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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

**JOINT RESPONSE TO BHOA'S
MOTIONS FOR PRELIMINARY
INJUNCTION AND FOR STAY OF
PROCEEDINGS**

Tier 2

(Eminent Domain)

(Assigned to Hon. Daniel Martin)

1 Plaintiff Town of Carefree (“Town”), through counsel, responds to: (1) The
2 Boulders Homeowner’s Association’s (“BHOA”) Motion for Preliminary Injunction; and
3 (2) the BHOA’s Motion for Stay of Proceedings.

4 **A. Factual Background.**

5 On July 7, 2021, the BHOA filed its Motion to Dismiss, arguing that the Town
6 filed this action “because the UCFD and the Water Company wanted immediate Possession
7 of the Property,” and that, “[t]he Water Tank project is very much a UCFD and Water
8 Company endeavor.” (Motion to Dismiss, etc., p. 3, lines 17-18, p. 4, lines 9-10.)

9 In its Under Advisement Ruling filed September 29, 2021, the Court noted the
10 BHOA’s argument that “Carefree UCFD and Carefree Water are the owners and operators
11 of the system.” (Under Advisement Ruling at 4.) However, the court agreed, “that the
12 ‘real test’ is ‘whether the intended use of a condemned property is a public use, not
13 whether the condemnor will be the end user.’” (*Id.*)

14 On October 1, 2021, the BHOA filed its Motion to enjoin “the Carefree Water
15 Company and the UCFD and/or their contractors, employees, architects, engineers, and
16 planners, from entering the property subject to the Order for Immediate Possession and
17 from engaging in any construction or use and operations.” (*See* Motion for Preliminary
18 Injunction; Proposed Order for Preliminary Injunction, ¶ 5.) Alternatively, the BHOA
19 requests the Court to stay the order of immediate possession. (*See* Motion for Stay of
20 Proceedings.)

21 **B. Legal Analysis.**

22 The BHOA’s Motions should be denied because there are no grounds for an
23 injunction or stay of proceedings and the relief requested is incompatible with the Court’s
24 ruling on the BHOA’s motion to dismiss. (*See* Under Advisement Ruling at 4.)

25 The BHOA requests a preliminary injunction on the theory that the Court’s
26 ruling and A.R.S. § 12-1116(H) limit the right of immediate possession to the plaintiff, in

1 this case, the Town. (Motion at 1.) A.R.S. § 12-1116(H) provides, however, that upon
2 making the requisite showing and posting an appropriate bond, “the plaintiff shall be let
3 into the possession and full use of the parcels of land.” In this case, the full use of the
4 condemned parcel is the construction of a water storage reservoir.

5 There is nothing in the statutory scheme that prevents the Town from using its
6 rights of possession and full use of the property to allow Carefree UCFD and the Carefree
7 Water Company to construct a water storage reservoir on the condemned land. The Court
8 has found that this is a necessary, public use for the purposes of A.R.S. § 12-1116(H). (*See*
9 *Under Advisement Ruling* at 4.) To the extent the BHOA seeks to limit the Town’s rights
10 of possession and use on the theory that Carefree UCFD and the Carefree Water Company
11 will be the “end users,” this argument has previously been rejected by the Court and that
12 ruling is now law of the case. *Dancing Sunshines Lounge v. Indus. Comm’n of Arizona*,
13 149 Ariz. 480, 482 (1986) (law of the case doctrine will apply “provided the facts, issues
14 and evidence are substantially the same as those upon which the first decision rested”).

15 The BHOA’s Motion also fails because it cannot show the required elements for
16 the issuance of an injunction.¹ First, there is no strong likelihood of success on the merits
17 because “full use” of the property for the purposes of A.R.S. § 12-1116(H) includes use of
18 the property for the purpose for which it was condemned. Second, there is no real risk of
19 irreparable injury. The BHOA concedes public use and necessity, but seeks to delay the
20 construction of the water storage reservoir until after the just compensation trial. The
21 eventual construction of the water storage reservoir, however, is inevitable.

22 The BHOA also fails to meet the balancing of hardships and public policy
23 requirements. Defendant concedes, and the Court has ruled, that condemnation of the

24
25 ¹ The BHOA’s Motion also fails on procedural grounds because it is not supported by a
26 verified pleading or affidavit. *See* A.R.S. § 12-1803(B); *Barnet v. Bd. of Med. Examiners*,
121 Ariz. 338, 340, (1979) (verification requirement applies if party is seeking injunctive
relief prior to the judgment)

1 subject property is necessary for a public use, namely a water storage reservoir. The
2 BHOA will be paid just compensation for the taking of the property. There is no prejudice.

3 The BHOA has filed a one-sentence motion for stay, but has failed to establish
4 any grounds for its issuance. (*See* Motion for Stay of Proceedings filed October 1, 2021.)
5 The BHOA requests the Court to stay the OIP until final judgment is entered or the Court
6 “allows the BHOA the opportunity to file a special action to the Court of Appeals.” (*Id.*)
7 The first alternative is contrary to law. Having made the requisite showing, and posted the
8 bond required by the Court, the Town has a statutory right to immediate possession, i.e.,
9 possession of the property before the entry of final judgment. *See* A.R.S. § 12-1116(H).
10 The second alternative is a *non sequitur*. The BHOA has not requested leave to file a
11 special action from the Court and no such permission is required. Accordingly, the
12 BHOA has failed to demonstrate grounds for a stay.

13 Finally, the Town objects to the BHOA’s Proposed Form of Order for
14 Preliminary Injunction on the grounds that it fails to provide for a bond for security.
15 *See* Ariz. R. Civ. P. 65 (“The court may issue a preliminary injunction or a temporary
16 restraining order only if the movant gives security in such amount as the court considers
17 proper to pay the costs and damages sustained by any party found to have been wrongfully
18 enjoined or restrained.”) In the event construction of the subject water storage reservoir is
19 wrongfully delayed, the Town may incur substantial damages in the form of lost water
20 revenues and increased construction costs.

21 **C. Conclusion.**

22 The BHOA’s Motions should be denied. In the alternative, in the event the
23 Court decides to enter a preliminary injunction, the Court should conduct appropriate
24 proceedings to determine the amount of a bond to be posted by the BHOA.

25 . . .

26 . . .

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

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

3
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11 ORIGINAL of the foregoing eFiled
12 this 6th day of October, 2021.

13 COPY emailed this 6th day of
14 October, 2021, to:

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Filed By: Brian Imbornoni

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Response: Joint Response to BHOA's Motions for Preliminary Injunction and for Stay of Proceedings