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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-000325 08/14/2017

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

RUSSELL R YURK

RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The Court has considered Plaintiff Town of Florence's Motion for Summary Judgment; Defendant's Response to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment; Plaintiff/Counterdefendant Town of Florence's Reply to Opposition to Motion for Summary Judgment and Response to Defendant/Counterclaimant's Cross-Motion for Summary Judgment; and [Revised] Defendant's Reply in Support of its Cross-Motion for Summary Judgment. The Court held oral argument on July 12, 2017.

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") filed a two count complaint. Count 1 seeks declaratory relief that the use of the Property for mining and related activities is an illegal use, the right to maintain nonconforming uses or structures on the Property related to mining activities has been abandoned, all nonconforming use structures are no longer legal, and FCI has no legal right to expand or move any legal conforming uses or structures currently present on the Property. In

Count 2, the Town seeks to obtain the Property through eminent domain. In the counterclaim, FCI contends the complaint should be dismissed. If, however, the case is not dismissed, FCI seeks specific performance as to FCI's vested contractual rights, compensatory damages for the Town's breach of contract and abuse of process, and compensatory damages for the Town's deprivation of FCI's constitutional rights.

The Town filed a motion for summary judgment arguing that the 2007 Ordinance replaced, superseded, and rescinded the 2003 Planned Unit Development Plan ("PUD" or "Development Plan") and, as a result, the right to mine the Property has been lost.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. In the cross-motion, FCI argues that the Court should enter summary 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") 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 Town is bound by the 2003 Development Agreement.

II. ANALYSIS OF DEVELOPMENT AGREEMENT

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 starting point of the Court's analysis is to review the 2003 Development Agreement.

A. The 2003 Development Agreement Unambiguously Allowed Copper Mining on the Property

In order to place the allegations of this case in context, the Court believes it is important to first discuss whether mining operations were allowed by the Development Agreement dated December 1, 2003.

1. In-situ mining is allowed as a non-conforming use under the Development Agreement

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* 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, with the exception of the copper mining operations.

> * 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."

> 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 ¶ 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 mine copper 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 Plan, the Court rejects the Town's argument that the Development Agreement limited mining to its existing or historic use. The development of commercial in-situ mining is clearly and unambiguously authorized by the Development Agreement. FCI is entitled to partial summary judgment against any argument to the contrary.

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 provisions for 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. 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; 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.

III. THE KEY ISSUE IN THIS CASE: DID ACTIONS IN 2007 ELIMINATE THE OWNER'S RIGHT TO MINE THE PROPERTY AS A NONCONFORMING USE WITHOUT TOWN APPROVAL?

To summarize so far, 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 mine copper and develop in-situ 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.

Copper mining was not on Merrill's radar in 2007. With copper prices low and the residential real estate market booming, Merrill was concerned about residential development, not mining. Mining was not discussed. Merrill offers uncontroverted testimony that Merrill and FCI never "entered into any amendment to the 2003 PADA [Development Agreement] that eliminated any rights to mining as referred to in the 2003 PADA." Merrill Aff. at ¶ 7. In 2006-07, the Town and Merrill's representatives didn't talk about mining.

IV. THE TOWN'S MOTION FOR SUMMARY JUDGMENT: IS THE TOWN ENTITLED TO SUMMARY JUDGMENT BECAUSE UNCONTROVERTED EVIDENCE DEMONSTRATES THAT THE RIGHT TO MINE WAS SUPERSEDED OR ABANDONED?

The zoning for the Property in the Development Agreement is I-1 (light industrial). In 2007, zoning on the Property was changed from I-1 to residential. The Town argues that the events of 2007 caused the elimination of the Owner's mining rights as a matter of law. The Court disagrees. The 2007 Ordinance, a legislative action, does not fall within any of the exceptions listed in section 6(f) of the Development Agreement and therefore cannot be applied to the Property. *See Redelsperger v. City of Avondale*, 207 Ariz. 430, 436, ¶ 21 (App. 2004) ("[W]e find that the Zoning Ordinance represented legislative action because it declared a public policy and provided the ways and means for its accomplishment"); *Wait v. City of Scottsdale*, 127 Ariz. 107, 108 (1980) ("The enactment of the original zoning ordinance is a legislative function, and we fail to see why the amendment of an ordinance should be of a different character. We accept

the majority view that the enactment and amendment of zoning ordinances constitute legislative action.") The Court explains its reasoning as follows.

