REVERSE AND REMAND and Opinion Filed December 28, 2018

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-17-01112-CV

EMF SWISS AVENUE, LLC, Appellant
V.
PEAK'S ADDITION HOME OWNER'S ASSOCIATION, CITY OF DALLAS, AND BOARD OF ADJUSTMENT FOR THE CITY OF DALLAS, Appellees

On Appeal from the 134th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-17-02532

MEMORANDUM OPINION

Before Justices Stoddart, Whitehill, and Boatright
Opinion by Justice Whitehill

After the City of Dallas issued building permits for an apartment complex in east Dallas, appellee Peak's Addition Home Owner's Association (the HOA) appealed one of those permits to the Board of Adjustment. The Board affirmed the permit's issuance, and the HOA sought judicial review of the Board's decision in district court. The district court granted final summary judgment in the HOA's favor shortly after appellant EMF Swiss Avenue, LLC intervened in the case.

EMF appeals the summary judgment.[1] For the reasons that follow, we reverse and remand.

[1] Although adverse to the HOA in the trial court, the City of Dallas and the Board of Adjustment for the City of Dallas did not appeal and thus are not appellants. *See* TEX. R. APP. P. 3.1(a). Although they are listed in this appeal's style as appellees, they are not adverse to EMF and so are technically not appellees either. *See id*. 3.1(c).

I. BACKGROUND

A. Facts

EMF planned to build a five-story apartment complex in east Dallas at 4217 Swiss Avenue (the Property).

Appellee Peak's Addition Home Owner's Association (the HOA) opposed EMF's plan. The HOA alleged in its live petition that it is a Texas corporation representing roughly 800 properties, including properties in an east Dallas area called Peak's Addition.

Summary judgment evidence indicates that HOA members knew in early 2016 that a new development was being planned for the Property. They communicated with a City of Dallas senior planner, who said in an April 2016 email that the submitted drawing would "violate the RPS." An RPS is a residential proximity slope, which is essentially a height restriction. Later, HOA members met with a City council member and others about the development, and at the meeting it was said that the new building would be height restricted to about twenty-six feet.

Nevertheless, in November 2016 the City issued several permits for a five-story multifamily dwelling and seven-floor parking garage on the Property. The permits listed Encore Enterprises as the "Owner Or Tenant" and Vicki Rader as the "Applicant."

The HOA appealed the permits' issuance to the Board of Adjustment. The appeal was later narrowed to a single permit, specifically the one permitting the third floor of the multifamily dwelling. The Board heard the HOA's appeal on February 21, 2017, and affirmed the permit's issuance by a 4–1 vote.

B. Procedural History

Next the HOA sued in district court requesting that the court reverse the Board of Adjustment's decision and declare it void. *See* TEX. LOC. GOV'T CODE § 211.011 ("Judicial Review of Board Decision"). The HOA named only the City and the Board as defendants.

The City and the Board answered.

A record of the Board's February 21, 2017 hearing was prepared and filed with the trial court.

The HOA moved for summary judgment, arguing that the Board abused its discretion by misinterpreting the Dallas Development Code and City of Dallas Planned Development District 298 (PD 298) and upholding the administrative official's decision to issue the permit.

The City and the Board cross-moved seeking a take nothing judgment.

Each side responded to the other's summary judgment motion.

The docket sheet indicates that the trial court heard the motions on August 30, 2017, which hearing was continued to September 11, 2017.

On September 8, 2017, EMF intervened and moved to continue the summary judgment hearing. EMF's petition asked the court to deny the HOA's petition and order that the HOA take nothing.

The docket sheet indicates that the September 11, 2017 hearing occurred as scheduled. That same day, the trial judge signed a final judgment granting the HOA's motion, denying the City and Board's motion and reversing the Board's decision upholding the interpretation of the building official who issued the permit.

EMF appealed.

Postjudgment motions concerning supersedeas resulted in two opinions from this Court. *EMF Swiss Ave., LLC v. Peak's Addition Home Owner's Ass'n*, No. 05-17-01112-CV, 2018 WL 914900 (Tex. App.—Dallas Feb. 16, 2018, order) (*EMF Swiss II*); *EMF Swiss Ave., LLC v. Peak's Addition Home Owner's Ass'n*, No. 05-17-01112-CV, 2017 WL 5150954 (Tex. App.—Dallas Nov. 7, 2017, order) (mem. op.) (*EMF Swiss I*).

C. The City's Position on Appeal

The City and the Board filed a joint appellees' brief arguing that the trial court erred and that we should reverse the trial court's judgment and affirm the Board's decision, which is some of the same relief EMF seeks. The HOA asks us to disregard the City and the Board's brief because they did not file a notice of appeal.

On the HOA's unopposed motion, we realigned the City and the Board with EMF for oral argument purposes. We conclude that they are not properly considered appellees in this appeal. *See* TEX. R. APP. P. 3.1(c) ("*Appellee* means a party adverse to an appellant."). But we will treat their brief as the equivalent of an amicus curiae brief. *See id*. 11.

