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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-000325 01/02/2019

HONORABLE ROGER E. BRODMAN

CLERK OF THE COURT
M. Corriveau
Deputy

TOWN OF FLORENCE

CHRISTOPHER W KRAMER

v.

FLORENCE COPPER INC, et al.

COLIN F CAMPBELL

KRISTIN MACKIN
RUSSELL R YURK
JUDGE BRODMAN

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A trial to the Court was held on December 5-13, 2019. The Court heard testimony from John DiTullio, Robert Schafer, Xenia Kritsos, Eric Mears, Mark Eckhoff, Tom Rankin, Sean McGee, Kyle Longley, Julie Tappendorf, and Grady Gammage, Jr. The Court reviewed the videotaped depositions of W. Harrison Merrill, Jan Dodson Zobel and Marchand Snyman, and the deposition transcript of Adrain Taylor. The Court reviewed the exhibits in this case.

The Court also reviewed two rounds of cross motions for summary judgment and the parties' pretrial briefs.

The purpose of the trial was not to relitigate issues previously decided in the motions for summary judgment. Nevertheless, future readers may benefit from a reconstruction of the analysis leading to the trial. As a result, the Court will borrow liberally from its August 14, 2017 ruling (the "Prior Ruling") in order to place the dispute and this trial in context.[1]

1. The Court adopts by this reference the August 14, 2017 ruling.

I. BACKGROUND

At issue is whether Florence Copper, Inc. ("FCI") has a right to maintain and expand nonconforming uses or structures related to mining on the subject property (the "Property"). The Town of Florence (the "Town") opposes mining. The Town claims that the 2007 Zoning Ordinance replaced, superseded, and rescinded the 2003 Planned Unit Development Plan ("PUD" or "Development Plan") and, as a result, the right to mine the Property has been lost. In the alternative, the Town argues that W. Harrison Merrill ("Merrill") abandoned any nonconforming mining rights before FCI purchased the Property. FCI argues that the Court should enter judgment against the Town and declare that mining is a lawful permitted use on the Property, and the 2003 Pre-Annexation Development Agreement ("Development Agreement" or "PADA") preserves FCI's right to mine the entire BHP Mine Overlay Area without limitation.

To summarize the dispute: in 1996 and 2003 the Town supported mining on the Property. By 2010-11, it did not. The issue is whether the parties are bound by the 2003 Development Agreement.

II. ANALYSIS OF DEVELOPMENT AGREEMENT AS SET FORTH IN THE PRIOR RULING

A development agreement is a contract. A.R.S. § 9-500.05(C) applies to development agreements, stating: "A development agreement may be amended, or canceled in whole or in part, by mutual consent of the parties to the development agreement or by their successors in interest or assigns." Similarly, subsection D states that "the burdens of the development agreement are binding on, and the benefits of the development agreement inure to, the parties to the agreement and to all their successors in interest and assigns." Cities are bound by development agreements. *Home Builders Ass'n v. City of Maricopa*, 215 Ariz. 146, 153-54, ¶ 28 (App. 2007).

A contract's interpretation is controlled by the intent of the parties, as ascertained through its language. *See ELM Ret. Ctr., L.P. v. Callaway*, 226 Ariz. 287, 290-91 (App. 2010). Words are given their ordinary, common sense meaning. *Aztar Corp. v. U.S. Fire Ins. Co.*, 223 Ariz. 463, 469 (App 2010). When the language is plain and unambiguous, it will be enforced as written. *Emp'rs Mut. Cas. Co. v. DGG & CAR, Inc.*, 218 Ariz. 262, 267 (2008). In interpreting a contract, "acts of parties under a contract, before disputes arise, are the best evidence of the meaning of doubtful contractual terms." *Associated Students of Univ. of Arizona v. Arizona Bd. of Regents*, 120 Ariz. 100, 105 (App. 1978).

The Court agrees with the following statement about development agreements made by defendant's expert, Julie Tappendorf:

> The primary purpose of a development agreement is to provide certainty to a developer or property owner that future regulatory changes (including the zoning amendments and approvals) that are inconsistent with the contractual rights granted by a development agreement are not applicable to and cannot be enforced against the property or project subject to the agreement. A municipality has no authority to apply or enforce subsequent zoning approvals or amendments that would interfere with these contractual rights, and any attempt to do so would constitute a breach of the development agreement.
>
> Moreover, a zoning ordinance simply cannot amend the development agreement. Only a proper amendment to the development agreement, entered into by mutual consent of the parties and approved in accordance with the procedures set out in state statute and in the underlying development agreement, can effectively amend the terms of the development agreement. Where there is no such amendment, the rights and benefits rights granted by the development agreement remain valid and enforceable.

Exhibit 194, page 3.

The Development Agreement must be read in conjunction with the Town's annexation. Mining was allowed prior to annexation. Merrill did not want annexation to occur unless the Town agreed to specific limitations on its future conduct. As noted by Merrill in a December 13, 2002 letter before annexation:

> I have been consistent from the beginning of my discussions with John Gieb through our meeting on Wednesday, and every meeting in between that we do not want to be annexed unless we are provided by the Town of Florence with <u>maximum</u> flexibility in the development of our 7200 acres. . .

Exhibit 127, p. 1 (emphasis in original). As a result, the Development Agreement was put in place to cement the parties' relationship and the terms of annexation.

The starting point of the Court's analysis is to review the 2003 Development Agreement as discussed in the Prior Ruling.

