San Luis City Attorney

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San Luis City Attorney Opinion

Re: Water Temperatures at Frontera Estates, San Luis, Arizona

DATE: July 6, 2016

TO: Honorable Mayor and Members of City Council

Tadeo De La Hoya, Interim City Manager

Ralph Velez, Consultant

Eulogio Vera, P.E., Public Works Director

From: Glenn Gimbut, Assistant City Attorney

at the Direction of Kay Marion Macuil, City Attorney

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The Office of City Attorney was directed to research and write an opinion on the legal responsibilities for the City for water temperature experienced by homeowners in Frontera Estates and the legal options available to address perceived problems experienced by some of the homeowners in the subdivision.

This opinion will address why the City not only has no legal responsibility to address the perceived problem, but why it would be unconstitutional for the city to do so. That being said, the situation is not without a remedy if the homeowners themselves are willing to shoulder the financial costs involved. To understand the conclusions, one must first understand the facts.

High Temperature Water

The complaint of homeowners Raul and Ana Lomeli are representative of the complaints being made. They are not alone, and their concern is typical. Because their complaints were put in writing, and are representative of the group of homeowners who are concerned about water temperatures, this opinion will refer to their specific

complaint. This is not to suggest that their complaint is not accurate. Rather this opinion assumes that what they are reporting is in fact true.

In a letter dated September 24, 2014 Mr. and Mts. Lomeli reported that they were experiencing water temperatures during the months of June, July, August, and September as high as 99.8 degrees to 103.1 degrees at the tap at their house. They decided that this was the fault of bad decision making at the City. As a result they wanted "something" done.

In response the City had a study conducted concerning water temperature prepared by Nicklaus Engineering, which resulted in a written report dated July, 2015. This study, hereinafter referred to as the "NEI report", confirmed the complaint of Mr. and Mrs. Lomeli. It confirmed that water at the tap could be as high as 116 degrees at the tap after flushing for two minutes. But the report also noted how their home was constructed. Service to the home was connected to the main using copper pipe. As a construction material, copper will conduct and transfer heat better than other types of piping. The service pipe was set in the ground at a depth higher than the main. The main was set at a 4 foot depth. The water service was set at a depth of two feet. At the time the water temperature hit 116 degrees at the house, ground temperature, which would impact the temperature of the water, at the water main, was only 75 to 78 degrees. Ground temperature at the 2 foot depth was 84 degrees. This means the rise in height of the depth of the pipe contributed to an increase in water temperature alone. Using copper pipe insured this increase in temperature. All of these depths and the use of copper meet the following legal standards of construction: Arizona Department of Environmental Quality; Arizona Department of Water Resources; Yuma County Public Works Standards; City of Yuma Public Works Standards; and Maricopa Association of Governments Public Works Standards.

Piping from the meter, through the home, and to the tap was by what is a local standard method of construction which is to take piping up the side of the home, through the roof, dropping down to the "stacks" where the connections to kitchens, bathrooms, laundry, etc. are placed. Sometimes the piping material is PVC, sometimes (in older homes) it is iron piping, and sometimes (like some of the residences in Frontera Estates) it is copper. Once again copper is a material which will transfer heat in a more efficient manner than PVC. Taking the water through a hot roof during the summer in Arizona accounts for upwards of a fifteen degrees increase in water temperature as will be discussed later in this memorandum

Construction standards for the plumbing of a home are governed by plumbing codes. The City uses the national standard, the 2006 International Plumbing Code ("IPC"). This code was developed by the International Code Council and the International Plumbing Code Development Committee. It is a standard set of regulations adopted throughout the United States of America to provide minimum standards to safeguard public health and safety by "regulating and controlling the

design, construction, installation, quality of materials, location, operation, and maintenance or use of plumbing equipment or systems." (Sec. 101.3 2006 IPC). The plumbing code allows for piping to come down from the roof. Because the water pipes circulate through the roof, it is like sending the water through a hot oven. By all reports from professional engineers, this has significant impact on the experienced water temperatures. The design of the house could have been to 1) have the water pipes and "stacks" come up from the floor instead of the roof. (This is the type of construction that occurs in colder climates where freezing water pipes is a concern) or it could have been to: 2) provide for special insulation around the piping to protect against heat transfer from a hot roof to water in the pipes. Neither ADEQ standards nor the IPC require the piping to be constructed such as to prevent water from becoming superheated due to the environment, nor do they provide for special insulation. Maybe it should. But these are not the standards that exist today, and were not the standards that existed at time of plan review.

Also contributing to the heat in the water was the lack of circulation of the mains due to the streets being a cul-de-sac. Mains sitting just four feet deep under an asphalt street without water circulating, but rather sitting in the pipes gaining heat transfer, adds to the problem as well. According to the NEI report water in the "dead end" mains was around 96 degrees and at the very end of the mains as high as 102 degrees.