II. JURISDICTION

EMF's principal brief does not discuss jurisdiction, although it does contain a short section asserting that it is a proper appellant because (i) its intervention in the case was not struck and (ii) it is a property owner aggrieved by the trial court's decision, as we recognized in *EMF Swiss I*, 2017 WL 5150954, at *3.

The HOA, however, raises a cross-issue asserting two potential jurisdictional defects. It argues that (i) EMF has not exhausted its administrative remedies and (ii) EMF lacks standing to appeal. We disagree.

A. Does exhaustion of administrative remedies apply when a party obtains its requested administrative relief?

The HOA argues that Texas courts lack subject matter jurisdiction over this dispute because EMF did not exhaust administrative remedies. Specifically, the HOA argues that even though the building official issued the permits that EMF apparently desired, the official's conclusion that no RPS height restriction applied to the development rested on reasoning different from EMF's interpretive argument in this appeal. Thus, the HOA concludes, EMF had to appeal to the Board to preserve its different legal argument supporting the permit's issuance.

In its reply brief, EMF argues that the administrative process has been fully exhausted.

1. Applicable Law

If the legislature grants an administrative body the sole authority to make an initial determination in a dispute, the agency has exclusive jurisdiction over the dispute. *Thomas v. Long*, 207 S.W.3d 334, 340 (Tex. 2006). In that case, a party must exhaust all administrative remedies *before seeking judicial review of the decision*. *Id*. Until the party satisfies the exhaustion requirement, the trial court lacks subject matter jurisdiction and must dismiss the claims without prejudice. *Id*.

Whether an agency has exclusive jurisdiction over a dispute is a legal question we review de novo. *Id*.

2. Applying the Law to the Facts

For the following reasons, we conclude that EMF was not required to exhaust administrative remedies to preserve its arguments supporting the permit's issuance because EMF obtained its requested administrative relief.

In exclusive administrative agency jurisdiction cases, "a party must exhaust all administrative remedies before seeking judicial review of the decision." *Id*. But EMF does not seek judicial review of the Board's decision; the HOA is seeking that review. EMF merely wants affirmance of the Board's decision affirming the permit's issuance. We have found no authority for the premise that an interested party in EMF's position must appeal an administrative official's decision through an administrative process if the party agrees with the decision but not necessarily its underlying rationale. In the cases the HOA cites, the losing party either failed to appeal an adverse administrative decision, *e.g.*, *City of Paris v. Abbott*, 360 S.W.3d 567, 572–74 (Tex. App.—Texarkana 2011, pet. denied) (landowner failed to appeal building-permit denial to board of adjustment), or failed to invoke the administrative process as all, *e.g.*, *Thomas v. City of San*

Marcos, 477 S.W.2d 322, 325–26 (Tex. App.—Austin 1972, no writ) (landowner whose land was annexed never applied to city to continue developing his land). Thus, the HOA's cases are distinguishable.

Accordingly, we conclude that EMF was not required to exhaust administrative remedies by appealing the permit in question to the Board.

B. Does the trial court's order negating EMF's permit give EMF standing?

1. Standing to Appeal

The HOA attacks EMF's standing to appeal the final judgment. The right to appeal is generally limited to parties of record. *State v. Naylor*, 466 S.W.3d 783, 789 (Tex. 2015). Under Texas's liberal intervention rules, an entity that intervenes before final judgment is rendered becomes a party who has standing to appeal. *E.g.*, *Fuentes v. Zaragoza*, No. 01-16-00251-CV, 2017 WL 976079, at *2–3 (Tex. App.—Houston [1st Dist.] Mar. 14, 2017, order) (mem. op.), *disp. on merits*, 555 S.W.3d 141 (Tex. App.—Houston [1st Dist.] 2018, no pet.); *see also* TEX. R. CIV. P. 60. Indeed, the HOA filed a postsubmission letter in which it asserts that "EMF was a party to the trial court's judgment" by virtue of its intervention. The final judgment granting the HOA's summary judgment motion and reversing the Board's decision essentially denied the relief EMF sought in its intervention petition. Thus, EMF has standing to appeal.

Moreover, we said in *EMF Swiss I* that EMF owns the Property, that it was aggrieved by the trial court's judgment, and that it had the right to appeal the judgment. 2017 WL 5150954, at *3. This also supports the conclusion that EMF has standing to appeal.

2. General Standing

The HOA also mounts a general standing challenge to EMF's participation in this case. The HOA argues that EMF lacks standing because (i) it was not the holder of the permit being

contested in this case and (ii) even if EMF owns the Property, the trial court's judgment invalidating the permit does not directly injure EMF.

EMF responds that (i) the record establishes that it is the Property's owner and developer and (ii) we already held in *EMF Swiss I* that EMF has standing.

a. Applicable Law

Standing is a component of subject matter jurisdiction and thus cannot be waived. *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993). It focuses on whether a party has a sufficient relationship with the lawsuit to have a justiciable interest in its outcome. *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 848 (Tex. 2005). Under the Texas test, (i) the party claiming standing must assert an alleged injury that is (a) personal to itself rather than an injury to a third party or the public at large and (b) concrete and particularized, actual or imminent, and not hypothetical, (ii) the alleged injury must be fairly traceable to the defendant's conduct, and (iii) the alleged injury must be likely to be redressed by the requested relief. *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 155 (Tex. 2012).

