This is an appeal under A.R.S. § 48-3612 and Section 409 of the Maricopa County Floodplain Regulations from a final decision of the Floodplain Review Board dated October 7, 2020. Gary Weinman has appealed from that decision.

This Board asked Hearing Officer Harold Merkow to review the matter and issue a recommendation. The Hearing Officer’s recommendation is attached hereto as Exhibit A and incorporated by reference. In addition, the Board has conducted its own independent review of the matter. The Board approves and adopts the Hearing Officer’s recommendations as the basis for its decision, and supplements the grounds for this decision as follows.

Weinman’s predecessor in interest granted to Cave Creek Crossing Corporation (CCCC) an express easement, which is an interest in real property. Under Section 2 of that easement, CCCC is legally and financially responsible for maintenance of the easement, including conformance of that easement to “all applicable laws, rules, regulations, ordinances, or governmental standards.” Under Arizona law “the easement carries with it the right to do all acts necessary and proper in order to obtain full enjoyment of the easement.” Papa v. Flake, 18 Ariz. App. 496, 498 (1972).
The central issue in this appeal is a dispute over the meaning of the word “owner” as used in Section 403 of the Floodplain Regulations (which requires authorization from an “owner” as part of an application for a permit). Because the word “owner” is not defined, it must be interpreted in light of common usage and to further the purpose of the Floodplain Regulations, which is to protect the public health and welfare. See Floodplain Regulations, Section 103; Sedona Grand LLC v. City of Sedona, 229 Ariz. 37 ¶26 (App. 2012) (observing that floodplain regulations have a “commonsense, self-evident nexus” to public health and safety).

Specifically, the issue here is whether the word “owner” is always limited to ownership as reflected in the records of the Maricopa County Assessor, who maintains records to permit the assessment of property taxes. If the same person or entity is responsible for both property taxes and maintenance of a floodplain—which is common—the County Assessor’s records provide a convenient and reliable way to determine the appropriate “owner” for purposes of Section 403.

But the assessment of property taxes involves a different legal regime than the regulation of designated floodplains. And CCCC’s easement is not reflected in the Assessor’s records for a reason that has everything to do with property taxes and nothing to do with floodplain regulation: property taxes are not imposed upon easements.

Under these unusual circumstances, the purposes of the Floodplain Ordinance would not be advanced by interpreting the word “owner” in a way that gives Weinman exclusive authority to control the initiation of work in the floodplain. Indeed, recognizing Weinman as the sole party with control over such work could impede, rather than promote, the purposes of the Floodplain Ordinance. This case thus presents unusual circumstances that involve a potential hardship, thereby allowing CCCC to initiate the floodplain application.
This Board thus affirms the decision of the Flood Review Board allowing CCCC to initiate the application for a floodplain permit. This appeal is hereby decided in accordance with the Hearing Officer’s recommendations, and the District is ordered to proceed in conformance with this decision by accepting an application from CCCC.

This decision is limited in scope. This Board of Directors does not have jurisdiction to decide, and does not purport to decide, any civil dispute over the respective rights as between Weinman and CCCC. Likewise, this appeal does not entail the review of any specific plans. The application has yet to be filed.

An appeal of this decision may be initiated pursuant to Section 409(E) of the Floodplain Regulations.
FLOOD CONTROL DISTRICT OF MARICOPA COUNTY
BOARD OF DIRECTORS

BY:

_________________________________
Chairman, Board of Directors
Date: ______________________

ATTEST:

________________________________
Clerk of the Board
Date: ______________________

Approved as to form:

________________________________
Deputy County Attorney
Date: ______________________
Exhibit A

Hearing Officer’s Report and Recommendation

(see attached)
MARICOPA COUNTY
FLOOD CONTROL DISTRICT
BOARD OF DIRECTORS

HEARING OFFICER’S
REPORT AND
RECOMMENDATION

In the Matter of the Appeal to the
Board of Directors by

GARY WEINMAN

This matter came before the undersigned hearing officer to review the
written appeal of Gary Weinman to the Flood Control District Board of
Directors which contests the Decision and Order of the Floodplain Review
Board that recognized the right of property easement holder Cave Creek
Crossing Corporation (CCCC) to sign the landowner’s authorization portion of
the application seeking a permit from the Flood Control District for
construction in a floodplain/floodway as a proxy for the landowner, as well as
the Motion to Strike/Dismiss Weinman’s appeal filed by CCCC.

Having reviewed the Floodplain Review Board’s Order and Decision,
having read and considered Gary Weinman’s appeal to the Board of
Directors, having read and considered the Motion to Strike/Motion to Dismiss
filed by CCCC, the Motion for Leave to Appeal to the Board of Directors filed
by CCCC, the responses and replies to the Motions, and the Motion by Desert
Foothills Land Trust to intervene in this appeal, the undersigned now submits
a report and recommendation to the Flood Control District Board of
Directors.

