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6 **Attorneys for Defendants**

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8 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
9 IN AND FOR THE COUNTY OF YAVAPAI

10 JENNIFER RICHARDS,
11 Plaintiff,
12 v.
13 SCOTT ELLIS, in his official capacity as the
City of Cottonwood Community Development
14 Director, LINDSAY MASTEN, Chairwoman of
the Planning and Zoning Commission, RANDY
15 GARRISON, Vice Chairman of the Planning
and Zoning Commission, JAMES GLASCOTT,
16 Commissioner, GEORGE GEHLERT,
Commissioner, BOB ROTHROCK,
17 Commissioner, DANIEL COMELLA,
Commissioner, PLANNING AND ZONING
18 COMMISSION OF THE CITY OF
COTTONWOOD,
19 Defendants.
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No. S1300CV202580044

**DEFENDANTS' MOTION TO
DISMISS PLAINTIFF'S
VERIFIED COMPLAINT AND
PETITION FOR WRIT OF
MANDAMUS**

21 Defendants respectfully request dismissal of Plaintiff's verified complaint and
22 petition for a writ of mandamus. Plaintiff's complaint must be dismissed for failure to
23 state a claim and for failure to provide a notice of claim. Plaintiff's petition must also be
24 dismissed because it does not set forth a non-discretionary duty this Court can compel.
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1 **I. PROCEDURAL BACKGROUND**

2 To initiate this action, Plaintiff filed a verified complaint. This is the old statutory
3 vehicle for requesting a writ of mandamus. A.R.S. § 12-2021. The new special action
4 rules dictate that if a party brings an action formerly described as a mandamus action
5 under A.R.S. § 12-2021, that action is an original special action. RPSA 2(c). Under these
6 rules, a verified complaint is not required. RPSA 2(b)(1).

7 However, a plaintiff *may* still initiate an original special action, such as this one,
8 by filing a complaint. RPSA 7(a)(1). A defendant can then answer or provide another
9 appropriate response pursuant to ARCP 12. RPSA 7(a)(2). Once this answer or other
10 response is filed, the court is required to hold a hearing within 30 days. RPSA 7(f).

11 Based on the recent rule change, it is not clear whether Plaintiff intends her verified
12 complaint as a mere vehicle for mandamus, as described in A.R.S. § 12-2021, or whether
13 Plaintiff intends for her complaint to stand apart from her petition. For that reason,
14 Defendants request both dismissal of Plaintiff’s complaint and dismissal of her request
15 for a writ of mandamus. To the extent this Court considers this an original special action,
16 Defendants request dismissal pursuant to RPSA 10(a)(4).

17 **II. LEGAL STANDARD**

18 The Arizona Supreme Court has set the proper standard applicable to a motion to
19 dismiss pursuant to Ariz. R. Civ. P. 12(b)(6):

20 Arizona courts look only to the pleading itself and consider the well-pled
21 factual allegations contained therein. . . . Courts must also assume the truth
22 of the well-pled factual allegations and indulge all reasonable inferences
23 therefrom. . . . [M]ere conclusory statements are insufficient to state a claim
24 upon which relief can be granted. . . . [A] complaint that states only legal
25 conclusions, without any supporting factual allegations, does not satisfy
26 Arizona’s notice pleading standard under Rule 8.

1 *Cullen v. Auto-Owners Ins. Co.*, 218 Ariz. 417, 419 ¶ 7 (2008) (internal citations
2 omitted).