If standing is questioned for the first time on appeal, we construe the petition in favor of the party whose standing is questioned and, if necessary, review the entire record to determine if any evidence supports standing. *Tex. Ass'n of Bus.*, 852 S.W.2d at 446. But if standing is challenged in the trial court, the party whose standing is challenged bears the burden to present sufficient evidence to show it has standing. *Douglas-Peters v. Cho, Choe & Holen, P.C.*, No. 05-15-01538-CV, 2017 WL 836848, at *6 (Tex. App.—Dallas Mar. 3, 2017, no pet.) (mem. op.); *Fitness Evolution, L.P. v. Headhunter Fitness, L.L.C.*, No. 05-13-00506-CV, 2015 WL 6750047, at *13 (Tex. App.—Dallas Nov. 4, 2015, no pet.) (mem. op.).

b. Applying the Law to the Facts

In this case, the HOA challenged EMF's standing during postjudgment motion practice when EMF moved to stay enforcement of the judgment and again when EMF moved for an order establishing supersedeas security. EMF responded to the HOA's standing challenge. The trial court denied EMF's motions without stating the grounds, so it may have ruled that EMF lacked standing. We review a trial court ruling on standing de novo. *See Nauslar v. Coors Brewing Co.*, 170 S.W.3d 242, 248 (Tex. App.—Dallas 2005, no pet.) ("Because the question of standing is a legal question, we review de novo a trial court's ruling on a plea to the jurisdiction.").

We conclude that EMF adequately demonstrated its standing. Indeed, we have already concluded that EMF owns the Property and is an aggrieved party entitled to appeal the judgment. *EMF Swiss I*, 2017 WL 5150954, at *3. That conclusion is supported by record evidence that:

- the Property was acquired in 2015 by "Borderplex Swiss Avenue, LLC"; and
- Borderplex Swiss Avenue, LLC changed its name to EMF Swiss Avenue, LLC in July 2016.

The record also contains the affidavit of Bradley Miller, who is president of a limited liability company that indirectly controls EMF. Miller testified that EMF is the owner and developer of the Property.

The HOA argues that EMF lacks standing nevertheless because (i) the judgment does not affect EMF's title to the Property or otherwise injure the Property and (ii) any economic consequences from the judgment are too uncertain and premature to be ripe. We reject the HOA's argument. The question is whether EMF suffered an injury that is concrete and particularized, actual or imminent, and not hypothetical when the court invalidated a permit authorizing development on its property. *See Heckman*, 369 S.W.3d at 155. To begin, EMF lost the ability to build the project as it planned.

Additionally, EMF's evidence showed that it invested more than $13.9 million in the Property's development and that the judgment caused the City to issue a stop work order that immediately halted all work being done on the project. EMF's evidence further explained how this event could lead to acceleration of a loan EMF obtained to fund the project. EMF's evidence also made the commonsense point that the partially completed project was susceptible to damage from the elements and theft.

Consistent with our opinion in *EMF Swiss I*, we conclude that EMF adequately showed its standing to participate in this litigation.

3. Conclusion

We conclude that the trial court had, and we have, subject matter jurisdiction in this case. Accordingly, we overrule the HOA's first cross-issue.

III. THE MERITS

EMF's sole issue argues that the trial court erred by granting summary judgment for the HOA. The HOA argues in a cross-issue that we must affirm because EMF failed to challenge all grounds supporting the judgment. We address the HOA's cross-issue first.

A. Has EMF failed to challenge all grounds supporting the judgment?

It is well settled that we must affirm a summary judgment if the appellant fails to challenge every independent ground on which the judgment might be based. *See Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970); *see also St. John Missionary Baptist Church v. Flakes*, 547 S.W.3d 311, 313–18 (Tex. App.—Dallas 2018, pet. pending) (en banc) (applying rule to a motion to dismiss and plea to the jurisdiction). According to the HOA, EMF's opening brief never references the grounds stated in the HOA's summary judgment motion. Therefore, the HOA concludes, we must affirm. We disagree.

We first examine the HOA's summary judgment motion to ascertain its grounds. "The term 'grounds' means the reasons that entitle the movant to summary judgment, in other words, 'why' the movant should be granted summary judgment." *Garza v. CTX Mortg. Co., LLC*, 285 S.W.3d 919, 923 (Tex. App.—Dallas 2009, no pet.).

The HOA's motion stated its grounds under heading II, "Grounds for Summary Judgment," with this single sentence:

> As a matter of law, the Board of Adjustment for the City of Dallas abused its discretion upholding the decision of the administrative official because the interpretation of the Dallas Development Code and PD 298 is legally incorrect.

The motion's argument was devoted to showing that, under a correct interpretation of the relevant ordinances, the Board's conclusion that no height restriction applied to the Property was wrong, and the HOA's contrary interpretation was right.

