George K. Staropoli
5419 E. Piping Rock Rd
Scottsdale, AZ 85254
602-228-2891

Pro Se

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

PHOENIX TOWNHOUSE HOMEOWNERS ASSOCIATION, an Arizona nonprofit corporation, **Plaintiff,** **vs.** **ARIZONA OFFICE OF ADMINISTRATIVE HEARINGS; ARIZONA DEPARTMETN OF FIRE, BUILDING AND LIFE SAFETY; and HON. BRIAN TULLY, ADMINISTRATIVE LAW JUDGE** **Defendants,** **and** **RON MERITT AND JOHN DEFENDANTS** Real Parties in Interest	**NO. LC 2008-000740** **INTERVENOR GEORGE K. STAROPOLI ANSWER TO COMPLAINT** (assigned to the Honorable Paul J. McMurdie)

Notice is given, pursuant to the Ariz. R. Civil P. R24(a)(2), (b)(2), and (c) that George K. Staropoli, a member of a homeowners association in Maricopa County who seeks to protect

interest concerning a matter of law and fact in common, submits his Answer to Plaintiff's Complaint.

Intervenor George K. Staropoli ("Intervenor") for his answers to plaintiff's complaint hereby admits, denies and alleges as follows:

1. Intervenor admits paragraphs 1 - 6.

2. Intervenor denies the allegations in paragraphs 7. The plaintiff fails to cite the discussion in Hancock (*J, W. Hancock Enterprises, Inc. v. Arizona State Registrar of Contractors*, 142 Ariz. 400, 405, 690 P.2d 119, 124 (App.1984)) on "Constitutionality" in which the court analyzed and discussed the practicality and acceptance by the courts of a commingling of powers among the branches, "*Despite language which appears to absolutely prohibit any commingling of the three types of powers, Arizona courts have not required absolute separation of powers*." (p. 123). The other possible justification for this statement is the belief in the validity of the trial court Waugaman decision (*Troon Village v. Waugaman*, LC 2007-000598) on the DFBLS adjudication of HOA disputes. Paragraph 5 below addresses *Waugaman*, and is incorporated and part of this denial. The Attorney General declined to appeal the *Waugaman* decision.

3. Intervenor denies allegation in paragraph 8 that an agency "may only" adjudicate private party disputes if it possess ancillary regulatory powers. This quote from *Hancock* is an explanation of the relevance of its citation of *Udall v. Severn*, 52 Ariz. 65, 79 P.2d 347 (1938) as an example that the co-mingling of powers is not absolute. The *Hancock* quote, in full, states: "*one branch may exercise the powers of another branch when such exercise is merely auxiliary to and dependent upon the proper exercise of legitimate power of the one branch"*. Nothing is said about the absolute requirement of proper regulatory authority.

4. Paragraphs numbered 9 - 12 are omitted in plaintiff's complaint.

5. Intervenor denies the validity of the *Waugaman* order, in paragraph 13, as it relied heavily on Cactus Wren (*Cactus Wren Partners v. Arizona Department of Building and Fire Safety*, 869 P.2d 1212 (App. 1993) which relied on the error in *Hancock*. Although the *Hancock* four-fold test was used in the *Waugaman* analysis, Judge Downey erred in her analysis, as indicated in paragraphs 3 and 10 herein. She relied on the *Cactus Wren* finding that DFBLS did have regulatory powers over the Act, *"[T]his [hearing] power supplements the Department's mission as expressed in its statutory purpose",* although there is no statutory provision within the Act (ARS 33-1400 et seq.) or within DFBLS (ARS 41-2141 et seq.) granting DFBLS regulatory powers over the ACT, as found with respect to HOAs within the planned community act (see ARS 33-1803(E)). The Waugaman ruling borrows from the plaintiff's argument that DFBLS did not have regulatory powers over HOAs, and therefore, was an intrusion on the judiciary branch. The attorneys for the plaintiff in *Waugaman* are the same attorneys for this plaintiff.

6. Intervenor admits paragraphs 14 - 16.

7. Intervenor denies the allegations in paragraph 17 that the statute in question is unconstitutional. The Attorney General filed a brief ("Attorney General's Brief in Support of the Constitutionality of ARS §§ 41-2198 - 2198.05", June 13, 2008) in *Waugaman* supporting the constitutionality of the statute in question, and Intervenor incorporates the reasoning contained in the brief into its argument both for the acceptance of jurisdiction and the ultimate resolution of the issues, attached hereto as Exhibit A . In its Answer in *Terravita v. Brown* (LC2007-000588) the Attorney General denied that the statute was unconstitutional (Answer of Department of Fire, Building and Life Safety, October 10, 2007, III lines 6-8), but did not participant any

further since the question of constitutionality was later determined to not have been raised in the case.

