Declaration of Unconstitutional Statute
Default Order of the Arizona Superior Court

In the Appeal of the ALJ Ruling on the

Office of Administrative Hearings

Adjudication of HOA disputes

February 26, 2009

Citizens for Constitutional Local Government, Inc.
supporting principles of democratic government

GEORGE K. STAROPOLI, EDITOR

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JANUARY 13, 2010

The State of Arizona will not protect buyers of HOA homes!

Saturday, Feb 28 2009

The Arizona Superior Court special action appeal of an administrative law judge decision upheld, and affirmed last week, the order that the administrative hearing adjudication of HOA disputes was unconstitutional. This affirmation was made one day before the time limit for a response set by the Superior Court Judge, and on the same day a letter introducing new facts in the case was received by the judge. The facts showed that there were no real parties in interest prior to the filing of the appeal and that the case was "fictitious." There is no acknowledgement of the letter nor a response to these important facts by Judge McMurdie. This is a gross miscarriage of justice!

This case, LC2008-000740 Maricopa Superior Court (Merrit), reflects an Arizona public policy that permits the denial of the equal protection of the laws in favor of private party adjudication of HOA disputes. It appears that the Attorney General, the Legislature, and the Judiciary itself see no problem with private party adjudication of disputes that can impose financial harm on homeowners, but will not allow an independent government agency to adjudicate these disputes. This turns the Constitution on its head! This is but a taste of what to expect living in the HOA-lands in the *New America*, in which not only the functions of government itself are privatized, but the judicial functions as well. What, then, is the purpose of public government and the Constitution?

This total disregard of my letter follows a flat denial, without explanation, of my February 11, 2009 Motion to Intervene, which was an abuse of discretion by Judge McMurdie. Perhaps it was because I had included the Attorney General's defense of the constitutionality of the statute in a prior case (which would have caused a trial and an embarrassment to the AG), LC2007-00598 (Waugaman), given that the AG and Legislature now failed to defend the statute in this case. Why? Maybe it was because I had made strong arguments (in my required Answer) against the CAI-HOA attorney argument that an agency had to possess regulatory functions. Such a requirement is not found to be a mandatory criteria in the Bennett four-fold test that was used in the Cactus-Wren and Hancock cases. These cases served as the basis of Judge Downey's order in Waugaman, whose order was included as part of the Merrit complaint.

You be the judge of the events and decisions in this effort to attain a fair trial adjudication of HOA disputes. How much has politics come into play? The relevant court filings are available at the links listed below. A Statement of Facts summary and Timeline can be found under the "summary of events" link below.

It is the policy of Arizona to favor the HOA industry with special laws and privileges that deny its citizens "fair trial" due process and the equal application of the law. **Perhaps in these times of financial hardship on the state, and on developers, homebuyers should speak out with their pocketbooks and buy homes at substantial discounts that are not in HOAs.** Homebuyers, avoid the mismanagement of HOAs; the blind adherence to arbitrary rules by "political machine" ruling boards; the divisiveness caused by the HOA attorneys who insist on enforcement, with no compassion; the lack of support and protection from your public government; and without having to be married to your neighbors who will not join in your just fight for fair treatment against board abuse**. Ask yourself, "Who needs it?"**

summary of events

Court filings:
HOA declaration:
merrit-quitclaim
OAH petition
Complaint
Summary disposition
Injunction order
Intevernor motion
Intervernor answer
Intervenor-order
Fact letter of new facts
time to reply
order affirming injunction
Waugaman AG brief

Waugaman decision

B. Statement of Facts

These findings occurred over a period of just 5 days subsequent to my filing for intervention in Merrit. Item C(3) herein contains a discussion of the chronology of events listed in Appendix A, Timeline.

