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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

GWEN GOODMAN, MARK EBERLEIN, DONALD UHLIR, and MARY UHLIR, Plaintiffs/Appellants, v. PIMA COUNTY; ANN DAY, RAMON VALADEZ, SHARON BRONSON, RAY CARROLL and RICHARD ELIAS, members of the Pima County Board of Supervisors, Defendants/Appellees, TDB TUCSON GROUP, Special Action Real Party in Interest/Appellee.	2 CA-CV 2009-0002 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C-20077041

Honorable Javier Chon-Lopez, Judge

AFFIRMED

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and

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H O W A R D, Presiding Judge.

¶1 Appellants Gwen Goodman, Mark Eberlein, Donald Uhlir, and Mary Uhlir appeal from the trial court's grant of summary judgment in favor of defendant Pima County and real party in interest TDB Tucson Group (TDB). Appellants claim the trial court erred in concluding the "cluster development option" set forth in Pima County Code (P.C.C.) § 18.09.040 is not subject to the notice requirements in A.R.S. § 11-829. Appellants also contend the court erred in denying their claim that their due process and First Amendment rights had been violated. Because exercise of the "cluster development option" is not a rezoning and appellants' constitutional rights were not violated, we affirm.

Facts

¶2 We view the facts in the light most favorable to the party opposing summary judgment and draw all reasonable inferences arising from the evidence in favor of that party. *Prince v. City of Apache Junction*, 185 Ariz. 43, 45, 912 P.2d 47, 49 (App. 1996). TDB owns a parcel of undeveloped real property in Pima County. The property is located within a CR-1 zone, which generally allows single residences on a minimum lot of 36,000 square feet. P.C.C. § 18.21.030. TDB applied to the county for approval to develop the property as a subdivision pursuant to the "cluster development option" under P.C.C. § 18.21.050. Cluster development is allowed in several zoning districts, including CR-1. P.C.C. § 18.09.040(C)(7). Its purposes are to provide planning in harmony with the natural features of the site; "protect natural, historic and man-made elements of scenic, environmental or cultural significance"; allow flexibility in placement of structures, and provide additional open space. P.C.C. § 18.09.040(A)(1). It allows for development of subdivisions with smaller lot sizes than otherwise required in a CR-1 zone but with a greater amount of open, undeveloped space. *Id.*

¶3 Appellants own property near or adjacent to the subject parcel. During the application process, TDB held three meetings with neighboring property owners and neighborhood association representatives. It sent flyers announcing these meetings to each association. At the meetings, TDB presented information about its planned development and responded to comments and questions from those in attendance. Two of the appellants in this

case, Donald and Mary Uhlir, attended one of the meetings, and Mary Uhlir also attended a second meeting.

¶4 The Pima County Design Review Committee (DRC) held a public meeting to review TDB's application. At this meeting, several neighbors spoke about their concerns. The DRC continued the matter to allow TDB to address these concerns. Before the next DRC meeting, TDB met again with neighboring property owners. Mary Uhlir attended this meeting as well. The DRC then held another public meeting to review TDB's revised plan. Neighbors in attendance were again permitted to address the committee. Mary Uhlir spoke and read a letter from Donald Uhlir. Other appellants did not receive any formal notice and did not attend any of the meetings. Subsequently, the DRC approved TDB's preliminary cluster-development plan, allowing 260 lots on the 286.5-acre parcel.

¶5 The zoning ordinance does not permit appellants to appeal the approval, *see* P.C.C. § 18.09.040(I)(6)(a), and they therefore filed a special action in superior court against Pima County and the Pima County Board of Supervisors and also named TDB as a real party in interest. Appellants challenged the validity of the county's approval, claiming the application for cluster development constituted a proposal to amend a zoning ordinance under A.R.S. § 11-829(A). All parties moved for summary judgment. The trial court granted the county's and TDB's motions, denied appellants' motion, and dismissed appellants' complaint with prejudice.