A. The Town Cannot Unilaterally Change the Development Agreement

As an initial matter, the Court rejects the notion that the Town can unilaterally change the Development Agreement or eliminate property rights vested by the Development Agreement. The terms of the Development Agreement clearly prevent this. So does A.R.S. § 9-500.05(C), which states: "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." (Emphasis added.) The Town cannot unilaterally act to take away a property right vested by the Development Agreement.

The Development Agreement sets forth a specific procedure to be used to amend the Development Agreement. Undisputed evidence demonstrates that this procedure was not followed. There was no written amendment to the Development Agreement, and there is no evidence that any amendment was recorded with the Pinal County Recorder. The parties knew how to amend the Development Agreement because they had done so on two prior occasions. The fact that there is no recorded document entitled "Amendment to Development Agreement" is strong evidence that the parties did not intend to amend the Development Agreement. The Town acknowledges that the rights established by the Development Agreement were vested and required mutual agreement to change. Eckhoff depo. at 77: 1-4.[1] Indeed, **at oral argument the Town admitted that it was not arguing that the Development Agreement had been amended**.

In conclusion, the Town cannot unilaterally change the Development Agreement or unilaterally derogate vested rights created by the Development Agreement. An amendment to the owner's vested rights established by the Development Agreement requires both legislative action and contractual action. In other words, if the Town adopts a zoning ordinance that conflicts with the vested contractual rights established in the Development Agreement, the Town cannot

1. In its Response, the Town argues that zoning "cannot be contracted away" and somehow the Town could amend the 2003 Ordinance by another ordinance notwithstanding the recorded Development Agreement. Response at 2. The Town cites no applicable authority for this unpersuasive argument. The Court agrees with FCI that the Town's argument displays a fundamental misunderstanding of development agreements. While a municipality is certainly free to change the zoning on property, the zoning change cannot derogate any right previously vested to property governed by a development agreement unless the parties to the development agreement mutually agree to the change. One of the purposes of development agreements is to protect developers when the winds of politics change direction.

enforce that zoning against the Property without amending the contract. FCI is entitled to partial summary judgment on any argument to the contrary.

B. Evidence Supports the Argument that Merrill's Request for a Zoning Change did not Demonstrate his Consent to the Elimination of Vested Mining Rights

Undisputed evidence shows that Merrill requested that the Town change the zoning on his development. Indeed, the Development Agreement states that "The Town shall not initiate any changes or modifications to the approved zoning except at the request of the owner of the portion of the Property for which such change is sought." Development Agreement at 6(b). The next issue is whether Merrill's request for a zoning change reflects his consent to the elimination of the mining rights vested by the Development Agreement as a matter of law.

To address this issue, the Court will again turn to the contracts entered into by the parties. The Development Agreement incorporates by reference the PUD that includes zoning classifications and designates the property as I-1 light industrial. This I-1 zoning category does not permit mining and, as a result, any mining already is a nonconforming use. The Development Agreement thus creates a contractual exception to the zoning restrictions and vested nonconforming mining rights within the zoning classification established in the 2003 PUD.

In 2007, the Town at Merrill's request approved Ordinance No. 460-07, changing the Property's zoning from light industrial to residential. The 2007 Ordinance does not include any reference to mining, nonconforming uses, or other similar activity. It does not address the owner's contractual exception to the zoning law. The Court sees no reason why a change from one zoning category (that does not allow mining) to another zoning category (which likewise does not allow mining) is, by itself, conclusive evidence that the previously vested and contractually excepted nonconforming use was eliminated. This is especially true since Merrill had substantial discretion to move zoning designations around within the totality of the development. Further, Merrill testified that the purpose of the 2007 zoning change was to maximize entitlements and get higher densities on the Property. Merrill wasn't interested in copper because he was interested in housing. Merrill depo. at 209:19-210:18; 220:6-12.