Here is the sole issue presented in EMF's appellate brief:

> Did the District Court err by entering a Summary Judgment Order holding that the City of Dallas and the Board of Adjustment abused their discretion by first issuing and then affirming construction permits for the Project on Appellant's Property? Or did the City and the Board act within their discretion by issuing and affirming these building permits?

On its face, this issue addresses the sole ground the HOA presented in its summary judgment motion: whether the Board's action was an abuse of discretion. Thus, there is not a *Malooly* problem here.

In post-submission letter briefing, however, the HOA contends that EMF's appellate issue doesn't match the HOA's summary judgment ground because EMF focuses on whether the Board abused its discretion, but the HOA's summary judgment ground focused on whether the City and Board interpreted the City's ordinances correctly.

We again disagree with the HOA. In this case, abuse of discretion and ordinance interpretation are two sides of the same coin. The HOA's summary judgment ground asserted that

the Board abused its discretion *because* it misinterpreted the ordinances and thus affirmed the permit. The trial court agreed. On appeal, EMF's issue asserts that the trial court erred because the City and the Board didn't abuse their discretion in issuing and affirming the permit, and its appellate argument presents its own ordinance interpretation.

We overrule the HOA second cross-issue.

B. Did the trial court err by concluding that the Board misapplied the City's ordinances?

1. Standard and Scope of Review

We review a summary judgment de novo. *Knopf v. Gray*, 545 S.W.3d 542, 545 (Tex. 2018) (per curiam). However, in this case the trial court itself sat as a court of review, and the only question before it was whether the Board's decision was legal. *See City of Dallas v. Vanesko*, 189 S.W.3d 769, 771 (Tex. 2006). This required the HOA to make a very clear showing that the Board abused its discretion. *See id*. A zoning board abuses its discretion if it acts without reference to any guiding rules and principles or clearly fails to analyze or apply the law correctly. *Id*. A party challenging the board's factual findings must establish that the board could have reasonably reached only one decision. *Id*. But our review is less deferential when we consider the board's legal conclusions and "is similar in nature to a de novo review." *Id*.[2]

In deciding whether the Board abused its discretion, the trial court considers the Board's "verified return"—i.e., the record of the Board's decision, *see City of San Antonio Bd. of Adjustment v. Reilly*, 429 S.W.3d 707, 710 (Tex. App.—San Antonio 2014, no pet.)—and any additional evidence necessary to properly dispose of the matter. *Bd. of Adjustment of City of Dallas v. Billingsley Family Ltd. P'ship*, 442 S.W.3d 471, 474 (Tex. App.—Dallas 2013, no pet.). Here,

[2] EMF cites *Zamora v. City of Austin*, No. 03-02-00377-CV, 2002 WL 31769039 (Tex. App.—Austin Dec. 12, 2002, pet. denied) (not designated for publication), for the premise that the Board does not abuse its discretion if it chooses between two reasonable interpretations of an ordinance.

the only summary judgment evidence consisted of the Board's record and the texts of some ordinances.

Our review is not limited to any reasons the Board may have given for its decision. "[S]ince the board is a quasi-judicial body, its orders should be upheld on any possible theory of law, regardless of the reasons given by the board in rendering its decision." *Murmur Corp. v. Bd. of Adjustment of City of Dallas*, 718 S.W.2d 790, 799 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (en banc); *accord Schreiber v. Bd. of Adjustment of City of Fort Worth*, No. 02-17-00107-CV, 2018 WL 360427, at *5 (Tex. App.—Fort Worth Jan. 11, 2018, no pet.) (mem. op.); *Bd. of Adjustment of the City of Dallas v. Winkles*, 832 S.W.2d 803, 805 (Tex. App.—Dallas 1992, writ denied).

Finally, we note that EMF did not respond to the HOA's summary judgment motion. Accordingly, the only arguments EMF may raise on appeal are arguments that the HOA summary judgment grounds are insufficient as a matter of law to support the judgment. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). The HOA's summary judgment ground was that the City's ordinances, properly interpreted, barred the Board's action. We conclude that EMF's argument that the HOA's ordinance interpretation is wrong is an argument that the HOA's summary judgment ground was legally insufficient. Thus, EMF may raise this argument on appeal under *Clear Creek*. *See Cty. of Dallas v. Wiland*, 216 S.W.3d 344, 358–59 n.62 (Tex. 2007) (County could argue on appeal that deputies' asserted substantive due process right in continued government employment was not a protected right, even though that argument was not made in the County's summary judgment response).[3]

[3] Our conclusion makes it unnecessary to consider EMF's argument that it can stand in the City's shoes under the virtual representation doctrine.

2. Ordinance Interpretation Principles

We use the same rules to construe municipal ordinances that we use to construe statutes. *CPM Trust v. City of Plano*, 461 S.W.3d 661, 669 (Tex. App.—Dallas 2015, no pet.). Our goal is to discern the city's intent. *Id*. at 669–70. We derive that intent from the ordinance's plain meaning unless (i) a different meaning is supplied by definition or is apparent from the context or (ii) the plain meaning leads to absurd results. *Id*. at 670. We consider the enactment as a whole to glean its meaning and do not construe words, phrases, or clauses in isolation. *Id*.

