

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCONINO

Cathleen Brown Nichols, Judge

Division 5

Date: April 14, 2021

Christal Stump, Judicial Assistant

VINCENT MCGEARY,

Plaintiff,

vs.

CITY OF SEDONA, an Arizona municipal
corporation, and the COUNCIL OF THE
CITY OF SEDONA, a legislative body,

Defendants.

Case No. CV 2019-00120

ORDER

Re: Special Action

The Court has read and considered the Plaintiff's Brief in Support of Request for Special Action Relief, the Defendants' Response, the Plaintiff's Reply, as well as the record of the subject proceedings.

Standard of Review

Arizona Rules of Procedure for Special Actions, Rule 3 (Questions Raised), states:

The only questions that may be raised in a special action are:

- (a) Whether the defendant has failed to exercise discretion which he has a duty to exercise; or to perform a duty required by law as to which he has no discretion; or
- (b) Whether the defendant has proceeded or is threatening to proceed without or in excess of jurisdiction or legal authority; or
- (c) Whether a determination was arbitrary and capricious or an abuse of discretion.

When a superior court is asked to review a decision made by the Commission and Council, the superior court is presented with and reviews the record before the Commission and Council when they made their decisions to approve the subject CUP. *See Murphy v. Town of Chino Valley*, 163 Ariz. 571, 574–75, 789 P.2d 1072, 1075–76 (App.1989). The dispositive question the superior court must decide is whether the Commission and Council, in making their decisions, acted arbitrarily, capriciously or abused their discretion. *Pingitore v. Town of Cave Creek*, 194 Ariz. 261, 264, ¶ 18, 981 P.2d 129, 132 (App.1998).

This Court may not substitute its opinion of the facts for that of the Commission and Council. Rather, if there is credible evidence to support the Commission’s and Council’s decisions, they must be affirmed. *See, Austin Shea (Arizona) 7th Street and Van Buren, L.L.C., v. City of Phoenix*, 213 Ariz. 385, 392 (2006); *see also Mueller v. City of Phoenix*, 102 Ariz. 575, 581, 435 P.2d 472, 478 (1967).

Accordingly, the Commission’s decision to grant the CUP is presumptively valid and “one who attacks it is met with the presumption that it is correct and carries the burden of showing the decision to be against the weight of the evidence, unreasonable, erroneous or illegal as a matter of law.” *Ivancovich v. City of Tucson Board of Adjustment*, 22 Ariz. App. 530, 535 (1974).

Given the limited scope of judicial review in this matter, the only issue before this Court is whether Plaintiff McGeary has met his burden to rebut the presumption that the Commission’s decision to grant the CUP was lawful, within its discretion, supported by evidence, and not arbitrary or capricious.

Record of Proceedings

The record before this Court shows that the Commission considered the evidence presented during the two (2) public hearings regarding the Arizona Water Company's ("AWC") CUP application, including concerns residents expressed about the project.

Following the presentation of evidence at the August and October 2018 public hearings, the Commission voted and granted the subject CUP. Significantly, the language of the subject Commissioner's motion, which passed, stated that the Commission's decision to grant the CUP was **"based on compliance with all ordinance requirements and satisfaction of the conditional use permit findings and applicable Land Development Code requirements and conditions as outlined in the staff report"** [See audio recording of Commission Hearing on October 16, 2018] [Emphasis added.]

Plaintiff McGeary contends that the Land Development Code ("LDC") required the Commission and Council to make specific findings when approving the CUP. In the present case, the Commission, and later the Council, when they approved the CUP, did not state any of the LDC sections they considered and relied upon in granting the subject CUP. All the Court knows from the record is that the Commission based its decision on "satisfaction of the Conditional Use Permit findings (without setting forth the said findings) and applicable Land Development Code requirements (without setting forth any of the LDC requirements that were considered) and conditions as outlined in the staff report" (without any reference at all to the said conditions in the staff report that were considered).

Defendants assert that Plaintiff McGeary has not met his burden to prove that the Commission's decision was arbitrary, capricious, unlawful, or not supported by substantial

evidence. (Citing *Ivancovich v. City of Tucson Board of Adjustment*, 22 Ariz. App. 530, 535 (1974).

Plaintiff McGeary also contends that the Council's action, in denying his appeal of the Commission's decision granting the subject CUP, was improper since the Council did not make any specific findings pursuant to the LDC. Before making a decision on said appeal, the Council conducted a public hearing and heard from City staff, the Plaintiff, a representative of the CUP Applicant, and members of the public. The Council, after meeting in executive session, then by motion approved the subject CUP, which operated as a denial of the Plaintiff's Appeal of the Commission's decision approving the CUP.

At said Council hearing, before granting a motion to approve the subject CUP, City staff specifically referred to and read from City staff's Memorandum/Report reviewing the applicable provisions of the LDC. Significantly, the Council voted and granted the following motion made to approve the subject CUP, which stated in relevant part:

I move to grant, with conditions, case number PZ17-00001 (CUP, DEV), Arizona Water Company's Water Tank and Booster Pump Facility at . . . , to allow for a new public utility and public service substation, water tank, and pumping plant based on compliance with all ordinance requirements and satisfaction of the Conditional Use Permit findings and applicable Land Development Code requirements and the conditions as amended by the Planning and Zoning Commission.
[Emphasis added.]

[See audio recording of Council Hearing on January 23, 2019, and COSOO1209.]

Very importantly, in voting to approve said CUP (and deny the Plaintiff's Appeal of the Commission's decision granting the CUP), the Council did not state any of the "conditional use permit findings" it considered, and it also did not state any of the "applicable Land Development Code requirements" it considered and based its decision on in granting the CUP.

