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AZ CORP COMMISSION
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Attorneys for Plaintiffs, Robert B. Marshall Trust, et al.

BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

COMMISSIONERS

GARY PIERCE, Chairman
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP
BRENDA BURNS

DOCKETED

JUN 29 2012

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13 IN THE MATTER OF THE APPLICATION
14 OF BLACK MOUNTAIN SEWER
15 CORPORATION, FOR A
16 DETERMINATION OF THE FAIR VALUE
17 OF ITS UTILITY PLANT AND
18 PROPERTY AND FOR INCREASES IN
19 ITS RATES AND CHARGES FOR
20 UTILITY SERVICE BASED THEREON.

DOCKET NO. SW-02361A-08-0609

**SECOND PUBLIC COMMENT OF
ROBERT B. MARSHALL**

INTRODUCTION.

21 The comments herein address certain positions raised in recent briefs submitted to
22 the Commission by Black Mountain Sewer Company (“BMSC”) and Wind P1 Mortgage
23 Borrower, L.L.C., doing business as The Boulders Resort and Golden Door Spa (the
24 “Resort”). Specifically, BMSC has asked the Commission to conclude in its order that
25 “[t]he continued operation of the Plant does not harm or threaten to harm the customers,
26 the Company, the residential community surrounding the Plant, or the public interest;...”¹
27 Additionally, the Resort in its Brief attempts to convince the Commission that the subject
28 Waste Water Treatment Plant (“WWTP”) and/or its collection system (collectively

1 “BMSC’s system) is neither a public nor private nuisance under the Resort’s skewed
2 version of the law. I am compelled to address these issues because I am currently
3 engaged in litigation against BMSC: *Robert B. Marshall Trust, et al. v. Black Mountain*
4 *Sewer Corporation, et al.*, Maricopa County Superior Court Case No. CV2011-004077.
5 The attempt by BMSC to have the Commission make a legal determination of whether or
6 not a nuisance exists is an effort to undermine my claims against BMSC in this lawsuit.

7 **DISCUSSION.**

8 On May 4, 2012 I submitted to the Commission a prior Public Comment (“PC”).
9 In my first PC, I set forth that I own the home that sits closest to the WWTP. Odors and
10 noise generated by BMSC’s system have: (1) deprived my wife and I of the use, comfort,
11 and enjoyment of our home; and (2) negatively affected our health. I incorporate my
12 comments within that PC, as if they are set forth fully herein.

13 **1. The Commission Should Deny BMSC’s Request.**

14 When an issue of fact is actually litigated and determined by a valid final
15 judgment, and the determination is essential to the judgment, the determination is
16 conclusive between the same parties, whether on the same or a different claim.² That
17 determination can also be used against a party in a subsequent action by another third-
18 party claimant when the party defending against the third-party’s claims had a full and
19 fair opportunity to litigate the settled issue in the earlier action.³ This holds true also
20 when the earlier action was administrative.⁴

21 In the past, the Commission has concluded that:
22

23 ¹ See BMSC’s June 12, 2012 Closing Brief (Phase 2), p. 11, lines 17 to 19.

24 ² See *Gilbert v. Bd. of Med. Examiners of State of Ariz.*, 155 Ariz. 169, 174-75, 745
25 P.2d 617, 622-23 (App. 1987) (explaining the principles of collateral estoppel).

26 ³ See *Wetzel v. Arizona State Real Estate Dept.*, 151 Ariz. 330, 333-34, 727 P.2d 825,
828-29 (App. 1986) (allowing for the offensive use of collateral estoppel).

27 ⁴ See notes 8 and 9 below (the facts at issue in those matters were first decided in
28 administrative forums). See also *Brown v. Indus. Comm’n of Arizona*, 199 Ariz. 521,
522, 19 P.3d 1237, 1238 (App. 2001).

