

As Filed

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8 SUPERIOR COURT OF ARIZONA

9 MARICOPA COUNTY

10 City of Phoenix, a political subdivision of
the State of Arizona,

11 Plaintiff,

12 v.

13 City of Tempe, a political subdivision of
14 the State of Arizona,

15 Defendant.

No.

VERIFIED COMPLAINT

16
17 For this Verified Complaint against Defendant, Plaintiff alleges as follows:

18 **Introduction**

- 19 1. Low-flying aircraft are noisy.
20 2. People are annoyed by noise, especially noise at their homes.
21 3. And so, for many years at the cost of many millions of dollars, experts in aircraft,
22 like the Federal Aviation Administration (“FAA”) and the professionals who run our nation’s
23 biggest airports, have worked very hard to keep homes away from low-flying aircraft.

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1 4. This case concerns current proposals to build, contrary to long-standing promises
2 not to build, within two separate developments, 2,314 homes under airplane flight paths in the
3 City of Tempe. And this case concerns the potential for even more homes to be built in the future
4 in violation of those promises.

5 5. Because of their proximity to Phoenix Sky Harbor International Airport (the
6 “Airport”), these planned homes would all fall within an area known to professionals as the “65
7 DNL.” The DNL metric represents Day-Night Average Sound Level (“DNL”), which is the
8 average aircraft noise that is received at a specific location, during an average second over a 24-
9 hour period, with a ten-decibel penalty for noise occurring between 10:00 p.m. and 7:00 a.m.
10 The 65 DNL is an area where the DNL is, based on this calculation, at least 65 decibels.

11 6. As to these homes, and indeed all homes, the “FAA considers areas exposed to
12 aviation noise levels of DNL 65 dB or above to be noncompatible with residential land use.”
13 [Exhibit 1 at 2 (6/1/2022 Letter from the FAA to Tempe City Manager Andrew Ching)]

14 7. The cities of Phoenix and Tempe have long disagreed over aircraft arriving at and
15 departing the Airport and over the resulting noise and vibrations that have affected Phoenix and
16 Tempe residents living nearby. After decades of disagreements and a handful of lawsuits,
17 though, in 1994 the cities settled their dispute. In short, they agreed to various measures to
18 minimize the total number of affected residents.

19 8. Phoenix agreed to measures to mitigate noise on Tempe’s residents. One measure,
20 for example, has been for aircraft departing from the Airport to fly less-direct-but-also-quieter
21 flight paths over the Salt River’s riverbed—concentrating aircraft noise to an area without many
22 residents and therefore minimizing noise for residents elsewhere.

23 9. Tempe, for its part, promised to prevent new residences from being developed
24 along much of this flight path and, more generally, on the Airport’s east side. Both measures

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1 have helped protect residents from aircraft noise, while also supporting the increasing demands
2 for more flights for Arizona residents and visitors.

3 10. Despite these promises, Tempe now has done exactly what it promised not to do:
4 approve, or start to approve, more residences near the Airport and in the area to which aircraft
5 have been directed for decades. Tempe has even agreed to sell over 46 acres of Tempe-owned
6 land (land that lacks any housing and is zoned mostly for industrial) to help build these new
7 residences.

8 11. But these actions violate the promises Tempe made to Phoenix long ago. And these
9 actions will expose thousands more individuals to aircraft noise and vibrations—and will
10 threaten the future of the Airport and its \$38-billion impact on the economy.

11 12. Phoenix brings this action to ensure that Tempe honors its promises.

12 **Parties, Jurisdiction, & Venue**

13 13. Plaintiff the City of Phoenix is an Arizona municipal corporation in Maricopa
14 County, Arizona. Phoenix owns and operates Phoenix Sky Harbor International Airport. The
15 Airport is within the City of Phoenix, and its terminals are about one mile from Tempe’s nearest
16 border. When Tempe approved the two current residential developments at issue here, Tempe
17 breached its agreement with Phoenix not to allow new residences in these areas. Based on these
18 breaches, Phoenix will be harmed when, for example, thousands more residents are exposed to
19 aircraft noise and vibrations and then will complain and sue Phoenix over these aircraft. These
20 complaints and lawsuits will limit the frequency of flights at the Airport, which already struggles
21 to meet historically high demand. Similar residential issues, in fact, have limited capacity and
22 growth at airports serving, for example, Washington, D.C., and Dallas, Texas.¹

23 ¹ See, e.g., Gaya Gupta, *A Neighborhood Fights to be Heard as Dulles Planes Drown Out*
24 *Daily Life*, WASH. POST (Aug. 9, 2022),
<https://www.washingtonpost.com/transportation/2022/08/09/dulles-airport-noise-loudoun->

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1 14. Defendant City of Tempe is an Arizona municipal corporation in Maricopa
2 County, Arizona. Among other things, Tempe administers zoning and land-use (e.g., General
3 Plan) policies within its boundaries.

4 15. Through these powers, Tempe has approved zoning and General Plan
5 amendments, to allow two new residential developments near the Airport. As part of these
6 residential developments, Tempe also sold or has agreed to sell several parcels of land, totaling
7 over 46 acres, to be used for over 2,300 residential units in total. By approving these amendments
8 and selling or agreeing to sell this land, Tempe has breached its agreement with Phoenix,
9 promising not to allow residential developments in these locations near the Airport. And this
10 breach has injured Phoenix, as noted above.

11 16. This Court has jurisdiction over this action pursuant to A.R.S. §§ 12-123 (Superior
12 Court jurisdiction), 12-1801 (injunctions), and 12-1831–33 (declaratory judgments), as well as
13 the Arizona Constitution, article VI, section 14 (Superior Court jurisdiction).

14 17. Venue in this county is proper under A.R.S. § 12-401.

15 **General Allegations**

16 ***Phoenix Sky Harbor International Airport***

17 18. The Airport is an economic driver for the economies of not only Maricopa County
18 (including Tempe), but also the State of Arizona.

19 19. Phoenix has operated the Airport since 1935. It is a self-sustaining enterprise and
20 the largest municipal enterprise in Arizona, with an economic impact of more than \$38 billion

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22 [county/](#) (reporting on a fight between Dulles International Airport and nearby residents, where
23 airport officials warned that a proposed development “would be exposed to low-flying planes
24 and overhead aircraft noise” but the development’s “residents said their only disclosure about
the airport’s sound levels before they purchased their homes was in a sentence at the end of one
of the many contracts they signed,” leading to “dozens” of residents “forming a group called the
Loudoun Aircraft Noise Mitigation Committee” that “fight[s] for quieter skies”).

