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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

CBS-136 HOMEOWNERS ASSOCIATION, a non-profit Arizona corporation, Appellant, vs. ANNETTE COHEN, an individual: STATE OF ARIZONA, Appellees.	No. LC2018-000316 **STATE OF ARIZONA'S ANSWERING BRIEF** (Assigned to the Hon. Patricia Starr)

The State of Arizona ("State"), pursuant to Rules 6 and 7 of the Arizona Rules of Procedure for Judicial Review of Administrative Decisions, files its Answering Brief in the above-captioned matter. The State respectfully requests that the Court reject Appellant's constitutional challenge to A.R.S. § 32-2199, *et seq.*, the statutes governing the homeowners' association ("HOA") dispute resolution process. The State takes no position on the underlying dispute between Appellant CBS-136 Homeowners Association ("the Association") and Appellee Annette Cohen.

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I. STATEMENT OF THE CASE/STATEMENT OF FACTS

This action arises from a dispute between Ms. Cohen, a condominium owner, and her homeowners' association. In early 2018, Ms. Cohen requested certain records from the Association. (Cohen Petition, Index of Record on Review ("IRR") 13). Under A.R.S. § 33-1258(A), HOAs must provide specified records within 10 business days of request. When the Association failed to provide Ms. Cohen with the records she requested within 10 business days, she filed a Petition for Hearing with the Arizona Department of Real Estate ("ADRE"), alleging violations of A.R.S. § 33-1258. (Administrative Law Judge ("ALJ") Decision, IRR 35 at 1 ¶2).

Pursuant to A.R.S. § 32-2199.01(D), ADRE reviewed the Petition and the HOA's response and then referred the matter to the Office of Administrative Hearings ("OAH"). (IRR 35 at 2 ¶5). At the administrative hearing held on June 6, 2018, the Association acknowledged that it did not provide the requested records within the statutory time frame, but asserted that the documents were ultimately provided to Ms. Cohen before the hearing. (IRR 35 at 2 ¶7). The ALJ found that the Association violated the statute and ordered payment of Ms. Cohen's $500.00 filing fee. (IRR 35 at 3). The ALJ declined to impose a civil penalty. *Id.*

In July 2018, the Association filed a Request for Rehearing with ADRE, to which Ms. Cohen responded. (IRR 23, 24). ADRE denied the rehearing request. (IRR 20). The Association then filed its Notice of Appeal with this Court in August 2018, naming both Ms. Cohen and ADRE as Appellees. The Notice of Appeal sought review of the ALJ's decision and alleged that the HOA dispute procedures authorized in A.R.S. § 32-2199, *et seq.* are unconstitutional. (Notice at 2 ¶¶5-6).

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On October 23, 2018, ADRE filed a Motion to Dismiss, arguing it was not a proper party in this action. This Court agreed and ordered the State of Arizona to be substituted for ADRE as an Appellee. (Minute Entry dated December 11, 2018). Counsel for the State entered an appearance within 15 days as required by the Court. In light of the Association's constitutional challenge, the Court further ordered the Association to serve a copy of its Opening Brief on the attorney general, speaker of the house of representatives and president of the senate. The Association did so on or about December 17, 2018.

II. STATEMENT OF THE ISSUES

A. Has CBS-136 met its heavy burden of demonstrating that the HOA dispute statutes are unconstitutional?

B. Is the State or any of its agencies bound by a de-published decision or decade-old rulings interpreting statutes that the Legislature has since twice amended, in part to address the constitutional concerns expressed by those courts?

III. ARGUMENT

A. The HOA Dispute Statutes are Constitutional.

1. Evolution of the HOA Dispute Resolution Process.

The Association argues that the statutes governing the HOA dispute process improperly delegate judicial authority to an executive agency (ADRE) in violation of the separation of power provisions of the Arizona Constitution. (Appellant's Opening Brief ("OB") at 2). A review of the legislative history and timing of prior constitutional challenges demonstrates that the Legislature has addressed the constitutional concerns raised by the Association in this case.

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a. First Version of the HOA Dispute Process (2006) and Constitutional Challenges to the Statutes.

In 2006, the Legislature first enacted a process for resolving disputes between planned community and condominium associations and their members ("the HOA dispute process").[1] 2006 Ariz. Sess. Laws, ch. 324, § 6, (codified in A.R.S. § 41-2198, *et seq*. but later repealed). Under the original statute, homeowners or HOAs could file a petition with the Department of Fire, Building and Life Safety ("DFBLS") alleging non-compliance with applicable laws or HOA documents. After reviewing the petition and response, DFBLS could then refer the matter to OAH for a hearing. The ALJ had authority to order any party to abide by the statute, condominium documents, community documents or contract provision at issue. The party that lost before the ALJ did not, however, have the right to request a rehearing. A.R.S. § 41-2198.02 (B) (repealed 2011).

Some HOAs challenged the constitutionality of the new process. In 2008, Judge Downie found the HOA dispute statutes unconstitutional. (OB, Exh. 1). In that case, DFBLS was named as an appellee and appeared as a nominal party. In 2009, Judge McMurdie similarly concluded that the 2006 statutes violated the separation of powers clause. (OB, Exh. 3). Both DFBLS and OAH were named as parties, but neither agency defended the constitutionality of the HOA dispute statutes in superior court. *Id*. According to the Association, an appeal from the 2008 ruling was withdrawn before the Court of Appeals issued a decision, and the 2009 ruling was not appealed at all. (OB at 23).

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[1] For ease of reference, this Brief will use the term "homeowners" to include both owners of condominiums (or unit owners) under Title 33, Chapter 9, A.R.S. § 33-1201, *et seq*. as well as owners in planned communities under Title 33, Chapter 16, A.R.S. § 33-1801, *et seq*. The term "homeowners' associations" or "HOAs" includes both unit owners associations as defined in A.R.S. § 33-1202, Title 33, Chapter 9 as well as "associations" as defined in A.R.S. § 33-1802(1), Title 33, Chapter 16.

