

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2015-000325

07/02/2015

HONORABLE ARTHUR T. ANDERSON

CLERK OF THE COURT
L. Nelson
Deputy

TOWN OF FLORENCE

CHRISTOPHER W KRAMER

v.

FLORENCE COPPER INC, et al.

COLIN F CAMPBELL

SHANE R SWINDLE

RULING

The Court has had under advisement Defendant Florence Copper, Inc.'s ("FCI") (i) Motion to Dismiss Plaintiff Town of Florence's (the "Town") Eminent Domain Claim and (ii) Second Motion to Dismiss Eminent Domain Claim (collectively, the "Motions").¹ Having read and considered the briefing and having heard oral argument, the Court issues the following rulings.

FCI owns 1100+ acres of real property in Florence, Arizona (the "Property"), which is the site of a significant underground copper oxide deposit. FCI intends to conduct copper-recovery operations on the Property (and on adjacent State trust land, pursuant to a mining lease), in accordance with its position that mining is a legal nonconforming use. For its part, the Town intends "to stop that mine from going in the middle of [the Town's] incorporated limits and in the middle of over 8,000 acres of residentially zoned land."² To this end, the Town filed this action, alleging claims for declaratory judgment and eminent domain. The Motions address only the eminent domain claim.

¹ Defendant RK Mine Finance Trust 1 joined in the Motions.

² Tr. May 8, 2015 at 28.

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FCI argues that the eminent domain claim should be dismissed because it is not ripe. *See Winkle v. City of Tucson*, 190 Ariz. 413, 415 (1997) (ripeness doctrine prevents a court from ruling on a situation that may never occur); *see also* A.R.S. § 12-1112(2) (taking must be “necessary” to the public use). The Court agrees. As FCI urges, this is not a matter of *alternative* pleading, *see* Ariz. R. Civ. P. 8(e)(2), but rather *conditional* pleading. The declaratory judgment claim seeks a ruling that mining on the Property is not a legal nonconforming use. The eminent domain claim is conditional on the Town losing the declaratory judgment claim, not alternative to it.³

The Town cites several out-of-state cases that support “alternative pleading” in the context of a declaratory judgment/condemnation action. (*See* Resp. to (1st) Mot. to Dismiss at 8.) The Court does not find these cases to be dispositive. Here, the Town claims a right of eminent domain to eliminate the nonconforming use pursuant to A.R.S. § 9-462.02.⁴ FCI argues that § 9-462.02 was effectively abrogated by Arizona’s Private Property Rights Protection Act. *See* A.R.S. § 12-1131 *et seq.*⁵ Resolution of this dispute is not absolutely necessary now, and it would be contrary to the exercise of judicial restraint for the Court to do so. *Cf. Planned Parenthood Ariz., Inc. v. Am. Ass’n of Pro-Life Obstetricians & Gynecologists*, 227 Ariz. 262, 270 (App. 2011) (“fundamental rule of judicial restraint is to avoid constitutional questions unless absolutely necessary to decide the case”).

Accordingly, based on the foregoing,

IT IS ORDERED granting the Motions.

³ Compl. at ¶¶ 81-82, 84, 89; *see also* Town’s Mot. to Bifurcate (filed Apr. 24, 2015) (at 2) (declaratory judgment claim should be tried first because a determination that mining is illegal “will eliminate all other claims....”).

⁴ Specifically, A.R.S. § 9-462.02(A) provides:

The municipality may acquire by purchase or condemnation private property for the removal of nonconforming uses and structures. The elimination of such nonconforming uses and structures in a zoned district is for a public purpose. Nothing in an ordinance or regulation authorized by this article shall affect existing property or the right to its continued use for the purpose used at the time the ordinance or regulation takes effect, nor to any reasonable repairs or alterations in buildings or property used for such existing purpose.

(Emphasis added.)

⁵ Specifically, A.R.S. § 12-1136(A)(5) provides that “public use” means any of the following: (i) The possession, occupation, and enjoyment of the land by the general public, or by public agencies; (ii) The use of land for the creation or functioning of utilities; (iii) The acquisition of property to eliminate a direct threat to public health or safety caused by the property in its current condition, including the removal of a structure that is beyond repair or unfit for human habitation or use; or (iv) The acquisition of abandoned property.