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Ariz. R. Crim. P. 31.24



DIVISION ONE  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

DENNIS P. BAYLESS, P.C., ) 1 CA-CV 09-0036  
)  
Plaintiff/Appellee, )  
) DEPARTMENT B  
v. )  
)  
CITY OF COTTONWOOD; COTTONWOOD CITY ) **MEMORANDUM DECISION**  
COUNCIL, DIANE JOENS, COTTONWOOD CITY ) (Not for Publication  
MAYOR; KAREN PFEIFER, COTTONWOOD CITY ) - Rule 28, Arizona  
VICE MAYOR; TIM ELINSKI, COTTONWOOD ) Rules of Civil  
CITY COUNCIL PERSON; DUANE KIRBY, ) Appellate Procedure)  
COTTONWOOD CITY COUNCIL PERSON; LINDA )  
NORMAN, COTTONWOOD CITY COUNCIL )  
PERSON, )  
)  
Defendants/Appellants. )  
)

Appeal from the Superior Court in Yavapai County

Cause No. V-1300-CV-0820080155

The Honorable Michael R. Bluff, Judge

**VACATED**

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**D O W N I E**, Judge

¶1 The City of Cottonwood ("City"), Cottonwood City Council ("Council"), and members of the Council (collectively, "Defendants") appeal the superior court's order granting Dennis P. Bayless, P.C. ("Plaintiff") mandamus relief. Defendants contend the court erred in ruling the Cottonwood Municipal Code ("CMC" or "Code") requires the Council to follow a public bid procedure before contracting with a law firm to serve as City Attorney and City Prosecutor. For the reasons that follow, we agree with Defendants and therefore vacate the superior court's judgment.<sup>1</sup>

#### **BACKGROUND**

¶2 From the mid-1980s until 2005, the law firm of Mangum, Wall, Stoops and Warden, PLLC ("MWSW") served as the Cottonwood City Attorney. For at least some of this time, MWSW also handled the City's prosecutions. Beginning August 1, 2000, Plaintiff contracted with the City to serve as the City Prosecutor. In April 2006, the City hired its first in-house City Attorney. Effective January 2, 2008, the in-house City Attorney resigned.<sup>2</sup> The City subsequently solicited a

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<sup>1</sup> We have considered the briefing relating to Plaintiff's post-argument motion to strike. We deny the motion, as well as Defendants' request for sanctions associated with the motion to strike. However, in deciding this case, we have only considered matters of record.

<sup>2</sup> The City intended for the City Attorney to eventually take over the responsibilities of the City Prosecutor. Apparently,

"proposal/cost estimate" from MWSW "to resume serving as City Attorneys and Prosecutors."

¶13 At a special meeting on January 8, 2008, the Council voted to "contract out" to MWSW all of the City's legal work, including prosecution services, as an interim measure until a replacement in-house City Attorney was hired. The City terminated Plaintiff's City Prosecutor contract.

¶14 On June 16, 2008, Plaintiff commenced this action in superior court, alleging the contract with MWSW violated Code section 2.88.020, entitled "Procedure for contracting with professional services" ("§ 2.88.020"). CMC title 2, ch. 2.88, § 2.88.020 (2009).<sup>3</sup> Plaintiff claimed the contract was not advertised, and no bids were solicited other than from MWSW. Plaintiff sought, *inter alia*, a writ of mandamus directing the Council to void the agreement with MWSW and re-bid the contract in conformity with § 2.88.020.<sup>4</sup>

¶15 In lieu of an evidentiary hearing, the parties agreed to submit the case for a decision on the pleadings and seventeen

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the City Attorney resigned before that transfer of responsibilities could occur. Also, during the time the City had an in-house City Attorney, MWSW and Plaintiff continued to provide legal services to the City.

<sup>3</sup> Unless otherwise stated, all references to the CMC are to the 2009 version.

<sup>4</sup> Plaintiff also raised breach of contract and interference with contract claims, neither of which is at issue in this appeal. Plaintiff originally named MWSW as a defendant, but MWSW was later dismissed by stipulation.

stipulated exhibits. The superior court accepted jurisdiction and found: "The City is required by the plain language of its own code to follow the provisions set forth in Section 2.88.020 in contracting for outside legal services." Accordingly, the court granted mandamus relief. Defendants unsuccessfully moved for reconsideration. This timely appeal followed. We have jurisdiction pursuant to Arizona Revised Statute ("A.R.S.") section 12-2101(B) (2003).

