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September 12, 2014

***Via U.S. Mail and Facsimile (520) 882-3699***

Fletcher McCusker, Chair of the Board  
Chris Sheafe, Treasurer of the Board  
Rio Nuevo District  
400 West Congress, Suite 152  
Tucson, AZ 85701

Re: *Rio-Nuevo RFP 14-2/Peach Properties HM, Inc. Protest*

Dear Gentlemen:

Pursuant to the Rio Nuevo Procurement Code (the "Code") § 28-79(4), Nor-Generations, LLC ("Nor-Gen") submits this response to Peach Properties HM, Inc.'s ("Peach") protest of RFP 14-2 regarding development of the Arena Site. For the reasons discussed herein, Peach's protest is wholly spurious.

Peach's protest claims that the entire Arena Site proposal process was tainted by a statement made by Rio Nuevo Board member Alberto Moore during the August 12, 2014 Board Meeting. In order for Peach to prevail, the Board has to accept the insulting proposition that one Board member's innocuous statements so influenced the other Board members that they lost control of their independent judgment and felt compelled to give Nor-Gen a higher score than they gave Peach. Peach presents no evidence this occurred, but they do close with the smear that Mr. Moore has been improperly influenced.

If Peach's protest demonstrates anything, it demonstrates that that it has no understanding of the District's goals or vision, or the fierce independence of its Board Members. Peach belittles the Board when it claims that Mr. Moore's belief that the development of the Arena parcel offers a "unique opportunity" to create a "gateway" to a "vibrant, active" Tucson — are "inconsistent" with the Board's own goals and its vision or the Arena Site and the District.<sup>1</sup>

<sup>1</sup> 8/12 meeting transcript at 113-116.

\* ALSO ADMITTED IN COLORADO + ALSO ADMITTED IN WASHINGTON, D.C.  
\*\* ALSO ADMITTED IN MARYLAND ♦ ALSO ADMITTED IN TEXAS ++ ALSO ADMITTED IN CALIFORNIA

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Board Chairman Fletcher McCusker himself stated that Mr. Moore's articulation of the Board's vision was "extraordinarily accurate."<sup>2</sup>

If it were not for the fact that Peach's team touched on virtually every point made in Mr. Moore's statement, before Mr. Moore even made it, Nor-Gen would attribute Peach's protest to a complete lack of understanding of the RFP itself. However, considering that Peach's presenters used Mr. Moore's own terms repeatedly, the real reason for the protest is clear. Peach cannot accept that its proposal was inferior to Nor-Gen's and a majority of the Board believed that to be the case in two separate scorings and a vote.

*Mr. Moore did not introduce any "new" criteria.*

Peach complains that the following "unauthorized criteria" were introduced by Mr. Moore: (1) that the property was "a gateway;" (2) that the development should speak to both our history and our vision for the future; (3) that linkage to the Westside of I-10 was important; (4) the property could be a truly "urban place;" (5) that the long term stability of the Tucson Gem and Mineral Show was a goal; and (6) that the future development should be "iconic."<sup>3</sup> Peach should re-read the Minutes and pay attention to what Peach itself presented. Peach cannot have its cake and eat it too. Peach itself introduced the very concepts it now complains Mr. Moore mentioned in his statement. Mr. Schwabe, Peach's owner and first presenter during the interview described the Arena parcel as a gateway property in his opening statement:

*And that's not just, you know, that it's gateway property. That's not just that it's a gateway property or that it's, you know, the property that 200,000 eyeballs look down on and form their impression about Downtown or the linkage to the West Side." (emphasis added)<sup>4</sup>*

After Mr. Schwabe, Peach's Architect Mr. Swaim, referred to the property as a "gateway," and joined in on emphasizing its linkage to the Westside: "It's important for the Mercado District to really create that linkage and support that. And it's also the gateway into downtown;"<sup>5</sup> "It really creates that gateway statement;"<sup>6</sup> "It's a gateway to downtown."<sup>7</sup>

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<sup>2</sup> 8/12 meeting transcript at 119.

<sup>3</sup> Although Peach's allegations relating to Treasurer Sheafe are even less clear than those leveled against Mr. Moore, it appears they believe he also contributed to a "tainting" of the process.

