FORM

(REVISED 07/08)

COMPANY NAME: Airport Rent A Car

ADDRESS: 2325 E. Washington St. Phoenix AZ 85034

CONTACT PERSON:

TELEPHONE:

EMAIL:

REQUIRED MONTHLY DATA

MONTH/YEAR WHEN CFC WAS COLLECTED:	Jan 11
NUMBER OF TRANSACTIONS DURING MONTH:	131
NUMBER OF TRANSACTION DAYS DURING MONTH:	241
CFC AMOUNT OWED TO THE CITY OF PHOENIX:	1446.00 (MULTIPLY TRANSACTION DAYS x 6)

I certify this is a true and accurate statement of CFC collections in accordance with Section 4-79 of the Municipal Code.

SIGNATURE	TITLE	PHONE	DATE
	Owner		2/14/11

BACKGROUND

The City of Phoenix Ordinance No. G-4410 requires all on-airport vehicle rental companies who lease terminal space at Phoenix Sky Harbor International Airport (Airport) and all off-Airport vehicle rental companies who obtain customers at the Airport to collect a daily customer facility charge (CFC) of six dollars per transaction day per vehicle from all Airport customers. All rental car contracts dated on or after June, 1, 2002 are subject to the CFC.

A transaction day is defined as a vehicle rented for twenty-five or fewer hours for the first transaction day, and every 24 hours for each transaction day thereafter.

INSTRUCTIONS*

1. The charge must be identified on the customer's invoice as either CFC or "Customer Facility Charge"
2. CFC Collections for a month must be remitted to the City of Phoenix by no later than the last day of the month following the collection month (the "Due Date")
3. The car rental company must send a separate check for CFC collections along with a completed and signed copy of the Customer Facility Charge Report Form.
4. The check must be made payable to the City of Phoenix and sent to the following address:

Aviation Department
City of Phoenix
PO Box 78235
Phoenix, AZ 85062-8235

*Failure to follow these instructions can result in the addition of delinquent fees to your account.

[illegible] Properties B056137779 p 6

City of Phoenix
AVIATION DEPARTMENT

RENTAL CAR CUSTOMER FACILITY CHARGE REPORT FORM

COMPANY NAME: Phoenix Airport Rent-A-Car
COMPANY ADDRESS: 2325 E Washington St
Phoenix
CONTACT PERSON: (Please Print)
TELPHONE:
E-MAIL ADDRESS:

REQUIRED MONTHLY DATA - MUST FILL IN ALL BLANKS

MONTH / YEAR WHEN CFC WAS COLLECTED	Sept 2013
NUMBER OF TRANSACTIONS SUBJECT TO CFC	82
NUMBER OF TRANSACTION DAYS SUBJECT TO CFC	234
CFC OWED TO THE CITY OF PHOENIX (Multiply transaction days subject to CFC x $6.00)	$1404.00 (Enclose Check)

I certify this is a true and accurate statement of CFC collections in accordance with Ordinance Number G-4418 as amended by Ordinance Number G-4530

[signature] Signature — preparer Title — Phone — 10/19/13 Date

BACKGROUND

The City of Phoenix Ordinance Number G-4418, as amended by Ordinance Number G-4518, requires all on-airport vehicle rental companies who lease terminal space at Phoenix Sky Harbor International Airport and all off-Airport vehicle rental companies who obtain customers at the Airport to collect a daily customer facility charge (CFC) of Six dollars ($6.00) per transaction day per vehicle from all Airport customers for all rental car contracts dated on or after September 1, 2003.

A transaction day is defined as twenty-five or fewer hours for the first transaction day and every 24 hours for each transaction day thereafter. Customers who do not arrive at the Airport by an airline serving the Airport as evidenced by the customer's rental contract and an Arizona driver's license that both reference a personal residence within one of the Maricopa County zip codes that fall within a 30 mile radius of the Airport are exempt from paying the CFC. This "Non-Airport Customer Exemption" terminates on the date of beneficial occupancy of the planned Consolidated Rental Car Facility.

INSTRUCTIONS

- The charge must be identified on the customer's remittance advice as either "CFC" or "Facility Charge."
- CFC collections for a month must be remitted to the City of Phoenix by no later than the last day of the month following the collection month (the "Due Date").
- The car rental company must send a separate check for CFC collections along with a completed and signed copy of this Customer Facility Charge Report Form.
- The check must be made payable to the City of Phoenix and sent to the following address:

  Aviation Department
  City of Phoenix
  P.O. Box 29112
  Phoenix, AZ 85038-9112

- Delinquent CFC collections and activity data received 10 days after the Due Date will be subject to an 18% interest charge as required by Phoenix City Code Section 4-7.

EXHIBIT C

Accounts Holding CFC Receipts as of January 1, 2017

CITY OF PHOENIX CIVIC IMPROVEMENT CORPORATION
RENTAL CAR FACILITY TRUSTEE ACCOUNT BALANCES

Trustee Account Number	Account Title	Balance as of June 30, 2016
785889000	Revenue Fund	$ -
785889001	Administrative Costs Fund	-
785889002	2004 Interest Account	6,011,831.35
785889003	2004 Principal Account	9,257,020.22
785889004	2004 Redemption Account	-
785889005	Debt Service Coverage Fund	5,337,711.85
785889006	2004 Debt Service Reserve Fund	21,428,788.37
785889007	Transportation O&M Fund	1,219,403.08
785889008	Transportation O&M Reserve Fund	7,547,640.35
785889009	Improvement Reserve/Surplus Fund	51,510,301.97

Clerk of the Superior Court
*** Electronically Filed ***
01/29/2020 8:00 AM

THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN THE ARIZONA TAX COURT

TX 2018-000759 01/22/2020

HONORABLE CHRISTOPHER WHITTEN

CLERK OF THE COURT
D. Tapia
Deputy

DANIEL POPE SHAWN K AIKEN

v.

CITY OF PHOENIX ERIC M FRASER

MINUTE ENTRY

The Court has Defendant's Motion to Dismiss, filed August 2, 2019, but not fully briefed until December 20, 2019. No oral argument is necessary.

Plaintiff's argument has already been addressed squarely and rejected by the Court of Appeals. *Karbal v. Arizona Dept. of Revenue*, 215 Ariz. 114, 116-18 ¶ 11-18 (App. 2007) (customers lack standing to challenge car rental tax because legal incidence of transaction privilege tax falls on rental companies); *accord, Saban Rent-a-Car LLC v. Arizona Dept. Of Revenue*, 246 Ariz. 89, 98 ¶ 34-35 (2019) (anti-diversion clause does not bar transaction privilege tax on car rental).

ACCORDINGLY, Defendant's Motion to Dismiss is **granted**.

NOTE: Due to rotations, effective February 13, 2020, this Division's calendar will be assigned to the Honorable Danielle J. Viola (telephone number: (602)-506-3442, located in the East Court Building, 101 West Jefferson, 7th Floor, Courtroom 712, Phoenix, Arizona 85003.

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Joshua D. Bendor, 031908
OSBORN MALEDON, P.A.
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Attorneys for Defendant

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

DANIEL POPE, individually and on behalf of all others similarly situated who paid the Rental Car Facility charge at Phoenix Sky Harbor Rental Car Center, Plaintiff, vs. CITY OF PHOENIX, a municipal corporation of the State of Arizona, Defendant.	No. TX2018-000759 **JUDGMENT** (Assigned to the Honorable Christopher Whitten)

Pursuant to the Court's order filed on January 29, 2020 granting Defendant's motion to dismiss,

IT IS ORDERED, ADJUDGED and DECREED:

1. Final judgment is entered in favor of Defendant and against Plaintiff on all of Plaintiff's claims against Defendant.

2. This judgment is final as to all claims and parties. No further matters remain pending and this judgment is entered under Ariz. R. Civ. P. 54(c).

DATED this 9th day of March, 2020.

Honorable Christopher Whitten
Maricopa County Superior Court Judge

Clerk of the Superior Court
*** Electronically Filed ***
05/07/2020 8:00 AM

THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN THE ARIZONA TAX COURT

TX 2018-000759 05/06/2020

HONORABLE CHRISTOPHER WHITTEN

CLERK OF THE COURT
D. Tapia
Deputy

DANIEL POPE SHAWN K AIKEN

v.

CITY OF PHOENIX ERIC M FRASER

JUDGE WHITTEN

MINUTE ENTRY

The Court has Plaintiff's Motion for a New Trial Under Rule 59(a)(1)(H), filed March 24, 2020, Defendant's response, filed April 12, 2020, and Plaintiff's reply, filed April 27, 2020.

When the Court, on January 22, 2020, granted the Defendant's August 2, 2019 Motion to Dismiss, it did so for only two reasons, which were explained in the order. The present pleadings suggest other reasons to deny the motion for a new trial. The Court declines the Defendant's invitation to expand the scope of its previous ruling.

Nonetheless, the Court continues to believe that the two cited reasons require the dismissal of Plaintiff's case.

ACCORDINGLY, Plaintiff's Motion for a New Trial Under Rule 59(a)(1)(H) is **denied**.

Clerk of the Superior Court
*** Electronically Filed ***
M. De La Cruz, Deputy
5/22/2020 9:40:00 AM
Filing ID 11676389

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Attorneys for Plaintiff and Proposed Class

SUPERIOR COURT OF ARIZONA

ARIZONA TAX COURT

DANIEL POPE, individually and on behalf of all others similarly situated who paid the Rental Car Facility charge at Phoenix Sky Harbor Rental Car Center, Plaintiff, v. CITY OF PHOENIX, a municipal corporation of the State of Arizona, Defendant.	Case No. TX 2018-000759 **NOTICE OF APPEAL** (Assigned to the Hon. Christopher Whitten)

Notice is hereby given that the Plaintiff Daniel Pope appeals to the Arizona Court of Appeals from the judgment entered in this case on March 10, 2020, and from the Order entered on May 7, 2020, denying Plaintiff's Motion for New Trial under Rule 59(a)(1)(H), which was timely filed on March 24, 2020.

DATED: May 22, 2020.

SHAWN AIKEN, PLLC
Shawn K. Aiken
5090 North 40th Street, Suite 207
Phoenix, Arizona 85018

and

KICKHAM HANLEY P.C.
Gregory D. Hanley (pro hac vice)
300 Balmoral Centre
32121 Woodward Avenue
Royal Oak, Michigan 48073

and

HOLDEN WILLITS PLC

By */s/ Robert G. Schaffer*
Robert G. Schaffer
Two North Central Avenue, Suite 1760
Phoenix, Arizona 85004
Attorneys for Plaintiff and the Class

E-FILED with the Clerk of the Court and
COPY served via TurboCourt.com to:

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2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012-2793
efraser@omlaw.com
jbendor@omlaw.com

/s/ Valerie Corral

Electronic Index of Record
MAR Case # TX2020-000833

No.	Document Name	Filed Date
1.	COMPLAINT FOR PERMANENT INJUNCTION AND REFUND OF RENTAL CAR FACILITY CHARGE (MUNICIPAL - PHOENIX CITY CODE 4-79)	Jul. 28, 2020
2.	PLAINTIFF'S MOTION FOR PLACEMENT OF CASE ON PENDING APPEALS CALENDAR OR STAY OF CASE	Jul. 28, 2020
3.	COVERSHEET	Jul. 28, 2020
4.	SUMMONS	Jul. 30, 2020
5.	CERTIFICATE OF SERVICE	Jul. 30, 2020
6.	[PART 1 OF 2] MOTION TO DISMISS	Aug. 12, 2020
7.	[PART 2 OF 2] MOTION TO DISMISS	Aug. 12, 2020
8.	[PART 1 OF 2] RESPONSE TO PLAINTIFF'S MOTION FOR PLACEMENT OF CASE ON PENDING APPEALS CALENDAR OR STAY OF CASE	Aug. 12, 2020
9.	[PART 2 OF 2] RESPONSE TO PLAINTIFF'S MOTION FOR PLACEMENT OF CASE ON PENDING APPEALS CALENDAR OR STAY OF CASE	Aug. 12, 2020
10.	CREDIT MEMO	Aug. 13, 2020
11.	REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR PLACEMENT OF CASE ON PENDING APPEALS CALENDAR OR STAY OF CASE	Aug. 24, 2020
12.	RESPONSE TO MOTION TO DISMISS	Aug. 31, 2020
13.	REPLY IN SUPPORT OF MOTION TO DISMISS	Sep. 14, 2020
14.	**ME: RULING [10/23/2020]**	**Oct. 26, 2020**
15.	NOTICE OF LODGING PROPOSED FORM OF FINAL JUDGMENT	Nov. 19, 2020
16.	[PART 1 OF 2] DEFENDANT'S APPLICATION FOR ATTORNEYS' FEES	Nov. 19, 2020
17.	[PART 2 OF 2] DEFENDANT'S APPLICATION FOR ATTORNEYS' FEES	Nov. 19, 2020
18.	NOTICE OF APPEARANCE	Dec. 9, 2020

Electronic Index of Record
MAR Case # TX2020-000833

No.	Document Name	Filed Date
19.	NOTICE OF FIRST EXTENSION OF TIME TO FILE RESPONSE TO DEFENDANT'S APPLICATION FOR ATTORNEYS' FEES AND OBJECTION TO PROPOSED FORM OF FINAL JUDGMENT	Dec. 9, 2020
20.	NOTICE OF SECOND EXTENSION OF TIME TO FILE RESPONSE TO DEFENDANT'S APPLICATION FOR ATTORNEYS' FEES AND OBJECTION TO PROPOSED FORM OF FINAL JUDGMENT	Dec. 15, 2020
21.	NOTICE OF THIRD EXTENSION OF TIME TO FILE RESPONSE TO DEFENDANT'S APPLICATION FOR ATTORNEYS' FEES AND OBJECTION TO PROPOSED FORM OF FINAL JUDGMENT	Dec. 22, 2020
22.	[PART 1 OF 2] PLAINTIFF'S OPPOSITION TO THE CITY OF PHOENIX'S APPLICATION FOR ATTORNEYS' FEES	Dec. 30, 2020
23.	[PART 2 OF 2] PLAINTIFF'S OPPOSITION TO THE CITY OF PHOENIX'S APPLICATION FOR ATTORNEYS' FEES	Dec. 30, 2020
24.	NOTICE OF FIRST EXTENSION OF TIME TO FILE REPLY IN SUPPORT OF APPLICATION FOR ATTORNEYS' FEES	Jan. 11, 2021
25.	REPLY IN SUPPORT OF APPLICATION FOR ATTORNEYS' FEES	Jan. 22, 2021
26.	FINAL JUDGMENT	Feb. 22, 2021
27.	**ME: RULING [02/22/2021]**	**Feb. 23, 2021**
28.	MOTION TO REOPEN TIME WITHIN WHICH TO FILE NOTICE OF APPEAL UNDER ARCAP 9(F)	Apr. 1, 2021
29.	ORDER RE: MOTION TO REOPEN TIME WITHIN WHICH TO FILE NOTICE OF APPEAL UNDER ARCAP 9(F)	May. 3, 2021
30.	NOTICE OF APPEAL	May. 10, 2021
31.	NOTICE OF CROSS-APPEAL	May. 25, 2021

APPEAL COUNT: 1

RE: CASE: UNKNOWN

DUE DATE: 06/08/2021

Electronic Index of Record
MAR Case # TX2020-000833

CAPTION: ROBERTS VS CITY OF PHOENIX

EXHIBIT(S): NONE

LOCATION ONLY: NONE

SEALED DOCUMENT: NONE

DEPOSITION(S): NONE

TRANSCRIPT(S): NONE

COMPILED BY: heather.kish on June 1, 2021; [2.5-17026.63]
\\ntfsnas\c2c\c2c-2\TX2020-000833\Group_01

CERTIFICATION: I, JEFF FINE, Clerk of the Superior Court of Maricopa County, State of Arizona, do hereby certify that the above listed Index of Record, corresponding electronic documents, and items denoted to be transmitted manually constitute the record on appeal in the above-entitled action.

The bracketed [date] following the minute entry title is the date of the minute entry.

CONTACT INFO: Clerk of the Superior Court, Maricopa County, Appeals Unit, 175 W Madison Ave, Phoenix, AZ 85003; 602-372-5375

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Gregory D. Hanley Pro Hac Vice

Attorneys for Plaintiff and Proposed Class

THE SUPERIOR COURT FOR THE STATE OF ARIZONA

IN THE ARIZONA TAX COURT

TX2020-000833

RACHEL ROBERTS, individually and on behalf of all others similarly situated who paid the Rental Car Facility charge at Phoenix Sky Harbor Rental Car Center,

Plaintiffs,

v.

CITY OF PHOENIX, a municipal corporation of the State of Arizona,

Defendant.

Case No.

COMPLAINT FOR PERMANENT INJUNCTION AND REFUND OF RENTAL CAR FACILITY CHARGE (MUNICIPAL— PHOENIX CITY CODE § 4-79)

(Assigned to the Hon. Danielle Viola)

I.

1. The Better Roads Amendment: Only Road Uses for Road Funds. In 1952, the people of Arizona overwhelmingly adopted the "Better Roads Amendment" to the Arizona Constitution.

2. This amendment to our constitution—Art. 9, § 14—"insure[d] the expenditure of all revenues derived from road users [on] road uses only," *State of Ariz. Initiative & Referendum Publicity Pamphlet, Proposed Amendment to the Constitution* at 3 (1952), "a purpose so important that the voters made it part of our state's organic law." *Hall v. Elected Officials' Ret. Plan*, 241 Ariz. 33, 57 (2016) (Bolick, J., dissenting) (referring to Art. 29, § 1 (Pension Clause)).

