CLARK HILL

Clark Hill PLC
14850 N. Scottsdale Road
Suite 500
Scottsdale, AZ 85254
T 480.684.1100
F 480.684.1199

clarkhill.com

T 480.684.1107
F 480.684.1167
Email: RLorenz@ClarkHill.com

May 23, 2017

VIA PRIVATE PROCESS SERVER

Carolyn Jagger, City Clerk
City of Scottsdale
3939 N. Drinkwater Blvd.
Scottsdale, AZ 85251

Re: NOTICE OF CLAIM – NoDDC, Inc., an Arizona non-profit corporation and Protect Our Preserve, an Arizona non-profit corporation v. City of Scottsdale, Hon. W.J. Lane, Suzanne Klapp, Virginia Korte, Kathy Littlefield, Linda Milhaven, Guy Phillips, David N. Smith

Madame Clerk:

This firm represents NoDDC, Inc. ("NoDDC") and Protect Our Preserve ("POP"). This communication is NoDDC's and POP's administrative claim pursuant to A.R.S. § 12-821.01, under which NoDDC and POP demand settlement in the form of action and refraining from action by the City of Scottsdale and its elected Mayor and Councilmembers, pertaining to the Desert Discovery Center development project ("DDC"), which appears to be planned for location at the McDowell Sonoran Preserve Gateway Trailhead at 18333 N. Thompson Peak Parkway, Scottsdale, Arizona 85255 ("DDC Site"). NoDDC and POP and their members hereby demand that the City, acting by and through its elected officials suspend the development and expenditure of public funds for the DDC until such time as a public election is held and the City's voters approve the reclassification of a specified quantity of acres of land, at a specified location, for development usage consistent with ongoing plans for the DDC. This claim may be settled by passage of a resolution of the City Council committing the City to the election demanded herein and preparation and conduct of such election in conformity with local and state law requirements.

I. HISTORICAL BACKGROUND OF THE MCDOWELL MOUNTAIN PRESERVE AND THE DDC.

A. Conservation Roots

Between 1981 and 1984, the City expanded by annexation to a northern boundary coterminous with the Tonto National Forest. Development of thousands of acres of land north of Deer Valley Road in Scottsdale would soon follow. However, a contrarian effort and movement began in 1990 to set aside and protect the mountainous area of the McDowell Mountains that came into the City limits.

Momentum built to combat the danger of developing too much of the native lands of the McDowell Mountains. However, the City had been dealt a set-back in a 1986 Arizona Supreme Court case, *Corrigan v. Scottsdale,* 149 Ariz. 538, 720 P.2d 513 (1986), in which the court held that zoning or regulatory changes to the character and uses of property might constitute a taking for which just compensation must be paid. The City's 1990s approach changed to acquiring property outright from private owners in order to consolidate such land into an area protected from development, rather than trying to zone it into conservation.

B. The Voters Speak I: Tax to Buy the McDowell Mountain Preserve

In 1995, citizens of Scottsdale authorized .20% sales tax increase for a thirty-year period to fund land purchases within a Recommended Study Boundary to become the McDowell Sonoran Preserve. On March 20, 1995, the City Council passed Resolution No. 4236 which placed Proposition 400 on a special election ballot set for May 23, 1995, as an initiative measure. The purpose and plan was to expend tax revenue on a "pay-as-you-go" basis. Proposition 400 stated, in part:

> That the taxes approved by Voters would be used to "provide funds to supplement private efforts to acquire land for the McDowell Sonoran Preserve for the purpose of maintaining scenic views, preserving plant and wildlife . . . and passive outdoor recreational opportunities for residents and visitors."

Proponents of Proposition 400 said these things in support:

> *The funds collected from Proposition 400 will be used solely for the purose of land acquisition. Furthermore the two-tenths of one percent tax will cease when the land has been acquired. . . . We must save our McDowell Mountains.*

Virginia Korte Letter in Support of Proposition 400.

