SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-019301 02/09/2009

HON. EDWARD O. BURKE

CLERK OF THE COURT
L. Nixon
Deputy

ARIZONA STATE, et al.

KENNETH D NYMAN

v.

MARICOPA COUNTY, et al.

CHARLES I KELHOFFER

THERESA M CRAIG

MINUTE ENTRY

The court has had Plaintiff, State of Arizona's ("State") Petition For Preliminary Injunction, the State's Motion For Summary Judgment on Maricopa County's Indemnity Claim, Defendant, Maricopa County's ("County") Cross-Motion For Summary Judgment On Count Three (Indemnity) Of The County's Complaint, the County's Motion For Summary Judgment 1 On Count One of it's Complaint, the County's Motion For Summary Judgment 2 on Count 2 of its Complaint and the County's Motion For Summary Judgment On Count Four Of Its Complaint under advisement and issues the following rulings.

The State's Petition For Preliminary Injunction is GRANTED.

The State's Motion For Summary Judgment on Maricopa County's Indemnity Claim is GRANTED.

The County's Cross-Motion For Summary Judgment, On Count Three (Indemnity) of Maricopa County's Complaint is DENIED.

The County's Motion For Summary Judgment 1 On Count One of Maricopa County's Compliant is DENIED.

The County's Motion For Summary Judgment 2 On Count Two of Maricopa County's Compliant is DENIED.

The County's Motion For Summary Judgment 4 On Count Four Of Maricopa County's Complaint is DENIED.

Facts

The court's decisions are based on the lengthy Statement of Stipulated Facts filed by the parties on January 27, 2009, which will not be repeated here. The essential facts are:

In 2004, the Arizona legislature enacted A.R.S. §11-806, §28-8461 and §28-8481, which require that Arizona political subdivisions in the vicinity of a military airport or ancillary military facility adopt and enforce comprehensive and general plans and zoning regulations for property in the high-noise and accident potential zones of those facilities, which was signed into law on April 19, 2004. Maricopa County includes property within the high-noise and accident potential zones of Luke Air Force Base ("Luke AFB"), Luke Aux 1 and Gila Bend AFAF, but has not adopted comprehensive and general plans and zoning regulations for those areas which comply with the Arizona statutes.

The State seeks preliminary and permanent injunctions requiring the County to comply with A.R.S. §11-806, §28-8461 and §28-8481 by adopting and enforcing comprehensive and general plans and zoning regulations for the high-noise and accident potential zones of LAFB, Luke Aux 1 and Gila Bend AFAF, to assure that property in those zones is developed in a manner compatible with the health and safety hazards in those zones.

A.R.S. §28-8481(A) requires political subdivisions that include areas within the high noise or accident potential ("APZ") zones of a military airport or ancillary military facility to adopt comprehensive and general plans and zoning regulations to assure development compatible with the high noise and accident potential of that facility.

A.R.S. §28-8461(9) defines the high-noise or APZ zones for Luke AFB, Luke AUX #1 and Luke AUX #2;

The County asks the Court to declare that A.R.S. §28-8481 is unenforceable because it: conflicts with A.R.S. §11-801, et seq. (County Complaint, Count One); usurps the County's zoning authority (County Complaint, Count Two); and violates Article 4, Part 2, §13 of Arizona's Constitution, (County Complaint, Count Four). The County also seeks a declaratory judgment that, if it is required to comply with A.R.S. §28-8481, the State must indemnify it for any takings claims brought because of its compliance with A.R.S. §28-8481. (County Complaint, Count Three) The County contends that A.R.S. §28-8481 does not apply to it

because A.R.S. §28-8481(F) states that A.R.S. §28-8481 is subject to any "development plan" approved on or before December 31, 2004, and its' R-43 (one residence per acre) designation for otherwise unzoned land constitutes a "development plan." Therefore A.R.S. §28-8481(F) exempts Maricopa County from the rest of A.R.S. §28-84841.

The County admits that it has not adopted the comprehensive and general plans, zoning ordinances and regulations required by A.R.S. §11-806, §28-8461 and §28-8481.

The County has zoned the area in the vicinity of Luke AFB and its two ancillary military facilities, Luke AUX #1 and Luke AUX #2 R-43; which generally allows one dwelling unit per acre.

The restricted uses in A.R.S. §28-8481(J) conflict with the uses allowed by the County Zoning Ordinance in that A.R.S. §28-8481(J) does not allow single family residential construction in accident potential zones.