FACTUAL BACKGROUND

Cave Creek Crossing Corporation (CCC) is the holder of a property
easement across the property owned by Gary Weinman which was granted
to CCC in 1983 by Weinman’s predecessor in interest and which easement
allows ingress and egress to 54 residences in the area. A portion of the
easement (Section 2) allows CCC to construct a “wet crossing” type ford
across Cave Creek at Desert Hills Drive and reads:

CCC hereby agrees to satisfy and meet the following
conditions:

a. To construct a “wet crossing” type ford across Cave
Creek, said ford to be designed by an accredited
engineer and of sufficient construction to withstand
flooding in the creek and to withstand fully loaded
construction vehicles of the type ordinarily used in
residential construction. The ford shall be constructed
of high grade building materials. The design of the ford
is to be subject to approval by an independent
consulting engineer which may be retained at the

-2-
option of Anderman (prior property owner). The ford shall also satisfy and meet all applicable rules and regulations, ordinances or governmental standards, and shall be maintained in conformity with the same. The CCCC will, at its cost, maintain the ford as is necessary to assure that it will be fully usable at all times.

b. The connecting roadway along the easement shall be graded by the CCCC at its expense at least once annually so as to meet the passage requirements of an ordinary passenger vehicle unless Maricopa County or some other governmental entity provides grading at lease once annually to the same or higher standard.

The 40 foot wide ford across Cave Creek was constructed by CCCC and has been maintained by it since the crossing became available to the 54 residences. A dispute between CCCC, the landowner, and downstream landowners has arisen due to the actions of CCCC maintaining the crossing, especially after flood events, whereby CCCC has removed debris, sand, and rocks from the crossing and deposited those materials downstream from the crossing. CCCC has also excavated and re-graded areas of Cave Creek to prevent damage to the 40' ford, all of which has caused a change to the natural flow and has altered the watercourse of Cave Creek above and below the “wet crossing”. The Army Corps of Engineers that has jurisdiction over
Cave Creek issued a Notice of Violation to CCCC.

CCCC desired to re-construct the Cave Creek crossing by raising it to the grade level of the banks of Cave Creek. The landowner refused to sponsor or authorize it to seek a permit application to the Flood Control District to allow such re-construction because of CCC’s actions in maintaining the existing crossing, especially after flood events. CCC then submitted a permit application under its own name, seeking a permit from the Flood Control District to re-construct the “wet crossing” by bringing it up to the grade level of the banks of Cave Creek.

CCC’s permit application was rejected by the Flood Control District on the basis that it requires the property owner to submit or authorize such applications pursuant to Section 403.A.2 of the Floodplain Regulations of Maricopa County, which authorization requirement the Flood Control District interpreted as being the owner of record (per the County Assessor’s Office records). CCCC appealed the Flood Control District’s decision to reject its permit application to the Floodplain Review Board, pursuant to regulation 409.A which reads:

Any person may file an appeal to the Floodplain Review Board if they feel that there is an alleged error or doubt in the interpretation of these Regulations, or that due to unusual circumstances attaching to their property an unnecessary hardship is being inflicted on
them, or if there is a dispute between the person and
district employees, of if location of a floodway or
floodplain is in doubt.

The bases on which CCCC relied for its appeal were the dispute about the
Flood Control District’s interpretation of its regulation about who must file or
authorize a permit application and its assertion that unnecessary hardship
has been inflicted on the residents due to unusual circumstances (CCCC also
added a conflict claim but it was directed at a Deputy County Attorney, not a
Flood Control District employee – that portion of the appeal was later
dropped).

After an extensive review of all of the circumstances involved in the
CCCC permit application, including allowing the landowner, Gary Weinman,
two CCCC residents, and the Desert Foothills Land Trust to intervene in the
appeal proceedings, the Floodplain Review Board concluded that the
interpretation of the Flood Control District’s Regulation 403.A.2 which
requires a “signed property owner authorization” if the owner wishes to
grant an agent, contractor, or consultant authority to make decisions on
their behalf, means the registered property owner as shown by the County’s
tax assessor’s office which, in this case, is Gary Weinman, was a reasonable
interpretation and that the Flood Control’s interpretation of that regulation
does not allow it to interpret an easement to decide whether the property
owner has delegated the right to submit a permit application authorization
on behalf of the owner of record by the easement holder. However, the Floodplain Review Board concluded that the interpretation of the Flood Control District “works an unreasonable hardship” since the easement held by CCCC “purports to allow the project” and that “there is some urgency for the project to move forward”.

