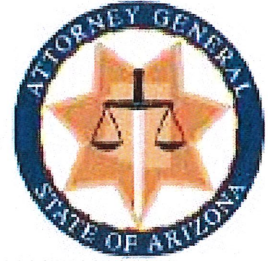


Office of Arizona Attorney General

Kris Mayes

Legislator Request for Attorney General Investigation of Alleged State-Law Violation by County, City, or Town



\*Identify the member(s) of the Legislature submitting this request for investigation (attach additional sheet if necessary):

Representative Steve Montenegro

\*Provide a contact person for communications from the Attorney General's Office regarding this request (may be a Legislator listed above or an employee of the Legislature).

\*Name: Linley Wilson

\*Email address: LWilson@azleg.gov

\*Phone number: (602) 926-5544

\*Mailing address: 1700 W. Washington Street, Suite H

Phoenix, Arizona 85007

\*The specific question for the Attorney General to investigate is:

Please see attached letter.

\*The name of the county, city, or town that is the subject of this request:

City of Tempe

\*The specific ordinance, regulation, order, or other official action adopted or taken by the governing body of the county, city, or town and the date thereof:

Ordinance Nos. O2022.56 & O2022.57,

Resolution No. R2022.170 & Sections 12.9 and 17 of DDA, Nov. 29, 2022

\*The specific Arizona statute(s) and/or constitutional provision(s) with which the action conflicts :

Arizona Constitution, article IV, part 1, section 1(8) and A.R.S. 16-407.01



Office of Arizona Attorney General



Kris Mayes

Legislator Request for Attorney General Investigation of Alleged State-Law Violation by County, City, or Town

\*All relevant facts of which you are aware (attach separate sheet if necessary):

Please see attached letter.

\*All relevant legal authority, including federal and state case law, of which you are aware (attach separate sheet if necessary):

Please see attached letter.

\* Any litigation involving this issue of which you are aware (include case name, number, and court where filed) :

None.

Check this box if you are attaching supporting documentation. [checked]

NOTE: This form and other information submitted to the Attorney General's Office is subject to the public records law, A.R.S. § 39-121 et seq.

I, a current member of the Legislature, verify that I and the other Legislators listed on the previous page (if any) are submitting this request for investigation under A.R.S. § 41-194.01.

\*First Name: Steve

\*Last Name: Montenegro

\*Signature: [Handwritten Signature]

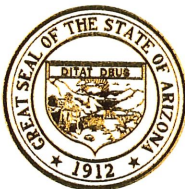
\*Date: 4/24/2023

Please submit the completed form to: Arizona Attorney General's Office Attn: Appeals and Constitutional Litigation/A.R.S. 41-194.01 2005 North Central Avenue Phoenix, AZ 85004 governmentaccountability@azagov

\* required field Rev. 8-2016



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INFRASTRUCTURE

DISTRICT 29

## Arizona House of Representatives

Phoenix, Arizona 85007

April 24, 2023

Via Email and U.S. Mail

Hon. Kris Mayes  
Arizona Attorney General  
2005 North Central Avenue  
Phoenix, Arizona 85004

**Re: Request for Investigation Pursuant to A.R.S. § 41-194.01**

Attorney General Mayes:

Pursuant to A.R.S. § 41-194.01, and as a current member of the Arizona House of Representatives, I respectfully submit this request for an investigation of ordinances and other official actions of the City of Tempe, in connection with the City's upcoming Special Election on May 16, 2023. Specifically, I request an investigation of the following question:

**Does the City of Tempe's Ordinance No. O2022.56, Ordinance No. O2022.57, Resolution No. R2022.170, or § 12.9 or § 17 of the Development and Disposition Agreement between the City and Bluebird Development LLC violate article IV, part 1, § 1(8) of the Arizona Constitution or A.R.S. § 16-407.01?**

The following information may be relevant to your investigation and legal analysis.

### Factual Background

On November 29, 2022, the Tempe City Council approved Ordinance No. O2022.57, authorizing Mayor Woods to execute a Development and Disposition Agreement ("DDA") with Bluebird Development LLC ("Bluebird"), a Delaware limited liability company, in contemplation of a new entertainment district featuring an arena for the Arizona Coyotes professional hockey team. That same day, as part of the overall development package, the Tempe City Council also approved two related measures—Ordinance No. O2022.56, which rezones the land in question, and Resolution R2022.170, which amends the City's general plan.<sup>1</sup>

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<sup>1</sup> A summary of the City's legal actions taken on November 29, 2022, is available at: [https://tempe.hylandcloud.com/AgendaOnline/Documents/ViewDocument/City\\_Council\\_Special\\_Meeting\\_1460\\_Summary\\_11\\_29\\_2022\\_6\\_00\\_00\\_PM.pdf?meetingId=1460&documentType=Summary&itemId=undefined&publishId=undefined&isSection=false](https://tempe.hylandcloud.com/AgendaOnline/Documents/ViewDocument/City_Council_Special_Meeting_1460_Summary_11_29_2022_6_00_00_PM.pdf?meetingId=1460&documentType=Summary&itemId=undefined&publishId=undefined&isSection=false). The City has posted the approved DDA at this link: <https://www.tempe.gov/home/showpublisheddocument/99272/638042185728370000>

