

# MEMORANDUM

GAMMAGE & BURNHAM, P.L.C.

November 16, 2015

TO: Bruce Washburn, City Attorney  
City of Scottsdale  
FROM: Grady Gammage, Jr.  
RE: Desert Discovery Center

This memorandum addresses the question of the Desert Discovery Center (DDC) use at the Gateway location within the City of Scottsdale's McDowell Sonoran Preserve. We understand that some questions have been raised about the DDC use at the proposed location because of language in Scottsdale's Preserve Ordinance.

It is quite clear that both the language of the Preserve Ordinance and the history of its application and interpretation recognize the DDC as a permitted use within the Preserve. As it proceeds, the DDC design may necessitate administrative amendments to the previously approved Municipal Use Master Site Plan (MUMSP).

**I. Since 2007, the DDC use has been explicitly approved by the City Council at the Gateway Access location.**

In its approval of the MUMSP for the Gateway in 2007, the City Council determined that the DDC use described as both "an education and demonstration center" and "an interpretive center" was allowed in the Preserve at the Gateway under the Preserve Ordinance. The first phase of the Gateway Access Area was approved with a site plan for the initial access area trailhead improvements. The Desert Discovery Center was explicitly identified in the MUMSP approval as the second phase. Although the total floor area was listed as 22,000 square feet in the Council Action Report based on the then available conceptual information about the facility, no stipulations of the approval limit the size of the future DDC facilities. The applicable stipulations contemplate an amendment to the MUMSP by requiring "any proposed significant change" to be subject to hearings by the Planning Commission and Council. Future planning will thus be subject to City Council approval through the normal Planning Commission and City Council public hearing process for MUMSP's.

The MUMSP was approved on a 543 acre site in the Preserve at 18333 N. Thompson Peak Parkway zoned Single Family Residential Environmentally Sensitive Lands (R1-10/R1-18/R1-35ESL), according to the City Council Action Report in Case No. 10-UP-2006. Under Scottsdale's Zoning Ordinance, the single family residential zoning districts allow a Municipal Use as a permitted use with no conditional use

permit required. Although the case was designated 10-UP(Use Permit)-2006 and the same type of hearings by Planning Commission and Council were held for its approval, the case was not a use permit case but rather a site plan approval case, as explained by Don Hadder, Principal Planner for the case.

Sec. 1.500 of the Ordinance provides for the Council approval of a MUMSP following recommendations by the Development Review Board and Planning Commission, with a public hearing by the Council. Therefore the same type of public hearings would be used to approve the amendment to the existing MUMSP. The site plan is approved administratively by the City Council, as are conditional use permits under the City's Ordinance. Each zoning district lists permitted uses and uses and uses that are subject to conditional use permit. Conditional uses are allowed by the zoning on the property with no change of zoning required for the use to be allowed, therefore no legislative action by the Council. The Council is only required to find that the listed Ordinance criteria for the conditional use permit are met.

The Scottsdale Zoning Ordinance and the residential zoning of the Gateway site also allow accessory uses, defined by the Ordinance as those "customarily incidental, related, appropriate and clearly subordinate to the principal use." Both the language of the City Council Action Report and the accompanying application Project Narrative for Case No 10-UP-2006 included potential accessory uses that would be ancillary to the principal interpretive center use, also described as "a primary educational facility." Among the potential uses customarily incidental to such an interpretive visitor center cited in the case documents were a café with outdoor dining terrace, a small administrative and support building, interpretive trails and gathering areas, a 400 seat outdoor amphitheater and parking, including bus parking. These accessory uses were ancillary uses and thus were to be incidental and smaller relative to the primary interpretive center/educational facility use. The structures were to be single-story, low in scale using materials that blend well with the natural desert environment. The Project Narrative also describes limited lighting being allowed for special evening events at the DDC.

This prior action by the City sets a clear precedent that the DDC is a fully permitted use under the Preserve Ordinance. Any judicial review would accord great deference to this long standing interpretation. See, e.g., Kubby V. Hammond 68 Ariz. 171, 98 P.2d 134 (1948).

## **II. The History and Intent of the Preserve Ordinance Demonstrate that the DDC was always an anticipated part of the Gateway area.**

In 1994 the City of Scottsdale established the initial Preserve area and created the McDowell Sonoran Preserve Commission. (MSPC) The following year the MSPC began drafting the Preserve Access Area Report, which was subsequently approved by the MSPC in 1999, and its final version approved by the City Council in 2011. The Gateway Access area was identified as 100-200 acres in size and as the location of

“the broadest range of public amenities,” including a visitor center with potential ancillary uses, including concessions, offices, picnic and ramada areas to accommodate corporate picnics and other large user groups. In conjunction with the generation of the Preserve Access Report and its approval by the MSPC, the Commission recognized the need for adopting rules and regulations for the public use of the Preserve.

