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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ROBERT ONG HING and ALICE Y. HING, husband and wife, *Petitioners*,

v.

THE HONORABLE KILEY, Judge of the SUPERIOR COURT OF THE
STATE OF ARIZONA, in and for the County of MARICOPA,
Respondent Judge,

CITY OF SCOTTSDALE, *Real Party in Interest*.

No. 1 CA-SA 16-0236
FILED 12-13-2016

Petition for Special Action from the Superior Court in Maricopa County
No. CV2016-008978
The Honorable Daniel J. Kiley, Judge

JURISDICTION ACCEPTED; RELIEF DENIED

COUNSEL

Quarles & Brady, LLP, Phoenix
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Counsel for Petitioner

Gust Rosenfeld, PLC, Phoenix
By Christopher W. Kramer, Laura R. Curry, Charles W. Wirken
Counsel for Real Party in Interest

MEMORANDUM DECISION

Presiding Judge Kent E. Cattani delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge Andrew W. Gould joined.

C A T T A N I, Judge:

¶1 Robert and Alice Hing seek special action review of the superior court's ruling in which the court found that the City of Scottsdale (the "City") did not act arbitrarily or capriciously when it exercised its power of eminent domain to condemn the Hings' property (the "Property") for use in building a fire station for the City. We accept special action jurisdiction because the superior court's order granted immediate possession to the City, and the Hings have no equally plain, speedy, or adequate remedy by appeal. *See* Ariz. R.P. Spec. Act. 1(a); *see also* *Queen Creek Summit, LLC v. Davis*, 219 Ariz. 576, 579, ¶ 11 (App. 2008). Nevertheless, we deny relief.

FACTS AND PROCEDURAL BACKGROUND

¶2 As part of a plan to bring emergency response times in line with national standards, the City sought to relocate one of its fire stations, Station 603. The City identified the Property, a vacant lot owned by the Hings with access to a major road, as a suitable location for Station 603. After rejecting an offer by the City to purchase the Property for \$1,250,000, the Hings agreed to sell the property and other land to Investment Properties Associates, LLC ("IPA") for \$10,000,000, with IPA intending to build a senior living facility. The City evaluated several additional sites, but determined that locating Station 603 at the Property would best serve the goal of reducing emergency response times. The Hings resisted the City's efforts to acquire the parcel and submitted a list of alternative sites to the City.

¶3 At a public meeting in June 2016, the Scottsdale City Council heard testimony regarding the potential acquisition of the Property. The City's Director of Public Works testified that locating a fire station at any of the Hings' proposed alternative sites would not reduce response times as effectively as building on the Property. He also testified that a location previously recommended to the City by an emergency services consulting firm was in a potential flood zone and thus was not a feasible alternative.

HING v. HON. KILEY/SCOTTSDALE
Decision of the Court

The City Council unanimously passed a resolution deeming the acquisition of the Property “necessary and essential as a matter of public welfare and in the public interest.” IPA subsequently cancelled its purchase agreement with the Hings.

¶4 The City filed this condemnation action shortly after passing the resolution. After an evidentiary hearing, the superior court found that the City had properly determined condemnation of the Property necessary to the relocation of Station 603. The court also found that the Hings had failed to establish that the condemnation “is not compatible with the greatest public good and least private injury.” Finally, the court made a preliminary finding that the Property was worth \$2,225,000, and granted immediate possession of the property to the City upon the posting of a bond in that amount.

DISCUSSION

¶5 The Hings first argue that the City did not comply with Arizona Revised Statutes (“A.R.S.”) § 12-1115(A), which requires that private property taken for public use be “located in the manner which will be most compatible with the greatest public good and the least private injury.”¹ The landowner opposing condemnation bears the burden of proving by clear and convincing evidence that the taking will be “unnecessarily injurious.” *Queen Creek Summit*, 219 Ariz. at 580, ¶ 16 (citation omitted). The condemnor need not “consider the specific plans the [landowner] had for the use of the property,” as long as it “consider[s] the impact and potential injury to the [landowner].” *Id.* at 581, ¶ 22. The superior court may analyze the interests of both the landowner and other relevant parties. *Id.* at 580, ¶ 19. We will uphold the superior court’s determination that the condemnor complied with § 12-1115(A) if it is supported by substantial evidence. *Id.* at 582, ¶ 25.