Significant evidence supports FCI's argument that the change of zoning was not an overt act indicating Merrill's waiver of the vested zoning rights. First, there is no evidence that the Town and Merrill agreed that the change in zoning eliminated the nonconforming use. The parties stipulated that the Town Manager and the Town Attorney had discussions with Merrill and his representatives regarding the proposed 2007 rezoning for Merrill's property and the issue was not discussed. The parties agree:

> In the referenced discussions between Mr. Merrill and/or his representatives and Mr. Mannato and/or Mr. Patel, the topic of in-situ copper mining on Mr. Merrill's Florence, Arizona property was never raised nor talked about. Nobody representing Mr. Merrill ever explicitly stated to Mr. Patel or Mr. Mannato that Mr. Merrill intended to give up whatever right he may have had to conduct mining on the property as part of the 2007 rezoning enactment. . . The discussions between Mr. Merrill and/or his representatives and Mr. Patel and/or Mr. Mannato preceded the adoption of Town of Florence Ordinance No. 460-07.

Statement of Stipulated Facts filed June 20, 2016. How could the parties "mutually consent" to an amendment of the Development Agreement that eliminated vested rights when undisputed evidence shows that the parties did not discuss the alleged amendment?

Second, Merrill offered uncontradicted testimony that he never consciously intended that the zoning amendment would extinguish the right to mine copper. *See*, e.g., Merrill depo. at 101:4-19; 119:13-20. Although the parties quibble over Merrill's specific language, the undisputed facts are that mining didn't come up in 2007 and was not on his mind. He testified:

> Q: And the copper mining never came up in the discussion of the 2007 PUD because it just wasn't on anybody's mind, right?
>
> A: No. Again, the mining question was never an issue, ever.

Id. at 220:6-12. Merrill's testimony is uncontroverted; the lack of amendment to the Development Agreement is confirmed by emails exchanged with 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]." Nothing in the Town's response to this email suggests that the Town believed a change needed be made to the Development Agreement. Moreover, from 2007 through 2009, Merrill was in negotiations to sell the Property to a mining company. Such discussions are consistent with Merrill's belief that mining rights were not eliminated, especially since these sales discussions were bundled with Merrill's ownership of mineral lease rights on the adjacent State Trust Land.

The Town argues that the change in zoning demonstrates that Merrill intended to abandon mining. To support this claim, the Town seems to argue that increasing residential zoning density is inconsistent with the owner's desire to continue his ability to mine on the Property. It is not. Based on his testimony, 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 would increase the value of his property. Evidence shows Merrill intended to mine the property and then develop the land for residential use after copper resources were depleted. FSI SOF ¶ 51.

The Town relies 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.

Third, the 2007 Ordinance itself suggests that it does not change rights vested in the Development Agreement. 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." (Emphasis added.) 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." Eckhoff depo. at 89:21-23; 93:8-9 ("The change of the zoning itself does not change the Development Agreement").

Finally, amendments to the Development Agreement must be recorded. The Court does not view this requirement as 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. *See* Eckhoff depo. at 86:11-16; Merrill

depo. at 41:5-17 (development agreement needs to be recorded so anyone who went through chain of title would know what the rights were). *See also* A.R.S § 33-416. The undisputed fact that there was no recorded amendment to the Development Agreement is evidence that there was no change to the Development Agreement.

C. What the "Consent to Conditions" Means is Ambiguous; Evidence Supports the Argument that Merrill's Signature on the "Consent to Conditions" Was Not Written Consent to Waive Mining Rights

The Town argues that Exhibit B, the "Consent to Conditions/Waiver for Diminution of Value," reflects Merrill's written assent to the changes. Indeed, 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 non-conforming 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 not continue. In other words, **there are no conditions** imposed on mining in the ordinance. Finally, the waiver itself makes clear that the Owner waives items "expressly set forth in Amendment PZ-6051-R and its Conditions of Approval." 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, the Consent to

Conditions cannot, as a matter of law, be read to waive Merrill's continued ability to have a nonconforming use vested by the Development Agreement.

In short, the Development Agreement expressly requires the Owner to affirmatively manifest its intent **in writing** before a right vested by the Development Agreement could be changed. State law says that a Development Agreement can only be modified by mutual consent. Here, evidence supports the argument that Merrill did not provide such consent. Merrill says he did not assent; the Town admits that the topic was never discussed. What the Consent to Conditions means is, at worst, ambiguous.

D. <u>The Non-conforming Use (*i.e.*, the mine) was not Closed or Abandoned</u>

Abandonment of mining is specifically defined in the Development Agreement. 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).

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. Thus, absent a mutually agreed change to the Development Agreement, the right to mine continues to this day.

