NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
FILED: 05-27-2010
PHILIP G. URRY,CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PINETOP LAKES ASSOCIATION, an Arizona homeowner's association, P.O. Box 2830 Pinetop, AZ 85935,

Plaintiff/Appellee,

v.

PONDEROSA DOMESTIC WATER IMPROVEMENT DISTRICT, 8706 Country Club Drive, Pinetop, AZ 85935,

Defendant/Appellant.

PONDEROSA DOMESTIC WATER IMPROVEMENT DISTRICT, a domestic water improvement district organized and existing under the laws for the State of Arizona,

Plaintiff/Appellant,

v.

MALRY CONSTRUCTION, LLC, an Arizona limited liability company; JAMES and NANCY RILEY; SHAWN MORRISON; FRANK SMITH; JAMES L. PARKINSON; EUN S. JEON; JOHN D. BLACKMORE and DONNA J. BLACKMORE; MARCELLA PATTON,

Defendants/Appellees.

1 CA-CV 09-0395

DEPARTMENT E

MEMORANDUM DECISION

(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Navajo County

Cause Nos. CV 2007-0615, CV 2007-0626 (consolidated)

The Honorable John N. Lamb, Judge

VACATED AND REMANDED

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H A L L, Judge

¶1 The Ponderosa Domestic Water Improvement District (the District) appeals the trial court's order dismissing its condemnation claims and granting an injunction to the Pinetop Lakes Association (the Association) preventing the District from pursuing well construction on a lot it had purchased in the Bent Oaks Subdivision (Bent Oaks). For the reasons that follow, we vacate the trial court's order and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

¶2 The Navajo County Board of Supervisors organized the District in September of 1984 as a water improvement district. The Board resolved to organize the District after a majority of

the property owners within its boundaries signed a petition agreeing to its creation. The resolution creating the District found that its formation would promote the "public convenience, necessity or welfare of the District."

¶3 In recent years, the District identified a need for new water capacity within its boundaries after drought conditions led to loss of the use of three wells, and approximately 400 new lots were added within District boundaries. Accordingly, the District recognized the need for additional wells to supply its water users, including those in Bent Oaks.

¶4 In response to this supply gap, the District took preliminary actions to place a well in Bent Oaks. In 2003, the District purchased Lot 27 in the subdivision. The District chose the site because of its size, the availability of three-phase power, drainage, and its proximity to an unused 500,000 gallon storage tank and booster system. The District drilled a well on the site to test water quality.

¶5 The District's use of Lot 27 was limited by Bent Oaks' Declaration of Reservations, Restrictions, Covenants, and Conditions (CC&Rs). The Bent Oaks CC&Rs restrict the properties in the subdivision to "residential use only" and prohibit "business activities of any kind whatsoever." Pursuant to

Navajo County's Special Development Zoning Ordinance, section 17, zoning is established by the conditions specified in CC&Rs after they are approved and adopted by the Navajo County Planning Commission and the Board of Supervisors. The Bent Oaks CC&Rs became part of the properties' zoning under the Special Development rules on May 1, 1989.[1]

¶6 In May 2004, the Association board refused the District's request for a variance from the zoning restrictions to allow well construction, asserting that it did not have authority to grant such a variance. On August 15, 2007, the District's Board of Directors authorized acquisition of any property rights that required the District to comply with Bent Oaks' CC&Rs. On December 17, 2007, in anticipation of a condemnation action, the Association filed a complaint claiming breach of the CC&Rs and seeking a preliminary injunction. On December 20, the District filed an action to condemn the CC&Rs in order to enable them to build a well on Lot 27, and the trial court consolidated the two cases.

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[1] In its reply brief, the District claims that neither the site plan nor the CC&Rs constitute zoning ordinances. However, the District acknowledged in its opening brief that "[t]he zoning of the land upon which the well is placed is residential" and admitted that "a well site and appurtenant facilities are not permitted under the County's zoning anywhere in the county." Therefore, for purposes of this decision, we assume, without deciding, that the site plan specifications and/or the CC&Rs were adopted by the Board of Supervisors as zoning regulations.

¶7 The trial court began an evidentiary hearing on the consolidated case on May 8, 2008, on the District's application for an order of immediate possession. *See* Ariz. Rev. Stat. (A.R.S.) § 12-1116(H) (Supp. 2009) (requiring finding of "necessary use" before condemnor may be granted possession). Testimony did not conclude by the end of the day. Rather than reschedule a new hearing date, the trial court, with the consent of the parties, decided to rule on the preliminary question whether the District could proceed with condemnation if doing so would violate the applicable zoning regulations.

¶8 After taking the matter under advisement, the court denied the District's condemnation action. The court reasoned that the District's eminent domain powers were limited by the county's zoning restrictions because the District was performing a proprietary function rather than a governmental one, relying on precedent defining a municipality's delivery of water to its inhabitants for a fee as a proprietary function.

