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OUR FILE NO. 11445-1

PHILLIP WEEKS (1930-1988)
DONALD N. MCINTYRE (1932-1998)

March 4, 2002

Via Hand Delivery

Mr. Will Manley
City Manager
City of Tempe
31 East Fifth Street
Tempe, Arizona 85280

Re: Notice of Claim¹

Dear Mr. Manley:

The Arizona Tourism and Sports Authority ("TSA") formally notifies the City of Tempe ("Tempe") that the TSA asserts claims against Tempe arising out of the representations and assurances Tempe gave to TSA as part of the site selection process for TSA's proposed multipurpose facility development (including, but not limited to, a new football stadium for the Arizona Cardinals), generally referred to herein as "the Project". This notice also extends to claims relating to the contractual relationship between TSA and Tempe that was created when those parties executed a Memorandum of Understanding ("MOU") on February 13, 2001, selecting the site at Priest Drive and Washington Avenue in Tempe for construction of the Project. As detailed herein, Tempe is liable to TSA for substantial damages as a result of Tempe's conduct relating to the site selection process.

¹ TSA does not believe it is required to give a notice of claim, but it nonetheless desires to confirm in writing the position TSA articulated in the meeting held with Tempe representatives in TSA's offices on January 3, 2002.

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I. INTRODUCTION

TSA issued a Request for Site Proposals ("RFP") on September 5, 2000. In the RFP, TSA enumerated criteria for a site to be selected. One of those criteria was a requirement that the proposed site meet applicable FAA regulations for flight paths and noise levels.

As discussed herein, when Tempe and TSA executed the MOU, Tempe contractually obligated itself to deliver a site upon which the Project could be constructed. This meant that the site must be free of legal or regulatory impediments to the construction of the Project. Indeed, Tempe repeatedly represented to TSA during the period leading up to the MOU that "preliminary approval" from the FAA had been obtained and the MOU reflected the parties' understanding that FAA approval was a mere formality.

It is clear from the record that Tempe never advised TSA correctly with respect to the FAA so-called "approval" process, either before or following the execution of the MOU. Tempe's aviation consultants first advised Tempe (and Tempe represented to TSA) that a structure less than 230 feet above ground level ("AGL") would be permitted by the FAA; then, these same consultants indicated a structure under 200 feet AGL would be required to pass FAA muster. In each case, TSA expended substantial sums on planning and design work, site evaluation and the like. In reality, given the proximity of the Tempe site to Sky Harbor Airport, virtually any structure would require notice to the FAA and an FAA determination of whether such structure constituted a hazard to air navigation.

What Tempe's consultants also failed to advise TSA is that such a hazard/non-hazard determination has both objective and subjective components. The subjective component has permitted Phoenix and other "hostile" parties to place the stadium issue into a significantly politicized context. This in turn resulted in substantial and regrettable delays in the Project, waste in the form of cleanup of the original site, increased legal and consultant fees not contemplated by TSA, and substantial increases in insurance premiums resulting from the events of September 11. Had TSA been able to keep the Project on schedule, those costs would have been avoided.

TSA was certainly entitled to rely on Tempe's asserted expertise in this area. Unfortunately, Tempe was desperate to be awarded the site, gambling with TSA and the taxpayers' money that the FAA problems Tempe knew about but never shared with TSA could be worked out. TSA never agreed to, or was even aware of, such a gamble.

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II. BACKGROUND

A. The Site Selection Process

The TSA invited interested parties to submit proposals that would outline all aspects of a proposed facility, including financing, traffic, amenities, parking, environmental issues and any special advantages or problems with the site. In conjunction therewith, Tempe submitted to TSA a "Proposal for Multipurpose Stadium Facility" (the "Proposal"), dated December, 2000, and transmitted to TSA on or about January 5, 2001.

The "Overview" in the Proposal emphasized the advantages of the Tempe site in terms of its location and accessibility, as well as the ability of Tempe to "get the job done" in terms of assuring the success of the Project. The site's proximity to Sky Harbor International Airport was couched in unambiguously positive terms. The following are excerpts from the Overview:

- "Tempe's proposed site clearly provides an extraordinary Valley location that can be delivered in time to meet the Tourism and Sports Authority's required schedule."
- "This urban setting is just one-half mile from Sky Harbor International Airport and links together the premier business and entertainment destinations in the Valley."
- "Tempe's central location offers excellent freeway linkage to the entire metropolitan area and is within five minutes of Sky Harbor International Airport."