The only basis for such an allegation is the *Waugaman* decision that is based on false assumptions used in the *Hancock* case (see paragraph 10 herein), in regard to the requirement for an agency to possess authority it regulate if it is to adjudicate private party issues. The *Waugaman* decision also relied on the *Cactus Wren* decision that relied on the error of *Hancock*, with respect to DFBLS possessing an alleged required regulatory authority, as well as on the erroneous belief that DFBLS has indeed regulatory authority over the mobile home residential landlord tenant act ("Act") (ARS 33-1400 et seq.). Unlike this case, there is no grant of authority to DFBLS to regulate this Act in the DFBLS statutes, ARS 41-2141 et seq. or in the Act., but merely to provide ministerial functions relating the mobile home fund, and to notify the Attorney General's office. Although, as in the case here, there is a direct grant of authority to adjudicate mobile home tenant disputes (ARS 41-2198). The conclusion is erroneous and is relevant only to the extent to determine the infringement on the separation of powers as set forth in the Bennett test. *State ex rel. Schneider v. Bennett*, 219 Kan. 285, 547 P.2d 786 (1976) (cited in *Hancock*, p. 124, and alternately referred to as the "four-fold test").

8. Intervenor denies paragraphs 18 - 23 as they are not claims but further remedies sought by the plaintiff.

Affirmative Defenses

9. Intervenor, as affirmative Defenses to the allegations contained in plaintiffs Complaint, in addition to those already set forth in this Answer, alleges all defenses allowed and enumerated under A.R.C.P Rule 8(c) and hereby incorporates these defenses by this reference.

10. The treatment of the regulatory requirement in *Hancock* is not dispositive in this case here where DFBLS was granted direct authority by statute to adjudicate complaints relating to the Act and to HOAs (ARS 41-2198). *Hancock* involved the Register of Contractors ("ROC") and the court interpretation of implied authority, *"A reading of the statute[ARS 32-1154(3)] in question makes it clear that implicitly the legislature sought to delegate just such authority."*(p.123). (The current ARS 32-1156 does specifically grant OAH authority to hear complaints, but it was added in 2000, while *Hancock* used the 1977 ARS). This is followed by a statement that ROC is "*authorized to construe contracts only ancillary to its regulatory purpose"* (p. 125), but while there is no factual support for this statement, it must flow reasonably flow from the court's interpretation. The court then concludes at the end of p.125 that the resolution of contractual disputes ancillary to ROCs regulatory purpose doesn't violate the separation of powers doctrine. This is a specific finding in a case where there's no direct statutory authority for adjudication, but the court's interpretation of limited adjudication logically confined to ROC's mission -- to regulate contractors. But there is a proper regulatory function, which distinguishes the *Hancock* case from this case. Here there is a direct statutory adjudication authority and there is no need to divine legislative intent and tie it to an agency's regulatory mission. The decision regarding constitutionality must therefore fall to the *Bennett* or four-fold test used in both *Hancock* and *Cactus Wren*. There is nothing in the *Bennett* test that considers proper regulatory authority per se. The requirement for adjudication as ancillary to proper regulatory authority is not a requirement of the *Bennett* four-fold test for a

violation of the separation of powers. It has only entered the picture to reflect the agency's limited judicial powers as confined to contractors and is, therefore, an acceptable, non-threat blending of powers.

11. Exhibit A of the Complaint contains the *Waugaman* decision that not only makes reference to *Hancock*, but *Cactus Wren* also. Judge Downie makes a strong case for the requirement that an agency must have regulatory functions in order to adjudicate private complaints: DFBLS "*had a clearly-defined and delegated regulatory role relating to mobile homes*", that the DFBLS governing statute, Title 41, chapter 16, "*is replete with statutory linkages between the Department and mobile homes*", and that the regulation of planned communities *"is virtually non-existent*." (p. 6). She then makes a hollow argument pertaining to the inability of DFBLS to overrule the ALJ decision as an indication of non-regulation, in spite of the fact many agencies are not permitted to overrule ALJ decisions. In view of the facts in *Hancock* contained in paragraph 10, this fixation on regulatory authority is misplaced in view of the direct statutory authority to adjudicate contractual disputes in both the Act and planned communities.

12. Judge Downie's assertion (p. 7) that *"[T]he Department is integrally involved with regulating and overseeing mobile home-related matters" is false*". There is no statutory authority for DFBLS to regulate landlord tenant contracts. While Title 41, chapter 16 governing DFBLS may be replete with authority over the physical aspects pertaining to homes, it is totally devoid of any mention of land-tenant relationships. And the powers and functions a state agency must be clearly granted by the legislature. "*Because agencies are creatures of statute, the degree to which they can exercise any power depends upon the legislature's grant of authority to the agency. 'An agency ... has no powers other than those the legislature has delegated to it....' Facilitec v. Hibbs*, 80 P.3d 765

(2003). Although ARS 41-2198 grants DFBLS the authority to adjudicate respective complaints, DFBLS has no statutory authority to regulate landlord-tenant relationships within the Act, as is granted within the planned communities act by ARS 33-1803(E).

13. As presented in this Answer, the analysis of *Cactus Wren* in the *Waugaman* decision is short on the restricted and highly limited powers of the ALJ to decide a narrow area of contract violations: only those pertaining to Chapters 9 and 16 of Title 33 that pertain to condos and planned communities, and only violations of the governing documents that pertain to disputes between the homeowner and the HOA. There is no usurpation of judicial powers by OAH adjudication in this severely restricted legal playing field.

