



BEFORE THE ARIZONA CORPORATION COMMISSION

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Commissioner

KRISTIN K. MAYES

Commissioner

IN THE MATTER OF THE )  
APPLICATION OF ARIZONA WATER )  
COMPANY, AN ARIZONA )  
CORPORATION, FOR ADJUSTMENTS )  
TO ITS RATES AND CHARGES FOR )  
UTILITY SERVICE FURNISHED BY ITS )  
WESTERN GROUP AND FOR CERTAIN )  
RELATED APPROVALS )

DOCKET NO. W-01445A-04-0650

POST-HEARING OPENING BRIEF OF THE  
CITY OF CASA GRANDE

AZ CORP COMMISSION  
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Pursuant to the Administrative Law Judge's direction at the close of the evidentiary hearing in this proceeding, the City of Casa Grande ("the City of Casa Grande" or "the City") hereby submits its Post-Hearing Opening Brief. This Brief is generally organized around the three issues of particular importance to the City of Casa Grande: water resource planning, CAP M&I recovery, and litigation expenses. The Brief also addresses certain other specific issues raised by Arizona Water Company's application for a rate adjustment and discussed at the evidentiary hearing.

## I. INTRODUCTION

Through its application for rate relief, Arizona Water Company ("the Company" or "Arizona Water Company") seeks to increase the rates it charges its Western Group customers by approximately 14%. As of test year 2003, City of Casa Grande residents and businesses accounted for 73.9% of all Arizona Water Company's Western Group customers. (*See Direct Testimony of Ralph J. Kennedy at 4.*) If this application is approved, water customers within the City of Casa Grande will pay approximately 81% of the adjusted operating revenue of the Western Group. (*See Direct Testimony of Edward F. Harvey at 3.*) The City of Casa Grande intervened in this case because its citizens comprise such a large portion of the Company's customer base, still the Company is requesting a significant rate increase, and the case raises a myriad of issues concerning future water supply, future costs and who will pay these costs.

The City of Casa Grande exists to serve its citizens. In the case of water, citizens are well-served if they have access to reliable, high-quality water at the lowest long-term cost. The City, of course, recognizes that the Company has a legitimate profit motive and

should be fairly compensated for the water services it provides, as well as be encouraged to make necessary and well-planned capital improvements to the water delivery system. From the very earliest stages of this rate case, the City expressed its desire to work with the Company in achieving these goals.

The City strongly believes that both parties can achieve reasonable goals to the benefit of present and future Casa Grande citizens, but that the City and the Company must find a way to work together for these benefits to occur. The City of Casa Grande is willing and able to partner with the Company in addressing many of the water resource issues facing its citizens. The City would embrace any partnership on a water resource issue that would serve the citizens of Casa Grande today and well into the future.

More than ever, water resource planning is critical for both the City and the Company. Rapid growth has begun to occur, and much information suggests that this rate of growth will accelerate. The Company is facing choices regarding major capital investments for arsenic treatment, CAP development and system expansion. The citizens of Casa Grande will demand to know that any increased water costs are justified and that the increased costs are the result of sound water resource planning. Further, citizens will want to be assured that growth is paying its way.

Regrettably, the Company has thus far refused the City's efforts to work together in a meaningful way on these issues and has refused to invest in serious planning efforts. The Company has not prepared a water resource master plan, produced a demand forecast, or undertaken feasibility studies in conjunction with anticipated large and expensive water treatment projects. This issue is critical to the citizens of Casa Grande as

the City may face an abrupt water delivery crisis or a needlessly expensive future supply plan if the Company does not quickly become much more serious about water resource planning in an open context. For this reason, in this case, the City asks the Commission to link the Company's recovery of water resource development costs (CAP M&I capital charges) to the Company's willingness to work with the City in designing and preparing a water resource master plan.

## **II. PRIMARY CONCERNS**

### **A. A Water Resource Master Plan**

The City of Casa Grande is seriously concerned that the Arizona Water Company is not prepared to provide reliable, low-cost, high-quality water to the citizens of Casa Grande going forward. By its own admission, the Company has not prepared a water resource master plan which would anticipate the growing demand for water, evaluate available resources, and direct how resources should be developed and employed. (*See* Tr. 374-375.) The Company does not have a timeline for implementing alternative water resources, a written assessment of all available water resources, or a plan for how these different water resources should be deployed over time to best serve water users. (*See* Tr. 551.) These are serious shortcomings. A water resource plan is an essential foundation for lawful water rates because it establishes operating and capital costs which drive rate-making calculations.

This lack of planning would be cause for concern for any city under normal circumstances. It is especially alarming here because these are not ordinary times for the City of Casa Grande. The City is facing unprecedented growth and major capital

investment. Residential growth estimates suggest that the City will at least double in population in the next ten years, and some data suggest an even higher growth rate. As the City explodes with growth, the availability and cost of water will affect all City residents – new and old. The economic health of the City will depend on the cost, quality, and future availability of water.

This growth trend is accompanied by an important (and not coincidental) transition from a water system dependent solely on groundwater to a system reliant on many water sources. In the future, the City will increasingly be served by a variety of types of water including treated CAP water, treated wastewater effluent, untreated CAP water (for non-potable uses), water from irrigation grandfathered rights, recharged water, and groundwater. To demonstrate an adequate supply of water at the lowest long-term cost, Arizona Water Company will need to prepare a water resource master plan like the plan sponsored by the City's Expert witness Mr. Ed Harvey. (*See Exhibit CCG-7.*) Such a plan would evaluate current and future demand, examine all available alternative water resources, and bring this information together in a coherent picture for the customers.<sup>1</sup>

### **1. Evaluating Future Demand**

During the hearing, it quickly became apparent that the Company does not know how many customers it will likely serve in the next three to five years. (*See Tr. 375-77; and Tr. 547* (“We really don’t know what to believe. I have heard developers say it is

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<sup>1</sup> The water resource master plan outlined in CCG-7 is neither unusual or difficult for a water utility to prepare, as evidenced by the substantially similar plans prepared for the cities of Surprise, Avondale, and Goodyear. (*See Exhibits CCG-4, CCG-5, and CCG-6.*)

going to double. I am hearing some say we are ready for a bust and it ain't going nowhere. So in terms of what is going to happen in the future, I think it is pretty much anybody's guess.".) Indeed, testimony on the issue of growth, from both Mr. Garfield and Mr. Whitefield, revealed that the Company has not prepared forecasts for water demand into the next decade.

Demand forecasts are a common water resource planning function and would be a significant component of any water resource master plan. At Tab 1 is a publicly available list of residential housing projects approved by the City of Casa Grande. (*See* [http://www.ci.casa-grande.az.us/pandz/rtf/residential\\_projects.rtf](http://www.ci.casa-grande.az.us/pandz/rtf/residential_projects.rtf)). This list includes plans for roughly 20,000 homes – the tip of the iceberg for residential growth in Casa Grande. Seemingly unaware of what is to come, Mr. Garfield offered the following testimony on growth:

Casa Grande has had fairly stable growth; although it has increased in the last, if you look at it over the last ten years, the growth rate is higher than what it was ten years ago. But it has been somewhat gradual. Casa Grande is growing right now at a rate of around 1900 customers per year, not much different from last year and that was a little bit higher than the year before and so forth.

(*See* Tr. 376.) Mr. Garfield paints a picture of steady but gradual growth for Casa Grande. However, if he had the benefit of a water resource master plan, he would know that 2005 growth in Casa Grande will be very different from the growth experienced in past years. The planned residential project list cited above indicates that substantially more residential customers will soon be added to the Arizona Water Company system.

In the month since the hearing, the Company has experienced first hand the frustration created by unanticipated demand. Attached at Tab 2 is a news article describing a recent water cut-off to residential development contractors in Casa Grande due to a water supply shortage. Harold Kitchen, *Excess River Water Available, Panel Told*, Casa Grande Dispatch, July 21, 2005.<sup>2</sup> In the article, the Pinal County's Active Management Area Director is quoted as saying, "I talked to the water company folks yesterday and their reason for doing this is the fact of the capacity problem with all the growth they have, . . . Although they're quickly moving to put in some new wells and expand some other wells, right now they are having some problems." *Id.* The article – which cites CAP water as a possible alternative source for construction work water – is further evidence of the pressing need to predict future demand and to begin planning for that demand.

## **2. The Availability and Cost of Alternative Water Resources and Uses**

The water resource master plan proposed by the City would also evaluate all possible alternative water sources available to the Company and the various ways a single source (e.g. CAP water) could be used. Perhaps the clearest articulation of why such a survey is needed occurred during the hearing, when counsel for the Company asked Mr. Harvey, the City's expert, whether the Company should just "give back" its CAP allocation given the costs associated with holding the allocation:

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<sup>2</sup> This event occurred after the hearing, and could not be the subject of inquiry at the hearing. Nonetheless, the City asks the Commission to take judicial notice of this news article, as it is directly relevant to the need for water resource planning by Arizona Water Company.

Q. (Mr. Shapiro): Is the city willing to take the risk that further delay in allowing recovery of the CAP costs may lead the company to give up its allocation of CAP water?

A. (Mr. Harvey): That is an interesting question that I haven't thought about. I think the city would have to think very hard about that and I think that would be, that would be the subject of a fair amount of evaluation that I can't do right now. But there is a very interesting question that you raised in that issue.

It is probably, what you have provided by that question is the best example that I have of why a plan is needed. You just provided it. Because whether or not to give up the CAP suggests do we have any other water resources. What other water resources can step into the breach of the growth that is coming? So the very decision that the city would make upon whether or not that is a good idea or bad idea or whether the city should support that or not support that would be predicated on the availability of a plan which is similar to the one in which we have requested.

(Tr. 893.) A water resource master plan would evaluate all available water resources for this very reason. The Company cannot know whether CAP is the best, least-cost, long-term alternative unless all other resources are examined. Similarly, the Company cannot know whether more groundwater wells are needed without studying how CAP water might be used. The Arizona Water Company witnesses described many different water sources in written testimony and during the hearing, including groundwater (*see* Tr. 554), treated CAP water (*see* Rebuttal Testimony of William Garfield at 11-19), water available from the San Carlos Irrigation District (*see* Tr. 549), treated wastewater effluent (*see* Tr. 301), Indian leases of CAP water (*see* Tr. 384-85), untreated CAP water (non-potable uses) (*see* Tr. 345-47), and recharged water (*id.*). The availability of these sources (long and short term) as well as cost estimates associated with each source would be included in a water resource master plan. In addition, the plan would also evaluate alternative uses of

a single source (e.g. CAP water) to find the least-cost, best-use plan based on costs associated with each proposed use.

To date, the Company has not evaluated the costs associated with the water sources (or uses) it has chosen. In fact, while the Company has decided to design and build a plant to treat CAP water, it does not know how much that undertaking will cost:

Q. (Ms. Burke): Okay. And even, I think as your testimony suggests, in the near future, what about water-resource alternatives and costs? What do you perceive the customers of Arizona Water Company will face in the near term with respect to cost choices?

A. (Mr. Whitefield): I don't know. We haven't built the plant, really don't know how much it is going to cost, don't know how much it is going to take to operate. You know, we are, you are asking me to look forward to the year 2012. I don't know.

(Tr. 555.) This choice – to build a CAP treatment plant – was made without studying whether using treated CAP water was the best, least-cost, long-term solution to Casa Grande's water needs or whether there were other alternate and preferable solutions for CAP water use. Similarly, the Company has not prepared a written plan that evaluates the long-term availability and cost of other water resources. (Tr. 546-553.) Mr. Whitefield testified to an abundance of groundwater resources, but it is not clear whether – or how long – the City could rely exclusively on groundwater for potable water requirements.

Given this lack of information, the City asks the Commission to require the Company to work in partnership with the City of Casa Grande in designing and developing a water resource master plan for the Western Group. The recovery of M&I

costs associated with CAP water should be conditioned on the preparation of such a plan.

The testimony of the City's expert during the hearing made this point quite clearly:

What we are saying, and I want to be as clear as I can, without the proper planning and context, we do not have sufficient information to support such a cost recovery effort. On the other hand, if such a plan is put forward, we are very supportive of establishing a hookup fee as soon as possible. And, in fact, the faster we get this done the better. I would like to see this happen because every new dwelling unit that comes in there is a lost hookup fee that we could be using to pay down this balance. We want this balance paid down, but we do not have a sufficient basis to support it at this time.

(Tr. 887-88.)

