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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

MCDOWELL RESIDENTIAL PROPERTIES, ) 1 CA-CV 09-0301  
L.L.C., an Arizona limited liability )  
company; 120TH AVENUE AND MCDOWELL ) DEPARTMENT B  
INVESTMENTS, L.L.C., an Arizona )  
limited liability company; and MARK ) **MEMORANDUM DECISION**  
DOERFLEIN, ) (Not for Publication  
 ) - Rule 28, Arizona  
Plaintiffs/Appellants, ) Rules of Civil  
 ) Appellate Procedure)  
v. )  
 )  
CITY OF AVONDALE, )  
 )  
Defendant/Appellee. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CV 2008-024173

The Honorable Robert H. Oberbillig, Judge

**REVERSED AND REMANDED**

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**N O R R I S**, Judge

¶1 The issue in this appeal is whether McDowell Residential Properties and the other appellants (collectively, "MRP") have standing to assert an inverse condemnation claim against the City of Avondale when, at the time of the alleged taking, it owned the property, but then sold it to a third party.

#### **FACTS AND PROCEDURAL BACKGROUND**

¶2 On October 31, 2006, MRP entered into an agreement to sell the property to P.B. Bell Commercial Acquisitions, LLC. Bell intended to construct an apartment complex on the property. On December 17, 2007, the Avondale City Council approved the final plat for Bell's apartment project,<sup>1</sup> but conditioned its approval on the dedication of an additional ten feet of the property to an existing 65 foot right-of-way on the south side of McDowell Road and the movement of a utility tower owned by Salt River Project located on the property (collectively, the "required dedications"). MRP's sale of the property to Bell closed on or about January 18, 2008.

¶3 Subsequently, MRP sued the City for "Inverse Condemnation - Unlawful Exaction" and contended the required dedications constituted a taking under Article 2, Section 17, of

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<sup>1</sup>In its briefing in the superior court and on appeal, the City described the Council's action in different terms -- as approving a rezoning request with conditions.

the Arizona Constitution, thereby entitling it to just compensation. In making this claim, MRP also alleged that under its sale agreement with Bell, it had assumed the costs for the City's "dedication, including the lands to be dedicated and the costs for relocating the SRP tower."

¶4 The City moved to dismiss MRP's complaint for failure to state a claim under Arizona Rule of Civil Procedure 12(b)(6). Because MRP no longer owned the property, a fact it had acknowledged in its complaint, the City argued MRP did not have standing to raise claims under Arizona Revised Statutes ("A.R.S.") sections 12-1134 (Supp. 2009) and 9-500.12 (2008). As we explain below, § 12-1134 allows a real property owner to recover "just compensation" under certain circumstances if a "land use law" reduces the fair market value of the property, see *infra* ¶¶ 17-19, and § 9-500.12 creates an administrative appeal process whereby a property owner may appeal certain municipal "actions relating to the owner's property," see *infra* ¶ 20. The City also essentially argued, even if MRP had standing to assert claims under these statutes, it had lost its right to do so because it had failed to exhaust its administrative remedies.

¶5 The superior court granted the City's motion. "Interpret[ing] the statutes literally," the court ruled MRP

"lack[ed] standing to pursue [its] claims for relief," because it was not the owner of the property. The court did not address the City's exhaustion argument. MRP timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(B) (2003).

## DISCUSSION

### *I. Motion to Dismiss*

¶16 The dispositive issue here is whether the superior court properly dismissed MRP's state constitutional inverse condemnation claim for lack of standing. Although standing is a question of law we review de novo, *Strawberry Water Co. v. Paulsen*, 220 Ariz. 401, 405, ¶ 7, 207 P.3d 654, 658 (App. 2008), in reviewing a grant of a motion to dismiss a complaint, "we assume the facts alleged in the complaint to be true and give plaintiffs the benefit of all inferences arising from those facts." *Capitol Indem. Corp. v. Fleming*, 203 Ariz. 589, 590, ¶ 2, 58 P.3d 965, 966 (App. 2002). We will uphold the dismissal only if the plaintiff is not entitled to relief "under any facts susceptible of proof under the claims stated." *Id.* (quoting *Linder v. Brown & Herrick*, 189 Ariz. 398, 402, 943 P.2d 758, 762 (App. 1997) (internal citation omitted)).

