Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000699-001 DT 11/22/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

WILLIAM M BROWN

WILLIAM M BROWN
6751 E AMBER SUN DR
SCOTTSDALE AZ 85266

v.

TERRAVITA COMMUNITY ASSOCIATION INC (001)
ARIZONA DEPARTMENT OF FIRE BUILDING & LIFE SAFETY (001)

CURTIS S EKMARK
MARY D WILLIAMS

OFFICE OF ADMINISTRATIVE HEARINGS
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Plaintiff-Appellant William M. Brown asks this Court to review the November 13, 2012, Order, certifying the October 4, 2012, Decision of the Administrative Law Judge as the Final Administrative Decision of the Arizona Department of Fire, Building, and Life Safety. For the following reasons, this Court affirms that Order and that Decision.

I. FACTUAL BACKGROUND.

On May 25, 2012, Plaintiff-Appellant William M. Brown (Brown) sent an e-mail to Kevin Pollock (Pollock), the manager of Defendant-Appellee Terravita Community Association, Inc. (TCA) requesting copies of (1) any engagement letter from TCA to its attorneys, Ekmark & Ekmark; (2) minutes of a March 27, 2012, meeting of the Board of Directors; and (3) minutes of an April 24, 2012, meeting of the Board of Directors. On May 30, 2012, Pollock sent an e-mail to Brown advising him of the following: (1) there was no engagement letter from TCA to Ekmark & Ekmark; (2) the March 27, 2012, meeting of the Board of Directors was an executive session and thus the minutes were not available to the public; and (3) there was no April 24, 2012, meeting of the Board of Directors.

On June 26, 2012, Brown filed with Defendant-Appellee Arizona Department of Fire, Building, and Life Safety (AzDFBLS) a petition alleging a violation of A.R.S. § 33–1805(A) and requesting a hearing, which was later set for October 9, 2012. On September 21, 2012, TCA filed a motion for summary judgment with an affidavit from Pollock stating the following: (1) there was no engagement letter from TCA to Ekmark & Ekmark; (2) the March 27, 2012, meeting of the Board of Directors was an executive session and thus the minutes were not available to the public; and (3) there was no April 24, 2012, meeting of the Board of Directors. TCA filed a notice for a deposition of Brown to determine what, if any, evidence he had to support his allegations, but Brown never appeared for the deposition.

On October 2, 2012, Brown filed a written response in opposition to the motion for summary judgment, and on October 3, 2012, filed a supplement. On October 4, 2012, ALJ Brian Tully issued a Decision granting TCA's motion for summary judgment. ALJ Brian Tully noted Brown had presented no proposed evidence (such as an affidavit) showing an engagement letter existed, and holding further that, if such a letter existed, it would be protected by the attorney-client privilege and thus would not be subject to disclosure. ALJ Tully further noted Brown had presented no proposed evidence (such as an affidavit) showing the Board had held a meeting on April 24, 2012, and that even if the Board had held a meeting on that date, because it would have been an executive session, as was the March 27, 2012, meeting, Brown would not be entitled to the minutes from those meetings.

On November 13, 2012, Cliff Vanell, Director of the Office of Administrative Hearings, issued a Certification of Decision of Administrative Law Judge certifying the October 4, 2012, Decision of the Administrative Law Judge as the Final Administrative Decision of the Arizona Department of Fire, Building, and Life Safety. On December 24, 2012, Brown filed a Complaint for Judicial Review of Administrative Decision. This Court has jurisdiction pursuant to A.R.S. § 12–124(A) and A.R.S. § 12–905(A).

II. GENERAL STANDARDS FOR REVIEW.

The Arizona statutory authority and case law define the scope of administrative review:

> The court may affirm, reverse, modify or vacate and remand the agency action. The court shall affirm the agency action unless after reviewing the administrative record and supplementing evidence presented at the evidentiary hearing the court concludes that the action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.

A.R.S. § 12–910(E).

> The court must defer to the agency's factual findings and affirm them if supported by substantial evidence. If an agency's decision is supported by the record, substantial evidence exists to support the decision even if the record also supports a different conclusion.

*Gaveck v. Arizona St. Bd. of Podiatry Exam.*, 222 Ariz. 433, 215 P.3d 1114, ¶ 11 (Ct. App. 2009) (citations omitted).

> [I]n ruling on the sufficiency of the evidence in administrative proceedings, courts should show a certain degree of deference to the judgment of the agency based upon the accumulated experience and expertise of its members.

*Croft v. Arizona St. Bd. of Dent. Exam.*, 157 Ariz. 203, 208, 755 P.2d 1191, 1196 (Ct. App. 1988).