Former MSPC Chairman Dr. Art DeCabooter, MSPC Member Christine Kovach and Preserve Director Bob Cafarella, all of whom were involved in the drafting of the rules and regulations which were eventually adopted by the City as the Preserve Ordinance in 2000, confirm that the intent of the Ordinance was to regulate the public use of the Preserve in order to ensure its protection from inappropriate use by members of the public. They have all stated unequivocally that the Preserve Ordinance was never intended to prohibit the DDC but rather that language was specifically included in the Ordinance to allow the DDC as a facility for providing the educational, research and tourism support opportunities cited in the purpose and management sections of the Ordinance.

**III. The Language of the Preserve Ordinance itself makes clear that the DDC use is allowed under two distinct provisions: the general use restrictions do not apply to uses by the City; and the City has explicit authority to permit public, civic, and educational uses.**

It is first worth noting that all of the language of the Preserve Ordinance should be read against what is usually called the “cardinal rule” of statutory construction, that is to give affect to the intent of the law making body. *Sandblom v. Corbin*, 125 Ariz. 178, 182, 608 P.2d 317 (App. 1980), citing *City of Mesa v. Killingsworth*, 96 Ariz. 290, 394 P.2d 410 (1964); *Phoenix Title & Trust Company v. Burns*, 96 Ariz. 332, 395 P.2d 532 (1964). “When interpreting a statute or ordinance, our primary goal is to determine and give effect to the enacting body’s intent.” *Gorman v. Pima County*, 230 Ariz. 506, \_\_\_, 287 P.3d 800, 803 (App. 2012) citing *City of Phoenix v. Yates*, 69 Ariz. 68, 71, 208 P.2d 1147, 1149 (1949); *Kahn v. Thompson*, 185 Ariz. 408, 412, 916 P.2d 1124, 1128 (App. 1995). “We look first to the language of the statute or ordinance as the best indicator of that intent. *Mathews ex rel. Mathews v. Life Care Ctrs. of Am., Inc.*, 217 Ariz. 606, ¶ 6, 177 P.3d 867, 869 (App.2008).

Next, a review of the various provisions of the preserve ordinance itself is useful. There are two lines of interpretation under which the DDC is allowed in the Preserve under the express provisions of the Preserve Ordinance. First, it would be allowed as a City use under the interpretation that the rules of general use apply to the use of the Preserve by members of the public but not to the City’s use of the Preserve for City activities. Support for this interpretation is found in Sec.21-22 (b) according to which otherwise prohibited activities are allowed without the need for any permit if conducted by the City. This section excludes the requirement of a permit for both fee and non-fee educational activities or outdoor classes “conducted by the City.”

Second, it would be allowed under the interpretation that pursuant to the express provisions of the Ordinance the City has the authority to allow activities that it determines both further legitimate public, civic or educational purposes and are consistent with the purposes of the Preserve and the Preserve management objectives listed in the Ordinance.

A. Purpose. The very first Purpose provision of the Preserve Ordinance reflects the intent of the drafters. The purpose, according to Sec. 21-2 (a) is to “establish in perpetuity a preserve of Sonoran desert and mountains..., while providing *appropriate public access for educational purposes*; and to provide passive outdoor recreational opportunities for residents and visitors.” (Emphasis added.) The Preserve was intended to be used for educational as well as other passive recreational purposes by both residents and visitors. Passive recreational activities are defined in the Ordinance as “non-motorized recreational activities such as hiking, wildlife viewing, mountain bicycling, horseback riding and rock climbing.” This definition distinguishes these activities from active recreational activities such as riding ATV’s or motorized dirt bikes, playing ballgames, using playground equipment, etc. The distinction is reinforced and expanded by the language in Sec.21-2 (c) cited below that describes the types of facilities in the Preserve as not those of a typical public park. The definition of passive recreational activities does not exclude the tourism, education and research activities that are expressly included under the Management Objectives of the Ordinance. In its approval of the DDC at the Preserve Gateway, the City Council determined that the DDC supports the passive recreational activities allowed under the Ordinance.