E. <u>FCI's Attempt to Obtain a Zoning Change Doesn't Mean it Waived the Right to Mine</u>

After FCI purchased the Property, FCI (or its predecessor, Curis) attempted to obtain zoning change or plan amendment. It did so in response to the Town's position that zoning needed to be changed. As noted above, the right to mine was a vested right that ran with the Property. A zoning change was irrelevant if the Owner had a right to a vested nonconforming use. By initially pursuing a rezoning amendment, FCI did not waive the vested rights established by the Development Agreement.

In short, in 2009 FCI either had a vested right to mine based on the dealings between Merrill and the Town or it did not. If FCI had a vested right, it did not lose that right by years later seeking to amend the General Plan or by seeking the Town's approval. Although the Town's approval might be expedient from a political standpoint, the Town's approval was not

necessary to allow FCI to act on a vested right. (That's what this lawsuit is for.) The request for a Plan amendment certainly was not an amendment to the Development Agreement. Statements from Curis or FCI years after the fact have no apparent relevance to actions taken by Merrill and the Town in 2007. And even if FCI held a subjective belief that rezoning was legally necessary rather than just politically advisable, such belief does not vary the terms of a contract entered into years before by third parties.[2]

F. Conclusion

The Court finds that admissible evidence supports the argument that the Development Agreement was not amended by "mutual consent." The Court finds there is admissible evidence supporting the claim that Merrill did not abandon the right to mine the Property or give up the Owner's right to mine with first obtaining the Town's approval. As a result, the Town's motion for summary judgment is denied.

V. FCI'S MOTION FOR SUMMARY JUDGMENT: IS FCI ENTITLED TO SUMMARY JUDGMENT BECAUSE NO TRIABLE ISSUE OF FACT EXISTS ON THE QUESTION OF WHETHER THE MINING RIGHTS VESTED BY THE DEVELOPMENT AGREEMENT WERE RESCINDED OR ABANDONED?

Because the Town is not entitled to summary judgment, the issue then becomes whether a triable issue of fact remains on FCI's motion for summary judgment. Could a factfinder conclude that Merrill traded the vested mining rights for increased residential densities which, at the time, increased the value of Merrill's property holdings?

Briefly summarized, FCI argues that there is no triable issue of fact on this question because: 1) the Development Agreement created a vested right to mine which could only be eliminated by mutual agreement in writing; 2) Merrill offers uncontroverted testimony that he did not enter an amendment to the Development Agreement that eliminated the right to mine; 3) the Town admits that mining was not discussed in 2007 when the zoning ordinance was amended and 4) the Town admits that the Development Agreement was never amended.

In response, the Town argues that the 2007 change of zoning was not a breach of the Development Agreement because the change was initiated at Merrill's request. The Town argues that a change in zoning to residential zoning (which was inconsistent with mining) did not require an amendment to the Development Agreement because it was an authorized change to

2. The Court questions whether FCI's belief on whether it needed to rezone is relevant to the issue of whether Merrill consented to a change in the Development Agreement in 2007. The Court reserves the issue of Rule 403 admissibility of this evidence for another day.

the PUD. The Court concludes that there is a triable issue of fact and therefore denies FCI's motion.

The starting point for this analysis is the recognition that the 2007 zoning ordinance (No. 460-07) was initiated by Merrill. (Although FCI argues that the Town requested that the Property be designated residential and the industrial zoning moved elsewhere within the development, there is no question that Merrill initiated the petition seeking to rezone his property.) The efforts to change the zoning were coordinated by Merrill and Merrill's attorneys. In support of his request, Merrill submitted a revised PUD which did not include the BHP Mine Overlay. At the time he made the request for the zoning change, Merrill sought the zoning change to increase allowable residential densities on the Property which, in turn, increased the value of his property holdings.

Although Ordinance No. 460-07 does not specifically mention mining or any elimination of mining rights, it does purport to supersede the Development Agreement by providing the following:

> 6. The Merrill Ranch Master Development Plan, dated January 26, 2007, as may be amended to reflect the final stipulations of Town Council approval, shall supersede any previously accepted development Plan, Master Development Plan, or PUD Development Guide for the Merrill Ranch PUD. (Emphasis added)

Evidence supports the Town's argument that the language quoted above was approved by -- if not suggested by -- Merrill's representatives. In Exhibit 13, the Town attached a February 9, 2007 letter from Merrill's attorney. The letter contains a "proposed set of modified stipulations" that Merrill would be able to support. On page 8 of the attachment to the letter, the attorney suggests amended language to paragraph 6 quoted above. There was no objection to the "shall supersede" language, and Merrill acknowledged that his attorney made the changes to the language. *See* Merrill depo. at 215:16-21.

