ARIZONA COURT OF APPEALS

DIVISION ONE

ABC SAND AND ROCK COMPANY INC., Plaintiff/Appellant, v. FLOOD CONTROL DISTRICT OF MARICOPA COUNTY, Defendant/Appellee.	Court of Appeals Division One No. 1 CA-CV 19-0652 Maricopa County Superior Court No. LC2016-000324-001

PLAINTIFF/APPELLANT'S REPLY BRIEF

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INTRODUCTION

As in the superior court, the District's aim is to avoid having a court consider ABC's arguments and evidence in full. The District contends that the appeal was untimely, even though the notice of appeal was filed within 30 days of entry of judgment. It urges the Court to disregard as waived ABC's purely legal arguments concerning the District's statutory power to issue civil penalties. And the District hopes to affirm the superior court's refusal to consider any evidence or argument developed after the administrative hearing, even though § 12-910 requires the superior court to consider the supplemental record and the vast majority of civil penalties relate to post-hearing conduct. The Court should reject these waiver-related arguments.

The District leans on waiver because the Answering Brief fails on the merits. First, the Answering Brief cannot identify any statutory authority for imposing prospective fines on future, unproven conduct. None exists.

Second, the District cannot defend the superior court's exclusion of evidence and argument. Like the superior court, the Answering Brief depends entirely on a single case that applies a materially outdated version of § 12-910, the statute governing judicial review of administrative decisions.

Finally, the Answering Brief fails to show that this record justifies the civil penalties issued. For all the reasons explained in the Opening Brief and here, the Court should reverse and grant ABC relief.

ARGUMENT

I. The Answering Brief cannot defend the unlawful prospective penalties for alleged violations occurring after the administrative hearing.

The Opening Brief shows (at 44-60) that the vast majority of potential fines—the fines of $1,000 per day from the date of the January 4, 2016 administrative hearing and into the future indefinitely—are unlawful because the District lacks authority to prospectively impose fines for future conduct and because such fines would violate due process. The District's arguments to preserve these future, unproven fines lack merit.

A. ABC has not waived the argument that the District's prospective fines are unlawful.

As discussed in the Opening Brief (at 65-66), in general, "[f]ailure to raise an issue at an administrative hearing that the administrative tribunal is competent to hear waives the issue." *Neal v. City of Kingman*, 169 Ariz. 133, 136 (1991). A party need not "specify the precise legal theory or theories" to preserve them for later review. *Id.* at 136. Instead, the party must give "fair notice," including by "setting forth the facts which form the basis of the

complaint." *Id.* at 136 (holding waiver occurred only when party failed to mention legal theory or the "facts which would arguably give rise to the application of such a theory").

The District contends (at 29-30) that ABC waived its arguments about the legality of the future fines because "ABC did not argue that the ongoing fines were statutorily barred or that they presented a due process issue" at the administrative hearing or to the Board. This argument fails for several reasons.

First, the District does not contest that ABC repeatedly challenged the future fines. Instead, the District faults ABC for not raising the same legal theories to challenge the future fines. In other words, ABC was not using the right "magic words" to "specify the precise legal theory or theories" raised on appeal. *See Neal*, 169 Ariz. at 133. That is exactly what *Neal* explains is *not* required to preserve an issue for appeal from an administrative decision.

Second, the District glosses over that these arguments were not reasonably available at the January 4, 2016 administrative hearing. The District did not push for prospective fines and the hearing officer did not recommend them. *See* IR-6 at PDF 263-64 (1/22/2016 Peck letter to Hearing

Officer) (stating that the "District requests that the hearing officer recommend that a violation exists and that a substantial fine be imposed"). Given that the authority to impose future fines was not squarely at issue, it would have made no sense to preemptively argue against them at the administrative hearing.

Third, once the Chief Engineer recommended future fines, ABC made the propriety of the fines a central issue before the Board of Hearing Review. ABC disputed the legality and factual basis for the fines, including by arguing that future fines are not based on any evidence in the record and could not be fairly imposed. In its brief to the Board, ABC argued that the "fines imposed by the Chief Engineer from December 23 through the present are retaliatory, unwarranted and baseless." APP097 (IR-6 at PDF 27). The brief further argues that, among other things, there was "[n]othing in the record" that "supports a fine for this period of time," and that the Chief Engineer relied on facts not in the record to justify post-hearing fines. *Id.*