In October, 2010, the Arizona Court of Appeals determined that the HOA dispute process violated the separation of powers provision of the Arizona Constitution. *Gelb v. Dep't of Fire, Bldg. & Life Safety*, 225 Ariz. 515 (App. 2010). But in May 2011, the Arizona Supreme Court denied review and ordered the Court of Appeals' decision de-published without explanation. *Gelb*, CV10-0371, 2011 WL 2028520 (Ariz. May 24, 2011).

b. Second Version - 2011 Post-*Gelb* Amendments.

In April 2011, the Legislature amended the HOA dispute statutes. Senate Bill 1148, 2011 Ariz. Sess. Laws, ch. 185, §§ 1-4 (1st Reg. Sess.) ("SB 1148"), attached hereto as Exhibit "A." The legislation specifically addressed *Gelb* and acknowledged that DFBLS did not directly license HOAs. SB 1148 § 4 ("It is the intent of the legislature to find, determine and clarify all of the following after careful consideration of the case Gelb v. Department of Fire, Building and Life Safety. . .); SB 1148 § 3 ("direct licensure and regulation of condominiums and planned communities may not be necessary at this time").

However, the Legislature reasoned that due to DFBLS' function in consumer protection, the agency had gained experience in interpreting, enforcing and applying statutes, which placed the agency in a good position to resolve common interest community disputes. SB 1148 § 4(2), (4). The Legislature found the HOA dispute process necessary due to years of owners being subjected to "inconsistent, unreasonable and often unlawful enforcement and application" of HOA rules yet "often unable to afford the cost of formally litigating their disputes in superior court." SB 1148 § 4(3). The Legislature also considered judicial economy, finding that the administrative process "efficiently and effectively provide[s] for resolution of these

common interest community disputes without the expense, formality and difficulty of requiring a trial in the superior court in every instance[.]" SB 1148 § 4(4).

In addition, the 2011 legislation removed the prohibition on rehearings, thus providing DFBLS authority to review the ALJ's decision and determine if a rehearing was necessary. SB 1148 § 2. The *Gelb* court had cited the *absence* of a rehearing process as a reason why DFBLS lacked sufficient regulatory authority over HOA disputes. *See Gelb*, 225 Ariz. at 519 ¶18. The Arizona Supreme Court de-published *Gelb* only one month after SB 1148 was enacted. While the court did not explain its reasoning, de-publication orders "generally signify that the supreme court disapproved of something in the court of appeals' opinion." *Associated Aviation Underwriters v. Wood*, 209 Ariz. 137, 182 n.9 (App. 2004) (internal citations and quotations omitted).

c. Third Version of the Statutes – 2016 Amendments.

In 2016, the Legislature amended the HOA dispute statutes again. 2016 Ariz. Sess. Laws, ch. 128 §§ 31-35 (2nd Reg. Sess.) (codified at A.R.S. § 32-2199, *et seq.*). In Senate Bill 1530, the Legislature determined that ADRE should administer the HOA dispute process instead of DFBLS.[2] The Legislature did not make any explicit findings about ADRE's regulatory authority over HOA disputes in 2016 as it did with respect to DFBLS in 2011. However, the Legislature was presumably aware of the scope of ADRE's regulatory authority over various aspects of the real estate industry[3] and deemed it sufficiently related to the HOA dispute process. *Staples v.*

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[2] In the same bill, the Legislature dismantled DFBLS and transferred its other statutory responsibilities to the Department of Housing and the State Forester.

[3] *See, e.g.*, A.R.S. § 32-2121, *et seq.* (licensing of real estate agents and brokers); A.R.S. § 32-2171, *et seq.* (oversight of property management firms); A.R.S. § 32-2181, *et seq.* (regulation of subdivisions); A.R.S. §32-2197, *et seq.* (time shares).

Concord Equities, 227 Ariz. 27, 33 ¶28 (App. 2009) (legislature is presumed to be aware of existing statutes and case law when it passes a statute).

At the same time, the Legislature took steps to ensure that homeowners were aware of the HOA dispute process. Senate Bill 1498, now codified at A.R.S. §§ 33-1242(D) and 33-1803(E), requires HOAs to include in its violation notice "written notice of the member's option to petition for an administrative hearing on the matter in the state real estate department pursuant to section 32-2199.01." 2016 Ariz. Sess. Laws, ch. 172, §§ 1, 3; ch. 230, §§ 1-2 (2nd Reg. Sess.).

2. The Association Bears the Burden of Proving Unconstitutionality.

A party challenging a statute's constitutionality, as the Association does here, "must overcome a 'strong presumption' that the statute is constitutional[.]" *State v. Meeds*, 244 Ariz. 454, 462 ¶21 (App. 2018). "When the statute in question involves no fundamental constitutional rights or distinctions based on suspect classifications, [courts] presume the statute is constitutional and will uphold it unless it clearly is not." *Biggs v. Betlach*, 243 Ariz. 256, 258 ¶9 (2017) (quoting *Cave Creek Unified Sch. Dist. v. Ducey*, 233 Ariz. 1, 5 ¶11 (2013)); *Meeds*, 244 Ariz. at 462 ¶21 (courts will interpret a statute so as to give it a constitutional construction if possible).

Accordingly, "[a] party challenging a statute generally has the burden of establishing that it is unconstitutional." *Cave Creek Unified Sch. Dist.*, 233 Ariz. at 5 ¶11 (citing *State v. Tocco*, 115 Ariz. 116, 119 (1988)); *Tocco*, 115 Ariz. at 119 (observing that the challenging party bears the burden of overcoming the strong presumption of constitutionality). *See also Martin v. Reinstein*, 195 Ariz. 293, 302 ¶16 (App. 1999) (describing the challenger's "heavy burden" of establishing that the legislation is unconstitutional). Courts analyze constitutional challenges de novo. *Biggs*, 243 Ariz. at 258 ¶9; *Martin*, 195 Ariz. at 301 ¶16.

