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

PLAINTIFF/ APPELLANT TOWN OF FLORENCE'S REPLY BRIEF AND APPENDIX

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Discussion

The 2007 Zoning Ordinance unequivocally states that the 2007 PUD (which does not mention mining) supersedes all other development plans on the Property. The legislation, enacted at Harrison Merrill's request, should applied to the Property. The zoning process must not be dependent on the terms of individual property owners' development agreement. Zoning does not lose its character because the zoning document is attached to or incorporated into a contract. It is unwise to permit people to collateral attack zoning ordinances. The Town respectfully requests that the Court enforce the 2007 zoning and declare mining on the Property illegal.

I. The Town Did Not Act Unilaterally

The trial court's decision, and FCI defense of it, are based on the false premise that Town took unilateral legislative action against the Property that negatively impacted Harrison Merrill's ("Merrill") contractual rights under the Pre-Annexation Development Agreement ("Development Agreement" or "PADA"). "Unilateral" is defined as "done or undertaken by one person or party." The Town did not take unilateral action against Merrill:

- Merrill, not the Town, submitted the petition to amend the zoning for the Property;
- Merrill, not the Town, authored the 2007 PUD that removed any reference to mining;
- Merrill, not the Town, removed reference to mining, the BHP Copper Mine Overlay, and authority for drilling and exploration.
- Merrill, not the Town, drafted the language for Ordinance No. 460-07, which amended the Town's Zoning Map by amending the PUD zoning.
- Merrill, not the Town, included language ("shall supersede") in Ordinance No. 460-07, which replaced the 2003 PUD.

The trial court and FCI's analysis is based on the false preemies that the Town took unilateral action against Merrill's rights. In a section titled "The Town Cannot Unilaterally Change the Development Agreement**",** the trial court makes the following statements (#IR 238, 8/16/207)

- As an initial matter, the Court rejects the notion that the Town can unilaterally change the Development Agreement or eliminate property rights vested…

- The Town cannot unilaterally act to take away a property right vested by the Development Agreement…

- In conclusion, the Town cannot unilaterally change the Development Agreement or unilaterally derogate vested rights…

- THE COURT FINDS that, as a matter of law, the Town cannot unilaterally change the Development Agreement or unilaterally derogate vested rights established by the Development Agreement without breaching the contract.

FCI's arguments also presume unilateral action by the Town.

- vested rights that municipalities cannot change through unilateral actions, including zoning ordinances. AB, Page 8.

- town can later, unilaterally enact a zoning ordinance that negates every right or protection given to that owner. AB, page 9.

- Florence Copper responded that its right to mine survived the 2007 rezoning because the 2003 Development Agreement created vested rights to mine that could not be impaired by a unilateral legislative action such as a rezoning ordinance….that the Town cannot unilaterally change AB, Page 23.

- The Development Agreement.. can be altered only through mutual agreement, not unilateral action… Mutual consent further insulates the Property from unilateral municipal regulations AB, page 34

- The intent to avoid unilateral action is further evinced by mandates expressly considering the effect of legislative and administrative regulations: Answering Brief, Page 34.

- Clearly, the Development Agreement anticipated the likelihood of unilateral municipal action and guarded against it AB, Page 36

- This unilateral action is a proper exercise of the Town's authority to regulate zoning only to the extent it does not interfere with vested contractual rights. Answering Brief, Page 42

- To allow a development agreement (or the vested rights enumerated in an attached PUD) to be altered by one party alone—as through a unilateral ordinance—would defeat the agreement's purpose. AB, page 43

- …by unilateral action (ordinance), make changes to a development plan,... Here, that leaves the Town free to unilaterally amend or replace the 2003 PUD, up to the point where it seeks to impair rights vested in the Development Agreement. AB, page 45.

- …that the Town cannot unilaterally change that agreement or derogate these vested rights …" AB, page 59

FCI's expert fails to acknowledge in her report (Appendix to AB at App. 142-159) that Merrill initiated the zoning request. Further exacerbating the impact of the faulty premise, the trial court relied upon FCI's expert's opinion[1] despite this deficiency, quoting extensively from the report. (IR #412, Opening Appendix p. 6).