3. Sky Harbor Airport: Rental Car Center Customer Facility Charge. Since 2002, the City of Phoenix has required that all rental car companies operating at the Phoenix Sky Harbor Consolidated Rental Car Center ("Center") must collect a daily customer facility charge ("CFC") from all Sky Harbor Airport customers. Phoenix City Code ("P.C.C.") § 4-79(A). "A violation of the requirements of the" ordinance "shall be deemed a Class 1 misdemeanor." P.C.C. § 4-80. In short, every rental car customer at the Center must—under penalty of criminal law—pay these daily CFCs before receiving the keys to their rental car.

4. The City spends these revenues not on public roads but instead on construction of an extension of the PHX Sky Train® and the Rental Car Center at Sky Harbor Airport.

5. The City's expenditure of CFCs—collected from road users—on the PHX Sky Train® and the Center—non-road uses—violates the Better Roads Amendment, which requires that "moneys derived from fees . . . relating to . . . operation or use of vehicles on the public highways or streets" must be used for "highway and street purposes[.]"

6. Rental car customers at the Center pay over $50 million in CFCs every year. Based on available records, those same customers drive over 225 million miles annually on Arizona's highways and streets.

II.

7. Plaintiff and Members of the Class Paid CFCs. On August 3, 2019, Rachel Roberts rented a motor vehicle at the Center (1805 E. Sky Harbor Circle South).

8. Like all rental car customers at the Center, Ms. Roberts paid the CFC levied under P.C.C. § 4-79. See Exh. A (copy of receipt for payment). In fact, she could not have received the keys to her rental vehicle unless and until she paid the CFC.

9. And, because the rental car companies doing business at the Center must, under P.C.C. § 4-79, "collect a daily customer facility charge ("CFC") of six dollars per transaction day per vehicle from all Sky Harbor Airport customers[,]" the legal incidence of the CFC falls on the rental car customer, Ms. Roberts. Therefore, only she—not her rental car company—has standing to seek refund of the CFC and obtain an injunction to stop its collection. See, e.g., *Karbal v. Arizona Dep't of Revenue*, 215 Ariz. 114 (App. 2007).

10. In her letter to the City of Phoenix dated January 29, 2020, Ms. Roberts notified the City of her claim. On March 19, 2020, the City denied her claim. On behalf of herself, and all those similarly situated, Ms. Roberts thereby complied with the requirements of A.R.S. § 12-821.01. Cf. *Arizona Dep't of Revenue v. Dougherty*, 200 Ariz. 5151, 519 (2001) (approving administrative class action procedure in which a single representative claim satisfying A.R.S. § 42-1118 was used for class purposes); *Kerr v. Killian*, 207 Ariz. 181, 186 (App. 2004) ("[A] class action can be used as a vehicle for bringing and exhausting certain administrative claims.").

11. Defendant City of Phoenix Collects and Must Refund CFCs to Customers. The City owns and operates the Center. Rental car companies lease space at the Center from the City. Every month, all rental car companies doing business at the Center remit to, and the Aviation Department of the City of Phoenix collects, the CFCs paid by every rental car customer at the Center.

12. During each month, before remitting the CFCs to the City, the rental car companies hold the CFC receipts in trust for the City: "All CFC's collected by all vehicle rental companies are and shall be trust funds held by the vehicle rental companies for the

benefit of the City. Vehicle rental companies and their agents hold only a possessory interest in the CFC's, and no legal or equitable interest." P.C.C. § 4-79(B).

13. At the end of every month, every rental car company at the Center must remit all CFCs paid by their customers "to a lockbox location designated by the City[,]" id. at (C), along with a report of collections to the City. See Exh. C (examples of Rental Car Customer Facility Charge Report Forms (February 2011 and October 2013 (redacted))).

14. In this way, every month, the CFCs pass from the customer through the rental car companies and then to the City. The rental car customers pay and the City collects the fee. Under Arizona law, the governmental unit that *collects* must also *refund* an illegal tax to the payors of that tax. *Copper Hills Enter., Ltd. v. Arizona Dep't of Revenue*, 214 Ariz. 386, 391 (App. 2007) ("Generally, of course, once a tax is held invalid under Arizona law, the government must refund the money collected."); *Pittsburgh & Midway Coal Mining Co. v. Arizona Dep't of Revenue*, 161 Ariz. 135, 139 (1989) ("An honorable government would not keep taxes to which it is not entitled[.]"). Accordingly, here, the City of Phoenix stands liable for refund of CFCs to Ms. Roberts (and other similarly situated taxpayers).

III.

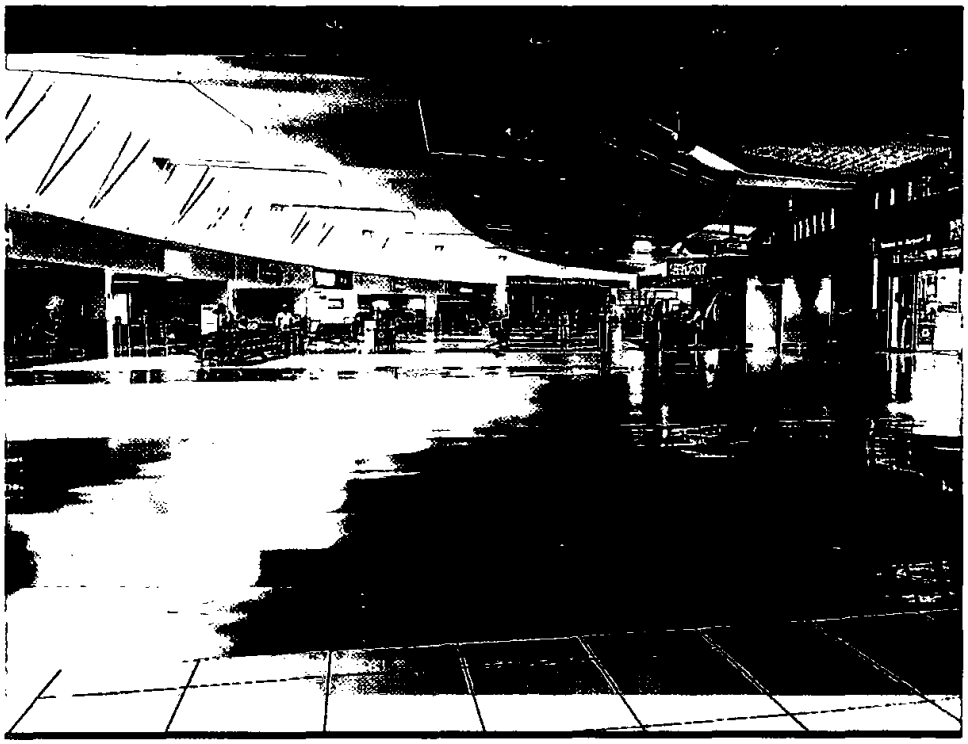
15. History of the Phoenix Rental Car Facility Charge. In July 2001, the Phoenix City Council approved the Customer Facility Charge Ordinance (No. G-4375) (codified at P.C.C. § 4-79). Under the Ordinance, rental car companies located in or who obtain customers at the Center must charge and collect the CFC from their customers. The companies must then remit those receipts to a financial institution designated by the City for use in funding the construction, operation, and maintenance of the Center (and related transportation facilities and equipment).

16. On June 1, 2002, the City imposed the CFC at the rate of $3.50 per transaction day. On September 1, 2003, the City increased the rate to $4.50 and, on January 1, 2009, increased the CFC to $6.00 per transaction day. Today, every rental car customer at the Center pays the CFC at the rate of $6.00 per transaction day to the City.

17. In the fiscal year ending June 30, 2019, rental car customers at the Center paid CFCs to the City in the amount of $51.355 million.

18. The City's Use of the Rental Car Facility Charge Receipts for Construction of the Center and Sky Train Rather Than for Street and Highway Purposes. In 2004, the City issued and sold bonds in the amount of $260 million. With the proceeds of those bonds, the City constructed the Center on a 141-acre site immediately west of Sky Harbor Airport, within the City's 550-acre Phoenix Sky Harbor Center, an industrial development area. In 2006, the Center opened after completion of construction at a cost of $285 million.

19. Today, the Center houses 14 rental car brands owned by 6 rental car companies. At 2.3 million square feet, with a footprint of just over 40 acres, the Center is the largest covered structure in the state of Arizona and one of the largest rental car centers in the United States. The four-story facility has three levels of parking, with 5,651 ready/return garage spaces for rental cars, and 12 cast-in place ramps, one for each rental company, along with vehicle servicing areas. The Center accommodates only Sky Harbor rental car companies, their counters, and vehicles.



20. Atop the three-level parking garage, on the fourth level of the Center, the City built a 125,000 square-foot customer-service lobby (above); counters for each of the 14 rental car agencies; and, spaces for display of local artwork. The City finished the entire fourth level with Terrazzo tile and Venetian plaster.

21. Use of CFCs for Construction of the PHX Sky Train® at Sky Harbor Airport. In October 2016, the Phoenix City Council authorized construction of Stage 2 of the PHX Sky Train®, a 2.5-mile extension of the line from Sky Harbor Airport to the Center.

22. From the outset, the Ordinance has provided that CFCs "shall be used to pay, or reimburse the City, for the costs associated with the RCC consolidated rental car facility which shall be located in Sky Harbor Center, *and for the costs of related transportation facilities* and equipment." P.C.C. § 4-79 (emphasis added).

23. The Phoenix City Council apparently regarded the Sky Train extension as a "related transportation facility" because the line will connect Airport Terminal 3 to the Rental Car Center. In any event, the City Council authorized payment for the Sky Train project with CFCs (and so-called Passenger Facility Charges collected from airline passengers at Sky Harbor Airport).

24. Today, revenue from CFCs pays holders of Series 2019A ($234.5M) CFC Revenue Bonds issued to fund construction of the PHX Sky Train® and Series 2019B ($78.7M) CFC Revenue Bonds issued to refund Series 2004 CFC bonds, which were sold to finance construction of the Center.

25. Thus, every year, from the $50 million or so received in CFCs from rental car customers, the City pays approximately $21 million in principal and interest to holders of outstanding Revenue Bonds.

26. The City directs the balance in CFC revenues to Center operations, debt reserve, and "the costs of related transportation facilities and equipment[,]" P.C.C. § 4-79, such as the Sky Train.

27. Today, according to public records, the City relies on current receipts from CFC collections (CFC Paygo) and proceeds of the Series 2019A CFC Bonds to fund about

$273 million of the $745 million cost to extend the PHX Sky Train® from Airport Terminal 3 to the Center. When completed in 2022, this 2.5 mile-long extension of the PHX Sky Train® will carry rental car customers from airport terminals to the Center.

IV.

28. Under *Saban Rent-a-Car*, the CFCs fall within the Anti-Diversion Provision of Arizona's constitution. The Customer Facility Charge in P.C.C. § 4-79 violates the Better Roads Amendment (also known as the Anti-Diversion Provision) of the Arizona Constitution, Art. 9, § 14, by diverting fees paid by road-users—the CFCs—to non-road uses—construction of the Center and extension of the PHX Sky Train®.

29. A recent opinion from the Arizona Supreme Court prohibits this diversion. In *Saban Rent-a-Car LLC v. Arizona Dep't of Revenue*, 246 Ariz. 89 (2019), plaintiffs challenged the constitutionality of A.R.S. § 5-839, which imposed a surcharge on car rental companies in Maricopa County to fund Arizona Tourism and Sports Authority construction projects. The *Saban* court upheld the tax because A.R.S. § 5-839 resembled the transaction privilege tax on rental car companies that was imposed well before adoption of the Better Roads Amendment.

30. The *Saban* Court held that "fees, excises, or license taxes relating to . . . the . . . operation, or use of vehicles" under Art. 9, § 14 "are ones imposed as a *prerequisite to*, or *triggered by*, the legal operation or use of a vehicle on a public road." 246 Ariz. at ¶ 39 (emphases added). The CFC at issue here falls squarely within this definition. And, unlike the transaction privilege tax upheld in *Saban*—which rental car companies paid based on their revenues—the daily CFC here falls directly on the road users themselves—rental car drivers—who must pay the fee based on the number of days of vehicle use.

31. In this case, road users themselves pay the CFC, not rental car companies. In fact, rental car companies at the Center pay their own transaction privilege taxes to the State of Arizona and City of Phoenix.

32. 'Prerequisite to the legal operation or use of a vehicle.' Turning to the first prong of the *Saban* test, P.C.C. § 4-79(A) requires that "[a]ll on-airport rental car companies

who lease space at Phoenix Sky Harbor International Airport, and **all** off-airport rental car companies who obtain customers through the Sky Harbor Rental Car Center ("RCC"), **shall collect** a daily customer facility charge ("CFC") of six dollars per transaction day per vehicle **from all** Sky Harbor Airport customers (emphases added)." Under the Ordinance, every rental car company must collect—and every customer at the Center must therefore first pay—the CFC before any customer receives the keys to drive—that is, uses—any rental vehicle from the Center. Failure to do so results in the commission of a Class 1 misdemeanor. See P.C.C. § 4-80.

33. Thus, in the formulation adopted by the *Saban* court, by the express terms of P.C.C. § 4-79, the City imposes the CFC as 'a prerequisite to' every rental customer's 'legal operation or use of a vehicle on a public road.' In every case, that is, payment of the CFC is a 'prerequisite to' the rental car customer's legal operation or use of a motor vehicle on Arizona's streets and highways because a rental car company cannot lawfully rent a vehicle to the customer without first collecting the CFC. And, the customer must first pay the CFC (as a 'prerequisite') before he or she may 'use' the vehicle. Otherwise, under P.C.C. § 4-80, the rental company and its customer violate P.C.C. § 4-79—and thereby commit a Class 1 misdemeanor. See P.C.C. § 4-80 (providing that violation of the requirements of Chap. 4, article IV of the City Code "shall be deemed a Class 1 misdemeanor.").

34. 'Triggered by the legal operation or use of a vehicle.' Turning to the second prong of the *Saban* test, every rental car company operating at the Center must collect the CFC from every rental customer. A recent investigation confirms that no rental car company at the Center will waive collection of the CFC even if asked to do so. See Exh. B (excerpt (p. 2) of investigative report by Christina Dougherty (R3 Investigations)).

35. The rental car companies keep only rental vehicles at the Center. As a result, every rental car company at the Center requires every customer first to pay the CFC before the company hands over the keys to every vehicle exiting the Center. Every rental car customer who pays the CFC immediately 'uses' a vehicle on a public road—after all, no one

rents a vehicle for any reason other than to drive it. Thus, payment of the CFC is—in the words of the *Saban* court—'triggered by . . . use of a vehicle on a public road.'

36. The City Spends the CFCs on Non-Road Uses. In 1952, the voter publicity pamphlet for the Better Roads Amendment declared that revenues derived from road users must be used for road purposes. *State of Ariz. Initiative & Referendum Publicity Pamphlet, Proposed Amendment to the Constitution* at 3. Otherwise, "if not used for road purposes, these user taxes become unfair because they are not based on benefits received, ability to pay, or the taxpayer's interest." Id. at 4.

37. Here, the City spends the CFCs for purposes outside the scope of the road uses permitted by the Anti-Diversion Provision of the Arizona constitution: construction and operation of the Center and construction of Stage 2 of the PHX Sky Train® at the airport.

38. The Center consists of a customer service building; parking garage; and, maintenance and storage facilities for each participating rental car company. Currently, the PHX Sky Train® connects the City's light rail system with the Airport's largest parking facility to Terminals 3 and 4, with a walkway to Terminal 2. Neither the Center nor the PHX Sky Train® serve as public streets or highways.

39. Since 1940, voters in over 20 other states—including Nevada, Oregon, Washington, and Colorado—have adopted Anti-Diversion amendments to their own state constitutions.

40. In some of these states, the highest court has examined the unauthorized expenditure of road-user fees. Although our own Supreme Court has not taken up this precise question, in *Rogers v. Lane County*, 307 Or. 534 (1989), the Supreme Court of Oregon considered a closely analogous question: whether the construction of an airport parking lot and a covered walkway from a parking lot to the airport terminal was a permissible highway use under the anti-diversion provision of the Oregon constitution. In that case, the Oregon Supreme Court found that the construction of an airport parking lot and walkway was "an expenditure primarily for the operational convenience of an airport,

rather than for a project or purpose within or adjacent to a highway, road, street or roadside rest area right-of-way that primarily and directly facilitates motorized vehicle travel." 307 Or. at 545. Therefore, under Oregon's similar anti-diversion provision, the proposed expenditure was not authorized by the state constitution. Id. at 545-46.

41. The same is true here. The City's construction of the Center and PHX Sky Train® have been solely for the operational convenience of Sky Harbor Airport and its customers rather than public street and highway purposes. Cf. *Ariz. Att'y Gen. Op. No. 105-003 (R04-011)* (expenditure of HURF monies permitted only if the expenditure is "directly related" to a highway and street purpose).

42. By 2029, the City will have paid over $315 million to bondholders from proceeds of the CFC collections. The City will also have directed at least $250 million in CFC revenues to construction of the PHX Sky Train®. But none of these CFC collections will have been spent for street or highway purposes—exactly the diversion that proponents of the Better Roads Amendment feared.

V.

43. Protective class allegations. Rachel Roberts represents herself and all similarly situated taxpayers. The City, its employees, and their family members are excluded from the Class.

