IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

TALKING ROCK LAND, LLC, *Plaintiff/Appellee*,

v.

INSCRIPTION CANYON RANCH SANITARY DISTRICT, et al.,
Defendants/Appellants.

No. 1 CA-CV 19-0284
FILED 1-9-2020

Appeal from the Superior Court in Yavapai County
No. P1300CV201800380
The Honorable John David Napper, Judge

AFFIRMED

COUNSEL

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By Hans Clugston
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MEMORANDUM DECISION

Judge David B. Gass delivered the decision of the Court, in which Acting Presiding Judge David D. Weinzweig and Chief Judge Peter B. Swann joined.

G A S S, Judge:

¶1 Inscription Canyon Ranch Sanitary District, Al Poskanzer, and Bob Hilb (collectively, the District) appeal the superior court's ruling and fee award for Talking Rock Land, LLC (Talking Rock). This case concerns the District's denial of Talking Rock's request for sewer services to Sterling Ranch, a new housing development. Talking Rock claimed the District's denial was an improper moratorium under A.R.S. § 48-2033. The superior court agreed and awarded attorney fees to Talking Rock as the prevailing party. Because substantial evidence supports the superior court's factual findings and the superior court did not abuse its discretion in awarding fees, the judgment is affirmed.

FACTUAL AND PROCEDURAL HISTORY

¶2 The District is an Arizona sanitary district established to regulate, purchase, establish, construct, and operate a sewerage system. *See* A.R.S. § 48-2001. Talking Rock owns a master planned community in an area of Yavapai County where the District is the exclusive sewer services provider. Over several years, Talking Rock developed Sterling Ranch and scheduled a public sale of forty-five lots to begin in June 2018.

¶3 Under Arizona Department of Environmental Quality regulations, the District must sign three forms before Yavapai County can approve Talking Rock's development plat. *See* A.A.C. R18-9-A301(B); R18-9-E301(C). The forms are a notice of intent to discharge (notice) and two capacity assurance approvals: an input flow capacity assurance approval (flow assurance); and a treatment facility capacity assurance approval (treatment assurance) (collectively, the capacity assurance approvals). The issue in this case centers on the notice and treatment assurance forms.

¶4 In March 2018, Talking Rock submitted all three forms. The District scheduled its review of the capacity assurance approvals on the District's March 30, 2018 meeting agenda. The notice was not listed on the agenda. Shortly after that meeting began, the board went into executive session. When the board returned to public session, the board voted

unanimously to proceed regarding Talking Rock's request "as advised in executive session." No public debate occurred. The board gave no further explanation of what the vote meant. When Talking Rock's representative questioned the vote during the meeting, the board chair simply said the forms "would not be signed at this time." Mr. Poskanzer then began to explain the board's position and the board chair asked him "not to elaborate any further." Mr. Poskanzer next suggested that someone go speak with Talking Rock's representative. The board chair responded "that the discussion regarding the matter was closed."

¶5 In late April 2018, Talking Rock filed suit alleging the District's refusal to sign the forms created a moratorium in violation of A.R.S. § 48-2033, and the District violated Arizona's open meeting laws. Talking Rock requested an emergency show cause hearing. The District responded that it did not and could not approve the forms because (1) Talking Rock had submitted incomplete and inaccurate information (the form issue), and (2) the treatment facility lacked the necessary capacity (the capacity issue).

¶6 In early May 2018, the superior court held a show cause hearing. At the show cause hearing, counsel for Talking Rock said the superior court could resolve both issues without the need for witnesses or evidence. Talking Rock also said it was willing to dismiss the case if the District would specify what was incorrect or incomplete on the forms. In response, the District said regardless of the form issue, it still needed an evidentiary hearing to resolve the capacity issue. Ultimately, the parties agreed to resolve the form issue without further superior court involvement, and the superior court agreed to hold an evidentiary hearing solely on the capacity issue.

¶7 When the superior court set the evidentiary hearing, it warned the parties "attorney's fees and costs are going to be a part of this litigation." Several weeks before the evidentiary hearing, the District asked the superior court to vacate the evidentiary hearing. The superior court denied the request because none of the reasons the District gave related to the capacity issue—the sole question for the evidentiary hearing.