The Town did not unilaterally undermine Merrill in his development plans for the Property; it facilitated his vision for a master planned community. The parties, at Merrill's request, and with his mutual, written consent, in the form of a zoning application amended the 2003 PUD by superseding it with the 2007 PUD--

[1] The Town moved to strike the expert opinion because she was not an Arizona attorney. Reply Appendix Exhibit 6, 123-127. The Court erred overruling that objection.

- an action authorized by both the PADA and the 2003 PUD and consistent with the zoning ordinances. The Town's action did not derogate Merrill's property rights but celebrated them by giving him control of the Development Plan as anticipated by the PADA. Once this myth of unilateral Town action is shattered, FCI's case crumbles; the Court must revere the Judgment.

II. The PADA Does Not Distinguish Among Vested and Non-vested Rights in the PUD.

To defend the Judgment, FCI must explain how the 2003 and 2007 PUDs can co-exist; particularly when, by Ordinance, one PUD supersedes the other. In a failed attempt to meet this challenge, FCI decrees that the 2003 PUD concerns itself with "vested rights" and the 2007 PUD's application is limited to circumstances where it does not impinge on those vested rights. There is no support in the law or the record for this dichotomy.

FCI concedes that the right to mine flowed from the 2003 PUD, which was incorporated into the PADA.[2] The PADA states at ¶3: "… For the term of this Agreement, Owner shall have a vested right to develop and use the Property in accordance with this Agreement and this Development Plan."[3] The vested right is to "use the Property in accordance with [the PADA] and the Development Plan."[4] There is no reference in the PADA to "vested rights" that are specific to mining or other uses or conditions --- just the general statement that would apply to all matters

[2] The Answering Brief, p. 31, states:
(a) The Development Agreement, through the Development Plan, expressly provides for copper mining operations.

[3] Opening Appendix 094

[4] "Vested" only appears in ¶¶ 3 and 5 of the PADA, Opening Appendix 094.

covered by the 2003 PUD. Consequently, there is a vested right to develop in accordance with all provision in the 2003 PUD.

To blunt the Town's argument, FCI attempts to create a false dichotomy between the 2003 PUD and the 2007 PUD. Consider FCI's argument at page 46 of the Answering Brief.

> There are not two PUDs affecting the same rights. Rather, there is (a) the 2003 PUD incorporated into the Development Agreement, which protects vested rights on the Property. Unless and until the Development Agreement is amended as to mining rights, this Plan continues to control *the vested rights on the Property.* And, there is (b) a 2007 Zoning Ordinance that references the 2007 PUD that was not incorporated into the Development Agreement. The 2007 PUD and Ordinance are operative insofar as they do not interfere with the vested rights protected by the Development Agreement.

There is nothing in contract law, zoning law, the Town Zoning Ordinance, the PADA or the PUD that supports FCI's constrict that the 2003 PUD is about *vested* rights and the 2007 PUD is about something else. Likewise, there is no support for FCI's artificial proclamation that the 2003 PUD controls "unless and until the Development Agreement is amended as to mining rights." Mining is not elevated to special status. Furthermore, FCI's analysis fails to acknowledge that, at Merrill's request, the 2007 Zoning Ordinance and the 2007 PUD state that the 2007 PUD **supersedes** "any previously accepted development (sic) Plan, Master Development Plan, or PUD Development Guide for the Merrill Ranch PUD."[5] Supersede means "to take the place of" or "supplant" which is contrary to the secondary status FCI attempts to ascribe to the 2007 PUD.

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[5] 2007 Zoning Ordinance #22, ¶6 and 2007 PUD, TE #26, p. 70 – IV(C), App. F, p. 59 and G, p. 86.

The application of the 2007 PUD is not dependent on a prior amendment to mining rights; it is effective when, as here, it is approved by ordinance at the Property Owner's request in accordance with state law and the Town's Zoning Ordinances without challenge by referendum. It is ironic that the trial court, FCI's expert and FCI argue that the purpose of a development agreement is to provide certainty to a property owner while also interpreting the PADA as authorizing two conflicting PUDs and establishing a vested right to mine when Florence's zoning map does not show a mine or refer to the BHP Overlay that appeared on the previous maps. The trial court's refusal to enforce the 2007 Zoning Ordinance as written, coupled with a strained interpretation of the PADA, transforms a simple PUD amendment into a legal quagmire.

