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BEFORE THE ARIZONA CORPORATION CO

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ASSET TRUST MANAGEMENT, CORP.,

DOCKET NO. W-03512A-06-0613

Complainants,

v.

**STAFF'S RESPONSE TO RESPONDENT'S
MOTION TO DISMISS**

PINE WATER COMPANY, an Arizona
Corporation,

Respondent.

Arizona Corporation Commission Staff ("Staff") hereby responds to the Motion to Dismiss filed by Pine Water Company ("PWCo") on October 11, 2006.

I. FACTS

On October 11, 2006, Asset Trust Management ("ATM") filed an application with the Commission seeking to delete certain territory from the certificate of convenience and necessity ("CC&N") held by Pine Water Company ("PWCo"). ATM's Application concerns the Eagle Glen Subdivision, which is owned by ATM and located within PWCo's CC&N territory. In its Application, ATM alleges that it has the "capability of providing domestic water to its property". (Application, page 3, line 12-13). The Application also suggests that PWCo has failed to provide adequate water service within it certificated area.

As stated in the Findings of Fact provided by the Commission in Decision No. 67823, the area governed in the CC&N is "subject to water shortages". (Decision 67823, Page 3, line 6). Due to the shortage issues, the Commission has ordered a moratorium on new water service connections within PWCo's CC&N area, reflecting the availability of water to serve the entire Pine and Strawberry area. The most recent action in this regard came in Decision 67823, when the Commission ordered that "if by April 30, 2006, a permanent solution to Pine Water Company's water shortage issues is not established ... a total moratorium on any new connections to Pine Water Company shall become

1 effective on May 1, 2006.” (Decision 67823, page 13, line 7-10). The threshold date came and
2 passed without a solution to the water shortage issue, and the moratorium took effect. That
3 moratorium remains in effect.

4 PWCo denies that it has failed to use reasonable efforts to produce water within its CC&N
5 territory. PWCo claims that its failure to connect additional customers results from the moratorium.
6 PWCo has requested that the Commission prevent the properties from being deleted from its CC&N
7 and has proposed instead that a variance to the moratorium be considered.

8 The Application appears to present two separate legal issues: 1) the deletion of the named
9 properties from PWCo’s CC&N territory, and 2) an alleged taking of property under the
10 Constitutions of both the United States and Arizona.

11 PWCo has filed a Motion to Dismiss the Application filed by ATM.

12 **II. LAW AND ARGUMENT**

13 **A. Legal Standard Governing Motions To Dismiss**

14
15 Respondent PWCo has cited Rule 12(B)(6) of the Arizona Rules of Civil Procedure as
16 foundational authority for its motion. Each of PWCo’s claims must be analyzed within that context.
17 Rule 12(B)(6) provides a defense in cases in which the Complaint, on its face, fails to state a claim
18 for which relief may be granted. “Motions to dismiss for failure to state a claim are not favored
19 under Arizona law.” *Maldonado v. Southern Pacific Transportation Company*, 129 Ariz. 165, 629
20 P.2d 1001(App. 1981), citing *Folk v. City of Phoenix*, 27 Ariz.App.146, 551 P. 2d 595 (App. 1976).
21 In considering whether a motion to dismiss for failure to state a claim may be granted, a court will
22 presume that the facts alleged in the complaint are true. *Savard v. Selby*, 19 Ariz. App. 514, 515, 508
23 P.2d 773, 774 (App. 1973). “A court should not grant a motion to dismiss for the reason that the
24 complaint fails to state a cause of action unless it appears certain that the plaintiff would not be
25 entitled to relief under any state of facts susceptible of proof under the claim stated.” *Folk v. City of*
26 *Phoenix*, at 149.

1 **B. Legal Standard Under a Claim for Taking of Property**

2 One of the foundational powers of government is the power to regulate the use of land.
3 But while this power may be extensive, it is not unlimited. While the Supreme Court admits to
4 having provided little guidance in terms of what constitutes going “too far,” the Court has
5 described at least two discrete categories of regulatory action as compensable without case-
6 specific inquiry into the public interest advanced in support of the restraint. The first
7 encompasses regulations that compel the property owner to suffer a physical invasion of his
8 property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, at 1015, 112 S.Ct. 2886. The
9 second situation “is where regulation denies all economically beneficial or productive use of
10 land.” *Id.* Where a land-use regulation results in a physical occupation of the subject property or
11 where *all* economically viable use of land is removed, a taking has occurred, and the Court will
12 order that the government compensate the owner for his property, regardless of the public
13 necessity for which the regulation was enacted.

