

SUPREME COURT OF ARIZONA

BONITO PARTNERS, LLC, an Arizona) Arizona Supreme Court
limited liability company,) No. CV-12-0096-PR
)
Plaintiff/Appellant,) Court of Appeals
) Division One
v.) No. 1 CA-CV 10-0819
)
CITY OF FLAGSTAFF, a) Coconino County
municipality,) Superior Court
) No. CV2010-00231
Defendant/Appellee.)

) **FILED 09/25/2012**

O R D E R

The Court has considered the Petition for Review by Bonito Partners, LLC ("Bonito"); the Response by the City of Flagstaff (the "City"); and the City's Cross-Petition for Review.

IT IS ORDERED denying Bonito's Petition for Review and denying Bonito's request for attorneys' fees;

IT IS FURTHER ORDERED granting the City's Cross-Petition for Review, which shall be submitted without supplemental briefing or oral argument. Before the trial court, Bonito acknowledged that there are no issues of material fact and cross-moved for summary judgment, arguing that any requirement that property owners repair adjacent public sidewalks is a "prima facie" taking of private property. Bonito did not contend before the trial court that the repair requirement constitutes a "regulatory taking" as applied to its property under the multi-factor test outlined in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Because this issue was not raised before the trial court, the Court of Appeals

erred by vacating the trial court's entry of summary judgment in favor of the City and remanding for the trial court to consider the *Penn Central* factors. *Cf. Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 187 Ariz. 479, 485, 930 P.2d 993, 999 (1997) (holding that court of appeals erred in remanding for determination of reasonableness of fee where the issue had not been raised in the trial court).

IT IS FURTHER ORDERED vacating the last sentence of ¶ 1 and ¶¶ 19, 20, and 37 of the opinion of the Court of Appeals and affirming the superior court's grant of summary judgment in favor of the City.

DATED this 25th day of September, 2012.

REBECCA WHITE BERCH
Chief Justice

TO:

Gerald W. Nabours
Kenneth H. Brendel
Clyde P. Halstead
Ruth Willingham
Joni L. Hoffman