DIVISION ONE
FILED: 02/02/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

PINAL COUNTY, Plaintiff/Appellee, v. LISA M. HARING-MILLER, Defendant/Appellant.	)	No. 1 CA-CV 11-0153 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2008-000475

The Honorable John A. Buttrick, Judge

AFFIRMED

James P. Walsh, Pinal County Attorney — Florence
By Seymour G. Gruber, Deputy County Attorney
Attorneys for Plaintiff/Appellee

Lisa M. Haring-Miller — Apache Junction
Defendant/Appellant

O R O Z C O, Judge

¶1 Lisa Haring-Miller (Appellant) appeals the trial court's judgment finding her in violation of multiple sections of the Pinal County Zoning Ordinance (the Ordinance) and ordering her to discontinue the violations. Appellant contends the

Ordinance is unconstitutional because the Ordinance deprives her of her "right to maintain a home" and argues Pinal County violated her Due Process rights by not giving proper notice of changes to the Ordinance. She also argues that the evidence does not support a finding that her use of the property constitutes a nuisance, and, regardless, her car collection should be allowed to remain on the property as a pre-existing non-conforming use. Finally, Appellant claims she was denied her right to a jury trial. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

¶2 Appellant owns two lots in an unincorporated area of Pinal County. In January 2003, Appellant was cited for violating Articles 8 and 34 of the Ordinance because she did not have permits for the mobile homes on her property and she was storing numerous unlicensed and inoperable vehicles.[2] After a hearing on July 21, 2004, a Pinal County Hearing Officer found Appellant

[1] Appellant's statement of facts does not contain any citations to the record, as required by Arizona Rule of Civil Appellate Procedure (Rule) 13(a)(4). Accordingly, we disregard the facts set forth in the opening brief and rely on Pinal County's statement of facts and our own review of the record for our recitation of the factual background. *See State Farm Mut. Auto Ins. Co. v. Arrington*, 192 Ariz. 255, 257 n.1, 963 P.2d 334, 336 n.1 (App. 1998).

[2] Article 8 limits the number of dwelling units to one per parcel in areas zoned "General Rural." Pinal County, Ariz., Zoning Ordinance § 801.a (2010). Article 34 prohibits storage of scrap and unlicensed or inoperable vehicles and the use of recreational vehicles for living purposes. Pinal County, Ariz., Zoning Ordinance §§ 3401, 3405, 3406 (2010).

liable for violating the Ordinance and fined Appellant $700 per day for every day the violations continued.

¶3 Three years later, on July 20, 2007, Pinal County filed a Verified Complaint and Application for Preliminary Injunction in Pinal County Superior Court, alleging Appellant was in continuing violation of the Ordinance by storing on her property "numerous inoperable and/or unlicensed vehicles, recreational vehicles, trash and debris" and by allowing "numerous family dwelling units on each of the two parcels which comprise her Property." Appellant moved for change of venue to Maricopa County, which was granted.

¶4 After the case was transferred to Maricopa County Superior Court, Appellant filed a Motion for Jury Trial. The trial court denied the motion, noting that there is no constitutional right to a jury trial in this type of action and that Appellant failed to cite any statutory entitlement to a jury trial.

¶5 A one-day bench trial was held, after which the court ruled in favor of Pinal County. The court found Appellant's use of the property violated the Ordinance and was a public nuisance per se pursuant to Arizona Revised Statutes (A.R.S.) § 11-808.C.[3]

[3] The county planning and zoning statutes were recently repealed, renumbered, and replaced. *See* 2010 Ariz. Sess. Laws, ch. 244, §§ 5-7 (2d Reg. Sess.). Section 11-808.C has been renumbered as § 11-815.C, *see* 2010 Ariz. Sess. Laws, ch. 244, §

The court ordered Appellant to "remove all inoperable and/or unlicensed vehicles, recreation vehicles being used for living purposes, scrap and debris and any residential units over the limit of one per parcel on the Property."

