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22  
23 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

24 **IN AND FOR THE COUNTY OF MARICOPA**

25 TOWN OF CAREFREE, a municipal  
26 corporation and political subdivision of the  
State of Arizona,

Plaintiff,

vs.

THE BOULDERS HOMEOWNERS  
ASSOCIATION; a domestic nonprofit  
corporation; and MARICOPA COUNTY  
TREASURER,

Defendants.

APN: 216-33-451B

No. CV2021-006704

**RESPONSE TO MOTION FOR  
ENTRY OF PARTIAL FINAL  
JUDGMENT**

**AND**

**OBJECTION TO PROPOSED  
FORM OF PARTIAL FINAL  
JUDGMENT**

*Tier 2*

**(Eminent Domain)**

**(Assigned to Hon. Daniel Martin)**

1 Plaintiff Town of Carefree (“Town”), through counsel, respectfully responds to  
2 The Boulders Homeowner’s Association’s (“BHOA”) Motion for Entry of a Partial Final  
3 Judgment and objects to the BHOA’s proposed form of Partial Final Judgment.

4 **A. Factual Background.**

5 In its Under Advisement Ruling filed September 29, 2021, the Court found that:  
6 “The Town has established public use and necessity for the taking, and therefore its right to  
7 immediate possession under A.R.S. § 12-1116(H).” (Under Advisement Ruling at 4.) The  
8 Court therefore entered its Order “permitting the Town to take immediate possession of the  
9 property legally described in Exhibit A to the Application upon deposit with the Clerk of  
10 Court of a bond in the amount of \$20,100.00.” (*Id.*) The Town posted its bond on  
11 September 30, 2021. (*See* Notice of Deposit filed September 30, 2021.)

12 On October 1, 2021, the BHOA moved for the entry of a partial final judgment  
13 pursuant to A.R.S. § 12-2101(A)(6) and *Bilke v. State*, 206 Ariz. 462 (2003). While not  
14 addressed in its Motion, the BHOA’s proposed form of Partial Final Judgment includes  
15 Rule 54(b) language as an independent ground for an interlocutory appeal.

16 **B. Legal Analysis.**

17 The BHOA’s Motion must be denied because Rule 54(b) and A.R.S. § 12-  
18 2106(A)(6) are not available to obtain interlocutory review of an Order for Immediate  
19 Possession (“OIP”). The case of *Catalina Foothills Unified Sch. Dist. No. 16 v. La Paloma*  
20 *Prop. Owners Ass’n, Inc.*, 229 Ariz. 525 (Ct. App. 2012), is directly on point.

21 In that case, the court held that an OIP does not qualify for Rule 54(b)  
22 certification because it does not dispose of any individual claim for relief. *Id.* at ¶ 10. The  
23 court noted the long-standing rule in Arizona “that an order of immediate possession is not  
24 directly appealable because it is not a final judgment.” *Id.* at ¶ 11; *see also Rogers v. Salt*  
25 *River Project Agric. Improvement & Power Dist.*, 110 Ariz. 279, 280 (1974); *Cordova v.*  
26 *City of Tucson*, 15 Ariz. App. 469, 470 (1971); *De Hansen v. Dist. Court*, 11 Ariz. 379,

1 383 (Terr. 1908); *cf. Bailey v. Myers*, 206 Ariz. 224, ¶ 8, 76 P.3d 898, 900 (App. 2003)  
2 (special action provides only relief from order of immediate possession).

3 On the issue of Rule 54(b) certification, the *Catalina Foothills* court wrote:

4 The order of immediate possession therefore is not a final judgment.  
5 And, because “[a] trial court's Rule 54(b) certification does not give this  
6 court jurisdiction to decide an appeal if the judgment in fact is not  
7 final,” we lack jurisdiction to review the order of immediate possession  
8 or the findings it contains, notwithstanding the trial court's inclusion of  
9 Rule 54(b) language in the partial judgment.

8 *Catalina Foothills* at ¶ 11 (citing *Davis v. Cessna Aircraft Corp.*, 168 Ariz. 301, 304  
9 (App.1991)).

10 To the same effect, A.R.S. § 12-2106(A)(6), which allows appeals from certain  
11 non-final judgments, does not apply to orders of immediate possession. *Catalina Foothills*  
12 at ¶ 18; *Rogers*, 110 Ariz. at 280 (construing similar statutory language in prior A.R.S. §  
13 12-2101(G)); *Cordova*, 15 Ariz. App. at 470 (same); *De Hansen*, 11 Ariz. at 383 (OIP  
14 “unquestionably not directly appealable” under Ariz. Civ. Code, § 1214 (1901)).

