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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.

> The Board of Directors interprets Section 11.02 to mean that, to amend the Declaration, Owners holding at least eighty percent (80%) of the votes that are cast, in person or by absentee ballot, at a meeting duly called, pursuant to the Articles and Bylaws, must vote to affirm the amendment.

Waugaman also challenged amendments to the CC&Rs that were made pursuant to the standard enunciated in the resolution.

An evidentiary hearing regarding Waugaman's complaint was held on July 31, 2007 at the Office of Administrative Hearings (OAH). Administrative Law Judge (ALJ) Michael K. Carroll presided over the proceedings. In a written decision dated August 13, 2007, the ALJ:

- Vacated the Board's resolution interpreting the CC&R amendment provisions.
- Vacated all CC&R amendments approved under the "new" standard.
- Ordered the Association to reimburse Waugaman's $2,000.00 filing fee.

The Association subsequently filed a timely complaint for judicial review with this court.

Legal Analysis

In 2006, the Arizona legislature established a new administrative process for resolving disputes between homeowners and homeowners' associations. *See* A.R.S. § 41-2198(1) and (2). The Department receives a petition for hearing, accompanied by a filing fee, from either a homeowner or a homeowners' association. The Department mails a copy of the petition, along with notice to the named respondent that a response is due within 20 days. After receiving a response, the Director "shall promptly review the petition for hearing and, if justified, refer the petition to the office of administrative hearings." A.R.S. § 41-2198.01(E). Administrative law judges at OAH hold hearings and adjudicate disputes arising out of: (1) statutes governing condominiums and planned communities;[2] and (2) the governing documents of a condominium or planned community, such as CC&Rs and bylaws. The Association contends that this legislative delegation of authority to the executive branch of government violates Article III of the Arizona Constitution. Because this argument is potentially dispositive, the court addresses it first.

[2] A.R.S. §§ 33-1201 and -1801, *et seq.*

Every duly-enacted state and federal law is entitled to a presumption of constitutionality. *Ruiz v. Hull,* 191 Ariz. 441, 957 P.2d 984 (1998). The party challenging the constitutionality of a statute bears the burden of overcoming a strong presumption of constitutionality. *Grammatico v. Industrial Comm'n,* 208 Ariz. 10, 90 P.3d 211 (App. 2004). Doubts are resolved in favor of upholding a statute against constitutional challenges. *Aros v. Beneficial Arizona, Inc.,* 194 Ariz. 62, 67, 977 P.2d 784, 789 (1999).

Article III of the Arizona Constitution states:

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

Article III does not require absolute compartmentalization of the branches of government. "[S]ome 'blending' of authority is permissible." *Cactus Wren Partners v. Arizona Dept of Building and Fire Safety,* 177 Ariz. 559, 562, 869 P.2d 1212, 1215 (App. 1993), *citing J.W. Hancock Enterprises, Inc. v. Arizona State Registrar of Contractors,* 142 Ariz. 400, 405, 690 P.2d 119, 124 (App. 1984). The mandate of the separation of powers doctrine is to protect one branch of government against the overreaching of any other branch. *Seisinger v. Siebel,* ___ Ariz. ___, ___ P.3d ___ (App. 2008); A.R.S. Const. Art. 3.

The parties agree that the court of appeals' decision in *Cactus Wren* is the seminal authority, though they disagree on its application. The plaintiff in *Cactus Wren* operated a mobile home park – leasing spaces to tenants and charging them for sewage services and trash removal, plus a monthly administrative fee. Mobile home park tenants filed a petition with the Department, alleging that Cactus Wren's administrative fee and its charges for trash and sewage services violated the Arizona Mobile Home Parks Residential Landlord and Tenant Act ("Act").[3] After an evidentiary hearing, a hearing officer appointed by the Department found in favor of the tenants. The Department's director affirmed the hearing officer's decision.

Cactus Wren sought judicial review in the superior court, which held that the adjudicative power exercised by the Department did not violate the separation of powers doctrine. The Court of Appeals affirmed. It held that an administrative agency may resolve disputes between private parties "if this authority is auxiliary to and dependent upon the proper exercise of legitimate regulatory power." 177 Ariz. at 562, 869 P.2d at 1215. The court considered the purposes for which the Department was created – specifically citing A.R.S. § 41-2141, which provides, in pertinent part:

[3] A.R.S. § 33-1401, *et seq.*

§ 41-2141. Department of fire, building and life safety; establishment; purposes; components

A. The department of fire, building and life safety is established to further the public interest of safety and welfare by maintaining and enforcing standards of quality and safety for manufactured homes, mobile homes and factory-built building and by reducing hazards to life and property through the maintenance and enforcement of the state fire code by providing fire training, fire investigations and public life safety education as provided for in this chapter. It is also the purpose of the department to establish a procedure to protect the consumer of such products and services.

