IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

JEFFERY HARRIS,
Plaintiff/Appellant,

v.

THE CITY OF BISBEE, ARIZONA; MAYOR, DAVID M. SMITH;
AND MEMBERS OF COUNCIL, ANNA CLINE, JONI GIACOMINO,
JOAN HANSEN, BILL HIGGINS, LESLIE JOHNS, AND GABE LINDSTROM,
Defendants/Appellees.

No. 2 CA-CV 2019-0168
Filed December 30, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Cochise County
No. CV201900052
The Honorable Laura Cardinal, Judge

REVERSED AND REMANDED

COUNSEL

Jeffery Harris, Bisbee
In Propria Persona

Humphrey & Petersen P.C., Tucson
By Marshall Humphrey III and Ryan S. Andrus
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Vásquez and Judge Brearcliffe concurred.

S T A R I N G, Presiding Judge:

¶1 Jeffery Harris appeals from the trial court's dismissal of his special-action request for an order requiring the City of Bisbee, mayor David M. Smith, and council members Anna Cline, Joni Giacomino, Joan Hansen, Bill Higgins, Leslie Johns, and Gabe Lindstrom (collectively, "the city") to hear his administrative appeal of the city manager's decision regarding his procurement-contract protest. We reverse and remand.

Factual and Procedural Background

¶2 "In reviewing a trial court's decision to dismiss a claim, we accept as true all facts asserted in the complaint." *Harris v. Cochise Health Sys.*, 215 Ariz. 344, ¶ 2 (App. 2007). In November 2018, the city entered into a procurement contract for services related to the operation of its municipal wastewater treatment plant. Harris and another local taxpayer filed a protest against the contract award, alleging it did "not comply with applicable law and regulations." Bisbee's city manager denied the protest, stating that based on research performed by the city attorney, Harris and the other taxpayer lacked standing to challenge the procurement contract because they were not "interested parties" under § 3.5.20 of the Bisbee City Code. Therefore, the city manager concluded, that "section of [the] Code [did] not apply, and given current code/policy, no further action [was] necessary." Harris had filed a timely notice of appeal of the denial pursuant to § 3.5.20(E)(1), but the Bisbee city council failed to "hear and consider the appeal within two (2) regular meetings" as required under § 3.5.20(E)(3).[1]

[1]The second regular session following the submission of Harris's appeal to the city council was held on January 15, 2019. The city does not dispute Harris's assertion that it failed to hear and consider his appeal in compliance with § 3.5.20(E)(3), but, as discussed below, instead asserts such a hearing was unnecessary based on Harris's lack of standing.

¶3 In February 2019, Harris filed a special-action complaint pursuant to Rule 4(b), Ariz. R. P. Spec. Act., and A.R.S. § 12-2021, alleging that the city had "failed to perform a duty explicitly required by . . . § 3.5.20[(E)(3)], as to which it has no discretion" and requesting that the trial court order the city council to hear and decide his administrative appeal. The city subsequently filed a motion to dismiss, arguing that, because he was "not a bidder or prospective bidder on the contract," Harris lacked standing to protest it. Harris moved to strike the city's motion to dismiss, asserting its argument that he lacked standing was immaterial to his contention that it had a nondiscretionary duty to hear his administrative appeal. And, he argued, because there had not been a final administrative decision as to his standing, that issue was not ripe for the court's review. In addition, Harris moved to strike the notice of appearance and any "unauthorized pleadings or other papers" filed by the attorney representing the city, alleging the city council had not authorized the retention of counsel by specific vote in a public meeting as required by A.R.S. § 38-431.03(D).

¶4 At the motions hearing, the city argued that "[a]s a predicate and foundation[al] requirement to [Harris] being able to protest the code section, he has to be an interested party. So if he's not an interested party, there is no basis for an appeal . . . ." In response, Harris maintained the city council's refusal to hear his appeal prevented him from exhausting his administrative remedies and from rebutting the city's contention that, as a resident taxpayer, he did not have standing to protest procurement contracts. The trial court denied Harris's motion to strike defense counsel's notice of appearance and granted the city's motion to dismiss, stating that it "agree[d] that [Harris] fails to overcome the initial hurdle which is to establish himself as an interested party within the legal, commonly understood legal definition of an interested party in the context of procurement contracts for governmental agencies" and that "[t]here is no assertion by . . . Harris that he is an interested party within those accepted definitions." Thus, it reasoned, the city had the ability to deny review because, even if an appeal were permitted, the city council "would have had the same impediment which is that [Harris] is not an interested party within the definition of the law."

