

SEP 10 2004

FILED  
PATRICIA A. NOLAND  
CLERK, SUPERIOR COURT  
September 9, 2004 (11:04 a.m.)  
By: Sylvia Green

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. CHARLES S. SABALOS

CASE NO. **C-20030461**

COURT REPORTER: NONE

DATE: September 09, 2004

STEVE and CELTA SHEPPARD, et ux., et al.,  
Plaintiff

vs.

TOWN OF ORO VALLEY, et al.,  
Defendant

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### MINUTE ENTRY

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#### UNDER ADVISEMENT RULING

This matter having been tried to the Court on April 6 and 7, 2004, the Court having received testimony and exhibits and having considered the written argument of counsel, together with proposed Findings of Fact and Conclusions of Law, the Court finds and rules as follow:

1. The Town of Oro Valley acquired the subject property (hereinafter "Facility") in 1977 for use as its Town Hall. The Facility is located on the northeast corner of Calle Concordia and Calle Milagro and has been used by the Town for the following purposes:

A. 1977 - 1986: The Police Department was fully housed at the Facility in the existing building and the Town also stored police vehicles at the Facility.

B. 1977 - 1986: The administration offices of the Town were housed at the Facility in the existing building and all vehicles used by such offices were stored there. This use included the Town Hall.

C. 1977 - Present: The Public Works offices and shop were housed at the Facility in an existing structure until 1992 when a new metal shop was constructed to replace the old wooden shop. In

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addition, all vehicles belonging to the Town owned or used by the Public Works department and Water Utility department were stored and maintained at the Facility.

D. 1977 - Present: The Town used fuel tank storage at the Facility to fuel its police and other Town-owned vehicles.

E. 1993: The existing underground storage fuel tank was removed and new above-ground storage tanks were installed.

F. 1995: The original building that housed the Police Department and Town Hall was refurbished.

G. 2001: A new modular building was constructed at the Facility to house Public Works engineering, operations and transit divisions.

2. In 2002 a soil and environmental audit was conducted at the Facility by an independent consulting firm which found no compliance issues and made eight recommendations for improved use. All recommendations were implemented by December 2002.

3. The perimeter of the Facility is screened by oleander hedges and the frontage on Calle Concordia is enclosed by a chain link fence. The effectiveness of the screening provided by the oleander hedges is disputed.

4. The Town's population has rapidly increased since 1977 with a corresponding increase in the number of employees and vehicles which use the Facility.

5. The Town currently uses the Facility for operations of the Public Works Department (engineering division), storage of its community transportation division (six vans), storage of its street equipment (seven large vehicles including loader, street sweepers, grader), water services department, police impound lot, summer youth arts program and administrative offices of the parks and recreation department. Currently refueling of Town vehicles is completed at the Facility from two above-ground fuel storage tanks.

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6. Plaintiffs reside in six homes near the Facility. Plaintiffs moved to their current homes in the following years:

- A. Misener 1972
- B. Sheppard 1978
- C. Loquvam 1990
- D. Gouvica 1996
- E. Huntsman 1998
- F. Smith 1999

7. Although the immediate neighborhood is residential, there are several churches and Canyon Del Oro High School located on Calle Concordia within one-half mile of the Town Facility.

8. Plaintiffs' complaint asks the Court to find that the Facility violates applicable zoning ordinances, constitutes a nuisance and asks the Court for an injunction prohibiting its present uses based on the following:

A. Heavy Town-owned vehicles create unusual traffic in the neighborhood: Testimony at trial indicated that the "heavy vehicles" (those with mandated back-up beepers) left the Facility in the morning and returned in the evening. There is a total of seven heavy Town-owned vehicles with mandated back-up beepers parked at the Facility. Plaintiffs alleged at trial that other Town-owned vehicles speed through the neighborhood on public streets, but no complaints were ever filed with the police department of the Town.

B. Petroleum products are stored and used for refueling at the Facility: Testimony at trial indicated that the fuel storage was used by the Town since 1977 to refuel its Town-owned vehicles, including police cars. In 2002 the underground tanks were removed by permit and replaced with above-ground storage tanks. Plaintiffs indicated that at times they could smell petroleum coming from the Facility, but Town employees testified that there were only two minor spills (one less than one-half pint),

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which were immediately cleaned and they have never detected petroleum smells emanating from the Facility.

C. Pollution from underground fuel storage tanks: The evidence showed that the underground storage tanks had been removed in 2002 and an environmental audit had been completed reflecting an absence of pollution.

