

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2014-000262-001 DT

03/05/2015

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

SAVE THE SCENIC SANTA RITAS

G VAN VELSOR WOLF JR.

v.

HENRY R DARWIN (001)
ROSEMONT COPPER COMPANY (001)

JAMES T SKARDON
ERIC L HISER

OFFICE OF ADMINISTRATIVE
HEARINGS
REMAND DESK-LCA-CCC

HIGHER COURT RULING / REMAND

Appellant Save the Scenic Santa Ritas (SSSR) asks this Court to review the Final Administrative Decision and Order in No. 13A-A010-DEQ (Director's Order) issued by Appellee Henry R. Darwin (Darwin), Director of Appellee the Arizona Department of Environmental Quality (AzDEQ), dismissing SSSR's appeal of AzDEQ's issuance of Air Quality Control Permit No. 55223 (the Permit) to Appellee the Rosemont Copper Company (Rosemont). For the following reasons, this Court reverses the Director's Order.

I. FACTUAL BACKGROUND.

On November 15, 2011, Rosemont submitted to AzDEQ an application for a Class II Synthetic Minor Air Quality Permit, and on August 6, 2012, AzDEQ issued to Rosemont a draft permit. On October 31, 2012, SSSR and others submitted comments to AzDEQ alleging, among other issues, that Rosemont's operation and sources had the potential to violate the National Ambient Air Quality Standards (NAAQS).

On January 31, 2013, AzDEQ issued to Rosemont the Permit in final form. On March 7, 2013, SSSR appealed Rosemont's Permit to the Office of Administrative Hearings. The Administrative Law Judge held hearings on July 24 to 31, and August 19 to 28, 2013. On April 10, 2014, the ALJ issued his Administrative Law Judge Decision recommending that SSSR's appeal be dismissed.

On April 25, 2014, Darwin issued Director's Order dismissing SSSR's appeal. On June 4, 2014, SSSR filed a Notice of Appeal 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).

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II. GENERAL STANDARDS FOR REVIEW.

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

In reviewing an agency's decision pursuant to the Administrative Review Act, the superior court **must** affirm the agency action unless it is "not supported by substantial evidence, is contrary to law, is arbitrary and capricious or is an abuse of discretion."

Carlson v. Arizona St. Pers. Bd., 214 Ariz. 426, 153 P.3d 1055, ¶ 13 (Ct. App. 2007) (emphasis added), quoting 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).

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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.

SSSR makes the following contentions on appeal: (1) Rosemont's operation and sources have the potential to violate the NAAQS; (2) Rosemont's July 2012 Modeling Report was flawed, and AzDEQ should not have relied upon that report because (a) the modeling evaluation inputs must be representative and conservative, (b) Rosemont's evaluation and modeling failed to use conservative inputs, (c) using conservative inputs, SSSR's model evaluation proved the permitted operations had the potential to violate the NAAQS, (d) Rosemont's December 2012 Modeling Report to the U.S. Forest Service proved the permitted operations had the potential to violate the NAAQS, (e) Rosemont's use of a single meteorological monitor for a site with complex terrain significantly reduced the utility of the data, and (f) Rosemont's failure to assess the extent of the impact of migration from the Tucson airshed rendered AzDEQ's approval of the Permit arbitrary and capricious. SSSR asks this Court to reverse the Director's Order and remand this matter to AzDEQ for further consideration using the proper criteria, and has provided to this Court authorities and arguments in support of its position.

AzDEQ makes the following contentions: (1) AzDEQ had no authority to require Rosemont to perform modeling or demonstrate compliance with the NAAQS; (2) SSSR's modeling arguments fail under the appropriate standards of appellate review; (3) the Director adequately reviewed the record; (4a) the modeling inputs must be representative, and Rosemont and AzDEQ selected the proper representative area; (4b) AzDEQ's approved NO₂ and NO_x in-stack ratios are appropriate; (4c) Rosemont provided acceptable monitoring data; (4d) Rosemont's modeling inputs are more accurate and representative than are SSSR's; (4e) the U.S. Forest Service study used different inputs that AzDEQ had reasonably rejected; (4f) Rosemont's use of a single meteorological station was justified; and (4g) AzDEQ reasonably evaluated the effects of emissions from the Tucson airshed on the Rosemont site. AzDEQ asks this Court to uphold Director's Order and has provided to this Court authorities and arguments in support of its position.

Rosemont makes the following contentions: (1) AzDEQ cannot require modeling as a condition of a Class II air quality permit; (2) Rosemont conducted and provided modeling in its July 2012 AERMOD Modeling Report, and AzDEQ properly relied on that modeling report because (a) the modeling evaluation inputs are representative and conservative, (b) Rosemont's evaluation and modeling demonstrated the permitted operations do not have the potential to violate the NAAQS, (c) SSSR's Air Resource Specialits model is of no consequence because it was not provided during public comment to the Agency, did not use a modeling protocol approved by AzDEQ, and used unrepresentative inputs, (d) the December 2012 Modeling Report was submitted to the U.S. Forest Service for an entirely different permitting process, used different and non-representative inputs, and had no applicability or relevance to this matter, (e) Rosemont appropriately used a single meteorological monitor for the site, and (f) the Tucson airshed has an insignificant impact on the project site. Rosemont asks this Court to uphold Director's Order and deny SSSR's appeal, and has provided to this Court authorities and arguments in support of its position.

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This Court concludes the authorities and arguments provided by SSSR are well-taken, and this Court adopts those authorities and arguments in support of its decision. SSSR has asked this Court to award attorneys' fees. Because it is likely this matter will be appealed to the Arizona Court of Appeals with possible review by the Arizona Supreme Court, this Court considers it more appropriate to wait until the further appeals process has run its course before considering the issue of attorneys' fee.

IV. CONCLUSION.

Based on the foregoing, this Court concludes there was not substantial evidence to support the action of the AzDEQ, and the action of the AzDEQ was contrary to law, was arbitrary and capricious, and was an abuse of discretion. This Court further determines there is no just reason to delay entry of judgment and no further matters remain pending, and thus this judgment is entered pursuant to Rule 54(c).

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, Pendergast v. Arizona St. Ret. Sys.*, 234 Ariz. 535, 323 P.3d 1186, ¶ 10 (Ct. App. 2014) ("On appeal, we review *de novo* the superior court's judgment, reaching the same underlying issue as the superior court: whether the administrative action was not supported by substantial evidence or was illegal, arbitrary and capricious, or involved an abuse of discretion."); *quoting Carlson v. Arizona St. Pers. Bd.*, 214 Ariz. 426, 153 P.3d 1055, ¶ 13 (Ct. App. 2007); *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, we review its judgment *de novo*, 'reaching the same underlying issue as the superior court.'"); *Blancarte v. Arizona D.O.T.*, 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 reversing the Final Administrative Decision and Order in No. 13A-A010-DEQ.

IT IS FURTHER ORDERED remanding this matter to AzDEQ for further consideration using the proper criteria.

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