Discussion

¶6 Summary judgment is proper when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Ariz. R. Civ. P. 56(c)(1). We review de novo whether there are any genuine issues of material fact and whether the trial court applied the law properly. *Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, ¶ 8, 156 P.3d 1157, 1160 (App. 2007). We also review de novo questions regarding the construction of statutes and ordinances, because both involve questions of law. *Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co.*, 177 Ariz. 526, 529, 869 P.2d 500, 503 (1994); *City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶¶ 33, 50, 181 P.3d 219, 230, 233 (App. 2008). We likewise review constitutional claims de novo. *Emmet McLoughlin Realty, Inc. v. Pima County*, 212 Ariz. 351, ¶ 16, 132 P.3d 290, 294 (App. 2006).

A.R.S. § 11-829 Claim

¶7 Appellants first argue the trial court erred in concluding the cluster development option, as set forth in P.C.C. §§ 18.09.040 and 18.21.050, is not a rezoning under A.R.S. § 11-821 so that the notice requirements set forth in A.R.S. § 11-829 are not applicable. When construing a statute, we must "determine and give effect to legislative intent." *City of Phoenix v. Phoenix Empl. Relations Bd.*, 207 Ariz. 337, ¶ 11, 86 P.3d 917, 920 (App. 2004). We look first to the plain language of the statute as the best indicator of legislative intent. *Mejak v. Granville*, 212 Ariz. 555, ¶ 8, 136 P.3d 874, 876 (2006). If the meaning of the language is clear, we employ no further methods of construction. *N. Valley*

Emerg. Specialists, L.L.C. v. Santana, 208 Ariz. 301, ¶ 9, 93 P.3d 501, 503 (2004). Rather, we apply the statute as written as long as doing so does not produce absurd or impossible results. *Id*. When interpreting a particular term, "'we apply a practical and commonsensical construction.'" *Clear Channel*, 218 Ariz. 172, ¶ 33, 181 P.3d at 230, *quoting Douglass v. Gendron*, 199 Ariz. 593, ¶ 10, 20 P.3d 1174, 1177 (App. 2001). In construing ordinances, we "apply the same general rules and principles as when interpreting a statute." *Id.*

¶8 The power of a county board of supervisors derives solely from state statute. *Hart v. Bayless Inv. & Trading Co.*, 86 Ariz. 379, 384, 346 P.2d 1101, 1105 (1959). When a county enacts zoning regulations, it must "adhere to the state statutes which delegate that power." *Sandblom v. Corbin*, 125 Ariz. 178, 184, 608 P.2d 317, 323 (App. 1980). The statutes delegating power to the counties are set forth in Title 11 of the Arizona Revised Statutes. In chapter six of that title, "County Planning and Zoning," A.R.S. § 11-821 directs counties to adopt a "county plan" to provide, among other elements, zoning for "various classes of residential, business, and industrial uses."

¶9 Also in chapter six, A.R.S. § 11-801(9) defines a zoning ordinance as "an ordinance adopted by the board of supervisors, which shall contain zoning regulations together with a map setting forth the precise boundaries of zoning districts within which the various zoning regulations are effective." Section 11-801(7) defines a "[r]ezoning ordinance" as "that portion of a zoning ordinance adopted by the board of supervisors that identifies the requirements for amending or changing the zoning district boundaries or

regulations within an area previously zoned." Section 11-829 requires notice to adjacent landowners and other potentially affected citizens with respect to rezoning applications.

¶10 Chapter 18-21 of the Pima County Code sets forth several sections of regulations for property located in a CR-1 zone. These sections delineate permitted and conditional uses and provide development standards for construction. P.C.C. §§ 18.21.010 through 18.21.040. In addition, chapter 18-21 contains a subsection entitled "Cluster development option," § 18.21.050, which provides that cluster development, as described in § 18.09.040, may be permitted in subdivided residential lots in CR-1 zones. Section 18.09.040 sets forth the regulations for cluster development, including the application process. This procedure includes review of the application by the DRC. § 18.09.040(H). The regulations provide for some form of notice to surrounding property owners but not the specific forms of notice in A.R.S. § 11-829. *See* § 18.09.040(I). There is no dispute that TDB complied with the requirements of the Pima County Code for the cluster development process.

