STATE OF ARIZONA

OFFICE OF THE ATTORNEY GENERAL

INVESTIGATIVE REPORT By MARK BRNOVICH ATTORNEY GENERAL February 1, 2018	No. 18-001 Re: City of Tempe Ordinances 02017.39 and 02017.48 Authorizing Land and Improvement Leases

To: The Honorable Doug Ducey, Governor of Arizona
The Honorable Steve Yarbrough, President of the Arizona Senate
The Honorable J.D. Mesnard, Speaker of the Arizona House of Representatives
The Honorable Vince Leach, Requesting Member of the Arizona Legislature
The Honorable Michele Reagan, Secretary of State of Arizona

I. Summary

Pursuant to Arizona Revised Statutes ("A.R.S.") § 41-194.01, the Attorney General's Office ("Office") has investigated City of Tempe ("City") Ordinance O2017.39 ("Ordinance 39") and Ordinance O2017.48 ("Ordinance 48") (collectively, "Ordinances"), which authorized the City to enter into land and improvement leases. Based on a review of relevant authorities and materials during the limited 30-day period in § 41-194.01(B), the Attorney General has determined that Ordinance 39 **does not violate** state law and Ordinance 48 **may violate** state law.

II. Background

A. The Office's Investigation

On January 2, 2018, the Office received a request for legal review of the Ordinances pursuant to A.R.S. § 41-194.01 from Representative Vince Leach ("Request"). The Office asked the City to provide a voluntary response. The City fully and openly cooperated with the Office's review, including by providing a voluntary response, along with supporting materials. In performing the required investigation during the limited 30-day period, the Office reviewed relevant materials and authorities.

The Office's legal conclusions are set forth below. The facts recited in this report serve as a basis for those conclusions, but they are not administrative findings of fact and are not made for purposes other than those set forth in A.R.S. § 41-194.01.

B. Relevant State Law

The Request questions whether the Ordinances violated a particular section of the statutory scheme that established the government property lease excise tax ("GPLET"), which generally authorizes municipalities to lease government-owned real property to a private tenant, often in exchange for the private tenant building or developing an improvement on the land. During the term of such a lease, the tenant pays a GPLET, as established by statute, in lieu of property tax on the land and improvements. *See* A.R.S. §§ 42-6201 to 42-6210. In particular, the Request focuses on whether the Ordinances complied with the requirements of A.R.S. § 42-6203(A) ("GPLET Rate Statute").

When first enacted, what is now the GPLET Rate Statute set forth the generally applicable GPLET rate. In 2010, the Arizona Legislature increased the generally applicable GPLET rate, while also amending the GPLET Rate Statute to include a provision that provides

for a "grandfathering" of the previous GPLET rate structure that is available for a lease "entered into before June 1, 2010" or:

> if a development agreement, ordinance or resolution was approved by the governing body of the government lessor before June 1, 2010 that authorized a lease on the occurrence of specified conditions and the lease was entered into within ten years after the date the development agreement was entered into or the ordinance or resolution was approved by the governing body.

2010 Ariz. Sess. Laws, ch. 321, § 2 (2d Reg. Sess.) (codified at A.R.S. § 42-6203(A)).

For GPLET leases with the grandfathered rate structure set forth in the GPLET Rate Statute, the GPLET rate decreases with the age of the property improvement in tiered increments, starting after ten years. A.R.S. § 42-6203(A)(2) (GPLET rate for such leases decreases by twenty percent every ten years, until "the tax due is zero" after fifty or more years). The calculation of the GPLET rate pursuant to this tiered decrease system runs from when "the original certificate of occupancy was issued" for the pertinent "government property improvement" under the GPLET lease. *Id.*

In 2017, the Legislature again amended the GPLET Rate Statute to require that municipalities seeking to use the grandfathered GPLET rate structure on new GPLET leases had to submit the new leases to the Arizona Department of Revenue ("ADOR") for a determination as to whether the new leases were "in compliance" with the GPLET Rate Statute. 2017 Ariz. Sess. Laws, ch. 120, § 2 (1st Reg. Sess.).

C. The Ordinances

Ordinance 39 concerns the "Graduate Hotel Parcel"; identifies a "certain Development Agreement dated June 12, 2014, Resolution No. R2014.87" between the City and Graduate Tempe Owner, LLC; authorizes the City's mayor to enter into a lease agreement with Graduate Tempe Owner, LLC; and includes among its recitals that "[t]he City would accept conveyance of land and improvements and would lease-back such land and improvements to the owner thereof

for a period of ten (10) years." In seeking to apply the grandfathered GPLET rate structure under the GPLET Rate Statute, Ordinance 39 relies upon City Resolution No. 2010.72 ("Resolution 72"), adopted by the City Council on May 20, 2010.