The next two Purpose sections expand on this intent. The Preserve is to be left in as pristine a state “as possible” so that in perpetuity it will be, as stated in Sec.21-2 (b), “a nearby natural desert refuge from the rigors of urban life.” Residents and visitors alike are to have a place to which they can come for relief from daily pressures and stresses to experience, enjoy and learn about the desert. That the “pristine a state as possible” language does not exclude any improvements is demonstrated by the language that immediately follows in the very next section. Sec.21-2 (c) describes the type of facilities contemplated in the Preserve, not the traditional facilities of a public park, such as playgrounds, ball fields, tennis courts, swing sets and climbing apparatus designed for “active” recreation, but rather, “*facilities or improvements that the City determines* are necessary or appropriate to support passive recreational activities.” (Emphasis added.)

This purpose section contains key language relative to the intent of the Ordinance as explained by the drafters cited above. The intent was that the Preserve is not a public park with typical “active” recreational uses like those associated with ballfields and playgrounds. In contrast with a typical public park, the Preserve is a place of “refuge,” enjoyment of the magnificent desert scenery, its flora and fauna, learning about the desert, walking on trails, “passively” enjoying, learning and recreating in it.

The only facilities to be in the Preserve are those determined by the City, acting through its City Council, to be necessary to support those types of passive activities.

B. Management Objectives. Sec.21-3 lists the Management objectives of the Ordinance and includes several objectives that expressly support the inclusion of a DDC facility in the Preserve. The objectives cite supporting tourism “by providing public outdoor educational opportunities for visitors” (6) and providing “opportunities for education and research on the Sonoran desert and mountains.” (7) Most importantly in this regard is providing “enough access areas of sufficient size and with *adequate amenities for appropriate public access.*” (Emphasis added.) The DDC is a long-identified and planned amenity to afford the public, residents and visitors, access to the Preserve that will enhance their experience of the Preserve and their knowledge about the Sonoran desert. The DDC is being designed as an educational and research-oriented interpretive visitor center that will be a destination tourist attraction welcoming visitors to a uniquely Scottsdale experience and implementing the objectives of the Ordinance. It serves the further purpose of providing appropriate public access to make the Preserve accessible to many disabled members of the public who would otherwise not be able to experience it as fully.

C. General Rules for Use. Both the plain language and a common sense reading of Sec.21-12 General rules for use demonstrate, as the drafters intended, that the rules apply to all persons using the Preserve but not to the City itself. Under (a) all persons are required to comply with all applicable laws including City ordinances. This requirement clearly applies to members of the public and not to the use by the City itself. A city would not normally require itself by Ordinance to comply with its own ordinances and regulations. Under (b) this application of the rules to members of the public is made even more clear by the provision that the City, under subsequent provisions of the Ordinance in Sec.21-22 and Sec. 21-23, may authorize exceptions to the rules. Logically if the City itself was compelled by the Ordinance to follow all the rules intended to apply to members of the public, the City could not allow exceptions, as these provision expressly state the City is empowered to do. Again the rules of construction require a common sense reading of the plain language of a statute or ordinance. For the City to have to grant itself exceptions to its own rules makes no sense. The convoluted application of the Ordinance necessitated by that reading is counter to all rules of interpretation that require a common sense, plain language approach.

The language of Sec. 21-12 (c) confirms only that the rules do not apply to persons or groups to whom the City acting through its preserve director grants a permit or to individual city employees performing their official duties, other individuals authorized by the City to perform certain services, including vendors when authorized by the preserve director. There is nothing in this final section that prohibits the City from exercising its authority under the Ordinance sections cited above to authorize activities that are exceptions to the stated rules, as the City has already in fact done

with regard to the use of motorized vehicles by members of the public using the Preserve.

D. City Authority. Sec.21-22 expressly confers upon the preserve director acting as the agent of the City the authority to “determine what activities may be allowed in the Preserve,” subject to permit issuance. According to the language of this section, such activities may include some that would be otherwise prohibited under the Ordinance, when “in the reasonable judgment of the preserve director, the activities serve or further a legitimate public, civic or educational purpose, and they are not inconsistent with the purpose of the preserve or preserve management objectives.” Thus the City acting through its preserve director can allow the DDC use as furthering a legitimate public, civic or educational purpose consistent with the purpose and management objectives of the Ordinance even it includes activities that would otherwise be prohibited by the Ordinance. Under this authority in the Ordinance the Council allowed the DDC use in its approval of Case No. 10-UP-2006, cited above.