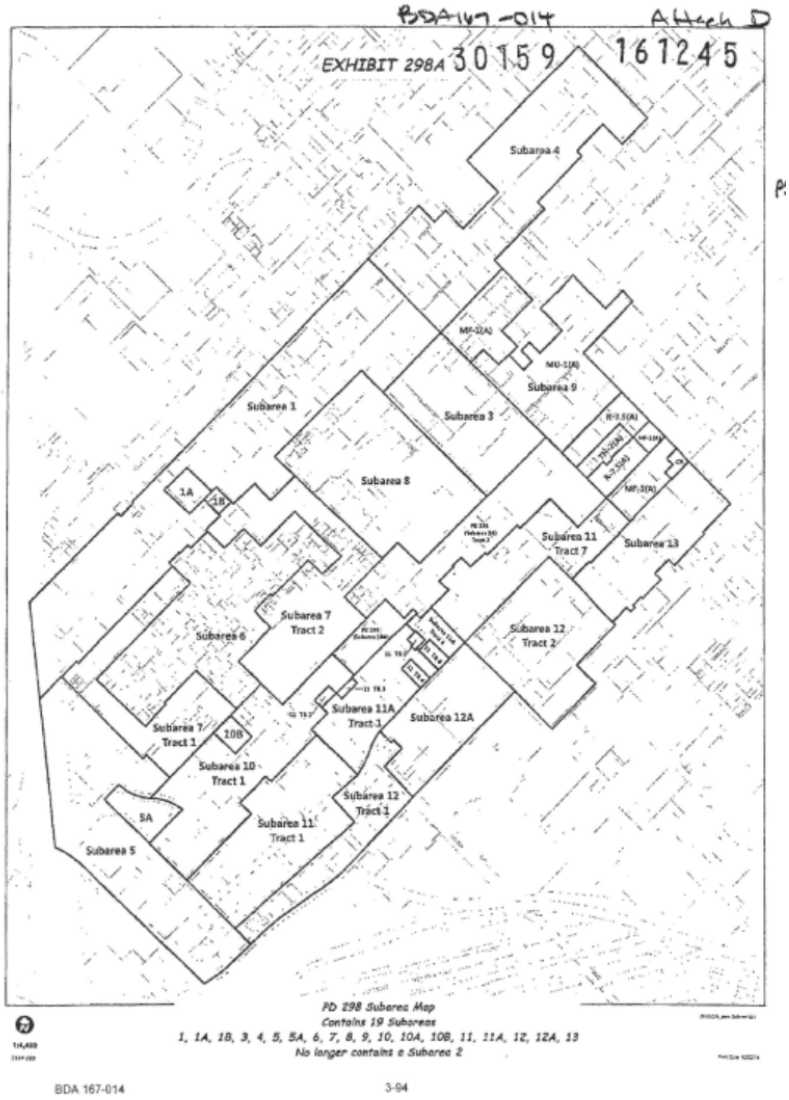
3. The Relevant Ordinances and the Parties' Interpretations

