Clerk of the Superior Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2017-015460 02/11/2019

HON. PAMELA GATES

CLERK OF THE COURT
K. Ballard
Deputy

TROON NORTH ASSOCIATION

DOUGLAS A JORDEN

v.

CITY OF SCOTTSDALE, et al.

ERIC C ANDERSON

FREDERICK E DAVIDSON
REMAND DESK-LCA-CCC

UNDER ADVISEMENT RULING

INTRODUCTION

The Scottsdale Zoning Administrator issued an interpretation of Scottsdale Zoning Case No. 3-ZN-94 as applied to Parcel 6 of Troon North, currently owned by Petitioner MBA Development Partners, LLC. *See* COS-MBA-000001-0004. The Zoning Administrator interpreted the zoning ordinances to allow 31 resort units on Parcel 6. *Id.* Thereafter, MBA appealed the Zoning Administrator's decision to the Scottsdale Board of Adjustment. The Board of Adjustment affirmed the Zoning Administrator's decision, and MBA appealed.

STANDARD OF REVIEW

As a statutory special action pursuant to A.R.S. § 9-462.06(K), review is limited to the record considered by the Board of Adjustment. *See Neal v. City of Kingman,* 169 Ariz. 133, 135 (1991); *Lane v. City of Phoenix,* 169 Ariz. 37, 39-40 (1991)("[T]he superior court is bound by the evidence presented to the Board, and cannot receive additional evidence or reweigh the evidence previously considered by the Board in order to arrive at a different factual determination.").

In this procedural posture, the court presumes the validity of the Board of Adjustment's determination unless it is "against the weight of the evidence, unreasonable, erroneous, or illegal as a matter of law." *Pawn 1st, LLC v. City of Phoenix*, 242 Ariz. 547, 551, ¶9 (2017)(quoting *Mueller v. City of Phoenix ex rel. Phoenix Bd. of Adjustment II*, 102 Ariz. 575, 581 (1967)("The court shall affirm the agency action unless . . . the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion."); *Pingitore v. Town of Cave Creek*, 194 Ariz. 261, 264, ¶ 18 (App. 1998)("[The] court may not substitute its opinions of facts for that of the Board . . [r]ather, if there is credible evidence to support the Board's decision, it must be affirmed.").

As part of this review, however, the court analyzes statutory and ordinance interpretation *de novo*. *See Pawn 1st*, 242 Ariz. at 551, ¶9 (citing *Baker v. Univ. Physicians Healthcare*, 231 Ariz. 379, 387 ¶30 (2013); *see also City of Phoenix v. Superior Court (Rosen)*, 110 Ariz. 155, 158 (1973). ("If, upon examination of the record, the Superior Court finds undue haste, unfair procedures, mistakes of law, etc., the court may return the record to the Board with instructions to give the aggrieved person more time and fairer procedures and to apply correct rules of law in accordance with the court's opinion."); *U.S. Parking Sys. v. City of Phoenix*,160 Ariz. 210, 211, 772 P.2d 33, 34 (App. 1989)(acknowledging that an agency's interpretation of a statute or regulation is given weight; however, the court remains the final authority on critical questions of statutory construction). Because zoning ordinances are in "derogation of common law property rights," the ordinances are strictly construed, resolving any ambiguity or uncertainty in favor of the property owner. *See Kubby v. Hammond*, 68 Ariz. 17, 22 (1948).

BACKGROUND

The original master plan for Troon North anticipated development of a resort. The zoning for the Resort Parcel was approved by the Scottsdale City Council in Case No. 28-Z-89 and established the internal resort core of the Troon North community. *See* COS-MBA-000609-000648 (identifying Parcels V1 assigned R-4R HD/HC zoning - including what is now known as Parcel 6, and V2 assigned R1-7 HD/HC zoning). Case No. 28-Z-89 included a stipulation (No. 10A) pertaining to what was referred to as the North Resort Site, requiring the commencement of construction of a resort hotel within five years; and, if commencement did not timely occur, the property would be deeded to the City of Scottsdale, who would then develop the resort hotel. *See* COS-MBA-000619. The combined Parcels V1 and V2 were allocated 280 resort rooms, plus 144 dwelling units. *See* COS-MBA-000609-000648.