44. Ms. Roberts requests the refund of CFCs on behalf of herself and all other similarly situated persons or entities who paid the CFC during the period January 28, 2018 through the date collection ceases ("Refund Period").

45. This is a protective claim. Many taxing authorities, including the Arizona Department of Revenue, have recognized the operation of a protective claim as a continuing claim and established guidelines for filing protective claims in specific circumstances. See *McNutt v. ADOR*, 196 Ariz. 255 (App. 1998). Here, on behalf of the Class, Ms. Roberts seeks the refund of all CFCs paid both before and after the date of her notice of claim for refund and until the City ceases collection of the CFCs.

46. The size of the Class makes joinder impractical. Phoenix is the third largest rental car market in the United States. During fiscal year 2019, the rental car companies operating at the Center remitted CFCs for over 2 million transactions.

47. Ms. Roberts' claims are typical of the claims of the Class Members; and, all claims are based on the same legal and remedial theories.

48. Common questions of law and fact predominate, including the following:

a. whether the City's use of the CFCs violates Article 9, § 14 of the Arizona Constitution; and,

b. whether Plaintiff and members of the Class are entitled to injunctive relief or refunds and, if so, in what amount.

49. In the prosecution of this action, and in the administration of all matters related to the claims, Ms. Roberts will fairly and adequately protect the interests of all Class Members.

50. Ms. Roberts suffered injuries similar to those suffered by Class Members.

51. She retained counsel experienced in handling class action suits. Neither the named Plaintiff nor Plaintiffs' counsel have any interest that might cause them to refrain from vigorous pursuit of the refund.

52. Ms. Roberts is representative of members of the Class and will, as the representative, fairly and adequately protect the interests of the entire Class.

53. The class action is superior to other available methods of adjudication because it will promote the convenient administration of justice and achieve a fair and efficient adjudication of the controversy given the number of potential class members.

54. The prosecution of separate actions by individual members of the Class would create a risk of:

a. inconsistent or varying adjudications that would confront the City with incompatible standards of conduct; and,

b. adjudications with respect to individual members of the Class that would as a practical matter substantially impair the interests of other members of the Class, who are not parties, because of the doctrine of res judicata.

55. The case would be manageable as a class action because proofs are the same for all members of the Class on all major issues.

56. Amount sought by the Class. In view of the nature of the issues and the expense of litigation, the separate claims of the individual Class Members would be insufficient in amount to support prosecution of separate requests for refund.

57. It is highly probable that the amount that may be recovered by individual Class Members would be large enough in the aggregate in relation to the expense and effort of administering the action to justify a class action because, although individual amounts may not be large, the size of the Class should be sufficient to justify class administration.

58. Based on public reports of the CFCs remitted to the City, the aggregate amount sought by the entire Class for the Refund Period, including interest, exceeds $50 million and will increase during the period of time this case is pending before the Court.

VI.

59. WHEREFORE, Plaintiff Rachel Roberts for herself and the proposed Class requests at least the following legal and equitable relief:

a. Certify this action as a class action, with Rachel Roberts certified as the representative of the Class, and define the Class to include all persons and entities who paid during the Refund Period and all those who will pay the CFC during the pendency of this action;

b. Find and declare that the City's collection and expenditure of the CFC as authorized under P.C.C. § 4-79 violates Art. 9, § 14 of the Arizona Constitution;

c. Order the refund of the CFCs that were collected under P.C.C. § 4-79 during the Refund Period and will be collected during the pendency of this action;

d. Order the City to pay into a common fund for the benefit of Plaintiff and the Class the total amount to which Plaintiff and the Class are entitled;

e. Enjoin the City's continued collection of the CFC, see *Williams v. Superior Court in and for Pima County*, 108 Ariz. 154, 1577 (1972) (this Court has the power to enjoin violations of the Arizona Constitution);

f. Prohibit the City's enforcement of P.C.C. § 4-79 or, in the alternative, compel the City's expenditure of the proceeds of the CFC on street and highway purposes;

g. Under the common-fund doctrine and any other available ground, award Plaintiff and the Class the costs and expenses incurred in this action, including their reasonable attorneys', accountants' and other experts' fees;

h. Award attorneys' fees to Plaintiff, the Class, and their counsel under the private attorney general doctrine even if the Court awards only injunctive or other non-monetary relief rather than retroactive recovery of the refund, see *Walter Ansley et al. v. Banner Health Network* et al., CV-19-0077-PR (3/9/20) at ¶¶ 37-40 (allowing for recovery of attorneys' fees where declaratory and injunctive relief obtained for the class under private attorney general doctrine), including any order to redirect the proceeds of the CFC collections to a street or highway purpose;

i. Award pre-judgment interest on the amount refunded to Plaintiff and the Class at the rate of 10% per annum, see *Arizona State University Board of Regents v. Arizona State Retirement System*, 242 Ariz. 387 (App. 2017); and,

j. Grant any other appropriate relief.

DATED: July 28, 2020.

SHAWN AIKEN, PLLC

By _____

Shawn K. Aiken
5090 North 40th Street, Suite 207
Phoenix, Arizona 85018
and
Gregory D. Hanley (pro hac vice)
KICKHAM HANLEY PLLC
300 Balmoral Centre
32121 Woodward Avenue
Royal Oak, Michigan 48073
Attorneys for Plaintiff and the Class

EXHIBIT A

THRIFTY CAR RENTAL
Phone: 800-334-1705
Web: www.thrifty.com

Thrifty CAR RENTAL

Rental Agreement No:	965899222
Invoice Date:	08/07/2019
Document:	969004222851

REPRINT

Renter: RACHEL ROBERTS
Account No.: **********6113 VIS

Direct All Inquiries To:
THRIFTY CAR RENTAL
PO BOX 35250
TULSA, OK 74153-1167

TAX Id: 73-1389882

RACHEL ROBERTS
654 N
NORTH, CO 92251

RENTAL REFERENCE

Rental Agreement No: 965899222
Reservation ID: J0893834261
Frequent Traveler: WN00020558830865
Special Bill Info: XXGEICO 500.00

RENTAL DETAILS

Rate Plan: IN: RXHD3 OUT: RXHD3
Rented On: 08/03/2019 08:49 LOC# 073130
PHOENIX AP, AZ
Returned On: 08/07/2019 10:08 LOC# 073130
PHOENIX AP, AZ
Car Description: COROLLA 8HCE238
Veh. No.: 2485316
CAR CLASS-Charged: B MILEAGE In: 11,278
Rented: C Out: 10,669
Reserved: B Driven: 609

MISCELLANEOUS INFORMATION

CC AUTH: 02996D DATE: 2019/08/03 AMT: 370.00
CC AUTH: 02996D DATE: 2019/08/03 AMT: 170.00

RENTAL CHARGES

DAYS	4 @	21.57	86.28
EXTRA HRS	1 @	3.67	3.67
SUBTOTAL			89.95
CONCESSION FEE RECOVERY			11.33
FF SURCHARGE			6.00
O & M RECOVERY FEE			4.56
AIRPORT FACILITIES FEE			30.00
ENERGY SURCHARGE			1.49
ROAD TAX			4.66
TAX		15.60%	22.36
AMOUNT DUE			170.35 USD

THANK YOU FOR RENTING FROM THRIFTY

ALL CHARGES HAVE BEEN BILLED TO YOUR ACCOUNT.

Rental Agreement No:	965899222
Invoice Date:	08/07/2019
Document:	969004222851

Direct All Inquiries To:
THRIFTY CAR RENTAL
PO BOX 35250
TULSA, OK 74153-1167
UNITED STATES

Renter: RACHEL ROBERTS
Account No.: **********6113 VIS

Phone: 800-334-1705
Web: www.thrifty.com

AMOUNT BILLED TO ACCOUNT: 170.35 USD

GHMGP RES2955 0105810

EXHIBIT C

10 19 2013 10:38 FAX 602 402 6894 [illegible]

[illegible]roperties 8056197779 p 6

City of Phoenix
AVIATION DEPARTMENT

RENTAL CAR CUSTOMER FACILITY CHARGE REPORT FORM

COMPANY NAME: Phoenix Airport Rent-A-Car

COMPANY ADDRESS: 3333 E. Washington St Phoenix

CONTACT PERSON: (Please Print)

TELPHONE:

E-MAIL ADDRESS:

REQUIRED MONTHLY DATA - MUST FILL IN ALL BLANKS

MONTH / YEAR WHEN CFC WAS COLLECTED	Sept 2013
NUMBER OF TRANSACTIONS SUBJECT TO CFC	52
NUMBER OF TRANSACTION DAYS SUBJECT TO CFC	204
CFC OWED TO THE CITY OF PHOENIX (Multiply transaction days subject to CFC x $6.00)	1224.00 (Increase Check)

I certify this is a true and accurate statement of CFC collections in accordance with Ordinance Number G-4418 as amended by Ordinance Number S-4530

C Hardwell Signature — preparer Title — Phone — 10/19/13 Date

BACKGROUND

The City of Phoenix Ordinance Number G-4418, as amended by Ordinance Number S-4418, requires all on-airport vehicle rental companies who lease terminal space at Phoenix Sky Harbor International Airport and all off-Airport vehicle rental companies who obtain customers at the Airport to collect a daily customer facility charge (CFC) of Six Dollars ($6.00) per transaction day per vehicle from all Airport customers for all rental car contracts dated on or after September 1, 2002.

A transaction day is defined as twenty-five or fewer hours for the first transaction day and every 24 hours for each transaction day thereafter. Customers who do not arrive at the Airport by an airline serving the Airport as evidenced by the customer's rental contract and an Arizona driver's license that both reference a personal residence within one of the Maricopa County zip codes that fall within a 30 mile radius of the Airport are exempt from paying the CFC. This "Non-Airport Customer Exemption" terminates on the date of beneficial occupancy of the planned Consolidated Rental Car Facility.

INSTRUCTIONS

- The charge must be identified on the customer's remittance advice as either "CFC" or "Facility Charge."
- CFC collections for a month must be remitted to the City of Phoenix by no later than the last day of the month following the collection month (the "Due Date").
- The car rental company must send a separate check for CFC collections along with a completed and signed copy of this Customer Facility Charge Report Form.
- The check must be made payable to the City of Phoenix and sent to the following address:

  Aviation Department
  City of Phoenix
  P.O. Box 29113
  Phoenix, AZ 85038-9113

- Delinquent CFC collections and activity data received 10 days after the Due Date will be subject to an 18% interest charge as required by Phoenix City Code Section 4-7.

[illegible] Form 2004-04-07 DOC (effective 07/01/13)

[illegible] PAGE 01/01 SHELL LLC 8059295368 08:38 07/15/2014

009

RENTAL CAR CUSTOMER FACILITY CHARGE REPORT FORM

(PLEASE PRINT)

COMPANY NAME: Airport Rent A Car

ADDRESS: 2325 Washington St
Phoenix AZ 85034

CONTACT PERSON:

TELEPHONE:

EMAIL:

REQUIRED MONTHLY DATA

MONTH/YEAR WHEN CFC WAS COLLECTED:	Jan 11
NUMBER OF TRANSACTIONS DURING MONTH:	131
NUMBER OF TRANSACTION DAYS DURING MONTH:	241
CFC AMOUNT OWED TO THE CITY OF PHOENIX:	1446.00 (MULTIPLY TRANSACTION DAYS x 6)

I certify this is a true and accurate statement of CFC collections in accordance with Section 4-79 of the Municipal Code.

SIGNATURE	TITLE	PHONE	DATE
	Owner		2/19/11

BACKGROUND

The City of Phoenix Ordinance No. G-4418 requires all on-airport vehicle rental companies who lease terminal space at Phoenix Sky Harbor International Airport (Airport) and all off-Airport vehicle rental companies who obtain customers at the Airport to collect a daily customer facility charge (CFC) of six dollars per transaction day per vehicle from all Airport customers. All rental car contracts dated on or after June, 1, 2002 are subject to the CFC.

A transaction day is defined as a vehicle rented for twenty-five or fewer hours for the first transaction day, and every 24 hours for each transaction day thereafter.

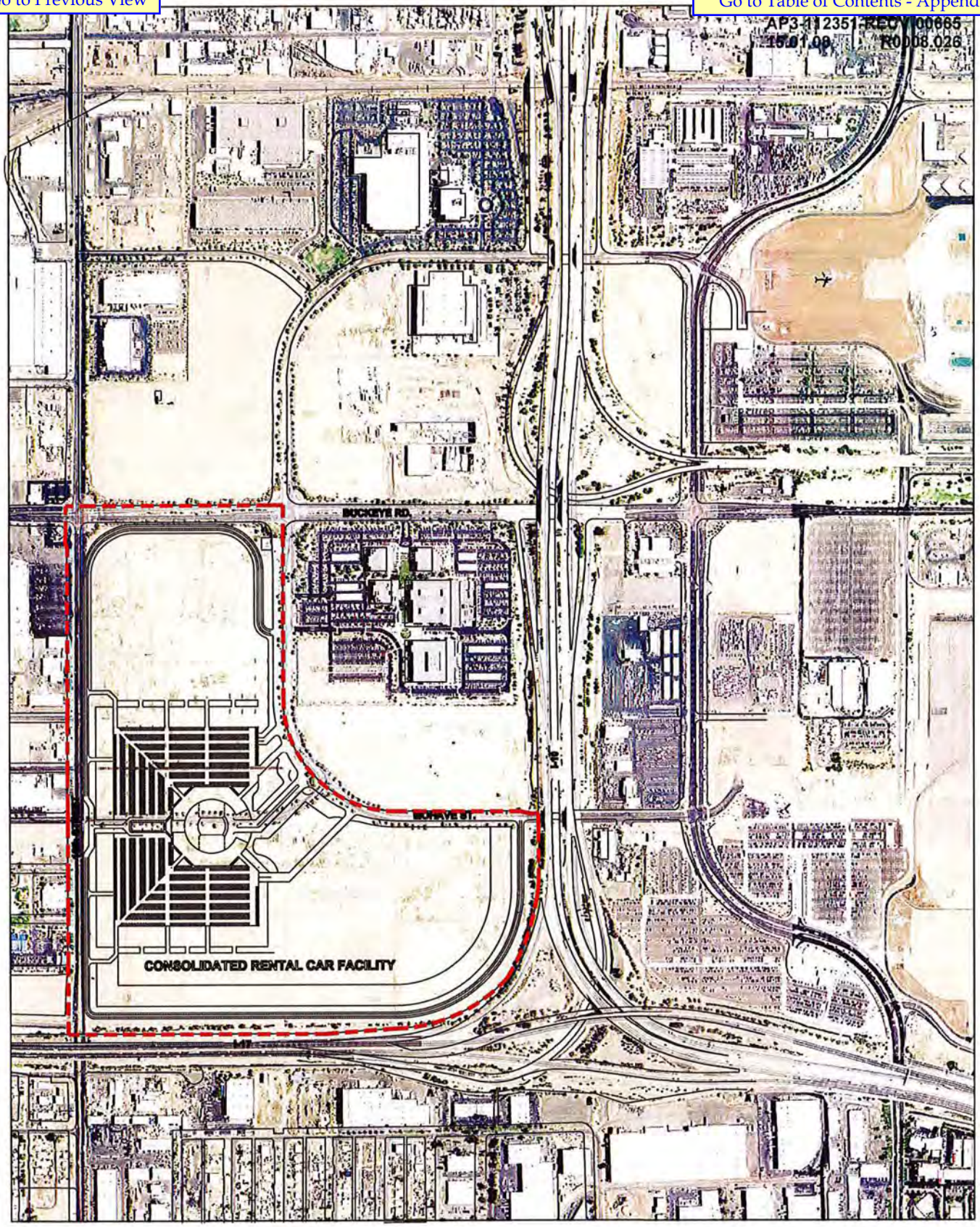
INSTRUCTIONS*

1. The charge must be identified on the customer's invoice as either CFC or "Customer Facility Charge"
2. CFC Collections for a month must be remitted to the City of Phoenix by no later than the last day of the month following the collection month (the "Due Date")
3. The car rental company must send a separate check for CFC collections along with a completed and signed copy of the Customer Facility Charge Report Form.
4. The check must be made payable to the City of Phoenix and sent to the following address:

Aviation Department
City of Phoenix
PO Box 78138
Phoenix, AZ 85062-8138

*Failure to follow these instructions can result in the addition of delinquent fees to your account.

Exhibit B



Environmental Assessment
Consolidated Rental Car Facility

Prepared By DMJM Aviation / HDR
July, 2003

Phoenix Sky Harbor International Airport

Environmental Assessment

Consolidated Rental Car Facility

Prepared for:
City of Phoenix Aviation Department

This environmental assessment becomes a Federal document when evaluated and signed by the responsible FAA official.

Responsible FAA Official

Date

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Appendices

1.0 PURPOSE AND NEED

1.1 INTRODUCTION

This Environmental Assessment (EA) presents a discussion of the potential environmental effects associated with the construction and operation of the proposed Consolidated Rental Car Facility (CRCF) at Phoenix Sky Harbor International Airport. The EA also presents a discussion of the alternatives considered during the planning process. The proposed action includes the construction of the CRCF, and on-site and off-site civil and roadway improvements associated with the CRCF, as described herein. Note that the project is described throughout the EA as either the CRCF or the Rental Car Center (RCC). These two terms refer to the same project that is the subject of this EA. Appendix 1 provides the list of preparers of the EA. Appendix 2 provides a bibliography of references for the EA. Appendices 3 through 9 include documentation of coordination with applicable regulatory agencies and provide calculations for the construction air quality analysis. This document has been prepared in accordance with the requirements of the National Environmental Policy Act (NEPA) and Federal Aviation Administration Order 5050.4A, *Airport Environmental Handbook*.