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3. The HOA Dispute Statutes Do Not Violate Separation of Power Provisions.

The HOA dispute statutes do not usurp the authority of the judicial branch and thus do not violate the separation of powers provision of the Arizona Constitution. Article 3 provides:

> 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.

Ariz. Const. art. 3. This provision does not, however, "require a hermetic sealing off of the three branches of government." *Jett v. City of Tucson*, 180 Ariz. 115, 122 (1994) (citing *State v. Prentiss*, 163 Ariz. 81, 84 (1989)); *Cactus Wren Partners v. Dep't of Fire, Bldg. & Life Safety*, 177 Ariz. 559, 562 (App. 1993) (recognizing that "blending" of authority among the three departments is permissible). As a result, "the fact that one branch of government has authority to act in a particular area does not necessarily preclude another branch from acting in the same area." *Jett,* 180 Ariz. at 122. Rather, the branches "share common boundaries." *Id.*

Arizona adopts the view that article 3 is designed to protect individual rights and that allocation of powers is simply a part of that overall objective. *Prentiss,* 163 Ariz. at 84; *Cook v. State*, 230 Ariz. 185, 187 ¶6 (App. 2012) ("The separation of powers doctrine . . . is part of an overall constitutional scheme to protect individual rights."). Separation of powers concerns are not resolved "by mechanistic formulas." *Cactus Wren*, 177 Ariz. at 562. Instead, the "*critical question*" is whether the exercise of power usurps the power of another branch of government. *Martin*, 195 Ariz. at 322 ¶105 (citations omitted) (emphasis added); *Cactus Wren*, 177 Ariz. at

563 (concluding that the DFBLS hearing officer function did not "usurp the authority of the judiciary."). Article 3 is violated "[o]nly when the legislative enactment 'unreasonably limits or hampers' the judicial system in performing its function." *Prentiss*, 163 Ariz. at 84 (citing *United States v. Superior Court*, 144 Ariz. 265, 278 (1985)); *Cook*, 230 Ariz. at 189 ¶15; *Jett*, 180 Ariz. at 123 ("[T]he separation of powers doctrine protects each branch against overreaching by the others.").

Arizona courts have adopted a non-exclusive four factor test to assess separation of powers claims. *Cactus Wren*, 177 Ariz. at 562. The factors are "1) the essential nature of the power exercised by the branch alleged to have usurped the power of another branch; (2) the degree of control that branch assumes in exercising the power of the other branch; (3) the objective of that branch's exercise of power; and (4) the practical consequences of the action." *Id.*; *Cook*, 230 Ariz. at 189 ¶15. On balance, these factors weigh in favor of the constitutionality of the HOA dispute process, especially considering the Association's "heavy burden" to prove otherwise.

a. The Essential Nature of the Power Exercised.

The first factor analyzes the essential nature of the power exercised. In *Cactus Wren*, the Court of Appeals considered the constitutionality of a hearing procedure overseen by DFBLS to resolve disputes between private parties (mobile home parks and their tenants). As to this first factor, the court concluded that "adjudication of a dispute between two private parties is considered judicial." *Cactus Wren*, 177 Ariz. at 563. Because the HOA dispute process challenged here similarly involves the resolution of disputes between private parties (HOAs and homeowners), the essential nature of the power exercised by ADRE is likely judicial.

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b. The Degree of Control Exercised by the Agency Over the Judiciary.

In *Cactus Wren*, the court found there was no "coercive influence" on the judiciary because (as in this case) the administrative decision was subject to judicial review under the Administrative Review Act. 177 Ariz. at 563. Although the Association refuses to concede this point (OB at 16), even *Gelb* concluded that DFBLS did not control or coerce the judiciary by administering the HOA dispute process. "Judicial review of the ALJ's decision is a critical judicial check of administrative power, preventing the Administrative Process from exceeding its proper constitutional scope." *Gelb,* 225 Ariz. at 518 ¶13 (App. 2010) (citing *Cactus Wren*, 177 Ariz. at 563) (internal quotations omitted). Thus, this second factor weighs in favor of constitutionality.

c. The Legislature's Objective in Establishing the Agency's Function.

In order to analyze the third factor concerning the legislature's objective, *Cactus Wren* examined "the relationship of [DFBLS] and its hearing officer to the administration of mobile home parks." 177 Ariz. at 562. Because DFBLS did not license mobile home parks, the challenger argued the agency lacked sufficient regulatory authority to administer the dispute process. 177 Ariz. at 561. The court rejected that argument. "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." *Cactus Wren*, 177 Ariz. at 563.

Here too, the Legislature has determined that formal licensure of HOAs is unnecessary. SB 1148 § 4(3). Instead, the Legislature established the HOA dispute process and ultimately determined that ADRE should administer it. While ADRE

does not license HOAs, it has "legitimate regulatory responsibilities" in related matters that establish a constitutionally sufficient nexus to the dispute process, as the Court of Appeals found with respect to DFBLS in *Cactus Wren.*

i. The HOA Dispute Process Aligns with ADRE's Definition and Purpose.

By definition, the HOA process seeks to resolve disputes concerning real estate interests. *See, e.g.,* A.R.S. § 33- 1202(10) ("'Condominium' means *real estate*, portions of which are designated for separate ownership . . ."); A.R.S. § 33-1802(4) ("'Planned community' means a *real estate development* . . . that is held by a nonprofit corporation or unincorporated association of owners . . ."); A.R.S. § 32-2101(48) ("'*Real estate*' includes leasehold-interests and any estates in land as defined in title 33, chapter 2, articles 1 and 2 . . ."") (emphasis added). These definitions alone establish a nexus between the subject of the dispute (real estate) and the Department that regulates the industry.