In addition, ABC argued against the propriety of the fines at the Board's hearing. ABC's counsel argued that the period 4 fines were "not just arbitrary, they are extraordinary" and they were wrongly "based on evidence not in the record about how ABC has behaved since December 23,"

2015. APP452 (IR-8, 6/16/2016 Tr. at 17:12-19). And when the Board was discussing the propriety and amount of an ongoing fine, the Board's counsel suggested the Board could disapprove of the "continued penalty" and require the District to institute a new enforcement proceeding for additional violations. ABC's counsel responded that "there is nothing in the record past November 30[, 2015] that would support any fine. In fact, much of this conversation is based on something that is not in the record." APP465 (IR-8, 6/16/2016 Tr. at 69:9-21). This record shows that the Board had more than "fair notice" that ABC was challenging the Board's authority to impose the period 4 fines past the point where there was evidence in the record of a violation.

As to the due process argument, as discussed in the Opening Brief (at 69-70), those arguments—based on the imposition of fines without any hearing concerning the facts or proof of the underlying violations—are based on evidence and alleged violations that occurred ***after*** the administrative hearings. ABC raised its due process arguments at the first possible instance in the superior court. *See* APP135-36 (IR-22 at 31-32); IR-33 at 22.

Fourth, although ABC did not waive the issue, in the alternative the Court should exercise its discretion to address these issues in any event. Discretionary review is particularly appropriate where, like here, the Court is considering interpretation and application of statutes. *See Evenstad v. State*, 178 Ariz. 578, 582 (App. 1993) (declining to limit itself to the parties' arguments when "considering the interpretation and application of statutes"). Moreover, because this is a purely legal issue concerning the District's statutory authority, ABC's alleged failure to articulate it to the Board "does not deprive [the courts] of any essential facts necessary to resolve the issue." *Rouse v. Scottsdale Unified School District No. 48*, 156 Ariz. 369, 371 (App. 1987) (cited by *Neal* and holding there was no waiver of late-raised issue); *cf. Mitchell v. Gamble*, 207 Ariz. 364, 370, ¶ 18 (App. 2004) (addressing issue raised for first time on appeal when "neither side claims any surprise or unfairness"). These purely legal issues are ready for the Court's consideration.

B. The Answering Brief confirms that the District's statutory authority allows fines only for violations that have already occurred.

To avoid a reversal of the imposition of fines post-dating the January 4, 2016 administrative hearing, the District must show that the Board has

statutory authority to impose fines for future, unproven violations. The Answering Brief fails to do so.

The Opening Brief demonstrates (at 48-51) that the legislature has authorized the District and its Board to impose fines for past violations only.

The Answering Brief leaves ABC's textual analysis unaddressed. The District does not explain how § 48-3615(C)'s authority to impose civil penalties on a person "who violates" also includes the authority to prospectively fine those who "may violate" later. *See* OB at 49. The Answering Brief also fails to explain why the Court should treat civil penalties here differently from civil penalties generally, which "address past violations" not "ongoing or future violations." *Reich v. Occupational Safety and Health Review Comm'n*, 102 F.3d 1200, 1202 (11th Cir. 1997). *See* OB at 49.

The Answering Brief also ignores the statutory context of § 48-3615. *See* OB at 50. The statutory scheme for the District's enforcement authority allows civil penalties for "violations observed" based on "evidence of the violation" presented at an adversarial administrative hearing, A.R.S. § 48-3615.01(A), (E), not penalties for unproven, not-yet-existing future violations. Although the Answering Brief ignores the "statute as a whole

and its context within the statutory scheme," *Stambaugh v. Killian*, 242 Ariz. 508, 511, ¶ 17 (2017), this Court should not.

Most glaring, the Answering Brief does not mention much less explain away the significance of A.R.S. § 48-3615.01(J). *See* OB at 50-51. That section states that the District should seek injunctive relief from the superior court "[i]f the person alleged to be in violation continues the violation after the chief engineer or hearing officer has issued a final decision and order or after the board of hearing review has completed its review pursuant to this section." A.R.S. § 48-3615.01(J). Here, however, the Board's prospective fines are in effect an exercise of the court's injunctive power. This renders the authority to pursue injunctive relief meaningless, violating the "cardinal principle of statutory interpretation," which is "to give meaning, if possible, to every word and provision so that no word or provision is rendered superfluous." *Nicaise v. Sundaram*, 245 Ariz. 566, 568, ¶ 11 (2019).

Finally, the District also fails to respond to the argument that its future fines are coercive civil contempt fines, something the District (unlike a court) lacks authority to issue. *See* OB at 51.