Prayer for Relief

Wherefore, Intervenor requests the Court for a judgment in favor of the defendants and Intervenor against the plaintiff as follows,

1. That the adjudication of the Condominium Act and Planned Community Act by the Department of Fire, Building and Life Safety and the Office of Administrative Hearings granted under ARS §§ 41-2198 et seq. does not violate the separation of powers doctrine of Article III of the Arizona Constitution;

2. Remand the case to the OAH to proceed with the adjudicating of the OAH petition that gave birth to this special action, matter as per ARS §§ 41-2198 et seq.;

3. Grant defendants such other relief deemed just and proper in the circumstances.

RESPECTFULLY SUBMITTED this _____day of February , 2009

George K. Staropoli
5419 E. Piping Rock Rd
Scottsdale, AZ 85254
Pro Se

ORIGINAL filed and COPY of the foregoing
mailed this _____ day of February, 2009 with:

Maricopa County Superior Court Clerk of the Court
101/201 W. Jefferson
Phoenix, AZ 85003

COPY of the foregoing mailed this ___ day of February, 2009 to:

Hon. Paul J. McMurdie
101/201 W. Jefferson
Phoenix, AZ 85701

Jason E. Smith, Esq.
Carpenter, Hazlewood, Delgado & Wood, PLC
400 E. Southern Ave., Ste. 640
Tempe, AZ 85282

Office of Administrative Hearings
400 W. Washington, Ste. 101
Phoenix, AZ 85007

Ron Merritt/John Hernandez
3154 E. Brookwood
Phoenix, AZ 85048

Robert Barger, Director
Arizona Department of Fire, Building and Life Safety
1110 W. Washington St., St. 100
Phoenix, AZ 85087

Camila Alarcon
Assistant Attorney General
1275 W. Washington
Phoenix, AZ 85007-2997

_____
George K. Staropoli

EXHIBIT A.

Attorney General's Brief in Support of Constitutionality

Terry Goddard
Attorney General
Firm Bar No. 14000

Paula S. Bickett
Chief Counsel, Civil Appeals
Office of the Solicitor General
1275 West Washington – EXO/SGO
Phoenix, Arizona 85007-2926
State Bar No. 6821
Tel: (602) 542-8304
Fax: (602) 542-8308

E-mail Address for Superior Court Clerk Use Only:
AppealsOpinionsElectionsEthics@azag.gov

ARIZONA SUPERIOR COURT

COUNTY OF MARICOPA

Troon Village Master Association, an Arizona non-profit corporation, Plaintiff, v. Arizona Department of Fire, Building & Life Safety; and Nancy J. Waugaman, an unmarried woman. Defendants.	Case No. LC-2007-000598-001DT **THE ATTORNEY GENERAL'S BRIEF IN SUPPORT OF THE CONSTITUTIONALITY OF A.R.S. §§ 41-2198 to -2198.05** (Assigned to the Honorable Margaret H. Downie)

Pursuant to A.R.S. § 12-1841(A), the Attorney General files this brief in support of the constitutionality of A.R.S. §§ 41-2198 to -2198.05. These statutes authorize the Office of Administrative Hearings (OAH) and the Department of Fire, Building, and Life Safety (the Department) to resolve disputes between planned community associations and homeowners that arise out of the planned community documents and the statutes governing planned communities, A.R.S. §§ 33-1801 to 1816. The Attorney General urges

the Court to find that these statutes do not do not unconstitutionally delegate judicial functions.

STATEMENT OF FACTS[1]

The Planned Community Act.

In 1994, the Legislature first enacted statutes regulating planned communities. 1994 Ariz. Sess. Laws, ch. 310, § 1. The initial provisions allowed the board of directors to impose late charges and reasonable penalties after notice and an opportunity to be heard, required that the association's meetings be open to members, required that the association's financial records be available for inspection by members, and required the seller of a planned community unit to disclose pertinent information about the association and its bylaws and rules. *Id.* The original enactment provided a right of action for purchaser damaged by a unit owner's failure to disclose the required information about the association but did not otherwise provide a right of action for persons harmed by violations of the statutes. *Id.*

From 1994 to 2006, the Legislature amended the statutes regulating planned communities, currently codified at A.R.S. §§ 33-1801 to -1816 (the Planned Community Act), almost every year and sometimes through multiple bills throughout the legislative year. *See, e.g.,* 1996 Ariz. Sess. Laws, ch. 147, § 8; 1996 Ariz. Sess. Laws, ch. 236 (providing, among other changes, that an association has a lien on a unit for past due assessments and late charges and that the prevailing party in an action brought to foreclose

[1] Because the Attorney General is arguing in support of the constitutionality of the statutory scheme at issue here and will not address the other issues in this case, his Statement of Facts discusses the statutory scheme of the Planned Community Act and the Department's adjudicatory procedures and legislative history.

