January 27, 2021

Via U.S. Mail and Electronic Mail

Robert A. Hyde
Assistant City Attorney
City of Phoenix

cc: Eric C. Anderson, Esq.

Re: Your letter of 1/21/2021 concerning *Lasse Norgaard-Larsen, et al., v. City of Phoenix, et al.*, U.S. Dist. Court Case No. 20-cv-02467-PHX-GMS (D. Ariz.)

Mr. Hyde,

We will take the liberty of using text from your correspondence as a basis to answer the statements in it. Statement for your correspondence are presented in **blue** text. Our responses and observation are in **black** color.

I am writing pursuant to the conference requirement described in LRCiv 12.1(c) of the Local Rules of Civil Procedure for the District of Arizona. As set forth in this letter, the City of Phoenix intends to move to dismiss your complaint pursuant to LRCiv 7.1, and Rules 8, 10, 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

I have conferred with Eric C. Anderson, counsel for the City of Scottsdale. Mr. Anderson agrees with the legal issues raised herein, and you can expect the City of Scottsdale to seek to dismiss your complaint as well.

Format of the Complaint

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Your 27-page, single-spaced complaint is not the short and plain statement envisioned by Rule 8. Dismissal is proper where, as here, "the very prolixity of the complaint ma[kes] it difficult to determine just what circumstances were supposed to have given rise to the various causes of action." *McHenry v. Renne*, 84 F.3d 1172, 1178 (9th Cir. 1996).

We bow to your better knowledge of legal procedures and formatting. As you know, we are amateurs. Thank you for this important information. As you say below, it is a little late to correct this oversight. We hope the court will be understanding of the plaintiff's lack of formal legal training.

As to the length of the Complaint (27 pages), the problem with this is that the offenses outlined in that document are numerous and the arguments with their legal and factual basis

require a proper presentation. As you know, being lawyers, a declaration of the legal basis for the lawsuit, a statement of the Complaint itself and a short history of the issue are standard aspects of a case of this nature. There were nine different items relating to violations of covenants and US legislation pertaining to parks (Items III.G.1 – III.G.8) as well as an additional three items relating to possible administrative irregularities perceived to be present in the arrangements between the defendants and their client (Items III.G.9 – III.G.11). These are also are included because they may be a vital factor in understanding how the inconceivable proposition that a private compound could be built in a public park. The Plaintiffs consider the transgression to be so egregious that a comprehensive, detailed explanation of charges is necessary. Not only that, given the nature of the case, a catalog of similar judicial cases involving park lands is required to substantiate the assertions in the arguments. Add to this the court-required need to present Legal Standards and Determining Factors (Item 3.A) that a party must present to obtain judicial relief, what one ends up with is a twenty-odd page Complaint.

If the case was simple, the complaint would have no more than three and a half pages. This case is not simple; it involves serious aspects of law and the rights of the public domain. Note that for a simple lease of a facility, the city of Phoenix of Phoenix composes a 170-page document that was the result of negotiations held over a period of 3-4 years, according to media reports. Once again, the plaintiffs do not believe the length of the Complaint to be excessive. It includes only relevant facts that need to be presented for the Court to rule on the substance of the case.

Rule 10(b) of the Federal Rules of Civil Procedure requires that a complaint be set out in numbered paragraphs "each limited as far as practicable to a single set of circumstances." Your complaint does not contain such numbered paragraphs.

LRCiv 7.1 requires that a complaint be double-spaced, in a font not smaller than 13 point, with no more than 28 lines per page. Your complaint is single-spaced, the font appears to be smaller than 13 point, and there are as many as 50 lines on a given page.

We were not aware of this. Thank you for this important information. This rule reminds the plaintiffs of high school compositions, with had similar requirements; double-spaces are great for corrections by the teacher.