#### *A. MRP's Claim*

¶17 Under the Arizona Constitution, property shall not be "taken or damaged" without just compensation. Ariz. Const. art.

2, § 17. In inverse condemnation cases, Arizona law "has only recognized a 'taking' of property where the government either assumes actual possession of the property or places a legal restraint upon the property that substantially diminishes or destroys the owner's right to, and use and enjoyment of, the property." *State v. Mabery Ranch, Co.*, 216 Ariz. 233, 242, ¶ 35, 165 P.3d 211, 220 (App. 2007) (quoting *DUWA, Inc. v. City of Tempe*, 203 Ariz. 181, 184, ¶ 16, 52 P.3d 213, 216 (App. 2002)). Our supreme court has described Article 2, Section 17, as "self-executing." *Calmat of Ariz. v. State ex rel. Miller*, 176 Ariz. 190, 192, 859 P.2d 1323, 1325 (1993) (injured party "must therefore be compensated, even though no specific statutory procedure governs this recovery").

¶18 In its complaint, consistent with these authorities, MRP plead a constitutional claim for inverse condemnation. It identified the property underlying the required dedications, described the City's actions it asserted gave rise to the alleged taking, and specified the legal basis for its claim -- the taking of property "pursuant to Article 2, Section 17 of the Arizona Constitution." See Ariz. R. Civ. P. 8(a).

#### B. *Standing*

¶19 Having asserted a constitutional inverse condemnation claim, MRP argues it has standing to assert this claim despite

its subsequent sale of the property to Bell, and therefore the superior court should not have dismissed its claim. On this record, we agree.

¶10 In Arizona and other jurisdictions, it is well settled that in a direct condemnation action, the right of damages is personal to the owner at the time of the taking and does not pass with a deed to a subsequent owner absent express provisions to the contrary. *Boyd v. Atchinson, T. & S. F. Ry.*, 39 Ariz. 154, 158-59, 4 P.2d 670, 671 (1931); see also *Kindred v. Union Pac. R. Co.*, 225 U.S. 582, 596-97, 32 S. Ct. 780, 782, 56 L. Ed. 1216 (1912); see generally Nichols on Eminent Domain § 5.02[3], at 58-60 (Matthew Bender, 3rd Ed. 2006) (citing cases; if parcel of land is sold after taken/injured, right to compensation does not run with land but remains a personal claim in hands of vendor unless assigned by special assignment or provision in deed).

¶11 Although we have found no Arizona case applying this rule in an inverse condemnation action, other courts have applied this principle in such cases. See *State ex rel. City of Blue Springs v. Nixon*, 250 S.W.3d 365, 370 (Mo. 2008) (one must own property at time property damage became ascertainable to have standing for inverse condemnation claim); see also *Ex parte Simpson*, \_\_ So.3d \_\_, 2009 WL 3335899 at \*6 (Ala. 2009) (citing

*City of Blue Springs*); *City of Los Angeles v. Ricards*, 515 P.2d 585, 587 (Cal. 1973) (inverse condemnation action; right to recover remains "in the person who owned the property at the time of the taking or damaging, regardless of whether the property is subsequently transferred to another"); *Brooks Inv. Co. v. City of Bloomington*, 232 N.W.2d 911, 918 (Minn. 1975) (when government interferes with person's right to possess and enjoy property to such an extent to create a "taking" in the constitutional sense, right to compensation vests in person owning the property at the time of such interference); *Dep't of Forests, Parks & Recreation v. Town of Ludlow Zoning Bd.*, 869 A.2d 603, 607 (Vt. 2004) (inverse condemnation action; citing cases and authorities for proposition it is "well-settled law" that right to recover damages belongs to person owning or having an interest in land at time of the taking and damage claim does not "run with the land") (internal citation omitted).