Having concluded that CCCC could not execute WEINMAN’s authorization for a permit as the property owner, the Floodplain Review Board next looked at whether circumstances exist to demonstrate an “unnecessary hardship” inflicted on the 54 residences of CCCC caused by “unusual circumstances” attaching to their property rights of holding the easement such as to create an exception to the Flood Control District’s authorization interpretation. As the Floodplain Review Board explained, it considered CCCC’s representations that the ford across Cave Creek could not be used by service providers, including emergency response, garbage pickup, cable provider, and others who have indicated that they would not use the crossing due to its current condition and that such refusal by service providers were at “an increased risk due to recent fires in the area because the condition of the crossing complicated efforts both to evacuate (if necessary) and for the fire department to access the area”. The Flood Control District had taken the position that the dispute between Weinman and CCCC which led Weinman to refuse to sign the permit application was
not a hardship and that the dispute between Weinman and CCCC should be settled through means other than the Floodplain Review Board (FRD proposed seeking a declaratory action in Court).

The Floodplain Review Board then decided that it could exercise its discretion under Regulation 409 “when unusual circumstances attaching to the property create an unnecessary hardship” and that the property owner’s refusal to sign the permit application “for an activity that is facially covered by an easement agreement may qualify as an unusual circumstance” allowing the Floodplain Review Board the authority and discretion to remand the permit application to the Flood Control District “with instructions to process the FUP (Floodplain Use Permit) application”, subject to limitations whereby the Flood Control District cannot authorize permission to CCCC to access the landowner’s property and which does not waive CCCC’s responsibility to obtain all other necessary permits.

The Floodplain Review Board then ordered:

The FRB upholds the District’s interpretation that the requirement for property owner authorization set forth in Section 403 means the record owner as shown on the records of the Maricopa County Tax Assessor. However, it is within the FRB’s discretion to find unusual circumstances attaching to the property create an unnecessary hardship. The FRB so finds here. The property owner of record refuses to sign the
application and the applicant has presented a facially valid easement that appears to provide a right to conduct the activities for which is permit is sought and has conducted work under the easement in the past.
The District is instructed to complete the technical review of CCCC’s application consistent with this order and either issue or deny the permit. No permit issuance or denial is before the FRB.

Following the entry of that Order, property owner Gary Weinman appealed to the Flood Control District Board of Directors. The appeal argues that the FRB exceeded its authority by making a determination allowing the permit application to proceed, despite Gary Weinman’s refusal to sign the permit application authorizing CCCC to proceed with the permit application, and that the Floodplain Review Board should not have determined any rights CCCC may have under its easement since only a court of law can make that determination. Weinman further argues that there are no unusual circumstances attaching to their property because the property in question is Weinman’s property, not CCCC’s property, that CCCC does not have any right to enforce the easement until it cures its violations to the satisfaction of the property owners in the area, and that the 40’ ford easement across Cave Creek does not demonstrate any unusual circumstances since it is useable in times other than during storm events’ flow of water through Cave Creek.
Weinman details the “years of damage” caused by CCCC by performing work
that was unlawful and unpermitted, all of which needs to be restored before any improvement to the 40' ford can be evaluated. Weinman insists that he, as property owner, cannot be excluded from the permit application procedure.

CCCC then filed a Motion to Strike/Dismiss Weinman’s appeal to the Board of Directors. In its Motion, CCCC argues that Weinman is not an “aggrieved appellant” party to these proceedings as he was only allowed to intervene in CCCC’s appeal to the Floodplain Review Board and CCCC argues that it can continue with its permit application without Weinman’s permission or participation.

Also, the Desert Foothills Land Trust, the holder of a conservation easement in the area, including Cave Creek, requested to intervene in this appeal to the Flood Control District Board of Directors. Desert Foothills Land Trust was allowed to intervene in the proceedings before the Floodplain Review Board and it asks to intervene in this appeal to allow it to determine whether the proposed construction by CCCC would have negative impacts on their conservation easement and perhaps suggest alternatives that could have less impact and a more sustainable crossing of Cave Creek.
DISCUSSION

CCCC is the holder of a valid recorded easement allowing it to ford Cave Creek through the property owned by Gary Weinman. As an easement holder, CCCC has property rights to the extent of its easement. Since Weinman refused to sign the application authorizing CCCC to proceed with improving the ford across Cave Creek, CCCC was permitted to seek such authorization through the Floodplain Review Board. Both CCCC and Weinman had a full opportunity to argue before the Floodplain Review Board about whether Weinman’s refusal to sign the permit application resulted in an unnecessary hardship to CCCC. By allowing Weinman’s intervention in the proceeding, Weinman became a party to the proceedings (unlike a situation where Weinman would only be recognized as a friend of the court). When the Floodplain Review Board ordered that CCCC’s permit application will proceed for a determination by the Flood Control District by permitting CCCC to sign the permit authorization as a proxy for the landowner, and entered that Order subject to certain limitations, Weinman could assert that he was “aggrieved” by that Order and request review by the Board of Directors.