<sup>4</sup> August 12, 2014 Minutes at page 65, lines 5 -9

<sup>5</sup> August 12, 2014 Minutes at page 70, lines 2 - 4

<sup>6</sup> Id. at page 72, lines 18 -19

<sup>7</sup> Id. at page 76, line 11

Peach protests that Mr. Moore “stated the area could be a “truly urban place.”<sup>8</sup> What is Peach’s complaint? Peach admits the RFP sought to create an “urban and/or mixed use development.” Does Peach really not understand what “*and/or*” actually means? Mr. Schwabe described his planned hotel as an “urban-type hotel” and acknowledged the Site is in an “urban setting.” Peach’s Architect Mr. Swaim stated he wanted to “really make sure that this works as *an urban—in an urban* location,” (emphasis added) and Peach touted its history of working with local “urban planning” organizations.<sup>9</sup>

Peach protests that Mr. Moore “stated ensuring the long-term stability of the Tucson Gem and Mineral Show as a goal. The RFP does not mention the Gem Show, except for the parking requirement.”<sup>10</sup> Does anyone who has ever read anything about Downtown and the District not understand that keeping the Gem Show is a goal? Should Board Member and Secretary Irvin’s statement that the Board was very concerned about taking care of “anybody that’s involved in the Gem Show”<sup>11</sup> be deemed cause to toss out his vote? Peach’s own Mr. Swaim certainly echoed this sentiment several times when he stated in his interview that developing the Arena Site presented an “incredible opportunity to support...the Gem Show,” and that the development “needs to support the Gem Show.”<sup>12</sup>

Peach protests that Mr. Moore emphasized linkage to the West Side while “the RFP only identifies support from the adjacent neighborhoods.”<sup>13</sup> Again, as noted above, Mr. Schwabe and Mr. Swaim both talked about the importance of “linkage” to the West Side. Mr. Swaim stated that the development would “really activate the West Side” and would “bridge that gap and support the West Side;” and Mr. Schwabe said it would be a “linkage to the West Side.”<sup>14</sup>

Peach protests that Mr. Moore suggested the development should be iconic. Peach’s own Mr. Swaim stated that it was an “iconic location,”<sup>15</sup> the development should be “really creating

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<sup>8</sup> Protest at 3.

<sup>9</sup> 8/12 at 66, 75, 80, 100.

<sup>10</sup> Protest at 3.

<sup>11</sup> 8/12 at 58.

<sup>12</sup> 8/12 at 69, 75.

<sup>13</sup> Protest at 3.

<sup>14</sup> 8/12 at 65, 75

<sup>15</sup> August 12, 2014 Minutes at page 71, line 9

an innovative destination – an iconic place here,”<sup>16</sup> “really creating an iconic place,”<sup>17</sup> and “we create an iconic place, that they can market.”<sup>18</sup>

Each of the items Peach protests were raised by Peach itself in their interview, prior to Mr. Moore’s comments. That Peach would base a protest on their own presentation is mystifying. Not only did Peach raise these issues themselves, in the context of Rio Nuevo and downtown Tucson, concepts like “Gem Show,” “gateway,” “west side,” and “urban” are inherently part of any development plan, and their influence in an RFP—express or implied, without regard for the semantics of exact phrasing—should be of no surprise to any sophisticated developer.

As to the rest of Peach’s specious protest, it is completely unsupported by the record.

*No one violated Rio Nuevo’s rules, the terms of the RFP, or the Code by speaking at the August 12 public meeting.*

The August 12, 2014 meeting was an open meeting. Following the interviews with Nor-Gen and Peach, Mr. Moore expressed his sentiments about the District’s vision for Arena Site; Chairman McCusker confirmed them.<sup>19</sup> Mr. Moore stopped speaking when advised to do so by Chairman McCusker and Mr. Schmaltz. Nothing in the procurement code or the RFP stated that Board members could not voice their opinion. No one objected to his comments until Peach lost its bid and, as noted above, Mr. Moore’s comments echoed Peach’s. In the end, Mr. Moore simply stated he thought Nor-Gen’s proposal *fit the very items Peach spoke to*, “beautifully.” The District’s own counsel, Mr. Schmaltz told Mr. Moore that his statements were “certainly appropriate” to make as a member of the Board, but that Mr. Moore should refrain from speaking further.<sup>20</sup> Chairman McCusker asked that Mr. Moore should stop *before* saying something that “allows a situation where one of the bidders could protest.”<sup>21</sup> Mr. Moore stopped. Nothing indicates that anything Mr. Moore actually said was improper—if he had, Chairman McCusker or Mr. Schmaltz would have noted so. Notably, Mr. Moore did not advocate for the other Board members to adopt his views or otherwise lobby for their support.

