COLORADO COURT OF APPEALS

DATE FILED: May 14, 2020
CASE NUMBER: 2019CA744

Court of Appeals No. 19CA0744
Jefferson County District Court No. 18CV30589
Honorable Lily W. Oeffler, Judge

Arvada for All the People,

Plaintiff-Appellant,

v.

Arvada City Council, City of Arvada, Arvada Urban Renewal Authority, Trammell Crow Company, and TC Denver Development Inc.,

Defendants-Appellees.

JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND CASE REMANDED WITH DIRECTIONS

Division IV
Opinion by JUDGE FREYRE
Terry and Lipinsky, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced May 14, 2020

Progressive Law LLC, Karen R. Breslin, Elizabeth, Colorado, for Plaintiff-Appellant

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Hoffman, Parker, Wilson & Carberry, P.C., Corey Y. Hoffman, Hilary M. Graham, Denver, Colorado, for Defendant-Appellee Arvada Urban Renewal Authority

Kaplan Kirsch Rockwell LLP, Nathaniel H. Hunt, Denver, Colorado, for Defendants-Appellees Trammell Crow Company and TC Denver Development Inc.

¶ 1 Plaintiff, Arvada for All the People (AAP), appeals the district court's order affirming the decision of defendants City of Arvada and Arvada City Council (collectively, City) to hear the revised application of Trammell Crow Company (developer) for approval of the Olde Town Residences Preliminary Development Plan (PDP), under Arvada Land Development Code (L.D.C.) section 3.1.17.[1] AAP contends that (1) email exchanges between the city manager and city council members before the public hearing violated Colorado's Open Meetings Law (OML), § 24-6-402, C.R.S. 2019; and (2) the City and the court misinterpreted L.D.C. section 3.1.17 to find that the City's action to approve the reapplication was legal. We conclude that any violation of the OML was remedied because, before the city council issued its decision, the council conducted an open hearing at which members of the public had an opportunity to comment on the motion to waive the L.D.C.'s one-year restriction on considering the revised application, the council received a legal opinion from the city attorney regarding the process for approving

[1] Other named defendants include Arvada Urban Renewal Authority, Trammell Crow Company, and TC Denver Development Inc.

the motion, and it engaged in renewed deliberations on the motion. Therefore, we affirm this portion of the court's judgment. However, we agree with AAP that the court and the City misinterpreted L.D.C. section 3.1.17, which provides that a revised application must be treated as if it were a new application. Accordingly, we reverse the portion of the court's judgment affirming the City's approval of developer's revised application and remand for that application to be considered as if it were new.

I. Factual and Procedural Background

¶ 2 This litigation concerns the Olde Town Residences project (project), a proposed multi-story, multi-family housing complex located near the Arvada Downtown National Historic District and the Regional Transportation District (RTD) Gold Line light rail. The project grew out of an urban renewal plan that the City approved in 2010. The project site is owned by RTD, the City, and the Arvada Urban Renewal Authority (AURA). The City selected developer to draft a PDP for the area.

¶ 3 In December 2016, developer submitted a PDP for the project and applied for a height exception to exceed the thirty-five-foot height limitation for buildings in Arvada. Neighborhood meetings

were held in September of 2016 and April of 2017. Residents expressed concerns about traffic, building heights impacting views, and conflicts with the adjacent historic area. AAP, a nonprofit organization composed of Arvada citizens, opposed the project in the meetings because, in its view, the project was incompatible with the historic character of Olde Town Arvada.

¶ 4 On January 22, 2018, the City held a public hearing on developer's PDP. The PDP comprised 256 units and 350 parking spaces, with a building height exceeding Arvada's height restrictions. The City denied the PDP in a 4-3 vote.

¶ 5 Shortly thereafter, on February 8, 2018, Arvada's City Manager emailed the seven council members that developer intended to submit a revised PDP application and asked whether they would consider it. He asked council members to reply yes or no only to him, and four city council members replied "yes" via email or phone. The full text of the email read:

> The City of Arvada has been made aware by the Trammell Crow Company ("TCC") that it intends to submit a revised application of its Preliminary Development Plan ("PDP") and Height Exception to Council for its consideration. It is the City's understanding that TCC's revised application will attempt to

> address some of the concern that it heard at the Public Hearing from Council.
>
> . . . .
>
> Based on the City's understanding of what TCC will be submitting, I need to know whether you agree to hear TCC's application. Respond only to me, and by yes or no response. Please don't CC anyone. If you need to call me, I am available by cell phone.