#### DISCUSSION

¶16 Defendants argue the superior court erred in concluding the Council was required to comply with § 2.88.020 before contracting with MWSW. We agree.<sup>5</sup>

¶17 Mandamus is only available to compel a public officer to perform a duty over which he or she has no discretion. *Sears v. Hull*, 192 Ariz. 65, 68, ¶ 11, 961 P.2d 1013, 1016 (1998). See also A.R.S. § 12-2021 (2003). "In the absence of some controlling . . . legislative requirement, competitive bidding is not an essential prerequisite to the validity of contracts . . . by and with public bodies." *Hertz Drive-Ur-Self Sys., Inc. v. Tucson Airport Auth.*, 81 Ariz. 80, 84, 299 P.2d 1071, 1074 (1956) (internal quotes and citation omitted). Whether

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<sup>5</sup> Because we find § 2.88.020 is inapplicable, we do not address whether the superior court employed the correct standard for reviewing the Council's decision, nor do we decide whether paragraph H of § 2.88.020 allowed the Council to deviate from public bid procedures.

competitive bidding is required depends on the "proper construction of the applicable law." *Achen-Gardner, Inc. v. Superior Court In and For County of Maricopa (City of Chandler)*, 173 Ariz. 48, 51, 839 P.2d 1093, 1096 (1992) (citation omitted).

¶18 The Council clearly has the authority to contract for legal services in lieu of hiring a City Attorney. CMC title 2, ch. 2.24, § 2.24.010. The disputed issue is what process, if any, the Council must follow in contracting for legal services.

¶19 Section 2.88.020(A) outlines the process for selecting and negotiating fees for professional services. "Professional services" include those provided by attorneys. CMC title 2, ch. 2.88, § 2.88.010. The Code provides that a "department or office" seeking to engage a professional service provider must follow the procedures in § 2.88.020 (B)(1), (C), (E), (F). The Code does not define the terms "department" and "office," and it does not specifically mention the Council vis-à-vis the bid selection procedures in § 2.88.010.

¶10 We review *de novo* the superior court's interpretation of the Code. See *City of Tucson v. State*, 191 Ariz. 436, 437, 957 P.2d 341, 342 (App. 1997). We interpret the Code using rules of statutory construction. See *Thomas and King, Inc. v. City of Phoenix*, 208 Ariz. 203, 206, ¶ 9, 92 P.3d 429, 432 (App. 2004) (courts interpret ordinances using the rules of statutory construction); *Douglass v. Gendron*, 199 Ariz. 593, 596, ¶ 10, 20

P.3d 1174, 1177 (App. 2001) (municipal ordinances are construed in the same manner as state statutes).

¶11 The primary goal of statutory interpretation is to find and give effect to the promulgators' intent. *State v. Ross*, 214 Ariz. 280, 283, ¶ 22, 151 P.3d 1261, 1264 (App. 2007). We look to the Code's plain language as the best indicator of that intent. *See Fragoso v. Fell*, 210 Ariz. 427, 430, ¶ 7, 111 P.3d 1027, 1030 (App. 2005). When the language is clear and unambiguous, we give effect to it and do not employ other tools of statutory interpretation. *Id.* "When a statute is ambiguous or unclear, however, we attempt to determine legislative intent by interpreting the statutory scheme as a whole and consider the statute's context, subject matter, historical background, effects and consequences, and spirit and purpose." *Ross*, 214 Ariz. at 283, ¶ 22, 151 P.3d at 1264.

¶12 Although the Code defines "Council" ("the common council of the city of Cottonwood"), it does not define "department" or "office." CMC title 1, ch. 1.04, § 1.04.020. We therefore give those terms their usual and commonly understood meanings. *Washburn v. Pima County*, 206 Ariz. 571, 578, ¶ 18, 81 P.3d 1030, 1037 (App. 2003) ("[W]e attribute no specialized meaning to statutory language unless the legislature has clearly conveyed its intent that we do so."); *Kilpatrick v. Superior Court (Rozar)* 105 Ariz. 413, 421, 466 P.2d 18, 26

(1970) ("Words are to be given their usual and commonly understood meaning unless it is plain or clear that a different meaning was intended.").

¶13 We cannot conclude the commonly understood meaning of "department" and "office" includes the Council, which is the City's legislative body that exercises the corporate powers of the municipality, including the appointment, supervision, and removal of city officers. See A.R.S. §§ 9-239 (2008), -274 (2008); CMC ch. 2.08, § 2.08.020; ch. 2.12, §§ 2.12.020, 2.12.050. The relevant dictionary definitions of "department" and "office" do not compel a contrary conclusion.<sup>6</sup> See *State v.*

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<sup>6</sup> "Department" is defined, in relevant part, as:

1. A distinct, usually specialized division of a large organization, especially: (a) A principal administrative division of a government: *the department of public works.*

. . . .