¶9 The District filed a special action seeking relief from the order, and we declined jurisdiction on October 28, 2008. On May 27, 2009, the court issued a final order to which the parties had stipulated and from which the District now appeals. The District filed a timely notice of appeal. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

DISCUSSION

¶10 The District argues on appeal that its condemnation of the CC&Rs was lawful because its eminent domain power is not limited by county zoning laws when exercised to discharge its sole purpose of providing water to the District. The Association contends that the superior court correctly held that Navajo County zoning ordinances limit the District's eminent domain power when it is used for water service, which the court found to be a proprietary function. We apply de novo review to "the superior court's interpretation and application of statutory and constitutional provisions." *Egan v. Fridlund-Horne*, 221 Ariz. 229, 232, ¶ 8, 211 P.3d 1213, 1216 (App. 2009). We are bound by the trial court's factual findings unless they are clearly erroneous, *Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, 47, ¶ 9, 156 P.3d 1149, 1152 (App. 2007), or if they combine law and fact "when there is an error as to the law," *Egan*, 221 Ariz. at 232, ¶ 8, 211 P.3d at 1216.

¶11 We begin our analysis by examining both the statutory and constitutional bases for the District's eminent domain power. The District is a county improvement district created pursuant to A.R.S. § 48-901 to -1088 (2000 & Supp. 2009). *See* A.R.S. § 48-903(A) (Supp. 2009) (authorizing petition to establish an improvement district signed "by a majority of the

persons owning real property or by the owners of fifty-one per cent or more of the real property within the limits of the proposed district"); § 48-906(A) (Supp. 2009) (requiring board of supervisors to establish improvement district if petition was signed by requisite number of voters and if it finds that "the public convenience, necessity or welfare will be promoted" by its establishment). Once established, an improvement district is a "body corporate with the powers of a municipal corporation for the purpose of carrying out [Article 1]," which includes the power to "[a]cquire by . . . condemnation . . . any real or personal property or interest in such property necessary or convenient for the construction, operation, and maintenance of any of the improvements provided for by this article." A.R.S. § 48-909(B)(1) (Supp. 2009).

¶12 The District was organized as a domestic water improvement district (DWID), which is a district formed with the purpose of constructing a new domestic water delivery system or improving or purchasing an existing system. A.R.S. § 48-1011(3) (Supp. 2009). A DWID's board of directors is "elected by the qualified electors of the district." A.R.S. § 48-1012(A) (Supp. 2009). The board has all the powers and duties of the board of directors of a county improvement district. A.R.S. § 48-1014(A) (Supp. 2009). These powers are described in A.R.S. §§ 48-909(B)

and -910, and include the authority to order "[t]he acquisition, construction, reconstruction or repair of waterworks for the delivery of water for domestic purposes[.]"

¶13 In addition to its condemnation power granted by the statutory scheme, the District claims that it is entitled to "all the rights, privileges and benefits" granted municipalities and political subdivisions under Article 13, § 7, of the Arizona Constitution because it is a tax levying public improvement district. We agree.

¶14 Article 13, Section 7 provides that:

> Irrigation, power, electrical, agricultural improvement, drainage, and flood control districts, *and tax levying public improvement districts* . . . shall be political subdivisions of the State, and vested with all the rights, privileges and benefits, and entitled to the immunities and exemptions granted municipalities and political subdivisions under this Constitution . . . .

(Emphasis added.) As a county improvement district, the District has the authority to levy taxes. *See* A.R.S. § 48-952 (2000) ("General obligations of the district shall be provided for by the levy and collection of taxes"). Therefore, in addition to its statutory authority, the District also possesses "all the rights, privileges, and benefits" of other political subdivisions, including the sovereign power of eminent domain recognized by Article 2, Section 17, of the Arizona Constitution. *See Hohokam Irrigation & Drainage Dist. v.*

Arizona Pub. Serv. Co., 204 Ariz. 394, 397, ¶ 9, 64 P.3d 836, 839 (2003) (explaining that the plain language of this provision "vests irrigation and other districts with powers and duties equal to the powers and duties conferred on municipalities and political subdivisions."); *see also Pinetop-Lakeside Sanitary Dist. v. Ferguson*, 129 Ariz. 300, 302, 630 P.2d 1032, 1034 (1981) ("The unmistakable language of Article 13, Section 7 grants improvement districts all immunities and exceptions."). The exercise of these powers is only permissible "to the extent they are incidental to and in furtherance of the primary purpose of the [improvement] district." *Hohokam Irrigation*, 204 Ariz. at 399-400, ¶ 23, 64 P.3d at 841-42.[2]

¶15 Having examined the basis for the District's eminent domain powers, we now turn to whether those powers are limited by county zoning ordinances. Arizona law has long held that "a governmental body exercising its power of eminent domain is not bound by zoning ordinances as long as it is acting in its 'governmental capacity' but is bound when acting in its 'proprietary capacity.'" *Tovrea v. Trails End Improvement Ass'n*, 130 Ariz. 108, 109, 634 P.2d 396, 397 (App. 1981) (citing

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[2] Because the District derives its eminent domain power from the Arizona Constitution, we do not address the Association's argument that we should construe A.R.S. § 48-909(B)(7) as impliedly limiting the condemnation authority granted the District by A.R.S. § 48-909(B)(1).