3 Similarly, the Arizona Supreme Court has also outlined the standard for
4 mandamus. “Mandamus is an extraordinary remedy issued by a court to compel a public
5 officer to perform an act which the law specifically imposes as a duty.” *Sears v. Hull*,
6 192 Ariz. 65, 68 ¶ 11 (1998) (quoting *Bd. of Educ. v. Scottsdale Educ. Ass’n*, 109 Ariz.
7 342, 344 (1973)). Mandamus does not lie if the public officer “is not specifically required
8 by law to perform the act.” *Id.*

9 Because a mandamus action is designed to compel performance of an act the law
10 requires, “the general rule is that if the action of a public officer is discretionary, that
11 discretion *may not* be controlled by mandamus.” *Collins v. Krucker*, 56 Ariz. 6, 13 (1940)
12 (*emphasis added*). Ultimately, mandamus “proceeds on the assumption that the applicant
13 has an immediate and complete legal right to the thing demanded.” *State Bd. of Tech.*
14 *Registration v. Bauer*, 84 Ariz. 237, 240 (1958). “A mandamus action cannot be used to
15 compel a government official to perform a function in a particular way if the official is
16 granted any discretion about how to perform it.” *Yes on Prop 200 v. Napolitano*, 215 Ariz.
17 458, 465 (App. 2007) (citing *Kahn v. Thompson*, 185 Ariz. 408, 411 (App. 1995)).

18 **III. FACTUAL BACKGROUND**

19 Copper slag is a waste material produced during the smelting process. When the
20 Clemenceau smelter closed in 1937, it left behind a very large pile of copper slag (the
21 “slag pile”). The City of Cottonwood, which was incorporated in 1960, grew up around
22 the slag pile.

23 In January 2008, a company now known as Minerals Research, Inc. (“MRI”) took
24 interest in reprocessing the slag pile. MRI wanted to break the slag pile up and repurpose
25 the crushed slag as an abrasive blasting media and pavement aggregate. MRI contacted
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1 the owner of the slag pile, and the owner of the property on which the slag pile is located
2 (the “slag pile property”), and made arrangements to which the City is not a party.

3 By that time, the City had adopted a comprehensive zoning map. The slag pile
4 property was designated on this map as “CF” or “Community Facilities,” which meant
5 that it could host a park, a cemetery, a public school, a hospital, an airport, or a
6 government administrative building. But the slag pile property was not zoned to host a
7 slag reprocessing facility, since slag reprocessing is not permitted by-right within the CF
8 Zoning District. *See* Exhibit 1. To reprocess slag on the slag pile property in compliance
9 with the Zoning Ordinance, MRI would need a Conditional Use Permit (“CUP”).

10 Conditional use permits are granted, or denied, by the Planning and Zoning
11 Commission (the “Commission”) after an application and approval process, which
12 includes a public hearing. *See* Exhibits 2 & 3. Once this hearing is held, the Commission
13 can either approve, approve with conditions, or deny the CUP at its discretion. Exhibit 3.
14 The Commission specifically considers the operational characteristics of the proposed
15 use, including the health and safety of nearby occupants, the compatibility with
16 surrounding land uses, and traffic concerns. *Id.*

17 MRI representatives made presentations at City Council meetings on January 24,
18 2008 and March 11, 2008. MRI then went before the Commission on March 17, 2008.
19 At this meeting, MRI answered questions about its operations, including questions about
20 complaints regarding a reprocessing operation in Ajo, Arizona. Exhibit 4. The
21 Commission decided to grant MRI a CUP. This gave MRI a zoning clearance to reprocess
22 slag on the slag pile property. The Commission has formally reviewed the CUP multiple
23 times since 2008.

24 Other governmental entities have jurisdiction over MRI’s operations. For
25 example, the Arizona Department of Environmental Quality (“ADEQ”) is currently
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1 allowing MRI to operate under an administratively complete Class II Individual Air
2 Quality Permit application.

3 ADEQ is currently reviewing that application in a process that involves public
4 comment. ADEQ is also currently monitoring for particulate matter and heavy metals in
5 the vicinity of the slag pile and has recently conducted a preliminary investigation under
6 the state's Water Quality Assurance Revolving Fund ("WQARF"), focusing on potential
7 impacts to soil and groundwater near the slag pile. The Arizona Department of Health
8 Services is conducting a health assessment based on findings by ADEQ. Information
9 regarding this ongoing regulation of MRI by state agencies can be found at:
10 <https://www.azdeq.gov/search?keys=minerals+research%2C+inc>.