Ordinance 48 concerns "the project located at 1625 West Fountainhead Parkway"; identifies a "certain Development Agreement dated October 26, 2017, Resolution No. R2017.135" between the City and Bank of the West; and authorizes the City's mayor to enter into a lease agreement with KBS II Fountainhead LLC in furtherance of the development agreement, which "contemplates" that KBS II Fountainhead LLC "shall lease" the property to Bank of the West in connection with a Bank of the West "Operations Center." In seeking to apply the grandfathered GPLET rate structure under the GPLET Rate Statute, Ordinance 48 relies upon City Resolution No. 2010.76 ("Resolution 76"), adopted by the City Council on May 20, 2010.

III. Analysis

The Request's overarching question is whether the City authorized leases that properly include the grandfathered GPLET rate structure. That question contains three subparts. *First*, whether the City complied with the GPLET Rate Statute's requirement that ADOR review a GPLET lease to determine whether the grandfathered rate was available. *Second*, whether the "original certificate of occupancy" under A.R.S. § 42-6203(A)(2) means the certificate issued when the GPLET lease is entered into or the original certificate issued when the property was first completed and occupied. *Third*, whether the City adopted a development agreement, ordinance, or resolution for each of the two locations at issue that was in accordance with the GPLET Rate Statute, *i.e.* that was "entered into" or "approved" before June 1, 2010, and "authorized a lease on the occurrence of specified conditions."

A. ADOR Review

The Request expressed concern that the City did not submit the lease agreements authorized by the Ordinances for approval by ADOR. Under the GPLET Rate Statute, one of the conditions to obtain the grandfathered GPLET rate is if "the lease was determined by the department of revenue to be in compliance with this subsection." A.R.S. § 42-6203(A). After examining materials provided by the City, the Office has concluded that the City submitted the Bank of the West/Fountainhead lease authorized by Ordinance 48 to ADOR on October 26, 2017, and ADOR gave preliminary approval on November 30, 2017. Accordingly, the City has not violated the GPLET Rate Statute's ADOR-related requirements in connection with Ordinance 48. The Office also has concluded that the Graduate Hotel lease authorized by Ordinance 39 has not yet been submitted to ADOR. However, this alone does not constitute a violation of the GPLET Rate Statute, because the lease has yet to be executed. Ordinance 39 merely authorizes the City's mayor to execute a lease in the future. And the GPLET Rate Statute appears to require only that ADOR receive the lease and provide a determination before the parties enter into the lease. Accordingly, the City has not at this time violated the GPLET Rate Statute's ADOR-related requirements in connection with Ordinance 39.

B. Original Certificate of Occupancy

The Graduate Hotel lease authorized by Ordinance 39 pertains to property first constructed in 1970, and the Request questions whether the City "purport[ed] to begin a new GPLET Lease agreement in year 47, allowing for a significantly reduced rate of tax remittance." As noted above, the grandfathered GPLET rate decreases by twenty percent every ten years for GPLET leases governed by the GPLET Rate Statute, and the calculation of the GPLET rate pursuant to this tiered system runs from when "the original certificate of occupancy was issued"

for the pertinent "government property improvement" under the GPLET lease. A.R.S. § 42-6203(A)(2). The Request queries whether "the original certificate of occupancy" in the GPLET Rate Statute means the certificate issued in connection with the execution of a new GPLET lease or the original certificate issued when the property was first completed and occupied.

The plain language of § 42-6203(A)(2), as well as the following subsection, A.R.S. § 42-6203(A)(3), establish that the property's age is the operative consideration in determining the appropriate GPLET rate under subpart (A)(2) of the GPLET Rate Statute. *First*, the adjective "original" that modifies the noun "certificate" in subpart (A)(2) denotes, at a minimum, that the GPLET Rate Statute is contemplating the certificate of occupancy that "[p]reced[es] all others in time." *See The American Heritage Dictionary of the English Language* 1243 (5th ed. 2011). *Second*, the immediately following paragraph, subpart (A)(3), expressly notes that "[i]f no certificate of occupancy can be located, dated aerial photographs or other evidence of substantial completion may be used to determine the age of the building for purposes of paragraph 2 of this subsection." A.R.S. § 42-6203(A)(3). Together, these considerations clarify that the original certificate of occupancy issued when the property was first completed and occupied is the "original certificate of occupancy" for purposes of A.R.S. § 42-6203(A)(2). Accordingly, Ordinance 39 does not violate state law in authorizing a lease that looks to the age of the property for purposes of establishing the lease's GPLET rate under the GPLET Rate Statute.