¶6 The Hings did not establish that the City failed to consider their injury when making its decision to take their property. Regardless whether the City offered a price acceptable to the Hings, the City clearly understood that the Hings would suffer a significant injury and were prepared to offer just compensation. *See* U.S. Const. amend. V; Ariz. Const. art. 2, § 17. And, as the superior court noted, the Hings failed to explain how the injury caused by taking their property was less justifiable than the

¹ Absent material revisions after the relevant date, we cite a statute’s current version.

HING v. HON. KILEY/SCOTTSDALE
Decision of the Court

potential injury that would be caused by condemning a single-family home, as suggested by their expert.

¶7 Furthermore, the superior court’s decision that locating Station 603 at the Property will lead to the greatest public good is supported by sufficient evidence, including evidence that the Property is advantageous from an operational perspective. Thus, the superior court did not err by finding that the Hings failed to show, by clear and convincing evidence, that the City did not properly balance the least private injury with the greatest public good.

¶8 The Hings also ask us to overturn the superior court’s finding that the City did not act arbitrarily and capriciously when it deemed condemnation of the Property necessary to the relocation of Station 603. Under A.R.S. § 12-1112(2), before taking property for public use, a condemnor must determine “that . . . [t]he taking is necessary to such use.” “Necessity” in the eminent domain context “means reasonable necessity, under the circumstances of the particular case.” *City of Tacoma v. Welcker*, 399 P.2d 330, 335 (Wash. 1965).² An action need not be “indispensable” to be “necessary.” *Id.* The availability of viable alternatives does not by itself justify overturning a legislative finding of necessity. *See Catalina Foothills Unified Sch. Dist. No. 16 v. La Paloma Prop. Owners Ass’n*, 238 Ariz. 510, 515, ¶ 18 (App. 2015). A court should not disturb a legislative finding of necessity “in the absence of fraud or arbitrary or capricious conduct.” *City of Phoenix v. McCullough*, 24 Ariz. App. 109, 114 (App. 1975); *see also City of Phoenix v. Superior Court*, 137 Ariz. 409, 416 (1983).

¶9 We agree with the superior court that the City did not act arbitrarily or capriciously in finding that taking the Property was necessary to the relocation of Station 603. The City’s decision to reject the location recommended by its emergency services consultant was supported by evidence that the site was in a potential flood zone. And throughout the process, the City reviewed at least 19 sites, finding that none of them provided the operational advantages of the Property. Furthermore, other than asserting that the City moved quickly throughout the condemnation process, the Hings have offered no objective evidence of bad faith, let alone

² Because Arizona’s constitutional eminent domain provision, Ariz. Const. art. 2, § 17, was based on a nearly identical provision in the Washington Constitution, eminent domain case law from Washington provides persuasive, albeit not controlling, authority. *Bailey v. Myers*, 206 Ariz. 224, 229–30, ¶ 22 (App. 2003).

HING v. HON. KILEY/SCOTTSDALE
Decision of the Court

fraud. Accordingly, the Hings did not establish that the City acted arbitrarily or capriciously in deciding to condemn the Hings' property.

¶10 Finally, the Hings argue that the City was required by A.R.S. § 19-142 and Article 7, Section 5 of the Scottsdale City Charter to wait 30 days before initiating the condemnation action so a referendum could be filed challenging the City's necessity determination. But, the referendum power only extends to a municipal body's legislative actions, not its administrative actions. *Wennerstrom v. City of Mesa*, 169 Ariz. 485, 488 (1991). A legislative action is one that creates a new policy, while an administrative action executes an already-adopted policy. *Id.* at 489.

¶11 Here, the residents of Scottsdale passed a bond measure funding the relocation of Station 603. At the time the measure was passed, the City had not yet identified a new location for Station 603. This bond measure was a legislative act: the residents of the City created a new policy in favor of relocating various fire stations. The City Council's resolution deeming the acquisition of the Property necessary to the relocation of Station 603 was an administrative act that executed the legislative plan. Thus, the City Council was not required to wait 30 days before initiating condemnation proceedings.³

CONCLUSION

¶12 For the foregoing reasons, we accept jurisdiction but deny relief.



AMY M. WOOD • Clerk of the Court
FILED: AA

³ The Hings also assert that the Scottsdale City Charter requires more serious good faith negotiations before the City can exercise its eminent domain power. Because the Hings first raised this argument in a motion for reconsideration, which the superior court denied without soliciting a response from the City, we decline to address it on appeal. See *Ramsey v. Yavapai Family Advocacy Ctr.*, 225 Ariz. 132, 137-38, ¶ 18 (App. 2010).