Ultimately, the District's statutory argument hinges on one point: the District has authority to issue prospective fines because § 48-3615(C)

provides that "[e]ach day the violation continues constitutes a separate violation." The District concludes (at 31-32) that this language means the District can pre-determine and impose prospective fines for violations in the future. The District's argument fails for several reasons.

First, the District's interpretation is an illogical reading of the text. The phrase means that a violation occurring over two or more separate days qualifies as, and may be punished as, two or more separate violations. The provision forecloses a defendant from arguing that a continuous violation over multiple days only counts as a single violation (and thus would be subject to only one civil penalty). The text does not speak to prospective penalties for violations in the future that have not yet occurred. Thus, the text the District relies on neither supports nor refutes the District's interpretation.

For the same reason, the District's citation (at 32) to § 9-462.02(C) does not help the District. That provision prohibits a municipality from "consider[ing] each day that an outdoor advertising . . . structure is illegally constructed . . . as a separate offense." *Id.* The District offers this as proof that the "legislature knows how to limit fines for ongoing violations if it wishes." But, like with § 48-3615(C), this language controls how a violation

that exists over more than one day should or should not be divided into separate offenses. Neither provision has to do with the issue of violations that may occur in the future.

The District cites two unpublished cases as proof that "counties regularly impose continuing fines for ongoing violations in the zoning context and this Court regularly affirms such fines without comment." *See* AB at 32 (citing *Coconino Cty. v. Calkins*, No. 1 CA-CV 18-0098, 2019 WL 1076238 (App. Mar. 7, 2019) *and Pinal Cty. v. Haring-Miller*, No. 1 CA-CV 11-0153, 2012 WL 344963 (App. Feb. 2, 2012).[1] These cases shed no light on the statutory interpretation question at hand. Neither case interprets the statute at issue, and neither case addresses the kind of argument raised here, much less analyzes the question. Although the District offers them as examples of courts "regularly" affirming "such fines," the fact that they are unpublished and do not even consider the argument raised here only underscores how unusual and far afield the District's position is.

[1] *Pinal*, an unpublished case from 2012, should not be cited. *See* Ariz. R. Sup. Ct. 111(c) (unpublished cases may be cited for persuasive value only if issued in 2015 or later).

Second, the District's citation (at 31) to § 9-500.21 also does not support the District's position. That provision provides that "a city or town" may impose civil penalties for the city's or town's ordinance violations "beyond the initial notice constituting a separate offense." *Id.* But ABC is not a "city or town" and the District's fines are not for violation of a city or town ordinance that was enacted by elected officials.

More importantly, even if applicable to the District, this provision does not authorize the District to mete out prospective civil penalties. The statute authorizes civil penalties for violations "beyond the initial notice" of a violation, not violations occurring after the adjudication of an alleged violation and into the future. ABC has not challenged the statutory authority to impose civil penalties for separate violations occurring after the "initial notice" it received in May 2015 and before the administrative evidentiary hearing on January 4, 2016. Rather, ABC's position is that the District lacks authority to impose prospective penalties for "separate offenses" that are not yet offenses, have not yet occurred, and for which there is no adversarial hearing.

Third, the District's discussion of *Anderson v. Arizona Game & Fish Department*, 226 Ariz. 39 (App. 2010) and *Whitmer v. Hilton Casitas*

Homeowners Association, 245 Ariz. 77 (App. 2018) misses the point. The Answering Brief (at 33-35) distinguishes the two cases on their facts, pointing out the different administrative proceedings at issue. But, as explained in the Opening Brief (at 46-47), the significance of those cases is that they illustrate how Arizona courts ensure that an administrative agency's "powers and duties" are "strictly limited by the statute creating them." *Cleckner v. Ariz. Dep't of Health Servs.*, 246 Ariz. 40, 43, ¶ 8 (App. 2019) (internal quotation marks and citation omitted).

Anderson and *Whitmer* are compelling examples where courts have reigned in agency overreach of the type the District has displayed in this case. Of particular significance, *Whitmer* confirms that an agency has only the enforcement power authorized by statute, not court-like inherent or implied powers, such as the "inherent contempt power," 245 Ariz. at 80, ¶ 11. As discussed in the Opening Brief (at 51), the prospective fines are not "civil penalties" to punish proven violations but rather are civil contempt sanctions—conditional fines intended to "coerce the defendant into compliance." *See Shell Offshore Inc. v. Greenpeace, Inc.*, 815 F.3d 623, 629 (9th Cir. 2016). Its different factual context is irrelevant; *Whitmer* confirms that

the District's authority to issue civil penalties does not include the implicit power to issue prospective civil penalties.