A. <u>The 2003 Development Agreement Unambiguously Allowed Copper Mining on the Property</u>

Mining was allowed at the time of annexation. In the Prior Ruling, the Court determined that in-situ copper mining was preserved as a nonconforming use by the 2003 Development Agreement. The Court's analysis was as follows:

1. <u>In-situ mining is allowed as a nonconforming use under the Development Agreement</u>

Although the 23-page Development Agreement itself does not mention mining (except through incorporation), the Development Agreement expressly establishes and protects the Owner's right to mine within the BHP Mine Overlay area.

The Development Agreement references and incorporates the PUD dated November 7, 2003 as set forth in Exhibit B. *See* Exhibit 1, page 3 ("All documents and exhibits referred to in this Agreement are hereby incorporated by reference into this Agreement"). Exhibit B is attached to the Development Agreement and is therefore incorporated into the Development Agreement. Exhibit B clearly establishes an allowed non-conforming use of copper mining. The document identifies a "BHP Copper Mine Overlay Area." *See* pages 19, 21, 28. The BHP underground leaching mine is referenced in the "Site History" portion. *Id*. at 8. The PUD provides that non-conforming uses of the land would continue. Paragraph 7 vests the Owner's right to non-conforming uses by providing:

> 7. Non-Conforming Uses of Land -- where, at the time of passage of this PUD, a lawful use of land exists which would not be permitted by the regulations imposed by this PUD, such use may continue so long as it remains otherwise lawful, provided:
>
> * No such non-conforming use shall be enlarged or increased nor extended to occupy a greater area of land than was occupied at the effective date of the adoption or amendment of this PUD.
>
> * No such non-conforming use shall be moved, in whole or in part, to any portion of the lot or parcel other than that occupied by such use at the effective date of adoption or amendment of this PUD.
>
> * 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 by this PUD for the district in which such land is located, **<u>with the exception of the copper mining operations.</u>**

> * No additional structure not conforming to the requirements of this PUD shall be erected in connection with such non-conforming use of land.

PUD at page 30 (emphasis added). In other words, the PUD, which is incorporated by reference into the Development Agreement, unambiguously provides that copper mining operations could continue on the Property. The point was emphasized in Paragraph 12 of the PUD, which allows drilling, mining and exploration for copper within the area indicated as the "BHP Copper Mine until said mine is closed." Paragraph 12 reads:

> 12. 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.**

Id. at page 32 (emphasis added). If the above-referenced facts were not enough, the December 15, 2003 zoning ordinance itself (No. 356-03) which adopted the zoning in the PUD contains an attachment that references the "BHP Copper Mine Overlay Area." *See* Exhibit 84, pg. 2.

As a nonconforming use, mining was allowed "until said mine is closed." The Court finds that "closure" has specific meaning in mine-speak. It does not mean suspending operations. The Development Agreement recognized that the mine could be dormant for years before copper recovery was initiated. The Development Agreement clearly established that maintaining a dormant mine was not the equivalent of closure.

2. The Development Agreement vests the right to mine in the Owner and future purchasers for 35 years.

The Development Agreement establishes "the permitted uses for the Property." *See* Page 1. The Development Agreement goes on to establish that its purpose is to protect the Owner's right to develop the Property over a period of years.

> Therefore, Owner requires certain assurances and protection of rights in order that Owner will be allowed to complete the development of the Property in accordance with the Development Plan over the period of years permitted by this Agreement.

Id. at page 2. The Development Agreement had a 35-year term. *Id*. at paragraph 4, page 4. The Court finds the following provision to be particularly important:

> **3. PLAN APPROVAL AND VESTED RIGHTS**. As of the execution date of this Agreement, Town, by and through its Mayor and Town Council (collectively, the

> "Council"), hereby grants to Owner, its successors and assigns, its approval of the Development Plan. **For the term of this Agreement, Owner shall have a vested right to develop and use the Property in accordance with this Agreement and the Development Plan.** The determinations of the Town in this Agreement and the assurances provided to the Owner in this Agreement are provided pursuant to and as contemplated by A.R.S. § 9-500.05 and other applicable law. (Emphasis added)

This language is not ambiguous. It is not unclear. The Development Agreement gives the Owner **vested** rights for the term of the Agreement. As previously noted, one of these rights is to perform mining operations in the area identified by the BHP Mine Overlay area. The words "develop and use the Property" clearly indicate that additional activity to develop the Property to support in-situ mining operations is permitted. Although the language in Paragraph 3 it is clear on its face, the language is confirmed in Paragraph 12 of the Development Plan which gives the Owner the right to drill, mine or explore for minerals. If mining was limited to its existing or historic use, there would be no reason to drill, mine or explore.

In addition, contracts "are to be given a reasonable construction" and "read in light of the parties' intentions as reflected by their language and in view of all circumstances." *Smith v. Melson, Inc.*, 135 Ariz. 119, 121 (1983). The argument that Merrill would explicitly carve out mining rights within the BHP Mine area for a potential joint venture with a mining company while simultaneously agreeing to limit his right to commercial-scale recovery of copper is nonsensical.

Accordingly, the vested rights established by the Development Agreement run with the land. The Development Agreement provides that "Owner and its successors are entitled to exercise the rights granted pursuant to this Agreement." *Id*. at ¶ 5, page 4. There is no question that FCI is the successor to Merrill. The Court finds that the 2003 Development Agreement unambiguously provided the Owner a vested right to in-situ copper mining on the Property, provided that the copper mining did not extend beyond the limits established by the BHP Copper Mine Overlay area.