### **3. Building a Coherent Water Resource Master Plan for Customers**

The process used for designing and building the water resource master plan should be open and inclusive. The City should be afforded the opportunity to participate in all stages of the planning process, including the earliest tasks relating to what information will be included in the water resource master plan and who will be responsible for designing and drafting the plan. The City can provide useful information and offer assumptions about the City based on its current and in-depth knowledge of its future actions and their likely effect on what is happening in and around the City. (*See* Tr. 1214-1215 (Testimony of Steven Olea) (discussing how participation of the City in planning would assist the Company in preparing a plan).) The credibility of the plan and its associated costs can be established through an open planning process. Relations between the Company and the City can also begin to be repaired through such an effort.

(*See* Tr. 839-840.)

Ultimately, the water resource master plan (Ex. CCG-7 or “WRMP”) will be a tool used by Arizona Water Company to show its customers that it carefully reviewed the cost and viability of all water supply options and, based on that review, chose the least cost, long-term water supply solution. Without such a plan, Arizona Water Company cannot establish for its customers that it is entitled to recover major capital investment expenses or other additional revenues.

**B. CAP M&I Cost Recovery**

Despite extensive settlement negotiations prior to the hearing, the parties were unable to reach agreement on a plan that would allow the Company to gradually recover accrued CAP M&I capital charges. Because the negotiations failed on the eve of the hearing, Staff filed its supplemental testimony proposing a plan for the Company’s deferred and ongoing CAP M&I capital charges the day before the hearing. (*See* Supplemental Testimony of Steven M. Olea.) The City generally supports Staff’s proposed plan, which provides for recovery of CAP M&I capital charges via a hookup fee, but the City believes that any recovery should be contingent upon the completion of a water resource master plan. (*See* Tr. 832-833.) The City agrees that it is appropriate for these charges to be recovered from future customers because it is the arrival of these new customers that has precipitated the need for new water resource development, including CAP water development. (*See* Tr. 833; Direct Testimony of E. Harvey at 3-4; Surrebuttal Testimony of E. Harvey at 4-5.)

Allowing recovery of CAP M&I capital charges before the Company’s CAP allocation is used and useful is, admittedly, a departure from past Commission policy.

Nonetheless, the City supports Staff's decision to recommend recovery – with Staff conditions – given the need to apply the fee immediately in order to capture new development. The City supports Staff's recommendation *only* because Staff has tied the hook-up fee to the nine conditions listed on Schedule SMO-4 to Mr. Olea's testimony. Each condition Staff recommends in conjunction with CAP M&I capital charge recovery is essential. Of primary importance is Staff's recommendation that the Company prepare, by a date certain, a water resource plan for its Western Group water systems. (*See* Supplemental Testimony of S. Olea at Attach. A.) The plan recommended by Staff – the Central Arizona Project Water Use Plan ("CAPWUP") – requires the Company to provide information regarding existing water supplies, future supplies and demands, and projected costs. The CAPWUP also requires the Company to examine future water resources (other than CAP) (*see id.* at Attach. A, points 2 and 4; Tr. at 1194-1200).

While the City agrees with Staff's recommendation that recovery of M&I capital charges be linked to preparation of a water resource plan, the City believes the CAPWUP is not sufficiently specific. The CAPWUP is a generalized version of the WRMP discussed above and recommended by the City (Ex. CCG-7), but the CAPWUP lacks a concluding section that brings together the plan for deploying the different resources and composite costs. This section, which is found in Part VIII of the WRMP, would require the Company to integrate the supply, demand and cost information into a plan that could be implemented. The City would support the CAPWUP if it included, at least, Part VIII of the WRMP.

Using the CAPWUP with the addition of WRMP Part VIII is not optimal. The City would prefer that the Commission replace Staff's proposed CAPWUP with the WRMP proposed by the City. The WRMP includes all the provisions included in the CAPWUP. (*See id.* at 836; 1208-1211.) However, it goes on to provide greater specifics as to these provisions and requires an explanation for the Company's strategy for using CAP water in the future and why this strategy is the best long-term solution for ratepayers. (*Id.* at 837-839.) Commission Staff does not object to the substitution of the CAPWUP with the WRMP and recognizes that requiring the Company to perform the additional planning and analysis required by the WRMP would not be harmful to either the Company or ratepayers. (*Id.* at 1211:22-1212:17.) In fact, as discussed above in Part II.A, such additional planning and analysis could be of great benefit to all parties. (*See also* Tr. 839:4-840:6 (discussing how such a plan may help foster a spirit of cooperation between the Company and the City, allowing them to put past differences behind them as they work toward a cooperative future).)

If the CAPWUP were replaced by the WRMP, the Staff hook-up fee proposal would not change and Schedule SMO-4 would change only insofar as each mention of CAPWUP would be replaced by "WRMP" and CCG-7 would be used for Attachment A instead of the CAPWUP.

Finally, the City believes that the Commission should withhold implementation of CAP M&I capital charge recovery until this plan is completed. (Tr. 892:22-25.) This

would create an incentive for the Company to work diligently on completing the plan, a process that should take less than a year. (*Id.* at 895:17-24.)<sup>3</sup>

### **C. Litigation Expenses**

The Company has asked the Commission to include over \$800,000 in legal expenses in its rate base.<sup>4</sup> The bulk of these expenses, which are associated with various legal actions between the Company and the City, should not be included in the rate base and should not be paid by the ratepayers. Requiring ratepayers to carry the burden of paying these fees in perpetuity as part of the rate-base would not only be inappropriate, but inequitable.

#### **1. Rate Base Treatment**

The legal fees that were incurred by the Company in connection with effluent and condemnation proceedings should be disallowed for ratemaking purposes due to their non-recurring nature. *See Gulf States Utilities Co. v. Louisiana Public Serv. Comm.*, 676 So.2d 571, 579-80 (La. 1996); *In re Consolidated Edison Co. of New York*, 73 P.U.R. 3d

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<sup>3</sup> To the extent The Company argues that it should be allowed to recover CAP M&I capital charges pursuant to the “Proposed Policy for Central Arizona Project Cost Recovery” posted on the Commission’s website, the City disagrees. The City adopts Staff’s position regarding this issue.

<sup>4</sup> Specifically, Arizona Water Company seeks \$453,101 for fees and costs associated with the effluent litigation, \$314,353 for fees and costs associated with condemnation litigation and \$48,808 in fees and costs for services unrelated to the effluent or the condemnation litigation. *See* Exhibit A-21 (the \$48,808 reflects the \$8113 reduction made by counsel for the company to the \$56,920 in non condemnation/effluent charges.) The City has not contested recovery by the Company of approximately \$48,808 in fees and costs unrelated to effluent and condemnation litigation. The City opposes recovery of all remaining fees, and objects to any rate-base treatment of legal fees and costs.

417 (New York Public Utilities Commission 1968). Legal expenses that are unrelated to a rate case proceeding may, under certain circumstances, be recovered as operating expenses. *See, e.g., Ex Rel. Utilities Commission and Glendale Water, Inc.*, 343 S.E.2d 898, 906 (N.C. 1986); *In Re Fitchburg Gas and Electronic Co.*, 1977 WL 26847 (Mass. D.P.U. August 31, 1977) (headnotes only on Westlaw). They should not, however, be included in the rate base. Including the legal fees in the rate base would cause customers to continue paying forever, which would be an unjust and punitive result. The City requests that the Commission reject rate-base treatment for all of the condemnation and effluent litigation expenses submitted by the Company.

## **2. The Fees Are Not Recoverable as Operating Expenses**

The Company may, alternatively, choose to seek recovery of the legal fees as operating expenses. However, “whether legal expenses may be considered as operating expenses and legitimately recovered from ratepayers depends on the type of legal dispute or service involved.” *Ex Rel. Utilities Commission and Glendale Water, Inc.*, 343 S.E.2d at 906. Public utility commissions typically follow a set of “general guidelines” when deciding whether to allow recovery of legal fees. *Id.* at 907. These guidelines include: (1) if the fees were reasonable and necessary for the utility to provide services; (2) if the underlying legal proceeding will provide a benefit to ratepayers; (3) if the legal expenses were incurred in good faith; and (4) the actual outcome of the litigation and whether the legal expenses could have been avoided through prudent management. (*Id.*) The utility bears the burden of proof in proffering evidence sufficient to support the recovery of such expenses. *See, e.g., In the Matter of the Petition of Interstate Power Company for*

*Authority to Increase its Rates for Electric Service in Minnesota*, 416 N.W. 2d 800, 810 (Minn. Ct. App. 1987); *Re Lake Spring Water Co.*, 70 Md. P.S.C. 259 (Md. Pub. Serv. Comm. 1979); *South Central Bell Telephone Co. v. Louisiana Public Service Commission*, 373 So. 2d 478, 488 (La. 1979). Under the general guidelines articulated above, the Company's request for legal expenses should be denied.

First, the Company provides no evidence that the requested legal expenses were either reasonable or necessary to provide services to ratepayers. The majority of these expenses relate to lawsuits and appeals filed by Arizona Water Company against the City challenging the City's authority to enter into effluent sales agreements within the Company's CC&N territory. This effort (in state and federal court and before the Commission) continued despite the fact that the Company was both unauthorized and incapable of selling (without reselling) effluent to any ratepayers.<sup>5</sup> These legal efforts to block the sale of effluent by the City were in no way reasonable or necessary to provide water services to ratepayers. Rather, the litigation reflected an effort by the Company to boost water sales revenue and increase shareholder profits by requiring potential effluent customers to purchase either: (1) other water resources available directly from the Company (such as groundwater or non-potable CAP water), or (2) City effluent from Arizona Water Company as the authorized reseller. Litigation designed to enrich shareholders is not reasonable or necessary to provide services to ratepayers. *See Gulf*

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<sup>5</sup> The Company is not engaged in the provision of wastewater service and, therefore, does not produce effluent. Moreover, it does not have a tariff for the sale of effluent in Casa Grande. (*See* Tr. 440:15-20.)

*States Utilities Co.*, 676 So.2d at 579-80 (finding legal expenses neither reasonable nor necessary to provide services to ratepayers because “[a]ny judgment in the case . . . would have affected [the utilities’] shareholders, not the ratepayers”); *see also Ex. Rel. Utilities Commission and Glendale Water, Inc.*, 343 S.E.2d at 907 (declining to include legal expenses in rate base because, among other things, they were not “‘associated’ with [the utilities’] task of providing water to its customers”).

Had the Company successfully blocked the City’s effluent sales, neither of the outcomes advocated by the Company would have benefited the ratepayer – which is the second guideline generally considered by utility commissions when determining whether to allow recovery of legal expenses. Under the first outcome, ratepayers would have been harmed if effluent went unused while limited, higher-cost alternative water resources were consumed. (*See generally* Tr. 436-437 (stating that effluent is a “much lower cost” commodity than other water resources).) Under the second outcome, the cost to ratepayers would have been needlessly raised by the introduction of the Company as a reseller. As Mr. Garfield made clear in his testimony, the purpose of these legal battles was to stop the City from offering, at lower cost, effluent to ratepayers who, in the absence of the City’s competitive offer, would be forced to purchase higher cost, alternative water resources from the Company. (*See* Tr. 500.) The Company’s motivation was not to benefit ratepayers, but to maximize shareholder profit.<sup>6</sup>

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<sup>6</sup> Given the general scarcity of water in the desert, if The Company had succeeded in blocking effluent sales, thereby forcing the purchase of additional groundwater, ratepayers could ultimately have been harmed. Limited alternative water resources would have been needlessly consumed while effluent went unused.

Similarly, in the condemnation action, the Company has offered no actual evidence to support its argument that the defense was reasonable or necessary to provide services to ratepayers. The parties do not know how the condemnation action would have been resolved and, however it concluded, ratepayers would have continued to receive services. The Company incurred legal expenses to preserve its business and its ability to earn profits from the effected ratepayers. This was of benefit to the Company's shareholders, not its ratepayers. *See Re Lake Spring Water Co.*, 70 MD. P.S.C. 259 (noting that issues related "to return on investment [do] not inure to the benefit of the ratepayer"); Tr. 930 and 939 (discussing why shareholders chose to oppose the condemnation action and why this was of benefit to them).