¶5 Harris subsequently filed a motion for relief from judgment pursuant to Rule 60(a), Ariz. R. Civ. P., asserting that the trial court's minute entry "inaccurately reflect[ed] the number of motions decided by the court" and requesting that it be amended to reflect the court's decisions on all three of his motions. He also requested relief under Rule 60(b)(3), arguing that in its response to his motion to strike the city's motion to dismiss, the city

had "materially misrepresented the law governing protests brought at the administrative level against contracts awarded by the [c]ity." (Emphasis omitted.) The city opposed Harris's motions and lodged a proposed form of judgment.

¶6 Over Harris's objection, the trial court adopted the city's proposed form of judgment, thereby formally granting the city's motion to dismiss and denying both of Harris's motions to strike. Harris subsequently filed a renewed motion for relief under Rule 60(b)(3), which the court denied. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).[2]

Discussion

¶7 On appeal, Harris argues the trial court erred in dismissing his special action without addressing the sole issue he had presented—whether the city council "had failed to perform a duty required by law as to which it has no discretion"—and instead ordering dismissal "with no determination on the merits, for reasons outside the proper scope of mandamus." "In reviewing a case brought as a special action, we 'conduct a bifurcated review.'" *Home Builders Ass'n of Cent. Ariz. v. Kard*, 219 Ariz. 374, ¶ 7 (App. 2008) (quoting *Bilagody v. Thorneycroft*, 125 Ariz. 88, 92 (App. 1979)). First, we must "determine whether the [trial] court in its discretion assumed jurisdiction of the merits of the claim. If so, then the determination of the merits may properly be reviewed." *Bilagody*, 125 Ariz. at 92. On the record before us, including the dismissal with prejudice, it appears the court accepted jurisdiction and therefore we proceed to consider the merits. "We do not review a trial court's decision to grant or deny special action relief de novo, that is, we do not determine whether we would have granted relief, but rather, whether the [trial] court abused its discretion in denying relief." *Bazzanella v. Tucson City Court*, 195 Ariz. 372, ¶ 3 (App. 1999).

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[2]On appeal, Harris challenges, among other things, the trial court's ruling as to his renewed Rule 60(b) motion. However, because he failed to identify this claim in his notice of appeal, we lack jurisdiction to consider it. *See Desert Palm Surgical Grp., P.L.C. v. Petta*, 236 Ariz. 568, ¶ 15 (App. 2015) (appellate review generally "limited to matters designated in the notice of appeal"); Ariz. R. Civ. App. P. 8(c)(3) ("The notice of appeal . . . must . . . [d]esignate the judgment or portion of the judgment from which the party is appealing . . . .").

¶8 We review issues of law, including a court's interpretation of a city code, de novo. *See City of Tucson v. State*, 191 Ariz. 436, 437 (App. 1997), *disapproved on other grounds by State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, ¶ 64 (2017). In doing so, we apply rules of statutory construction. *See Thomas & King, Inc. v. City of Phoenix*, 208 Ariz. 203, ¶ 9 (App. 2004); *Douglass v. Gendron*, 199 Ariz. 593, ¶ 10 (App. 2001) (municipal ordinances "construed in the same manner as state statutes"). The primary goal of statutory interpretation is to find and give effect to the promulgator's intent. *State v. Ross*, 214 Ariz. 280, ¶ 22 (App. 2007). We look to the code's plain language as the best indicator of that intent. *See Fragoso v. Fell*, 210 Ariz. 427, ¶ 7 (App. 2005). When the language is clear and unambiguous, we give effect to such language and do not employ other tools of statutory interpretation. *Id.*