In addition, the Merrill Ranch Master Development Plan dated January 26, 2007 prepared by Merrill's representatives and submitted in support of Merrill's request for a zoning change did not reference mining or a mine overlay. *See* Exhibit 14 at 12-14. Specific references to mining in the document would be clear evidence of Merrill's intent to preserve mining. The absence of such a reference is evidence that he did not. The 2007 PUD was enacted as part of the zoning ordinance and Merrill signed the "Consent to Conditions/Waiver for Diminution of Value." The Court has already concluded that the Consent to Conditions is not clear and unambiguous. Evidence thus supports the claim that Merrill acknowledged a change to the Development Plan and waived any claim for reduction in value by signing the "Consent to Conditions." A

reasonable factfinder could determine that this document satisfies the "written consent" requirement of section 32 of the Development Agreement.

Merrill testified that copper mining was not on his mind in 2007 when the Ordinance was enacted. However, he also testified that he believed that the Property needed to be rezoned after the 2007 PUD if the Property was to be mined. *See* Merrill depo. at 187:3-5, 18-21. Although Merrill did not believe that rezoning would be a problem, his post-2007 belief that the Property needed to be rezoned is evidence that he acknowledged that the Town's approval was necessary to initiate mining operations. *See* Exhibit 47. This is evidence that Merrill believed that an unfettered and vested right to mine the Property no longer existed. Of course, Merrill also said he would not have had discussions with mining companies for the sale of the Property from 2007 to 2009 if he "believed that any agreements with the Town of Florence existed that extinguished the right to mine copper on the private property." Merrill Aff. at ¶ 8. A finder of fact will have to figure out Merrill's intent.

The fact that Merrill filed a Site Investigation Plan for the Closure of the Florence Copper In-Situ Mine Project is a double edged sword suggesting an issue of fact. On the one hand, the evidence suggests that Merrill had no intention of mining and therefore was content to have the vested right to mine traded for increased density. On the other hand, the fact that he never followed through with a Closure Plan suggests that Merrill did not intend to abandon mining and, if fact, did not do so.

The evidence cited above supports the argument that, in exchange for increased residential densities, Merrill agreed to a plan that would not allow mining on the Property without first obtaining the Town's approval through rezoning. Thus, there is evidence to support the claim that Merrill "mutually consented" in writing to a change in the Development Agreement that resulted in the Town's ability to approve of mining activity on the Property. To be sure, no amendment to the Development Agreement was ever recorded. But the Zoning Ordinance is a matter of public record, so the purposes of recording were arguably satisfied and potentially waived. FCI cannot dispute that it had both actual and constructive notice of zoning on the Property.

In conclusion, the Court finds that admissible evidence supports the argument that Merrill consented in writing to a change in zoning that traded an unfettered right to mine the Property for increased residential zoning density which required a change in zoning if the owner wanted to mine. FCI's motion for summary judgment is denied.

VI. CONCLUSION

The Court concludes that there are triable issues of fact and neither party is entitled to a case ending summary judgment. However, the Court will resolve some issues as a matter of law.

THE COURT FINDS that, as a matter of law, the Development Agreement does not limit the Owner's mining to the existing or historic use. If effective, the Development Agreement allows the Owner to develop in-situ commercial mining operations.

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. A change to this Development Agreement requires both legislative action and contractual action.

Whether the parties "mutually agreed" to restrict mining rights vested by the Development Agreement is a triable issue of fact.

IT IS ORDERED that the Town's motion for summary judgment is denied.

IT IS ORDERED that, except as noted above, FCI's motion for summary judgment is denied.

IT IS FURTHER ORDERED setting a Status/Trial Setting Conference on **September 15, 2017 at 8:30 a.m.**, (time allotted: 30 minutes) to address status and a trial setting, in this division, East Court Building, Fourth Floor, 101 West Jefferson, Courtroom 413, Phoenix, AZ.

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.