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Clerk of the Superior Court

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7 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
8 **IN AND FOR THE COUNTY OF COCONINO**

Case No. CV 2018000616

9 COCONINO COUNTY FLOOD
10 CONTROL DISTRICT, a political
subdivision of the State of Arizona,

11 Plaintiff,

12 v.

13 TOWN OF TUSAYAN, an Arizona
14 municipal corporation,

15 Defendant.

**MOTION FOR PRELIMINARY &
PERMANENT INJUNCTION**

16
17 Plaintiff Coconino County Flood Control District (the "Plaintiff" or the "District")
18 brings this Motion for Preliminary and Permanent Injunction against Defendant, Town of
19 Tusayan (the "Defendant" or the "Town") for violations of Coconino County's Floodplain
20 Regulations and applicable sections of the Arizona Revised Statutes. Plaintiff requests the
21 Court set a hearing on its Motion and issue a preliminary injunction *pendente lite*, until such


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1 time as a trial on the merits in this matter can occur, and thereafter to permanently enjoin
2 Defendant as requested in Plaintiff's Verified Complaint. This Motion is supported by the
3 accompanying Memorandum of Points and Authorities and by Plaintiff's Verified
4 Complaint, which are incorporated herein by reference.

5 Respectfully Submitted this 4th day of December, 2018.

6 **WILLIAM P. RING**
7 **COCONINO COUNTY ATTORNEY**

8 
9 Brian Y. Puruya
Deputy County Attorney

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **I. Introduction & Statement of Facts**

12 This Motion is a request to enjoin Defendant from violating Coconino County's
13 Floodplain Regulations and Sections 48-3601 through 48-3628 of the Arizona Revised
14 Statutes at that certain property located in Coconino County, Arizona, and known as
15 Coconino County Assessor's Parcel Number 502-14-001B (the "Subject Property").
16 Presently on the Subject Property, and at other unknown locations within the Town, are
17 conditions, alleged in Counts One and Two of Plaintiff's Verified Complaint, which violate
18 applicable floodplain laws and regulations. The Verified Complaint filed in conjunction
19 with this Motion details the specifics of such violative conditions and activities, and is
20 hereby incorporated by reference as if set forth fully herein.

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1 **II. Statement of Law**

2 **A. Jurisdiction**

3 The Court has jurisdiction to hear this action and grant relief requested pursuant to
4 A.R.S. §§ 12-122, 12-123, and 12-1801 *et seq.*, and Rule 65, Ariz. R. Civ. P. The Plaintiff
5 need not post security as it is a political subdivision of the State of Arizona. Ariz. R. Civ. P.
6 65(c)(1).

7 **B. The Arizona Statutes, Floodplain Regulations, & Violations**

8 Arizona counties, via their respective flood control districts, are authorized and
9 directed to adopt local floodplain regulations for their area of jurisdiction. A.R.S. §§ 48-
10 3603(D) and 48-3609.¹ The floodplain regulations enforced by Plaintiff exists as Section
11 2.15B of the Coconino County Zoning Ordinance. *See* Coconino County Zoning
12 Ordinance, Section 2.15B: FPM—Floodplain Management Overlay Zone (the “County
13 Floodplain Regulations”), at ¶ 1 *et seq.*

14 The County Floodplain Regulations have been in effect continuously since 1983, and
15 have been amended thereafter from time to time, with the present version thereof being
16 effective during all times relevant to this action.² The County Floodplain Regulations apply
17 to all Special Flood Hazard Areas, as established by FEMA Flood Insurance Rate Maps, and
18 all “development of land, construction of residential, commercial or industrial Structures or
19 future development, or Uses of any kind conducted on land areas located within [the

20 _____
21 ¹ Verified Complaint, ¶ 19.

22 ² Verified Complaint, ¶ 21.

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1 District’s jurisdiction] shall be accomplished in complete conformance with the provisions
2 of [the County Floodplain Regulations].” County Floodplain Regulations, at ¶¶ 2(a)–(c).³
3 The County Floodplain Regulations specify that where proposed development activities are
4 to take place within a Watercourse that is in a delineated Floodplain, “it is unlawful to
5 excavate or build any Structure affecting the flow of waters without securing written
6 authorization of the [District’s] Board.” County Floodplain Regulations, at ¶ 2(j).⁴

7 The Subject Property is upstream from the Town by virtue of its location and the
8 topography of the surrounding area.⁵ Portions of the Subject Property contains, and is
9 encumbered by, a Federal Emergency Management Agency (“FEMA”) Zone A Special
10 Flood Hazard Area, per Flood Insurance Rate Map 04005C3850G and is specifically
11 defined as a “floodplain” pursuant to A.R.S. § 48-3601(6).⁶ It appears that the boundaries of
12 the Subject Property contain a portion of the so-called “Coconino Wash” and a portion of at
13 least one tributary to the Coconino Wash, both of which are specifically defined as
14 “watercourses” pursuant to A.R.S. § 48-3601(12).⁷ A.R.S. §§ 48-3613 and 48-3615 prohibit
15 specific development that will divert, retard or obstruct the flow of waters in any
16 watercourse without prior written authorization from the board of the district and/or flood
17 control district board.⁸ The County is authorized to maintain and prosecute any violators by

19 ³ Verified Complaint, ¶ 22.

