IN THE SUPREME COURT
OF THE STATE OF ARIZONA

ASPEN 528, LLC, Petitioner, v. CITY OF FLAGSTAFF, ARIZONA, Respondent.	No. CV-12-0422 Arizona Court of Appeals No. 1 CA-CV 11-0512 Superior Court of Coconino County Case No. CV2010-00795

PETITION FOR REVIEW OF
MEMORANDUM DECISION OF COURT OF APPEALS

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INTRODUCTORY STATEMENT

This case presents a novel question under Arizona's Private Property Rights Protection Act, Ariz. Rev. Stat. § 12-1134. That statute entitles a property owner to compensation when state or local governments restrict the use of his property in ways that reduce its fair market value. But Section 12-1134(E) allows him to sue only after he first submits to the government a "written demand" for a specific amount of compensation, and waits for that Demand to be either denied or deemed denied by the passage of 90 days. The problem giving rise to this appeal is that Section 12-1134(G) requires an action for just compensation to be filed within three years of the effective date of the property restriction. In this case, Aspen filed its Demand within the three-year period and waited 90 days for an answer. But the three-year period expired before the 90 days were over.

Aspen then filed suit, arguing that ordinary principles of equity will toll a statute of limitations when a plaintiff is forced to await the outcome of an administrative procedure or exhaustion process before bringing suit. *See, e.g., Ariz. Dep't of Rev. v. Dougherty*, 29 P.3d 862, 869, 200 Ariz. 515, 522 (Ariz. 2001). Nevertheless, the Superior Court dismissed on statute of limitations grounds, and the Court of Appeals affirmed, holding that "the accrual of Aspen's claim did not toll the three year limitations period." *Aspen 528, LLC v. City of Flagstaff, Ariz.*, No. 1

CA-CV 11 0512, 2012 Ariz. App. Unpub. LEXIS 1555, at *7 (Ariz. Ct. App. Dec. 18, 2002).

Aspen contends that the 90-day period mandated by Section 12-1134(E) should toll the three-year limitations period whenever the property owner files the Demand within the three years. By refusing to apply this routine tolling principle to allow Aspen to comply with the Demand requirement, the decision below effectively shortens the statute of limitations from three years to two years and nine months. Among other consequences, this bars from court any property owner who complies with the Demand requirement during the last 90 days of the three-year window if—as here—the government simply ignores the Demand. Property owners who buy property during the last 90 days of the three-year period, or who only learn of their injury and submit a Demand within those 90 days, would thereby be deprived of Section 12-1134's protections. That conclusion is contrary to the intention of the Act, ignores ordinary principles of equity, and would reward government entities for their own refusal to cooperate with the statutory procedure. No Arizona decision has addressed this question; review by this Court is therefore warranted.

ISSUE PRESENTED FOR REVIEW

Whether the Court of Appeals correctly held that the statute of limitations in Ariz. Rev. Stat. § 12-1134(G) is not tolled while the claimant complies with the 90-day demand requirement in Ariz. Rev. Stat. § 12-1134(E).

FACTUAL AND PROCEDURAL BACKGROUND

This lawsuit seeks just compensation for the reduction in property value caused by Flagstaff City Ordinance 2007-34. That Ordinance was enacted on June 19, 2007. On June 20, 2007, Paul Turner, owner and president of Aspen, filed a Demand with the City of Flagstaff (City), as required by Section 12-1134(E). The City ignored that letter, so it was deemed denied on September 18, 2007. On October 3, 2007, Turner, along with three other property owners, filed a lawsuit seeking compensation. That case was called *Regner v. Flagstaff*, Coconino County Superior Court No. CV2007-0678. For reasons not relevant here, the Superior Court dismissed the case, but the Court of Appeals reversed that dismissal on February 3, 2009.[1]