The "evidence" submitted by the Company that ratepayers benefited from the Company's opposition to the condemnation is entirely speculative. The Company did not evaluate or study whether condemnation could actually benefit ratepayers. (*See* Tr. at 420:10-12, 422-423, and 430:10-14.) Unsupported suppositions concerning potential ratepayer harm are not sufficient to meet the burden required for recovering legal expenses. *See In the Matter of the Petition of Interstate Power Company*, 416 N.W. 2d 800, 805 and 810 (declining to include legal fees in rate base because the utility's unsupported supposition that absent the litigation ratepayers would be jeopardized, was not "substantial evidence" sufficient to justify inclusion of the expenses). As the City's expert, Edward Harvey explained, "what would have happened eventually in that condemnation case no one can know." (Tr. 931:22-23; *see id.* 931-933 (discussing why the Company's alleged benefits to ratepayers brought about by opposing the

condemnation are speculative and insubstantial); *id.* at 1065 (testimony of RUCO witness William A. Rigsby) (“who is to say, I mean if the City of Casa Grande had taken over that system, run it as a municipal system, who is to say whether or not the customers would have been better or worse off?”).) Had the eventual price for condemnation been sufficiently low, for instance, water rates could have been maintained at current levels.

The third guideline, whether the legal expenses were incurred in good faith, is inapplicable to the Company’s request, as there is no evidence suggesting that either the Company or the City acted in bad faith during any of the legal proceedings. In fact, during the course of the condemnation proceeding, both the Arizona Superior Court and the Arizona Court of Appeals expressly found that the City acted in good faith. *See* May 12, 2000 Superior Court Order in CV99-046814 at 2, attached at Tab 3 (finding that it was “inescapable that there could be no finding of bad faith”); March 13, 2001 Court of Appeals Order in CV99-046814 at 16-18, attached at Tab 4 (affirming lower court’s finding of no bad faith and noting trial court’s remark that the condemnation case raised “a question of first impression.”).

The fourth guideline (the actual outcome of the litigation and whether the legal expenses could have been avoided with prudent management), like the first two, counsels against including the Company’s requested legal expenses in its rate base. The Company incurred the majority of the legal expenses at issue pursuing highly questionable legal positions that directly conflicted with controlling precedent. (*See* Exhibit R-9 (December 21, 2000 District Court Order in CIV00-0345-PHX-PGR) at 9 (rejecting the Company’s position after noting that it was in direct conflict with

“numerous” other cases and primarily premised on an opinion which had “been distinguished or courts have declined to apply . . . in nearly every circuit and district court since its inception”); Exhibit R-13 (April 1, 2002 Superior Court Order in CV2000-022448) at 4-5 (rejecting the Company’s position after noting that it was in direct conflict with controlling precedent which “made clear” that the Company had no claim against the City).) Even when the Company’s legal arguments were soundly rejected by the lower courts – in light of “clear” contrary authority – the Company chose to incur additional legal expenses by pursuing (ultimately unsuccessful) appeals. (See Exhibit R-10 (April 1, 2002 Ninth Circuit Memorandum in No. 01-15179) (affirming District Court’s dismissal of the Company’s federal action for lack of jurisdiction); Exhibit R-13 (September 4, 2002 Notice of Appeal in CV2000-022448).) To require ratepayers to pay for the Company’s imprudent decisions to pursue highly questionable litigation would be inappropriate, especially in light of the litigation expenses also being neither reasonable or necessary to provide services to ratepayers nor beneficial to them. The Company pursued these legal efforts to protect its own interests, not those of the ratepayer.

Finally, it is worth noting that in the only legal proceeding at issue where the Company’s legal arguments prevailed over the City’s, the Company unsuccessfully sought to recover its legal expenses. (See Tr. 302.) Both the lower court and appellate court denied the Company’s request, holding it appropriate for the City and the Company to bear their own legal expenses. See May 12, 2000 Superior Court Order in CV99-046814, attached at Tab 3; March 13, 2001 Court of Appeals Order in CV99-046814 at

13-18, attached at Tab 4; Tr. at 327. Further, in the other legal proceedings at issue, the City and the Company also bore their own legal expenses. (*See* Tr. 399:5-19.)

Consequently, as Mr. Garfield admitted at the hearing, if the Company were allowed, now, to include its legal fees in its rate base, its ratepayers – “roughly” the same group as the City’s taxpayers – would ultimately be responsible for paying both sides of the litigation. (*Id.* 400:17-25.) Such an outcome, in addition to being highly inequitable, would both undermine the various courts’ prior decisions and create a situation where a utility would have no disincentive to avoid pursuing questionable litigation. (*See* Tr. 929-930 and 940-942 (discussing why public policy supports having each party pay their own litigation costs); *see generally Ex. rel. Utilities Commission and Glendale Water, Inc.*, 343 S.E.2d at 907 (noting that it would be “improper to require the class of people” that the opposing party sought to protect to pay the utility’s associated legal expenses via inclusion in operating expenses).) To encourage a party to enter into litigation by ensuring recover of expenses, and even a financial return, amounts to poor public policy.

### **III. ADDITIONAL ISSUES**

While the City’s primary concerns lay with the three issues discussed above, several other issues were raised in the Application and at the hearing. These other issues are briefly discussed here, to ensure that the City’s position is clear.

#### **A. Cost of Capital**

The City’s concerns with the Company’s financial models, and resulting proposed rate of return, are provided in its pre-filed testimony. (*See* Direct Testimony of E. Harvey at 6-9.) While these concerns were fully addressed by Staff in its pre-filed testimony and

at the hearing, the City believes a brief discussion of the Company's request that a risk premium be added to its cost of equity is appropriate.

Despite the Commission having previously rejected – twice – requests by the Company that its cost of equity be adjusted upward to account for alleged “special risks,” the Company again raises this issue. (*See* Tr. 80:25-81:3.) None of the alleged “special risks” asserted by the Company warrant an adjustment and, furthermore, at least three factors argue for a downward reduction in the cost of equity due to the absence of risk.

**1. Capital Structure, Expected Growth Rate, and Diversification  
Decrease the Risk Associated with Investing in the Company**

The risk associated with investing in the Company is decreased by at least three factors: (1) a less leveraged capital structure, (2) dramatic product sales growth rate, and (3) a diversified collection of water systems. The Company's own expert does not dispute that, in general, the presence of these factors is associated with a decrease in risk. Because these three factors decrease risk, even if the Company were subject to the Company's alleged “special risks” (which it is not), a risk premium would be inappropriate. (*See, e.g.*, Decision No. 66849 in Docket No. W-01445A-02-0619 (the “Eastern Group Opinion and Order”) at 23 (declining to make any risk adjustment in light of each sides' competing arguments for either upward or downward adjustment).)

First, it is a well-settled principle that the more equity a company has, generally the less financial risk it has. (*See* Tr. 88:8-14; Direct Testimony of Alejandro Ramirez at 11-12.) The Company's expert, Thomas M. Zepp, on several occasions, has recognized this principle, and even relied on it to recommend risk premium adjustments for utilities

more leveraged than their sample water utilities. (*See id.* 100:25-107:3.) Here, the Company proposes a capital structure that is less leveraged than the sample water utilities. (*See Cost of Capital Direct Testimony of William A. Rigsby at 41-42*) (noting that the Company's proposed capital structure is 73% equity to 27% debt while the sample utilities averaged only 56% equity to 44% debt.) Consequently, at least with respect to this factor, the sample water utilities would be considered more, not less, risky than the Company. This additional risk is included in the cost of equity derived from analysis of the sample water utilities, yet the Company made no downward adjustment to account for it.

Second, as the Company's expert testified, a utility's market risk is also influenced by whether product sales are likely to increase or decrease. (*See Tr.* 89:15-18.) It is undisputed that the Company's Western Group's population is expected to grow considerably over the next ten years. (*See, e.g., id.* 91:5-15.) Such expected, dramatic growth in customer base indicates a likely associated growth in product sales. (*Id.* 90:3-10.) Dramatic, expected product sales growth (like the Company's being less leveraged) is yet another factor suggesting that the Company is actually less risky than the sample water utilities. Again, no downward adjustment was made to account for this lowering of risk.

Finally, the more highly diversified a utility, generally the less risky. For example, if a water utility serves merely one system, as opposed to ten, that utility will be less attractive to investors. (*See id.* 93.) In a diversified collection of systems, should something happen in one system that negatively affects profits (*e.g.* drought, unexpected

increases in electrical costs, etc ...), the other systems may be unaffected and, therefore, able to balance out this loss. It is undisputed that the Company is highly diversified, serving 22 different water systems in Arizona. (*Id.* 93:12-14; *see also, e.g., id.* 131-133 (noting that diversification benefits likely exist if there are weather differences across the Company's 22 systems).) Again, no downward adjustment has been made by the Company to account for a lowering of risk due to diversification.

**2. The Company's Request for a Risk Premium, Which Has Twice Been Rejected By the Commission, Should Be Rejected Again**

While the Company ignores factors that indicate it may be less risky than the sample water utilities, it pays particular attention to four "special risks" that, according to the Company, warrant applying a risk premium to the calculated cost of equity:

(1) regulatory risk associated with being subject to Arizona's rate-setting system and its use of a historical test year, (2) the new federal arsenic standards, (3) the use of inverted rates, and (4) the loss of a Purchase Water Adjustment Mechanism and Purchase Power Adjustment Mechanism.

Of these four, the Company asserts that the regulatory risk associated with being subject to Arizona's rate-setting system is "critical." (*See* Tr. 133:4-8.) Yet, the Commission already twice rejected proposed risk premium adjustments premised on this supposedly "critical" risk. *Id.* 82-84; *see* Eastern Group Opinion and Order at 23; Decision No. 64282 in Docket No. W-01445A-00-0962 (the "Northern Group Opinion and Order") at 18-19. The Commission's definitive dismissal of the Company's position in these prior rate cases is likely due to the reasons offered by RUCO and Staff witnesses.

(See Direct Testimony of A. Ramirez at 37-38; Cost of Capital Direct Testimony of W. Rigsby at 51-54 (noting that because the Commission “makes allowances for known and measurable changes to historic test year operating results . . . there is no reason for any additional return on investments” and then providing testimony on why, currently, the regulatory environment in Arizona is “more favorable to water utilities” than ever before).)

Similarly, the Commission twice previously rejected a recommendation by the Company to impose a risk premium based on the new federal arsenic standards. (See Tr. 86:18-87:1; Eastern Group Order at 23-24, (“[T]he risks associated with arsenic treatment costs have been mitigated by the Commission’s approval in both the Northern Group case . . . and in this proceeding, of an arsenic cost recovery mechanism that enables the Company to seek expedited approval of capital costs and a significant portion of operating costs associated with arsenic treatment for its affected systems. Given all of these factors, we will not adopt any specific risk adjustment . . . .”); Northern Group Order at 18-19 (“We do not agree with the Company’s proposal to assign a risk premium . . . based on . . . proposed revisions to the arsenic drinking water standards. . . . [W]e note that all water companies will be affected by the new rules and we do not believe that the arsenic standards should be used to attach a higher level of risk to the Company.”).) Since the Commission’s rejections of the Company’s prior requests for an adjustment were based on this factor, there have been no changes to either the new federal arsenic standards or the date of compliance for them. (See Tr. 87-88.) Therefore, the Commission should follow its prior ruling and reject the Company’s request for a risk

premium based on this factor. (*See also* Direct Testimony of A. Ramirez at 39; Cost of Capital Direct Testimony of W. Rigsby at 55-56.)

The Company's remaining, allegedly "special risks" are equally unpersuasive. (*See* Surrebuttal Testimony of E. Harvey at 6; Direct Testimony of A. Ramirez at 38, 40; Cost of Capital Direct Testimony of W. Rigsby at 56-57, 58.) Further, to the extent the Company may be subject to any "special risks," the effect of these risks is more than adequately offset by the decrease in risk associated with the Company's capital structure, expected growth in product sales, and diversification (all ignored by the Company in its risk premium analysis).

In summary, the City has serious concerns with the Company's financial models and resulting proposed rate of return. Therefore, the City endorses adoption of the approach advocated by Staff, which is similar to that proposed by Staff (and by-and-large implemented by the Commission) in the Northern and Eastern Group cases.

#### **B. Multi-Tier Rate Design**

The Commission has repeatedly and unequivocally rejected single-tiered rate designs proposed by water companies in recent years, including the single-tiered rate design proposed in this case. *See, e.g.*, Eastern Group Opinion and Order at 26-27 (rejecting the single-tiered design proposed by the Company and adopting an "inverted tier rate structure" after noting that the Commission has used a similar design "in a number of prior cases"). Instead, the Commission has endorsed, for conservation reasons, the use of a three-tiered rate design. *Id.* at 26 (the "inverted tier rate structure is

a valid tool for promoting conservation by sending appropriate price signals to heavier users”).

