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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 3/14/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

KEVIN LITTON and ELAINE LITTON,) No. 1 CA-CV 12-0012
husband and wife; ALEXIS J., LLC,)
an Arizona limited liability) DEPARTMENT B
company,)
Plaintiffs/Appellants,) **MEMORANDUM DECISION**
)
v.) (Not for Publication -
) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
CITY OF PHOENIX, a political)
subdivision of the State of)
Arizona; PHIL GORDON, duly elected)
Mayor of City of Phoenix; THELDA)
WILLIAMS, vice Mayor of City of)
Phoenix/duly elected councilwoman;)
BRYAN JEFFRIES, duly elected)
councilman; BILL GATES, duly)
elected councilman; TOM SIMPLOT,)
duly elected councilman; CLAUDE)
MATTOX, duly elected councilman;)
SAL DICICCIO, duly elected)
councilman; MICHAEL NOWAKOWSKI,)
duly elected councilman; and)
MICHAEL JOHNSON, duly elected)
councilman,)
Defendants/Appellees.)
_____)
)
HOWARD TAYLOR dba ARIZONA GOLD)
EXCHANGE, INC., an Arizona)
corporation,)
Real Party in Interest.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CV2011-014526

The Honorable Arthur T. Anderson Judge

AFFIRMED

Baker & Baker By Thomas M. Baker Attorney for Plaintiff/Appellant	Phoenix
Burch & Cracchiolo, P.A. By Andrew Abraham Randall D. Wilkins Attorneys for Defendants/Appellees	Phoenix
Cantelme & Brown, P.L.C. By David J. Cantelme D. Aaron Brown Samuel Saks Attorneys for Real Party/Appellee Taylor	Phoenix

G O U L D, Judge

¶1 Plaintiffs Kevin and Elaine Litton and Alexis J., LLC, appeal from the superior court's judgment dismissing their cause of action against Defendants the City of Phoenix ("City") and its mayor and city council members (collectively, "City Council") and real party in interest Howard Taylor doing business as Arizona Gold Exchange, Inc. ("AGE"). Plaintiffs contend they were entitled to injunctive and declaratory relief because the City Council abused its discretion in passing a rezoning ordinance Taylor requested allowing him to operate an AGE pawn shop within 500 feet of residential property. For the following reasons, we conclude that the superior court properly

deferred to the City Council's discretion in passing the ordinance; thus, we affirm.

BACKGROUND

¶2 Taylor owns and operates two AGE pawn shops in Phoenix. Desiring to open a new AGE store on the C-2 zoned northwest corner of Cave Creek and Greenway Roads ("Parcel") in a mostly vacant strip mall that is thirty to forty feet from neighboring property, Taylor applied for a variance from the City's zoning ordinance standard that requires pawn shops to be located no less than 500 feet from a residential development. See City of Phx. Zon. Ord. ("Zoning Ordinance") § 623.D.132 (2012).¹ A City of Phoenix Zoning Adjustment Hearing Officer conducted a public hearing on Taylor's variance application and denied it on January 6, 2011. Taylor appealed to the Board of Adjustment ("Board"), which on March 3, 2011 upheld the hearing officer's decision to deny the variance.

¶3 Taylor subsequently applied to the City Council to rezone the Parcel from C-2 commercial to a Planned Unit Development ("PUD") district. See City of Phx. Zon. Ord. § 671 (2012) (describing purpose, applicability, permitted uses and

¹ This ordinance's renumbering became effective after the parties filed their briefs in this matter. See <http://www.codepublishing.com/AZ/phoenix/>. Because the ordinance remained otherwise materially unchanged, we cite its current version.

application requirements for a PUD). The City's Planning Commission and the Paradise Valley Village Planning Committee approved the application. At a public hearing conducted on July 6, 2011, the City Council received comments from local residents both supporting and opposing Taylor's application. The City Council voted 7-2 in support of the application. Accordingly, that same day the City Council passed Ordinance G-5640 reclassifying the Parcel from C-2 to a PUD and thereby amending the City's zoning ordinance and map. Pursuant to Arizona Revised Statutes ("A.R.S.") section 9-462.04(J) (West 2012), Ordinance G-5640 became effective on August 6, 2011.