¶9 Section 3.5.20(A)(1) of the Bisbee City Code provides: "Any interested party may protest a solicitation issued by the City, or the proposed award or the award of a City contract."[3] Under subsection (D), the city manager must issue written decisions in response to contract protests. § 3.5.20(D)(1). Subsection (E), which provides for an appeal from the city manager's decision, states that "[a]n appeal from a decision entered . . . by the City Manager shall be filed with the City Clerk within five (5) working days from the receipt of the City Manager's decision" and "shall contain . . . [t]he precise factual or legal error in the decision of the City Manager from which the appeal is taken." § 3.5.20(E)(1), (2)(ii). Further, it states the "City Council shall hear and consider the appeal within two (2) regular meetings. The protester and the City Manager shall be given a reasonable opportunity to be heard in the matter." § 3.5.20(E)(3). Finally, it provides, "[t]he decision of the City Council is the final administrative action." § 3.5.20(E)(5).

¶10 Harris contends that, in "keeping with the proper scope of mandamus," he sought special-action relief "for one reason alone: in order to expedite matters, he sought an extraordinary remedy in the form of an order compelling the City 'to perform a duty required by law as to which [it] had no discretion.'" (Alteration in original) (quoting Ariz. R. P. Spec. Act. 3(a)). Because the city council failed to hear and decide his appeal as required under § 3.5.20(E), he argues, he has not yet exhausted his

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[3] The parties' arguments as to whether Harris has standing to challenge the contract turn on the meaning of the term "interested party." The parties agree that the city code does not explicitly define this term. *See* § 3.5.20.

administrative remedies and the question of whether he had standing to challenge the city's procurement contract was not ripe for the trial court's review.[4] Further, Harris maintains that even if the issue of standing was ripe for review, the court erred in determining he lacked standing.

¶11 The city counters that "[b]ecause . . . Harris did not bid on the contract, and was not awarded or [denied] the contract, he is not an 'interested party' for purposes of the procurement sections of the Bisbee City Code, including § 3.5.20," and therefore lacked standing to pursue an administrative remedy under that section. Relying on *Karbal v. Arizona Department of Revenue*, 215 Ariz. 114 (App. 2007), the city contends Harris did not need to "exhaust his administrative remedies before a court [could] determine that he lack[ed] standing to pursue those remedies." The city also asserts that although Harris may have had standing in an action for declaratory or injunctive relief related to government expenditures, his status as a resident-taxpayer "does not support standing as an 'interested party' in the specialized context of a protest" under the city's procurement code.

¶12 Under its plain terms, § 3.5.20(E)(3) states that "[t]he City Council *shall* hear and consider the appeal within two (2) regular meetings. The protester and the City Manager *shall* be given a reasonable opportunity to be heard in the matter." (Emphasis added.) As Harris notes, the code "does not provide for *any* exception to its requirement that the Bisbee City Council hear and consider *all* appeals taken from a city manager's denial of a protest lodged under § 3.5.20 regardless of the protester's standing." *See* § 3.5.20(E). Because the code does not define "interested party,"

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[4]Harris also asserts the city manager violated the code by failing to include in the decision denying his protest "notice of the right to appeal" as set forth in § 3.5.20(E) and required under § 3.5.20(D)(1), failing to provide him with a copy of the decision by a "method that provides evidence of receipt" as required by § 3.5.20(D)(2), and failing to give notice of the protest to the successful contractor as required by § 3.5.20(B)(5). Because he fails to develop these arguments further, we do not address them. *See* Ariz. R. Civ. App. P. 13(a)(7)(A) (opening brief must contain argument with "[a]ppellant's contentions concerning each issue presented for review, with supporting reasons for each contention, and with citations of legal authorities and appropriate references to the portions of the record on which the appellant relies"); *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62 (App. 2009) (failure to develop and support arguments on appeal can constitute abandonment and waiver of claims).