1. Petitioner Ron Merrit and DFBLS/OAH case 08F-H0089004-BFS.
   a. The OAH Petitioner was Ron Merrit, with an address not within the subdivision, who signed the petition although John Hernandez is listed along with Merrit as "homeowner". Merrit names Phoenix Townhouse Homeowners Association as the HOA. (Exhibit 1, relevant parts).
   b. At the time of filing this petition, co-owned a unit within a Phoenix Townhouse subdivision along with a John Hernandez, bought on Feb. 10, 2006. (Exhibit 2).
   c. Merrit did not file a specific allegation against his HOA, for which he was notified by ALJ Tully on September 15, 2008, and ordered to supplement his Petition. (Exhibit 3). Merrit simply alleged a violation of ARS 33-1242(C) without specifying any act that had occurred to cause the alleged violation(s). Under "4. Complaint", Instruction(E) clearly spells out how the complaint is to be completed, and that the petition will be returned if not completed properly. The statute requires a charge of a specific violation of either Title 33, Chapters 9 or 16, or of the governing documents. None was provided.
   d. Merrit responds with 4 page supplement alleging a long series of HOA violations on Sept. 22. The hearing was allowed to continue for alleged violations on June 23 only.
   e. On Oct. 10, 2008, Merrit quitclaims his interest in the Phoenix Townhouse unit to Big Henge Enterprises, LLC, whose two members are Merrit and Hernandez (Exhibit 5). The special appeal was filed on Oct. 23rd naming both Hernandez, not a Petitioner, and Merrit, no longer a member of the HOA as real parties in interest.

2. The underlying Waugaman Superior Court appeal, LC2007-000589.
   a. HOA attorneys Jason E. Smith and Carrie H. Smith of the Carpenter, Hazelwood law firm had raised the same constitutionality question in this appeal in another OAH case, Waugaman. The ALJ ruled against the HOA.
   b. The Attorney General filed a brief on June 8, 2008 in support of the constitutionality of the statutes in question, ARS 41-2198 et seq., which was included in my Answer that is required to be filed for intervention by Rule 24.
   c. The HOA filed this decision with its Complaint in Merrit on Oct. 3rd. Judge Downie declared the statute in violation of the separation of powers doctrine, and did not expand her ruling to include an injunction against further HOA adjudication by DFBLS/OAH.
   d. On that very same day, Oct. 3rd, the HOA attorneys filed a motion for "an expedited request for order" with a suggested order with a simple caption, "Order". (Exhibit 6). This motion and order are signed by the two Smiths, and by Scott Carpenter. However, the order slipped in a declaration of the unconstitutionality of the statute and an in junction against any further adjudications, not part of the Downie order.
   e. The Attorney General filed an objection to the form of this proposed order by the HOA attorneys on Oct. 10th. (Exhibit 7).
   f. On Oct. 28, Judge Houser, having replaced Judge Downie who moved on to the Appellate Court, denied the motion.
   g. Notice of AG appeal filed on Oct. 31. Notice withdrawn on Nov. 21. What happened??

3. The Merrit special action

a. The Oct 23rd special action names Hernandez and Merrit as real parties in interest, but they are not (see 1(e) above).
b. The address given in the notice of service by the HOA for Merrit and Hernandez is 3154 E. Brookwood, which is not within the Phoenix Townhouse subdivision (The subdivision is located on the west side, between 15th and 17th avenues, around Campbell Ave.). The attorney for the Brookwood HOA (Mountain Park Ranch) is a CAI member, Beth Mulcahy.
c. The Plaintiff and OAH Respondent, Phoenix Townhouse Homeowners Association, is a non-existent legal entity. There are no filings of a trade name, a corporation/LLC, or any mention of this entity in the Phoenix Townhouse subdivision Declaration (See Exhibit 8, ¶ 6, as to relevant part). The named Association is the Phoenix Townhouse Corp. (It is noteworthy that in only March of 2008, the Carpenter law firm filed a tax action using the correct legal name of the HOA. See exhibit 9.)
d. The only occurrence of the name "Phoenix Townhouse Association" appears in 2004 with the required filing of a notice by the HOA under ARS 33-1807(J). It was filed by the "managing agent", an alleged "Mutual Management Services, Inc" entity, but is notarized without any signature! As an aside, Mutual Management is not a legal corporation, but "Management Mutual Services" is a trade name of Cimros, Inc., a corporation in good standing.
e. As of Nov. 14, 2008, Phoenix Townhouse Corp. was classified as "Not in Good Standing", and remains so today, for failure to file its annual report. Carpenter, Hazelwood is the statutory agent.

