SUPREME COURT OF ARIZONA

WORKERS FOR RESPONSIBLE DEVELOPMENT (CASE), a political action committee; JOSHUA WELLS, an individual, Plaintiffs/Appellants/Cross-Appellees, v. CITY OF TEMPE, a political subdivision of the State of Arizona; CARLA REECE, in her official capacity as City Clerk, Defendants/Appellees/Cross-Appellants. SOUTH PIER TEMPE HOLDINGS LLC, an Arizona limited liability company, Real Party in Interest/Appellee.	Arizona Supreme Court No. ____________ Court of Appeals No. 1 CA-CV 22-0395 EL Maricopa County Superior Court No. CV2022-003530

PETITION FOR REVIEW

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Appendix

Appellees/Cross-Appellants the City of Tempe (the "City") and Carla Reece, City clerk, pursuant to ARCAP 10(j) and 23, hereby petition for review of Section II of the attached Court of Appeals Opinion ("Opinion"), dated January 24, 2023. The City and Ms. Reece also join in the petition for review filed in this matter by appellee/real-party-in-interest South Pier Tempe Holdings LLC ("South Pier") regarding Section I of the Opinion.

I. Issue Presented For Review.

Did the appellate court err by finding the Tempe City Council engaged in a legislative act by approving the subject ordinance authorizing the mayor to execute the development agreement?

II. Material Facts.

On February 10, 2022, the Tempe City Council adopted the subject ordinance (the "Ordinance"), authorizing the mayor to execute a Development and Disposition Agreement (the "Agreement") with developer South Pier to develop multiple parcels along Tempe Town Lake (the "Property"). Ordinance, Ptn_Appx 001 – 002.[1] The Property is zoned for "multi-use, high density" ("MU-4"), which the City's Zoning and Development Code ("ZDC") states, as a mixed use district, is established to provide a mixture of land uses:

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[1] The Ordinance and Agreement, as filed with the Court of Appeals, are attached hereto in the appendices, sequentially numbered starting with "Ptn_Appx 001".

> … including *retail*,[2] *offices*, commercial *services*, *Public Universities, Public University related uses,* civic uses, and housing. These districts are intended to create economic and social vitality and to encourage trip reduction; and encourage pedestrian circulation as an alternative to driving and provide employment and housing options.

ZDC §§ 2-103(F), 3-201(A). MU-4 zoning allows "unlimited housing *density* in a *mixed-use* setting with commercial, *office*, and *public uses*." ZDC § 3-201(B)(6)(d). The ZDC sets forth uses permitted in a MU-4 district, uses that are permitted with a use permit or other limitations, and uses are prohibited. ZDC § 3-202, Table 3-202B. The Agreement limits South Pier to the uses permitted in MU-4 and it is compliant with the purpose established for the mixed-use zoning in the ZDC. The Agreement contemplates a project that "will be a mixed-use, entertainment destination within an urban setting. The project will include a mix of housing, retail, senior housing, office, hotel restaurant and entertainment / venue uses." Agreement, Recital D, Ptn_Appx 003; *see also* Ordinance, Recital B, Ptn_Appx 001, listing uses including green areas, condos, apartments and office.

South Pier owns three parcels within the Property. The Agreement authorizes South Pier to lease the other parcels from the City during the process of building the project. South Pier may enter into an eight-year Government Property Lease Excise Tax ("GPLET") lease for tax abatements after the first improvement on each parcel is

[2] Italicized terms in the ZDC are defined elsewhere in the ZDC.

completed. South Pier agrees to purchase the City-owned parcels after the expiration of the GPLET. Ordinance, Recital D, Ptn_Appx 001; Agreement §§ 6.1, 7.1, Ptn_Appx 012, 015. The Ordinance and Agreement require South Pier to contribute nearly $13 million to a combination of education and affordable housing nonprofits and the City transit fund, as well as to contribute to building a pedestrian bridge, pier and other enhancements at the Property. Ordinance, Recital E, Ptn_Appx 001; Agreement, §§ 2.4, 6.1(e), Ptn_Appx 009, 013. As required by the ZDC for all land zoned MU-4, South Pier must submit a planned area development overlay that would control the development of the Property. *See* ZDC §§ 2-103(F), 5-401 - 403; Agreement, §§ 1.31, 8.2, Ptn_Appx 007, 017.