As a result of the clear and unambiguous language in the Development Agreement, the Prior Ruling rejected the Town's argument that the Development Agreement limited mining to its existing or historic use. The development of in-situ mining is clearly and unambiguously authorized by the Development Agreement. The Prior Ruling entered partial summary judgment in favor of FCI on this point. Although the trial did not open up this issue for reconsideration, the Court notes that even the Town's expert, Mr. Gammage, agreed that the 2003 Development Agreement preserved the Owner's right to mine.

B. <u>The Development Agreement provided specific methods for amendment</u>

A.R.S. § 9-500.05(C) provides that a development agreement may be amended by "mutual consent" of the parties. The Development Agreement contains the following mandates concerning amendment:

> **6. DEVELOPMENT PLAN**. (a) the development of the Property shall be in accordance with the Development Plan and this Agreement unless otherwise amended pursuant to this Agreement.
>
> * * *
>
> (c) . . . Town shall not adopt or change any ordinance, regulation or other control that are not uniform and that discriminate in their application against the Owner or the Property. Owner and Town agree that after this Development Plan has been approved, any and all subsequent zoning ordinances or requirements, zoning restrictions, addenda, and revisions adopted by the Town will not be applied to the Property except as may be required pursuant to Paragraph (f). . .
>
> (f) 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 the recording of the Agreement. **<u>Town shall not apply to the Property any legislative or administrative land use regulations adopted by the Town or pursuant to an initiated measure that would change, alter, impair, prevent, diminish, delay or otherwise impact the development or use of the Property as set forth in the Development Plan except as follows: 1) as specifically agreed in writing by the Owner</u>**; 2) future generally applicable ordinances, rules, regulations, and permit requirements. . . of the Town reasonably necessary to alleviate legitimate threats to public health and safety. . . 3) adoption and enforcement of zoning ordinance provisions governing nonconforming property or uses; 4) future planned use ordinances, rules, regulations, permit requirements and other requirements and official policies of the Town enacted as necessary to comply with mandatory requirements imposed on the Town by County, state or federal laws and regulations. . . and 5) future updates of, and amendments to, existing building, plumbing, mechanical, electrical, and similar construction and safety related codes adopted by the Town. (Emphasis added)

The Development Agreement also describes in detail how it is to be amended:

> **32. AMENDMENTS**. No amendment shall be made to this Agreement except by written document executed by Town and Owner. Within ten (10) days after the execution of any

> amendment by both parties, the amendment shall be recorded with the Pinal County Recorder, Pinal County, Arizona.

It includes a "non-waiver" provision:

> **21. WAIVER**. No delay in exercising any right or remedy by either Town or Owner shall constitute a waiver thereof. Waiver of any of the terms of this Agreement of the Development Plan shall not be valid unless in writing and signed by all parties hereto. The failure of any part [sic] to enforce the provisions of the Agreement or the Development Plan or require performance of any of the provisions, shall not be construed as a waiver of such provisions or the fact the right of the party to enforce all of the provisions of this Agreement and the Development Plan.

On two occasions prior to 2007, the Development Agreement was amended and the amendment was recorded. (Neither of the amendments involved mining rights.) Evidence is undisputed that no amendment to the Development Agreement revoked the Owner's right to mine on the Property. In fact, the Town does not contend that the Development Agreement was amended.

Finally, amendment of a development agreement is not the same as amending a zoning ordinance. Amending zoning, without more, cannot change rights vested in a development agreement.

III. FCI ACQUIRES THE PROPERTY

From 2006 through 2009, Merrill negotiated with Hunter Dickenson to sell the Property. The deal was never consummated. In 2009, Merrill lost the Property to the People's Bank. In August 2009, HDI was the successful bidder for 1162 acres of the Property for approximately $8000 per acre. *See* Exhibit 51.

To make matters even more confusing, 160 acres of the 350 acre mining site is owned by the State of Arizona. Merrill leased the mining rights on the State land, and the State was constantly pressing Merrill to engage with mining companies so the State's royalty could be realized.

In August, 2009, the State Land Department was looking for someone to take over Merrill's mineral lease. *See* Exhibit 54. Ultimately, FCI acquired Merrill's mineral rights on the State Lease land based on cash and stock.

The Court finds that FCI is the successor in interest to Merrill. To the extent Merrill had a right to mine, those rights were passed to FCI.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE KEY ISSUE IN THIS CASE: DID ACTIONS IN 2007 ELIMINATE THE OWNER'S RIGHT TO MINE THE PROPERTY AS A NONCONFORMING USE?

The Prior Ruling held that the Development Agreement is a valid exercise of the Town's police power and is enforceable. The Development Agreement gave the Owner a transferable, 35-year vested right to develop in-situ copper mining in the Mine Overlay Area. FCI is the successor to Merrill. The issue, then, becomes whether the actions of the Town and Merrill in 2007 eliminated this vested right.

The unfortunate fact is that the Development Agreement and associated documentation cannot be called models of clarity. As previously noted, the right to mine is not mentioned in the main body of the Development Agreement, but is incorporated by reference to Exhibit B, which is the PUD. Both parties can find isolated snippets of contract language which support their position. The documents contain some ambiguities, allowing reasonable people to differ in their interpretations. But when the Development Agreement is viewed in conjunction with the testimony and other contemporaneous documents, the Court finds that clear and persuasive evidence supports FCI's position that neither Merrill nor FCI abandoned their nonconforming use right to mine as established in the 2003 Development Agreement.