⁴ Verified Complaint, ¶ 26.

20 ⁵ Verified Complaint, ¶ 7.

⁶ Verified Complaint, ¶¶ 8 & 11.

⁷ Verified Complaint, ¶¶ 9 & 10.

21 ⁸ Verified Complaint, ¶¶ 12 & 13,

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1 requesting injunctive relief and abatement of zoning violations pursuant to A.R.S. §§ 48-
2 3613 and 48-3614.⁹ The County may also seek an award of monetary damages pursuant to
3 A.R.S. §§ 48-3614 and 48-3615.¹⁰ Furthermore, “Every new Structure, Building, fill,
4 excavation or development located or maintained within any Special Flood Hazard Area
5 after August 8, 1973 in violation of the [County Floodplain Regulations] is a public
6 nuisance per se and may be abated, prevented or restrained by action of [the District].”
7 County Floodplain Regulations, at ¶ (2)(h).¹¹

8 On or about January 5, 2017, the Town caused the Subject Property to be subdivided
9 by its recording of a final plat map for the “Ten X Ranch Phase I” subdivision as evidenced
10 in the Official Records of Coconino County as Instrument Number 3773962 with the intent
11 to develop the Subject Property to contain multiple units of workforce housing, which
12 required the modification, excavation, fill, compaction, construction, and/or other alteration
13 of the Watercourses and/or Floodplains situated within the boundaries of the Subject
14 Property.¹² On or about April 16, 2018, Plaintiff discovered that the Town intended to break
15 ground on its intended workforce housing development project at the Subject Property in
16 Spring of 2018 and made contact with the Town’s manager to advise that it was aware that
17 the Town intended to initiate a development project on the Subject Property within the
18 Floodplain and/or Watercourses delineated in the Subject Property, and additionally advised

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20 ⁹ Verified Complaint, ¶¶ 14-16.

¹⁰ Verified Complaint, ¶¶ 17 & 18.

¹¹ Verified Complaint, ¶ 28.

21 ¹² Verified Complaint, ¶ 29-32.

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1 the Town that an approved floodplain use permit would be required prior to initiation of any
2 construction activities on the Subject Property.¹³ On or about April 21, 2018, the Town's
3 manager denied knowledge of said project and then failed to respond despite two more
4 attempts at communications initiated by Plaintiff.¹⁴

5 On or about July 24, 2018, the Town began construction of its workforce housing
6 project within the Floodplain and/or Watercourses at the Subject Property without informing
7 the District.¹⁵ On or about August 28, 2018, the Town passed Ordinance 2018-01 in an
8 attempt to assert jurisdiction over administration of the floodplains within its corporate
9 boundaries.¹⁶ On or about September 26, 2018, the Town received a completed citizen
10 referendum petition, with sufficient signatures to refer its Ordinance 2018-01 to a vote of
11 the qualified electors of the Town.¹⁷

12 On or about October 8, 2018, the District's staff learned that the Town had
13 substantial cleared, excavated, graded, and completed other work at the Subject Property,
14 and that there was a dispute that prevented the Town from assuming the role of floodplain
15 administration.¹⁸ That same day, the District's staff sent an email to the Town requesting
16 clarification concerning whether or not such work was within the Floodplain and/or
17 Watercourses on the Subject Property.¹⁹

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19 ¹³ Verified Complaint, ¶¶ 33 & 34.

¹⁴ Verified Complaint, ¶¶ 35-38.

¹⁵ Verified Complaint, ¶¶ 39 & 40.

¹⁶ Verified Complaint, ¶ 41.

¹⁷ Verified Complaint, ¶ 42.

¹⁸ Verified Complaint, ¶ 43.

¹⁹ Id.

