DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ASPEN 528, LLC,	)	1 CA-CV 11-0512
	)	
Plaintiff/Appellant,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
CITY OF FLAGSTAFF, ARIZONA,	)	Rule 28, Arizona Rules
	)	of Civil Appellate
Defendant/Appellee.	)	Procedure)
	)	
	)	

Appeal from the Superior Court in Coconino County

Cause No. S0300CV201000795

The Honorable Joseph J. Lodge, Judge

AFFIRMED

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T H O M P S O N, Judge

¶1 Aspen 528, LLC (Aspen) appeals from the dismissal of its complaint against the City of Flagstaff (Flagstaff) for compensation for the loss in value of its property caused by a city ordinance. We affirm for the following reasons.

FACTS AND PROCEDURAL HISTORY

¶2 The underlying facts are not in dispute. On June 19, 2007, Flagstaff adopted Ordinance No. 2007-34 (the ordinance), which imposed strict regulations on development within an area designated as the "historic district." Aspen's property is located in the district. Paul Turner, Aspen's only shareholder, was hoping to build his retirement home on the property, but the ordinance prevented him from doing so as planned.

¶3 Turner wrote a letter to Flagstaff on June 20, 2007, demanding just compensation for the loss in value of the property as a result of the ordinance. *See* Ariz. Rev. Stat. (A.R.S.) §§ 12-1131 to -1138 (Supp. 2012).[1] Because Flagstaff did not respond, Turner filed a complaint in October 2007. Flagstaff moved to dismiss, arguing that Turner was not title owner of the property and had not filed a notice of claim within 180 days pursuant to A.R.S. § 12-821.01 (2003). The trial court

[1] We cite to the current version of applicable statutes when no revisions material to this decision have occurred.

dismissed his complaint, and he appealed in *Turner v. City of Flagstaff*, 226 Ariz. 341, 247 P.3d 1011 (App. 2011). Turner then moved to amend his complaint to substitute Aspen as the proper plaintiff, but his motion was automatically stayed by the appeal in that case.

¶4 Meanwhile, out of concern for the three-year statute of limitations under A.R.S. § 12-1134(G) (the statute of limitations), Aspen sent its own demand letter to Flagstaff on May 18, 2010. Flagstaff did not respond to Aspen's demand. On September 15, 2010, Aspen filed this complaint, stating that Turner's motion to amend and substitute Aspen as plaintiff had been denied, so Aspen was now filing "pursuant to Arizona Revised Statute Annotated section 12-504(D) . . . as a proper Plaintiff."

¶5 Flagstaff moved to dismiss Aspen's complaint, arguing that the statute of limitations had expired in June 2010, and Aspen's attempt to invoke § 12-504 (2003) (the savings statute) was premature because dismissal of Turner's complaint was pending appeal. The trial court granted Aspen's request to stay litigation in this case pending the decision in *Turner* and took the matter under advisement.

¶6 In March 2011, this Court held in *Turner* that Aspen, not Turner, was the owner of the property, so Turner's demand letter failed to satisfy the notice of claim requirements of

both A.R.S. §§ 12-821.01 and -1134. *Turner*, 226 Ariz. at 343-44, ¶¶ 12, 17, 247 P.3d at 1013-14. We vacated the dismissal and remanded for the trial court to determine Turner's motion to amend his notice of claim, noting that the determination may implicate other issues including the statute of limitations under § 12-1134(G) and the savings statute under § 12-504. *Id.* at 344 n.4, ¶ 16, 247 P.3d at 1014 n.4. In May 2011, on remand, the parties stipulated to dismiss Turner's complaint and it was dismissed with prejudice without leave to file a new complaint.

¶7 Meanwhile, in this case, Flagstaff again moved to dismiss Aspen's complaint because Aspen's arguments about the notice of claim contradicted the holding in *Turner.* Aspen objected to dismissal, arguing that it did not have to comply with the notice provisions of § 12-821.01 because its demand letter was sufficient notice under § 12-1134(E). Aspen also argued that the three-year statute of limitations was tolled because it had to wait ninety days for Flagstaff to review its demand letter before it could file an action.