¶ 6 Developer submitted a revised PDP on February 9, 2018. The revised PDP reduced the number of units from 256 to 252, removed the top floor of the center portion of the north side of the building, included an extra setback, and added fifteen additional parking spaces. On March 8, 2019, the city council announced a new public hearing for the project.

¶ 7 On March 19, 2018, the city council conducted a public hearing on many items, including the revised PDP. The agenda said the city council would consider a motion to waive the one-year restriction to consider developer's revised PDP under L.D.C. section 3.1.17. Section 3.1.17 provides:

> If the City Council denies an application, that same request or one substantially the same may not be heard by the City Council for a period of one (1) year from the date of denial, unless the City Council explicitly states that

> an earlier reapplication will be considered. The Applicant may submit a revised application that adequately addresses all of the Council's stated reasons for denial, however, at any time. Such revised application shall be treated as a new application for purposes of review and scheduling.

¶ 8 The minutes from the meeting reflect that Councilmember Goff moved to waive the one-year restriction pursuant to L.D.C. section 3.1.17 to consider developer's reapplication. They also reflect the city attorney's opinion that nothing in the code, rules, or procedures prohibited the public hearing on the reapplication from occurring on the same night as the motion. After hearing comments from three members of the public and receiving a legal opinion from the city attorney, the city council granted the motion by a 7-0 vote. The public hearing on the revised application then commenced.

¶ 9 The city council heard testimony from the city attorney, the executive director of AURA, city staff, and thirty-seven members of the public, including members of AAP. The city council approved developer's revised PDP by a 6-1 vote.

¶ 10 AAP filed a complaint (and an amended complaint) in the district court alleging, as relevant here, that the City's approval of

the revised PDP violated the municipal code and that the February 8, 2018, email poll violated the OML. After the parties agreed not to take discovery, the court considered their motions and cross-motions for summary judgment.

¶ 11 On March 12, 2019, the district court issued a detailed written order finding that the City did not abuse its discretion or exceed its authority when deciding to waive the one-year restriction in L.D.C. section 3.1.17 to consider developer's revised PDP. Additionally, the district court found that the email poll did not violate the OML because AAP failed to establish a link between the email and the policy-making process or to show that the email constituted a discussion of public business. The court further found that even if there was an OML violation, it was cured at the subsequent public hearing. Finally, the court found no abuse of discretion in the City's interpretation and application of L.D.C. section 3.1.17.

II. Open Meetings Law

¶ 12 AAP first contends that the email poll on February 8, 2018, constituted a formal action within the meaning of the OML because it concerned a matter of public business to which four city council members responded. AAP further contends that the violation was

not cured by the motion at the public hearing because the motion simply "rubber stamped" the email poll. We disagree.

A. Standard of Review and Relevant Law

¶ 13 We review a trial court's application and construction of statutes de novo. *Freedom Colo. Info., Inc. v. El Paso Cty. Sheriff's Dep't*, 196 P.3d 892, 897 (Colo. 2008). Our interpretation of the OML presents a legal question we review de novo. *Intermountain Rural Elec. Ass'n v. Colo. Pub. Utils. Comm'n*, 2012 COA 123, ¶ 9.

¶ 14 The OML defines a meeting as "any kind of gathering, convened to discuss public business, in person, by telephone, electronically, or by other means of communication." § 24-6-402(1)(b). It applies to "[a]ll meetings of a quorum or three or more members of any local public body, whichever is fewer, at which any public business is discussed or at which any formal action may be taken." § 24-6-402(2)(b). As well, "[i]f elected officials use electronic mail to discuss pending legislation or other public business among themselves, the electronic mail shall be subject to the requirements of this section." § 24-6-402(2)(d)(III).