¶6 Appellant filed a timely notice of appeal. This court has jurisdiction pursuant to A.R.S. § 12-120.21.A.1 (2003) and -2101.A.1 (2011).[4]

DISCUSSION[5]

Nuisance

¶7 Appellant argues that the evidence does not support the trial court's conclusion that her use of the property constitutes

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7 (2d Reg. Sess.) (effective October 1, 2011), but remains substantively the same. The statute provides: "It is unlawful to erect, construct, reconstruct, maintain or use any land in any zoning district in violation of any regulation or any provision of any ordinance pertaining to the land and any violation constitutes a public nuisance." A.R.S. § 11-815.C (2011).

[4] The Arizona Legislature recently renumbered A.R.S. § 12-2101. *See* 2011 Ariz. Sess. Laws, ch. 304, § 1 (1st Reg. Sess.) (effective July 20, 2011). We cite the current version of applicable statutes when no revisions material to this decision have since occurred.

[5] We note Appellant has failed to comply with Rules 13(a)(3) and (a)(6). Appellant has not stated the basis of this court's jurisdiction, as required by Rule 13(a)(3), and she has not provided the proper standard of review or citations to the relevant authorities or the record, as required by Rule 13(a)(6). However, we prefer to decide cases on their merits rather than dismiss for procedural defects, *see Clemens v. Clark*, 101 Ariz. 413, 414, 420 P.2d 284, 285 (1966), so we have attempted to construe Appellant's arguments and we address them below.

a public nuisance. When an appellant intends to argue that the trial court's factual findings or conclusions are unsupported by the evidence, the appellant must include in the record a transcript and any other items necessary for us to review the trial court's findings. ARCAP 11(b)(1). The trial exhibits were included in the record, but Appellant has failed to provide a transcript of the trial.[6] When a party does not include the transcript as part of the record on appeal, we assume the transcript would support the trial court's findings and conclusions. *Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995). Furthermore, we review the exhibits in the light most favorable to upholding the trial court's findings. *A.R. Teeters & Assocs., Inc. v. Eastman Kodak Co.*, 172 Ariz. 324, 328, 836 P.2d 1034, 1038 (App. 1992). "We will not reweigh the evidence or substitute our evaluation of the facts." *Castro v. Ballesteros-Suarez*, 222 Ariz. 48, 52, ¶ 11, 213 P.3d 197, 201 (App. 2009).

[6] In her Reply Brief, Appellant asserts that she paid the $500 fee "for preparation of the complete record" and claims that because the proceedings were electronically recorded an electronic copy of the proceedings should have been transferred with the rest of the record. The $500 fee was the bond for costs on appeal in accordance with Rule 10(a). Appellant had a separate duty to order a certified transcript. ARCAP 11(b). When the proceedings were electronically recorded and no certified court reporter was present, as was the case here, Rule 11(b)(3) places a duty on the appellant to order the transcript.

¶8 The photographs in evidence depict numerous motor vehicles and recreational vehicles in various states of disrepair, multiple mobile homes, and piles of scrap and garbage located on Appellant's property. These exhibits support the trial court's findings and conclusion. Furthermore, absent a transcript of the proceedings, we must assume the evidence supports the trial court's conclusion that Appellant violated the Ordinance, which constitutes a nuisance per se.

Pre-existing Rights

¶9 Appellant also contends that she can legally store her "vintage car collection" on her property because the collection existed on the property prior to prohibitive zoning and therefore is a "grandfathered" non-conforming use.[7] However, Appellant has not directed us to evidence in the record or provided this court with the trial testimony of the specific dates of when the Ordinance was enacted or when the use began. Without

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[7] The county zoning statutes "grandfather" legal, non-conforming uses by providing:

> A. Nothing contained in any ordinance authorized by this chapter shall:
>
> 1. Affect existing uses of property or the right to its continued use or the reasonable repair or alteration of the property for the purpose for which used at the time the ordinance affecting the property takes effect.

A.R.S. § 11-812.A.1 (2011).

transcripts, it is unclear whether this issue was even addressed at trial.

