

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2006-001260

08/23/2006

HONORABLE PETER SWANN

CLERK OF THE COURT
D. Kenney
Deputy

DOWNTOWN VOICES COALITION INC, et al. ELLEN M VAN RIPER

v.

PHOENIX CITY, et al.

MARSHA HOULF WRIGHT

MINUTE ENTRY

Pending before the Court is Defendants' Motion to Dismiss and Plaintiffs' Motion for Leave to Amend. The Court has considered the parties' briefing on these motions and heard oral argument.

For the following reasons,

IT IS ORDERED granting Defendants' Motion to Dismiss with regard to all plaintiffs except Arizona Asian Museum, without prejudice.

IT IS FURTHER ORDERED granting Plaintiffs' Motion for Leave to Amend.

The sole question presented by the Motion to Dismiss is whether Plaintiffs have standing to challenge a City of Phoenix decision concerning a Certificate of Appropriateness that would permit the construction of an 11-story addition on the city-owned Sun Mercantile Building in downtown Phoenix. The merits of the City's decision are not at issue in the motion.

Reading the complaint in the light most favorable to Plaintiffs, the Sun Mercantile Building is a structure with historical significance in downtown Phoenix. Because of its history

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and location, the building is of importance to numerous individuals and groups interested generally in historic preservation, as well as Asian-American groups seeking to promote understanding of the history of Asian-Americans in Phoenix. The decision challenged in this action is that of the City Council to reverse a decision of the Historic Preservation Commission concerning an application by Southwest Value Partners for a Certificate of Appropriateness to build a 39-floor hotel tower adjacent to the Sun Mercantile Building, as well as the aforementioned 11-story addition. The Historic Preservation Officer (whose recommendation was affirmed by the Commission) had recommended approval of the application with two conditions pertinent here: (1) the elimination of the 11 story addition and (2) the allocation of 4500 square feet of museum/Exhibit space inside the Sun Mercantile Building for the use of the Asian-American community.

Section 812(E) of the Phoenix Zoning Ordinance provides: “Any person aggrieved by a decision of City Council on a Certificate of No Effect or a Certificate of Appropriateness may file a special action in Superior Court in accordance with the law, to have the court review that decision.” Defendants’ Motion to Dismiss is premised on the argument that Arizona law requires a plaintiff to demonstrate a particularized injury to itself before an action will be permitted to proceed. *See, e.g., Bennett v. Brownlow*, 211 Ariz. 193 (2005). Plaintiffs counter that they are “aggrieved” by the City’s decision within the meaning of the zoning ordinance, and a “zone of interest” standard, more relaxed than the “particularized injury” standard, should apply here.

The law is well-settled on this point: “To have standing, a plaintiff ‘must plead damage from an injury peculiar to him or at least more substantial than that suffered’ by the community at large. . . Allegations of general economic or aesthetic losses in an area, without instances of injury particular to the plaintiff, are generally not sufficient to create standing.” *Blanchard v. Show Low Planning and Zoning Commission*, 196 Ariz. 114 (Ct. App. 1999) (internal citations omitted). Put differently, the harm alleged “must be separate and distinct from the damage suffered by the general public.” *Buckelew v. Town of Parker*, 188 Ariz. 446 (Ct. App. 1996). The Court concludes that Plaintiff Arizona Asian Museum (“AAM”) satisfies this standard. AAM is a nonprofit corporation formed for the purpose of developing a “living museum” in the Sun Mercantile Building, and the decision challenged specifically and negatively affects the space allocated for such a museum by the Commission. Accordingly, AAM’s interest in this action is not abstract or theoretical – its prospects have been materially affected by the decision of the Commission and the Council and the injury alleged is sufficiently “particularized” to support its standing to maintain this action.

The remaining plaintiffs named in the First Amended Complaint, however, stand in a different position. These plaintiffs consist of associations and nonprofit corporations whose purpose is either historical preservation, the well being of Asian Americans or the perpetuation

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of the “family name and heritage” of families involved in the original construction of the building. [First Amended Complaint, ¶¶ 2-15] These concerns are not “particularized” in the sense of a unique injury – to the contrary, they actually reflect the overall *public* harm that the various plaintiffs believe will be caused by the City’s decision. The existing plaintiffs seek to vindicate the public interest in historical preservation of a property that (with regard to the neighborhood associations) lies outside their boundaries. The harm of which the Asian-American associations complain are likewise of general public concern, and therefore of a nature that does not support standing.

For the proposition that a more liberal standard should apply, Plaintiffs rely on *City of Scottsdale v. McDowell Mountain Irrigation and Drainage Dist.*, 107 Ariz. 117 (1971). That case does not support Plaintiffs’ position. Indeed, the court in that decision rejected a claim that a league of cities and towns had standing to pursue an action in Superior Court challenging a decision allowing organization of an irrigation district, holding that the harm alleged was “remote and speculative, and further lacks the concrete adverseness necessary to assure proper presentment of the pertinent issues.” Plaintiffs also contend that they have standing to pursue this action by virtue of their status as taxpayers. The Court disagrees. *See Bennett v. Napolitano*, 206 Ariz. 520, 527 (2003) (“Petitioners here do not claim the funds affected by the vetoes are to be spent for an illegal or unconstitutional purpose; they challenge only the manner in which the governor’s action affected proposed spending.”). Here, as in *Bennett*, Plaintiffs challenge a governmental decision affecting a public asset. But while they claim that the City’s decision was improperly reached and unlawful in its result, they do not contend that the City is spending taxpayer resources for an unconstitutional or illegal purpose. “The right to maintain [a taxpayer] suit is based upon the taxpayer’s equitable ownership of such funds and his liability to replenish the public treasury for the deficiencies.” *Smith v. Graham County Community College Dist.*, 123 Ariz. 431, 432 (Ct. App. 1979). This case does not raise such concerns, and to allow a taxpayer standing here would effectively supplant the “particularized harm” requirement.

Plaintiffs also seek leave to file a Second Amended Complaint to add a new plaintiff, Michael Levine. According to the Motion, Mr. Levine owns five historic properties located between 380 and 1940 feet from the Sun Mercantile Building, and believes that his property interests are threatened by the redevelopment authorized by the City Council. In opposing the Motion for Leave to Amend, Defendants characterize Mr. Levine’s interest as generalized about historic properties and downtown property values concern no different from that of the other plaintiffs. Defendants do not, however, address the holding of the *Blanchard* decision as it relates to the standing of a nearby property owner. There, the Court of Appeals held:

While proximity is a factor to be considered in determining standing, a neighborhood or other discrete area may be affected by zoning changes and not all landowners need to be directly adjacent

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to the subject property to be harmed by the proposed rezoning. *See Armory Park v. Episcopal Community Servs.*, 148 Ariz. 1, 6 (1985) (action on behalf of neighborhood affected by meal center for indigents). Thus, the mere fact that the . . . properties are not adjacent to the rezoned parcel does not alone preclude standing. . .

196 Ariz. at 117-18 (holding that owner of property 750 feet from a rezoned property had standing to challenge zoning decision). Because the Court treats the opposition to a Motion for Leave to Amend on grounds of futility as the functional equivalent of a 12(b)(6) motion, the proposed complaint must be read in the light most favorable to Plaintiff. Under this standard, the Court cannot say that the proposed amendment is futile.

For the foregoing reasons,

IT IS ORDERED dismissing without prejudice all plaintiffs except AAM, and permitting the filing of a Second Amended Complaint to join Mr. Levine as a plaintiff.