



# Arizona Department of Transportation

## Office of the Director

206 South Seventeenth Avenue Phoenix, Arizona 85007-3213

Janice K. Brewer  
Governor

John S. Halikowski  
Director

John A. Bogert  
Chief of Operations

John McGee  
Executive Director  
for Planning & Policy

April 28, 2011

Mr. Tim Ernster  
City Manager  
City of Sedona  
102 Roadrunner Drive  
Sedona, AZ 86336

Dear Tim:

I am writing in response to your letter of April 13, 2011, concerning the Transfer Agreement and ADOT's response to the pending referendum. In your letter, you express disappointment that ADOT is giving the City an "ultimatum that the City is powerless to meet". The letter goes on to state that there are two reasonable alternatives for ADOT to consider.

The City's first alternative is that ADOT pay the \$10.6 million dollars to the City now, while the City would do nothing in return until the referendum vote is held and the Transfer Agreement is validated. You have indicated to us that it is the intention of the City to hold a special election in November, 2011 in order to allow the voters to consider the referendum.

Given that ADOT is proceeding with the advertisement for the Pavement Preservation Project and the Andante Traffic Signal Project, the advance payout you are advocating would result in ADOT performing on close to 99 percent of its obligations under the Transfer Agreement (with only the enhancement project remaining) while the City would do nothing in return unless authorized in the future election. Your letter asserts that "this option would present no risk whatsoever, to ADOT." We believe that there is substantial risk to ADOT.

First, this alternative would require ADOT to fully perform on the contract, while getting nothing in return from the City beyond a hope of its future performance.

Second, our engineering study indicates that continuous roadway lighting should be installed as soon as possible. Your alternative entirely negates the issue of the lighting. As you are well aware, the driving force behind the Transfer Agreement has been the City's desire to avoid installation of the lighting improvement that the Department's engineers recommend.

Third, the Department has no assurance that if the money is sent, and the referendum is successful, that the City would be able to act upon its pledge to "return that sum plus interest" to ADOT. How can we have any assurance that another referendum or action of the Council might not stay the City from returning the funds, resulting in future litigation to recover them?

Fourth, the transfer of State funds without contract performance on the City's part is not only a poor business decision, but a breach of ADOT's stewardship responsibility over State funds, and, quite possibly an unlawful "gift" of public money which is prohibited by Arizona's Constitution. ADOT cannot be put in such a position.

Finally, both ADOT and the State Transportation Board have previously indicated their desire to have this issue resolved as soon as possible. As you will recall, the Board originally gave the City a deadline of January, 2011 to finish and approve the Transfer Agreement. The Board later modified this deadline (at the request of the City) to February, 2011. Under your proposal, ADOT would now have to wait at least an additional seven months with no continuous roadway lighting in place, and without any assurance that the transfer will ever be accomplished.

For all these reasons, your first proposal is unacceptable.

As a second alternative, the City offered to "agree to amend the Transfer Agreement to move the funding deadline from June 30, 2011, to a time after the referendum is determined." This alternative presents some of the same difficulties as the first alternative. It does not address the fact that the lighting is not in place, nor does it address the Board's desire to have a timely resolution of this issue.

The amendment alternative raises a number of other questions. If the Department and the City were to agree to amend the Transfer Agreement, would that agreement then be subject to a referendum? Since the City has taken the position that the referendum stays all action under the agreement, can the City even agree to an amendment? Sedona's City Attorney opined in an email sent to ADOT on April 1, 2011 that such an amendment "could possibly be challenged in Court as violating the referendum stay, or it may give rise to another referendum challenge thereby staying the amendment itself." And yet your letter of April 13 refers to this as a "very viable option". Based on the potential legal issues raised by your own attorney, it seems anything but a "very viable option".

Even if one assumes that these options are somehow "viable", they do not meet the parties' intent to finally decide the issues of control over the highway and roadway lighting. The City offers no compensation to ADOT for the fact that under either alternative ADOT would continue to retain control of the highway without the continuous lighting, or the fact that ADOT would continue operating a highway that the City Council agreed to immediately take over.

For all these reasons, your second proposal is unacceptable.

The fact remains that ADOT would not receive the benefit of the bargain under either alternative presented by the City. ADOT would be required to bear additional risks, while receiving none of the benefits of the Agreement, while also remaining in limbo with no definite or assured endpoint to the transfer.

Your letter of April 13 also claims that ADOT's position "effectively insures ADOT will retain liability for the roadway in perpetuity." We disagree with your conclusion that absent the

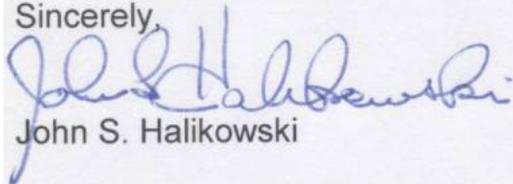
Transfer Agreement ADOT must continue to hold the roadway in perpetuity. ADOT believes other valid legal options exist to address this issue.

Your letter also states that ADOT has offered the City a "wholly unworkable option." The previous memorandum from your City Attorney to the Assistant Attorney General stated that the City Attorney was not asserting the official position of the City. Even so, we view the April 13, 2011 letter indicating the City is powerless to perform under the Transfer Agreement as constituting the official position of the City. The Attorney General's Office cannot overrule the City Attorney's advice, nor can it give the City legal advice.

ADOT has been diligently working with the City since 2006 to address the City's request relating to safety issues on SR89A. Since that time the City Council has voted on three separate occasions in support of the lighting project, and, on February 22<sup>nd</sup>, 2011, voted to take back the road as part of the Route Transfer Agreement. Four times ADOT believed it had come to resolution with the City on this issue. And yet, each of those actions was ultimately overturned or delayed. ADOT today finds itself essentially in the same position it was in 2006. ADOT still owns and is responsible for the road, and the issue of continuous lighting has yet to be resolved.

ADOT fully respects the constitutional right of the citizens of Sedona to refer the Council's decision in this matter to a referendum vote. However, it is unreasonable to assume that ADOT must continue to bear sole liability and risk while the community and its elected representatives continue to deliberate this issue. ADOT has a responsibility to address public safety concerns on all its highways, and to act in the best interests of all of Arizona's citizens and visitors.

Sincerely,



John S. Halikowski

cc: The Honorable Mayor Rob Adams  
Mike Goimarac, Attorney, City of Sedona  
John McGee, Executive Director for Planning and Policy  
Bill Feldmeier, Chairman  
Bobbie Lundstrom, Vice-Chairwoman  
Felipe Zubia, Board Member  
Victor Flores, Board Member  
Steve Christy, Board Member  
Kelly Anderson, Board Member  
Hank Rogers, Board Member  
Joe Acosta, Jr., Assistant Attorney General  
John Harper, Flagstaff District Engineer  
Audra Merrick, Flagstaff Development Engineer  
Jennifer Toth, Assistant Director, Multimodal Planning Division  
Matthew Burdick, Assistant Director, Communication and Community Partnerships