A summary of the Court's conclusion can be simply stated: If the Town wanted to amend the Development Agreement to eliminate mining rights vested by the Development Agreement, it should have amended the Development Agreement.

A. Finding #1: The Development Agreement was never amended.

A.R.S. § 9-500.05(C) provides that a development agreement may be amended by mutual consent of the parties. Here, the parties agree that the Development Agreement was never amended. The Town's representative, Mr. Eckhoff, testified that amending zoning does not amend the Development Agreement. In fact, the Town does not claim that the Development Agreement was amended.

As a matter of undisputed fact, the Court finds that the provisions in the Development Agreement pertaining to preservation of the nonconforming use of in-situ mining were never amended.

B. <u>Finding #2: The fact that the Development Agreement was not amended is strong evidence that the parties did not agree to eliminate in-situ mining as a nonconforming use</u>.

The Development Agreement contains a specific procedure for amendment. The amendment must be by a written document executed by the Town and Owner. In addition, the amendment shall be recorded. The fact that no amendment was made to the Development Agreement is strong and persuasive evidence that the nonconforming mining rights were not eliminated.

The requirement that amendments to the Development Agreement must be recorded is not an insignificant or ministerial act that can readily be ignored. The purpose of the recording requirement is to put future purchasers of the Property -- like FCI -- on notice of what restrictions were placed on the Property. Mr. Eckhoff agreed that development agreements need to be recorded so anyone who went through the chain of title would know what the rights were. By statute, development agreements must be recorded, A.R.S. § 9-500(D), so amendments must be recorded, as well.

The Town and Merrill knew how to amend the Development Agreement because they did so on two prior occasions. *See* Exhibits 85 (entitled "Amendment No. 1 to the Merrill Ranch Development Agreement") and 86 (entitled "Amendment No. 2 to the Merrill Ranch Development Agreement"). Those agreements are specific in what portion of the Development Agreement was being amended. Both were recorded. Neither mentioned mining.

When interpreting a contract, the acts of the parties before a dispute arises is the best evidence of doubtful contract terms. *Associated Students of Univ. of Arizona, supra* at 105. Here, the parties demonstrated a history of following the mandated procedures in amending the Development Agreement. If the Town wanted to eliminate a nonconforming use vested by a Development Agreement, the Town should have followed the mandated procedure for amending the Development Agreement. The parties clearly knew how to do so and had, in fact, followed procedure on two prior occasions. The Town's failure to follow this process demonstrates that there was no mutual agreement and is fatal to its claim.

C. <u>Finding #3: The Town failed to show that Merrill affirmatively intended to give up vested mining rights. Therefore, there is no mutual agreement to modify vested mining rights and Merrill never waived or abandoned mining rights</u>.

The Court finds that the Town failed to demonstrate by the preponderance of the evidence that Merrill affirmatively intended to give up the vested mining rights or otherwise waived or abandoned those rights.[2] Several persuasive arguments support FCI's position.

1. <u>Merrill never manifested an objective intent to trade vested mining rights for increased density residential zoning</u>

For several reasons, the Court finds by a preponderance of the evidence that Merrill never manifested an objective intent to trade vested mining rights for increased residential zoning, and he never manifested an objective intent to abandon mining at the Property.

First, there was no amendment to the portion of the Development Agreement that gave the owner of the Property the vested right to mine. Other amendments to the Development Agreement made clear what portions of the Development Agreement were being amended. Amendment 2 to the Development Agreement gave Merrill the right to increase density in exchange for payment of additional money. Not one word mentions mining. *See* Exhibit 86. Mr. Eckhoff acknowledged that after the Second Amendment the original Development Agreement remained in force except as amended. The Town never asked for or negotiated an amendment to the Development Agreement that would give up mining rights.

Second, there is no evidence that Merrill and the Town discussed mining during the 2007 rezoning. The Town stipulated that no Town representative ever spoke to Merrill or his representatives about mining during the 2007 rezoning. Copper mining was not on Merrill's radar in 2007. The lack of discussion persuasively demonstrates that neither party had an expressed intent to eliminate mining. In fact, credible testimony established that the Town had been historically favorable to mining development until well after 2007. There was no historical evidence from 2003 through 2007 and thereafter until 2010 that anyone at the Town was publicly opposed to the mine. Merrill had no reason to think the existing vested mining rights in the 2003 Development Agreement were at risk and needed affirmative protection. There is no evidence of a *quid pro quo* for relinquishing the mine. The increased density had been established in

2. The Town's expert offered the opinion that the burden is on the property owner to affirmatively maintain or preserve a nonconforming use. The distinction is not important. Regardless of who carries the burden, evidence clearly established that Merrill affirmatively maintained and preserved the nonconforming mining rights. In other words, FCI proved that Merrill affirmatively preserved the nonconforming use.

Amendment 2, and mining is not mentioned. Instead, in Amendment 2 Merrill agreed to pay additional money in the event the Town approved the increased density in the PUD amendment.

Third, Merrill credibly testified that he did not give up or change mining rights in the Development Agreement. *See* Exhibit 219 ("WMH Merrill nor Florence Copper ever entered into any amendment to the 2003 PADA that eliminated any rights to mining as referred to in the 2003 PADA.") Merrill credibly testified that he always felt he had the option of either mining the property or developing it residentially. He "could go in either direction." Merrill Depo. at 79:24-80:3. Mr. Eckhoff credibly testified that Merrill, like all developers, wanted "maximum flexibility." Mr. Schafer credibly testified that the development could be "sequenced," *i.e.*, once the mine was finished the property could be developed for other purposes.