- 1 • “[O]dor problems exist on BMSC’s system.”⁵
- 2 • It is “clear that customers in BMSC’s service area, especially those living
- 3 in close proximity to the treatment plant have endured and continue to
- 4 endure offensive odors related to the Boulders WWTP.”⁶
- 5 • The primary source of the odor problems is the WWTP.⁷

6 Additionally, BMSC admits that if the WWTP remains open, “[s]ome odors and noise

7 will continue to be present.”⁸

8 In my prior PC I explained that an independent environmental engineer that I had

9 retained (i.e., Clark Seif Clark (“CSC")), had recorded levels of hydrogen sulfide at my

10 residence that were in excess of what several human health and/or environmental

11 organizations or agencies consider to be potentially hazardous to humans. I also

12 explained that the odors have impacted our health and our comfortable enjoyment of our

13 real property. My wife and I are not alone with regard to the noxious odors. It is a matter

14 of public record that hundreds of our neighbors have encountered and/or complained

15 about the odors emitted by BMSC’s system and/or the WWTP as well.⁹

16 Accordingly, BMSC’s request that the Commission include a statement in its

17 decision stating that: “[t]he continued operation of the Plant does not harm or threaten to

18 harm the customers, the Company, the residential community surrounding the Plant, or

19 the public interest,”¹⁰ would be contrary to the evidence. Quite simply, BMSC’s request

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21 _____

22 ⁵ See this Commission’s Decision 69164 in case no.: SW-02361A-05-0657, p. 40, ¶ 25

23 and this Commission’s Decision 71865 in case no.: SW-02361A-08-0609, pp. 51-52.

24 ⁶ See this Commission’s Decision 71865 in case no.: SW-02361A-08-0609, p. 51, lines

25 2 through 4.

26 ⁷ See this Commission’s Decision 71865 in case no.: SW-02361A-08-0609, p. 51, lines

27 2 through 10 and p. 52, lines 1 through 4.

28 ⁸ See BMSC’s June 12, 2012 Closing Brief (Phase 2), p. 10, lines 4 to 5.

⁹ See this Commission’s Decision 71865 in case no.: SW-02361A-08-0609, p. 49, lines

20 through 26. There have also been complaints about noises.

¹⁰ See BMSC’s June 12, 2012 Closing Brief (Phase 2), p. 11, lines 17 to 19.

1 is an inappropriate attempt to perform an "end run"¹¹ around the judicial process in my
2 lawsuit against BMSC. In short, as discussed more fully below, this tribunal appears to
3 have considered repeatedly in the past, sufficient evidence to conclude that BMSC's
4 system constitutes a nuisance under the law. Therefore, I urge the Commission to declare
5 the WWTP a nuisance. Alternatively, if the Commission concludes that it has not heard
6 sufficient evidence, such a legal conclusion should be left for the Court to decide in
7 CV2011-004077.

8 **2. BMSC's System is a Nuisance but the Commission need not make this**
9 **legal determination.**

10 The Resort attempts to convince the Commission that WWTP and/or BMSC's
11 system is not a nuisance under the law.¹² I beg to differ.

12 In *City of Phoenix v. Johnson*, 51 Ariz. 115, 75 P.2d 30 (Ariz. 1938) the Arizona
13 Supreme Court upheld the jury's verdict that the City's sewer plant was a nuisance.¹³ The
14 City however, like BMSC here, denied that the operation of its sewer plant was
15 essentially "unreasonable, unwarranted or unlawful."¹⁴ In fact, the City, like BMSC and
16 the Resort here, urged as a defense that its plant was essentially constructed properly and
17 operated efficiently.¹⁵ The Court however, stated the following:

18 No matter how closely a public sewage plant may follow the plans which
19 theoretically are sufficient to prevent its becoming a nuisance, and no
20 matter how efficiently such plant may be operated in accordance with

21 ¹¹ See *Phoenix Gen. Hosp. v. Superior Court In & For Maricopa County*, 138 Ariz. 504,
22 505, 675 P.2d 1323, 1324 (1984) (defendants' attempt to invoke the power of the
23 court to carryout what would have amounted to an improper "end-run" was
24 prohibited).

25 ¹² See the Resort's Brief, pp. 18 to 21.

26 ¹³ See *City of Phoenix v. Johnson*, 51 Ariz. 115, 75 P.2d 30 (Ariz. 1938)

27 ¹⁴ See the Resort's Brief, pp. 19 to 20 (The Resort incorrectly asserts that in order for
28 BMSC's system to be considered a nuisance it must arise from an "unreasonable,
unwarranted or unlawful, use..."). See also *Johnson, supra*, 51 Ariz. at 119-122, 75
P.2d at 32-34 (The City denied that its plant was "negligently" or improperly
operated).