The County's comprehensive plan and the White Tanks Area Plan currently permit residential construction in APZ zones. R-43 zoning within APZ zones is consistent with the County's comprehensive plan and White Tanks Area Plan, but does not comply with A.R.S. §28-8481; and

The County has not amended its comprehensive plan for the area near Luke AFB, Luke AUX #1 and Luke AUX #2 since A.R.S. §28-8481 was enacted.

Issues and Rulings

The parties have raised the following issues.

1. Is A.R.S. § 28-8481 Unconstitutional and/or Unenforceable?

The County contends that A.R.S. § 28-8481 is unconstitutional and/or unenforceable because it is overly broad and bears no rational relationship to the goal of preserving LAFB because it "zones by statute" an area nearly four times the area LAFB claims it needs within APZ II.

All statutes are presumed to be constitutional. The party challenging the constitutionality of a statute has the burden of overcoming that strong presumption. Courts have a duty to construe a statute so it will be constitutional, if possible. State v. Preston, 197 Ariz. 461, 464, 4 P.3d 1004 (App. 2000).

Counties do not inherently have zoning power. The power to zone is a part of the State's police power and subordinate governmental units have no greater power than is delegated to them by the State. Transamerica Title Ins. Co. v. Tucson, 157 Ariz. 346, 350, 757 P.2d 1055 (1988). In Transamerica, the Supreme Court also said: "The delegation of the power to zone may also include the process that must be followed to achieve the zoning." 157 Ariz. 346, 350.

In Klensin v. City of Tucson, 10 Ariz. App. 399, 402, 459 P.2d 316 (1969) the court pointed out that a general purpose of zoning is "to bring about the orderly physical development of the community, to conserve, protect, or maintain the value of buildings or other property, and to put land to the use or uses to which it is best adapted, or the use which is most appropriate."

The State's police power to zone is not limited by regulations or requirements of the United States Air Force ("USAF"). The fact that the area affected by A.R.S. §28-8481 is broader than the accident potential zones the USAF has found to be compatible with its operations cannot affect the State's police power to require zoning regulations in excess of the USAF's requirements. The State's concerns extend not only to safety but to noise considerations and the court does not find that it is overly broad. Similarly, the fact that A.R.S. § 28-8481 precludes uses that LAFB has acknowledged are compatible to its operations i.e. residential construction at a density of no greater than one dwelling unit per acre is not a reason to invalidate the statute.

The court does not find that A.R.S. §28-8481 delegates the final say over zoning in the high-noise and accident potential zones to the federal government. Emmet McLoughlin Realty Inc. v. Pima County, 203 Ariz. 557, 58 P.3d 39 (App. 2002) does not require the court to declare A.R.S. §28-8481 unconstitutional. In McLoughlin the neighbors were granted a veto power over zoning which is not the case with A.R.S. §28-8481 which only allows the USAF to waive a statutory prohibition enacted for its benefit, which is not an improper delegation of legislative power. West St. Paul Fed'n of Teachers v. Independent Sch. Dist. No. 197, 713 N.W.2d 366, 377 (Minn. App. 2006) and O'Brian v. City of St. Paul, 173 N.W.2d 462, 465 (Minn. 1969)

The State's effort to ensure that development near military airports is compatible with their operations does not give the USAF the right to veto zoning enactments.

The court finds that A.R.S. § 28-8481 has a reasonable relationship to the public health, safety and welfare by providing for protection from noise and safety issues coincident with the operation of a military airfield.

2. Can the State Exercise Zoning Power Previously Delegated to the County?

The County concedes that the State can revoke delegations of power to zone or portions thereof at anytime. (See page 9 of the County's Response to the State's Memorandum in Support of its Motion For Preliminary Injunction). The court finds that the State has not exercised its zoning power over land located in Maricopa County but simply placed restrictions on the County's delegated power to zone certain properties, which it has the power to do. City of Tucson v. Whiteco Metrocom, Inc., 194 Ariz. 390, 394, 983 P.2d 759 (App. 1999).

The court does not find that A.R.S. §28-8481 is a zoning ordinance. Rather, it is a statute which imposes restrictions on the State's delegation of the power to zone to the counties. See A.R.S. §28-8481(D).

3. Does A.R.S. § 28-8481 Violate the Single Subject Rule?

The County argues that A.R.S. § 28-8481 violates the Arizona Constitution's requirement that legislative acts must contain a single subject. Article IV, Part 2, §13 of the Arizona Constitution provides:

> "Every Act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title, but if any subject shall embrace in an Act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be embraced in the title."