C. The Answering Brief fails to show that the District's prospective fines satisfy due process.

The Answering Brief argues that the prospective fines do not violate due process. The District argues (at 35-37) that ABC "was given due process" through the administrative hearing and appeals process, and that it should not be able to contest the future fines because "[t]he only permissible action for ABC was to stop mining," and ABC has no right to be "heard regarding its new excuses for continuing to violate the law." The District turns due process on its head.

Regardless of the underlying facts of a purported violation, due process entitles ABC to "notice and an opportunity to be heard in a meaningful manner and at a meaningful time" before it is deprived of its property, i.e., before a fine is imposed. *Gaveck v. Ariz. State Bd. of Podiatry Examiners*, 222 Ariz. 433, 437, ¶ 14 (App. 2009) (internal quotation marks and citation omitted).

Here, there is no hearing at all about the future alleged violations because they had not yet occurred. The deprivation of property is

predetermined before the conduct has occurred or relevant facts proven at a hearing.

The District's argument (at 36) is that ABC is not entitled to further contest the imposition of penalties because nothing can excuse ABC's "illegal" conduct. But ABC has *never* had an opportunity to contest the factual basis for a fine for any alleged violations occurring after January 4, 2016. It was prohibited from introducing any new evidence before the Board of Hearing Review, and the superior court refused to consider any evidence occurring after January 4, 2016. ABC has been denied its "due process right to offer evidence and confront adverse witnesses" about the post-January 4, 2016 violations. *Id*.

Moreover, despite its arguments, the District's conduct is highly relevant to whether a fine is appropriate and in what amount. The fact that the District has arbitrarily and capriciously refused to issue a permit of short duration is directly relevant to whether a fine of $1,000 per day is a lawful penalty. *See, e.g.*, APP474 (6/16/2016 Tr. at 78:6-17 (Board chairman discussing amount of future fine and saying it should only continue until "a temporary permit issues" and that "when you get down to nothing but ticky-tacky corrections, it should be, a permit of some sort should be issued").

The District's answer (at 36) is that ABC had a separate right to appeal a denial of a permit of short duration. True, ABC has had to spend endless resources pursuing a short-term permit. *See* OB at 33-36; *see also* APP392-93 (Floodplain Review Board decision finding that District had constructively denied multiple short-term permit requests and had failed to explain its reasons for denial). But that appeal process does not allow ABC to challenge the propriety of the prospective fines already decided and imposed.

Finally, the District does not distinguish the Washington Supreme Court's opinion in *Post v. City of Tacoma*, 217 P.3d 1179 (Wash. 2009). There, the inability to separately challenge prospective fines for future violations posed an unacceptable "risk of erroneous deprivation." *Id.* at 1186, ¶ 25. That is exactly the situation here where ABC has no ability to challenge the propriety of a fine for alleged violations past January 4, 2016, even if a fine would erroneously deprive ABC of its property.

Other than saying that "the facts are vastly different," the District does not address the case. Instead, it urges the Court to look to a Washington Court of Appeals case applying *Post*, *City of Bonney Lake v. Kanany*, 340 P.3d 965 (Wash. Ct. App. 2014). But *Kanany* confirms the due process problems here. In *Kanany*, the court found that the person subject to daily fines had a

"full opportunity to challenge both the determination that the violation was occurring and the imposition of specific daily fines until that violation was remedied" whereas in *Post*, there was no ability to challenge the city's post-hearing, discretionary fines that depended on changing facts. *Id.* at 969-70. Here, there is no hearing to "determine[] that the violation was occurring" after January 4, 2016, and no hearing on the District's discretionary decision to issue or deny a permit during that time. *Kanany* does not save the District's imposition of prospective fines.

D. Regardless of the Answering Brief's other arguments, any future fines ceased April 15, 2016 under the terms of the Board's order.

Even if the Court agrees the District could impose prospective fines, under the terms of the Board's decision, the fines ceased when the District denied a permit on April 15, 2016, the date "the District determine[d] to issue or deny a Floodplain Use Permit." *See* OB at 57-58.