On August 21, 2009, the City filed a second motion to dismiss, contending that Mr. Turner's Demand was inadequate because he did not personally own the property, but that it was instead owned by his corporation, Aspen. The Superior Court granted that motion on November 19, 2009, and the *Regner* case was again appealed. While the Court of Appeals was considering that appeal, Mr. Turner became aware that the three-year deadline was approaching, and that he should take action to preserve Aspen's right to seek compensation in the event that the Court of Appeals ruled that he could not seek compensation on Aspen's behalf. So, on May 18, 2010, Aspen sent

[1] Plaintiff Jon Regner later voluntarily dismissed his claims and Turner proceeded as the sole plaintiff.

the City a Demand in its own name. On that same day, Aspen filed in the Superior Court a motion to amend the complaint in *Regner v. Flagstaff*, No. CV2007-0678, so as to substitute Aspen as a plaintiff in Mr. Turner's place. That motion also asked the Superior Court to hold Aspen's claims in abeyance for 90 days to await the City's disposition of Aspen's May 18 Demand.

Sadly, the City also ignored Aspen's May 18, 2010, Demand. That Demand was therefore deemed denied on August 16, 2010—the same day that the Superior Court held oral arguments on Aspen's motion to amend the *Regner* complaint. On August 26, 2010, the Superior Court denied that motion to amend, ruling that it lacked jurisdiction because the Court of Appeals was still considering the *Regner* appeal. Aspen 528 therefore filed a new complaint in its own name (*Aspen 528 v. Flagstaff*, No. CV2010-00795) on September 14, 2010. The City moved to dismiss this new case on October 12, 2010, but the Superior Court stayed that motion pending the Court of Appeals' resolution of the still-pending *Regner* appeal.

On February 22, 2011, the Court of Appeals issued its decision in *Regner*, now re-named *Turner v. Flagstaff*, 247 P.3d 1011, 226 Ariz. 341 (Ariz. Ct. App. 2011). It held that because the property is technically owned by Aspen, the Demand filed by Turner was insufficient. It also ruled that property owners must comply with both the notice of claim requirement in Ariz. Rev. Stat. § 12-821.01 and the Demand requirement in Section 12-1134(E), and that because Turner had failed to comply with

both requirements, his case was bared. 247 P.3d at 1013, 226 Ariz. at 343. The mandate in that case was issued on March 29, 2011, remanding to the Superior Court to address whether Turner should be given leave to amend his original 2007 Demand.

But by that time, Aspen 528 had already filed its own Demand (May 18, 2010)—and that, too, had also been deemed denied (on August 16, 2010). Mr. Turner and the City therefore stipulated on May 9, 2011, to dismiss so that Aspen could seek compensation in its own name in the then-pending *Aspen 528 v. Flagstaff*, No. CV2010-00795.

The City moved to dismiss *Aspen 528* on May 25, 2011, arguing, first, that Aspen failed to comply with Ariz. Rev. Stat. § 12-821.01, and, second, that the complaint was filed after the three-year statutory period. Aspen argued that it was not required to comply with Section 12-821.01 and that it was entitled to await the outcome of the 90-day Demand process, so long as the Demand was sent during the three-year statutory period. The Superior Court dismissed, and Aspen appealed. While that appeal was pending, the state legislature amended Ariz. Rev. Stat. § 12-821.01 to make clear that its requirements do not apply to claims brought under Section 12-1134. The Court of Appeals thereupon requested supplemental briefing on the second question: the statute of limitations issue. On December 18, 2012, it affirmed the dismissal, holding that the three-year limitations period barred the

Aspen 528 complaint, and that that period was not tolled by the 90-day period mandated by Section 12-1134(E).

REASONS WHY REVIEW SHOULD BE GRANTED

This case involves a critical question of first impression about the procedure for seeking compensation under Ariz. Rev. Stat. § 12-1134. This case is of statewide importance and has never been addressed in any previous Arizona decision. Specifically, this case will resolve whether the three-year statute of limitations provided in Section 12-1134(G) is tolled for property owners who file the required Demand within the limitations period, and who must then wait 90 days before they may file suit—only to have the limitations period end during those 90 days. Appellant contends that the Court of Appeals erred by failing to apply ordinary rules of equity to allow a person with a claim against the government to await the outcome of a mandatory exhaustion requirement before suing.