III. The Town and Merrill Amended the 2003 PUD at His Request and Effectively Extinguished any Mining Rights that Existed Prior to the Amendment; No Recorded, Executed Document Was Required.

Under the decision of the Court and the reasoning of FCI, the 2007 PUD Rezoning did not extinguish Merrill's mining rights because there was not a document signed by the parties and filed in Pinal County. The Court held that in order for an amendment to be effective, Merrill and the Town needed to follow the PUD Zoning Amendment Process (legislative) and also amend the PADA in accordance with the requirements of ¶32 (contractual). This analysis violates the fundamental principles of contract interpretation. *Cty. of La Paz v. Yakima Compost Co.*, 224 Ariz. 590, 599, ¶ 16, 233 P.3d 1169, 1178 (App. 2010) (preferred contract interpretation gives a reasonable, lawful and effective meaning to all terms in the agreement) *Hamberlin v. Townsend,* 76 Ariz. 91, 196, 261 P. 2d 1003, 1006 (1953)

(Court looks at the entire agreement and intention of the parties in order to give effect to every word.)

The 2003 Development Agreement is independent of the zoning and is a preliminary contractual promise to seek a zoning designation. Due to the nature of the process, the PADA, annexation, PUD Zoning and PUD District Zoning raise "chicken and egg" issues. Property must be annexed by ordinance,[6] but a property owner does not want to annex before there are assurances about zoning, development, etc.. The PADA provides conditional assurance so that developers feel safe in their investments. In this case, the PADA acknowledged that the Town approved the 2003 PUD but that the enactment of annexation and PUD District Zoning ordinances would be forthcoming. If the Town did not approve the zoning, the property owner could require the Town to rescind the annexation but there would be no continuing vested right to develop according to the 2003 PUD. (TE, #1, PADA Whereas clause ¶2).

The Town did adopt the annexation ordinance [7] and grant the PUD Zoning.[8] The PADA granted Merrill a 35-year vested right to develop and use the Property in accordance with the PUD. But, as one would expect in a 35-year contract, the PADA also gave Merrill the right to ask that the PUD be changed. (See: TE, #1, PADA, 6: Section Development Plan:

> Owner expects that amendments to the Development Plan will be necessary….

The PADA <u>permits the owner to initiate</u> an amendment to the PUD and the PUD establishes that the amendment occurs by <u>ordinance.</u> (TE #1, 63, App. L. p. 138, and Section III.B.3). The 2003 PUD did not contain <u>any</u> reference to the PADA

[6] A.R.S. §9-471(D)
[7] Trial Exhibit ("TE") #83 and Appendix K.
[8] TE #84 and App. L, p. 157.

and did not require that the PADA be amended in order for a PUD amendment enacted by ordinance to be effective. This is consistent with the procedure for the adoption of a PUD in the Florence Zoning Code.

Significantly, in the Development Plan section, the PADA provides "that the ordinances, rules, regulations, permit requirements, policies or other requirements of the Town applicable to the Property and the development of the Property shall be those that are now existing and in force for the Town as of the date of this Agreement. (TE #1, ¶6(f)). The parties abided by these rules when rezoning the property. As required by A.R.S. §9-462.05, the Florence Zoning 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. Upon Town Council approval, the PUD zoning is reflected on the Town zoning map. Development Code §150.069(O) at TE #82 and App. Q. This is the procedure Merrill and the Town followed when he initiated a rezoning of his property.

As FCI recognized on page 45 of its Answering Brief, "A PUD is a development plan. It is not an agreement. It is not signed by any parties." The PUD is a separate zoning plan that is modified separately from the development agreement in accordance with the Town Ordinances that govern PUD Districts. The PADA did not alter the application of these ordinances to Merrill's self-initiated rezoning petition. The rezoning changes the PUD, not the PADA, therefore the requirements of ¶ 32 are irrelevant.

Property Owners have many reasons that they do not want to amend both the PUD and the PADA. In fact, during the 2007 Rezoning, Merrill's agent is adamant that the parties are not amending the PADA during the 2007 rezoning process.