4. Community Associations Institute (CAI)
   a. The HOA attorneys in this case and the underlying Waugaman case, Scott Carpenter, Jason E. Smith and Carrie H. Smith are all members of the national pro-HOA lobbying organization, Community Associations Institute.
   b. Two other OAH petitions that had raised the constitutionality issue on appeal, LC2008-000043 and LC2007-000588, but never became an issue for a decision, were brought by HOAs whose attorney was another long time CAI member, Curtis Ekmark.
   c. Scott Carpenter and Curtis Ekmark are, and have been, the Arizona CAI chapter's lobbying committee (Legislative Action Committee, or LAC), chairs. CAI opposed the bill establishing OAH adjudication in 2006, HB2824.
   d. Statistics relating to the success of homeowner OAH petitions reveal a surprising, even to this long time advocate, of some 42% ("Decided Cases" as of Jan. 9, 2009, excluding "splits", as shown in Table 1) victories for the homeowner. Almost all the homeowners were Pro Pers against the HOA attorney. Such a success rate by lay people was a thorn in the side of the CAI lobbyists.
   e. This constitutionality challenge was not raised during the hearings on the bill, HB2824, in 2006.

Table 1.

	Disposed Cases				**Decided Cases**	
Nr of Decisions	**Dismissed Cases**	**Settled Cases**	**Default Cases**	**Split Deci+sions**	**Respondent Prevailed**	**Petitioner Prevailed**
66	7	6	1	3	28	21

f. Objectives of CAI can be found in its Legislative Action Committee (LAC) Guidelines (Exhibit 10 contains a statement of the LAC's purpose, emphasis added).

> No CAI chapter, member, LAC staff, contractor, or advocate shall conduct state-level advocacy activities in that state on CAI's behalf except as requested or authorized by the LAC. . . . LACs exist to represent the interests of, and to provide regular communications to, CAI members regarding state legislative, regulatory, and *amicus curiae* activities of relevance to the creation and operation of community associations

It is evident that the HOA attorneys have a personal interest in promoting the objectives of CAI — an attempt to remove OAH adjudication of HOA disputes — that conflict with its obligations to its client, the HOA.

Appendix A. Timeline

Date	Waugaman	Merrit	action
2/10/06		Merrit & Hernandez buy unit in Phx Townhouse subdivision	
6/08/08	AG files brief		supports statute
8/7/08		petition recv'd at OAH	not signed by Hernandez
9/15/08		ALJ asks for a definitive allegation	response required by 9/25
9/22/08		Merrit 4 page supplement	
9/29/08		ALJ allows petition to continue on June 23 actions by HOA	
10/03/08	judge rules unconstitutional		
10/03/08	CAI files for expansive order		filed as "expedited order"
10/06/08		CAI motion to dismiss	denied
10/10/08	DFBLS/OAH objects to expansive CAI order		"expedited order"
10/10/08		Merrit quitclaims deed to Big Henge	
10/16		CAI seeks stay for constitutionality	denied
10/23/08		special action appeal	names Merit & Hernandez
10/28/08	Houser does not expand Downie ruling		case applies to Troon only
10/31/08	AG/DFBLS files notice of appeal		
11/19/08	AG/DFBLS withdraws appeal		
11/21/08		OAH/DFBLS file nominal party status	
11/26/08		notice to Legislature of statute	
1/28/09		default order	
2/11/09		intervenor filed	
2/18/09		intervention denied	flat denial
2/23/09		"new facts" letter sent to judge	no response from judge

2. Each townhouse shall be a separately designated and legally described freehold estate consisting of an area of cubic space and the improvements therein, together with an undivided 1/251 interest in the common elements of said condominium, as designated in that Declaration of Horizontal Regime recorded in Docket 5051, page 421 in the office of the County Recorder of Maricopa County, Arizona. Said freehold estates are herein defined and referred to as "townhouses."

3. The "common elements" shall be as defined in said Declaration of Horizontal Regime referred to in paragraph 2 above, and shall include, but not be limited to the land upon which the townhouses are situate, recreational facilities, community and commercial facilities, if any, swimming pools, pumps, trees, pavements, streets, pipes, wires, conduits and other public utility lines, and any air space not otherwise specifically designated as a townhouse unit.

4. Notwithstanding any provisions herein contained to the contrary, it shall be expressly permissible for the Builder of a major portion of said townhouses to maintain during the period of construction and sale of said townhouses, upon such portion of the premises as such Builder may choose, such facilities as in the sole opinion of said Builder may be reasonably required, convenient or incidental to the construction and sale of said townhouses, including, but without limitation, a business office, storage area, construction yards, signs, model units and sales office.