In response, the District does not contest that its April 15, 2016 denial of a short-term permit was a denial of a floodplain use permit. *See* OB at 58-59. That concession resolves this issue. The Board's decision states that the prospective daily fines of $1,000 per day should be calculated "from December 23, 2015 until the District determines to issue or deny a Floodplain

Use Permit." APP377 (Ex. 203 at 10). Under the plain text of the Board's decision, that occurred on April 15, 2016.

The Answering Brief (at 38-39) makes the arguments the Opening Brief predicted: (1) the April date cannot apply because it predates the Board's July 1, 2016 decision; and (2) the Board must have been referring to ABC's application for the five-year permit, not a short-term permit. As explained in the Opening Brief (at 59), these arguments fail to overcome the plain text of the Board's decision and are refuted by the record. *See* APP474 (6/16/2016 Tr. at 78:6-15 (Board chair explaining rationale of prospective fines and stating they should end when a "permit, that could be a temporary permit issues")). And in any event, the District again denied a permit on July 7, 2016, so if the April date cannot apply because it predates the Board's decision then the fines must cease by July 7 at the latest.

Rather than there being "no logic" to this argument as the District asserts (at 39), it makes perfect sense. The Board recognized that prospective fines would balloon out of control if the final permitting took too long or the District dragged its feet. If the District believed that additional violations occurred after it denied a short-term permit and merited more penalties, it could have followed § 48-3615.01 by issuing a notice of violation, presenting

evidence at an adversarial hearing, and seeking a fine from the Board. There is nothing illogical about following the law that applies to alleged violations in every other case.

II. The District fails to refute that the superior court incorrectly disregarded new evidence and argument under § 12-910.

The District's insistence that the superior court did not err when it refused to consider new evidence or arguments depends entirely on its interpretation of *Hatch v. Arizona Department of Transportation*, 184 Ariz. 536 (App. 1995).

The District does not separately explain why the superior court's exclusion of evidence complies with the current version of § 12-910, which requires the superior court to allow "relevant and admissible exhibits and testimony" at a supplemental hearing and to consider "the administrative record and supplementing evidence presented at the evidentiary hearing," § 12-910(B), (E). *See* OB at 61-62. Nor does the District respond to ABC's separate argument that the superior court wrongly excluded new legal arguments, including arguments based on evidence that was unearthed after the administrative hearing. *See* OB at 68-69 (listing claims the superior court

incorrectly concluded were waived). The Court should remand for consideration of those arguments.

The District's total reliance on *Hatch* is unpersuasive for several reasons.

First, the District argues (at 40-41) that the post-*Hatch* amendment to § 12-910 "was not as great as ABC claims" because "the decision to admit new evidence is still discretionary." This argument does not survive any amount of scrutiny. The post-*Hatch* amendment dramatically changed § 12-910 and the applicability of *Hatch*'s holding.

When *Hatch* was decided, § 12-910(A) stated that "[n]o new or additional evidence in support of or in opposition to a finding, order, determination or decision of the administrative agency shall be heard by the court," unless there was a trial de novo or the court determined "justice demands" new evidence. *See Hatch*, 184 Ariz. at 539 (quoting then-current version of § 12-910(A)). *Hatch* relied directly on that language for its holding. After quoting § 12-910(A), the opinion reasons that post-hearing evidence "cannot 'support' or 'oppose' a hearing officer's decision that was based upon circumstances existing at the time of the hearing." 184 Ariz. at 540 (quoting 1995 version of § 12-910(A)).

The 1996 amendments flip § 12-910(A) to require rather than prohibit new evidence and testimony. That section now states, in relevant part, that when requested "the court shall hold an evidentiary hearing, including testimony and argument" and including "testimony from witnesses . . . who were not called to testify at the administrative hearing." A.R.S. § 12-910(A). And the legislature added § 12-910(B) to require that "[r]elevant and admissible exhibits and testimony that were not offered during the administrative hearing shall be admitted." 1996 Ariz. Sess. Laws Ch. 102, § 16 (2d Reg. Sess.).

In other words, when *Hatch* was decided, the law prohibited any new evidence except in narrow circumstances; after *Hatch*, the law *requires* new evidence and argument be allowed except in narrow circumstances.

There is simply no merit to the District's argument that these changes are insignificant as to the superior court's role in hearing and considering new evidence. Indeed, the District does not identify a single case applying *Hatch* or even reaching the same conclusion as *Hatch* under the current statutory scheme.