C. The State of Arizona Pitches In

Unfortunately, some of the land that could not be acquired by purchase from sales tax revenue was State Trust Land. Responding to statewide pressure, Governor Symington rolled out

the Arizona Preserve Initiative in 1995 ("API"). This was enacted as law in 1996. See A.R.S. § 37-311 et seq. The API defined conservation lands as "natural assets of state trust lands for the long-term benefit of the land, the trust beneficiaries, lessees, the public and the unique resources that each area contains, such as open space, scenic beauty, protected plants, wildlife, archaeology and multiple use values." A.R.S. § 37-311(1). The dictates of the API have the force and effect of the authority of the federal Arizona Enabling Act and the Arizona Constitution. See *Forest Guardians v. Wells*, 201 Ariz. 255, 264, 34 P.3d 364, 373 (2001) (Martone, J. dissenting).

The API was a boon to the McDowell Sonoran Preserve effort. A conservation classification, lease or sale to the City could augment the preserve by 3,200 acres. The classification right of the State Land Department could give the City time to marshal the funds to make purchases, without the possibility of commercial auction of the State Trust Land. Though private acquisitions of land grew the preserve by thousands of acres from the sales tax revenues, a few McDowell Mountain developers made inroads into the Recommended Study Boundary, compromising to some extent but building what they could.

D. The City Redoubles Its Efforts

In 1996, the City appointed members to a Desert Preservation Task Force ("DPTF") to study preserving lands in the city limits in northern Scottsdale. On April 1, 1997, the Council accepted the DPTF recommendation to expand the Reserve Boundaries by an additional 19,940 acres including adding land to what have become the Tom's Thumb and Lost Dog access points. No action was taken to authorize the use of the 1995 sales tax funds to purchase those lands, since that would require voter approval of a new use of the funds not different than approved in Proposition 400.

By Resolution 5143 dated August 17, 1998, the City extended the Reserve Boundaries to include those additional 19,370 acres. The Council asked for a second vote by the electorate of Scottsdale to approve the use of the Preserve Sales Tax to buy those additional acres.

E. The Voters Speak II: Another 19,370 Acres and Adopting the Preserve Amendment to the Scottsdale City Charter

In 1998, the electorate was again provided ballot measures in the form of Proposition 411, to approve the use of the preserve sales tax authorized by Proposition 400 for the purchase of the 19,370 additional acres; and Proposition 410, known as the Preserve Charter Amendment. In Proposition 410, the City became bound to protect the McDowell Sonoran Preserve. Under Proposition 410, the City Charter would be amended adding new Article 8, §§ 8-11 ("Preserve Charter Amendment"). This enabled the City to designate preserve land as part of a newly created "power to cause land to be left in its natural condition". Charter, Art. 8, § 8.

Through Proposition 410, voters were promised and the City was bound to maintain preserve designations in perpetuity, without following strict provisions calling for super-majority Council action and subsequent ratification by voters. Taken together, Propositions 410 and 411 allowed for expansion of the McDowell Sonoran Preserve by over 19,000 acres and the

assurance that it would be kept that way. This more than doubled the size of land area. The McDowell Sonoran Preserve thereby became the largest protected urban land mass of its type in the United States.

F. The City Enhances Propositions 410 and 411

In 2000, the City enacted the McDowell Sonoran Preserve ordinance, which prohibited certain activities such as concessions, bringing food into the preserve, night time operations, sound amplification, and other intrusive activities in the preserve. At no time did the City enact a provision of the ordinance authorizing construction and development of the DDC as an exception or exclusion from these rules. Voters and the taxpayers were involved throughout the enactment process, once again instilling the belief that the McDowell Sonoran Preserve would never be subjected to the pressures of commercial use or development, even by the municipal steward that created it.

G. The Voters Speak III: Tax Increases Approved

The speed of acquisition of preserve property from the State could be maintained only by using the sales tax funds authorized in 1995 under Proposition 400. As real estate values dramatically increased in the early 2000s, interest developed in accelerating the rate of purchase. The City sought to take advantage of the authorization to expand the preserve to more than 33,000 Acres. Voters were once again asked to approve a sales tax increase. Voters were also asked to authorize the issuance of bonds to be repaid by the greater sales tax revenue. Ballot Question 1 asked voters to approve an additional 0.15% sales tax for a thirty-year period extending through 2034. Though lacking in specifics, Question 1 also asked whether tax revenue greater than required for acquisition might be used for "constructing improvements thereto". The extent, size, scope, and grandiosity of the improvements was never clear in the ballot question.