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1 annually.² The Airport supports about 57,000 jobs.³ As the largest civil airport in Arizona, the
2 Airport serves more than 1,200 flights per day.⁴ Currently, the Airport serves more than 120,000
3 passengers daily, with more than 44 million passengers in 2022.⁵

4 20. Demand for passenger flights is estimated to grow even more over the next fifty
5 years. Based on a 2017 study, the total number of passengers annually at the Airport is estimated
6 to grow to nearly 55 million in 2026 and nearly 70 million in 2037. [Exhibit 2 at 7 (Phoenix Sky
7 Harbor International Airport, Comprehensive Asset Management Plan (2019))] Those numbers
8 could be even higher if the Airport experiences accelerated growth, with the study estimating for
9 2037 that the Airport might see annually as many as nearly 75 million passengers. [Id.] And the
10 amount of cargo transported through the Airport is estimated to increase from 354,000 U.S. tons
11 in 2016 to 666,000 U.S. tons in 2037. [Id.]

12 ***Aircraft Noise in Urban Areas***

13 21. As an international airport near the center of the Phoenix metropolitan area, the
14 Airport manages numerous competing concerns: from the increasing demands for flights in
15 Arizona, to the impacts of aircraft noise on the Airport's neighbors.

16 22. As mentioned above, the DNL metric represents the average aircraft noise that is
17 received at a specific location, during an average second over a 24-hour period, with a ten-
18 decibel penalty for noise occurring between 10:00 p.m. and 7:00 a.m. Noise is measured in
19 decibels, which reflect the relative intensity of sound on a scale from zero (for no noise) to about
20 130 decibels. And because DNL levels are based on average noise, they understate noise

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23 ² Phoenix Sky Harbor Int'l Airport, *History & Economic Development*,
<https://www.skyharbor.com/about-phx/history-economic-development/> (last visited Mar. 25,
2023).

24 ³ *Id.*

⁴ *Id.*

⁵ *Id.*

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1 exposure levels from peak periods when aircraft are flying overhead.

2 23. The geographical distribution of DNL noise levels is indicated by a series of lines
3 (or “contours”) connecting points of equal DNL values and are superimposed on a map of an
4 airport and its surroundings. These DNL contour maps (also called “Noise Exposure Maps”) are
5 a means of comparing average noise impacts. The following is an example of a Noise Exposure
6 Map for the Airport:



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19 24. The above Noise Exposure Map shows the DNL contours that are currently
20 recognized by the Federal Aviation Administration (“FAA”) and that were approved in 2019.
21 Zoomed-in maps showing the relevant area, to the Airport’s east, are attached as Exhibit 3.

22 25. The above Noise Exposure Map shows the noise contours for 60, 65, 70, and 75
23 DNL, with the DNL increasing closer to the Airport. In sum, areas with a higher DNL experience
24 more aircraft noise than areas with a lower DNL. And areas closer to the Airport—or under a

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1 flight path (as shown by the arches to the Airport’s east and west)—experience more noise as
2 well.

3 26. In evaluating the range of DNL levels, the FAA has determined that 65 DNL is
4 “the threshold of significant noise exposure, below which residential land uses are compatible.”⁶

5 27. But levels even below 65 DNL “highly annoy” most people, as the FAA has found.
6 Beginning in 2016, the FAA conducted a congressionally mandated study of aircraft noise and
7 evaluated perceptions of different DNL levels for individuals who lived near various airports.
8 Through this study, the FAA found in 2021 that (i) at noise levels of 65 DNL, 60.1–70.09% of
9 people were highly annoyed, (ii) at noise levels of 60 DNL, 43.8–53.7% of people were highly
10 annoyed, (iii) at noise levels of 55 DNL, 27.8–36.8% of people were highly annoyed, and (iv) at
11 noise levels of 50 DNL, 15.4–23.4% of people were highly annoyed.⁷

12 28. Aircraft noise therefore can negatively impact residents if it is not effectively
13 managed, including for airports near—and especially those within—major metropolitan areas.

14 29. As the population in Maricopa County has increased since the Airport’s opening
15 and as new developments (and residences) are built to serve that increasing population, the
16 Airport has worked to manage noise impacts while also meeting increasing demand for flights.

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21 ⁶ Fed. Aviation Admin., *Community Response to Noise*,
22 https://www.faa.gov/regulations_policies/policy_guidance/noise/community#dn_avg_sl (last
visited Mar. 25, 2023).

23 ⁷ Dep’t of Transp., Fed. Aviation Admin., Overview of FAA Aircraft Noise Policy and
24 Research Efforts: Request for Input on Research Activities to Inform Aircraft Noise Policy, 86
Fed. Reg. 2722 (Jan. 13, 2021) (notice), <https://www.govinfo.gov/content/pkg/FR-2021-01-13/pdf/2021-00564.pdf>.

1 *Historical Noise Issues*

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2 30. Phoenix and Tempe have disagreed over aircraft noise since at least the 1970s.

3 31. One key dispute has been over Tempe’s request that aircraft arriving at or
4 departing the Airport, on the east side over Tempe, fly over the riverbed for the Salt River.

5 32. The riverbed route’s “purpose is to keep departures from dispersing at low
6 altitudes over populated areas on both sides of the riverbed before reaching the SR202/101
7 intersection.”⁸

8 33. About fifty years ago, in 1974, Tempe expressed concerns that not enough aircraft
9 were flying over this route. To address this concern, equipment was installed that served as a
10 navigational aid to help aircraft stay along this route and to, relatedly, avert aircraft from flying
11 over Tempe homes.

12 34. Nearly a decade later, in 1982, a committee appointed by the Tempe City Council
13 submitted a report to the council claiming that, still, not enough aircraft flew along the Salt River
14 route and recommending that Tempe oppose expansion plans at the Airport until Tempe’s
15 complaints were addressed.

16 35. Several years later, in 1985, Phoenix and Tempe discussed jointly sponsoring a
17 Part 150 Noise Compatibility Study and Program. Through this federal program, among other
18 things, an airport operator (here, the City of Phoenix) studies an airport and its surrounding
19 communities and prepares a program to increase noise compatibility. Phoenix and Tempe
20 proceeded with this joint sponsorship. They first studied ways for mitigating noise effects on
21 residents near the Airport, and an expert then prepared a program recommending various
22 measures, including some that discouraged developments that were incompatible with the noise

23 ⁸ City of Tempe, *Aircraft Noise Mitigation Reports: Aircraft Noise and Compliance with*
24 *Departure Procedures over the City of Tempe*, <https://www.tempe.gov/government/sustainable-tempe/aircraft-noise> (last visited Mar. 25, 2023).

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1 levels in those areas near the Airport.