Standing and Subject Matter Jurisdiction

Your complaint appears to raise four legal bases for relief: (1) the Property Clause of the U.S. Constitution; (2) the Land and Water Conservation Fund Act of 1965, 16 U.S.C. § 460*l*-4, et seq.; (3) the Federal Property Act, 40 U.S.C. § 550(e); and (4) the Contracts Clause of the U.S. Constitution. However, you do not have standing to assert these claims in this lawsuit.

"Standing includes two components: Article III constitutional standing and prudential standing." *Yakima Valley Mem'l Hosp. v. Wash. State Dep't of Health*, 654 F.3d 919, 932 (9th Cir. 2011). Prudential standing examines whether "a particular plaintiff has been granted a

right to sue by the statute under which he or she brings suit." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1199 (9th Cir. 2004).

Let us quote a few lines from Wikipedia: "Article III standing law is built on separation-of-powers principles. Its purpose is to prevent the judicial process from being used to usurp the powers of the legislative and executive branch of the U.S. federal government. Article III standing requires an injury that is "concrete, particularized and actual or imminent; fairly traceable to the challenged action and redressable by a favorable ruling." The plaintiff's injuries are personal, real and documented. We do understand the principle of 'separation of powers' but in this case we would like to make clear that the executive branches of government – city parks personnel, officials at the BLM, NPS, OIG and Solicitor and OIG – did nothing to address the issues brought up by the plaintiffs -- not only did they ignore us, but we were given false information that was supposed to absolve them of all responsibility for their violation of the public domain. The plaintiffs also sent dozens of emails to members of the legislation branch (Sinema, McSally and Stanton) asking them merely to send emails to those officials in the executive side, saying they supported an investigation into happenings at Papago Park. Let us emphasize that we did not ask them to support our position, only to say the DOI and Parks people should look into the matter and hopefully produce a report. As far as we know, this was not done. So, the executive and legislative branches failed us, period, so we turned to the judicial branch for redress.

A more proper understanding of a legal question, in this case, should be whether "a particular plaintiff has been denied the right to sue"" by a statute – or by the court, and not just if "a particular plaintiff has been granted a right to sue." As presented below, there are many factors that allow a plaintiff to sue, even if that right is not explicitly included in a statute under which he or she sues".

However, the "core component of standing" is the case-or-controversy requirement found in Article III of the United States Constitution. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Article III standing (also called constitutional standing) requires a plaintiff to "demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett v. Spear*, 520 U.S. 154, 162 (1997).

As to 'injuries,' the plaintiff refers you to the emails section of the Complaints, dates September 28 and November 2, 2019 – at the very beginning of the construction of the facility, in which the presence of a long green fence through the park and the blocking of trails was brought to the attention of authorities. In an email received from 'George' – one of the many more not included in the in the 63 pages of emails attached to the Complaint, he says "I was shocked to see the fence you are talking about. This was not what I was talking about. I drove down there and was even more surprised. That fence closes off Finley Drive and the entire area." This objection was repeated in an email sent April 23, and we quote: "the fence

encompassed not only the said facility but quite a bit more, to the extent that some of the trails I habitually walked were blocked."

How does the city of Phoenix claim there is no injury when citizens are denied the use of a public park trail so that land can be given for exclusive use by a private corporation? The idea of restricting freedom of movement of an individual in a public area, particularly in a park -- except for common-sense time, place, or manner restrictions relating to specific uses -- is unthinkable.

Certainly, there is a controversy here - about access to a public park – but there is also a specific case of an individual being denied access to public lands. Is that injury enough for you? Now a bit of history: It is common knowledge that Blacks were discriminated against in many areas of the country. Yet no "backs are discriminated against" case was taken to court. Instead it was five African American women, five individuals, that became the plaintiffs in the *Browder v. Gayle*, which ended bus segregation in Alabama (Strangely, Rosa parks was not in this case). Note also that this case was filed in a US District Court, thus bypassing the Alabama state court system

In the opinion of one plaintiff, he has (1) actually and personally suffered injury or harm, (2) the injury or harm suffered by the plaintiff is fairly traceable to the defendant's actions and (3) the injury or harm would be capable of redress by the court. If that is not enough for the Defendants, the plaintiff will ask his lovely wife, who, conveniently, is POC, to take a walk with them down what were trails in Papago Park and, after we reach the green fence of shame, we will file another case (not controversy) in the US Court system, and that document will be double-spaced.

