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June 18, 1987

The Honorable Heinz R. Hink  
Arizona State Representative  
The Honorable Jim Skelly  
Arizona State Representative  
State Capitol - House Wing  
Phoenix, Arizona 85007

Re: I87-087 (R87-075)

Dear Representatives Hink and Skelly:

You have asked three questions pertaining to the acquisition of land for right-of-way for the Northeast Outer Loop along Pima Road. You have asked whether the Arizona Department of Transportation ("ADOT") is obligated to purchase property from property owners whose requests for advance acquisition were "accepted" by ADOT and from those who have not applied, but whose property lies within the July 31, 1986 alignment.<sup>1/</sup> You have asked whether the State Transportation Board ("Board") abrogated its legal responsibilities in agreeing to consider an alternate plan submitted by various other governmental associations and whether the Board has authority to rescind an alignment previously approved by the Board.

We conclude that because ADOT may abandon a condemnation at anytime before final purchase, it may likewise abandon an advance acquisition and it is not obligated to purchase property of owners who have received approval for advance acquisition or those who have not applied. There was no

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<sup>1/</sup>On July 31, 1986 a proposed plan for alignment of the Northeast outer loop half upon the Reservation and half upon the City of Scottsdale land was announced. This plan was adopted by the State Transportation Board on August 15, 1986.

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unlawful delegation of authority in merely agreeing to consider an alternative plan. The Board may rescind an alignment it has previously approved.

In order to answer your questions, it is necessary to set out some of the factual background which prompted them. On August 15, 1986, ADOT adopted an alignment of the Northeast Outer Loop which would be on property owned by homeowners in the City of Scottsdale and on the Pima-Maricopa Indian Reservation. This is a state route plan, not a corridor or alignment. A.R.S. § 28-101(51).

Pursuant to that route designation and A.R.S. § 28-1865(D), ADOT Right-of-Way Administration advised residents that if they wished to apply for advance acquisition, they could do so by sending in a request. Advance acquisition of property is a process by which ADOT purchases property for "future needs" when there is an approved state route plan and "a reasonable need for such property." A.R.S. § 28-1865(D).

Advance acquisition begins with a request by the property owner stating the basis for the request. ADOT then evaluates the request and rejects or "approves" it. If the request is approved, the owner is notified of the approval and informed that an appraisal will be done and that ADOT will either purchase or condemn the property. Subsequently, ADOT secures an appraisal and conveys a purchase offer to the owner. If the owner accepts the offer, the property will be acquired by purchase rather than by condemnation. The owner may, however, reject the offer. If this occurs, ADOT will begin a condemnation suit to determine the amount of compensation to be paid, and the property will be acquired by ADOT by condemnation.

With this factual context in mind, we answer your questions.

You first ask if ADOT has a legal obligation to purchase property from owners whose requests for advance acquisition were approved and those who were within the July 31, 1986 alignment, but who had not applied for advance acquisition.

We address the second part of this question first. If an owner has not yet applied for advance acquisition, ADOT is under no legal obligation to proceed with its advance acquisition procedures. ADOT is under no obligation to acquire

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any property in advance. The terms of A.R.S. § 28-1865(A) and (D) provide, in part, as follows:

A. The director, in the name of the state, may acquire, either in fee or a lesser estate or interest, real property which the director considers necessary for transportation purposes, by purchase, donation, dedication, exchange, condemnation or other lawful means with monies from the state highway fund or any other monies appropriated to the department. . . . .

. . . . .

D. The authority conferred by this section to acquire real property for transportation purposes includes authority to acquire for future needs provided the transportation board has an adopted and approved state route plan or airport site location for such transportation showing a reasonable need for such property.

(Emphasis added.) Words are to be given their ordinary meaning, unless the context requires otherwise. Huerta v. Flood, 103 Ariz. 608, 447 P.2d 866 (1968). The use of the word "may" and other language in the statute is permissive, not mandatory. Whether or not to engage in advance acquisition is solely within the discretion of ADOT. Therefore, ADOT is not legally required to acquire in advance, property of owners who have not yet applied, if and when they do apply.