¶ 15 The OML's purpose is to "afford the public access to a broad range of meetings at which public business is considered." *Bd. of*

Cty. Comm'rs v. Costilla Cty. Conservancy Dist., 88 P.3d 1188, 1193 (Colo. 2004) (quoting *Benson v. McCormick*, 195 Colo. 381, 383, 578 P.2d 651, 652 (1978)). Our supreme court requires the OML to be interpreted broadly "to further the legislative intent that citizens be given a greater opportunity to become fully informed on issues of public importance so that meaningful participation in the decision-making process may be achieved." *Cole v. State*, 673 P.2d 345, 347 (Colo. 1983).

¶ 16 A meeting must be part of the policy-making process to be subject to the requirements of the OML. *Bd. of Cty. Comm'rs*, 88 P.3d at 1194. A meeting is part of the policy-making process if it "concerns a matter related to the policy-making function of the local public body holding or attending the meeting." *Id.* Indeed, for a meeting to be subject to the requirements of the OML, a link must exist between the meeting and the policy-making powers of the governmental entity holding or attending the meeting. *Id.* This link exists when a meeting is held to "discuss or undertake one of the actions enumerated in the remedy provision of the OML such as a rule, regulation, ordinance, or formal action," or it may exist when the record "demonstrates that a meeting was held for the purpose of

discussing a pending measure or action, which is subsequently 'rubber stamped' by the public body holding or attending the meeting." *Id.*; *see Bagby v. Sch. Dist. No.1*, 186 Colo. 428, 434, 528 P.2d 1299, 1302 (1974).

B. Application

¶ 17 We begin by noting that four (a quorum) of the seven city council members responded to the city manager's email and that nothing in the record shows that these four members ever discussed the email's contents among themselves. Indeed, the email did not reference L.D.C. section 3.1.17. Nevertheless, the email specifically stated, "I need to know whether you agree to hear TCC's [developer's] application," which arguably solicits a position on whether to waive the one-year restriction for hearing revised applications set forth in section 3.1.17. We need not decide whether this email communication violated the OML, however, because we conclude that, even assuming it did, the error was cured at the public hearing. *Colo. Off-Highway Vehicle Coal. v. Colo. Bd. of Parks & Outdoor Recreation*, 2012 COA 146, ¶ 33 (holding that a violation of the OML may be "cure[d]" by a subsequent complying meeting, provided that the subsequent meeting is not a

mere "rubber stamping" of an earlier decision made in violation of the OML).

¶ 18 In *Colorado Off-Highway Vehicle Coalition*, a division of this court considered, as a matter of first impression, whether an OML violation could be cured by a subsequent public hearing. Noting that the OML statute was silent on this issue, the division relied on the holdings in *Van Alstyne v. Housing Authority*, 985 P.2d 97 (Colo. App. 1999), and *Bagby*, 186 Colo. 428, 528 P.2d 1299, to find that the statute implicitly allowed a violation of the OML to be cured. *Colo. Off-Highway Vehicle Coal.*, ¶ 34. In *Van Alstyne*, the housing authority adopted a resolution to accept an offer for the sale of property, but it failed to provide notice of the hearing. 985 P.2d at 98. At a subsequent public hearing, the housing authority considered only the proposals discussed at the unnoticed hearing and reaffirmed its previous decision. A group of neighbors filed suit alleging a violation of the OML, and the trial court found for the housing authority. The division reversed, holding that the record failed to show whether the housing authority had actually considered its earlier action or whether it had merely rubber-stamped it.

¶ 19 Similarly, in *Bagby*, our supreme court found a violation of the OML when school board members privately discussed business in advance of the public meeting and then adopted the decisions previously made in the private meetings at the public meeting. 186 Colo. at 434, 528 P.2d at 1302.