2 36. In 1989, after completing this study, the Airport submitted its Noise Compatibility
3 Program, attached as Exhibit 4. The FAA subsequently approved this Noise Compatibility
4 Program.

5 37. Based on increasing demands for flights at the Airport, the State of Arizona in
6 1990 conducted a study of aviation needs and determined that the Airport's two runways would
7 not meet the estimated demand for travelers and flights.

8 38. A year later, in 1991, Tempe sued to stop the construction of any additional runway
9 at the Airport. And three years later, Tempe filed two more lawsuits to stop the construction of
10 the Airport's proposed third runway.

11 ***1994 Intergovernmental Agreement on Noise Mitigation Flight Procedures***

12 39. To settle these lawsuits and the historical disputes over aircraft noise, Phoenix and
13 Tempe executed a settlement concerning aircraft noise and land use near the Airport.
14 Specifically, in 1994 the cities executed the 1994 Intergovernmental Agreement on Noise
15 Mitigation Flight Procedures (the "Agreement"), attached as Exhibit 5.

16 40. In this Agreement, the cities promised to do (and not do) various things to help
17 mitigate noise from the Airport—and to reduce the number of residents affected by this noise.
18 These obligations fall into five categories: noise mitigation, land use, noise and flight-track
19 monitoring, program updates, and the Airport's proposal for a third runway.

20 41. Key here, the Agreement created two obligations for Phoenix and Tempe.

21 42. First, based on Tempe's request that aircraft fly over the Salt River riverbed and
22 because the FAA (not Phoenix) has jurisdiction over flight paths, Phoenix agreed to "not request
23 the FAA to abandon or modify these noise mitigation procedures and [to] affirmatively oppose
24 any abandonment or modification by filing with the FAA Administrator an official written

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1 statement of opposition to any abandonment, modification or change of these noise mitigation
2 procedures proposed for reasons other than safety.” [Exhibit 5, art. III(1.2)]

3 43. Second, “Tempe and Phoenix agree[d] to take all actions necessary, consistent
4 with applicable laws and regulations, to implement the land use management strategies
5 recommended in the F.A.R. Part 150 Noise Compatibility Plan and Program.” [*Id.*, art. III(3)]

6 44. Phoenix and Tempe also agreed to “update” the Airport’s already approved Noise
7 Compatibility Program, before the Airport opened its third runway. [*See id.*, art. III(2) (“No later
8 than the Operations Commencement Date [i.e., the date when aircraft operations first began on
9 the Airport’s third runway], Phoenix shall submit to the FAA an update of the F.A.R. Part 150
10 Noise Compatibility Plan and Program for the Airport.”)]

11 45. An “[a]irport noise compatibility program” “mean[s] that program, and all
12 revisions thereto.” 14 C.F.R. § 150.7.

13 46. As the cities agreed, an update to the Noise Compatibility Program was submitted
14 in 1999, attached as Exhibit 6. And the FAA later approved the updated Noise Compatibility
15 Program for the Airport. Based on those updates, the Noise Compatibility Program continued
16 numerous noise-compatibility measures and implemented new measures as well, as discussed
17 more below.

18 47. From 1994 to 2022, pursuant to its obligations under the Agreement and the
19 Airport’s Noise Compatibility Program, Phoenix undertook numerous measures, including
20 supporting the Salt River flight path and spending hundreds of thousands of dollars annually,
21 over the past 27 years, on a noise monitoring system.

22 48. Tempe agrees that, pursuant to its obligations under the Agreement, at least some
23 residential (e.g., single-family residential) is prohibited in Tempe within the 65 DNL contour.

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1 *Proposal for the Tempe Entertainment District*

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2 49. In 2021, Tempe issued a request for proposal, seeking proposals for purchasing
3 and developing 46 acres of Tempe-owned land at the northeast corner of Rio Salado Parkway
4 and Priest Drive in Tempe, Arizona. [Exhibit 7 (City of Tempe Request for Proposal, RFP# 22-
5 030 (July 22, 2021)] Tempe specifically sought proposals for a “mixed-use project” with certain
6 minimum components, including an arena for a professional sports franchise, shopping, and at
7 least 1,000 residential units. [*Id.* at 5]

8 50. Through this request for proposal, Tempe also directed those submitting a proposal
9 to “adhere to the most recently updated FAA Noise Mitigation measures identified in Phoenix
10 Sky Harbor International Airport F.A.R. Part 150 Noise Compatibility Study for all new
11 construction in the area within which the Property is located.” [*Id.* at 4] Tempe further directed
12 any proposal’s “developer to obtain the most current noise contour maps from the City of
13 Phoenix.” [*Id.*]

14 51. Tempe received only one proposal, from Bluebird Development LLC (the “TED
15 Developer”), proposing to build a development that would be named the Tempe Entertainment
16 District (the “TED”).

17 52. As originally proposed, the TED would have included an arena for the Arizona
18 Coyotes hockey team as well as 1,675 residential units. The proposal also noted that, because of
19 these residential units, “a zoning change will be required to allow for mixed-use development.”

20 53. After receiving this (single) proposal, Tempe’s City Council voted to proceed with
21 negotiations with the TED Developer.

22 54. After this original proposal, the TED Developer increased the proposed number of
23 residential units from 1,675 to, eventually, 1,995.

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1 55. As proposed, the TED (as shown below in yellow)—and all of its residential
2 units—would be located entirely within the Airport’s 65 DNL contour that the FAA last
3 approved (in 2019):



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19 56. That the TED and its residential units would be located entirely within, at least,
20 the 65 DNL contour is true regardless of whether the Airport noise contours that apply are from
21 1990 (when the FAA first approved the Airport’s Noise Compatibility Program), from 1999
22 (when aircraft were generally noisier than today), or from 2019 (as shown in paragraph 55).

