Dennis I. Wilenchik
diw@wb-law.com

WILENCHIK & BARTNESS
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
The Wilenchik & Bartness Building
2810 North Third Street Phoenix Arizona 85004

Telephone: 602-606-2810 Facsimile: 602-606-2811

Licensed in
Arizona, Texas, New
York and the District of
Columbia

August 15, 2018

VIA EMAIL and CERTIFIED MAIL
RETURN RECEIPT REQUESTED

City of Phoenix City Council
Mayor Thelda Williams (District 1)
Vice Mayor Jim Waring (District 2)
Councilwoman Debra Stark (District 3)
Councilwoman Laura Pastor (District 4)
Councilwoman Vania Guevara (District 5)
Councilman Sal DiCiccio (District 6)
Councilman Michael Nowakowski (District 7)
District 8 (Vacant)
Phoenix City Hall
200 W. Washington Street
Phoenix, Arizona 85003
mayor.williams@phoenix.gov
council.district.1@phoenix.gov
council.district.2@phoenix.gov
council.district.3@phoenix.gov
council.district.4@phoenix.gov
council.district.5@phoenix.gov
council.district.6@phoenix.gov
council.district.7@phoenix.gov
council.district.8@phoenix.gov

City of Phoenix City Manager
Ed Zuercher
Phoenix City Hall
200 W. Washington Street
Phoenix, Arizona 85003
ed.zuercher@phoenix.gov

City of Phoenix City Attorney
Brad Holm
City Attorney's Office
Phoenix City Hall
200 W. Washington Street
Phoenix, Arizona 85003
brad.holm@phoenix.gov

Re: City of Phoenix Garfield Redevelopment - Trellis

To whom it may concern:

This firm and the Goldwater Institute have been retained to represent certain residents of the City of Phoenix who pay both property and sales tax, and who bear a share of the burden when the City of Phoenix unconstitutionally depletes the public treasury by giving advantages to private, special interests. As described more fully herein, it has come to our attention that the City of Phoenix (the "City") has entered into, or plans to enter into, an agreement with Trellis in which Trellis will pay the City $50,000.00 for ten City-owned lots that were independently appraised and valued at $668,000.00.

This Agreement violates the Arizona Constitution's Gift Clause, Ariz.Const. art. IX, § 7, which forbids government from giving or lending public money to private enterprises unless the expenditures are for public purposes and taxpayers receive

adequate value in return. *See Turken v. Gordon*, 223 Ariz. 342 (2010). The Gift Clause provides:

> Neither the state, nor any county, city, town, municipality, or other subdivision of the state shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation.

Ariz. Const. art. IX, § 7. As is clear from its text, the clause has two primary purposes—preventing the "depletion of the public treasury or inflation of public debt by engagement in non-public enterprise" and protecting public funds against use for "the purely private or personal interest of any individual." *Kromko v. Ariz. Bd. of Regents*, 149 Ariz. 319, 320–21, 718 P.2d 478, 479–80 (1986) (internal quotations, emphasis, and citations omitted); *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349, 687 P.2d 354, 357 (1984) ("The constitutional prohibition was intended to prevent governmental bodies from depleting the public treasury by giving advantages to special interests[.]").

To determine if an unlawful expenditure has occurred, a court will examine the expenditure under a two-prong test. *See Turken v. Gordon*, 223 Ariz. 342, 348 ¶ 22, 224 P.3d 158, 164 (2010); *Wistuber*, 141 Ariz. at 349, 687 P.2d at 357. The expenditure will be upheld only if (1) it has a public purpose, and (2) the consideration received by the government is not "grossly disproportionate" to the amounts paid or benefit provided to the private entity. *Turken*, 223 Ariz. at 345, 348 ¶¶ 7, 22, 224 P.3d at 161, 164.

First, the Agreement does not serve a public purpose because it *primarily* benefits private interests. To be considered public, an expenditure "must be primarily to satisfy the need, or contribute to the convenience, of the people of the city at large." *City of Tombstone v. Macia*, 30 Ariz. 218, 224 (1926). Examples include the "maintenance of an adequate police department," "opening, maintaining, and paving a system of public streets," and "providing a system for the disposal of sewage, thus protecting the public health." *Id.* at 222. Unlike these examples, the Agreement does not primarily benefit all City of Phoenix taxpayers; rather the actual beneficiary is the private developer, Trellis.

Moreover, the consideration received by the City is "grossly disproportionate" to the benefit conferred on the private beneficiaries. As the City of Phoenix reported in Item No. 76 for Agenda date April 19, 2017, the City of Phoenix has claimed that the consideration, or "[t]he financial return to the City would be determined by fair market value, and may include payments and other consideration that provide a public benefit." Tellingly, the point system devised by the City for the evaluation of bids only allocated fifteen percent (15%) of the total points to the price to be paid for the lots. In the City's June 27, 2018 Request to authorize the City Manager to enter into a Sale and Redevelopment Agreement with Trellis, for the sale and redevelopment of up to 10 vacant, City-owned lots, the City plainly stated that "[t]he sale of the Package 2 lots will generate a one-time sales proceed of up to $50,000 to the City of Phoenix … [t]he sale of these lots will put 1.44 acres of land back into private ownership, which will generate

new property tax revenues … will bring an estimated investment value up to $2.58 million to the Garfield Neighborhood and create up to 60 construction jobs."

As you should be aware, the provision of a "public benefit", generation of property tax revenues, investment value, anticipated jobs, or other *indirect* benefits do not satisfy the "consideration" prong of the Gift Clause analysis. *Turken*, 223 Ariz. at 350, 224 P.3d at 166 (anticipated indirect benefits to city, such as projected tax revenue, do not constitute "consideration" under Gift Clause, adequacy of consideration focuses instead on the ***objective fair market value***)

As such, the only factor that could even ostensibly satisfy the "consideration" prong is the "fair market value" of the property. Disturbingly, the City has agreed to sell the ten City-owned lots for $5,000.00 per lot, or $50,000.00 total. According to the appraisal report commissioned by the City, dated March 14, 2017, these properties are worth between $68,000.00 and $85,000.00 apiece. That is, the appraised value of these ten City-owned lots, in the aggregate, is $668,000.00, or ***$618,000.00 more than the City has agreed to sell*** them to Trellis; ***an approximately 92% discount***. This, undisputedly, constitutes consideration "grossly disproportionate" to the benefit conferred on the private entity in clear violation of the Gift Clause.

Because the Agreement with Trellis clearly violates the Arizona Constitution and breaches the taxpayers' trust, we urge the City of Phoenix City Council to terminate the Agreement and refrain from executing similar agreements in the future. We will be forced to take appropriate legal action should the City fail to terminate the unlawful Agreement within the next two weeks. If we are ultimately forced to bring legal action we will necessarily be requesting our fees and costs for doing so under all applicable laws, including, the private attorney general doctrine.

We appreciate your thoughtful consideration of these matters and look forward to receiving a response no later than **August 28, 2018**.

If you have any questions or would like to discuss this further, please do not hesitate to contact myself, John D. Wilenchik, Esq., or David A. Timchak, Esq.

Sincerely,

Dennis I. Wilenchik