Further, administering the HOA process is consistent with ADRE's consumer protection mission. The purpose of ADRE is to "protect the public interest through licensure and regulation of the real estate profession in this state." A.R.S. § 32-2102; *Whitaker v. Ariz. Real Estate Bd.*, 26 Ariz. App. 347, 349 (1976) ("The purpose underlying the statutes regulating real estate activities is to protect the public from unscrupulous and unqualified persons."). For example, the Commissioner has authority to publish general public educational materials that she "deems helpful and proper for the guidance and assistance of both licensees and the public." A.R.S. § 32-2107(C). In 2011, the Legislature found that the HOA dispute process "will provide an important consumer protection for owners in condominiums and planned communities." SB 1148 § 4(4). Thus, the Department's administration of the HOA

dispute process is consistent with its consumer protection mission and the objectives of the process itself.

ii. ADRE's Regulation of Planned Communities.

ADRE also regulates the development of communities governed by HOAs. The Commissioner is charged with issuing a "public report" with regard to each proposed subdivision – necessarily including planned communities – which authorizes the sale or lease of lots, parcels or fractional interests within the subdivision. A.R.S. § 32-2183(A). Before offering subdivided lands for sale, the developer must provide to ADRE copies of the community's covenants, conditions and restrictions ("CC&Rs").[4] *See* A.R.S. § 32-2181(A)(5).

ADRE rules detail the requirements for a public report application. *See* A.A.C. R4-28-A1201, *et seq*. Among other things, the application must include information about:

- Property Owner's Association, including the name of the association, the amount of the assessment that property owners will be required to pay, and a copy of the Articles of Incorporation and Bylaws in effect. A.A.C. R4-28-A1213(1), (3), (10).
- Common, Community, or Recreational Improvements, including a list of all such improvements located within the development and the cost

[4] Real estate statutes govern some of the content of CC&Rs that are enforced by HOAs. For instance, any covenants or restrictions that are based on race, religion, color, disability status or national origin are invalid and unenforceable. *See* A.R.S. § 32-2107.01 (procedure for commissioner to record disclaimer of unlawful restrictions). ADRE statutes also prohibit CC&Rs from including provisions that would limit the right of homeowners to testify in governmental hearings regarding real property. *See* A.R.S. § 32- 2181(I); A.R.S. § 32- 2195(I).

that a lot purchaser will be required to pay for completion and maintenance of each improvement. A.A.C. R4-28-A1209(3), (5).

- Master Planned Community, including a list of all improvements located outside the development, but included in the development offering and the cost, if any, a lot purchaser will pay toward the competition and maintenance of each improvement. A.A.C. R4-28-A1210(1), (5).

ADRE is charged with ensuring that the public report, including copies of the CC&Rs, is provided to prospective purchasers. A.R.S. § 32-2183(A); A.A.C. R4-28-805. ADRE may deny issuance of a public report if the Commissioner determines the developer is not in compliance with applicable state law or rules, which would include the requirements to disclose information about HOAs and the community's CC&Rs. A.R.S. § 32-2183(E)(1); A.R.S. § 32-2195.03(C)(1), (6). ADRE also reviews and determines the sufficiency of the financial arrangements necessary to assure completion of all proposed or promised improvements for a planned community. A.R.S. § 32-2183(F)(2); A.A.C. R4-28-A1211.

ADRE retains oversight of real estate developments – including those with HOAs developments – even after the initial issuance of the public report. A developer must notify the Commissioner of any "material changes" to the approved plan. A.R.S. § 32-2184(A); A.R.S. § 32-2195.10. If needed to protect potential purchasers, the Commissioner may suspend approval of sales pending amendment of the public report. A.R.S. § 32-2184(A); A.A.C. R4-28-B1203. The Commissioner may also "revoke" a public report once issued. A.R.S. § 32-2183(E).

As demonstrated, ADRE has considerable expertise with respect to CC&Rs and the community improvements that HOAs are in charge of maintaining. HOAs

enforce CC&Rs and collect HOA fees to pay for improvements and maintenance, which in turn may trigger disputes. *See*, *e.g.,* A.R.S. § 33-1242 (powers of unit owners' association); A.R.S. § 33-1802(1), (4) (defining "association" and "planned community"). As part of its regulatory responsibilities, ADRE receives and reviews the documents that govern HOAs and which, if violated, could lead to a dispute. *See* A.R.S. § 32-2199.01(A). Thus, it is ADRE's expertise in dealing with the matters that are the most likely subject of HOA/homeowner disputes that justifies the Legislature's deliberate decision to have ADRE conduct the initial screening of the petition in question, and "if justified," refer the petition to OAH for hearing. *See* A.R.S. § 32-2199.01(D).

iii. A.R.S. § 33-1270, a Condominium Act Statute, Does Not Limit ADRE's Authority Over the HOA Dispute Process.

Despite these authorities, the Association contends ADRE "has no regulatory authority over condominium and planned community associations." (OB at 12-13). The Association cites A.R.S. § 33-1270(B), which requires the Commissioner to ensure compliance with two condominium statutes in connection with public reports[5] but otherwise provides that "[t]he commissioner shall not be required to administer or enforce any other provisions of this chapter."

