DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

SUSAN MAGAZINER and SAM FAMILY 2003 TRUST, Plaintiffs/Appellants, v. YAVAPAI COUNTY DEVELOPMENT SERVICES; YAVAPAI COUNTY BOARD OF SUPERVISORS; JEANNE GROSSMAYER; STEVE MAUK; BOYCE MACDONALD; JOHN EDMAN, Defendants/Appellees.	1 CA-CV 10-0778 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Yavapai County

Cause No. V1300CV200980709

The Honorable Michael R. Bluff, Judge

AFFIRMED IN PART; VACATED IN PART; REMANDED

William P. Ring, P.C. — Flagstaff
by William P. Ring
Attorneys for Plaintiffs/Appellants

Sheila Polk, Yavapai County Attorney — Prescott
by Jack H. Fields, Deputy County Attorney
Attorneys for Defendants/Appellees

I R V I N E, Presiding Judge

¶1 Susan Magaziner and the SAM Family 2003 Trust (the "Trust") appeal from the superior court's order affirming a

civil penalty for a non-permitted lodging violation under Yavapai County Planning and Zoning Ordinance ("Ordinance") sections 301 and 400. We hold that substantial evidence supports the violation finding, but vacate the penalty and remand for further proceedings consistent with this decision.

FACTS AND PROCEDURAL HISTORY

¶2 The Trust owns a house in Sedona ("Property"). Magaziner serves as the Trust's authorized representative. After receiving complaints from Magaziner's neighbors, Yavapai County Inspector Jeanne Grossmayer visited the Property on May 7, 2009. A man answered Grossmayer's knock and told her that he was renting the Property for one week. Five days later, Grossmayer cited Magaziner and the Trust for violating Ordinance § 301, which defines lodging as "[t]he rental, lease or sale of a dwelling unit on a daily or weekly basis or any other basis for less than thirty (30) consecutive days."

¶3 Grossmayer filed a notice of amended violation on June 16, 2009, citing Ordinance § 400 as an additional basis for the charge. Ordinance § 400 designates use districts and provides, in relevant part, that "[a]ny use or structure not specifically permitted by District Provisions (or analogous to a permitted use or structure) shall be deemed prohibited and unlawful (nor shall same be considered an accessory use or structure for the District)." The notice designates the Property's use as "R1L-

35," defined under § 410 as residential; single family limited. Ordinance § 103 provides that "the rental, lease or sale of dwelling units in less than thirty (30) day increments is prohibited in residential zones."

¶4 Grossmayer returned to the Property on June 25, 2009, and spoke to two women who informed her that they were renting the Property for one week to celebrate their father's birthday. When Grossmayer returned again on August 7, 2009, she did not enter the Property because she saw a "private property no trespassing" sign.

¶5 At a September 11, 2009 hearing before a hearing officer, Magaziner testified that she had received no prior notification of any of Grossmayer's site visits. Grossmayer and Magaziner's neighbors testified about the short-term rentals of the Property and disruptive noise emanating from it. Grossmayer also testified that Magaziner had altered her internet advertising to offer thirty-day rentals of the Property, although the ads also mentioned uses for family reunions, small retreats and company meetings.

¶6 The hearing officer determined that Magaziner had committed the charged violation of the zoning ordinance on May 7, 2009. The officer assessed a $1500 civil fee and gave Magaziner 30 days

> to bring everything into compliance in other words all the ads must be stopped and all the other activities under the 30 day limit single family must be stopped. If this is not stopped within the 30 days a $10,000.00 fine will be assessed that will be waived if the property is brought into compliance.

¶7 The order, however, provides that the $10,000 penalty could be set aside only if the defendants met the following conditions by October 11, 2009: "1. CEASE ADVERTISEMENT OF HOME FOR SHORT TERM LODGING AND OTHER NON-RESIDENTIAL USES 2. CEASE SHORT TERM LODGING AND OTHER NON-RESIDENTIAL RENTAL OF HOME." The order provided that the Developmental Services Department would assess whether the conditions are met within the applicable time.

¶8 Magaziner submitted no evidence of compliance. On December 17, 2009, Grossmayer filed a noncompliance notice with a "Yavapai County Hearing Office" caption stating:

> Pursuant to web page advertisement as of 10/19/09 the Yavapai County Development Services Department has verified that the defendant is not in compliance with the Hearing Officer's Judgment dated 9/11/09. This matter will be turned over to the County Attorney for further action.

