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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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9 PAIGE A. NORBY, dba TUCSON )  
RANGE RIDERS, et al., )

10

Plaintiffs, )

No. CIV 07-232-TUC-CKJ

11

vs. )

**ORDER**

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CITY OF TOMBSTONE, et al., )

13

Defendants. )

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Pending before the Court are Defendants’ Motion for Summary Judgment (Docs. 190, 196, 228) and Plaintiffs’ Objection and Motion to Strike and Motion to Reconsider Sur-Reply (Docs. 252 and 253). The parties presented oral argument to the Court on March 18, 2011. Additionally, Plaintiffs' Second Joint Objection to Defendants' Amended Summary Response and Motion to Strike and Motion to Reconsider Sur-Reply is pending before the Court (Doc. 258).

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*Factual Background*

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An action has been filed by David Weik (“Weik”) and Paige Norby Weik (“Weik”) (collectively, “Plaintiffs”) against Defendants City of Tombstone, Marshall Merlin Jay Smith (“Smith”), Councilwoman Stacey Korbeck-Reeder (“Korbeck-Reeder”) and Stephen Schmidt (“Schmidt”).<sup>1</sup>

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<sup>1</sup>Schmidt was a City Councilman during the relevant time period. Additionally, claims were also made against Dustin Escapule, Sr. Those claims were dismissed on May

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1 *Tombstone Rangeworks General Store and Tombstone Range Riders*

2 Plaintiffs operated Tombstone Rangeworks General Store and Tombstone Range  
3 Riders, a trail riding business, at 116 S. Fourth Street in Tombstone, Arizona. Weik initially  
4 obtained a business permit for the store on May 27, 2005. The store operated until August  
5 of 2006.

6 On December 6, 2005, Weik expressed his desire to the Tombstone City Council  
7 (“City Council”) to conduct horse trail rides within the City of Tombstone and suggested  
8 staging them on Allen Street. On December 7, 2005, Weik submitted three animal use permit  
9 applications for four horses each to conduct a trail riding business within the town limits.

10 On December 20, 2005, during the next City Council meeting, some people present  
11 expressed safety concerns over allowing single horse trail rides on downtown Allen Street.<sup>2</sup>  
12 At that meeting, the City Council members discussed with Weik other concerns including  
13 sanitation issues, insurance, damage to roads, staging location, and other organizations using  
14 Allen Street. Two members of the City Council voted to approve the permit applications and  
15 two members voted against approval.

16 On January 5, 2006, the City Council again addressed the issue. Defendants assert  
17 this is because Plaintiffs requested a 60 day conditional permit. Plaintiffs assert that the 60-  
18 day permit was proposed by the City Council. The City Council voted to approve a permit  
19 for nine horses, with a staging location of 116 S. 4th Street.<sup>3</sup> This conditional permit was

20 \_\_\_\_\_  
21 21, 2008.

22 <sup>2</sup>The parties dispute whether all persons expressing concerns were Tombstone  
23 residents. The basis of some of the concerns involved a previous incident where an  
24 individual was trampled by a trail horse owned by Blue Sky Ranches.

25 <sup>3</sup>Although Weik had informed the City Council that he owned the horses, Defendants  
26 assert that the horses were not purchased until after the permit was issued. Plaintiffs point  
27 out that the permit allowed for Plaintiffs to conduct trail rides for up to nine riders at a time,  
28 but did not limit Plaintiffs’ ownership or possession to nine horses. The horses were kept  
within the city limits in a corral or stable area approximately a five to ten minute walk from  
the store front.

1 later extended. The expiration date of the permit was January 27, 2007. Norby's name was  
2 added to the permit on July 28, 2006.

3 Defendants assert Plaintiffs knew the City had not permitted them to stage on Allen  
4 Street when the permit was issued.<sup>4</sup> During argument, Weik acknowledged that Plaintiffs  
5 knew they were not permitted to stage on Allen Street.

6 Weik requested a safer staging location from the City Council.<sup>5</sup> At the February 14,  
7 2006, meeting the request died for lack of motion.

8 Plaintiffs requested permission from Mayor Andree DeJournett ("DeJournett") to  
9 place a covered wagon in front of the store at 116 S. Fourth Street in Tombstone, Arizona  
10 – in front of the gas meter and above the ground gas line; DeJournett granted the request.  
11 Weik went before the City Council on January 17, 2006, and was told to move the wagon  
12 because its placement had not been approved by the City Council.<sup>6</sup>

13 Defendants assert that, due to safety issues regarding traffic and the gas line, Plaintiffs  
14 began staging across the street in a parking lot area. Defendants also assert that Plaintiffs had  
15 not received permission from the parking lot owner to do this; the owners of the parking lot  
16 told Plaintiffs to move the horses. Plaintiffs assert that they staged some rides from a vacant  
17 lot near the store. Plaintiffs also staged some rides from the corral.

18 On September 19, 2006, Weik asked the City Council if he could stage his horses on  
19 Allen Street. Safety issues regarding traffic and a gas meter were discussed. The City

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21 <sup>4</sup>Defendants assert Allen Street is the main tourist attraction in Tombstone which has  
22 over 400,000 visitors each year. Plaintiffs assert there is nothing to support Defendants'  
23 claim. Other groups, including the Tombstone Vigilantes, the Tombstone Office of Tourism,  
24 Tombstone Chamber of Commerce, Tucson Tumbleweed, Tombstone Western Music  
Festival, and the Tombstone Lions Club, use Allen Street for various activities, but their  
activities do not involve a horse trail riding business.

25 <sup>5</sup>Plaintiffs point out that, while Allen Street does not have any vehicular traffic, 4th Street  
26 not only has vehicular traffic, but a gas meter was located in front of the Tombstone Rangeworks  
General Store.

27 <sup>6</sup>Plaintiffs point out that the Historic District Commission recommended to the City  
28 Council that the placement of the covered wagon be approved.

1 Council denied the request.

2 Defendants assert that Smith discussed the proposed staging area with business  
3 owners on Allen Street. The business owners objected to the proposed staging area. Smith  
4 recommended against the proposed staging in a confidential memorandum to the City  
5 Council. Smith subsequently attempted to speak with Weik about another possible staging  
6 area; Weik refused to talk with Smith.

7 The renewal of Tombstone Range Rider's Animal Use Permit was placed on the  
8 agenda for the December 12, 2006, City Council meeting. The renewal died for lack of a  
9 motion. DSOF, Ex. 10.

10 City Clerk George Burns sent a letter to Weik on December 18, 2007, informing Weik  
11 that additional information regarding permits needed to be provided by January 5, 2007.  
12 Weik provided some of the requested information on January 8, 2007.

13 On January 9, 2007, Weik went before the City Council regarding the permit renewal.  
14 Weik claimed that the staging area was up in the air, but that he was just seeking renewal of  
15 the permit at that time; Weik did not inform the City Council that he was willing to stage  
16 from his corral area. The minutes indicate that the City Council and Weik discussed zoning  
17 issues and Weik's complaints regarding the safety of staging areas. Weik informed the City  
18 Council that he would obtain insurance only if his permit was renewed. The City Council  
19 requested Weik return when he had a complete package and had a place to stage the horses.  
20 The minutes from that Council meeting state:

21 City Attorney Mr. Bays advised the City Council:

22 [I]n essence because we are still in the discussion phase, the City is only being asked  
23 to approve a permit for being able to ride the horses within the city limits. If the  
24 entity is violating a zoning ordinance then there are other avenues that we can get that  
25 enforced. It is not something we have to necessarily decide tonight on whether or not  
26 we are going to approve or disapprove the permit that he is requesting. Furthermore,  
27 in order to disapprove the permit that is already in use right now, I realize that it is  
28 only a one (1) year permit, but the City is going to have to have a good faith basis for  
disapproving a business permit that they previously have already approved. The good  
faith basis could be the health, safety and welfare of the citizens of Tombstone or  
tourist, but not necessarily because he is violating a zoning ordinance that can be  
enforced through some other action.

DSOF, Ex. 11, p. 5. No member of the City Council moved to approve the Animal Use

1 Permit renewal for Tombstone Range Riders for the operation of trail rides and the request  
2 died for lack of a motion.

3 Defendants assert that the City Attorney has indicated that additional information  
4 (including home addresses, proof of insurance, staging area, names and information  
5 regarding wranglers, Weik's driver's license number, and \$100 deposit per animal) was not  
6 provided to the City Council. DSOF, Ex. 27. However, the minutes of the January 9, 2007,  
7 City Council meeting indicate that City Clerk George Burns stated that "Mr. Weik has  
8 provided the information that we requested such as driver's license, certifications, the owners  
9 of the businesses, and will provide a copy of the certificate of insurance upon approval  
10 because it is not refundable." DSOF, Ex. 11, p. 2. Defendants point out that Weik never  
11 had a valid driver's license during this time although it is a requirement of the permit.

12 Weik did not return to the City Council with a proposed staging area and did not  
13 address questions from the City Attorney regarding the permit application.

14 Plaintiffs' insurance expired on January 20, 2007. Pursuant to the City Code, the  
15 permit was immediately deemed cancelled when the insurance expired.

16 Plaintiffs asserts that the City of Tombstone never sent Plaintiffs a Letter of Denial.<sup>7</sup>

17 The trail ride business was dissolved on January 24, 2007. No citation for any  
18 violation of safety or city codes was ever issued to Weik, Norby, the Tombstone Range Rider  
19 business, or the Tombstone Range Rider wranglers.

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21 *Contacts Between Smith and Weik*

22 *Reports from Kitchel and Fike*

23 Defendants assert that, on May 16, 2006, Harvey Kitchel ("Kitchel") contacted the  
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27 <sup>7</sup>Plaintiffs point to the deposition of Brenda Ikirt in which she indicates that the City  
28 Council was required to send a denial letter of application. PSSOF, Ex. 47 (Doc. 222-4), p.  
139.