"[A] suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit." *Cetacean Community v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004).

There is no private cause of action for alleged violations of the Land and Water Conservation Fund Act or the Federal Property Act. *See, e.g., Friends of Roeding Park v. City of Fresno*, 848 F.Supp.2d 1152, 1160 (E.D. Cal. 2012) (stating that it is "well accepted" that there is no private right of action under the LWCFA); *Conservation Law Found. of New England, Inc. v. Harper*, 587 F.Supp. 357, 366-67 (D. Mass. 1984) ("[Plaintiffs] do not have a private right of action under the [Federal Property Act]").

A private cause of action, or right of action, allows a private plaintiff to bring an action (i.e., to have standing in court) based directly on a public statute, the Constitution, or federal common law. Although Congress has placed express private rights of action into some legislation, implied private rights of action are not created by Congress. They can be granted by courts, and often are, when the nature of the plaintiff's injury and remedy sought is consistent with the legislative purpose.

In *Cort v. Ash,* the Supreme Court developed a four-factor test to determine whether a private action could be implied from a federal statute (https://www.luc.edu/media/lucedu/law

/students/publications/llj/pdfs/vol-49/9_Newcombe%20(117-147).pdf) These factors are (1) whether the plaintiff is part of a class "for whose special benefit the statute was enacted[;]" (2) whether there is an indication of any legislative intent to deny or create such a remedy; (3) whether the remedy would be consistent with the "underlying purposes" of the legislation; and (4) whether the subject of the cause of action was one "traditionally relegated to state law" so that it would be inappropriate to imply a new action based on federal law.

With regard to these four factors, the plaintiff responds: (1) Certainly the plaintiff is a member of the public and the public is the expressed object is the term "public park," (2) the multitude of regulations found in federal statutes relating to the protection and preservation of public lands is a clear indication of legislative intent, (3) the penalties, or remedies for those violations, are indicative of the intent to restore the declared purpose of the parks – that is of recreation and leisure by the general public, and (4) because the cause of action is a violation of federal laws on lands that with protection enacted by federal legislation, state laws and courts are an inappropriate forum.

The plaintiff's research has made obvious that the "implied private rights of action" principle is complex and even controversial. The same linked article identifies some factors have consistently emerged as guidelines for the creation of implied private rights of action by a court.

F**actor 1. Type of Statute.** A court is more likely to base an implied private right of action on a prohibitory statute, rather than a disclosure statute. A prohibitory statute is one that forbids a certain action, such as using public lands for non-public purposes (or in the language of the park deeds: "if such lands are abandoned for such (public) purpose." In this case, the court found that a prohibitory statute "implies a private right of action to enforce those protections, its prohibition (Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173 (2005))

Factor 2. A statute must identify a particular group it is designed to benefit. This needs no elaboration; the Acts of Congress and US legislation relating to federal parks and related lands, including those of former lands transferred to other entities, are proclaimed to be done to benefit present and future generations.

Factor 3. A Statute must confer a "Right" on the Plaintiff Legislation setting aside public lands for recreational purposes implies the land is to be used for that purpose and therefore equally implies the public, individually and collectively, have a right to use those lands for the intended purposes. An important aspect of this statute is that it must focus on the individuals protected, not the entity regulated. Under the first amendment, the right of the people to enter and use a public space (i.e., to assemble) may not be unreasonably restricted by the federal or state government. While there may be no law or statues that specifically states "people have a right to use a public park" or that "children have a right to play in a park," the very definition of the term 'park' implies that individuals using a park has those rights.