¶12 In *Brooks*, the Minnesota Supreme Court described the rationale for applying this rule in inverse condemnation cases as "simple and logical." It explained:

When the government interferes with a person's right to possession and enjoyment of his property to such an extent so as to create a 'taking' in the constitutional sense, a right to compensation vests in the person owning the property at the time of such interference. This right has the status of property, is personal to the

owner, and does not run with the land if he should subsequently transfer it without an assignment of such right. The theory is that where the government interferes with a person's property to such a substantial extent, the owner has lost a part of his interest in the real property. Substituted for the property loss is the right to compensation. When the original owner conveys what remains of the realty, he does not transfer the right to compensation for the portion he has lost without a separate assignment of such right. If the rule were otherwise, the original owner of damaged property would suffer a loss and the purchaser of that property would receive a windfall. Presumably, the purchaser will pay the seller only for the real property interest that the seller possesses at the time of the sale and can transfer.

232 N.W.2d at 918.

¶13 We agree with the rationale given by the Minnesota Supreme Court for applying this rule in inverse condemnation cases. Applying the rule recognized by that court and the other authorities cited above, we hold MRP has standing to assert an inverse condemnation claim against the City.

¶14 We nevertheless acknowledge that at oral argument before this court the City contended it had not taken any property belonging to MRP by simply conditioning approval of the final plat on the required dedications; according to the City, a taking in the constitutional sense could not have occurred



unless the required dedications had been satisfied. We decline to consider this argument.<sup>2</sup>

¶15 First, the City failed to raise this argument in the superior court<sup>3</sup> and in its briefing on appeal,<sup>4</sup> thus depriving MRP of a fair opportunity to address it.

¶16 Second, implicit in the City's argument is the factual assertion the required dedications have never been satisfied. The record before us, however, contains no information regarding

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<sup>2</sup>In making this argument, the City relied on *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001), a case involving a land-use regulatory takings claim, in contrast to the type of takings claim alleged by MRP here. In *Palazzolo*, the Supreme Court held the landowner could bring his regulatory takings claim even though he had acquired the property after the regulation had taken effect. 533 U.S. at 616, 121 S. Ct. at 2457. In so holding, the Court rejected the State's argument the property owner could not have had "reasonable investment-backed expectations" simply because he had acquired the property after enactment of the regulation. *Id.*

<sup>3</sup>In its reply in support of its motion, the City argued there had not been a taking because the SRP tower had not yet been moved, and it was possible SRP would decide to bear the moving costs. Putting aside the City's failure to provide the superior court with any factual support for these assertions, we fail to see how these assertions preserved the City's argument the required dedications had to be satisfied for there to be a taking. *Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, 109-10, ¶ 17, 158 P.3d 232, 238-39 (App. 2007).

<sup>4</sup>In its answering brief the City argued MRP presented "no facts to support an inverse condemnation claim." The City neither made this argument in the superior court, nor does this argument signal it intended to argue MRP had to have satisfied the required dedications to have standing to assert its inverse condemnation claim.

the details of the required dedications and whether the required dedications have been satisfied. Accordingly, we express no opinion on whether MRP's inverse condemnation claim is dependent on the satisfaction of the required dedications, as the City argues.

## *II. The City's Statutory Arguments*

¶17 Although, as we have discussed, the owner of property as of the time of the taking has standing to assert an inverse condemnation claim, here, as in the superior court, the City challenges MRP's standing by recasting its claim to allege "causes of action . . . based on A.R.S. § 12-1134 and A.R.S. § 9-500.12," even though MRP made no references to these statutes in its complaint. Although not stated explicitly, the City essentially argues these statutes supplant MRP's constitutional inverse condemnation claim. The City also argues the plain language of the statutes creates a cause of action only for the current "owner" of the property; thus, because MRP is no longer the owner of the property, it did not have standing to pursue its claim against the City. On their face, however, these statutes do not supplant MRP's constitutional inverse condemnation claim.

¶18 Sections 12-1131 to -1138 of Arizona Revised Statutes are based on Proposition 207 ("Prop. 207"), a private property

rights initiative approved by Arizona voters in 2006. See A.R.S. §§ 12-1131 to -1138 (Supp. 2009) (Historical and Statutory Notes); see generally Jeffrey L. Sparks, Note, *Land Use Regulation in Arizona After the Private Property Rights Protection Act*, 51 Ariz. L. Rev. 211 (2009) (discussing implications of Prop. 207). Prop. 207 was drafted in response to unpopular attempted and successful public takings<sup>5</sup> and was intended to "ensure that Arizona citizens do not lose their home or property [or its value] without just compensation," and to provide an efficient mechanism to recover compensation in light of "judicial processes . . . [that] are burdensome, costly and unfair." See Historical and Statutory Notes preceding A.R.S. §§ 12-1131 to -1138 (Prop. 207, § 2(A)(4), (6), (B)).