1 Marshal's office and Smith began conducting a fraud investigation regarding Weik.<sup>8</sup>  
2 Although Plaintiffs point out that Smith, during his deposition, did not provide a date when  
3 Kitchel contacted him, Smith's incident report indicates that Kitchel contacted Smith on May  
4 16, 2006. *See* DSOF, Ex. 20.

5 Defendants assert that Mike Fike ("Fike"), one of Plaintiffs' customers, stated that  
6 Weik had threatened him on May 19, 2006. Plaintiffs point out that, in the letter Fike sent  
7 to the Tombstone Chamber of Commerce, Fike did not state that Weik threatened him.

8 Smith investigated the incident. At one point, Smith contacted Weik at the Tombstone  
9 Range Works and General Store. According to Smith's incident report, Weik permitted  
10 Smith to review the rental agreement between Tucson Range Riders and Fike. Plaintiffs  
11 assert that Smith told Weik he was going to take the Fike liability waivers and see about  
12 getting Plaintiffs' permit pulled. Defendants assert that, when Smith told Weik that it would  
13 be in everyone's best interest for Weik to return Fike's rental fee, Weik stated that he would  
14 talk with his attorney first and left the store. Smith took possession of the waivers;  
15 Defendants assert this was done without objection from Norby.

16 Smith's incident report indicates that Weik returned shortly and indicated that his  
17 attorney agreed that it would probably be best to refund the money. *See* DSOF, Ex. 20.  
18 Plaintiffs assert the attorney returned with Weik and the attorney spoke with Smith.  
19 Plaintiffs assert Weik discovered that Smith had taken the waivers without authorization.  
20 Weik's attorney arranged for the return of the waivers from Smith. PSSOF, Ex. 76, p. 238.  
21 During his deposition, Smith stated that he took the waivers without asking permission.

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24 <sup>8</sup>The relationship between Weik and Norby ended at the end of May 2006. Defendants assert that Norby had hired Kitchel to investigate Weik after she learned that he  
25 was still married and that Norby had given money to Weik on a promise that they would be  
26 married. Plaintiffs assert that Weik's ex-wife did not inform Weik that there had been a  
27 problem with the divorce proceedings and Weik did complete divorce proceedings. Plaintiffs  
28 further assert that Norby did not give money to Weik on a promise of marriage. The parties  
dispute whether Norby ever stated that she was afraid of Weik. Norby and Weik  
subsequently reconciled and were married.

1 PSSOF, Ex. 76, p. 236-37.

2 Smith referred the Fike matter to the prosecutor on June 6, 2006. Although Weik was  
3 formally charged, the charges were dismissed on February 2, 2007. PSSOF, Exs. 90-91.

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5 *Hitching Rail Incident*

6 On May 24, 2006, Weik, in western wear, was standing at the hitching rail on 4th  
7 Street and Allen Street. Weik asserts that Smith pushed Weik against a rail and tried to pull  
8 out Weik's gun. Weik further asserts that, when Weik turned around, Smith said, "No one  
9 is watching your back," and walked away. Witness Randy Tamplin ("Tamplin") testified at  
10 deposition that Smith put a hand or fist on Weik's back and grabbed Weik's gun. PSSOF,  
11 Ex. 83, p. 48. Mike Jones ("Jones") testified during his deposition that Smith shoved Weik  
12 on the shoulder and tried to pull his gun and that it did not seem like Smith was merely  
13 horsing around; he also testified that Weik had "smirked like what a jerk. What an idiot."  
14 PSSOF, Ex. 81, pp. 33, 60-61. In a June 14, 2006, memorandum to the Tombstone Mayor  
15 and City Council, Smith stated that he "did in fact walk up behind Mr. Weik and put [his]  
16 hand on the butt of one of [Weik's] guns and shook it. At the same time [Smith] put a finger  
17 in the small of [Weik's] back and said 'who's watching your back David?' [Smith] made  
18 no attempt what so ever to remove his gun nor would I have any reason to do so. [Smith's]  
19 conduct and comments were made entirely in jest and [Smith was] quite certain that Mr.  
20 Weik knew that at the time." DSO, Ex. 22. Weik asserts that he reported this incident to  
21 the mayor on May 24, 2006, and asserts that he reported the incident to the Arizona  
22 Department of Public Safety ("DPS") prior to June 5, 2006. PSSOF, Ex. 87. Defendants  
23 assert Weik did not report the incident to DPS until June 8, 2006, after Weik learned that  
24 Smith was investigating him. The incident was investigated by the Arizona Department of  
25 Public Safety, which concluded that the claim was unfounded and closed its investigation.

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27 *Care of Horses*

28 Additionally, on January 16, 2007, Weik's horses were investigated after a citizen

1 complained to the Marshal's office that the horses were not being fed and watered. The  
2 animal control officer and the fire chief fed and watered the horses and referred the matter  
3 to the Arizona Livestock Inspector. On January 20, 2007, Livestock Inspector Cathe Shelton  
4 visited the horses. Plaintiffs assert that she informed Weik that there were the best kept trail  
5 riding horses she had seen in years. Shelton issued findings to the Livestock and Agricultural  
6 Department and closed the file.

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8 *City Council Aspirations of Weik*

9 Plaintiffs have presented evidence that Weik expressed interest in running for City  
10 Council. PSSOF, Ex. 2 pp. 69-70. Plaintiffs assert that Dwayne Harris intended to run for  
11 another City Council position with Weik. DeJournett stated in an affidavit that Weik told  
12 him many times that Weik wanted to run for City Council. When asked by the Court during  
13 argument what evidence existed that any of the Defendants knew of Weik's aspirations,  
14 Weik indicated that Tombstone is a small town and things get around by word of mouth.  
15 However, no evidence is before the Court that disputes the deposition testimony of Tamplin  
16 and Jones that they were not aware Weik was interested in running for City Council.

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18 *Procedural History*

19 Plaintiffs filed a Complaint on May 21, 2007. The Complaint was dismissed with  
20 leave to amend and, on March 21, 2008, an Amended Complaint was filed. The Amended  
21 Complaint alleged claims of defamation, harassment, false light invasion of privacy,  
22 malicious prosecution, abuse of process, assault, respondeat superior, and conspiracy. The  
23 Amended Complaint also alleged violations of the First Amendment, Fourth Amendment,  
24 Fifth Amendment, and the Fourteenth Amendment. The assault claim and the Fourth  
25 Amendment claim as to Plaintiffs' papers and effects were alleged against Smith alone.<sup>9</sup> The

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28 <sup>9</sup>The Amended Complaint refers to the "Defendant's papers and effects[.]" Doc. 22,  
p. 13. Reading the statement in the context of the Amended Complaint, the Court accepts



1 remaining claims were alleged against all Defendants.

2           Following the filing of a previous Motion for Partial Summary Judgment, summary  
3 judgment was granted in favor of Defendants as to the state law claims and judgment on the  
4 pleadings was granted in favor of Defendants Korbeck-Reeder and Schmidt as to the First  
5 Amendment retaliation claim, in favor of Smith as to the First Amendment association claim,  
6 in favor of Korbeck-Reeder and Schmidt as to the Fourth Amendment claim, in favor of  
7 Smith as to the Fifth Amendment takings claim, and in favor of Smith as to the Fourteenth  
8 Amendment due process claim. The claims that remain pending before the Court are a First  
9 Amendment retaliation claim against Smith, a First Amendment expressive association claim  
10 against Korbeck-Reeder and Schmidt, a Fourth Amendment claim against Smith, a Fifth  
11 Amendment takings claim against Korbeck-Reeder and Schmidt, a Fourteenth Amendment  
12 Due Process and Equal Protection claims against the City of Tombstone, Korbeck-Reeder,  
13 and Schmidt, and a 42 U.S.C. § 1983 conspiracy claim against Smith, Korbeck-Reeder, and  
14 Schmidt. Additionally, policy-making claims against the City of Tombstone for the pending  
15 claims against the individuals Defendants remain pending.

16           On March 30, 2010, Defendants filed a Motion for Summary Judgment (Docs. 190,  
17 196, 228). A Response and a Reply were filed. On December 23, 2010, this Court granted  
18 permission for Plaintiffs to file an Amended Response. In issuing the Order, the Court made  
19 clear that the Amended Response superseded the original response and that the original  
20 response would not be considered in resolution of the Motion for Summary Judgment. An  
21 Amended Response (Docs. 244, 245, 221-225) and an Amended Reply (Doc. 249) have been  
22 filed.

23           Plaintiffs have filed a controverting statement (Doc. 220).

24           Plaintiffs have filed an Objection and Motion to Strike and Motion to Reconsider Sur-  
25 Reply (Docs. 252 and 253). A Response and a Reply have been filed. Plaintiffs also filed  
26 a Second Joint Objection to Defendants' Amended Summary Response and Motion to Strike

27 \_\_\_\_\_  
28 this statement to mean the Plaintiffs' papers and effects.

1 and Motion to Reconsider Sur-Reply (Doc. 258).

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3 *Applicable City Code Provisions*

4 The Tombstone City Code sets out the requirements for an animal use permit. Among  
5 other provisions, the City Code gives the City Council discretion in issuing permits and to  
6 consider the health and welfare of citizens, number of animal drawn vehicles on the streets,  
7 the probable effect of increased service on local traffic, the character and experience of the  
8 applicant, etc.:

9 A. Animal Use Permit Required:

10 1. In addition to the business license required pursuant to title 4 of this code,  
11 shall require each owner, peddler, merchant, itinerant merchant, solicitor or  
12 proprietor, or any agent, assign, or subdivision of any kind, to obtain from the  
13 city clerk an animal use permit, hereinafter referred to as "permit", to be used  
14 solely for the operation of commercial enterprises or businesses using animals  
15 or animal drawn vehicles on public streets within the limits of the city of  
16 Tombstone. Permit holders shall not be granted a permit unless the permit  
holder has acknowledged in writing that this ordinance has been read in its  
entirety and that, by being granted a permit under this ordinance, the permit  
holder consents to the rules, regulations, restrictions, and penalties embodied  
in this ordinance and the laws of the state of Arizona and the city of  
Tombstone.