THE OPINION BELOW ERRONEOUSLY DEPRIVES PROPERTY OWNERS OF THE BENEFIT OF TOLLING RULES APPLIED IN EVERY OTHER AREA OF ARIZONA LAW

Section 12-1134(E) gives a property owner a cause of action only after he makes a written Demand for compensation and that Demand either is rejected or expires by the passage of 90 days. It says that "*[i]f a land use law continues* to apply . . . *more than ninety days after* the owner of the property makes a written

demand . . . for just compensation . . . *the owner has a cause of action.*" (Emphasis added.) Aspen therefore had no cause of action, and could not have sued, before its Demand was either denied or deemed denied by the expiration of 90 days.

When a party is forced to submit to an exhaustion procedure before filing suit, courts ordinarily toll the statute of limitations until the outcome of that process—so long as the exhaustion process was initiated before the limitations period expired. *See, e.g.*, *Dougherty*, 29 P.3d at 869, 200 Ariz. at 522; *Third & Catalina Assocs. v. City of Phoenix*, 895 P.2d 115, 119, 182 Ariz. 203, 207 (Ariz. Ct. App. 1994); *Hosogai v. Kadota*, 700 P.2d 1327, 1331, 145 Ariz. 227, 231 (Ariz. 1985). Because Section 12-1134 requires a property owner to wait either for the government to deny his Demand, or for the expiration of that Demand by the passage of 90 days, the statute of limitations must be tolled during that process.

On May 18, 2010, within the limitations period, Aspen filed its Demand and also moved to amend the complaint in the then-existing *Regner* case to be substituted as a plaintiff. Aspen's Demand was deemed denied on August 16, 2010, which was after the three-year period expired (in June, 2010), and its motion to amend the *Regner* complaint to be added as a plaintiff was denied on August 26, 2010, on the grounds that the Superior Court lacked jurisdiction; the Superior Court declared that it would

"address all pending issues when the case is remanded."[2] While the parties waited for that, Aspen decided out of an abundance of caution to file its own complaint on September 14, 2010. Thus, because the statute of limitations should have been tolled to await the City's action in response to Aspen's Demand, this case was timely filed.[3]

Aspen was required to await the outcome of its May 18, 2010, Demand before suing. Section 12-1134 does not give a property owner a cause of action until after he makes a written demand and it either expires or is rejected. The Demand is therefore an *exhaustion* requirement, not a mere notice requirement, and where a person must perfect his right to sue by awaiting the defendant's response to a demand, the statute of limitations will be tolled to accommodate that process.

In *Third & Catalina*, the court held that a four-year statute of limitations was tolled because the property owner who sought compensation for a regulatory taking was required to await a decision on its request for a zoning variance before suing. 895

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[2] Under-Advisement Ruling, *Regner v. Flagstaff*, No. CV 2007-0678 (Coconino Cnty. Super. Ct. Aug. 26, 2010).

[3] The City may contend that Aspen should have filed the complaint on the same day its Demand was deemed denied. But the 19 days between August 26 and September 14 easily meet the requirements for equitable tolling. *See Jepson v. New*, 792 P.2d 728, 734, 164 Ariz. 265, 271 (Ariz. 1990) (listing elements of equitable tolling). The City had timely notice of Aspen's claims—in the form of Paul Turner's 2007 Demand or Aspen's own 2010 Demand. The City was not prejudiced in gathering evidence; no discovery has yet taken place, and the City is free to gather evidence should this case proceed. Aspen acted reasonably and in good faith, attempting first to amend the complaint in the pending action, and then diligently filing its own complaint even before the appellate court had issued its decision.