Plaintiff Workers for Responsible Development (CASE) ("Workers") timely presented a petition to the City Clerk for referral of the Ordinance to the ballot, but the Clerk refused to accept it as administrative actions are not referable. Workers filed suit to require the Clerk to process the petition. After briefing and argument, the trial court held that the Ordinance was referable, but the petition failed to strictly comply with statute. Workers appealed and the City and Clerk cross-appealed. South Pier appealed the strict-compliance ruling. The appellate court reversed the strict compliance ruling and affirmed that the Ordinance was referable. See Opinion, attached hereto.

III. The Court Should Accept Review of Section II of the Opinion and Reverse.

A. The issue is one of first impression and state-wide importance.

The Arizona Supreme Court should grant review of the appellate court's finding in Section II of the Opinion because it raises an issue of first impression in Arizona.[3] The appellate court correctly found that not all development agreements under A.R.S. § 9-500.05, are legislative, but erred in finding the Ordinance authorizing execution of the Agreement is legislative, under the analysis first stated by this Court in *Wennerstrom v. City of Mesa*, 169 Ariz. 485 (1991). Opinion, ¶¶ 31-48. There are no published appellate decisions on whether development agreements akin to the Agreement are legislative nor applying *Wennerstrom* to development agreements. This Court has not addressed the issue before either. In *Wennerstrom*, the Court applied a three-part analysis to determine that municipal resolutions implementing roadway improvements approved by a prior bond election did not amount to legislative acts so they were not subject to referenda. *Id*. at 495. The Court of Appeals relied on *Wennerstrom* in its analysis of the Agreement but reached the opposite result. Opinion, ¶ 49. Granting review in this case will allow this Court to correctly apply the *Wennerstrom* analysis to an administrative development

[3] If the Court does not reverse the appellate court, the City will need a mandate by July of 2023 in order to review and potentially certify Workers' petition in time for the matter to be on the ballot for the March 2024 election.

agreement.

Review should also be granted because this case presents an issue of statewide importance that is likely to recur and on which practitioners and lower courts need guidance. *American Power Products, Inc. v. CSK Auto, Inc.*, 242 Ariz. 364, 366, ¶ 7 (2017) (review granted on "legal issues of statewide importance that are likely to recur."). A.R.S. § 9-500.5 currently applies to 91 incorporated municipal governments. The statutory right to enter development agreements provides value and opportunity to municipalities. Their leaders and qualified electors are both entitled to reasonable guidance as to when a development agreement may be referred.

B. The appellate court wrongly determined that the Agreement is a new, general policy.

A council acts legislatively under Arizona law if it takes an action that is: (1) permanent rather than temporary; (2) general in nature, rather than specific or with limited application; and (3) creates a policy rather than implements a policy. *Redelsperger v. City of Avondale*, 207 Ariz. 430, 433, ¶ 15 (App. 2004) (citing *Wennerstrom*, 169 Ariz. at 489). The appellate court erred by holding that the City Council created a general and permanent policy by approving the Ordinance because the Agreement includes a recital stating:

> City and Developer [i.e., South Pier] hereby acknowledge and agree that significant benefits will accrue to City from the development of the Property by Developer, including, without limitation, increased tax

> revenues, and the creation of jobs in the City, and the development of the Property in accordance with the Conceptual Development Plan (hereinafter defined), will otherwise improve or enhance the economic welfare of the inhabitants of the City.

Agreement, Recital F, Ptn_Appx 004; Opinion, ¶ 39. This is not a statement of a new general and permanent policy. It is not akin to the City stating it will prohibit the riding of scooters on the sidewalk, or require developers to pay a new type of fee. Instead, the provision contains a rather "boilerplate" recital of certain benefits the City will receive by entering into the Agreement. If this recital is a policy, then every contract a municipality enters into stating it will benefit the municipality is a policy. If taking an action to improve the economic welfare of City inhabitants is policy creation, then virtually everything the City does falls under the category of "policy" creation. Every instance where the City assesses a fee on a person could be labeled a policy, as it ultimately benefits inhabitants by increasing the money in the City's coffers. Every administrative decision about matters like cleaning graffiti, removing litter, installing landscaping, improving parking facilities is for the overall improvement of the economic welfare of City inhabitants. These actions all make the City a cleaner, safer, and better place to do business.