¶9 Meanwhile, Magaziner appealed to the Yavapai County Board of Supervisors (the "Board"), which upheld the hearing officer's ruling on October 20, 2009. Magaziner appealed to the Yavapai County Superior Court on June 30, 2010, and argued: (1) the civil penalty was excessive; (2) her due process rights were

violated because she received no hearing on the additional $10,000 fine; (3) the hearing officer admitted hearsay and illegally obtained evidence; (4) the hearing officer's decision was not supported by substantial evidence; (5) the decision was contrary to law; (6) the County has no authority to regulate web advertising; and (7) the County improperly amended its notice of violation.

¶10 The superior court affirmed the Board's judgment, finding: the fines were not excessive, no violations of due process, there was substantial evidence to support the finding of zoning violations, and the decision was not contrary to law. Magaziner and the Trust timely appeal.

DISCUSSION

I. Substantial Evidence Supports the May 7, 2009 violation.

¶11 On appeal, Magaziner and the Trust challenge the superior court's decision to affirm the Board's ruling. The superior court may only determine if the Board's decision is "supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion." A.R.S. § 12-910(E) (2003). In reviewing that determination, this court answers the same question as the superior court. *See Pima County v. Pima County Merit Sys. Comm'n*, 189 Ariz. 566, 569, 944 P.2d 508, 511 (App. 1997). We do not reweigh the evidence or

substitute our judgment for that of the agency. *Shaffer v. Ariz. State Liquor Bd.*, 197 Ariz. 405, 409, ¶ 20, 4 P.3d 460, 464 (App. 2000). Further, when a party appeals an ordinance's interpretation, our review is de novo. *Speros v. Yu*, 207 Ariz. 153, 156, ¶ 11, 83 P.3d 1094, 1097 (App. 2004).

¶12 Magaziner and the Trust contend that the superior court's decision lacks substantial evidentiary support. They maintain that evidence obtained during an entry of the property without prior authorization from Magaziner is excluded by § 205, which states:

> B. ZONING INSPECTION:
>
> 1. Responsibility: The Chief Deputy Land Use Specialist is responsible for investigating all complaints of suspected violations of this Ordinance and other applicable codes within Development Services jurisdiction.
>
> 2. *Inspection: With proper, prior permission from the property owner or his agent, the Land Use Specialist may, in the discharge of his duties, and for good and probable cause, enter private property*, during assigned working hours to inspect same in connection with any application made under the terms of this Ordinance, or for any investigation as to whether or not any portion of such property, building or other structure was constructed or is being used in violation of this Ordinance. If permission to enter property is unobtainable, refused or withdrawn, the Inspector shall follow legally prescribed procedures for seeking a search warrant subject to the protections provided for rights of the

> property owner by the State of Arizona and the United States Constitution.

(Emphasis added.)

¶13 Magaziner and the Trust argue that the evidence was obtained during an illegal inspection because Grossmayer entered the Property in a manner not prescribed by Ordinance § 205(B)(2). We disagree. A New York court construed an analogous town code to mean only that the code itself was not an authority for entry. *People v. M. Santulli, L.L.C.*, 910 N.Y.S.2d 336, 339 (N.Y.App. Term. 2010) (holding that an apartment owner lacked standing to challenge the town zoning inspector's entry onto property and sufficient evidence supported the owner's conviction). By the same token, "the provision does not eliminate any right of entry that would otherwise exist, and consequently cannot afford any expectation of privacy beyond what would otherwise exist." *Id.*

¶14 Similarly in this case, Ordinance § 205(B)(2) does not define an authority to enter the Property and does not eliminate any right of entry that would otherwise exist.[1] Neither § 205(B)(2) nor the Fourth Amendment prohibits Grossmayer from

[1] We note that the February 22, 2011 amendment to Ordinance § 205(B)(2) added language creating authority to enter as follows: "The Land Use Specialist or designee may, in the discharge of his duties during assigned working hours, enter private property for the sole purpose of contacting the owner or occupant of same, provided the property is not posted with 'No Trespassing' notices or otherwise secured." (Effective March 24, 2010.)

entering the Property and knocking on the front door. As the County points out, anyone may "openly and peaceably knock [on an individual's door] with the honest intent of asking questions of the occupant thereof – whether the questioner be a pollster, a salesman, or an officer of the law." *United States v. Hammett*, 236 F.3d 1054, 1059 (9th Cir.) (citation omitted), *cert. denied*, 534 U.S. 866 (2001); *accord State v. Olm*, 223 Ariz. 429, 433, ¶ 13, 224 P.3d 245, 249 (App. 2010) (explaining that "no Fourth Amendment violation occurs when an officer, without a warrant, crosses the curtilage to knock on the front door to ask questions of a resident.").