17 2. It shall be unlawful for any person, enterprise or business, hereinafter  
18 referred to as "person", to be licensed under title 4 of this code or permitted  
19 under this title to operate an animal or animal drawn vehicle (also known as  
20 a wagon) on the streets of the city of Tombstone for commercial purposes;  
21 provided, however, the city clerk may issue licenses and permits for said  
activities subject to the terms and conditions of this ordinance and such other  
reasonable terms or conditions as the mayor and common council may impose.  
The mayor and common council have authority to promulgate rules and  
regulations relating to such licenses and permits in addition to those contained  
herein.

22 B. Principal Also Liable: Any person, firm, partnership, corporation, or entity, or any  
23 officer or director thereof, employing any employees, shall also be liable for the  
violation of any provision of this ordinance by its employee.

24 C. Indemnity: The holder of any permit issued under the terms of this ordinance shall  
25 release and indemnify, defend and save harmless the city, its officers, agents and  
26 employees from and against any and all claims, actions, causes of action, demands,  
27 judgments, costs, expenses, and all damages of any kind and nature incurred by or  
28 insuring to any person whatsoever predicated upon injury to death or any person to  
damage to property, public or private, or whatever ownership, or damage to business,  
provided such injury, death, loss or damage shall arise out of or be connected directly  
or indirectly with the exercise of any right or privilege granted by such a permit.

1 D. Insurance Requirements:

2 1. No permit shall be issued or remain in effect unless the permittee, at the  
3 permittee's expenses and without cost to the city, procures, and maintain in  
4 force and on file with the city clerk sufficient evidence of a general liability  
5 policy naming the city of Tombstone as an additional insured covering bodily  
injury, including death, in the amount of one million dollars (\$1,000,000.00)  
and one hundred thousand dollars (\$100,000.00) coverage for injury to or  
destruction of property of others in any one accident.

6 2. Such insurance coverage constitutes a minimum requirement and shall in no  
7 way be deemed to limit or lessen the ability of the permittee under the terms  
8 of such permit. Permittee is encouraged to purchase additional coverage if at  
no cost to the city.

9 3. An endorsement shall be included on the required policy, providing for  
thirty (30) days' notice to the city of any material change or cancellation.

10 E. Designated Hours And Locations Of Operation:

11 1. The mayor and common council hereby promulgate rules and regulations  
12 designating the hours of operation and the acceptable areas, sites and streets  
13 in which animals and animal drawn vehicles may be ridden or operated for  
14 commercial purposes. The mayor and common council, or its designee may  
15 limit the number of animals and animal drawn vehicles in any area or within  
16 the limits of the city of Tombstone if such limitations are needed for the health,  
17 safety or welfare of the general public. Limitations shall be temporary and only  
for the period determined to address an immediate issue of health, safety or  
welfare. Limitations shall not be made unless reasonable and timely notice is  
given to the owner or operator specifying the reason for the temporary  
limitation. The term "operator" is intended to include persons driving, riding,  
or controlling animals.

18 2. It shall be unlawful for any person to operate an animal or animal drawn  
19 vehicle for commercial purposes at times or locations other than those  
permitted and stated on the permit.

20 3. The city clerk is authorized to issue periodic special use permits to peddlers,  
21 vendors and persons, waiving the normal hours and defined areas of operation  
when special days or events are being celebrated.

22 4. The hours of operation shall be from dawn to dusk.

23 5. The designated route(s) and loading/unloading zone(s) shall be mapped and  
24 filed with the office of the city clerk on the effective date of this ordinance and  
printed or attached to the permit.

25 F. Application: An application for a permit under these provisions shall be made to  
the city clerk and shall include the following information:

26 1. The name, address and telephone number, both business and personal of the  
27 applicant; in the case of an S corporation or closely held corporations, limited  
28 liability company or partnership, the names of the shareholders or owners,  
partners of officers with authority to act on behalf of the corporation or  
partnership.

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- 2. The number of animals other than those connected to an animal drawn vehicle to be operated; not to exceed four (4) per permit holder.
- 3. A specific description of the area and the streets on which the animal drawn vehicle is to be operated; to include a description of city property and proposed ticket booths or structures.
- 4. Such other information as the city clerk may require; including the name of animal riders or animal drawn vehicle drivers, their ages and driver license numbers. After submission of initial application, the same information must be submitted for new drivers at the time the driver is hired. Permit holders shall be responsible for keeping the information contained on their application current.

G. Requirements For Issuance: A permit issued under this ordinance shall be subject to the following requirements:

- 1. The permit shall be valid for a period of not more than twelve (12) months after the date of issuance and may be revoked or suspended for cause. The expiration date of each permit shall be shown on the permit, and each permit shall expire at twelve o'clock (12:00) midnight on the expiration date. Any permit holder may renew a permit by submitting the same application with any updates or changes noted.
- 2. A permit issued under this ordinance is valid only for the applicant and is not transferable.
- 3. In addition to the permit holder's name and such other information required by the city clerk, the permit shall contain the following:
  - a. The period of time for which the permit is issued;
  - b. A statement that the permit issued is not transferable. In the case of a corporation, limited liability company or partnership, it shall be unlawful for the permit holder to transfer the permit to any person, shareholder, partner, owner or other entity not listed on the original application.
  - c. The locations and hours of the operation; and
  - d. A statement that the permit is subject to the provisions of this ordinance.
- 4. The permit holder shall designate by signing the permit that:
  - a. The permit holder is authorized to sign the permit;
  - b. The information contained in the application and permit are true and accurate to the best of the undersign's knowledge and belief;
  - c. This chapter has been read and understood in its entirety and that the permit holder consents and binds those operating under this permit to the rules, regulations, restrictions and penalties described herein.

1 H. Standards Of Issuance And Renewal:

2 1. If the city clerk finds upon application for a new permit that existing  
3 commercial animal drawn transportation for hire is adequate to meet the public  
4 convenience the permit application shall be taken by the city clerk to the  
5 mayor and common council for a final determination.

6 2. If the mayor and common council find that the particular commercial  
7 transportation for hire in the city will not place an undue burden on the health,  
8 safety, or welfare of its citizens and that additional commercial transportation  
9 will serve the public convenience and necessity and the applicant can satisfy  
10 the legal and financial obligations or responsibilities of this ordinance, and is  
11 willing and able to perform such public transportation and to conform to the  
12 provisions of this ordinance, then the city clerk shall be instructed to issue a  
13 permit to the applicant in accordance with the regulations and limitations  
14 stated in subsection I of this section.

15 3. The mayor and common council shall take into consideration the number of  
16 animal drawn vehicles already in operation, whether existing transportation is  
17 adequate to meet the public convenience, the probable effect of increased  
18 service on local traffic conditions, the character, experience and financial  
19 responsibility of the applicant, the number, kind and type of equipment being  
20 used in the enterprise.

21 4. No permit shall be issued by the city unless the applicant has certified in  
22 writing to the city clerk that each owner/operator has demonstrated his or her  
23 knowledge of horses or other such hoofed animals, animal drawn vehicles, and  
24 the handling of the combination of the animals and animal drawn vehicles.

25 I. Restrictions: A person or firm to whom a permit has been issued hereunder is  
26 subject to the following restrictions:

27 1. The rider or operator of an animal or animal drawn vehicle must be least  
28 eighteen (18) years of age and have a valid Arizona driver's license in order to  
ensure competency levels and knowledge of applicable transportation codes  
of the state of Arizona and must comply with the same when subject to this  
chapter.

2. No permit holder shall be allowed to operate more than four (4) animal  
drawn vehicles.

3. No person shall be allowed to have an interest in more than four (4) permits  
under this ordinance.

4. Permittee shall maintain premises and equipment in a clean and safe  
condition, and adhere to state laws and local regulations pertaining to the  
proper and humane treatment of animals. Maltreatment to, or neglect of the  
animals could result in civil or criminal penalties for offending parties.

5. Permittee shall immediately notify the city clerk of any change of address  
or substantial change in equipment or circumstances.

J. Fees: The fees for permits under this section, which apply to commercial use of  
animals and animal drawn vehicles, may be prorated if issued for less than one year  
shall be as follows:

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- 1. Nonrefundable annual application fee: One hundred fifty dollars (\$150.00);
- 2. Annual permit fee for loading area in the Tombstone historic district: Three hundred twenty dollars (\$320.00) per vehicle or one hundred dollars (\$100.00) per animal if no vehicle is involved; and
- 3. Special use permits for animals and animal drawn vehicles shall not exceed twenty dollars (\$20.00) per vehicle or per animal without a vehicle, for each event. A special use permit shall be valid for a twenty four (24) hour period after its effective date or until the conclusion of the event for which the permit is issued, whichever comes first.

\* \* \* \* \*

L. Stopping And Loading Of Passengers: The mayor and common council shall establish, fund the construction of, and clearly designate stop and loading zones for animals and animal drawn vehicles. Only designated stop and loading zones will be used by the rider or operator for loading or unloading riders or passengers. No unauthorized zones will be permitted or condoned, except when emergencies arise or when the public safety, health and welfare are paramount considerations or when designated by a police officer.

\* \* \* \* \*

Q. Waste Control: Efficient provisions should be made for the immediate and prompt removal of material deposited by animals. Failure to comply with this provision could result in suspension and/or revocation of the permit.

\* \* \* \* \*

T. Operation/Contract Agreement: The mayor and common council are hereby authorized to place additional definitive restrictions on the permittee by a means of a written operation/contract agreement. The general types of considerations to be included in the said agreement are: route determination, roadway maintenance, loading and unloading sites; hours of operation; animal welfare, treatment and care; appearance and condition of a vehicle; vehicle modifications; expiration and amendment clauses; and authorized seating capacity per vehicle.