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1 On or about October 9, 2018, the Town’s manager replied to the District’s email
2 stating that the Town was the floodplain administrator with regard to those floodplains
3 within the Subject Property; however, it failed inform the District of the referendum petition
4 received on September 26, 2018 regarding its Ordinance 2018-01.²⁰ That same day, the
5 Town’s manager sent an email to the Arizona Department of Water Resources (“ADWR”),
6 providing it with a variety of planning documents and the Town’s Ordinance 2018-01, and
7 represented to ADWR that the Town had assumed jurisdiction over floodplain
8 administration within its corporate territory; however, the Town failed to disclose the
9 completed referendum petition.²¹

10 On or about October 10, 2018, ADWR’s staff sent an email to the District advising
11 that it had reviewed the Town’s Ordinance 2018-01, and based upon it, advised of its
12 opinion that the Town was responsible for permitting and ensuring compliant development
13 within the floodplains in the Town’s corporate boundaries, which include those at the
14 Subject Property.²² As a result, on or about November 13, 2018, the District obtained
15 various preliminary reports related primarily to the water and wastewater systems to support
16 the workforce housing project on the Subject Property, and observed that these plans were
17 vastly different from the final plat recorded by the Town.²³

20 ²⁰ Verified Complaint, ¶¶ 44 & 47.

21 ²¹ Verified Complaint, ¶¶ 45-46.

22 ²² Verified Complaint, ¶ 48.

23 ²³ Verified Complaint, ¶ 49.

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1 On or about November 20, 2018, the Coconino County Recorder certified all
2 signatures on the referendum petition regarding the Town’s Ordinance 2018-01.²⁴

3 On or about December 7, 2018, the District’s staff received a report from an
4 independent engineer with Civiltec Engineering, Inc., (“Civiltec Report”) evaluating the
5 preliminary reports obtained by the District in November and other aspects of the
6 development at the Subject Property and concluded that insufficient study and data are
7 provided via the preliminary reports for the Town’s project at the Subject Property to
8 properly evaluate the effect of the project on the floodplain and/or develop proper flood
9 control measures and flood resistant structures, and opines that the failure to provide
10 sufficient analysis poses a risk to property and human life.²⁵ Plaintiff reasonably believes
11 that the Town will continue with development activities, at least to some extent, on the
12 Subject Property, unless enjoined therefrom.²⁶

13 **C. Law on Preliminary Injunctions**

14 Plaintiff hereby requests that the Court issue a preliminary injunction, requiring that
15 Defendant cease and desist with any and all construction, excavation, filling, compaction,
16 alteration, and/or other development activities upon the Subject Property until such time as
17 it obtains a permit therefor, if possible. Further, Plaintiff requests that the Court order that

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²⁴ Verified Complaint, ¶ 50.

²⁵ Verified Complaint, ¶ 51 & 52.

²⁶ Verified Complaint, ¶ 62.

1 Defendant take all necessary steps to fully and completely apply for a floodplain use permit
2 from the District as quickly as possible.

3 “When the law is being violated, ‘it is the province *and the duty* of the court to
4 restrain it.’” Burton v. Celentano, 134 Ariz. 594, 595, 659 P.2d 247, 248 (App. 1982)
5 (emphasis added). Restraint of a violation of the law is accomplished through preliminary
6 and mandatory injunctions. Id.

7 There are four traditional equitable criteria Plaintiff must show when establishing
8 entitlement to an injunction. These include:

- 9 (1) The possibility of irreparable injury not remedied by damages if the request is
10 denied;
- 11 (2) A balance of hardships;
- 12 (3) A strong likelihood that Plaintiff will succeed at trial on the merits; and
- 13 (4) A public policy which favors the injunction.

14 Burton, 134 Ariz. at 595, 658 P.2d at 248.

15 However, “when the acts sought be enjoined have been declared unlawful or clearly
16 are against the public interest, plaintiff need show neither irreparable injury nor a balance of
17 hardship in [its] favor. This is especially true when a statute expressly authorizes
18 interlocutory relief.” Id., 134 Ariz. at 598, 658 P.2d at 249.

19 In the present case, as noted above, Arizona statutes clearly prohibit a person from
20 engaging in any development or to divert, retard or obstruct the flow of waters in a
21 watercourse if it creates a hazard to life or property without securing the written

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1 authorization of a flood control district board; and where the watercourse is a delineated
2 floodplain it is unlawful to engage in any development affecting the flow of waters without
3 securing the required written authorization. A.R.S. § 48-3615(A). Such violations are
4 deemed to be public nuisances *per se*. A.R.S. § 48-3614. As a party that may suffer injury
5 from such unauthorized tampering within a floodplain in its own jurisdiction of
6 administration, Plaintiff has a right to request this Court to abate the violation, and Statutes
7 provide that the Court “*shall require* the violator to . . . comply with [the floodplain
8 management statutes] if authorized by the board, or remove the obstruction and restore the
9 watercourse to its original state. A.R.S. § 48-3613(D) (emphasis added).