Section 12.9 of the DDA requires Bluebird to submit the project to Tempe voters for approval, stating in relevant part as follows:

**12.9 Indemnity and Defense of Referendum Related Suits.** Developer has indicated that **Developer shall submit the PAD, the General Plan Amendment, and the Development Agreement to Tempe voters in accordance with Title 19 of the Arizona Revised Statutes, as amended (the “Referral”) by filing petitions for the Referral to qualify for a special election (the “Referendum Election”)** subject to City and County undertaking actions relating thereto pursuant to Applicable Laws. In connection with seeking to qualify the Referral for the Referendum Election, Developer acknowledges that City’s City Council must undertake a “call” for an election (a “Call for Election”).

(Emphasis added.)

As required by § 12.9 of the DDA, Bluebird collected enough signatures to refer the development project to the ballot, and a Special Election has been scheduled by the City for May 16, 2023. The City’s Resolution No. R2022.170 and Ordinance Nos. O2022.56 and O2022.57 appear on the ballot as Propositions 301, 302, and 303, respectively.<sup>2</sup>

Significantly, § 17 of the DDA appears to require Bluebird to fund the City’s Special Election. Section 17 states: “Developer shall bear the third-party, nonrecoverable actual costs, expenses, and fees associated with the Referral and the Referendum Election, including all third-party, non-recoverable actual costs that may be incurred by City in connection with the Referendum Election.” DDA, § 17.

And Bluebird—through the organization “Tempe Wins”—appears to have registered voters in anticipation of the upcoming Special Election. *See* [www.tempewins.com](http://www.tempewins.com).

#### Relevant Legal Authority

Article IV, part 1, § 1(8) of the Arizona Constitution provides that the referendum power is “reserved to the qualified electors of every incorporated city, town and county as to all local, city, town or county matters on which such incorporated cities, towns and counties are or shall be empowered by general laws to legislate.” This provision also requires cities to “prescribe the manner of exercising said powers within the restrictions of general laws.” Ariz. Const. art. IV, pt. 1, § 1(8).

Section 16-407.01 expressly prohibits “[a] city ... that conducts or administers elections” from “receiv[ing] or expend[ing] private monies for preparing for, administering or conducting an election, including registering voters.” A.R.S. § 16-407.01. This law took effect on September 29, 2021 and does not appear to have been the subject of any previous litigation.

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<sup>2</sup> *See* <https://www.tempe.gov/government/city-clerk-s-office/election-information/may-16-2023-special-election>



The City's actions here appear to violate article IV, part 1, § 1(8) of the Arizona Constitution by requiring Bluebird to exercise referendum power on the City's behalf, thus usurping qualified electors' constitutional right to refer matters to the ballot. *See Arrett v. Bower*, 237 Ariz. 74, 77 (App. 2015) (recognizing the importance of and respect for "citizens' constitutional right to challenge a government's legislative actions by referring a duly enacted measure to the ballot for a vote") (citation omitted). As our supreme court stated a century ago, "[i]t is axiomatic in law that what cannot be done directly may not be done by indirection[.]" *Black & White Taxicab Co. v. Standard Oil Co.*, 25 Ariz. 381, 396 (1923).

Constitutional concerns aside, the fact remains that the City Council required Bluebird to refer the measures to the voters, and the DDA states that adverse consequences will occur if Bluebird fails to "take those steps required of it by Title 19 of the Arizona Revised Statutes." *See* DDA, § 17. Section 12.9 of the DDA violates A.R.S. § 16-407.01 by requiring Bluebird to expend private monies to prepare for the Special Election. And as noted above, the funding provision of the DDA (§ 17) appears to violate the plain, unambiguous language of A.R.S. § 16-407.01.

In sum, the Arizona Constitution does not allow the City to directly refer measures to the ballot, but the development agreement with Bluebird appears to be an indirect and unconstitutional attempt to do so. The City's agreements with Bluebird also appear to violate A.R.S. § 16-407.01, which prohibits cities from expending private monies for preparing for, administering or conducting an election.

Please investigate this complaint and issue a written report of your findings and conclusions in accordance with A.R.S. § 41-194.01. Although A.R.S. § 41-194.01(B) requires a report to be issued "within thirty days," the City's Special Election will occur in 22 days. I just learned of the City's actions and decided to bring this matter to your attention as quickly as possible. I would greatly appreciate an expedited report, to the extent you are able to do so.

Thank you for your consideration of this request.

Respectfully,

A handwritten signature in black ink, appearing to read "Steve Montenegro". The signature is written in a cursive style with a large, sweeping initial "S" and a horizontal line extending to the right.

Steve Montenegro  
Legislative District 29