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7/8/2024 4:46:38 PM

ARIZONA SUPERIOR COURT, PIMA COUNTY

HON. KYLE BRYSON

CASE NO. C20235484

DATE: July 03, 2024

TUCSON ELECTRIC POWER COMPANY
Plaintiff,

vs.

CITY OF TUCSON BOARD OF ADJUSTMENT and
CITY OF TUCSON
Defendants

UNDER ADVISEMENT RULING

IN CHAMBERS:

This case is before the Court on Tucson Electric Power's (TEP) special action appeal of the Zoning Administrator Determination (ZAD), and the City of Tucson's (City) motion for summary judgment on the issues of preemption and estoppel. The Court heard oral argument on both actions, has reviewed the record on appeal, and renders this ruling.

On July 19, 2021, TEP requested a ZAD from the City of Tucson Planning and Development Services Department (PDSD) regarding the construction of overhead transmission lines along an approximately 3.5-mile segment of Kino Parkway. Kino is designated as a Gateway Corridor according to the Major Streets and Routes Plan (MS&RP), and as such is subject to specific zoning restrictions outlined in the Unified Development Code (UDC). One such restriction is the requirement that new utilities[1] be constructed underground. UDC § 5.5.4(B)(1)(a). TEP characterized the Demoss-Petrie Project (DMP) as an upgrade of utilities, and not new construction, and argued that UDC § 5.5.4(B)(1)(c) should control instead. The Administrator ruled the DMP was new development[2], and not an upgrade, and that TEP was required to underground the transmission lines along Kino.

[1] Utilities: services such as gas, electric, water, telephone, and cable television. UDC § 11.4.22.
[2] Development: any human alteration to the state of land, including its vegetation, soil, geology, or hydrology, for any residential, commercial, industrial, utility, or other use…. UDC § 11.4.5.

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TEP properly appealed the decision to the Board of Adjustment (Board) where they argued that the Administrator had misunderstood the nature of the project by not classifying it as an upgrade, that the State had preempted the City's ability to restrict construction of utility poles, and that the City was estopped from requiring undergrounding because the City had previously approved overhead lines in a different Gateway. The Board upheld the ZAD after hearing argument from TEP and the City, as well as comments from the general public, but it declined to address the issues of estoppel and preemption.

The Special Action

When reviewing the decision of a municipal zoning board, the Court "must determine whether the Board acted arbitrarily, capriciously or in an abuse of its discretion." *Pingitore v. Town of Cave Creek*, 194 Ariz. 261, 264 (Ct. App. 1998). The Court should not substitute its opinion of the facts for that of the Board and must affirm the decision if there is credible evidence to support it. *Id.* However, the Court is "free to draw [its] own conclusions on whether an agency misinterpreted the law and may substitute its judgment for the Board's assessment of the legal effect of the underlying facts." *Whiteco Outdoor Advert. v. City of Tucson*, 193 Ariz. 314, 317 (Ct. App. 1998). Questions of the interpretation of statutes or ordinances are reviewed *de novo*. *Id.*

The ZAD and the UDC

The Court will first address TEP's argument that the Gateway Corridor regulations of the UDC do not apply to utilities. TEP asserts that UDC 1.4.2.G exempts rights-of-way from zoning regulations, and that in doing so it exempts all development within the right-of-way from those same zoning regulations. Section 1.4.2.G states, in its entirety:

> Zoning is applicable on all property, except street[3] rights-of-way[4]. Use of street rights-of-way for other than public street purposes requires approval by the Zoning Administrator and the Department of Transportation. The Zoning Administrator may allow, within the right-of-

[3] Street: any permanent public or private right-of-way…set aside to accommodate vehicular travel lanes…[or] utility areas….

[4] Right-of-way: an area reserved for a public or private use, such as…street…and utility easements.

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> way, only those uses or structures that are permitted on the property immediately abutting the right-of-way.

UDC 1.4.2.G.

