

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2006-000577-001 DT

02/28/2007

JUDGE DOUGLAS L. RAYES

CLERK OF THE COURT
S. Yoder
Deputy

DEL WEBB HOME CONSTRUCTION INC

ROBERT C BROWN

v.

ARIZONA STATE REGISTRAR OF
CONTRACTORS (001)
RAYMOND DOE (001)
KAREN DOE (001)

MONTGOMERY LEE
RAUL GARZA JR.
MELANIE MARIE LABOY

EXHIBITS-CCC

RULING

Plaintiff Del Webb Home Construction, Inc. (hereinafter "Del Webb") appeals from a final decision by the Registrar of Contractors ("ROC") suspending its license for failure to comply with a corrective work order at the home of Defendants, Raymond Doe and Karen Doe ("Doe"). This Court has jurisdiction over Del Webb's appeal pursuant to the Administrative Review Act, A.R.S. §§ 12-901, *et seq.* The Court has considered the record of the administrative proceedings, the evidence produced at the Evidentiary Hearing of February 23, 2007, the Opening Brief, Response and Reply Brief, Del Webb's Hearing Memorandum, Does' Hearing Memorandum, and the arguments of counsel.

A.R.S. § 12-910(e) defines the scope of this Court's 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

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action is not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion.”

In determining the propriety of the ROC's final decision, this Court views the evidence in the light most favorable to upholding its action and will affirm if the decision is supported by any reasonable interpretation of the record. See *Baca v. Arizona Dept. of Economic Security*, 191 Ariz. 43, 951 P.2d 1235 (App. 1998). The court reviews the record to determine whether there has been “unreasoning action, without consideration and in disregard for facts and circumstances; where there is room for two opinions, the action is not arbitrary or capricious if exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.” *Petras v. Arizona State Liquor Board*, 129 Ariz. 449, 452, 631 P.2d 1107, 1110 (App. 1981), quoting *Tucson Public Schools, District No. 1 of Pima County v. Green*, 17 Ariz. App. 91, 94, 495 P.2d 861, 864 (1972). The court does not function as a “super agency” and may not substitute its judgment for that of the ROC where factual questions are involved. See *DeGroot v. Arizona Racing Comm'n.*, 141 Ariz. 331, 686 P.2d 1301 (App. 1984). The ROC's legal interpretations and conclusions, on the other hand, are not binding on the court. *Begay v. Arizona Dept. of Economic Security*, 128 Ariz. 407, 626 P.2d 137 (App. 1981).

Facts

The Does purchased a home from Del Webb in Sun City Grand. Within a relatively short time of moving in, the residence began to experience ceiling cracks, wall cracks, loose grout and similar issues. When the Does asked Del Webb to make repairs, Del Webb hired an engineer they frequently hire in these types of claims, Daniel Bingham (“Bingham”), to investigate.

Bingham wrote a report of August 5, 2004 stating that the condition of the Doe home is likely due to moisture infiltration of expansive clay soils under the perimeter of the floor slab. Based on Bingham's report, Del Webb denied the Doe claim for repairs. In October 2005, the Does filed a complaint against Del Webb with the ROC alleging that Del Webb failed to properly construct their residence, resulting in cracks and similar issues. The ROC conducted an inspection of the residence and issued a corrective work order on November 21, 2005 directing Del Webb to make repairs.

When Del Webb failed to make repairs, ROC issued a citation and complaint charging Del Webb with violating A.R.S. § 32-1154(3) (failing to construct the Does' residence according to applicable building codes and industry standards) and A.R.S. § 32-1154(23) (failing without justification, to comply with the corrective work order). Del Webb answered the citation claiming it was not responsible for the repairs and alleging that the problems with the Does' residence were caused by the Does' landscaping and grading changes.