a lien is entitled to costs and reasonable attorneys' fees); 1997 Ariz. Sess. Law, ch. 40 (amending the provision that granted a right of action for damages for failure to disclose association information upon resale to include the right to attorneys' fees and specified that an association could be sued for failure to disclose); 1999 Ariz. Sess. Laws, ch. 231, § 2 ; 2002 Ariz. Sess. Law, ch. 96, § 2 ; 2002 Ariz. Sess. Law, ch. 184, § 1 (added a provision prohibiting the association from prohibiting the display of a flag); 2003, ch. 99, § 1 (added a provision prohibiting the association from prohibiting residents who are public service employees from parking work-required vehicles); 2004 Ariz. Sess. Law, ch.57, § 2, ch. 72, § 2 (requiring the association's board of directors to conduct an annual financial audit), ch. 114, § 5, ch. 166, § 1 (adding protection for residents who are police and fire protection employees to park work-required vehicles), ch. 245, § 2, ch. 299, § 1 (prohibiting associations from prohibiting the display of political signs), ch. 312, § 5 (prohibiting an association board member from voting on matters when he or she has a conflict of interest), ch. 342, § 2 (amending the provision that allowed the association to impose a lien for assessments to include late fees and attorneys' fees in the lien); 2005 Ariz. Sess. Laws, ch.106, § 2, ch. 132, §§ 14, 16, ch. 269, §§ 5 to 8 (adding provisions governing proxy voting and removal of members of the association's board of directors), 2006 Ariz. Sess. Laws, ch. 71, §§ 5 to 8 (requiring notice to homeowners before assessing penalties), ch. 72, § 2, ch. 75, § 2, ch. 173, § 1. Obviously, the Legislature devoted substantial time and effort in developing the statutes that regulate planned community associations.

The Adjudicatory Procedures.

In 2006, the Legislature amended A.R.S. §§ 41-2198 to -2198.05 to authorize the Department and OAH to "adjudicate complaints regarding and ensure compliance with" planned community documents and the Planned Community Act, A.R.S. §§ 33-1801 to -1816. 2006 Ariz. Sess. Laws, Ch. 324, § 6. It also amended a portion of the Planned Community Act to cross reference A.R.S. § 41-2198.01. *Id.* § 2. In supporting this amendment, Representative Farnsworth "advised that homeowners' associations continue to be an issue" and that going to court was not an adequate remedy for homeowners when paying the assessment would be less expensive. *Minutes of Meeting Before H. Comm. on Judiciary on Feb. 16, 2007*, 47th Leg., 2nd Reg. Sess. 10 (Ariz. 2007) (attached hereto). Representative Farnsworth noted that because homeowner associations have "automatic statutory lien authority and foreclosure authority," "homeowners generally decide to pay the assessments or fees even if they disagree with them." *Id.* He stated that the purpose of the amendment was to create a "mechanism to allow HOAs and homeowners to have a reasonable resolution at a reasonable cost." *Id.* Cliff Vanell, the Director of OAH, supported the amendment, noting that it was "within the existing mission of OAH." *Id.*

Under A.R.S.§ 41-2198.01(B), if an owner and a planned community association have a dispute, either may petition the Department for a hearing concerning violations of the planned community documents or statutes that regulate planned communities. However, the Department does not have jurisdiction to hear disputes that are among or between owners and do not involve the association. *Id.* After receiving the petition and filing fee, the Department must mail a copy of the petition to the respondent and notify

him or her of the right to respond within twenty days. A.R.S. § 41-2198.01(D). After receiving the response, the Department's director must review the petition to determine if it is justified, and if it is, refer the petition to OAH. A.R.S. § 41-2198.01(E). The director must issue a default if the respondent fails to answer and may informally dispose of any contested case. A.R.S. § 41-2198.01(F), (G).

If the Department's director refers the petition to OAH, the petition is assigned to an administrative law judge (ALJ) who hears the case in accordance with A.R.S. § 41-1092.07.[2] This section provides for an informal hearing in which each party is permitted to present relevant evidence and cross-examine witnesses. A.R.S. § 41-1092.07. After the hearing, the ALJ may order any party to abide by the statute or community document at issue and "may levy a civil penalty on basis of each violation." A.R.S. § 41-2198.02(A).

The ALJ's order is a final administrative decision and is enforceable through contempt of court. A.R.S. § 41-2198.02(B). Under A.R.S. § 41-1092.08(H), a party may appeal the final administrative decision to this Court. The ability to use the procedures in A.R.S. §§ 41-2198 to -2198.05 should "not be construed to limit the jurisdiction of the courts of this state to hear and decide matters pursuant to the . . . statutes and documents that regulate planned communities. A.R.S. § 41-2198.03(B).

[2] Under A.R.S. 41-1092.01(C)(7), the director of OAH must maintain "a program for the continuing training and education" of ALJs," which must require that the ALJ "receive training in the technical and subject matter areas of the sections to which the administrative law judge is assigned." The director is also required to "[s]ecure, compile and maintain all decisions, opinions or reports of administrative law judges" under A.R.S. §§ 41-1092 to -1092.12. A.R.S. § 41-1092(C)(6).

ARGUMENT

The Statutes that Authorize the Department and OAH to Resolve Disputes Between Owners and Planned Community Associations Do Not Violate Article III.