A.R.S. § 33-1270, however, was enacted as part of the Uniform Condominium Act and has not been amended since 1985, more than two decades before the advent

[5] A.R.S. § 32-2183(E)(8) sets forth the public report requirements for condominium declarations (citing A.R.S. § 33-1215 and § 33-1219 (the two statutes referenced in A.R.S. § 33-1270)).

of any HOA dispute process.[6] Under current law, ADRE may receive petitions with respect to *both* condominium and planned community association disputes. A.R.S. § 32-2199.01(A). Crucially, the planned community statutes contain no provision similar to § 33-1270. If A.R.S. § 33-1270 means that ADRE lacks authority over condominium association disputes (as the Association suggests), then ADRE would only be able to oversee some but not all HOA disputes, an unintended result. *See* SB 1148 § 4 (legislative findings regarding the need for a HOA dispute process). A more logical interpretation is that A.R.S. § 33-1270 merely limits the Commissioner's ability to enforce condominium statutes (other than those specified) as part of her duties with respect to subdivisions and public reports.[7] There is no need to read A.R.S. § 33-1270 as conflicting with the HOA dispute statutes. *Facilitec v. Hibbs*, 206 Ariz. 486, 488 ¶15 (2003) (Whenever possible, courts "adopt a construction of a statute that reconciles it with other statutes and gives force to all statutes involved.") (Internal citations and quotations omitted).

d. Practical Result of Mingling of Roles.

The *Cactus Wren* court concluded that the fourth factor concerning the practical results of the challenged legislation weighed in favor of constitutionality. The court found that DFBLS' "objective of administering compliance with the

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[6] According to West's Arizona Revised Statutes (2017-2018 ed.), A.R.S. § 33-1270 was "[a]dded by Laws 1985, Ch. 192, § 3, eff. Jan. 1, 1986."

[7] A.R.S. § 33-1270 (A) provides: "Nothing in this chapter shall be construed to increase or decrease or otherwise affect any rights or powers granted to the commissioner of the department of real estate under title 32, chapter 20 with respect to the *issuance of public reports*." (Emphasis added). A.R.S. § 33-1270 (B) provides: "The com-missioner of the department of real estate shall require compliance with section 33-1215 and section 33-1219 in connection with the *administration of the subdivision laws* of this state under title 32, chapter 20, article 4." (Emphasis added).

[Mobile Home Parks Residential Landlord and Tenant] Act is furthered by inclusion of its hearing officer function . . . 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.

The same is true here. The HOA dispute process is designed to "efficiently and effectively provide for resolution of these common interest community disputes . . . while still maintaining the ability and right to recourse in the superior court, and without threat to the core functions of the judiciary." SB 1148 § 4(4). The current HOA dispute process complements the role of the courts but does not, as a practical matter, interfere with it. *Martin,* 195 Ariz. at 322, ¶107 (holding that the legislature's selection of procedural rules for a newly created commitment process "does not usurp judicial power but merely complements it.").

The Association claims that the practical result of the current legislation is to "seriously threaten" the parties' constitutional right to trial by jury. (OB at 17). *Cactus Wren* rejected a similar claim. There, the court found that DFBLS' adjudication and award of restitutive damages did not violate the constitution, in part because "the right to a jury trial does not preclude administrative adjudication." 177 Ariz. at 564. Nothing *requires* parties to utilize the HOA administrative process – it simply provides another dispute resolution option. A.R.S. § 32-2199.01(A) ("the owner or association *may* petition the department for a hearing. . .") (emphasis added). Consequently, the HOA dispute process does not deprive parties of their right to a jury trial.

In sum, the Association has not met its heavy burden of demonstrating that the HOA dispute statutes violate separation of powers principles. Whether the HOA dispute process is sufficiently related to ADRE's regulatory authority is only a part of

the analysis, and that requirement is met as shown above. The HOA dispute process does not usurp, unreasonably limit or hamper the function of the courts. The statutes are therefore constitutional.

B. The State is Not Bound by the 2008, 2009, or 2010 Rulings.

The Association argues that ADRE and OAH are bound by two prior superior court decisions (in 2008 and 2009) and the de-published *Gelb* decision (in 2010) under the doctrine of res judicata and/or collateral estoppel. (OB at 18; *See supra* pp. 4-6 for a discussion of these decisions). The Association also attempts to enforce the 2009 injunction against the State. Both efforts fail.

1. Neither Res Judicata nor Collateral Estoppel Apply in this Case.

Under the doctrine of res judicata, a judgment "on the merits" in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. *Chaney Bldg. Co. v. City of Tucson*, 148 Ariz. 571, 573 (1986) (citations omitted). Collateral estoppel or issue preclusion applies "when the issue or fact to be litigated was actually litigated in a previous suit, a final judgment was entered, and the party against whom the doctrine is to be invoked had a full opportunity to litigate the matter and actually did litigate it . . .[.]" *Id.*; *Corbett v. Manorcare of America, Inc.,* 213 Ariz. 618, 624 ¶16 (App. 2006). Collateral estoppel does not, however, apply if there is has been intervening change in the law. *Corbett*, 213 Ariz. at 626 ¶¶23-24; *See also State v. Whelan*, 208 Ariz. 168, 172-3, ¶¶14-15 (App. 2004) (discussing Arizona courts' adoption of the *Restatement* view that an intervening change in the law precludes application of collateral estoppel).

The res judicata and collateral estoppel doctrines examine whether the prior and current actions involve the same cause of action or same issues. That requirement is not met here. The prior actions (2008, 2009, 2010) involved DFBLS' authority to administer the HOA dispute process whereas this action challenges ADRE's

authority. The separation of powers analysis examines the statutory authority of the executive agency allegedly asserting judicial powers. *Cactus Wren*, 177 Ariz. at 562. Each agency is defined by the statutes creating it. *Simms v. Napolitano*, 205 Ariz. 500, 503 ¶15 (App. 2004) ("The Department is a creature of statute and like other state agencies, is created and maintained for the purpose of administering certain of the State's sovereign powers, and must proceed and act according to legislative authority as expressed or necessarily implied.") (internal citations and quotations omitted). Different statutes define the purpose and authority of ADRE (Title 32, Chapter 20) as compared to the former DFBLS (Title 41). Consequently, the prior rulings analyzing DFBLS' statutory authority do not involve the "same" cause of action or issues as here, which concerns ADRE's.