In 1994, prior to the expiration of the five-year deadline for the commencement of resort construction, Case Nos. 3-ZN-94 and 2-GP-94 were commenced to address the impending five-year construction deadline imposed by the City on the Developer and to further specify the zoning for the six parcels included within the Resort Parcel. *See* COS-MBA-000698-000809. The former

Parcel V2 was re-zoned from R1-7 ESL (HD/HC) to R-4R ESL,[1] and the development standards for the area were amended. *See* COS-MBA-000698-000699. Stipulation 2 in Case No. 3-ZN-94 stated:

> Maximum densities and dwelling unit counts shall be as indicated on the approved development plan except that in no case shall [the] unit count exceed 385 (for units which are not used or available as resort rooms) and 424 units maximum (of which at least 90 units shall be used as resort rooms) without a subsequent public hearing. The specific location of each parcel shall be determined at the time of site plan review. Redistribution of the units is subject to maximum densities and Project Coordination staff approval. All such requests shall include a revised master development plan and a revision to the table on page 2 indicating the parcels with the corresponding reduction/increase.

See COS-MBA-000700.

The table in Stipulation 2 sets forth information regarding the various parcels and identified: 1) Parcel Number; 2) Gross Acreage; 3) Zoning; 4) Proposed Dwelling Units Per Acre; 5) Maximum Dwelling Units Per Acre; 6) Proposed Number of Units; and 7) Maximum Number of Units. *Id.* In this table, Parcel 6, identified as 1.49 acres, was assigned a density of 15 du/acre (15 dwelling units per acre) and a maximum number of units of 22. *Id.*

Of note, after the City Council report had been prepared, but before the City Council approved Case No. 3-ZN-94, Don Hadder received a letter dated March 28, 1994, alerting him that the acreage listed in table for Parcel 6 was incorrect. *See* COS-MBA- 000571-000572. Despite receipt of the March 28, 1994 letter, the table was not corrected.

Case No. 3-ZN-94 also included Stipulation 12 from Case 28-Z-89, which provided that "density will be based on the gross development area of each parcel." *See* COS-MBA-000710. Case 3-ZN-94 was adopted by the City Council as enabling Ordinance 2650. *See* COS-MBA-000698-809.

On or about July 22, 2016, MBA acquired title to Parcel 6 via a warranty deed recorded as Document No. 2016-0519301, Official Records of Maricopa County, Arizona. Parcel 6 was acquired with the intention of completing a resort project. *See* COS-MBA-001297- 001304.

[1] In Scottsdale, the land use category for R-4R is for Resort/Townhouse Residential. *See* Scottsdale Revised Code, Appendix B, §5.900 *et seq*., which establishes the minimum gross land area per guest room as 4,100 square feet and the minimum gross land per dwelling unit is 5,770 square feet. *See* Scottsdale Revised Code, Appendix B, §5.904(C).

MBA's initial submittal to the City Development Review Board occurred on or about October 20, 2016. *See* COS-MBA-000895-897. On November 21, 2016, the Planning Coordination Staff instructed MBA to review the project narrative to explain what section of the Zoning Ordinance was being utilized to equate the maximum allocated 37[2] units to 53 of the proposed units and to address how the 64 proposed flex units would comply with the established zoning while exceeding both of those unit counts. *See* COS-MBA-000899-903. At no time did MBA receive the formal approval of the Development Review Board or the Planning Coordination Staff for more than 22 dwelling units or 31 resort rooms. *See* R.T. 11/01/17 (Bamford) at 21 & 47-48.

On July 24, 2016, Troon North Association requested a Zoning Administrator Interpretation. *See* COS-MBA-000528-000574. The Zoning Administrator's Interpretation issued on August 24, 2017. *See* COS-MBA-000001-004. On November 1, 2017, the Board of Adjustment affirmed the decision of the Zoning Administrator, finding that the decision was neither arbitrary, capacious, nor an abuse of discretion. *See generally* R.T. 11/01/17.

ANALYSIS

The City of Scottsdale is empowered to enact zoning ordinances pursuant to A.R.S. § 9-462.01 *et seq.* Section 9-462.05(C) directs the City to establish an Office of Zoning Administrator who has the responsibility of enforcing zoning ordinances. The Scottsdale City Code directs the Zoning Administrator to interpret and apply the zoning ordinances. *See* Scottsdale Rev. Code, Appendix B, §1.201 *et seq.* Here, the Zoning Administrator fulfilled the duty by providing an August 24, 2017 interpretation, concluding that "Parcel 6 is currently allowed 22 dwelling units or 31 resort rooms." *See* COS-MBA-000001-000004. On appeal, the Board of Adjustment determined that the Zoning Administrator's decision was not arbitrary, capricious, or an abuse of discretion.