Second, and relatedly, the District contends (at 41) that the amendments to § 12-910 are meaningless because post-hearing evidence is

not "[r]elevant and admissible" under § 12-910(B) and cannot "supplement" the record because it post-dates the hearing. That makes no sense and is not supported by the text. Of course evidence post-dating the hearing can be relevant. The District is asking the court to sustain penalties for more than half-a-million dollars based on alleged conduct ***after the hearing***. How could the parties' interactions and facts occurring after the hearing be irrelevant? The Court should disregard this tortured, results-oriented interpretation of § 12-910.

Third, in its zeal to prop up *Hatch*, the District ignores ABC's other arguments concerning *Hatch*'s holding. As pointed out in the Opening Brief (at 64), the *Hatch* court faulted the superior court for considering new evidence and remanded the case back to the agency "for rehearing based on the facts as they now exist." 184 Ariz. at 540. Given that the bulk of the civil penalties here concern alleged conduct post-dating the administrative hearing, if *Hatch* applies here then the same relief should be applied.

The District also disregards that *Hatch* arose in a far different procedural context. The District's regulations sharply limit the ability to discover and present evidence. *See* OB at 16; FRMC § 707(B)(1)-(2) (no pre-hearing discovery or disclosure); Resolution FCD 2016R004(A) (no new

evidence allowed before the Board). The District has nothing to say about this argument either.

At a minimum, the Court should remand so that the superior court can consider the full supplemental record, including all "testimony and argument," § 12-910(A), and "exhibits and testimony that were not offered during the administrative hearing," § 12-910(B).

III. The Answering Brief's defense of the fines confirms that they are contrary to law, arbitrary and capricious, unsupported by substantial evidence, or an abuse of discretion.

The Opening Brief (at 70-78) explains several reasons why the Board's decision is "contrary to law, is not supported by substantial evidence, is arbitrary and capricious or is an abuse of discretion." A.R.S. § 12-910(E). The Answering Brief's response falls short for several reasons.

A. The District's conduct is relevant to whether the fines are unlawful.

The District's primary argument reduces to one point it uses repeatedly throughout the Answering Brief: none of ABC's arguments matter because ABC was operating without a permit, operating without a permit is unlawful, and therefore any civil penalties are justified. *See* AB at 42, 43, 47, 49. But in assessing whether agency action is arbitrary and capricious, the *agency*'s conduct is relevant. *See Maricopa Cty. Sheriff's Office*

v. Maricopa Cty. Emp. Merit Sys., 211 Ariz. 219, 222, ¶ 14 (2005) ("arbitrary" agency action is "unreasoning action, without consideration and in disregard of the facts and circumstances").

That check on agency power is especially important here, where the District plays the prosecutor, the judge, and the permit-issuing regulator. The facts and circumstances of the District's decision to continually deny a short-term permit without a valid reason (after promising to issue one) and yet seek fines based on the lack of that same permit is relevant to whether the agency's enforcement action is lawful. The District thus cannot simply rely on its "no permit" argument as a crutch to justify the extreme fines it has pursued.

B. The District does not have unfettered discretion to withhold a permit of short duration while seeking exorbitant fines for operating without a permit.

The District's failure to issue a temporary permit renders all or most of the civil penalties arbitrary and capricious. *See* OB at 73-75. The District, however, wants the Court to pay no attention to its conduct ignoring, denying, and refusing to issue a permit of short duration to ABC. *See* OB at 19-21, 33-34 (detailing the retaliatory and unequal refusal to issue a short-

term permit to ABC after promising to provide one). The District's various arguments to sweep aside its conduct are not persuasive.

First, the District argues (at 44-45) that ABC has "describe[d] no legal error of the superior court" or of the Board because "the District could have wrongly denied ABC a permit . . . and ABC could be properly fined." This is simply wrong. For the District to promise a permit of short duration, unjustifiably deny it, and then pursue fines for the lack of that permit is to act capriciously and "without consideration and in disregard of the facts and circumstances." *Maricopa Cty. Sheriff's Office*, 211 Ariz. at 222, ¶ 14. To issue and uphold fines despite this conduct is error.

Second, the District argues (at 44) that there is no right to a permit of short duration at all because "issuance of such a permit is still discretionary with the District." True, the District's regulations provide that the District "may" issue a permit of short duration for "applicants participating in an ongoing application process." FRMC §§ 404(B)(4) (APP212), 403(B)(3) (APP210). But having enacted that regulation, the District cannot dole out that benefit arbitrarily or based on improper reasons.