2. . . . One of the principal executive divisions of the federal government of the United States, headed by a cabinet officer.

Dictionary.com, The American Heritage® Dictionary of the English Language, Fourth Edition (2004), <http://dictionary.reference.com/browse/department> (last visited Feb. 4, 2010).

"Office" is defined, in relevant part, as:

[1.]c. A subdivision of a governmental department: *the U.S. Patent Office.*

[1.]d. A major executive division of a

*Mahaney*, 193 Ariz. 566, 568, ¶ 12, 975 P.2d 156, 158 (App. 1999) (“In determining the ordinary meaning of a word, we may refer to an established and widely used dictionary.”) (citation omitted).

¶14 We read “department” and “office,” as used in § 2.88.020, to refer to such typical municipal bodies as the fire and police departments and the office of the city manager. The Code itself recognizes such categorization. See CMC ch. 2.12, § 2.12.010 (creating offices of city manager/marshal, city clerk, and city magistrate); ch. 2.32, § 2.32.010 (creating office of finance director); ch. 2.44, § 2.44.010 (creating police department); ch. 2.48, § 2.48.010 (creating fire department); ch. 2.52, § 2.52.050 (creating office of library director); ch. 2.76, § 2.76.010 (creating office of director of civil defense); ch. 2.96, § 2.96.010 (creating office of administrative hearing officer).

¶15 Nonetheless, Plaintiff points to, and the superior court apparently relied on, Code § 2.88.020(G)(3) as indicative

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government: *the British Home Office*.

. . . .

3. A position of authority, duty, or trust given to a person, as in a government or corporation: *the office of vice president*.

*Id.* at <http://dictionary.reference.com/browse/office> (last visited Feb. 4, 2010).



of an intent that the Council be bound by public bid procedures when procuring professional services. That section states:

G. Project Fees

. . . .

3. Complex or large projects having an estimated fee of over seventy-five thousand dollars shall be approved by the city council through the process outlined in Section 2.88.020(F).

CMC ch. 2.88, § 2.88.020(G)(3). When read in isolation, subsection (G)(3)'s reference to subsection (F)--which in turn expressly refers to "department[s] or office[s]" as the entities required to follow specified procurement procedures for "complex or large projects"--could create ambiguity about whether the Council must follow the Code's bid procedures when hiring outside legal counsel. Reading the applicable Code provisions as a whole, however, § 2.88.020(G)(3) evidences an intent that the Council *not* participate in procurement procedures such as notice, review, selection, and fee negotiations that apply to City departments or offices seeking professional services; rather, the Council's *approval* is required after a department or office has completed the public bid procedures and reached an agreement with a provider for a fee that exceeds \$75,000.

¶16 Turning to the relevant provisions of § 2.88.020, we initially note that departments or offices may hire

professionals on either an annual no-fee retainer basis, or on a project basis that entails payment of a fee. CMC § 2.88.020(C), (E), (F). With respect to the latter, the Code provides two different procedures for departments and offices to follow, depending on the size of the project. CMC § 2.88.020(E), (F). "Complex or large projects" require a more detailed process ("§ F Procedure") than "small or medium projects" ("§ E Procedure").<sup>7</sup> *Id.* Regardless of the size of the project, the Code contemplates that, once an agreement is reached with a professional regarding the scope of work and the fee, "further city processing and approval" (i.e. "consummat[ing] . . . a contract") is required "prior to beginning work." CMC § 2.88.020(E)(4), (5), (F)(8).

¶17 These Code provisions raise the following questions: (1) What determines the size of a project that, in turn, dictates whether a § E Procedure or § F Procedure applies? And, (2) Who is responsible for final approval? The answers to these questions are found in § 2.88.020(G), which states:

#### G. Project Fees

1. Projects having an estimated fee of under five thousand dollars may be approved by the city manager through the specific project negotiation process outlined in Section 288.020 [sic] (E).

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<sup>7</sup> "In any case, the more detailed procedure for complex or large projects may be used for small and medium projects at the option of the department or office." CMC § 2.88.020(E)(5).

2. Projects having an estimated fee of over five thousand dollars and less than seventy-five thousand dollars shall be approved by the city council through the specific project negotiation process outlined in Section 2.88.020(E).