E. References to “Person” in the Preserve Ordinance do not apply to the City. The use and definition of the word “person” in the Ordinance also supports the intent that the rules and regulations were meant to govern members of the public using the Preserve, but not to prohibit use by the City for activities it determines to be in furtherance of a legitimate public, civic or educational purpose and consistent with the purposes and management objectives of the Ordinance. The term “corporation” in a City Ordinance does not typically imply “municipal” corporation when the City is adopting rules applicable to the general public. It was not intended to include the City in the context of the Preserve Ordinance taken as a whole, according to the drafters. To interpret the word “corporation” in the definition of person as applying to the City would contradict both the intent and specific language of the Ordinance.

It would be contrary to the City’s own practice to infer that the term “corporation” was intended to include “municipal corporation” for at least two reasons:

(1) When the City intends to include political subdivisions, in the definition of “person” it does so explicitly; see Scottsdale City Code, Section 1-5 Rules of Construction and Definitions:

*Person.* The word "person" shall include the state, the county, a political subdivision of the state, other governmental entity, a corporation, firm, partnership, association, organization and any other group acting as a unit, as well as an individual. It includes a trustee, receiver, an assignee, or similar representative.

(2) When the City intends to refer to itself in its ordinances including the Preserve Ordinance, it uses the term “city.” See, e.g. Section 21-2 – Purpose of the preserve: “The preserve will not contain traditional facilities or improvements associated with a

public park, but may contain facilities or improvements that the city determines are necessary or appropriate to support passive recreational opportunities” (Emphasis added.)

The Lake Havasu City v. Arizona Department of Health Services case has been used to support the position that the word “corporation” in the definition of “person” in the Preserve Ordinance may include “municipal” corporation. However, in the context of the subject state statute, the case is clearly distinguishable from the Preserve Ordinance definition. In the Lake Havasu case the State of Arizona was interpreting and applying its child-care statutes and regulations to regulate a municipal entity, a "lower" level of government, over which it exercises authority under its statutes. The state in the Lake Havasu case was not regulating itself but rather a lower level of government over which it has regulatory authority. In the case of the City regulating the use of the Preserve, if the word “corporation” included the City as a municipal corporation, the City would be regulating itself in the same manner as members of the public, which would not be the normal application of municipal regulations. The court upheld the state's interpretation and application of the statute in the same way that the courts generally uphold the interpretation and implementation of municipal ordinances by cities. In fact the decision as a whole is consistent with the principle that the City as a rule both interprets and applies its own ordinances and the City’s own interpretation is given great deference by the courts.

Additionally, under the state statute, the definition of person lists a “school governing board,” a public entity akin to a municipal corporation, whereas a "municipal corporation" did not have a separate listing, nor would one have been required, because it would be included in "corporation," as an entity over which the state routinely exercises authority. It would be unreasonable and inconsistent for the state to be able to regulate school board operation of a child-care facility and not city operation of the same kind of facility. The statute's intent is to govern all entities under its control that operate child care facilities/programs and thus the court determined that a city operating a child care facility was included in the "person/corporation" definition. The state in this case was not regulating itself and its own activities as the state under these statutes. If the strained application of the use of the word person to include municipal corporation were applied, the City would be regulating itself and its activities as the municipality.

The Preserve Ordinance language expressly excludes activities in the Preserve conducted by the City from the requirement of preserve director approval or permit issuance. This further demonstrates that the City is not equivalent to a member of the public, a “person,” under the Ordinance. As cited above, Sec.21-22 does not require a permit for both fee and non-fee educational activities or outdoor classes conducted by the City. Additionally, again, the City has previously exercised its interpretation/application authority under the Ordinance to allow jeep tours even though there is an express prohibition of motorized vehicles in Sec. 21-12

(b) (2) of the Preserve Ordinance and the City has approved the DDC use in the Preserve in its approval of the MUMSP for the Gateway.

### **Conclusion**

The DDC has long been contemplated as a use within the Preserve Gateway area. It was approved for such use in 2007 as part of the Municipal Use Master Site Plan. The plain language of the Preserve Ordinance permits the DDC use as a municipal use within the Preserve. There is no question that the intent of the drafters of the Preserve Ordinance and the subsequent administration of the Preserve Ordinance by the City staff charged with interpreting it both support the DDC use within the Preserve.

As planning and development of the DDC proceeds there will need to be specific amendments to the MUMSP to deal with changes in facilities and scope. These amendments would be future administrative actions approved through Planning Commission and City Council in their discretion. It is in these future reviews that the specifics of the site plan and development configuration will be determined.