B. The department of fire, building and life safety consists of the board of manufactured housing, the installation standards committee, the state fire safety committee and the director of the department. The director's office consists of the deputy director, the office of manufactured housing, the office of state fire marshal and the office of administration.

For reasons discussed herein, this court concludes that the Department's resolution of the dispute between the Association and Waugaman was not "auxiliary to and dependent upon the proper exercise of legitimate regulatory power." The court has considered the four-part test enunciated in *J.W. Hancock Enterprises, Inc. v. Arizona State Registrar of Contractors*, 142 Ariz. 400, 690 P.2d 119 (App. 1984), which sets forth the following non-exclusive factors:[4]

1. The "essential nature" of the power exercised;

2. The degree of control exercised by the agency in the exercise of the power;

3. The legislature's objective in establishing the agency's functions; and

4. The practical result of the mingling of roles.

The "Essential Nature" of the Power Exercised

Cactus Wren makes it clear that the power exercised by the Department and OAH is judicial in nature. The ALJ hears and resolves disputes between private parties. The ALJ may also levy civil penalties. "Generally, the adjudication of a dispute between two private parties is

[4] *Cactus Wren*, 177 Ariz. at 562, 869 P.2d at 1215.

considered judicial." *J.W. Hancock*, 142 Ariz. at 406, 690 P.2d at 125. Moreover, the ALJ's order "is enforceable through contempt of court proceedings[,]" A.R.S. § 41-2198.02(B), further demonstrating the judicial nature of the process.

The Degree of Control Exercised by the Agency in the Exercise of its Power

In analyzing the degree of control exercised by the agency in the exercise of its power, the following language from *Cactus Wren* is instructive:

> The hearing officer function is not such that it constitutes a "coercive influence" upon the judiciary. [citations omitted] To the contrary, judicial review of the Department's decision is afforded a party by means of the Administrative Review Act, A.R.S. §§ 12-901 through -914, 41-2198.04(E), a critical judicial "check" of administrative power.

177 Ariz. at 563, 869 P.2d at 1216.

As in *Cactus Wren*, a homeowner or homeowners' association aggrieved by an ALJ's decision may seek judicial review in the superior court. Additionally, A.R.S. § 41-2198.03 provides that the statutes "shall not be construed to limit the jurisdiction of the courts of this state to hear and decide matters pursuant to . . . the statutes or condominium documents that regulate condominiums or the statutes or community documents that regulate planned communities."

The Legislature's Objective in Establishing the Agency's Functions

This case begins to meaningfully diverge from *Cactus Wren* when one considers the third prong of the *J.W. Hancock* test: the legislature's objective in establishing the agency's functions. In *Cactus Wren*, it was significant that the adjudicatory role conferred on the executive branch vis-à-vis mobile home parks merely supplemented the Department's pre-existing regulatory mission. The court stated:

> [R]egarding the nature of the legislature's objective, A.R.S. § 41-2198 permits a hearing officer to preside over and decide matters relating to the Act. *See also* A.R.S. § 41-2198.03. **This power supplements the Department's mission as expressed in its statutory purpose and that of the Act**. *See* A.R.S. §§ 33-1402, 41-2141(A). **While the Department does not license mobile home parks, it has other legitimate regulatory responsibilities which may, in the opinion of the legislature, make formal licensure unnecessary**. *See McHugh*, 261 Cal.Rptr. 310, 777 P.2d 91 (although board established by municipality was not licensing agency, it legitimately regulated landlords by setting and regulating maximum rents in housing market). [Emphasis added.]

177 Ariz. at 563, 869 P.2d at 1216.

The *Cactus Wren* court noted that other jurisdictions also require a clear nexus between the agency's primary regulatory powers and any adjudicatory authority conferred on it by the legislature, stating:

> [Our] analysis is not unique. For example, the California Supreme Court directs that an administrative agency may constitutionally hold hearings at which it determines facts and applies the law to those facts if:
>
> (i) such activities are authorized by statute or legislation and are *reasonably necessary* to effectuate the administrative agency's *primary, legitimate regulatory purposes,* and (ii) the *"essential" judicial power* (i.e., the power to make enforceable, binding judgments) *remains ultimately in the courts through review of agency determinations.*
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> *McHugh v. Santa Monica Rent Control Board,* 49 Cal.3d 348, 261 Cal.Rptr. 318, 333, 335, 777 P.2d 91, 106, 108 (1989) (emphasis original).[5]

177 Ariz. at 562, 869 P.2d at 1215.

In *Cactus Wren*, the Department of Fire, Building and Life Safety had a clearly-defined and delegated regulatory role relating to mobile homes. Title 41, chapter 16 is replete with statutory linkages between the Department and mobile homes.[6] It is also significant that the Department was expressly created to, *inter alia,* maintain and enforce quality and safety standards for mobile homes and to protect consumers of mobile homes. A.R.S. § 41-2141.