P.2d at 118-19, 182 Ariz. at 206-07. The court ruled that this exhaustion served important constitutional and policy considerations, and that plaintiffs who fail to exhaust their statutory remedies are barred from seeking judicial relief. *Id.* at 119, 182 Ariz. at 207. Consequently, the limitations period was tolled to await the outcome of this requirement. *Id.*

Similarly, in *Dougherty*, 29 P.3d 862, 200 Ariz. 515, a taxpayer filed a lawsuit against the Department of Revenue, alleging that the disallowance of certain deductions was unconstitutional. That complaint was dismissed due to the taxpayer's failure to exhaust administrative remedies. *Id.* at 863, 200 Ariz. at 516. She then exhausted those remedies and re-filed her lawsuit. *Id.* The Department of Revenue argued that her case was barred by the statute of limitations, but this Court, citing *Third & Catalina*, held that "the statute of limitations is tolled while the claimant exhausts his or her administrative remedies." *Id.* at 869, 200 Ariz. at 522.

This Court explained the general principles of tolling in *Hosogai*, 700 P.2d at 1331, 145 Ariz. at 231, when it stated that tolling is proper "when it would effectuate: 1) the policies underlying the statute, and 2) the purposes underlying the statute of limitations," and when the plaintiff has given the defendant timely notice; the defendant was not prejudiced in gathering evidence in defense; and the plaintiff engaged in reasonable, good faith conduct in the first case, and diligently filed the second. 700 P.2d at 1333, 145 Ariz. at 233. All these standards are met here.

Nevertheless, the Court of Appeals refused without explanation to apply these ordinary tolling rules. It held that the three-year statute of limitations in Section 12-1134(G) bars any claim filed after that three-year period, regardless of the Demand requirement. The court did not say why tolling rules that apply to every other exhaustion requirement in Arizona law do not apply here. The full extent of the court's explanation consists of two sentences:

> [B]y the plain language of § 12-1134(G), the three-year limitations period begins to run upon "the effective date of the land use law, or of the first date the reduction of the existing rights to use, divide, sell or possess property applies to the owner's parcel, whichever is later." Accordingly, the accrual of Aspen's claim did not toll the three-year limitations period.

Aspen 528, 2012 Ariz. App. Unpub. LEXIS 1555, at *7. The court simply never explained why Aspen was not entitled to await the denial or expiration of the Demand, as Section 12-1134(E)'s "plain language" requires.

THE DECISION BELOW EFFECTIVELY REDUCES THE THREE-YEAR LIMITATIONS PERIOD IN SECTION 12-1134 TO TWO YEARS AND NINE MONTHS

The decision below holds that a property owner is *not* entitled to await the denial or expiration of the Demand. But because Section 12-1134(E) gives a property owner a cause of action *only* after a Demand is submitted and either denied or deemed denied, the result is effectively to shorten the statute of limitations by three months.

Section 12-1134(E) states that "*[i]f* a land use law continues to apply . . . *more than ninety days after* the owner . . . makes a written demand . . . the owner *has a cause of action*" except if the government entity pays the Demand, or repeals, amends, or waives the law (emphasis added). Thus the owner may not sue before the 90 days expire, or if the government provides redress. Thus if, as the decision below held, the limitations period is not tolled during that 90 days, a property owner who sends a Demand within the last three months will be barred from suing if the government simply ignores it.

For example, someone who acquires property during the last three months of the three-year period can submit a Demand, but the City can simply wait one more month and then deny it once safely past the limitations period, and the owner will have no opportunity to seek compensation. Courts have never allowed defendants to "pocket veto" claims in this way. *Cf. Milwaukee Cnty. Wisc. v. Brock*, 771 F.2d 983, 988 (7th Cir. 1985) ("[S]uch an interpretation would, in effect, give the [government] the power of 'pocket dismissal' (analogous to the President's 'pocket veto'), a power entirely inconsistent with the duty to [address complaints subject to administrative exhaustion].").

The City argued below that tolling should not apply because the Demand requirement is only a notice requirement and not an exhaustion requirement. But the text of Section 12-1134(E) provides that a property owner *has no right to sue* until

after a Demand is either denied or expires. Since the right to sue is contingent on the government's actions, the Demand requirement is not a mere notice requirement.