Fourth, Merrill's intent is persuasively demonstrated by his conduct. Starting in 2006 and extending through 2009 when he lost the Property, Merrill had discussions with mining companies in an attempt to sell the right to mine. Merrill never discussed zoning with the mining companies and never disclosed that the Property needed to be rezoned. The fact that Merrill negotiated to sell the Property to a mining company is strong evidence that Merrill had no contemporaneous belief that he had agreed to eliminate mining. The evidence clearly established that Merrill's business objective was to have maximum flexibility to respond to the market. Having the property zoned with a higher density while maintaining mining as a nonconforming use allowed Merrill the best of both worlds, especially when State owned land (which was not under the Town's authority) sat in the middle of the Property waiting to be mined. Moreover, shortly before the rezoning Merrill signed a 10-year agricultural lease on the Property which specifically preserved the right to enter the Property for the purposes of mining exploration drilling. Exhibit 141, p. 4. All of these actions conclusively demonstrate that Merrill intended to retain mining rights.

Fifth, when viewed in context with the other evidence, the more persuasive documents do not support the Town's position. Nothing in the Zoning Ordinance (Exhibit 22) mentions mining or the elimination of mining. Nothing in the Zoning Ordinance says that the nonconforming uses grandfathered into the Development Agreement are eliminated. In fact, paragraph 23 reads as follows: "Town and Owner agree to work together in good faith to modify any applicable portions of the Merrill Ranch Development Agreement that may be found to be in conflict with this PUD Amendment Approval." In other words, the Zoning Ordinance was an amendment to the PUD -- not the Development Agreement. If the Ordinance was in conflict with the Development Agreement, the parties needed to work through the differences. There is no evidence that the parties did so, leaving the conclusion that the zoning change did not change the vested right to mine set forth in the Development Agreement. Mr. Eckhoff, the Town's zoning administrator, admitted that changing and amending the zoning does not amend the Development Agreement.

Other documents support FCI's claim that the zoning changes did not affect the mining rights vested by the Development Agreement. The lack of amendment to the Development Agreement is confirmed by emails exchanged between the Town and Merrill's representatives. For example, the email from Merrill manager Jan Dodson on February 21, 2007 indicates that the requested zoning change is a stand-alone issue from the Development Agreement. She writes, "Why are they [the PUD zoning changes] 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 [Development Agreement]." Exhibit 19, p. 2. Nothing in the Town's response to this email suggests that the Town believed that a change needed be made to the Development Agreement.

Merrill and the Town negotiated for over a year regarding the terms of the 2007 rezoning. But not once during this year did mining rights come up. Instead, the lengthy correspondence and documents shared between the parties reflect negotiations over numerous other conditions, including realignment of Attaway Road, the timing and amount of certain fee payments and planning approvals, and specific residential zoning standards. Mr. DiTullio's February 15, 2007 response to the Town's proposed stipulations indicates that certain proposals must be removed because they do not comply with the Development Agreement. Exhibit 18, pp. 2-3. The Town never hinted rezoning did away with rights vested by the Development Agreement, and the Town never suggested that the Development Agreement needed to be amended.

Sixth, the copper mine was a valuable asset. The Property is listed in the Merrill Trust document dated September 2003 (Exhibit 223 at 2224) as containing over 1.1 billion pounds of copper. The *quid pro quo* for annexation was the preservation of mining on the Property. There is no persuasive evidence that Merrill would simply give away the right to mine.

Seventh, the mine was never closed. Merrill spent hundreds of thousands of dollars to monitor and maintain environmental permits for the mine, both before and after rezoning. Mr. Mears is a geologist who worked for Brown and Caldwell, the consulting firm that prepared the Site Investigation Plan submitted to ADEQ. The Court found persuasive Mr. Mears' testimony that there was never a "big C" closure of the mine or a relinquishment of permits to mine from ADEQ or the EPA. Closure of the pilot test wells is not a closure of the entire mine. *See* Exhibit 8 at page 3 ("I explained that the process of permanently discontinuing hydraulic control and abandoning the test wells . . . would neither constitute nor trigger closure of the Project.") Exhibit 16 is a "precursor" to a closure plan. It is not a closure plan. The plan was simply a way to minimize monitoring costs of the pilot test facility while keeping the mine open and permits active.

> The Brown and Caldwell position was persuasively set forth in a March 18, 2009 letter:
>
> Although Merrill did not conduct any further mine development or testing activities, all environmental permits, issued by several state and federal regulatory agencies, have been maintained in the event that the mining project were to proceed. The permits require a number of on-going monitoring, compliance, and reporting activities.
>
> Unfortunately these activities cannot be legally discontinued without first obtaining "closure" of the site which would trigger several large remediation activities. These permits and attendant compliance requirements are discussed in more detail below.

Exhibit 48, p. 1. Mr. Mears credibly testified that Brown and Caldwell was hired to maintain the mining permits. Maintaining mining permits is inconsistent with abandoning the right to mine. In short, appropriate state and federal regulatory permits were maintained. This mine was never close to being closed. There was no closure and no abandonment.

2. The Town never contemporaneously expressed intent to Merrill that the 2007 change in zoning affected vested mining rights

Any amendment to the Development Agreement requires "mutual consent." In the section above, the Court found that Merrill did not consent to the elimination of mining. This should end the inquiry. Lest there be any doubt, however, the Court also finds by the preponderance of the evidence that the Town never contemporaneously expressed the intent to Merrill that the change in zoning negatively affected vesting mining rights. Undisputed evidence established that the Town never communicated to Merrill a belief that the change in zoning affected the vested mining rights. In fact, persuasive evidence showed that the Town not only failed to discuss mining, but that the Town affirmatively didn't raise the issue for fear that Merrill would "figure out he was giving up his mining rights."