And here, ABC presented compelling evidence that (1) it was being treated unlike any other mining company, ever (OB at 35); (2) that the

District first promised a short-term permit and then agreed with ABC that "a temporary permit [was] not necessary" while the parties moved to "process the permit application," (*see* OB at 19, 25-26; APP272); and (3) that the district buried a short-term permit after learning that ABC's principal was advocating for the defeat of legislation the District supported (*see* OB at 19-22). This pattern of conduct bears directly on whether the fines the District sought and the Board imposed are contrary to law, arbitrary or capricious, or an abuse of discretion.

Third, the Answering Brief argues that it was justified in denying the permit because "ABC did not file anything with the District concerning its requests for a permit" and so there was "nothing to which to respond." There are two flaws with this argument. One, the District does not have a formal temporary permit application to file. Two, the record conclusively contradicts the District's point. ABC repeatedly, in writing, asked for a permit of short duration over (APP262), and over (APP359-60), and over again (APP362, 366, 407-08). This argument highlights the worst kind of bureaucratic Catch-22 nonsense: the District tells ABC it will issue a permit of short duration if necessary, never supplies that permit despite repeated

requests, and then blames ABC for failing to file for the permit in the right way.

Had the District followed through and issued a short-term permit at any of these points, the civil penalties would either be wiped out or dramatically reduced. To sustain the penalties in light of the District's conduct is error.

C. The District's responses to ABC's other arguments lack merit.

1. The District's misuse of attorney-client privilege.

The District asserts (at 42) that the Opening Brief "does not explain how the alleged misuse of the attorney client privilege compels a finding that the superior court's decision to uphold was arbitrary." Yes, it does. Without that information, the District cannot offer an explanation for why it refused to issue a short-term permit, or rebut the compelling evidence that its denial was retaliatory and unlawful. *See* OB at 72. Nowhere in its brief does the District mention the evidence showing that the District buried a short-term permit it was preparing to issue and then started going after ABC when the District learned of ABC's political advocacy. *See* OB 19-22.

Without disclosing its internal discussions concerning its permitting decisions, the District cannot rebut that evidence. Without such evidence,

there is no substantial evidence to justify imposing a fine during a period of time when ABC should have been issued a short-term permit.

The District also notes that the District did not use the Chief Engineer as a witness and so did not use the privilege as a "sword," only a "shield." This misses the point in the caselaw ABC cited. A party may not rely on a "defense based on factual assertions that . . . incorporate the advice or judgment of its counsel" and also "deny an opposing party the opportunity to discover the foundation for those assertions in order to contest them." *Mendoza v. McDonald's Corp.*, 222 Ariz. 139, 153, ¶ 42 (App. 2009). That is exactly the case here, where the District has contended that ABC should have been denied a permit of short duration but has used the privilege to halt questioning about internal discussions concerning ABC's permits. *See* OB at 71.

2. The civil penalties.

The Opening Brief separately argued that—even on the superior court's artificially narrowed record—the civil penalties should be reversed for multiple reasons. *See* OB at 75-78.

For the most part, the District's response is a version of the same argument: the civil penalty is lawful because ABC was mining without a

permit. *See* OB at 47 (period 2), 49 (period 3 and period 4). As discussed above, this argument does not carry the day.

The District's other arguments are unpersuasive.

Fines for January 2015 – July 2015.

The District states that fines are justified because ABC was warned it could be fined if it kept mining.[2] These warnings conflict with the District's broken promise to forbear enforcement and issue a short-term permit. *See* OB 19-22.

The District also cannot explain away that it delayed ABC's ability to get a permit by failing to process ABC's February 2015 permit application as § 48-3645 requires. *See* OB at 22-23, 75. Although the District contends that ABC "did not file the correct fee for a new permit" and thus the District could not process the application, the Chief Engineer admitted that if the cover of the application had a different label ("new" instead of "amended") the

[2] The District states (at 47) that ABC made "mispresentations to this court" concerning these facts, implying that ABC did not reveal these communications. That is not true. The Opening Brief cites to, quotes from, and discusses these lawyer letters at length, which are included in the Appendix. *See* OB at 22-24 (discussing the District's lawyer's March and April 2015 letters at APP254-261 (Exs. 143, 144)).

District would have processed it as normal. OB at 23; APP489. And other mine operators had been able to "apply for renewals after their permit had expired." APP572.

Fines for July 30 to December 23, 2015.