Under the "Single Subject" rule a provision need only directly or indirectly relate to the subject of the title and have a natural connection therewith, or be germane to the subject expressed in the title to be constitutional. Manic v. Dawes, 213 Ariz. 252, 256, 141 P.3d 732 (App. 2006). See also Litchfield Elementary School Dist. No. 79 of Maricopa County v. Babbitt, 125 Ariz. 215, 608, P.2d 792 (App. 1980). The courts must construe the questioned legislation liberally in favor of finding it constitutional and must be convinced beyond a reasonable doubt that the constitutional provision has been violated before declaring it void.

HB 2141 deals with the subject of planning, zoning and development around military airports. Its title, "Military Airports; Development; Planning; Zoning," sufficiently, if not precisely, describes the subject of A.R.S. §28-8481. The court rejects the County's argument that the statute was placed in the wrong section of the Arizona Revised Statutes.

4. Does A.R.S. § 28-8481 Improperly Delegate Zoning Authority to the Attorney General?

A.R.S. §28-8481(I) provides in part:

> "If the attorney general determines the approval, adoption or readoption of the general or comprehensive plan or the major amendment to the general or comprehensive plan is not in compliance with subsection J of this section, the attorney general shall notify the political subdivision by certified mail, return receipt requested, of the determination of noncompliance. Within 30 days after the receipt of a determination of noncompliance by the attorney general as prescribed by this section, the governing body of the political subdivision shall reconsider any approval, adoption or readoption of, or major amendment to, the general or comprehensive plan that impacts property in the high noise or accident potential zone of a military airport or ancillary military facility. If the governing body reaffirms a prior action subject to an attorney general's determination of noncompliance pursuant to this section, the attorney general may institute a civil action pursuant to subsection L of this section."

That subparagraph goes on to state that if the attorney general takes no action any general comprehensive plan or major amendment thereto shall be deemed to comply with subsection J.

This section does not delegate any zoning authority whatsoever to the attorney general. It simply gives the attorney general the authority to review certain zoning actions taken by the County and bring the State's concerns to the attention of the County and request reconsideration and, if necessary, file suit to compel compliance with the statute.

5. Does A.R.S. § 28-8481 Violate Landowners' Due Process Rights?

The County argues that A.R.S. §28-8481 violates landowners' due process rights. However, government actions relating to property are legislative in nature and do not entitle property owners to procedural due process. 75 Acres L.L.C. v. Miami-Dade County, Fla., 338 F.3d 1288, 1294 (11th Cir. 2003).

Nor does A.R.S. §28-8481 violate procedural due process requirements. The statute is not a zoning ordinance but rather places restrictions on the County's power to zone land in the vicinity of military airports and ancillary military facilities. The counties will still have to follow

the due process protections of notice, a public hearing, and the opportunity to be heard in regard to such zoning.

The County argues, in reliance on Jachimek v. Superior Court In and For Maricopa County, 169 Ariz. 317, 819 P.2d 487 (1991), that the statute treats different landowners within the same zoning district differently and therefore violates the uniformity requirement of A.R.S. § 9-462.01(C). First, A.R.S. § 9-462.01(C) applies only to "municipalities" which are specifically defined in A.R.S. § 9-461(2) as incorporated cities and towns. Thus it does not apply to Maricopa County. Maricopa County's zoning authority is set forth in A.R.S. § 11-801, et. seq. There is no specific requirement for uniformity and the court does not read A.R.S. § 11-801(8) as such a requirement. Second, even a uniformity requirement does apply to county zoning, A.R.S. § 28-8481(N) allows the County to issue waivers.

6. Is Maricopa County in Compliance with A.R.S. § 28-8481?

The County contends that because it has adopted R-43 zoning in the affected areas it complies with A.R.S. §28-8481 as this zoning designation serves as a development plan. The court disagrees. A.R.S. §28-8481(P) contains examples of "development plans" including a planned community development plan, a planned area development plan, a planned unit development plan, a development plan that is the subject of the development agreement adopted pursuant to Ariz. 2 §9-500.05 or §11-1101, a site plan, a subdivision plan and any other use approval designation that is a subject of a zoning ordinance. In State v. Barnett, 142 Ariz. 592, 596, 691 P.2d 683 (1984) our supreme court stated that when a statute lists specific classes of items and then refers to them in more general terms, the general terms are limited to the same class of items specifically listed. Therefore the specific terms in Ariz. §24-8481(P) preceding the general term "other land use approval designation" mean a designation that constitutes a plan beyond simply placing land in zoning districts. Had the Legislature wished to include zoning ordinances in its definition of "development plans" it could easily have done so. Therefore, the County's R-43 zoning does not exempt Maricopa County from the requirements of Ariz. §24-8481(A).