The Plaintiff, Troon Village Master Association (Troon Village), argues that the Legislature impermissibly delegated judicial authority to the executive branch when it authorized the Department to adjudicate community association cases. Plaintiff/Appellant's Opening Brief at 13-18. This argument fails because this adjudicatory authority is a proper exercise of regulatory authority under the court of appeals' analysis in *Cactus Wren v. Dep't of Bldg. & Fire Safety*, 177 Ariz. 559, 869 P.2d 1212 (App. 1994).

Article III of the Arizona Constitution provides that the powers of Arizona's government will be divided into the legislative, executive, and judicial departments and "such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others." "[T]he separation of powers doctrine does not forbid all blending of powers, but only is intended to keep one branch of government from exercising the *whole power* on another branch." *J.W. Hancock Enterprises, Inc. v. Ariz. State Registrars of Contractors*, 142 Ariz. 400, 405, 690 P.2d 119, 124 (App. 1984) (emphasis added).

In *Cactus Wren*, 177 Ariz. at 561, 869 P.2d at 1214, the court of appeals addressed whether A.R.S. §§ 41-2198 to -2198.03 (1988), which authorized the Department (then called the Department of Building and Safety) to resolve disputes between private parties, infringed unconstitutionally upon the powers of the judiciary. The court first noted that "an administrative agency may resolve disputes between private parties if this authority is

auxiliary to and dependant upon the proper exercise of legitimate regulatory authority." *Id.* at 562, 869 P.2d at1215. The court determined that the authority for the Department's hearing officer to resolve disputes between mobile home parks and tenants was a proper exercise of regulatory authority. *Id.* at 562-63, 869 P.2d at 1215-16. In reaching this conclusion, the court looked to the Department's regulatory authority under A.R.S. § 41-2141(A) and the purpose of the hearing officer function in A.R.S. § 41-2198 (1988), which was to "adjudicate complaints regarding and ensure compliance with" the Arizona Mobile Home Parks Residential Landlord and Tenant Act. *Id.* at 562, 869 P.2d at 1215. The court also examined the purpose of the Arizona Mobile Home Parks Residential Landlord and Tenant Act, finding that its purpose was "'[t]o simplify, clarify and establish the law governing the rental of mobile home spaces and rights and obligations of landlord and tenant' and '[t]o encourage landlord and tenant to maintain and improve the quality of mobile home housing.'" *Id.* at 562-63, 869 P.2d at 1214-15 (quoting A.R.S. § 33-1402).

The court then applied the four-factor test, which it had adopted in *J.W. Hancock* to analyze a separation-of-powers claim that a legislative scheme that conferred adjudicative powers on an administrative agency infringed on judicial powers. *Id.* The *J.W. Hancock* test considers the following, non-exclusive factors: "(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." *Id.* at 562, 869 P.2d at 1214 (quoting *J.W. Hancock*, 142 Ariz. at 405, 690 P.2d at 1214). Although the court recognized that the power exercised by the Department through its hearing officer was judicial, it concluded that "the hearing

officer function within the Department d[id] not usurp the authority of the judiciary." *Id* at 563, 690 P.2d at 1215. Application of the other factors supported its conclusion: there was judicial review of the Department's decision; the Legislature's purpose was to augment the Department's regulatory powers; and "as a practical matter, the Department's objective of administering compliance with the [Arizona Mobile Home Parks Residential Landlord and Tenant] Act [were] furthered by inclusion of its hearing officer function." *Id.*

The statutory scheme that the court upheld in *Cactus Wren* is very similar to the statutory scheme challenged here. In 2006, the Legislature amended A.R.S. §§ 41-2198 to -2198.04, which authorized the Department and OAH to adjudicate disputes between mobile home parks and tenants, to also "adjudicate complaints regarding and ensure compliance with" planned community documents and the Planned Community Act. 2006 Ariz. Sess. Laws, Ch. 324, § 6. This additional adjudicatory authority is also a proper exercise of regulatory authority. Like the Mobile Home Parks Residential Landlord and Tenant Act, the Planned Community Act establishes the law governing the rights and obligations of homeowner associations and members. *See, e.g.*, A.R.S. § 33-1803 (regulating the amount of assessments and requiring associations to give members notice and a right to be heard before imposing assessments); -1804 (requiring associations to conduct open meetings at least once a year and give notice of the meetings); -1805 (requiring the association to make its financial and other records available to the members); -1806 (requiring members to provide purchasers relevant information about the association); -1807 (permitting the association to impose a lien on a member's unit for

unpaid assessments); -1808 (regulating the permissible display of signs). These statutory regulations would have little meaning if there were no agency able to enforce them. As Representative Farnsworth noted, the ability to bring an action in superior court was not adequate when the cost of litigation exceeded the amount of the association's assessment. *See Minutes of Meeting Before H. Comm. on Judiciary on Feb. 16, 2007*, 47th Leg., 2nd Reg. Sess. 10 (Ariz. 2007). And, by virtue of their role as adjudicators, both the Department and OAH through its ALJs will develop expertise in the Planned Community Act's regulations. *See* A.R.S. § 41-1092.01 (C)(7) (requiring the director of OAH to develop a program requiring that an ALJ "receive training in the technical and subject matter areas of the sections to which the administrative law judge is assigned") and (c)(8) (requiring the director to maintain all ALJ decisions, opinions, and reports).

