IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

MARK STUART, *Plaintiff/Appellant*,

v.

JIM LANE, *et al.*, *Defendants/Appellees*.

No. 1 CA-CV 15-0746
FILED 8-31-17
AMENDED PER ORDER FILED 10-20-17

Appeal from the Superior Court in Maricopa County
No. CV2013-006138
The Honorable Joshua D. Rogers, Judge

AFFIRMED

COUNSEL

Horne Slaton PLLC, Scottsdale
By Sandra L. Slaton
Counsel for Plaintiff/Appellant

Scottsdale City Attorney's Office, Scottsdale
By Eric C. Anderson
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Donn Kessler(retired) joined.

C A T T A N I, Judge:

¶1 Mark Stuart appeals the superior court's entry of summary judgment for the City of Scottsdale (the "City"). For reasons that follow, we affirm summary judgment as well as the superior court's imposition of Rule 68 sanctions.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 1996, the City entered into a Golf Course Concession Agreement ("GCCA") with Capital Realty ("Capital") for the construction and operation of a golf course. The golf course was to be located on land owned by the City and land owned by the United States Bureau of Reclamation ("BOR"). The City refers to the land subject to the GCCA as "the License Area." The City has jointly developed and managed the BOR-owned portion of the License Area, as well as certain adjacent BOR-owned land, for public recreation since 1982 under a Cost Sharing and Land Use Agreement ("CLUA").

¶3 The GCCA required Capital to build and maintain a golf course on the License Area at its own expense. Once the golf course became operational, Capital would pay the City a Percentage Use Fee ("PUF") of 2% of gross sales. The GCCA also required Capital to pay a Basin Management Fee ("BMF") of 2% of gross sales plus $1 per 9 holes of golf played at the course. The BMF would be increased to 4% of gross sales (plus the surcharge) "[u]pon repayment or refinancing of any construction lien for construction of the [golf course], but in no event later than the tenth annual anniversary of" the GCCA. The BMF could be used, at the City's discretion, "only to pay the costs of constructing, repairing and replacing capital improvements and other permanent improvements of all descriptions at or benefitting the License Area."

¶4 The City retained several rights in the License Area, including the right to carry out flood control and groundwater recharge operations. Although the City reserved the right to construct new improvements, the

City could not make such improvements for "[c]ommercial uses and golf uses." The City would also retain title to any fixtures built by either party at the License Area if the GCCA were to terminate or expire. The GCCA is set to expire at the end of the CLUA, but will be automatically extended if the CLUA is extended. Under the GCCA, the City would "[i]n no event . . . be obligated to compensate" Capital for any improvements made during the agreement period.

¶5 Capital and its successors in interest built and maintained a golf course at the License Area. The City regularly collected PUF and BMF payments; funds from the PUF went to the City's general fund, while funds from the BMF were managed in a separate account.

¶6 In 2011, Capital assigned its interest to White Buffalo Golf, LLC ("White Buffalo"). Shortly thereafter, the City and White Buffalo entered into a Golf Course Improvement Agreement ("GCIA"). Under the GCIA, White Buffalo advanced $200,000 to design upgrades to the golf course. White Buffalo paid another $500,000 toward the improvements, to be reimbursed by retaining the per-round BMF surcharge plus an additional surcharge of $1 per 9 holes. The City also authorized the use of $500,000 from the BMF fund for the improvements. Finally, White Buffalo provided over $250,000 of in-kind improvements, such as a screen to protect adjoining property, a custom clock, and specialized aeration.

¶7 A year later, the parties amended the GCCA (the "Third Amendment") to provide for an upgrade to the golf course clubhouse. Under the Third Amendment, the City would provide $1.5 million toward the clubhouse improvement project. White Buffalo was responsible for the rest of the money (approximately $850,000) necessary to complete the project. The Third Amendment also allowed White Buffalo to collect an additional surcharge of no more than $1 per 9 holes to fund clubhouse improvements up to $500,000. White Buffalo also agreed to increase the PUF to 3% of gross sales for 20 years.