11 Plaintiff has written to the City to request revocation of the CUP, and the City has
12 responded. Plaintiff has also filed a report with the Police, which was investigated. *See*
13 Exhibit 5. Plaintiff now seeks a writ of mandamus compelling the Commission to hold a
14 hearing to revoke the CUP.

15 **IV. PLAINTIFF FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN**
16 **BE GRANTED**

17 To the extent that Plaintiff intended to file a complaint for damages, and is not
18 merely filing a complaint as a vehicle for her petition for mandamus, she has failed to
19 state any claim upon which relief can be granted. Plaintiff does not list a single cause of
20 action or state a single claim. Her factual allegations do not amount to a cause of action.
21 Her recitation leads to her ultimate request for mandamus, and the City therefore
22 presumes that mandamus is the only relief sought.

23 In short, Plaintiff falls short of the Rule 8 pleading requirements and has failed to
24 state a claim upon which relief can be granted, even taking her allegations as true.

1 Accordingly, the City respectfully requests dismissal of the complaint as anything other
2 than a vehicle for mandamus.

3 **V. PLAINTIFF HAS FAILED TO COMPLY WITH THE NOTICE OF CLAIM**
4 **REQUIREMENTS**

5 Again, to the extent that Plaintiff intended to file a complaint for damages, and is
6 not merely filing a complaint as a vehicle for her petition for mandamus, such claim must
7 be dismissed for failure to file a notice of claim.

8 Before bringing a state law claim against a public entity or public employee in
9 court, a plaintiff must first satisfy Arizona’s mandatory notice of claim statute by filing a
10 notice of claim within 180 days of the accrual of the claim. A.R.S. § 12-821.01(A). The
11 statute requires that a person who believes he has a claim must file the notice of claim
12 “with the person or persons authorized to accept service for the public entity, public
13 school or public employee as set forth in the Arizona rules of civil procedure.” *Id.* “Any
14 action against a public entity or public employee must be preceded by notice of claim to
15 each entity and each employee named in the lawsuit.” *Johnson v. Superior Court*, 158
16 Ariz. 507, 510 (App. 1988). In short, a public entity cannot be sued unless a plaintiff
17 properly files a notice of claim. A.R.S. § 12-821.01(A).

18 Strict compliance with the statute is a prerequisite to filing suit, and failure to
19 comply with the statute’s requirements bars an action in court. *See id.*; *see also Harris v.*
20 *Cochise Health Sys.*, 215 Ariz. 344, 351 ¶ 25 (App. 2007). The notice of claim
21 requirement fulfills the important purpose of allowing the public entity or employee “to
22 investigate and assess their liability, to permit the possibility of settlement prior to
23 litigation and to assist the public entity in financial planning or budgeting.” *Crum v.*
24 *Superior Court*, 186 Ariz. 351, 352 (App. 1996).

25 Here, Plaintiff did not file a notice of claim. The complaint does not allege, nor
26 could it be amended to allege, that Plaintiff ever did so. Additionally, the complaint itself

1 is not a valid notice of claim. A valid notice of claim must be filed *before* Plaintiff can
2 file a lawsuit. A.R.S. § 12-821.01.

3 In short, filing a valid notice of claim is a mandatory prerequisite to bringing a
4 lawsuit against the City. Plaintiff’s failure to comply with the notice of claim requirement
5 necessitates dismissal of the complaint as anything other than a vehicle for her petition
6 for mandamus.

7 **VI. MANDAMUS CANNOT COMPEL DISCRETIONARY DECISIONS OF**
8 **THE DIRECTOR OR COMMISSION**

9 Mandamus relief is not available for the inherently discretionary decisions for
10 which it is sought here. Arizona courts have previously recognized that planning and
11 zoning commissions exercise discretion with regard to CUPs. *See, e.g., Redelsperger v.*
12 *City of Avondale*, 207 Ariz. 430, 434 ¶¶ 16–17 (App. 2004) (discussing the discretion
13 afforded to a planning and zoning commission regarding CUPs); *Maricopa Citizens*
14 *Protecting Taxpayers v. Price*, 244 Ariz. 330, 335 ¶ 13 (App. 2017) (recognizing that a
15 grant of a CUP is a discretionary act); *Bartolomeo v. Town of Paradise Valley*, 129 Ariz.
16 409, 416 (App. 1981) (recognizing that the zoning power is an inherently discretionary
17 power granted by a permissive statute, and that “the granting or the refusal to grant
18 rezoning by special use permit is . . . subject to limited review by this Court”).