In addition, application of the *J.W. Hancock* four-factor test shows that the statutes authorizing the Department and OAH to resolve disputes that arise from the Community Planning Act and community planning documents do not usurp judicial authority.

First, the "essential nature" of the power exercised in the challenged statutes is judicial. The statutes are an amended version of those reviewed by the court in *Cactus Wren* and the court found that the adjudicatory function in the statutes was judicial in nature. 177 Ariz. at 563, 869 P.2d at 1216. Because it is constitutionally permissible for administrative agencies to exercise judicial power, there is only a violation of Article III if it is warranted under the other three factors.

Second, the adjudicatory function does not constitute a coercive influence upon the judiciary. As the court in *Cactus Wren* noted about the hearing officer function addressed

there (*id.*), OAH's final decision here is subject to judicial review under A.R.S. § 12-905(A). This provides "a critical 'check' of administrative power." *Cactus Wren*, 177 Ariz. 563, 869 P.2d at 1216. The ALJ's power is limited to ordering compliance with the Planned Community Act and planned community documents and levying a civil fine for violations. A.R.S. § 41-198.02(A). The ALJ's orders must be enforced through contempt of court. A.R.S. § 41-2198.02(B). In addition to judicial review, A.R.S. § 41-298.03(B) specifically provides that the existence of the administrative remedy is not to be construed to limit the state courts' ability "to hear and decide matters" pursuant to "the statutes or community documents that regulate planned communities." Thus, associations and members may obtain relief directly from the courts for violation of the statutes.

Third, the Legislature's objective in permitting OAH to hear complaints concerning the Planned Community Act and planned community documents is to ensure compliance with the Act. A.R.S. § 41-2198. The ALJ's remedial authority is appropriately limited to this purpose; there is no jurisdiction to hear "[a]ny dispute among or between owners to which the association is not a party" or "[a]ny dispute between an owner" and an entity or person "that is engaged in the business of designing, constructing or selling . . . any property or improvements as defined in § 33-1802, ..." Moreover, the legislative history of the Planned Community Act shows that the Legislature was not interested in taking away judicial power but ensuring the enforceability of the Act. *See* legislative history of the Planned Community Act *infra* at 2-3 that indicates that the Legislature continually amended it to add both judicial and administrative remedies.

Fourth, as a practical matter, permitting OAH to adjudicate complaints arising from the Community Planning Act is critical to the goal of ensuring compliance with the Act. Without this remedy, an owner would be forced to go to court even if the nature of the complaint did not justify the time, effort, and expense of going to court or forego any relief from violations of the Community Planning Act. *See Minutes of Meeting Before the H. Comm. on Judiciary on Feb. 16, 2007*, 47th Leg. 2nd Reg. Sess. 10 (Ariz. 2007) (Representative Farnsworth advised that going to court was not an adequate remedy to resolve owners' complaints against homeowners' associations); *see also J.W. Hancock*, 142 Ariz. at 406, 690 P.2d at 125 (noting that public policy favored permitting the Registrar of Contractors to resolve disputes between private parties because some disputes "would not justify the time and effort of going to a court").

In sum, because the statutes that authorize the Department and OAH to resolve complaints between owners and planned community associations do not usurp the judiciary's power, they do not violate Article III.

CONCLUSION

For all the foregoing reasons, the Attorney General requests the Court to uphold the constitutionality of A.R.S. §§ 41-2198 to 2198.05.

RESPECTFULLY SUBMITTED this 13th day of June, 2008.

Terry Goddard
Attorney General

Paula Bickett
Chief Counsel, Civil Appeals
Office of the Solicitor General

ORIGINAL of the foregoing filed this 13th day of June, 2008, with:

Clerk of Court
Maricopa County Superior Court
101 West Jefferson
Phoenix, Arizona 85003-2243

COPY of the foregoing mailed/delivered this 13th day of June, 2008, to:

The Honorable Margaret Downie
Maricopa County Superior Court – CCB
201 West Jefferson
Phoenix, Arizona 85003-2243

Scott B. Carpenter
Jason E. Smith, Esq.
Carrie H. Smith, Esq.
Carpenter, Hazlewood, Delgado & Wood, PLC
1400 East Southern Avenue, Suite 640
Tempe, Arizona 85282
Attorneys for Plaintiff

Nancy Waugaman
25924 Norht 115th Way
Scottsdale, Arizona 85255

Michelle Wood, Assistant Attorney General
Office of the Attorney General
1275 West Washington –CIV/LES
Phoenix, Arizona 85007-2926
Attorney for Defendant Arizona Department of Fire, Building and Life Safety

Robert Barger, Director
Arizona Department of Fire, Building and Life Safety
1110 West Washington Street, Suite 100
Phoenix, Arizona 85007