In the section of the Proposal describing the actual site, Tempe briefly addressed any regulatory issues presented because of the site's proximity to Sky Harbor Airport. The Proposal indicated the following:

- Based on the proximity of this site to Sky Harbor International Airport, a noise study (Appendix G) was also conducted to aid the team in stadium design. A preliminary Federal Aviation Administration review was also conducted at the regional level, utilizing computer modeling to check for compliance with Federal requirements. Formal application for review will be submitted upon site selection. (emphasis added)

As indicated in the preceding excerpt, Tempe submitted a Noise Study measuring the noise levels generated by aircraft taking off and landing at Sky Harbor, as measured at a point near the proposed site. One of the conclusions of the Noise Study was that "current site

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environmental noise levels would not negatively impact the intended activities to be associated with this project." (Appendix G, p. 2 of Report)

Tempe's proposal also contained detailed studies and information about traffic, parking, environmental issues and other matters germane to TSA's determination of the desirability of the site. However, other than the language referred to above, there was nothing in the Proposal relating to any potential FAA issues, such as height restrictions, regulatory approvals or any other possible FAA-related impediments to TSA's selection of the site. Even if one assumes a benign interpretation - - that Tempe did not intentionally mislead TSA - - the above-cited statement inadequately summarized the FAA issue and certainly left the impression that Tempe knew how the FAA process worked. As discussed below, Tempe was wrong from the beginning.

By supplemental submission dated January 20, 2001 (the "Response"), Tempe addressed certain follow-up questions specifically raised by TSA after TSA reviewed the Proposal. Many of TSA's follow-up questions related to such items as revenue projections, traffic, environmental issues, site development and other matters. However, TSA asked the following question, typed in bold, and Tempe's answer follows:

How is the proposed site situated vis-à-vis the take-off and approach paths for airlines at Sky Harbor? Are FAA approvals required? What would be the height of planes and noise levels over the Stadium? The proposed site is situated on the north side of the Salt River, which is the agreed upon flight corridor, very similar to Sun Devil Stadium on the south side of the Salt River. The height of planes within the proposed stadium area during landing operations to the west is approximately 500-600 feet. Tempe's aviation consultant, Williams and Associates, has been working with the regional office of the FAA and received a preliminary approval. Final application will be made upon site selection and finalization of stadium location. A noise study of the site was included in Tempe's original response.

TSA selected the Tempe site on February 13, 2001. TSA and Tempe thereupon entered into a Memorandum of Understanding (the "MOU"), delineating the rights and obligations of the parties in connection with construction and operation of the multipurpose facility site. At Section 11 of the MOU, the parties agreed as follows:

Immediately upon the Authority's selection of the Stadium orientation, Tempe will submit a request to the FAA for a determination that the Stadium and its operations (including operations for events with the retractable roof in an open position) do not violate FAA height and

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noise restrictions, and will use its best efforts to secure such a determination as soon as possible and by June 1, 2001. (emphasis added)

As will be discussed below, the preceding formulation of the FAA issue in the Response is misleading: FAA regulations do not provide for any sort of "preliminary approval". Nor is there a simple "per se" rule of violation/no violation of FAA height restrictions for any structure of the proposed size of the stadium, within the site's distance to Sky Harbor Airport. Indeed, under the regulatory structure in place, there is, strictly speaking, no FAA "approval" of any particular project. Rather, the Code of Federal Regulations requires, at 14 C.F.R. Part 77, submission of notice to the FAA of a proposed construction project covered by Part 77, and a determination by the FAA whether such project constitutes a "hazard to air navigation." The issue for Tempe to present to TSA should have been whether or not the proposed stadium site constituted, in the FAA's view, a hazard to air navigation. Even though the FAA has no formal enforcement authority to reject or enjoin construction of a hazard to air navigation, all parties seem to recognize that a hazard determination by the FAA would for all practical purposes mean that the Project as sited could not go forward. Indeed, under state law, a "hazard to air navigation" is a nuisance, and Phoenix filed a state-court lawsuit to enjoin construction of the stadium on the grounds that it constituted a nuisance.

B. FAA Problems With the Site

On or about February 16, 2001, the news media began making inquiries to Tempe about the status of FAA approval of the stadium site. An internal Tempe memorandum (the "2/20/01 Memorandum") dated February 20, 2001, written by Steve L. Nielsen, the Redevelopment Director, confirmed that Tempe's actions in regard to FAA issues were at marked variance with the disclosures and representations made to TSA. The 2/20/01 Memorandum indicated that Tempe's aviation consultant had contacted an employee of the FAA's Los Angeles office in November, 2000, and outlined the general location of the proposed stadium, indicating a proposed height of 190-230 feet. Based on that conversation, Mr. Nielsen stated that "we were later told that a Dennis Hughes, a senior FAA official ran the site through their computer model and that there were no fatal flaws." While the 2/20/01 Memorandum does not define "fatal flaws", nor does the 2/20/01 Memorandum identify the person who so advised Tempe, it appears that Tempe evidently had at least some concern about FAA problems as early as December 1, 2000, because, Mr. Nielsen noted, "the stadium team [for Tempe] made the decision to wait until after final selection for further contact with the FAA to insure that Phoenix (Sky Harbor) did not unfairly weigh into the selection process." Tempe also had to have known that TSA was relying on Tempe for FAA expertise since TSA had no FAA consultant of its own.