¶15 Moreover, the United States Supreme Court recognizes that tenants, not landlords like Magaziner, have a privacy interest in leased residences under the Fourth Amendment. *Chapman v. United States*, 365 U.S. 610, 616-17 (1961); *accord Santulli*, 910 N.Y.S.2d at 339 ("[A] landlord does not have a reasonable expectation of privacy with respect to property that he has rented to a tenant, and that is occupied by that tenant") (citations omitted); *cf. State v. Lucero*, 143 Ariz. 108, 109-10, 692 P.2d 287, 288-89 (1984) (holding that person whose name appeared on a storage locker's rental agreement, was responsible for payment of its rent, and held a set of keys to the locker had apparent authority to consent to the locker's search). Accordingly, assuming without deciding that the conversation at

the front door constituted an inspection/search, the persons leasing the Property had authority to consent to it once Grossmayer lawfully arrived at the front door.

¶16 Even assuming that evidence from the May 7 entry should not have been considered, other substantial evidence in the record sufficiently supports the finding that a violation occurred on May 7, 2009. *See DeGroot v. Ariz. Racing Comm'n*, 141 Ariz. 331, 336, 686 P.2d 1301, 1306 (App. 1984) ("[I]n order to reverse the agency's decision, the trial court must find that there was *no* substantial evidence to support the agency decision.").

¶17 During the hearing, Magaziner admitted that she had engaged in short-term rentals of the Property and made an "attempt to really start to comply" when she received her first call from the County on an unspecified date. Magaziner further stated that she had cancelled a number of wedding reservations and told the hearing officer: "I plan to comply."

¶18 Ron Mohney ("Mohney"), Magaziner's neighbor and the spokesman for seven other neighbors, testified that Magaziner had persisted in short-term rentals into August 2009. He and other neighbors have observed groups coming as one family or multiples of families, and staying on an average of three to seven days. In early July, Mohney identified six cars from different states on the Property. According to Mohney,

Magaziner's tenants make "a lot of noise," engage in "screeching, yelling and laughing," and "party and it goes past midnight."

¶19 As of September 10, 2009, Magaziner was still displaying online ads to use the property for small retreats, family meetings, company meetings, and other commercial purposes. Another neighbor stated that Magaziner's promotional site states groups of "above 60 people" will not be accepted. This evidence substantially supports the finding of a zoning violation on May 7, 2009. *See, e.g., Price v. Zoning Bd. of Appeals*, 883 P.2d 629, 637 (Haw. 1994) (upholding a zoning violation determination based upon the vendor's testimony that he was selling food to the public, and upon testimony from witnesses who had observed the lunch wagon's operations on the property).

¶20 In an effort to evade the consequences of this record, Magaziner contends that all the evidence collected stemmed from an illegal initial contact and must therefore be suppressed under a "sour fruit" or "fruit of the poisonous tree" theory. We decline to consider this argument because Magaziner is asserting it for the first time on appeal. *See Stewart v. Mut. Of Omaha Ins. Co.*, 169 Ariz. 99, 108, 817 P.2d 44, 53 (App. 1991). We therefore express no opinion as to whether the doctrine applies or if it may be raised upon remand.

II. Due Process Based on Admission of Hearsay

¶21 Magaziner and the Trust further contend that they were deprived of due process because the Board was entitled to consider any hearsay evidence "important to the case." A violation of due process is a question of law that we review de novo. *In re MH 2006-002044*, 217 Ariz. 31, 33, ¶ 7, 170 P.3d 280, 282 (App. 2007).