Water temperature at the hydrant near the Lomeli house, which would be reflective of the temperature at the meter, was on average 91 degrees after a two minute flush. Water at hydrants which were not on a "dead end" main were only 83 degrees after a two minute flush. This means 8 degrees of increased temperature can be explained by the mains being "dead end" and not looped and sitting at a depth of 4 feet. (The lower the main in the soil the cooler the soil and less heat transfer.) ADEQ standards and all known public works standards, then and now, allow for such a "dead end" main to exist at that soil depth. Having a looped main and having it at a lower depth would have increased cost to the developer without increasing the market for the lots in the subdivision. Obviously the developer did not want to spend money that it was not legally required to do.

It would appear that at least 8 degrees can be explained by placement of mains in four feet of soil on a "dead end" main, versus existing in a true looped system, and upwards of 15 degrees can be explained due to the design and construction of the house. It is undisputed that once water passes the main and into the tap which serves the house, that is the legal responsibility of the homeowner. All construction impact described above involves design and construction after the meter. No one has ever disagreed that construction after the meter is the sole responsibility of the property owner, and such piping is not, and never has been, part of the utility system of the City.

From a factual standpoint, as shown by the NEI report, changing the water mains in the street could impact water temperature by as much as 8 degrees, and changing house construction could impact by as much as 15 degrees. If the water temperature experienced by Mr. and Mrs. Lomeli dropped by 23 degrees, this author is certain that this would solve the problems that they have complained about.

Legal Process of Plan Review

When plans for a subdivision are brought in for review, the construction plans are reviewed for the standards of ADEQ, ADWR, Yuma County Public Works Standards, and, for water and sewer work, City of Yuma Public Works Standards since Yuma County Public Works Standards do not deal with those topics per se. The public works standards of both Yuma County and the City of Yuma are based on the Maricopa Association of Governments ("MAG") standards, which are the 'gold standard'. As a result since the plans met all known standards, they were approved, and the City of San Luis Department of Development Services did its job, and did it correctly. The City of San Luis is actually prohibited from having standards that conflict with either ADEQ or ADWR. ADEQ regulates the type of materials of piping, size of piping, water pressure, standards for quality of water, depths and angles of piping, as well as other standards. Temperature of water is not regulated but because of the extent of regulation by the United States Environmental Protection Agency and ADEQ, the State and the Federal government have "occupied the field" and the City is legally prohibited from adopting any regulation that could be seen as a conflict with these standards, regulations, and laws, See *BNSF Ry. Co. v. Seats Inc*., 237 Ariz. 259, 349 P. 3d 1096, (Ct. App. Div. 1 2015); *Gade v. National Solid Wastes Mgt. Ass'n*, 505 U.S. 88, 112 S.Ct. 2374 (1992); *City of Phoenix v. Arizona Dept. of Environmental Quality*, 205 Ariz. 57674 P.3d 250 (Ct. App. Div.1 2003). See also A.R.S. §49-353.01. The "dead end" water mains as placed at a four foot soil depth meets these standards, and the City lacked the legal power to not approve proposed construction that met the law as it existed at that time.

City staff may not make up standards as it goes along. It may not, legally, apply standards or rules that do not yet exist. Review of subdivision plans must be in accordance with already adopted standards. If the subdivision plat meets those standards, the city may not deny approval. See 8 McQuillin Mun. Corp. § 25:132 (3d ed.); *Projects American Corp. v. Hilliard*, 711 S.W.2d 386 (Tex. App. Tyler 1986); *Tony Ashburn & Son, Inc. v. Kent County Regional Planning Com'n*, 962 A.2d 235 (Del. 2008); and *People ex rel. J. C. Penney Properties, Inc. v. Village of Oak Lawn*, 38 Ill. App. 3d 1016, 349 N.E.2d 637 (1st Dist. 1976).

Likewise with building permits. When an application meets all known codes, the city lacks the power to deny the building permit. 17 McQuillin Mun. Corp. § 51:59 (3d ed.); *Sgromolo v. City of Asbury Park*, 134 N.J.L. 195, 46 A.2d 661 (N.J. Sup. Ct. 1946);

Allenbach v. City of Tukwila, 101 Wash. 2d 193, 676 P.2d 473 (1984); and *Roberts v. City of Bethany*, 1977 Ok Civ App 42, 668 P.2d 350 (Ct. App. Div. 1 1977).

Since the subdivision plat met all known laws, standards, and regulations in existence at time of application, and the building permit application for construction of the house met all known laws, standards, and regulations at time of application, and nothing presented by either the complaint of the residents, the petition presented by the residents, nor the NEI report presents any facts to dispute those conclusions, the Department Development Services acted properly in recommending approval of the subdivision plat, and approval of building permits.

