IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

RICHARD RODGERS, SHELBY MAGNUSON-HAWKINS, AND DAVID PRESTON,
Plaintiffs/Appellants/Cross-Appellees,

v.

CHARLES H. HUCKELBERRY, IN HIS OFFICIAL CAPACITY AS COUNTY ADMINISTRATOR OF PIMA COUNTY; SHARON BRONSON, RAY CARROLL, RICHARD ELIAS, ALLYSON MILLER, AND RAMÓN VALADEZ, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE PIMA COUNTY BOARD OF SUPERVISORS; AND PIMA COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF ARIZONA,
Defendants/Appellees/Cross-Appellants.

No. 2 CA-CV 2018-0161
Filed October 21, 2019

Appeal from the Superior Court in Pima County
No. C20161761
The Honorable Catherine M. Woods, Judge

APPEAL DISMISSED

COUNSEL

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OPINION

Presiding Judge Eppich authored the opinion of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

E P P I C H, Presiding Judge:

¶1 Pima County resident-taxpayers Richard Rodgers, Shelby Magnuson-Hawkins, and David Preston ("the taxpayers") appeal from the trial court's grant of partial summary judgment in favor of Pima County, Pima County Administrator Charles Huckelberry, and the members of the Pima County Board of Supervisors ("the county"). The taxpayers argue the court erred in ruling that the county had not violated state law and county ordinances in procuring services to construct a launch pad for high-altitude balloons and related facilities.[1] The county cross-appeals, contending the taxpayers lack standing to pursue their claims and the issue is moot. We conclude that the taxpayers have standing but dismiss their appeal as moot.

Factual and Procedural Background

¶2 Beginning in September 2014, World View Enterprises Inc., a near-space exploration company that manufactures high-altitude balloons for scientific research and tourism, approached Pima County staff about locating its headquarters, manufacturing facility, and launch pad in the county. An initial plan for World View to use an existing facility at the Tucson International Airport did not come to fruition. But in the summer of 2015, World View and the county discussed the possibility of a new facility, which led to a proposal that the county would build a facility that it would own and lease to World View.

¶3 In August 2015, County Administrator Huckelberry told World View that preliminary design and cost information for the facility was needed. Later that month, Swaim Associates Ltd., an architectural

[1]This appeal arises out of trifurcated proceedings in Pima County Superior Court. In *Rodgers v. Huckelberry*, 243 Ariz. 427 (App. 2017), we considered count two of the taxpayers' complaint, and determined that the county was not required to employ a competitive bidding process in leasing the facility to World View. *Id.* ¶¶ 13, 22. We now address counts three and four of the complaint.

firm, was chosen to provide preliminary design services. Swaim, in turn, employed Barker-Morrissey Contracting Inc., for preliminary cost estimates. Neither Swaim nor Barker-Morrissey were paid for the preliminary services they provided over the next few months with the hope that they would be awarded paid contracts if the project materialized.

¶4 By September or October 2015, World View informed the county that its facility had to be operational by the end of 2016. In October, Huckelberry submitted to World View a written proposal to provide it a facility that it could occupy in 2017, but it remained unclear for the next several weeks whether World View would agree to the proposal. Finally, on December 23, 2015, World View agreed to move into a building leased from Pima County "by approximately November 2016," a completion date that required the facility to be built much sooner than the usual eighteen to twenty-four months to complete such a facility.

¶5 In January 2016, the Pima County Board of Supervisors, on Huckelberry's recommendation, voted to approve the World View project. At the same time, the board approved Swaim as the architect and Barker-Morrissey as the contractor without a competitive procurement process, following Huckelberry's advice that the board should invoke its emergency procurement authority under A.R.S. § 34-606 and Pima County Code § 11.12.060 to select those firms to build the facility. The facility was substantially completed and certified for occupancy by December 2016. For completing the project, Swaim was paid $667,709; Barker-Morrissey, $12,334,531.

¶6 Meanwhile, in April 2016, the taxpayers filed this lawsuit, claiming, among other things, that the selection of Swaim and Barker-Morrissey was "predetermined" and violated competitive procurement requirements in A.R.S. §§ 34-603 and 34-604 and Pima County Code §§ 11.04.010 and 11.16.010. In their complaint, the taxpayers requested injunctive and declaratory relief.