¶19 The plain text of A.R.S. § 12-1134(H) states, "[t]he remedy created by this section is in addition to any other remedy that is provided by the laws and constitution of this state or the United States and is not intended to modify or replace any other remedy." Thus, Prop. 207 and its constituent statutes augment, rather than supplant, other remedies available under Arizona law. These other remedies include, of course, an inverse condemnation claim under Article 2, Section 17, of the

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<sup>5</sup>See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655, 162 L. Ed. 2d 439 (2005); *Bailey v. Myers*, 206 Ariz. 224, 76 P.3d 898 (App. 2003); *DUWA, Inc.*, 203 Ariz. 181, 52 P.3d 213.

Arizona Constitution. Whether MRP is an "owner" under § 12-1134 is irrelevant to its inverse condemnation claim, and we need not decide whether Prop. 207 applies only to current owners.

¶20 The plain text of A.R.S. § 9-500.12 establishes an administrative appeals process whereby an owner may appeal certain "actions relating to the owner's property by a city or town, or an administrative agency or official of a city or town." It was originally enacted, in part, "to prescribe a process by which private property owners may appeal dedication or exaction requirements on approvals of the use, improvement or development of real property." House Fact Sheet for H.B. 2229, 42nd Leg., 1st Reg. Sess. (1995). The statute does not create a cause of action, and it does not therefore restrict or limit MRP's standing to pursue its inverse condemnation claim against the City.<sup>6</sup>

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<sup>6</sup>The City also argues MRP waived its inverse condemnation claim when it decided to close the sale to Bell because, by doing so, it relinquished its right to sue the City for inverse condemnation. We disagree. As discussed above, MRP's right to sue the City for inverse condemnation came into existence at the time of the alleged taking and at that time it owned the property. Its subsequent sale of the property to Bell did not strip it of its pre-sale right to sue the City for inverse condemnation and, accordingly, its subsequent sale could not, in and by itself, constitute a waiver.

### *III. Exhaustion*

¶21 Although the superior court did not base its dismissal of MRP's claim on the City's failure to exhaust administrative remedies argument, the City argues we should affirm the court's dismissal on that basis. As we understand its argument, the City contends MRP was required to exhaust the administrative appeals process established by A.R.S. § 9-500.12. As relevant here, that statute establishes an administrative process whereby a property owner "may appeal" the "requirement by a city or town of a dedication or exaction as a condition of granting approval for the use, improvement or development of real property" to, first, a hearing officer, and then if aggrieved by the hearing officer's decision, to the superior court. A.R.S. § 9-500.12(A)(1), (C), (G).

¶22 Even if we were to assume this statute could apply to MRP's constitutional inverse condemnation claim, an issue we need not and do not decide,<sup>7</sup> this administrative appeals process is inapplicable to "a dedication or exaction required in a legislative act by the governing body of a city or town that

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<sup>7</sup>MRP argues exhaustion under A.R.S. § 9-500.12 is not required because, first, nothing in that statute requires exhaustion as a condition precedent to filing a lawsuit pursuant to Article 2, Section 17; second, exhaustion under the statute is permissive because it states a property owner "may appeal"; and third, exhaustion would have been futile. We express no opinion on any of these arguments.

does not give discretion to the administrative agency or official to determine the nature or extent of the dedication or exaction." A.R.S. § 9-500.12(A)(1). The record is insufficiently developed for us to determine whether the City Council's decision falls within this statutory carve-out. Accordingly, on the record before us, we cannot say MRP was required to exhaust the administrative appeals process established by § 9-500.12.

**CONCLUSION**

¶23 For the foregoing reasons, we hold MRP has standing to pursue its inverse condemnation claim under Article 2, Section 17, of the Arizona Constitution against the City. We therefore reverse the superior court's judgment dismissing MRP's claim and remand for further proceedings consistent with this decision.

/s/

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PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/

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DANIEL A. BARKER, Judge

/s/

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PETER B. SWANN, Judge