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6 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

7 **IN AND FOR THE COUNTY OF COCONINO**

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

10 Plaintiff,

11 v.

12 TOWN OF TUSAYAN, an Arizona
13 municipal corporation,

14 Defendant.

Case No. CV2018-00616

**FINAL JUDGMENT &
PERMANENT INJUNCTIVE ORDER**

(Assigned to Hon. Cathleen Brown Nichols;
Division 5)

15 THIS MATTER, having come before the Court upon the Plaintiff's application, and
16 after review of the pleadings and the Parties' Stipulation for Entry of Final Judgment and
17 Permanent Injunctive Order, and being advised in the premises, now therefore, based upon
18 the Parties' stipulation and agreement and for good cause:

19 **THE COURT FINDS AND CONCLUDES AS FOLLOWS:**

20 A. The Court has subject matter jurisdiction over this matter by virtue of A.R.S. §§ 12-
21 122, 12-123; 12-1801; 48-3613; and 48-3614. The Court has personal jurisdiction
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1 over the Defendant due to its presence in Coconino County at all times relevant to
2 this matter, and also due to its appearance in this case.

3 B. The Defendant, Town of Tusayan (the “Town”), owns that certain parcel of real
4 property (the “Subject Property”), located within the corporate boundaries of the
5 Town, known generally as Coconino County Assessor’s Parcel No. 502-14-001B,
6 comprising 20.07 acres of land originally associated with the “Ten X Ranch.”

7 C. The Plaintiff, Coconino County Flood Control District (the “District”), is the entity
8 with regulatory jurisdiction over those “Watercourses” and “Floodplains” located
9 within the Subject Property, pursuant to A.R.S. § 48-3603.

10 D. Portions of the Subject Property contain, and are encumbered by, a Federal
11 Emergency Management Agency (“FEMA”) Zone A Special Flood Hazard Area,
12 per Flood Insurance Rate Map 04005C3850G and are a “Floodplain” as that term is
13 specifically defined by A.R.S. § 48-3601(6).

14 E. The boundaries of the Subject Property contain a portion of the so-called “Coconino
15 Wash” and a portion of at least one tributary to the Coconino Wash, which
16 Coconino Wash and its tributaries are “Watercourses,” as that term is specifically
17 defined by A.R.S. § 48-3601(12).

18 F. The Town engaged in preliminary development of the Subject Property, with the
19 goal of creating workforce housing, which resulted in modification, excavation,
20 grading, fill, compaction, construction, and other alteration of the Watercourses and
21 Floodplains situated within the boundaries of the Subject Property (“Development
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Work”) without obtaining a valid floodplain use permit or any other written authorization from the District.

G. The District alleged a violation of A.R.S. §§ 48-3613(A) and 48-3615(A), as well as provisions and requirements of the Coconino County Zoning Ordinance, Section 2.15B: PLM—Floodplain Management Overlay Zone (the “County Floodplain Regulations”), ¶¶ 2 and 4.

H. On February 5, 2019, on stipulation of the parties, this Court issued a Preliminary Injunction Order, which specified measures to halt the Development Work, and to install certain structures to mitigate potential flooding dangers stemming from the Development Work.

I. Based upon the stipulation and representations of the parties, the Court finds that the Town of Tusayan, as of the date hereof, has satisfactorily completed installation of the mitigation measures specified in the Preliminary Injunction Order of February 5, 2019 that effectively restore the conveyance and water storage capacity of the Watercourses hydraulically connected to Coconino Wash and its tributary within the Subject Property.

J. The Town has not yet fulfilled requirements specified in the Preliminary Injunction Order concerning obtaining a Conditional Letter of Map Revision (“CLOMR”) from FEMA, or a flood plain use permit from the District.

K. The safety and welfare of the public require that the Court issue a permanent injunction in this case under the terms agreed to by the Parties.

1 L. There is a likelihood of irreparable harm if Defendant is not enjoined from further
2 development in the Subject Property without proper consideration being given to
3 the appropriateness of design and evaluation of the Development Work.