The actual litigation requirement is not met here either. Neither DFBLS nor the State defended the constitutionality of the HOA dispute statutes in the 2009 superior court case or in *Gelb*. In fact, the 2009 injunction that the Association seeks to enforce here was entered after the State did not defend the constitutionality of the statutes and "no other party . . . appeared and defended." (OB, Exh. 3). "[I]n the case of a judgment entered by confession, consent or default, none of the issues is actually litigated." *Chaney*. 148 Ariz. at 573 (citing *Restatement (Second) of Judgments* § 27). Because the constitutionality of the HOA statutes was not contested or actually litigated in the 2009 and 2010 cases, collateral estoppel does not apply.[8]

[8] Though DFBLS appealed the 2008 ruling, the appeal was withdrawn before the Court of Appeals could consider the merits. In *Restatement (Second) of Judgments* § 27 (1982), the commenters observe that there are many reasons why a party may choose not to raise an issue or contest an assertion in a particular action. §27 cmt. e. While it can be difficult to determine whether an issue is actually litigated, policy considerations "weigh strongly in favor of nonpreclusion." *Id.* It is therefore questionable whether the State "actually litigated" the issues in the 2008 action.

Even if the Association could overcome these hurdles, the relevant statutes have been amended at least twice since the 2008, 2009, and 2010 decisions. Collateral estoppel does not apply when there has been an intervening change in the law. *Corbett,* 213 Ariz. at 626 ¶24. The 2011 and 2016 amendments acknowledged the courts' constitutional concerns, added a rehearing procedure, and granted ADRE the authority to administer the HOA dispute process. These changes render moot the prior court decisions. Neither res judicata nor collateral estoppel applies here.

2. The State is Not Bound by the 2009 Injunction.

The Association wrongly seeks to enforce the 2009 injunction against the State. As noted in the decision itself, neither DFBLS nor OAH defended the statutes' constitutionality. The attempt to bind the State or any of its agencies to a judgment and injunction that was not actually litigated is not supported by law. *See Chaney,* 148 Ariz. at 573; *Corbett*, 213 Ariz. at 626 ¶22. And the 2009 ruling enjoined enforcement of the laws in effect *at that time*, before the 2011 and 2016 amendments.

The Association claims ADRE should have "followed the lead of its predecessor, DFLBS in refusing to process administrative hearing petitions" after the 2008 and 2009 rulings. (OB at 23-4). But ADRE is *required* to administer the State's real estate laws, including those relating to the HOA dispute process at A.R.S. § 32-2199, *et seq*. *See* A.R.S. § 32-2102 (duty of real estate commissioner to direct ADRE in administering Title 32, Chapter 20); *Facilitec*, 206 Ariz. at 487 ¶8 (administrative agencies are "charged with administering and implementing particular legislation.") (citation omitted). In fulfilling its statutory duties, ADRE has acted in accordance with the presumption that the HOA dispute process is constitutional – a presumption shared by the agencies administering the process before and after the 2011

amendments.[9] This Court should therefore reject the Association's effort to hold the State to a ten year old judgment interpreting a different statutory scheme than the one in place now.

C. The State is Not Liable for Attorneys' Fees.

The Association requests an award of attorneys' fees under A.R.S. § 12-348(A)(2). (OB at 24). The Administrative Review Act allows for the recovery of attorneys' fees in judicial review actions, but only if the party requesting the award prevails on the merits. A.R.S. § 12-348(A). Because the Association cannot meet its burden of establishing unconstitutionality, it should not prevail here.

Moreover, courts may not award attorneys' fees against the State when it is a "nominal party" in the proceedings. A.R.S. § 12-348(H)(4). Although the State is defending the constitutionality of the statutory process in this action, it has no pecuniary or proprietary stake in the outcome of the HOA-homeowner dispute and is not advocating for either party. *Cortaro Water Users' Ass'n v. Steiner*, 148 Ariz. 314, 318 (1986) (a state agency may lose protection as a nominal party if it takes the role of an advocate in the proceedings); *MVC Const., Inc. v. Treadway*, 182 Ariz. 615, 621 n.1 (App 1995) (the state may be subject to attorneys' fees award if it has a pecuniary or proprietary stake in the outcome). In *MVC Const. v. Treadway*, the court

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[9] Although DFBLS apparently stopped administering HOA disputes for a few years immediately following the 2008/2009 decisions, DFBLS returned to referring HOA disputes to OAH after the post-*Gelb* 2011 amendments. According to OAH's annual report for fiscal year 2012, "[SB1148] restored the dispute process for planned community and condominium disputes to OAH, commencing July 20, 2011. Twenty-one cases were filed in FY 2012." OAH Seventeenth Annual Report, November 1, 2012 at 2, https://www.azoah.com/17thAnnualReport.pdf (last visited Jan. 28, 2019). OAH's annual reports for subsequent fiscal years show that DFLBS, then ADRE, referred HOA disputes for hearing, in accordance with applicable laws. *See* OAH Annual Reports, FY 2013 - FY 2018, available at https://www.azoah.com/stats.html.

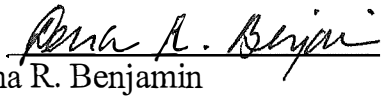
held that the Registrar of Contractors did not forfeit nominal party status by complying with its statutory obligations to answer the complaint and certify the record. 182 Ariz. at 620. Here, the State is similarly fulfilling its duty to defend its own statutes. Accordingly, this Court should deny any request for an attorneys' fees award against the State.