While the Company acknowledges the Commission’s recent use of an inverted tier rate structure to promote conservation, it has refused to follow the Commission’s prior rulings, arguing instead that if conservation caused a reduction in water use the Commission must “adjust the rates or revenue to make up for that loss.” (Tr. 595:8-9.) In other words, the rate design could take away the Company’s “opportunity to earn the authorized rate of return . . . .” (*Id.* 598-600.)

To support this claim, and a single-tier rate design, the Company offered a cost of service study from 1990. Given the changes in the Casa Grande system, this cost of service study is so out of date as to be useless for this purpose. (Tr. 851-852.) The Company merely speculates on how water users might respond to an inverted tier rate structure. (*See id.* 601-610; 657-663.) The Company does not offer a current cost of service study or any reliable evidence demonstrating that the Company has or will lose revenue due to use of an inverted tier rate design.

Even presuming the Commission has not already resolved this issue by prior order, the City would still oppose the Company’s proposed single-tier rate design. Under the Company’s proposal the smallest meter size, the 5/8 inch user, will experience the highest percent rate increase, except for the 8 inch meter size. No rationale supports imposing the highest increase on the smallest (predominantly residential) users. In contrast, the multi-tier design will cause water to be more affordable to the smallest (again typically residential) users. For this reason, the City supports the Commission’s

prior decisions ordering the use of a multi-tiered rate design, as well as Staff and RUCO's endorsement in this case of a multi-tier rate design, using inverted block rates. (*See generally* Direct Testimony of E. Harvey at 9-10; Surrebuttal Testimony of E. Harvey at 7-8.)

**C. Purchase Power/Water Adjustments**

The City agrees with Staff and RUCO's position that the Company's Purchase Power/Water Adjustments should be eliminated. (*See* Surrebuttal Testimony of E. Harvey at 6.)

**D. Arsenic Cost Recovery**

The City generally agrees with Staff and the Company on arsenic cost recovery: An arsenic cost recovery mechanism similar to the ones approved for the Northern and Eastern Groups should be devised for all Western Group customers. However, the Company's efforts to obtain low-cost financial assistance for its arsenic recovery efforts troubles the City. (*See* Direct Testimony of E. Harvey at 4-5; Surrebuttal Testimony of E. Harvey at 5; Tr. 917:3-17.) The City believes that "every effort [should be] made to see if [the City and The Company, working together] can find some low cost financing . . . ." (Tr. 917:8-9.) A reduction of even 1 percent in the interest rate could save ratepayers \$100,000 or more each year. The City is willing to provide the Company with whatever assistance it might ask for, including jointly researching and pursuing how the City and the Company could "work together in some sort of a public/private partnership to see if [they] can get [lower cost] financing . . . ." (*Id.* at 918:9-10; *see generally id.* at 916:8-

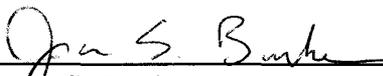
923:22 and 925-926 (discussing the City's position).) Achieving such lower cost financing would be of benefit to ratepayers, the Company, and the City.

### CONCLUSION

The City of Casa Grande respectfully requests that the Administrative Law Judge make any CAP M&I capital expense recovery contingent upon the submission of the Water Resource Master Plan identified in this record as Exhibit CCG-7. Consistent with the City's request, and Staff's recommendation, the City should be allowed the opportunity to participate at all stages of the WRMP process, including decisions relating to what the WRMP will include. The City also asks that the Judge deny the City's request for recovery of non-recurring legal fees relating to effluent litigation and condemnation litigation.

Respectfully submitted this 1st day of August, 2005.

OSBORN MALEDON, P.A.

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Brenda Wendt

**1**



## City of Casa Grande Proposed Residential Projects

Project	Contact Name/Phone	General Map Location	Units	Use	Stat	Recorded
Arroyo Grande PAD CGPZ-85-04	Grant & Sons LTD, LLC 480-615-1379	NEC McCartney Road & Trekell Road	312 20 ac.	SF MF	PP	
Arroyo Vista PAD CGPZ-67-04	Fleet-Fisher Engineering 602-264-3335	SWC Peart & McCartney Road	509	SF	FP	
Arroyo Vista PAD CGPZ-59-05	Ryland Homes 480-736-4556	SWC Peart & McCartney Road	509	SF	Housing Product	R
Avalon PAD CGPZ-03-03	Dietz-Crane - D R Horton 602-973-8632	S. of Val Vista Road E. of Burris Road	260	SF	PP	
Avalon Phase 1 PAD CGPZ-68-04	Dietz-Crane 602-973-8632	S. of Val Vista Road W. of Faldale Road	131	SF	FP	R
Avalon Phase B PAD CGPZ-94-04	Dietz-Crane 602-973-8632	NWC of Faldale Road & Martin Road	116	SF	PP	
Carlton Commons (PAD) CGPZ-11-04	AMEC Infrastructure, Inc. 480-830-3700	S. of Doan Between Peart & Henness	892	SF	PP	
Carlton Commons (PAD) CGPZ-66-04	Josh Hannon AMEC Infrastructure 480-830-3700	S. of Early Road, W. of Henness Road	468	SF	PP	
Carlton Commons CGPZ-25/26-05	Josh Hannon, AMEC 480-830-3700	SEC Peart & Doan Street	124	SF	PAD Amend PP	
Casa Grande 320 PAD CGPZ-07-01	Synergy 480-598-2105	SE of Earley & Henness Road	1148	SF	ZA	
Casa Grande Links PAD CGPZ-44/45-95	Crescent Park Construction 520-316-0035	NW of Kortsen Road & Thornton Road	66	SF	UC	R
Casa Grande Crossings (PAD) CGPZ-48-05	M. Engineering Inc. 602-787-0333 (Maracay Homes)	Southwest of the SWC of Interstate 10 & Florence Boulevard	408 14 ac.	SF MF	PP	
College Park 9 Unit III	Countrywalk Homes 520-316-0470	W. of Casa Grande Avenue S. of Silver Reef	34	SF	UC	R
Colorado Estates (UR) CGPZ-87-04	Bob Dean 480-831-7289	W. of Colorado, S. of Florence Boulevard	3	SP	PP	R
Copper Vista PAD CGPZ-10-01	Dietz-Crane 602-973-8632	NWC of Val Vista & Pinal Avenue	206	SF	UC	R
Copper Mountain Ranch Phase 1 CGPZ-44-03	Vanguard 480-926-4710	NW of Val Vista & Pinal Avenue	1167	SF	PP	
Copper Buttes PAD CGPZ-108-00	Dietz-Crane 602-973-8632	SEC Val Vista & Burris Road	253	SF	FP	R
CopperValley Resort PAD CGPZ-07-99	McMillan 818-716-0803	NW of Gila Bend & Burris Road	278	MH*	ZA	
Cottonwood Commons (PAD) CGPZ-53/54-04	Countrywalk Homes 520-316-0470	SEC Colorado Street & Cottonwood Lane	27	SF	Housing Product	R
Cottonwood Estates (R-1) CGPZ-101-03	PSC Investments 602-369-1020	S. of Cottonwood Lane W. of Colorado		SF	PP	
Cottonwood Ranch PAD CGPZ-20-01	AGRA Infrastructure 480-830-3700	NE of Cottonwood Lane & Trekell Road	751	SF	FP	R
Cottonwood Ranch Phase 2 CGPZ-43-05 (Parcels C & G)	Sunstone Homes 602-695-2661		164		Housing Product	R
Cottonwood Ranch Parcel H & I CGPZ-21-05	Cornerstone Homes 602-332-0802	Southeast corner of Kortsen & Trekell Road	159		Housing Product	
Cottonwood Ranch Parcel B CGPZ-71-05	AMEC Infrastructure, Mary Currie 480-830-3700	N. of Cottonwood, E. of Trekell	124	SF	FP	
Cottonwoods (R-1a) CGPZ-37-99	MC Homes 426-9075 Contact: Linda	SE Cottonwood & Thornton Road	61	SF	UC	R
Cottonwoods Phase II, III, IV R-1a(90 ac.) R-3 (20ac abuts Cottonwood) B-2 (10 ac. SEC Thornton & Cottonwood)	Duran Thompson D&M Engineering 480-350-9590	SEC Cottonwood Lane & Thornton Road	207	SF	PP	
Cottonwoods Phase V (R-1a) CGPZ-29-05	Tarantini Family Limited Partnership 602-765-0290	S. of SEC Cottonwood Lane and Thornton Road	144	SF	PP	
Countrywalk Estates (R-1) CGPZ- 120-94	Countrywalk Homes Inc. 480-874-8891	E. of Pinal Avenue N. of Hopi Drive	67	SF	ZC	
Coyote Ranch PAD	Gardner Development Corp.	NE of Rodeo Road & Pinal Avenue	251	SF	UC	R

FP=Final Plat FR=For Rent PP=Preliminary Plat UC=Under Construction ZA=Zoning Approval  
MF=MultiFamily MH=Mfd Hsg RV=Recreational Vehicle SF=Single Family \*=Age Restricted NR = Not recorded  
R = Recorded, PDR = Protected Development Right

CGPZ-27-97	520-836-0491					
Desert Sky Ranch (PAD) CPGZ-32-02/CGPZ-68-01	421-2340	SE of Kortsen & Thornton Road	265 37+	SF MH	FP UC	R
Desert Crossing PAD CGPZ-12-02	KBHomes 602-306-1000	SE of Kortsen & Pinal Avenue	249 18.5 ac	SF MF	UC	R
Dominion Creek PAD CGPZ-37/38-04	David Grangaard Apex Holding Ltd. 480-596-6602	NEC Pinal Avenue & Hopi Road (alignment)	202	SF	PP	
Echeverria Estates (R-1, B-2) CGPZ-27-99	Doug McEvoy 520-836-7483	NE of McMurray Boulevard & Trezell Road	12	SF	UC	R
Elaine Farms (PAD) CGPZ-99-03	Jackie Guthrie 836-3146	NWC Kortsen Road & Trezell Road	566 21.5 ac	SF	ZA	
Gadsden Greens PAD CGPZ-17-05	Liberty Homes	SWC of Rodeo Road & Thornton Road	391	SF	Housing Product - 55' lots	
Gadsden Greens PAD CGPZ-66-05	Rochelle Megic, L.C. - Liberty Homes 801-561-2525	SWC of Rodeo Road & Thornton Road	64	SF	Housing Product - 50' lots	
Garrett Estates (R-1) CGPZ-49-00	520-836-9237	NE of McMurray & Colorado	6	SF	UC	R
G Diamond Ranch PAD CGPZ-69-03	Greg Loper 602-550-7004	NWC Cottonwood Lane & Peart Road	938 367 ac.	SF	ZA	
G Diamond Ranch Parcel C (PAD) CGPZ-135-04	Greg Loper 602-550-7004	NWC Cottonwood Lane & Peart Road	224	SF	FP	
G Diamond Ranch CGPZ-70-05	D.R. Horton - Continental Series Steve Curtis 480-483-0006	NWC Cottonwood Lane & Peart Road	1254		Housing Product	
Ghost Ranch PAD CGPZ-109-00	Dietz-Crane 602-973-8632	SEC Ghost Ranch Road & Pinal Avenue	124	SF	UC	R
Ghost Ranch II CGPZ-44-04	D.R. Horton Inc.-Dietz-Crane 602-973-8632	E. of Ghost Ranch Unit 1	235	SF	PP	
Gila Buttes PAD CGPZ-107-00	Dietz-Crane 602-973-8632	SWC Val Vista & Scott	502	SF	FP	R
Gila Buttes II CGPZ-45-01	Dietz-Crane 602-973-8632	NWC Martin & Thornton Road	60	SF	ZC	
Grant Estates (R-1) CGPZ-15-03	Sterling Burke 480-829-0937	Sec of 10 <sup>th</sup> Street & Olive	3	SF	UC	R
Highland Manor Unit 1 PAD CGPZ-13-03	Richmond American Homes 602-956-4100	NE of Kortsen & Peart Road	307	SF	UC	R
Highland Manor Unit 2 PAD CGPZ-37-03	Richmond American Homes 602-956-4100	S. of Kortsen E. of Peart Road	142	SF	FP	R
Ironwood Commons PAD CGPZ-100-03	Beazer Homes 480-921-5763	NW of McMurray & Peart Road	263	SF	UC	R
Ironwood Commons II (PAD) CGPZ-131-04	Beazer Homes 480-921-5763	N. of NWC McMurray and Peart Roads	79	SF	FP	R
Ironwood Village PAD CGPZ-113-00	Don Graves 602-863-7607	NE of McMurray & Peart	264	SF*	UC	R
La Puesta Del Sol (UR) CGPZ-68-05	Gary Larkin 480-704-1477	NEC of Avenue A and Doan Road	3	SF	FP	
Los Portones (Los Portales) CGPZ-17/18-03	Chuck Reynolds or Bob Long 602-277-1600	N. of Kortsen Road, E. of Thornton Road	220	SF	PP	
McCartney Center PAD CGPZ-58-04	CG 313 313-602-6777	SWC McCartney Road & I-10	617	SF (MF)	Amend to PAD	
McCartney Center (PAD) Parcel DD CGPZ-79-04	Palacia Homes (836-1535) 480-545-1243	NEC McCartney Road & Peart Road	126	SF	Housing Product	
McCartney Center DD & EE (PAD) CGPZ-17-04	Casa Grande 313 L.L.C. 602-315-6777	E. of NEC McCartney Road & Peart Road	181	SF	FP	
McCartney Center AA & EE CGPZ-82-04	Louis L. Turner (836-9443) Turner Dunn Homes 602-861-2202	Northeast corner of McCartney Road and Peart Road.	222		Housing Product	
McCartney Center Parcel CC CGPZ-13-05	Canusa Homes	NEC McCartney Road & Peart	54		Housing Product	
McCartney Center FF CGPZ-61-05	Casa Grande 313 L.L.C. Tom Eggert 602-315-6777	NEC Peart & McCartney	80	SF	FP	
Mission Por Del Rio PAD w/PDRP CGPZ-21/3-04	Carl Hoffman 480-821-3177	NEC Kortsen & Peart Roads	565 8 ac	SF MF	ZC	