Elizabeth A. Stark
Secretary to Paula Bickett

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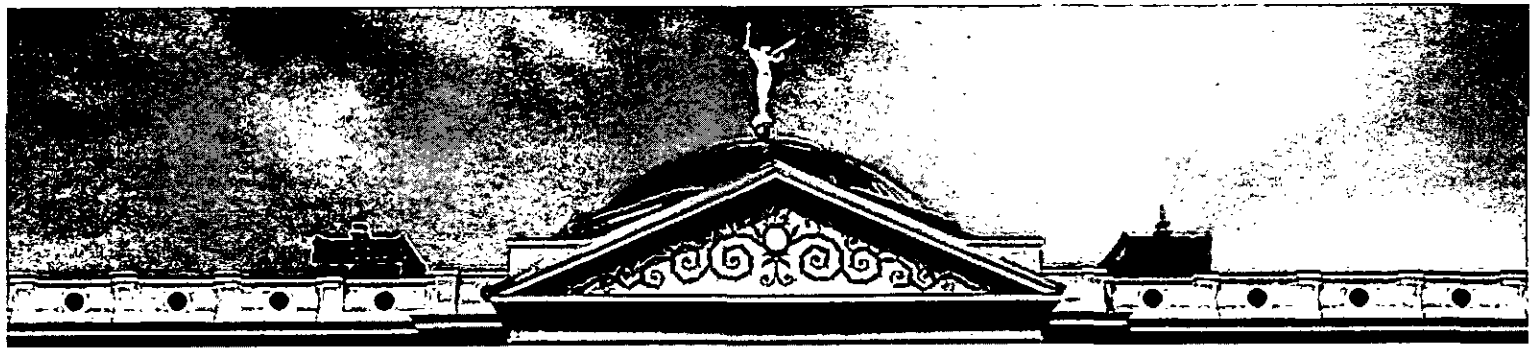

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ARIZONA HOUSE OF REPRESENTATIVES
Forty-seventh Legislature – Second Regular Session

COMMITTEE ON JUDICIARY

Minutes of Meeting
Thursday, February 16, 2006
House Hearing Room 4 -- 8:30 a.m.

Chairman Farnsworth called the meeting to order at 8:35 a.m. and attendance was noted by the secretary.

Mr. Downing asked whether the 48 hours can be expanded. Chairman Farnsworth again stated that the person can be removed from the classroom. This legislation addresses those who are non-compliant and who refuse to take action to obtain a fingerprint card. He noted it already is law that a current fingerprint card is required to work with children unless the person is a volunteer. He advised that it can take up to six weeks to acquire a fingerprint card.

Mr. Quelland expressed concern about teachers who have contracts with districts. He queried how this would work in those situations. Chairman Farnsworth thinks the teacher would know what State law is.

Michele Diamond, Director of Government Affairs, Arizona State Board for Charter Schools, spoke in support of H.B. 2118. She advised that the Charter Board currently does not have a tool to deal with repeat fingerprinting violations. Sponsors of charter schools have two tools available to them to deal with violations: withhold 10 percent of State aid until the school comes into compliance, and issue a notice of intent to revoke.

Persons in support of H.B. 2118 who did not speak:

Gary Bae, Director of Public Affairs, The Leona Group Arizona
Tom Dorn, representing Arizona Charter Schools Association

Question was called for on Vice-Chairman Barto's motion that the Farnsworth ten-page amendment dated 2/15/06 be adopted (Attachment 5). The motion carried.

Vice-Chairman Barto moved that H.B. 2118 as amended do pass. The motion carried by a roll call vote of 8-0-0-1 (Attachment 7).

H.B. 2824, homeowners' associations; condominiums; hearings – DO PASS AMENDED

Vice-Chairman Barto moved that H.B. 2824 do pass.

Vice-Chairman Barto moved that the Farnsworth 23-line amendment dated 2/15/06 be adopted (Attachment 8).

Katy Proctor, Majority Research Analyst, reviewed the provisions of H.B. 2824 (Attachment 9):

- Provides that for a dispute between an owner and either a condominium association or planned community association, either may petition the Department of Building and Fire Safety (DBFS) for a hearing concerning *violations of the association documents or violations of statutes regulating associations.*

- Requires the petitioner to file a petition with DBFS and pay a filing fee of $500.

- Deposits the filing fee into the Condominium and Planned Community Hearing Office Fund (Fund).

- Provides that an order issued by an administrative law judge (ALJ) in an action regarding a condominium or planned community is final and not subject to a request for a rehearing.

- Establishes the Condominium and Planned Community Hearing Office Fund (Fund) within the DBFS. Allows the Director of DBFS to administer the fund.

- Makes Fund monies continuously appropriated and requires the State Treasurer to invest/divest monies on notice from the Director. Credits monies earned from investment to the Fund.

- Requires monies in the Fund to be transferred from the Fund to the general fund quarterly.

- Allows DBFS to retain five percent of the monies to offset the costs of administering and providing a hearing officer function for these disputes, including reimbursing the OAH for actual costs incurred.

- Contains a blank appropriation from the general fund in FY 2007 to the Fund. Exempts the appropriation from lapsing.

- Requires the Joint Legislative Budget Committee (JLBC) to review and make recommendations to the Legislature regarding the filing fees charged to parties for filing for an administrative hearing under this section. JLBC must recommend a level of filing fee appropriate to ensure the hearing officer program is fiscally sound and self-supporting. The report must be made by December 1, 2007.