1.2 PURPOSE AND NEED

The CRCF is proposed as the preferred facility to accommodate existing and projected demand for rental car facilities at Phoenix Sky Harbor International Airport. During daily peak travel periods, the existing facilities available for on-Airport rental car patrons are insufficient to accommodate demand at acceptable levels of service. Future demand will result in a continued reduction in rental car facility level of service. Demand is projected to increase at an average annual growth rate of 2.4% from 1,771,300 transactions in 1999 to 2,242,600 transactions in 2009 (*Consolidated Rental Car Facility Planning Phase I Project Summary*, Landrum and Brown, May 2, 2000). The City of Phoenix Aviation Department and the rental car companies serving the Airport evaluated alternative methods to improve service and develop facilities that would meet existing and projected rental car demand. The result of this evaluation was the recommendation to develop a CRCF in the southwest portion of the Sky Harbor Center development area, west of Interstate 10 (I-10) between Buckeye Road and I-17 (Figure 1). The CRCF would increase the efficiency of Airport rental car services by consolidating all critical functions at one location.

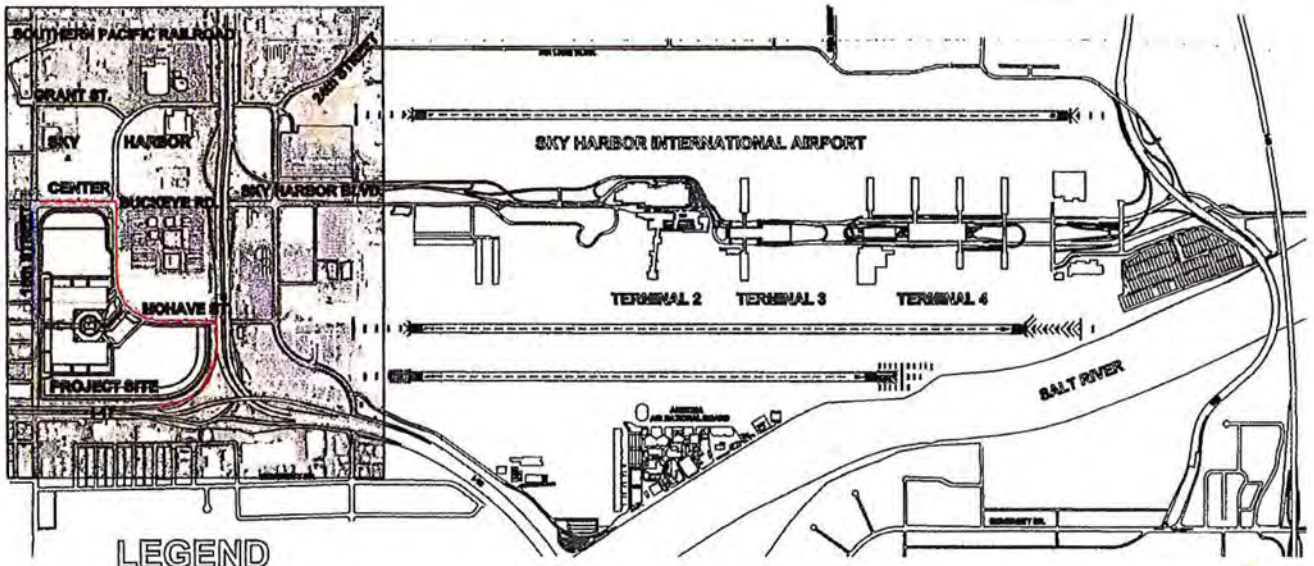
1.3 PROJECT DESCRIPTION

1.3.1 General Features

The Department of Aviation is proposing to construct the CRCF on a mostly vacant 140-acre site owned by the City of Phoenix and located just west of Sky Harbor International Airport (see Figure 1). The site is bordered by Buckeye Road on the north, 18th/Mohave Streets (Sky Harbor Circle South) and I-10 on the east, I-17 on the south, and 16th Street on the west (see Figure 2)

VICINITY MAP

FIGURE 1



PROJECT LOCATION

FIGURE 2

Phoenix Sky Harbor International Airport

DMJM Aviation HDR

DATE: 07/14/03

The only existing structure on the project site is a fire station building located at the southwest corner of Buckeye Road and 18th Street. Although not directly part of the proposed action, the fire station building would be demolished to accommodate off-site roadway improvements for current traffic and for Sky Harbor Center development, including the CRCF. Primary access to the CRCF would be via 18th Street/Mohave Street (Sky Harbor Circle South) and/or Buckeye Road, which provide access to 16th Street, 24th Street, and the interstate highway system.

The City of Phoenix Aviation Department proposes to construct the CRCF, which would accommodate up to 15 rental car companies and up to 7,400 parking spaces. An overflow lot consisting of approximately 11,000 spaces would also provide additional storage, if needed. If future demand and conditions warrant, the facilities could be expanded as a separate project within the proposed site. Any further expansion would be subject to Federal and local requirements. It is anticipated that in excess of 99% of the total rental car activity would be relocated to the CRCF. Upon CRCF completion at Sky Harbor Center, there would be no rental car operations on the Airport itself.

The CRCF would include the following major features:

1) Customer service building of approximately 150,000 square feet;
2) Multi-level parking structure to accommodate rental ready/return vehicles;
3) Administrative buildings on the service sites of approximately 86,000 square feet;
4) Maintenance buildings on the service sites of about 45,500 square feet;
5) Vehicle storage and service areas (including 15 fuel storage tanks) for participating rental car companies; and
6) Related infrastructure including roadways, grading, drainage, signage, and landscaping.

Table 1: CRCF Site Land Allocation Summary

Facility or Land Use	Area (acres)
Customer Service Building/Parking Structure (includes circulation/bus plaza, visitor parking, rental ready and return parking)	50
Vehicle Storage and Service Areas	65
Service Loop Road, Landscape and Building Setback Areas	25
Total Site Area within Property Line	140

The CRCF would include a perimeter service loop road to accommodate the on-site circulation of rental cars between the Customer Service Building/Parking Structure and the vehicle storage and service areas to be operated by the rental car companies. The service loop road precludes the need to use local off-site streets for the movement of rental cars and service vehicles between activity areas on the CRCF site.

Rental car customers would access the CRCF site from 18th/Mohave Streets via access drives and directly enter the parking garage level via ramps.

The City of Phoenix Aviation Department is proposing to develop a future Automated People Mover (APM) system connecting the CRCF to airport terminal facilities. Without the APM, a single, common shuttle bus system operated by the Aviation Department would transport rental car customers between the terminals and the CRCF. According to the May 2002 Consolidated Rental Car Facility, Facility Planning Phase 1 Project Summary, prepared by Landrum and Brown on behalf of the Aviation Department, a total of 56 buses would be required to serve the facility's need daily. By comparison, a 2002 survey showed that the cumulative number of vehicles being operated by all of the major rental car companies serving the Airport was 88 buses (some of the smaller companies were not included in the survey). The CRCF bus system would also require use of alternative fuels, whereas some of the buses/shuttles currently being operated by the rental car companies do not use such fuels.

The conceptual building plan consists of an approximately 150,000 square-foot Customer Service Building and a multi-level parking structure with about 2.4 million square-feet of parking to accommodate up to 7,400 cars in ready/return spaces, circulation and visitor parking. The Customer Service Building would be surrounded on three sides by the parking structure. The main level of the building would contain the rental car company rental space. Future expansion of facilities could be accommodated on site, if warranted.

Table 2 summarizes the principal features and amenities of the Customer Service Building, vehicle service centers, and parking structure.

Table 2: Major Features of the CRCF

Customer Service Building	
• Lobbies, plazas (bus, counter, and APM) • Rental car retail counters • Customer queuing • Customer seating • Back offices • Support offices (reservations, accounting, conferencing) • Office support areas (workrooms, files, storage, etc.) • Customer amenities (retail, business center, etc.)	• Employee amenities (office break rooms, shuttle break rooms, vending, etc.) • Core (elevators, escalators, stairs, restrooms, etc.) • HVAC/electrical/data/fire/trash support • Dock/security managers • Guard booths • Visitor/delivery/bus parking • Landscaping
Vehicle Service Centers	
• Fuel/wash/vacuum • Vehicle servicing (bays, equipment, storage, etc.) • Vehicle support offices/reception • Support offices (reservations, accounting, conferencing) • Employee amenities (break rooms, lockers, training, etc.)	• Office support areas (workrooms, files, storage, etc.) • Core (elevators, stairs, restrooms, etc.) • HVAC/electrical/data/fire/trash support • Secure car storage • Employee/delivery parking • Landscaping
Parking Structure	
• Multi-level parking structure to accommodate rental car pick-up and return activities with ready/return parking, internal vehicular circulation, exit kiosks, ramps, and an external circulation roadway.	

1.3.2 Civil/Roadway Improvements (On-Site)

The on-site roadway improvements are planned to include a perimeter service loop road, as shown on Figure 3. The roadway would have a travel lane in each direction with a center left-turn lane. The on-site roadway network would provide access to the

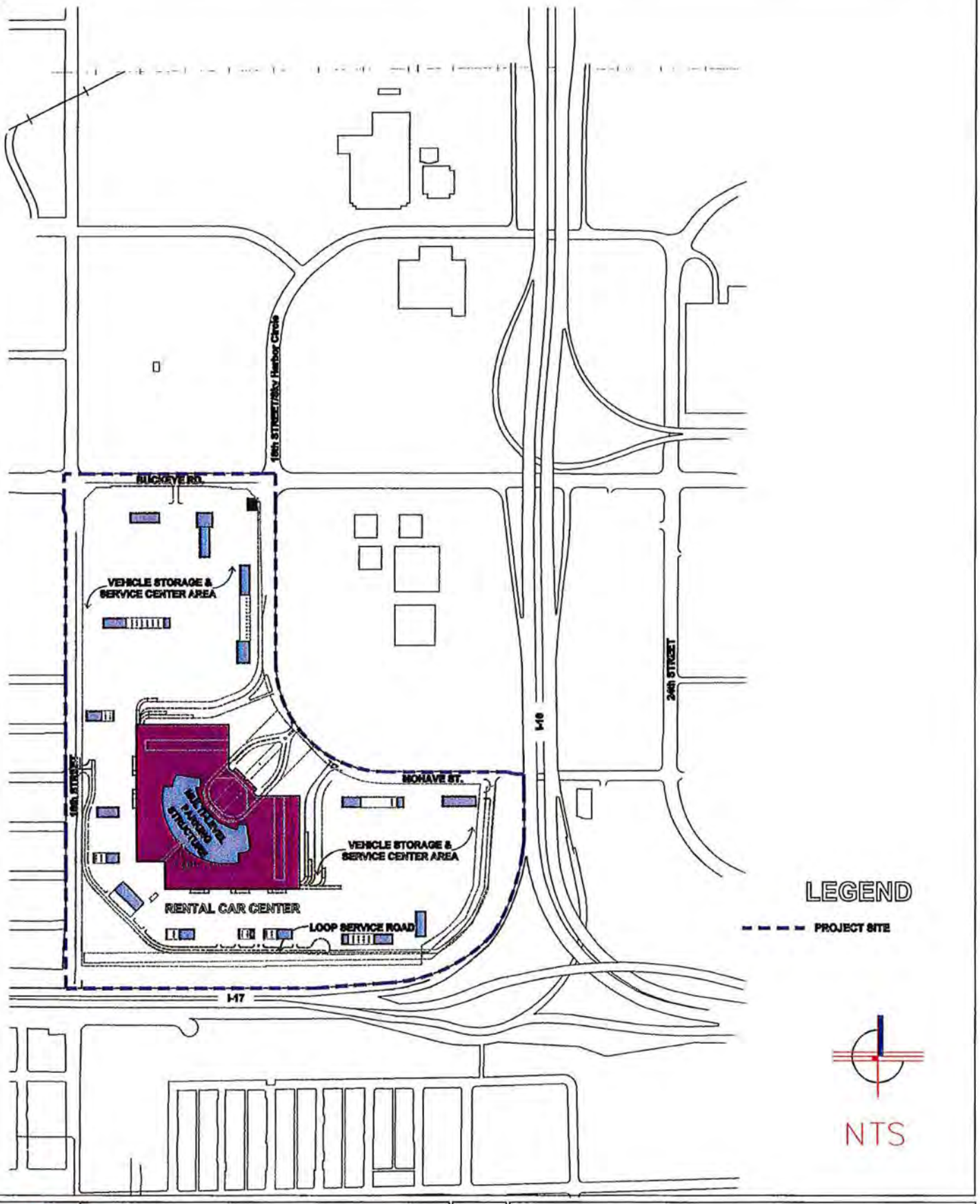
all vehicle service centers. The roadway improvements would be designed to optimize access to the Customer Service Building and the parking structure. Landscaping would be provided in a manner consistent with the Phoenix Sky Harbor Center Design Standards Manual and City of Phoenix requirements.

Figure 4 depicts one of the conceptual storm water drainage systems that could be constructed to provide on-site storm water detention for the project. The system would utilize surface grading and underground detention with outfall piping to the adjacent storm drain system. Wet-wells would be installed to percolate detained water into the ground within 36 hours. An alternative system being considered is the use of detention ponds. Implementation of either drainage system would minimize impacts. Off-site drainage improvements would be coordinated with the City of Phoenix Street Transportation Department and could include the metering of the outlet into the storm drain system located within the 16th Street right-of-way. (See Section 3.6, Water Quality.)

1.3.3 Civil/Roadway Improvements (Off-Site)

Figure 5 shows the off-site roadway improvements that may be required as part of the project. These facilities have been planned to accommodate the additional vehicular traffic on roadways in the vicinity of the CRCF that would be associated with the project. Although the project would not generate new trips to or from the Airport area, there would be a relocation of traffic to street segments and intersections in the vicinity of the CRCF. The following street improvements are planned as elements of the project:

- Construct a third northbound lane on 16th Street along the west side of the CRCF site from I-17 to Buckeye Road (Improvement A on Figure 5). This improvement would be constructed to accommodate traffic from the planned Sky Harbor Center and would not be required to accommodate traffic due to the CRCF.
- Construct a second southbound lane on 18th Street (a.k.a. Sky Harbor Circle) from Buckeye Road south past the location of the fire station building to the point where the two existing southbound lanes continue to 24th Street (Improvement B on Figure 5). Although not directly a part of the proposed project, the relocation would be necessary to accommodate off-site roadway improvements for current traffic and for Sky Harbor Center development, including the CRCF.
- Construct an extension of the existing eastbound right turn lane at Buckeye Road from 16th to 18th Streets (Improvement C on Figure 5).
- Construct right turn lanes on 18th/Mohave Street at the CRCF driveways (Improvement D on Figure 5).
- Construct dual left turn lanes northbound on 24th Street and Sky Harbor Circle South (Improvement E on Figure 5). Further investigation would be required prior to CRCF construction to determine whether this improvement would actually be required for the proposed project.
- Provide directional signage that will conform to the Manual on Uniform Traffic Control Devices and the City of Phoenix Street Transportation Department Guidelines. Augment freeway signage along I-17 and I-10.



