

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

ARCADIA OSBORN NEIGHBORHOOD, et al., *Plaintiffs/Appellants*,

v.

CLEAR CHANNEL OUTDOOR, LLC, *Defendants/Appellees*.

No. 1 CA-CV 22-0464
FILED 8-15-2023

Appeal from the Superior Court in Maricopa County
No. LC2020-000294-001
The Honorable Katherine Cooper, Judge

AFFIRMED

COUNSEL

Richard Mario Storkan Attorney at Law, Tempe
By Richard Mario Storkan
Co-Counsel for Plaintiffs/Appellants Arcadia, et al.

Kimberly W. MacEachern, Phoenix
By Kimberly W. MacEachern
Co-Counsel for Plaintiffs/Appellants Arcadia, et al.

Neal Haddad, Phoenix
Plaintiff/Appellant

ARCADIA OSBORN, et al. v. CLEAR CHANNEL, et al.
Opinion of the Court

Harvey Shulman, Phoenix
Plaintiff/Appellant

Osborn Maledon PA, Phoenix
By Eric M. Fraser, Hayleigh S. Crawford
Counsel for *Defendant/Appellee Clear Channel Outdoor LLC*

Burch & Cracchiolo
By Andrew Abraham, Daryl Manhart
Counsel for *Defendant/Appellee J & R Holdings VI LLC*

Phoenix City Attorney's Office
By Paul M. Li
Counsel for *Defendant/Appellee City of Phoenix*

League of Arizona Cities and Towns
By Nancy Davidson
Counsel for *Amicus Curiae League of AZ Cities*

Bowman and Brooke LLP, Phoenix
By Amanda E. Heitz, Kendra L. Cobb
Counsel for *Amicus Curiae Out of Home Advertising*

OPINION

Judge James B. Morse Jr. delivered the opinion of the Court, in which Presiding Judge Maria Elena Cruz and Judge Daniel J. Kiley joined.

M O R S E, Judge:

¶1 The City of Phoenix Board of Adjustment ("Board") granted five use permits and a variance to allow Clear Channel Outdoor, LLC ("Clear Channel") to relocate three billboards onto the facade of a newly planned building and to convert two of the billboards from static to digital. Harvey Shulman, Neal Haddad, Tabitha Myers, (collectively "Individual Plaintiffs") and Arcadia Osborn Neighborhood Association ("AONA") filed this petition for special action in superior court claiming that the Board acted in excess of its statutory authority and that the relocation and

conversion of the billboards would violate the City of Phoenix Zoning Ordinance. The superior court dismissed the petition after finding that the Individual Plaintiffs and AONA both lacked standing to challenge the Board's decision. We affirm because we agree with the superior court that the Individual Plaintiffs do not have a sufficient particularized palpable injury to confer standing and AONA has neither representational nor organizational standing.

FACTS AND PROCEDURAL BACKGROUND

¶2 Appellee Clear Channel owns and operates three static billboards located on property owned by J & R Holdings VI, LLC ("J & R") at the northwest corner of Thomas Road and Central Avenue in Phoenix ("Property"). Clear Channel's billboards are located on a tower within a "perpetual, exclusive easement" that encumbers the Property.

¶3 Although Clear Channel's easement does not expressly forbid development of the Property, both Clear Channel and J & R determined that Phoenix zoning law made it practically impossible to do so without encroaching on the easement. In 2019, Clear Channel and J & R devised a solution which would allow J & R to construct a new mixed-use tower on the Property by relocating Clear Channel's billboards and easement to the facade of the tower.

¶4 In October of that year, Clear Channel applied for five use permits and a variance, which would allow it to relocate the three billboards and to convert two of the signs from static to digital. The City's Zoning Adjustment Hearing Officer ("ZAHO") held a public hearing on Clear Channel's application. Following the hearing, the ZAHO approved the relocation of the billboards but denied the request to convert two of the three signs to digital.

¶5 Clear Channel appealed the ZAHO's denial of the digital conversion to the Board. And AONA, along with the Urban Phoenix Project Network ("UPP"), appealed the ZAHO's approval of the relocation. After a hearing on the merits, the Board upheld the ZAHO's relocation decision but reversed the denial of Clear Channel's request for digital conversion.