Ballot Question 2 asked voters to authorize the issuance of $500 million of general obligation bonds to accelerate purchases. The "Summary Analysis" of Question 2 disclosed that "This election submits the question of whether General Obligation Bonds may be issued to finance land purchases of the McDowell Sonoran Preserve". Once again, no mention was made as to the use of bond funds for improvements, much less the size, scope, allocation, budgeting, and quantity of bond funds to be expended.

No arguments in opposition to either Question 1 or Question 2 were publicized. The arguments in favor provide clarification on voter impressions of how the funds were to be used:

- "preserve open space" (Protect and Preserve Committee Co-Chairs Hill and DeCabooter)
- "preserve the open spaces, clear skies and clean water" (Senator Carolyn Allen and Representative Michelle Reagan)
- "additional revenues to purchase preserve lands for Scottsdale" (Then Scottsdale Area Chamber of Commerce President, Virginia Korte, now City Council Member.)

- "permanently protect 36,000 acres or nearly one third of our city as natural, public open space" (Christine Kovach)
- "voting 'yes' will allow for the purchase and permanent preservation of one third of our city as natural open space" (Resort Operators)

H. City Actions Since Passage of Questions 1 and 2 in the 2004 Special Election.

From 2004 through 2008, the City conducted multiple studies and projects to discuss the potential construction of the DDC. In 2008, the discussions took new shape and form when the City retained ConsultEcon, Inc. to evaluate the market opportunities for the DDC. The DDC Phase I study was prepared by ConsultEcon, Inc. in association with Exhibit Design Associates. This study analyzed the potential viability of the project and identified possible program concepts and themes and the desired size and scope. The DDC Site was analyzed and recommended as the optimum location for the DDC. The notion of using non-preserve land was considered but apparently discarded. Phase I of the DDC feasibility study was completed in June 2008. The consulting fees were paid one-half from bed tax and one-half from private sector.

On August 12, 2008 a joint meeting of the Tourism Development Commission ("TDC") and the City's McDowell Sonoran Preserve Commission ("MSPC") was held. The joint concern about the DDC was that the size, type and scale of the project that the public might accept could not be known. Little or no consideration was given to conforming the project to the Charter amendment and the Preserve Ordinance. At that time, the City Attorney admitted that compliance with the Charter and Preserve Ordinance would have to be addressed. By this time, the City was still reeling from the outcome of its condemnation lawsuit against Edmunds-Toll Construction Co. ("Toll Brothers"). In that case, Maricopa County Superior Court case no. CV2004-001025, a jury awarded Toll Brothers over $81.9 million for the 383-acre parcel at the DDC Site. This was over $35 million more than the City's pre-judgment bond paid to Toll Brothers. This was not easy to swallow as Arizona descended into the great recession and real estate values crashed. The City had no choice but to pay the judgment to Toll Brothers, to the tune of $214,000 per acre, not including its defense costs.

On October 9, 2009, the City Council approved the creation of a new capital project "Desert Discovery Center" and authorized funding for the Phase II Feasibility Study, funded by sales tax dollars. Subsequently, The DDC Phase II Design/Feasibility Study contract was awarded on January 26, 2010 to the consultant team headed by Swaback Partners PLLC ("Swaback"). The request for proposals identifies the DDC Site and described the project as a "larger, destination, attraction-type facility." The January 26, 2010 Council Action Report documenting the award of the contract to Swaback reiterated the consensus of the joint MSPC/TDC effort, stating, "Subcommittee members further agreed and recommended that Phase Two should focus on the development of a single concept to be located at the [DDC Site], one that matches the magnificence of the Preserve and will draw visitors to Scottsdale." The City authorized expenditure of $500,000 to Swaback for its fees, not including change orders.