FP=Final Plat FR=For Rent PP=Preliminary Plat UC=Under Construction ZA=Zoning Approval  
 MF=MultiFamily MH=Mfd Hsg RV=Recreational Vehicle SF=Single Family \*=Age Restricted NR = Not recorded  
 R = Recorded, PDR = Protected Development Right

McCartney Ranch PAD CGPZ-12-01	AGRA Infrastructure 480-830-3700	SW of McCartney Road & Trezell Road	1175	SF	FP	
McCartney Ranch Phase 1 (Units 3, 4,5,6) (PAD) CGPZ-16-04	Vanderbilt Farms LLC 480-831-2000	NWC Rodeo Road & Trezell Road	414	SF	FP	
McMurtry Ranch CGPZ-19-03	McMurtry Family 520-836-3187	W. of Pottebaum, S. of Florence Boulevard	7	SF	FP	R
Mission Ranch PAD CGPZ-36-04	The Dehaven Company Alan Kennedy 602-954-3900	N. of NEC of Rodeo Road & Peart Road	344	SF	FP	
Mission Royale PAD CGPZ-77-03 CGPZ-3-05	Hancock Communities 520-421-9191 Phase 3	SEC Florence Boulevard & I-10	2319	SF SF	UC PP	R
Mission Valley PAD CGPZ-66-01	836-9708	NE of Kortsens & Peart Road	1131	SF	UC	R
Mission Valley Phase 2A (PAD) CGPZ-20-04	D.R. Horton Inc. - Dietz Crane 602-973-8632	NEC Arizola Road & Kortsens Road	87	SF	FP	R
Mission Valley 3A (PAD) CGPZ-24-05	D.R. Horton - Dietz-Crane 602-973-8632	NEC Of Arizola Road & Kortsens Road	158	SF	FP	
Mission Valley 4 (PAD) CGPZ-73-04	D.R. Horton - Dietz-Crane 602-973-8632	E. of NEC of Peart Road & Kortsens Road	177	SF	PP	
Mission Valley 5 CGPZ-27-05	D.R. Horton - Dietz-Crane 602-973-8632	E. of NEC of Peart & Kortsens Road	99	SF	PP	
Missin Valley Phase 6 CGPZ-49-05	D.R. Horton - Dietz-Crane 602-973-8632	E. of the NEC of Peart & Kortsens Road	130	SF	PP	
Mission Valley CGPZ-47-05	D.R. Horton - Dietz-Crane 602-973-8632	E. of NEC of Peart & Kortsens Road				Housing product
Monterra Village (PAD) CGPZ-110-04	EPS Group 480-503-2250	SEC Peart Road & Korsten Road	253	SF	FP	
Monterra Village CGPZ-53-05	Richmond American Homes	SEC Kortsens Road & Peart Road	253	SF		Housing Product
Mountain View Ranch (PAD) CGPZ-69-05 Parcels B, C, D	DR Homes MVR Dev. LLC - Don Kunitz 520-795-5111	NWC Rodeo Road & Peart Road	181	SF		Housing Product R
Muirlands (PAD) CGPZ-10/11-05	Rick Engineering company Edward Packard 602-957-3350	W. of the NWC of Peart Road & Kortsens Road	216	SF	PP	
Palm Creek Resort PAD CGPZ-133-99	520-421-7000	NE of Florence Boulevard & Henness Road	3000	RV*	FR	R
Pebble Trail Unit 4 & 5 (PAD) (Coyote Ranch PAD)	GDC 520-876-4004	NE of Pinal Avenue & Rodeo Road	51	SF	FP	R
Post Ranch (PAD) CGPZ-115-04	Jason Hadley 480-429-0500	SEC Overfield Road & Florence Boulevard	2170	SF	ZA	
Rancho Val Vista PAD CGPZ-23-99	Greg Allen, Allen Consulting Eng. 480-844-1666	SW of Rodeo & Trezell	186	MH*	ZA	
Rancho Palo Verde (R-1) CGPZ-82-99	Republic Homes 480-775-7273	SW of Kortsens & Trezell Road	108	SF	UC	R
Rodeo Estates PAD CGPZ-58-99	Watson 800-706-3472	SE of Rodeo & Pinal Avenue	88	MH*	UC	R
Rodeo Ranch Estates (R-1) CGPZ-6/7/8-05	Creative Design Builders 520-510-9579	SWC Casa Grande Avenue & Rodeo Road	38	SF	PP	
Santa Cruz Village (PAD) CGPZ-89-04	Dietz-Crane 602-973-8632	SWC Pinal Avenue & Rodeo Road	387	SF	FP	
Santa Rosa Unit VII & VIII (Mountain View Ranch PAD Parcel A) CGPZ-60-03	Gerry Kumpe 520-876-4505	E. of Colorado, N. of Rodeo Road	201	SF	FP	R
Santa Rosa Units IX & X (PAD) CGPZ-43-04	Gerry Kumpe - Stephen Homes 520-876-4505	NEC Colorado & Rodeo Road	39	SF	FP	
Sierra Ranch 2 PAD CGPZ-88/78-03	Grace Land Development 480-377-8300	SE of Florence Boulevard & Arizola Road	471	SF	PP	
Sonoran Heights PAD CGPZ-134-04	EPS Group, Inc. 480-503-2250	NEC of Earley & Henness Road	776 20.3 ac	SF MF	PP	
Southern Trails PAD w/ PDRP CGPZ-98-04	BenRoss Corporation 602-468-0040	NEC Kortsens Road & Henness Road	193	SF	PP	
Southfork PAD CGPZ-27-94	Dick Hanson 602-922-1310	SE of Florence Boulevard & Pottebaum	32+	SF	UC	R
Stoneridge (Mtn. View Ranch PAD Parcel E)	Centex Homes	Near NWC Peart & Rodeo Road	137	SF	UC	R

FP=Final Plat FR=For Rent PP=Preliminary Plat UC=Under Construction ZA=Zoning Approval  
MF=MultiFamily MH=Mfd Hsg RV=Recreational Vehicle SF=Single Family \*=Age Restricted NR = Not recorded  
R = Recorded, PDR = Protected Development Right

CGPZ-128-00						
Sunset Views Unit 1 (Coyote Ranch PAD) CGPZ-63-03	Achen-Gardner, Inc. 520-876-4004	E. of Pinal Avenue, N. of Rodeo Road	25	SF	UC	R
Tamaron PAD CGPZ-89-03	Landmark Engineering 602-861-2005	NWC of Cottonwood Lane & Arizola Road	425	SF	PP	
Tamaron PAD CGPZ-60-05	Shea Homes 480-348-6045	NWC of Cottonwood Lane & Arizola Road	425	SF	Housing Product	R
Pueblo Townhomes CGPZ-57/58-05	James B. Suor 520-836-6511	N. of NEC of Pueblo Drive & Florence Boulevard	40	Single-story	PP	
Trekell Estates (R-4) CGPZ-42-04	PSC Investments 602-369-1020	SWC Trekell Road & Campbell Street	40	SF	FP	
Tri-plex (R-3) CGPZ-79-03	JKRM LLC 251-1866	1403 N. Gilbert	2	SF	Building Review	
Villa de Jardines (R-2) CGPZ-12-00	CDR Enterprises 480-654-7172	NW of McMurray & Henness Road	127	SF*	UC	R
Villa de Jardines (R-2) Phase II CGPZ-72-04	Quadra Holdings, LLC 602-418-1000	Near NWC of McMurray & Henness Road	57	SF	FP	R
Villago (Rancho Paseo) CGPZ-52-04	Ken Abrahams 520-577-0200	NEC Pinal Avenue & McCartney Road	1629 total ac	SF	PP	
Villago Phase 1 (PAD) CGPZ-128-04	CMX L.L.C. 480-648-1900	NEC Pinal Avenue & McCartney Road	999	SF	FP	
Villago (Parcels 13, 14) CGPZ-67-05	Morrison Homes 480-941-0818	NEC McCartney Road & Pinal Avenue	225		Housing Product - 55' & 65' lots	
Wildwood PAD CGPZ-67-01	Richmond American Homes 602-956-4100	Near SEC Peart Road & Cottonwood Lane	97	SF	UC	R
Yost Ranch (Nichols) PAD CGPZ-65-00	Langley Estates 480-633-0999	NEC I-10 & Selma Highway	804 15 ac.	SF (MF)	ZA	

FP=Final Plat FR=For Rent PP=Preliminary Plat UC=Under Construction ZA=Zoning Approval  
 MF=MultiFamily MH=Mfd Hsg RV=Recreational Vehicle SF=Single Family \*=Age Restricted NR = Not recorded  
 R = Recorded, PDR = Protected Development Right

**2**

## Excess river water available, panel told

By HAROLD KITCHING, Staff Writer

July 21, 2005

### **CASA GRANDE - Arizona Water Company's continued cutting off of water to residential subdivision contractors in Casa Grande would be alleviated by use of surplus Central Arizona Project water, members of the Pinal Groundwater Users Advisory Council were told Thursday morning.**

Casa Grande officials said Arizona Water told the city that water had been cut off at times - the latest last Monday for an indefinite period - because the developers' water trucks were drawing down almost as much water as does the entire population.

That is compounded because the tanker trucks were drawing off water early in the morning, followed by heavy use by residents getting ready for work or other activities, causing storage tanks to become critically low.

The water is necessary in construction projects to control dust.

Contractors have said that the cutting off of water has lasted from a couple of days to a period over the Fourth of July holiday when it was cut off that Thursday and not started again until the following Tuesday.

"The Fourth of July weekend I talked to Sanders Achen at Achen-Gardener (construction company) and he pointed out that there wasn't a piece of equipment in this city that weekend that was moving," GUAC member Jackie Guthrie said.

Pinal Active Management Area Director Randy Edmond told the council that the situation is a challenge and that Arizona Water is aware of the problems.

"I talked to the water company folks yesterday and their reason for doing this is the fact of the capacity problem with all of the growth they have," Edmond said. "Although they're quickly moving to put in some new wells and expand some other wells, right now they're having some problems.

"They're concerned about making certain they have enough water for regular drinking needs and other needs in the community, and that's why they cut it off."

Casa Grande officials said there was also the concern that with storage tanks being dangerously low there would be insufficient water pressure in case of a major fire in the city.

"Is it a capacity issue or is it an infrastructure issue?" Guthrie asked.

Edmond responded that it is "a little of both; they need more wells."