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An evidentiary hearing occurred on January 19, 2006. The ALJ issued a decision and Recommended Order on June 20, 2006 finding that the damage to the Does' home was caused by Del Webb's failure to construct the Does' residence according to applicable building codes and professional industry standards. The ALJ found that Del Webb did not have a legal basis for its failure to make corrections. The ALJ explained at Paragraph 21 of his Decision that Del Webb's defense was ineffective because: (1) Del Webb approved the landscaping plans; (2) Del Webb did not show deviation from those plans; and (3) Del Webb did not persuade him that the landscaping contributed to or caused the damage found in the home. On July 13, 2006, the ROC adopted the ALJ's Recommended Order to become effective on August 22, 2006.

Del Webb filed a Petition for Rehearing arguing an irregularity of the proceedings, newly discovered material evidence and that the decision was not justified by the evidence. Del Webb argued that the three reasons for the ALJ's decision, as set forth in Paragraph 21 of his Order, were factually incorrect as would be shown by additional evidence and the record of the administrative proceedings. The ALJ rejected Del Webb's arguments, noting that even if factors 1 and 2 of Paragraph 21, were factually wrong, the ALJ "did not find Respondent's expert's testimony defensively persuasive vis-à-vis that of Complainant's landscaper (and the Registrar of Contractor's inspector; and, the homeowner who himself has an extensive contracting background) on the issue of causation." The ALJ indicated in his order recommending denial of respondent's petition for a rehearing that he found it more probable than not that the Does' landscaper did not cause the conditions addressed in the ROC's corrective work order. The ALJ stated in his recommended order "It has been found persuasive that faulty construction probably created present conditions."

Additional Evidence

Del Webb persuaded the Court to hold an evidentiary hearing pursuant to A.R.S. § 12-910(A) and (B). Del Webb argued that additional evidence would assist the Court because the ALJ's decision was based on two erroneous findings: (1) representatives of Del Webb were members of the ARC when this committee approved the plans; and (2) Del Webb's improper workmanship caused the issues noted by the ROC's corrective work order. In its hearing memorandum, Del Webb stated that it is uncontested that Del Webb did not approve the plans and that Del Webb would establish at the hearing that it graded the Does' lot to provide positive drainage away from the residence and that the Does made dramatic landscaping and grading changes to their lot.

In considering the evidence presented at the February 23, 2007 hearing, the Court is guided by *Shaffer v. Arizona State Liquor Board*, 197 Ariz. 405, 4 P.3d 460 (App. 2000). The court in *Shaffer* points out,

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“[W]hile the language of the statute allows for supplementing the administrative record in the superior court, it does not permit a trial *de novo* in every instance. Rather, the superior court determines from the administrative record and the supplementing evidence whether substantial evidence still exists in the record to support the administrative decision. The court, as before, defers to the administrative decision if substantial evidence supports it. If, on the other hand, the court concludes that new or additional evidence is such that, had it been introduced in the administrative proceedings, no reasonable fact finder would have reached the administrative decision, then the latter is not supported by substantial evidence. The superior court may accordingly ‘reverse, modify or vacate and remand the agency action.’ A.R.S. § 12-910(E).

For these reasons, we conclude that the legislature did not intend to make the superior court an independent trier of fact and that the statute offers a safety net for the unusual case in which new evidence, had it been presented in the administrative proceeding, would have changed the decision.” 197 Ariz. at 409, 4 P.3d at 464.

Discussion

The Does conceded at the February 23, 2007 hearing that Del Webb was not a member of the architectural review committee and that the approval of the landscaping plans by the committee was without regard to grading or drainage. The issue before the Court is whether there is substantial evidence to support the ALJ’s finding that the damage to the Does was caused by Del Webb’s failure to construct the home according to code and standards. At the administrative hearing, the Does contended that Del Webb had improperly compacted the soil, resulting in settlement. Del Webb contended that expansive soil caused the movement of the house. Del Webb argued that Does’ landscape changes caused moisture to infiltrate the soil resulting in the soil expansion.

