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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

HERBERT HILBIG and HANNELORE HILBIG, *Plaintiffs/Appellants*,

v.

YAVAPAI COUNTY BOARD OF SUPERVISORS, *Defendant/Appellee*.

No. 1 CA-CV 16-0631
FILED 12-12-2017

Appeal from the Superior Court in Yavapai County
No. P1300CV201600010
The Honorable Jeffrey G. Paupore, Judge *Pro Tempore*

VACATED;
DECISION OF THE YAVAPAI COUNTY BOARD OF
SUPERVISORS AFFIRMED

COUNSEL

Herbert Hilbig and Hannelore Hilbig, Prescott Valley
Plaintiffs/Appellants

Yavapai County Attorney's Office, Prescott
By William A. Kunisch
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge James P. Beene and Judge Randall M. Howe joined.

C A T T A N I, Judge:

¶1 Herbert and Hannelore Hilbig challenge the superior court’s dismissal of their appeal from the Yavapai County Board of Supervisors’ decision regarding unpermitted construction. For reasons that follow, we vacate the superior court’s judgment and affirm the Board of Supervisors’ decision.

FACTS AND PROCEDURAL BACKGROUND

¶2 Hilbig purchased six acres in Yavapai County in 1980 and built a home on the property in 1991 without obtaining any permits. When Hilbig sought to subdivide his parcel into three lots in the early 2000s, he learned that the County’s overlay on the mapping system incorrectly designated the property as being within the Prescott National Forest. Hilbig’s realtor told him he would need to correct that designation before subdividing or selling the property.

¶3 In 2004, Hilbig contacted Yavapai County Development Services to obtain a post-construction permit for the 1991 home. Hilbig contends Development Services told him he could not get a permit without first correcting the mapping error. Hilbig contacted the County Assessor’s office to do so, and in 2007, the Assessor’s office told him that its review of aerial photos indicated the property was still incorrectly designated as being part of the Prescott National Forest even after the property lines were redrawn. Hilbig requested and obtained County approval to subdivide his property into three lots one year later without disclosing the 1991 house already built without a permit, and he built a second house on the property in 2009 without obtaining permits.

¶4 The County Cartography Office discovered and corrected the mapping error in 2012. In 2013, the County learned that Hilbig had not obtained permits for either of the houses on the property. Hilbig met with Development Services in March 2014 to request that both houses be issued certificates of occupancy, arguing that they should be “grandfathered in”

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on the basis that Yavapai County's permitting requirements did not apply to construction completed on the property before the mapping error was corrected. *See* Yavapai County Planning and Zoning Ordinance ("Ordinance") § 205(G) (requiring a certificate of occupancy be issued "for any structure or premises existing at the time" the property becomes subject to the Ordinance). Development Services declined Hilbig's request and informed him that, "[r]egardless of the map overlay issues, the structures built required permitting prior to construction."

¶5 In October 2014, Development Services filed a complaint regarding the unpermitted houses and in July 2015 served Hilbig with a notice that he was in violation of the Ordinance. Hilbig applied for the necessary permits, but later withdrew his application. After a hearing on the complaint, a hearing officer found that Hilbig had violated the Ordinance, imposed a \$100 fine, and assessed a \$20,000 civil penalty that would be set aside if Hilbig complied with the Ordinance by January 20, 2016.

¶6 Hilbig appealed the hearing officer's decision to the Yavapai County Board of Supervisors. *See* Ariz. Rev. Stat. ("A.R.S.") § 11-815(G).¹ The Board unanimously affirmed the hearing officer's decision.

¶7 Hilbig timely appealed the Board's decision to the superior court and obtained a stay of the civil penalty. Hilbig contended (1) the County should have granted him certificates of occupancy under § 205(G) because the Ordinance did not apply to the houses until the County corrected the mapping error and (2) the County waived its right to enforce the Ordinance by allowing the houses to remain for many years without demanding that he obtain permits. Hilbig asked the superior court to reverse the Board's decision and direct "the proper County authority . . . to issue a 'certificate of occupancy' for the 2009 residence."

¶8 The superior court dismissed the appeal with prejudice, finding that Hilbig's request that the court order the County to issue a certificate of occupancy converted the appeal into "a 'Trojan Horse' action for mandamus." The court determined mandamus was not available because the decision whether to grant a certificate of occupancy "was a discretionary act." The court further stated that Hilbig "provide[d] no

¹ Absent material revisions after the relevant date, we cite a statute's current version.

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argument or authority for the Court to make a finding the Decision was arbitrary, capricious, or the discretion was abuse[d].”

¶9 Hilbig timely appealed to this court, and we have jurisdiction under A.R.S. § 12-913.