a. Background: Planned Development District 298

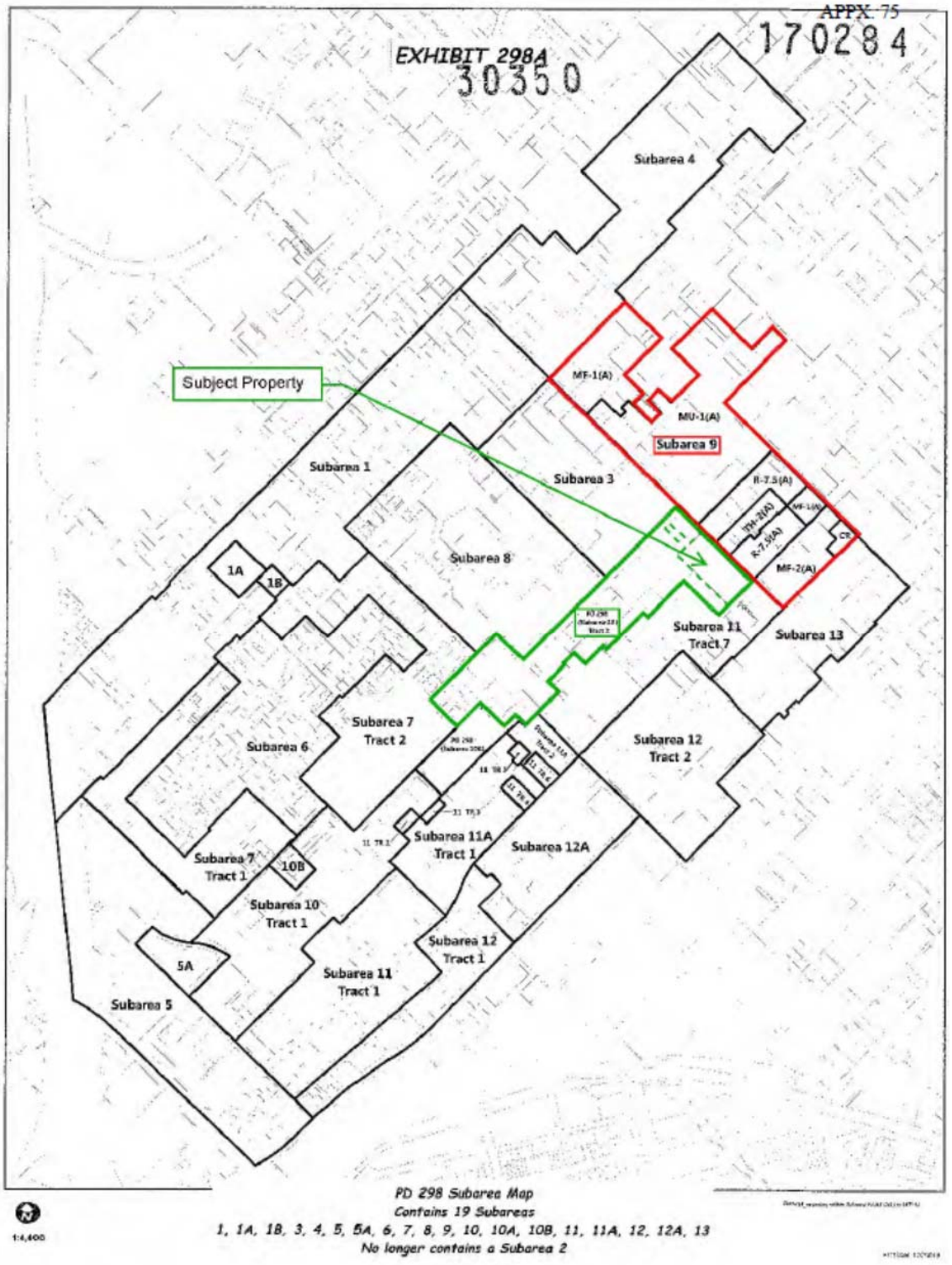
To put the parties' disagreements in context, we first survey the ordinances that establish and govern the "planned development district" in which the Property is located: PD 298.

Dallas City Code Chapter 51A is entitled "Dallas Development Code." Section 51A-4.702 recognizes that the City may, by ordinance, establish planned development districts (PDs). DALLAS, TEX., CITY CODE § 51A-4.702. A PD's purpose "is to provide flexibility in the planning and construction of development projects by allowing a combination of land uses developed under a uniform plan that protects contiguous land uses and preserves significant natural features." *Id*. § 51A-4.702(a)(1). "The regulations of each PD ordinance shall be codified in Chapter 51P." *Id*. § 51A-4.702(a)(5). Thus, Dallas City Code Chapter 51P is entitled "Dallas Development Code: Planned Development District Regulations."

The ordinances governing PD 298, also called the Bryan Area Special Purpose District, are found in §§ 51P-298.101 – .122. PD 298 is east of downtown Dallas. *See id*. § 51P-298 ex. A. The Board's record includes this map depicting PD 298:



EMF's appendix contains essentially the same map with a few enhancements that clarify the facts:



As both maps show, PD 298 is divided into numerous subareas. The Property, marked "Subject Property" in the second map, is located in Subarea 10 of PD 298. Some HOA members

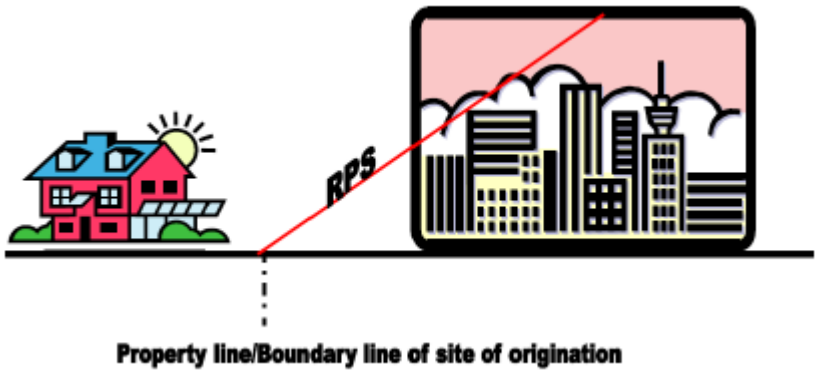
live in Subarea 9—including one homeowner who testified before the Board that he lives across the street from the Property.

b. Residential Proximity Slopes and the HOA's Interpretation of the Ordinances

The HOA relies on a kind of height restriction called a residential proximity slope (RPS). Chapter 51A defines an RPS as

> a plane projected upward and outward from every site of origination . . . . Specifically, the slope is projected from the line formed by the intersection of:
>
> (1) the vertical plane extending through the boundary line of the site of origination; and
>
> (2) the grade of the restricted building or structure.