\* \* \* \* \*

V. Suspension Or Revocation:

- 1. The violation of Arizona traffic regulations criminal code or city ordinances could result in suspension of operations up to thirty (30) days or permanent revocation by the mayor and common council.
- 2. A permit shall be immediately revoked if the permit holder or agents are found guilty of operating an animal or animal drawn vehicle under the influence of alcohol or an illegal drug. Operating a vehicle in a reckless manner could also be grounds for suspending or revoking a permit.
- 3. A permit shall be immediately revoked upon the cancellation of insurance as required by this ordinance.
- 4. The city clerk shall have the authority to suspend under this ordinance and

1 recommend revocations to the mayor and common council. The office of city  
2 clerk and the office of city marshal are authorized to take any steps reasonably  
3 necessary to enforce this chapter.

4 \* \* \* \* \*

5 City Code 8-5-2.

6 *Plaintiffs' Joint Objection and Motion to Strike and Motion to Reconsider Sur-Reply*

7 Plaintiffs request the Court strike Defendants' Amended Reply and/or its Exhibit A.  
8 Defendants' Exhibit A is a copy of portions of the Tombstone City Code. The Court finds  
9 this document is not evidence and it is not appropriate to strike a copy of the applicable  
10 code.<sup>10</sup> Further, the Court notes that the source of the document, Sterling Codifiers, is a  
11 source used by the Court and the website, [http://www.sterlingcodifiers.com/codebook/  
12 index.php?book\\_id=541](http://www.sterlingcodifiers.com/codebook/index.php?book_id=541), indicates that the last update was based on May 8, 2007,  
13 modifications.<sup>11</sup>

14 Plaintiffs also ask the Court to reconsider its previous Order denying Plaintiffs  
15 permission to file a sur-reply regarding the summary judgment documents. Plaintiffs assert  
16 that they believe that the Court's Order was the result of Plaintiffs' failure to abide by the  
17 Court's cut-off date for disclosure of discovery. In issuing its Order, the Court stated:

18 Additionally, the original Response having been superseded by the Amended  
19 Response, Defendants' Reply is null. Defendants will be given an opportunity to file  
20 a new Reply. Similarly, Plaintiffs' request to file a sur-reply is null; the Court will  
21 deny the request.

---

22 <sup>10</sup>The Court declines to address Plaintiffs' objections regarding their opportunity to  
23 respond based on "disclosure date" and mailing. Exhibit A is, in essence, a legal authority  
24 rather than "evidence." *See generally, Long Beach Area Peace Network v. City of Long  
25 Beach*, 574 F.3d 1011, 1026 n.1 (9th Cir. 2009) (taking judicial notice of municipal  
26 ordinances).

27 <sup>11</sup>Plaintiffs' motion expresses concern that the Code presented to the Court includes  
28 revisions made after the filing of Plaintiffs' lawsuit. The Court notes that this action was  
filed on May 21, 2007, after the latest revisions. Further, as discussed *infra*, the Court  
accepts that the portion specifically pointed out by Plaintiffs as having been modified in  
2006, City Code § 1-6-10, was not in effect until November 21, 2006.

1 December 23, 2010, Order, p. 3. Because Defendants’ original Reply was null, there was no  
2 document that warranted a sur-reply at that time. The Court will consider Plaintiffs’ current  
3 request in light of the Amended Response and Amended Reply that have subsequently been  
4 filed.

5 Plaintiffs assert that Defendants make an argument based on new evidence in their  
6 Reply. *See e.g. Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996), *cert denied* 522 U.S.  
7 808 (1997) (party may not file “new” evidence with reply and then deprive opposing party  
8 opportunity to respond). However, the “new evidence” complained of by Plaintiffs is a copy  
9 of portions of the City Code. There has been no showing by Plaintiffs that they did not have  
10 access to this legal authority when preparing their Amended Response.<sup>12</sup> The Court finds  
11 Plaintiffs have not shown any basis to either strike the reply or permit a sur-reply. *See*  
12 *generally Macquarie Group Ltd. v. Pacific Corporate Group, LLC*, No. 08 CV 2113-IEG-  
13 WMC, 2009 WL 539928, at \*3 (S.D.Cal.2009), *citing* 5C Wright & A. Miller, Federal  
14 Practice and Procedure § 1380 (3d ed. 2004) (“Motions to strike are a drastic remedy and  
15 generally disfavored.”); L.R.Civ. 7.2 (providing for motion, response, and reply); *Silvas v.*  
16 *GMAC Mortg., LLC*, No. CV-09-265-PHX-GMS, 2009 WL 457234 (D.Ariz. 2009).

17  
18 *Plaintiffs’ Second Joint Objection and Motion to Strike and Motion to Reconsider Sur-Reply*

19 Plaintiffs assert the Court did not give Plaintiffs an opportunity to argue the original  
20 Joint Objection and Motion to Strike and Motion to Reconsider Sur-Reply during oral  
21 argument. However, the Court informed Weik, who was presenting argument for Plaintiffs  
22 that she would ask him some questions and then allow him to make any additional comments.  
23 After the defense made rebuttal argument, the Court permitted Weik to make additional  
24 comments. That the Court did not specifically invite comments regarding the Plaintiffs’ Joint  
25 Objection and Motion to Strike and Motion to Reconsider Sur-Reply did not prevent  
26 Plaintiffs from raising issues they thought appropriate.

27  
28 <sup>12</sup>Indeed, Plaintiffs’ Amended Response cites to the City Code.



1           Additionally, Plaintiffs have submitted a portion of the former City Code that differs  
2 from Defendants' Exhibit A in that the City Code appears to have been modified on  
3 November 21, 2006, to specify when the City Council meetings would be held. For purposes  
4 of this Order, the Court will accept that City Code § 1-6-10, which addresses when City  
5 Council meetings are to be held, was not in effect until November 21, 2006.

6           Lastly, the Court notes that the Plaintiffs' Joint Objection and Motion to Strike and  
7 Motion to Reconsider Sur-Reply did not include "'Oral Argument Requested' immediately  
8 below the title of such motion[.]" L.R.Civ. 7.2(f). Not only does a party waive any right to  
9 oral argument by failing to request it, *see Dredge Corp. v. Penny*, 338 F.2d 456, 461-62 (9th  
10 Cir. 1964), but the decision whether to grant oral argument is discretionary. *Biotics Research*  
11 *Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983).<sup>13</sup> Although this Court initially  
12 scheduled oral argument on this motion because of its interrelationship with the Motion for  
13 Summary Judgment, the Court does not find that scheduling this matter for further oral  
14 argument would assist the Court. The Court will deny the motion.

15  
16 *Plaintiffs' Controverting Statement of Facts*

17           A motion for summary judgment is to set forth the specific facts (with reference to a  
18 specific admissible portion of the record where the fact may be found) on which a party relies  
19 separately from the memorandum of law. L.R.Civ. 56.1. Furthermore, the specific facts are  
20 to be set forth in serial fashion and not in narrative form. *Id.*

21           The Court has reviewed Plaintiffs' Controverting Statement of Facts and has sought  
22 to identify material factual disputes in the Court's factual summary. The Court will not  
23 specifically address each dispute, but will only consider admissible evidence that is supported  
24 by specific facts that may show a genuine issue of material fact. *See Anderson v. Liberty*  
25 *Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986).

26  
27 \_\_\_\_\_  
28           <sup>13</sup>*Dredge Corp.* and *Biotics Research Corp.* discuss the requirement of oral argument as  
to a motion for summary judgment.

1 *Summary Judgment Legal Standard*

2 Summary judgment may be granted if the movant shows “there is no genuine issue  
3 as to any material fact and that the moving party is entitled to judgment as a matter of law.”  
4 Rule 56(c), Federal Rules of Civil Procedure. The moving party has the initial responsibility  
5 of informing the court of the basis for its motion, and identifying those portions of “the  
6 pleadings, depositions, answers to interrogatories, and admissions on file, together with the  
7 affidavits, if any,” which it believes demonstrate the absence of a genuine issue of material  
8 fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

9 Once the moving party has met the initial burden, the opposing party must "go beyond  
10 the pleadings" and "set forth specific facts showing that there is a genuine [material] issue  
11 for trial." *Id.*, 477 U.S. at 248, 106 S.Ct. at 2510, internal quotes omitted. The nonmoving  
12 party must demonstrate a dispute “over facts that might affect the outcome of the suit under  
13 the governing law” to preclude entry of summary judgment. *Anderson v. Liberty Lobby Inc.*,  
14 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Further, the disputed facts  
15 must be material. *Celotex Corp.*, 477 U.S. at 322-23. In opposing summary judgment, a  
16 plaintiff is not entitled to rely on the allegations of his complaint, Fed.R.Civ.P. 56(e), or upon  
17 conclusory allegations in affidavits. *Cusson-Cobb v. O'Lessker*, 953 F.2d 1079, 1081 (7th  
18 Cir. 1992). Further, "a party cannot manufacture a genuine issue of material fact merely by  
19 making assertions in its legal memoranda." *S.A. Empresa de Viacao Aerea Rio Grandense*  
20 *(Varig Airlines) v. Walter Kiddle & Co.*, 690 F.2d 1235, 1238 (9th Cir. 1982).

21 The dispute over material facts must be genuine. *Anderson*, 477 U.S. at 248, 106  
22 S.Ct. at 2510. A dispute about a material fact is genuine if “the evidence is such that a  
23 reasonable jury could return a verdict for the nonmoving party.” *Id.* A party opposing a  
24 properly supported summary judgment motion must set forth specific facts demonstrating a  
25 genuine issue for trial. *Id.* Mere allegation and speculation are not sufficient to create a  
26 factual dispute for purposes of summary judgment. *Witherow v. Paff*, 52 F.3d 264, 266 (9th  
27 Cir. 1995) (per curiam). “If the evidence is merely colorable or is not significantly probative,  
28 summary judgment may be granted.” *Anderson*, 477 U.S. at 249-50, 106 S. Ct. at 2511.