The recital relied on by the appellate court is part of a single specific contract. It is limited in nature to the terms of the Agreement. The recital is not a general statement or declaration of new City policy seeking contributions to affordable housing and other efforts, selling City property, and entering into leases and GPLETs

to increase tax revenue and create jobs. The recital merely provides examples of how the Agreement will economically benefit the City. For these reasons, the Ordinance is not referable and the appellate court's decision should be reversed.

The Ordinance and Agreement are just the implementation of the policy stated by designating the Property for mixed-use zoning ("MU-4" designation), as well as including the Property in a redevelopment area. Ordinance, Recital B, Ptn_Appx 001; Agreement, §§ 1.14, 6.1(c), Ptn_Appx 005, 011; Ex. F to Agreement, Recital B and § 3.1, Ptn_Appx 036, 037.

The appellate court erred by stating that the MU-4 zoning cannot be the policy under which the Ordinance was enacted because the Ordinance and Agreement do not specifically cite to the MU-4 zoning. Opinion, ¶ 46. The inclusion or omission of a single magic word should not determine whether the Agreement is administrative or legislative. Moreover, the Agreement references the development as being "*mixed-use*" multiple times. The particular uses referenced in the Agreement are many of the same uses referenced in MU-4. Agreement, Recital D, Ptn_Appx 003; *id.* §§ 8.11, 8.12, Ptn_Appx 019. Also, the appellate court ignores that the Ordinance and Agreement both state the Property is within a redevelopment district established legislatively by the Council under A.R.S. § 36-1471 *et seq.*, and that the Master Lease rental payment is a "contribution toward fulfillment of Landlord's [i.e., City's] policy and desire to promote development within a

redevelopment area ….” Ordinance, Recital B, Ptn_Appx 001; Ex. F to Agreement, Recital B and § 3.1, Ptn_Appx 036, 037; *see also* Agreement, §§ 1.14, 6.1(c), Ptn_Appx 005, 011.

The appellate court also determined that the MU-4 zoning cannot be the previously declared legislative policy that the Ordinance and Agreement implement because MU-4 allows a range of development intensities. Opinion, ¶ 45. In fact, the Agreement is a direct implementation of prior legislative policy. First, the Agreement *only* allows the uses in MU-4. Second, application of the appellate court's reasoning would render every development agreement referencing *any* zoning designation allowing multiple uses subject to referendum. Any development agreement regarding building offices, stores and apartments on a parcel zoned for multi-use would be deemed a legislative act.

Third, the inclusion of a conceptual design in the Agreement does not convert the Agreement into a legislative act. *See* Opinion, ¶ 47. Applying this reasoning, every site plan and subdivision plat becomes subject to referendum, which is contrary to the law. *E.g., Redelsperger*, 207 Ariz. at 438, ¶ 28 (quoting 3 Edward H. Ziegler, Jr. et al., Rathkopf's The Law of Zoning and Planning, § 46:7 (4th ed. 1994) ("[T]he implementation of existing zoning ordinances, by the grant of a variance, special use permit or tentative approval of a subdivision plat, generally is considered

to involve 'administrative action' not properly subject to voter initiative or referendum.")

Also, it would mean that every development agreement is legislative because by their very nature, all will have some statement of what is intended to be built on the subject property. Indeed, A.R.S. § 9-500.05(H)(1) defines a "development agreement" as an agreement that may specify or relate to "[t]he permitted uses of property subject to the development agreement," as well as density, intensity, maximum height, and size of buildings. It is hard to envision a development agreement that would not state what is planned for the property being developed. This contradicts the appellate court's separate – and correct - determination that the text of Section 9-500.05 *does not* make every development agreement referable. Opinion, ¶ 32. Indeed, the text of Section 9-500.05 is not ambiguous (the appellate court found no ambiguity) and there is no basis in the text supporting a finding the statute categorically makes all development agreements subject to referendum. *See* *Bilke v. State*, 206 Ariz. 462, 464-65 ¶ 11 (2003) (The first step to determine the legislature's intent is to "look to the language of the statute itself.") (quoting *Zamora v. Reinstein*, 185 Ariz. 272, 275 (1996)). Unless the statute is ambiguous, the court will not consider "the statute's context, subject matter, historical background, effects and consequences, spirits and purpose." *Zamora*, 915 P.2d at 1230. The fact that development agreements may not be passed as emergency measures does not in and

of itself dictate that such agreements are legislative. *See Arizona Free Enterp. Club v. Hobbs*, 253 Ariz. 478, __, 515 P.3d 665, 671-73, ¶¶ 23-25, 31 (2022). Therefore, this Court should overturn the Opinion's finding that a recital stating the development agreement is to the City's economic benefit is a new policy rather than merely a recital in a contract that is implementation of the City's legislative policies in the ZDC and designation of the Property for redevelopment.