¶11 In support of their argument that notice pursuant to § 11-829 was required, appellants contend that approval of a cluster development amends or changes the zoning regulations in the area where the property is located. But the regulations for CR-1 include the provision for cluster development. *See* P.C.C. ch. 18-21. And the regulations for cluster development are incorporated by reference in the CR-1 regulation authorizing the cluster development option. *See* P.C.C. § 18.21.050. A developer's adherence to the regulations

for development in CR-1 zones, in the form of an application for approval of a cluster development, is not a request to change the regulations as contemplated by A.R.S. §§ 11-829 or 11-801(7). Rather, such an application to develop property in a manner permitted by the existing CR-1 zoning regulations complies with those regulations.

¶12 Appellants argue the requirement that a developer submit an application for review and approval proves cluster development is a change in zoning regulations. But any kind of building construction requires a permit, *see* P.C.C. § 18.01.030(E)(1), and most development plans require some additional level of review and approval. *See* P.C.C. § 18.71.010(A), (B). This does not render approval of these plans a change in the zoning regulations; on the contrary, it demonstrates conformity with the regulations.

¶13 Appellants also challenge the trial court's conclusion that exercising the cluster development option does not change the boundaries of the zoning district in which the subject property is located.[1] Appellants claim the district boundaries are altered by cluster development because part of the area will continue to be designated CR-1 while another part of the area will be designated "cluster development." But the Pima County Code does not identify "cluster development" as a zoning district. All cluster development takes place within an existing zoning district. *See* P.C.C. § 18.09.040(C) (listing various zones in which

[1]The county asserts and appellants admit this argument was not raised below. But in interpreting a statute, we are not bound by this waiver. *See Home Builders Ass'n of Cent. Ariz. v. City of Maricopa*, 215 Ariz. 146, n.3, 158 P.3d 869, 874 n.3 (App. 2007). In our discretion, we will consider the argument.

cluster development is permitted). According to a plain reading of the code, the area within which the subject property is located will continue to be a CR-1 zone with no change in the existing district boundaries.

¶14 Appellants further point out that the CR-1 regulations provide specific requirements for such things as lot size, setback requirements, and distance between buildings. *See* P.C.C. § 18.21.030. Appellants compare these requirements with certain provisions under the cluster development option that allow flexibility in determining such matters. *See* P.C.C. § 18.09.040(A)(1)(d), (E)(1)–(6). Appellants argue this flexibility means the requirements for lot size, setback, and distance between buildings are not "fixed by legislation" as contemplated by A.R.S. § 11-801(10). They contend the fact that the DRC determines these requirements for each individual plan necessarily shows the cluster development option changes the regulations in CR-1.[2] But, again, the regulations for CR-1, adopted by the county's legislative body, provide for that option and incorporate the attendant regulations, including those establishing flexibility in such things as lot size and setback requirements. *See* P.C.C. § 18.21.050. Thus, these existing zoning regulations "govern[] the use of land" as required by A.R.S. § 11-801(10), and adhering to the regulations does not constitute a "change" in the regulations.

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[2]The county characterizes this argument slightly differently and asserts it also is waived for failure to raise it below. Again, because we are interpreting a statute, we exercise our discretion to address appellants' argument as we understand it. *See Home Builders Ass'n*, 215 Ariz. 146, n.3, 158 P.3d at 874 n.3.