> There are only a handful of stipulations left to work through, and the few that effectively change our approved and recorded Development Agreement with the Town are the sensitive ones . We feel that we shouldn't even be discussing changes to our DA while in the process of hearing our PUD Amendment application. The Town Staff, Council and Mayor were in agreement with our DA and Amendments to our DA at the time they were approved, so why are these issues coming up now, and why are they holding us back from getting our PUD Amendment processed as a stand alone zoning document? We have not made an application requesting any changes to our DA.

See FCI's App 205. Merrill and the Town knew that under the PADA no amendment to the PADA was required for the PUD Amendment to be processed as a "stand alone" document. It is ludicrous to suggest that Merrill was undergoing the PUD Amendment process, holding public hearings and negotiating for over a year with the Town in order to receive PUD zoning that, according to FCI, was not as legally significant as the prior 2003 PUD. FCI also is aware that PUD rezoning is separate and distinct from a PADA amendment. In fact, when FCI sought a PUD and General Plan amendment from the Town in order to rezone the Property for mining, it did not seek to amend the PADA. (Reply App. Exhibit 8)

This Court should rule, as a matter of law, that the 2007 PUD Amendment, requested by Merrill, was effective upon the Town's enactment of the 2007 Zoning Ordinance. Consequently, Merrill lost whatever right he had to mine by failing to include mining as a permitted use in the 2007 PUD, which governed the zoning on the property. The Town Development Code establishes that Property in the PUD

district can only be developed in accordance with uses in the underlying zoning or that are included in the PUD. See §150.69. Since the 2007 PUD supersedes the 2003 PUD, there is no active PUD that permits mining on the Property. FCI fails to explain why Merrill, after he voluntarily rezoned his Property, would be entitled to choose indiscriminately between two PUDs even though the law in the Town, by ordinance, is that the 2007 PUD prevails. This is an absurd result. The trial Court erred as a matter of law on this legal issue, and the Court, after its *de novo* review, should reverse the Judgment.

IV. Merrill Did not Discuss Mining with the Town in 2003 or 2007 and Had No Opinion Regarding Whether a Zoning Amendment was Required before Mining was Permitted as a Legal Use on the Property.

Harrison Merrill did not testify in person at trial. The Court reviewed a video tape deposition and an affidavit that was drafted by FCI's attorneys (Exhibit 3). The affidavit states Merrill did not review any documents to refresh his memory as to events 12 years ago before signing the affidavit (FCI's Answering App. 12, App. 225). The Court and FCI make numerous statements regarding Merrill's testimony and his intentions with respect to the mine and the development of the Property that are contrary to any reasonable interpretation of the evidence.

Merrill testified that he never had a substantive conversation with the Town about mining prior to or during the 2003 annexation process. (Reply Appendix, Exhibit 8, p. 26-27). He has no recollection of focusing on or negotiating mining rights in 2003. (Reply Appendix, Exhibit 8, p. 26-27). This is significant. because the trial court assumes that mining was on Merrill's mind at the time of the annexation (Ex. A, p. 6.).

Merrill, testified: "I don't think we thought a lot about it [the right to mine] one way or the other because, we we didn't plan to do that ... (Merrill's deposition,

page 58-59.) He testified that he gave no thought to mining during the rezoning in 2007 and that the new residential densities were inconsistent with mining. (Merrill Deposition, p. 184-185).

Even though Merrill had not discussed mining with the Town in either 2005 or 2007, the trial court faulted the Town for not asking Merrill, an experienced Developer and attorney with a cache of development professionals, whether he intentionally left mining out of the 2007 PUD. The law cannot place a contractual obligation on a Town to determine whether property owners really mean what they say or do not say in their zoning documents. The faulty reasoning is based on a reoccurring failure to appreciate the difference between the Town being a party to a contract and the Town engaging in the legislative act of zoning.

Merrill consistently testified that he believed if the prospective purchaser did not have the right to mine, the purchaser would obtain the rights from the Town or decline to purchase the property. For example:

Merrill's deposition page 101:

> " ... we always thought that it could be mined and that if there was a problem, there wouldn't be a problem with the Town .... "

Merrill's deposition, pp Page 121:

> "It's more if I didn't think they had the right to mine the property. I think they had the right to mine the property if we assigned it or if they didn't, they would get it or they wouldn't close it.