Were this section read alone, it might support TEP's conclusion. However, it must be read in conjunction with the rest of the UDC, and other related ordinances and development plans like the MS&RP. Because Kino is a Gateway Corridor under the MS&RP, UDC 5.5 applies to projects which take place within the GCZ. Section 5.5.4 states "[i]n addition to other applicable standards…the following development standards are required of projects in the GCZ." Subsection B specifically applies to utilities within the GCZ and states, in pertinent part, "New utilities for development on private and on public right-of-way along Gateway Routes shall be underground unless relief is otherwise granted…." UDC § 5.5.4.B.1.a.

Arizona "construe[s] statutes [and ordinances] to give meaning to each word and phrase, leaving none a nullity." *Sharpe v. Arizona Health Care Cost Containment Sys.*, 220 Ariz. 488, 492 (App. 2009). In order to give all parts of the ordinances here meaning, the Court must conclude that UDC 5.5.4 can apply to utilities development on public rights-of-way. Therefore, the Court finds that the Administrator was correct in applying the Gateway Corridor standards in the UDC to TEP.

TEP also argues that the Administrator applied the wrong section of the UDC to the DMP. TEP characterizes the project as an upgrade of existing infrastructure, rather than new development, and argues that UDC 5.5.4.B.1.c should apply. The UDC allows for "upgrades and reinforcements of existing overhead facilities to the extent that the total number of electrical circuits or communication cables is not increased." UDC 5.5.4.b.1.c. In its ruling, the Administrator stated:

> "In general, when determining if something is an upgrade of existing equipment or new project, we look at the relative size, scale, and location of the existing development in comparison to the size, scale, and location of the new development. In this case, the size and scale of the proposed development is significantly larger and more impactful that [sic] the existing equipment. Additionally, the location of the poles has changed, many times changing from one side of the road to the other. A simple upgrade of existing equipment would result in similarly sized poles and equipment in the same location, which is not the case with this project."

ZA Determination, p.3.

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Although "upgrade" as it is used in the UDC is not defined, it is typically defined in the context of machinery or electronics as "to replace something with a more useful version or alternative." *Upgrade,* Merriam-Webster.com, https://www.merriam-webster.com/dictionary/upgrade. TEP urged the Court to apply the definition of upgrade broadly, arguing that increasing the capacity of Tucson's power grid should be considered an upgrade under the UDC, regardless of where the line is placed and how it is installed, and therefore the Administrator erred in determining the DMP was not an upgrade. The City countered that the specific language of 5.5.4.B.1.c indicates upgrade should be applied narrowly to allow upgrades of poles, lines, and other facilities which are already in place.

At oral argument before this Court, TEP admitted that there are no, or very few, existing transmission lines running along Kino at this time. There is no evidence in the record which indicates a broad definition of upgrade must be applied as opposed to a narrow one, and the lack of existing infrastructure and the scale of the development proposed by TEP indicate to the Court that the DMP goes beyond the scope of an upgrade under the UDC. The Zoning Administrator and board did not misinterpret the law.

THE COURT FINDS that the DMP is not an upgrade, but rather is new development under UDC 5.5.4.B.1.a.

The Motion for Summary Judgment

Summary judgment is appropriate when there are no genuine issues of material fact. *Orme School v. Reeves*, 166 Ariz. 301, 802 P.2d 1000 (1990). "A 'genuine' issue is one that a reasonable trier of fact could decide in favor of the party adverse to summary judgment on the available evidentiary record." *Modular Mining Sys., Inc. v. Jigsaw Techs., Inc.*, 221 Ariz. 515, 518 (App. 2009). Even if facts aren't in dispute, but a genuine dispute exists as to conflicting inferences from those facts, summary judgment should not be granted. *Executive Towers v. Leonard*, 7 Ariz. App. 331, 439 P.2d 303 (1968).