Undisputed evidence demonstrates that the Town never raised the issue of mining or the waiver of mining rights with Merrill or any of his agents during discussions of the 2007 Zoning Ordinance. The fact that neither Merrill nor the Town discussed the elimination of the nonconforming mining rights strongly supports the conclusion that there was no mutual agreement that mining rights were eliminated.

The Court found persuasive the testimony from Dr. Longley that discussions about or opposition to the copper mine were not in the public discourse in Florence in 2003-2007. Thus, Merrill had no reason to believe the Town was interested in ending mining.

"The phrase 'manifestation of intent' adopts an external or objective standard for interpreting conduct; it means the external expression of intention as distinguished from undisclosed intention." Restatement (Second) of Contracts § 2, cmt. b (1981).

The Town mayor at the time, Tom Rankin, testified that he spoke with Town representatives and communicated his desire to eliminate mining because he didn't think it was good for the Town. He admitted that his views were never communicated to Merrill, and he provided the explanation that he didn't want to raise the issue because "I didn't want Harrison [Merrill] to figure out he was giving up his mining rights." Even if one assumes that the documents are somehow ambiguous (which they aren't when viewed in context), the Court adopts FCI's argument that a party with secret intent as to a contract cannot take advantage of an ambiguity. *See* Restatement (Second) of Contracts, § 20 (first party's intent controls if first party has no reason to know of any different meaning and the second party has reason to know the meaning attached by the first party). Moreover, this testimony provides persuasive evidence that the Town knew Merrill was not interested in giving away the right to mine in 2007. If the Town "didn't want him to figure it out," the Town must have known that Merrill wouldn't agree to give the mining rights away.

When viewed in context with the other evidence, the documents are not ambiguous. Nevertheless, even if one assumes an ambiguity, the Town should not be able to take advantage of ambiguous provisions through hidden intent. If the Town wanted to eliminate mining, it should have raised the issue and executed an appropriate amendment to the Development Agreement in accordance with the mandated procedure for amendment instead of adopting a tortured interpretation of amendments to the PUDs.

3. Conclusion

In conclusion, the preponderance of the evidence firmly demonstrates that there was never any mutual agreement to eliminate nonconforming mining rights. Neither side expressed an intent to abandon mining. The preponderance of the evidence firmly demonstrates that Merrill never waived or abandoned mining rights. Since undisputed evidence indicates that FCI was the successor to Merrill, FCI continues to have a vested right to mine that cannot be altered by the Town's unilateral actions.

D. Finding #4: In light of all of the other evidence, the Town's arguments are not persuasive.

The Court finds that evidence supporting FCI's position clearly outweighs the evidence supporting the Town's position.

The Town points to several statements made by Merrill to support its claim that mining was abandoned. To be sure, in the abstract some of Merrill's actions could be interpreted as consistent with an intent to abandon mining. But Merrill's statements to mining companies must be taken with a grain of salt because he is, in the first instance, always a dealmaker trying to posture for a better deal. (Merrill knows that a seller should never act too eager or desperate to sell.) Moreover, at the time Merrill was uninterested in mining and believed the Property was more valuable in real estate development. With the price of copper low in 2005-07 and real estate skyrocketing, Merrill did not view mining as an economically feasible option. *See* Exhibit 8, p. 2. And the Court believes Merrill occasionally made negative comments about mining because he knew the State Land Department was pressing him to develop the mineral rights on the leased land, and he was trying to keep the State Land Department off his back. *See* Exhibit 25. He wanted to keep his options open, and did not want to be forced to mine if better options were available.

Merrill's statements must be viewed in conjunction with his other conduct. Merrill testified that he never gave up the right to mine. He testified that he had negotiations to sell the Property to mining companies in 2006-2009. Although he made inquiries, Merrill did not initiate formal closure procedures on the mine, never closed the mine and continued to pay for monitoring. When the Property went into foreclosure, Merrill made statements attesting to the Property's value as a mining property. His statements demonstrating that he did not abandon mining are far more persuasive than any statements suggesting that mining was abandoned.

The Town argues that the change in zoning and enactment of the 2007 PUD demonstrates that Merrill intended to abandon mining. Evidence established that the Merrill Ranch Master Development Plan dated January 26, 2007 was prepared by Merrill's representatives and submitted in support of Merrill's request for a zoning change. Evidence establishes that the new PUD did not include a reference to the BHP Mine Overlay. Any references to mining found in the 2003 PUD were removed, and such removal appears intentional. Similarly, evidence established that provisions specifically related to mining in the 2003 PUD (such as paragraph 12) were omitted from the 2007 PUD. Merrill signed the "Consent to Conditions/Waiver for Diminution of Value."

