MEMORA NDUM

DATE: October 21, 2014

TO: Ralph Velez, City Manager
John Starkey, Acting Director, Developmental Services

FROM: Glenn Gimbut, City Attorney

Re: Cellular Tower at Riedel Plaza – Opinion of City Attorney
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This memorandum will serve as a legal opinion and determination of the Office of City Attorney.

The City granted the application for a request by Victor Gillespie and Excelsior Properties, LLC for a Conditional Use Permit as per Article 2-6 Chapter 7 Section 7.2 "C-2" Community Commercial Zoning District *Section C* of the City of San Luis Zoning Ordinance to allow the construction and operation of a 100' tall monopole for telecommunications for CLEARTALK in a Community Commercial (C-2) zoning district, Assessor's Parcel No. 775-45-185, located on 656 N. Archibald Street, San Luis Arizona, pursuant to Conditional Use Case No. 2014-050.

On September 9, 2014 the applicant for the building permit submitted a new site plan showing the change in location. On September 17, 2014 the change was approved and a building permit was issued. Construction then began. The location of the tower moved from the exact edge of one parcel, owned by Mrs. Nieves Riedel to a point just inside of the property line of the neighboring parcel, also owned by Mrs. Riedel. Mrs. Riedel gave permission for the re-location by a written letter that is on file.

On or about September 24, 2014, Mr. Barraza, Chairman of the Planning and Zoning Commission raised several good questions. The purpose of this memo will be to address each one.

First, if this request was to move the tower 20 feet within the SAME parcel for which the conditional use was granted, then the decision of John Starkey, as Acting Zoning Administrator, may have been proper under Section 3.8 of the Zoning Ordinance as a minor variance. Section 3.8 allows the Zoning Administrator to grant a minor variance if one is dealing with only a 15 percent variance in a dimensional requirement. While this author has not measured this particular change, a small movement in location is exactly what a minor variance is for. So, if a minor variance was available, technically, the use would have been permitted by a conditional use permit, and its exact location changed by a minor variance. However, Mr. Barraza is correct, that one cannot cross property lines and transfer a conditional use permit from one parcel to another. So the procedure of minor variance is simply not available here. Technically, this is now an improper use. But it is not an illegal use, as will be explained herein.

Second, issues of liability do not truly exist. The property owner, Mrs. Riedel knows, and has acquiesced, in this construction. She wanted it. She can now hardly complain about it. If it falls down and hits a building, it will be the same one that was in jeopardy with the initial application –

namely hers. She, and subsequent owners of property, will be estopped from asserting a claim. As to possible future property owners, remember this is not a hidden problem. It is quite visible and a reasonable and prudent buyer will know, or should know, of its existence and have a full opportunity to investigate and inspect before buying. A subsequent buyer will be bound and succeed to the position of Mrs. Riedel, and will assume those benefits as well as the detriments.

As to safety concerns, this actually is not a zoning ordinance question as much as it is a building code one. In reality if the structure is unsound, if it is not designed to withstand wind or earthquakes, or the foundation is such that it might otherwise fall over on its own weight, then no building permit should have ever been issued, irrespective of the conditional use permit. This is why we require detailed engineered plans and drawings before a building permit is issued. The purpose of the building codes are to be certain that a structure is designed, installed, and anchored in such a way as to not pose a danger to the public. And if something should deteriorate in the future? We have safety codes for that which can require that the dangerous structure be removed or made safe at the property owner's expense.

The real issue is what is the status under the Zoning Ordinance, and what do we do now?

What we have is a fact pattern not dissimilar to *Pingitore v. Town of Cave Creek*, 194 Ariz. 261, 981 P.2d 129 (Ariz.App. Div. 1,1998). As stated by the Court of Appeals:

> "In July 1992, [the Pingitores] applied to the Town for a permit to extend Old Schoolhouse Road up the side of the mountain for use as a driveway to the site of their future residence. In October 1992, after the Town Engineer had reviewed their plans, the Town issued the Pingitores a permit for construction of the driveway. . . In February 1993, after a plan review of the project, the Town advised the Pingitores that their driveway, as now partially built, potentially violated the Hillside Regulations. After Mr. Pingitore met with the Town's Supervising Engineer and the Town Manager to discuss the Town's concerns, the Town staff advised the Pingitores to apply to the Board for a variance allowing them to complete the driveway.
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> The Pingitores duly applied for the variance, seeking permission to pave a driveway that exceeded the Hillside Regulations' width and height limitations for exposed cut-and-fill slopes. In December 1993, the Board approved the variance, subject to additional requirements that the Pingitores revegetate disturbed areas within 18 months of the date of the variance and install a large water-storage tank on the property to comply with fire-safety standards applicable to their planned residence. . . The Pingitores then agreed to pave the driveway within the 18 months in which they were to complete the revegetation and landscaping work. Approximately $60,000 has been expended in constructing the driveway. . .
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> Thereafter, the Pingitores agreed to extend a sewer line to the site of their residence and applied for the required permit. The Town granted this permit in December 1994, and the Pingitores finished the backfill of the trench dug for the installation of the sewer line in April 1995, expending approximately $11,000 in installing the line.