The conceptual design and exhibits were presented to the City Council on June 15, 2010. After that meeting, the focus of the study moved to the operating cost estimates and the business

and marketing plan. The draft information was provided to the DDC Subcommittee of the joint MSPC/TDC committee for review during their weekly meetings. However, later that year, on September 29, 2010, TDC and MSPC held a joint meeting to review and vote on the DDC Phase II Feasibility Study and Recommendations/Work Program. The TDC voted unanimous approval. The MSPC vote was split 5-to-5. MSPC members expressed concerns regarding the location of the DDC in the Preserve boundary and use of sales tax. The MSPC dissenting members listed a number of concerns including location, Preserve Ordinance violations, cost, and sustainability.

I. Thinking Big and Spending Bigger

Notwithstanding these concerns, on November 9, 2010, the City Council voted to approve Resolution No. 8469 accepting the DDC Phase II Feasibility Study and Recommendations to move forward with the project. Bed tax funding was allocated to continue this effort in Phase III to the DDC project, basically ignoring the concerns expressed by the MSPC. Once again, no discussion was included on legal compliance with the Charter or the Preserve Ordinance. We have reviewed no record of referral of the matter to the City Attorney's Office for review and advice. Still undaunted, on December 13, 2010, the City passed Resolution No. 8540 establishing the DDC Phase III Feasibility Committee. Again, bed taxes were allocated for this expense.

In early 2012, the DDC Phase III Feasibility Study and Work Plan to test the assumptions from the Phase II plan. This committee reported that "The committee strongly supports the location, concept and vision of the DDC project as a premier education and tourism facility." On March 27, 2012 the City Council held a study session to review the DDC Phase III Feasibility Committee recommendations. On April 3, 2012 the City Council approved Resolution No. 8998 accepting the Phase III Committee Recommendations and Work Program.

Late in 2012, the City issued a request for qualifications for DDC operations, identifying the location for those operations to be at the DDC Site. There were no respondents. In 2013, the City created the Desert Discovery Center Advocates Group (DDCAG). The DDCAG was a loose association of private citizens, formed in the summer of 2013 to conduct community outreach, to conduct a fundraising feasibility study, to explore and develop potential private-public partnerships, and to marshal community support for the DDC. Throughout 2013 and 2014, the DDCAG met in private, often with City officials in attendance, to advance the DDC project.

In March 2015, during a work study, the City Council gave direction to staff to reissue a new DDC request for qualifications ("DDC RFQ"). In short order, the DDCAG incorporated as Desert Discovery Center Scottsdale, Inc. ("DDC Inc.") responded with its Scope of Qualifications. Since the DDCAG helped draft the DDC RFQ, the result was predictable. As the only respondent, DDC Inc. was awarded the contract.

In September 2015, the City Council directed staff to negotiate a contract with DDC Inc. and for the City treasurer to identify possible funding sources. On January 11, 2016, the City Council voted 6-1 to approve the contract with DDC Inc. for further planning and study, to issue

a request for qualifications for professional design services, and to initiate an amendment to the Municipal Use Master Site Plan ("MUMSP") pertaining to the DDC Site.

Since January 2016, DDC Inc. has spent a large portion of the $1.7 million budgeted for the DDC RFQ. It is our client's understanding that this expenditure of funds has generated plans to bulldoze native preserve land using taxpayer dollars to construct permanent buildings and related curtilage occupying a thirty-acre footprint. The total cost to the taxpayers is understood to be between $35 million and $75 million.

The City Council and DDC Inc. have refused to discuss the option of a public vote and have refused to consider construction locations other than the DDC Site.

II. LEGAL STATUS OF PRESERVE LAND

A. Authority of Charter

The Charter Form of Government of the City of Scottsdale ("Charter") is the City of Scottsdale's organizing document, first adopted in 1951 when the city was incorporated. The provisions of the Charter supersede inconsistent measures adopted by a city. "Upon such approval said charter shall become the organic law of such city and supersede any charter then existing (and all amendments thereto), and all ordinances inconsistent with said new charter." Ariz. Const. Art. XIII, § 2. See *Pointe Resorts v. Culbertson*, 156 Ariz. 158, 160, 750 P.2d 1361, 1363 (1988).

B. Protection Afforded at the Highest Local Law Level

The Charter authorizes the acquisition of property by the city. Under the City Charter,

> The city may acquire property within or without its corporate limits for any city purpose, consistent with state law, in fee simple or any lesser interest or estate, by purchase, gift, devise, lease or condemnation, and may sell, lease, mortgage, hold, manage and control such property as its interests may require.