¶7 The county moved to dismiss the case, contending, among other things, that the taxpayers lacked standing and the county had acted lawfully under § 34-606, which provides for emergency procurements "if a threat to the public health, welfare or safety exists or if a situation exists that makes compliance with this title impracticable, unnecessary or contrary to the public interest, except that these emergency procurements shall be made with such competition as is practicable under the circumstances." The trial court denied the motion to dismiss. The county then moved for partial summary judgment, arguing that the issue was moot. The court

denied this motion as well, finding the county had conceded the facility was not completed at that time and the contractors had not been fully paid, and even if the issue was moot, the "matter present[ed] issues of great public importance and/or issues that are capable of repetition yet evading review."

¶8 The county then filed a second motion for partial summary judgment, again contending its procurement process was lawful. The taxpayers filed a cross-motion for partial summary judgment. This time, the trial court granted the county partial summary judgment. The court concluded that Huckelberry had not violated procurement laws in his pre-award consultation with Swaim and Barker-Morrissey because those laws applied only to an "agent" and Huckelberry as County Administrator did not fit the statutory definition of an agent. The court also concluded the county had lawfully invoked its emergency procurement power in awarding the contracts. It found that the county had determined the World View project was in the public interest as a means of economic development, and that the project would have been put at risk had the county not agreed to the November 2016 deadline. The court further determined the board had acted within its discretion when it concluded that any competitive bidding for the project on that schedule would have been impracticable because had there been any competitive bidding, "it would have left a mere 6-8 months for the design and construction of the building and balloon pad—a time frame that appears unrealistic if not impossible."

¶9 The taxpayers appealed the trial court's summary-judgment ruling that no illegal procurement had occurred. The county cross-appealed the court's denial of its motion to dismiss for lack of standing, also arguing that the issue of whether procurement procedures had been violated had become moot and should not be decided. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1).

Taxpayer Standing

¶10 We first address the county's contention that the trial court erred in denying its motion to dismiss the taxpayers' claims for lack of standing. After entry of judgment, a party may challenge the trial court's earlier denial of a motion to dismiss. *See In re Pima Cty. Mental Health No. MH20130801*, 237 Ariz. 152, ¶ 14 (App. 2015). We generally review a court's denial of a motion to dismiss for abuse of discretion, *id.*, but review application of legal standards *de novo*, *see In re $70,070 in U.S. Currency*,

236 Ariz. 23, ¶ 12 (App. 2014). Here, the facts relevant to taxpayer standing are undisputed; we therefore review that issue *de novo*.

¶11 "A taxpayer has sufficient standing in an appropriate action to question illegal expenditures made or threatened by a public agency." *Smith v. Graham Cty. Cmty. Coll. Dist.*, 123 Ariz. 431, 432 (App. 1979).[2] Such standing is based on taxpayers' "equitable ownership of such funds and their liability to replenish the public treasury for the deficiency which would be caused by the misappropriation." *Ethington v. Wright*, 66 Ariz. 382, 386 (1948). "Illegal expenditures" include expenditures made without complying with required competitive bidding processes, even if the purpose of the expenditure is proper. *See Smith*, 123 Ariz. at 432 (school roof); *Secrist v. Diedrich*, 6 Ariz. App. 102, 104 (1967) (school landscaping).[3] Although our supreme court has stated that a taxpayer does not have standing "unless the taxpayer and his class have sustained or will sustain some pecuniary loss" and it "affirmatively appear[s] by the complaint that such loss will occur," *Henderson v. McCormick*, 70 Ariz. 19, 24-25 (1950), an allegation of an illegal expenditure has generally been held sufficient to establish standing, *see, e.g.*, *Ethington*, 66 Ariz. at 387 (finding taxpayer standing where harm alleged was that "public moneys [would] be unlawfully expended" if allegedly unconstitutional statute were enforced); *Secrist*, 6 Ariz. App. at 104 (finding taxpayer standing where landscaping work at school buildings performed without soliciting public bids; no requirement of allegation that competitive bidding would have resulted in lower cost); *Smith*, 123 Ariz. at 433-34 (*Henderson* does not require a showing of pecuniary loss to enjoin an illegal expenditure); *see also Dail v. City of Phoenix*, 128 Ariz. 199, 202 (App. 1980) (taxpayer standing established by showing either "a pecuniary loss attributable to the challenged transaction

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[2]Standing is not a constitutional requirement in Arizona, but our courts have consistently required a plaintiff to have standing as a matter of judicial restraint. *See Sears v. Hull*, 192 Ariz. 65, ¶¶ 24-25 (1998).