1 However, the evidence of the nonmoving party is to be believed and all justifiable inferences  
2 are to be drawn in his favor. *Id.* at 255. Further, in seeking to establish the existence of a  
3 factual dispute, the non-moving party need not establish a material issue of fact conclusively  
4 in his favor; it is sufficient that “the claimed factual dispute be shown to require a jury or  
5 judge to resolve the parties’ differing versions of the truth at trial.” *T.W. Elec. Serv.*, 809  
6 F.2d 626, 631 (9th Cir. 1987).

7 Additionally, the Court is only to consider admissible evidence. *Moran v. Selig*, 447  
8 F.3d 748, 759-60 (9th Cir. 2006) (pleading and opposition must be verified to constitute  
9 opposing affidavits); *FDIC v. New Hampshire Ins. Co.*, 953 F.2d 478, 484 (9th Cir. 1991)  
10 (declarations and other evidence that would not be admissible may be stricken).

11  
12 *First Amendment Retaliation Claim Against Smith*<sup>14</sup>

13 In a non-employment context, a First Amendment retaliation claim requires that a  
14 plaintiff has engaged in constitutionally protected activity, a defendant’s conduct caused the  
15 plaintiff to suffer an injury that would chill a person of ordinary firmness from continuing  
16 to engage in that activity, and defendant’s conduct must have been substantially motivated  
17 against the plaintiff’s exercise of constitutionally protected conduct. *See e.g. Worrell v.*  
18 *Henry*, 219 F.3d 1197, 1212-13 (10th Cir. 2000).

19 Defendants asserts that Plaintiffs have not identified any constitutionally protected  
20 activity that Plaintiffs were engaged in.<sup>15</sup> Plaintiffs assert that the constitutionally protected

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21  
22 <sup>14</sup>To the extent that Defendants argue that, while the City Code specifically gives  
23 authority to the Marshal to enforce the animal use permit, inspect the horses, investigate  
24 complaints, etc., it is the City Council that has authority to issue permits and licenses, *see*  
25 *Minnesota Brd. For Community Colleges v. Knight*, 465 U.S. 271, 285, 104 S. Ct. 1058,  
26 1067 (1984) (the denial of permits and licenses is insufficient to state a retaliation claim), that  
27 argument does not address whether Smith’s investigation of Weik caused Plaintiffs to suffer  
28 an injury that would chill a person of ordinary firmness from continuing to engage in that  
activity.

<sup>15</sup>Defendants acknowledge that Weik asserts the retaliation was based on his  
complaint of the May 24, 2006, incident. However, Plaintiffs argue that the retaliation is for

1 activity at issue in this case is that Plaintiffs were petitioning the government (i.e., seeking  
2 a permit) and Weik was contemplating running for city council. While the First Amendment  
3 “does not guarantee a favorable response, or indeed any response, from [government]  
4 officials,” *Baltoski v. Pretorius*, 291 F.Supp.2d 807, 811 (N.D.Ind. 2003), the right to redress  
5 is constitutionally protected activity.

6 Defendants also assert that Plaintiffs have not shown that any injury suffered by Weik  
7 would chill a person of ordinary firmness from continuing to engage in that activity and has  
8 not identified any way in which Smith allegedly retaliated against Weik because of his  
9 speech or activity. *Hartman v. Moore*, 547 U.S. 250, 265-66, 126 S.Ct. 1695, 1703-04  
10 (2006) (discussing “but for” causation standard in retaliation claims); *Beck v. City of Upland*,  
11 527 F.3d 853, 864 (9th Cir. 2008).

12 To any extent that the claimed retaliation is for reporting Smith for the May 24,  
13 2006, incident, the Court notes that Defendants assert that Smith began investigating Weik  
14 based on Norby’s allegations of fraud and the Fike incident before the May 24, 2006,  
15 incident.<sup>16</sup> Further, Defendants assert that the Fike incident was referred to the prosecutor  
16 before Weik had made any complaint about the incident. Defendants argue that Smith’s  
17 action in investigating Weik could not have been in retaliation when the investigation  
18 occurred before Weik made a complaint. Plaintiffs, however, assert that Weik immediately  
19 reported the incident. Whether Weik immediately reported the incident or not is not a  
20 material dispute. Smith began investigating after the May 16, 2006, information from  
21 Kitchel and the May 19, 2006, information from Fike.

22 Defendants also argue that the probable cause that came from Norby and Fike defeats  
23

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24 petitioning the City Council and considering running for a City Council seat.

25  
26 <sup>16</sup>Although Plaintiffs assert that Norby never indicated that she was afraid of Weik,  
27 this dispute is not material because evidence in the record establishes that Smith had  
28 information from Kitchel of possible fraud. Even if Kitchel’s information was false, there  
is no evidence in the record to establish that Smith should have known of the falsity. Smith  
was entitled to rely on the information from Kitchel in pursuing the investigation.

1 if not totally bars any retaliation claim. *Hartman*, 547 U.S. at 265-66, *Beck*, 527 F.3d at 864.  
2 While the Ninth Circuit has interpreted *Hartman* as applicable in only those retaliation cases  
3 where a criminal prosecution results, *see Skoog v. County of Clakamas*, 469 F.3d 1221,  
4 1234-35 (9th Cir.2006) (holding no requirement to plead and prove absence of probable  
5 cause in an “ordinary retaliation claim” and explaining that proof of an absence of probable  
6 cause is necessary in retaliatory prosecution cases due to the complexity of causation in such  
7 cases), in this case, the prosecutor in this case did initiate charges. Although the charges  
8 were ultimately dismissed, for purposes of consideration whether summary judgment is  
9 appropriate, the Court finds the initiation of those charges requires summary judgment unless  
10 the evidence establishes a lack of probable cause. Plaintiffs have not shown a lack of  
11 probable cause and, therefore, summary judgment in favor of Defendants is appropriate.

12 Further, Plaintiffs have failed to link Smith's investigation to any speech or activity  
13 of Plaintiffs other than the Norby and Fike incidents. For example, no evidence has been  
14 presented that Smith knew Weik was running for office. Further, the initial approval of the  
15 animal use permits had occurred months earlier. The Court finds that there is no genuine  
16 issue of material fact that Smith was substantially motivated against Plaintiffs' exercise of  
17 constitutionally protected conduct.

18  
19 *First Amendment Expressive Association Claim Against Korbeck-Reeder and Schmidt*

20 A plaintiff alleging a violation of the right to expressive association may support his  
21 or her claim by demonstrating, *inter alia*, some form of government action to impose  
22 penalties for the expression of political views. *Roberts v. United States Jaycees*, 468 U.S.  
23 609, 622, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) (infringement may be “justified by  
24 regulations adopted to serve compelling state interests, unrelated to the suppression of ideas,  
25 that cannot be achieved through means significantly less restrictive of associational  
26 freedoms”).

27 In determining whether a group is protected by the First Amendments’ expressive  
28 associational right, the Court must determine if the group engages in “expressive association”

1 otherwise protected by the First Amendment. *Boy Scouts of America v. Dale*, 530 U.S. 640,  
2 648, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000). Plaintiffs have presented evidence that Weik  
3 intended to run for the City Council and associated with then-mayor Andre DeJournett and  
4 Dwayne Harris. While the right to associate for the advancement of common political goals  
5 is protected by the First Amendment and Fourteenth Amendments, *Timmon v. Twin Cities*  
6 *Area New Party*, 520 U.S. 351, 357, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997), there is no  
7 evidence in the record to support Plaintiffs’ assertion that Defendants knew Weik was  
8 considering running for a position on the City Council.

9         Moreover, in addressing this claim, Plaintiffs assert that Schmidt, Korbeck-Reeder and  
10 Smith were angered by Notices of Claim made by Plaintiffs – Plaintiffs assert that  
11 Defendants retaliated against them by refusing to renew the permits. However, because the  
12 denial of the requested permits and licenses is insufficient to state a claim, *see Minnesota*  
13 *Brd. for Community Colleges v. Knight*, 465 U.S. 271, 285, 104 S.Ct. 1058, 1067, 79 L.Ed.2d  
14 299 (1984) (noting that “[n]othing in the First Amendment or in this Court’s case law  
15 interpreting it suggests that the rights to speak, associate and petition require government  
16 policymakers to listen or respond to individuals’ communications on public issues”), the  
17 Court previously determined that Plaintiffs had failed to state a First Amendment retaliation  
18 claim against Schmidt and Korbeck-Reeder.

19         Additionally, the City Code, as to the Animal Use Permit requirements, does not “aim  
20 at the suppression of speech, does not distinguish between prohibited and permitted activity  
21 on the basis of viewpoint, and does not license enforcement authorities to administer the  
22 statute on the basis of such constitutionally impermissible criteria.” *Roberts v. U.S. Jaycees*,  
23 468 U.S. 609, 623, 104 S.Ct. 3244, 3253, 82 L.Ed.2d (1984) [Citations omitted.] Further,  
24 the City Code does not grant the City Council “unfettered discretion” in determining whether  
25 a permit should be granted. *See Seattle Affiliate of the October 22nd Coalition v. City of*  
26 *Seattle*, 550 F.3d 788, 794 (9th Cir. 2008). Rather, the City Code sets forth the requirements  
27 and sets forth the considerations to be made in determining whether a permit should be  
28 granted. The City Code is content neutral.