¶6 In response, Appellants and others filed this special action in superior court challenging the Board's decision. Appellees moved to dismiss the complaint, arguing that all plaintiffs lacked standing under A.R.S. § 9-462.06(K).

ARCADIA OSBORN, et al. v. CLEAR CHANNEL, et al.
Opinion of the Court

¶7 After briefing and oral argument, the superior court determined that the plaintiffs failed to plead the special damages necessary to qualify as "persons aggrieved" under the statute and dismissed the complaint. AONA and the Individual Plaintiffs appealed. We have jurisdiction under A.R.S. § 12-2101(A)(1).

DISCUSSION

¶8 "Whether a party has standing is a question of law we review de novo." *Pawn 1st, L.L.C. v. City of Phoenix*, 231 Ariz. 309, 311, ¶ 11 (App. 2013). When ruling on a motion to dismiss for lack of standing, "we consider the facts alleged in the complaint to be true . . . and determine whether the complaint, construed in a light most favorable to the plaintiff, sufficiently sets forth a valid claim." *Scenic Ariz. v. City of Phx. Bd. of Adjustment*, 228 Ariz. 419, 421-22, ¶ 5 (App. 2011) (quoting *Douglas v. Governing Bd. of the Window Rock Consol. Sch. Dist. No. 8*, 206 Ariz. 344, 346, ¶ 4 (App. 2003)).

I. The Individual Plaintiffs.

¶9 The Individual Plaintiffs claim that they are entitled to statutory standing as "person[s] aggrieved" under A.R.S. § 9-462.06(K) and that they are entitled to "procedural" and "First Amendment" standing due to the constitutional claims raised in their First Amended Complaint.

A. Persons Aggrieved

¶10 "If a statute authorizes judicial review of an administrative decision, deciding whether a plaintiff has standing 'must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.'" *Scenic Ariz.*, 228 Ariz. at 422, ¶ 7 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972)). Here, A.R.S. § 9-462.06(K) authorizes a "person aggrieved by a decision of the legislative body or board" to file a special action in superior court for judicial review of that decision.

¶11 We interpret the term "person aggrieved" broadly, with an eye towards "promot[ing] the ends of justice." *Id.* at 422, ¶ 7. But to have standing to bring an action under the statute, "a plaintiff must allege 'particularized harm' resulting from the [Board's] decision." *Ctr. Bay Gardens, L.L.C. v. City of Tempe City Council*, 214 Ariz. 353, 358, ¶ 20 (App. 2007). "An allegation of generalized harm that is shared alike by all or a large class of citizens generally is not sufficient to confer standing." *Sears v. Hull*, 192 Ariz. 65, 69, ¶ 16 (1998). In other words, "[g]eneral economic losses

ARCADIA OSBORN, et al. v. CLEAR CHANNEL, et al.
Opinion of the Court

or general concerns regarding aesthetics in the area without a particularized palpable injury to the plaintiff are typically not sufficient to confer standing." *Ctr. Bay Gardens*, 214 Ariz. at 358-59, ¶ 20.

¶12 The Individual Plaintiffs assert harms related to traffic safety and loss of aesthetic value in the area. Their allegations of individualized harm focus on the frequency with which they use the intersection adjacent to the Property. But it is not enough that a plaintiff has suffered the same kind of harm or interference as the general public but to a greater extent or degree. *Hopi Tribe v. Ariz. Snowbowl Resort Limited Partnership*, 245 Ariz. 397, 401, ¶ 13 (2018). Accordingly, because the Individual Plaintiffs have not alleged particularized harm causing palpable injuries, their allegations are insufficient to confer standing.

¶13 Myers alleges that she works in a building within view of the Property, but she does not claim that she can see the proposed billboards from her office. Instead, she claims that she may be distracted by them if she chooses to work in other public areas of the building or in a nearby café. These claims also fail to show a particularized harm that is not shared by others who regularly travel through and frequent businesses located at a busy intersection in midtown Phoenix. *See Sears*, 192 Ariz. at 69-70, ¶¶ 17-19 (finding plaintiffs' allegations of increased traffic, crowding, and stress did not establish standing "under nuisance or zoning law").