¶4 Meanwhile, Plaintiffs, who are residents living next to the Parcel and a local owner of nearby commercial property that is leased to a pawn shop competitor of AGE, filed a "Verified Complaint for Declaratory [sic] Relief and Special Action Injunctive Relief" on August 5, 2001.² Plaintiffs sought a temporary restraining order pending a preliminary injunction enjoining enforcement of Ordinance G-5640 and enjoining Taylor from operating AGE on the Parcel. Focusing on the Parcel's location within 500 feet of a residential district, Plaintiffs argued the City Council, by passing Ordinance G-5640, usurped

² Plaintiffs subsequently filed an amended complaint that merely substituted RBS Investments with Specialty Development as the then-current owner of the Parcel and a named real party in interest.

the Board's authority in deciding appeals in zoning variance cases, and alleged the ordinance was unlawful because it was inconsistent with the city's general development plan ("General Plan")³ and violated various provisions of the City's zoning code. Taylor and Defendants responded and moved to dismiss, arguing Plaintiffs were limited to a remedy at law, not equitable relief, because Ordinance G-5640 had gone into effect, and in any event, Plaintiffs could not succeed on the merits because the City Council had properly exercised its discretion in passing Ordinance G-5640.

¶5 The court held a three-day evidentiary hearing commencing on August 30, 2011 at which the Plaintiffs, their expert and Taylor testified, and the transcripts from the City Council's July 6, 2011 public hearing were admitted into evidence. At the conclusion of the Plaintiffs' case, Defendants and Taylor orally moved for judgment as a matter of law.⁴ On September 27, 2011, the court issued a detailed minute entry ruling and found no legal merit to Plaintiffs' challenge to

³ Arizona Revised Statutes section 9-462.01(F) states: "All zoning and rezoning ordinances or regulations adopted under this article shall be consistent with and conform to the adopted general plan of the municipality[.]"

⁴ Because the record on appeal does not contain the transcripts from the evidentiary hearing, we are unable to discern the specific arguments made in connection with the motion. The court, however, treated the dispositive motions as motions for summary judgment because it considered evidence that was extrinsic to the complaint.

Ordinance G-5640 and consequently denied the requested injunctive and declaratory relief. The court entered a signed judgment dismissing this action, and Plaintiffs timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1) (West 2012).

DISCUSSION

¶6 As they did in superior court, Plaintiffs raise various arguments challenging the City Council's decision to rezone the Parcel from C-2 commercial to a PUD. None of these arguments persuade us to conclude the court reversibly erred in dismissing Plaintiffs' cause of action.

¶7 We defer to a superior court's findings of fact unless clearly erroneous, but we review its conclusions of law *de novo*. *City of Casa Grande v. Arizona Water Co.*, 199 Ariz. 547, 20 P.3d 590 (App. 2001)

¶8 When presented with a challenge to a zoning ordinance, Arizona courts begin with the presumption that the ordinance is valid. See *Peabody v. City of Phoenix*, 14 Ariz. App. 576, 580, 485 P.2d 565, 569 (1971). This presumption arises from the deference that courts afford, under separation of powers principles, legislative bodies responsible for passing such regulations. See *id.* "Absent a showing that the reasonableness of [the challenged] ordinance is not fairly debatable, it must be upheld." *Id.* Thus, "it is . . . the function of this court

to determine whether the record shows a reasonable basis for the action of the zoning authorities, and if the reasonableness of the ordinance is fairly debatable, the legislative determination will not be disturbed." *Dye v. City of Phoenix*, 25 Ariz. App. 193, 194, 542 P.2d 31, 32 (1975).