Summary judgment should be granted only if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people

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could not agree with the conclusion advanced by the proponent of the claim or defense. *Kim v. Wong*, 253 Ariz. 247, 512 P.3d 689 (App. 2022). Summary Judgment should not be a substitute for a trial of a case on the merits. *Sanchez v. City of Tucson*, 191 Ariz. 128, 953 P.2d 168 (1998).

Estoppel

TEP argues that the City has been estopped from requiring undergrounding in the DMP because, in a separate project, the PDSD allowed construction of overhead lines in a GCZ. Typically governmental entities are not subject to estoppel because "estoppel sounds in equity and will therefore not apply to the detriment of the public interest." *Valencia Energy Co. v. Arizona Dep't. of Revenue*, 191 Ariz. 565, 576 (1998). Therefore, the burden of proof on estoppel against a governmental entity is somewhat higher than against a non-governmental entity. "The first element [of estoppel] requires affirmative acts inconsistent with the position later relied on. Common sense tells us that the evidentiary burden in cases such as the present would require that the state's action bear some considerable degree of formalism under the circumstances. An off-the-cuff opinion, for example, will not suffice if the question presented requires a measure of research or deliberation." *Id.* at 577. Additionally, "the action must be taken by or have the approval of a person authorized to act in the area under consideration." *Id.* The claiming party must actually rely on the actions by the governmental entity. "Reliance should be considered reasonable if 'a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries.'" *Id.* (quoting *Freightways, Inc. v. Arizona Corp. Commission*, 129 Ariz. 245, 247 (1981)). Finally, the asserting party must have suffered a substantial detriment due to the change in positions by the governmental entity. Such change in position must not have been compelled by law, however. "No detriment is incurred when the party's only injury is that it must pay taxes legitimately owed under the correct interpretation of the law." *Id.*

In this case, TEP has "suffered a detriment" due to a perceived change in position by the PDSD. TEP purchased supplies for overhead lines which cannot be applied to undergrounding, and unlike what was suggested by *Valencia* or other tax cases, the detriment is not simply paying what is actually

owed. However, the record does not support TEP's belief that statements made by the City about one project should apply to another, namely to the DMP.

TEP began formal line siting procedures in 2019 with the PDSD regarding two-line replacement projects, the DMP at issue here, and the Irvington-East Loop Project. TEP received approval to build overhead lines on the Irvington project, because Irvington was considered a relocation of utilities under UDC 5.5.4.B.3 according to the City's planner on that project, John Beall. The reasons cited in the record for that determination were the project's connection with Davis-Monthan, the small amount of infrastructure that would actually be installed along the gateway route, and MS&R Policy 5.A.4 which states "utilities in the right-of-way or visible from the street *should* be placed underground wherever possible." UDC 5.5.4.B.3 indicates that the franchise controls when utilities "required by public improvement districts" are relocated along Gateway Routes. The vast majority of the Irvington project's new and relocated line was not along Gateway Routes. In fact, the only section on a Gateway was a less than one-mile-long segment on Kolb between Littletown and Valencia. The rest of the line was set to be constructed either on DM itself, or along Pantano which is not a Gateway.

The DMP, however, while connected with both downtown Tucson and the University of Arizona, runs along a significantly longer section of a Gateway. Specifically, TEP states it would need to underground approximately 5.5 miles of line. Conversely, as noted above, the section of line installed on the Gateway in the Irvington project was less than 1 mile long. As discussed above, TEP admitted that there is little to no existing line running along the Kino section of the DMP which could be replaced with high-capacity transmission lines. It is clear from the record that all of Mr. Beall's comments were directed solely at the Irvington project, were based on facts specific to that case, and were definitely not intended to apply generally. Because of the significant differences between the two projects, for zoning purposes, it is unreasonable to believe any statements made about the Irvington project, even from City officials, could be applied to the DMP.

Therefore, as the elements of equitable estoppel have not been met, the Court finds the City is not estopped from requiring the new lines to be undergrounded.