> A trial court may not function as a "super agency" and substitute its own judgment for that of the agency where factual questions and agency expertise are involved.

*DeGroot v. Arizona Racing Comm'n*, 141 Ariz. 331, 336, 686 P.2d 1301, 1306 (Ct. App. 1984).

> [The reviewing court must] view the evidence in a light most favorable to upholding the Board's decision and "will affirm that decision if it is supported by any reasonable interpretation of the record."

*Baca v. Arizona D.E.S.*, 191 Ariz. 43, 46, 951 P.2d 1235, 1238 (Ct. App. 1998) (cites omitted).

> A question of statutory interpretation involves a question of law, and [the reviewing court] is not bound by the trial court's or the agency's conclusions [about] questions of law.

*Siegel v. Arizona St. Liq. Bd.*, 167 Ariz. 400, 401, 807 P.2d 1136, 1137 (Ct. App. 1991).

> On appeal, [the reviewing court] is free to draw its own conclusions in determining if the Board properly interpreted the law; however, the Board's interpretation of statutes and . . . regulations is entitled to great weight.

*Baca*, 191 Ariz. at 45–46, 951 P.2d at 1237–38.

> Judicial deference should be given to agencies charged with the responsibility of carrying out specific legislation, and ordinarily an agency's interpretation of a statute or regulation it implements is given great weight. However, the agency's interpretation is not infallible, and courts must remain the final authority on critical questions of statutory construction.

*U.S. Parking Sys. v. City of Phoenix*, 160 Ariz. 210, 211, 772 P.2d 33, 34 (Ct. App. 1989) (citations omitted).

III. ISSUE: WAS THERE SUBSTANTIAL EVIDENCE TO SUPPORT THE ACTION OF THE AGENCY, AND WAS THE ACTION OF THE AGENCY CONTRARY TO LAW, ARBITRARY AND CAPRICIOUS, OR AN ABUSE OF DISCRETION.

Brown contends the ALJ erred in granting TCA's motion for summary judgment and thus contends he was entitled to an evidentiary hearing. Brown has provided to this Court authorities and arguments in support of its position. TCA contends Brown never presented any indication that he had any evidence showing there was an engagement letter or that there was a meeting on April 24, 2012, and further contends the other requested information is privileged. TCA has provided to this Court authorities and arguments in support of its position. This Court concludes the authorities and arguments provided by TCA are well-taken, and this Court adopts those authorities and arguments in support of its decision.

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IV. CONCLUSION.

Based on the foregoing, this Court concludes there was substantial evidence to support the action of the ALJ and TCA, and that the action of the ALJ and TCA was not contrary to law, was not arbitrary or capricious, and was not an abuse of discretion. This Court further determines there is no just reason to delay entry of judgment.

If any party wishes to appeal this Court's Decision to the Arizona Court of Appeals, that party must do so pursuant to A.R.S. § 12–913 and Rule 9(a) of the Arizona Rules of Civil Appellate Procedure. *See Eaton v. AHCCCS,* 206 Ariz. 430, 79 P.3d 1044, ¶ 7 (Ct. App. 2003) ("The [Arizona Court of Appeals] will allow an administrative decision to stand if there is any credible evidence to support it, but, because we review the same record, we may substitute our opinion for that of the superior court." "And when consideration of the administrative decision involves the legal interpretation of a statute, this court reviews de novo the decisions reached by the administrative officer and the superior court."); *accord, Pima Cty. Hum. Rts. Comm. v. Arizona D.H.S.,* 232 Ariz. 177, 303 P.3d 71, ¶ 7 (Ct. App. 2013) (because the superior court did not hold an evidentiary hearing or admit any new evidence, Arizona Court of Appeals reviewed its judgment *de novo,* reaching the same underlying issue as the superior court); *Blancarte v. Arizona DOT,* 230 Ariz. 241, 282 P.3d 442, ¶ 7 (Ct. App. 2012) ("Applying a *de novo* review of the superior court's decision . . . ."); *Ritland v. Arizona St. Bd. Med. Exam.,* 213 Ariz. 187, 140 P.3d 970, ¶ 7 (Ct. App. 2006) ("In reviewing the Board's decision, we are not bound by the superior court's judgment because we review the same record.").

**IT IS THEREFORE ORDERED** affirming the November 13, 2012, Order, certifying the October 4, 2012, Decision of the Administrative Law Judge as the Final Administrative Decision of the Arizona Department of Fire, Building, and Life Safety.

**IT IS FURTHER ORDERED** signing this minute entry as a formal Order of the Court.

*/s/ Crane McClennen*
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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