Temperature as an "Aesthetic"

The City's legal duty on delivery of water is to deliver potable water that meets the standards of the Clean Water Act and other health regulations as enforced by ADEQ. There is no legal duty to deliver a particular kind of water beyond these legal requirements.

As is stated in 19 McQuillin Mun. Corp. § 53A:18 (3d ed.):

> "The Safe Drinking Water Act of 1974 and its amendments (SDWA) authorizes the Environmental Protection Agency (EPA) to regulate tap water contaminates and also authorizes state programs with standards at least as strict as the SDWAs. Under the SDWA, primary drinking regulations apply only to public water systems, including those providing piped water for human consumption if the system has at least fifteen service connections or regularly serves at least twenty-five people. The SWDA also applies to collection, treatment, storage and distribution facilities mainly used in connection with such systems that ultimately supply water to consumers.
>
> The act authorizes National Primary Drinking Water Regulations (NPDWR) that specify maximum contaminant levels with possible adverse effects on human health. Both natural and man-made contaminants are covered. The SWDA mandates direct public notification by owners or operators of public water systems failure to comply with applicable maximum contaminant levels or treatment technique requirements and monitoring."

The City made contact with Donna Calderon with ADEQ. Ms. Calderon confirmed that the temperature of water is not a matter which is regulated by the Safe Drinking Water Act nor any other regulation enforced by ADEQ. Again the City's legal duty is confined to providing water that meets these regulations. It has done so, and

continues to do so. It is not unsafe in the eyes of these known governmental health and safety regulations. As a result the desire to have the city provide cooler water, is what is known as an "aesthetic" or something that is attractive or appealing, not something that is required under the law. Since this is a matter of an aesthetic nature, not something that is required or covered by the Safe Drinking Water Act, it is not a matter that can legally be supported at the cost of the other utility rate payers of the City of San Luis.

Fiduciary Duty of City Officials – Anti-Gift Clause of the Arizona Constitution

Article 9, Section 7 of the Arizona Constitution states:

> Neither the state, nor any county, city, town, municipality, or other subdivision of the state shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or become a joint owner with any person, company, or corporation, except as to such ownerships as may accrue to the state by operation or provision of law or as authorized by law solely for investment of the monies in the various funds of the state.

This provision has become known as the Anti-Gift Clause of the Arizona Constitution.

As stated by the Supreme Court of North Carolina in *Lette v. County of Warren*, 341 N.C. 116, 462 S.E.2d 476 (1995) at page 479 a ". . . municipality cannot lawfully make an appropriation of public monies except to meet a legal and enforceable claim, and cannot make payment upon a claim which exists merely by reason of a moral or equitable obligation, which a generous, or even a just, individual when dealing with his own moneys, might recognize as worthy of some reward."

Without a known legal duty to provide a particular water temperature, and the construction of the subdivision, including the placement of mains and the use of "dead end" mains, and the construction of the home meeting all known standards and laws, provision of something else becomes an expenditure not for a legal and enforceable claim, but one that is a "…donation or grant, by subsidy or otherwise to [an] individual…" in violation of the Anti-Gift Clause. As a result, if something is to be done to change the infrastructure to change the water temperature, it can only be done at the cost and expense of the individual or individuals who desire it.

Further, any payment or expenditure in violation of the Arizona Constitution would be in breach of fiduciary duty, meaning the members of the Council that approved this as well as staff members who approve payment, would be subject to potential personal liability. They would not enjoy legislative immunity, since there is no immunity

for decisions at an operational level. See *Schable v. Deer Valley Unified Scholl Dist. No. 97*, 186 Ariz. 161, 920 P.2d 41 (App. Div. 1 1996).

Community Facilities District

The City of San Luis has formed a community facilities district for Frontera Estates. A community facilities district has the power to construct infrastructure and issue bonds paid by special lien assessments on the real property in the district. As a result, if the homeowners themselves were willing to have their land subject to special lien assessments, it might be possible to use this special district to dig up the streets, reset the mains to a lower depth, loop the water systems, reconnect the properties, and replace the streets. Again the homes themselves would end up being subject to a special tax assessment to pay for this. Since the homeowners themselves would be paying for the improvements that they desire, which for the reasons set forth above are improvements beyond the requirements of law, it would not be a violation of the Anti-Gift Clause. But it would be very, very expensive.

Home Construction

Any work needed to the affected homes to change the water pipes to a material less conducive to the transmission of heat; to supply water in a manner that does not involve piping dropping down from the ceiling, or involves insulating the pipes, because it is the legal responsibility of the property owner, must be done solely at the expense of the property owner, otherwise, once again, it would be an unconstitutional violation of the Anti-Gift Clause.

Conclusion

The city is not unsympathetic to the issue raised. But it is beyond the power of the city to address it using the public purse. Only at the cost of the homeowners themselves can something be done.

Kay Marion Macuil

San Luis City Attorney