¶8 The court dismissed Aspen's complaint for failure to comply with the notice of claim provisions of § 12-821.01. Aspen timely appealed.

DISCUSSION

¶9 We review the grant of a motion to dismiss de novo when it involves questions of law. *Coleman v. City of Mesa,* 230

Ariz. 352, 355-56, ¶ 7, 284 P.3d 863, 866-67 (2012). Aspen argues that the trial court erred in dismissing its complaint for failure to comply with § 12-821.01's notice of claim requirements. While this appeal was pending, the Arizona legislature passed House Bill 2319, which amended § 12-821.01 to clarify, in response to *Turner*, that the notice of claim statute does not apply to property claims under § 12-1134. *See* 2012 Ariz. Sess. Laws, ch. 110, § 2 (applying retroactively to claims accruing on or after July 17, 1994). Citing the new law, Aspen moved to "reverse" this appeal.

¶10 We denied Aspen's motion, noting that issues concerning the three-year statute of limitations under A.R.S. § 12-1134(G) and the savings statute remained unresolved. We ordered supplemental briefing on those issues and now address them, because we may affirm the trial court's grant of a motion to dismiss if it is correct for any reason.[2] *See Old Rep. Nat. Title Ins. Co. v. New Falls Corp.*, 224 Ariz. 526, 530, ¶ 19, 233 P.3d 639, 643 (App. 2010).

¶11 The Arizona Private Property Rights Protection Act provides a three-year statute of limitations as follows:

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[2] We deny Aspen's motion to strike and to disregard pages eleven to thirteen of Flagstaff's supplemental brief because it exceeded the page limits of this court's order for supplemental briefing and the Arizona Rules of Civil Appellate Procedure (ARCAP).

> An action for just compensation based on diminution in value must be made or forever barred within three years of the effective date of the land use law, or of the first date the reduction of the existing rights to use, divide, sell or possess property applies to the owner's parcel, whichever is later.

A.R.S. § 12-1134(G).

¶12 Aspen failed to file its complaint within three years pursuant to § 12-1134(G). Aspen has known about damages to its property since the ordinance passed on June 19, 2007, but asserts that the ordinance took effect on June 27, 2007. From either date, the statute of limitations expired in June 2010. Aspen did not file a complaint until September 15, 2010. Barring a tolling period, Aspen's action is thus time-barred.

¶13 Aspen argues that the statute of limitations was tolled because § 12-1134(E) requires a plaintiff to wait ninety days for a response before a demand for compensation is deemed denied and a cause of action accrues.[3] We disagree.

¶14 Unlike the one-year statute of limitations for actions against a public entity, § 12-1134(G) does not mention accrual. *Cf.* A.R.S. § 12-821 (2003) ("All actions against any public entity or public employee shall be brought within one year after

[3] Section 12-1134(E) states: "If a land use law continues to apply to private real property more than ninety days after the owner of the property makes a written demand . . . the owner has a cause of action for just compensation . . . ."

the cause of action accrues and not afterward."). Rather, by the plain language of § 12-1134(G), the three-year limitations period begins to run upon "the effective date of the land use law, or of the first date the reduction of the existing rights to use, divide, sell or possess property applies to the owner's parcel, whichever is later." Accordingly, the accrual of Aspen's claim did not toll the three-year limitations period.

¶15 Aspen, however, contends that under the savings statute, as a proper plaintiff, it was automatically entitled to relief from the statute of limitations. Specifically, Aspen argues that pursuant to § 12-504(D), "the *only* statutory requirement" is that Flagstaff had notice of the claim through the dismissal of Turner's complaint. We disagree that the savings statute saves its claim.