Having considered the entire record, including the transcript of the administrative hearing and having considered the evidence presented at the evidentiary hearing of February 23, 2007, the Court finds that the ROC’s decision is supported by substantial evidence. There is substantial evidence that the damage was caused by improper compaction of soil resulting in settlement.

Jim Dimond, an inspector with the ROC with a background in commercial and industrial structural concrete, testified at page 22 of the reporter’s transcript (“RT”) that Del Webb violated contracting standards enforced by the ROC in the construction of the Doe home. He testified

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that the conditions outlined in the corrective work order relate to a construction defect that would have been the responsibility of Del Webb to safeguard against. (RT pp. 21-22) Dimond testified that the cause of the problems in the Doe home was settlement in the house. (RT pg. 20)

Mr. Doe, a former house builder in Washington, testified that he and his wife noted that there was a lot of "fill" on the lot before the home was built and he contended that the lot was not properly compacted. (RT pp. 35-36) He also noted that the roof designed by Del Webb caused water to feed into the courtyard area from two directions. He testified that the courtyard area was part of the Del Webb house construction and design. (RT pp. 31-33)

The missing piece of evidence that Del Webb contends would have changed the outcome, was evidence of the drainage on the lot when the Does took possession. At the February 23, 2007 hearing, Del Webb introduced lot elevation as-built plans. Del Webb also presented testimony from Mr. Bingham, who had not seen the as-built plans when he testified before the ALJ.¹ Neither Mr. Bingham's testimony nor the as-built plans cause the Court to find that no reasonable fact finder would have reached a different decision.

First, the Does' allegation, that was found to be the cause of the damage, was that the soil was not properly compacted and the damage was caused by settlement. The question of who was responsible for the drainage was not relevant, if the damage was caused by settlement as opposed to expansion.

Second, if soil expansion was related to the damage, the as-built plans do not change the outcome. There was evidence the landscaping did not change the drainage. Further, the area of the most significant water buildup was the front courtyard area created by Del Webb. The roof design caused water to flow into the courtyard area from two directions.

Third, despite Mr. Bingham's opinion to the contrary, the as-built plans do not show that Del Webb left the yard in a properly graded condition. The determination of slope requires knowledge of two elevations and the distance between them. The as-built plan does not show the footprint of the house, distances from the house to property edge or ground elevation at the edges of the house. Without that information, the Court cannot determine how the adequacy of the drainage could be ascertained. Nonetheless, Mr. Bingham estimated the house ground elevation at 8.9. The as-built shows elevations along the east side of the property ranging from 8.85 in the back of the lot to 8.35 near the front. Mr. Bingham estimated the house set-back to be 20 to 25 feet. He testified that the minimum required slope is 5 to 6 percent. Using Mr. Bingham's estimates, the slope from the east front of the house to the east side of the front edge

¹ There was no showing that the as-built plans were not available to Del Webb at the time of the hearing before the ALJ.

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of the property (8.9 to 8.35 over a distance of 25 feet) is approximately 2 percent or one-third of required minimum. The slope along the east side of the property (8.85 to 8.35 over 115 feet) is less than 0.5 percent. The slope along the west side (8.45 to 7.75 over 115 feet) is 0.6 percent, far less than what Mr. Bingham testified was minimally required.

The cause of the damage to the Doc home was a contested issue at the administrative hearing. The ALJ made a determination of credibility and determined that the evidence presented by the Does was persuasive that Del Webb was responsible for violating construction standards. The evidence presented to the Court at the February 23, 2007 hearing did not persuade the Court that the ALJ's decision was unreasonable. The Court cannot find from the record or from the evidence presented at the evidentiary hearing that "no reasonable fact finder would have reached the administrative decision."

Conclusion

The ROC's decision is supported by substantial evidence and is not contrary to law, arbitrary, capricious, or an abuse of discretion.

IT IS ORDERED affirming the decision of the ROC. Del Webb's requested relief is denied.

FILED: Exhibit Worksheet.

/s/ Douglas L. Rayes 2-28-07

Douglas L. Rayes
Judge of the Superior Court