¶ 20 Unlike these two cases, the division in *Colorado Off-Highway Vehicle Coalition*, ¶ 34, concluded that while the Board of Parks and Outdoor Recreation had violated the OML on three occasions, it "cured" those violations at its regularly scheduled public meeting by allowing a full discussion of the proposed changes, including hearing testimony from twenty members of the public and representatives of the plaintiff coalition. The division reaffirmed that "[t]he intent of the Open Meetings Law is that citizens be given the opportunity *to obtain information about and to participate in the legislative decision-making process*." *Id.* at ¶ 31 (quoting *Cole*, 673 P.2d at 349). It then concluded that the public meeting "did not merely constitute a 'rubber stamping' of a prior decision" because the Board heard additional comments from several key players and interested public parties and engaged in renewed deliberations before announcing its final decision. *Id.* at ¶ 34.

¶ 21 Similarly, here, at the March 19, 2018, public hearing, three members of the public spoke in opposition to the motion to waive the one-year limitation to consider developer's revised PDP before the city council voted. They voiced their concerns about considering this revised PDP so close in time to the City's decision to reject the initial PDP. And they requested that council members require developer to go through the formal application process so that they would have more time to assess the changes. As in *Colorado Off-Highway Vehicle Coalition*, therefore, the city council heard additional comments from interested public parties before making a decision.

¶ 22 As well, after Councilmember Goff moved to waive the one-year restriction, the city attorney provided his opinion on the legality of the process and answered questions from the mayor. Thus, the council considered these additional comments before making a decision. Only after having received the additional comments did the city council then vote unanimously to grant the motion to waive the one-year restriction and to consider developer's revised PDP. Because neither the city attorney's opinion nor the public comments were known to the four councilmembers who responded

to the email, and because all seven council members agreed to grant the motion, we conclude that the city council engaged in renewed deliberations with this new information before announcing its decision. Under these circumstances, we agree with the district court that the City did not merely rubber-stamp the email communication, but allowed for public comment and engaged in deliberations, based on those comments, before reaching its decision. *Colo. Off-Highway Vehicle Coal.*, ¶ 34. Accordingly, any OML violation that occurred in the email exchange was cured by the public hearing.

III. Statutory Interpretation

¶ 23 AAP next contends that the City misinterpreted L.D.C. section 3.1.17 and asks us to review this legal error under C.R.C.P. 106(a)(4). We conclude that the plain language of L.D.C. section 3.1.17 — stating "[s]uch revised application shall be treated as a new application for purposes of review and scheduling" — precluded the city council from holding a public hearing on developer's revised application without submitting the application to the procedures of a new application. Therefore, we reverse the

court's judgment affirming the city's approval of developer's revised application.

A. Standard of Review and Law

¶ 24 "In a Rule 106(a)(4) proceeding, our review is limited to whether the governmental body's decision was an abuse of discretion or was made in excess of its jurisdiction, based on the evidence in the record before that body." *Whitelaw v. Denver City Council*, 2017 COA 47, ¶ 7. "While interpretation of a city code is reviewed de novo, interpretations of the code by the governmental entity charged with administering it deserve deference if they are consistent with the drafters' overall intent." *Id.* at ¶ 8.

¶ 25 "Review of a governmental body's decision pursuant to [C.R.C.P.] 106(a)(4) requires an appellate court to review the decision of the governmental body itself rather than the district court's determination regarding the governmental body's decision." *Alpenhof, LLC v. City of Ouray*, 2013 COA 9, ¶ 9 (quoting *Bd. of Cty. Comm'rs v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996)). "Accordingly, '[o]ur review is based solely on the record that was before the [governmental body], and the decision must be affirmed unless there is no competent evidence in the record to support it . . . .'"

IBC Denver II, LLC v. City of Wheat Ridge, 183 P.3d 714, 717 (Colo. App. 2008) (quoting *City & Cty. of Denver v. Bd. of Adjustment*, 55 P.3d 252, 254 (Colo. App. 2002)). "'No competent evidence' means that the decision is 'so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.'" *Whitelaw*, ¶ 8 (quoting *Canyon Area Residents for the Env't v. Bd. of Cty. Comm'rs*, 172 P.3d 905, 907 (Colo. App. 2006)). "An agency's misinterpretation or misapplication of governing law may constitute an alternative ground for finding an abuse of discretion under C.R.C.P. 106(a)(4)." *Id.* at ¶ 7.