See generally, Merrill's Deposition, p. 58-59, 101. 119-120, 121, 169, 180 -184.

The trial court concluded that Merrill did not give up his right to mine because he was going to sequence the Master Plan Community – mine first, build homes second. <u>This belief is completely inconsistent with how Merrill phased the Master Planned Community in the 2007 PUD</u>. According to the phasing map and

chart, the homes were to be built first on the mining sire. (Reply Appendix, Item 7.) Merrill was all in on the Master Plan Community.

Merrill's testimony demonstrates that he was not concerned with mining and that he took no steps to preserve the non-conforming use rights that were recognized in the 2003 PUD. The Town's premier Arizona land-use expert Grady Gammage, explained how Merrill's conduct extinguished any non-conforming right he may have had under the applicable Arizona president. (See, Reply Appendix, Item 5, pp. 102-105 and discussion at trial on re-direct 12/13/18 p. 60:12-62).

The trial court erred as a matter of law when it conducted a trial to probe Merrill's intent during the 2007 rather than enforcing valid legislation (2007 Ordinance and 2007 PUD) . If such an inquiry was proper, however, the trial court's conclusion that Merrill did not abandon his right to mine are legally and factually in error. The Town's general plan, zoning maps, zoning code and procedures should not be impacted by such a subjective exercise into a zoning action taken long ago.

V. FCI Knew Prior to the Purchase that the Town would Require a General Plan Amendment and Rezoning of the Property.

Sean Magee testified about doing due diligence for FCI prior to the purchase of the mine. In the Appendix of the Answering brief at page 480, ¶4,5,6, Mr. Magee recounts how he was told by Town employees during the due diligence period that the Town would require rezoning and a General Plan Amendment before mining would be permitted on the Property. After it purchased the Property, FCI attempted on several occasions to rezone the Property. For example, Reply App. Item 9 contains one of the Florence Cooper Planned Development Rezoning Applications which acknowledges that mining is not permitted on the Property because "an amendment in 2007 removed the possibility." FCI's rezoning application

anticipates that there will be a first phase (mining) and a second phase (Master Planned Community Development) of use on the Property. FCI details this in the Application and provides two separate development plans for the sequenced land use and development.

Unlike FCI, Merrill completely ignored mining when seeking the 2007 Rezoning. If Merrill, an expert Master Plan Community Developer and Attorney, had intend to preserve mining for some sequencing with the development of homes, his zoning application would have mirrored FCI's.

ARGUMENT

1. The Town's Powers are Not Absolute but it Does Have the Authority to Rezone a Property Consistent with the Owner's Request without Oversight from a Court.

The Town is authorized by statute to zone or rezone property by ordinance if certain procedures are strictly followed. *Jachimek v. Superior Court In & For Cty. of Maricopa*, 169 Ariz. 317, 318–19, 819 P.2d 487, 488–89 (1991)(citations omitted). Merrill asked the Town to use these powers to rezone his Property in accordance with the PUD he submitted to the Town as part of his rezoning application. The Town did so, resulting in the 2007 PUD as the new development plan for the Property.

The rezoning, was not a taking, an impairment of contract rights or in derogation of vested rights. There was no unilateral action by the Town. Merrill asked for rezoning, which he was given through the proper Town zoning procedure. His attorneys and business associates drafted the documents and the Town enacted the appropriate legislation. The zoning amendment actually increased the value of

Merrill's property so is not a taking under *City v. Oglesby,* 112 Airz. 64, 557 P. 934 (1975) (See Merrill deposition p. 171).

The PADA is a contract and, even though the 2003 PUD is incorporated by reference, that does not change its legal nature of the PUD from zoning to contract. Consider a contract in which parties agree that one will bequeath the other a substantial sum of money. Even if the will is an exhibit to the contract and incorporated by reference, it will still be amended or probated in accordance with the laws of estate. If the testator executed another valid will inconsistent with the terms of the agreement, that might be a breach of contract, but it wouldn't result in two valid wills being subject to the terms of the contract with individual picking terms from each.