3. Complex or large projects having an estimated fee of over seventy-five thousand dollars *shall be approved by the city council through the process outlined in Section 2.88.020(F).*

(Emphasis added.)

¶18 To the extent the superior court found that the emphasized language in § 2.88.020(G)(3) required the Council to follow the § F Procedure before awarding the legal services contract to MWSW, we disagree.<sup>8</sup> To construe that language in such a manner would lead to the nonsensical result that the Council must approve fee agreements that the Council *itself* already negotiated to its satisfaction. See § 2.88.020(F)(6), (G)(3). We do not construe statutes in a manner that leads to absurd results. *In re Estate of Zaritsky*, 198 Ariz. 599, 603, ¶ 11, 12 P.3d 1203, 1207 (App. 2000).

¶19 Instead, because subsections (1) and (2) of § 2.88.020(G) contain substantially the same language as that emphasized in subsection (3), we interpret § 2.88.020(G) as

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<sup>8</sup> Because the fee agreement between the City and MWSW exceeds \$75,000, it is not disputed that, if the contract is subject to a public bid requirement, § F provides the relevant procedure.

serving two necessary purposes. First, it establishes the fee amounts that determine whether the § E Procedure or the § F Procedure must be followed for a particular project. Second, § 2.88.020(G) delineates the responsibility for final approval of projects' terms that have been agreed on by a department or office and a service provider; namely, and sensibly, that responsibility lies with the city manager for smaller projects and the Council for projects exceeding \$5000. Thus, § 2.88.020(G)(3) does not, as Plaintiff contends, require the Council to participate in the § F Procedure in the same manner as a department or office for purposes of notice, selection, and fee negotiations when contracting with service providers.<sup>9</sup>

¶120 Other factors support our interpretation. First, the Code's drafters used the terms "department," "office," "city manager," and "city council" when referencing those bodies' respective responsibilities in the procurement process for contracting with professional service providers. CMC § 2.88.020. Had the drafters intended the Council to follow the same bid procedures as departments and offices, they presumably would have mentioned the Council in § 2.88.020(E) and (F). See *HCZ Constr., Inc. v. First Franklin Fin. Corp.*, 199 Ariz. 361,

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<sup>9</sup> Additionally, § 2.88.020(G) specifically applies to "projects." Although we need not reach this issue, it is questionable whether MWSW's provision of general counsel and prosecutor services qualifies as a "project."

365, ¶ 15, 18 P.3d 155, 159 (App. 2001) (use of different words in a statute demonstrates an intent to give each word its separate and ordinary meaning).

¶21 Second, if references to "department or office" in § 2.88.020 are deemed to include the Council, the city manager would be required to concur with the Council's decision to deviate from the § E or § F Procedures in those instances when the Council determines negotiating on a sole-source basis with a specific person is clearly advantageous to the City. See CMC § 2.88.020(H). This would be an absurd result given the city manager's subordinate status vis-à-vis the Council.<sup>10</sup>

¶22 Finally, Code § 2.24.010 states, without reference to the public bid procedures in § 2.88.020: "The city, in lieu of appointing a city attorney, may contract for its required legal services with an attorney or a firm licensed to practice law in the state of Arizona." Had the Code's drafters intended the Council to abide by the public bid procedures for engaging legal service providers, they could have manifested this intent by referring to § 2.88.020 in § 2.24.010. We will not read into

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<sup>10</sup> See CMC ch. 2.16, §§ 2.16.010, 2.16.080 (city manager appointed by the Council and serves under the direction and control of the Council). Further, the Council is required to review all contracts negotiated pursuant to § 2.88.020(H) prior to final award. CMC § 2.88.020(I). This requirement would be nonsensical if the Council, as a "department or office," negotiated the contract at issue pursuant to § 2.88.020(H).

the Code such a requirement. See *Hertz*, 81 Ariz. at 84-85, 299 P.2d at 1074 ("It is reasonable that a statute requiring bids 'is restrictive and should not be extended beyond the language used in it.'") (citation omitted).

¶123 In sum, the Code provisions mandating public bid procedures before contracting for professional services did not require the Council to follow the § F Procedure before engaging MWSW. Therefore, the superior court erred in granting relief to Plaintiff.

#### CONCLUSION

¶124 For the foregoing reasons, we vacate the superior court's order granting mandamus relief to Plaintiff.

/s/  
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/  
PATRICIA K. NORRIS, Presiding Judge

/s/  
SHELDON W. WEISBERG, Judge