¶8 The City financed its portion of the clubhouse improvements through the issuance of a bond. The debt on the bond was to be serviced from the BMF fund, and under the anticipated payment schedule, $140,000 would be sufficient to cover the annual debt service on the bond. As part of the Third Amendment, White Buffalo agreed to pay at least $140,000 into the BMF fund each year (even if the amount required based on gross sales plus surcharge was less than $140,000).

¶9 The City Council approved the Third Amendment by a 6-1 vote. The dissenting member expressed a concern that the contract provided a subsidy to White Buffalo. The City Treasurer also expressed a concern about the adequacy of the consideration received by the City under the Third Amendment, but he did not testify at the council meeting. Nevertheless, the City moved forward with the Third Amendment, and all of the planned clubhouse improvements were completed by the end of 2013.

¶10 Stuart, a Scottsdale resident and business owner, subsequently filed a complaint against the City and several City officials challenging the Third Amendment.[1] The complaint alleged violations of the Gift Clause of the Arizona Constitution and the Anti-Subsidy Clause of the Scottsdale City Charter. *See* Ariz. Const. art. 9, § 7; Scottsdale City Charter art. I, § 3(O).

¶11 While discovery was underway, the City filed a motion for summary judgment. The court denied the motion, but indicated that it would allow the City to file a new motion after sufficient discovery had been completed. Stuart then filed an amended complaint, adding several claims. In addition to the original claims, Stuart alleged that (1) § 4.5 of the GCCA, which established the Basin Management Fund, violated the Gift Clause and the Anti-Subsidy Clause; (2) the automatic renewal provision of the GCCA violated the Gift Clause and Anti-Subsidy Clause; and (3) the City had violated public records laws.

¶12 The City moved for summary judgment on all claims. Stuart filed a cross-motion for summary judgment on all of his claims other than the Gift Clause challenge to the Third Amendment and the Anti-Subsidy Clause challenge to the original GCCA.[2]

¶13 The superior court granted summary judgment to the City on all of Stuart's claims. The court ruled that Stuart lacked standing to

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[1] A co-plaintiff, Scottsdale resident John Washington, joined in the complaint but subsequently withdrew from the case.

[2] Stuart asserted that if the Court were to find that the Third Amendment violated the Anti-Subsidy Clause, there would be no need to engage in a Gift Clause analysis. And he indicated that a separate motion for partial summary judgment on the GCCA-related claims would be forthcoming, but he never filed such a motion.

challenge the Third Amendment because there was no evidence that the City expended any funds raised by taxation or that the City suffered any pecuniary loss. The court also ruled that Stuart lacked standing to challenge the original GCCA, and that any claims related to that contract were barred by the one-year statute of limitations established by Arizona Revised Statutes ("A.R.S.") § 12-821.[3] Additionally, the court ruled that Stuart's claims challenging the GCCA's extension clause were not yet ripe, because no extension had occurred. Finally, the court granted summary judgment to the City on Stuart's public records claims, finding that Stuart had requested materials that were privileged, were non-existent, or did not constitute public records.

¶14 The superior court then granted the City's request for Rule 68 sanctions on the basis that Stuart had rejected the City's more favorable pretrial offer of judgment (dismissal, but with each side to bear its own costs). *See* Ariz. R. Civ. P. 68(g). The court denied Stuart's subsequent motions for new trial, and Stuart timely appealed. We have jurisdiction under A.R.S. § 12-2101(A)(1), (5)(a).

DISCUSSION

I. Summary Judgment Rulings.

¶15 A moving party is entitled to summary judgment if it "shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). We review a grant of summary judgment de novo, and will affirm if it is correct for any reason. *S & S Paving & Constr., Inc. v. Berkley Reg'l Ins. Co.*, 239 Ariz. 512, 514, ¶ 7 (App. 2016).

A. Third Amendment to the GCCA (Claims 1 and 2).

¶16 Although we disagree with the superior court's ruling that Stuart lacks standing to bring the Gift Clause and Anti-Subsidy claims related to the Third Amendment, we nevertheless affirm the superior court's summary judgment ruling because the City is entitled to judgment as a matter of law.

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[3] Absent material revisions after the relevant date, we cite a statute's current version.