Here, an amendment to the PADA would not change the 2007 PUD --- because zoning cannot be done by contract. This is why contractual amendments (like amendment 1 and 2) are signed and recorded and the PUD amendment is not. The PUD already went through its own process as required by law. And, as noted by FCI on page 45 of its Answering Brief, "the PUD is a development plan. It is not an agreement. It is not signed by any parties." For the parties to abide by the trial court's ruling, they would need to go through a vigorous rezoning process followed by a second contractual procedure **that may be unique to each property owner who has a development agreement**. This is not consistent with the legislative process for enacting zoning. The court violates the separation of powers when it inserts itself into the legislative process and imposes the will of the court on those institutions appointed by the legislature to regulate zoning. When deciding a zoning case, courts cannot substitute their judgment for that of the legislative bodies responsible for passing zoning regulations and developing procedure. *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 Town respectfully requests this Court to vacate the trail court's order on this basis.

2. It is Inconsistent with the Certainty Required in Zoning Administration that a Property's Development be Governed by Two Competing Development Plans.

FCI claims on Page 46 of its Answering Brief that the Town waived the issue of whether it is lawful to have two PUDs govern the Property. The issue is subsumed in the Town's argument in the trial court below (decided against the Town by the Court) that the 2007 PUD supersedes the 2003 PUD and that the PUD was amended according to the Town's Zoning Code, §150.069, TE #82. The result of the trial court's decision is two competing PUDS. *Retzke v. Larson*, 166 Ariz. 446, 449, 803 P.2d 439, 442 (App.1990) (stating that a party may cite new case law on appeal in support of theories or issues raised below). The Town is permitted to use those consequences to persuade the Court to vacate the decision.

The Town's zoning ordinance provides that in a PUD district the only use or development permitted is that authorized by a development plan [PUD] approved by the Town.[9] The trial court's decision contemplates there being two active PUDs on one property, a clear violation of the ordinance. To defend the Judgment, FCI must explain how the 2003 and 2007 PUDs can co-exist; particularly when, by Ordinance, the 2007 PUD supersedes the 2003 PUD. In a failed attempt to meet this challenge, FCI decrees that the 2003 PUD concerns itself with "vested rights" and the 2007 PUD's application is limited to circumstances where it does not impinge

[9] Town's Zoning Code, §150.069, TE #82.

on those vested rights. There is no support in the law or the record for this dichotomy.

FCI concedes that the PADA does not mention mining, and that the right to mine flowed from the 2003 PUD, which was incorporated into the PADA.[10] The PADA states at ¶3: "… For the term of this Agreement, Owner shall have a vested right to develop and use the Property in accordance with this Agreement and this Development Plan."[11] The vested right is to "use the Property in accordance with [the PADA] and the Development Plan."[12] There is no reference in the PADA to "vested rights" that are specific to mining or other uses or conditions --- just the general statement that would apply to all matters covered by the 2003 PUD. Consequently, there is a vested right to develop in accordance with all provision in the 2003 PUD.

To blunt the Town's argument, FCI attempts to create a false dichotomy between the 2003 PUD and the 2007 PUD. Consider FCI's argument at page 46 of the Answering Brief.

> There are not two PUDs affecting the same rights. Rather, there is (a) the 2003 PUD incorporated into the Development Agreement, which protects vested rights on the Property. Unless and until the Development Agreement is amended as to mining rights, this Plan continues to control *the vested rights on the Property.* And, there is (b) a 2007 Zoning Ordinance that references the 2007 PUD that was not incorporated into the Development Agreement. The 2007 PUD and Ordinance are operative insofar as they do not interfere with the vested rights protected by the Development Agreement.

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[10] The Answering Brief, p. 31, states:
(b) The Development Agreement, through the Development Plan, expressly provides for copper mining operations.

[11] Opening Appendix 094

[12] The word vested only appears in ¶¶ 3 and 5 of the PADA, Opening Appendix 094.

There is nothing in contract law, zoning law, the Town Zoning Ordinance, the PADA or the PUD that supports FCI's constrict that the 2003 PUD is about *vested* rights and the 2007 PUD is about something else. Likewise, there is no support for FCI's artificial proclamation that the 2003 PUD controls "unless and until the Development Agreement is amended as to mining rights." Mining is not elevated to special status under either the PADA (where it is not mentioned) or the 2003 PUD, where it is vested on par with all other terms in the document. Furthermore, FCI's analysis fails to acknowledge that, at Merrill's request, the 2007 Zoning Ordinance and the 2007 PUD 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] Supersede means "to take the place of" or "supplant" which is contrary to the secondary status FCI attempts to ascribe to the 2007 PUD.