C. The appellate court wrongly determined that the Agreement is a permanent policy.

In addressing the permanent versus temporary dichotomy in the *Wennerstrom/Redelsperger* test, the appellate court incorrectly determined that the Ordinance was a permanent legislative measure because the Agreement allows the City's Director of Community Development to approve hypothetical requests the Developer *may* make in the future for variations from the City's sign code. Opinion, ¶ 36; Agreement, § 8.10, Ptn_Appx 019. The Agreement states the community development director "…will consider approval" of such signage concepts proposed by South Pier, "in accordance with its *normal process* for such requests." *Id.* (emphasis added). Although the Agreement authorizes the director to consider requests from South Pier to deviate from the ZDC's sign code, there is nothing indicating what the nature of such requests might be or any requirement that the director must approve any request outside of the normal process. This paragraph of the Agreement does not create a definite or permanent deviation from the ZDC.

The appellate court concluded other parts of the Agreement make it permanent in nature but did not explain its findings. Opinion, ¶ 37. Nothing in the Agreement constitutes a permanent policy. The Opinion refers to the Master Lease, but that is a 25-year ground lease – thus not permanent. Agreement, § 3.1, Ptn_Appx 010; Ex. G to Agreement, § 2.4, Ptn_Appx 060. The Master Lease can be extended, as the Opinion mentioned, but only up to the length of the Agreement term. Agreement, § 3.1, Ptn_Appx 010; Ex. G to Agreement, § 2.4, Ptn_Appx 060. The Agreement governs the *development* of the Property; once development is complete the Agreement ceases to apply. Furthermore, the purpose of the Master Lease is to allow South Pier to construct improvements on City owned parcels. After a certificate of completion issues for the improvements, the developer and City may enter into an eight-year (non-extendable) GPLET for that parcel. Agreement, §§ 3.6, 6.1, Ptn_Appx 011-014. After the GPLET terms ends, the developer will purchase the parcel, terminating that part of the Master Lease. *Id.* § 6.1(h), Ptn_Appx 014. Thus, the Master Lease is temporary, not permanent, and under *Wennerstrom/Redelsperger*, the Ordinance is not legislative.

Finally, the Opinion wrongly states that the Agreement is permanent because it "restricts the property's land use based on its terms." Opinion, ¶ 37. The Opinion does not cite to any such restrictions. Again, the Ordinance and Agreement do not change the zoning on the Property. If the Agreement is terminated for any reason,

then the next developer on the Property would be subject to the very same MU-4 zoning restrictions, no more and no less. Per the Agreement, South Pier must submit a Planned Area Development Overlay ("PAD") for City Council approval, just as any other developer on an MU-4 zoned property would have to submit a PAD. *See* ZDC §§ 2-103, 5-401 - 403; Agreement, §§ 1.31, 8.2, Ptn_Appx 007, 017. The PAD will give greater clarity as to the uses, density and what will be constructed on the Property. While the construction of hotel, apartment, office, and retail buildings can be characterized as "permanent" in nature, they do not render the Agreement permanent for purposes of the *Wennerstrom* analysis. Opinion, ¶ 37. Approvals of such actions are no more permanent than any city approval for any building being placed on a property. Any approval of a site plan or use permit to build a structure would become legislative under this theory. This result is contrary to *Redelsperger*, 207 Ariz. at 438, ¶ 28. Additionally, the Agreement is conditional – should South Pier not live up to its promises in the Agreement, or if the parties mutually agree, the Agreement can be terminated. Agreement, § 10.1, Ptn_Appx 022-023. Therefore, the Development Agreement is not permanent in character, and under *Wennerstrom/Redelsperger*, is not legislative.

Conclusion

For the foregoing reasons, the Court should grant review and vacate the Opinion of the Court of Appeals.

Respectfully submitted this 3rd day of February, 2023.

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