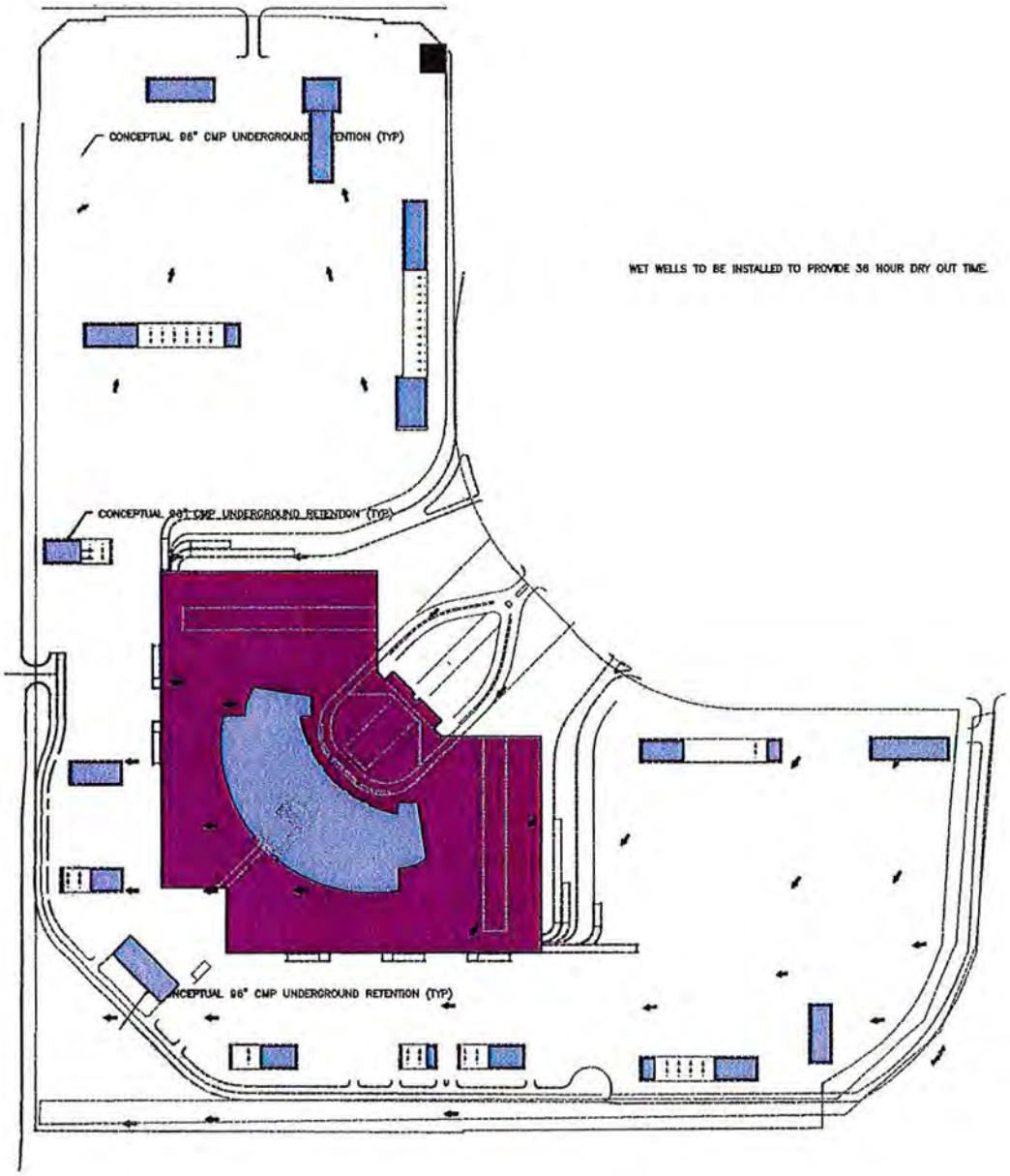
Phoenix Sky Harbor International Airport

DMJM Aviation
HDR

ON-SITE CRCF IMPROVEMENTS

DATE: 07/14/03

FIGURE 3



Phoenix Sky Harbor International Airport

DMJM Aviation HDR

CONCEPTUAL DRAINAGE PLAN

DATE: 07/14/03

FIGURE 4

OFF-SITE ROADWAY IMPROVEMENTS:

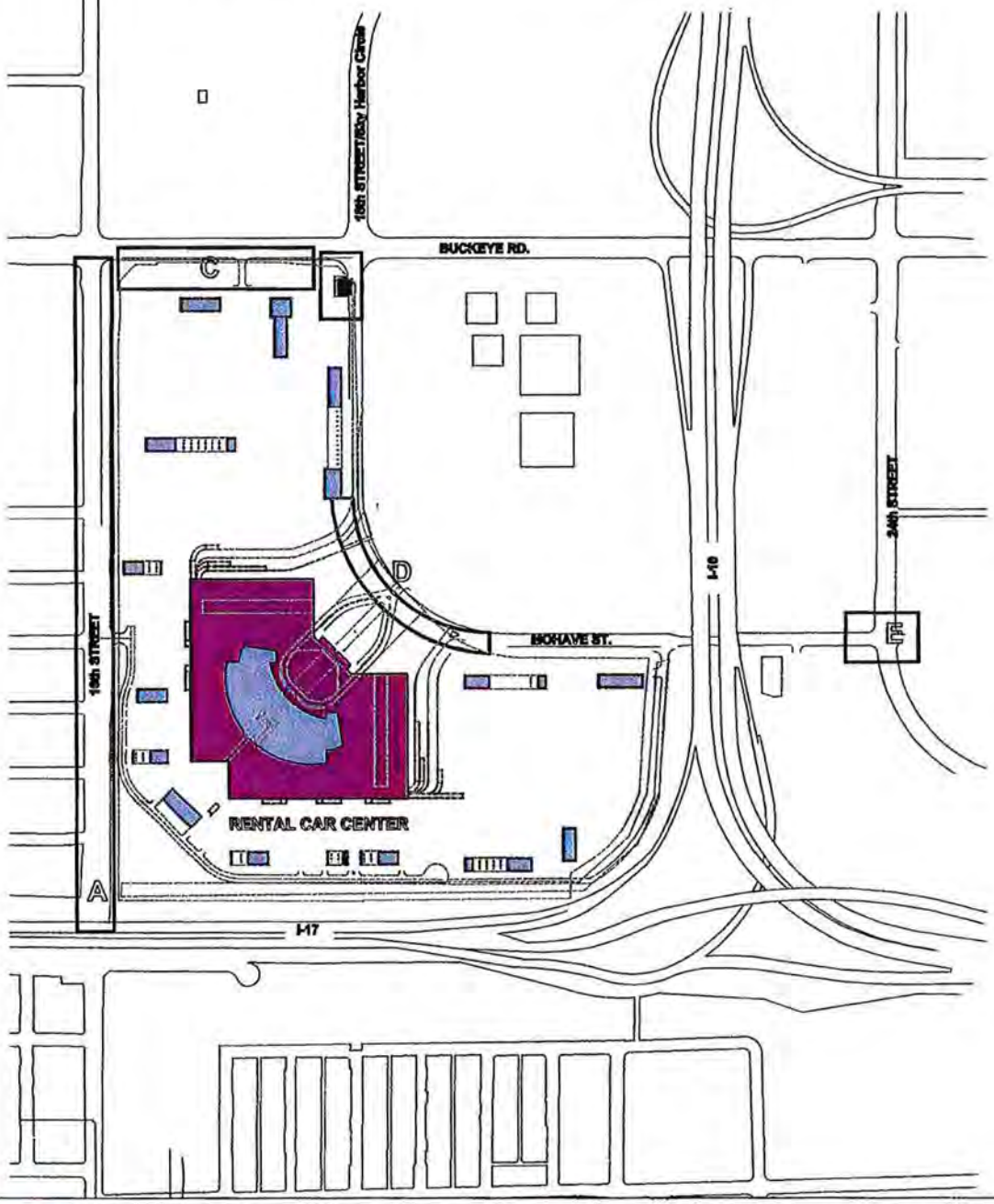
A. COSTRUCT A THIRD NORTHBOUND LANE ON 16TH STREET FROM I-17 TO BUCKEYE ROAD

B. CONSTRUCT SECOND SOUTHBOUND LANE ON 18TH STREET/SKY HARBOR CIRCLE FROM BUCKEYE ROAD SOUTH TO EXISTING SOUTHBOUND LANES

C. CONSTRUCT EASTBOUND RIGHT TURN LANE AT BUCKEYE ROAD FROM 16TH TO 18TH STREET

D. CONSTRUCT RIGHT TURN LANES ON 18TH/MOHAVE STREET AT CRCF DRIVEWAY

E. CONSTRUCT DUAL LEFT TURN LANE NORTHBOUND ON 24TH STREET SKY HARBOR CIRCLE SOUTH



NTS

Phoenix Sky Harbor International Airport

DMJM Aviation HDR

OFF-SITE IMPROVEMENTS

DATE: 07/14/03

FIGURE 5

All roadway improvements as proposed have been coordinated with the City of Phoenix Street Transportation Department and the Arizona Department of Transportation. The off-site roadway improvements have been planned to minimize and prevent excess traffic from the CRCF from passing through adjacent neighborhoods. The Aviation Department would continue to coordinate with the state and city agencies as design and construction progresses.

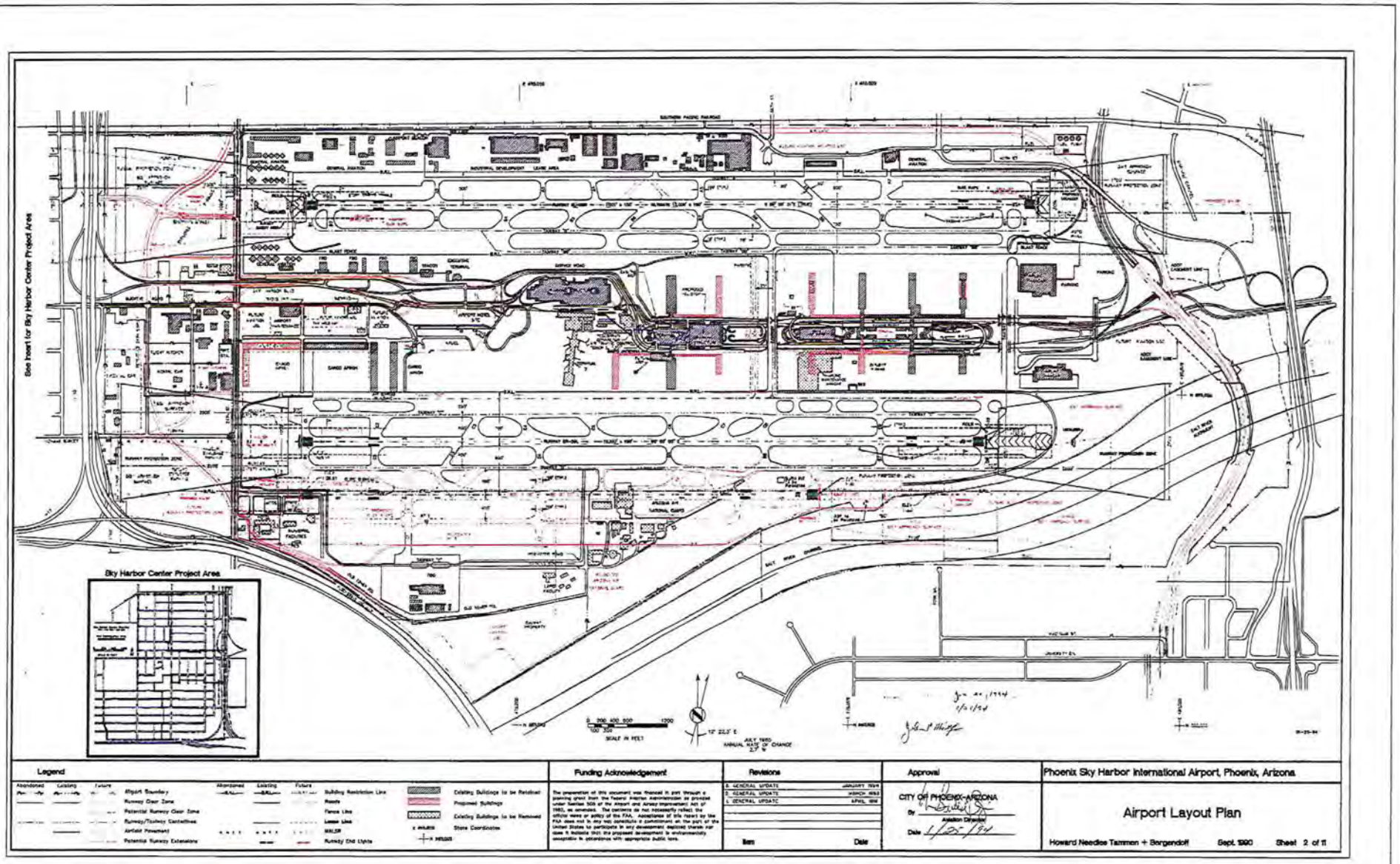
1.4 RELATION TO AIRPORT LAYOUT PLAN

The proposed CRCF project is located within the Sky Harbor Center Project Area. The Sky Harbor Center Project Area was incorporated into the 1994 Sky Harbor International Airport Layout Plan, as shown in see Figure 6. The 2001 Airport Layout Plan, as shown in Figure 7, depicts a portion of Sky Harbor Center Project Area being dedicated for use by the CRCF. FAA conditionally approved the Airport Layout Plan on May 9, 2001.

1.5 RELATION TO AIRPORT DEMAND AND OTHER PLANNED PROJECTS

As previously noted, the CRCF is needed to accommodate existing and projected demand for rental car activities that cannot be accommodated at the appropriate levels of service with the currently available on-Airport rental car facilities. The number of passengers and aircraft operations served at the Airport would not be affected by the implementation of the project. However, as rental car usage increases over time, the quality and level of service for rental car patrons would deteriorate without construction of the CRCF.

Since 1989, the Aviation Department and the City of Phoenix Fire Department have agreed to relocate the fire station facility located on the site at the southwest corner of Buckeye Road and 18th Street and demolish the building to accommodate the Sky Harbor Center development as needed. In a memo dated November 14, 1989, (see Appendix 3), Fire Chief Alan V. Brunacini stated, "If the interests of Sky Harbor Center can best be served by selling or developing the property being reserved for the fire station, the Fire Department will certainly not object." In a meeting between various city agencies on March 13, 2002, the Community and Economic Development Department indicated that the intersection improvements are needed as soon as possible, regardless of the construction of the CRCF, due to current traffic and development in the Sky Harbor Center. The Aviation Department further indicated that the intersection improvements would be needed prior to opening of the CRCF, which would require relocation of the fire station. To ensure that the relocation and demolition are completed prior to construction of the CRCF, the Aviation Department and the Fire Department would enter into a Memorandum of Agreement stating that the Aviation Department would initially pay for the relocation costs with reimbursement from the Fire Department in their current or future bond programs. The site for relocation of the fire station is yet to be determined.



Phoenix Sky Harbor International Airport

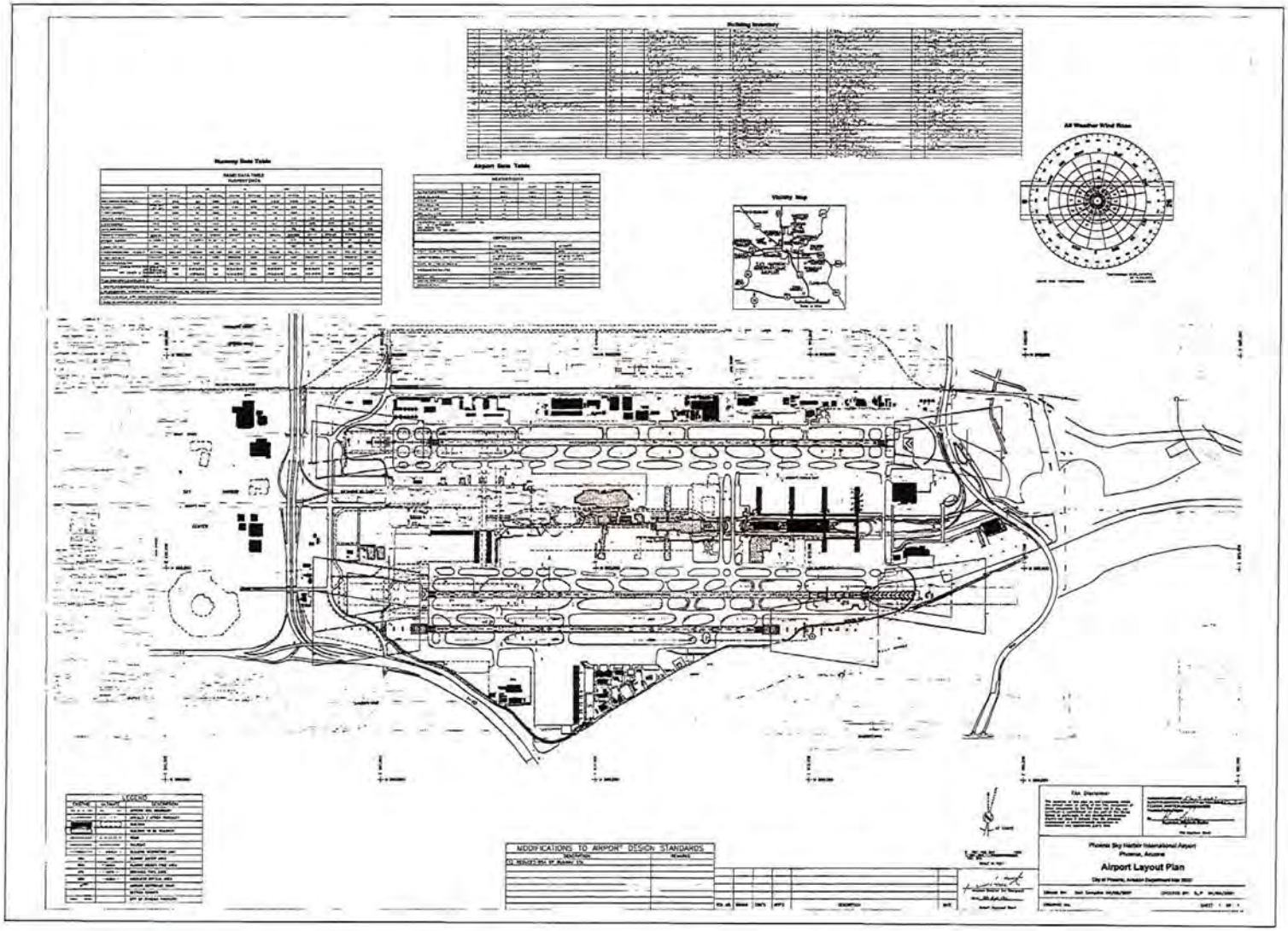
DMJM Aviation HDR

Environmental Assessment
Consolidated Rental Car Facility

1994 Approved ALP

DATE: 07/14/03

Figure 6



Phoenix Sky Harbor International Airport

Environmental Assessment
Consolidated Rental Car Facility

2001 ALP

DATE: 07/14/03

Figure 7

1.6 INDEPENDENT UTILITY

The proposed action as presented and assessed in this EA has independent utility from all other approved or planned actions that would be undertaken by the Aviation Department in the foreseeable future. The determination of independent utility can be made based on the answers to four basic questions: 1) would the project operate as proposed without the need for additional actions; 2) would the project necessitate the implementation of any other actions, 3) is the need for the project the result of the effects of other proposed projects; and, 4) does the project preclude other planned or programmed projects?

The facility would operate independently, with service provided to and from the facility via a common bus system. Roadway access improvements to the site are included as part of the proposed action as described in the project description. As described in the previous section, although provisions would be made for the potential extension of the APM to the CRCF, the facility would be designed such that the bus system could be used indefinitely. Therefore, the CRCF would operate independently without the need for any other actions beyond those presented in the project description and would not necessitate the implementation of any other action.