1. Standing.

¶17 A person seeking redress in the courts generally must first establish standing by alleging "a distinct and palpable injury." *Sears v. Hull*, 192 Ariz. 65, 69, ¶ 16 (1998). Arizona law has long recognized that taxpayers have standing to enjoin the improper expenditure of state and municipal funds. *See Ethington v. Wright*, 66 Ariz. 382, 386–87 (1948). Taxpayer standing "is based upon the taxpayers' equitable ownership of such funds and their liability to replenish the public treasury for the deficiency which would be caused by the misappropriation." *Id.* at 386.

¶18 Here, the contract at issue authorized the City to spend up to $1.5 million on capital improvements to a golf course, and the City subsequently issued a municipal bond to pay for its portion of clubhouse improvements. This bond is "payable from and secured solely by a lien on the City's Excise Taxes." Thus, Scottsdale taxpayers are directly funding the City's contribution to the improvements, and Stuart has standing to challenge the Third Amendment.

¶19 Relying on *Dail v. City of Phoenix*, 128 Ariz. 199 (App. 1980), the City argues that Stuart lacks standing because the City's bond payments will be reimbursed from the BMF fund. Generally, an individual taxpayer lacks standing unless he or she is "a contributor to the particular fund to be expended." *Smith v. Graham Cty. Cmty. Coll. Dist.*, 123 Ariz. 431, 433 (App. 1979). In *Dail*, this court concluded that a Phoenix resident lacked standing to challenge a contract under which the City of Phoenix would reimburse a real estate development company for building a water line by allowing the company to keep 35% of the revenue generated by sales of water to customers served by the system. 128 Ariz. at 200, 203. We held that the normal rationale for taxpayer standing did not apply to these circumstances because the contract did not involve the "expenditure of funds generated through taxation . . . or a transaction resulting in a pecuniary loss." *Id.* at 203.

¶20 Here, the debt service on the bond is guaranteed by the BMF, and this obligation is secured by White Buffalo's promise to pay at least $140,000 into the BMF fund annually. Nevertheless, the Third Amendment does not explicitly prevent the expenditure of taxpayer funds. The guarantee provision of the Third Amendment would not be necessary without an expenditure in the first place. And because the Third Amendment contemplates the expenditure of City funds raised through excise taxes, Stuart has standing to challenge it.

2. Gift Clause Claim.

¶21 Under the Gift Clause, a municipality may not "give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation." Ariz. Const. art. 9, § 7. The Gift Clause prevents "depletion of the public treasury or inflation of public debt by engagement in non-public enterprise" and ensures that public funds are not "used to foster or promote the purely private or personal interests of any individual." *Town of Gila Bend v. Walled Lake Door Co.*, 107 Ariz. 545, 549 (1971) (citations omitted). We will uphold an expenditure challenged under the Gift Clause if "(1) it has a public purpose, and (2) the consideration received by the government is not 'grossly disproportionate' to the amounts paid to the private entity." *Cheatham v. DiCiccio*, 240 Ariz. 314, 318, ¶ 10 (2016). We take a "panoptic view of the facts . . . giv[ing] appropriate deference to the findings of the governmental body." *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349 (1984).

¶22 Stuart appears to concede that the golf course serves a public purpose sufficient to satisfy the first prong of the Gift Clause analysis.[4] He alleges primarily that the City has received insufficient consideration in exchange for its new investments under the Third Amendment.

¶23 Stuart asserts that the Third Amendment is flawed because the City did not undertake adequate market research before entering the agreement. As evidence, he notes that the City did not first obtain an appraisal of the fair market rent of the golf course. He claims that the City thus lacked "particularized information" necessary to make an informed decision about whether the Third Amendment was supported by adequate consideration. *See Ariz. Ctr. for Law in the Pub. Interest v. Hassell*, 172 Ariz. 356, 369 (App. 1991).

¶24 Stuart's claim fails because an appraisal was not necessary in this context. The parties entered into the Third Amendment with the stated intention to make improvements to the golf course clubhouse. The contract limited the City's contribution to the project to $1.5 million. In exchange for the City's contribution to the project, White Buffalo agreed to pay the rest of the clubhouse improvement costs (worth approximately $850,000), and to increase the PUF from 2% of gross sales to 3% for 20 years (worth at least $520,000 even according to Stuart's expert's conservative estimate of

[4] As addressed below in Section I.A.3., however, Stuart does argue that the Third Amendment lacks a "clearly identified public purpose" sufficient to satisfy the City's Anti-Subsidy Clause.