The ONLY issue before the Flood Control District Board of Directors is whether the Floodplain Review Board’s Order was capricious, arbitrary, or beyond its jurisdiction which could lead to an abuse of its discretion. The Floodplain Review Board did not denigrate the freeholder’s property interest
and simply considered whether Gary Weinman’s refusal to sign the permit application submitted by CCCC authorizing the issuance of a permit to improve the crossing of Cave Creek created unusual circumstances which resulted in an unnecessary hardship, per Regulation 409. Clearly the Floodplain Review Board had jurisdiction to entertain CCCC’s appeal to it pursuant to Regulations 409 and 411 and there were no participation restrictions imposed by the Floodplain Review Board (the Board allowed 4 intervention requests) which allowed a full presentation to it – both pro and con.

The Floodplain Review Board carefully considered that, although Cave Creek is an ephemeral stream, when a flood event occurs, it prevents the occupants of the 54 residence members of CCCC from using the easement crossing. The Floodplain Review Board carefully considered that information together with the evidence adduced that showed that, because of the deteriorated condition of the crossing at other non-flood times, first responders, service providers, waste removal providers, and “numerous” others will no longer cross to provide service to the 54 members. CCCC also raised the spectre of wildfires in the area that limits evacuation from the 54 residences or fire service to prevent property destruction. The instability of ingress and egress prevents CCCC from enjoying the full property benefit of the recorded easement.
Since the Floodplain Review Board was in the paramount position to evaluate and balance the evidence put before it, it was also in the best position to determine whether relief should be afforded to CCCC "due to unusual circumstances attaching to their property an unnecessary hardship is being inflicted on them". From the evidence presented to it, the Floodplain Review Board’s choice points could allow it to craft equitable relief to CCCC and allow it to serve as a proxy for the landowner’s required authorization on the Flood Control Permit application. The easement is not novel and CCCC’s application’s intentions made to the Flood Control District are central to the terms and conditions of that easement, all as demonstrated to the Floodplain Review Board by CCCC on the face of the easement itself.

The Floodplain Review Board considered the arguments made to it by CCCC, Gary Weinman, the Desert Foothills Land Trust, and homeowners who use the crossing. Those arguments presented to the Board negate any notion that the Floodplain Review Board entered its Orders arbitrarily or capriciously and, because the Floodplain Review Board relied on uncontested facts presented by all parties, one cannot conclude that its Order was entered by abusing its discretion to interpret Rule 409.

The technical review of CCCC’s application to raise the crossing over Cave Creek to match the banks’ elevation was analyzed favorably by the Flood Control District and the demonstrable effects of a new crossing are
evident. The remaining issues before the Flood Control Board of determining
CCCC’s responsibility to construct the crossing within the terms and scope of
any permit issued by the Flood Control District and requiring full compliance
by CCC to obtain any other permits, clearances, and approvals necessary to be able to construct the new crossing **BEFORE** it can construct the new crossing, are all elements best delegated to the Flood Control District’s
Director – with the full participation by the area’s landowners and other interested parties.

**RECOMMENDATION**

1). It is the recommended decision of the undersigned hearing officer that the Flood Control District Board of Directors enter an Order finding that the Floodplain Review Board did not act arbitrarily or capriciously, that the Floodplain Review Board did not exceed its jurisdiction, and that the Floodplain Review Board did not abuse its discretion in finding the existence of unusual circumstances attaching to the property creating an unnecessary hardship to the 54 residences of CCC.

2). It is the recommendation of the undersigned hearing officer that the Flood Control District enter an Order affirming the decision of the Floodplain Review Board recognizing the existence of unusual circumstances
attaching to the property creating an unnecessary hardship to the 54 residences which decision directs the Flood Control District to accept CCCC as the proxy for the property owner’s authorization for a permit, and additionally, enter an Order denying this appeal by Gary Weinman, and enter an Order remanding this matter to the Flood Control District’s Director for a determination of whether to issue a permit to Cave Creek Crossing Corporation (CCCC) as requested in its application, conditioned on a technical review of the permit application, a determination of responsibility by CCCC to fulfill the requirements of the issued permit, setting restrictions preventing CCCC from entering on the property of any other landowner to conduct the permitted work, and directing CCCC to provide that any permits, clearances, and approvals necessary to effect the Flood Control permit be obtained from any other local, state, or federal agency having authority and jurisdiction over this floodplain and floodway before any construction of an improved crossing may begin.

3). It is the recommendation that the Board enter an Order allowing the intervention of landowner Gary Weinman and Desert Foothills Land Trust in the Flood Control District’s Director’s review of this permit application.

4). It is the recommendation that the Board enter an Order denying
CCCC’s Motion for Leave to File an Appeal to the Board of Directors.

DATED: February 5, 2021

[Signature]

HAROLD J. MERKOW
Hearing Officer