Congestion of Airport roadways, parking areas, and curbsides has been an on-going concern of the Airport. Rental car companies and their associated activities are accommodated by various methods at the Airport. Some of the rental car companies maintain ready-return facilities in the parking garages and other parking facilities within the Airport terminal complex, while others maintain single locations either on- or off-Airport, requiring each company to operate individual shuttle operations to serve patrons. The rental car activities on their own place high demand on the terminal roadways, parking areas, and curbsides and need to be addressed, regardless of any other development at the Airport. The Aviation Department initiated a study in 1998 to identify the best means for addressing the concerns related to rental car activity. The CRCF was identified through that study as the optimal means for accommodating rental car demand and the Aviation Department has worked with the incumbent rental car companies to identify the preferred site for the facility. Thus the CRCF project is not derived from any other projects at the Airport, but solely from the existing need to accommodate rental car companies and patrons in a more efficient manner, by removing the significant strain on the Airport terminal roadway, parking, and curbside facilities.

The CRCF would be constructed on City of Phoenix property that has been designated for Airport-related uses. The specific site was selected by the Aviation Department working closely with the rental car companies to identify the best location for the facility and is not proposed for a site that was planned to accommodate any other activity or facility.

1.7 RELATIONSHIP TO PROPOSED AUTOMATED PEOPLE MOVER

The Aviation Department has undertaken planning for the future development of an automated people mover (APM) system to transport Airport patrons and employees

between various passenger service facilities, potentially including the CRCF. Site planning for the CRCF recognizes the potential for an APM trackway and station platform and has provided appropriate locations to accommodate the future APM. The construction of the APM is not included as a part of the CRCF project. However, the CRCF would be designed to accommodate future construction of the APM without disruption to activities at the CRCF. Upon construction of the CRCF, passenger transportation to the CRCF would be provided by buses. The CRCF and associated roadway access facilities have been planned such that transportation between the facility and the passenger terminals could continue to be provided indefinitely via the proposed bus system to be operated by the City of Phoenix Aviation Department. Therefore, while the construction and operation of the CRCF is not dependent upon, nor would its operation require the development of the APM, it would be designed to accommodate future APM development.

1.8 REQUESTED FEDERAL ACTION

The City of Phoenix Aviation Department proposes the following:

- Clear 140 acres of land owned by the City of Phoenix to accommodate the CRCF.
- Lend funds to the City of Phoenix Fire Department to relocate the fire station facility and demolish the building located at the southwest corner of Buckeye Road and 18th Street. Although not directly a part of the proposed project, the relocation would be necessary to accommodate off-site roadway improvements for current traffic and for Sky Harbor Center development, including the CRCF.
- Construct a 150,000 square-foot Customer Service Building facilities to accommodate up to 15 rental car companies.
- Construct a multi-level parking structure to accommodate approximately 7,400 spaces.
- Construct vehicle service/storage centers consisting of about 45,500 square feet of administrative buildings and about 86,000 square feet of maintenance buildings for the rental car companies.
- Construct on-site and off-site roadway and other civil improvements.

These combined elements are referred to herein as the proposed action. The requested federal action is conditional approval of the sponsor's Airport Layout Plan. Construction activities are planned to begin in September 2003 and will last approximately 27 months.

2.0 ALTERNATIVES

2.1 INTRODUCTION

This section describes the proposed action and alternatives for construction of a consolidated rental car facility (CRCF) at Phoenix Sky Harbor International Airport. During peak travel periods (from 9:00 a.m. to 2:00 p.m. and 8:00 p.m. to 11:00 p.m.), the existing facilities available for on-Airport rental car patrons are insufficient to accommodate demand at the appropriate levels of service. Car rental companies have been forced to move their facilities off-site and bus their passengers to and from the terminals, which has caused considerable congestion on the roadways and curbs at the Airport.

2.1.1 Identification of Alternatives

Two alternatives were identified to meet the demand for Airport user rental car needs: an alternative that would construct the CRCF, and a no action alternative that would leave the Airport rental car facilities in their current condition. The Airport determined that in order to meet the significant growth of the car rental industry and the public parking demand in the terminal parking structures, the new CRCF should be constructed.

2.1.2 Alternative Sites Eliminated from Further Consideration

The City of Phoenix identified ten sites as possible locations for the new CRCF based on the facility requirements to meet peak parking demand at the Airport through the year 2009. Seven of these sites (see Figure 8) were not analyzed in further detail because they did not meet the size, location and fundamental requirements of the CRCF. Table 3 lists the seven sites that were considered but not considered for further analysis.

2.2 NO ACTION ALTERNATIVE

The Airport also considered the alternative to provide no further action, which would leave the rental car facilities in their existing condition. This alternative was not considered to be viable because it does not meet the demand for rental car services and facilities that is generated by Airport users.

2.2.1 Consequences of No Action Alternative

As stated previously, current facilities do not meet the demand for rental car facilities that Airport users generate. Most large rental car companies have relocated their operations to off-site facilities, which require that passengers be transported to and from these locations by bus. This busing operation by the rental car companies has created an increase in traffic congestion in the terminal curb area as well as the roadway system in the Airport vicinity. In addition, with a no-action alternative, the rental car agencies, as private companies, would construct separate facilities to meet the individual demand of each agency.

Exhibit C

City of Phoenix
City Council Transportation and Technology Subcommittee
April 26, 2000
Item #7

CITY COUNCIL REPORT

TO: Marsha Wallace
Deputy City Manager

FROM: David Krietor
Acting Aviation Director

SUBJECT: APPROVAL OF A CONSOLIDATED RENTAL CAR FACILITY - PHASE I AND INITIATION OF PHASE II

This report requests approval from theTransportation & Technology Subcommittee for Phase I of the Consolidated Rental Car Facility Project and to initiate Phase II, which includes consultant selection retention process for design and business negotiations with the industry. This project has been developed jointly with the car rental industry that services Sky Harbor, which totals 17car rental operators. The industry supports this concept and has endorsed the financing method and plan for this project.

THE ISSUE

In the fall of 1998 the Phoenix City Council approved retaining Landrum & Brown, Inc. and Coover-Clark & Associates as the consultants to study the feasibility of developing a consolidated rental car facility at Phoenix Sky Harbor International Airport. This concept has been developed at other airports including Dallas/Fort Worth and San Francisco and is being pursued by airports like Kansas City and Houston.

A conceptual design has been developed for a site in Sky Harbor Center, which includes a development of a 200,000 s.f. corporate type facility that will house all customer service and administrative functions and employee amenities with an additional 200,000 s.f. for maintenance buildings. The proposed development has been programmed to provide approximately 6,000 ready/return-parking spaces in a two level structure with an additional 11,000-overflow/storage spaces

OTHER INFORMATION

The rental car concessions are a significant revenue center for the Airport generating over $260 million in gross sales annually. The traditional business structure between Airports and the rental car industry is for the Airport to provide rental car companies with customer services/servicing facilities to support their operations. The Aviation Department currently provides these facilities within the Terminal buildings, parking

garages, and areas adjacent to these facilities. The car rental industry has experienced significant growth over the past few years. These support facilities in and around the Terminal buildings are undersized to meet the current and projected level of activity. These areas cannot be expanded due to space constraints and other airport priority needs (i.e. public parking demand). Some rental car companies have responded by bussing their passengers to facilities remote from the terminal areas. This has resulted in increased bus congestion activity at the terminal curbside areas, and more costly, inefficient operations for the rental car companies and poor customer service.

Phoenix is the 6th largest rental car market in the United States. The industry currently employs 2,300 from the metropolitan area, with a payroll that exceeds $40 Million. Thirty-one percent of the total number of employees reside in District 8, where Sky Harbor is located. By calendar year end 1999, the industry procured over $129 Million for materials, supplies, services, etc. from local vendors. Approximately $16 Million of that total was procured through companies operating in District 8. Currently, seventeen car rental operators with a 40,000-vehicle fleet service the Airport. Of the seventeen operators, ten are "on-airport" operators while seven are "off-airport" operators. Staff and the consultants worked with the rental car industry to: 1) determine land needs by studying the industry's current and proposed market size, 2) translate market size to facility needs, 3) equate facility needs to acreage demands under various development scenarios (surface vs. structure) and 4) develop schematic plans for potential sites.

Three sites were analyzed for the development. These three sites included the Greyhound Dog Track consisting of approximately 70 acres, Riverpoint (32nd Street and Broadway) consisting of approximately 75 acres and the Sky Harbor Center (SHC) site, consisting of 135 acres. The analysis included site circulation, roadway access to and from the Airport, infrastructure requirements and expansion capabilities. The SHC site is owned by the Aviation Department, is available now for development and provides for full consolidation of the rental car operations, while maintaining lower development costs and allows for expansion capabilities for the next 20 years. The analysis concluded and the industry concurred SHC is the preferred location for this project.

Because SHC is the preferred location, the proposed corporate type development will be of high quality construction and will not only comply, but will attempt to exceed the established SHC Design Standards. In addition, the Aviation Department has met with the Nuestro Barrio Fightback Association and will be meeting with the Eastlake Neighborhood Association as well as the Grant Park Neighborhood Association to inform them of this project and to address their issues and concerns with the proposed development. To date, we have not been presented with any concerns. However, these neighborhood associations will continue to have the opportunity to present issues and have these issues addressed during the Design Development process.

The conceptual design includes a development of a 200,000 s.f. corporate type facility that will house all customer service and administrative functions and employee amenities with an additional 200,000 s.f. for maintenance buildings. The proposed

development has been programmed to provide approximately 6,000 ready/return-parking spaces in a two level structure with an additional 11,000-overflow/storage spaces. Unique design features will be explored to enhance the use of these parking areas. The facility will provide the operational flexibility for each company to conduct its business as they prefer and the capacity for future expansion, while allowing for new entrances, if necessary. The project will also implement a common bussing operation, which may consist of approximately 60 buses operating on alternative fuel. For those car rental companies who chose not to participate in the project, they will be required to pick up their customers from the facility where those customers will be bussed to their off site location. The preferred financing method by the industry for this project is the issuance of a Special Facility Revenue Bond supported by a Customer Facility Charge (CFC) estimated to be $3.50 to $4.50. The CFC would finance the development cost of the facility and the operations and maintenance of the bussing system. Total development cost is estimated between $200 to $250 million.

RECOMMENDATION

The Aviation Department recommends approval of Phase I of the Consolidated Rental Car Facility Project and initiate Phase II, which includes the consultant selection retention process for design and business negotiations with the industry.

The approval of Phase I includes 1) selecting SHC site with the proposed conceptual design, 2) implementing a common bussing system which will require which will require those car rental companies who chose not to participate in the project to pick up their customer at the facility and bus those customers to their off site location and 3) establishing a Customer Facility Charge estimated to be $3.50 to $4.50 per rental day as the financing mechanism, which would include the operations and maintenance of the common bus system. The Aviation Department further recommends that the Customer Facility Charge be a mandated charge and that all operation and maintenance expenses for the bus system could be included in the Customer Facility Charge.

The Phoenix Aviation Advisory Board approved this item on April 20, 2000.

Exhibit D

SHAWN AIKEN
ARBITRATION · MEDIATION

January 29, 2020

VIA PERSONAL SERVICE;
CERTIFIED FIRST CLASS MAIL,
RETURN RECEIPT REQUESTED
VIA E-MAIL: denise.archibald@phoenix.gov
Ms. Denise Archibald, City Clerk
CITY OF PHOENIX
City Clerk Department
PHOENIX CITY HALL
200 W. Washington St., 15th floor
Phoenix, Arizona 85003

Re: *Rachel Roberts for herself and, if litigation ensues, on behalf of all others who paid the Rental Car Facility Charge at Phoenix Sky Harbor Rental Car Center from January 28, 2019 until collection ceases.*

Notice of Claim for Refund of Rental Car Facility Charge Paid Under Phoenix City Code (P.C.C.) § 4-79.

Dear Ms. Archibald:

I represent Ms. Rachel Roberts. On August 3, 2019 through August 7, 2019, Ms. Roberts rented a motor vehicle at the Phoenix Sky Harbor Rental Car Center (1805 E. Sky Harbor Circle South). She paid the Customer Facility Charge (CFC) levied under P.C.C. § 4-79. See Exh. A (copy of receipt for payment dated August 7, 2019).

For the reasons below, Ms. Roberts requests the City's refund of the CFC because the City's expenditure of CFC receipts violates Art. 9, § 14 of the Arizona Constitution. In compliance with A.R.S. § 12-821.01, Ms. Roberts notifies the City of Phoenix of (a) the facts supporting the amount demanded to resolve her *individual* claim; and, (b) the sum certain for which the City may resolve her *individual* claim.

1. Adoption of the anti-diversion provision of the Arizona Constitution and the Rental Car Customer Facility Charge.

1.1. In 1952, voters adopted Art. 9, § 14 of the Arizona Constitution, which prohibits the use of fees or excises relating to the operation of a motor vehicle for other than street and highway purposes.

1.2. In 2001, the Phoenix City Council passed the Rental Car Customer Facility Charge Ordinance, Phoenix City Code § 4-79. Today, under that ordinance, rental car companies located in or who obtain customers at the Phoenix Sky Harbor Rental Car Center must "collect a daily customer facility charge ("CFC") of six dollars per transaction day per vehicle from all Sky Harbor Airport customers." P.C.C. § 4-79(A).

1.3. Under the ordinance, every rental car company operating at the Center must remit the CFCs on a monthly basis to a financial institution designated by the Aviation Department of the City of Phoenix. In turn, the City must use the CFCs "to pay, or reimburse the City, for the costs associated with the RCC consolidated rental car facility which shall be located in Sky Harbor Center, and for the costs of related transportation facilities and equipment." P.C.C. § 4-79(C)(1).

2. The City spends the Rental Car Facility Charge receipts on construction of the Rental Car Center and Sky Train.

2.1. Since 2001, the City has directed all CFC receipts to construction of the Phoenix Sky Harbor Rental Car Center ("Center") and the PHX Sky Train®.

2.2. Construction of the Rental Car Center. In 2004, the City issued and sold bonds to investors in the amount of $260 million in order to finance construction of the Center.

2.3. In 2006, following completion of construction, the Center opened. Located on a 140-acre site west of Sky Harbor Airport, the Center today houses 14 rental car brands owned by 6 rental car companies. No other business operates at the Center.

2.4. At 2.3 million square feet, built on just over 40 acres, the Center is the largest covered structure in the state of Arizona and one of the largest rental-car centers in the United States. The four-story facility—with three levels of parking, 7400 stalls, and 12 cast-in place ramps, one for each rental company, along with vehicle servicing areas on site—houses only rental car companies operating at Sky Harbor Airport, their rental counters, and their vehicles.

2.5. On the fourth level of the Center, the City built a 160,000 square-foot customer service lobby; counters for each of the 14 rental car agencies; and, spaces for display of local artwork. The City finished this fourth level with Terrazzo tile and Venetian plaster.

2.6. To pay for the bonds sold to construct the Center, the City imposed the CFC on June 1, 2002 and, on September 1, 2003, increased the rate from $3.50 to $4.50 per transaction day. On January 1, 2009, the City again increased the CFC (to $6.00 per transaction day). Today, the CFC stands at $6.00 per transaction day.

2.7. The receipts from the CFCs pay investors who hold the bonds. The City has less than $200 million in principal remaining to repay the bonds that were sold to finance construction of the Center.

2.8. The CFCs are pledged to the repayment of those bonds. Only $4.50 of the $6.00 daily charge is considered to be revenues pledged to service the bond debt. If the Aviation Enterprise Fund deposits the additional $1.50 of the CFC into the trustee's revenue fund, then those additional revenues become revenues pledged to re-pay the bond debt. In recent fiscal

years, the City has elected to deposit the entire CFC ($6.00 per day) into the trustee's revenue fund for the benefit of bondholders.

2.9. Construction of Phase 2 of the PHX Sky Train®. In October 2016, the Phoenix City Council approved extension of the PHX Sky Train® light rail line from Sky Harbor Airport terminals to the Center. In this so-called Phase 2, the City will extend the PHX Sky Train® line another 2.5 miles at a cost of $740 million.

2.10. In May 2018, the Phoenix City Council approved the contract for construction of the extension of the Sky Train from Sky Harbor Terminal 3 to the Rental Car Center at a cost of up to $265 million. The Phase 2 project will be completed in summer 2022. No local tax dollars will be used to fund the project. Instead, the cost will be paid for with receipts from Customer and Airline Passenger Facility Charges.

3. The City's expenditure of CFCs violates the state constitution.

3.1. Before operating her rental car, Ms. Roberts was required to pay the CFC. In fact, every car rental customer at the Center must pay the CFC before the car rental company will give the keys to its customer. Payment must precede use. Otherwise, the company (and customer) would violate P.C.C. § 4-80 and thereby commit a Class 1 misdemeanor.

3.2. Under the test announced in *Saban Rent-A-Car, LLC v. Arizona Dept. of Revenue*, 246 Ariz. 89 (2019), the City's CFC falls squarely within Art. 9, § 14 of our state constitution, which prohibits (a) the use of *any* "moneys" derived from "fees or excises" (b) "relating to" the "operation[] or use" of "vehicles on the public highways or streets" (c) for other than "highway and street purposes." The *Saban* Court explained that those are fees or excises "imposed as a prerequisite to, or triggered by, the legal operation *or use* of a vehicle on a public road." *Saban*, at ¶39 (emphasis added). Unlike the surcharge approved in *Saban*, the CFC is aimed directly (and only) at customers, who must pay the CFC before operating their rental vehicle.