$26,000 per year). White Buffalo agreed to make a yearly BMF payment of at least $140,000, enough to cover the City's bond obligations. Finally, and importantly, under the terms of the original GCCA, the City will keep title to the clubhouse improvements when the GCCA expires. *See Walled Lake Door*, 107 Ariz. at 549–50 (holding that a town's construction of a water line directly benefitting one private company did not violate the Gift Clause in part because "ownership and control over the water line [were] to remain in the Town"). All told, the City promised to provide an initial investment of $1.5 million ($2.1 million after interest), and in exchange would receive title to improvements worth $2.3 million, plus increased PUF payments worth at least half a million dollars, plus a guarantee of payments sufficient to cover the City's bond obligations. Thus, the City received a significant benefit notwithstanding that White Buffalo also stood to benefit from the improvements.

¶25 It is unclear from the record whether the City or White Buffalo is entitled to keep the Third Amendment's new $500,000 Clubhouse Work Surcharge. The contract requires White Buffalo to "collect[]" the surcharge, but invoices suggest that White Buffalo will then pay the collected funds to the City. This discrepancy is immaterial because the Third Amendment satisfies the Gift Clause regardless of who keeps this surcharge. *See* Ariz. R. Civ. P. 56(a) (authorizing summary judgment absent genuine dispute of *material* fact). The Clubhouse Work Surcharge either constitutes $500,000 in extra consideration to the City, or it provides White Buffalo a City-approved mechanism for accelerated cost recovery. If the latter theory applies, the City would also essentially be forbearing from its right to collect $15,000 in PUF and $20,000 in BMF from the surcharge, because the surcharge would be excluded from the calculation of gross sales. Given the equitability of the other contract terms, however, the City's forbearance of $35,000 in future revenues would not render the Third Amendment "grossly disproportionate."

¶26 Stuart argues that the facts of this case parallel those of *City of Tempe v. Pilot Properties, Inc.*, 22 Ariz. App. 356 (App. 1974). In that case, this court reversed summary judgment that had upheld a contract under which the City of Tempe charged $1 annual rent to a private entity to construct and use a publicly owned baseball facility, and remanded for findings regarding the adequacy of the consideration. *Id.* at 359, 363.

¶27 Stuart claims that the Third Amendment reduces the City's "net rent" to less than zero annually, so it is analogous to a nominal rent scheme. But his interpretation is based on two erroneous assumptions. First, Stuart includes the fee that the City pays to BOR annually ($100,000

beginning in 2007 and increasing at 5% annually thereafter) as an operating cost included in the calculation of net rent. Although Stuart may be correct that the new revenues from the Third Amendment are insufficient to cover the City's ever-increasing obligations to BOR, the Third Amendment's relationship to the City's other pre-existing financial obligations does not bear on a Gift Clause analysis, which focuses solely on whether the City is receiving proper consideration for its *new* expenditures.

¶28 Second, Stuart suggests that the Third Amendment places an annual cap of $140,000 on White Buffalo's contributions to the BMF fund. But this misreads the parties' obligations under the Third Amendment, which instructs the parties to "[i]nsert a new paragraph 4.5 in the [GCCA]" establishing a "Clubhouse Work Use Fee." Under this provision, White Buffalo will pay the City "an additional amount equal to the amount, if any, by which the amount of Basin Management Fee that [White Buffalo] paid to [the City] for that year was less than One Hundred Forty Thousand Dollars." Thus, the Clubhouse Work Use Fee is a guaranteed floor for White Buffalo's contributions, rather than a cap.

¶29 Stuart suggests to the contrary that the parties intended to replace original § 4.5 with the new § 4.5, thereby limiting White Buffalo's BMF payment obligations. But this was clearly not the parties' intention. When interpreting a contract, we apply a standard of reasonableness and consider the circumstances surrounding the agreement. *Malad, Inc. v. Miller*, 219 Ariz. 368, 371, ¶ 17 (App. 2008). New § 4.5 mentions White Buffalo's ongoing Basin Management Fund obligations, and the term "Basin Management Fee" is defined in original § 4.5. Accordingly, the new § 4.5 must supplement the original, not replace it. Moreover, the City and White Buffalo both appeared to understand during contract negotiations that new § 4.5 would operate as a safety net for the City's bond obligations, not a cap on White Buffalo's BMF payments. And they have performed accordingly, with White Buffalo remitting payments of $152,378.99 and $177,819.87 in the first two years since the Third Amendment was signed. Stuart's interpretation is thus unreasonable as a matter of law.