Factor 4. The conduct of the defendant(s) must be intentional. In this case, mere negligence is not enough to support an implied private right of action. The building of a private training facility did not just happen (oops!) when city officials were having donuts and coffee, watching the fabulous Arizona sunset. It was a planned and elaborate action that conducted over a

considerable period by individuals that chose to ignore restriction and reversionary provisions in their own project documentation.

Factor 5. Statutory Purpose. Denying or interfering with a private rights of action would, in this case, hurt the overall statutory purpose of legislation intended to protect public parks and guarantee the use of those lands for recreation and leisure purposes. Note that the Complaint filed by the plaintiffs – to safeguard public lands – is consistent with the underlying purposes of the US national park policy.

Factor 6. Legislative Intent and Enforcement Provisions. An important issue in seeking to obtain a private right of action is whether the statute at issue already provides an enforcement mechanism. In this case, the statutes do not. The prohibitions are clear, as are the provisions in case of violation, but there is no comprehensive plan to ensure, as in the Complaint, that public lands remain in the public domain. Perhaps the reason for this is that nobody thought it necessary to include such mechanism in the instruments of conveyance, because the possibility that a government entity would give public park lands to a private corporation as alien to them.

Factor 7. The problem of "Remediless". To deny a plaintiff a private cause of action or, more simply, the ability to pursue justice in a court of law, would leave such a plaintiff "remediless." This occurs when a government agency tasked with enforcing a statute refuses to do so. *Franklin v. Gwinnett County Public Schools* provides an example of the Supreme Court deciding to imply a private remedy from a federal statute after the public agency tasked with enforcing it failed to do so.

… Without a right of action, your alleged injuries cannot be redressed by the court and you lack Article III standing for these claims. The court lacks subject matter jurisdiction.

For the reasons and factors expounded above, the plaintiffs believe they have more than sufficient ground for a private right of action, and that our injuries can be redressed by the court and that the US District Court has jurisdiction on matters pertaining to US laws that govern US properties and properties that continue to be bound to it by various legally proscribed processes.

You lack prudential standing for your other two claims.

The Property Clause "precludes states and private individuals from divesting the federal government—through state laws or otherwise—of title to property without congressional consent." *Freedom Mortg. Corp. v. Las Vegas Dev. Group, LLC*, 106 F.Supp.3d 1174, 1179 (D. Nev. 2015). Claims under the Property Clause are properly brought by the federal government because "the federal government is the best advocate of its *own* interests." *The Wilderness Soc. v. Kane County, Utah*, 632 F.3d 1162, 1172 (10th Cir. 2011) (italics in original). You do not have standing to assert the federal government's rights under the Property Clause merely because you are citizens or taxpayers. *See Schnapper v. Foley*, 667 F.2d 102, 116 (D.C. Cir. 1981).

The Complaint filed is in no way about divesting the federal government of title to property without congressional consent. Much to the contrary, the plaintiffs are only seeking to enforce the restrictions and provisions in Acts of Congress and instruments of conveyance that require that Papago Park be used for Public purposes.

Although the Contracts Clause can, in certain circumstances, provide a private cause of action through 42 U.S.C. § 1983, such a claim is properly brought by an individual whose own vested contract rights are impaired by the government. Here, you have no vested contract rights in these transactions and, thus, you lack prudential standing. *See Dodge v. Bd. of Educ. of City of Chicago*, 302 U.S. 74, 80 (1937) (holding that Contracts Clause challenge failed in the absence of vested contractual rights); *Lazar v. Kroncke*, 862 F.3d 1186, 1200 (9th Cir. 2017) ("Because Lazar never possessed a vested contractual right, she suffered no contractual impairment" under the Contracts Clause).

The plaintiffs never claimed "contractual rights." The Complaint filed is in no way divesting the federal government of title to property without congressional consent. Much to the contrary, the plaintiffs are only seeking to enforce the restrictions and provisions in Acts of Congress and instruments of conveyance that require that Papago Park be used for Public purposes. The essence of the Property Clause is that "Congress has the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. The fact is that the City of Phoenix, by means of the Lease and Sublease, has, in the opinion of the plaintiffs, violated those rules and regulations.