19 The discretionary nature of the decisions at issue here is confirmed by examination
20 of the City Zoning Ordinance, which describes these decisions with permissive and
21 discretionary language in all relevant sections—including those cited by Plaintiff.

22 In requesting mandamus, Plaintiff cites various sections of the City Zoning
23 Ordinance. However, each cited provision explicitly provides for discretion. As stated
24 above, mandamus is only available to command a non-discretionary act. Accordingly,
25 Plaintiff has not set forth any valid grounds for a writ of mandamus.

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1 First, Plaintiff cites Section 103 (“Interpretation and Application”). This
2 introductory section states that, in interpretation and application of the zoning ordinance,
3 “the provisions of this Ordinance shall be held to be minimum requirements for the
4 promotion of a comprehensive plan and for the promotion of the public health, safety and
5 general welfare.” Exhibit 5. This language provides a general framework for
6 interpretation of the ordinance’s provisions. It does not compel any specific duty or action
7 by the Director or the Commission. Further, these “minimum requirements” do not
8 pertain to any hearing requirement or to revocation of a CUP. Accordingly, this section
9 provides no grounds for mandamus.

10 Second, Plaintiff cites Section 104(B) (“Planning and Zoning Commission –
11 Powers and Duties”). This general, summary section outlines the power and duties of the
12 Commission. It states, in pertinent part:

13 It shall be the duty of the Commission to formulate and administer any
14 lawful plan duly adopted by the Council for the present and future growth
15 and development of the City of Cottonwood, pertaining to the use of land
16 and buildings for any purpose, to make or cause to be made a continuous
17 study of the best present and future use to which land and buildings shall
18 be put within the City of Cottonwood and in cooperation with adjacent areas
and to recommend to the Council revisions in such plans which, *in the
opinion of the Commission, are for the best interest of the citizens of the
City of Cottonwood to hold public hearings where necessary*

19 Exhibit 2 (emphasis added). This language highlights the discretionary nature of holding
20 a hearing. The Commission does not have any general duty to hold public hearings, to
21 hold a public hearing whenever one is requested, or to hold a public hearing upon the
22 receipt of a complaint.

23 Rather, a public hearing is held when, *in the opinion of the Commission*, a hearing
24 is both in the best interest of the citizens of the City and necessary. *Id.* Each decision in
25 the set of decisions leading to a hearing in this formulation is purely discretionary.
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1 Mandamus cannot be used to compel a decision of this nature. *Sears*, 192 Ariz. at 68
2 ¶ 11.

3 Third, Plaintiff turns to Section 302(D)(4). This section, entitled, “Commission
4 Action and Findings” states that “[a] Conditional Use Permit *may* be subject to review
5 and *possible* revocation where a violation of the conditions of approval is indicated and
6 where the required findings for revocation, as described in this Section, are
7 demonstrated.” Exhibit 3 (emphasis added).

8 Again, this section expressly grants discretion to the Commission. The
9 Commission is granted the discretion to review a CUP (or not) and then consider its
10 possible revocation (or not). This discretion is triggered when a violation of the conditions
11 of approval is indicated and the required findings are made. So, even if those conditions
12 are met, the Commission retains discretion to make the call on a hearing and on
13 revocation. This language falls far short of any mandatory duty. Because the language
14 does not impose review and revocation as a mandatory duty, mandamus is inappropriate.
15 *Sears*, 192 Ariz. at 68 ¶ 11.