¶30 Finally, Stuart characterizes the Third Amendment as an attempt by the City to loan its credit to White Buffalo because the City will pay only 2.5% interest on its bond obligation, while White Buffalo would have likely paid a much higher rate if it had financed the project without any contribution from the City. But whether White Buffalo might have paid more under other financing scenarios is not relevant because the City received adequate compensation for its investment in the project.

Accordingly, the superior court did not err by granting the City summary judgment on this Gift Clause claim.

3. Anti-Subsidy Clause Claim.

¶31 Stuart further argues that the Third Amendment contravenes the City's own Anti-Subsidy Clause, which provides:

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

Scottsdale City Charter art. I, § 3(O). Stuart argues that the Third Amendment lacks a clearly identified public purpose and that the City is not receiving substantially equal consideration for its expenditure under the contract.

¶32 In the recitals to the Third Amendment, the parties stipulated that they entered into the agreement (1) to allow the City to temporarily collect increased PUF and (2) so the City could provide "construction and funding of certain capital repairs to the clubhouse at the Property." Generally, "the primary determination of whether a specific purpose constitutes a 'public purpose' is assigned to the political branches of government," *Turken v. Gordon*, 223 Ariz. 342, 349, ¶ 28 (2010), and the courts will not override the political branch's assessment unless the governmental body authorizing the expenditure has "unquestionably abused" its discretion. *City of Glendale v. White*, 67 Ariz. 231, 237–38 (1948). Here, the City views golf facilities as a desirable service for its citizens and an important source of tourism revenue. Because the clubhouse improvements serve the City's goal of providing golf amenities to its citizens, the Third Amendment satisfies the "clearly identified public purpose" prong of the Anti-Subsidy Clause.

¶33 Although the Anti-Subsidy Clause's requirement of "consideration substantially equal to its expenditure" has not been defined by any court, Stuart's argument fails under any reasonable interpretation of this term. As explained above, the City is expending $1.5 million (plus debt service) in exchange for at least $500,000 in increased PUF and title to $2.3 million in revenue-generating improvements to City land. And even assuming White Buffalo is entitled to keep the Clubhouse Work Surcharge,

the city is only forbearing $35,000 of future revenues by allowing White Buffalo to do so. By any construction of the term "substantially equal," the City has received adequate consideration, and we affirm summary judgment in favor of the City as to Stuart's Anti-Subsidy Clause claim regarding the Third Amendment.

4. Evidentiary Ruling Regarding Stuart's Expert.

¶34 Stuart asserts that the superior court improperly granted the City's motion to strike two declarations from his golf course appraisal expert, Albert Nava, because Nava's testimony was not timely disclosed. *See* Ariz. R. Civ. P. 26.1(a)(6), 37(c)(1). We review imposition of disclosure sanctions for an abuse of discretion, recognizing that a key consideration is the scope of prejudice to the party harmed by improper disclosure (which may be especially pronounced when disclosure does not occur until the eve of trial or consideration of a case-dispositive motion). *Zimmerman v. Shakman*, 204 Ariz. 231, 235–36, ¶¶ 10, 14, 16 (App. 2003).

¶35 Here, Stuart identified Nava as a possible expert witness in his pretrial disclosures and provided the City with a questionnaire that Nava had completed. The questionnaire did not, however, address opinions about the GCCA or the Third Amendment, and Nava responded to substantive questions about the golf course by saying he would have to do more research. Without any further disclosures about Nava's anticipated testimony, Stuart included two declarations from Nava in his cross-motion for summary judgment, one of which contained opinions on the potentially deleterious effects of the Third Amendment.