¶10 In the absence of transcripts, we must assume evidence on this issue was presented at trial and the evidence supports the court's conclusion that Appellant violated the Ordinance by storing vehicles on her property, *see Baker*, 183 Ariz. at 73, 900 P.2d at 767, which implies that the collection of cars was not a pre-existing use when the Ordinance was enacted.

¶11 Furthermore, Appellant's argument on appeal is essentially a request to reweigh the evidence, but, as stated above, an appellate court will not reweigh the evidence. *Castro*, 222 Ariz. at 52, ¶ 11, 213 P.3d at 201.

Constitutionality of the Ordinance

¶12 Appellant also argues that the Ordinance is unconstitutional because it deprives her of her "right to maintain a home and live in her [two] mobile homes" and because Pinal County did not give proper notice of changes to the Ordinance.

¶13 Zoning ordinances are presumed valid, and "this presumption can be overcome only by a showing . . . that the classification is clearly arbitrary and unreasonable and without any substantial relation to the public health, safety, morals or general welfare." *Dye v. City of Phoenix*, 25 Ariz. App. 193, 194, 542 P.2d 31, 32 (1975) (citations omitted).

¶14 Appellant was cited for violating regulations pertaining to the number of dwelling units allowed per parcel and the storage of vehicles and scrap on the property. In the absence of any authority cited by Appellant to the contrary, these regulations are clearly related to public health, safety, and general welfare. Thus, the Ordinance is a valid regulation of Appellant's use of her property.[8]

Right to Jury Trial

¶15 Finally, Appellant contends she was denied her right to a jury trial. Whether a defendant is entitled to a jury trial is a question of law we review de novo. *Stoudamire v. Simon*, 213 Ariz. 296, 297, ¶ 3, 141 P.3d 776, 777 (App. 2006). "The Arizona Constitution preserves the right to a jury trial only in cases where it would have existed under the common law prior to statehood." *In re Estate of Newman*, 219 Ariz. 260, 272, ¶ 45, 196 P.3d 863, 875 (App. 2008); *see* Ariz. Const. art. 2, § 23.

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[8] Appellant also contends that Pinal County violated her Due Process rights by not giving proper notice of changes to the Ordinance "banning all Mobile Homes over 20 years old." However, Appellant offers this argument without any additional information or citation to any change in the Ordinance that purports to ban all mobile homes over twenty years old. We must assume that if this missing information was presented at trial, the evidence presented at trial supported the court's conclusion that the Ordinance is enforceable against Appellant. *See Baker*, 183 Ariz. at 73, 900 P.2d at 767.

¶16 This zoning enforcement action was instituted by Pinal County pursuant to A.R.S. § 11-808.H (2001),[9] which provides that the county attorney "may institute injunction, mandamus, abatement or any other appropriate action or proceedings" to terminate a zoning violation. Section 11-808 was enacted as part of the County Planning and Zoning Act of 1949 -- no common law right to a jury trial in this type of action existed at the time Arizona became a state in 1912. Furthermore, the statute itself makes no reference to a jury or jury trial. *See* A.R.S. § 11-808; *Newman*, 219 Ariz. at 272, ¶ 45, 196 P.3d at 875 ("Unless the statute expressly so provides, there is no right to a jury trial on statutory claims that did not exist at common law prior to statehood."); *see also Hoyle v. Superior Court*, 161 Ariz. 224, 227-29, 778 P.2d 259, 262-64 (App. 1989) (finding that the absence of a reference to juries or jury trials implies no statutory right to a jury trial exists in paternity actions). Therefore, we conclude that Appellant was not entitled to a jury trial.

[9] Former § 11-808.H is now § 11-815.H.

CONCLUSION

¶17 For the reasons stated above, we affirm the trial court's judgment in favor of Pinal County.

/S/

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PATRICIA A. OROZCO, Judge

CONCURRING:

/S/
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DIANE M. JOHNSEN, Presiding Judge

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LAWRENCE F. WINTHROP, Judge