

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2021-006704

09/24/2021

HONORABLE DANIEL G. MARTIN

CLERK OF THE COURT
J. Eaton
Deputy

TOWN OF CAREFREE

BRIAN IMBORNONI

v.

BOULDERS HOMEOWNERS ASSOCIATION, DALE S ZEITLIN
THE, et al.

DAVINA DANA BRESSLER
MICHAEL W WRIGHT
CHRISTOPHER W KRAMER
JUDGE DANIEL MARTIN

UNDER ADVISEMENT RULING

Pending before the Court is Plaintiff Town of Carefree's (the "Town") April 23, 2021 Complaint in condemnation and Application for Immediate Possession (the "Application"), and Defendant The Boulders Homeowners Association's (the "Association") July 7, 2021 Rule 12(b)(7) Motion to Dismiss for Failure to Join Indispensable Defendants and Plaintiffs Under Rule 19 And Failure to Prosecute This Action in the Name of the Real Party in Interest Pursuant to Rule 17 (the "Motions"). The Court held a hearing on July 29, 2021, at which time the parties presented evidence and argument as to both the Application and the Motions. Thereafter, on September 13, 2021, the Association filed a Submission of Newly Discovered Evidence in Support of Rule 12(b)(7) Motion to Dismiss and in Support of Opposition to the Plaintiff's Request for Immediate Possession. The Town filed a response on September 16, 2021, and the Association filed a reply on September 17, 2021. Having now considered the arguments of counsel, and the record presented, the Court enters its rulings denying the Motions and granting the Application.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2021-006704

09/24/2021

DISCUSSION

The Application

When presented with an application for immediate possession, the Court must consider three questions: (1) whether the property is being condemned for a public use; (2) whether the property is necessary for that use; and (3) the amount of probable damages. *See* A.R.S. § 12-1116(H); *see also* A.R.S. § 12-1112. Here, and for purposes of the present proceeding only, the Association does not contest that the condemnation is for a public use or that the property is necessary for that use. Nor does the Association challenge, for purposes of the present proceeding, the amount of probable damages. *See* Exhibit 2 (Zaddack Appraisal Report) (calculating probable damages at \$20,100.00). Rather, the Association contends that the Town is not a proper plaintiff, and that the individual owners within the Association must be named as defendants because each has severance damage claims that cannot adequately be asserted by the Association. These are the arguments presented in the Motions, and it is the resolution of these questions that control the disposition of the Application.

The Motions

The Court incorporates the Town's factual background as setting forth the basic outline of the circumstances underlying this dispute:

The Town went into the water business in 1998 when it purchased the Carefree Water Company, Inc. ("Carefree Water"), a private water company that had been serving the water delivery needs of the Carefree community. Taking advantage of the benefits of the Community Facilities Districts Act, A.R.S. § 48-701 to 48-729, the Town formed the Town of Carefree, Arizona Community Facilities District ("Carefree UCFD"). Carefree UCFD, itself a municipal corporation, owns all the shares of Carefree Water. Carefree UCFD acts in concert with the Town's interests because the individual members of the Carefree Town Council serve as the Board of Directors of Carefree UCFD.

Pursuant to the terms of an intergovernmental agreement, Carefree UCFD recently acquired the water service infrastructure and right to serve three neighborhoods within the municipal boundaries of the Town of Carefree, referred to collectively as the Carefree Service Area ("CSA") by condemnation from the Town of Cave Creek. (*See Carefree UCFD v. Town of Cave Creek*, Maricopa County Superior Court Case CV2019-052592.) Independent engineering studies performed for the Town determined that a new 300,000 water storage reservoir was

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2021-006704

09/24/2021

required to best meet the water service needs of the CSA and the fire suppression needs of the Town.

The Town's outside engineers, reporting to the Town Engineer, performed a Tank Site Selection study (copy attached as Exhibit A). That study found that the subject property was the only location to meet all selection criteria. (*See id.*) Chief among those criteria was an elevation that allows the system to provide appropriate pressure by gravity flow to meet water delivery and fire suppression requirements. (*See id.*) As a courtesy to nearby neighbors, the Town has agreed to place the water storage reservoir underground, with landscaping over the top of the water tank. (*See Proposed Underground Water Storage Reservoir*, copy attached as Exhibit B.)