IV. CONCLUSION

The HOA dispute process does not "unreasonably limit or hamper" or "usurp" the judicial function. Instead, the administrative process complements it by providing an alternative method for HOAs and homeowners to resolve their community disputes. The courts retain ultimate authority to review the ALJs' decisions on HOA matters. A.R.S. § 32-2199.02(B). And both parties remain free to file an action directly with the court if they so choose. Because the Association has not overcome the strong presumption in favor of the statutes' constitutionality, this Court should reject the challenge and deny the Association's request for attorneys' fees.

RESPECTFULLY SUBMITTED this 31st day of January, 2019.

MARK BRNOVICH
Attorney General

By: 
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ORIGINAL filed with the Maricopa County Clerk of the Superior Court this 31st day of January, 2019

COPY of the foregoing hand-delivered this 31st day of January, 2019 to:

The Honorable Patricia Starr
Judge of the Superior Court
101 W. Jefferson, East Court Building, #613
Phoenix, Arizona 85003

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CERTIFICATION OF WORD COUNT PURSUANT TO JRAD RULE 8(c)C

The undersigned certifies that the brief to which this Certificate is attached uses type of at least 14 points, is double-spaced, and contains 5,636 words. The document to which this Certificate is attached does not exceed the applicable word limit that is set by JRAD Rule 8.

The information provided in this Certification is true and complete.

DATED this 31st day of January, 2019.

By _____
Dena R. Benjamin in
Assistant Attorney General
Attorneys for the State of Arizona

#7613151

EXHIBIT A

SESSION LAWS

STATE OF ARIZONA

Fiftieth Legislature

FIRST REGULAR SESSION

Chapters 1 to 237

Convened – January 10, 2011

Sine Die – April 20, 2011

2011

3. PROVIDES FOR THE FINANCIAL AND MEDICAL NEEDS OF A PARTICIPANT THROUGH CONTRIBUTIONS FROM ONE PARTICIPANT TO ANOTHER.

4. SUGGESTS AMOUNTS THAT PARTICIPANTS MAY CONTRIBUTE WITH NO ASSUMPTION OF RISK OR PROMISE TO PAY AMONG THE PARTICIPANTS AND NO ASSUMPTION OF RISK OR PROMISE TO PAY BY THE HEALTH CARE SHARING MINISTRY TO THE PARTICIPANTS.

5. PROVIDES A WRITTEN MONTHLY STATEMENT TO ALL PARTICIPANTS THAT LISTS THE TOTAL DOLLAR AMOUNT OF QUALIFIED NEEDS SUBMITTED TO THE HEALTH CARE SHARING MINISTRY AND THE AMOUNT ACTUALLY PUBLISHED OR ASSIGNED TO PARTICIPANTS FOR THEIR CONTRIBUTION.

6. PROVIDES A WRITTEN DISCLAIMER ON OR ACCOMPANYING ALL APPLICATIONS AND GUIDELINE MATERIALS DISTRIBUTED BY OR ON BEHALF OF THE MINISTRY THAT READS, IN SUBSTANCE:

> NOTICE: THE ORGANIZATION FACILITATING THE SHARING OF MEDICAL EXPENSES IS NOT AN INSURANCE COMPANY AND THE MINISTRY'S GUIDELINES AND PLAN OF OPERATION ARE NOT AN INSURANCE POLICY. WHETHER ANYONE CHOOSES TO ASSIST YOU WITH YOUR MEDICAL BILLS WILL BE COMPLETELY VOLUNTARY BECAUSE PARTICIPANTS ARE NOT COMPELLED BY LAW TO CONTRIBUTE TOWARD YOUR MEDICAL BILLS. THEREFORE, PARTICIPATION IN THE MINISTRY OR A SUBSCRIPTION TO ANY OF ITS DOCUMENTS SHOULD NOT BE CONSIDERED TO BE INSURANCE. REGARDLESS OF WHETHER YOU RECEIVE ANY PAYMENT FOR MEDICAL EXPENSES OR WHETHER THIS MINISTRY CONTINUES TO OPERATE, YOU ARE ALWAYS PERSONALLY RESPONSIBLE FOR THE PAYMENT OF YOUR OWN MEDICAL BILLS.

Approved by the Governor April 19, 2011.
Filed in the Office of the Secretary of State April 19, 2011.

HOMEOWNERS' ASSOCIATIONS—DISPUTES—ADMINISTRATIVE HEARINGS

CHAPTER 185

S. B. 1148

AN ACT AMENDING SECTIONS 41-2141, 41-2198.02 AND 41-2198.04, ARIZONA REVISED STATUTES; RELATING TO THE DEPARTMENT OF FIRE, BUILDING AND LIFE SAFETY.

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 41-2141, Arizona Revised Statutes, is amended to read:

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 buildings 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.

B. THE DEPARTMENT OF FIRE, BUILDING AND LIFE SAFETY HAS AS AN ADDITIONAL PURPOSE THE PROTECTION OF THE PUBLIC INTEREST IN MAINTAINING THE SUBSTANTIAL RESPONSIBILITY FOR INTERPRETING AND ENFORCING THE TERMS OF MOBILE HOME PARK RENTAL AGREEMENTS THROUGH ITS HEARING OFFICER FUNCTIONS AND HAS EXERCISED THAT RESPONSIBILITY FOR MOBILE HOME COMMUNITIES FOR MANY YEARS, INCLUDING INTERPRETATION OF STATUTES REGULATING THOSE COMMON INTEREST COMMUNITIES AND THE INTERPRETATION AND ENFORCEMENT OF THE OTHERWISE PRIVATE CONTRACTS AND RULES THAT GOVERN THOSE COMMUNITIES, EVEN THOUGH THE COMMUNITIES THEMSELVES ARE NOT DIRECTLY LICENSED BY THE DEPARTMENT. ACCORDINGLY, THE DEPARTMENT OF FIRE, BUILDING AND LIFE SAFETY PERFORMS A SIMILAR FUNCTION FOR CONDOMINIUMS REGULATED BY TITLE 33, CHAPTER 9 AND PLANNED COMMUNITIES REGULATED BY TITLE 33, CHAPTER 16 IN THAT THE DEPARTMENT, THROUGH ITS HEARING OFFICER FUNCTION, APPLIES AND ENFORCES THE STATUTES REGULATING THOSE COMMON INTEREST COMMUNITIES AND THE INTERPRETATION AND ENFORCEMENT OF THE OTHERWISE PRIVATE CONTRACTS AND RULES THAT GOVERN THOSE COMMUNITIES. SIMILARLY, THE DEPARTMENT DOES NOT DIRECTLY LICENSE THOSE COMMUNITIES. It is also the purpose of the department to establish a procedure to protect the consumer of such products and services, INCLUDING THE OWNERS IN CONDOMINIUMS AND PLANNED COMMUNITIES AS WELL AS THE RENTERS IN MOBILE HOME PARK COMMUNITIES.