4 M. The parties have agreed that if the Town assumes jurisdiction over the Floodplains
5 within its corporate boundaries, it will not assume jurisdiction over the Floodplains
6 within the Subject Property, unless, notwithstanding A.R.S. § 48-3610, the Town
7 obtains the consent of the District, which shall not be denied if:

- 8 i. the Town has received an approved CLOMR from FEMA with regard to any
9 proposed developments at the Subject Property; and
- 10 ii. the Town, in good faith, has applied for and pursues a LOMR that FEMA
11 accurately and fully incorporates and addresses all developments, conditions,
12 and circumstances at the Subject Property at the time that such application is
13 submitted, and which application must also be consistent with those
14 developments, conditions, and circumstances described in any FEMA-
15 approved CLOMR issued to the Town regarding the Subject Property.
- 16 iii. Alterations by the Town to the description of developments, conditions, and
17 circumstances of the Subject Property contained within the LOMR
18 application are permissible subject to approval by the District, which shall
19 not be unreasonably withheld.
- 20 iv. If the parties mutually agree that the Town can assume jurisdiction over the
21 Floodplains within the Subject Property at an earlier date, the parties shall
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1 file an amendment to this permanent objection so stating.

2 Upon due consideration, and based upon the stipulation and agreement of the Parties herein,
3 and in satisfaction of the requirements and provisions of Rule 65(d)(1) of the Arizona Rules
4 of Civil Procedure,

5 **IT IS HEREBY ORDERED:**

6 1. The Defendant Town of Tusayan will continue to acknowledge the County Flood
7 Control District as the Floodplain administrator, until such time as the Town validly
8 and finally assumes jurisdiction over the Floodplains within its corporate boundaries
9 pursuant to A.R.S. § 48-3610.

10 2. If the Town assumes jurisdiction over the Floodplains within its corporate
11 boundaries, it will not assume jurisdiction over the Floodplains within the Subject
12 Property, unless, notwithstanding A.R.S. § 48-3610, the Town obtains the consent of
13 the District, which shall not be denied if:

- 14 a. the Town has received an approved CLOMR from FEMA with regard to any
15 proposed developments at the Subject Property; and
16 b. the Town, in good faith, has applied for a LOMR that accurately and fully
17 incorporates and addresses all developments, conditions, and circumstances at
18 the Subject Property at the time that such application is submitted, and which
19 application must also remain in basic harmony with those developments,
20 conditions, and circumstances described in any FEMA-approved CLOMR
21 issued to the Town regarding the Subject Property.

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3. If the Town should acquire jurisdiction over the Floodplains within the Subject Property pursuant to its compliance with all requirements as stated in Paragraph 2 above, such jurisdiction shall be, and remain, provisional and expressly contingent pursuant to the following conditions:
- a. The Town shall in good faith continue to pursue the above-referenced LOMR until its final adoption and issuance by FEMA.
 - b. The contingent nature of the Town’s jurisdiction over the Floodplains within the Subject Property shall continue, until such time as FEMA approves, grants, and issues said LOMR with relation to the Subject Property.
 - c. While the application for LOMR is pending, the Town shall not increase, intensify, remove, destroy, or otherwise alter any developments or conditions associated with its above-referenced application for a LOMR in any substantial way that deviates from the issued CLOMR, and/or would otherwise meaningfully affect the hydrologic or hydraulic characteristics of the floodplain within the Subject Property or any related watercourse downstream therefrom, without the express written consent of the District, which consent shall not be unreasonably withheld. The District shall have sole and exclusive discretion to determine whether or not any given change to the hydrologic or hydraulic characteristics of the floodplain within the Subject Property or any related watercourse constitutes a “meaningful effect.” The District’s discretion as to such a determination shall be exercised reasonably.

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- d. While the application for LOMR is pending, the Town shall not withdraw or seek to amend the pending LOMR application in any manner that deviates from the issued CLOMR, without the express written consent of the District, which consent shall not be unreasonably withheld.
 - e. If, after it has obtained provisional and contingent jurisdiction over the Floodplains within the Subject Property pursuant to Paragraph 2 above, the Town should at any point fail to fulfill or to comply with any of the conditions set forth herein, the District shall give notice of such failure to the Town, in writing, via U.S. Certified Mail.
 - f. If the Town should fail to cure any deficiencies described in a written notice from the District within 15 business days after receipt thereof, the Town’s jurisdiction over the Floodplains within the Subject Property shall automatically and immediately terminate and shall revert in the District at the expiration of the 15th business day, unless the District, in its sole and exclusive discretion, extends the time for curing those deficiencies.
4. If the parties mutually agree that the Town can assume jurisdiction over the Floodplains within the Subject Property at an earlier date, the parties shall seek an amendment to this permanent injunction so stating.
5. As concerns the mitigation measures installed pursuant to this Court’s Preliminary Injunction Order of February 5, 2019, as well as all matters deriving from or related to the Development Work or any continuation thereof, the District shall have