whether Harris has standing to challenge the contract is a debatable legal issue, *see Aegis of Ariz., L.L.C. v. Town of Marana*, 206 Ariz. 557, ¶ 16 (App. 2003) (standing is a question of law), and the city council did not have discretion to refuse to hear his appeal. Further, even if the city council would ultimately have reached the conclusion "that [Harris] is not an interested party within the definition of the law," as a procedural matter, it had a nondiscretionary duty imposed by the plain language of its own code to hear and decide Harris's appeal, thereby allowing him to exhaust his administrative remedies.[5] *See* Ariz. Admin. Rev. Act, A.R.S. §§ 12-901 to 12-914 (administrative decisions not judicially reviewable until agency has issued final decision affecting "legal rights, duties or privileges of persons and [terminating] the proceeding before the administrative agency"). Thus, the trial court erred as a matter of law in determining the city council was not required to hear Harris's appeal of the city manager's denial of his contract protest and abused its discretion in granting the city's motion to dismiss. *See Montano v. Browning*, 202 Ariz. 544, ¶ 12 (App. 2002).

¶13 Moreover, the city's reliance on *Karbal* is unavailing. There, the Arizona Department of Revenue moved for dismissal, arguing Karbal had not exhausted his administrative remedies and lacked standing to challenge the tax and surcharge at issue. 215 Ariz. 114, ¶¶ 5, 8. The tax court dismissed the complaint based on Karbal's failure to file a refund claim. *Id.* On appeal, the court concluded Karbal did not have standing and therefore "decline[d] to address the issue of exhaustion of administrative remedies." *Id.* n.4. The instant case is procedurally and factually distinguishable—at issue is the trial court's review of the city council's failure to issue a final decision as to Harris's administrative appeal, which essentially prevented him from exhausting his

[5]Based on our disposition, we need not address Harris's argument that he had standing to challenge the contract. Similarly, we need not address his arguments that he was deprived of due process by the court's denial of his motion to strike the city's motion to dismiss and renewed motion for relief from judgment under Rule 60(b). Neither do we address Harris's argument that the court erred in denying his motion to strike counsel's appearance, which is based on his claims that the city's insurer retaining counsel upon receipt of a claim violated § 38-431.03(D) and that the court improperly announced its decision before oral argument. On remand, Harris may address this issue in connection with exhausting his administrative remedies.

administrative remedies, violating its own code governing such matters. *See* § 3.5.20(E).

Attorney Fees

¶14 Harris requests costs pursuant to A.R.S. § 12-341, attorney fees pursuant to A.R.S. § 12-348, and attorney fees, expenses, and double damages pursuant to A.R.S. § 12-349. However, Harris represented himself on appeal and is not entitled to attorney fees under §§ 12-348 or 12-349. *See Connor v. Cal-Az Props., Inc.*, 137 Ariz. 53, 56 (App. 1983) (holding self-represented party not entitled to attorney fees due to absence of attorney-client relationship). And, as to his claim for fees, expenses, and double damages under § 12-349(A)(1), an award of fees and expenses is mandatory, and double damages are discretionary, if the other party brings or defends a claim without substantial justification. Harris fails to show he is entitled to any award under § 12-349(A)(1). *See Reynolds v. Reynolds*, 231 Ariz. 313, ¶ 16 (App. 2013) (lack of substantial justification must be proven by a preponderance of the evidence). And, because the trial court did not award damages and Harris did not allege damages below, his argument for double damages would in any event be forfeited. *See Cont'l Lighting & Contracting, Inc. v. Premier Grading & Utils., LLC*, 227 Ariz. 382, ¶ 12 (App. 2011) ("If the argument is not raised below so as to allow the trial court . . . an opportunity [to address the issue on its merits], it is waived on appeal."); *cf. Balestrieri v. Balestrieri*, 232 Ariz. 25, ¶ 11 (App. 2013) (claim for attorney fees forfeited where party did not request fees until after court granted motion to dismiss). But, because he is the prevailing party on appeal, we award Harris his appellate costs under § 12-341 upon his compliance with Rule 21, Ariz. R. Civ. App. P.

Disposition

¶15 For the foregoing reasons, we reverse the trial court's order granting the city's motion to dismiss and remand for entry of an order directing the city to hear and decide Harris's administrative appeal.