¶15 Appellants also observe the cluster development option is intended to promote compact development as contemplated by A.R.S. § 11-821(C)(1)(b). Section 11-821(C) provides that, as part of the county plan, counties shall include a "land use" plan that incorporates programs promoting "compact form development activity." Appellants argue § 11-821(C)(1)(b) "makes it clear that 'compact form development' is a specific program and policy, and therefore logically distinct from the standard land use plan." Appellants contend this means the cluster development option must be treated as a distinct form of zoning. We reject that theory on several grounds. First, as stated above, § 11-821(C) directs that compact form development programs and policies be included in the land use plan. Therefore, they cannot be "logically distinct" from the land use plan. Second, § 11-821(C)(1)(b) does not require that policies and programs promoting compact form development be set up as zoning districts separate from other districts. The zoning statutes in general do not impose specific zoning classifications; rather, they give the county the authority to create those classifications. *See* A.R.S. § 11-821(B). The county has done so and has included the cluster development option as part of the CR-1 zone class. *See* P.C.C. § 18.21.050.

¶16 In sum, because exercising the cluster development option does not entail a change to the CR-1 zoning district boundaries or regulations, the county and TDB were not required to follow the notice requirements in A.R.S. § 11-829. The trial court therefore did not err in concluding that, as a matter of law, appellants failed to show a violation of the zoning statutes.

Constitutional Claims

¶17 Appellants next argue the trial court erred in concluding their constitutional rights had not been violated. They first assert their due process rights were violated when they were not provided with notice and an opportunity to be heard.

¶18 Constitutional due process affords the right to notice and an opportunity to be heard before the state may deprive someone of a protected property interest. U.S. Const. amend. XIV; *Emmet McLoughlin Realty*, 212 Ariz. 351, ¶ 17, 132 P.3d at 294. "'A protected property interest is present where an individual has a reasonable expectation of entitlement deriving from existing rules or understandings that stem from an independent source such as state law.'" *Aegis of Ariz., L.L.C. v. Town of Marana*, 206 Ariz. 557, ¶ 44, 81 P.3d 1016, 1027 (App. 2003), *quoting Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994); *see also Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972).

¶19 Appellants assert A.R.S. § 11-829 creates a protected property right. But, because we have already concluded that § 11-829 does not apply in this case, any rights derived from § 11-829 are not material here. Appellants do not identify any other protected property interest at stake. Moreover, appellants do not dispute that TDB complied with the notice requirements in the county code for cluster development applications. *See* P.C.C. § 18.09.040(I)(1)(b). The trial court did not err in finding that, as a matter of law, appellants' due process rights had not been violated.

¶20 In their reply brief, appellants argue that their constitutional claim is not, as the county asserts, indistinguishable from their statutory claim, because they have requested damages. Because they have not identified any protected property right affected by the cluster development approval, however, they have not established a constitutional violation in the first instance, regardless of the relief sought.

¶21 Appellants also claim the trial court erred in concluding their First Amendment rights had not been violated. They argue the lack of notice of TDB's proposal deprived them of the opportunity to assert their objections to county public officials. The First Amendment protects the right "to petition the Government for a redress of grievances." U.S. Const. amend. I. "'The right to petition bars state action interfering with access to the legislature, the executive branch and its various agencies, and the judicial branch.'" *City of Tucson v. Pima County*, 199 Ariz. 509, ¶ 33, 19 P.3d 650, 660 (App. 2001), *quoting Ruiz v. Hull*, 191 Ariz. 441, ¶ 61, 957 P.2d 984, 1000 (1998).

¶22 Appellants cite no authority for the proposition that a failure to give personal notice of a public meeting constitutes a restriction on the First Amendment right to petition the government. And appellants do not dispute that the DRC held two public meetings at which members of the public were permitted to speak and express their concerns about TDB's proposal. Nor do they dispute that one appellant, Mary Uhlir, did in fact speak at one of these meetings and read aloud a letter that had been written by another appellant, Donald Uhlir. Because the county took no action to prevent appellants from presenting their

objections at these public meetings, the trial court did not err in concluding that appellants' First Amendment rights had not been violated.

Conclusion

¶23 In light of the foregoing, we conclude the trial court did not err in denying appellants' motion for summary judgment and in granting summary judgment in favor of Pima County and TDB Tucson Group. Accordingly, we deny appellants' request for attorney fees on appeal, and we affirm the trial court's judgment.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PHILIP G. ESPINOSA, Judge