The Town asks that the Court reject this new unsupported zoning scheme proposed by FCI in an effort to hang on to the mining rights that were preserved in the 2003 PUD and are now extinguished.

3. Public Hearings on Zoning Issues are Futile of Property Owners can obscure their Rights and the Authorizing Source.

FCI claims on Page 48 of its Answering Brief that the Town waived the issue of whether the trial court's ruling eviscerated the Public input mandates for the state and local and zoning process. The issue arises as a result of the trial court decision and is subsumed in the Town's argument that only the 2007 PUD survived the 2007 Amendment. *Retzke v. Larson*, 166 Ariz. 446, 449, 803 P.2d 439,

[13] 2007 Zoning Ordinance #22, ¶6 and 2007 PUD, TE #26, p. 70 – IV(C), App. F, p. 59 and G, p. 86.

442 (App.1990) (stating that a party may cite new case law on appeal in support of theories or issues raised below). The Town is permitted to use those consequences to persuade the Court to vacate the decision.

Merrill voluntarily applied to rezone his property in accordance with the 2007 PUD which was drafted by his agents. The 2007 PUD is a development plan for a Master Planned Community of 7,000 homes and makes no mention of mining. According to the 2007 PUD, FCI's mining Property is slated for the first phase of development. (Reply App. Item 7). When Merrill's agents drafted the 2007 Zoning Ordinance, they specifically added language that dictated that the 2007 PUD supersedes 2003 PUD. At Merrill's request the Council enacted the ordinance. FCI conceded on page 31 of its Answering Brief that "the Development Agreement, through the Development Plan, expressly provides for copper mining operations." FCI stands in the shoes of Merrill and is entitled to only to what Merrill would be entitled to under the law based on these facts.

The rezoning required a public hearing under state and local law. The Town's process involved review or hearings before the Planning Director, Technical Committee, Planning and Zoning Committee. Development Code §150.069(E)-(O) TE #82, formerly, §4-57(E)- (O), Appendix Q and R. Merrill never mentioned mining but "sold" the idea his Master Planned Community to the community.

It is inconceivable that zoning law would permit Merrill to come forward two years after he received the 2007 PUD rezoning and declare that he was foregoing the development of a Masterplan Community to mine copper. There is nothing in the PADA that compels that result. If Merrill could not resurrect the mine two years after his rezoning then FCI has no such right.

If this Court upholds the trial court's order, it will mean that the public who participated in the mandatory public hearings related to the 2007 PUD will have been duped. They would have lost the opportunity to have input on a copper mine operation in their area. The Town raises this issue because it illustrates just how absurd the impact of the court's order is on the zoning issues at play.

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 Town has repeatedly addressed the arguments that demonstrate the trial court's errors in contract interpretation and in findings of fact. The Town will not repeat them here except to remind the Court that the Town rook no unilateral action with respect to zoning. Notably, on page 45 of the Answering Brief, FCI illustrates why the 2007 PUD did not have to be reduced to writing, signed by the parties and filed with the PADA:

> A PUD is a development plan. It is not an agreement. It is not signed by any parties. It cannot by itself create or eliminate any rights. It only function as a particularized articulation of a development agreement.

These characteristics are the reason that the PUD is not amended in accordance with paragraph ¶32, but in accordance with the Development Code and state and local zoning ordinances. Just as a PUD cannot by itself create or eliminate any rights the PADA cannot amend any zoning. Consequently, if Merrill wanted to rezone his property he was not required to amend the PADA,

5. FCI's Description of the Dispute Between the Parties is An Admission that the Town's Action Does Not Arise out of Contract.

The application of the attorney fee statute is a matter of statutory interpretation reviewed by the Court *de novo. Chaurasia v. Gen. Motors Corp., 212*

Ariz. 18, 26, 126 P.3d 165, 173 (Ct. App. 2006). The action (not the defense) must arise out of contract. A.R.S. § 12-341.01(A). "The pivotal question is whether the asserted claims arise out of an express or implied contract…" *Id.* FCI has the burden of proof to establish that it is entitled to an award of attorney fees, including that the action filed by the Town arises out of contract. *Woerth v. City of Flagstaff*, 167 Ariz. 412, 419, 808 P, 2d 297, 304 (App. 1990).

