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August 14, 2008

HAND DELIVERED

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City of Scottsdale
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Scottsdale, AZ 85251

Vice Mayor Robert Littlefield
City of Scottsdale
3939 N. Drinkwater Blvd.
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Council Member Betty Drake
City of Scottsdale
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Council Member W.J. "Jim" Lane
City of Scottsdale
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Scottsdale, AZ 85251

Re: July 8, 2008 City Council Meeting
Agenda Item 34A

August 18, 2008 City Council Agenda

Notice Pursuant to Private Property Rights Protection Act,
Known as Proposition 207, and Section 1983

Dear Mayor and Members of the City Council:

This firm represents the owner of the property at the Northeast corner of Indian School Road and 68th Street as to the critical need to protect their legal rights under the Constitution.

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This letter is in response to the discussion concerning Agenda Item 34A at the July 8, 2008, meeting of the City Council. Specifically, the request by Vice Mayor Robert Littlefield to place "a resolution to SRP" on a future Council agenda "that the Council does not support the relocation of the substation." That item has now been scheduled for August 18, 2008.

The August 18 Agenda item must be removed from the Agenda and not considered or debated.

This letter is also notice to the City, particularly Vice Mayor Littlefield, pursuant to the Private Property Rights Protection Act, known as Proposition 207, and Section 1983, that the proposed action is impermissible and actionable under Prop. 207 and Section 1983. It is also barred by case law involving the City of Scottsdale that is cited below.

Prop 207 was passed by the voters to protect property rights from non-consented to, ad hoc, actions of government. It was aptly named by the voters as the Private Property Rights Protection Act.

Section 1983 is a federal law that provides a right of legal action for the violation of a person's 5th Amendment, and other, fundamental rights. A companion law, Section 1988, provides for attorneys' fees and costs of having to bring such an action. Governments and government officials can be corporately and personally liable for violation of 5th Amendment and other rights.

As you will see below, Scottsdale has faced these issues before. The Arizona Supreme Court case law, and the recent Prop. 207, coming from those earlier situations tell us that the proposed "resolution" should not be considered.

The July 8 "Request"

The marked up Agenda, on the City's website, from the July 8 meeting states:

*****34A. Citizen Petition Requesting Denial of a Potential Private Development Project and Salt River Project Substation Relocation at 68th Street and Indian School Road**

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- **VICE MAYOR LITTLEFIELD REQUESTED THAT A RESOLUTION TO SRP STATING THAT THE COUNCIL DOES NOT SUPPORT THE RELOCATION OF THE SUBSTATION BE AGENDIZED FOR COUNCIL DISCUSSION ON THE AUGUST 18, 2008 AGENDA**

Request: Consideration of, and possible action on, a citizen petition as provided for by the City Charter, asking the Council to "demand that any substation relocation to the aforementioned neighborhood [located at 68th Street and Indian School Road], as part of the above proposed project [Solis Scottsdale Hotel and residences, AKA Waterview], be rejected by Salt River Project and the project itself under the above terms be denied by the Council."

Related Policies, Procedures: City Charter, Article 2, Section 16 states: "Consideration of petitions. Any citizen of the city may appear before the council at any regular meeting and present a written petition; such petition shall be acted upon by the council, in the regular course of business, within thirty (30) days."

The Problem

There is no study before the Council as to the proper location of electric facilities in the Downtown area. Vice Mayor Littlefield's request is nothing more than an effort to create a political issue to assist candidates he is supporting in the election that is now underway. Citizens are now voting. It also impacts only one property, an application pending before the City and alters a potential land use; all in violation of law and City codes.

No other government in Arizona uses the procedure being urged by Vice Mayor Littlefield. Its use will create an atmosphere of uncertainty and confusion that is completely divorced from the constitutions, statutes and codes that comprehensively govern land use in Arizona.

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History and the Need for Authority

To act, the City Council needs authority by Constitution, statute, charter or lawful codes. When a matter that the City proposes to act upon involves land use and property rights, this is even more true and, thus, the property owner is protected by the Arizona Constitution, United States Constitution, State law, Section 1983, Prop. 207 and the City's codes. In a case involving Scottsdale, the Arizona Supreme Court stated:

The position of the appellant city is not in harmony with the announced law of this state. In City of Scottsdale v. Superior Court, 103 Ariz. 204, 439 P.2d 290 (1968) this court specifically held that zoning authority comes from the state. When the state grants zoning power to a city, the power must be exercised within the limits and in the manner prescribed in the grant and not otherwise.

Charter cities have certain rights and privileges in local matters to legislate free from interference by the legislature. Luhrs v. City of Phoenix, 52 Ariz. 438, 83 P.2d 283 (1938). When the subject of legislation is a matter of statewide concern the Legislature has the power to bind all throughout the state including charter cities. Clayton v. State, 38 Ariz. 466, 300 P. 1010 (1931); Luhrs v. City of Phoenix, supra. Zoning regulation is based upon the police power of the state. Hart v. Bayless Investment and Trading Company, 86 Ariz. 379, 346 P.2d 1101 (1959); City of Scottsdale v. Superior Court, supra. Zoning regulation is a matter of statewide concern.