In August 1995, the Pingitores applied for a building permit to install the water-storage tank and booster-pump stations dictated by the Town to comply with its fire-safety standards. The Town granted this permit, and the Pingitores spent approximately $8800 installing these items.

About this time, the Town approved a zoning clearance for the Pingitores' residence conditioned upon their satisfaction of minimum setback requirements. This required the Pingitores to obtain a lot-line adjustment prior to the issuance of a building permit. To comply with these provisos, the Pingitores joined 2.5 acres of a five-acre parcel adjacent to their property, which they purchased for $220,000, to the five-acre parcel on which they intended to build their residence.

A later Town Planning Staff report said that the Pingitores' proposed lot-line adjustment now conformed to the zoning requirements. Thus, the Pingitores applied for a building permit to construct their residence, including with their application a complete set of plans and drawings for review by the Town's engineering staff. In September 1995, a Town official advised the Pingitores' architect that certain changes to the plans were needed before the Town could approve the plans and issue a building permit.

On September 25, 1995, the Pingitores posted a grading bond of $8250. On October 2, the Town declared that the conditions of the zoning clearance had been satisfied, and it granted the Pingitores a permit for the grading of their site. The Pingitores contracted with a grading company for preparation of the site. The price for this work is $45,000, and the Pingitores have paid the first bill of $7068.09.

The Pingitores also hired Desert Southwest Construction as the contractor for the construction of their residence. Under this contract, they face $96,000 in liability.

In July 1994, while the Pingitores were in the midst of this project, the Town adopted an ordinance creating a new zoning district, the Mountain Preservation Zone ("MP Zone"), which includes the Pingitores' property. In the MP Zone, structures may not be constructed above the twenty-degree-horizontal plane of any "ridge line," which term is undefined.

On October 23, 1995, the Town Zoning Administrator issued a stop-work order directing that the Pingitores cease construction of their residence. The Town's stated basis for the order was the Pingitores' failure to comply with the time limitations for completing the revegetation and paving stipulations attached to the driveway variance. However, the Town Manager later admitted that the order was actually issued because the Town was uncertain whether the building restrictions imposed by the MP Zone applied to the Pingitores' property.

The Pingitores appealed the Zoning Administrator's stop-work order to the Board. On November 28, the Town Zoning Administrator issued the Pingitores a second stop-work

> order for violating the MP Zone provisions. The Pingitores also appealed the issuance of this order to the Board.
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> On December 12, the Board heard the Pingitores' appeal of both orders. At this proceeding, the Pingitores were advised for the first time that the Town Zoning Administrator had determined that they were building on a ridge line in violation of the MP Zone ordinance. . . The Board ...affirmed the Zoning Administrator's orders."

The Pingitores filed suit. The Court of Appeals upheld the Superior Court which had granted relief, saying in part at page 133:

> "Thus, a governmental entity may be estopped from proceeding further in its course unless such action is "to the detriment of the public interest." Id. at ¶ 32 (citing Spur Industries v. Del E. Webb Dev. Co., 108 Ariz. 178, 184, 494 P.2d 700, 706 (1972)). The court then reiterated the three elements of equitable estoppel: "(1) the party to be estopped commits acts inconsistent with a position it later adopts; (2) reliance by the other party; and (3) injury to the latter resulting from the former's repudiation of its prior conduct." Id. at ¶ 35.
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> The evidentiary burden to be borne in establishing the first element requires a "considerable degree of formalism," usually a written document. Id. at ¶ 36. Further, the action claimed to be relied upon by the party asserting estoppel must have been taken by or have had the approval of one authorized to act in that circumstance. Id. In this case, the Town, through its agents, issued a variety of permits and variances to the Pingitores that were necessary for the Pingitores to build at their desired location. While no building permit for the residence yet had been approved, a zoning clearance for the home had been issued. The Pingitores also had submitted an application for the permit to which was attached a complete set of building plans and drawings, and, while the written response from the Town dictated certain changes, it did not implicate the placement of the site. These actions by the Town are inconsistent with its later issuance of the stop-work orders."

The Court then went on to find that there was reliance on the Towns actions and the Pingitores' expectation that the Town would grant them a building permit for their house was reasonable. The Court held that they would suffer harm and damage if they were not permitted to build. It also found the public interest would not be unduly damaged by allowing the home to be built.

With respect to the tower, San Luis was informed of the proposed location change, and a building permit for the new location was issued. While technically a permit should not have been issued until a new conditional use permit granted, there has been construction in reliance on the permit, and if told that the tower must either come down or be relocated, damages will occur to the applicant resulting from the City's change in position. As stated by the Court, the City actually has the legal power to recognize a fait accompli. (An accomplished fact.)

Therefore it is the opinion of this office that the City is estopped from prohibiting this use. By recognizing and applying the doctrine of equitable estoppels, this tower, as it presently exists, becomes a legal non-conforming use and all future decisions with respect to this use must be made accordingly.

I recommend informing the applicant of this determination. The ability to increase or intensify the use in the future may be impacted. As a result future additions of antenna to the tower may not necessarily be allowed. Further I note that the initial application for the tower was for no more than 100 feet high. The tower that is installed appears to be much higher than that, once again leading to the need to carefully review future changes to the structure.