ARIZONA COURT OF APPEALS

DIVISION ONE

TOWN OF FLORENCE, a political subdivision of the State of Arizona Plaintiffs/Appellants, v. FLORENCE COPPER, *et al.* Defendants/Appellees.	Court of Appeals Division One No. 1 CA-CV 19-0504 Maricopa County Superior Court Case No.: 2015-000325

AMENDED OPENING BRIEF OF PLAINTIFF/ APPELLANT TOWN OF FLORENCE

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Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

This zoning appeal arises from a declaratory judgment action in which the Town of Florence ("Town") requested an order declaring it illegal for Florence Copper, Inc. ("FCI") to operate a copper mine on property the Town zoned exclusively for residential use.[1] Mining is illegal by operation of law because an active 2007 Zoning Ordinance and 2007 Development Plan ("2007 PUD") limit development to residential uses. The trial court disagrees, finding that a 2003 Pre-Annexation Development Agreement ("PADA" or "Development Agreement") established a vested contractual right to mine that was not extinguished by the 2007 Zoning Ordinance. The preliminary question before the Court is whether, as a matter of law, the Town can enforce its zoning ordinance against the Property.

FCI owns 1,162 acres ("Property") located within a larger master-planned residential community of 5,800 acres ("Merrill Ranch"). In 2003, Merrill Ranch, formerly owned by W. Harrison Merrill ("Merrill"), was annexed into the Town by Ordinance No. 354-03 ("2003 Annexation Ordinance").[2] FCI acquired the Property in 2009 from Peoples Bank after Merrill lost Merrill Ranch in foreclosure proceedings.[3] When FCI purchased the Property, it was zoned for residential use by Zoning Ordinance No: 460-07; a municipal law properly enacted by the Town Council in 2007 at Merrill's request.[4] The Town has not enacted any zoning ordinances restricting uses on the Property since FCI acquired it in 2009.

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[1] The declaratory judgment action was decided against the Town after two summary judgment motions and a five-day bench trial. The trial court's findings of fact and conclusions of law are reflected in its 1/3/2019 ruling, which incorporates by reference the 8/16/2017, ruling on cross-motions for summary judgment. IR #412 and #239, respectively and Appendix A and B.

[2] Trial Exhibit ("TE") #83 and Appendix K.

[3] IR#412, p. 8 and Appendix A at p. 11.

[4] TE #22 and Appendix F, p. 58-65.

The Town has its own law, process, and procedure for zoning property within its boundaries.[5] The Town's zoning scheme allows for the creation of PUD (Planned Unit Development) mixed-use districts.[6] At Merrill's request, Merrill Ranch was zoned a PUD district.[7] By law, a PUD district "*may only be developed in accordance with an approved development plan* [emphasis added.]"[8] The only land uses allowed in the PUD district are those permitted by the underlying zoning or the approved development plan [emphasis added].[9] An "approved development plan" is one that has been reviewed and commented upon by the Planning Director, Technical Committee, Planning and Zoning Commission, Town Council and the public. Upon Town Council's final approval, the Town Zoning Map is amended by ordinance to reflect the PUD zoning and it is enforceable by law.[10]

Under the Town's zoning scheme, the "approved development plan" for Merrill Ranch was adopted by Ordinance in 2007 at Merrill's[11] request and in accordance with the zoning laws.[12] The 2007 Zoning Ordinance and the 2007 PUD master-planned state that the 2007 PUD supersedes "any previously accepted development (sic) Plan, Master Development Plan, or PUD Development Guide for the Merrill Ranch PUD."[13] Mining is not a permitted use under the 2007 PUD**;**

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[5] Town of Florence Development Code §150.001 *et. seq.*
[6] Town of Florence Development Code §150.069, TE #82, *formerly* §4-57, Appendix Q and R, respectively.
[7] TE #84, App. L, p. 187.
[8] Town of Florence Development Code §150.069(A) TE #82, *formerly*, §4-57(A), Appendix Q and R.
[9] Development Code §§ 150.069(C), TE #82, *formerly*, §4-57(C), App. Q and R.
[10] Development Code §§150.069(E)-(O),TE #82, *former*, §4-57(A), App. Q and R.
[11] The Court found that Merrill requested the rezoning and that his representatives coordinated it and his attorneys drafted the 2007 PUD.
[12] Zoning Ordinance No: 460-07 and the 2007 development plan ("2007 PUD), TE #22 and 26, respectively. Appendix F and G.
[13] 2007 Zoning Ordinance #22, ¶6 and 2007 PUD, TE #26, p. 70 – IV(C), App. F,

mining is only mentioned as an historical event.[14] Since the PUD district can only be developed by the approved development plan (2007 PUD) and mining is not listed as a permitted use, it is illegal under the laws of the Town of Florence for Florence Copper to mine on the Property. The Town is entitled to declaratory relief.

The trial court should have decided this case on the language of the 2007 Zoning Ordinance, the 2007 PUD, and the Development Code. In finding against the Town, however, the trial court ruled that notwithstanding the 2007 Zoning Ordinance, a 2003 Pre-Annexation Development Agreement[15] between the Town and Merrill granted Merrill (and FCI by extension) a vested, contractual right to mine the Property as a nonconforming use. The 23-page PADA never mentions mining. The PADA incorporated by reference a 2003 PUD that was attached to the PADA as Exhibit B. Arguably, the 2003 PUD preserved mining as a nonconforming use in an area referred to as the BHP Copper Mine Overlay. Under ¶6(a) of the PADA, development of the Property was to be in accordance the 2003 PUD and PADA unless otherwise amended pursuant to the Agreement. The PADA acknowledges that the PUD will be amended from time to time during the 35-year term.[16] Notably, the 2003 PUD specifically dictated how it was to be amended:[17]

> This PUD may be amended by the same procedure as it was adopted, by ordinance. Each amendment shall include all sections or portions of the PUD that are affected by the change.
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p. 59 and G, p. 86.

[14] "Site History" states: "… Currently the site is vacant, but historically portions of the site were used for mining and agricultural purposes." (TE #26 p. 15)

[15] Resolution 872-03, approved December 1, 2003 (TE #1), Appendix A.

[16] TE#1, PADA p. 5; App. H, p. 98, ¶6(b).

[17] TE #1, p. 29 and App. H, p. 138.

> This plan may be amended as necessary in the same manner it was adopted; by ordinance.

The Town believes that any right to mine that may have existed was extinguished as a matter of law when the 2003 PUD was superseded by the 2007 PUD through adoption of the 2007 Zoning Ordinance.[18] The trial court disagreed: deciding that since the 2003 PUD was incorporated by reference into the PADA, it could only be amended by amending the PADA. By its terms, the PADA required amendments be by mutual agreement, in writing, signed by both parties, and filed with the Pinal County Recorder. *See also,* A.R.S. §9-500.05(C).[19] Following its faulty PADA analysis, the court conducted a five-day bench trial to determine whether Merrill subjectively intended to give up his mining rights and whether the parties had properly amended the PADA. The court answered "no" to both questions and concluded that FCI's right to mine the Property had been preserved.