¶ 26 Courts interpret land use ordinances as they would any other form of legislation by employing the general canons of statutory construction. *Sierra Club v. Billingsley*, 166 P.3d 309, 312 (Colo. App. 2007). When construing an ordinance, a court must give effect to the intent of the legislative body. *Id.* In doing so, it looks first to the plain language and accords words their ordinary meaning. *Id.* And if that language is clear, it should not subject the language to a strained or forced interpretation. *Id.* However, if the language is ambiguous, "we give great deference to an agency's interpretation of a rule it is charged with enforcing, and its

interpretation will be accepted if it has a reasonable basis in law and is warranted by the record." *Id.*

B. Analysis

¶ 27 We begin with AAP's contention that the City's and the court's interpretations of section 3.1.17 undermine the integrity of the quasi-judicial process. Specifically, AAP argues that opponents of the revised PDP did not have the same opportunity to be heard as proponents of the project because the City did not require developer to reapply "under the regular planning process." It argues that the last sentence of section 3.1.17 requires a revised application to be processed as a new application. Neither appellee addressed the meaning of the last sentence of section 3.1.17, but, instead, both rely on well-settled law holding that the interpretation of the municipal code by the governmental body charged with enforcing it is entitled to great deference. *Whitelaw*, ¶ 8.

¶ 28 The last sentence of L.D.C. section 3.1.17 provides: "Such revised application shall be treated as a new application for purposes of review and scheduling." The rules for interpreting the L.D.C. are set forth in L.D.C. section 1.7, "Rules of Construction and Interpretation." They require undefined words and phrases to

be given their common and approved usage. L.D.C. § 1.7.6. Furthermore, L.D.C. section 1.7.8 ("Mandatory and discretionary terms") provides that "[t]he word 'shall' is always mandatory, and the words, 'may' or 'should' are always permissive . . . ."

¶ 29 Applying these rules to the last sentence of L.D.C. section 3.1.17, we conclude that the City abused its discretion by proceeding to a public hearing on developer's revised PDP application without first treating the revised application as a new application and subjecting it to the review and scheduling procedures set forth in L.D.C. Article 3.[2] We are not persuaded otherwise by the city attorney's opinion and advice to the city council that nothing in the code, rules, or procedures precluded it from hearing the motion to waive the one-year restriction and the public hearing on the revised application the same night. To be sure, if the revised PDP had already proceeded through the Article 3 process, then nothing would have precluded the city council from

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[2] *See* L.D.C. § 3.1.1 ("Preapplication conferences"); L.D.C. § 3.1.6 ("Neighborhood meetings"); L.D.C. § 3.1.7 ("Community development director and agency review"); L.D.C. § 3.1.8 ("Submittal requirements"); L.D.C. § 3.1.12 ("Permitted scope of action-consistent with notice"); L.D.C. § 3.1.13 ("Final action by majority vote of decision-making body").

voting on the one-year restriction and conducting the public hearing the same night, and the city attorney's opinion would have been accurate. *See* L.D.C. § 3.1.17 ("The Applicant may submit a revised application that adequately addresses all of the Council's stated reasons for denial, however, at any time."). But since it had not, the city attorney's opinion directly conflicted with the plain language of section 3.1.17, which requires revised applications to be treated as new applications. And because the City's interpretation is inconsistent with the plain language of the L.D.C., we do not defer to it.

¶ 30 Accordingly, we reverse the city council's decision approving developer's revised PDP application and remand for the revised application to be treated as a new application.

C. Remaining Contentions

¶ 31 Because we reverse the city council's decision, we need not address AAP's remaining contentions that (1) the first sentence of L.D.C. section 3.1.17 is ambiguous on its face; (2) when construed with Rule 4L of the Arvada City Council Rules of Procedure, developer's reapplication was a reconsideration that could not be filed for at least one year after the denial; and (3) the doctrine of res

judicata precludes an applicant from making a "demand" that the City rehear the same application.

IV. Conclusion

¶ 32 The judgment is affirmed in part and reversed in part, and the case is remanded with directions.

JUDGE TERRY and JUDGE LIPINSKY concur.

Court of Appeals

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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Steven L. Bernard
Chief Judge

DATED: March 5, 2020

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