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<sup>16</sup> August 12, 2014 Minutes at page 75, lines 18 - 19

<sup>17</sup> August 12, 2014 Minutes at page 77, lines 11 - 13

<sup>18</sup> August 12, 2014 Minutes at page 77, line 25, page 78, line 1

<sup>19</sup> 8/12 at 119.

<sup>20</sup> 8/12 at 117.

<sup>21</sup> 8/12 at 119.

*No one has been unduly influenced by outside forces.*

Peach claims that Mr. Moore was “influenced by outside forces.”<sup>22</sup> What forces are those, common sense? Neither Nor-Gen nor its principals have any financial or social ties to *any* members of the Board. The Board covered the issue of conflicts of interest exhaustively at the August 12, 2014 meeting, and found that none of the Board members who participated in this RFP were conflicted.<sup>23</sup>

*The Board was not unduly influenced by Mr. Moore’s statements.*

Peach protests that Code § 28-18(5) provides that the only criteria the Committee can consider are those stated in the RFP. Perhaps Peach should actually read the Code provision:

(a) Evaluation criteria. The request for proposals shall state the criteria to be used in the evaluation of the proposals and shall include their relative importance. Specific numerical weighting is not required.

Where does the word “only” appear? The RFP itself provides:

12. Submittal Content. *Every Proposal* must address each of the items listed herein, and *may include any additional information* that the *Proposer believes may be important* to the Project.

Peach was not limited in what it could present and did not behave as if it was limited. Peach itself introduced the very terms it now protests Mr. Moore used.

As Rio Nuevo’s record clearly shows, each Board member scored each proposal according to those criteria, and only those criteria, contained in the RFP, as required by the Code and the RFP itself.<sup>24</sup> Looking at the scores, Mr. Moore’s comments clearly had no effect on his fellow Board members. Supporters of Peach remained supporters of Peach, and supporters of Nor-Gen remained supporters of Nor-Gen. There simply is no evidence that any Board members relied on Peach’s phantom criteria at Mr. Moore’s behest, or were at all influenced by his ruminations.

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<sup>22</sup> Protest at 4.

<sup>23</sup> 8/12 at 14.

<sup>24</sup> scoresheets

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Subsequent media reports confirm that the independence the Board Members was not compromised. As reported by Inside Tucson Business:

“Board Chair Fletcher McCusker put Norville’s Nor-Generations ahead of the other bidder, the Ron Schwabe-led Peach Properties, after oral and written presentations. But, he said, so did other board members — rebuffing the idea that Moore’s scores, which put Nor-Gen more than 1,000 points ahead, was an undue influence.”

The Board’s Chair also commented:

“If I believe personally as chair that there is any impropriety in the ranking I would be the first to recommend that we terminate the process. I in fact am most interested in proceeding with this procurement.”

Board Secretary Irvin, while criticizing Mr. Moore, stated:

“he appreciates Nor-Gen’s efforts for the gem shows, but that it hasn’t built a permanent structure “speaks for itself.” He preferred Peach’s design and density, and said he couldn’t get comfortable with Nor-Gen’s museums, although he couldn’t get comfortable either with Peach’s parking garage.”

Board Treasurer Sheafe reportedly said that:

his “job was to make the absolute best decision I could for the community of Tucson and to try and drive the process forward so that we could get something done in Tucson, which is a rather unusual circumstance for this community.”

Board Member Jannie Cox acknowledged that:

“both proposals were complete and well-considered. She went with Peach because the financing was secure from the beginning to the end, and she liked the higher residential density. Cox said Nor-Gen’s proposal was exciting and showed vision, but it had some uncertainties.”

And finally, Board Chair McCusker affirmed that his vote was based on the economics:

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“Nor-Gen has offered us more money for the project. But moreover, I believe the Peach proposal was flawed in the manner in which they suggested that we construct a garage. That’s a \$9 million obligation that I don’t believe this board is capable of managing. Remember that our bonds have recently been downgraded, so for us to take on that kind of responsibility, I thought created an economic disadvantage for that proposal.”

Thus, every Board Member that voted explained their vote and not a single one indicated that Mr. Moore’s comments changed their vote.