C. Reliance on Resolutions Adopted Before June 1, 2010

Finally, the Request contends that the Ordinances violate the GPLET Rate Statute because each failed to satisfy the requirements set forth in the GPLET Rate Statute for leases dated after June 1, 2010, that still seek to use the grandfathered GPLET rate structure:

> [A] development agreement, ordinance or resolution was approved by the governing body of the government lessor before June 1, 2010 that authorized a

> lease on the occurrence of specified conditions and the lease was entered into within ten years after the date the development agreement was entered into or the ordinance or resolution was approved by the governing body.

2010 Ariz. Sess. Laws, ch. 321, § 2 (2d Reg. Sess.) (codified at A.R.S. § 42-6203(A)). In particular, the Request contends that neither the Graduate Hotel lease authorized by Ordinance 39 nor the Bank of the West/Fountainhead lease authorized by Ordinance 48 is tied to a Resolution or Ordinance pre-dating June 1, 2010, that "authorized a lease on the occurrence of specified conditions" for a particular lease or piece of property.

1. Ordinance 39 (Graduate Hotel Parcel)

Ordinance 39 authorizing the Graduate Hotel lease satisfies the requirements of the GPLET Rate Statute, and the Graduate Hotel lease's use of the grandfathered GPLET rate structure is best understood as complying with the GPLET Rate Statute. As noted above, Ordinance 39 relies upon Resolution 72, adopted by the City Council on May 20, 2010. This resolution pre-dates June 1, 2010. It is site-specific to the "property now known as 'Twin Palms,' located on Lots 1 through 8 of Block 2 of the University Park Addition as recorded in Book 30 of Maps Page 37 of Maricopa County, Arizona, a portion of Section 22, Township 1 North, Range 4 East of the Gila and Salt River Base and Meridian, Maricopa County[.]"

Moreover, Resolution 72 includes an authorization for a "lease on the occurrence of specified conditions," namely empowering the Mayor to enter into a lease "at such time as the following specified conditions have been satisfied as to such Lease:" (1) there is a building on the pertinent property (a) for which a certificate of occupancy has been issued, (b) "for which title of record is held by the City of Tempe," (c) "which is situated on land for which the City holds title of record," and (d) which is available for use for any commercial, residential rental, or industrial purpose; (2) the City and the pertinent developer "have entered into a development agreement" detailing the government property improvement and various other specifics; and (3)

the development agreement provides for certain payments to "the Tempe Union High School District and Tempe Elementary School District No. 3[.]"[1]

2. Ordinance 48 (Bank of the West Lease)

Ordinance 48 authorizing the Bank of the West/Fountainhead lease very likely does not satisfy the requirements set forth in the GPLET Rate Statute, and the Bank of the West/Fountainhead lease's use of the grandfathered GPLET rate structure is best understood to violate the GPLET Rate Statute. As noted above, Ordinance 48 relies upon Resolution 76, adopted by the City Council on May 20, 2010. This resolution pre-dates June 1, 2010. And, like Resolution 72, it includes an authorization for a "lease on the occurrence of specified conditions"—the "specified conditions" in Resolution 76 echo almost exactly those set forth in Resolution 72 and do not differ materially for purposes of this "specified conditions" analysis.

However, Resolution 76 is not site-specific to a certain property. Resolution 72 set out in detail—at the plat-map level—the property it was approving for a future GPLET lease. And as many as seven other GPLET-related Resolutions adopted by the City Council on the same day as Resolutions 72 and 76 likewise identified particular properties at a similar level of detail or

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[1] In light of the latent ambiguity in the GPLET Rate Statute, it is not wholly inconceivable that under the GPLET Rate Statute an authorizing ordinance or resolution for a specific property would necessarily need to articulate "specified conditions" specific to the particular, unique considerations and circumstances for each lease or property parcel at issue; said differently, specified conditions would need to be specified as well as specific and particular to the property and parties at issue. However, the best reading of the GPLET Rate Statute is that Resolution 72 includes an authorization for a "lease on the occurrence of specified conditions," and therefore, under A.R.S. § 41-194.01(B), Ordinance 39 is not in violation of the GPLET Rate Statute. Had Resolution 72's specified conditions merely repeated the requirements of the statute (*i.e.*, included only those considerations listed in paragraph 1 of Section 1) there would likely be a problem meeting the "specified conditions" requirement, because such "specified conditions" must mean more than what is already required by statute. *See, e.g.*, *Williams v. Thude*, 188 Ariz. 257, 259 (1997) ("Each word, phrase, clause, and sentence [of a statute] must be given meaning so that no part will be void, inert, redundant, or trivial."). But Resolution 72 also includes additional conditions in the following two paragraphs, and therefore avoids this issue.

specific, existing development agreements. But Resolution 76 made no such designation. Instead it is a general resolution setting "specified conditions" for seemingly all potential property within the City and thereby designating all of Tempe as potentially available for future GPLET leases using the grandfathered GPLET rate structure under the GPLET Rate Statute.