City of Scottsdale v. Municipal Court of Tempe, 90 Ariz. 393, 397, 368 P.2d 637, 641 (1962)). The Association contends that the trial court was correct in holding that the county's zoning ordinance precluded the District's exercise of its eminent domain power because domestic water delivery has historically been considered a proprietary function, rather than a governmental one. The District counters that its eminent domain power is not subject to county zoning regulations because water delivery is its sole function, thus making the purpose for the power's exercise governmental rather than proprietary.[3] We agree with the District's contention because domestic water delivery is the primary public purpose for which a DWID is established, and therefore a function within its governmental capacity.

¶16 Arizona precedents provide a guide for determining whether a political subdivision is acting in a governmental or proprietary capacity. A district exercises a governmental function by acting in the "limited spheres" of its primary

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[3] The District also asks us to adopt authorities from other states holding that the power of eminent domain is a sovereign power inherently superior to zoning ordinances, without regard for the governmental or proprietary nature of the purpose. *See, e.g., State ex rel. Askew v. Kopp*, 330 S.W.2d 882, 888 (Mo. 1960). We do not consider this request because we are bound by contrary Arizona Supreme Court precedent. *See City of Scottsdale v. Municipal Court of Tempe*, 90 Ariz. 393, 397-98, 368 P.2d 637, 641-42 (1962) (applying governmental-proprietary distinction in deciding that Tempe's zoning laws could not be used to prevent Scottsdale from constructing a sewage disposal plant on property located within Tempe's city limits).

public purpose. *See Salt River Project Agr. Imp. & Power Dist. v. City of Phoenix*, 129 Ariz. 398, 401, 631 P.2d 553, 556 (App. 1981) (concluding that "within the limited sphere of its drainage and irrigation function," an improvement district exercised a governmental function). A municipal corporation discharging the state's duty to preserve the public health is "exercis[ing] . . . a purely governmental function." *City of Scottsdale*, 90 Ariz. at 398, 368 P.2d at 640.

¶17 As primary support for its argument that the provision of water by the District is a proprietary rather than a governmental function, the Association relies on *Taylor v. Roosevelt Irrigation District*, 71 Ariz. 254, 258, 226 P.2d 154, 156 (1950). *Taylor* held that an irrigation district was not shielded from liability for negligence in the maintenance of a canal it operated for domestic water distribution, because it was a proprietary function. *Id.* In so finding, the court stated that improvement districts do not act in a governmental capacity when "they are not operated for the direct benefit of the general public but only of those inhabitants of the district itself." *Id.; see also City of Tucson v. Sims*, 39 Ariz. 168, 174, 4 P.2d 673, 675 (1931) (holding that Tucson was entitled to charge more for providing domestic water to persons outside its boundaries than its residents because it operated the water

system in its proprietary capacity); *Flowing Wells Irrigation District v. Tucson*, 176 Ariz. 623, 628, 863 P.2d 915, 917 (Tax 1993) (concluding that an irrigation district "supplying water to urbanites" was exercising a proprietary function, and it could thereby be taxed on its resulting revenue). But the conclusion in each of these cases that the function involved was proprietary was dependent on the specific factual circumstances presented. *See Salt River Project*, 129 Ariz. at 401, 631 P.2d at 556 (concluding that litigant was "ignoring the context of the discussion" in prior cases of differences between an improvement district and a city or town in considering governmental and proprietary functions). For example, *Taylor* involved an issue of governmental immunity from tort liability, *Sims* involved a billing discrepancy between residents and nonresidents of Tucson, and the issue in *Flowing Wells* was whether an *irrigation* district could be taxed on its incidental business of selling water to household consumers. None of these cases involved a question of an improvement district's power of eminent domain or any restrictions on that power.