¶9 Although Plaintiffs present a variety of specific arguments challenging the City Council's rezoning decision, the thrust of their argument is that Ordinance G-5640 is invalid because it does not comport with the City's General Plan. Specifically, Plaintiffs point to the General Plan's stated goal to "protect residents from incompatible land uses." Plaintiffs argue that because the proposed AGE pawn shop location is not more than 500 feet from neighboring residential property as required by Zoning Ordinance § 623.D.132, the Parcel cannot permissibly be used as a pawn shop. We disagree.

¶10 We initially note that Plaintiffs misapprehend the General Plan's purpose in guiding the City's zoning decisions. Its purpose is not to mandate strict requirements, but rather to provide broad guidelines. For example, the General Plan recognizes that it merely "provides general guidance to more detailed decisions. Elected officials must prioritize and balance many desirable actions with available resources, legal constraints and market conditions. It is the responsibility of the City Council to interpret the General Plan to resolve any

ambiguities or inconsistencies among its parts." Further, the General Plan states:

The General Plan contains goals, policies and recommendations. Goals are the ultimate accomplishment towards which the city's actions should be directed. The goals in this plan may not be entirely achievable, nor are they considered to be of equal importance. However, they are meant to provide direction for Phoenixians rather than being a final decision. . . . It is not expected that all goals . . . will be achieved within . . . any specific time frame, due to funding limitations and the need to set priorities.

In addition to the stated goal prohibiting incompatible land uses, the General Plan also expresses that the City "should maintain a high quality of life and an economically healthy community."

¶11 In *Haines v. City of Phoenix*, this court held that, although a rezoning ordinance allowing a 500-foot commercial building on the subject parcel "surpassed by a large margin the 250-foot height restriction" otherwise applicable under the parcel's C-2H-R zoning classification, the rezoning was nonetheless "in basic harmony" with the general plan because the City Council considered evidence establishing that the rezoning would accomplish other goals in the general plan. 151 Ariz. 286, 290-91, 727 P.2d 339, 343-44 (App. 1986).

¶12 Similarly, here the City Council had evidence that the geographic area surrounding the Parcel was struggling

economically, and Taylor's proposed development would revitalize the entire strip mall, not just the pawn shop's specific location, and bring substantial economic benefits to the area and its residents. The evidence also showed that Taylor was involved in the local community, and the AGE pawn shop would be limited to dealing in precious metals not other transactions that typify pawn shops. Further, the Planning Commission and the local Village Planning Committee, in addition to some local residents, recommended the City Council approve Taylor's rezoning request. Because this evidence furthers the General Plan's goal of maintaining a community's economic health, we agree with the superior court that the evidence supports the City Council's determination that Ordinance G-5640 was in basic harmony with the General Plan. See *Haines*, 151 Ariz. at 291, 727 P.2d at 344.⁵

¶13 We also reject Plaintiffs' assertion that by passing Ordinance G-5640, the City Council passed an unlawful variance and usurped the Board's authority. Ordinance G-5640 was not the result of Taylor's request for a variance but his request that the Parcel be rezoned, which is a determination that can only be

⁵ For this reason, we also reject Plaintiffs' argument that Ordinance G-5640 constituted illegal spot zoning. See *Haines*, 151 Ariz. at 291, 727 P.2d at 344 (holding that because zoning amendment granted by the city council was in compliance with the general plan of the city, the amendment did not constitute illegal spot zoning).

made by the City Council, not the Board. See Zoning Ordinance §303(B)(2)(1) (Board specifically prohibited from changing terms of the Zoning Ordinance except for granting of variances). Although the Board rejected Taylor's request for a variance, we know of no authority that prohibited Taylor from seeking a PUD. Further, Plaintiffs provide no authority supporting the proposition that the City Council, when determining a request for rezoning a parcel for which the Board previously denied a variance, must defer to the Board's decision.

