

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

CV 2011-005700

05/29/2012

HONORABLE GEORGE H. FOSTER, JR.

CLERK OF THE COURT  
L. Stogsdill  
Deputy

POWER ROAD-WILLIAMS FIELD L L C, et al. FRANCIS J SLAVIN

v.

TOWN OF GILBERT, et al.

ROBERT GRASSO JR.

ADRIAN MICHAEL GOUGH  
DAVID J OUIMETTE  
JENNY J WINKLER

**UNDER ADVISEMENT RULING**

The Court took under advisement the Motions to Dismiss the Amended Complaint that were filed by Maricopa County, The City of Mesa and their respective officials. The Court has considered the pleadings and the arguments of counsel and the record to date. Based on the matters presented the Court finds as follows.

The Court previously ruled on a Motion to Dismiss portions of the original Complaint. The Plaintiff filed an Amended Complaint which contains, nominally, four counts. Court One bears a caption "Failure to Conform to the Gilbert General Plan." However, the first count really seeks as a remedy a claim for a declaratory judgment and injunctive relief. In this regard, the Plaintiff seeks an order declaring that the design and construction of Power Road at or near its intersection with Williams Field Road shall conform to the Gilbert General Plan and a declaration that the "Split Alignment" currently under development fails to conform to the Gilbert General Plan. Insofar as injunctive relief is concerned, it seeks an Order enjoining the Defendants from designing, planning constructing or condemning property of the Split Alignment or other work associated with it.

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Count Two seeks mandamus relief against the City of Gilbert and an injunction against designing, planning, construction and/or condemnation of the Split Alignment until the Town of Gilbert complies with the mandamus order.

Count Three seeks a Declaratory Judgment that the Defendants are required to enter into an Intergovernmental Agreement before commencing the design, construction, right of way acquisition of the Power Road Project. This count also seeks injunctive relief enjoining the Defendants from awarding construction contracts and commencing and continuing the design, right of way acquisition and construction of the Power Road Project without a properly approved and signed Intergovernmental Agreement.

Finally, Count Four seeks a Declaratory Judgment and injunctive relief. The Order sought is one that states the use of the Split Alignment is arbitrary and capricious and irrational and an abuse of discretion. The Count seeks to enjoin any work toward the development of the Split Alignment, arguably, because of the finding that the use of the Split Alignment is arbitrary and capricious and irrational.

All of the Counts request attorneys' fees and costs and such other relief the court deems appropriate. There is no demand for damages in any amount.

The Court previously dismissed certain claims which appear to be reiterated in the First Amended Complaint. The Court ruled that the natural persons working in their official capacities for the municipalities and the County are immune from personal liability. The Amended Complaint fails to address that prior ruling. As plead the claim for such attorneys' fees and costs against any individual employed by the municipality or the County is dismissed.

The Court previously ruled regarding the requirement of an Intergovernmental Agreement. Nothing in the statutes or in the law cited in the memoranda requires the County or the municipalities to enter into such an agreement. Nothing cited requires the cities to enter into such an agreement.

Further, neither the municipalities nor their employees are liable for acts and omissions of the employees in the exercise of legislative and administrative functions. ARS §12-820.01.

IT IS ORDERED, granting the Motions to Dismiss filed by Defendants Maricopa County, R. Fulton Brock, Don Stapley, Andy Kunasek, Max Wilson, Mary Rose Wilcox and the City of Mesa on the claim for declaratory and injunctive relief under Count Three of the First Amended Complaint.

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IT IS FURTHER ORDERED, granting the Motion to Dismiss all claims against the County and City officials for attorneys' fees and costs.

The Court notes that the First Amended Complaint fails to allege in Counts One, Two and Four any facts that support any cause of action or seek any relief applicable to Maricopa County or its employees. The Plaintiffs complain that the County has unofficially taken positions or approved certain things. It fails to indicate any violation of any provision of the law in this regard. Simply put, it fails to allege a real controversy.