Even if some properties have been acquired since the unveiling of the August 15, 1986 plan, it does not alter the conclusion that ADOT can reject future requests. The fact that discretion has been exercised in one way does not require the same exercise in the future. State ex rel. Sullivan v. Carrow, 57 Ariz. 434, 114 P.2d 896 (1941). Nor can estoppel be claimed against the State. Arizona Law Enforcement Merit System Council v. Dann, 133 Ariz. 429, 652 P.2d 168 (App. 1982); Arizona Lotus Corp. v. City of Phoenix, 136 Ariz. 22, 663 P.2d 1012 (App. 1983). Thus, there is no legal requirement that further advance acquisition requests be granted.

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The first part of your first question involves resolution of the question whether an enforceable contract is formed when a property owner is informed his request for advance acquisition has been approved. We conclude that approval of a request for advance acquisition does not create an enforceable contract. The state and its agencies, including ADOT, may do only what they are authorized to do. The State and ADOT may acquire private property by eminent domain only for a public purpose. Ariz. Const., art. II, § 17; A.R.S. § 12-1111; A.R.S. § 28-1865. The property to be acquired must be "necessary" to the public purpose. A.R.S. § 12-1112. Generally, this means the condemning authority needs the property presently or will need it within a reasonable time. City of Phoenix v. McCullough, 24 Ariz.App. 109, 536 P.2d 230 (1975). ADOT is also specifically authorized to acquire real property for future needs provided the transportation board has an adopted plan showing a reasonable anticipated need for the property. A.R.S. § 28-1865(D).

However, establishment of a highway route is not irrevocable. The transportation board has continuing authority to "relocate, alter, vacate or abandon" any portion of a route. A.R.S. § 28-106(B)(3). The commencement of acquisition by condemnation is not an irrevocable decision. The director of ADOT is specifically authorized to abandon an action at any time prior to payment of the compensation. A.R.S. § 28-1865(H).

Because ADOT may alter a route and render acquisition of a property unnecessary, and because ADOT may abandon a acquisition by condemnation, it follows that ADOT may abandon a purchase by advance acquisition. Otherwise, ADOT could be required to purchase property which is not necessary for a public purpose. This result is prohibited because it would be inconsistent with the requirement that property may only be obtained which is necessary for a public purpose. Ariz. Const., art. II, § 17, A.R.S. §§ 12-1111, 12-1112 and 28-1865.

In short, ADOT may abandon an advance acquisition process at any time prior to payment of the purchase price, just as it may in a condemnation suit, and, in fact, may be required to do so if the land is no longer necessary for a public purpose.

Consideration of general contract law principles does not mandate a different conclusion. Even though the State is bound by legally entered contracts, State ex rel. Herman v.

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Schaffer, 105 Ariz. 478, 467 P.2d 66 (1970), there is no legally entered contract in the present situation. The request for advance acquisition by a property owner and approval by ADOT does not amount to a contract.

For a contract to be enforceable, "there must be an offer, an acceptance, consideration, and sufficient specification of terms so that obligations involved can be ascertained." Savoca Masonry Company, Inc. v. Homes and Son Construction Company, Inc., 112 Ariz. 392, 394, 542 P.2d 817, 819 (1975).

An offer is an expression of willingness to enter a bargain made so that the offeree's acceptance will conclude the bargain. K-Line Builders Inc. v. First Federal Savings and Loan Association, 139 Ariz. 209, 212, 677 P.2d 1317, 1320 (App. 1983). An acceptance is a manifestation of assent to terms of offer made by offeree. An offer cannot be accepted unless terms are specified. Id. Where an owner has requested advance acquisition, no terms are stated and no action by ADOT can transform the matter into a contract for sale of property.

Consideration consists of a benefit to the promissor and a detriment to the promisee. Carroll v. Lee, 148 Ariz. 10, 13, 712 P.2d 923 (1986). The approval of the request by ADOT is a statement that ADOT is willing to acquire the property in advance rather the later, for the benefit of the property owner. Even if this statement is construed as a promise, there is neither a benefit to ADOT nor a detriment to the owner. The owner has given no promise in consideration of ADOT's "promise", and ADOT is therefore not bound by the "promise." In the request and approval sequence, there is no exchange of promises and no mutual obligation, and therefore no contract.

There is also no specification of terms in this sequence. ADOT must receive an appraisal and make an offer on the amount of purchase price which the owner is free to reject. If this term is not agreed upon at that time, there is no contract and ADOT may proceed to condemnation.