7. Does This Court Have the Power to Enjoin Maricopa County to Comply with A.R.S. § 28-8481?

The County argues that this court cannot enjoin a legislative enactment because the Arizona Constitution "prohibits the intervention of the judicial department in the internal workings of the legislative process, citing Queen Creek Land & Cattle Corporation v. Yavapai County Board of Supervisors, 108 Ariz. 449, 451, 501 P.2d 391 (1972). The County claims that the State has requested this court to order Maricopa County to exercise its planning and zoning powers in a particular manner to comply with A.R.S. § 28-8481.

The court finds that the State is not asking this court to adopt legislation in a particular manner. The closest that the State's request for relief comes to asking for an order directing legislation to be adopted is request for relief "d." on page 18 of its complaint and petition for a preliminary injunction which requests: "An order requiring Maricopa County to institute the process of adopting comprehensive and general plans for property in the high-noise and accident potential zones of Luke AFB, Luke Aux 1 and Gila Bend AFAF in compliance with A.R.S. § 28-8481."

In City of Scottsdale v. Superior Court, 103 Ariz. 204, 207, 439 P.2d 290 (1968) the Supreme Court said:

> "…it is a well-established general rule that when the legislature grants to a municipal corporation power to do any act and prescribes the manner in which the power shall be exercised the power must be exercised in the manner stated in the grant and not otherwise,..."

The State, acting within its rights under its police power, placed limitations on its grant of zoning power to the County in areas near military airports. The State's request for an order requiring the County to institute the process of adopting comprehensive and general plans does not enjoin a legislative act, rather it is an order to a subordinate governmental unit to act in accordance with the State's delegation of power to it.

8. Should an Injunction be Issued in this case?

The County argues that there is no emergency or irreparable injury because the BRAC Commission has not been reconvened to address the closure of LAFB and the balance of hardships favors the County. When an act sought to be enjoined is unlawful or clearly against the public interest, neither irreparable injury nor a balance of hardship is required. Burton v. Celentano, 134 Ariz. 594, 596, 658 P.2d 247 (App.1982). Where a state agency has been authorized to institute proceedings in equity to prevent and restrain specified violations of the law, irreparable injury need not be shown as harm is conclusively presumed. Arizona State Board of Dental Examiners v. Hyder, 114 Ariz. 544546, 562 P.2d 717 (1977). A.R.S. § 28-8481 gives the attorney general the authority to institute proceedings in certain situations. The court does not find that the balance of hardships favors Maricopa County.

9. Is Maricopa County Entitled to be Indemnified by the State and Should this Court issue a Declaration to that Effect?

In Arizona it has long been held that a county is an agent of the State. State Board of Control v. Buckstegge, 18 Ariz. 277, 283, 158 P. 837 (1916); County of Maricopa v. Anderson, 81 Ariz. 339, 306 P.2d 268 (1957); and Orsett/Columbia L.P. v. Superior Court ex rel. Maricopa County, 207 Ariz. 130, 83 P.3d 608 (App. 2004).

In Orion Corp. v. State, 109 Wash. 2d 621, 747 P.2d 1062 (1987), the Supreme Court of Washington held that because the County acted under the direction and control of the State of Washington, an agency relationship developed and therefore the State had to take full responsibility if a taking occurred by inverse condemnation.

This court believes that Orion, supra, should apply to this case. That is not the end of the inquiry however. To apply Orion in this case, the court must find that there is a justiciable controversy and not render an advisory opinion. The State does not concede that it would be liable for indemnity in every case involving an inverse condemnation resulting from the County's adherence to A.R.S. § 28-8481. Rather, the State's position is that the State's liability for indemnity depends on the conduct of the County in each particular case.

The County argues that footnote 3 in Mutschler v. City of Phoenix, 212 Ariz. 160, 161, 129 P.3d 71 (App. 2006) obviates the need for a case by case examination of this issue. The court does not agree because of the variety of land use situations that might arise under the County's zoning scheme once it complies with A.R.S. § 28-8481, i.e. not every owner will be deprived of all economically viable use of his or her land. This court is not empowered to issue an advisory opinion that will cover all situations that may arise. City of Tucson v. Pima County, 199 Ariz. 509, 514, 19 P.3d 650 (App. 2001).

Accordingly, the court will issue a preliminary injunction containing the provisions requested by the State on pages 18-19 of its Complaint and Petition For Preliminary Injunction. The State shall submit an appropriate form of order.