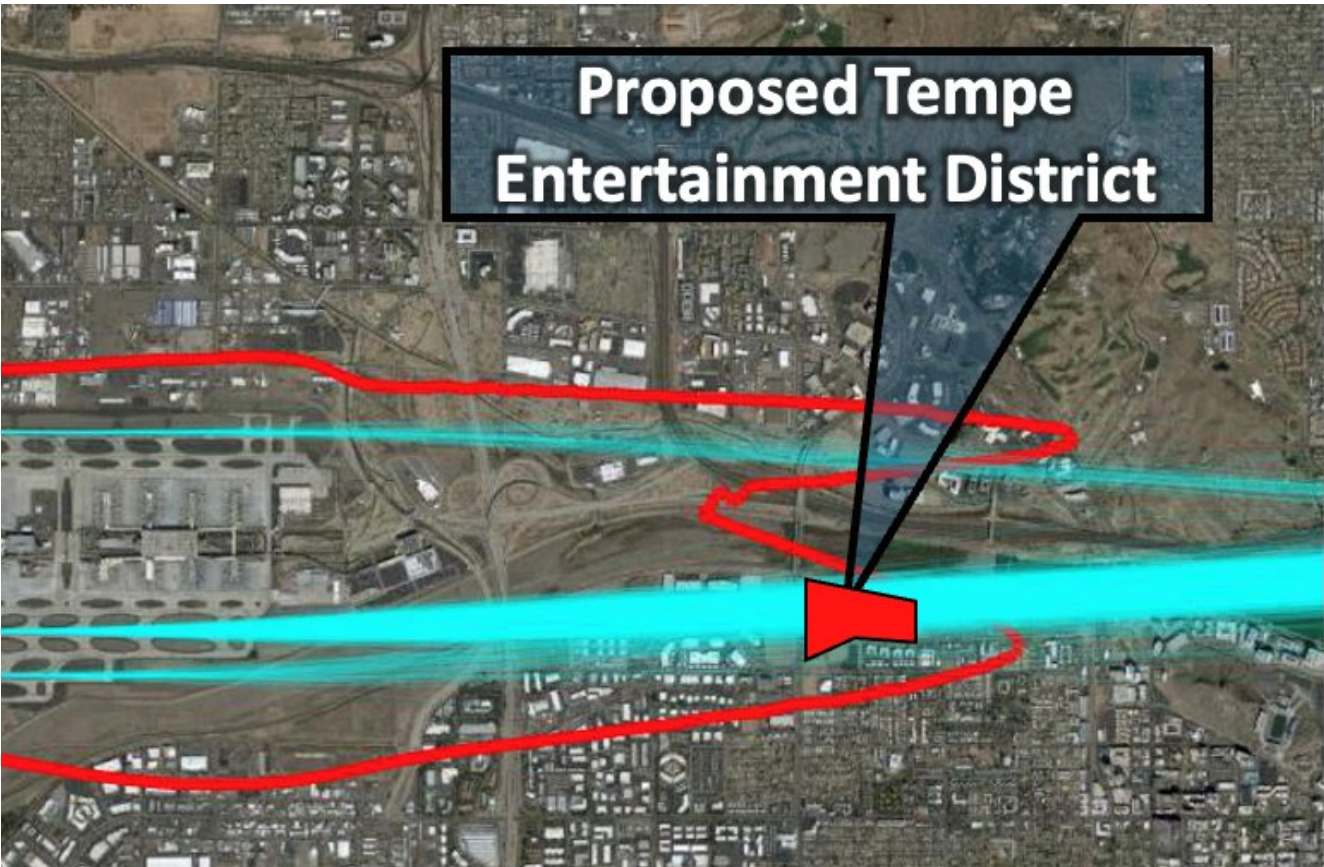
23 57. After the TED Developer submitted its proposal for the TED, the FAA wrote to
24 Tempe in an April 1, 2022 letter, explaining that “residential housing placed within the 65 DNL

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1 is incompatible airport land use” and that “[the TED] would be located within two miles of [the
2 Airport] within the Day-Night Average Sound Level (DNL) 65 decibel (dB) contour and is
3 heavily affected by aircraft arrivals/departures.” [Exhibit 8 at 1, 3 (4/1/2022 FAA letter to City
4 of Tempe)]

5 58. In another letter to Tempe dated June 1, 2022, the FAA reiterated that the “FAA
6 considers areas exposed to aviation noise levels of DNL 65 dB or above to be noncompatible
7 with residential land use” and that “[t]he proposed TED development would be located within
8 the DNL 65 dB noise contour as depicted in the airport’s Noise Exposure Maps (NEMs).”
9 [Exhibit 1 at 1]

10 59. Indeed, the TED (shown below in red) would be located only about 9,800 feet from
11 the Airport’s south runway and underneath the Airport’s flight paths (as shown below in blue):



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1 60. To proceed with the TED’s residential units, the TED Developer (through its
2 counsel) also applied to Tempe for certain amendments to Tempe’s zoning maps and Tempe’s
3 General Plan, both of which govern land use in Tempe. Specifically, the TED Developer applied
4 for “a General Plan Projected Land Use Map Amendment from ‘Commercial’ to ‘Mixed-Use’
5 for approximately 34.4 acres; a General Plan Projected Density Map Amendment from ‘No
6 Density’ to ‘High Density – Urban Core’ (more than 65 du/ac) for approximately 34.4 acres; a
7 Zoning Map Amendment from R1-6 RSOD [i.e., Single-Family Residential] and GID RSOD
8 GIOD [i.e., General Industrial] to MU-4 RSOD [i.e., Mixed-Use, High Density] for
9 approximately 46.27 acres; and a Planned Area Development Overlay to establish standards and
10 varying heights up to 129 feet, 2100 dwelling units and commercial consisting of a multi-purpose
11 entertainment facility, retail, restaurant, hotel and office uses.”

12 61. Because the TED Developer has proposed new residential units within the 65 DNL
13 contour—and under two flight paths for the Airport—Phoenix has objected to these residential
14 units, many times. In objecting to the residential units, Phoenix also confirmed that it did not
15 object to other aspects of the TED, including restaurants, shops, and the sports arena.

16 62. Among other things, Phoenix submitted objections to Tempe on November 14,
17 2022, noting that Phoenix “continue[s] to object to the inclusion of residential in the [TED] and
18 to any associated rezoning, general plan amendment, or overlay to accommodate this residential
19 use.” Phoenix also cautioned Tempe that approving the TED “would violate the 1994
20 Intergovernmental Agreement between Phoenix and Tempe.”

21 63. Despite Phoenix’s objections, on November 15, 2022, the Tempe Development
22 Review Commission recommended that the Tempe City Council approve the TED Developer’s
23 application.

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1 64. On November 22, 2022, the Tempe City Council held a public hearing on the TED
2 and the TED Developer’s application.

3 65. One week later, on November 29, 2022, the Tempe City Council held another
4 public hearing on the TED and the TED Developer’s application. At this hearing, the Tempe
5 City Council approved the TED Developer’s application. Specifically, the Tempe City Council
6 authorized (i) a General Plan Projected Land Use Map Amendment (from “Commercial” to
7 “Mixed-Use”) (ii) a General Plan Projected Density Map Amendment (from “No Density” to
8 “High Density – Urban Core”), (iii) a Zoning Map Amendment (from “Single-Family
9 Residential” and “General Industrial” to “Mixed-Use, High Density”), and (iv) a Planned Area
10 Development Overlay to establish development standards for the TED. Moreover, the Tempe
11 City Council also authorized the Mayor of Tempe to execute with the TED Developer an
12 agreement for Tempe to sell the TED Developer the 46 acres of land that is proposed to be used
13 for the TED. Those Tempe ordinances and resolution are attached as Exhibit 9.