*Treasurer Sheafe’s comments were cherry-picked and taken out of context by Peach.*

Peach asserts that Treasurer Sheafe “added to any bias created by Mr. Moore when he stated that he thought Mr. Moore’s statements were ‘particularly well stated...[and] I, frankly appreciated it very much. And I would like to hear the rest of it.’” Peach intentionally used ellipses in its quote to excise the phrase “was the beginning of your piece” from Treasurer Sheafe’s statement. The beginning of Mr. Moore’s piece was his restatement of Rio Nuevo’s vision, as later confirmed by Chairman McCusker as accurate and Mr. Schmaltz as proper. Furthermore, Peach excised the sentence that immediately followed: “I wonder if you would give me the courtesy of deferring until after we’ve done the scoring?” This is Treasurer Sheafe politely requesting Mr. Moore to stop speaking, not Treasurer Sheafe pandering to Mr. Moore’s elocution. This questionable and selective quoting not only libels Treasurer Sheafe, but smacks of Peach’s desperation—they know they lost and will go to great lengths to personally attack those they hold responsible.

*Any action taken to discard a score would be groundless.*

No one can contest that Mr. Moore’s scores favored Nor-Gen. But so did other members of the Board. And yet others favored Peach. Removing Mr. Moore’s entire score—both proposal and interview components—simply because he favored Nor-Gen over Peach does not serve the interests of fairness and objectivity, and sets a precedent that non-winners can challenge individual scores. Based on the scores, in any straight vote—where each member votes for either Nor-Gen or Peach—Nor-Gen’s score remains on top, either 4-2, 3-2, or 3-1. Furthermore, the scoring process was, as Procurement counsel pointed out, separate from the actual vote to proceed with negotiations. The Board was not required to proceed with Nor-Gen on the basis that its proposal was ranked number one. The Board could have voted to start the process over.

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*Re-competing is inappropriate and unnecessary.*

There is no good cause to repeat the entire process. The record is clear that the process was not tainted. Granting Peach the relief it seeks establishes the dangerous precedent that protests may be accepted and proposers “re-competed” on the basis that one side lost. Such a ruling would also completely discredit the District’s procurement process. Procurement counsel Schmaltz explained very clearly that the procurement process was a two-step one: step one was scoring; step two was voting. A high score did not mean that the District had to proceed with the highest ranked proposal. After the scores were compiled, the District then had to vote to proceed, or vote to start over:

Because you are the board, the open meeting law rules, of course, have applied to every step of the process, which is one of the things I want to highlight in terms of the difference between scoring and voting. Where we have today is a vote. You have -- you have preserved and have had in front of you the option as set forth in the RFP as well as in the procurement code the action that you take at the end of the scoring process. There's a key distinction between scoring and voting. The scoring you have all done individually based upon your review and application of the criteria set forth in the RFP to the proposals themselves and to the presentations. Each of you individually submitted those scores and the result of the combination of those scores has resulted in the final list. However, as you have agendized today, today is the day that you have before you the options that are reflected on the agenda, which is to take action related to that final list.

The other option that you had from the beginning and as is reflected in the RFP terms themselves very clearly as well as in the procurement code, one of your options is to terminate the RFP. And both of those options are presented to you today as they are options that you've had from day one. Because we have the final list today, you have those potential actions and that's the question that you have to decide today based upon a motion that may come from one of you today. You have that decision to make and that action to take. And that's a key distinction between scoring and final action. Scoring is not votes. It has been clear from the very beginning that you rank the proposals and give them scores.

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That is the essence of the difference between scoring and voting on this item because you have scored the proposals that were submitted to you, you have evaluated them based upon their criteria that you approved as part of the RFP and we've arrived at a final list with a ranking of the proposals. Now you have that option to decide whether or not to proceed with negotiations, number one, or to terminate the RFP.<sup>25</sup>

Not a single Board member moved to start the process over; *not a single one*. Every single member of the selection committee, with the exception of one, voted to proceed with negotiations with the first ranked proposer, Nor-Gen. Furthermore, after the five to one vote in favor of Nor-Gen, *the only Board member that had voted no then moved that the Board authorize the District's executive officers to immediately commence negotiations with Nor-Gen.*

*Conclusion.*

In conclusion, and in light of the foregoing, Nor-Gen respectfully submits that the Board should deny Peach's spurious protest as wholly without merit and proceed in accordance with its vote to negotiate with Nor-Gen for the development of the Arena Site. As the District well knows, if those negotiations are unsuccessful the District can repeat the proposal process, or negotiate with Peach.

Very truly yours,



Michael J. Rusing

MJR\smm

cc: Michele Bettini (micheleb@rionuevo-tucson.org)  
Mark Collins (mcollins@gustlaw.com)

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<sup>25</sup> August 26, 2014 Minutes pages 9 – 12