~~B.~~ C. 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.

~~C.~~ D. The attorney general shall act for the department in all legal actions or proceedings and shall advise the department on all questions of law arising out of the administration of this chapter.

Sec. 2. Section 41-2198.02, Arizona Revised Statutes, is amended to read:

41-2198.02. Orders; penalties; disposition

A. The administrative law judge may order any party to abide by the statute, condominium documents, community documents or contract provision at issue and may levy a civil penalty on the basis of each violation. For purposes of actions brought under the Arizona mobile home parks residential landlord and tenant act, the civil penalty shall not exceed five hundred dollars. All monies collected pursuant to this article shall be deposited in the state general fund to be used to offset the cost of administering the administrative law judge function, except that monies collected from disputes involving condominiums or planned communities as prescribed in section 41-2198.01, subsection B shall be deposited in the condominium and planned community hearing office fund established by section 41-2198.05. If the petitioner prevails, the administrative law judge shall order the respondent to pay to the petitioner the filing fee required by section 41-2198.01.

B. The order issued by the administrative law judge is binding on the parties unless a rehearing is granted pursuant to section 41-2198.04 based on a petition setting forth the reasons for the request for rehearing, in which case the order issued at the conclusion of the rehearing is binding on the parties. ~~Notwithstanding sections 41-1092.08, subsection B and 41-1092.09, an order issued by the administrative law judge in an action regarding a condominium or planned community is the final administrative decision and is not subject to a request for rehearing.~~ The order issued by the administrative law judge is enforceable through contempt of court proceedings AND IS SUBJECT TO JUDICIAL REVIEW AS PRESCRIBED BY SECTION 41-1092.08.

Sec. 3. Section 41-2198.04, Arizona Revised Statutes, is amended to read:

41-2198.04. Rehearing; appeal

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 pursuant to section 41-1092.09. Within ten days after filing such petition, the director shall serve notice of the request on the other party by mailing a copy of the petition in the manner prescribed in section 41-2198.01 for notice of hearing.

B. The filing of a petition for rehearing temporarily suspends the operation of the administrative law judge's action. If the petition is granted, the administrative law judge's action is suspended pending the decision on the rehearing.

C. In the order granting or denying a rehearing, the director shall include a statement of the particular grounds and reasons for the director's action on the petition and shall promptly mail a copy of the order to the parties who have appeared in support of or in opposition to the petition for rehearing.

D. In a rehearing conducted pursuant to this section, a corporation may be represented by a corporate officer or employee who is not a member of the state bar if:

1. The corporation has specifically authorized such officer or employee to represent it.

2. Such representation is not the officer's or employee's primary duty to the corporation but is secondary or incidental to such officer's or employee's duties relating to the management or operation of the corporation.

Sec. 4. Legislative findings and intent; department of fire, building and life safety; community disputes

It is the intent of the legislature to find, determine and clarify all of the following after careful consideration of the case Gelb v. Department of Fire, Building and Life Safety, 1 CA CV 09-0744, filed October 28, 2010 (Ct. App. 2010):

1. The department of fire, building and life safety has exercised substantial responsibility for many years in the enforcement and application of state laws and private contracts that regulate the relationships between those who reside in and those who control certain types of common housing, namely, mobile home park residential communities.

2. The legislature has determined that while the direct licensure of mobile home parks and their owners may not have been necessary, the regulation of their private, legal relationships with their tenants has been and continues to be an important consumer protection function of the department of fire, building and life safety and that department has developed considerable expertise in interpreting, enforcing and applying the statutes relating to these mobile home communities and in interpreting, applying and enforcing the terms of the leases, rules and other documents that regulate the relationship between the residents of the mobile home parks and the owners and managers of those parks, and doing so in a cost-effective manner for the residents.

3. The legislature further determines and finds that while direct licensure and regulation of condominiums and planned communities may not be necessary at this time, the legislature has repeatedly found over the years that owners in condominiums and planned communities are frequently subjected to inconsistent, unreasonable and often unlawful enforcement and application of the declarations, rules and bylaws that govern their communities, their managers and their boards of directors, and owners are often unable to afford the cost of formally litigating their disputes in the superior court.

4. The legislature further finds that the continuing use of the existing hearing officer function in the department of fire, building and life safety will provide for an efficient use of already-established common interest community expertise at this agency, will provide an important consumer protection for owners in condominiums and planned communities and will efficiently and effectively provide for resolution of these common interest community disputes without the expense, formality and difficulty of requiring a trial in the superior court in every instance, and will do so without the cost and bureaucratic complexity of creating an entirely new administrative body to perform these important functions, while still maintaining the ability and right to recourse in the superior court, and without threat to the core functions of the judiciary.

Approved by the Governor April 19, 2011.
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