14 66. The measures relating to the TED—i.e., the General Plan amendment, zoning
15 amendment, and authorization to execute an agreement with the TED Developer—have now all
16 been referred to Tempe’s electorate for approval.

17 67. To be clear, and to reaffirm as Phoenix has publicly stated repeatedly, Tempe
18 approving the TED violates the Agreement based on one part of the development and one part
19 alone: the TED’s proposed residential units. To the extent either the TED Developer removes
20 those residences or Tempe rejects them, the TED would not violate the Agreement and Phoenix
21 would not object to the TED, including its restaurants, shops, and sports arena.

22 *Application for Modera Rio Salado*

23 68. In 2022, Tempe also received an application relating to another proposed
24 residential development: Modera Rio Salado. The developer for this proposal (the “Modera

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1 Developer”) proposed for Modera to include 319 residential units. This development is proposed
2 to be constructed in Tempe, Arizona, at the southeast corner of Rio Salado Parkway and Hardy
3 Drive—caddy-corner from the southeastern corner of the TED.

4 69. As proposed, Modera—and all of its residential units—would be located within,
5 at least, the 65 DNL contour, regardless of whether the Airport contours from 1990, 1999, or
6 2019 apply.

7 70. Under the most compact contours (i.e., from 2019), in fact, the proposed location
8 for Modera (as shown below in yellow) is still entirely within the 65 DNL contour (outlined
9 below in red):



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1 71. To proceed with Modera’s residential units, the Modera Developer (through its
2 counsel) also applied to Tempe for certain amendments to Tempe’s General Plan and Zoning
3 Map. Specifically, the Modera Developer applied for “a General Plan Projected Land Use Map
4 Amendment from ‘Public Open Space’ to ‘Mixed Use’ for approximately 1.66 acres; a General
5 Plan Projected Density Map Amendment from ‘No Density’ (0 du/ac) to ‘High Density’ (up to
6 65 du/ac) for approximately 1.66 acres; a General Plan Projected Density Map Amendment from
7 ‘Medium to High Density’ (up to 25 du/ac) to ‘High Density’ for approximately 3.39 acres; a
8 Zoning Map Amendment from GID RSOD [General Industrial] to MU-4 RSOD [Mixed-Use,
9 High Density] for approximately 5.04 acres; a Planned Area Development Overlay to establish
10 development standards; and a Development Plan Review for a new seven-story, mixed-use
11 development consisting of 319 dwelling units and commercial use on 5.04 acres.”

12 72. On July 14, 2022, Phoenix objected to the Modera Developer’s application.
13 Phoenix also cautioned Tempe that, “[b]y approving the [application] with its residential
14 component—as currently contemplated—Tempe will violate its obligations and will breach the
15 [Agreement] with Phoenix.”

16 73. That same week, Tempe conveyed land that it owned and that is proposed to be
17 used for Modera. Specifically, Tempe sold a parcel of land to the property owner of the
18 remainder of the 5.04 acres to be used for Modera. [Exhibit 10 (7/11/2022 Special Warranty
19 Deed)]

20 74. Despite Phoenix’s objections, on October 25, 2022, the Tempe Development
21 Review Commission recommended that the Tempe City Council approve the Modera
22 Developer’s application.

23 75. On November 3, 2022, the Tempe City Council held a public hearing on Modera
24 and the Modera Developer’s application.

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1 76. On December 1, 2022, the Tempe City Council held another public hearing on
2 Modera and the Modera Developer’s application. At this hearing, the Tempe City Council
3 approved this application. Specifically, the Tempe City Council authorized (i) a General Plan
4 Projected Land Use Map Amendment (from “Public Open Space” to “Mixed Use”),
5 (ii) Projected Density Map Amendments (from “No Density” to “High Density”), (iii) a Zoning
6 Map Amendment (from “General Industrial” to “Mixed-Use, High Density”), and (iv) a Planned
7 Area Development Overlay and Development Plan Review to establish development standards
8 for Modera. Those ordinances and resolution are attached as Exhibit 11.

9 ***Other Planned or Pending Applications for Incompatible Residential Units***

10 77. On information and belief, there are other pending or planned projects in various
11 stages of contemplation or development that call for residential units to be located within the 65
12 DNL, in violation of the Agreement.

13 78. On information and belief, these other pending or planned projects would be
14 developed in areas where residential is currently prohibited, pursuant to Tempe’s Zoning Map
15 or General Plan.

16 79. On information and belief, for these other pending or planned projects to be
17 developed, Tempe would need to take various actions, including approving Zoning Map and
18 General Plan amendments, issuing permits, and other measures.

19 80. On information and belief, these other pending or planned projects would allow
20 hundreds (if not thousands) more people to move into (at least) the 65 DNL near the Airport.