¶14 Moreover, Ordinance G-5640 did not "usurp" the statutory authority of the Board because Taylor was not required to appeal the Board's denial of his request to the superior court. Ordinance 303 provided that an appeal from the Board's decision "may" occur by filing a complaint or action in the superior court, but does not state that such an appeal is the exclusive way to dispute the Board's decision. Ordinance 671 describes an alternative way to effect change: by applying for a PUD district.

¶15 Finally, we disagree with Plaintiffs' assertion that Taylor's application to rezone the Parcel as a PUD afforded insufficient notice because the application failed to disclose the intent to allow a pawn shop within 500 feet of residential property. We disagree. The sufficiency of the application is borne out by the fact the Littons (and their counsel) appeared

at the July 6, 2011 public hearing before the City Counsel and expressed their opposition to Taylor's request to operate the AGE pawnshop within 500 feet of the Littons' property.

¶16 We also agree with the superior court's rejection of Plaintiffs' argument that Ordinance G-5640 is unlawful because it allows the Parcel to be developed for an impermissible use, i.e. operation of a pawn shop within 500 feet of a residentially zoned parcel. As the court correctly noted, Zoning Ordinance § 671 states that a PUD may be used for "[a]ny permitted use which is described in the Phoenix Zoning Ordinance Uses may include permitted, permitted with conditions, temporary or accessory uses." Zoning Ordinance § 671.C. Because the Parcel had been zoned as a C-2 commercial district, operation of a pawn shop thereon was a permitted use. See Zoning Ordinance § 623.D.132. Thus, contrary to Plaintiffs' argument, the 500 foot buffer zone requirement does not relate to a pawn shop's designation as a "permitted" use under the PUD ordinance; instead, it fits under the "permitted with conditions" category for which PUD zoning designations may be utilized. This conclusion is consistent with the purpose of a PUD ordinance:

The Planned Unit Development (PUD) is intended to create a built environment that is superior to that produced by conventional zoning districts and design guidelines. Using a collaborative and comprehensive approach, an applicant authors and proposes standards and guidelines that are tailored

to the context of a site on a case by case basis.

Zoning Ordinance § 671(A).

¶17 We conclude that, on this record,⁶ although the City Council was presented with objections to Taylor's requested rezoning of the Parcel to allow operation of a pawn shop within 500 feet of neighboring residents, the City Council's reasonableness in passing Ordinance G-5640 was at least "fairly debatable." See *Peabody*, 14 Ariz. App. at 580, 485 P.2d at 569. Accordingly, the superior court was required to defer to the City Council's decision to pass Ordinance G-5640. See *id.* Plaintiffs' claims failed as a matter of law, thus the court properly dismissed this case.

¶18 Because we affirm the trial court's decision, we do not reach the cross-issues of waiver, lack of a remedy in equity, or standing raised by Taylor.⁷

⁶ We note that the transcripts from the evidentiary hearing conducted by the superior court are not in the record on appeal. We assume, therefore, that the testimony at that hearing also supports the court's findings. See *BAC Home Loans Servicing, LP v. Semper Invs. L.L.C.*, ___ Ariz. ___, ___, ¶ 5, 277 P.3d 784, 787 (App. 2012).

⁷ Regardless, we do not reach Taylor's arguments regarding standing, given the fact the portions of Taylor's brief that raise this issue (pages 44-46) were stricken pursuant to our order on September 26, 2012.

CONCLUSION

¶19 The judgment dismissing this action is affirmed. Plaintiffs and Taylor request their attorneys fees incurred on appeal. Because Plaintiffs are not the prevailing party, we deny their request. Pursuant to A.R.S. § 12-348(A)(2) (West 2012), we award Taylor his fees and costs in an amount to be determined upon his compliance with ARCAP 21.

/S/

ANDREW W. GOULD, Judge

CONCURRING:

/S/

PATRICIA K. NORRIS, Presiding Judge

/S/

RANDALL M. HOWE, Judge