¶8 During the evidentiary hearing, the District's witnesses and documents—including its website—established that adding the forty-five Sterling Ranch lots presented no problem for the treatment plant's capacity. The capacity issue instead resulted from the District's improper use of "the most conservative operational mode." The board chair further confirmed the board did not review Talking Rock's notice when the District decided

to deny Talking Rock's request because the board had "tak[en] a position that we cannot" approve requests from Talking Rock or any other developer.

¶9 The superior court concluded the District "had the obligation to make sure that it didn't find itself in this position, and now they've decided not to sign a single request from anybody, and if that isn't a moratorium, I don't know what is." The superior court gave the District thirty days to review and sign Talking Rock's forms—as revised based on the parties' resolution of the form issue—or "put the reasons they have not been signed on the record in public" for the superior court to review. The board timely signed Talking Rock's forms.

¶10 Talking Rock submitted a request for attorney fees under A.R.S. § 48-2033(F). In the superior court's final ruling, it found the evidentiary hearing unnecessary, declared Talking Rock the prevailing party, and awarded attorney fees limited to work conducted for the unnecessary evidentiary hearing.

¶11 The District timely appealed, alleging three errors: (1) no moratorium existed because the District had not engaged in a "pattern or practice" as required under A.R.S. § 48-2033(G)(2)(a); (2) the case was moot once the District signed Talking Rock's forms; and (3) the award of attorney fees was improper because Talking Rock did not prevail on the case as a whole.

ANALYSIS

¶12 This court is not bound by a superior court's conclusions of law and instead reviews those conclusions *de novo*. *See SAL Leasing, Inc. v. State ex rel. Napolitano*, 198 Ariz. 434, 438, ¶ 13 (App. 2000). A superior court's findings of fact, however, are reviewed for abuse of discretion. *Great W. Bank v. LJC Dev., LLC*, 238 Ariz. 470, 478, ¶ 22 (App. 2015). This court will adopt a superior court's factual findings unless they are clearly erroneous, even in the face of conflicting evidence, if substantial evidence supports the court's findings. *See id.* Abuse of discretion "is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Quigly v. Tucson City Ct.*, 132 Ariz. 35, 37 (1982).

I. The District waived its "pattern or practice" argument.

¶13 The District argues for a *de novo* review, saying the superior court misinterpreted the plain language of A.R.S. § 48-2033(G)(2)(a). In response, Talking Rock argues the District waived this issue because it did

not raise the argument before the superior court. *See Cont'l Lighting & Contracting, Inc. v. Premier Grading & Utils., LLC*, 227 Ariz. 382, 386, ¶ 12 (App. 2011), *as corrected* (June 1, 2011); *Schurgin v. Amfac Elec. Distrib. Corp.*, 182 Ariz. 187, 190 (App. 1995). Talking Rock is correct.

¶14 In its reply brief, the District argues it could not raise its "pattern or practice" argument until after the superior court found a moratorium existed. The District relies on *Resolution Trust Corp. v. Foust*, 177 Ariz. 507 (App. 1993) and *Northwest Land & Investment, Inc. v. New West Federal Savings & Loan Ass'n*, 827 P.2d 334 (Wash. Ct. App. 1992). Those cases do not support the District's argument. *Resolution Trust* found no waiver for an assignee who was not previously a party to the litigation. *See* 177 Ariz. at 518-19. *Northwest Land* found a waiver because the party "had several opportunities prior to entry of judgment to raise" an issue, but did not. 827 P.2d at 338.

¶15 As in *Northwest Land*, the District had ample opportunity to raise its "pattern or practice" argument with the superior court. In particular, the superior court's November 2018 ruling expressly concluded, "[b]y any standards, [the District's conduct] meets the definition of engaging in a pattern or practice of delaying or stopping the issuance of permits, authorizations or approvals necessary for a subdivision." The District responded with a motion for reconsideration alleging seven "significant errors of law in the" superior court's ruling. The District did not raise its "pattern or practice" argument.