D. Back-up beepers: Plaintiffs presented evidence that the Town violated its pretrial agreement not to use back-up beepers before 7:00 a.m. or after 3:30 p.m., Monday through Friday. However, Town employees testified that only on three occasions were back-up beepers inadvertently set off prior to 7:00 a.m. Town employees testified that vehicles with beepers were parked in the afternoon so they could exit without backing up.

E. Dust and noise: Plaintiffs agreed that dust rarely occurred at the Facility and Town employees testified that it is graveled and wetted when dust conditions became prevalent. Plaintiffs testified that the back-up beepers were the most prevalent noise they could hear from the Facility. One non-party witness claimed to hear constant noises from certain activities at the Facility, but Town employees testified that such activities did not occur.

F. Violation of septic tank requirements: Plaintiffs admitted that this allegation was only a suspicion on their part and Town employees testified that the Town did comply with septic tank requirements and, in fact, had installed a new additional septic tank.

G. Violation of zoning requirements for set-back of fence, a "no view" fence, and modular office building: Although these conditions exist at the Facility, the Town contends that it need not comply with the residential zoning for its governmental facility.

9. The Town Manager testified that the Town has attempted to address the concerns of Plaintiff Celta Sheppard by conducting an environmental audit to insure there was no pollution at the Facility and entering into the pretrial agreement regarding the time of use for back-up beepers and

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refueling operations.

10. Activities which cause a nuisance must be substantial, intentional and unreasonable under the circumstances. *Armory Park Neighborhood Assn. v. Episcopal Community Services*, 148 Ariz. 1, 712 P.2d 914 (1985).

11. The existence of a nuisance in Arizona is determined by weighing and balancing the following factors: "(1) locality and character of the surroundings, (2) nature of defendant's business and the manner in which it is conducted, (3) the value to the community of defendant's activities, (4) the defendant's ability to reduce the harm, (5) the extent to which the defendant would be damaged by an injunction and the plaintiff damaged by the failure to enjoin." *McQuade v. Tucson Tiller Apartments*, 25 Ariz. App. 312, 543 P.2d 150 at 314 (App. 1975).

12. A nuisance must be proven by clear and convincing evidence. *Kubby v. Hammond*, 68 Ariz. 17, 198 P.2d 134 (1948).

13. Priority of use is a factual consideration in determining whether a nuisance actually exists and whether relief should be granted by the Court. *McQuade, supra; Spur Industries v. Del Webb*, 108 Ariz. 178, 494 P.2d 700 (1972).

14. Based on the evidence, applicable law and a balancing of all relevant factors, the Court concludes that Plaintiffs have failed to prove the existence of a nuisance.

15. The evidence supports the Town's contention that its Facility is critical to the Town's operations and any injunction issued by the Court would significantly interfere with the operation of the Town.

16. The Town is not bound by the zoning restrictions of its own code for its governmental and public operations conducted upon the Town Facility. *Scottsdale v. Municipal Court*, 90 Ariz. 393, 368 P.2d 637 (1962).

17. The Court finds that the activities conducted at the Facility are not of a commercial or

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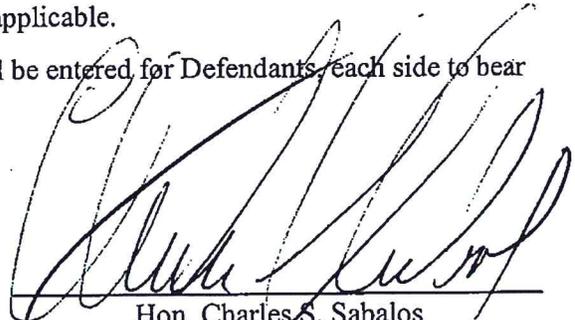
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competitive character, but are those fundamentally inherent in the basic nature of government and have been undertaken because of a duty imposed on the Town to provide for the welfare and protection of the citizens of the Town of Oro Valley. The Town's use of the Facility being governmental and not proprietary in nature, the Town's zoning ordinances are inapplicable.

18. For the reasons stated above, judgment shall be entered for Defendants, each side to bear their own attorneys' fees and costs.



Hon. Charles S. Sabalos

cc: Clerk of Court - Under Advisement Clerk  
*med* Dennis Rosen, Esq. Fax ~~319-8254~~ 8284  
*med* C. Brad Woodford, Esq. Fax 602-274-9135

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