¶14 In addition, Myers now claims she is entitled to standing as "a taxpayer who owns or leases . . . a property within three hundred feet" of the Property. A.R.S. § 9-462.06(K). But Myers did not assert taxpayer standing before the superior court and, thus, waived this claim on appeal. *See Cont'l Lighting & Contracting, Inc. v. Premier Grading & Utils., LLC*, 227 Ariz. 382, 386, ¶ 12 (App. 2011) ("If the argument is not raised below so as to allow the trial court . . . an opportunity [to address it], it is waived on appeal.").

B. Scenic Arizona

¶15 Appellants claim that our decision in *Scenic Arizona* created a new, broader category of standing whenever the case involves a challenge to a billboard. This is not so.

¶16 In *Scenic Arizona*, we recognized that "deciding whether a person is aggrieved necessarily involves examining the legal basis of the claimed injury." 228 Ariz. at 423, ¶ 11. In that case, *Scenic Arizona* claimed that a proposed electronic billboard adjacent to Interstate 17 would violate the Arizona Highway Beautification Act, A.R.S. § 28-7901, *et seq.* ("AHBA").

ARCADIA OSBORN, et al. v. CLEAR CHANNEL, et al.
Opinion of the Court

Id. at 420, ¶ 1. And we focused our inquiry on "whether Scenic qualifye[d] as a 'person aggrieved' under A.R.S. § 9-4602.06(K) *within the context of the AHBA.*" *Id.* at 421, ¶ 5 n.6 (emphasis added). We found that Scenic Arizona's allegations of "claimed interference with the proper use and enjoyment of one of the highways of this state, which are interests within the scope of the AHBA," were sufficient to confer standing. *Id.* at 424, ¶ 13. We also noted that the loss of "aesthetic enjoyment," "increased safety risk," and other "specific harm[s]" that Scenic Arizona alleged fell "within the zone of interests the AHBA was intended to protect—the safety and aesthetics of Arizona's highways." *Id.* at 424, 425, ¶¶ 13, 16. Finally, we found that restricting standing to assert claims under the AHBA to only "neighboring property owners who experience injuries to their own properties would make highway billboards . . . virtually immune from judicial review." *Id.* at 425, ¶ 16.

¶17 Notably, *Scenic Arizona* reaffirms the "well-established principles" applied in cases "involving other land use challenges" that, to establish standing, a plaintiff must generally show (1) particularized harm resulting from the decision, (2) injury, "economic or otherwise," and (3) damages "peculiar to the plaintiff or at least more substantial than that suffered by the community at large." *Id.* at 424, ¶ 14 (quoting *Ctr. Bay Gardens*, 214 Ariz. at 358, ¶ 20).

¶18 Thus, the plaintiffs in *Scenic Arizona* had standing because the billboard at issue in that case was subject to the AHBA. *Id.* at 425, ¶16. Ordinary zoning ordinances do not create the same special interest. *See* Phoenix Zoning Ordinance § 102 (2011) (stating that the purpose of the Zoning Ordinance is to "establish standards and regulations to govern the use of land and structures in the City and for review and approval of all proposed development of property in the City"). Because the billboards at issue in this case are not subject to the AHBA, *Scenic Arizona* does not provide standing for the Individual Plaintiffs to challenge an ordinary zoning decision absent allegations of a particularized harm, injury, or damages distinct from that suffered by the public. 228 Ariz. at 425, ¶ 16. As noted above, *supra* ¶¶ 12-13, the Individual Plaintiffs failed to meet this standard, and the superior court correctly dismissed their complaint.

C. Constitutional Standing

¶19 The Individual Plaintiffs also claim the superior court erred in finding that they lacked standing to bring their constitutional claims because "they d[id] not allege violations of their own constitutional rights." We disagree.