Statute of Limitations

Assuming you have standing to assert any federal claims here, the statute of limitations for those claims would be two years. *See TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999). As alleged in your complaint, the cities entered into the lease at issue on November 28, 2018, and the City of Scottsdale entered into its sublease with the San Francisco Giants on December 1, 2018. However, you filed your lawsuit challenging the propriety of those agreements on December 23, 2020, more than two years later. Thus, your federal claims would be time-barred if you had standing to assert them.

The question of 'Standing' is to be determined by the Courts and it is separate and distinct from the issue of violation of covenants and US Legislation – which is the heart of the plaintiff's complaint. The use of state law and state enacted statutes of limitations is problematic. The Supreme Court has admonished courts to "borrow no more [state law] than necessary" when using a state statute of limitations and its related tolling provisions to implement federal statutory law (West, 481 U.S. at 39-40). Another fact is the case cited and not disclosed in your reference to *TwoRiver* is whether the amended § 12-502 should be applied retroactively to bar this plaintiff's claim.

Federal, not state, law determines when a civil rights claim accrues (*Elliott v. City of Union City*, 25 F.3d 800, 801-802 (9th Cir.1994)). Under federal law, a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action.

The facts are that even in late 2019 -- one full year before filing an action in Court -- the plaintiffs were already sending correspondence to the Defendants asking about the Giants project and raising question as to its legality, based upon the legislative sources and instruments of conveyance. By May 2020, the plaintiffs had already contacted officials in the Department of the Interior and Arizona State Parks, asking them to investigate the Giants project and reminding them of their responsibilities as specified in those documents.

Note also the fact that the lapse in the timeline of the construction and somewhat deceptive nature of the contract. For almost one year after the signing of the Lease and Sublease, nothing was done at the project site. The Lease itself gives no indication of the extent of new construction. It is on record that people thought the Giants lease was nothing but a simple reuse or, as best, as stated in the lease, an enhancement of the former facility.-- or as one person said "a new coat of paint and a new sign at the entrance." It was not until construction began, buildings torn down and acres of land bulldozed, that neighbors became aware of the true nature of the contract. This obfuscation of the true nature of the contract, as well as in inaction of state and federal agencies to address issues taken to them, are the reason for the delay of legal challenge. Now a quote from *Oregon & California R. Co. v. U.S.*(238 U. S.393, 1.36, 4.38, 1915) "Acts of Congress granting lands are laws as well as grants, and are operative until repealed; the fact that the conditions imposed in the grant were not applicable to the character of the lands furnishes no excuse for antagonistic action, even though it might justify nonaction pending further legislation. The delay in the assertion of a right is not conclusive against its existence…" The Plaintiffs understand that Papago Park is protected by US laws and those laws have not been repealed. Furthermore, there is no statute of limitations on deed restrictions. In the case of federal or state restrictions established under law, they are valid until specifically reversed or annulled by another law.

State Law Claims

Although your complaint discusses several Arizona cases, it is unclear whether you are making any claims under Arizona law or instead included these cases in your complaint for context. To the extent you are alleging that the City of Phoenix or the City of Scottsdale violated state law, those claims fail for two reasons.

First, you did not serve either city with a timely notice of claim. A.R.S. § 12-821.01(A) requires a person with a claim against a public entity or public employee to first serve a notice of claim within 180 days after the cause of action accrues, or the cause of action will be barred. The statute is "clear and unequivocal," and the failure to comply with any aspect of the statute prevents a plaintiff's claim from going forward. *Deer Valley Unified School Dist. v. Houser*, 214 Ariz. 293, 296, ¶ 9 (2007). *See also State Comp. Fund v. Super. Ct.*, 190 Ariz. 371, 376 (App. 1997) ("Under the claims statute, no action may be maintained when a plaintiff has failed to

file a timely, sufficient notice of claim, including all elements required by law, with a person authorized by the Arizona Rules of Civil Procedure to accept service. . . .").