10 **III. An Injunction is Necessary to Protect Public Health, Safety and Welfare**

11 Though the Plaintiff need not establish prongs one and two of the *Burton v.*
12 *Celentano* equitable factors as a matter of law, 134 Ariz. at 249, 596, the evidence
13 nonetheless plainly weighs in favor of Plaintiff on these prongs. In addition to the code
14 violations cited in the Verified Complaint and discussed herein, the Subject Property poses a
15 danger to public health, safety, and welfare that cannot be remedied by damages or penalties
16 alone. The Subject Property has had extensive grading and modification of the floodplain
17 and watercourses upon it. The Defendant has provided inadequate information about what
18 the exact impact of those major alterations are going to be. As noted by the Civiltec Report,
19 proceeding without sufficient study and data has exposed the public to serious risk to human
20 life and/or property damage. Compliance with the Floodplain Management Statutes and
21

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1 County Floodplain Regulations is not a convenience to be ignore. Nor is compliance with
2 the law a hardship; it is a civic duty, essential to protect the public.

3 Plaintiff has also demonstrated fulfillment of the third prong, strong likelihood of
4 success on the merits. Defendant cannot deny that it has proceeded to alter the Floodplain
5 and Watercourses within the Subject Property. It also cannot deny that it has altogether
6 failed to even seek, let alone obtain, written authorization from the District. And further, the
7 danger is so evident, that it is beyond reasonable question and the connection between
8 danger to the public and lack of compliance intuitive. The Verified Complaint establishes
9 the violations continue unabated, and a breach of the law by Defendant is firmly established
10 by the evidence.

11 Lastly the fourth prong, that public policy favors the injunction, is met here.
12 Ordinances and state statute set the public policy. The County Floodplain Regulations and
13 Arizona Revised Statutes §§ 48-3601 *et seq.* all prohibit the conduct of Defendant in this
14 case and provide for injunctive relief as an appropriate remedy. Where Defendant refused
15 to comply or to stand down, injunctive relief is necessary to restore public health, safety,
16 and welfare.

17 **IV. Conclusion & Requested Relief**

18 The Defendant has committed serious and continuing violations of the County's
19 Floodplain Regulations and Arizona's Floodplain Management statutes. It has continued in
20 its violations, despite knowing that it must obtain a floodplain use permit, and should have
21 obtained such permissions prior to commencing work. Therefore, preliminary injunction

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1 orders should issue to halt all construction and/or development activities at the Subject
2 Property, so that the *status quo* may be maintained until this case may be heard on its merits,
3 and further, the court should order that Defendant follow the law and apply to the District
4 for a floodplain use permit, all such orders to be under the terms and conditions set forth in
5 Rule 65(d), Ariz. R. Civ. P.

6 It is respectfully requested that the Court set a preliminary injunction hearing on the
7 matter at its earliest convenience, but not prior to January 7, 2019, so that the holidays will
8 not make any witness, party, or attorney unavailable, and also to provide sufficient notice
9 after service of process. Plaintiff estimates that three (3) hours may be required for the
10 hearing.

11 At the close of this preliminary injunction hearing, Plaintiff will ask that the Court
12 issue preliminary injunctive orders that:

13 (1) preserve the *status quo* by requiring a halt of all further alteration of
14 the Floodplains and Watercourses on the Subject Property; and

15 (2) require Defendant Town of Tusayan to fully and completely comply
16 with all requirements of the District to apply for and obtain a floodplain use
17 permit.

18 A proposed form of order will be presented at the preliminary injunction hearing for
19 the Court's consideration. If preliminary injunction is ordered, the Court should retain
20 continuing jurisdiction over this matter to ensure that its injunctive orders are obeyed and
21 the conduct prescribed in its Orders are fulfilled through to completion.

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1 At trial on the merits, Plaintiff intends to, and hereby moves for, entry of injunctive
2 orders that follow the requested relief in the Verified Complaint, Counts I & II, as set forth
3 therein.

4 RESPECTFULLY SUBMITTED this 14th day of December, 2018.

5 WILLIAM P. RING
6 COCONINO COUNTY ATTORNEY

7 
8 Brian Y. Furraya
9 Deputy County Attorney

10 ORIGINAL of the foregoing filed this 14th day of December, 2018 with:

11 Clerk of the Court
12 Coconino County Superior Court
13 200 North San Francisco Street
14 Flagstaff, Arizona 86001

15 A Copy of the foregoing was served by mailed this 14th day of December, 2018 to:

16 William J. Sims III, Esq.
17 SIMS MURRAY
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19 Phoenix, Arizona 85012
20 wjsims@simsmurray.com
21 *Attorney Accepting Service on*
22 *behalf of Defendant*

23 By: 