This Court cannot determine from the record of the above-mentioned proceedings if the Commission's decision and the Council's decision to grant the CUP was or was not arbitrary, capricious, unlawful, or not supported by substantial evidence, since the Commission and Council did not specifically state any of the "conditional use permit findings" they considered, and they also did not state any of the "applicable Land Development Code requirements" they considered and based their decisions on in granting the CUP. Moreover, the Commission also failed to state any of the conditions in the staff report that they considered, and just stated they considered the "conditions as outlined in the staff report." Interestingly, the Council did not refer at all to said staff report when it voted to approve the CUP, and deny the Plaintiff's Appeal.

This Court cannot decide the merits of the underlying dispute because both the Commission's decision approving the subject CUP, and the motion granted by the Council to approve the subject CUP (which operated as the Council's denial of the Plaintiff's appeal of the Commission's decision granting the CUP), lacked any findings of fact, as required by the LDC, and, as such, has prevented meaningful judicial review of both the Commission's and the Council's decisions approving the subject CUP. Based on the forgoing reasons, this Court must vacate the granting of the subject CUP by the Commission and Council, and remand this matter to the Commission and Council to explain their factual and legal basis for their decisions approving the subject CUP, to include reference to the applicable LDC provisions that they considered and based their decisions upon.

The decision to remand is within this Court's discretion. A.R.S. Section 12-910(E) (Supp.2013) permits the superior court to "affirm, reverse, modify or vacate and remand the ... action." To that end, the superior court is authorized to "[s]pecify questions or matters requiring further hearing or proceedings and give ... proper instructions," and to remand for further

development “when from the state of the record ... or otherwise it appears that such action is just.” A.R.S. § 12–911(A)(6)–(7) (Supp.2013).

This Court acknowledges its role is to examine whether the actions taken by the Commission and the Council, in approving the subject CUP, were arbitrary, capricious, or an abuse of discretion, and, in so doing, it must defer to the Commission’s and Council’s factual findings if supported by substantial evidence. However, because both the Commission and the Council did not state any factual findings, as required by the LDC, this Court has no way of knowing whether substantial evidence supported the findings the Commission and Council may or may not have made. As such, for there to be meaningful review in this matter, the Commission and Council must state their reason or reasons for granting the subject CUP.

“Findings ... must be explicit to enable the reviewing court to review the decision intelligently and to ascertain whether the facts as found afford a reasonable basis for the decision or be sufficiently definite and certain to permit judicial interpretation.” *Wammack v. Indus. Comm'n*, 83 Ariz. 321, 325, 320 P.2d 950, 953 (1958).

Significantly, this Court, based on a review of the record of the proceedings before the Commission and Council in this matter, has no knowledge about the specific factual and legal bases for the Commission’s and Council’s decisions granting the subject CUP.

The Plaintiff set forth in detail in his Brief in Support of said Special Action, and in his Reply Brief, the specific provisions in the LDC that the Commission and Council were required to consider before granting the subject CUP. However, the subject Commissioner’s motion, which passed, only stated that the Commission’s decision to grant the CUP was **“based on compliance with all ordinance requirements and satisfaction of the conditional use permit findings and applicable Land Development Code requirements and conditions as outlined**

in the staff report” [See audio recording of Commission Hearing on October 16, 2018]
[Emphasis added.]

Moreover, the Council’s motion approving the CUP (which operated as a denial of the Plaintiff’s Appeal of the Commission’s decision granting the CUP) simply stated the following:

I move to grant, with conditions, case number PZ17-00001 (CUP, DEV), Arizona Water Company’s Water Tank and Booster Pump Facility at ..., to allow for a new public utility and public service substation, water tank, and pumping plant based on compliance with all ordinance requirements and satisfaction of the Conditional Use Permit findings and applicable Land Development Code requirements and the conditions as amended by the Planning and Zoning Commission.
[Emphasis added.]

[See audio recording of Council Hearing on January 23, 2019, and COSOO1209.]

The Defendants contend that they considered and “adopted” the City staff’s findings in said staff’s report/memorandum prepared before the Commission’s hearing granting said CUP. It is impractical, if not impossible, for this Court to divine what factual and legal issues, if any, the Commission and Council considered and decided, and whether their conclusions were legally correct without any findings of fact or conclusions of law. For example, this court cannot ascertain from the Commission’s and Council’s votes whether their respective decisions were based on a determination that granting the CUP was consistent with, and not in violation of the applicable provisions in the LDC.

The decisions granting the CUP by the Commission and Council do not indicate the factual or legal basis for their decisions, other than their statements as referenced above. An abuse of discretion encompasses incorrect legal rulings or conclusions, *see Flying Diamond Airpark, LLC v. Meienberg*, 215 Ariz. 44, 50, ¶ 27, 156 P.3d 1149, 1155 (App. 2007).

Importantly, without more detailed decisions, setting forth that the Commission and Council considered the applicable sections of the LDC, and that they found that granting the CUP was consistent with said LDC provisions, this Court cannot meaningfully review the Commission's and Council's conclusions, as this Court does not know what, if any, legal or factual conclusions it reached.

Factual findings and conclusions of law clearly would facilitate judicial review of the subject matters, and, as such, and for the reasons discussed above, this Court must vacate the granting of the subject CUP by the Commission and Council, and remand this matter back to the Commission and Council for such clarification.

ORDERED, based on the forgoing reasons, this Court vacates the granting of the CUP by the Commission and Council, and hereby remands this matter to the Commission and Council to explain the factual and legal basis for their decisions approving the subject CUP, to include reference to the ordinance requirements that were complied with, the conditional use permit findings that were considered satisfied, and the applicable LDC provisions that the Commission and Council considered and based their decisions upon.



Hon. Cathleen Brown Nichols

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