

1 **CARPENTER HAZLEWOOD DELGADO & WOOD, PLC**
2 Attorneys at Law
3 1400 E. Southern Ave., Suite 400
4 Tempe, Arizona 85282
5 t (480) 991-6949, f (480) 991-7040
6 (Jason E. Smith - #023007)
7 (Carrie H. Smith - #022701)
8 (Chad P. Miesen - #024910)
9 PHXTWHS.0049

10 Attorneys for Plaintiff

11 **SUPERIOR COURT OF ARIZONA**
12 **MARICOPA COUNTY**

13 **PHOENIX TOWNHOUSE**
14 **HOMEOWNERS ASSOCIATION, an**
15 **Arizona nonprofit corporation,**

16 **Plaintiff,**

17 **vs.**

18 **ARIZONA OFFICE OF**
19 **ADMINISTRATIVE HEARINGS;**
20 **ARIZONA DEPARTMENT OF FIRE,**
21 **BUILDING AND LIFE SAFETY; and**
22 **HONORABLE BRIAN TULLY,**
23 **ADMINISTRATIVE LAW JUDGE;**

24 **Defendants,**

25 **and**

26 **RON MERITT AND JOHN**
27 **HERNANDEZ,**

28 **Real Parties in Interest.**

MICHAEL K. JEANES
Clerk of the Superior Court

By VOLANDA ESCALANTE, Deputy
Date 10/23/2008 Time 02:45 PM
Description Qty Amount
CASE# LC2008-000740-001

PLAINTIFF/APPELLANT 001 286.00

TOTAL AMOUNT 286.00
Receipt# 00010366680

LC2008-000740-001

Case No. _____

**COMPLAINT FOR SPECIAL
ACTION, DECLARATORY
JUDGMENT AND INJUNCTIVE
RELIEF**

29 The Plaintiff, Phoenix Townhouse Homeowners Association ("Association"), an
30 Arizona non-profit corporation, by and through undersigned counsel, respectfully submits
31 its Complaint for Special Action, with ancillary claims for declaratory and injunctive
32 relief, pursuant to the Arizona Rules of Procedure for Special Actions, as follows:

1 1. This Court has jurisdiction to hear and determine this Special Action
2 complaint and to grant the relief requested by virtue of Article VI, Section 18 of the
3 Arizona Constitution and Rule 4, Rules of Procedure for Special Actions.

4 2. Plaintiff is an Arizona non-profit corporation whose principal place of
5 business is in Maricopa County.

6 3. Defendant Office of Administrative Hearings (“OAH”) is a department of
7 the Executive Branch of the Arizona government, whose director is appointed by the
8 Governor and whose organic act is codified at A.R.S. §41-1092.01 *et seq.*

9 4. Defendant Department of Fire, Building and Life Safety (“DFBLS”) is also
10 a department of the Executive Branch of the Arizona government, whose boards and
11 director are appointed by the Governor and whose organic act is codified at A.R.S. § 41-
12 2141 *et seq.*

13 5. Judge Brian Tully is an administrative law judge on staff with the Office of
14 Administrative Hearings that was assigned to adjudicate the private party dispute
15 between the Association and the Real Parties in Interest pursuant to A.R.S. § 41-2198 *et*
16 *seq.*

17 6. The Real Parties in Interest are residents of Maricopa County who filed a
18 petition, pursuant to A.R.S. § 41-2198.01, for an administrative hearing with the DFBLS
19 on August 7, 2008 and are made defendants herein pursuant to Rule 2(a) of the Rules of
20 Procedure for Special Actions.

21 7. The Plaintiff contends that A.R.S. § 41-2198 *et seq.* violates the separation
22 of powers clause in Article III of the Arizona Constitution, which provides:

23 The powers of the government of the State of Arizona shall be divided into
24 three separate departments, the Legislative, the Executive, and the Judicial;
25 and, except as provided in this Constitution, such departments shall be
26 separate and distinct, and no one of such departments shall exercise the
powers properly belonging to either of the others.

27 8. The Arizona Legislature delegated to the executive branch the power to
28 adjudicate private parties disputes, but private party disputes may only be adjudicated in
the executive branch if the adjudicatory power is “auxiliary to and dependent upon the

1 proper exercise of legitimate regulatory power.” *J.W. Hancock Enterprises, Inc. v.*
2 *Arizona State Registrar of Contractors*, 142 Ariz. 400, 405, 690 P.2d 119, 124 (Ct.App.
3 1984).

4 13. The Plaintiff herein withheld filing this special action at an earlier date as it
5 was aware of a separate matter pending before the Superior Court in Maricopa County,
6 *Troon Village Ass’n v. Waugaman*, LC2007-000598-001DT, that also addressed the
7 constitutionality of the administrative hearing process for community associations.
8 Although a ruling was issued in that case on October 3, 2008 reversing the administrative
9 order against the community association in that case based upon the unconstitutionality of
10 A.R.S. § 41-2198 *et seq.* as it applies to community associations, the ruling appears to be
11 limited to the parties in that Administrative Review Act case pursuant to A.R.S. § 12-
12 911(A)(5). A copy of the ruling is attached hereto as Exhibit A, and the Plaintiff
13 incorporates the reasoning contained in the ruling into its argument both for the
14 acceptance of jurisdiction and the ultimate resolution of the issues.