In their Answering Brief, FCI's descriptions of the Town's cause of action is an admission that the action does not arise out of contract. Consider:

> …[T]he Town sued, seeking a declaratory judgment that, because the 2007 zoning ordinance contained no allowance for mining, [FCI] could not mine on the Property.[14] [Answering Brief, p. 11]
>
> Following discovery, the parties cross-moved for summary judgment. The Town argued that the 2007 Rezoning Ordinance and the 2007 PUD eviscerated FCI's right to mine. [Answering Brief, p. 23][15]

FCI raised the Development Agreement as its defense to the Town's attempt to enforce its zoning ordinance. *See* fn. 33 and 34.

FCI's choice of defense does not convert the Town's zoning action into one arising out of contract. An action arises out of contract if it could not exist "but for" the contract. *Sparks v. Republic Nat'l Life Ins. Co.,* 132 Ariz. 529, 543, 647 P.2d 1127, 1141, cert. denied, 459 U.S. 1070, 103 S.Ct. 490, 74 L.Ed.2d 632 (1982). The Town has a PUD District. FCI acknowledges that a PUD is not a contract,

[14] FCI went on to describe its defense --- which is the contract: "Florence Copper responded that the Development Agreement established vested rights to mine, and those rights could be impaired only through an amendment to that agreement as to those rights, which had not happened." AB, p. 11.

[15] Again, FCI relied upon the contract as its defense: "[FCI] responded that its right to mine survived the 2007 rezoning because the 2003 Development Agreement created vested rights to mine that could not be impaired by a unilateral zoning change." AB, p. 23.

stating on page 45 on the Answering Brief: "A PUD is a development plan. It is not an agreement. It is not signed by any parties."

Fees are not recoverable in purely statutory actions or if the contract is only a factual predicate to the action but not the essential basis of it. *Kennedy v. Linda Brock Auto. Plaza, Inc.*, 175 Ariz. 323, 325–26, 856 P.2d 1201, 1203–04 (Ct. App. 1993) (claim for defective vehicle arose under "Lemon Law" statute, not under lease contract, even though lease was factual predicate for claim); Whether a claim "arises out of a contract" is determined by the abstract nature of the claim, rather than whether it happens to hinge on predicate contract questions in the specific circumstances of one case. Compare *Morris v. Achen Constr. Co.*, 155 Ariz. 512, 514, 747 P.2d 1211, 1213 (1987) .

The Town brought a zoning action to enforce its zoning ordinance which made mining on the Property illegal. See Ordinance No. 460-07. 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).

If the Court finds A.R.S. §12-341.01 applies, the Town asks the Court to reduce the fee proportional to the fees directly related to the Counter claims because there is no prevailing party. For example, the Town should not be paying legal fees for FCI to draft notices of claim to sue the Town on the Counterclaim because those claims have not 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 2 and 3.

6. The Court Should Vacate the Judgment Establishing Specific Performance as a Remedy for a Future Unidentified Breach.

The Court's vague judgment regarding specific performance will be in effect for another 20 years, if not reversed. FCI argues page 63 of its Answering Brief that "The order and judgment simply inform the parties that, should the Town in the future attempt to impair Florence Copper's vested right to mine, it could then be enjoined from doing so." The Judgment states is much boarder. It speaks to a breach of the PADA, not a breach impacting Florence Copper's right to mine.

> (d) In the event of a breach of the Development Agreement by the Town…

(IR #451 and App. E) Given that FCI agrees that there is no breach, it is problematic to make an order that was issued in a vacuum and may have a shelf life of two decades.

I. CONCLUSION

The Town requests that the trial court vacate the judgment and reverse the trial court's ruling permitting mining on the Property. In the alternative, the Town requests that the Court declare that the Town's action did not issue arise from contract and vacate the attorney fee award.

DATED this 7th day of April, 2020.

SIMS MACKIN

s/ Catherine M. Bowman
Attorney for The Town of Florence