15 While the BHOA cites *Bilke v. State*, 206 Ariz. 462 (2003), the *Catalina*  
16 *Foothills* court specifically rejected reliance on *Bilke* in the context of an OIP:

17 Thus, although *Bilke* may have application beyond its specific facts, we  
18 find controlling the express holding in *Rogers* that an order of immediate  
19 possession “does not qualify as an appealable interlocutory judgment”  
20 under § 12-2101(A)(6).

20 *Catalina Foothills* at ¶ 18 (citations omitted).<sup>1</sup>

21 There is good reason for this rule. An OIP does not qualify for interlocutory  
22 review under A.R.S. § 12-2106(A)(6) because it does not determine all issues “except the  
23 amount of recovery.” *Bilke* at ¶ 26 (quoting *Musa v. Adrian*, 130 Ariz. 311, 314 (1981);  
24 *Rogers*, 110 Ariz. at 280 (noting “lack of legislative authorization” for appeal from OIP).

25  
26 <sup>1</sup> Both Westlaw and Lexis flag *Bilke v. State* as distinguished by *Catalina Foothills*.

1 Unlike an ordinary case of bifurcated liability and damages, there is more to an eminent  
2 domain proceeding following the entry of an OIP than a simple determination of damages.  
3 For example, the eminent domain statutes address the posting of a bond to secure probable  
4 damages, the priority and payment of property taxes, and the calculation and payment of  
5 interest. *See* A.R.S. § 12-1116. The statutes also address the effect of severance from a  
6 larger parcel and the impact of improvements on compensation, A.R.S. § 12-1122, the  
7 recordation of immediate possession orders and the subsequent granting of tax exempt  
8 status, A.R.S. § 12-1123, circumstances requiring the restoration of possession to the  
9 defendant, A.R.S. § 12-1124, recordation of the final order of condemnation, A.R.S. §  
10 12-1126, and the condemnor's right of possession pending appeal, A.R.S. § 12-1127.

11 Ignoring the controlling case law, the BHOA argues that the OIP should be  
12 certified for interlocutory review because if reversed, the date of valuation will change.  
13 (Motion at 3.) This argument, however, would justify interlocutory review any time an  
14 OIP is entered. At the same time, this request for relief, coupled with the BHOA's request  
15 for an injunction or stay pending appeal, would render the statutory right of immediate  
16 possession meaningless. *See* A.R.S. § 12-1112.

17 The BHOA also mischaracterizes the testimony of Greg Crossman, the General  
18 Manager of the Carefree Water Company to support the specious (and irrelevant) argument  
19 that denying the Town possession of the site will cause no prejudice to the Town. (*See id.*)  
20 The BHOA asserts that the subject water storage reservoir is not needed until mid-2022,  
21 but ignores the time that will be required to construct the water tank. (*See id.*) On this  
22 point, Mr. Crossman testified that construction of the tank was scheduled to begin in  
23 October of 2021. (Motion, Ex. 2, p. 24, lines 16-18.)

24 The BHOA also asserts that any delay in obtaining possession will not affect  
25 water deliveries to customers. (Motion at 3.) While the Town of Cave Creek may provide  
26 service to the Carefree Service Area Creek pending completion of the storage reservoir, the

1 BHOA ignores the fact that revenues from these water deliveries were intended to service  
2 the revenue bonds financing the construction of improvements required to serve the  
3 Carefree Service Area. (Motion, Ex. 2; p. 26, lines 13-24.)

4 In any event, Rule 54(b) and A.R.S. § 12-2101(A)(6) provide no basis for the  
5 certification of an interlocutory appeal. The OIP does not resolve any individual “claim”  
6 for the purposes of Rule 54(b) and § 12-2101(A)(6) does not apply in condemnation  
7 actions. *Catalina Foothills* at ¶ 18. The BHOA’s arguments to the contrary are  
8 unpersuasive and its Motion should be denied.

9 **C. Conclusion.**

10 The Town respectfully urges the Court to deny the BHOA’s Motion.

11 RESPECTFULLY SUBMITTED this 6th day of October, 2021.

12 **JENNINGS, STROUSS & SALMON, P.L.C.**

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21 ORIGINAL of the foregoing eFiled  
22 this 6th day of October, 2021.

23 COPY emailed this 6th day of  
24 October, 2021, to:

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**Wamhoff, Cathy M.**

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