The Town asks that this Court reverse the trial court's decision because it is wrong as a matter of law and the antithesis of sound public policy in zoning and planning. The trial court violated the separation of powers when it refused to enforce the Town's lawful zoning ordinances. The trial court created an entirely new procedure for amending PUD zoning that conflicts with the Town's statutory scheme and the amendment provision in the 2003 PUD, thereby interfering with the police power. The trial court ignored the unambiguous "supersedes" language in the 2007 PUD and the edict in the 2003 PUD that it was to be amended by ordinance. Additionally, the trial court's decision leads to absurd results. Instead

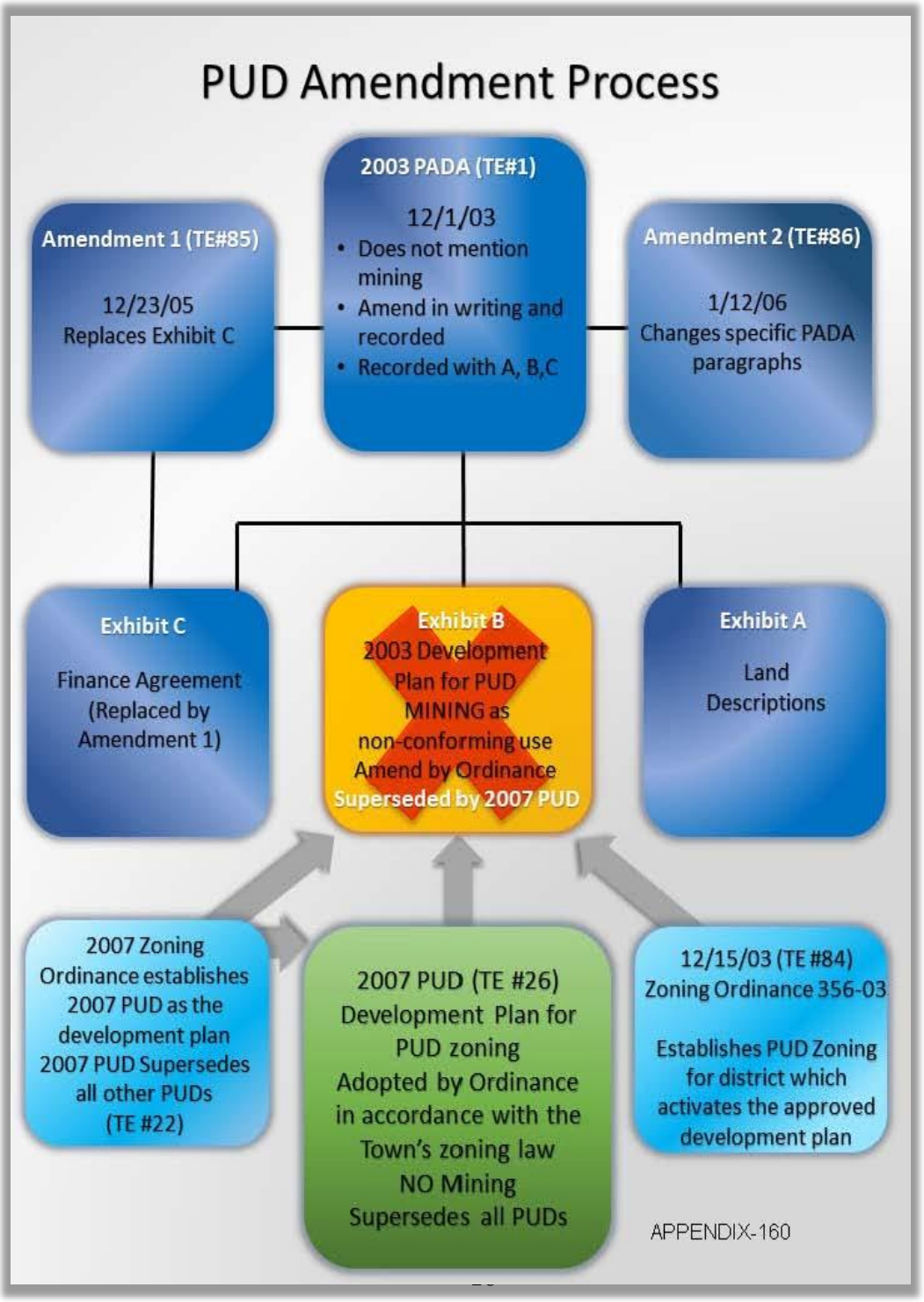
[18] This PUD amendment procedure was consistent with the Development Code and the amendment provisions of the 2003 PUD and did not conflict with the PADA.
[19] A.R.S. §9-500.05(C) states, "a development agreement may be amended, or cancelled in whole or in part, by mutual consent of the parties to the development agreement or by the successors in interest or assigns.

of looking at the Town's Zoning Map to determine permitted uses on the Property, it took a bench trial lasting five days, with 10 witnesses, 250 exhibits, numerous depositions, videotaped depositions, and two summary judgment motions to make the call. The court's decision ultimately recognizes two conflicting PUDs for the same Property, a violation of state and local law that will only lead to confusion for the Town and other property owners in the Merrill Ranch District.[20] The state and locally mandated public participation processes are eviscerated because after the public participated in a year-long procedure for approval of the residential master-planned community reflected in the 2007 PUD, the citizens of Florence will get a copper mine in their neighborhood instead.

The Town's analysis of the case fits with the law, public policy and zoning and planning practices. Merrill and the Town entered a PADA to facilitate annexation. The parties anticipated that soon after execution of the PADA, Merrill Ranch would be annexed into the Town by Ordinance, be designated PUD by Ordinance and be developed in accordance with the 2003 PUD as the "approved development plan." As recognized in both the PADA and the 2003 PUD, the terms of the PADA required flexibility so the parties could account for changing conditions over thirty-five years. On two occasions when the parties needed to change the PADA, they amended it in a signed, recorded writing. When Merrill wanted to replace the 2003 PUD with the 2007 PUD (without amending the PADA) that was accomplished by ordinance in accord with the 2003 PUD amendment

[20] FCI owns only 1,162 of the 5,800 acres in the Merrill Ranch district governed by the 2007 PUD. The trial court's ruling gives all property owners in the District the right to develop under either the 2003 PD or the 2007 PUD or arguably to mix and match. Such a scheme is not enforceable.

provisions and the Development Code. This thoughtful and legally consistent process can be depicted as follows:



The Town's legislative process does not violate any contractual obligations in the PADA and is consistent with its terms. Since the Town has the police power to regulate zoning, it would violate the separation of powers for the Court to disregard the Town's lawful process to amend PUD zoning or interfere with the enforcement of the 2007 Zoning Ordinance. The Town respectfully requests the Court to reverse the trial court's order and rule that the 2007 Zoning Ordinance and 2007 PUD apply to the Property and that mining is an illegal use.

If the Court reverses the trial court's ruling, the Town asks that the Court vacate the $1.7 million attorney fee award because FCI would not be the prevailing party.[21] In the alternative, the Town requests that the Court vacate the attorney fee award since, as demonstrated above, the Town's claim did not arise out of contract within the meaning of A.R.S. §12-341.01. The Town's claim is rooted in zoning, which is a legislative function.

Lastly, the Town requests that the Court reverse the trial court's Judgment that specific performance is a proper remedy for a hypothetical, nonidentified breach of the PADA.[22] This order is legally improper because, in its Counterclaims, FCI admits that it is in breach of the PADA and that performance is impossible. IR #367, ¶¶28, 91-92. Specific performance is not available to FCI when it is in breach of the agreement. Furthermore, the court's order is confusing and unnecessary considering that FCI agrees that the Town is not in breach of the PADA. The PADA has 20 more years on its term. The Town should not be bound or restrained by this ambiguous ruling for the next two decades. The Town respectfully requests the Court vacate item 3.d of the Judgment.