ARCADIA OSBORN, et al. v. CLEAR CHANNEL, et al.
Opinion of the Court

¶20 First, the Individual Plaintiffs assert that they "have standing to raise the constitutional rights of others if a violation of those rights will directly harm them." But we have previously identified three requirements for litigants seeking to assert standing based on the constitutional rights of a third party: (1) the litigant must have a substantial relationship to the third party, (2) the third party must be unable to assert the constitutional rights on its own behalf, and (3) failure to grant the litigant standing must dilute the rights of the third party. *Kerr v. Killian*, 197 Ariz. 213, 217, ¶ 16 (App. 2000). Because litigants failed to allege a substantial relationship to the parties whose rights they sought to raise, the superior court correctly determined they lacked standing to bring their constitutional claims.

¶21 Finally, the Individual Plaintiffs claim the superior court erred in dismissing their due process claims. Specifically, they claim the court erred in relying on the "incorrect factual statement" that Individual Plaintiffs "did not file the appeal that led to the Board hearing." But the First Amended Complaint, which the superior court was required to accept as true, clearly states that the appeal was filed only by "Plaintiff UPP and Plaintiff AONA," not the Individual Plaintiffs.¹ The superior court did not err in relying on a factual assertion contained in the First Amended Complaint. *See Scenic Ariz.*, 228 Ariz. at 421-22, ¶ 5 (stating that courts must consider the facts alleged in the complaint to be true).

¶22 The Individual Plaintiffs' due process claims focus on the Board's denial of their request for an "automatic continuance." Non-appellant parties to an administrative hearing are entitled to procedural due process. *See Rouse v. Scottsdale Unified Sch. Dist. No. 48*, 156 Ariz. 369, 371 (App. 1987) ("We start from the premise that there are certain 'fundamental' procedural requisites which a person is entitled to receive at an administrative hearing which is quasi-judicial in nature."). But even if the Individual Plaintiffs were wrongfully denied an "automatic continuance," they acknowledge that the Board granted their continuance after hearing arguments on the issue. Therefore, any due process claims are moot. *See Simms v. Ariz. Racing Comm.*, 253 Ariz. 214, 220, ¶ 30 (App. 2022) (finding a due process claim moot where the plaintiff received the proper remedy through other means).

¹ Because AONA does not raise the issue in its own opening brief, we determine they have waived the issue on appeal. *See Robert Schalkenbach Found. v. Lincoln Found., Inc.*, 208 Ariz. 176, 180, ¶ 17 (App. 2004) ("Generally, we will consider an issue not raised in an appellant's opening brief as abandoned or conceded.").

II. The Arcadia Osborn Neighborhood Association.

¶23 AONA raises claims of both representational standing on behalf of its members and direct organizational standing.

A. Representational Standing

¶24 The test for representational standing in Arizona is "whether, given all the circumstances in the case, the [organization] has a legitimate interest in an actual controversy involving its members and whether judicial economy and administration will be promoted by allowing representational appearance." *Armory Park Neighborhood Ass'n v. Episcopal Cmty. Svcs.*, 148 Ariz. 1, 6 (1985). A primary consideration in this test is whether the association's members would have standing to sue in their own right. *Home Builders Ass'n of Cent. Ariz. v. Kard*, 219 Ariz. 374, 377, ¶ 10 (App. 2008).

¶25 AONA alleges that its members are persons aggrieved because they work in and commute through the area. But AONA does not identify particularized harm, injury in fact, or damage peculiar to any specific member. *See Scenic Ariz.*, 228 Ariz. at 424, ¶ 14. Instead, AONA relies on the standing arguments raised by the Individual Plaintiffs. These arguments are insufficient. *See supra* ¶¶ 10-22. Because AONA has failed to establish individual standing on behalf of any of its members, it cannot assert representational standing. *Cf. Armory Park*, 148 Ariz. at 6 (finding standing where an organization would "adequately and fairly represent the interests of those of its members who would have had standing in their individual capacities").

B. Direct Standing

¶26 Finally, AONA claims the superior court erred in finding that it lacks direct standing to challenge the Board's decision. The superior court did not err.

¶27 The First Amended Complaint lists two ways the Board's decision could harm AONA. First, the decision "would threaten AONA's mission (and successes) in limiting digital billboard conversion" and second, the intersection adjacent to the billboards is "probably . . . located on one of the non-highway commuter routes most used by [its] members."