3.3. The CFC thus falls within the definition announced by the *Saban* Court. But, the City's expenditure of the CFC receipts—that is, payment of the $260 million debt incurred for construction of (and the costs for improvements to) the Center; relocation of tenants at the Center; and, construction of the Sky Train—falls well outside the scope of the only use permitted by Art. 9, § 14 of our state constitution: "highway and street purposes."

3.4. In an analogous case, *Rogers v. Lane County*, 307 Or. 534 (1989), the Supreme Court of Oregon considered whether the construction of an airport parking lot and a covered walkway from the parking lot to the airport terminal were permissible highway uses under an anti-diversion provision in the Oregon state constitution. In that case, the Oregon Supreme Court determined that the construction of the airport parking lot and walkway was "for the construction of an airport parking lot and covered walkway, *rather than an expenditure for a highway, road, street or roadside rest area itself.* Further, it is an expenditure primarily for the operational convenience of an airport, rather than for a project or purpose within or adjacent to a highway, road, street or roadside rest area right-of-way that primarily and directly facilitates motorized vehicle travel." 307 Or. at 545 (emphasis added). The Oregon Supreme Court struck the tax under a provision of the Oregon state constitution nearly identical to Art. 9, § 14 of the Arizona Constitution.

3.5. The same result holds here. The City of Phoenix constructed the Center for the operational convenience of Sky Harbor Airport and its rental car customers rather than the construction or improvement of our public streets and highways. Moreover, neither the Center nor the Sky Train are a highway, road, street or roadside rest area. The City of Phoenix directs the CFCs to the Rental Car Center and Sky Train—expenditures primarily for the operational convenience of Sky Harbor Airport, "rather than for a project or purpose within or adjacent to a highway, road, street or roadside rest area right-of-way that primarily and directly facilitates motorized vehicle travel." *Rogers v. Lane County*, 307 Ore. at 545 (tax could not be properly spent on airport facilities because the facilities were not for the purpose of motor vehicle travel).

3.6. In Arizona, the connection to public highways must be "direct." Ariz. Att'y Gen. Op. I89-085. An expenditure furthers a "road or highway purpose" under the anti-diversion provision of our constitution only if it actually "supports the maintenance, repair or construction of highways and streets." *John E. Shaffer Enterprises v. City of Yuma*, 183 Ariz. 428, 433, (App. 1995). If, for example, highway-user fees are to be used for any "building or leasing offices and other facilities," those facilities or offices must be for the Highway Department, and must be "necessary for the construction of highways and streets." *Id.* Those fees cannot be used to build a rental-car operations center for private enterprise or a light rail line for airport customers.

3.7. In other states, courts have been emphatic that spending road-user funds on alternative forms of transportation, like the Sky Train, rather than motor travel, is an unconstitutional diversion of road-user fees. See, e.g., *In re Op. of the Justices*, 85 N.E. 2d 761, 764 (Mass. 1949) (prohibiting road-user funds from being used for the structures of the Metropolitan Transit Authority); see also *State ex rel O'Connell v. Slavin*, 452 P.2d 943 (Wash. 1969) ("dedicated funds may not be used for the maintenance of public transportation system.") This is because "expenditure must be for the highway itself," 41 Or. Op. Att'y Gen. 545, 547 (1981), that is, on roads rather than alternatives to the roads.

3.8. Elsewhere, the City has touted the traffic mitigation effects of the Center. But, in other states, courts have universally rejected the proposition that measures "materially contribut[ing] to reduce traffic" on roads possess a sufficient road connection to allow the expenditure of road-user funds on them. 85 N.E. 2d at 764. Mere "[i]ndirect benefits to highway users, such as [measures] which reduce highway congestion" are not sufficient to establish a "road or highway purpose." 41 Or. Op. Att'y Gen. 545. Here, the Sky Train takes travelers to and from parking lots, the Center, and the airport terminals. The Sky Train is not a road. The Center services rental car customers and houses vehicles. It is not a 'highway, road, or street.'

3.9. Finally, elsewhere, the City describes the CFC as a fee for use of the Center. But, in Arizona, our constitution makes no distinction between "fees," "user fees," or "excises." The City admits (in an October 27, 2017 letter from Ms. Carolina Potts) that the CFC is a "fee," that is, "a charge intended to defray, in whole or in part, the expense of regulating or providing a service, benefit or privilege." *New Mexico Mining Association v. New Mexico Mining Commission*, 122 N.M. 332, 338 (N.M. App. 1996)(citing authorities). Our state constitution plainly forbids the use of "moneys derived *from fees*" relating to the operation or use of vehicles on our public streets for other than "highway and street purposes." So, whether labeled "user fees" or "excises," the City diverts the CFC to support the construction and improvement of an airport building and light rail line, plainly unconstitutional uses of moneys collected by the City.

4. Ms. Roberts demands $4.8 million to settle her individual claim.

4.1. Under long-standing Arizona law, the governmental unit that collects must also refund any illegal tax to the payors of that tax. See *Maricopa County v. Hodgin*, 46 Ariz. 247, 251 (1935) (in Arizona there is "one action for the recovery of the tax . . . against the taxing unit that collected the tax."). And, under decades-old federal decisional law, the governmental unit that collects the tax must retroactively (rather than only prospectively) return the receipts collected to the taxpayers. As a result, for the reasons above, the City of Phoenix—which collected the CFC under P.C.C. § 4-79—must refund the CFC to Ms. Roberts (and, if litigation ensues, other members of the taxpayer class).

4.2. According to its own budget publications, in fiscal year 2018-19, the City collected CFCs in the amount of $48.238 million. The City estimates CFC revenues for FY2019-20 at $48.138 million. If litigation ensues, in other words, the City faces liability to Ms. Roberts and the putative class in the amount of at least $48 million, *cf. Andrew S. Arena, Inc. v. Superior Court (Pima County)*, 163 Ariz. 423, 426 (1990) (holding that "A.R.S. § 12-821 does not bar class actions against public entities" and that "a claim against a public entity may be presented as a class claim[ ]"), an amount that increases during the pendency of Ms. Roberts' claim, plus applicable interest.

4.3. In *City Of Phoenix v. Fields*, 219 Ariz. 568, 571 (2009), the Arizona Supreme Court addressed the notice of claim statute in the context of a class action: "We therefore hold that A.R.S. § 12-821.01(A) requires a putative class representative to include in her notice of claim a "specific amount" for which her individual claim can be settled. The notice should also include a statement that, if litigation ensues, the representative intends to seek certification of a plaintiff class. If a class is later certified, the notice of claim will serve as a representative notice for other class members."

4.4. In compliance with the holdings in *City of Phoenix v. Fields* and *Yollin v. City of Glendale*, 219 Ariz. 24, 29 (App. 2008), Ms. Roberts confirms that she would settle her *individual* claim in return for the City's payment to her in the amount of $4.8 million. If litigation ensues, Ms. Roberts intends to seek certification of a plaintiff class of all others who paid and all those who will pay the Rental Car Customer Facility Charge described in Phoenix City Code § 4-79 from January 29, 2019 through today and until collection ceases. Ms. Roberts confirms the "facts supporting that amount," as required under A.R.S. 12-821.01(A), in order to settle her *individual* claim. Those facts include her rental of a motor vehicle at the Center and the facts described in sections 1, 2, and 3 above.

4.5. Parenthetically, the City might be concerned that Ms. Roberts has demanded an amount that is too high. But, the amount demanded need not fall within a certain (or even any) range, especially an amount thought reasonable or appropriate by the City. Ms. Roberts' demand to settle her *individual* claim stands apart from any putative class claim that would follow if litigation ensues. Any concern about the amount demanded runs contrary to the policy choice made by the Arizona legislature: the governing statute, A.R.S. § 12-821, requires not an objectively reasonable demand, only a specific amount with supporting facts. See *Donovan v. Yavapai Cmty. College Dist.*, 244 Ariz. 608, ¶10 (App. 2018) ("The notice of claim statute does not require that the proffered settlement amount be objectively reasonable[.]"). Ms. Roberts has provided all that is required: "a definite and exact amount for which" the City could settle. *Id.*, at ¶11. The statute requires no more. *Cf. id.* ("Because Donovan's notice of claim provided a

definite and exact amount for which Yavapai College could settle, the superior court erred by concluding that the notice of claim failed to satisfy the requirements of § 12–821.01(A) and by entering summary judgment in favor of Yavapai College on that basis.").

Yours very truly,

SHAWN AIKEN, PLLC

Shawn K. Aiken

Enclosure: Exh. A (receipt)

EXHIBIT A
Rental vehicle customer receipt
(Personal information redacted)

THRIFTY CAR RENTAL
Phone: 800-334-1705
Web: www.thrifty.com

Rental Agreement No: 965899222
Invoice Date: 08/07/2019
Document: 969004222851

Direct All Inquiries To:
THRIFTY CAR RENTAL
PO BOX 35250
TULSA, OK 74153-1167

TAX Id: 73-1389882

REPRINT

Renter: RACHEL ROBERTS
Account No.:

RACHEL ROBERTS

RENTAL REFERENCE

Rental Agreement No: 965899222
Reservation ID: J0893834261
Frequent Traveler: WN00020558830865
Special Bill Info: XXGEICO 500.00

RENTAL DETAILS

Rate Plan: IN: RXHD3 OUT: RXHD3
Rented On: 08/03/2019 08:49 LOC# 073130
PHOENIX AP, AZ
Returned On: 08/07/2019 10:08 LOC# 073130
PHOENIX AP, AZ
Car Description: COROLLA 8HCE238
Veh. No.: 2485316
CAR CLASS Charged: B
Rented: C
Reserved: B
MILEAGE In: 11,278
Out: 10,669
Driven: 609

MISCELLANEOUS INFORMATION

CC AUTH: 02996D DATE: 2019/08/03 AMT: 370.00
CC AUTH: 02996D DATE: 2019/08/03 AMT: 170.00

RENTAL CHARGES

DAYS	4 @	21.57	86.28
EXTRA HRS	1 @	3.67	3.67
SUBTOTAL			89.95
CONCESSION FEE RECOVERY			11.33
FF SURCHARGE			6.00
O & M RECOVERY FEE			4.56
AIRPORT FACILITIES FEE			30.00
ENERGY SURCHARGE			1.49
ROAD TAX			4.66
TAX		15.60%	22.36
AMOUNT DUE			170.35 USD

THANK YOU FOR RENTING FROM THRIFTY

ALL CHARGES HAVE BEEN BILLED TO YOUR ACCOUNT.

Rental Agreement No: 965899222
Invoice Date: 08/07/2019
Document: 969004222851

Direct All Inquiries To:
THRIFTY CAR RENTAL
PO BOX 35250
TULSA, OK 74153-1167
UNITED STATES

Renter: RACHEL ROBERTS
Account No.:

Phone: 800-334-1705
Web: www.thrifty.com

AMOUNT BILLED TO ACCOUNT: 170.35 USD

GTHR02P RES2955 0105810

Clerk of the Superior Court
*** Electronically Filed ***
10/26/2020 8:00 AM

THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN THE ARIZONA TAX COURT

TX 2020-000833 10/23/2020

HONORABLE DANIELLE J. VIOLA

CLERK OF THE COURT
K. Cabral
Deputy

RACHEL ROBERTS SHAWN K AIKEN

v.

CITY OF PHOENIX ERIC M FRASER

JUDGE VIOLA

MOTION TO DISMISS – Granted

MOTION FOR PLACEMENT OF CASE ON PENDING APPEALS CALENDAR OR STAY OF CASE - Denied

The Court has received and considered the following:

1. Plaintiff's Motion for Placement of Case on Pending Appeals Calendar or Stay of Case filed July 23, 2020;
2. Defendant's Response filed August 12, 2020;
3. Plaintiff's Reply filed August 24, 2020;
4. Defendant's Motion to Dismiss filed August 12, 2020;
5. Plaintiff's Response filed August 31, 2020; and
6. Defendant's Reply filed September 14, 2020.

The Court does not believe oral argument is necessary to address the issues presented.

Motion to Dismiss

Defendant City of Phoenix asks the Court to dismiss the complaint for four different reasons: 1) Plaintiff Roberts filed an invalid notice of claim; 2) Roberts lacks standing; 3) the anti-diversion provision does not apply to the facility charge; and 4) the City is not diverting funds to other uses. Roberts' position has been considered and rejected by the Arizona Court of Appeals

in *Karbal v. Arizona Dept. of Revenue*, 215 Ariz. 114, 116-118 ¶ 11-18 (App. 2007) (customers lack standing to challenge car rental tax because legal incidence of transaction privilege tax falls on rental companies); *accord Saban Rent-a-Car LLC v. Arizona Dept. of Revenue*, 246 Ariz. 89, 98 ¶ 34-35 (2019) (anti-diversion clause does not bar transaction privilege tax on car rental). The Phoenix City Code at issue, Section 4-79(a) requires all on-airport rental car companies who lease space at Phoenix Sky Harbor International Airport, and all off-airport rental car companies who obtain customers through the rental car center to collect a daily customer facility charge. The requirement under the code section falls on the rental car companies, not the customers. Even if that were not the case, Roberts' notice of claim fails to provide facts supporting the amount for which she claims the claim could be settled. A.R.S. § 12-821.01(A). Additionally, even if the anti-diversion clause did apply, the funds are not being diverted to the extent they are being raised at the facility to maintain the facility. *See John E. Shaffer Enterprises v. City of Yuma*, 183 Ariz. 428, 433 (App. 1995) ("Highway user revenues may fund any activity that promotes such 'highway or street purposes' even if the activity does not fall within one of the enumerated categories") (citation omitted). The Court agrees with the City as explained at page 8-9 of the Motion that using the facility charge to fund construction of the rental car facility does not result in diverting funds.

IT IS ORDERED granting Defendant's Motion to Dismiss. Defendant shall submit any fee application and form of judgment on or before November 20, 2020.

Plaintiff's Motion for Placement of Case on Pending Appeals Calendar or Stay of Case

As set forth above, the Court has granted the Motion to Dismiss. Accordingly, the Court finds that placing the matter on the pending appeals calendar or staying the matter is moot. Plaintiff is not without a remedy. As addressed in the Response, Plaintiff could seek to consolidate any appeal with *Daniel Pope v. City of Phoenix* (Case No. 1-CA-TX 20-0006; Arizona Tax Court TX 2018-000759 (Hon. Christopher Whitten) or could seek to stay the appeal pending a decision in *Pope*.

IT IS ORDERED denying Plaintiff's Motion for Placement of Case on Pending Appeals Calendar or Stay of Case as moot.

Clerk of the Superior Court
*** Electronically Filed ***
K. Higuchi-Mason, Deputy
5/10/2021 11:21:29 AM
Filing ID 12873217

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SUPERIOR COURT OF ARIZONA

ARIZONA TAX COURT

RACHEL ROBERTS, individually and on behalf of all others similarly situated who paid the Rental Car Facility charge at Phoenix Sky Harbor Rental Car Center, Plaintiff, v. CITY OF PHOENIX, a municipal corporation of the State of Arizona, Defendant.	Case No. TX2020-000833 **NOTICE OF APPEAL** (Assigned to the Hon. Danielle Viola)

Notice is hereby given that the Plaintiff Rachel Roberts appeals to the Arizona Court of Appeals from the judgment entered in this case on February 22, 2021.

DATED: May 10, 2021.

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and

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ARIZONA COURT OF APPEALS

DIVISION ONE

DANIEL POPE, Plaintiff/Appellant, v. CITY OF PHOENIX, Defendant/Appellee.	Court of Appeals Division One No. 1 CA-TX 20-0006 Arizona Tax Court No. TX2018-000759 **MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION**

Pursuant to ARCAP 6, Defendant/Appellee City of Phoenix asks the Court to dismiss the appeal filed by Plaintiff/Appellant Daniel Pope. Pope's appeal is untimely.

ARGUMENT

I. Pope's notice of appeal is untimely.

Pope filed this case in the Tax Court. [IR-1.] By statute, in Tax Court "[t]he judgment is final unless within thirty days after the entry of the judgment a notice of appeal is filed with the clerk of the tax court." A.R.S. § 12-170(C). Here, the Tax Court entered final judgment on March 10, 2020. [IR-24.] Consequently, the deadline for filing a notice of appeal lapsed on April 9, 2020. Pope filed his notice of appeal on May 22, 2020, long after the appeal period expired. [IR-32.] His appeal is untimely and should be dismissed for lack of jurisdiction. *See Edwards v. Young*, 107 Ariz. 283, 284, (1971) ("It is settled in Arizona that the perfecting of an appeal within the time prescribed is jurisdictional; and, hence, where the appeal is not timely filed, the appellate court acquires no jurisdiction other than to dismiss the attempted appeal.").

II. Pope's motion for new trial did not extend the deadline for filing a notice of appeal from Tax Court.

Pope also filed a motion for new trial on March 24, 2020, which the Tax Court denied on May 7, 2020. [IR-26 (motion); IR-30 (ruling).] In ordinary civil cases, an order denying a motion for new trial is an appealable order under A.R.S. § 12-2101(A)(5)(a). But here, A.R.S. § 12-170(C) mandates finality without extending the time for a motion for new trial. This statute controls.