Charter, Art. 1, § 3(A). In August 1998, the City's appointed Charter Review Advisory Commission ("Charter Commission") issued a report to the Mayor and City Council in which the commission recommended adoption of Ordinance 3183, to place two questions on the November 3, 1998 ballot. The Charter Commission had worked with the McDowell Sonoran Preserve Commission ("Preserve Commission") to formulate the text of Ordinance 3183, which would become finalized in ballot Proposition 410. The basis for the cooperative effort of the Charter Commission and Preserve Commission was to "help the community insure that preserve designated lands could be protected in perpetuity." The Charter Commission re-affirmed that deep commitment by unanimously declaring that a Charter amendment would be dedicated to "developing the most 'bullet proof' strategy for preservation-whether it is by a vote of the people, deed restrictions or other strategies." Proposition 410 was approved by a resounding majority of voters on November 3, 1998.

The provisions of Proposition 410 were codified in the Charter in Article 8, sections 8, 9, 10 and 11. These four sections neatly provide for designation of preserve land, the perpetual nature of such designation, the restrictions against alienation of preserve land and procedure for removal of land from preserve designation, respectively. As to designation, the Charter provides:

> To establish a mountain and desert preservation heritage for present and future citizens of the city, the council may designate as preserve land any land owned by the city which is suitable for mountain or desert preservation. The council shall designate preserve land by resolution. Land purchased directly with the proceeds of a tax specifically authorized by the electors for purchase of preserve land shall be deemed designated as preserve land upon the city's acquisition. Land that may be designated as preserve land is any land owned by the city in fee title and any other real property interest which gives the city possession or use of land or power to cause land to be left in its natural condition.

Charter, Art. 8, § 8. The Proposition 410 additions to the Charter reflected the same commitment to permanent protection of preserve land. "A preserve land designation shall be perpetual unless that designation is removed as provided in this charter." Charter, Art. 8, § 9. The depth of protection from alienation was also very clearly expressed. "The city shall not convey ownership or grant any easement, lease, lien or other real property interest in any land designated as preserve land." Charter, Art. 8, § 10. Lastly, and most pivotal to this claim, the voters imposed a procedure for removal of land from preserve status, but left that issue to be decided by future elections.

> The council may remove the preserve designation from any parcel of land less than one (1) acre in area. Such removal shall be limited to a maximum of six (6) parcels within any one (1) calendar year. Such removal shall not become effective until sixty (60) days after an affirmative vote of two-thirds (2/3) of all members of the council and after resolution of any referendum concerning such removal. Removal of the preserve designation from any other parcel of land shall require approval by an affirmative vote of two-thirds (2/3) of all members of the council, but shall not become effective unless submitted by the council to the electors and approved by vote of the majority of votes cast at the election.

Charter, Art. 8, § 11.

On January 23, 2009, Barack Obama was quoted as telling a Republican congressional leader, "Elections have consequences, and at the end of the day, I won. So I think on that one I trump you." The quotation has substantial applicability when voters express themselves at the ballot box on matters of public policy. See *Winkle v. City of Tucson*, 190 Ariz. 413, 418, 949 P.2d 502, 507 (1997) ("A vote to enact legislation...expresses the voters' preferred rule of governance."). Cf. *State Farm Mut. Auto. Ins. Co. v. Wilson*, 162 Ariz. 251, 253, 782 P.2d 727, 729 (1989) (legislative enactments evidence public policy). Arizona public policy strongly favors direct citizen participation in the legislative process. See, e.g., *Western Devcor, Inc. v. City of*

Scottsdale, 168 Ariz. 426, 428, 814 P.2d 767, 769 (1991) ("Throughout the years...we have recognized Arizona's strong public policy favoring the initiative and referendum."); *Forszt v. Rodriguez*, 212 Ariz. 263, 265, 130 P.3d 538, 540 (App. 2006) ("Arizona recognizes a strong public policy favoring the powers of initiative and referendum.").