¶16 We review issues of statutory construction de novo with the goal of giving effect to legislative intent. *Short v. Dewald*, 226 Ariz. 88, 93-94, ¶ 26, 244 P.3d 92, 97-98 (App. 2010) (citations omitted). When statutory language is clear and unambiguous, it is conclusive unless clear, contrary legislative intent exists or it would lead to impossible or absurd results. *Id.* at 94, ¶ 26, 244 P.3d at 98 (citation omitted). "[W]hen construing a statute, 'we examine its individual provisions in the context of the entire statute to achieve a consistent interpretation.'" *Id.* (interpreting A.R.S. § 12-504(A) and (C)

together) (quoting *State v. Gaynor-Fonte*, 211 Ariz. 516, 518, ¶ 13, 123 P.3d 1153, 1155 (App. 2005)).

¶17 Sections 12-504(A) and (D) provide as follows:

> A. If an action is commenced within the time limited for the action, and the action is terminated in any manner *other than by . . . voluntary dismissal* . . . the plaintiff, or a successor or personal representative, may commence a new action for the same cause after the expiration of the time so limited and within six months after such termination. If an action timely commenced is terminated by . . . *voluntary dismissal by order of the court . . . the court in its discretion may provide* a period for commencement of a new action for the same cause, although the time otherwise limited for commencement has expired. Such period shall not exceed six months from the date of termination.
>
> . . . .
>
> D. If an action timely commenced is dismissed because the named plaintiff is not the proper party to bring the action, *the provisions of this section apply to an action subsequently brought by the proper party*, provided that the dismissed action was sufficient to put the defendant on notice of the claim sought to be asserted.

(Emphasis added.)

¶18 Applying its plain meaning, the first sentence of subsection A provides relief from the statute of limitations within a six-month window only if the prior case was terminated in a "manner other than by voluntary dismissal," and the new action is brought by the plaintiff, his successor in interest or

a representative. A.R.S. § 12-504(A). The second sentence states that if the prior action was terminated by "voluntary dismissal by order of the court," the trial court has discretion to grant a period within six months to file a new action. Subsection D expressly applies these provisions "to an action subsequently brought by the proper party." A.R.S. § 12-504(D).

¶19 Read together, subsections A and D required Aspen to request leave of court to file a new complaint after the limitations period because Turner's case had been voluntarily dismissed by court order, and the trial court had discretion to grant or deny the request.[4] In other words, once the limitations period had passed and Turner's complaint had been voluntarily dismissed, Aspen could only file a new action at the court's discretion. *See Jepson v. New*, 164 Ariz. 265, 273, 792 P.2d 728, 736 (1990) (stating it is significant that relief is "discretionary as opposed to automatic" when a prior action was

[4] Aspen contends that dismissal was involuntary because the holding in *Turner* left it no choice but to dismiss the prior action. We disagree. In *Turner,* we vacated the dismissal and remanded for determination of Turner's motion to amend the notice of claim. 226 Ariz. at 344, ¶ 17, 247 P.3d at 1014. In doing so, we specifically declined to address any issues regarding the savings statute or the statute of limitations. *Id.* at ¶ 16. Moreover, Aspen stipulated to dismiss the prior action. A "stipulation" is, by definition, a "voluntary agreement between opposing parties" in a proceeding. Black's Law Dictionary 1455 (8th Ed. 2004). Because a stipulation is "binding without consideration," we will not now address the reasons for voluntary dismissal of the prior complaint. *Id.*

voluntarily dismissed because discretionary relief requires a showing of diligence); *Roller Village, Inc. v. Superior Court (Dow)*, 154 Ariz. 195, 197, 741 P.2d 328, 330 (App. 1987) (stating that the court's discretion to grant a period within six months to file a new complaint implies that it had discretion to deny a new action). Aspen never asked the court for permission to file a new complaint; that failure was compounded by its lack of diligence in avoiding the statute of limitations in the first instance. Under these circumstances, the dismissal of Aspen's claim was not error. *See Glaze v. Marcus*, 151 Ariz. 538, 540, 729 P.2d 342, 344 (App. 1986) ("We will affirm the trial court's decision if it is correct for any reason, even if that reason was not considered by the trial court.").

CONCLUSION

¶20 For these reasons, we affirm the dismissal of Aspen's complaint.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

DIANE M. JOHNSEN, Presiding Judge

/s/

DONN KESSLER, Judge