
MARTIN & BONNETT, P.L.L.C.

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June 18, 2013

Via Email and U.S. Mail

Anne L. Tiffen, Esq.
Dickinson Wright
2901 N. Central Avenue, Suite 200
Phoenix, AZ 85012

Re: *Notice of Intent to Terminate Town Manager of Cave Creek – Usama Abujbarah*

Dear Ms. Tiffen:

We write this letter to address several matters concerning the recent actions of the Town Council (“Council”) concerning our client, Usama Abujbarah. As you know, Mr. Abujbarah has been an employee of the Town of Cave Creek (“Town”) for the past 17 years, the last 14 of which has been as Town Manager. As you also know, on June 10, 2013, a majority of the current Council members voted to terminate Mr. Abujbarah’s written contract of employment effective September 9, 2013.

Prior to the Council meeting, I raised certain procedural issues that were again stated on the record at the Council meeting. They are not repeated here as they are a matter of public record. In addition, a separate letter dated June 13, 2013 regarding the written Notice of Intent to Terminate was sent directly to the Town Clerk. There are some additional procedural and substantive matters, however, that came to light during the Council meeting that are addressed herein.

First, it is still unclear who called the Special Meeting on June 10, 2013. I am reviewing a copy of the audio recording of the meeting to review the question posed to the Mayor about whether he, in fact, actually called the special meeting. This is due to the fact that Vice-Mayor Adam Trenk stated at one point during the evening that he had requested the meeting. Since neither the official Agenda nor any public record makes it clear at whose request the Special Meeting was called, a question exists concerning whether the meeting was properly convened pursuant to Section 30.35(B) of the Cave Creek Town Code (“Code”).

Second, the motion made by Vice-Mayor Trenk was obviously prepared in advance of the meeting. He was clearly reading from a document. I have been provided with a document that appears to be the document from which he was reading the motion. No amendments were offered to the motion by any Council member nor was there any discussion about the motion itself during the open session other than whether to terminate or retain Mr. Abujbarah. Given the multiple issues involved in the motion beyond the retention issues, it begs the question of whether there was discussion and consensus among the four Council members who voted in favor of the motion in violation of the Open Meetings Law. A.R.S. §38.431.02(H); *see also Kerby v. Luhrs*, 44 Ariz. 208, 36 P.2d 549 (Ariz. 1934).

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Third, as mentioned, the motion that was made, seconded and approved contained multiple issues. For example, one issue calls for notice to the Town Manager terminating his employment effective September 9, 2013. Another issue called for re-assigning Mr. Abujbarah to unspecified duties. Another issue called for a process for selection of a new Town Manager while yet another called for an independent audit of Town funds. We believe the motion was procedurally defective because it contained multiple issues for consideration rather than a single stand-alone issue. Although it does not appear that the Town Code contains an express provision relating to how many issues may be embodied in a single motion, Arizona law explains the rationale behind motions, ballot initiatives or propositions being limited to a single issue. See *Bentley v. Building Our Future*, 217 Ariz. 265, 172 P.3d 860 (Ariz.App. Div. 1, 2007) (saying “the purpose of the single subject rule is to give the voters a chance to express their opinion on unrelated propositions separately, and to avoid ‘logrolling.’”).

Fourth, regardless of the Council’s position on the propriety of a motion containing only a single issue versus the multiple issues embodied in the motion in question, it clearly contained issues that were not listed on the Agenda for the Special Meeting of the Council. As you know, the item for consideration on the Agenda for the June 10, 2013 Special Meeting reads:

1. Council discussion and consideration of the employment, assignment, compensation, benefits, promotion, demotion, dismissal, termination and/or resignation of the Town Manager and/or consultation with the attorneys of the public body for legal advice regarding the employment, assignment, compensation, benefits, promotion, demotion, dismissal, termination and/or resignation of the Town Manager. A.R.S. §38-431.03(A)(1) and (3).