¶28 Turning to the first allegation of harm, AONA points to federal case law to assert that diversion of resources is sufficient to show a concrete injury justifying standing. But our supreme court has recently

ARCADIA OSBORN, et al. v. CLEAR CHANNEL, et al.
Opinion of the Court

rejected that line of cases. *See Ariz. Sch. Bds. Ass'n, Inc. v. State*, 252 Ariz. 219, 224, ¶ 18 (2022) (disavowing the trial court's reliance on *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006 (9th Cir. 2013)). Instead, in Arizona, organizations "cannot establish standing if the only injury arises from the effect of a challenged action on the organizations' lobbying activities, or when the service impaired is pure issue-advocacy." *Id.* (quoting *Equal Means Equal v. Ferreira*, 3 F.4th 24, 30 (1st Cir. 2021)) (cleaned up). AONA's efforts to limit digital-billboard conversion—such as organizing neighbors for the purpose of preserving the character of the neighborhood, serving as a source of information gathering and dissemination, and promoting neighborhood goals and objectives as they relate to transportation issues—are pure issue advocacy, and granting standing on that basis would "eviscerat[e] the standing requirement" *Id.*

¶29 The second allegation of harm fails for the same reason as the Individual Plaintiffs' allegation of individualized harm. *See Supra* ¶ 12. AONA does not claim its members are damaged by a special use of the subject intersection. Instead, it relies on their frequency of use and reliance on the intersection for commuter travel—an interest shared by all commuters that travel through the area. As stated above, it is not enough to show that its members suffered the same kind of harm or interference as the general public but to a greater extent or degree. *Sears*, 192 Ariz. at 70, ¶ 19; *see also Hopi Tribe*, 245 Ariz. at 401, ¶ 13.

III. Standing to Seek Declaratory Relief.

¶30 Appellants further claim the superior court erred in denying them standing under the Arizona Declaratory Judgments Act ("ADJA"). The ADJA allows "[a]ny person . . . whose rights, status or other legal relations are affected by a . . . municipal ordinance" to "obtain a declaration of rights, status or other legal relations thereunder." A.R.S. § 12-1832.

¶31 The First Amended Complaint mentions the ADJA, but does not include an allegation that plaintiffs' "rights, status or other legal relations are affected by" the Phoenix Zoning Ordinance or any other municipal ordinance. *See id.* Instead, on nine of the twelve counts raised in the Complaint, plaintiffs seek "declaratory judgment that Defendant Board acted in excess of legal authority." But in considering a motion to dismiss under Arizona Rules of Civil Procedure 12(b)(6), "the prayer is not part of the complaint." *Citizens' Comm. for Recall of Jack Williams v. Marston*, 109 Ariz. 188, 192 (1973). And even if it were, using declaratory language does not transform a special-action challenge to an action seeking declaratory judgment. *See Lecky v. Staley*, 6 Ariz. App. 556, 558-59 (1967) (holding that

ARCADIA OSBORN, et al. v. CLEAR CHANNEL, et al.
Opinion of the Court

labeling a complaint "Complaint For Declaratory Judgment (Contract)" did not transform an action for damages to an action for declaratory judgment).

¶32 Whether labeled a special action or a request for a declaratory judgment, Appellants ask the superior court to reverse the Board's decision. Such a request is outside the scope of the ADJA. See A.R.S. § 12-1832 (stating that relief is limited to "obtain[ing] a declaration of rights, status or other legal relations"), *Black v. Siler*, 96 Ariz. 102, 105 (1964) (noting that a declaratory judgment "simply declares the rights of the parties or expresses the opinion of the court on a question of law, without ordering anything to be done"). Short of reversing the Board's decision, a declaration that the Board acted in excess of its legal authority would be advisory only. See *Ariz. St. Bd. of Dirs. for Junior Colls. v. Phx. Union High Sch. Dist. of Maricopa Cnty.*, 102 Ariz. 69, 73 (1967) ("No proceeding will lie under the declaratory judgment acts to obtain a judgment which is advisory only or which merely answers a moot or abstract question; a mere difference of opinion will not suffice."). The superior court did not err.

CONCLUSION

¶33 For the reasons stated above, we affirm the ruling of the superior court that plaintiffs lack standing to challenge the Board's decision.



AMY M. WOOD • Clerk of the Court
FILED: AA