15 14. On October 6, 2008, the Plaintiff filed a motion to dismiss the
16 administrative petition filed by the Real Parties in Interest. The motion to dismiss was
17 based upon the constitutional infirmities inherent in the statute and the resulting lack of
18 jurisdiction in the OAH and DFBS with respect to the Plaintiff and the claims by the
19 Real Parties in Interest.

20 15. On October 16, 2008, the Plaintiff also filed an Expedited Motion to Stay
21 the administrative hearing, which is scheduled for October 29, 2008 at 9:00 a.m., so that a
22 court with appropriate jurisdiction could make a final determination as to the
23 constitutional validity of the statute and the jurisdiction of the OAH and DFBS over this
24 and similar disputes.

25 16. Judge Tully denied both the motion to dismiss and the motion to stay on
26 October 16, 2008, stating that the “constitutional issues raised by Respondent should be
27 resolved in the Court rather than before an administrative tribunal” yet refused to stay the
28 hearing so that the Association could obtain that relief through the courts. A copy of the
order denying the motions is attached hereto as Exhibit B.

1 17. The Defendants herein are without jurisdiction over the Plaintiff inasmuch
2 as the statute on which they rely is unconstitutional.

3 18. The Plaintiff requests stay relief against the Defendants to prohibit them
4 from adjudicating the underlying administrative petition at the hearing scheduled for
5 October 29, 2008.

6 19. The Plaintiff also seeks injunctive relief to stop all other private party
7 adjudications by the OAH and/or DFBLs involving community associations under
8 A.R.S. § 41-2198.01, including the acceptance by DFBLs of further petitions and filing
9 fees from homeowners or other parties.

10 20. The Plaintiff also seeks declaratory relief under A.R.S. § 12-1831 *et seq.*
11 that the statute is unconstitutional, and, pursuant to A.R.S. § 12-1841(A), the Plaintiff is
12 also serving this complaint on the President of the Senate and the Speaker of the House at
13 the same time as the parties herein so that they may have the opportunity to be heard.

14 21. The Plaintiff does not have an equally plain, speedy and adequate remedy
15 by any appellate procedure from the actions of the DFBLs, OAH and Judge Tully
16 because the Plaintiff's only appellate remedy may be limited to the scope of review under
17 the Arizona Administrative Review Act, A.R.S. § 12-901 *et seq.* and will suffer
18 irreparable injury and damage unless the requested relief is granted by means of this
19 special action.

20 22. Special Action jurisdiction is appropriate as the issue is one of first
21 impression, aside from the administrative review decision of limited applicability; it is a
22 purely legal question; it is of statewide importance; and it is definitely likely to arise
23 again, as undersigned counsel has another client with a case that has been filed with the
24 DFBLs but has not yet been assigned to a judge at the OAH.

25 23. As a result of the foregoing, Judge Tully, the OAH and the DFBLs have
26 proceeded and/or are threatening to proceed without jurisdiction or legal authority and,
27 pursuant to Rule 3, Rules of Procedure for Special Actions, this matter is proper for
28 consideration by the Court as a special action.

1 WHEREFORE, Plaintiff requests that this Court accept jurisdiction of this Special
2 Action and issue an Order:

- 3 a. Declaring A.R.S. § 41-2198 *et seq.* void and unconstitutional as a violation
4 of the separation of powers doctrine;
- 5 b. Enjoining the Defendants from adjudicating this and other private party
6 disputes pursuant to A.R.S. § 41-2198 *et seq.*;
- 7 c. Awarding the Plaintiff its costs and attorneys' fees incurred herein; and
- 8 d. Granting Plaintiff such other relief deemed just and proper in the
9 circumstances.

10 Respectfully submitted this 23rd day of October, 2008.

11 **CARPENTER, HAZLEWOOD, DELGADO & WOOD, PLC**

12 By: _____

13 Jason E. Smith, Esq.
14 1400 E. Southern Avenue, Suite 400
15 Tempe, Arizona 85282
16 Attorneys for Plaintiff

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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2007-000598-001 DT

10/02/2008

HON. MARGARET H. DOWNIE

CLERK OF THE COURT
T. Melius
Deputy

TROON VILLAGE MASTER ASSOCIATION

CARRIE H SMITH

v.

ARIZONA STATE DEPARTMENT OF FIRE
BUILDING & LIFE SAFE (001)
NANCY J WAUGAMAN (001)

MICHELLE L WOOD
MELANIE C MCKEDDIE

OFFICE OF ADMINISTRATIVE
HEARINGS
REMAND DESK-LCA-CCC

RECORD APPEAL RULE / REMAND

The Superior Court has jurisdiction over this administrative appeal pursuant to the Administrative Review Act, A.R.S. §§ 12-901, *et seq.*

Factual and Procedural Background

Defendant Nancy Waugaman (“defendant” or “Waugaman”) is a member of the Troon Village Master Association (“plaintiff” or “Association”) by virtue of her ownership of real property within the Troon planned community. The Association is an Arizona non-profit corporation that manages the affairs and maintains the common areas of the community. In April 2007, Waugaman filed a complaint with defendant Arizona Department of Fire, Building and Life Safety (“Department”) – an executive branch agency.¹ She challenged a resolution approved by the Association’s Board of Directors (“Board”) that interpreted the requirements for amending the community’s covenants, conditions and restrictions (CC&Rs). The resolution stated:

¹ The Department is appearing as a nominal party in these proceedings.
Docket Code 512