16 Fourth, Plaintiff cites to Section 302 (G)(1) and (2), which again states, in language
17 very similar to 302 (D)(4), that “[a] Conditional Use Permit granted pursuant to this
18 Section *may* be revoked by the Planning and Zoning Commission”
19 (Emphasis added).

20 Fifth, Plaintiff cites Section 302(G)(4). This section deals with revocation of a
21 CUP. As in Sections 302 (G)(1) and 302 (D)(4), the language of 302(G)(4) cited by
22 Plaintiff uses permissive language and describes a discretionary decision by the
23 Commission:

24 The Planning and Zoning Commission *may* revoke the CUP if it makes any
25 of the following findings:
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- 1 a. That the use is in substantial violation of the conditions of approval for
2 the Conditional Use Permit, or there is or has been a violation of or
3 failure to observe the terms or conditions of approval for the CUP, or
4 the use has been conducted in violation of the provisions of this
5 Ordinance;
- 6 b. That approval was obtained by means of fraud or misrepresentation of
7 a material fact;
- 8 c. That the holder of the permit has failed to initiate construction or
9 undertake the use in question within the six (6) month period following
10 the effective date of the permit. An extension of time for up to six (6)
11 months or longer may be approved by the Commission where the permit
12 holder has submitted a written request that adequately demonstrates
13 their intent to proceed with establishing the use in a timely manner;
- 14 d. That an established use has ceased to exist or has been suspended for six
15 (6) months or more; or
- 16 e. That the use to which the permit applies has been conducted detrimental
17 to the health, safety or general welfare of the public, or so as to be
18 considered an ongoing or habitual nuisance.

19 Exhibit 3. (emphasis added)

20 Plaintiff cites to the above-subsections (a), (b), and (e), which are each controlled
21 by the opening line, which states that the Commission “*may*.” This is an expressly
22 discretionary matter, and therefore not subject to mandamus. Even if the Commission
23 found a violation under any of these subsections, it would not be required to revoke the
24 CUP. This section’s language states the Commission *may* revoke a CUP for a violation.
25 Further, this section does not require the Commission to hold a public hearing to
26 investigate any allegation.

This section also does not impose any mandatory duty upon the Commission. To
the extent it grants revocation power, the section grants it in a broadly discretionary
manner. Accordingly, mandamus is not available.

Finally, Plaintiff cites to language in the job description of a Community
Development Director. A human resources job description is not a law, and it does not
create a legal duty that can be compelled by mandamus. Furthermore, the language she

1 has cited is descriptive, which means it does not even purport to establish a duty. The
2 language also does not say anything about setting public hearings or revoking CUPs.
3 Plaintiff's citation to the word "coordinate" within the job description simply does not
4 support the argument she is making.

5 **VII. CONCLUSION**

6 Defendants respectfully request the dismissal of the complaint and the petition for
7 a writ of mandamus. ARCP 12(b)(6); RPSA 10(a)(4). Plaintiff's complaint fails to state
8 a claim upon which relief can be granted, and Plaintiff did not file the requisite notice of
9 claim. Further, the petition does not identify any mandatory duty of the Commission to
10 hold a public hearing on any alleged violations of the CUP. The holding of a hearing in
11 these circumstances is an explicitly discretionary duty. Accordingly, mandamus cannot
12 be granted.

13 The complaint and petition, and therefore this original special action, should be
14 dismissed with prejudice. ARCP 12(b)(6); RPSA 10(a)(4).

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CERTIFICATE OF CONFERRAL

Pursuant to Arizona Rule of Civil Procedure 12(j), I certify that undersigned counsel has conferred in good faith with plaintiff Jennifer Richards by telephone to determine whether the issues described in Defendants’ Motion to Dismiss can be resolved.

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Respectfully submitted this 25th day of February, 2025.

GUST ROSENFELD P.L.C.

By /s/ John A. Gaylord - 029816
John A. Gaylord
John A. Butzer
Attorneys for Defendants

Original of the foregoing electronically
filed via TurboCourt this 25th day of February, 2025,
and a copy emailed the same date to:

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