¶22 Pursuant to A.R.S. § 11-808(G) (2001), the Board has adopted the Yavapai County Hearing Officer ("YCHO") Rules of Procedure for zoning violation cases. YCHO Rule 8 provides: "The Arizona Rules of Evidence will not apply in cases coming before the Hearing Officer. Any evidence that is offered may be included if the Hearing Officer believes the evidence is important to the case." This is consistent with A.R.S. § 41-1062(A)(1) (2004), which states in relevant part:

> A hearing may be conducted in an informal manner and without adherence to the rules of evidence required in judicial proceedings. Neither the manner of conducting the hearing nor the failure to adhere to the rules of evidence required in judicial proceedings shall be grounds for reversing any administrative decision or order providing the evidence supporting such decision or order is substantial, reliable, and probative. Irrelevant, immaterial or unduly repetitious evidence shall be excluded.

¶23 Arizona courts have held that an administrative decision may be sustained on reliable hearsay. *Reynolds Metals*

Co. v. Indus. Comm'n, 98 Ariz. 97, 101-03, 402 P.2d 414, 416-18 (1965) (rejecting the rule that a "residuum of legal evidence" must be used to sustain a judgment along with hearsay). Awards must be based on hearsay that has "rational probative force," *id*. at 103, 402 P.2d at 418, and is "reliable," meaning that "the circumstances tend to establish that the evidence offered is trustworthy." *Wieseler v. Prins*, 167 Ariz. 223, 227, 805 P.2d 1044, 1048 (App. 1990).

¶24 Federal courts have likewise recognized that the use of hearsay evidence in administrative proceedings does not violate the Due Process Clause:

> We are aware that [the statute] provides that in conducting a hearing the deputy commissioner "shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties. . . . This relaxation of the ordinary rules of procedure and evidence does not invalidate the proceedings, provided the substantial rights of the parties are preserved. . . . Although administrative agencies may be relieved from observance of strict common law rules of evidence, their hearings must still be conducted consistently with fundamental principles which inhere in due process of law.

Jones v. Indus. Comm'n, 1 Ariz. App. 218, 222-23, 401 P.2d 172, 176-77 (1965) (citing *S. Stevedoring Co. v. Voris*, 190 F.2d 275, 277 (5th Cir. 1951) (internal citation omitted)).

¶25 Pursuant to these authorities, a hearing officer is not bound by the rules of evidence, and the hearing officer's reliance upon reliable hearsay did not violate due process. *See State Div. of Fin. v. Indus. Comm'n*, 159 Ariz. 553, 556, 769 P.2d 461, 464 (App. 1989) (explaining that an administrative law judge is not bound by the rules of evidence); *accord Price*, 883 P.2d at 637 ("[T]he rules of evidence in administrative proceedings, unlike those applicable to judicial proceedings, allow admission of hearsay evidence."). The rationale for relaxing the evidentiary rules in administrative proceedings "is due in part [to] the absence of a jury." *Id.* at 637 n.8, 883 P.2d at 637 n.8 (citation omitted). Consequently, "the general rule is that hearsay evidence is admissible in agency proceedings." *Id.*

¶26 Magaziner and the Trust fail to explain why the tenants' statements were unreliable. Magaziner also does not allege that she was denied an opportunity to cross-examine at the August 2009 hearing. Her objection pertains to the statements obtained during Grossmayer's site visits. Presumably, Magaziner knew who was renting the Property on those dates and could have attempted to call them to testify. On this record, substantial evidence supports the violation determination. We therefore find no abuse of discretion or due process violation based on this ground.

III. Due Process Violation After The Evidentiary Hearing.

¶27 Magaziner contends that her due process rights were also violated after the liability determination. According to Magaziner, the financial sanctions were implemented without a hearing to determine her compliance with the judgment. She also complains that the County lacks authority to regulate advertising on the internet.

¶28 We begin with Magaziner's argument that the County lacks express authority to regulate web advertising. This argument misses the ultimate point. The hearing officer had authority to sanction Magaziner for admittedly engaging in a lodging violation and non-conforming use. The initial sanction was stayed pending demonstration of her compliance with the regulation and agreement to alter the website. Because there was a basis for the sanction, we affirm the authority to enter the initial sanction for the zoning violation itself, even assuming that the County lacked authority to sanction on the basis of web advertising.

¶29 More troubling are Magaziner's due process arguments based upon post-hearing events. It is fundamental that a party with a protected interest enjoys the due process right to offer evidence and confront adverse witnesses. *See, e.g., Gaveck v. Ariz. State Bd. of Podiatry Exam'rs*, 222 Ariz. 433, 437, ¶ 14, 215 P.3d 1114, 1118 (App. 2009). The County contends that

Magaziner never chose to exercise that right. She submitted no evidence of her own compliance by the October 11, 2009 deadline, or thereafter, to the hearing officer nor did she contact the Zoning Enforcement Office.