Under the Uniform Declaratory Judgments Act in Arizona:

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

ARS § 12-1832.

The remedial purpose of the declaratory judgments act has been adverted to in Peterson v. Central Arizona Light & Power Co., 56 Ariz. 231, 107 P.2d 205 (1940) and Podol v. Jacobs, 65 Ariz. 50, 173 P.2d 758 (1946). But, even though the act is remedial and is to be liberally construed, it is well settled that a declaratory judgment must be based on an actual controversy which must be real and not theoretical. Moore v. Bolin, 70 Ariz. 354, 220 P.2d 850 (1950); Kleck v. Wayland, 53 Ariz. 432, 90 P.2d 179 (1939); Riley v. County of Cochise, 10 Ariz.App. 55, 455 P.2d 1005 (1969); Farmers Insurance Group v. Worth Insurance Co., 8 Ariz.App. 69, 443 P.2d 431 (1968); Iman v. Southern Pacific 7 Ariz.App. 16, 435 P.2d 851 (1968). To vest the court with jurisdiction to render a judgment in a declaratory judgment action, the Complaint must set forth sufficient facts to establish that there is a justiciable controversy. Maricopa Realty & Trust Co. v. VRD Farms, Inc., 10 Ariz.App. 524, 460 P.2d 195 (1969); Connolly v. Great Basin Insurance Company, 6 Ariz.App. 280, 431 P.2d 921 (1967). A 'justiciable controversy' arises where adverse claims are asserted upon present existing facts, which have ripened for judicial determination. Manning v. Reilly, 2 Ariz.App. 310, 408 P.2d 414 (1965).

In this case, the County and its Supervisors have not taken any official action. At best, the First Amended Complaint alleges that the County and the municipalities have discussed and set in motion plans to develop the Power Road Project without taking the proper steps under the law. The law provides for certain steps to be followed if the County is to commit funds for a project. Nothing in the Complaint states that the County has refused to take those steps or has actually officially approved the payment of County Funds without following these steps.

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Simply put, the Complaint fails to allege a true matter in controversy as to the County. Accordingly, it fails to state a claim for which relief can be given.

IT IS ORDERED, dismissing Counts One, Two and Four as to the Defendants Maricopa County, Fulton Brock, Don Stapley, Andy Kunasek. Max Wilson and Mary Rose Wilcox.

The City of Mesa has also filed a Motion to Dismiss the various claims by the Plaintiffs seeking undifferentiated relief. The sum and substance of the relief requested under Count 1 is that this Court declare that the roadway plan conform to the Town's General Plan. However, the First Amended Complaint only avers that the Town has met and is in the planning process and that it has not formally approved anything. The same appears to apply to the City of Mesa

For example, A.R.S. 9-461.08 and 9-461.09 describe procedures for approving specific plans relative to the General Plan of a Municipality. The First Amended Complaint does not specifically allege that these or other legal requirements are being ignored by any of the Defendants. While the First Amended Complaint does allege that at a meeting the Town of Gilbert declined to then an there schedule a public hearing on a matter, it is within their discretion to reject that demand in that forum. The First Amended Complaint, while it says a lot, fails to state what procedures, if any, the City of Mesa has not followed toward formal approval of its participation in the proposed plan.

The law has noted that a general plan is not specific and as noted above any specific plan that is guided by the general plan has a process that must be followed.

[A] city's General Plan is a statement of broad policies, goals, and principles. It enacts nothing definite or specific nor does it implement any law, purpose, or policy previously declared by the legislative body. *See Wennerstrom*, 169 Ariz. at 489, 821 P.2d at 150 (quoting 5 E. McQuillin, *The Law of Municipal Corporations* § 16.55, at 266 (3d rev. ed.1989)).