C. Lower Level Legislation and City Action

It is our understanding that the development of the DDC has a number of legislative roots. However, none of measures the City has taken since the Charter amendments adopted under Proposition 410 can trump the Charter. On May 23, 2000, the City enacted Ordinance 3321, commonly known as McDowell Sonoran Preserve Ordinance ("Preserve Ordinance"). Scottsdale Revised Code ("S.R.C.") §§ 21-1 through 21-23. We believe that the Preserve Ordinance was the product of the momentum from the groundswell of public interest expressed in the Charter amendments from Proposition 410. Thus, the Preserve Ordinance can be harmonized in most respects with Proposition 410 Charter amendments.

This consistency is best exemplified by the stated purpose of the Preserve Ordinance:

> (a) The purpose of the McDowell Sonoran Preserve is to establish in perpetuity a preserve of Sonoran desert and mountains to maintain scenic views, as a habitat for wildlife and desert plants; to protect archaeological and historical resources and sites, while providing appropriate public access for educational purposes; and to provide passive outdoor recreational opportunities for residents and visitors.
>
> (b) The preserve will be left in as pristine a state as possible to maintain for this and future generations, in perpetuity, a nearby natural desert refuge from the rigors of urban life.
>
> (c) 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 activities

S.R.C. § 21-2. Some of these provisions could be construed to support the development and construction of what the currently planned DDC looks like. Moreover, the Preserve Ordinance also suggests that the McDowell Sonoran Preserve be managed to "[p]rovide opportunities for education and research on the Sonoran desert and mountains....and...[p]rovide enough access areas of sufficient size and with adequate amenities for appropriate public access." S.R.C. § 21-3(7), (8). "Access area" is defined term, meaning an area for "parking vehicles, interpretive displays, information, and minor amenities such as restrooms. Major trailheads will be located at the access areas in the preserve." S.R.C. § 21-11.

Subsection (c) of the S.R.C. § 21-2 is a critical aspect of the Preserve Ordinance. The City is afforded discretion as to what is "necessary or appropriate to support passive recreational activities" which are defined as "hiking, wildlife viewing, mountain bicycling, horseback riding and rock climbing." However, what the City cannot do is repurpose land in quantities greater

than one acre and effectively remove them from preserve status without a public vote. Charter, Art. 8, § 11.

This is where the rubber meets the road. The DDC constitutes the effective taking of dozens of acres of preserve land out of the preserve designation. The DDC is neither minimalist, nor humble. It constitutes a bigger and bolder intrusion into the preserve than contemplated under the Preserve Ordinance and is a larger allocation of land than the one-acre-at-a-time Charter provision. A trailhead need only consist of adequate signage to alert the would-be user of the preserve where the trail begins. Education about the vast natural world of the Sonoran desert does not require an Imax theater in an air-conditioned auditorium, right in the middle of the Sonoran Desert. The whole idea of the preserve is for the user to enter into the land and observe and learn by experience, not by reinforcing the zombie-like state into which television plunges its viewers. More conservative learning tools such as unpretentious, explanatory signage to identify the species of animals and vegetation of the preserve are adequate. As to the actual dozens of acres that the DDC will occupy, it goes in the opposite direction of leaving the preserve "in as pristine a state as possible for this and future generations, in perpetuity…" S.R.C. § 21- 2(b).

NoDDC and POP do not question the good intentions of the DDC's advocates. Indeed, the DDC's strongest advocates, including the DDC Inc., its board and perhaps even those who may profit from City contracts to build the DDC, believe in what they are doing. Unfortunately, the Charter prohibits the removal of preserve designated land to construct the presently planned DDC, unless a public vote is taken and approves it. The City's collective thought process on preserve designated land in 1998 was to make it "bullet proof" from development and intrusion into the hallowed ground.