¶18 Instead, we believe *City of Scottsdale* is more analogous to the circumstances of this case. In that case, Scottsdale owned a sewage plant on land outside its city boundaries that the city of Tempe later annexed. 90 Ariz. at

395, 368 P.2d at 637. Tempe denied Scottsdale's application for a use permit to expand the plant, and then cited Scottsdale for violating its zoning ordinances when Scottsdale continued with the expansion. *Id.* The court held that Scottsdale was not subject to Tempe's zoning law because the function of the sewage disposal plant was governmental rather than proprietary. *Id.* at 397, 368 P.2d at 639. The court reasoned that sewage treatment was a governmental function because it affected "the welfare not only of the citizens[] residing within its corporate limits but of the citizens of the state generally, all of whom have an interest in the prevention and spread of infectious or contagious diseases." *Id.* at 398, 368 P.2d at 640.

¶19 A DWID, organized with the primary public purpose of providing domestic water service, likewise discharges a public health function. Like sewage treatment, domestic water delivery benefits the general public health. It can hardly be denied that the consumption of untreated water can lead to communicable disease, making the delivery of treated water essential to preventing such diseases. The delivery of water free from contamination also prevents the expenditure of state funds to treat and support those who contract chronic ailments caused by such contaminants. *See Salt River Project*, 129 Ariz. at 401, 631 P.2d at 556 (reasoning that improvement districts have both

proprietary and governmental functions, and that they "serve[] a governmental function while engaged in the *primary public purpose* for which [they are] authorized and formed.") (emphasis added).

¶20 As a DWID, the District's legislatively-authorized purpose is constructing or improving a domestic water delivery system, A.R.S. § 48-1011(3), and it is empowered to pursue "construction, operation, and maintenance" of water-related improvements, § 48-909(B)(1). The county resolution establishing the District resolved that it would promote "the public convenience, necessity or welfare" and that it would serve and promote the public health of the District's inhabitants. In this case, the District's installation of a well to add domestic water capacity to the system is clearly related to the reason for which it was established.

¶21 Accordingly, we hold that the exercise of a DWID's eminent domain powers to improve a domestic water system is a governmental function because it is within the legislatively-authorized primary public purpose of a DWID. The District's condemnation in this case accomplishes that purpose by acquiring property to build a well to provide safe water to its residents. The District's condemnation power, whether viewed as an exercise of its eminent domain power under the constitution or its

statutory authority, is therefore not subject to the county's zoning regulations. The trial court erred by concluding otherwise.

¶22 Our holding does not mean that a county improvement district's eminent domain authority is limited only by the "public use" and "necessity" requirements as set forth in Article 2, § 17 and A.R.S. § 12-1116(H), respectively. *See also* A.R.S. § 12-1112 (2003); *City of Phoenix v. Superior Court, Maricopa County,* 137 Ariz. 409, 411-12, 671 P.2d 387, 389-90 (1983) (explaining that a municipality's determination of necessity may be overturned if arbitrary or capricious). Rather, as a threshold matter, an improvement district may only exercise its powers of condemnation "to the extent they are incidental to and in furtherance of the primary purpose of the [improvement] district." *Hohokam Irrigation*, 204 Ariz. at 399-400, ¶ 23, 64 P.3d at 841-42. Here, the District's condemnation of property rights to install a well is appropriately characterized as governmental in nature because its action is legitimately related to the reason for which it was organized. *See id.* at 399, ¶ 22, 64 P.3d at 841 (limiting an improvement district's Article 13, Section 7 powers "only so far as they have a legitimate relationship to the legal objectives for which the District is organized").

CONCLUSION

¶23 For the foregoing reasons, we vacate the trial court's decision and remand for further proceedings consistent with this decision.

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
JOHN C. GEMMILL, Judge

WEISBERG, Judge concurring.

¶24 I write separately because, although I agree with the result reached by the majority, I do not agree that such result should be reached by comparing the District's right of eminent domain with the enforceability of a county zoning ordinance. The record here only involves the association's assertion that its CC&Rs cannot be condemned by the District. I disagree with that assertion because of those eminent domain powers of the District as articulated by the majority.

¶25 However, even if the same restrictions set forth in the relevant CC&Rs have been adopted by Navajo County, the county is not a party here and apparently has not attempted to enforce its zoning regulations, if applicable. Nor does the record reflect that the Association may act as agent for Navajo

County in the enforcement of zoning regulations. The record only reflects the Association's authority to enforce its CC&Rs.

¶26 Therefore, I conclude that any reference to the possible enforcement of Navajo County's zoning regulations is not pertinent here, and that Navajo County's power to enforce its zoning regulations is not prejudiced by our decision. *See Daystar Inv.s v. Maricopa County,* 207 Ariz. 569, 572, ¶ 15, 88 P.3d 1181, 1184 (App. 2004) (holding that County Treasurer not required to comply with court order to issue deed to Daystar, which acquired property in a foreclosure action because Treasurer not a party to the action and was not bound by the judgment).

_/s/______________________________________
SHELDON H. WEISBERG, Presiding Judge