¶36 The superior court did not abuse its discretion by striking Nava's declarations, which were submitted after the final disclosure deadline, because the City was prejudiced by Stuart's attempt to use Nava's testimony without prior disclosure. As the City noted in its motion to strike, there was no opportunity to depose Nava to ask him about his newly disclosed opinions or to have the City's experts examine those opinions because the City's renewed motion for summary judgment and Stuart's cross motion were already pending.

¶37 Moreover, consideration of Nava's declarations would not have changed the outcome. Nava's declaration reinforces Stuart's argument that the Third Amendment reduces the City's "net rent" to zero because of the City's obligations to BOR. But as explained in ¶ 27 above, the City's payments to BOR are irrelevant to the question of whether the Third Amendment is proper.

B. § 4.5 of the GCCA (Claims 3 and 4).

¶38 Stuart also challenges the superior court's grant of summary judgment in favor of the City on his claims that § 4.5 of the GCCA, which established the BMF, violates the Gift Clause and the Anti-Subsidy Clause. He asserts that because the GCCA only restricts the use of BMF funds to "permanent improvements of all descriptions at or benefitting the License Area," the City is essentially remitting White Buffalo's rent payments back to White Buffalo, for White Buffalo's sole benefit.

¶39 Stuart does not have standing to challenge § 4.5 of the GCCA. Although the Third Amendment contemplates an expenditure of public funds, the original GCCA does not. (Nor does the language of new § 4.5, added by the Third Amendment.) Stuart has not identified how § 4.5 creates any actual or threatened expenditure from a fund to which he is a contributor, and he thus lacks standing to challenge that provision. *See Smith*, 123 Ariz. at 432–33.

¶40 Moreover, Stuart's claims regarding the original GCCA are barred by the one-year limitations period applicable to "[a]ll actions against any public entity or public employee." A.R.S. § 12-821. Such a cause of action "accrues when the damaged party realizes he or she has been damaged and knows or reasonably should know the cause, source, act, event, instrumentality or condition that caused or contributed to the damage." A.R.S. § 12-821.01(B). Although Stuart argues that the limitations period did not begin to run until he personally had reason to know about potential problems with the GCCA, Scottsdale taxpayers—who comprise the group allegedly damaged—had reason to know of any potential claim long before. The GCCA was approved in 1996, the work on the course was completed in 1998, and the course has operated continuously in the years since. While the City's approval of the GCCA at an open meeting did not necessarily, in and of itself, begin the limitations period, *see Long v. City of Glendale*, 208 Ariz. 319, 325–26, ¶¶ 12–14 (App. 2004), the claim accrued, at the latest, when the City began work on the golf course—giving the residents of Scottsdale notice that their city council had approved the project—more than 15 years before Stuart brought this action.

¶41 The limitations period is not extended or restarted by the continued payments into the BMF fund. *See Mayer Unified Sch. Dist. v. Winkleman*, 219 Ariz. 562, 567, ¶¶ 19–20 (2009) (rejecting a "continuing violation" theory premised on "a new claim aris[ing] each moment that the [governmental entity] fails to obtain value" for the allegedly unconstitutional easements at issue). And Stuart is not exempted from the

one-year limitations period simply because he characterizes his claim as "public interest litigation." As a general matter, the one-year statute of limitations of § 12-821 applies to "[a]ll" actions against any public entity. *See Flood Control Dist. v. Gaines*, 202 Ariz. 248, 252, ¶ 9 (App. 2002) ("The word 'all' means exactly what it imports. . . . A more comprehensive word cannot be found in the English language. Standing by itself the word means all and nothing less than all.") (citation omitted). Although under A.R.S. § 12-510 the State is exempt from most statutes of limitations, Stuart has not demonstrated how his suit as a private citizen seeking to void a municipal contract is in any way an action in the interest of and on behalf of the State. *Cf. Valley Bank & Tr. Co. v. Proctor*, 47 Ariz. 77, 79 (1936).

C. Automatic Extension of the GCCA (Claims 6 and 7).

¶42 Stuart also challenges the superior court's grant of summary judgment in favor of the City on his claims that the GCCA's extension provision violates the Gift Clause and the Anti-Subsidy Clause. Under the terms of the GCCA, the contract will last until the end of the City's CLUA with BOR. If the CLUA is extended, the GCCA will automatically be extended as well. The CLUA is currently set to expire in 2032. Stuart argues that this is an impermissible gift because the City has a duty to independently analyze whether the contract should be renewed at the end of the contract term, rather than granting White Buffalo automatic extensions.