Second, the statute of limitations for state-law claims against the City of Phoenix and the City of Scottsdale is one year. *See* A.R.S. § 12-821 ("All actions against any public entity or public employee shall be brought within one year after the cause of action accrues and not afterward."). Any state-law claims in your complaint are time-barred for the same reasons set forth above regarding your federal claims.

As indicated above, the plaintiffs have filed the claim under federal law in a federal court. The plaintiffs did no more than cite cases before State of Arizona courts, just as federal courts commonly cite jurisprudence from many state courts. This is a federal case dealing with a former federal property that happens to be in Arizona and has serious encumbrances upon it derived from Presidential proclamations and statues passed by the US Senate and House of Representatives.

Conclusion

Aside from the format of the complaint, I do not believe that any of the issues raised above can be cured by amendment. Therefore, I believe that amending your complaint to remedy the formatting issues identified here would be futile. *See Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991) ("A district court does not err in denying leave to amend where the amendment would be futile . . . or would be subject to dismissal."). If you disagree, I am happy to review any authority you wish to provide.

Should you wish to discuss any of these issues further, please feel free to email me a written response. Please copy Mr. Anderson on any correspondence. If you would prefer to speak by phone, I can coordinate a conference call.

Since it appears that the City of Phoenix will file a motion to dismiss, in any case – that seems the logical action for an official in your position – therefore a phone call or meeting to discuss the case would be futile. Note that since the beginning of this issue the plaintiffs have tried to reach some sort of agreement that would protect and preserve the integrity of our most historic park. While official documents containing reversionary provisions are somewhat ambiguous, under the 1959 Conditional Certificate of Purchase and the 1964 Deed of Sale there is room for meeting to resolve the issues that the plaintiffs see as a violation of stipulations in the title documents. From the very beginning of this process, the plaintiffs have made clear that the problem we all face is complicated because of the many legal entanglements and complex history of Papago Park. The plaintiff could find no case like, only some that similar elements.

On a personal note, one plaintiff feels that what has been done to the area with the construction zone of the facility has forever altered the nature of the land. It will never be the same again. Even the desert-like landscaping on the East and South sides, done by the Giants,

has very little to do with the typical Sonoran desert flora that is still present in some areas of Papago Park and which has been a part of much of my life, stating in Maricopa and around the Estrella mountains. Neither of the plaintiffs is dogmatic. We are sensitive to the investments made, the salaries of workers involved and the potential cost to taxpayers, depending on how our Complaint is handled. We are willing to talk with the Cities of Phoenix and Scottsdale, but we recognize that we are legal limits that must be considered, particularly those in the title instruments and US legislation. We are also aware that the cities possess means to make changes and that there is a public interest that these issues be resolved to the satisfaction of all, or maybe, of most.

If this case should be thrown out by the US District Court, we will file an appeal – double spaced and numbered, of course. If the appeal is unsuccessful, we will file a second civil case stressing the private right of action and civil rights legislation.

If I do not hear from you by January 27, 2021 (the deadline for the City's responsive pleading to your complaint), I will move forward with my motion to dismiss.

Finally, what this plaintiff finds most remarkable in your letter, is that it essentially says a private citizen has no right to question the action of a city government ("You have no standing"), at least in the present case regarding Papago Park, because we are not a government or public entity, and do not have some unspecified contract.

Who, then, has a right to accuse and complain about appropriation of public places for private purposes? Not the public, evidently. Does the City of Phoenix believe itself above the confines of law? Why does it use laws, policies and legal expertise to obfuscate and reprehend those who dare have a contrary opinion about the merits of its actions?

Sincerely,

(Signed)
J. Arthur Deal
Lasse Norgaard-Larsen,

January 27, 2021