

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2019-000323-001 DT

02/20/2020

HONORABLE DOUGLAS GERLACH

CLERK OF THE COURT

J. Eaton

Deputy

CLEMENTE RANCH HOMEOWNERS
ASSOCIATION

LYNN M KRUPNIK

v.

TERESA J JOHNSTONBAUGH (001)

TERESA J JOHNSTONBAUGH
2983 S SALIDA DEL SOL CT
CHANDLER AZ 85286

JUDGE GERLACH
OFFICE OF ADMINISTRATIVE
HEARINGS
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Clemente Ranch Homeowners Association appeals the decision of the Arizona Department of Real Estate granting a petition filed by Teresa Johnstonbaugh and ordering the Association to comply with Article 3.11(A)(5) of the Association's bylaws.¹ The court has considered the opening and reply briefs filed on behalf of the Association, Johnstonbaugh's answering brief, the transcript of an evidentiary hearing convened by an administrative law judge that was held on July 19, 2019, and relevant matters in the record to which the parties have directed the court's attention. The

¹ Article 3.11(A)(5) states that the Association's Board "shall . . . [p]rovide for the operation, care, upkeep and maintenance of all of the Common Area and borrow money on behalf of the Association when required in connection with the operation, upkeep and maintenance for said areas; provided, however, the consent of Members having at least two-thirds (2/3) of the total votes in the Association shall be obtained . . . in order for the Association to borrow in excess of \$5,000.00."

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court has decided to affirm the Department's decision in part and reverse and vacate the Department's decision in part.²

The dispute in this case concerns the section of a concrete block wall that is located on the property line at the south edge of Johnstonbaugh's property. The issue presented is whether Johnstonbaugh or the Association is responsible for paying the expense required to replace that section of the wall, which, because of its poor condition, has been removed by the Association.

That property line runs parallel to Queen Creek Road in Chandler. Outside the section of the wall that sits on that property line is a public sidewalk that abuts the street. In between the sidewalk and the wall is a narrow, landscaped area. Johnstonbaugh maintains that the landscaped area is part of the Association's common area, and as such, the Association is responsible for replacing the wall. The Association maintains that the landscaped area is not part of the Association's common area, and thus, Johnstonbaugh must pay for the wall's replacement.³

The Association's opening brief insists that documents having the effect of a contract, including recorded documents, that pertain to Johnstonbaugh's property establish that the landscaped area is not part of the common area and, as a result, the Department's decision is in error because it ignores settled principles of contract law applicable here. That brief, however, overlooks the well-settled principle that "acts of the parties under the contract, before disputes arise, are the best meaning of doubtful contractual terms." *Godbey v. Roosevelt Sch. Dist. No. 55*, 131 Ariz. 13, 21, 638 P.2d 235, 243 (App. 1981); *Associated Students of the Univ. of Ariz. v. Arizona Bd. of Regents*, 120 Ariz. 100, 105, 584 P.2d 564, 569 (App. 1978) (same).

Johnstonbaugh testified that, going back to at least 2012, the Association treated the landscaped area as if it were common area. [Hrg. Tr. (7/19/19) at 20] She also testified that, at least since 2012, the Association never manifested the certainty it now professes, i.e., that the landscaped area is common area. [*Id.* at 26] The ALJ was permitted to accept that testimony as true, irrespective of any evidence supporting a contrary conclusion, and from that conclude that the landscaped area is common area. *Callender v. Transpacific Hotel Corp.*, 179 Ariz. 557, 562, 880 P.2d 1103, 1108 (App. 1993) (recognizing that a trier of fact may accept all, some, or none of what a witness says); *Sigmen v. Arizona Dep't of Real Estate*, 169 Ariz. 383, 386, 819 P.2d 969,

² The Association has requested oral argument, but Johnstonbaugh has not. Because oral argument is not an opportunity to raise issues or urge arguments that have not been briefed, and because the Association has had the benefit of two legal memoranda, there is no reason to think that the issues on appeal have not been fully briefed in the parties' written submissions. Therefore, the court has concluded that oral argument will not assist a decision, and the request is denied.