We further understand that, as a function of City planning, the City has also issued a Municipal Use Master Site Plan for the DDC Site that authorizes the DDC to be situated on 543 acres of the DDC Site. This document (case no. 10-UP-2006) ("MUMSP") was issued under S.R.C. Appendix B ("Zoning Ordinance") § 1.501 et seq. Apparently, all planning and development of the DDC concept, as well as the expenditure of taxpayer money for the DDC has occurred under the MUMSP. Unfortunately, because zoning decisions are made by the City through ordinance, action taken contrary to the provisions of the Charter must yield. The expansive use of preserve land constitutes its removal from preserve status, and is contrary to the Preserve Ordinance requiring the preserve "…be left in as pristine a state as possible to maintain for this and future generations, in perpetuity…" Such action is illegitimate. In other words, it does not matter how many commissions are created, how much council oversight occurs, how much care is taken for review and bureaucratic involvement, the Charter still trumps ordinances which conflict with its blackletter rules. The DDC is not an authorized use under the Charter.

II. CLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF

A. Standing of NoDDC and POP

Three elements are necessary for individual standing are: (1) the plaintiff must allege that he, she or it has suffered an injury in fact, that is, an actual or threatened injury that is not conjectural or hypothetical; (2) the injury must be fairly traceable to the challenged conduct; and (3) it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992); see also, *Karbal v. Arizona Dep't of Revenue*, 215 Ariz. 114, 116, 158 P.3d 243, 245 (App. 2007). The United States Supreme Court has held that an association has standing to sue on behalf of its members when (1) its members would have standing to sue in their own right; (2) the interests which the association seeks to protect are relevant to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members. *Warth v. Seldin*, 422 U.S. 490, 95 S.Ct. 2197 (1975). However, Arizona courts do not rigidly apply federal standing requirements because Arizona's constitution does not have "case or controversy" language. *Armory Park Neighborhood Ass'n. v. Episcopal Cmty. Servs*., 148 Ariz. 1, 6, 712 P.2d 914, 919 (1985).

To satisfy the first prong of the test, the entity must show, through specific facts, that at least one member has concrete and personal interests that have been or will be directly harmed by the challenged government action. *Summers v. Earth Island Inst*., 555 U.S. 488, 493 (2009). Alleging generalized harm to the environment is not sufficient, but an affidavit showing that an alleged environmental harm "affects the recreational or even the mere esthetic interests" of a member will suffice. *Id*. The member must aver that he or she has used the area and has "specific and concrete" plans to return. *Id.* at 495. Members must name specific, affected subareas that they use and enjoy in order to demonstrate a particularized threat of injury. *W. Watershed Project v. Kraayenbrink*, 632 F.3d 472, 484 (9th Cir. 2011).

NoDDC and POP's members and principals are residents and property owners in the City. NoDDC and POP members and principals have made use of the McDowell Sonoran Preserve for passive recreational activities. NoDDC and POP members and principals make specific use of the DDC Site for entry to and exit from the larger parcel of the preserve. NoDDC and POP members and principals intend to continue using the preserve for passive recreational activities and will make access through and at the DDC Site. NoDDC and POP members and principals will make regular and consistent use of the preserve. NoDDC and POP members and principals find the planned DDC to be an eyesore, and detrimental to the overall preserve experience that those members and principals have enjoyed. NoDDC and POP members and principals believe that the planned DDC is pretentious, intrusive, overtly contemptuous of the natural and unrefined beauty of the preserve.

NoDDC and POP have representational standing through some or all of their members and principals. NoDDC and POP members and principals would have individual standing to challenge the City's development of the DDC. The DDC is not hypothetical. The City has already spent millions of dollars on planning and development, including payments to a private

consultant, DDC Inc. These injuries are the direct result of the City's action to approve the DDC in violation of the Charter.

NoDDC and POP's members' and principals' interests are relevant to the organization's purpose. NoDDC and POP were specifically created to contest the City's action and protect its members' and principals' interests in protecting the preserve land from the DDC. An affiliated political action committee website makes clear that its purpose is to provide "information and awareness in opposition to the 30-acre $74 million dollar Desert Discovery Center, that . . . violates the Preserve Ordinance, goes against the wishes of the voters, and is being promoted under false pretenses." NoDDC' and POP's purpose is not only relevant to the members' and principals' interest in this case, but it is a primary reason why NoDDC and POP were created.