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The 2/20/01 Memorandum indicated that the only additional steps that Tempe had taken with respect to FAA issues since December 1, 2000 was to ask its FAA consultant "to run the more definitive site through his computer model (reported to be the same as the FAA) and give us a Letter of Opinion on the suitability of the site." The consultant issued a letter dated February 7, 2001, stating that "based on the height of 230 feet that we discussed previously, we do not see any problem with the structure as proposed based on the FAA obstruction evaluation criteria." The "we" in the letter clearly refers to Tempe's private consultant, and not to the FAA. TSA at that point had no reason not to rely on Tempe, and in fact did rely on Tempe, much to TSA's detriment.

The 2/20/01 Memorandum acknowledges that, contrary to the representation to TSA that FAA "preliminary approval" had been obtained, Tempe "relied solely on our aviation consultant, as we did not want to give Phoenix any reason to object to our site." (emphasis added) This statement suggests that Tempe had made the decision to obtain the site first, and deal with the FAA issues later.

Tempe assumed the role of expert with respect to FAA issues and TSA had every reason to rely on Tempe. Tempe was simply wrong about the FAA regulatory framework, since Tempe continually and wrongly asserted to TSA that a structure of a particular height would be acceptable to the FAA. What that height was varied from under 230 feet in January-February 2001, to under 200 feet in April 2001. But none of this was known by TSA when it awarded the site to Tempe, and TSA was substantially harmed when the FAA made its final determination in November 2001.

C. Factual Support for TSA's Position

TSA's legal theories are predicated, among other things, upon a determination that Tempe did in fact make material misrepresentations to TSA, as follows:

- (1) The Response's statement that "preliminary approval" had been obtained from the FAA.
- (2) The letter from Tempe's consultant that a structure under 230 feet AGL would receive more or less automatic FAA approval.
- (3) Tempe's later statements to FAA that a structure under 200 feet AGL would result in virtually guaranteed approval.

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- (4) Tempe's failure to share with TSA what it actually know about the FAA's approach to height issues, when Tempe clearly had a duty not to stand by silently.

III. Legal Claims

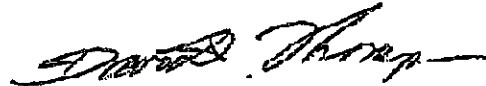
TSA may bring claims against Tempe on contract, or for negligent and / or intentional tortious acts and / or omissions. Claims may include, but are not limited to, negligent and intentional misrepresentation, fraudulent concealment, tortious interference with contractual relations, breach of implied covenant of good faith and fair dealing, and injurious falsehood. As part of TSA's contract claim, the TSA may assert a claim against Tempe for breaching its duty to act in good faith and deal fairly, and also breach of the contractual requirement to deliver a site on which a stadium could be built.

IV. CONCLUSION

Based on the facts and analysis set forth in this notice, TSA requests that Tempe immediately reimburse TSA for any and all amounts expended as a consequence of Tempe's wrongful conduct in regard to site-selection issues. As TSA advised Tempe's representatives in the January 3, 2002 meeting, the total of such amounts as of this date is \$1,516,101.95. A summary of the claimed expenditures is attached. If you fail to make the reimbursement demanded herein, TSA reserves all rights it has in this matter, including the right to commence litigation against the City of Tempe based on the claims set forth in this notice.

Respectfully,

**MARISCAL, WEEKS, MCINTYRE &
FRIEDLANDER, P.A.**



David I. Thompson
For the Firm

DIT:ptm

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Tourism and Sports Authority
Tempe Site Costs - All

<u>Date</u>	<u>Purpose</u>	<u>Amount</u>
<u>Fennemore Craig, P. C.</u>		
Various	Magellan Property	\$ 6,715.45
Various	City of Phoenix	7,151.18
Various	FAA Issues	25,902.32
Various	Site selection	88,501.27
Various	Real Estate Matters	322,647.98
		<u>\$ 449,918.18</u>
<u>Friedlob, Sanderson, Paulson & Tourtellott</u>		
7/31/01	FAA consultant	\$ 94,758.09
8/31/01	FAA consultant	130,283.03
9/30/01	FAA consultant	70,074.72
10/31/01	FAA consultant	108,180.32
11/30/01	FAA consultant	2,293.38
11/30/01	Courtesy Discount	(41,398.00)
12/31/01	FAA consultant	52.07
		<u>\$ 364,744.41</u>
<u>Geotechnical and Environmental Consulting</u>		
3/31/01	Phase I	\$ 1,700.00
4/13/01	Phase II	14,079.27
4/26/01	Phase II	7,776.47
6/22/01	Removal	44,950.88
6/27/01	Removal	218,958.39
6/30/01	Removal	347,283.07
7/31/01	Removal	21,507.87
10/10/01	Final site condition review	638.75
		<u>\$ 656,892.70</u>
<u>Hunt Construction Group, Inc.</u>		
3/31/01	Permits	10,776.72
6/30/01	Plaza Design	34,269.94
Various	Re-locate and re-design	- (a)
		<u>\$ 45,046.66</u>
Total Tempe Site Costs		<u>\$ 1,516,101.95</u>

(a) Final costs associated with the Tempe site are being adjusted and reconciled