This language does not cover several issues combined in the single motion such as an independent audit or a process for selecting a successor Town Manager. Without the appropriate mention of these issues on the Agenda, they could not legally be the subject of or included in a motion called for a vote. Yet they were. Given the fact these issues were not voted on separately but in a single motion which contained issues not listed on the Agenda, the action of the Council regarding the entire motion is null and void. A.R.S. §§38.431.05(A), 38.431.02(H); see also *Johnson v. Tempe Elementary Sch. Dist. No. 3 Governing Bd.*, 199 Ariz. 567, 570, 20 P.3d 1148, 1151 (App. 2001).

Fifth, issues regarding the motion relating to a requirement that Mr. Abujbarah return City property yet require that he assist the Town by essentially continuing to perform, directly or indirectly, Town Manager duties are inconsistent. Mr. Abujbarah’s contract of employment and the Town Code contemplate that following the required written notice of intent to terminate his employment as Town Manager, he will either continue in his position until the effective date of the termination or be placed on paid administrative leave. See Employment Agreement § 3.1(A); Code § 31.25(f). Neither the Code nor the contract contemplate any other contingency under the present circumstances. Yet, the Council passed a motion amounting to Mr. Abujbarah being relegated to a position other than Town Manager without consideration of whether any such position actually

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exists within the Town that is authorized by the Town Code. Additionally, no duties and responsibilities were identified for this yet-to-be-identified position nor was a line of reporting authority established so that Mr. Abujbarah knows who to report to and what is expected of him for the next 90 days. Given the form of government of Cave Creek, the applicable provisions of Mr. Abujbarah's contract and the Town Code, and the language of the motion passed at the June 10, 1013 Special Meeting it begs the question, "Who is currently in charge of the day-to-day operation of the Town?"

Sixth, the motion when considered in its entirety requires that Mr. Abujbarah agree to serve in some undefined role and to carry out undefined duties and responsibilities as a condition of receiving the benefits he is entitled to under the terms of his employment agreement. This is a clear breach of the contract itself as well as a breach of the implied covenant of good faith and fair dealing embodied in every written contract. *See Wells Fargo Bank v. Arizona Laborers, Teamsters and Cement Masons Local No. 395 Pension Trust Fund*, 201 Ariz. 474, 38 P.2d 12 (Ariz. 2002).

Finally, comments made by Vice-Mayor Trenk regarding Mr. Abujbarah's's exercise of his First Amendment rights of free speech and association are troubling to say the least. They suggest that the decision made by the majority of the Council to terminate Mr. Abujbarah's employment was in retaliation for his exercise of these rights. If true, this not only may subject the Town to liability but may also expose these Council members to individual, personal liability. *Los Angeles Police Protective League v. Gates*, 907 F.2d 879, 894 (9th Cir. 1990).

As I mentioned in an earlier phone call, the month of July 2014 is significant for Mr. Abujbarah in terms of the effect retirement after that date will have on his pension benefits. Loss of employment and related loss or decrease in contributions to his retirement plan after the noticed effective date of his termination will have a substantial impact on the present value of his retirement benefit over his life expectancy. We are in the process of calculating the present value of this loss as well as the value of the loss of all benefits he is entitled to under the terms of his contract of employment.

We are in the process of preparing a statutory notice of claim pursuant to A.R.S. §12.821.01. As you know, that notice must be served on the Town and any public official against whom Mr. Abujbarah may wish to seek monetary relief. As you know, once served, the notice of claim becomes a matter of public record. *See Phoenix Newspapers, Inc. v. Ellis*, 215 Ariz. 268, 272, ¶ 17, 159 P.3d 578, 582 (App.2007) ("Based on its nature and purpose, we easily conclude that the Notice of Claim is a public record.") Additionally, we are evaluating the possibility of mandamus, declaratory and injunctive relief for the reasons stated above.

If there is any interest in discussing any of the matters raised in this letter, please feel free to contact me at your convenience. We recognize that there may be a need to address some of these

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issues with the Council. Nonetheless, if we do not hear from you on or before June 28, 2013, we will assume there is no interest in discussing these matters and will proceed accordingly.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel L. Bonnett". The signature is written in a cursive style with a large initial "D" and a long horizontal flourish at the end.

Daniel L. Bonnett