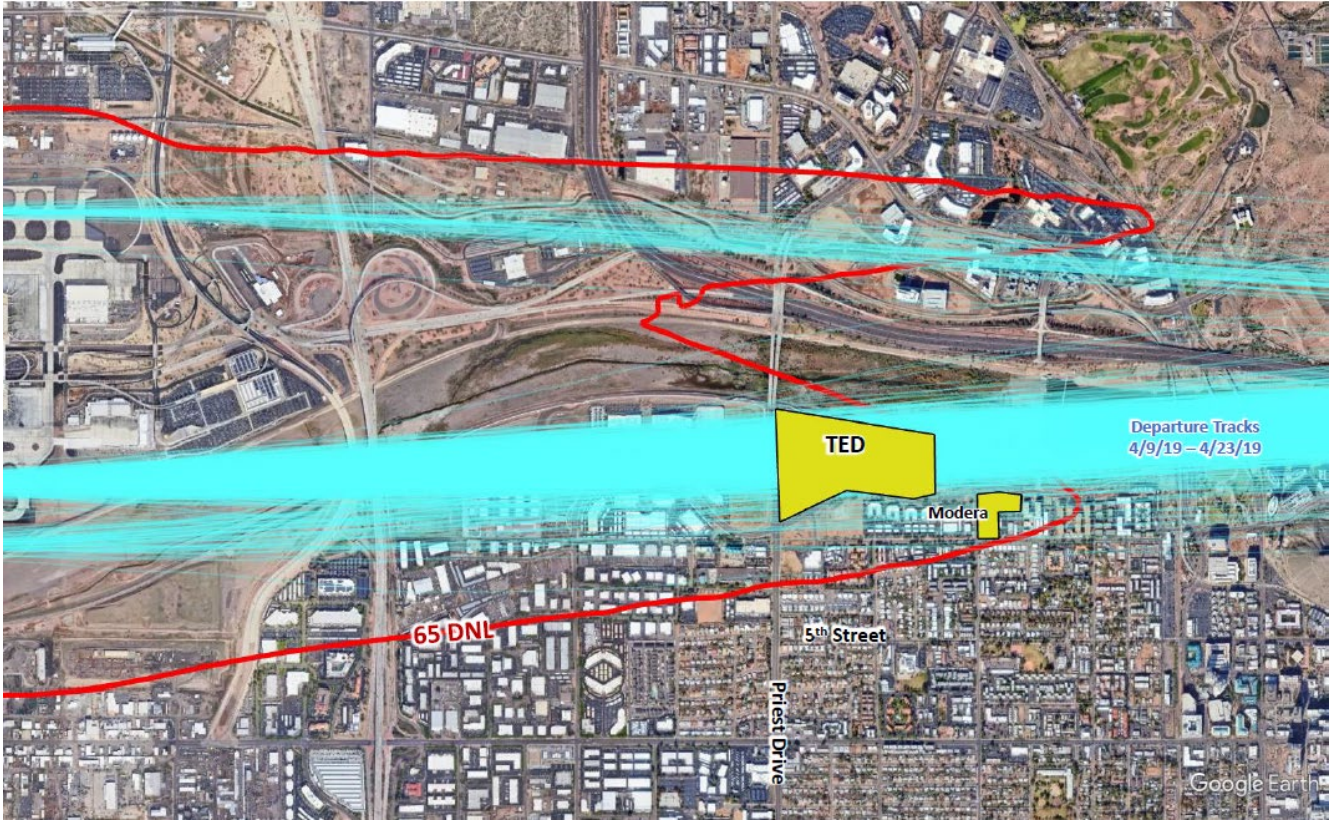
21 ***Phoenix’s Attempts to Resolve This Dispute***

22 81. Over the past year, through numerous meetings, public hearings, calls, and
23 communications, Phoenix has tried to work with Tempe to resolve this dispute and to find a
24 negotiated resolution that would serve both cities and the public and avoid litigation.

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1 82. Since at least March 2022, Phoenix has communicated with Tempe and explained
2 Phoenix's position that Tempe approving the TED's or Modera's or any other project's
3 residential units within the 65 DNL would violate Tempe's promises under the Agreement.

4 83. Indeed, both the TED and Modera (shown below in yellow) would be not only
5 within the 65 DNL contour, but also directly underneath the flight paths from the Airport:



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18 84. On June 2, 2022, the Tempe City Council had a public meeting on the TED, where
19 Phoenix presented its position and explained that the TED's residential units (but not the other
20 aspects of the TED) would violate the Agreement.

21 85. On October 14, 2022, Phoenix and Tempe representatives met to discuss a
22 potential resolution of the dispute over the Agreement. Phoenix and Tempe representatives met
23 again on October 18, and again on November 1, to continue discussing a potential resolution.

24 86. On November 22, 2022, Phoenix and Tempe representatives again met to discuss

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1 a potential resolution. That same day, at a Tempe City Council hearing concerning the TED,
2 Phoenix publicly presented its position regarding the TED and how its residential units would
3 violate the Agreement.

4 87. On November 26, 2022, the Mayor of Phoenix and the Mayor of Tempe met to
5 discuss a potential resolution of the dispute.

6 88. On November 29, 2022, at a Tempe City Council hearing concerning the TED,
7 Phoenix again publicly presented its position regarding the TED and how its residential units
8 would violate the Agreement. That same day, Phoenix had a telephonic meeting with the TED
9 Developer to discuss the Agreement and the TED.

10 89. On November 3 and December 1, 2022, at Tempe City Council hearings
11 concerning Modera, Phoenix again publicly presented its positions regarding Modera and how
12 its residential units would violate the Agreement.

13 90. After the Tempe City Council voted to advance the TED and Modera projects,
14 Phoenix proposed to Tempe a possible resolution of their dispute over the Agreement and the
15 TED's and Modera's residential units. But, on January 16, 2023, Tempe rejected that proposed
16 resolution.

17 91. The next day, on January 17, 2023, the Phoenix City Manager and the Tempe City
18 Manager again discussed a proposed resolution and Tempe's rejection of Phoenix's earlier
19 proposed resolution.

20 92. On January 30, 2023, Phoenix and Tempe representatives met, again, to discuss a
21 possible resolution.

22 93. On January 31, 2023, Phoenix sent Tempe the Airport's 2019 noise contours, as
23 Tempe had requested.

24 94. On February 2, 2023, Phoenix sent Tempe more materials and information, as

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1 Tempe had requested.

2 95. On February 7, 2023, Phoenix sent Tempe a proposed draft amendment to the
3 Agreement, as Tempe had requested.

4 96. On February 9, 2023, Phoenix presented at the Tempe City Council, regarding
5 certain aspects of a proposed resolution of the dispute over the Agreement.

6 97. On March 17, 2023, the Tempe City Manager sent the Phoenix City Manager two
7 letters, rejecting Phoenix's proposed resolution and further delaying any resolution of this
8 dispute over the Agreement. In these letters, Tempe's City Manager said that "Tempe is currently
9 unable to respond" and "Tempe cannot yet agree." Tempe did not provide a timeline for its
10 answer, instead stating only that "Tempe will proceed with all deliberate speed."

11 **Claim 1**

12 **(Breach of Contract: Land Use Measure 3)**

13 98. Phoenix realleges and incorporates by reference all prior paragraphs of this
14 Complaint and the paragraphs in the claims below as though fully set forth herein.

15 99. As the Agreement provides, "Tempe and Phoenix agree to take all actions
16 necessary, consistent with applicable law and regulations, to implement the land use
17 management strategies recommended in the F.A.R. Part 150 Noise Compatibility Plan and
18 Program." [Exhibit 5, art. III(3)]

19 100. One such strategy is Land Use Measure 3. [Exhibit 6 at 6-24]

20 101. Under this measure, Tempe must "[a]mend Mixed Use designations within the
21 1999 65 DNL contour to exclude residential." [*Id.*] Specifically, the Noise Compatibility
22 Program provides: "Large areas of planned mixed-use (which allows high concentrations of
23 residential development) east of the airport and within Tempe should be amended. Developing
24 a new mixed use category that does not allow residential inside the 1999 65 DNL noise exposure

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1 contour is recommended.” [*Id.*; *accord id.* at 6-41 (noting the obligation for “Tempe” to
2 “[a]mend Mixed Use designations within the 1999 65 DNL contour to exclude residential”)]

3 102. Tempe has not amended its Mixed Use designations within the 65 DNL contour to
4 exclude residential, as is required and as the cities agreed.