14 In all other cases, the court must look to the public policy behind which the regulation
15 was enacted. In conducting that analysis, the U.S. Supreme Court has provided some framework
16 within which to analyze the claim. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, at 413,
17 43 S.Ct. 158. There, the Court dealt with a case in which a company’s previously-existing rights
18 to mine coal were abrogated by a newly-passed statute. The statute prevented coal from being
19 mined from beneath certain structures above ground. In *Pennsylvania Coal*’s case, the statute
20 prevented the company from mining the coal located beneath a home that was already in place at
21 the time the company bought the rights to mine beneath the property. *Pennsylvania Coal*
22 claimed that the statute prevented all economic benefit of the rights it had purchased in the
23 subject property. The Court framed the issue thus: “The question is whether the police power
24 can be stretched so far.” *Id.* The Court went on to say:

25 “Government could hardly go on if to some extent values incident
26 to property could not be diminished without paying for every such
27 change in the general law. As long recognized, some values are
28 enjoyed under an implied limitation and must yield to the police
 power. But obviously the implied limitation must have its limit or
 the contract and due process clauses are gone.”

1 *Id.* at 413. The Supreme Court has further elaborated on Fifth Amendment protection: “As we
2 have said on numerous occasions, the Fifth Amendment is violated when land-use regulation
3 ‘does not substantially advance legitimate state interests or *denies an owner economically viable*
4 *use of his land*.’” *Agins v. City of Tiburon*, 447 U.S. 255, at 447, 100 S.Ct. 2138 (emphasis in
5 original).

6 An allegation of a taking, then, will be analyzed within a Fifth Amendment context. If
7 the regulation that is alleged to effect a taking does not in substance advance a legitimate public
8 interest, or if it denies all economic use of land, the regulation will constitute a taking of
9 property, for which compensation will be required. In analyzing the public interest portion of the
10 test, the Supreme Court has provided guidance: “These cases are better understood as resting not
11 on any supposed ‘noxious’ quality of the prohibited uses but rather on the ground that the
12 restrictions were reasonably related to the implementation of a public policy ... expected to
13 produce a widespread public benefit and applicable to all similarly situated property.” *Penn*
14 *Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646.

15 The Court then further expounded upon the perspective from which a court must view the
16 requirement that the policy be of benefit to “all similarly situated property”.

17 “Taking jurisprudence does not divide a single parcel into discreet
18 segments and attempt to determine whether rights in a particular
19 segment have been entirely abrogated. In deciding whether a
20 particular governmental action has effected a taking, this Court
21 focuses rather both on the character of the action and on the nature
22 and extent of the interference with rights in the parcel as a whole-
23 here, the city tax block designated as the landmark site.”

22 *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104. The determination of
23 whether or not a land-use regulation substantially advances a legitimate state interest is to
24 determine whether the regulation is reasonably related to the implementation of a public policy
25 with the expected purpose of producing a widespread benefit to ‘all similarly situated property’
26 within the domain of the regulation. Further, the Supreme Court has clarified that where a State
27 “reasonably conclude[s] that the ‘health, safety, morals, or general welfare’ would be promoted
28

1 by prohibiting particular contemplated uses of land,” such regulation would be legitimate. *Penn*
2 *Central Transportation Co. v. New York City*, 438 U.S. 104, at 125.

3 In his dissenting opinion in *Pennsylvania Coal*, Justice Brandeis succinctly stated that “a
4 restriction, though imposed for a public purpose, will not be lawful, unless the restriction is an
5 appropriate means to the public end.” *Pennsylvania Coal*, at 418. He went on to add that
6 “restriction upon use does not become inappropriate as a means, merely because it deprives the
7 owner of the only use to which the property can then be profitably put.” *Id.*, citing *Mugler v.*
8 *Kansas*, 123 U.S. 623, 668, 669, 8 S.Ct. 273, and *Powell v. Pennsylvania*, 127 U.S. 678, 682, 8
9 S.Ct. 992, 1257.

10 Takings jurisprudence, then, requires that in order to show a taking for which
11 compensation is required, an owner must prove that a regulation was not undertaken in the public
12 interest. If the regulation does not advance the public interest, then a taking has occurred. If, on
13 the other hand, the regulation is found to advance the public interest, then the question becomes
14 *how much* economic damage must be inflicted before an owner is entitled to compensation. The
15 Supreme Court answered:

16 “We think, in short, that there are good reasons for our frequently
17 expressed belief that when the owner of real property has been called upon
18 to sacrifice *all* economically beneficial uses in the name of the common
good, ... he has suffered a taking.”

19 *Lucas v. South Carolina Coastal Counsel*, 505 U.S. 1003 (emphasis in original).

20 Therefore, in order to successfully pursue a claim against the government or an agency
21 thereof on the grounds that a regulation has affected a taking of property, the owner will need to
22 prove one of two things, either 1) that the diminution of value to his property is the result of a
23 state regulation not enacted to pursue a legitimate public interest, or 2) that a regulation has been
24 enacted which was enacted to advance a legitimate public interest, but which has nonetheless
25 resulted in the destruction of *all* of the economically viable uses of his land.