After considering the pleadings, the argument, and conducting a thorough review of the record considered by the Board of Adjustment, this court affirms the Board of Adjustment's decision. In doing so, the court affirms the Board of Adjustment's determination that the Zoning Administrator articulated a rational connection between the facts and the decision and that the Zoning Administrator's decision was based on relevant facts.

As part of this review, the court analyzed the Board of Adjustment's legal determinations *de novo*. *See Pawn 1st*, 242 Ariz. at 551, ¶9. When interpreting statutes or ordinances, the court follows the ordinary or plain meaning of the text unless: 1) it appears from the context that a special meaning

[2] In Case No. 48-DR-2007, the Development Review Board Report lists 37 as the number of units allowed. *See* COS-MBA-000858-000891. Of note, this approval, from 2007, expired after two years. Any new project required Board approval based on current conditions and standards.

was intended; 2) the text suggests an absurd result; or 3) the text contains a scrivener's error. *Austin Shea (Ariz.) 7th St. & Van Buren, L.L.C. v. City of Phoenix,* 213 Ariz. 385, 391 ¶23 (App. 2006).

The parties agree the acreage of Parcel 6 listed in Stipulation 2 of Case No. 3-ZN-94 is incorrect. However, the court does not find that the inclusion of 1.49 acres and the resulting maximum number of units of 22 is a simple scrivener's error. *See United States Nat'l Bank of Oregon v. Independent Ins. Agents of America, Inc.,* 113 S.Ct. 2173, 2186 (1993)(re-punctuating a statute when the true meaning of the language is clear beyond question and the scrivener's error, a mistake made by someone unfamiliar with the law's object and design, is too weak to trump the overwhelming evidence from the structure, language, and subject matter of the statute).

Read as a whole, the Stipulations in Case No. 3-ZN-94 set the maximum densities per parcel and the maximum number of units per parcel with a mechanism for "[r]edistributi[ng] . . . the [number of] units [per parcel] . . . subject to maximum densities and Project Coordination Staff approval." *See* COS-MBA-000700; *see also* COS-MBA-001361 (the site plan listing the correct acreage for Parcel 6 and retaining the maximum number of units for Parcel 6 as 22); *Smith v. United States,* 113 S.Ct. 2050, 2056 (1993)("Statutory construction . . . is a holistic endeavor.")(quoting *United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd.,* 484 U.S. 365, 371, 108 S.Ct. 626, 630 (1988)). The ordinary or plain meaning of the text, read holistically, is consistent with the Zoning Administrator's interpretation that absent Project Coordination staff approval,[3] the maximum number of dwelling units for Parcel 6 is 22 or 31 resort rooms.

Guided by the ordinary and plain meaning of the text, the court rejects MBA's argument that the Stipulations require at least 90 units to be resort rooms. Instead, the court finds that the requirement of 90 units "used as resort room" applies when the unit count exceeds 385. *See* COS-MBA-000700 ("Maximum densities and dwelling unit counts shall be as indicated on the approved development plan except that in no case shall [the] unit count exceed 385 (for units which are not used or available as resort rooms) and 424 units maximum (of which at least 90 units shall be used as resort rooms) without a subsequent public hearing. . . . **The 385 unit maximum is the maximum allowed for residential units**.")(Emphasis added); *see also* R.T. 11/01/17 (Bamford) at 39-42. Cannons of interpretation and grammar tenets are also consistent with this interpretation. For example, the Chicago Manual of Style notes that words within a parenthetical typically modify the nearest word or phrase. Applying this tenet to the language of Stipulation 2, "of which at least 90 units shall be used as resort rooms" modifies unit count in excess of 385. *See The Chicago Manual of Style* § 6.97 (15th ed. 2003). Similarly, under general cannons of interpretation, when

[3] Among other requirements, all such requests to the Projection Coordination staff must include a revised master development plan and a proposed revision to the table on page 2 of the Stipulations, indicating the parcels with the corresponding reduction/increase. *See* COS-MBA-000700.

the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent. *See* Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts (2012).

The Board of Adjustment acted within its discretion. In making this decision, the court finds that neither the Zoning Administrator nor the Board of Adjustment misappropriated the authority of the City Council. Moreover, the court finds that neither the Zoning Administrator nor Board of Adjustment failed to consider relevant vested rights. Finally, the court does not find a violation of due process.

IT IS ORDERED accepting jurisdiction and affirming the decision of the Board of Adjustment's decision upholding the Zoning Administrator's determination.