[3]In a footnote citing *Bennett v. Napolitano*, 206 Ariz. 520, ¶ 30 (2003), the county contends a "taxpayer must allege that the expenditure is for an unconstitutional or otherwise illegal *purpose*, not merely that the process resulting in the expenditure was flawed." We do not interpret the one-paragraph discussion in *Bennett*, undertaken to dispose of a taxpayer-standing claim raised for the first time in a reply brief by legislators challenging the governor's exercise of veto authority as applied to spending bills, to create such a requirement.

of a municipality" or "a direct expenditure of funds that were generated through taxation").

¶12 Here, the taxpayers have alleged the county spent tax-generated funds on the World View project without complying with the statutory competitive procurement process—an illegal expenditure. The county nonetheless argues the taxpayers lack standing because "a victory for [the taxpayers] would have . . . no impact" on their equitable interest in taxpayer funds. The county suggests that prior taxpayer-standing cases have involved competitive bidding processes where price was a primary concern, *see, e.g.*, *Secrist*, 6 Ariz. App. at 104, rendering those cases distinguishable from the competitive procurement process here, which is focused primarily on merit, *compare* A.R.S. § 34-221 (price as primary factor), *with* A.R.S. §§ 34-603, 34-604 (qualifications as primary factor).

¶13 We see no principled distinction, however. Whether a competitive process focuses on price or qualifications, the taxpayer has an equitable interest in enforcing it to maximize value received for money spent. Moreover, the procurement process at issue here requires consideration of both qualifications and price. While the process initially requires a list of qualified candidates to be compiled without considering "fees, price, man-hours or any other cost information," §§ 34-603(C)(1)(a), 34-604(C)(1)(a), the process then requires negotiations with those candidates, beginning with the best qualified candidate, which "shall include consideration of compensation," §§ 34-603(E), 34-604(E).

¶14 Nor are we persuaded by the county's argument that the taxpayers lack standing because they have not alleged Swaim and Barker-Morrissey were unqualified. We see no principled reason to require a taxpayer alleging an expenditure violating a merit-based procurement process to show lack of qualifications to establish standing, when a taxpayer alleging an expenditure violating a price-based competitive bidding process need not make a corresponding showing of pecuniary loss. *See Smith*, 123 Ariz. at 434.

¶15 The county further contends that A.R.S. § 34-613, enacted along with the competitive procurement process in 2000, provides the exclusive remedy for violations of the statutory procurement process. It cites *Valley Drive-In Theatre Corp. v. Superior Court*, 79 Ariz. 396, 400 (1955), for the proposition that "when a statute creates a right and also provides a complete and valid remedy for the right created, the remedy thereby given is exclusive." But unlike the statute at issue in *Valley Drive-in*, which authorizes a defendant in a replevin action to retain possession of the

property pending litigation by posting a bond, *id.* at 398, § 34-613 creates no rights. Instead, it imposes obligations on the attorney general to enforce the provisions in Title 34, Chapter 6, including the competitive bidding process, by taking action to collect fines and bringing "any appropriate civil action to enjoin a threatened or pending violation." Furthermore, the court in *Valley Drive-in* concluded only that the defendant, who was provided "a right and . . . a complete and valid remedy for the right" by statute, could not sue for other equitable remedies; it did not hold that others not granted rights in the statute would be similarly precluded from seeking an equitable remedy. *Id.* at 400.

¶16 The county also cites *State ex rel. Horne v. AutoZone, Inc.*, 229 Ariz. 358 (2012), in support of its contention that § 34-613 precludes taxpayer standing. But *Horne* similarly involved a statute that grants a right to sue, rather than imposing an obligation. 229 Ariz. 358, ¶¶ 16-22 (citing A.R.S. § 44-1528). And like *Valley Drive-in*, *Horne* involved a situation in which the party given the statutory right was ruled to be limited to the remedies granted to it in the statute; *Horne* does not speak to the equitable rights and remedies of others. *Id.* A final case the county cites, *Hunnicutt Construction, Inc. v. Stewart Title & Trust of Tucson Trust No. 3496*, 187 Ariz. 301 (App. 1996), presents circumstances similarly distinguishable from those here.