Id. § 51A-4.412(b). The City and the Board's brief provides the following illustration of an RPS:



Under § 51A-4.412, generally an RPS projects outward from any "site of origination," defined in part as any private property in certain residentially zoned districts. *Id.* § 51A-4.412(a)(3)(A). The HOA argues that (i) Subarea 9 contains residentially zoned private property immediately northeast of Subarea 10 and the Property and (ii) therefore an RPS projects southwest from Subarea 9 across the Property and limits buildings on it to approximately thirty-six feet in height.

c. EMF's Interpretation and the HOA's Responses

EMF argues that no RPS projects from Subarea 9, based on the following analysis:

- The general RPS ordinance does not apply in a PD unless that RPS is expressly incorporated into the PD's ordinance's height regulations.
- PD 298's ordinance expressly incorporates an RPS into its height regulations, but that RPS does not benefit Subarea 9.
- Therefore, the general RPS ordinance does not apply in PD 298 to benefit Subarea 9.

For the following reasons, we agree with EMF.

(1) EMF's First Premise

First, EMF relies on § 51A-4.702(a)(8)(A), which provides, "The residential proximity slope defined in Section 51A-4.412 governs development in a PD only to the extent that it is expressly incorporated into the height regulations of the PD ordinance." *Id*. § 51A-4.702(a)(8)(A). EMF argues that this provision plainly means that there are no RPSs within a PD unless the PD ordinance's height regulations expressly provide for one.

The HOA responds first that EMF cannot rely on § 51A-4.702(a)(8)(A) because that section is outside the scope of the HOA's pleadings and summary judgment motion. According to the HOA, (i) the building official did not rely on § 51A-4.702(a)(8)(A) when he issued the permit and (ii) the building official actually concluded, contrary to EMF's position, that an RPS applies to Subarea 9, but he erroneously concluded that it restricted only properties within Subarea 9. The HOA insists that its pleadings and summary judgment motion addressed only the building official's final, erroneous conclusion, and it contends that EMF cannot now rely on § 51A-4.702(a)(8)(A) because EMF didn't file a summary judgment response.

We disagree with the HOA. EMF can attack the legal sufficiency of the grounds stated in the HOA's motion. *Clear Creek Basin Auth.*, 589 S.W.2d at 678. The motion's ground was that the building official and the Board misinterpreted the ordinances by not enforcing an RPS emanating from Subarea 9. That ground necessarily required the HOA to show that its interpretation is correct when the ordinances are read *as a whole*—because that is how all

ordinances must be interpreted. *See CPM Trust*, 461 S.W.3d at 669. If relevant ordinances contradict the HOA's interpretation, EMF can rely on those ordinances now to show that the HOA's motion was legally insufficient. *See Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 764 n.4 (Tex. 2014) ("[P]arties are free to construct new *arguments* in support of issues properly before the Court."); *see also Miller v. JSC Lake Highlands Operations, LP*, 536 S.W.3d 510, 513 n.5 (Tex. 2017); *Wiland*, 216 S.W.3d at 358–59 n.62.

Moreover, we must consider any possible legal theory that supports the Board's decision, regardless of whether the Board actually relied on that theory. *See, e.g.*, *Murmur Corp.*, 718 S.W.2d at 799.

Finally, we note that the HOA's summary judgment motion cited § 51A-4.702(a)(8), as did the City and the Board's response, so that subsection was raised before the trial court.

Alternatively, the HOA responds that EMF's interpretation of § 51A-4.702(a)(8)(A) is incorrect. First, the HOA cites § 51A-4.702(a)(6)(A), which provides, "For PDs created on or after March 1, 1987 [like PD 298], the regulations in this chapter [i.e., Chapter 51A] control unless they are expressly altered by a PD ordinance in accordance with this section." DALLAS, TEX., CITY CODE § 51A-4.702(a)(6)(A). Although this provision states a general rule that Chapter 51A's zoning ordinances generally apply in a PD, we conclude that § 51A-4.702(a)(8)(A) is more specific to RPSs and therefore controls. *See Holmes v. Morales*, 924 S.W.2d 920, 923 (Tex. 1996) ("When two sections of an act apply, and one is general and the other is specific, the specific controls.").

Second, the HOA argues that EMF's interpretation of § 51A-4.702(a)(8)(A) renders the following subsection (B) meaningless. We quote (A) and (B) together for convenience:

> (A) The residential proximity slope defined in Section 51A-4.412 governs development in a PD only to the extent that it is expressly incorporated into the height regulations of the PD ordinance.

> (B) Pursuant to Resolution No. 87-2319, the city council may authorize exceptions to the residential proximity slope by establishing PD's in high-intensity commercial growth nodes, as described in the city's growth policy plan, in order to accomplish objectives such as transit ridership or residential development, or to achieve other economic or development objectives.

DALLAS, TEX., CITY CODE § 51A-4.702(a)(8). According to the HOA, subsection (B) is meaningless if subsection (A) means that § 51A-4.412's RPS provisions apply in a PD only to the extent expressly incorporated into the PD ordinance's height regulations. But the HOA proposes no other reasonable meaning for subsection (A), which seems clear on its face. And subsection (B) appears to merely restate a truism regardless of the meaning we assign subsection (A)—if the city council wants to create an exception to the general RPS provisions in § 51A-4.412, one way it can do so is by establishing a PD. Accordingly, we reject the HOA's argument.