[21] IR #450 and App. D, p. 46.
[22] IR #449 and App. C, p. 42

II. STATEMENT OF THE CASE

This matter originated as a two-count Complaint filed on October 13, 2013, by the Town against FCI (IR #1). Count I was a declaratory judgment action to determine the zoning and permitted uses on the Property under Zoning Ordinance No. 460-07 ("2007 Zoning Ordinance"). Count II was a statutory condemnation action authorized by A.R.S. §12-1111 et. seq. and A.R.S. §9-462.02. FCI filed Counterclaims against the Town, but they were stayed while the trial court considered the Town's declaratory judgment action.

FCI attempted to remove the case to federal court but it was remanded to Pinal County (IR#14). In April 2015, FCI filed a Motion to Dismiss and Change of Venue (IR #31). Pinal County Superior Court granted the motion for change of venue and transferred the case to Maricopa County in January 2015. By Order of August 25, 2015, Count II (eminent domain) was dismissed without prejudice based on FCI's Motion arguing that the claim was not ripe (IR #106, Order August 25, 2015).

Count I, the Town's declaratory judgment action, sought an order from the trial court declaring that mining is not a legal use on the Property because it is zoned it exclusively for residential use. On November 10, 2015, the Town moved for summary judgment as a matter of law based primarily on the legal effect of the 2007 rezoning (IR #125). The Town also argued that any non-conforming use to mine that may have existed was superseded or abandoned before FCI required the Property.

In response, FCI filed a Rule 56(f) motion which was granted on February 2, 2016 (IR #116-125). The parties conducted discovery and completed briefing on cross-motions for summary judgment and the Court issued its ruling on August 14,

2017 (IR #239). The Court granted partial summary judgment to FCI finding that the Pre-Annexation Development Agreement ("PADA") established a vested right to in-situ copper mining in the BHP Copper Mine Overlay Map as indicated in the 2003 PUD. The Court found that there was a triable fact on whether the actions of the Town and Merrill during the 2007 rezoning extinguish that right. *Id.*

A bench trial was held on December 5-13, 2018, that included ten live witnesses, three video depositions, one written deposition, nearly 250 exhibits, dozens of stipulated facts and the evidence from two summary judgment motions. At the conclusion of the trial, the court found that Merrill had not relinquished, waived or abandoned the non-conforming right to mine that the court found existed in the PADA. (IR #412. App. A and IR #239, App. B)

The parties then stipulated to a form of judgment with only the attorney fee issue remaining. The Town argued that case arose from a zoning matter, not a contract and that the $10,000 limit in A.R.S. §12-348(4) applied. The trial court disagreed and ordered the Town to pay $1,700,000 in attorney fees (IR #449, 450, App. C and D). The court permitted FCI to argue against the stipulated judgment and move for summary judgment on two of the stayed counterclaims. The court granted FCI summary judgment on two of its counterclaims even though they had been stayed throughout the litigation (IR#450, 451). The Court ruled in the abstract that if the Town breached the PADA, FCI would be allowed as a matter of law to seek specific performance. The Judgment was issued on June 7, 2019 (IR #451 and App. E), which states, in part:

> 3. The Court grants the following declaratory judgment as to the interpretation of the Development Agreement:

(a) Under the terms of the Development Agreement, Florence Copper, Inc. has a vested right to conduct in-situ mining operations on its Florence property, including the right to maintain and expand nonconforming uses or structures related to mining on property designated as the BHP Copper Mine Overlay area in the Development Agreement and incorporated documents dated December 3, 2003.

(b) Florence Copper, Inc.'s vested right to mine runs with the land.

(c) Florence Copper, Inc.'s vested right to mine has not been lost by an amendment to the Development Agreement, or any mutual agreement to modify the vested right to mind, or by abandonment.

(d) In the event of a breach of the Development Agreement by the Town of Florence, Florence Copper has the available election of judicial remedies for breach of contract and may elect either specific performance or money damages.

The Town filed a timely appeal on June 28, 2019 (IR #452).

III. STATEMENT OF THE FACTS

A. Relevant Actors

A.1 "**Town**": Appellant/ Plaintiff Town of Florence brought the declaratory judgment action below to determine the zoning and permitted uses on the Property under Zoning Ordinance No. 460-07 ("2007 Zoning Ordinance").

A.2 "**FCI**": Appellee/ Defendant Florence Copper, Inc. is the owner of 1,162 acres of land located in the Town of Florence ("Property"). FCI, formerly known as Curis Resources (Arizona), Inc., acquired the Property in 2009 after W. Harrison Merrill lost it to the People's Bank. The Property is part of a 5,800 PUD (Planned Unit Development) district established in accordance with state and local law.

A.3 **"Merrill":** W. Harrison Merrill is an attorney who has practiced corporate and securities law and real estate law. He has over 30 years of experience as a real estate developer and is an expert in master-planned communities. (TE# 399, p. 11-12; deposition of W. Harrison Merrill, p. 12:8-16 and CV at Exhibit 7

and App. P). In 2001, entities owned by Merrill acquired ownership of approximately 8,750 acres of land in Pinal County which included the 1,182 Property. In 2003, these entities (CMR/CASA Grande, L.L.C, Florence Copper, Inc., El Em, L.L.C., Vanguard Properties, Inc., and Roadrunner Resorts, L.L.C.) and the Town entered into a Pre-Annexation Development Agreement ("PADA") (TE #83). The Florence Copper, Inc. involved in the 2003 annexation is not the same company as the Defendant/ Appellant. For simplification, the term "Merrill" will be used in this brief to encompass the ownership or interests of all the Merrill entities.

B. Merrill Ranch and the Property:

The term "Merrill Ranch" refers to the nearly 5,800 acres annexed into the Town by the enactment of Ordinance No. 354-03 and zoned PUD by Ordinance No. 356-03. (TE # 83 and 84 and App. K and L, respectively). Merrill Ranch was later rezoned by Ordinance No. 460-07 at a reduced acreage of 5,800. The term "Property" refers to the 1,182 acres FCI purchased in December 2009. (IR #374, JPTS Stipulated Facts p. 4-5 ¶1-3).

C. Pre-Annexation Development Agreement ("PADA)

The Pre-Annexation Development Agreement ("PADA") between the Town and Merrill was approved by Resolution No. 872-03 on December 1, 2003. (TE #1, p. 1 and App. H, p. 1). Notably, the PADA is still in effect and applies not only to the Property but to the other 4,600 plus acres owned by entities other than FCI. The PADA is a contract under A.R.S. §9-500.05. The PADA does not establish zoning, which is a legislative act requiring that the Town Council enact an Ordinance. Since it is a contract, a development agreement "may be amended, or canceled in whole or in part, by mutual consent of the parties…" A.R.S. §9-500.05(C). Paragraph 32

of the PADA states that "no amendment shall be made to [the PADA] except by written document executed by Town and Owner." Any amendment to the PADA needed to be recorded. (TE 1, PADA §32, App. H, p. 108).

Mining is not mentioned in Resolution 872-03 or the 23-page PADA document (TE #1 and App. H, p. 93 and 94-116). Mining is only mentioned in the 2003 PUD, which is a development plan for a PUD zoning district approved by the Town under §150.069 of the Development Code.[23] A Whereas Clause in the PADA states:

> Owner has submitted to the Town for review and approval the documents known as the Planned Unit Development for Merrill Ranch dated November 7, 2003 ("Development Plan") as set forth in Exhibit B.

(TE #1, p. 2, App. H, p. 94). The 2003 PUD was attached to the PADA as Exhibit B and incorporated by reference. ("All documents and exhibits referred to in this Agreement are hereby incorporated by reference into this Agreement" TE #1, p. 4. App. H, p. 96).