\* \* \*

¶ 14 The Arizona statute requiring each municipality to adopt a general plan also reveals that a general plan, such as the city's, is to be an aspirational guide or statement of policies and preferences. *See A.R.S. § 9-461.05(A)*. The statute provides in relevant part: "The general plan shall consist of a statement of community goals and development policies. It shall include a diagram ... and text setting forth *objectives, principles, standards and plan proposals*." *A.R.S. § 9-461.05(C)* (emphasis added). The statute also requires a land use element to "designate[ ] the *proposed general distribution* and

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location and extent of such uses of the land for housing, business, industry,” and other purposes. A.R.S. § 9-461.05(C)(1) (emphasis added).

¶ 15 From this language we conclude that a general plan need not command anything specific. It need not provide the ways and means of its own accomplishment and thus is not a self-executing document. To realize a general plan's abstract policies and preferences, the city must undertake further specific actions, adopt specific ordinances, and make use-specific decisions.

*Fritz v City of Kingman*, 191 Ariz. 432, 957 P.2d 337 (1998). Here, the First Amended Complaint does not allege the formal adoption of the plan known as the Split Alignment has taken place. Nevertheless, it does allege and for the purposes of a Motion to Dismiss, the Court is required to accept as true the allegations of the complaint that it appears the City is about to undertake actions to implement that plan. However, it is not for this Court to say whether or not the plan conforms or fails to conform to the General Plan. That is a legislative function of the City. See, *Wennerstrom v City of Mesa*, 169 Ariz. 465, 821 P.2d 146 (1991). And it is not the proper subject of injunctive relief. A.R.S. 12-1802(7).

IT IS ORDERED, dismissing the claims for injunctive relief in Counts One, Two and Four.

Moreover, in a special action the issues to be resolved by the Court are set forth in Rule 3, Rules of Procedure for Special Actions which 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.

In this case, the Plaintiffs have stated a claim for relief within the parameters of the foregoing rules applicable to special action.

Law of the case.

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The Motion to Dismiss filed by the County argued that the prior ruling on the first Motion to Dismiss constitutes the law of the case. The prior ruling was not ever appealed and does not, under the law, constitute the law of the case.

What is meant by the \*336 phrase ‘law of the case?’ The Court first discussed it in Snyder v. Pima County, 6 Ariz. 41, 53 P. 6, in the following language: ‘\* \* \* Even though we should now be convinced that this court had made a mistake in its former judgment, directing the district court to overrule the demurrer and proceed to trial, yet that judgment is the law in this case. Its construction is more than *stare decisis*. It becomes *res adjudicata*. While this court may reserve to itself the right to reverse that decision as it may be applied to another case, yet it is well settled that a judgment of an appellate court in a case becomes the law of that particular case, and is not subject to review thereafter on second appeal. (Citing cases.) \* \* \*’

The same rule is stated in Commercial Credit Co. v. Street, 37 Ariz. 204, 291 P. 1003, 1004, quoting 4 C.J., Sec. 3075, p. 1093: “It is a rule of general application that the decision of an appellate Court in a case is the law of that case on the points presented throughout all the subsequent proceedings in the case in both the trial and the appellate Courts, and no question necessarily involved and decided on that appeal will be considered on a second appeal or Writ of Error in the same case, provided the facts and issues are substantially the same as those on which the first decision rested, and, according to some authorities, provided the decision is on the merits. This doctrine is not one whose extension is looked upon with favor, and it is adhered to in the single case in which it arises and is not carried into other cases as a precedent.” See, also, 5 C.J.S., Appeal and Error, § 1821.

In Re Monaghan’s Estate, 71 Ariz. 334, 227 P.2d 227(1951).

All in accordance with the formal written Order signed by the Court on May 29, 2012 and filed (entered) by the Clerk on May 29, 2012.

May 29, 2012

\_\_\_\_\_/s/ HONORABLE GEORGE H. FOSTER, JR.  
**DATE Hon. GEORGE H. FOSTER, JR**

ALERT: The Arizona Supreme Court Administrative Order 2011-140 directs the Clerk's Office not to accept paper filings from attorneys in civil cases. Civil cases must still be initiated on paper; however, subsequent documents must be eFiled through AZTurboCourt unless an exception defined in the Administrative Order applies.