Specific references to mining in the 2007 Development Plan and/or PUD would be clear evidence of Merrill's intent to preserve mining. The absence of such a reference is evidence that he did not. However, the Court did not find the evidence supporting the Town's argument in support of abandonment as strong as the evidence opposing abandonment. The fact that Merrill initiated rezoning does not persuasively demonstrate Merrill's intent with respect to the Property's vested mining rights because the existing zoning likewise did not permit mining. Mining was preserved in the Development Agreement as a nonconforming use under any zoning plan. The Court was not persuaded that a zoning change from I-1 Light Industrial (which did not

allow mining) to Residential (which also does not allow mining) demonstrates an intent to eliminate a use that was nonconforming under either zoning classification. Unlike the 2003 PUD, which was incorporated into and recorded as part of the Development Agreement, the 2007 PUD is not part of the Development Agreement and was never recorded. Instead, it appears only in the Town's zoning book. As such, it is a zoning document and cannot create or remove any vested contractual rights.

The Town argues that the change in zoning on June 4, 2007 demonstrates that Merrill intended to abandon mining. *See* Exhibit 22. To support this claim, the Town argues that increasing residential zoning density is inconsistent with the owner's desire to continue his ability to mine on the Property. It is not. Merrill's goal clearly was to maximize entitlements (and thus the value) to the Property. Having both the right to mine and increased residential densities would give Merrill the best of both worlds and thus could increase the value of his property. Evidence shows Merrill preserved an option to mine the Property and then develop the land for residential use after copper resources were depleted.

In prior motions the Town relied on *Duffy v. Milder*, 896 A.2d 27 (R.I. 2006), to support its contention that Merrill's request to rezone the Property was an overt act manifesting his intent to abandon any mining uses on the Property. The Court believes that *Duffy* is distinguishable for several reasons. That case involves interpretation of Rhode Island law, and Arizona has asserted strong private property rights in the face of governmental regulation. *See* Proposition 207, the Private Property Rights Protection Act. Besides, as noted above, the Court was not persuaded that a change in zoning from light industrial to residential constitutes an overt act to eliminate a nonconforming use that is nonconforming under both zoning categories. Finally, the facts in *Duffy* are distinguishable. In *Duffy*, the zoning certificate stated that "the keeping of horses on this lot is currently considered a lawful nonconforming and permitted use and shall be allowed to continue until such time as an overt action for discontinuation is conducted by the property owner." *Id*. at 30. The court found that the owners' voluntary act of rezoning the property in order to build condominiums was an overt act that "manifested their intent to abandon the use of their property as a horse farm." *Id*. at 39. No language similar to the *Duffy* zoning certificate can be found in the instant case. To the contrary, waiver of Development Agreement rights requires more than an "overt act"-- it required a written agreement signed by the Owner and recorded in the County Recorder's office.

The Town argues that Section 6(f) of the 2003 PADA provides that the property owner can consent to different zoning in writing, without requiring an additional amendment to the PADA. While by itself the statement is true, the Court did not find this argument persuasive for the claim that the nonconforming rights vested by the Development Agreement were eliminated. First, other provisions of the Development Agreement more specifically control the situation concerning vested nonconforming rights, and the Town's interpretation of Section 6(f) takes the

provision out of context. Nonconforming mining rights are vested by the Development Agreement, and amendments to the Development agreement must be in writing and recorded. Second, as noted above, Merrill's request for a zoning change never manifested intent to give up vested mining rights. Third, as noted above, a change in zoning does not demonstrate an intent to eliminate a use that is nonconforming under either zoning classification.

The Town argues that Exhibit B to the 2007 Zoning Ordinance, the "Consent to Conditions/Waiver for Diminution of Value," reflects Merrill's written assent to the changes. On March 21, 2007, Merrill signed Exhibit B which reads:

> The undersigned is/are the owner(s) of the subject land described in Exhibit A hereto that is subject of the PUD Rezoning Amendment Application PZ-6051-R ("Amendment PZ-6051-R"). By signing this document, the undersigned agrees and consents to all the conditions imposed by the Florence Town Council in conjunction with the approval of PUD Rezoning Amendment Application PZ-6051-R ("Conditions of Approval") and waives any right to compensation for diminution in value pursuant to Arizona Revised Statutes § 12-1134 that may now or in the future exist as a result of the approval of PUD Rezoning Amendment Application PZ-6051-R. Except as expressly set forth in Amendment PZ-6051-R and its Conditions of Approval, nothing herein shall constitute a waiver of any other of the undersigned's rights pursuant to the above- referenced statutes.

The Court does not believe that the Consent to Conditions is clear and unambiguous when viewed in the context of this case.

The Ordinance itself places a specific limitation on the Consent to Conditions. Paragraph 24 provides that the Owner "agrees to waive claims for diminution in value pursuant to Proposition 207 [A.R.S. 12-1134] pursuant to the waiver attached hereto as Exhibit B." Thus, the waiver's purpose is limited to diminution of value caused by the zoning change under Arizona's post-*Kelo* Proposition 207, the Private Property Rights Protection Act, not a waiver of nonconforming uses. Moreover, the waiver itself speaks of "conditions imposed by the Florence Town Council" in conjunction with the change in zoning. Of course, nothing in the Zoning Ordinance mentions mining or expressly states that a pre-existing nonconforming use would be discontinued. In other words, **there are no conditions** imposed on mining in the ordinance. Finally, the waiver itself contains a final sentence that was added by Merrill. This sentence makes clear that the Owner waives items "expressly set forth in Amendment PZ-6051-R and its Conditions of Approval," but does not waive "other" rights. *See also* Exhibit 160 (in discussing the added language, Merrill's attorney wrote "we have added a sentence which clarifies this concept and provides the appropriate safeguards to us that we are not waiving any rights for future unknown land-use actions the town may take outside the scope of the amendment or the conditions of approval").