Neither the claim asserted nor the relief requested requires the participation of the individual members. An association's standing "depend[s] in substantial measure on the nature of the relief sought," where standing is most often found where the association sought declarative or injunctive relief. *Home Builders Ass'n of Cent. Ariz. v. Kard*, 219 Ariz. 374, 377 ¶ 13, 199 P.3d 629, 632 (App. 2008) (citing Warth, 422 U.S. at 515).

B. NoDDC's and POP's Right and Remedy

The City's action and legal position on the DDC is contrary to a plain and unambiguous provision of its Charter. The City has attempted to circumvent the Charter through extensive legislation, planning measures, and by brute force expenditure of money on a project overlooking its organic document. NoDDC and POP principals have participated in civic discourse with the City to urge it to abide by the Charter to no avail. Instead, the City has relied upon contrary but incorrect analyses of the law.

The present status of the DDC, the continuing expenditure of public funds for its development and forthcoming construction, and the prohibition against removing dozens of acres of preserve land from the preserve has created a present uncertainty in the relative rights and obligations of the City, its leadership, its employees, its departments, its commissions, and its contractors, and the rights of the citizens of Scottsdale and particularly members and principals of NoDDC and POP to have a say in the matter by ballot. The City is preparing to destroy that which it vowed to its voters it would preserve, unless approved by the people.

This matter is ripe for determination of these rights and obligations under the Uniform Declaratory Judgment Act, A.R.S. § 12-1831 et seq. Injunctive relief is available

> 1. When it appears that the party applying for the writ is entitled to the relief demanded, and such relief or any part thereof requires the restraint of some act prejudicial to the applicant.
>
> 2. When, pending litigation, it appears that a party is doing some act respecting the subject of litigation, or threatens or is about to do some act, or is procuring or

> suffering some act to be done, in violation of the rights of the applicant, which would tend to render the judgment ineffectual.
>
> 3. In all other cases when applicant is entitled to an injunction under the principles of equity.

A.R.S. § 12-1801. If this matter is not settled and litigation ensues, NoDDC and POP reserve their right to seek a temporary restraining order, preliminary injunction and a permanent injunction to stop the City from continuing the development of the DDC unless and until the matter is validly approved by the electors of Scottsdale. Under the present circumstances, NoDDC and POP have "a strong likelihood of success on the merits, a possibility of irreparable injury if the injunction is not granted, a balance of hardships weighing in [its] favor, and public policy favoring the requested relief." *TP Racing, L.L.L.P. v. Simms*, 232 Ariz. 489, 495, 307 P.3d 56, 62 (Ct. App. 2013). A court applying these factors "may apply a sliding scale" requiring the moving party to "establish either (1) probable success on the merits and the possibility of irreparable injury; or (2) the presence of serious questions and that the balance of hardships tips sharply" in the moving party's favor. *Ariz. Ass'n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6, 12, 219 P.3d 216, 222 (Ct. App. 2009) (citation, internal quotations, and internal parentheses omitted).

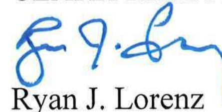
III. ADMINISTRATIVE CLAIM AND SETTLEMENT DEMAND

Pursuant to A.R.S. § 12-821.01(A), a party aggrieved by conduct or omissions of a political subdivision must serve an administrative claim. "The claim shall contain facts sufficient to permit the public entity, public school or public employee to understand the basis on which liability is claimed. The claim shall also contain a specific amount for which the claim can be settled and the facts supporting that amount. A.R.S. § 12-821.01(A).

NoDDC and POP have provided sufficient facts and legal analysis to support its positions that an election is required by the Charter. No monetary demand is made herein. Instead, NoDDC and POP demand that to settle this claim, the City, acting through the Mayor, Council and/or City Manager, instruct the City Attorney to prepare and submit for special election the question of whether a specified and legally described parcel of land, including the total number of acres of such parcel, located in the McDowell Sonoran Preserve at or near the DDC site be removed from preserve status for the development and construction of the DDC. If satisfactory City action has not been taken within sixty (60) days, this claim will be deemed denies under A.R.S. § 12-821.01(C). An action will thereafter be commenced in the Maricopa County Superior Court against the City, Mayor and Councilmembers seeking the relief demanded herein.

Very Truly Yours,

CLARK HILL PLC



Ryan J. Lorenz