¶30 We are persuaded, however, that due process required more. This is not a case where a definite penalty was imposed with a possibility of having it reduced or eliminated if the violator proves compliance with certain specified requirements. In such a case, failure of the violator to act by proving compliance simply leaves in place the set penalty. Here, the $10,000 penalty was imposed subject to a determination of the Developmental Services Department. No specific burden of proof was imposed on Magaziner, and how compliance would be measured was not clearly defined.

¶31 As Magaziner and the Trust point out, this case is analogous to a probation case in that subsequent actions determine what a penalty will be or if a penalty will be modified. Due process requires that a defendant receive notice and a hearing before probation is modified. *State v. Korzuch*, 186 Ariz. 190, 193, 920 P.2d 312, 315 (1996). We have found a due process violation when a juvenile received no notice of a hearing or the reasons for it. *Pinal County Juv. Action No. J-169*, 131 Ariz. 187, 189, 639 P.2d 377, 379 (App. 1981). In this case, the Trust and Magaziner received no prior notice of a non-

compliance determination, nor were they provided with an opportunity to dispute that determination in a hearing.

¶32 Magaziner additionally claims that the non-compliance decision was improperly left to the prosecuting authority. This is an issue that the superior court did not address, but the County makes no effort to refute on appeal. Pursuant to A.R.S. § 11-808(F) (2001), a hearing officer "shall determine whether a zoning violation exists" and "may impose civil penalties." The "zoning inspector," in contrast, only "reports a zoning violation to the hearing officer," A.R.S. § 11-808(E), and "presents evidence showing the existence of a zoning violation." A.R.S. § 11-808(F).

¶33 Here, the notice of violation from the "Yavapai County Hearing Office" identifies Grossmayer as a "land specialist." Ordinance § 205 provides that a "land use specialist" has the duty to "administer and enforce [the] Ordinance including the receiving of applications, the inspection of premises and the issuing of permits." Grossmayer was thus a "zoning inspector" within the meaning of A.R.S. § 11-808. There is no evidence that the Board ever appointed Grossmayer as a hearing officer, nor have we been provided with any authority that a hearing officer is entitled to delegate non-compliance determinations to a "land specialist" who also prosecuted the zoning violation.

¶34 For these reasons, we hold that the conditional $10,000 penalty should not have been imposed without providing Magaziner and the Trust with notice and an opportunity to be heard. We therefore vacate the penalty. This holding obviates the need to consider whether the sanction imposed was permissible. We also need not reach additional arguments that Yavapai County lacked the authority to regulate web-based advertising or that the related Ordinance was vague. Further, we decline to address the notice amendment argument because it has not been sufficiently developed for the purposes of review. *Polanco v. Indus. Comm'n*, 214 Ariz. 489, 491 n.2, ¶ 6, 154 P.3d 391, 393 n.2 (App. 2007). These issues are also waived because they were not previously raised before the superior court. *See* Stewart, 169 Ariz. at 108, 817 P.2d at 53.

¶35 Finally, we deny Magaziner and the Trust's request for attorneys' fees on appeal pursuant to A.R.S. § 12-348(A)(1) (2003). Section 12-348(A)(1) permits an award of attorneys' fees and costs to the prevailing party in a "civil action brought by the state or a city, town or county against the party." A "civil action" is defined as "an action brought to enforce, redress, or protect a private or civil right; a noncriminal litigation." Black's Law Dictionary 32 (8th ed. 2004).

¶36 Here, Yavapai County did not bring suit, but merely imposed civil fines for the zoning violation. This did not

constitute a "civil action" within the meaning of the statute. We therefore deny the request for attorneys' fees.

CONCLUSION

¶37 We affirm the superior court's evidentiary rulings and liability determination, but vacate the $10,000 civil penalty because the County determined noncompliance without affording notice and a hearing to Magaziner and the Trust. On remand, the superior court will direct the County to comply with the procedures outlined in this decision. Specifically, it shall order the County to conduct a hearing presided over by a hearing officer, not a prosecutor.

/s/
PATRICK IRVINE, Presiding Judge

CONCURRING:

/s/
JOHN C. GEMMILL, Judge

/s/
PHILIP HALL, Judge