5 103. Tempe’s current Mixed Use designations within the 65 DNL contour allow
6 residential.

7 104. Through its request for proposal relating to the TED, Tempe also proposed
8 rezoning the land for the TED to allow precisely what Land Use Measure 3 prohibits: “a mixed-
9 use project” with at least “1,000 residential units.” [Exhibit 7 at 5]

10 105. On November 29, 2022, Tempe approved the TED Developer’s application—
11 amending the General Plan Projected Land Use Map from “Commercial” to “Mixed-Use,”
12 amending the Zoning Map from “Single-Family Residential” and “General Industrial” to “Mixed
13 Use,” and authorizing related measures. [Exhibit 9] These amendments and measures allow for
14 the TED Developer’s proposed 1,995 residential units, all within the 65 DNL.

15 106. On December 1, 2022, Tempe further approved the Modera Developer’s
16 application—amending the General Plan Projected Land Use Map from “Public Open Space” to
17 “Mixed-Use,” amending the Zoning Map from “General Industrial” to “Mixed Use,” and
18 authorizing related measures. [Exhibit 11] These amendments and measures allow for the
19 Modera Developer’s proposed 319 residential units, all within the 65 DNL.

20 107. On information and belief, there are other pending or planned projects with
21 residential units that are proposed to be developed in mixed-use areas east of the Airport, within
22 Tempe, and within the 65 DNL. On information and belief, these pending or planned projects
23 call for Tempe to authorize these projects through, for example, amendments to Tempe’s General
24 Plan, Zoning Map, or other related measures.

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1 108. Through these actions, Tempe has breached its obligation under the Agreement to
2 “implement the land use management strategies recommended in the [Noise Compatibility
3 Program]” (Exhibit 5, art. III(3)), including not allowing “[l]arge areas of planned mixed-use
4 (which allows concentrations of residential development) east of the airport and within Tempe”
5 (Exhibit 6 at 6-24).

6 109. Tempe therefore has breached Land Use Measure 3 of the Noise Compatibility
7 Program and, as a result, the Agreement with Phoenix.

8 **Claim 2**

9 **(Breach of Contract: Land Use Measure 5)**

10 110. Phoenix realleges and incorporates by reference all prior paragraphs of this
11 Complaint and the paragraphs in the claims below as though fully set forth herein.

12 111. As noted above, the Agreement provides that “Tempe and Phoenix agree to take
13 all actions necessary, consistent with applicable law and regulations, to implement the land use
14 management strategies recommended in the F.A.R. Part 150 Noise Compatibility Plan and
15 Program.” [Exhibit 5, art. III(3)]

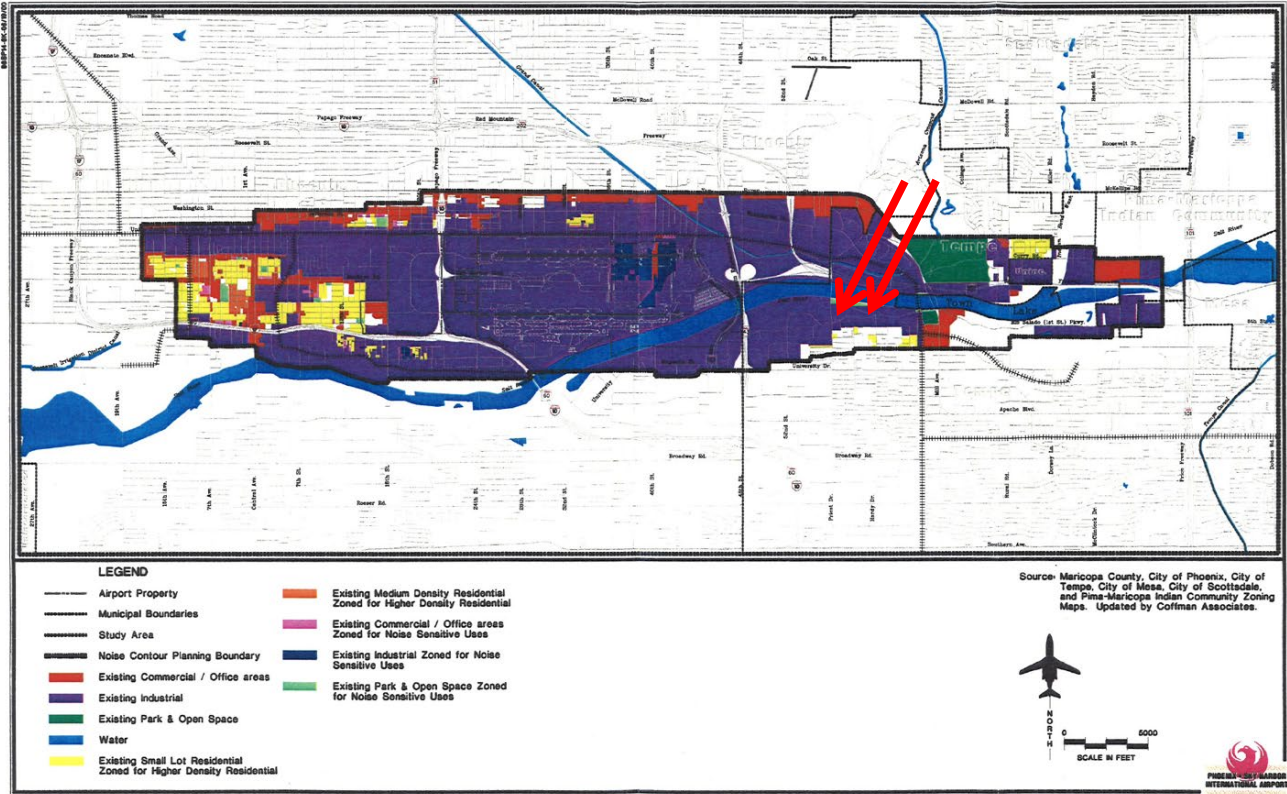
16 112. Another such strategy is Land Use Measure 5. [Exhibit 6 at 6-26]

17 113. This measure provides: “There are several areas within the NCPB [Noise Contour
18 Planning Boundary] [that] are currently zoned for compatible use. When possible, the areas that
19 are zoned for compatible use should be maintained.” [*Id.*] “Commercial and industrial zoning in
20 the vicinity of the airport cannot guarantee that all noise-sensitive uses will be avoided, although
21 large-scale residential development would be effectively prohibited.”⁹

22
23
24 ⁹ Sky Harbor Airport, *Land Use Alternatives Ch. 5*, at 5-8 (1999),
https://www.skyharbor.com/media/km2dfyts/1999_part150_v2_ch5_landusealternatives.pdf.