Jack Long of the Hohokam Irrigation and Drainage District said the issue had been discussed since the first shutoff three weeks ago, but nothing had been done toward calling together everyone affected and seeking a solution, even if for the short term.

"I guess I believe in addressing problems head-on and rapidly - and they should be," Long said.

"We're right in the beginning of this heat season. We've got a lot of hot weather ahead of us. We've got a lot of development out there that has just begun, a lot more that is just on the verge of beginning. This isn't a short-

term problem that will go away in two weeks or a month or like that.

"It's not a water table problem, not a water supply problem," Long continued. "The problem is not enough wells to pump it out quickly enough, not enough storage capacity, and Arizona Water Company, obviously because of the time frame, the kind of temporary high demand because of construction, can't gear up to meet that."

Long, however, pointed out that once the subdivisions are built or are at least to the point where heavy amounts of water are not used daily for dust control and compaction, the consumption will show a considerable drop. Because of that, he said, it really isn't feasible for Arizona Water to run expensive temporary pipes to the developments.

Long said his suggestion to both Arizona Water and to contractors "was that this year - maybe this year only - there is CAP water (from the Colorado River) that they're just begging to get rid of, begging to get rid of, for a couple of reasons.

"One was that we had rains in March that filled the reservoirs on the Salt River, put water in San Carlos Reservoir. Those people are no longer taxing or overtaxing the CAP. We had several direct recharge sites in the state that were washed away, others had contamination problems and they had to shut down, so they couldn't do that direct recharge.

"So that freed up water," Long said. "We got notification about a month or a month and a half ago from the Arizona Water Bank that we've probably got 200,000 to 250,000 acre-feet additional if we'd like to take it, and at a lower cost."

Little has happened in that direction, Long said, partly because agricultural water allocations had already been set and granted. "We picked up a little bit, some others have picked up a little," he said, "but very small amounts, I think, compared to what's excess out there."

Long said that because Casa Grande does not have a municipal water system, the private Arizona Water Company holds the city's rights to Central Arizona Project water "that's going unused, by and large."

"It seems to me that it's a tragedy if we don't try to utilize some of that water when we've got a problem here, a relatively short-term supply problem," Long said.

He said San Carlos Irrigation and Drainage District canals come west of Interstate 10 and could be used to transport the CAP water that Arizona Water holds.

"They have an inter-tie with our Hohokam system," Long continued. "We come right up to the freeway with our canals. Maricopa-Stanfield (irrigation district) comes in relatively close on the west side.

"I think there are some things that can be done that would make everybody winners in this thing, including Arizona Water Company, that could make money off of it because it would be their water. It would make the contractors winners if they could participate in putting in some temporary infrastructure. It could be very rapid. If it was jumped on three weeks ago it would be done today, I can tell you that."

The easiest way, Long said, would be to put temporary diversions in the canals, forming pools from which contractors' trucks could draw water.

"I found interest in all those calls that I made, but no action," Long said. "And I think it's a real tragedy that we're going to wait until crews have been shut down, workers have left the community because they can't afford to sit there and work and not get paid.

"I don't have any special affection for contractors, don't misunderstand me; I don't have special affection for developers, but that's beside the point. Those people all play a great, large role in our economy and the perception here. We're in a boom right now and that boom is based a lot on perception. If we get a perception

out there from the investment community, whether they be developers or individuals, that Casa Grande has a serious water problem, such as look, they shut down the hydrant meters, they haven't even got enough to do dust control, we'll have a bigger problem."

Brian Betcher of the Maricopa-Stanfield Irrigation and Drainage District said CAP has temporary permits that could be issued and that his district could then carry the water.

"It's a nuisance because it's not the standard type of delivery," he said. "Some of the contractors are going to go a little farther distance to get the water, but whether it's San Carlos or whether it's Hohokam or Central Arizona or our canal, the water is there and can be made available. They'll just have to go get it."

That would cost developers more money, but both Long and Betcher pointed out that that cost is better than being shut down entirely.

"That's why I said I'm surprised that they haven't come knocking because there are contractors up in Maricopa that are calling us daily," Betcher said. He also said that many of the contractors working in Casa Grande and Maricopa also have projects in the Phoenix area where CAP water is used.

Right now, Betcher said, Maricopa-Stanfield district is carrying CAP water for Arizona Water.

"We have two long-term arrangements for wheeling Arizona Water Company's non-potable water supply to two golf courses now," he said, "for Francisco Grande and a smaller course south of there. The Desert Basin electric plant that Salt River Project has is using non-potable Arizona Water Company water, and we've got many arrangements in place. So some standard agreements are available."

Long said that if canal water were to be used, there should be as many as six locations, alleviating long waits for filling water tankers.

Casa Grande City Manager Jim Thompson said the city is also willing to sell treated effluent water from the city's sewage plant. That effluent is not all being used by the city.

Edmond said Bill Garfield, Arizona Water's president, told him the company has no problems with contractors using canal water. The council was told that in the past Arizona Water, which has the certificate to serve most of the Casa Grande area, has objected to contractors attempting to find alternative supplies.

Another benefit to using CAP supplies from the canals, Long said, is that so far contractors have been using treated potable water for dust control and compaction, water that is more expensive than untreated supplies.

Council Chairman Oliver Anderson said another major consideration that is "very, very critical" is the lack of semi-experienced labor in the construction industry.

"Many times if one area shuts down, that labor's going to be sucked up by the other areas, I'll guarantee you," he said, "and you ask whether Pinal County, Casa Grande, any individual area can afford the loss of that labor force."

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SUPERIOR COURT OF ARIZONA  
PINAL COUNTY

05/11/2000

CLERK OF THE COURT  
FORM V000

HONORABLE BARRY C. SCHNEIDER

W. Echols  
Deputy

CV99-046814

FILED: MAY 12 2000

CITY OF CASA GRANDE

THOMAS K IRVINE #006365

v.

ARIZONA WATER COMPANY, ET AL

STEVEN A HIRSH #006360

ROBERT CARTER OLSON

CLERK OF THE COURT  
PINAL COUNTY

~~Reviewed by attorney~~ \_\_\_\_\_

~~At input date:~~ \_\_\_\_\_ ~~By:~~ \_\_\_\_\_

~~Printed:~~ \_\_\_\_\_

11/05/01 C. ROSE, J. HARRISON

MINUTE ENTRY

This matter was previously assigned to the Honorable Colin F. Campbell. Judge Campbell recused himself. This division has succeeded to the calendar previously presided over by Judge Campbell. Accordingly, this matter is now assigned to the Honorable Barry C. Schneider.

The court has considered defendant Arizona Water Company's motion for award of attorneys' fees, costs, disbursements and expenses, plaintiff's response, and defendant's reply.

As to the issue of attorneys' fees, the court agrees with plaintiff that under the State and Federal statutes, defendants are not entitled to an award of attorneys' fees. First, the court agrees that the statutes apply only to actions to condemn real property. This conclusion is borne out by the fact that the State statutes are part of Title 11, Chapter 7, Article 4 entitled "Relocation Assistance". The purpose appears to be as expressed in related Federal statutes, 42 U.S.C. Section 4621,

SUPERIOR COURT OF ARIZONA  
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CV99-046814

that the primary purpose is to insure that displaced persons not suffer disproportionate injuries. From this focus of the statute on displaced persons and relocation assistance, it is apparent that the awarding of attorneys' fees was intended to apply to condemnation actions involving the condemnation of real property.

Second, the court agrees that A.R.S. Section 11-974 does not entitle defendants to an award of attorneys' fees. The court agrees with plaintiff that this statute is to be narrowly construed. The appropriate narrow construction is to limit the statute's applicability to situations where federal funds are used to acquire the project. This is not the situation in this case.

The third basis for an award of attorneys' fees submitted by defendants is that the action was not brought in good faith. Although the court did not preside over the proceedings that led to the granting of judgment in favor of the defendants, it is clear from the pleadings that the decision was a close call for Judge Campbell. Under such circumstances, the conclusion is inescapable that there could be no finding of bad faith.

The above discussion relates to the defendants' application for attorneys' fees. There appears to be no opposition to defendants' statement of costs. The requested costs shall be included in the judgment to be signed by the court.

\$ 86.00  
\$ 12,757.22

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**4**

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MAR 13 2001  
COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

CITY OF CASA GRANDE, a municipal )  
corporation of the State of Arizona, )  
 )  
Plaintiff/Appellant/Appellee, )  
 )  
v. )  
 )  
ARIZONA WATER COMPANY, )  
an Arizona corporation, )  
 )  
Defendant/Appellee/Appellant. )  
\_\_\_\_\_ )

2 CA-CV 00-0028  
2 CA-CV 00-0128  
(Consolidated)  
DEPARTMENT A

OPINION

APPEALS FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CV-99046814

Honorable Colin F. Campbell, Judge  
Honorable Barry C. Schneider, Judge

AFFIRMED

Irvine Van Riper, P.A.  
By Thomas K. Irvine and Ellen M. Van Riper

Phoenix

and

Ulrich & Anger, P.C.  
By Paul G. Ulrich and William H. Anger

Phoenix  
Attorneys for City of Casa Grande

Bryan Cave LLP  
By Steven A. Hirsch, Rodney W. Ott, and Jill Harrison

Phoenix  
Attorneys for  
Arizona Water Company

BRAMMER, Presiding Judge.

¶1 Plaintiff City of Casa Grande appeals from the trial court's order dismissing its condemnation action by which it sought to acquire a portion of defendant Arizona Water Company's (AWC) public utility property in Pinal County. AWC appeals from the trial court's subsequent order denying its motion for attorney's fees. We have consolidated the two appeals. We affirm the trial court's order dismissing the City's condemnation action. We also affirm the order denying AWC attorney's fees.

### Facts and Procedural History

¶2 The facts in this case are undisputed. In May 1999, the City filed a condemnation action to acquire a portion of AWC's public utility facility, service area, and real and personal property. Earlier that month, the City had adopted an ordinance it contended authorized it to condemn the property, the first section of which read:

That the City Manager and the City Attorney are hereby authorized and directed to procure professional services and to acquire and condemn said real property, [if] any; personal property, if any; system, if any; lines, if any; wells, if any; plants, [if] any; equipment, if any; franchises, if any; certificates of convenience and necessity, if any; contracts, if any; rights, if any; and other property whatsoever, if any; of Arizona Water Company located within that certain described area of Pinal County, Arizona as described in the attached Attachment "A" needed to provide water service to that area as well as any other area as determined by the City, including all rights, title and interest, if any it may have, in said certificate or certificates of convenience and necessity as above described, and to consummate the acquisition of such property under the power of eminent domain and to do all things necessary to accomplish this purpose.

Attachment A, which was entitled "Assets to be Condemned," described in detail a substantial land area and stated that these assets included "any and all personal and real property necessary to provide water service to the area to be condemned" as well as "[a]ny and all tangible and

intangible rights, privileges, and obligations of [AWC] attributable to [the] Subcontract . . . between the United States Bureau of Reclamation, the Central Arizona Water Conservation District,” and AWC to deliver Central Arizona Project (CAP) water to the area described.<sup>1</sup>

¶3 Arguing that the City had not first held an election pursuant to A.R.S. § 9-514, AWC contested the City’s right to condemn the plant and property. Because the City had not first obtained voter approval of the acquisition, AWC claimed that the City lacked authority to proceed with the condemnation action.

¶4 Although AWC did not file a formal motion to dismiss the City’s complaint, the trial court entered an order dismissing it, stating that “[a]n election under § 9-514 is a prerequisite to a condemnation of this property under the City Charter.” The court considered the statutory scheme as a whole, interpreted the language of § 9-514 to require “voter approval of a particular project,” and concluded that general authority, such as that granted by the City’s charter, was insufficient to satisfy the statute.

¶5 AWC subsequently sought an award of its attorney’s fees and costs, pursuant to A.R.S. § 11-972, which mandates awarding fees under certain circumstances if a governmental body has failed in its attempt to condemn real property. AWC also argued that it was entitled to an award of fees pursuant to both the Arizona common law theory that fees are recoverable from a governmental body that does not initiate a condemnation action in good faith and A.R.S. § 12-349(A), which requires a court to assess reasonable attorney’s fees against a party if that party has brought or defended a claim “without substantial justification.” In the alternative, AWC

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<sup>1</sup>The legal description in the Assets to be Condemned was amended by an ordinance enacted in June 1999, which stated, “All other portions of [the original ordinance remain] in full force and effect.”

requested a hearing for additional discovery on these issues. The trial court awarded AWC \$86.00 in costs, but denied its request for attorney's fees, finding that it had failed to meet the statutory requirements of § 11-972 and that there was no evidence the City had acted in "bad faith."

