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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2011-014526 09/26/2011

HONORABLE ARTHUR T. ANDERSON

CLERK OF THE COURT
L. Nixon
Deputy

KEVIN LITTON, et al.

THOMAS M BAKER

v.

CITY OF PHOENIX, et al.

ANDREW ABRAHAM

DAVID J CANTELME

RULING

The following were taken under advisement following the Special Action Injunctive Relief evidentiary hearings.

- Plaintiffs' First Amended Verified Complaint for Declaratory Relief and Special Action Injunctive Relief and Application for Special Action Injunctive Relief;

- Real Party in Interest Howard Taylor's ("Taylor") Motion to Dismiss Plaintiff Alexis J., L.L.C. for lack of standing, and joinder by Defendant City of Phoenix, its Mayor and Council Members (the "City");

- City's and Taylor's (collectively, "Defendants") Motions to Dismiss for failure to state a claim.

Plaintiffs challenge the Phoenix City Council's rezoning decision, PUD Ordinance G-5640 (the "Ordinance"). Plaintiffs request this Court to enter orders enjoining the effective date of the Ordinance and enjoining Taylor from opening a pawnshop on the property at issue.[1]

[1] The Council approved the Ordinance on July 6, 2011. Pursuant to A.R.S. § 9-462.04(J), the Ordinance became effective 30 days thereafter, or on August 6, 2011.

Having read and considered the briefing and having heard oral argument, the Court issues the following rulings.[2]

I. *Standing*.

Plaintiffs Kevin and Elaine Litton ("Littons"). To have standing, the Littons must plead damage from an injury peculiar to them or at least more substantial than that suffered by the general public. *Buckelew v. Town of Parker,* 188 Ariz. 446, 452, 937 P.2d 368, 374 (App. 1996). The proposed pawnshop will be 30 feet from their 5'3" high back fence. The Littons allege that the location and activities of a pawnshop will result in increased noise, litter, vandalism, and criminal activity. They also allege the pawnshop will increase their homeowners' insurance premiums and decrease their property's value. Without belaboring the point, based on the testimony and evidence presented, the Court finds these damages interfere with the use and enjoyment of the Littons' property in a manner peculiar to them and more substantial than that sustained by even their immediate neighbors. *See id., citing Armory Park v. Episcopal Comm. Servs.,* 148 Ariz. 1, 3, 712 P.2d 914, 916 (1985); *see also Blanchard v. Show Low Planning & Zoning Comm'n,* 196 Ariz. 114, 118, 993 P.2d 1078, 1082 (App. 1999).

Alexis J. ("Alexis J." or Mark "Brooks"). Clearly, Alexis J.'s allegations of particularized harm can be cast as an objection to increased competition. *See Center Bay Gardens, L.L.C. v. City of Tempe City Council,* 214 Ariz. 353, 360-61, 153 P.3d 374, 381-82 (App. 2007). However, Alexis J. also alleges a particularized harm intrinsic to the value of its grandfathered location, a harm not suffered by other grandfathered locations in the City by virtue of proximity. *See Blanchard,* 196 Ariz. at 117-18, 993 P.2d at 1081-82 (proximity considered in determining standing). Based on the testimony and evidence presented, the Court finds this particularized economic harm is sufficient to confer standing on Alexis J. *See Center Bay Gardens, id.*

II. *Injunctive Relief.*

Likelihood of Success on the Merits. This Court has a limited role in a zoning case. *Rubi v. 49'er Country Club Estates, Inc.*, 7 Ariz. App. 408, 411, 440 P.2d 44, 47 (1968) (court does not sit as super-zoning commission); *Town of Paradise Valley v. Gulf Leisure Corp*., 27 Ariz. App. 600, 605, 557 P.2d 532, 537 (1976). The Ordinance is presumed to be valid, *City of Phx. v. Fehlner*, 90 Ariz. 13, 18, 363 P.2d 607, 610 (1961), and Plaintiffs have the burden to

[2] Having heard evidence extrinsic to the Complaint, the Court treats the motions to dismiss as motions for summary judgment. *Blanchard v. Show Low Planning & Zoning Comm'n,* 196 Ariz. 114, 117, 993 P.2d 1078, 1081 (App. 1999); *Center Bay Gardens, L.L.C. v. City of Tempe City Council,* 214 Ariz. 353, 356, 153 P.3d 374, 377 (App. 2007.

show it is invalid or unconstitutional. *Id*.; *Ranch 57 v. City of Yuma*, 152 Ariz. 218, 223, 731 P.2d 113, 118 (App. 1986). The standard of review is the rational basis test. *Haines v. City of Phx.*, 151 Ariz. 286, 290, 727 P.2d 339, 343 (App. 1986). The Ordinance will be upheld unless it is clearly arbitrary and unreasonable, without a substantial relation to the public health, safety, morals, or general welfare. *City of Tucson v. Ariz. Mortuary*, 34 Ariz. 495, 507, 272 P. 923, 927 (1928). The Court will not substitute its judgment for that of "the duly elected legislative body, the city council." *Haines, id.*; *see also Melhorn v. Pima Cnty.*, 194 Ariz. 140, 141, 978 P.2d 117, 118 (App. 1998). The Court must uphold the Ordinance where its reasonableness is "fairly debatable". *City of Tempe v. Rasor*, 24 Ariz. App. 118, 120, 536 P.2d 239, 241 (1975).