DISCUSSION

¶10 On judicial review of a board of supervisors’ final zoning enforcement decision, the superior court must affirm the board’s action unless it was not supported by substantial evidence or was contrary to law, arbitrary and capricious, or an abuse of discretion. A.R.S. § 11-815(G) (providing for judicial review of final zoning enforcement decisions pursuant to the Administrative Review Act, A.R.S. §§ 12-901 to -914); A.R.S. § 12-910(E); *Horne v. Polk*, 242 Ariz. 226, 230, ¶ 13 (2017). On appeal to this court, “we independently examine the record to determine whether the evidence supports the judgment[] under a preponderance of the evidence standard.” *Parsons v. Ariz. Dep’t of Health Servs.*, 242 Ariz. 320, 322, ¶ 10 (App. 2017) (citations omitted). We review legal determinations de novo. *McGovern v. Ariz. Health Care Cost Containment Sys. Admin.*, 241 Ariz. 115, 118, ¶ 8 (App. 2016).

¶11 The superior court dismissed Hilbig’s appeal based on its interpretation of Hilbig’s complaint as seeking only mandamus relief, concluding that, because the challenged act was discretionary, mandamus relief was not available. See A.R.S. § 12-2021; *Sears v. Hull*, 192 Ariz. 65, 68, ¶ 11 (1998); *Blankenbaker v. Marks*, 231 Ariz. 575, 577, ¶ 7 (App. 2013). But Hilbig’s briefing to the superior court sought more than just mandamus relief: “[T]he Hilbigs respectfully request the County’s Judgment be reversed, and the proper County authority be directed to issue a ‘certificate of occupancy’ for the 2009 residence.” (Emphasis added.) Thus, regardless whether Hilbig’s request to order issuance of a certificate of occupancy could be characterized as an action for mandamus relief, the superior court was required to address the merits of the Board’s decision, i.e., whether the Board’s actions were arbitrary, capricious, or an abuse of discretion. Although the court noted that Hilbig “provide[d] no authority or argument” in support of his position, it did not further address or decide the merits of the issues Hilbig properly presented. Accordingly, the court improperly dismissed the appeal. See A.R.S. § 12-910(E) (authorizing the superior court to “affirm, reverse, modify or vacate and remand the agency action”); A.R.S. § 12-911(A)(5) (granting the court power to “[m]odify, affirm or reverse the decision in whole or in part”); see also *Ariz. State Bd. of*

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Dental Exam'rs v. Superior Court, 24 Ariz. App. 553, 554 (App. 1975) (“The measure of the court’s power is circumscribed by [§ 12-911(A)(5)].”).

¶12 Nevertheless, we conclude that Hilbig is not entitled to the relief he requests because the Board correctly rejected Hilbig’s arguments that (1) the 2009 house was exempt from the Ordinance and (2) the County waived its right to enforce the Ordinance. *See McGovern*, 241 Ariz. at 118, ¶ 8 (“In an appeal [under the Administrative Review Act], both the trial court and this court reach the same underlying issues: whether the administrative action was illegal, arbitrary, capricious or involved an abuse of discretion.”).

I. Exemption.

¶13 Hilbig claims that the property was not subject to the Ordinance until the County corrected the mapping overlay, so the 2009 house (constructed before the correction) is exempt from the Ordinance. But Hilbig’s argument that his property was in “no man’s land” and subject to neither federal nor county authority is unpersuasive. The legal description of Hilbig’s property stated that it was within Yavapai County. Despite the accurate legal description, Hilbig relies on the fact that there was an admittedly erroneous mapping overlay that incorrectly designated the property as being within the Prescott National Forest. But a mapping error does not create an exemption to the permit requirement for property actually within Yavapai County. And the mapping system itself included a disclaimer that its accuracy was “not guaranteed” and “[n]o portion of the information should be considered to be, or used as, a legal document.” Moreover, Hilbig recognized that the property was subject to County authority in 2008 when he sought approval from the Yavapai County Land Use Manager before subdividing the property notwithstanding the mapping error. Accordingly, substantial evidence supported the Board’s decision that Hilbig’s property was not exempt from the Ordinance.

II. Waiver.

¶14 Hilbig also contends the County waived its right to enforce the Ordinance because it was aware of the houses years before it brought this enforcement action. Waiver generally requires either the intentional relinquishment of a known right or conduct that would warrant such an inference. *Minjares v. State*, 223 Ariz. 54, 58, ¶ 17 (App. 2009). To prevail, Hilbig must make a “clear showing” the County intended to waive its right to enforce the Ordinance. *See Rigoli v. 44 Monroe Mktg., LLC*, 236 Ariz. 112, 116, ¶ 12 (App. 2014) (citation omitted).

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¶15 Hilbig asserts that the County had both “actual and constructive knowledge” of the 1991 and 2009 houses and that its failure to seek enforcement until 2013 waived its right to enforce the Ordinance. But until 2012, Yavapai County mistakenly believed the 2009 house was on National Forest land (and thus not subject to Yavapai County zoning); Hilbig concedes that the County did not discover the mapping error until that time. Moreover, even assuming the County was aware of the existence of the houses earlier, the County did not discover that Hilbig’s houses were not permitted until 2013. Without prior knowledge that the houses had been built without the required permits, the County’s purported delay does not support a finding of waiver. *See Goglia v. Bodnar*, 156 Ariz. 12, 19 (App. 1987).

CONCLUSION

¶16 For the foregoing reasons, we vacate the superior court’s judgment and affirm the Yavapai County Board of Supervisors’ decision.



AMY M. WOOD • Clerk of the Court
FILED: AA