¹⁵ See *Johnson, supra*, 51 Ariz. at 37, 75 P.2d at 130.

1 those plans, if, as a matter of fact, notwithstanding this, it does create a
2 nuisance, the fact of the proper construction and efficient operation does
3 not constitute a defense to an action for damages. The city must at its peril
4 devise and carry out some plan of sewer construction and operation which
will prevent the plant from becoming a nuisance, or must pay damages if
the nuisance exists.¹⁶

5 All Arizona public service corporations must maintain their facilities to promote
6 the safety, health, comfort and convenience of their patrons.¹⁷ It is a public nuisance for
7 anything “[t]o be injurious to health, offensive to the senses, or an obstruction to the free
8 use of property that interferes with the comfortable enjoyment of life or property by an
9 entire community or neighborhood or by a considerable number of persons.”¹⁸ A private
10 nuisance “is one which affects a single individual or a definite number of persons in the
11 enjoyment of some private right which is not common to the public.”¹⁹ In other words,
12 “[a]private nuisance is “an interference with a person's interest in the enjoyment of real
13 property.”²⁰ Moreover, what constitutes unreasonable interference with another person's
14 use and enjoyment of his property is determined by the injury caused by the condition,
15 and is not determined by the conduct of the party creating the condition.²¹ Finally,
16 "coming to the nuisance" is not a defense to a public nuisance.²²

17 Based on the above, including especially the findings of facts and conclusions of
18 law issued by the Commission in prior proceedings, and the evidence that the
19 Commission has considered herein, the WWTP is undeniably a nuisance as a matter of
20 law. However, if the Commission does not believe that it has considered sufficient
21

22 ¹⁶ See *Johnson, supra*, 51 Ariz. at 37, 75 P.2d at 130-131.

23 ¹⁷ A.R.S. § 40-361(B).

24 ¹⁸ A.R.S. § 13-2917(A)(1).

25 ¹⁹ See *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Services in Arizona*, 148
Ariz. 1, 4, 712 P.2d 914, 917 (1985).

26 ²⁰ *Id.*

27 ²¹ See *Graber v. City of Peoria*, 156 Ariz. 553, 753 P.2d 1209 (App. Div. 2 1988).

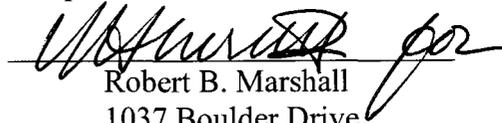
28 ²² To be added by Bob

1 evidence to reach such a conclusion, it should refrain from doing so in this administrative
2 forum, in which I am not a party, and where the legal arguments have not been fully
3 developed.

4 **CONCLUSION.**

5 For the reasons set forth in my prior PC and above, I respectfully request that the
6 Commission in its decision either 1) issue a decision deeming the WWTP to be nuisance
7 as a matter of law or, 2) refrain altogether from including in its decision the following
8 language requested by BMSC, or the like: “[t]he continued operation of the Plant does
9 not harm or threaten to harm the customers, the Company, the residential community
10 surrounding the Plant, or the public interest;...” The odors and noise emitted by the
11 WWTP have interfered with our use and comfortable enjoyment of our real property and
12 have harmed our health and well being. Admittedly, if the WWTP remains open,
13 emissions of odors and noise will continue.

14 Out of the entire town of Carefree, only the Resort wants the WWTP to remain
15 open. This is because the Resort purchases effluent at about \$0.2 million annually which
16 otherwise has a market value between \$1.0 to \$1.5 million. In short, as it stands, the
17 ratepayers are underwriting the Resort’s operating expenses in an amount that exceeds
18 \$1.0 million annually. Unless the WWTP is closed, the ratepayers will continue to
19 unfairly fund the Resort’s operation and the WWTP will remain a physical threat to its
20 customers, the Company, the community and the public interest.

21 
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24 **ORIGINAL** and 13 copies served via
25 U.S. Mail this ²⁸ day of June, 2012 to:

26 Docket Control
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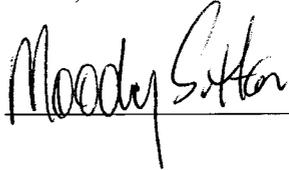
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