Finally, the HOA argues that EMF's interpretation has undesirable effects, such as defeating many property owners' reasonable expectations that they enjoy the benefit of an RPS and complicating the interpretation of other PD ordinances. As an example of the latter, the HOA cites § 51P-99.108(c)(5)(A), which provides, "If any portion of a structure is over 26 feet in height, that portion of the structure may not be located above a residential proximity slope." *Id.* § 51P-99.108(c)(5)(A). Article 99 assumes that an RPS already applies, but it does not otherwise expressly incorporate an RPS, so § 51P-99.108(c)(5)(A) appears to have no present application. Nevertheless, this incongruity does not persuade us that we should not give § 51A-4.702(a)(8)(A) its plain meaning. The city council could later amend its ordinances to give § 51P-99.108(c)(5)(A) practical effect. As for property owners' expectations, those expectations must be grounded in the ordinances, including § 51A-4.702(a)(8)(A), to be reasonable.

We agree with EMF's interpretation of § 51A-4.702(a)(8)(A).

(2) EMF's Second Premise

Second, EMF argues that (i) there are height restrictions within the PD 298 ordinance but (ii) those restrictions don't expressly incorporate the RPS set forth in § 51A-4.412 in favor of Subarea 9. EMF cites the following provisions in the PD 298 ordinance:

> **SEC. 51P-298.109. RESIDENTIAL PROXIMITY SLOPE.**
>
> A 1:3 residential proximity slope emanates from the property line of any property within Subarea 6 or any R(A), D(A), or TH(A) district adjacent to the Bryan Area SPD. . . .
>
> **SEC. 51P-298.110. MAXIMUM HEIGHTS.**
>
> (a) In general. Except as provided in this section and Sections 51P-298.107(b) and 51P-298.109, maximum structure heights for each subarea within the Bryan Area SPD are as follows: [chart showing that Subarea 10 has a maximum structure height of 100 feet].

Id. §§ 51P-298.109 – .110(a). Because Subarea 9 is neither Subarea 6 nor adjacent to the Bryan Area SPD (because only areas outside the Bryan Area SPD can be "adjacent to" it), EMF concludes that the only height restriction applicable to the Property is the 100-foot restriction found in § 51P-298.110.

The HOA argues that we must accept the building official's premise that the RPS does apply to Subarea 9 and then consider only whether he and the Board erred in concluding that the RPS does not emanate outwards and thus does not affect properties in other subareas. But, as we have stated, we must affirm the Board's decision—which is the decision under review, not the building official's decision—if it is supported by any legal theory. *See, e.g.*, *Murmur Corp.*, 718 S.W.2d at 799. If EMF's ordinance interpretation is correct, then the general RPS ordinance does not apply to Subarea 9 at all, the Board's decision was correct, and we must uphold it.

The HOA argues that the building official's ordinance interpretation was repeated by certain City officials at the Board hearing and amounted to a judicial admission. But legal conclusions are not facts and cannot be judicial admissions. *In re R.M.R.*, No. 05-14-01247-CV,

2016 WL 1321141, at *4 (Tex. App.—Dallas Apr. 5, 2016, no pet.) (mem. op.); *Tempo Tamers, Inc. v. Crow-Houston Four, Ltd.*, 715 S.W.2d 658, 668 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

We agree with EMF's ordinance interpretation. The RPS defined in § 51A-4.412 is not expressly incorporated into PD 298's ordinance for the benefit of Subarea 9. Therefore, the development of the Property is not limited by an RPS emanating from Subarea 9. *See* DALLAS, TEX., CITY CODE § 51A-4.702(a)(8)(A).

4. Conclusion

The RPS defined in § 51A-4.412 does not apply for the benefit of Subarea 9 in PD 298. Accordingly, the trial court erred by granting the HOA's summary-judgment motion, which argued the contrary. We sustain EMF's issue.

However, because the City and the Board did not appeal the denial of their summary judgment motion, and because EMF did not move for summary judgment, we cannot render judgment in EMF's favor, as its brief requests.

IV. DISPOSITION

For the foregoing reasons, we reverse the trial court's judgment and remand the case for further proceedings consistent with this opinion.

/Bill Whitehill/
BILL WHITEHILL
JUSTICE

171112F.P05

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

EMF SWISS AVENUE, LLC, Appellant

No. 05-17-01112-CV V.

PEAK'S ADDITION HOME OWNER'S ASSOCIATION, CITY OF DALLAS AND BOARD OF ADJUSTMENT FOR THE CITY OF DALLAS, Appellees

On Appeal from the 134th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-17-02532.
Opinion delivered by Justice Whitehill.
Justices Stoddart and Boatright participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with the opinion.

It is **ORDERED** that appellant EMF Swiss Avenue, LLC recover its costs of this appeal from appellee Peak's Addition Home Owner's Association. The District Clerk of Dallas County is directed to release the full amount of the balance of the cash deposit in lieu of supersedeas bond to appellant EMF Swiss Avenue, LLC.

Judgment entered December 28, 2018.