The PADA does have numerous generic references to the "Development Plan" which will be referred to collectively as "Pada Development Plan Provisions." For example, Paragraph 3, grants the owner a vested right to "develop and use the Property in accordance with [the PADA] and the Development Plan."; Paragraph 4 grants the Owner the right to implement development in accordance with the Development Plan for a period of thirty-five (35) years; Paragraph 5, establishes that the rights under the PADA and Development Agreement run with the land; Paragraph 6(a) provides "the development of the Property shall be in

[23] The Development Code is the Town of Florence's Land Use and zoning ordinances. It is excerpted at TE # 82 and App. Q. It does not differ materially from the version in effect at the time the PADA was signed, which is excerpted in App. R).

accordance with the Development Plan and [the PADA] unless otherwise amended pursuant to the Agreement; Paragraph 6(b) establishes that the Owner expects that amendments to the Development Plan will be necessary because of the significant time period (35 years) and changes in markets and other events. There is no evidence that either party wanted to amend any of the PADA Development Plan Provisions as part of the rezoning in 2007 so no amendment of the PADA was required. These PADA Development Plan Provisions are generic and transferable to the 2007 PUD.

D. PADA Amendments

Since 2003, there have been two amendments to the PADA. The Town Council approved Amendment 1 by Resolution on December 19, 2005 (TE #85). It modified Exhibit C to the 2003 PADA which was an Intergovernmental Agreement for financing participation between the Town, Merrill and Pulte Home Corporation. The Amendment did not relate to mining or to the 2003 PUD.

The Town Council Approved Amendment 2 by Resolution No. 982-06 on January 3, 2006 (TE #86). Amendment 2 modified the language in Paragraphs 6(e), 50, 51, 52, 53 and 54. The Amendment did not relate to mining or the 2003 PUD.

E. 2003 PUD Ordinance and 2003 PUD

On December 15, 2003, the Town adopted Ordinance No. 356-03, amending the Town's zoning map to designate Merrill Ranch as a Planned Unit Development ("PUD") mixed-use zoning, for the 2003 PUD to take effect. (TE #84 and App. L, p. 157). It is this Ordinance, and not the PADA, that "activates" the 2003 PUD as the "approved development plan" for the PUD District.[24]

[24] When the PADA is signed on December 1, 2003, Merrill Ranch is not yet annexed into the Town. The annexation ordinance is adopted on December 15, 2003, the

The Town of Florence Development Code §150.069 governs PUD districts. Section §150.069 (A) states, in part:

> This [PUD] district, which may only be developed in accordance with an approved development plan [emphasis added] is further established to provide both the developer and the town with reasonable assurances that specific, proposed uses, intensities and phasing are consistent with the adopted general plan.

Likewise, Development Code §150.069(C), states:

> All uses permitted within the PUD district are determined by the underlying zoning district, or by an approved development plan for the site [emphasis added].

Consistent with the requirements of A.R.S. §9-462.05, the Development Code establishes the procedure for the approval of a development plan, requiring review by staff, the Technical Committee, the Planning and Zoning Commission and Town Council with several required public meetings and hearings along the way. Development Code §150.069(E)-(N) at TE #82 and App.Q, p. 175-180 and A.R.S. §9-462.03. Notably, "upon Town Council approval, the PUD zoning shall be, by ordinance, reflected on the town zoning map." Development Code §150.069(O) at TE #82 and App. Q. This is the exact impact of Ordinance No. 356-03, which states that the appropriate public hearings were held, and recommendations obtained and that:

> …the Zoning Map, Florence Arizona, is hereby amended by changing the zoning classification of the parcel of land from AG Agricultural Zone to PUD (Planned Unit Development) Mixed Use Zoning as depicted on attached Exhibit A.

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same day as the property is rezoned to PUD. Even thought the 2003 PUD was attached as an exhibit to the PADA, it had no legal significance until Ordinance 356-03 was adopted.

(TE #84 and App. L, p. 157). The 2003 PUD contains further factual evidence that Ordinance No. 356-03, not the PADA, implemented the 2003 PUD (TE #1, 63, App. L. p. 138). Section III.B.3 states:

> This PUD may be amended by the same procedure as it was adopted, by ordinance. Each amendment shall include all sections or portions of the PUD that are affected by the change.

Section IV.C under "Procedures" states:

> This plan may be amended as necessary in the same manner it was adopted; by ordinance.

(TE #1, p. 50) The 2003 PUD did not contain <u>any</u> reference to the PADA and did not require that the PADA be amended in order for a PUD amendment enacted by ordinance to be effective.

F. 2003 PUD and References to Mining

In the over one hundred pages of the 2003 PUD "mining" is mentioned in exactly four places. The trial court referenced the provisions in its order (IR #412, p. 4-5 and App. A, p. 7-8). Under the "Site History" on page 8 it states (TE #1, p. 42 and App. H, 129):

> …In addition, BHP has a proposed underground leaching permit area for a copper mine immediately south of Hunt Highway.

On maps on pages 19, 21 and 28, the words "BHP Copper Mine Overlay" appear in small print. (TE #1, p. 53, 55, 62 and App. H,130, 135, 137, highlight) Paragraph 7, which preserves certain non-conforming uses of land, provides, in part:

> If any such non-conforming use of land ceases for any reason for a period of more than 180 days, any subsequent use of such land shall conform to the regulations specified in this PUD for the district in which such land is located with the exception of coppering mining operations.

Lastly, Paragraph 12 states (TE #1, p. 64, App. H, p. 139):

> "Drill sites – Drilling, mining or exploration for any minerals, oil, gas or other hydrocarbon substances shall be prohibited in the PUD area with the

> exception of that area indicated as the BHP Copper Mine until said mine is closed."

(TE #1, p. 64, App. H, p. 139) These four provisions in the 2003 PUD are the basis for the Court's finding that in-situ copper mining was preserved as a non-conforming use by the 2003 PADA.

G. 2007 PUD Amendment

The Court found that at the time that he requested the 2007 rezoning, Merrill was uninterested in mining because he did not see it as a viable option for the Property. (IR #412, p. 16 and App. A, p. 19). In 2005-2007, Copper prices plummeted, and real estate skyrocketed. *Id.* Merrill repeatedly testified in his deposition, and stated in his affidavit, that he was not thinking about mining, no one talked about mining during the rezoning and he was not concerned about mining. In its order, the trial court repeatedly mentions that no one from the Town or Merrill's camp discussed mining during the year-long negotiations. Merrill repeatedly refused to sign an affidavit presented to him by FCI's counsel that stated various versions of Merrill "did not intend to give up mining." Mining was just not on Merrill's radar during the 2007 PUD Zoning Amendment process.