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Preemption

TEP asserts that the State legislature has preempted the City's authority to require undergrounding of transmission lines. For the City's authority to be preempted, there (1) must be a city law which conflicts with a state law, (2) the state law must be of statewide concern, and (3) the legislature must intend to appropriate the field through a clear preemption policy. *State v. Coles*, 234 Ariz. 573, 574 (Ct. App. 2014). Whether a city code or a state law controls "essentially hinges 'on whether the subject matter is characterized as of statewide or purely local interest.'" *State ex rel. Brnovich v. City of Tucson*, 242 Ariz. 588, 599 (2017) (citation omitted). The regulation of electric utilities is undisputedly a matter of statewide concern. A.R.S. § 40-209. Therefore, the only question before the Court on this matter is whether UDC 5.5.4.B conflicts with any statutes?

TEP relies primarily upon A.R.S. §§ 9-599 and 9-810 to support its argument that the State has clearly and intentionally preempted the City's authority to control how TEP constructs its transmission lines. A.R.S. § 9-599(2) states that Article 8 does not "confer on any authority…any zoning, land use, or planning…authority over utility poles…owned, controlled, or operated by an…investor-owned electric utility…." The wording here suggests not that the State intended to restrict the City's authority over utility poles, but rather that the State did not intend to grant any additional authority the City did not already have. Indeed, 9-594(A) specifically states "the following activities that take place inside of a right-of-way are subject to this section and all of the authority's codes and regulations, including zoning codes and other regulatory processes governing use of rights-of-way…. (1) Installation of new monopoles, utility poles, or wireless facilities…." If the State had intended to preempt the City's authority over utility poles, there would be no reason for this section to have been enacted.

However, the State has specifically preempted the City's authority to prevent individuals from accessing public utilities.

> A. The regulation of a utility provider's authority to operate and serve customers is a matter of statewide concern. A person's or entity's ability to use the services of a utility provider that is capable and authorized to provide utility service is not subject to further regulation by a municipality pursuant to this section.

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> B. Any code, ordinance, land use regulation or general or specific plan provision or part of a code, ordinance, land use regulation or general or specific plan provision adopted by a municipality may not prohibit or have the effect of restricting a person's or entity's ability to use the services of a utility provider that is capable and authorized to provide utility service at a person's or entity's property.
>
> C. A municipality may not impose a fine, penalty or other requirement that has the effect of restricting a utility provider's authority to operate or serve customers.

A.R.S. § 9-810.

This section very specifically and clearly restricts the City's authority to enact laws which would have the effect of preventing anyone from accessing utility services within the City's jurisdiction. It does not, however, prevent the City from regulating how the utility expands or modifies its own network, so long as such regulations do not have the effect of restricting access.

The State has also preempted the City's ability to determine where, but not how, transmission lines are constructed. The State clearly intended the Arizona Corporation Commission (ACC) to have exclusive authority over line siting for high-capacity transmission lines. A.R.S. § 40-360, *et seq*. *See also* 1971 Session Laws Ch 67, § 1. The purpose of this is to simplify the process of expanding Arizona's electrical grid, which is necessarily a matter of statewide importance. However, the Court has been unable to locate any law which restricts the City's authority to regulate how transmission lines are constructed. TEP is correct that there is no law which explicitly grants the City the authority to require undergrounding, but neither is there a specific law which purports to exempt utilities from all zoning regulations.

Therefore, the Court finds that, as a matter of law, the City has the authority to require undergrounding of transmission lines.

Ruling

Therefore, for the reasons stated above:

IT IS ORDERED the Special Action Appeal is DENIED and the ruling of the Zoning Administrator and the Board of Adjustment is AFFIRMED.

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IT IS FURTHER ORDERED the Motion for Summary Judgment on the issues of Equitable Estoppel and State Preemption is GRANTED.

The parties shall pay their respective attorneys' fees and court costs incurred herein.

There being nothing further pending before the Court, judgment is hereby entered pursuant to Ariz. R. Civ. Proc., Rule 54 (c).

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Clerk of Court - Civil Unit
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