¶17 "It is . . . easy enough for the legislature to state that a certain statute does or does not create, preempt, or abrogate a private right of action." *Hayes v. Cont'l Ins.*, 178 Ariz. 264, 273 (1994). We cannot say that § 34-613 is "so comprehensive . . . that the legislature must have intended [it] to provide the sole remedy" for a violation of the competitive procurement procedures. *Id.* at 271. In sum, we conclude the taxpayers had standing and a right of action to enjoin the allegedly illegal expenditures.

Mootness

¶18 The county also contends this action is moot, pointing out that the World View project has already been constructed and Swaim and Barker-Morrissey have already been paid for their services. We agree. *See J. R. Francis Constr. Co. v. Pima County*, 1 Ariz. App. 429, 430 (1965) (finding action to challenge public contract bidding process moot where construction had been completed), and the taxpayers do not contend we can offer them any meaningful relief. Indeed, while the taxpayers argue that the case is not moot because the contractors have not been paid for their pre-award services and must still honor any warranties or other guarantees in the contracts, it would be against the taxpayers' interest in preventing

depletion of public funds to compel further payments to Swaim and Barker-Morrissey or relieve them of continuing obligations.[4]

¶19 Though we are not constitutionally constrained to avoid moot issues, we ordinarily decline to decide them. *See Kondaur Capital Corp. v. Pinal County*, 235 Ariz. 189, ¶ 8 (App. 2014). We may decide a moot issue, however, when it is "of great public importance" and "likely to recur," or when the issue "evade[s] review." *Sears v. Hull*, 192 Ariz. 65, n.9 (1998). On occasion courts have considered moot issues involving public contracts. For example, in *Big D Construction Corp. v. Court of Appeals*, 163 Ariz. 560, 562-63 (1990), our supreme court decided the constitutionality of Arizona's bid preference statute, even though the parties had settled and the issue was moot. The court reasoned that the issue was of significant importance because a large amount of public money was implicated, and the issue was likely to recur for other bidders and evaded review because litigating the issue would necessarily jeopardize timely completion of projects. *Id.* at 563. We acknowledge similar circumstances here: a substantial expenditure, a process that may recur, and the possibility of future litigation that could delay completion of a project.

¶20 We are reluctant to grant relief to challengers of public contracts that have been fully performed, however. *W. Sun Contractors Co. v. Superior Court*, 159 Ariz. 223, 227 (App. 1988). And we have shown particular unwillingness to grant relief to parties that have not taken appropriate steps to prevent an issue from becoming moot. For example, in *ASH, Inc. v. Mesa Unified School District No. 4*, 138 Ariz. 190 (App. 1983), we declined to decide a challenge to a public contract that had been fully performed where the challenger had "sought none of the procedural remedies available to stay performance of the contract." *Id.* at 192. We reasoned that "[b]y failing to obtain any interlocutory stay or injunction to enjoin performance of the disputed contract," the challenger "did not protect the status quo in th[e] case," and therefore "ha[d] not effectively preserved the issue" for consideration on appeal. *Id.*

¶21 Similarly here, the taxpayers could have preserved the possibility of a meaningful remedy by seeking to temporarily enjoin performance of the disputed contracts pending the outcome of the lawsuit.

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[4]At oral argument, the taxpayers conceded that the county has no contractual obligation to pay Swaim and Barker-Morrissey for pre-award services and any remaining warranty work would be performed without additional compensation under the terms of the contract.

They did not do so, however, despite ample opportunity. The taxpayers filed suit less than three months after the contracts were entered, and more than eight months before the facility was substantially completed. Indeed, the taxpayers maintained that the design and construction contracts still had not been fully paid in June 2017—fourteen months after they filed their lawsuit. A live controversy therefore evaded review only because the taxpayers did not take appropriate legal action to attempt to preserve one. We therefore decline to decide this moot issue.

Disposition

¶22 We dismiss the taxpayers' moot appeal. And the taxpayers not having prevailed on appeal, we decline their requests for attorney fees under A.R.S. § 12-348 and the private attorney general doctrine, and costs under A.R.S. § 12-341.