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1 114. Here, the TED’s and Modera’s proposed locations (shown with the red arrows) are
2 in the area zoned mostly for Industrial (shown in dark purple):



15
16 115. For Tempe to approve the TED and Modera, though, Tempe has rezoned those
17 locations from compatible zoning (e.g., General Industrial) to the incompatible “Mixed-Use,
18 High Density” zoning that allows residential.

19 116. Again, on November 29, 2022, Tempe approved the TED Developer’s application
20 to rezone the location for the TED from “General Industrial” (and “Single Family Residential”)
21 to “Mixed Use, High Density.”

22 117. Also, on December 1, 2022, Tempe approved the Modera Developer’s application
23 to rezone the location for Modera from “General Industrial” to “Mixed Use, High Density.”

24 118. On information and belief, there are other pending or planned projects with

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1 residential units that are proposed to be developed within the Noise Contour Planning Boundary
2 and in areas that are currently zoned for compatible use. On information and belief, these pending
3 or planned projects call for Tempe to authorize these projects through, for example, amendments
4 to Tempe’s Zoning Map or other related measures.

5 119. Through all these zoning approvals, Tempe has not “maintained” “the areas that
6 are zoned for compatible use,” as Land Use Measure 5 requires. [Exhibit 6 at 6-26]

7 120. Tempe therefore has breached Land Use Measure 5 of the Noise Compatibility
8 Program and, as a result, the Agreement with Phoenix.

9 **Claim 3**

10 **(Breach of Contract: Land Use Measure 1)**

11 121. Phoenix realleges and incorporates by reference all prior paragraphs of this
12 Complaint and the paragraphs in the claims below as though fully set forth herein.

13 122. As noted above, the Agreement provides that “Tempe and Phoenix agree to take
14 all actions necessary, consistent with applicable law and regulations, to implement the land use
15 management strategies recommended in the F.A.R. Part 150 Noise Compatibility Plan and
16 Program.” [Exhibit 5, art. III(3)]

17 123. In addition to the updated (1999) Noise Compatibility Program, the initial (1989)
18 Noise Compatibility Program also restricts land use near the Airport.

19 124. One such strategy is Land Use Measure 1. [Exhibit 4 at 7-25]

20 125. This measure requires “Tempe [to] adopt noise overlay zoning” in certain areas—
21 including in the areas proposed for the TED and Modera—and requires “that all residential uses
22 be prohibited in any business or industrial zone within any noise overlay zone.” [*Id.*]

23 126. Tempe has not adopted noise overlay zoning that prohibits all residential uses in
24 any business or industrial zone.

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1 127. The TED Developer and the Modera Developer both propose residential uses in
2 areas that are or were zoned for Industrial.

3 128. On information and belief, there are other pending or planned projects with
4 residential units that are proposed to be developed in areas that require overlay zoning and that
5 are in a business or industrial zone.

6 129. Had Tempe performed its obligation to adopt noise overlay zoning, this overlay
7 zoning would have prohibited the TED's and Modera's residential units, as well as any
8 residential units in any other pending or planned projects.

9 130. Tempe therefore has violated Land Use Measure 1.

10 131. Tempe therefore has violated the initial Noise Compatibility Program as well and,
11 as a result, the Agreement with Phoenix.

12 **Prayer for Relief**

13 Wherefore, Phoenix respectfully requests that this Court enter judgment:

14 132. declaring that Tempe has violated the Agreement and Land Use Measure 3 of the
15 Noise Compatibility Program;

16 133. declaring that Tempe has violated the Agreement and Land Use Measure 5 of the
17 Noise Compatibility Program;

18 134. declaring that Tempe has violated the Agreement and Land Use Measure 1 of the
19 Noise Compatibility Program;

20 135. granting specific performance or mandamus under the Agreement (article III(6.1.))
21 and ordering Tempe to rescind its zoning and General Plan amendments for the TED, to rescind
22 the zoning and General Plan amendments for Modera, to amend Mixed Use designations within
23 the 65 DNL contour to exclude residential, and to adopt noise overlay zoning requiring that all
24 residential uses be prohibited in any business or industrial zone within any noise overlay zone;

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1 136. permanently enjoining Tempe from amending the zoning to Mixed-Use for the
2 locations proposed to be developed for the TED or Modera, from amending the General Plan to
3 Mixed Use for the locations proposed for the TED or Modera, from amending the noise overlay
4 zoning requiring that residential uses be prohibited in any business or industrial zone within any
5 noise overlay zone, and from performing any provision of Tempe's agreement with the TED
6 Developer concerning the TED's residential units;

7 137. permanently enjoining Tempe from amending its Zoning Map or General Plan, or
8 taking any other action, with respect to any pending, planned, or future residential development,
9 when such action would violate any provision of the Agreement and the Noise Compatibility
10 Program, including Land Use Measures 1, 3, or 5;

11 138. awarding Phoenix its attorneys' fees under the Agreement (article III(6.2)), A.R.S.
12 § 12-348.01, and any other applicable doctrine or statute;

13 139. awarding Phoenix its taxable and nontaxable costs under A.R.S. § 12-1840, or as
14 may be allowed by law; and

15 140. awarding Phoenix any other and further relief as this Court may deem just and
16 appropriate.

17
18 Dated: March 28, 2023

PERKINS COIE LLP

19 By: /s/ Jean-Jacques Cabou
20 Jean-Jacques Cabou
21 Alexis E. Danneman
22 Matthew R. Koerner
23 2901 North Central Avenue, Suite 2000
24 Phoenix, Arizona 85012-2788

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2
3 **VERIFICATION**

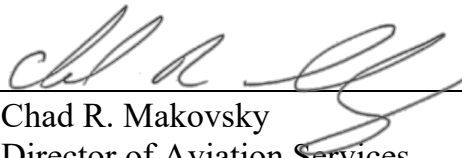
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4 I, Chad R. Makovsky, state as follows:

5 I am the Director of Aviation Services for the City of Phoenix, the Plaintiff in this case.
6 In my capacity as the Director of Aviation Services, I am authorized to make this verification
7 for and on behalf of the Plaintiff. I have read the foregoing Verified Complaint, and I am
8 acquainted with the facts stated therein. To the best of my knowledge, the facts set forth in the
9 foregoing Verified Complaint are true and accurate.

10 I declare under penalty of perjury that the foregoing is true and correct.

11 Executed on this 27th day of March, 2023.

12
13 
14 _____
15 Chad R. Makovsky
16 Director of Aviation Services
17 City of Phoenix
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