1 The Ninth Circuit has stated:

2 Outside the school speech context, the Supreme Court has repeatedly held that a law  
3 restricting speech on a viewpoint- and content-neutral basis is constitutional as long  
4 as it withstands intermediate scrutiny – i.e., if: (1) “it furthers an important or  
5 substantial government interest”; (2) “the governmental interest is unrelated to the  
6 suppression of free expression”; and (3) “the incidental restriction on alleged First  
7 Amendment freedoms is no greater than is essential to the furtherance of that  
8 interest.” [*Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 661-62, 114  
9 S.Ct. 2445, 129 L.Ed.2d 497 (1994).] The same is true of a regulation that has an  
10 incidental effect on expressive conduct. *United States v. O'Brien*, 391 U.S. 367,  
11 376-77, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

12 *Jacobs v. Clark County School Dist.*, 526 F.3d 419 434 (9th Cir. 2008), *footnote omitted*.

13 To the extent that Plaintiffs are arguing that the City Code, as applied, has an incidental  
14 effect on their expressive conduct, the consideration of safety concerns (including the staging  
15 of the horses), a driver’s license requirement, and an insurance requirement further a  
16 substantial government interest in the safety of persons. Indeed, even the driver’s license  
17 requirement is “to ensure competency levels and knowledge of applicable transportation  
18 codes of the state of Arizona[.]” City Code 8-5-2(I)(1). This governmental interest is  
19 unrelated to the suppression of free expression and is no greater than is needed to further the  
20 governmental interest. There is no genuine issue of material fact presented to the Court that  
21 the lack of renewal of the permit, with an invitation to Plaintiffs to return with additional  
22 information, unjustifiably infringed on Plaintiffs’ First Amendment expressive association  
23 rights. Summary judgment in favor of Defendants is appropriate.

24 *Fourth Amendment Claim Against Smith – May 19, 2006*

25 Defendants assert that, in taking and then returning the waivers, Smith did not violate  
26 the Fourth Amendment. Defendants assert that Smith had the authority under the City Code  
27 to investigate the Fike incident and took the waivers without objection. Plaintiffs argue that  
28 Smith was not a certified police officer, was impersonating a police officer, and committed  
larceny by taking the waivers from the store.<sup>17</sup> However, Plaintiffs do not dispute that Smith

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<sup>17</sup>The Court notes that Plaintiffs have not pointed to any authority that Smith did not have the authority to act as a peace officer; i.e., any authority that states that Smith was

1 was hired as, and acting as, the Tombstone Marshal. *See* Tombstone Code § 1-14-2. As  
2 such, Smith was acting under color of law, i.e., under pretense of law, which occurs when  
3 an officer’s action are in some way related to the performance of his official duties. *Huffman*  
4 *v. County of Los Angeles*, 147 F.3d 1054, 1058 (9th Cir.1998), *quotation marks and citations*  
5 *omitted; see also Screws v. United States*, 325 U.S. 91, 111, 65 S.Ct. 1031, 89 L.Ed. 1495  
6 (1945) (“It is clear that under ‘color’ of law means under ‘pretense’ of law.”).

7 To the extent that Defendants argue that Smith took the waivers without objection,  
8 Smith testified during his deposition:

9 A: . . . The waivers that I saw in the store I took, made copies of them, returned  
10 them and then submitted the waivers I had with my report to the prosecutor.

11 Q: How did you get those waivers?

12 A: I took them.

13 Q: You took them?

14 A: Uh-huh.

15 Q: Without permission?

16 A: I didn’t ask permission.

17 Q: Did you ask David for those waivers?

---

18  
19 required to be certified under the Arizona Peace Officer Standards and Training Board (“AZ  
20 POST”) – rather, the documentation provided by Plaintiffs indicates that a grace period for  
21 compliance is provided for and a waiver of academy attendance can be requested. Although  
22 Plaintiffs point to A.R.S. § 41-1822 for the assertion that the AZ POST is authorized to  
23 establish minimum qualifications, this provision does not address deficiencies, grace periods,  
24 academy waiver, or the authority of a person appointed by the governing authority (i.e., the  
25 City Council) in such a situation. It is not disputed that the City Council appointed Smith as  
26 the Tombstone Marshal. Further, the documentation establishes that Smith was taking steps  
27 to be AZ POST certified. Although Plaintiffs have also provided documentation that Smith  
28 was advised by the AZ POST that he did not have peace officer authority, they have not  
provided any basis to conclude that Smith could not perform some functions in his appointed  
position. *See* Tombstone Code § 1-14-4. Additionally, Plaintiffs have provided a letter from  
Curt Milam with AZ POST indicating that Smith was not a Certified Arizona Peace Officer.  
Milam also indicates that he told Smith he could not present himself with a badge and a gun.  
PSSOF, Ex. 87. During his deposition, Smith acknowledged that he was not AZ POST  
certified between March 2006 and November 15, 2006.



1 A: No, I took the waivers. I said, "I'm taking these for evidence and I'm going  
2 to make copies and bring them back".  
3 Q: Didn't David refuse you those waivers?  
4 A: I got the waivers, so obviously he did not refuse –  
5 Q: I'm going to object, non-responsive. Did you ask David for the waivers?  
6 A: No, I took the waivers.

7 PSSOF, Ex. 76, p. 236-37.

8 In the Fourth Amendment context, the Ninth Circuit has stated that consent may not  
9 be shown by a failure to object. *See Lopez-Rodriguez v. Mukasey*, 536 F.3d 1012, 1017 (9th  
10 Cir. 2008), *quoting United States v. Shaibu*, 920 F.2d 1423, 1427 (9th Cir.1990). Although  
11 consent to a warrantless search or seizure can be inferred from nonverbal actions, it "must  
12 be 'unequivocal and specific' and 'freely and intelligently given.'" *United States v. Basher*,  
13 629 F.3d 1161, 1167 (9th Cir. 2011), *quoting United States v. Chan-Jimenez*, 125 F.3d 1324,  
14 1328 (9th Cir.1997). The dispute about whether consent was given for the seizure constitutes  
15 a dispute of material fact. *See e.g. Marks v. Clarke*, 102 F.3d 1012, 1032 (9th Cir. 1996).  
16 "Because the conduct alleged by plaintiffs would be clearly unlawful and because a material  
17 dispute of fact exists, [. . . Smith] is not entitled to summary judgment on the basis of  
18 qualified immunity[.]" *Id.*<sup>18</sup>

19 Additionally, the Ninth Circuit has stated that, while "some governmental intrusions  
20 may be so minor as not to violate the Fourth Amendment at all, . . . it has never held that  
21 actions that do violate the Fourth Amendment may result in such little harm that § 1983 is  
22 not an available remedy." *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 949 (9th Cir.

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23  
24 <sup>18</sup>Government officials are entitled to qualified immunity "insofar as their conduct  
25 does not violate clearly established statutory or constitutional rights of which a reasonable  
26 person would have known." *Liston v. County of Riverside*, 120 F.3d 965, 975 (9th Cir.  
27 1997), *citing Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396  
28 (1982). Any genuine issues of material fact concerning the underlying facts of what the  
officer knew or what the officer did are questions of fact for the jury. *Acosta v. City and  
County of San Francisco*, 83 F.3d 1143, 1149 (9th Cir. 1996), *citing Sinaloa Lake Owners  
Ass'n v. City of Simi Valley*, 70 F.3d 1095, 1099 (9th Cir. 1995).

1 2003), *overruled on other grounds*.<sup>19</sup> This Fourth Amendment claim on behalf of Plaintiffs  
2 against Smith may proceed.

3  
4 *Fourth Amendment Claim Against Smith – May 24, 2006*

5 Defendants also assert the May 24, 2006, incident does not constitute a Fourth  
6 Amendment violation. *See, e.g., Brower v. County of Inyo*, 489 U.S. 593 (1989). The  
7 Supreme Court has stated that “[a] ‘seizure’ triggering the Fourth Amendment’s protections  
8 occurs only when government actors have, by means of physical force or show of authority,  
9 in some way restrained the liberty of a citizen.” *Graham v. Connor*, 490 U.S. 386, 395 n. 10,  
10 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989), *alterations and quotations omitted*. A seizure takes  
11 place when, “taking into account all of the circumstances surrounding the encounter, the  
12 police conduct would ‘have communicated to a reasonable person that he was not at liberty  
13 to ignore the police presence and go about his business.’” *Kaupp v. Texas*, 538 U.S. 626,  
14 629, 123 S.Ct. 1843, 155 L.Ed.2d 814 (2003), *quotation omitted*.

15 The parties dispute what occurred during this incident. Accepting all reasonable  
16 inferences in favor of Plaintiffs, the non-moving parties, Smith restrained the liberty of Weik  
17 by pushing him against a rail and trying to remove his gun. Indeed, the Ninth Circuit has  
18 stated that “[g]ratuitous and completely unnecessary acts of violence by the police during a  
19 seizure violate the Fourth Amendment.” *Fontana v. Haskin*, 262 F.3d 871, 880 (9th Cir.  
20 2001), *citing McDowell v. Rogers*, 863 F.2d 1302, 1307 (6th Cir.1988). “Because the

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21  
22 <sup>19</sup>In the context of suppression of evidence during a criminal proceeding, the Ninth  
23 Circuit considered whether the defendant had been inconvenienced or whether his plans had  
24 been interfered with. *United States v. Beale*, 736 F.2d 1289 (9th Cir. 1984). During his  
25 deposition, Weik testified that Smith contacted him around 11:00 or 11:30 and that they met  
26 at the store to talk about the Fike incident. PSSOF, p. 149. Weik further testified that his  
27 attorney had arranged for Weik to retrieve the waivers from the Marshal’s office at 3:00.  
28 PSSOF, p. 154. In other words, Smith interfered with Plaintiffs’ Fourth Amendment rights,  
by the seizure of the waivers, for no more than four hours. However, Weik was  
inconvenienced in that he personally and through his attorney had to take actions to retrieve  
the waivers. Moreover, accepting all reasonable inferences in favor of Plaintiffs, the non-  
moving parties, Smith acted after being denied permission to take the waivers.

1 conduct alleged by plaintiffs would be clearly unlawful and because a material dispute of fact  
2 exists, [. . . Smith] is not entitled to summary judgment on the basis of qualified immunity[.]”  
3 *Marks*, 102 F.3d 1012 at 1032. This Fourth Amendment claim on behalf of Weik against  
4 Smith may proceed.