Although not binding on this Court, the Texas Court of Appeals' decision in *Moreno v. City of El Paso*, 71 S.W.3d 898 (Tex. App. 2002), is instructive. After reviewing the law of several jurisdictions, that court contrasted notice rules, which only require notification of the defendant—to which tolling does not apply—with the kind of exhaustion requirement at issue here, under which a plaintiff must submit a Demand and await the defendant's action before suing. *Id.* at 902. Tolling *does* apply to these requirements. *Id.*; *see also Brown v. Rocky Farmers Co-Op, Inc.*, 118 P.3d 214, 216 (Okla. Civ. App. 2005) ("where the possibility of delay [is] controlled by some entity other than the plaintiff, and any resulting delay would be beyond the plaintiff's control," "a statute of limitations would be tolled."); *Marathon E.G. Holding Ltd. v. CMS Enters. Co.*, 597 F.3d 311, 321-22 (5th Cir. 2010) (same).

The Texas court found that the rule at issue there was a mere notice requirement because it did not prevent a plaintiff "from giving notice and filing suit immediately . . . and any delay in filing suit is likely within the control of the injured party." 71 S.W.3d at 902. Here, by contrast, a property owner may *not* give notice and sue immediately, and any delay is *not* in the property owner's control. Instead, the owner must submit a Demand and *wait* either for redress, for denial, or for expiration of the Demand before he may bring suit. Section 12-1134(E) therefore does not impose a

mere notice requirement as in the Texas case—rather, the Demand process is "an essential part of the cause of action," 71 S.W.3d at 903. A plaintiff may only sue *after* he has first presented a Demand, and the government has "neglected or refused to pay all or part of [it]." *Id.* at 902. The Demand requirement is an exhaustion requirement to which tolling applies.

In its briefing below, the City claimed that the 90-day period runs simultaneously with the three-year statute of limitations, relying heavily on *Stulce v. Salt River Project Agric. Improvement & Power Dist.*, 3 P.3d 1007, 197 Ariz. 87 (Ariz. Ct. App. 1999). But *Stulce* does not apply to this case, because it involved only the interaction between subsections (A) and (C) in Ariz. Rev. Stat. § 12-821.01—a statute that does not apply at all to this lawsuit. *See* Ariz. Rev. Stat. § 12-821.01(H). Even if *Stulce* did apply, it would actually support Aspen's position, because that case ruled that subsection Ariz. Rev. Stat. § 12-821.01(C) provides a tolling period for all cases that are *not* subject to Section 12-821.01(A). *See* 3 P.3d at 1012, 197 Ariz. at 92 ("[W]e construe the tolling provisions of A.R.S. § 12-821.01(C) to apply to alternative dispute resolutions or administrative claims and review processes *other than* the notice of claim procedure set forth in subsection A." (emphasis added)). Since Aspen's claims are not subject to subsection (A), *Stulce* would, if it applied, entitle Aspen to toll the limitations period "until all such [review or exhaustion] procedures, processes or remedies have been exhausted." *Id.* at 1010-11, 197 Ariz. at 90-91 (quoting Ariz.

Rev. Stat. § 12-821.01(C)). But because *Stulce* does not apply, this case should be resolved on regular tolling principles—which entitle Aspen to await the government's action on its Demand before suing.

To rule otherwise is to cut short the statute of limitations established in Section 12-1134(G), and to empower government entities to "pocket veto" lawsuits. This would work an unjustifiable hardship on property owners who find themselves within the last 90 days of the three-year limitations period. It is precisely to cure this problem that the equitable doctrines of tolling apply to all similar situations in Arizona law. *Hosogai*, 700 P.2d at 1333, 145 Ariz. at 233.

CONCLUSION

Review should be granted. The decision below should be vacated, and the case remanded to the Superior Court with instructions to proceed to the merits.

DATED: February 15, 2013.

Respectfully submitted,

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