26 ...
27 ...
28 ...

1 C. **The Moratorium Is Not A Taking**

2 1. **ATM Does Not Have A Compensable Property Interest In Connection to**
3 **PWCO's System.**

4 In order to establish a taking, ATM must show that all of the economic value of
5 its property has been taken. ATM has argued that its inability to connect to the PWCo system
6 has taken all of the value from its property; nonetheless, there exist other options, such as a
7 variance to the moratorium, which may allow ATM to connect to PWCo. ATM has not alleged
8 that it has pursued this remedy, and until it does so, it will not have exhausted its remedies.
9 Furthermore, ATM readily admits to having a source of water for the property. That alone
10 should prevent the prosecution of a takings claim. If a property has a source of water, it
11 therefore retains economic value at least as a residential property. Even if ATM's property did
12 not have a source of water, ATM has yet another alternative. If ATM were to build a storage
13 tank on the property in question, ATM could then have its water hauled in by truck, again
14 retaining value for the property.

15 As the plaintiff, the burden is upon ATM to prove that it has no economic value to its
16 property. As shown, there is no set of facts which would demonstrate that all economic value
17 has been taken from the property *as a result of the Commission's moratorium on new*
18 *connections to the PWCO water system.*

19 2. **The Moratorium Is Not a Regulatory Taking.**

20 The intent of the moratorium is to preserve the existing water to the extent possible,
21 thereby benefiting as many parcels of land as possible within the certificated area. On its face,
22 the regulation should be upheld as pursuing a legitimate public interest.
23

24 Once the moratorium is found to be in the public interest, ATM will then have to take the
25 second step of proving that *all* of the economically beneficial uses of its land have been taken as
26 a result of the moratorium and its inability to connect to PWCo's water system. However, since
27 ATM *does* have the ability to build a storage tank to provide water to the property, the
28 moratorium and the inability to connect with PWCo's water system have not combined to

1 remove all of the economic value of the property. In fact, it can even be argued that the value of
2 ATM's property has actually been enhanced by the moratorium, since more of the scarce water
3 resources of the area will be protected by the operation of the moratorium.

4 **D. Remaining Issues**

5 As an additional matter, Staff notes that the Commission is not frequently presented with
6 motions to dismiss. When such a motion is presented, the Administrative Law Judge ("ALJ")
7 has the option of taking the motion under advisement and addressing it them in the ALJ's final
8 recommended opinion and order. The Commission can then evaluate any motions to dismiss in
9 the broader context of the entire proceeding. This may be an appropriate procedure in this case.

10 Although ATM's takings claim, very likely fails to state a claim for which relief can be
11 granted, other allegations contained in ATM's Application are probably sufficient to survive a
12 motion to dismiss. PWCo has correctly cited *James P. Paul Water Co. v. Arizona Corp. Comm'n*,
13 137 Ariz. 132, for the proposition that the Commission may only delete territory from a CC&N
14 when it can be shown that the holder of the CC&N is unwilling and unable to provide water
15 utility services to the territory. PWCo apparently concedes, that if ATM were to prove, that
16 PWCo were in fact unwilling and unable to provide water service at reasonable rates, there exists
17 a remedy whereby ATM could be entitled to at least some type of relief. Because a set of facts
18 has been alleged which, if proven, could provide for the possibility of relief, the Application
19 should, at least in part, probably survive a motion to dismiss.

20 In addition, Staff believes that the issues presented by this case could potentially be solved
21 by granting a variance to the moratorium. Whether a variance is appropriate in these
22 circumstances is a fact-specific inquiry that will require additional analysis by the Utilities
23 Division Staff. The issues related to the variance will likely remain, even if the takings claims
24 were dismissed.

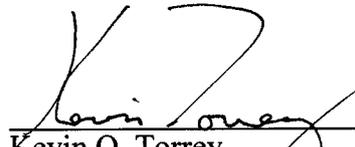
25 To Summarize, this case is probably not limited to a takings claim; it appears to present
26 additional issues that are likely to remain even if one were to conclude that the takings claim
27 could be dismissed. For this reason, it may be an efficient use of agency resources for the ALJ to
28 simply take PWCo.'s motion to dismiss under advisement for the present and then address it in

1 the final recommended opinion and order, thereby placing it in the broader context of the entire
2 proceeding.

3 **III. CONCLUSION**

4 For the foregoing reasons, Staff suggests that the ALJ take PWCo's motion to dismiss
5 under advisement for the present and then address it in the final recommended opinion and order,
6 thereby allowing this matter to be addressed in the context of the entire proceeding.

7
8 RESPECTFULLY SUBMITTED this 16th day of November, 2006.

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