5  
6 *Fifth Amendment Takings Claim Against Korbeck-Reeder and Schmidt*

7 A Fifth Amendment regulatory takings claim is considered non-categorical when the  
8 alleged taking “is the consequence of a regulatory imposition that prohibits or restricts only  
9 some of the uses that would otherwise be available to the property owner, but leaves the  
10 owner with substantial viable economic use.” *Rith Energy, Inc. v. United States*, 247 F.3d  
11 155, 1362 (Fed.Cir. 2011), *citation omitted*. The determination of whether an actionable  
12 non-categorical taking has occurred requires a fact-based inquiry into (1) the character of the  
13 governmental action; (2) the economic impact of the action on the plaintiff; and (3) the  
14 effects of the governmental action on the reasonable investment-backed expectations of the  
15 plaintiff. *See, Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537, 125 S.Ct. 2074, 2081, 161  
16 L.Ed.2d 876 (2005); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S.Ct.  
17 2646, 2659, 57 L.Ed.2d 631 (1978); *American Pelagic Fishing Co., LP v. United States*, 379  
18 F.3d 1363, 1372 (Fed.Cir.2004).

19 As argued by Defendants, Plaintiffs have not shown that they were entitled to or had  
20 a protectable property interest in the permits. *See, e.g., United States v. Fuller*, 409 U.S. 488,  
21 494, 93 S. Ct. 801 (1973) (property right must have indicia of rights such as transferability  
22 and excludability). The requested permits were within the discretion of the City Council,  
23 were limited in duration, were not transferrable, and did not permit Plaintiffs to exclude  
24 anyone.

25 Moreover, where a government decision diminishes the value of private property, the  
26 act does not constitute a taking requiring compensation if, despite the regulation, a reasonable  
27 use of the regulated property still exists. *See Silveira v. Lockyer*, 312 F.3d 1052, 1092 (9th  
28 Cir.2002). Indeed, “[a] requirement that a person obtain a permit before engaging in a

1 certain use of his or her property does not itself ‘take’ the property in any sense: after all, the  
2 very existence of a permit system implies that permission may be granted, leaving the  
3 landowner free to use the property as desired.” *United States v. Riverside Bayview Homes,*  
4 *Inc.*, 474 U.S. 121, 127, 106 S.Ct. 455, 459, 88 L.Ed.2d 419 (1985). It is only when the  
5 effect of a permit denial is to prevent “economically viable” use of the property in question  
6 can it be said that a taking has occurred. *Id.* While the “economic impact of the action on  
7 [Plaintiffs’ interest in the horses and the rental interest in the stable] is presumably  
8 substantial,” it potentially could have been “temporary” if Plaintiffs had sought to address  
9 the concerns of the City Council. *Carr HUML Investors, LLC v. Arizona*, CV 05-2233 PHX  
10 MEA, CV 05-2470 PHX MEA, CV 06-2636 PHX MEA, 2007 WL 4403981 \*17 (D.Ariz.  
11 2007).

12 Defendants point out that the original permits were to stage the horses on 4th Street  
13 and Plaintiffs were not complying with those permits. Indeed, Plaintiffs do not dispute that  
14 the City Council was informed that the staging area issue was unresolved. In other words,  
15 the requested permits did not resolve the staging area issue and it appears that Plaintiffs were  
16 seeking to obtain permits for which Plaintiffs did not intend to comply. The governmental  
17 action in not voting on the requested permits (which, as a practical matter, constitutes a  
18 denial of the permits) was within the City Council’s discretion to issue permits, limit permits,  
19 and place restrictions on permits. *See Erdelyi v. O'Brien*, 680 F.2d 61, 63 (9th Cir. 1982),  
20 *citation omitted* (“Whether the statute creates a property interest in concealed weapons  
21 licenses depends ‘largely upon the extent to which the statute contains mandatory language  
22 that restricts the discretion of the (issuing authority) to deny licenses to applicants who claim  
23 to meet the minimum eligibility requirements.”). Not only did Plaintiffs still have an  
24 economically viable use of the property, but Plaintiffs have not shown that they could not  
25 have addressed the concerns of the City Council and again request a permit. Summary  
26 judgment in favor of Defendants is appropriate.

27 The Court also agrees with Defendants that they are entitled to qualified immunity on  
28 this claim. Taken in a light most favorable to Plaintiffs, the facts do not show that

1 Defendants' conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201, 121  
2 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001); *see also Billington v. Smith*, 292 F.3d 1177, 1183  
3 (9th Cir. 2002). Moreover, the defense of qualified immunity allows for errors in judgment  
4 and protects "all but the plainly incompetent or those who knowingly violate the law . . . [I]f  
5 officers of reasonable competence could disagree on the issue [whether or not a specific  
6 action was constitutional], immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335,  
7 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986). Qualified immunity balances the  
8 interests of "the need to hold public officials accountable when they exercise power  
9 irresponsibly and the need to shield officials from harassment, distraction, and liability when  
10 they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808,  
11 815, 172 L.Ed.2d 565 (2009); *Watkins v. City of Oakland*, 145 F.3d 1087, 1092 (9th Cir.  
12 1998). In this case, the staging area issue was not resolved, the City Council was aware of  
13 safety concerns, the City Code granted the City Council discretion in granting permits, and  
14 the City Council's action did not prohibit Plaintiffs from returning to seek a permit. The  
15 Court finds that city councilpersons of reasonable competence could disagree on whether the  
16 conduct was constitutional. Defendants are entitled to qualified immunity on this claim and,  
17 therefore, summary judgment in favor of Defendant is appropriate.

18  
19 *Fourteenth Amendment Due Process Claim against the City of Tombstone, Korbeck-Reeder,*  
20 *and Schmidt*

21 Fourteenth Amendment substantive due process rights are those not otherwise  
22 constitutionally protected but which are deeply rooted in this country's history and tradition  
23 and "implicit in the concept of ordered liberty" such that "neither liberty or justice would  
24 exist if it were sacrificed. *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S.Ct. 2258, 138  
25 L.Ed.2d 772 (1997). Plaintiffs have asserted that Defendants have violated Plaintiffs'  
26 substantive due process rights by deliberately abusing their power without any reasonable  
27 justification in aid of any government interest or objective and only to oppress in a way that  
28 shocks the conscience. *Sandin v. Connor*, 515 U.S. 472, 483-84, 115 S.Ct. 2293, 132

1 L.Ed.2d 418 (1995); *Daniels v. Williams*, 474 U.S. 327 (1986); *Board of Regents of State*  
2 *Colleges v. Roth*, 408 U.S. 564, 569, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

3 “A protected property interest is present where an individual has a reasonable  
4 expectation of entitlement deriving from ‘existing rules or understandings that stem from an  
5 independent source such as state law.’” *Wedges/Ledges of California, Inc. v. City of*  
6 *Phoenix, Arizona*, 24 F.3d 56, 62 (9th Cir. 1994), quoting *Board of Regents v. Roth*, 408 U.S.  
7 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). “A reasonable expectation of  
8 entitlement is determined largely by the language of the statute and the extent to which the  
9 entitlement is couched in mandatory terms.” *Association of Orange Co. Deputy Sheriffs v.*  
10 *Gates*, 716 F.2d 733, 734 (9th Cir. 1983). Where, as here, the City Council has the discretion  
11 to grant or deny a permit, Defendants argue that Plaintiffs cannot show an entitlement.  
12 *Lindsay v. City of Philadelphia*, 844 F.Supp. 229 (E.D. Pa. 1994). Indeed, Defendants point  
13 out that there is no basis in the City Code for this claimed entitlement especially when  
14 Plaintiffs did not meet the requirements for the permit.

15 Furthermore, Defendants argue that substantive due process claims must be grounded  
16 in fundamental rights. *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997). In other words,  
17 Defendants point out that, in order to qualify for “substantive due process” protection, an  
18 alleged “property interest” must consist of something more than an abstract need, desire or  
19 expectation of the interest. Because of the discretionary nature of the City Council’s action,  
20 Defendants assert Plaintiffs cannot show a “legitimate claim of entitlement” to the property  
21 interest. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); see also *Lindsay v. City of*  
22 *Philadelphia*, 844 F.Supp. 229 (E.D. Pa. 1994). Further, Defendants assert Plaintiffs do not  
23 have a protected interest unless and until they can demonstrate that their renewal permit fully  
24 complied with the City requirements and the City Council had no discretion in denying it.  
25 See *Aegis of Arizona, L.L.C. v. Town of Marana*, 206 Ariz. 557, 570, 81 P.3d 1016, 1029  
26 (App. 2003) (“Courts repeatedly have held that a complaining landowner’s substantive due  
27 process and equal protection rights are not violated even when a municipality acts in  
28 violation of state or local law, in bad faith, and/or beyond its jurisdiction.”); *Bartolomeo v.*

1 *Town of Paradise Valley*, 129 Ariz. 409, 415, 631 P.2d 564, 570 (App. 1981) (since the  
2 record involving application for special use permit showed reasonable concerns, town  
3 council’s denial of permit application was not arbitrary or unreasonable).

4       Recently, the Ninth Circuit declined to find a legitimate entitlement where the  
5 governing body was not limited in its discretion to grant or deny a permit. *Gerhart v. Lack*  
6 *County, Mont.*, — F.3d — , 2011 WL 923381 (9th Cir. 2011). In this case, the City Code  
7 set forth prerequisites for a permit and provided factors to consider in determining whether  
8 a permit should be granted or denied; however, within those parameters, it was within the  
9 discretion of the City Council whether or not to renew the permit.