For this reason, Ordinance 48 may violate state law by purporting to authorize a lease using the lower, grandfathered GPLET rate structure in a way not permitted by the GPLET Rate Statute. *See* A.R.S. § 42-6203(A). The GPLET Rate Statute's plain language best supports a reading that would require a separate resolution or ordinance authorizing either a specific lease or a future lease for a specific property parcel that utilized the grandfathered GPLET rates. The GPLET Rate Statute requires that "a development agreement, ordinance or resolution" be approved by the City's governing body "that authorized a lease." The term "a lease" is shorthand for the full term used in the preceding clause, which is "a lease of a government property improvement." The use of the singular article "a" throughout these phrases strongly indicates that the GPLET Rate Statute contemplates approval by a governing body that is specifically related to a singular lease of a singular government property improvement or a lease concerning a specifically identified property parcel. And later in the same sentence, the statute refers to "the lease," further indicating the statutory language contemplates action related to a specific lease or specific property/government property improvement.

Furthermore, legislative history for the GPLET Rate Statute's current version suggests that a major policy purpose of amending the GPLET Rate Statute was to significantly limit the number of leases that could obtain the grandfathered GPLET rate. Indeed, a Senate fact sheet issued regarding the enacted version of the bill noted that the bill's express purpose was to enact "requirements for *all* new Government Property Lease Excise Tax (GPLET) leases entered into

beginning June 1, 2010, and provides for the setting of new GPLET lease rates." Senate Fact Sheet for H.B. 2504, 5/19/2010 (emphasis added).[2] The same fact sheet noted that the bill's proposed changes to the GPLET Rate Statute would "[g]randfather[] all leases entered into before June 1, 2010 or that result from a development agreement, ordinance or resolution approved before June 1, 2010 that are entered into within 10 years after approval and meet all required conditions." *Id.*. This same language appeared in the House of Representatives House Summary for the version of the bill transmitted to the governor. House Summary for H.B. 2504, 5/20/2010. The phrases "that result from" and "that are entered into within 10 years after approval" suggest that it was understood that *specific* development agreements, resolutions, or ordinances relating to *specific* government property improvements would have correspondingly specific consequences.

Although it appears the GPLET Rate Statute's best reading would mean Ordinance 48 violates state law (because it relies on a 2010-era resolution that is not adequately site-specific to a certain property), another plausible reading of the GPLET Rate Statute exists, which the City has offered. Under this alternative reading, the GPLET Rate Statute's language regarding "a . . . resolution or ordinance" simply means that the City could negotiate new GPLET leases with the grandfathered rates as long as a single resolution or ordinance authorized the City to do so and was enacted before June 1, 2010, irrespective of the resolution or ordinance's specific content. In this light, Resolution 76's lack of specificity regarding a particular property is irrelevant, and accordingly, under this reading, the City complied with state law in enacting Ordinance 48 via Resolution 76. Given that the GPLET Rate Statute does not define terms and requires use of

[2] As originally introduced, H.B. 2504—which amended A.R.S. § 42-6203(A) upon its enactment in 2010—provided that a new GPLET rate applied to any GPLET lease entered into after January 1, 2011. What ultimately became the current version of A.R.S. § 42-6203(A) was added in the Senate. *See* Senate engrossed version of H.B. 2504.

interpretive canons of construction, the Office cannot conclusively declare this reading of the GPLET Rate Statute to be mistaken. Indeed, the GPLET Rate Statute is at least somewhat ambiguous as to whether "a lease" means, effectively, "any lease" that the City could authorize by passing a general ordinance or resolution (as the City did here) or whether an authorizing ordinance or resolution adopted before June 1, 2010, must be specific to either an already negotiated lease or a future lease for a specific property parcel.

Although the Office believes that the best reading of the GPLET Rate Statute establishes that Ordinance 48 violates state law, there is adequate ambiguity to warrant pursuing a special action in the Arizona Supreme Court to resolve the matter pursuant to A.R.S. § 41-194.01(B)(2).

IV. Conclusion

The Office concludes under A.R.S. § 41-194.01(B) that Ordinance 39 does not violate state law but Ordinance 48 may violate state law. The Office recognizes that there are multiple ways to read the GPLET Rate Statute concerning how a City could have authorized a lease with the grandfathered GPLET rate. Although the City did not act in accordance with what the Office views as the GPLET Rate Statute's best reading by adopting Ordinance 48, there is enough of a question as to whether doing so violated state law to warrant proceeding to the Arizona Supreme Court in accordance with A.R.S. § 41-194.01(B)(2).

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