The Court found that Merrill initiated the petition to rezone his property through an amendment to the 2003 PUD. This is consistent with the Development Code, which requires the property owner to submit a preliminary PUD. The Court found that Merrill and his attorneys coordinated the rezoning efforts. The Court found that the evidence established that Merrill's attorneys prepared the 2007 PUD and submitted it to the Town for approval. Merrill's attorneys deleted any reference to mining as a nonconforming use, the reference to the BHP Copper Mine Overlay on the maps and the authority for drilling and

exploration rights in the Overlay. (IR #412, p. 16, App. A, 19-20). The Court found that the removal of the mining provisions appeared intentional. (IR #239, p. 15-16. App. B, p. 39-40). The negotiations took over a year. (IR #412, p. 16, App. A, 19)

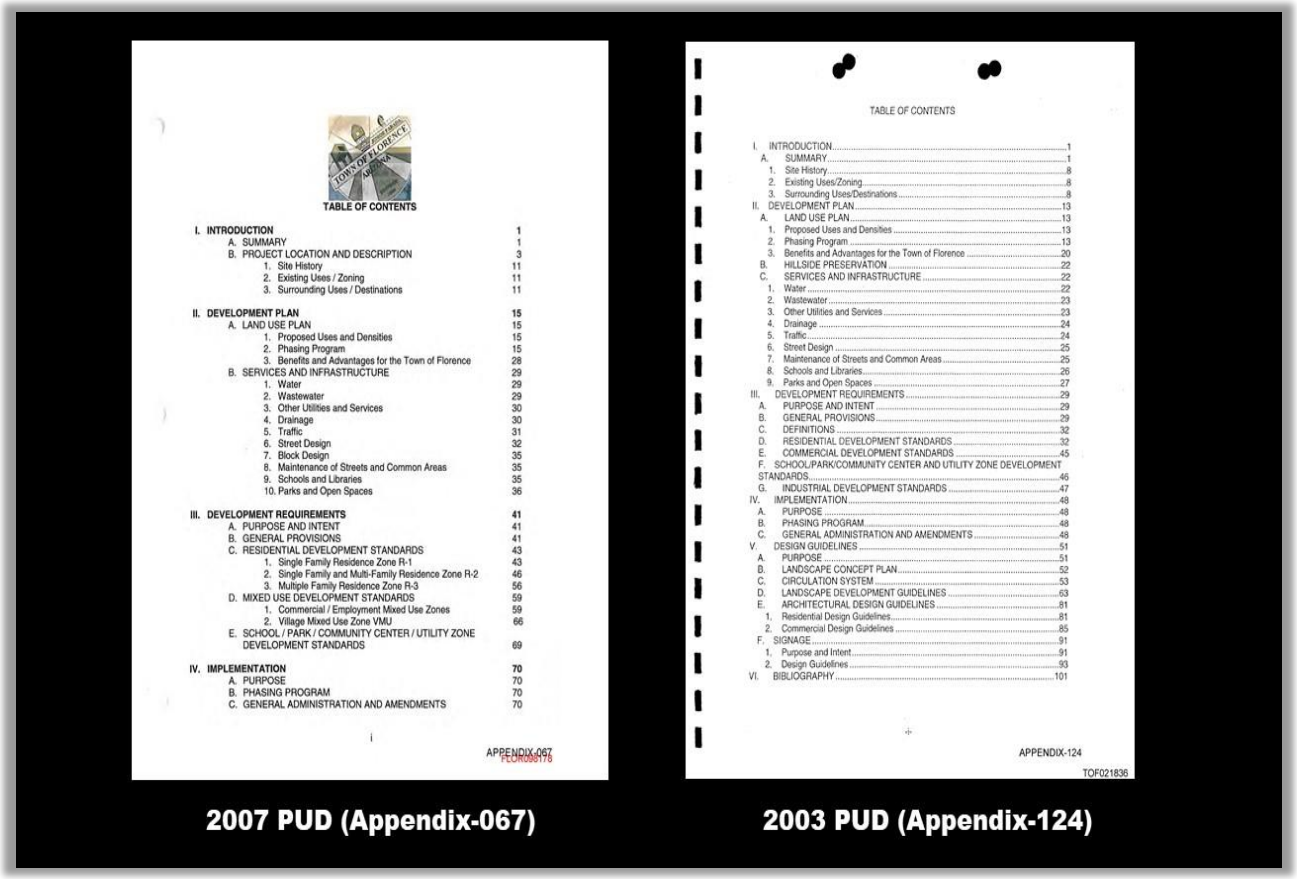
As discussed previously, the 2003 PUD specifically stated in more than one section that it could be amended by Ordinance (TE #1, p. 29 and App. H, p. 138). This is consistent with the Town's zoning process codified in the Development Code. At Merrill's behest, and following the procedures in Development Code §150.069(E)-(N), the Town Council enacted Ordinance No. 460-07, thereby amending the Town of Florence Zoning Map by amending the PUD zoning for the Merrill Ranch Development. The 2007 Ordinance established conditions, including the following:

> 6. The Merrill Ranch Master Development Plan, dated January 26, 2007, as may be amended to reflect the final stipulations of Town Council approval, **shall supersede** [emphasis added] any previously accepted development Plan, Master Development Plan, or PUD Development Guide for the Merrill Ranch PUD.

The trial court found that Merrill's attorney either suggested or approved the "shall supersede" language in the 2007 Ordinance. Comparing the extensive Table of Contents in the 2003 PUD and the 2007 PUD it is apparent that the 2007 PUD

subsumes the subject matter of the 2003 PUD and is meant to replace it (Compare, App. G, p. 66 and H, p. 124).

In pursuing the rezoning, Merrill's attorneys followed the requirements in the 2003



PUD that required that each amendment "include all sections or portions of the PUD that are affected by the change." TE #1, p. 29 and App. H, p. 138.

Once the 2007 Zoning Ordinance was adopted by the Town Council, the 2007 PUD became the only approved PUD for the Merrill Ranch PUD district. By operation of law, only the uses enumerated in the 2007 PUD were permitted within the PUD district. See Development Code §150.069(C): "All uses permitted within the PUD district are determined by the underlying zoning district, or by an approved development plan for the site [emphasis added]." Since the 2007 PUD

did not permit mining, any nonconforming use for mining that may have existed in the 2003 PUD was extinguished upon passage of the 2007 Zoning Ordinance. Contrary to the trial court's ruling, no amendment to the PADA was required to yield this result.

IV. ISSUES ON APPEAL

1. **The trial court violated the separation of powers doctrine when it failed to give deference to the legislative act of the Town.**

2. **The trial court created a new zoning scheme that resulted in two PUDs applying to a single property, in violation of state and local law.**

3. **The trial court eviscerated the public input mandates of the state and local planning process by ruling that the 2003 PUD survived the 2007 rezoning process.**

4. **The trial court erred as a matter of law in its contract interpretation when it determined that the 2003 PUD could not be amended without amending the PADA.**

5. **The trial court erred as a matter of law and acted in an arbitrary and capricious manner when it awarded Florence Copper $1.7 million in attorney fees under A.R.S. §12-341.01 and included fees for work on the counterclaims that had not been resolved.**

6. **The trial court act contrary to law, arbitrarily and capriciously and beyond its jurisdiction when it determined that specific performance is available as a judicial remedy under the PADA when Florence Cooper admits that Town did not breach the agreement and Florence Copper is in breach.**

V. ARGUMENT

A. Standard of Review

After a bench trial, the Court reviews the trial court's legal conclusions *de novo* but defers to its findings of fact unless clearly erroneous. *Town of Marana v. Pima Cnty.*, 230 Ariz. 142, 152, ¶ 46, 281 P.3d 1010, 1020 (App. 2012). Statutory interpretation is reviewed *de novo*, as is the interpretation of an ordinance or contract. See *Home Builders Ass'n of Cent. Ariz. v. City of Maricopa*, 215 Ariz. 146, ¶ 6, 158 P.3d 869, 872 (App. 2007) (statutory interpretation reviewed *de novo*); *Speros v. Yu*, 207 Ariz. 153, ¶ 11, 83 P.3d 1094, 1097 (App.2004) (interpretation of ordinance reviewed *de novo*); *ELM Retirement Center, LP v. Callaway*, 226 Ariz. 287, 290, ¶ 15, 246 P.3d 938, 941 (App. 2010) (appellate court reviews issues of contract interpretation de novo).

1. THE TRIAL COURT VIOLATED THE SEPARATION OF POWERS DOCTRINE WHEN IT REFUSED TO APPLY THE TOWN'S PUD ZONING ORDINANCE TO THE PROPERTY.