10       However, the United States Supreme Court has recognized that property interests may  
11 extend to benefits that have already been acquired. The Court has held that “once licenses  
12 are issued . . . their continued possession may become essential in the pursuit of a livelihood.  
13 Suspension of issued licenses thus involves state action that adjudicates important interests  
14 of the licensees.” *Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971).  
15 “[A] regulation that fails to serve any legitimate governmental objective may be so arbitrary  
16 or irrational that it runs afoul of the Due Process Clause.” *Id.*, quoting *Lingle v. Chevron*  
17 *U.S.A., Inc.*, 544 U.S. 528, 542, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005).

18       Plaintiffs have presented evidence that the City Council did not require strict  
19 adherence to the permit prerequisites on January 5, 2006, when their permits were initially  
20 approved. Further, Plaintiffs do not dispute (although they attempt to excuse) that they had  
21 not met all of the requirements (e.g., no insurance (Plaintiffs assert they would have renewed  
22 policy if permit had been renewed); lack of Weik’s license on file (Plaintiffs had provided  
23 Norby’s license) for a renewal. However, new requirements, not inconsistent with the terms  
24 of an ordinance, may be required for a renewal. 62 C.J.S. Municipal Corporations § 171.  
25 Here, the City Council did not mandate new requirements, but simply enforced “old”  
26  
27  
28

1 requirements.<sup>20</sup> Moreover, Defendants have argued, and City Council meeting minutes  
2 confirm, that the City Council was concerned with safety issues. Indeed, the Court notes that  
3 the City Council meeting minutes indicate that safety issues were an ongoing concern since  
4 the issuance of the original permits. The Court finds that there is not a material factual issue  
5 in dispute – the City Council acted within its discretion. Summary judgment in favor of  
6 Defendants on this claim is appropriate.

7 Moreover, the Court finds that city councilpersons of reasonable competence could  
8 disagree on whether the conduct was constitutional. Defendants are entitled to qualified  
9 immunity on this claim and, therefore, summary judgment in favor of Defendants is  
10 appropriate.

11  
12 *Fourteenth Amendment Equal Protection Claim Against the City of Tombstone, Korbeck-*  
13 *Reeder, and Schmidt*

14 “The Equal Protection Clause . . . is essentially a direction that all persons similarly  
15 situated should be treated alike.” *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S.  
16 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). “To state a claim . . . for a violation of the  
17 Equal Protection Clause . . . a plaintiff must show that the defendants acted with an intent or  
18 purpose to discriminate against the plaintiff based upon membership in a protected class.”  
19 *Lee v. City of Los Angeles*, 250 F.3d 668, 686 (9th Cir. 2001), quoting *Barren v. Harrington*,  
20 152 F.3d 1193, 1194 (9th Cir. 1998).

21 Moreover, “[i]n order to claim a violation of equal protection in a class of one case,  
22 the plaintiff must establish that the [defendant] intentionally, and without rational basis,  
23 treated the plaintiff differently from others similarly situated.” *N. Pacifica LLC v. City of*  
24 *Pacifica*, 526 F.3d 478, 486 (9th Cir. 2008); *City of Cleburne v. Cleburne Living Center*, 473

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25  
26 <sup>20</sup> In relying on *Rivera v. City of Phoenix*, 186 Ariz. 600, 925 P.2d 741 (App. 1996),  
27 for the assertion that they have a vested property right because they have incurred expenses  
28 in reliance on the issuance of the original permit, Plaintiffs fail to acknowledge that the  
*Rivera* court ruling was premised on a *legitimately* issued permit – it was only because of the  
discretion of the City Council that certain prerequisites were not originally required.



1 U.S. 432, 440 (1985). Defendants assert that a “rational-basis review in an equal protection  
2 analysis is not a license for courts to judge the wisdom, fairness or logic of a governmental  
3 activity.” *Heller v. Doe*, 509 U.S. 312, 319 (1993). Indeed, Defendants asserts that the  
4 actions or inactions of the City Council and its members cannot be challenged, “if there is  
5 any reasonable conceivable state of facts that could provide a rational basis” for their  
6 conduct. *Fed. Communications Comm’n v. Beach Communications, Inc.*, 508 U.S. 307, 313  
7 (1993); *see also, Gerhart*, 2011 WL 923381 \* 7 (issue is whether there is a rational basis for  
8 treating plaintiff differently, not whether there is a rational basis for denying permit).

9 Defendants assert that the facts present a rational basis for the City Council’s conduct  
10 – the City Council had a good faith basis not to make a decision until Plaintiffs had a staging  
11 area and had complied with all permit requirements. Moreover, the evidence presented by  
12 both Plaintiffs and Defendants establish that all parties were concerned about safety issues.<sup>21</sup>  
13 Further, the Court considers that Plaintiffs have not presented any evidence that they were  
14 treated differently than any other business seeking to conduct trail rides.<sup>22</sup> *See e.g., Gerhart*,  
15 2011 WL 923381 \* 7 (“[plaintiff] presented considerable evidence that he ws treated  
16 differently than other similarly situated property owners throughout the permit application  
17 process”).

18 Further, Plaintiffs have not presented any evidence, as opposed to speculation, that  
19 the reasons offered by Defendants are pretextual. *See Squaw Valley Development Co. v.*  
20 *Goldberg*, 375 F.3d 936 (9th Cir. 2004) (need to show disparate treatment, defendant’s action  
21 were arbitrary or irrational and not supported by a rational basis, and proffered reason was  
22 a pretext), *overruled on other grounds*.

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23  
24 <sup>21</sup>The Court notes that although Plaintiffs argue that their horses did not present a  
25 safety issue, they have stated that there were safety concerns regarding the staging of the  
horses.

26 <sup>22</sup>Plaintiffs have presented evidence of other businesses that have been granted permits  
27 (e.g., Old Tombstone Stables) and others that have not been granted permits (e.g., Horst  
28 T.R.O.T. Stables, LLC); however, Plaintiffs have not presented any evidence that a *trail ride*  
business has been granted a permit and/or was subject to a different standard.

1           Moreover, the Court finds that city councilpersons of reasonable competence could  
2 disagree on whether the conduct was constitutional. Defendants are entitled to qualified  
3 immunity on this claim and, therefore, summary judgment in favor of Defendants is  
4 appropriate.

5  
6 *42 U.S.C. § 1983 Conspiracy Claim Against Smith, Korbeck-Reeder, and Schmidt*

7           To establish a conspiracy claim under 42 U.S.C. § 1983, a plaintiff must show “an  
8 agreement' or 'meeting of the minds' to violate constitutional rights. The defendants must  
9 have, 'by some concerted action, intend[ed] to accomplish some unlawful objective for the  
10 purpose of harming another which results in damage." *Mendocino Environmental Center v.*  
11 *Mendocino County*, 192 F.3d 1283, 1301 (9th Cir. 1999), *citations omitted*. Furthermore, a  
12 plaintiff must establish that there was an actual deprivation of his constitutional rights as a  
13 result of the conspiracy. *Hart v. Parks*, 450 F.3d 1059, 1071 (9th Cir. 2006), *citing*  
14 *Woodrum v. Woodward County, Oklahoma*, 866 F.2d 1121, 1126 (9th Cir. 1989).

15           Plaintiffs have presented evidence that Smith told Weik that failure to comply with  
16 his demands would result in Plaintiffs permits being “pulled” and that Smith subsequently  
17 recommended to the mayor and council that Plaintiffs be denied continuing operations within  
18 the city limits. The City Council subsequently failed to approve the permit renewal.  
19 Plaintiffs argue that the dated history of the chain of events clearly establishes the meeting  
20 of minds of Korbeck-Reeder, Schmidt and Smith; however, the evidence merely presents  
21 speculation. Plaintiffs have not presented any evidence of a meeting of minds to violate the  
22 constitutional rights of Plaintiffs. The Court finds there is no genuine issue of material fact  
23 in dispute and summary judgment in favor of Defendants is appropriate.

24  
25 *Attorney's Fees and Costs*

26           Defendants assert that this is a frivolous lawsuit, they are entitled to summary  
27 judgment and are entitled to fees and costs pursuant to 42 U.S.C. § 1988; *Karam v. City of*  
28 *Burbank*, 340 F.3d 884 (9th Cir. 2003). Because issues remain pending, an award of

1 attorney's fees and costs is not appropriate at this time.

2  
3 Accordingly, IT IS ORDERED:

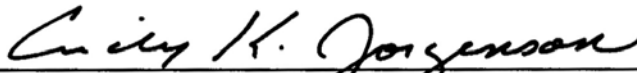
4 1. Defendants' Motion for Summary Judgment (Docs. 190, 196, 228) is  
5 GRANTED IN PART AND DENIED IN PART.

6 2. Summary judgment in favor of Defendants and against Plaintiffs is awarded  
7 on the First Amendment, Fifth Amendment, Fourteenth Amendment, and conspiracy claims.  
8 The Fourth Amendment claims being the only remaining claims, Korbeck-Reeder and  
9 Schmidt are DISMISSED from this action.<sup>23</sup>

10 3. Plaintiffs' Objections and Motions to Strike and Motions to Reconsider Sur-  
11 Reply. (Docs. 252, 253, and 258) is DENIED.

12 4. The parties shall submit their Proposed Joint Pretrial Order on or before May  
13 2, 2011. *See generally* May 23, 2008, Order.

14 DATED this 31st day of March, 2011.

15  
16 

17 Cindy K. Jorgenson  
18 United States District Judge  
19  
20  
21  
22

23  
24 <sup>23</sup>The Court notes that Defendants did not move for summary judgment as to the City of  
25 Tombstone. *See* December 1, 2008 Order (finding Plaintiffs had stated claims against City of  
26 Tombstone where claims were adequately stated against individual defendants). Although  
27 Plaintiffs did not present evidence of a policy or custom of the City of Tombstone as to the  
28 Marshal's authority or the Fourth Amendment claims, because Defendants did not raise this issue  
in their Motion for Summary Judgment, Plaintiffs had no reason to present such evidence and  
summary judgment on the Fourth Amendment claims against the City of Tombstone is not  
appropriate.