¶43 The superior court correctly concluded that Stuart lacks standing to bring this claim. There is no expenditure effected (or even made more likely) by the extension provision. *See Smith*, 123 Ariz. at 432–33. Additionally, the superior court properly concluded that even if Stuart had standing, the issue is not yet ripe, because the City and BOR have not indicated when or if the CLUA will be extended. *See Moore v. Bolin*, 70 Ariz. 354, 357 (1950) ("The court ordinarily will not decide as to future or contingent rights, but will wait until the event giving rise to rights has happened[.]") (citation omitted). Accordingly, we affirm summary judgment on Stuart's claims challenging the GCCA's extension provision.

D. Public Records (Claims 5 and 8).

¶44 Stuart next challenges the superior court's grant of summary judgment in favor of the City as to his claims that the City wrongfully denied two public records requests. Stuart's first request sought financial records that Capital and White Buffalo were required to provide to the City under § 14 of the GCCA. But the City apparently never collected these

records. Stuart's second request sought "all legal guidance provided to the city council from the city attorney, or outside attorneys, regarding [the Anti-Subsidy Clause] and the guidance for its implementation." The court granted summary judgment to the City on both of these claims, concluding that (1) Stuart "ha[d] not demonstrated that [the § 14] documents constitute public records or that they are in the [City's] possession or control" and (2) because the City is "not required . . . to produce privileged documents, to create lists of privileged or other documents, or to provide or create documents that don't otherwise exist, at Plaintiff's request." We review the court's public records ruling de novo. *Phx. Newspapers, Inc. v. Ellis*, 215 Ariz. 268, 271, ¶ 13 (App. 2007).

¶45 A public record is (1) a record "made by a public officer in pursuance of a duty, the immediate purpose of which is to disseminate information to the public, or to serve as a memorial of official transactions for public reference"; (2) one "required to be kept, or necessary to be kept in the discharge of a duty imposed by law or directed by law to serve as a memorial and evidence of something written, said or done"; or (3) a "written record of transactions of a public officer in his office, which is a convenient and appropriate method of discharging his duties, and is kept by him as such, whether required by . . . law or not." *Griffs v. Pinal County*, 215 Ariz. 1, 4, ¶ 9 (2007) (citation omitted). Any person may inspect a public record kept "in the custody of any officer." A.R.S. § 39-121. And public officials must "maintain all records . . . reasonably necessary or appropriate to maintain an accurate knowledge of their official activities and of any of their activities which are supported by monies from . . . any political subdivision of this state." A.R.S. § 39-121.01(B).

¶46 White Buffalo's financial records are not public records. Although the GCCA places a duty on White Buffalo to provide certain financial records to the City, it does not impose a corresponding duty on the City to collect such information. The City's revenue from the GCCA is based solely on White Buffalo's gross revenues and the number of rounds played per year; White Buffalo provides both pieces of information to the City regularly. The details of White Buffalo's finances (what it pays its employees, how it invests its profits, etc.) are irrelevant to the City's duty to collect fees calculated based on gross revenues and rounds of golf played.

¶47 Additionally, records of any advice given by the Scottsdale City Attorney regarding the Anti-Subsidy Clause are public records, but they are protected by the attorney–client privilege and thus are not subject to inspection. *See* A.R.S. § 12-2234(B); *Lake v. City of Phoenix*, 222 Ariz. 547, 549, ¶ 8 (2009) ("Even if a document qualifies as a public record, it is not

subject to disclosure if privacy, confidentiality, or the best interests of the state outweigh the policy in favor of disclosure."). And while Stuart argues that he was entitled to an index of the documents containing such advice from the city attorney, the City has stated that no such list exists, and "the law does not require a government entity to expend the time and resources to create such an index—a new public document—in order to satisfy a public records request." *See Judicial Watch, Inc. v. City of Phoenix*, 228 Ariz. 393, 400, ¶ 31 (App. 2011).