The District defends these fines by insisting that this Court, like the superior court, should give the parties' June 2015 agreement zero weight. The parties met and agreed that no temporary permit would be needed or pursued because the parties would diligently proceed with the main permit application. APP272 (Ex. 154). The Chief Engineer agreed he was bound by this agreement. The lower court and the Board erred by penalizing ABC for acting consistently with that agreement. *See* OB at 25-26 (summarizing the record of the June 2015 meeting agreement).

Moreover, the District does not contest that the District never provided any deadlines to ABC that ABC missed, or that the District staff were well aware it would take ABC a substantial amount of time to work out the technical requirements of a five-year permit. *See* OB at 76-77. Instead, the District repeats (at 49) its argument that "[n]othing permits ABC to mine without a permit." As argued above, that is not a winning argument.

Fines for December 23, 2015 and on.

The Opening Brief challenged both the legal and evidentiary basis for fines during this period (in addition to challenging the statutory authority to impose prospective fines). *See* OB at 77-78. The District (at 49) offers no response except its view that ABC continued mining without a permit and so any civil penalty is justified. Again, that argument lacks merit.

IV. The Court has jurisdiction to consider this appeal.

Finally, the District argues (at 49-52) that this Court lacks jurisdiction because the notice of appeal was untimely. The District is incorrect.

Under A.R.S. § 12-913, "[t]he final decision, order, judgment or decree of the superior court entered in an action to review a decision of an administrative agency may be appealed." To be timely, a notice of appeal must be filed within "30 days after entry of the judgment from which the appeal is taken." ARCAP 9(a). Here, the Court entered a final judgment on August 7, 2019. IR-47. ABC filed its notice of appeal on September 5, fewer than 30 days after the entry of judgment. IR-49. This Court therefore has jurisdiction to consider the appeal.

The District, however, contends that ABC had to file a notice of appeal within 30 days of entry of the Court's unsigned minute entry order (IR-41) entered on July 23, 2018. The District is incorrect.

The July 23, 2018 minute entry order is not a "final" decision from which an appeal could be taken. Section 12-913 allows an appeal from the superior court's "final decision, order, judgment or decree" and, "[a]bsent compliance with Rule 54(b) or 54(c), such rulings are not final." *Brumett v. MGA Home Healthcare, LLC*, 240 Ariz. 420, 431, ¶ 23 (App. 2016). "Accordingly, absent compliance with Rule 54(b) or Rule 54(c), a final decision, order, judgment or decree entered by a superior court in an action to review an administrative agency's decision is not appealable under A.R.S. § 12-913." *Id*. The August 7, 2019 judgment (IR-49) complies with Rule 54(c); the July 28, 2018 minute entry (IR-41) does not.

Brumett thus forecloses the District's argument. In fact, *Brumett*'s holding related to § 12-913 was made in the exact procedural context as this case: an appeal between ABC and the District. *Brumett*, 240 Ariz. at 433, ¶ 6 (holding in earlier appeal that ABC needed to obtain an order with Rule 54(c) language to pursue its appeal in 1 CA-CV 16-0294).

The District argues (at 51-52) that *Brumett* is incorrect because the Rules of Civil Procedure did not apply to administrative appeals unless there was a trial de novo, which there was not here. This argument does not help the District. The question is not whether the Rules of Civil Procedure apply but rather whether a decision is "final" and thus appealable. The District's argument (at 50-51) assumes that the July 2018 minute entry is a "final decision" but does not explain why that is so. Indeed, the minute entry lacks many features of a "final" decision. Unlike the August 7, 2019 judgment, the July 23, 2018 minute entry decision does not contain Rule 54(c) finality language, is unsigned, and does not state that it is "[t]he final decision, order, judgment or decree of the superior court," A.R.S. § 12-913.

Under *Brumett*, however, the answer is clear: the 2018 minute entry is not a "final" decision and the 2019 judgment is a "final" judgment because it has Rule 54 language stating that it is a final judgment. 240 Ariz. at 431, ¶ 23. The Rules of Procedure for Judicial Review of Administrative Decisions—previously silent on this question—now also provide that any appeal must be from an order that "complies with Arizona Rule of Civil Procedure 54(b) or (c)." Ariz. R. P. JRAD 13. Under controlling caselaw and

now rule, the only appealable "final" order here is the 2019 judgment. ABC's appeal is therefore timely and this Court has jurisdiction.

CONCLUSION

The Court should vacate the fines imposed and should award ABC its fees and costs.

RESPECTFULLY SUBMITTED this 12th day of May, 2020.

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