A. The Town's Zoning Authority

Zoning laws are designed to restrict how a piece of property can be used. In Arizona, zoning is a legislative act. *Redelsperger v. City of Avondale*, 207 Ariz. 430, 437, 87 P.3d 843, 850 (Ct. App. 2004). The Arizona Legislature delegated its zoning authority to cities, towns and counties.[25] A.R.S. §§ 9–462 through 9–462.08 and 11–801 through 11–876. Consequently, the Town is authorized by statute to zone or rezone property by ordinance if certain procedures are followed.[26] Since

[25] For the purpose of A.R.S. §9-462 *et. seq*, municipal or municipality includes a city or a town. See A.R.S. §9-462(A)(5).

[26] A.R.S. §9-462.01: A. Pursuant to this article, the legislative body of any municipality by ordinance [emphasis added] may in order to conserve and promote the public health, safety and general welfare:

the Municipal zoning authority derives from the state, the power must be exercised within the limits of the authority and in strict compliance with the statutes. *Jachimek v. Superior Court In & For Cty. of Maricopa*, 169 Ariz. 317, 318–19, 819 P.2d 487, 488–89 (1991)(citations omitted). State law requires the Town to provide a public review process as outlined in the statutes, and to establish by ordinance "all necessary and appropriate rules and procedures governing application for zoning amendment… and all other actions which may be considered necessary or desirable for enforcement of the zoning ordinance." A.R.S. §§9-462.03(A) and 9-462(D).

A "zoning ordinance" is a municipal ordinance regulating the use of land or structures, or both. A.R.S. §9-462(A)(5). Once a zoning ordinance is enacted, the Town has the authority to enforce it in the same manner as other municipal ordinances are enforced. A.R.S. §9-462.05.

B. The Town's PUD Zoning Legislation

The power to zone is part of the police power. The delegation of the power to zone also includes the process that must be followed to achieve the zoning. *Transamerica Title Ins. Co. v. City of Tucson*, 157 Ariz. 346, 350, 757 P.2d 1055, 1059 (1988). Through the authority granted by the state, the Town has enacted ordinances that establish the procedure for zoning or rezoning of land within its jurisdiction.

The Town's establishment of PUD districts is an example of the Town's exercise of its police powers in accordance with the state statutes. Development Code §150.069, TE #82, formerly §4-57, Appendix Q and R, respectively. Both the 2003 PUD and the 2007 PUD were approved through the PUD process.

1. Regulate the use of buildings, structures and land as between agriculture, residence, industry, business and other purposes.

Consistent with the ordinance, for both PUDs, Merrill submitted a detailed development plan for the Town's approval. The PUDs were vetted by staff, committees, the public and the Town Council as required by the ordinance and state law. At the conclusion of both processes, the Town Council adopted ordinances amending the Town of Florence Zoning Map. (2007 Zoning Ordinance 460-07, #22, App. F and 2006 Zoning Ordinance 356-03, App. L).

The Town's PUD ordinance is clear: a PUD district may only be developed in accordance with an approved development plan and the only uses allowed in the PUD district are those permitted by the underlying zoning or the approved development plan. (Development Code §150.069(A), TE #82, formerly, §4-57(A), Appendix Q and R and Development Code §§ 150.069(C), TE #82, formerly, §4-57(C), App. Q and R). Consequently, FCI cannot mine on the Property unless FCI can identify an active development plan for its Property that lists mining as a permitted use. To allow mining without the authorizing PUD violates the ordinance and falls outside the authority granted to the Town by the legislature.

C. The Separation of Powers

The legislature delegated the zoning authority to the Town. The Town Council, consistent with the state-law requirements, adopted a zoning scheme pursuant to its police powers to provide for the health, safety, and welfare of its residents. The trial court was compelled under the separation of powers doctrine to defer to the Town's laws and procedure in determining the zoning for the Property. Article III of the Arizona Constitution, states:

> The powers of the government of the state of Arizona shall be divided into three separate departments, the legislative, the executive, and the judicial; and, except as provided in this constitution, such departments shall be

> separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others

The enactment of zoning ordinances is a function reserved to the legislative branch of government. *City of Phoenix v. Oglesby*, 112 Ariz. 64, 537 P.2d 934 (1975); *New Pueblo Const., Inc. v. Pima County,* 120 Ariz. 354, 586 P.2d 199 (App.1978). The amendment of zoning ordinances is an exclusively legislative function as well. *Wait v. City of Scottsdale,* 127 Ariz. 107, 618 P.2d 601 (1980); *see Fritz v. City of Kingman,* 191 Ariz. 432, 957 P.2d 337 (1998). The establishment of the manner in which a zoning ordinance may validly be adopted is also the exclusive function of the legislative branch of government. *City of Phoenix v. Fehlner,* 90 Ariz. 13, 363 P.2d 607 (1961). When deciding a zoning case, courts cannot substitute their judgment for that of the legislative bodies responsible for passing zoning regulations. *Fidelity Nat'l Title Ins. Co. v. Pima County,* 171 Ariz. 427, 831 P.2d 426 (App.1992); *Rubi v. 49'er Country Club Estates, Inc.*, 7 Ariz.App. 408, 440 P.2d 44 (1968).

The trial court violated the separation of powers when it ruled the right to mine in the 2003 PUD survived the 2007 Zoning Amendment because the PADA was not amended in the rezoning process. The trial court's decision is at odds with the Town's Development Code and the express terms of the 2003 PUD. The Development Code determines the process for adopting or amending the PUD --- no recording of a signed document is required. The 2003 PUD explicitly stated it could be amended by Ordinance. The trial court, however, formulated a different threshold for amending a PUD, ignoring the Town Council procedures. The trial court then applied its own rules to the Property to FCI's benefit. The Development Code provides that only uses permitted by an approved development plan are

allowed in a PUD district development. Notwithstanding Florence's laws, the court decided mining can occur even though the 2003 PUD (which addressed mining rights) has been superseded by the 2007 Zoning Ordinance and 2007 PUD which extinguished mining rights.

The trial court's interference with the Town's zoning powers is particularly egregious in this case. Merrill, as the owner of the Property (and thousands of acres more in Merrill Ranch) *requested* that the Town rezone the Property. Merrill signed a consent to the conditions of the rezoning (IR #22 and App. F, 65). The Town rezoned in accordance with the 2007 PUD submitted by Merrill and his attorneys. The trial court found that Merrill and his attorneys intentionally removed mining from the 2007 PUD, removing all provisions related to nonconforming use. The "Site History" section of the 2007 PUD refers to mining as an historical use, in contrast to the 2003 PUD which referenced an active BHP permit. Merrill, an attorney with an LLM in real estate and corporate law, and experienced developer was familiar with the Town's PUD zoning district ordinance. The Town, Merrill, and his attorney were intricately involved in the PADA and the development of the 2003 PUD and its 2007 amendment. These actors <u>intended to amend</u> the 2003 PUD. Merrill's attorney included a provision that ensured that the 2007 PUD would "supersede" any other PUD or development plan for Merrill Ranch. Everything the Town and Merrill did was consistent with the PUD zoning provisions in the Development Code. There is simply no legal justification for the trial court to interfere with the intended, lawful effect of the 2007 Zoning Amendment. The Town respectfully requests the Court to vacate the Town's order as a violation of the separation of powers doctrine.

2. THE TRIAL COURT CREATED A NEW ZONING SCHEME THAT RESULTED IN TWO PUDS APPLYING TO A SINGLE PROPERTY, IN VIOLATION OF STATE AND LOCAL LAW.