¶48 Stuart argues that the superior court should have reviewed any allegedly privileged documents in camera before determining whether such documents could be inspected as public records. On this record, and given the analysis above, Stuart has not shown that the court abused its discretion by declining to conduct an in camera review. Accordingly, we affirm the superior court's ruling on Stuart's public records claims.

II. Rule 68 Sanctions.

¶49 Stuart challenges the court's imposition of sanctions against him under Arizona Rule of Civil Procedure 68. We review the imposition of Rule 68 sanctions for an abuse of discretion, but review the court's interpretation of Rule 68 de novo. *Berry v. 352 E. Virginia, L.L.C.*, 228 Ariz. 9, 15, ¶ 31 (App. 2011).

¶50 In order to "encourage settlement and eliminate needless litigation," *Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, 138, ¶ 57 (App. 2008), Rule 68(a) allows any party to make to any other party "an offer to allow judgment to be entered." If the offeree rejects the offer and subsequently fails to "obtain a more favorable judgment," that party must pay, as relevant here, the offeror's reasonable expert witness fees and double taxable costs incurred post-offer. Ariz. R. Civ. P. 68(g)(1). Moreover, the offeree must serve written notice of any objections to the validity of the offer within 10 days of receiving the offer. Ariz. R. Civ. P. 68(d)(2). "The failure to serve timely objections waives the right to object to the offer's validity in any proceeding to determine sanctions under [Rule 68]." *Id.*; *see also Boyle v. Ford Motor Co.*, 235 Ariz. 529, 531–32, ¶¶ 11–15 (App. 2014).

¶51 Here, the City made a Rule 68 offer under which the action would be dismissed with each side to bear its own costs. Stuart did not accept this offer, nor did he file an objection to the validity of the offer under Rule 68(d)(2). Stuart did not obtain a more favorable outcome than the one offered by the City; instead, the City's success on summary judgment led to

judgment wholly in its favor, and it further received a mandatory award of taxable costs as the successful party. *See* A.R.S. § 12-341. Accordingly, the court granted the City's request for over $26,000 in Rule 68 sanctions comprising expert fees and double taxable costs incurred after the offer.

¶52 Stuart argues that Rule 68 sanctions are incompatible with litigation in which a private party asserts a public right against government officials. He also argues that the City's offer of judgment was insufficient as a matter of law because it was unapportioned, *see* Ariz. R. Civ. P. 68(f), and that the offer violated the law of the case. But Stuart did not file any such objections to the validity of the offer as required by Rule 68(d)(2), so all such objections are waived. *See Boyle*, 235 Ariz. at 531–32, ¶¶ 11, 13.

¶53 Stuart also asserts that the superior court denied him due process by failing to hold an evidentiary hearing on the City's motion, arguing that under *Warner*, "due process demands that, before a party may properly be sanctioned, it must have had the ability to avoid that sanction." 218 Ariz. at 136, ¶ 51. But *Warner* stands only for the proposition that an offeree who lacks the legal ability to accept an offer of judgment—and thus had no meaningful opportunity to avoid its ramifications—cannot be sanctioned for failing to accept the offer. *Id.* at 136–37, ¶¶ 51, 54. *Warner* does not address, much less require, an evidentiary hearing before imposing Rule 68 sanctions on a litigant who had a prior opportunity (and power) to accept the offer. Moreover, Stuart had an opportunity to (and did in fact) oppose the City's request for sanctions. He thus received all process due before the imposition of Rule 68 sanctions.

¶54 Finally, Stuart claims that the City's expert costs were unreasonable. However, courts are "given wide latitude in assessing" the amount of taxable costs allowable under A.R.S. § 12-332. *Folwer v. Great Am. Ins. Co.*, 124 Ariz. 111, 114 (App. 1979). The City requested its costs related to the preparation of an appraisal of the License Area as it existed when the City and Capital entered into the GCAA. These costs are reasonably related to Stuart's claims, and the superior court did not abuse its discretion by granting them.

CONCLUSION

¶55 For the foregoing reasons, we affirm the judgment of the superior court granting summary judgment to the City on all of Stuart's claims. We also affirm the court's entry of Rule 68 sanctions against Stuart. In an exercise of our discretion, we decline the City's request for an award of attorney's fees on appeal under ARCAP 25.

AMY M. WOOD • Clerk of the Court
FILED: JT