Thus, the request for and approval of early acquisition does not amount to a contract. Applying these contract principles here, there is only an expression of willingness by both parties that a sale take place. It is no more than an agreement to make an agreement if terms are later agreed upon

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and, therefore, it is not enforceable. T.D. Dennis Builder, Inc. v. Goff, 101 Ariz. 211, 214, 418 P.2d 367, 370 (1966).

Furthermore, a contract abrogating the state's powers and duties would be void as against public policy; A public authority cannot contract away its powers under eminent domain. Tucson Electric Power Company v. Adams, 134 Ariz. 396, 656 P.2d 1257 (App. 1982). Even if the communications between ADOT and property owners amounted to a contract, it would not be legal and enforceable.

Under any view, then, there is no legal obligation to consummate advance acquisitions already commenced, nor to begin additional acquisitions upon request. However, unless and until the alignment established by the August 15, 1986 resolution is rescinded or altered, ADOT retains the authority to continue or initiate advance acquisitions in that alignment, at its discretion.

Your second question is whether the transportation board abdicated its responsibility in the resolution of January 19, 1987, by stating it would consider an alternate plan agreed upon by the City of Scottsdale, the Indian Community and the Maricopa Association of Governments. We conclude that the agreement to consider an alternate plan was not an unlawful delegation of authority by the board.

The board has the legal responsibility and power to establish, open, relocate, alter, vacate or abandon any portion of a state route or highway. A.R.S. § 28-106(B)(3). The January 19 resolution merely allowed the local interested entities an opportunity to present an alternative plan for the board's consideration. The January 19 resolution did not improperly delegate the board's authority to the local entities. It recognizes that the board is the only body empowered to set routes and also seeks to learn the wishes of the entities most affected by the ultimate decision. Such consultation with affected entities, to assist the responsible authority in making the most informed decision, has been approved. D.C. Federation of Civic Associations v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972). The court in Volpe pointed out that decisions locating highways must be tentative and conditional, subject to reconsideration and adjustment. Id. at 1268. The board will ultimately approve or reject any alternate plan that may be submitted to it which is a proper exercise of its discretion.

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The January 19 resolution is just one step in the process of reconsideration and refinement, while properly retaining final decision-making authority in the board. Therefore, it is not an unlawful abdication or delegation of authority.

Your final question is whether the transportation board may legally rescind an established alignment. The board may do so.

The board has the power to relocate, alter, vacate, or abandon any state route or highway. A.R.S. § 28-106(B)(3). The statutes granting the board such powers have been construed to give the board the power and duty of locating highways in its sole discretion. Rowland v. McBride, 35 Ariz. 511, 281 P. 207 (1929); State ex rel. Sullivan v. Carrow, 57 Ariz. 434, 114 P.2d 896 (1941).

In Rowland v. McBride, the legislature had appropriated \$150,000 for the improvement of a highway at the existing location. The newly-created Highway Commission (predecessor to the Transportation Board) had decided there was a better route for the highway and was proceeding with construction. A taxpayer sued to require the Commission to improve the highway in the existing route. The court held that the \$150,000 could only be expended for the location specified by the legislation. However, the court did not order the Commission to improve the existing road and spend the \$150,000. The court reasoned that since the Commission had the power to abandon the highway, it could do so before the highway was improved. The court held that the obvious intent of the statutes was to give the Commission plenary control over the highways, and the road could be abandoned without being improved. It follows that a road may be abandoned before it is constructed.

In State ex rel. Sullivan v. Carrow, 57 Ariz. 434, 114 P.2d 896 (1941), a property owner had made substantial improvements to his property in reliance on the promise of highway officials that Route 66 would remain in place. The Highway Commission later changed the route of the highway. The court held the Commission retained the authority to alter the location, in spite of promises to the contrary.

While these decisions were rendered long ago under previous statutes, the principle of broad discretion has not

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been overturned. See also State v. Tucson Title Insurance Co.,  
101 Ariz. 415, 420 P.2d 286 (1966). Therefore, the board  
clearly has the power to rescind an alignment it has previously  
approved.

We conclude that ADOT is not obligated to purchase  
property it has approved for advance acquisition and it need not  
purchase property of owners who have made no application for  
advance acquisition. The State Transportation Board may  
lawfully agree to consider alternate plans submitted by other  
groups and may rescind a plan they had previously approved.

Sincerely,



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