³ Previously, before the full cost of repair or replacement was known to anyone, the Association agreed to pay part of the expense.

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972 (App. 1991) ("It is not this court's function to reweigh the evidence. The hearing officer as trier of fact was the proper judge of witness credibility" (citations omitted)); *see also Gutierrez v. Gutierrez*, 193 Ariz. 343, 347-48 ¶ 13, 972 P.2d 676, 680-81 (App. 1999) (stating that it is the function of trial courts to determine "witnesses' credibility and the weight to give to conflicting evidence"); *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 287, 681 P.2d 390, 439 (App. 1983) (stating that "[t]he weight to be given conflicting evidence is for the trier of fact, not a reviewing court").⁴

Moreover, the Department's decision (at 7, para. 7) concludes that Johnstonbaugh's testimony predominates over the evidence presented by the Association. This court, like any other appellate court, is not permitted to reject that conclusion. *Blake v. City of Phoenix*, 157 Ariz. 93, 96, 754 P.2d 1368, 1371 (App. 1988) ("We will not substitute our judgment for that of the agency if it was persuaded by the probative force of the evidence before it . . . [even when] we would have reached a different conclusion had we been the original arbiter"); *see also Culpepper v. State*, 187 Ariz. 431, 436, 930 P.2d 508, 531 (App. 1996) ("In reviewing factual determinations by an administrative agency, this court does not reweigh the evidence or substitute its judgment for that of the agency").⁵

Accordingly, to the extent that the Department's decision is based on the conclusion that the wall on the southern edge of the Johnstonbaugh property is the Association's responsibility, that conclusion is supported by substantial evidence. *E.g., Eastern Vanguard Forex, Ltd. v. Arizona Corp. Comm'n*, 206 Ariz. 399, 409, ¶35, 79 P.3d 86, 96 (App. 2003) (stating that "[s]ubstantial evidence exists if either of two inconsistent factual conclusions are supported by the record"); *Shaffer v. Arizona State Liquor Bd.*, 197 Ariz. 405, 409, ¶20, 4 P.3d 460, 464 (App. 2000) (stating that "[e]ven if the record supports inconsistent conclusions, neither we nor the superior court may substitute our judgment for that of the ALJ because conflicting evidence can

⁴ The Association's only witness had begun working for the Association merely 13 months before the hearing. As such, she could not, based on first-hand knowledge, contradict Johnstonbaugh's testimony nor otherwise testify about how the Association treated the landscaped area in the past, and she made no attempt to do so.

⁵ This court is required to view the record in the light most favorable to upholding the Department's decision. *Lewis v. Arizona St. Pers. Bd.*, 240 Ariz. 330, 334, ¶15, 379 P.3d 227, 231 (App. 2016) (stating that, on appeal, the evidence must be viewed "in the light most favorable to upholding" the agency's decision, which will be "affirm[ed] if any reasonable interpretation of the record supports the decision"); *Baca v. Arizona Dep't of Econ. Sec.*, 191 Ariz. 43, 46, 951 P.2d 1235, 1238 (App. 1997) ("[W]e view the evidence in a light most favorable to upholding the [agency's] decision"). An appellate court's obligation when viewing the record in that way does not mean that the appellate court must accept the reasoning of the decision being reviewed. An appellate court will affirm the decision under review if it is correct for any reason. *E.g., Arnold v. Knettle*, 10 Ariz. App. 509, 511, 460 P.2d 45, 47 (1969) (stating that "if the trial court was correct in its ruling for any reason, the reviewing court is bound to affirm"); *see also Glaze v. Marcus*, 151 Ariz. 538, 540, 729 P.2d 342, 344 (App. 1986) (stating that appellate court "will affirm the trial court's decision if it is correct for any reason, even if that reason was not considered by the trial court").

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still be 'substantial'") (citations omitted); *see also Waltz Healing Ctr., Inc. v. Arizona Dep't of Health Servs.*, 245 Ariz. 610, 613, ¶9, 433 P.3d 14, 17 (App. 2018) ("We defer to the agency's factual findings if they are supported by substantial evidence, even if other evidence before the agency would support a different conclusion").