1 continuing jurisdiction to enforce the Arizona Revised Statutes and County
2 Floodplain Regulations to correct violations thereof at the Subject Property,
3 regardless of the outcome of any future resolution, action, or referendum by the
4 Town to assume jurisdiction over the Floodplains within its corporate boundaries,
5 unless and until the Town should acquire jurisdiction over the Floodplains within the
6 Subject Property, pursuant to and as set forth by, Paragraphs 2–3 above, or unless
7 otherwise agreed to by the parties pursuant to this Final Judgment & Permanent
8 Injunctive Order. Unless and until the Town shall have acquired jurisdiction over the
9 Floodplains within the Subject Property as specified herein, the following terms shall
10 be observed:

- 11 a. The Town shall maintain the constructed mitigation measures that have
12 effectively restored the conveyance and water storage capacity of the
13 Watercourses hydraulically connected to Coconino Wash and its tributary
14 within the Subject Property.
- 15 b. The mitigation measures that have been installed upon the Subject Property,
16 pursuant to this Court’s Preliminary Injunction Order of February 5, 2019 are
17 to remain present, operative, and unchanged until such time as the Town
18 obtains a CLOMR from FEMA, and a floodplain use permit is issued by the
19 District to the Town for any future work at the Subject Property. The safety of
20 the mitigation measures and on-going maintenance of the Town’s
21 “Stormwater Pollution Prevention Plan” with regard to the Subject Property
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shall remain the responsibility of the Town.

c. The Town will continue to forebear on any and all further Development Work at the Subject Property, until specified otherwise herein or by further order of this Court. Nothing in this Final Judgment & Permanent Injunctive Order shall be construed as preventing the Town from performing work limited to the purpose of repairing and/or maintaining mitigation structures, which repairs and/or maintenance must first be authorized by the District. Authorization for repair and/or maintenance shall be in the sole and exclusive discretion of the District, which shall be exercised reasonably.- Maintenance related to the City’s Stormwater Pollution Prevention Plan, trash removal, weeding, or non-earth disturbing activities shall not require approval by the District prior to implementation.

d. The Town shall not resume or perform any other or further development at the Subject Property, unless and until the Town has received authorization to do so by the District.

6. The Town acknowledges, understands, and agrees that for Development Work at the Subject Property and for work within other areas of the corporate boundaries of the Town prior to the Town’s assumption of jurisdiction over the Floodplains within the corporate boundaries of the Town other than the Subject Property, the Town must fully and completely comply with all requirements imposed by the District as part of its permit application process as a precondition to issuance of a floodplain use permit

1 for the Subject Property, including, but not limited to: conducting, creation, and
2 submission of a full hydrologic and hydraulic study of the Coconino Wash and the
3 relevant tributary; completion and submission of all application paperwork; applying
4 for and obtaining a CLOMR from FEMA; submission of any further studies,
5 calculations, data, analysis, and other materials requested by District staff as
6 necessary or useful to allow District staff to adequately assess and review the Town’s
7 request; and payment of all associated fees and costs, including without limitation,
8 the application fee and all costs and/or fees associated with third-party review of the
9 Town’s applications and proposals referred to herein.

10 7. The District shall have, and is hereby granted, the right to enter the Subject Property
11 at any time, to perform routine inspections of the mitigation measures installed and
12 check compliance with the stormwater pollution prevention plan, as well as to ensure
13 that no unauthorized Development Work is being performed.

14 8. The Town shall continue to indemnify and defend the District from any and all
15 damages deriving from, and/or related to, any of the Town’s work at the Subject
16 Property, except to the extent such damages result from the negligent or wrongful
17 acts of the District. In any third-party action against the District related to work on
18 the Subject Property, the Town shall bear the cost of defense for the District.

19 9. Pursuant to Rule 65(d)(2) of the Arizona Rules of Civil Procedure, the Defendant, its
20 officers, agents, servants, employees, and attorneys, as well as any other person(s)
21 who are in active concert or participation with any of these, and who receive actual
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notice of this Final Judgment & Permanent Injunctive Order are bound to observe and comply with the foregoing provisions and orders.

10. This Order shall be served upon the Defendant and any person(s) participating with or acting in concert with the Defendant by personal service, or by any other means reasonably calculated to provide such persons with actual notice hereof.

11. No further matters remain pending in this case and final judgment is entered hereby pursuant to Rule 54(c) of the Arizona Rules of Civil Procedure.

DATED this ____ day of December, 2021.

BY THE COURT

Hon. Cathleen Brown Nichols
Superior Court Judge, Div. V

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