City of Scottsdale v. Scottsdale Associated Merchants, 120 Ariz. 4, 583 P.2d 891 (1978).

Clearly and without question, state law does not allow the action proposed by Vice Mayor Littlefield.

A little history is in order due to the recent plethora of petitions designed to push the City into taking actions that are well outside the normal procedures allowed by law (see for example, Agenda Item 33, July 8, 2008, seeking an illegal public vote on anti-property rights and economic development issues).

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In the early 1990s, the City experienced controversy over whether or not to improve 64th Street to what it is today. Neighbors, my clients, successfully referred the matter to a vote of the people. So far, so good. The City Council then decided to gratuitously place a number of other items on the same ballot relating to transportation. My clients were forced to sue the City to have the matters that we considered to be nothing more than a public opinion poll tossed off the ballot. The City hired Grady Gammage as its outside counsel to assist the City Attorney.

Judge Jonathan Schwartz tossed the matters referred by the Council off the ballot. Judge Schwartz agreed with the neighbors, my clients, that the City had to have express authority to place something on a ballot, and equally important, to take any action. The Judge further agreed that the "advice" the City claimed to be seeking from its voters through those ballot measures was not authorized by law.

The 64th Street election went ahead. By the narrowest of margins, the Council's action was upheld and the project went ahead; likely because preceding the vote the City added the neighborhood mitigation measures that are now in place to the project. That is how proper public participation works when the law and constitution are adhered to.

Let's look at why Judge Schwartz was able to so easily rebuke the City in the 64th Street case. The case he relied upon most heavily was, of course, an earlier case involving Scottsdale. In *City of Scottsdale v. Superior Court*, 103 Ariz. 204, 207-208, 439 P.2d 290, 293 - 294 (Ariz. 1968), the Arizona Supreme Court held:

Thus it appears abundantly clear that under the charter of the City of Scottsdale and the 'provisions of the constitution and general laws of the state' the voluntary submission of the ordinance by the council to a special vote of the people, in the absence of a referendum petition therefor, was wholly without authority and outside the delegated powers of the city council.

Now, in a reversal from the 64th Street situation, the so-called activists and Vice Mayor Littlefield are seeking to have the Council place unauthorized advisory matters on the ballot and to pass unauthorized resolutions. All of these proposals are designed

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to influence the ongoing election. The Constitution and the law does not allow such unconstitutional and illegal actions.

In the 1968 Supreme Court case, the City of Scottsdale was enjoined from accepting an initiative petition relating to land use. The Court definitively stated:

Thus it is clear and we hold that the initiative process is not available as a mode for amending a comprehensive zoning plan. It is an irreconcilable conflict with the due process clause of the United States Constitution, 14th amendment.

Thus, it is abundantly clear that the action now scheduled for August 18, 2008, is illegal pursuant to precedent involving the City and its Council. The Scottsdale cases clearly hold that the statutes and codes regarding property use and rights must be followed in order for the Council to act, matters cannot be referred to the voters without a referendum and the power of initiative is not available in land use matters.

Importantly, as the 64th Street example shows, those now seeking the illegal actions may be the victims of such actions in the future. The only course to steer is that allowed by law.

Predicate to Placement on the Agenda

The August 18, 2008, agenda item cannot come before the Council without the City Attorney certifying that it is a lawful action.

The City Code, section 2-21 requires the following prior to any matter being placed on the Agenda for Council consideration:

Sec. 2-21. Review of ordinances, resolutions, etc., by city attorney and city manager. **Before presentation to the council, all ordinances, resolutions and contract documents must have been approved as to form and legality by the city attorney and referred to the city manager.** The city manager shall have an opportunity to present his comments prior to the passage of any ordinance, resolution or acceptance of a contract. (emphasis supplied)

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Thus, in order for Vice Mayor Littlefield's effort to help his political slate to be placed on the Agenda, the City Attorney must find authority for such an action and certify it as legal based on the precedent cited above and other relevant law and cases.

Trying to obscure the substance of the action by calling it some kind of note to SRP will not work. The substance will govern. Abundant authority for brushing past ruses exists in Section 1983 law concerning Fifth Amendment rights. The earlier cases involving Scottsdale demonstrate that ruses will not work.

Based on recent actions, we anticipate unwarranted political attacks on members of the Council and staff who would dare to follow the law. Such may be the current "ethic;" however, it is not right. If the City wants to take actions such as those demanded in Agenda Items 34A and 33 it must seek Legislative amendments or, at least, go to court to seek a declaration that the binding precedent of the Arizona Supreme Court somehow is not binding. Plowing ahead just violates important constitutional rights and may result in large expenditures of public funds in fruitless defense of a transitory political action.