The Opening Brief' urges that, by entering into an agreement with the Association before the full extent of the damage to the wall was learned by either side, Johnstonbaugh, in effect, acknowledged that the wall was not adjacent to any common area for which the Association was responsible. Neither the agreement nor anything else in the record shows conclusively that the purported acknowledgement was part of the negotiations and understanding that led to the agreement. Indeed, even if one were to give the Association the benefit of the doubt, notwithstanding the obligation of this court to view the record in the light most favorable to upholding the Department's decision, the most that can be said is that the agreement may permit an inference of Johnstonbaugh's acknowledgement, but nothing more. And, it is well-settled that what inferences to draw and what inferences to reject are the exclusive province of the trier of fact. *See e.g., Bullard v. Stonebreaker*, 101 Ariz. 584, 422 P.2d 700 (1967) (stating that appellate court "must accept the inferences drawn by the jury"); *Harrington v. Industrial Comm'n*, 84 Ariz. 356, 359 328 P.2d 311, 313 (1958) (stating that "inference to be drawn was . . . exclusively the province of the triers of fact"); *State v. Dixon*, 7 Ariz. App. 457, 458, 440 P.2d 918, 919 (1968) (recognizing that inferences to be drawn from the evidence are "always left to the jury").

The Department's decision also concludes (at 8, para. 10) that "the Association, over the course of the past seven years, has not maintained the underlying common area at issue," and thus, has violated Article 3.11(A)(5) of the Association's bylaws. When reaching that conclusion, the Department's decision erroneously applied a preponderance of the evidence standard. The applicable evidentiary standard is clear and convincing. A.R.S. §10-3830(D).⁶

The Association also filed a Motion to Strike Portions of [Johnstonbaugh's] Answering Brief. None of the statements in that brief to which the motion objects are supported with citations to the record. That means that, for purposes of the rulings here, those statements warrant, and thus, received, no consideration. *E.g., State v. One Single Family Residence at 1810 East Second Ave., Flagstaff, Ariz.*, 193 Ariz. 1, 2 n.2, 969 P.2d 166, 167 n.2 (App. 1997) (declining to consider facts stated in appellate brief that were not supported by citations to the record); *Matter of Estate of Killen*, 188 Ariz. 562, 563 n.1, 937 P.2d 1368, 1369 n.1 (App. 1996) (disregarding statement of facts that was not "supported by appropriate references to the record"); *see also Woerth v. City of Flagstaff*, 167 Ariz. 412, 420, 808 P.2d 297, 305 (App. 1991) (recognizing that an unsworn and

⁶ Article 3.11(A)(5) imposes a duty on "the Board." "The Board" means the individuals who make up the Association's board of directors. [Declaration of Covenants, Conditions, and Restrictions for Clemente Ranch (7/6/94) at 2, sec. 1.9]. As such, A.R.S. §10-3830(D) is implicated here.

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unproven assertion in a legal memorandum is not a fact that a court considers (citations omitted)). Accordingly, the motion is moot and requires no court action.

IT IS ORDERED:

1. The decision of the Arizona Department of Real Estate in *Johnstonbaugh v. Clemente Ranch Homeowners Association* (case no. 19F-H1919058-REL) is:

a. Affirmed to the extent that the decision determines that immediately beyond the wall sitting on the property line at the southern edge of the Johnstonbaugh property is a common area of the Association, and thus, the Association is responsible for replacing the wall; and

b. Reversed and vacated to the extent that the decision determines that the Association has failed over the last seven years to maintain the common area that is the subject of this case, which necessarily means that the order requiring the Association to comply with Article 3.11(A)(5) of the Association bylaws is reversed and vacated.

2. The Motion to Strike that was filed on behalf of the Association is moot.

3. This matter is remanded to the Department of Real Estate with instructions to convene a new hearing. The sole issue for that hearing is whether the Association has breached its duty to maintain the Johnstonbaugh wall.

4. No matters remain pending in connection with this appeal. This is a final order. JRAD 13; Ariz. R. Civ. P. 54(c).

/s/ Douglas Gerlach
Honorable Douglas Gerlach
Judge of the Superior Court

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