The Town originally intended to construct the water storage reservoir on the subject property relying upon its rights pursuant to a utility easement that encumbers the property. Following litigation brought by an adjacent landowner, the Town elected to proceed with condemnation of the property to eliminate any uncertainty regarding its legal right to proceed with construction.

As noted by defendant in its Motion, Carefree UCFD passed a resolution authorizing condemnation of the parcel. Subsequent thereto, the Town passed Resolution No. 2021-006, making its determination of public use and necessity and authorizing the taking of the subject property by the right of eminent domain. Upon inquiry by defense counsel, the Town's attorney explained by email that the Town brought this action in its own name to eliminate any doubt about its right to take immediate possession.

As defendant also notes, the BHOA homeowners hold certain easement interests in the common areas, which include the subject parcel. Article V of the BHOA CC&R's, entitled "Easements," grants easements in favor of the BHOA for ingress and egress for utility service and maintenance. (*See Motion*, Ex. 7, §§ 5.1 & 5.2.) Section 5.3 of the CC&R's grants an easement in favor of owners and their guests for ingress and easement to the golf course facilities and for "the limited purpose of retrieving golf balls and otherwise playing golf on the Golf Course Facilities." (*Id.*, § 5.3.) In addition, Article Two of the CC&R's grants "a non-exclusive easement for use and enjoyment in and to the Common Areas," and to all of the easements, covenants, conditions, restrictions and other provisions contained in the CC&R's. (*Id.*, § 2.1.)

Response, at pages 3-4 (footnote omitted).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2021-006704

09/24/2021

The Individual Homeowners Are Not Indispensable Parties

Preliminarily, the Court concludes that the individual homeowners are not indispensable parties. As the Town correctly observes, *Catalina Foothills Unified Sch. Dist. No. 16 v. La Paloma Prop. Owners Ass'n, Inc.*, 238 Ariz. 510 (Ct. App. 2015) is directly on point, and compels the conclusion that the individual homeowners are not indispensable (or necessary) parties. *See generally* Response, at pages 9-11. Accordingly, the Association's motion to dismiss for failure to join indispensable defendants will be denied.

The Town is a Proper Plaintiff

The Association contends that the Town is not a proper plaintiff because it has "no use or need for the water tank" and "does not operate a water system or provide water to the residents of Carefree." Motion, at page 2. The Association observes that because Carefree UCFD and Carefree Water are the owners and operators of the water system, and because each is a legal entity separate and distinct from the Town, they are the real parties in interest, and only they may bring the condemnation action in question (which action would *not* include authority for immediate possession, a power not granted to Carefree UCFD). To conclude otherwise, the Association urges, would "run afoul of the provisions and spirit of the Constitution." Reply, at page 2.

The Town responds that the "real test" is "whether the intended use of a condemned property is a public use, not whether the condemnor will be the end user." Response, at page 7 (citing *City of Phoenix v. Phoenix Civic Auditorium & Convention Ctr. Ass'n, Inc.*, 99 Ariz. 270, 278 (1965)); *see also Cordova v. City of Tucson*, 16 Ariz. App. 447, 449 (1972), *City of Phoenix v. Superior Ct., Maricopa Cty.*, 137 Ariz. 409, 411 (1983), *Humphrey v. City of Phoenix*, 55 Ariz. 374, 384 (1940). The Court agrees. The Town has established public use and necessity for the taking, and therefore its right to immediate possession under A.R.S. § 12-1116(H). Accordingly, the Application will be granted, and the Association's motion to dismiss for failure to join indispensable plaintiffs and failure to prosecute in the name of the real party in interest will be denied.

DISPOSITION

IT IS ORDERED granting the Application.

IT IS FURTHER ORDERED, pursuant to A.R.S. § 12-1116, permitting the Town to take immediate possession of the property legally described in Exhibit A to the Application upon deposit with the Clerk of Court of a bond in the amount of \$20,100.00.

IT IS FURTHER ORDERED denying the Motions.

/s/ Daniel G. Martin

HON. DANIEL G. MARTIN
JUDGE OF THE SUPERIOR COURT