The August 18, 2008 agenda item must be removed as being illegal.

Deprivation of Fundamental Rights by Invented Procedures

The agenda item Vice Mayor Littlefield has requested is actually an effort to take away a potential land use for the property involved. That, in effect, is a rezoning and brings the Constitution, Section 1983 and Prop. 207 into play. State statutes, and the City's Zoning Ordinance, do not allow the Council to initially declare a land use opinion and circumvent the Constitutionally protected rights and statutory procedures. This is true even in this case where the land use decision is attempted to be obscured by Vice Mayor Littlefield attempting to label it a resolution addressed to the utility company.

To put it another way, there is no difference between the proposed "note" to SRP and the Council passing a resolution urging someone not to purchase a property. What

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if the proposed resolution concerned a homeowner, not a developer? The proposed conduct of the City would rightly shock the conscience of the Council and the public.

Moreover, there is no authority in State law, the Charter or Ordinances for the resolution being sought by Vice Mayor Littlefield. The reason for this is obvious. There are well established methods of studying land use and utility matters that simply do not allow election season political nonsense to deprive a property owner of its due process and property rights by impromptu actions. That is a misuse of the public process, uses City funds for political purposes and is a violation of Section 1983 and Prop. 207. This is particularly true in this case where there is a pending application being processed concerning this property.

Vice Mayor Littlefield has apparently been telling people that the City has done this type of thing before. That is not the case. The four examples that I have heard of are not at all similar circumstances. Three involve the Council opining on larger public issues such as overhead versus underground power lines, the Tele Communications Act and an aborted land trade of the 1990s involving Spur Cross Ranch. The fourth involved a federal government plan concerning the downtown post office. Only the post office case remotely involves the Council declaring an intention involving a discrete property and it is not analogous as it involves a federal plan and not a prohibition of land uses allowed on any specific property.

It is simply not possible to credibly suggest that the Council has a history of passing resolutions that impact only one property, one owner and the use of that property without following the land use ordinances' procedures. That is the case here.

Liability – Corporate and Personal

This letter provides notice to the City of the illegality of the proposal by Vice Mayor Littlefield, of the liability the City and of the personal liability of any member of the Council who participates in such an action.

The Private Property Rights Protection Act, the potential liability under Section 1983, the Arizona Constitution and, even, the City's own procedures bar the action being suggested.

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The Larger Issue

The proposal by Vice Mayor Littlefield is being responded to in this manner not just because it impacts this property and this owner. This response will, hopefully, deter similar unauthorized actions and the controversies and liabilities that such actions will engender. It has been a long time since the 1968 case and the 64th Street situations; all involved in present discussions need to be reminded of the Constitution and the law.

No property owner or business in Scottsdale should be forced to check the City Council meetings for fear that the Council might want to pass some resolution impacting that person's property, business or livelihood. In essence, that is what Vice Mayor Littlefield's proposal will lead to if not ruled unlawful. Such actions are not only illegal, they will send a signal that no one should invest in Scottsdale. It does little to suggest that such a resolution is in no way binding. Such an official action can impact financing, impair contracts, alter decisions to purchase or sell and other important rights. Government cannot lightly create such an impact; that is why it is an illegal action.

Moreover, such ad hoc acts as that proposed by Vice Mayor Littlefield violate the rights of all citizens of Scottsdale to participate in a discussion related to a particular property. The state laws and City codes require public notice, including posting a property, in order to protect all citizens and allow all citizens to participate. Making up procedures as you go violates fundamental rights of the property owner in this case and of all citizens of the City.

There are deliberate processes and requirements in place to avoid the Council taking action targeted at one property or one business. The proposed resolution is so targeted. There is reason and good cause to require a citizens' based process for decisions involving land uses.

It is particularly important to adhere to those processes and requirements when the proposed action is so overtly political and timed to impact the election. Situations like this have frequently resulted in findings of personal liability on the part of elected officials for there can be no greater harm to the public process

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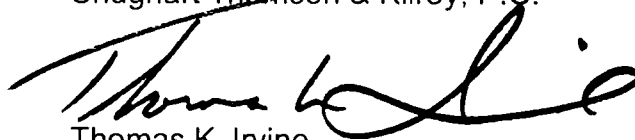
than using a property or a business as a pin cushion in the political season by cavalierly dealing with fundamental property rights and protections.

Conclusion

The matter proposed by Vice Mayor Littlefield must be removed from the Council Agenda. It is truly unfortunate that we need to communicate in this manner. We hope this matter is closed and urge its removal from the August 18, 2008 agenda. Thank you.

Sincerely,

Shughart Thomson & Kilroy, P.C.



Thomas K. Irvine

cc: City Clerk

TKI:jd