Ms. Proctor explained the Farnsworth 23-line amendment dated 2/15/06 clarifies that the decision by the

Administrative Law Judge is also not subject to being accepted, rejected or modified by the Director, and rewrites the Fund language (Attachment 8).

Chairman Farnsworth advised that homeowners' associations continue to be an issue. The only option available to a homeowner is to go to court which ultimately may cost more money than paying the assessment. *HOAs have the* power of automatic statutory lien authority and foreclosure authority. Because of that threat, homeowners generally decide to pay the assessments or fees even if they disagree with them. This legislation is a mechanism to allow HOAs and homeowners to have a reasonable resolution at a reasonable cost. The bill calls for a $500 filing fee to prevent frivolous lawsuits. If the homeowner is successful with his suit, the HOA has to reimburse the filing fee.

Mr. Downing asked whether a justice of the peace (JP) can do this. Chairman Farnsworth replied this is a different mechanism than going to a justice court.

Representative Chuck Gray, said there are still some mechanical issues involving JPs that are not workable, so he is here to support this bill. He believes it solves the problem of holding HOAs accountable.

Mr. Downing asked Representative Gray if he is comfortable with the $500 threshold. He thinks it might affect some people of limited means. Representative Gray said he believes it is within the realm of acceptability.

Chairman Farnsworth stated the $500 filing fee was set high enough to prevent a person from filing just to harass an HOA.

Cliff Vanell, Director, Office of Administrative Hearings (OAH), spoke in support of H.B. 2824. He said this legislation is within the existing mission of OAH. It does have a funding source that would allow these cases to proceed without putting an undue burden on the Office. It is designed to limit the number of cases that go to OAH and guards against other frivolous situations. It clearly states what the Administrative Law Judge is to address and the remedies to be applied. He maintained it is an appropriate tool to use for this stated purpose.

In reply to Mr. Downing, Mr. Vanell advised that the right of appeal would be to the Superior Court.

Mr. Downing queried the number of cases anticipated. Mr. Vanell said he thinks with the $500 filing fee, the number would not be large. He referred to the OAH website and newsletter (Attachment 10) where information

can be accessed to allow people to participate more.

Mr. Barnes wondered if OAH plans to have indoctrination sessions with people who do not understand the process. Mr. Vanell advised that people can research past OAH decisions to allow them to see what the approach of the OAH has been in the past. He related that a copy of their brochure is sent to each party to assist them to interface with OAH so they can be well prepared to represent themselves.

Brian Lincks, Arizona Association of Community Managers, testified in opposition to H.B. 2824. He stated that some of the language is ambiguous and he does not know how it would work. One of the provisions in the bill clearly limits management companies from representing their HOA Board of Directors in the Administrative Law hearings. There is also concern about higher costs which will not allow HOAs to handle matters on their own without legal counsel. He said the Association would like to work with the sponsor and others so the Association could support this legislation.

Roland Kelly, Coalition of HomeOwners for Rights and Education (CHORE), expressed support for H.B. 2824. He stated it is very important to do as much as possible in an area where there is so little control and where so many homeowners are subjected to unnecessary fines. He said the fines could turn into large amounts of money for people who are interested in pursuing their cases in court. He related that CHORE gets hundreds of complaints each year. Homeowners usually pay rather than becoming involved in a protracted lawsuit. They pay because they believe they are told they have no other recourse.

Mr. Miranda agreed with Mr. Kelly. He believes the playing field needs to be even.

George Staropoli, representing self, stated support for H.B. 2824. He said he thinks the OAH will be an excellent forum to address these issues. Homeowners are at a definite disadvantage because HOAs have the resources to hire attorneys while homeowners oftentimes do not. He said he thinks this bill will go a long way to help solve the problem.

Persons in support of H.B. 2824 who did not speak:

Pat Haruff, Coalition of HomeOwners for Rights and Education (CHORE)
Anne Stewart, spokesperson for The Sun City Formula Registry

Fran Noe, representing self
John Lamer, representing self
Donna Neill, representing self
Jerry Neill, representing self
Keith Wallace, representing self
Mary Afdem, representing self
N. Kasper, representing self
Fred Fischer, representing self

Persons in opposition to H.B. 2824 who did not speak:

Kevin DeMenna, representing Community Associations Institute (CAI)
Linda Lang, Executive Director, Arizona Association of Community Mangers

Question was called for on Vice-Chairman Barto's motion that the Farnsworth 23-line amendment dated 2/15/06 be adopted (Attachment 8). The motion carried.

Vice-Chairman Barto moved that H.B. 2824 as amended do pass. The motion carried by a roll call vote of 9-0-0-0 (Attachment 11).

H.B. 2342, child support; self-employed parent – DO PASS

Vice-Chairman Barto moved that H.B. 2342 do pass.

Jen Forst, Majority Intern, summarized the provisions of H.B. 2342 (Attachment 12):

- Strikes the provision that requires both parents to equally share the cost of the federally-authorized tax practitioner (FATP) if at least one of the parents is self-employed.

- Requires the court to determine which parent shall pay for the cost of the FATP or determine each parent's share of the cost.