### Condemnation Action

#### A. Does the City's charter supersede A.R.S. § 9-514?

¶6 We review de novo the interpretation of a statute. *City of Tucson v. Pima County*, 190 Ariz. 385, 949 P.2d 38 (App. 1997). In doing so, we attempt to determine and give effect to the legislature's intent by first applying the plain and unambiguous language of the statute. *Oaks v. McQuiller*, 191 Ariz. 333, 955 P.2d 971 (App. 1998). However, we must also consider the statute "in the context of the entire statutory scheme of which it is a part." *Id.* at 334, 955 P.2d at 972; *see also Grant v. Board of Regents*, 133 Ariz. 527, 652 P.2d 1374 (1982). And, we strive to achieve consistency among related statutes. *Goulder v. Arizona Dep't of Transp.*, 177 Ariz. 414, 868 P.2d 997 (App. 1993).

¶7 As it did below, the City offers three alternative bases for its action. First, it argues that, because its charter, adopted in 1975, grants it general authority to engage in the public utility business, it was not required to hold a public election pursuant to § 9-514 on whether it could acquire the portions of AWC's assets it sought. Article XII, § 2, of the charter provides that the City "shall have the power to own and operate any public utility . . . and to lease or purchase any existing utility properties used or useful to public service." It further provides that the City Council "may provide by ordinance for the establishment of such utility." Article I, § 3, of the charter generally provides that the City may acquire property by condemnation.

¶8

At the time the City filed the condemnation action, § 9-514 stated:

Before construction, purchase, acquisition or lease by a municipal corporation, as authorized in §§ 9-511 to 9-513, inclusive, of any plant or property or portion thereof devoted to the business of or services rendered by a public utility shall be undertaken, the construction, purchase, acquisition or lease shall be authorized by the affirmative vote of a majority of the qualified electors who are taxpayers of the municipal corporation voting at a general or special municipal election duly called and held for the purpose of voting upon the question.

Relying on A.R.S. § 9-284(A), the City argues that, because its charter “expressly empowers the City to engage in the water utility business,” and because it had enacted an ordinance to do so by exercising its power of eminent domain, the charter’s authority “prevails over conflicting state law” requiring an election.

¶9

Section 9-284(A) provides that, when charter provisions conflict with applicable state law, “the provisions of the charter shall prevail notwithstanding the conflict, and shall operate as a repeal or suspension of the law to the extent of conflict, and the law shall not thereafter be operative as to such conflict.” However, § 9-284(B) states that the charter “shall be consistent with and subject to the state constitution, and not in conflict with . . . general laws of the state not relating to cities.” Article 13, § 2, of the Arizona Constitution clarifies the relationship between charter cities and the state by declaring that a city charter must be “consistent with, and subject to, the Constitution and the laws of the State.” See *City of Tucson v. State*, 191 Ariz. 436, 438, 957 P.2d 341, 343 (App. 1998) (“Our courts have historically held that general state laws pertaining to matters of statewide concern override conflicting city charters.”). A charter city’s ordinance on a matter not solely of local concern is invalid if it conflicts with a valid state statute on the matter, even if the ordinance is more restrictive than the state law. *City of*

*Tucson v. Consumers for Retail Choice Sponsored by Wal-Mart*, 197 Ariz. 600, 5 P.3d 934 (App. 2000). If the local and statewide laws do not conflict, that is, if they can peacefully coexist, the local ordinance “may nevertheless be invalid if the state has appropriated the field.” *Id.* at ¶7, 5 P.3d at ¶7; *see also Union Transportes de Nogales v. City of Nogales*, 195 Ariz. 166, 985 P.2d 1025 (1999).

¶10 The City argues that, because “the decision to provide water service is strictly a local matter,” its ordinance is valid. AWC argues that, because the City was exercising its power of eminent domain—which, AWC argues, is a matter of statewide concern<sup>2</sup>—to acquire its property, the ordinance is invalid. Neither position adequately identifies the true issue before us, the acquisition by a municipality of a portion of the assets of an existing public service corporation. Our first inquiry, which we answer on a case-by-case basis, is whether such an acquisition is a matter solely of local concern. *See Strode v. Sullivan*, 72 Ariz. 360, 236 P.2d 48 (1951). A subject matter may be of statewide concern if uniform regulation is appropriate. *See Consumers for Retail Choice; see also U.S. West Communications, Inc., v. City of Longmont*, 948 P.2d 509 (Colo. 1997).

¶11 The portion of AWC the City seeks, once acquired, would no longer be subject to the jurisdiction of the Arizona Corporation Commission (ACC), and the customers in this former portion of AWC’s service area could thereby lose several statutory protections.<sup>3</sup> *See* Ariz. Const.

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<sup>2</sup>*See City of Mesa v. Smith Co. of Arizona, Inc.*, 169 Ariz. 42, 816 P.2d 939 (App. 1991).

<sup>3</sup>Under the statutory scheme governing the ACC’s regulation of public service corporations, aggrieved parties have extensive rights to seek administrative remedies, including “investigations, hearings and appeals,” into whether the public service corporation has violated the law or a rule or order of the ACC. *See, e.g.,* A.R.S. § 40-246 and Ariz. Admin. Code R14-2-411 and R14-3-101 through R14-3-113; *see also* A.R.S. §§ 40-361 through 40-375

art. 15, §§ 2, 3 (municipal corporations excluded from definition of public service corporations, which are subject to regulation and supervision by ACC under the Arizona Constitution and A.R.S. § 40-202(A))<sup>4</sup>; *see also City of Phoenix v. Wright*, 52 Ariz. 227, 80 P.2d 390 (1938). Because regulation of municipally owned utilities is not within the purview of the ACC, recourse for their customers is through the municipal electoral process—a very different method of registering concerns with utility rates or service from that of the ACC’s administrative procedures to which public service corporations are subject. *See City of Phoenix*. The comprehensive statutory scheme prescribing ACC regulation of public service corporations plainly indicates the legislature’s recognition that the matter is of statewide importance and controlled appropriately by the ACC. *Cf. Mayor of Prescott v. Randall*, 67 Ariz. 369, 375, 196 P.2d 477, 481 (1948) (“complete and comprehensive code” governing liquor licensing evinces legislative intent for statewide control over subject matter). Clearly, the loss of these statutory benefits, which would be the consequence for these AWC customers if the City acquired this portion of AWC, is no less a matter of statewide concern.

¶12 Moreover, we believe the plain wording of § 9-514 indicates both an implicit legislative recognition of the need for uniform regulation of its subject matter, municipal acquisition of an existing utility, and an implicit determination that the matter is of statewide

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(requiring, inter alia, rates charged by public service corporation to be “just and reasonable,” filing of rate schedules with ACC, and notice before rates are increased); A.R.S. § 40-250 (providing for a hearing before rates are increased) and Ariz. Admin. Code R14-2-105; A.R.S. §§ 40-461 through 40-464 (establishing residential utility consumer office and board to hear consumer complaints); A.R.S. § 40-110 (establishing consumer services section within ACC utilities division to provide information and investigate complaints).

<sup>4</sup>For specific purposes that are inapplicable to this situation, municipal corporations are subject to limited ACC jurisdiction. *See, e.g., A.R.S. § 40-360.22* (underground facilities).

importance. *See Clayton v. State*, 38 Ariz. 135, 149, 297 P. 1037, 1042 (1931) (invalidating city ordinance relating to driving under the influence of alcohol because "the legislature in the Highway Code has determined that the sobriety . . . of a motor vehicle driver on the public highways of the state is a matter of state-wide policy and concern, and that . . . the rule with reference to such drivers should be uniform throughout the state"). The statute requires voter approval before a city may acquire a utility, but that requirement would be eviscerated if a city could satisfy it simply by enacting an ordinance pursuant to a charter provision imposing no such requirement. Therefore, we conclude that the City's attempted acquisition of a portion of AWC was not a matter solely of local concern but, rather, a matter of both local and statewide concern. Accordingly, the ordinance the City enacted to accomplish the acquisition may not conflict with § 9-514. *Consumers for Retail Choice*.

¶13 We must next determine whether the City's ordinance conflicts with § 9-514. The City argues that, based on its "existing charter authority," it was "vest[ed] . . . with express authority to condemn the property of AWC without first conducting an election." Section 9-514, however, expressly states that a city must first obtain voter approval before acquiring a public utility. Because the City charter purports to enable the City to pursue the AWC acquisition without a vote required by state law, we therefore find that the ordinance enacted pursuant to its authority "conflict[s] with or attempt[s] to overrule" the requirements of § 9-514. *Consumers for Retail Choice*, 197 Ariz. 600, ¶10, 5 P.3d 954, ¶10. Consequently, we conclude that the ordinance, without more, cannot authorize this acquisition of AWC's property. In light of this conclusion, we need not also determine, as AWC suggests, whether the legislature has otherwise preempted the field. *See Union Transportes; Consumers for Retail Choice*.

B. Is this condemnation action subject to the requirements of § 9-514?

¶14 The City alternatively argues that, even if § 9-514 generally applies, the statute is inapplicable to this situation because it undertook the condemnation under the authority of either A.R.S. § 9-515 or § 9-522, neither of which, it contends, is subject to the requirements of § 9-514. Section 9-515 states, in pertinent part:

A. When a municipal corporation and the residents thereof are being served under an existing franchise by a public utility, the municipal corporation, before constructing, purchasing, acquiring or leasing, in whole or in part, a plant or property engaged in the business of supplying services rendered by such public utility, shall first purchase and take over the property and plant of the public utility.

¶15 The City contends that the plain language of § 9-514, which, at the time the condemnation action was filed, applied to the acquisition of a utility "as authorized in [A.R.S.] §§ 9-511 to 9-513, inclusive," limits its applicability to condemnation proceedings undertaken by authority only of those statutes. Therefore, the City argues, because it sought to condemn the utility under § 9-515, it was not subject to the requirements of § 9-514. However, the City's amended complaint does not cite the source of its authority to act in the limited manner it now suggests. The complaint states that the action is brought, inter alia, under the provisions of "Title 9, Chapter 5, Articles 2 and 3," which are comprised of A.R.S. §§ 9-511 through 9-540. Furthermore, in looking at the statutory scheme as a whole, we find nothing to suggest that the legislature intended §§ 9-514 and 9-515 to operate independently of each other. Rather, because they relate to the same subject matter, we construe them in concert. *Goulder*.

¶16 Sections 9-514 and 9-515 were enacted together in 1933, when the sections that are now §§ 9-511 through 9-513 were amended. 1933 Ariz. Sess. Laws, ch. 77, §§ 1-3. Both

sections describe the affirmative duty a city has before it may acquire a utility: § 9-514 requires a city to obtain voter approval before building, buying, leasing, or acquiring a public utility, and § 9-515 requires a city to first “purchase and take over” an existing utility serving its citizens before it may construct or acquire one of its own. We find the most harmonious reading of the statutes to be that § 9-514 imposes an election and voter approval requirement whenever a city wants to acquire a utility. If the area to which a city seeks to provide utility service is already being served by a utility, § 9-515 requires the city to acquire the utility, perhaps by eminent domain, and pay just compensation for the acquisition. Nothing in § 9-515 reflects a legislative intent to exempt the situation it describes from the requirements of § 9-514. Rather, § 9-515 merely details a city’s additional obligations under the circumstances it describes.

¶17 We also find unavailing the argument the City makes in reliance on *Sende Vista Water Co., Inc. v. City of Phoenix*, 127 Ariz. 42, 617 P.2d 1158 (App. 1980), that § 9-522 “provides independent authority for the City to acquire a portion of AWC, without first conducting an authorizing election pursuant to A.R.S. § 9-514.” Section 9-522 states, in pertinent part:

A. In addition to its other powers, a municipality may:

1. Subject to the requirements and restrictions of §§ 9-515 through 9-518, within or without its corporate limits, construct, improve, reconstruct, extend, operate, maintain and acquire, by gift, purchase or the exercise of the right of eminent domain, a utility undertaking or part thereof, and acquire in like manner land, rights in land or water rights in connection therewith.

We find *Sende Vista*, and the supreme court case it relied on, *City of Scottsdale v. Municipal Court of Tempe*, 90 Ariz. 393, 368 P.2d 637 (1962), readily distinguishable from this case.