The Consent to Conditions also should be read in context with other communications between the parties. Merrill's lawyer had objected to proposed stipulations that conflicted with the Development Agreement. *See* Exhibit 18. In a letter to the Mayor and Town Council on March 23, 2007, Mr. DiTullio wrote:

> The owner of the property has in place a development agreement negotiated with the Town that sets the rules and guidelines which have governed the expectations and development planning for this project. The proposed set of stipulations from Town staff contains certain attempts to modify certain aspects of the development agreement that we cannot agree to in their proposed form, as they significantly impact bargained for and previously approved development and value variables of this project.

Exhibit 20, p. 6. This letter and other contemporaneous documents demonstrate that the 2007 Zoning Ordinance was not intended to modify the Development Agreement. Given that nothing in the Zoning Ordinance suggests that a pre-existing nonconforming use was eliminated, and given that the Town admits that there was no discussion with Merrill or his representatives that suggested such a result, when viewed in conjunction with other evidence the Consent to Conditions cannot be read to waive Merrill's nonconforming use vested by the Development Agreement. At best, the waiver does not give up nonconforming rights vested by the Development Agreement. At worst, the waiver is ambiguous and the evidence taken in context favors FCI's interpretation.

The Court rejects plaintiff's expert's opinions that Merrill abandoned mining and that the Town abandonment ordinance somehow trumps the clear and unmistakable language in the Development Agreement. As noted above, persuasive evidence indicates that Merrill did not abandon the nonconforming use. Moreover, abandonment of mining is specifically defined in the Development Agreement.[3] It means closure of the mine; it does not mean the cessation of copper mining operations for extended periods of time. *See* Development Plan at sections 7 and 12. Stated otherwise, "ordinary" nonconforming uses under the Development Agreement can be abandoned if they cease for more than 180 days. Mining rights, however, can only be abandoned or given up by closing the mine (or by modifying the Development Agreement). This exception is logical and necessary, because everyone recognized that the mine could be dormant for some time, and the term of the Development Agreement was 35 years. And "closing" a mine is something much different than closing a store or restaurant.

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3. The Development Agreement was approved by the Town Council and recorded as a *quid pro quo* for annexation. It carves out nonconforming mining as an exception and allows the mine to remain dormant. The notion that a specifically detailed term is rendered moot by a Town ordinance defining general abandonment of nonconforming uses defies logic.

As a matter of undisputed fact, the mine was not closed. Although undisputed evidence indicates that Merrill investigated steps to close the mine, he never instituted closure proceedings. *See* Merrill depo. at 69:12-14 (the mine was not closed). No Closure Plan has ever been submitted for the Property. The in-situ well permits have not expired and the wells have not been closed. Appropriate federal and state mining permits have been maintained. Thus, absent a mutually agreed change to the Development Agreement, the right to mine continues to this day.

The Court also rejects the Town's argument that FCI's rezoning applications provide persuasive evidence that Merrill abandoned mining. There was no evidence that Merrill told anyone from Curis/HDI/FCI that he gave up unfettered mining rights under the Development Agreement with the understanding that he would have to later rezone in order to gain mining rights.

Mr. McGee credibly testified that he started working with the Town in 2009 and the Town initially was positive towards mining, but told HDI/Curis that it needed a General Plan Amendment. In August 2010 the Town told FCI that it needed to seek rezoning. *See* Exhibit 170 ("it has always been made clear that HDI/Curis would be subject to a public process including General Plan Amendments . . . for their project to go forward.") Mr. Eckhoff agreed, testifying that the Town always made it clear to Curis/FCI that it had to go through a General Plan Amendment and zoning change in order to mine.

The Court was persuaded that defendant made a business decision to try to work cooperatively with the Town. *See* Exhibit 174. This was a reasonable business decision borne out of necessity and was not a waiver or intentional relinquishment of the right to mine. If defendant had been able to gain the Town's cooperation through General Plan Amendment, the past several years of litigation would have been avoided. Given the Town's initial support for the mine, FCI had no reason in 2009 to believe the process would be as contentious as it has turned out to be. The fact that defendant sought rezoning does not outweigh the other strong evidence supporting defendant's position. Nor do disclosures to the Canadian securities regulators demonstrate that FCI/Curis concede that rezoning was necessary.[4]

4. The statements to the securities regulators are not inaccurate. Indeed, if FCI lost this litigation it would be forced to obtain a zoning change from the Town.

ORDERS

THE COURT FINDS that the Town failed to demonstrate its entitlement to declaratory relief that prohibits FCI from engaging in in-situ mining in accordance with the 2003 Development Agreement.

THE COURT FURTHER FINDS that Merrill's and the Town's actions in 2007 did not eliminate or abandon in-situ mining rights of the Owner established by the 2003 Development Agreement. The Town is **not** entitled to an order finding the 2007 rezoning effective and enforceable by the Town to prevent in-situ mining within the mine overlay area.

IT IS ORDERED that the Town gets no relief pursuant to Count 1 of its complaint.

The Court is unclear as to the next step in this litigation.

IT IS ORDERED that, within 10 days of the filed date of this Order, the parties are to discuss the case and a future plan of action.

IT IS FURTHER ORDERED setting a telephonic Status Conference on **January 23, 2019 at 8:30 a.m. (time allotted: 30 minutes)** in this division, to address the status and remaining issues. Counsel for plaintiff shall initiate the call by arranging the presence of all parties and contacting this division at **602-372-2943.**

IT IS FURTHER ORDERED that the parties shall submit a Rule 16 joint report and proposed scheduling order at least seven days prior to the status conference.