Plaintiffs dispute that the reasonableness of the Ordinance is fairly debatable, contending that it violates the City's General Plan. *See* A.R.S. § 9-462.01(F). The Court agrees with Defendants that *Haines* is dispositive of this issue. If the Council could have determined from the evidence before it that the Ordinance was in basic harmony with the General Plan, the rezoning is valid. 151 Ariz. at 290-91, 727 P.2d at 343-44.

Here, the Council had before it evidence that this was a struggling area of the City. Taylor was proposing development that would revitalize the entire property, not just the pawnshop location itself. Taylor had an interest and involvement in that community and had an established business model that operated differently than a traditional pawnshop. His application had some neighborhood support and had been approved by the City's Village Planning Committee and Planning Commission. The Court simply cannot say that the Council was wrong in finding the rezoning in basic harmony with the General Plan. *See Haines, id.* at 291, 727 P.2d at 344.

The Court also does not find that the Ordinance approves an impermissible use in violation of the PUD requirements. "Uses may include permitted, permitted with conditions, temporary or accessory uses." Phoenix Zoning Ordinance § 671(C). The property had been zoned C-2; a pawnshop was a permitted use. The Court agrees with Defendants that the Ordinance changed the development standard, the 500 foot requirement, which would fall under a use "permitted with conditions." *Id.* Alternatively, the Court finds that the Council's interpretation of its authority under § 671(C) is fairly debatable and not unreasonable. *See Peabody v. City of Phx.*, 14 Ariz. App. 576, 579, 485 P.2d 565, 568 (1971). The purpose of a PUD ordinance is to "create a built environment that is superior to that produced by conventional zoning districts and design guidelines." Phoenix Zoning Ordinance § 671(A). This purpose is achieved when the Council is afforded zoning flexibility tailored on a property-by-property basis. The Council's power to rezone via a PUD ordinance would be largely illusory were the Council constrained by existing "permitted uses."

The Court does not find that the Ordinance constitutes illegal spot zoning. *Haines*, 151 Ariz. at 291, 727 P.2d at 344 (not illegal spot zoning when ordinance in accordance with general plan). Nor does the Court find that the Ordinance constitutes an unlawful variance or that it usurps the Board of Adjustment's authority. Taylor had two options to obtain the result he sought, variance or rezoning. His choice to pursue either or both was perfectly lawful. *Cf. Peabody*, 14 Ariz. App. at 580, 485 P.2d at 569 (wisdom of City's Planned Area Development procedure not a concern of the courts).

Plaintiffs also challenge the Ordinance on the basis that it was conditioned on restrictions discussed during the July 6, 2011 Council meeting. Initially, the Court notes that the Council clearly indicated the restrictions Taylor proposed were a private agreement between him and the neighbors, separate and apart from the Ordinance itself. There is no evidence that Taylor does not intend to comply with these restrictions. Moreover, Plaintiffs have indicated that any such restrictions and Taylor's compliance therewith is of no relevance to them, under any circumstances.

Irreparable Harm. The Court is not unmindful of the harm alleged by Plaintiffs. However, the Littons' testimony demonstrates that their primary concern is non-economic harm largely stemming from residing 30 feet from a C-2 property in this economy, a pawnshop differing from a plumbing supply or jewelry store only in degree. As to the economic harm to Alexis J.'s grandfathered location, Brooks is aware that the zoning of any given nearby property is subject to variance or rezoning.[3]

III. *Conclusion.*

The Court finds no legal merit to Plaintiffs' challenge to the Ordinance. Accordingly, the Court denies the requested injunctive relief. *See Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists*, 227 Ariz. 262, 257 P.3d 181 (App. 2011) (injunction not justified by likelihood of success).

IV. *Declaratory Relief.*

Having found no legal merit to Plaintiffs' challenge to the Ordinance, the Court grants Defendants' motions to dismiss Plaintiffs' First Amended Verified Complaint for declaratory relief based on failure to state a claim.

[3] Indeed, if pawnshops do better in clusters, as Brooks has stated, Pawns Plus' increased business potentially offsets any diminution in value to his grandfathered location. (1/8/09 Board of Adjustment Hearing minutes at 4.)