In the case at bar, the connection between the Department of Fire, Building and Life Safety and the regulation of planned communities is virtually non-existent – with the exception of the very statutes being challenged. The legislature has not established a regulatory framework for community associations within the Department or any other executive agency. Unlike many agencies, the Department does not even retain the power to accept, reject, or modify an ALJ's rulings regarding disputes between homeowners and their associations; the ALJ's determination

[5] In *McHugh*, the Supreme Court of California held that the Rent Control Board –an executive branch entity -- could adjudicate tenants' claims for excess rents without violating the separation of powers doctrine. The court determined that such actions, "although judicial in nature, are both authorized by the Charter Amendment **and reasonably necessary to accomplish the administrative agency's primary, legitimate regulatory purposes**, i.e., setting and regulating maximum rents in the local housing market." [emphasis added]

[6] For example, A.R.S. § 41-2142 sets forth 40 separate definitions applicable to Chapter 16, all of which are related to mobile homes and manufactured housing, not condominiums or planned communities. A.R.S. §§ 41-2143 and 41-2144, relating to the board of manufactured housing, has no application to condominiums or planned communities.

is final. A.R.S. § 41-2198.02. This is another distinguishing factor from *Cactus Wren*, where the Department's director reviewed and adopted the hearing officer's decision **and** had the authority to consider and deny a petition for rehearing filed by Cactus Wren. Unlike administrative proceedings involving manufactured and mobile homes, the Department is expressly prohibited from considering a petition for rehearing involving condominiums and planned communities. A.R.S. § 41-2198.04(A) ("Except for an action relating to condominium documents or planned community documents or the statutes regulating condominiums or planned communities, a person aggrieved by a decision of the administrative law judge may apply for a rehearing by filing with the director a petition in writing . . . ").

The Practical Result of the Mingling of Roles

Finally, the court considers the practical result of the mingling of roles. Once again, it derives guidance from *Cactus Wren*, which states:

> [A]s a practical matter, the Department's objective of administering compliance with the Act is furthered by inclusion of its hearing officer function. This purpose would be less easily met if matters relating to the Act were left to the judicial process. [citations omitted] "[T]he limited ancillary power to construe contracts does not threaten the core functions of the courts." [citation omitted] Any necessity for the courts to intervene in resolving landlord-tenant disputes is preserved by the provisions of the Administrative Review Act . . .

177 Ariz. at 563, 869 P.2d at 1216.

As discussed above, the Department is integrally involved with regulating and overseeing mobile home-related matters. As such, the *Cactus Wren* determination that the Department's "objective of administering compliance" was furthered by the administrative hearing function makes sense. Here, however, the hearing function is *not* tied to any statutory or regulatory mission of the Department. The legislature may have had valid policy reasons for devising a different system for resolving homeowner association disputes. But it appears that the Department of Fire, Building and Life Safety is a mere figurehead or "parking lot" for those disputes. In the final analysis, the court concurs with the following argument by the Association:

> When developing this ALJ process for planned communities, the Legislature failed to take the basic step of delegating regulatory authority to an executive agency to carry out the intent of the Legislature's enactments on community associations. The Legislature bypassed the standard and necessary procedure of granting authority for the [Department] to "regulate" planned communities and proceeded to simply delegate judicial functions to the executive branch through an administrative agency. Although its brief claims that the

> [Department] regulates mobile home parks, which are similar to planned communities, the Attorney General's office fails to identify a single way in which the [Department] actually exerts regulatory authority over planned communities.
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> Plaintiff/Appellant's Response to the Attorney General's Brief, p. 3.

An administrative agency may resolve disputes between private parties if this authority is auxiliary to and dependent upon the proper exercise of legitimate regulatory power. In the context of disputes between homeowners and homeowners' associations, there are no defined regulatory duties vested in the Department or any other executive branch agency. Thus, the legislature's delegation of authority to the Department violates the separation of powers doctrine.[7]

Conclusion

IT IS ORDERED reversing the final administrative decision issued in this matter.

IT IS FURTHER ORDERED rescinding the stay issued on November 28, 2007 as moot.

IT IS FURTHER ORDERED that the Association is entitled to the return of the $2000.00 bond it previously posted with the clerk of the court.

/s/ Margaret H. Downie
HON. MARGARET H. DOWNIE

[7] Based on this determination, the court need not address the other arguments raised by the parties.