¶18 We agree with Division One's analysis of *Sende Vista* and *City of Scottsdale*, and the statutes upon which they were based, in *Moore v. City of Page*, 148 Ariz. 151, 713 P.2d 813 (App. 1986). The court distinguished both cases, finding that they involved "situations in which municipalities with existing utilities sought to expand operations by acquiring utilities which were operating in areas [the] city wished to serve." *Id.* at 162, 713 P.2d at 824. In *Moore*, as in this case, the city was seeking to establish initial utility service. Thus, for the first time, Division One addressed in *Moore* the question of whether Title 9, chapter 5, article 3, which includes § 9-522, is applicable to that situation. The court held that only if the city were seeking to extend or improve a utility it already owned would the provisions of article 3 apply. *See Moore* (because of overall purpose of article 3, applicability of § 9-522 construed as limited to such situations despite its apparently contradictory language).

¶19 Both *Sende Vista* and *City of Scottsdale* were cases in which cities sought to extend their extant utility functions. Casa Grande, on the other hand, sought to begin its utility function by acquiring some of AWC's assets—an action governed instead by Title 9, chapter 5, article 2, which includes § 9-514. *See Moore*. The City's reliance on *Sende Vista* is therefore unavailing.

C. Did either the 1916 or 1975 election satisfy the § 9-514 requirements?

¶20 Finally, the City argues that, even if it was required to obtain voter approval before condemning AWC's property, the requirement had been satisfied by one of two prior public votes: the first conducted in 1916 when voters authorized the then town to sell bonds to construct several utilities, and the second in 1975 when voters approved the charter to incorporate the town as a city. The City relies on *Desert Waters, Inc. v. Superior Court*, 91 Ariz. 163, 370 P.2d 652 (1962), for the proposition that "it is not necessary for a city to conduct an election each and every

time it seeks to acquire public utility property, so long as it has existing authority either by a charter provision or other publicly voted upon measure permitting the city to engage in that utility business.” The City’s reliance on that case, however, is misplaced. The court in *Desert Waters* specifically stated that it was not construing § 9-514, which it found inapplicable because the city had undertaken the condemnation after complying with the election provision of chapter 5, article 3. *Desert Waters*, therefore, does not support the City’s assertion that it has satisfied the requirements of § 9-514.

¶21 The City also relies on *Graham County Electric Cooperative, Inc. v. Town of Safford*, 95 Ariz. 174, 388 P.2d 169 (1963), to support its contention that we should “look to the extent of the voters’ [earlier] authorization to determine whether [it has] existing authority to enter the utility business.” In *Graham County*, our supreme court held that a vote by the electorate approving the acquisition of a portion of a utility’s facilities located within town limits did not “impl[y] or import[] future authority in the [town] to purchase further [utility] facilities either within or without the town limits in whole or in part. In order that [the town] purchase other facilities it must be authorized at an election held in conformity with [§ 9-514].” *Id.* at 184, 388 P.2d at 176. *Graham County* does not support the City’s assertion that its general authority to acquire a utility is sufficient voter authorization to satisfy the plain language of § 9-514. Indeed, it supports the contrary position.

¶22 When a statute’s language is clear, we need not look beyond its plain language to determine its meaning. *Hayes v. Continental Ins. Co.*, 178 Ariz. 264, 872 P.2d 668 (1994); *Oaks*. We agree with the trial court that the “common sense meaning of the language [of § 9-514] calls for voter approval of a particular project, not general authority.” The town council minutes from

the meeting setting the 1916 election state that its purpose was to determine whether the town should be allowed to issue and sell bonds "for the purpose of installing a Town water plant, a Town electric light and power plant and a Town ice plant." According to the statement on the official ballot, the special election in 1975 was called for the purpose of voting on the following question: "Shall the charter proposed by the board of freeholders be ratified?" The current question is whether the City has authority to acquire AWC's property for the purpose of operating a utility. Construing the voter approval the City obtained at either earlier election as sufficient to satisfy the requirements of § 9-514 would compel us to torture the meaning of the language "voting upon the question." This we decline to do. Section 9-514 requires the City to obtain voter approval at an election "duly called and held" for the purpose of voting on that specific question before commencing an action to acquire AWC's property.<sup>5</sup> The trial court's order dismissing the condemnation action is therefore affirmed.

#### **Attorney's Fees**

A. Is AWC entitled to an award of reasonable attorney's fees under A.R.S. § 11-972?

¶23 After the trial court entered judgment in its favor in the condemnation action, AWC sought to recover its attorney's fees and costs. AWC first argued it was entitled to an award of attorney's fees pursuant to § 11-972(A), which provides:

The court having jurisdiction of a proceeding instituted by an acquiring agency to acquire real property by condemnation shall award the owner of any right, or title to, or interest in such real property, such sum as will reimburse such owner for his reasonable costs, disbursements and expenses, including reasonable attorney,

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<sup>5</sup>See 1965 Op. Ariz. Att'y Gen. 65-39-L (television translator system granted ACC certificate of public convenience and necessity as a public utility may be acquired by city only after voter approval obtained pursuant to § 9-514).

appraisal and engineering fees actually incurred because of the condemnation proceedings if either of the following occur:

1. The final judgment is that the acquiring agency cannot acquire the real property by condemnation.
2. The proceeding is abandoned by the acquiring agency.

Section 11-974(A), A.R.S., however, limits the applicability of § 11-972 only to those circumstances in which “real property or improvements thereon are acquired or are to be acquired for a project for which federal financial assistance is to defray all, or part of, the costs of such project.” The trial court found that the statute did not apply, both because the condemnation action was not one to condemn real property and because there was no evidence the City would have used federal financial assistance to acquire AWC’s property.

¶24 Because we agree with the trial court that AWC failed to prove that the City would have used federal financial assistance to acquire its property, we conclude that AWC was not entitled to attorney’s fees under § 11-972. “Federal financial assistance” is defined as “a grant, loan or contribution in any form whatsoever provided by the United States to an acquiring agency.” A.R.S. § 11-961(7). The City argues, as it did below, that there was “no evidence that [the City] proposed to use any federal funds to acquire AWC’s property,” but rather, “the acquisition was to be solely funded by municipal funds.” Claiming that the City has continually refused to explain how it planned to finance its acquisition of AWC’s property, AWC relies on one of the City’s stated reasons for seeking to acquire the property—it wanted to distribute the

area's CAP allocation more efficiently than it claimed had been AWC's practice—as evidence of the City's intent to utilize federal financial assistance for the condemnation.<sup>6</sup>

¶25 We agree with the trial court's implicit conclusion that the fact the City would have acquired the area's CAP water allocation was irrelevant to the issue of how it planned to finance the acquisition. AWC's argument that federal funds would have been used for the project is based on mere speculation. *Salaz v. City of Tucson*, 157 Ariz. 251, 756 P.2d 348 (App. 1988). And, we construe § 11-972 narrowly. *See United States v. 4.18 Acres of Land*, 542 F.2d 786, 789 (9th Cir. 1976) (federal statute with nearly identical wording construed as “a narrow exception to the general rule of nonrecovery of litigation expenses”).

¶26 At oral argument, AWC contended that the trial court had improperly denied it an opportunity to discover the City's funding source and that, because the court ruled in its favor on the merits prior to discovery on that issue, it should be allowed to pursue discovery and have a hearing on its entitlement to attorney's fees. Generally, a trial court has broad discretion in deciding discovery issues, and we will not disturb its rulings absent a showing of an abuse of that discretion. *Perguson v. Tamis*, 188 Ariz. 425, 937 P.2d 347 (App. 1996). On the record before us, we cannot say that the trial court abused its discretion in denying AWC's request for a hearing and for additional discovery on whether the City planned to use federal funds to acquire its property or on whether the City had acted in bad faith. *See Lenze v. Synthes, Ltd.*, 160 Ariz. 302, 772 P.2d 1155 (App. 1989) (denial of request for evidentiary hearing reviewed for abuse of

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<sup>6</sup>In making these assertions, AWC refers to the City's responses to its interrogatories. Those documents are not part of the record on appeal, although they were apparently intended to be attached to AWC's motion for attorney's fees. Because the City does not dispute either of AWC's contentions, we accept them as true for purposes of this appeal.

discretion). Because AWC failed to make the showing necessary to contradict the City's assertion that it did not plan to use federal funds to acquire AWC's property, the trial court correctly denied attorney's fees under § 11-972.<sup>7</sup> *Salaz*.

B. Did the City act in bad faith in filing condemnation proceedings against AWC?

¶27 Citing both statutory and common law theories of recovery, AWC also claimed it was entitled to an award of attorney's fees on the ground that the City had acted in bad faith by "bringing [the] action when [it] knew it lacked authority" to do so, requesting a hearing on the issue. AWC relied on § 12-349(A), which mandates an award of attorney's fees if a party has brought a claim "without substantial justification," defined as a claim or defense that "constitutes harassment, is groundless and is not made in good faith." § 12-349(F). All three elements must be proven by a preponderance of the evidence. *Fisher v. National Gen. Ins. Co.*, 192 Ariz. 366, 965 P.2d 100 (App. 1998). We review the trial court's findings of fact under a clearly erroneous standard, but its application of the statute is a question of law that we review de novo. *Id.*; see also *Phoenix Newspapers Inc. v. Department of Corrections*, 188 Ariz. 237, 934 P.2d 801 (App. 1997).

¶28 AWC argued that it was also entitled to attorney's fees under the common law rule that "the condemning party shall have acted in good faith both in instituting and abandoning the proceedings." *State ex rel. Morrison v. Helm*, 86 Ariz. 275, 282, 345 P.2d 202, 206-07 (1959); see also *City of Sedona v. Devol*, 196 Ariz. 178, 993 P.2d 1142 (App. 1999). As Division One of this court has observed, the relevant case law has not defined what constitutes bad faith on the

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<sup>7</sup>Having concluded that the trial court correctly denied fees because AWC did not establish that the acquisition would have been funded in any way by federal financial assistance, we need not consider whether the City sought to acquire "real property."

part of a condemning party, but rather, only "offers illustration of that standard as the courts have applied it case by case." *City of Sedona*, 196 Ariz. 178, ¶23, 993 P.2d 1142, ¶23.

¶29 As justification for recovering fees under either § 12-349 or the common law, AWC argued below that, because the City had held a special election in 1990 for the purpose of deciding whether it should enter into the water utility business, the City "knew that state law required it to hold an election." AWC further argued that, because the voters had rejected the ballot proposition in 1990, the City's attempt to condemn AWC's property nearly ten years later without first holding another election was clearly "[i]n disregard of both the law and the will of its citizens." The City responded, however, that the "outcome of the 1990 election is inconsequential, because that election involved the issuance of revenue bonds, which clearly requires an election under A.R.S. § 9-523," and the City did not plan to fund this acquisition of AWC's property by issuing bonds. In denying fees on this ground, the court stated only that, because the decision in AWC's favor on the condemnation action was "a close call[,] . . . the conclusion is inescapable that there could be no finding of bad faith."

¶30 The judge who ruled on AWC's fee request was not the same judge who had dismissed the condemnation action. The judge who dismissed the City's action had stated that the case was "a question of first impression" and that "[t]he statutes and prior case law are not a model of clarity." That judge also found that the "common sense meaning of the language [of § 9-514] calls for voter approval of a particular project, not general authority." As illustrated by both the trial court's lengthy discussion preceding its order dismissing the condemnation action and our own discussion herein, the position asserted by the City was fairly debatable. *See Lynch v. Lynch*,

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164 Ariz. 127, 133, 791 P.2d 653, 659 (App. 1990) (court should administer § 12-349 cautiously to avoid discouraging "assertion of fairly debatable positions").

¶31 Accordingly, although the City's action was unsuccessful, we agree with the trial court's implicit conclusion that AWC failed to prove by a preponderance of the evidence that the City had acted in bad faith. *Fisher*. We therefore find no error in the trial court's denial of attorney's fees under § 12-349. We likewise find no error in the trial court's implicit conclusion that this was not an appropriate case for awarding attorney's fees under the common law. *See City of Sedona*. Therefore, the order denying AWC attorney's fees and awarding it \$86.00 in costs is affirmed.

¶32 AWC has requested attorney's fees on appeal on the same grounds it requested fees below. Because AWC did not establish that it is entitled to attorney's fees on any of those grounds, we deny its request.

  
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

  
M. JAN FLÓREZ, Judge

  
JOHN PELANDER, Judge