Merrill requested the 2007 Zoning Amendment and removed all references to mining from the 2007 PUD. The trial court rejected that this conduct demonstrated that Merrill intended to abandon mining. The trial court found that Merrill wanted "the best of both worlds" and "to keep his options open." The trial court found that "the evidence shows Merrill preserved an option to mine the Property and then develop the land for residential use after the copper was depleted." (IR # 412, 16-17, App. A, 19-20). This developer utopia the trial court has constructed from its view of the facts does not account for the practicalities of planning and zoning.

To start, the trial court's conclusion ignores that Merrill specifically requested that the 2007 Zoning Ordinance supersede his previous PUD zoning. Next, if Merrill can choose to develop under either the 2003 PUD or the 2007 PUD – so can all the other developers who own land in the remaining 4,000 acres in Merrill Ranch. For example, the Land Use Map for the 2003 PUD provides for golf courses on the north end of Merrill Ranch; the 2007 Land Use Map does not provide for any golf courses on the project. (Compare, TE #1, p. 12, App. H, p. 130 to TE #26, p. 16, App. G, p. 79). If, under the trial court's decision, Merrill can choose mining or houses under the 2003 PUD and 2007 PUD, respectively, a developer on the northside of Merrill Ranch would be permitted to choose between golf course and green space as well. This scenario undercut the health, safety and welfare component of zoning, because there is a limited free-for-all with the Town unable to plan and the public unable to participate in the development of its community in a meaningful manner.

To compound the issues with the implementation of the trial court's order, the decision would also allow the Town to elect to operate to under the 2003 PUD. For example, in the 2003 PUD, in the same section as the non-conforming use provisions related to mining it states:

> Any person, firm or corporation, whether a principal, agent, employee or otherwise, violating any provision of these regulations shall be prosecuted under the Town of Florence Development Code pertaining to misdemeanors; and compelled to comply with same.

Essentially, this provision permits the Town to charge people with a crime if they violate the PADA – even if it is not a crime under the Town Code. This provision was removed from the 2007 PUD. Under the trial court's reasoning, however, the Town could invoke the provisions of the 2003 PUD under the contractual terms of the PADA.

These examples demonstrate why the trial court erred as a matter of law when it determined that Merrill was shrewd enough to have vested rights under two PUDs for the same piece of property. While developers may desire flexibility, they cannot violate the law to achieve that result. The Town respectfully requests the Court vacate the trial court's order.

3. THE TRIAL COURT EVISCERATED THE PUBLIC INPUT MANDATES OF THE STATE AND LOCAL PLANNING PROCESS BY RULING THAT THE 2003 PUD SURVIVED THE 2007 REZONING PROCESS.

As discussed in §II, the Town receives its zoning authority from the state. See, A.R.S. A.R.S. § 9–462 through §9–462.08 and 11–801 through 11–876. Consequently, the Town must exercise its zoning power within the limits of that delegation. *Jachimek v. Superior Court In & For Cty. of Maricopa*, 169 Ariz. 317, 318–19, 819 P.2d 487, 488–89 (1991). State law requires public hearings on any

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matters that could change zoning on property. A.R.S. §9-462.03(B). Counties, cities and towns are required to pass ordinances that establish a public participation process for zoning matters. A.R.S. §9-462(D). The Town has enacted ordinances consistent with this obligation. Development Code §150.069(E)-(O) TE #82, formerly, §4-57(E)- (O), Appendix Q and R. The Town's process involves review or hearings before the Planning Director, Technical Committee, Planning and Zoning Committee.

The trial court acknowledged that the negotiation/planning process for the 2007 PADA took over year. The Town followed the Development Code to process the 2007 PUD. The Town conducted reviews, meetings and public hearings, consistent with its obligations under state and local law. The Town made available to those who participated in the public process the Comprehensive Master Community Plan and the 2007 PUD. Citizens were told that it superseded any past zoning plans for Merrill Ranch. People were talking about the incredible Master Planned Community including the 7,000 plus homes on FCI's Property. The trial court found that during the 2007 PUD process, no one discussed mining --- not Town Staff, Council, Merrill or the public. Housing was booming and that was the focus.

The unintended consequences of the trial court's ruling are apparent. The public unknowingly was misled about the zoning in their community. Members of the public purchased homes believing the 2007 Zoning Amendment controlled. The trial court's holding --- that the 2003 PUD survived notwithstanding the 2007 Zoning Amendment --- means the public cannot rely on the information they are provided by either the government or a developer regarding the potential land uses

in their neighborhood. Such a result cannot stand. It violates the separation of powers, sets bad public policy and results from an erroneous interpretation of the PADA.

4. THE TRIAL COURT ERRED AS A MATTER OF LAW IN ITS CONTRACT INTERPRETATION WHEN IT DETERMINED THAT THE 2003 PUD COULD NOT BE AMENDED WITHOUT AMENDING THE PADA.

The Court interprets a contract *de novo*. *Andrews v. Blake*, 205 Ariz. 236, 240, ¶ 12, 69 P.3d 7, 11 (2003). The preferred contract interpretation gives a reasonable, lawful and effective meaning to all terms in the agreement. *Cty. of La Paz v. Yakima Compost Co.*, 224 Ariz. 590, 599, ¶ 16, 233 P.3d 1169, 1178 (App. 2010). The Court looks at the entire agreement and the intention of the parties in order to give effect to every word. *Hamberlin v. Townsend*, 76 Ariz. 91, 196, 261 P. 2d 1003, 1006 (1953).

The trial court's reasoning regarding the contract interpretation is as follows: The PADA is a contract under A.R.S. §9-500.05. The 2003 PUD was incorporated by reference into the PADA. (TE #1, App. H ¶26) The 2003 PUD preserved mining as a nonconforming use in the BHP Copper Mine Overlay. The PADA at ¶32 provided it could only be amended through a document executed by both parties and filed in Pinal County. The PADA was amended on two occasions, neither having to do with mining or the 2003 PUD and those amendments to the PADA were recorded.

In 2007, Merrill asked the Town to rezone Merrill Ranch as a Master Planned Community. At the time of the rezoning, Merrill had no interest in mining and did not believe that mining was feasible on the property. He planned to build houses – a lot of them – including over 7,000 on the Property. It took a year to negotiate the

deal which was coordinated by Merrill's lawyers. Mining was not mentioned: not by Merrill, the Town or the Community. After the proper internal Town review and mandatory public meetings and hearing, the Town Council adopted Ordinance No. 460-07 amending the Town of Florence Zoning Map to reflect the new zoning. The parties did not record the 2007 PUD because it is not required under the PUD zoning ordinances. At the time of the 2007 Zoning, Merrill and the Town were the only two parties to the PADA. The 2007 Ordinance established conditions, including the following:

> 6. The Merrill Ranch Master Development Plan, dated January 26, 2007, as may be amended to reflect the final stipulations of Town Council approval, **shall supersede** [emphasis added] any previously accepted development Plan, Master Development Plan, or PUD Development Guide for the Merrill Ranch PUD.

The 2007 PUD drafted by Merrill's attorney contained the above language. In 2009, Merrill Ranch went into foreclosure and FCI acquired approximately 1,182 acres out of foreclosure. Developers also purchased portions of Merrill Ranch out of foreclosure. Those developers are subject to the PUD zoning on the property.

The Town filed the declaratory judgment action to obtain a legal ruling on the effect of the 2007 PUD zoning on mining rights on the Property. In ruling against the Town, the trial court interpreted the PADA and determined that since the 2007 PUD was not recorded, the PADA was not amended and the 2003 PUD survived the rezoning. The trial court reasoned that Merrill, or FCI as successor, had the benefit of choosing to develop under either PUD.