Under settled principles of statutory construction, "newer, specific statutes govern older, general statutes." *Cosper v. Rea ex rel. Cty. of Maricopa*, 228 Ariz. 555, 557, ¶ 10 (2012) (citing *In re Guardianship/Conservatorship of Denton v. Superior Court*, 190 Ariz. 152, 157 (1997)); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 183 (2012) (when conflicting provisions cannot be reconciled, "the specific provision is treated as an exception to the general rule").

Here, the finality of a judgment under A.R.S. § 12-170(C) controls over A.R.S. § 12-2101(A)(5)(a). First, A.R.S. § 12-170(C) is newer. The Legislature created the 30-day limit for appealing the judgment in 1988, at the same time as it created the Tax Court. *See* 1988 Ariz. Sess. Laws, ch. 330, § 2 (2d Reg.

Sess.). By contrast, the statute making the denial of a new trial an immediately appealable order is more than two decades older; it dates back at least as far as 1964. *See* 1964 Ariz. Sess. Laws, ch. 102, § 2 (2d Reg. Sess.).

Second, A.R.S. § 12-170(C) is more specific. It applies only to Tax Court proceedings. It is part of a statute that treats tax cases differently on appeal, including by mandating that all tax cases be directed to Division One of the Court of Appeals, and that they be heard by a specific panel once at the Court of Appeals. *See* A.R.S. § 12-170(C). For these reasons, A.R.S. § 12-170 is the newer, more specific statute. It controls over A.R.S. § 12-2101(A)(5)(a), which is the older, more general statute.

The interplay between A.R.S. §§ 12-170(C) and 2101(A)(5)(a) pertaining to a motion for a new trial appears to be an issue of first impression. But the limited caselaw interpreting § 12-170(C) supports the City's construction. For example, when interpreting whether a document entitled "OPINION" was appealable, the Supreme Court emphasized that under § 12-170(C), "it is from a judgment alone that an appeal is possible" and that "a final judgment of the tax court becomes absolute and unreviewable if no notice of appeal is filed within the 30 days following its

entry." *Devenir Assocs. v. City of Phoenix*, 169 Ariz. 500, 503 (1991) (citation omitted).

In many cases, ARCAP 9 controls the time for filing a notice of appeal. For example, A.R.S. § 12-2101 does not specify the number of days for filing a notice of appeal, so ARCAP 9 controls. But ARCAP 9 expressly yields to statutes that specify an appeal deadline. It specifically exempts its own deadlines if "the law provides a different time." ARCAP 9(a). The deadline of 30 days after entry of judgment in A.R.S. § 12-170(C) is a "law [that] provides a different time," in the parlance of ARCAP 9(a). Consequently, the 30-day deadline in A.R.S. § 12-170(C) controls.

CONCLUSION

Pope's deadline for appeal lapsed on April 9, 2020, making his May 22, 2020 notice of appeal is untimely. This Court lacks jurisdiction over the appeal and the appeal should be dismissed.

RESPECTFULLY SUBMITTED this 1st day of July, 2020.

OSBORN MALEDON, P.A.

By /s/ Eric M. Fraser

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ARIZONA COURT OF APPEALS

DIVISION ONE

DANIEL POPE, Plaintiff/Appellant, v. CITY OF PHOENIX, Defendant/Appellee.	Court of Appeals Division One No. 1 CA-TX 20-0006 Arizona Tax Court No. TX2018-000759 **REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION**

INTRODUCTION

A judgment of the Tax Court "is final unless within thirty days after the entry of the judgment a notice of appeal is filed with the clerk of the tax court." A.R.S. § 12-170(C). It is undisputed that Pope filed his notice of appeal more than 30 days after the entry of judgment. Thus, the judgment became "absolute and unreviewable" and his appeal is untimely. *Devenir Assocs. v. City of Phoenix*, 169 Ariz. 500, 503 (1991) ("a final judgment of the tax court becomes absolute and unreviewable if no notice of appeal is filed within the 30 days following its entry") (citation omitted).

To save his appeal, Pope argues that, notwithstanding the emphatic language of § 12-170(C) and *Devenir*, the judgment did not become "absolute and unreviewable" because he filed a motion for new trial, which (he says) extended the deadline to appeal under ARCAP 9(e). But ARCAP 9 expressly states that it does *not* apply when "the law provides a different time." ARCAP 9(a). For tax appeals, the law "provides a different time" — the fixed 30-day deadline of § 12-170(C). Thus, ARCAP 9 does not apply and Pope's appeal is untimely.

ARGUMENT

I. Because Pope does not dispute that the denial of his motion for new trial is not an appealable order, the only remaining issue is whether his appeal from the final judgment is timely.

The City's motion to dismiss the appeal explained (at 2) that if Pope's notice of appeal was untimely or not an appealable order, then this Court has no jurisdiction over the appeal. Pope does not dispute that this is a jurisdictional issue.

The motion to dismiss also explained (at 3-4) that A.R.S. § 12-170(C) (the newer, more specific statute) controls over A.R.S. § 12-2101(A)(5)(a) (the older, more general statute). Pope does not dispute this point, either. Consequently, Pope does not contest that this Court lacks jurisdiction over his appeal from the order denying a motion for new trial in the Tax Court.

Pope's only response (at 10) is that "Pope is not pursuing an appeal from the denial of his post-judgment motion under 12-2101(A)(5)(a) but from the dismissal of his class complaint by a final judgment under 12-2101(A)(1)." But Pope offers nothing to substantiate his assertion. And his unsupported assertion conflicts with the notice of appeal he filed in the Tax Court, which states that he appeals from both the judgment "and from the Order entered on May 7, 2020, denying Plaintiff's Motion for New Trial . . . ."

[IR-32 at 1.] This Court should not credit an unsupported assertion about the timeliness of the notice of appeal that conflicts with Pope's own notice of appeal.

At a minimum, Pope's appeal as to the order denying the motion for new trial should be dismissed on this basis. The only remaining issue, then, is whether his appeal from the Tax Court's judgment is timely despite not being filed within the time provided by A.R.S. § 12-170(C).

II. The time limitation in A.R.S. § 12-170(C) applies because it supplements ARCAP 9.

A. The Legislature has the authority to enact procedural statutes that supplement court rules.

The Arizona Constitution grants the Supreme Court the "[p]ower to make rules relative to all procedural matters in any court." Ariz. Const. art. 6, § 5(5). But the Legislature also has "rulemaking power." *State v. Forde*, 233 Ariz. 543, 575, ¶ 145 (2014) (citation omitted). As a result, "statutes that supplement [court] rules are valid." *Id.* And although the Supreme Court's rules take precedence, courts read procedural statutes and rules in harmony whenever possible, invalidating a procedural statute only when it presents an "irreconcilable conflict" with a rule. *Id.* (citation omitted); *see also Graf v. Whitaker*, 192 Ariz. 403, 406, ¶ 11 (App. 1998) (Courts "do not hastily find a

clash between a statute and court rule. Rather, [o]ur rules of procedure and statutes should be harmonized wherever possible and read in conjunction with each other.") (citation omitted).

The role of the statutes and court rules governing appeals helps to show how they can be read in harmony. The statutes (e.g., A.R.S. § 12-2101 or A.R.S. § 12-170(C)) govern which orders are appealable. Court rules (e.g., ARCAP 9) specify the general deadlines for taking an appeal. But ARCAP 9 expressly allows for—and yields to—statutes setting different deadlines. *See* ARCAP 9(a) ("unless the law provides a different time"). As explained below, the Legislature has accepted ARCAP 9(a)'s invitation to set different appeal deadlines (e.g., in Tax Court cases or election cases). And when a court rule allows the Legislature to act, then the statute properly *supplements* the rule; it does not conflict with the rule. The statute and the rule can coexist and be harmonized through the court rule's express invitation.

B. ARCAP 9 expressly permits other sources of law, including statutes, to create different appellate deadlines.

ARCAP 9(a) does three things. First, it sets a default deadline to file a notice of appeal of 30 days after entry of judgment. Second, it provides that the default deadline is extended "as otherwise provided in this Rule." This

clause refers to ARCAP 9(d) and (e), which extend the 30-day deadline when a party dies or files a time-extending motion, such as a motion for new trial.

Third, after providing the default 30-day deadline and allowing that deadline to be extended, ARCAP 9(a) states that these deadlines govern "unless the law provides a different time." This clause recognizes that there may be situations in which it is necessary or appropriate for the law to set shorter or longer appellate deadlines. For example, election cases require an accelerated timeline. As a result, the Legislature has enacted statutes providing that certain election appeals must be filed within five days after entry of judgment. *See* A.R.S. §§ 16-351(A), 19-122(A); *see also* ARCAP 10. These statutes are valid supplements to the default appellate deadlines in ARCAP 9(a), and are made possible by ARCAP 10 and the provision in ARCAP 9(a) that its deadlines apply "unless the law provides a different time."

C. A.R.S. § 12-170(C) provides a different appellate deadline in tax cases.

The Tax Court also has distinct appellate deadlines. The Legislature has provided that a judgment of the Tax Court is "final"—or in the Supreme Court's words, "absolute and unreviewable"—if not appealed within 30

days. A.R.S. § 12-170(C); *Devenir*, 169 Ariz. at 503 (citation omitted). Under the plain text of the statute (and *Devenir*), the judgment's finality does not depend on whether a party has died or moved for a new trial.

This emphasis on finality is consistent with federal law, which "recognize[s] that 'the usual rules of law applicable in court procedure must be changed' to achieve the finality needed in the realm of tax decisions." *Wapnick v. Comm'r*, 365 F.3d 131, 132 (2d Cir. 2004) (quoting *R. Simpson & Co. v. Comm'r*, 321 U.S. 225, 228 (1944)); *see also Harbold v. Comm'r*, 51 F.3d 618, 621 (6th Cir. 1995) (discussing rule of finality in Tax Court and that, pursuant to 26 U.S.C. §§ 7481(a)(1), -7483, decisions of the United States Tax Court become final if no notice of appeal is filed within 90 days).

Like the election appeal deadlines, the Tax Court appeal deadline is consistent with ARCAP 9(a), which recognizes that the regular appellate deadlines may be adjusted in certain areas of law.

III. Pope's arguments to the contrary do not harmonize the statute and the rule.

A. Pope's interpretation conflicts with the text of § 12-170(C).

Section 12-170(C) is emphatic regarding finality. It provides that "[t]he judgment is final" unless appealed within thirty days. A.R.S. § 12-170(C).

Devenir's description of § 12-170(C) is similarly emphatic, stating that a Tax Court judgment not appealed within thirty days "becomes absolute and unreviewable." 169 Ariz. at 503 (citation omitted). Neither the statute nor *Devenir* leaves any room for exceptions.

Pope claims (at 8) that because § 12-170(C) does not mention time-extending motions, it allows them to extend the deadline to appeal. But courts "are not at liberty to rewrite [a] statute under the guise of judicial interpretation." *Tucson Unified Sch. Dist. v. Borek ex rel. Cty. of Pima*, 234 Ariz. 364, 368, ¶ 11 (App. 2014) (citation omitted). The statute provides that a Tax Court "judgment is final unless" appealed "within thirty days after the entry of the judgment." A.R.S. § 12-170(C). Under Pope's interpretation, a judgment would not necessarily be final 30 days after the entry of judgment, contrary to § 12-170(C)'s command. Pope's interpretation would effectively add a whole new clause: "or if a time-extending motion is filed under ARCAP 9(e)." But the Legislature did not write those words, and this Court may not add them.

Pope argues (at 3) that his interpretation of § 12-170(C) is countenanced by *Devenir* and *People of Faith, Inc. v. Dep't of Revenue*, 164 Ariz. 102 (App. 1990), which, according to Pope, held that § 12-170 does not restrict

appellate deadlines. But that is not what those cases held. To the contrary, *People of Faith* rejected the taxpayer's argument that § 12-170(C) expanded the right to appeal beyond "the tax court's final, dispositive ruling." 164 Ariz. at 105; *see also id.* (Section 12-170(C) "does not authorize a right of appeal that did not exist before but confirms that the procedures for appealing *final judgments* under [former] A.R.S. § 12–2101(B) also apply to judgments entered by the tax court.") (emphasis added). *Devenir* agreed with *People of Faith's* approach to § 12-170(C) and simply held that a Tax Court decision labeled "opinion" was not a final, appealable judgment. *Devenir*, 169 Ariz. at 504.

Neither *Devenir* nor *People of Faith* comes anywhere close to holding that § 12-170(C) incorporated the time-extending provisions of ARCAP 9(e). After all, if the Legislature had wanted to allow tax-court appellate deadlines to be adjusted pursuant to ARCAP 9(e), it could have said that. Its decision to set a "final" deadline without referencing ARCAP 9(e) shows that it meant what it said: a judgment of the Tax Court is "final" if not appealed within thirty days.

People of Faith's citation to ARCAP 8 and 9 does not change the analysis. *People of Faith* cited those provisions in support of its holding that § 12-170(C)

"emphasizes that a final judgment of the Tax Court becomes absolute and unreviewable if no notice of appeal is filed within the 30 days following its entry." 164 Ariz. at 105. That citation makes sense because ARCAP 8 and 9 govern notices of appeal and provide for the default 30-day deadline. *People of Faith* did not suggest that § 12-170(C) incorporated the time-extending provisions of ARCAP 9, and nothing in the statutory text would support such a suggestion.

B. Pope's interpretation violates the text and purpose of ARCAP 9(a).

Pope also argues that if § 12-170(C) does not incorporate the time-extending provisions of ARCAP 9(e), then it conflicts with and is superseded by that rule. But as discussed, ARCAP 9(a) expressly allows statutes such as § 12-170(C) to set different appellate deadlines.

Pope's response (at 10-11) boils down to contending that the clause "unless the law provides a different time" does not apply to the immediately preceding clause (allowing extensions "as otherwise provided in this rule"). In other words, Pope thinks that ARCAP 9(a) allows the Legislature to modify the 30-day deadline but not the provisions of ARCAP 9 extending that deadline. But Pope never explains how this interpretation is consistent

with the text of ARCAP 9(a). The word "unless" comes after the 30-day deadline *and* the time-extending clause; it therefore applies to both.

If the Supreme Court wanted to limit the Legislature's power in this way, then it would have said so (e.g., by flipping the order, so the "unless" clause came before the time-extending clause). Pope's proffered interpretation is consistent with this backwards version of the rule, but not with the actual text. The following table illustrates this point:

Version	**Text**	**Allows statutes to modify the extensions provided in ARCAP 9(d)-(e)?**
The real ARCAP 9(a)	30-day deadline applies "except as otherwise provided in this Rule or *unless* the law provides a different time."	Yes.
Backwards version (consistent with Pope's position)	30-day deadline applies "*unless* the law provides a different time and except as otherwise provided in this Rule."	No.

Pope also does not explain why his proffered interpretation is consistent with the purpose of ARCAP 9(a). ARCAP 9(a) reflects the Supreme Court's desire to allow the Legislature to alter the standard time for taking an appeal. Pope concedes (at 11) that ARCAP 9(a) allows the law to prescribe a "shorter time period"—which necessarily means that some appeals that would be timely under ARCAP 9(a) would be untimely under a shorter statute. Pope does not explain why the Supreme Court would want to allow the Legislature to alter the appeal period in this way, but not by altering the time-extending effect of certain motions.

The principal case Pope relies on, *Thielking v. Kirschner*, 176 Ariz. 154, 158 (App. 1993), does not support his argument. At the time of *Thielking*, Arizona's Administrative Review Act provided a 35-day deadline to file an action to review a final administrative decision, running from the date when the decision was served on the party affected. *Id.* The statute was "silent" as to whether Arizona Rule of Civil Procedure 6(e) added five days to the appeal deadline when the agency served its decision by mail. *Id.* In the face of this silence, *Thielking* held that Rule 6(e) should apply as normal. *Id.* at 158-59.

Pope claims (at 8) that, like the statute in *Thielking*, § 12-170(C) is silent as to whether its 30-day deadline can be extended by a motion for new trial. But § 12-170(C) is not silent: it unequivocally states that a Tax Court judgment is "final" unless appealed within thirty days. *Id.* at 158. That does not mean "final" unless something else happens. It means "final," full stop.

CONCLUSION

A Tax Court judgment becomes final if not appealed within thirty days. Pope filed this appeal more than thirty days after the Tax Court entered judgment. Accordingly, the judgment become "final," A.R.S. § 12-170(C), and "absolute and unreviewable," *Devenir*, 169 Ariz. at 503 (citation omitted). Pope's appeal is therefore untimely and must be dismissed.

RESPECTFULLY SUBMITTED this 23rd day of July, 2020.

OSBORN MALEDON, P.A.

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IN THE

COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

DIVISION ONE
FILED: 08/06/20
AMY M. WOOD,
CLERK
BY: JT

DANIEL POPE,	)	Court of Appeals
	)	Division One
Plaintiff/Appellant,	)	No. 1 CA-TX 20-0006
	)	
v.	)	Arizona Tax Court
	)	No. TX2018-000759
CITY OF PHOENIX,	)	
	)	DEPARTMENT D
Defendant/Appellee.	)	
	)	

ORDER RE: MOTION TO DISMISS

Judges Jennifer B. Campbell, Lawrence F. Winthrop, and Peter B. Swann have considered the Motion to Dismiss Appeal for Lack of Jurisdiction, the response, and reply.

IT IS ORDERED denying the motion without prejudice to appellee raising arguments regarding the court's jurisdiction and the timeliness of the notice of appeal in the answering brief.

IT IS FURTHER ORDERED that the opening brief shall be due on September 8, 2020.

_____ __ _____/s/_____ _____
Jennifer B. Campbell, Presiding Judge

A copy of the foregoing
was sent to:
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