¶16 "Because a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects before error may be raised on appeal, absent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal." *Trantor v. Fredrikson*, 179 Ariz. 299, 300 (1994). Here, no extraordinary circumstances exist. For reasons known only to the District, it did not argue the statutory "pattern or practice" language on which it now relies. The District, therefore, waived this statutory interpretation issue.

II. Sufficient evidence supports the superior court's factual finding that the District improperly established a moratorium.

¶17 During the show cause hearing and the evidentiary hearing, the District said it did not approve Talking Rock's forms because the notice was incomplete, and the treatment assurance incorrectly listed the plant's capacity. The testimony and evidence at the evidentiary hearing contradicts each of these claims.

¶18 The District's board chair specifically said the board decided not to sign Talking Rock's forms without ever reviewing the notice. The board did not even list Talking Rock's notice on its agenda for the March 30, 2018 meeting. The board chair said the board took the position it could not approve requests from Talking Rock or any other developer. The testimony further established Talking Rock used the proper values on the treatment assurance. Data from the District's own documents established the District's capacity value was artificially low and the treatment plant had sufficient capacity for Sterling Ranch.

¶19 Considering the evidence, including the board chair's testimony, the superior court did not err in finding the District established a *de facto* moratorium in violation section 48-2033.

III. The District did not moot the case when it approved Talking Rock's forms.

¶20 A case is moot when a party seeks to determine an abstract question not arising upon existing facts or rights. *Contempo-Tempe Mobile Home Owners Ass'n v. Steinert*, 144 Ariz. 227, 229 (App. 1985). "Arizona's judicial system[, however,] has no constitutional provision constraining it to consider only cases or controversies. Thus, our reluctance to consider a moot or abstract question is solely a matter of prudential or judicial restraint." *Big D Constr. Corp. v. Court of Appeals*, 163 Ariz. 560, 562-63 (1990) (citations omitted).

¶21 Talking Rock's complaint expressly sought a fee award for the District improperly imposing a moratorium under A.R.S. § 48-2033(F). Based on the evidence, including the board chair's testimony at the show cause and evidentiary hearings, the superior court said: "when you say you're not going to sign anything that anybody provides you regardless of what the form says, regardless of the capacity increase, regardless of any of those things, that's a moratorium."

¶22 Though the District eventually approved Talking Rock's request for services, Talking Rock had to litigate the capacity issue at an evidentiary hearing before the District acquiesced. A defendant's corrective action, taken on the eve of an adverse judicial ruling, does not moot the case and strip the plaintiff of its right to a fee award. *See Hess v. Purcell*, 229 Ariz. 250, 253, ¶¶ 10-11 (App. 2012).

¶23 Contrary to its arguments, the District did not moot this case once the District approved Talking Rock's forms.

IV. The superior court did not abuse its discretion in granting Talking Rock's fee request.

¶24 The legislature granted the superior court "the authority to award reasonable attorney fees . . . to the prevailing party." A.R.S. § 48-2033(F). Talking Rock's central complaint was the District improperly established a moratorium. The superior court agreed, and the record supports the superior court's finding. The superior court limited Talking Rock's fee application to expenses associated with the evidentiary hearing, an evidentiary hearing the District requested. The superior court considered the District's response to the fee application, including the District's request to vacate the evidentiary hearing. The superior court ultimately awarded Talking Rock nearly $30,000 less than requested.

¶25 The superior court, therefore, did not abuse its discretion in finding Talking Rock the prevailing party. The fee award is well-reasoned and supported by the record.

CONCLUSION

¶26 For the foregoing reasons, the superior court's judgment is affirmed. Both sides requested attorney fees and costs pursuant to Rule 21(a), Arizona Rules of Civil Appellate Procedure, and A.R.S. § 48-2033(F). Talking Rock also requested fees pursuant to A.R.S. § 12-348(A)(2). This court exercises its discretion to award attorney fees and costs to Talking Rock as the prevailing party upon compliance with Rule 21, Arizona Rules of Civil Appellate Procedure.

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