The trial court's analysis does not produce a reasonable, lawful and effective meaning to all terms in the agreement. It is unreasonable because it fails to reflect that Merrill, as a sophisticated developer, wanted to change the zoning on his own

property and for his own benefit. Whatever his reasons, he chose not to preserve mining as a nonconforming use on his land. There is only one PUD on Merrill's property in 2003 and, in 2007, Merrill explicitly asks the Town Council to supersede it with another. On these facts, it is arbitrary, capricious and an abuse of discretion for the trial court to find that Merrill never intended to give up his mining rights.

The court's findings also imply that because the Town and Merrill were parties to the PADA, the Town had an obligation to advise Merrill of his options. The Town was not taking any negative governmental actions against Merrill --- they were trying to zone his property as he requested. Under the Town Council's police power, the Town has the right to enact PUD zoning schemes; it is inconsistent with this right for the court to opine that the Town should have done more to discern Merrill's intentions. In any event, Merrill, through his lawyers, actually wrote the PUD and since he already had PUD zoning, and was himself an experienced land use attorney, he knew what he needed to do to establish uses on his land.

The trial court's reasoning conflicts with the Town's zoning code by producing two PUDs for one property. It endorses the 2003 PADA as having legal significance when under the Town Code it is superseded by the 2007 PUD. The trial court's ruling misleads the public by letting it believe that the 2007 PUD superseded all prior zoning schemes for Merrill Ranch, when twelve (12) years later all uses in the 2003 PUD are now in play. Most importantly, the trial court's analysis ignores significant terms in the PADA and the 2003 PUD. For example, in two separate places in the 2003 PUD, it states <u>it can be amended by ordinance</u>. The 2003 PUD was amended (and explicitly superseded) by Ordinance No. 460-07, yet the trial court insists that the 2003 PUD survived that zoning law. The trial court failed to account for the provisions in the PADA that state the owner intends to

amend the PUD from time to time and that the PUD could be amended in accordance with the agreement. See for example ¶6(b) of the PADA. If incorporating the 2003 PUD into the PADA by reference makes it part of the agreement as the trial court ruled, then surely the provisions related to amendment (by ordinance) also become part of the PADA. While FCI may not be permitted to mine if this Court applies a reasonable, effective meaning to the agreement, the Court will not be faced with these bizarre consequences that arise as a result of the trial court's opinion.

5. THE TRIAL COURT ERRED AS A MATTER OF LAW AND ACTED IN AN ARBITRARY AND CAPRICIOUS MANNER WHEN IT AWARDED FLORENCE COPPER $1.7 MILLION IN ATTORNEY FEES UNDER A.R.S. §12-341.01 AND INCLUDED FEES FOR WORK ON THE COUNTERCLAIMS THAT HAD NOT BEEN RESOLVED.

The trial court awarded FCI $1.7 million in attorney fees. (IR #450, App. D, p. 46). The award was based on A.R.S. §12-341.01. The Town has two issues with the award. First, the trial court viewed this case as arising out of contract when it is a zoning case. The Town implored the trial court to enforce Ordinance No. 460-07, the 2007 Zoning Ordinance, and rule that mining was illegal on the Property. The Town requests this Court to reverse the trial court's order and find that the award was not authorized because this is not a contract matter. The Town agrees that if FCI remains the prevailing party in this action, an award of $10,000 is authorized by A.R.S. §12-348(A)(1).

Second, if the Court finds that this is a contract case, and fees are owed under A.R.S. §12-341.01, the Town asks that the trial court reduce the fee. Over the Town's objection, the trial court held that FCI was entitled to fees incurred for activities directly related to the Counterclaims --- which have not yet been litigated. FCI comingled and block billed its activities on the statutory eminent domain action (Count II), Counterclaims

and the federal court removal and remand action. This makes it impossible to identify the time associated with these activities. This is problematic because clearly there is no statutory authority for a fee award for these activities and on the Counterclaims the prevailing party has not yet been determined. IR #49, Exhibit 3 contains a non-exhaustive sampling of block billed entries. Also, if the Court looks at the Town's objections in the yellow highlighted entries in Exhibit 2, the entries are almost all block billed. This causes a hardship for the Court and prejudice to the Town because there is no reliable manner to match the time to an activity that is related to a prevailing claim.

6. THE TRIAL COURT ACT CONTRARY TO LAW, ARBITRARILY AND CAPRICIOUSLY AND BEYOND ITS JURISDICTION WHEN IT DETERMINED THAT SPECIFIC PERFORMANCE IS AVAILABLE AS A JUDICIAL REMEDY UNDER THE PADA WHEN FLORENCE COOPER ADMITS THAT TOWN DID NOT BREACH THE AGREEMENT AND FLORENCE COPPER IS IN BREACH.

The trial court ruled in the abstract that *if* the Town breached the PADA in the future, FCI would be allowed as a matter of law to seek specific performance. (IR # 449, 450 App. C and D). The Judgment states, in part:

> (d) In the event of a breach of the Development Agreement by the Town of Florence, Florence Copper has the available election of judicial remedies for breach of contract and may elect either specific performance or money damages.

(IR #451 and App. E) This ruling by the trial court is in error. Specific performance is a remedy for breach of contract. *Shreeve v. Greer*, 65 Ariz. 35, 39 (1946); *See also, Skydive Arizona, Inc. v. HogueI*, 238 Ariz. 357, 360 P.3d 153 (App. 2015) (Hogue has not breached the contract, however, and therefore, Skydive Arizona is not entitled to specific performance). FCI admits that the Town is not in breach of the PADA. It is impossible for a court to determine whether specific performance

is an available remedy as a matter of law based on an unidentified breach. Furthermore, since there is no breach, there is no justiciable controversy between the parties. *Am. Fed'n of State, County & Mun. Employees, AFL–CIO, Council 97 v. Lewis*, 165 Ariz. 149, 152, 797 P.2d 6, 9 (App.1990); *Thomas v. City of Phoenix*, 171 Ariz. 69, 74, 828 P.2d 1210, 1215 (App.1991)(Courts will not hear cases that seek an advisory judgment or answer moot or abstract questions.)

The ruling is also legally improper because FCI admits in its Counterclaims and the Joint Pre-Trial Report that it is in breach of the PADA and that performance is impossible. IR #367, ¶¶28, 91-92 and IR #415, respectively. FCI admits that it is not in compliance with the terms of the PADA --- particularly the platting of 4,500 lots. Consequently, specific performance is not available to FCI when it is in breach of the agreement. See, *MacRae v. MacRae*, 57 Ariz. 157, 161, 112 P.2d 213, 215 (1941) ("It is a cardinal rule of equity that [one] who comes into a court of equity seeking equitable relief must come with clean hands.")

Lastly, the trial court's order is confusing and unnecessary considering the PADA has nearly 20 more years on its term. The Town should not be bound or restrained by this ambiguous ruling for the next two decades. The Town respectfully requests the Court vacate item 3.d of the Judgment.

VI. CONCLUSION

The Town respectfully requests that the Court recognize the Town's power to enforce its lawfully enacted zoning ordinances within its borders. The Town and Merrill had a solid working relationship, which resulted in the annexation of his property and its rezoning in accordance with his wishes at the time. There is no lawful basis for the Court to expand the zoning on the Property beyond what is

allowed by the Town through its police powers. For the Court to do so would violate the separation of powers doctrine enumerated in Arizona III of the Constitution.

DATED this 2nd day of December, 2019.

SIMS MACKIN

s/ Catherine M. Bowman
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