5. No animals, livestock or poultry of any kind shall be raised, bred or kept on any lot, except that dogs, cats or other household pets may be kept provided that they are not kept, bred or mai[illegible] for any commercial purpose.

6. No advertising signs (except one of not more than five square feet "For Rent" or "For Sale" sign per parcel), billboards, unsightly objects, or nuisances shall be erected, placed or permitted to remain on the premises, nor shall the premises be used in any way or for any purpose which may endanger the health or unreasonably disturb the owner of any townhouse or any resident thereof. Further, no business activities of any kind whatever shall be conducted in any building or in any portion of the premises. Provided, further, however, the foregoing covenants shall not apply to the business activities, signs and billboards, or the construction and maintenance of buildings, if any, of the Builder, its agents and assigns during the construction and sale period, and of PHOENIX TOWNHOUSE CORP., a non-profit corporation incorporated or to be incorporated under the laws of the State of Arizona, its successors, and assigns, (hereinafter referred to as the Association), in furtherance of its powers and purposes as hereinafter set forth.

7. All clotheslines, equipment, garbage cans, service yards, woodpiles, or storage piles shall be kept screened by adequate planting or fencing so as to conceal them from view of neighboring townhouses and streets. All rubbish, trash, or garbage shall be regularly removed from the premises, and shall not be allowed to accumulate thereon. All clotheslines shall be confined to patio areas.

When recorded mail to:

Name: RON MERITT

Address: 3154 E. BROOKWOOD CT.

City/State/Zip: PHOENIX, AZ 85048

M.

2008

MIRAMONTE.COM

this area reserved for county recorder

CAPTION HEADING:

DO NOT REMOVE

This is part of the official document.

3/10

Quitclaim Deed

THIS QUITCLAIM DEED, executed this **10th day of October, 2008**

by first party, Grantor, **Ron Meritt**

whose post office address is **3154 East Brookwood Court, Phoenix, AZ 85048**

to second party, Grantee, **Big Henge Enterprises, LLC**

whose post office address is **11022 South 51st Street, Suite 201, Phoenix, AZ 85048**

WITNESSETH, That the said first party, for good consideration and for the sum of

Zero Dollars ($0.00) paid by the said second party, the receipt whereof is hereby acknowledged, does hereby remise, release and quitclaim unto the said second party forever, all the right, title, interest and claim which the said first party has in and to the following described parcel of land, and improvements and appurtenances thereto in the County of **Maricopa**
State of **Arizona** to wit:

1592 W. Campbell Avenue
Phoenix, AZ 85016

Unit 130, Phoenix Townhouse, according to Declaration of Horizontal Property Regime recorded in Docket 5051, Page 421, and plat recorded in Book 105 of Maps, Page 45 and Page 46, records of Maricopa County, Arizona

Parcel ID Number: 512 21 010

A.R.S. 11-1134 **B9**

IN WITNESS WHEREOF, The said first party has signed and sealed these presents the day and year first above written. Signed, sealed and delivered in presence of:

Signature of Witness: _____

Print name of Witness: _____

Signature of Witness: _____

Print name of Witness: _____

Signature of First Party: Ron Meritt

Print name of First Party: RON MERITT

Signature of Second Party: _____

Print name of Second Party: JOHN HERNANDEZ

Signature of Preparer Ron Meritt

Print Name of Preparer RON MERITT

Address of Preparer 3154 E. BROOKWOOD COURT, PHX, AZ 85048

State of Arizona
County of Maricopa

On Oct. 9, 2008 before me, Ron Merit & John Hernandez

appeared, _____
personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.
WITNESS my hand and official seal.

ASHLEY CRACRAFT
NOTARY PUBLIC - ARIZONA
MARICOPA COUNTY
My Commission Expires
May 15, 2009

Ashley Cracraft
Signature of Notary

Affiant ____ Known ✓ Produced ID
Type of ID Drivers License

(Seal)

INSTRUCTIONS

A. Describe the specific acts or conditions that you believe violate:
   - The statutes that regulate condominiums or planned communities, Arizona Revised Statutes Title 33, Chapter 9 or 16, or
   - The Condominium Documents or Planned Community Documents.

B. Include the specific dates when each act occurred or when each condition came into existence.

C. You must state each act or condition separately in the space provided.

D. For each act or condition, in the table list the section number of the applicable statute(s) and, if applicable, the Condominium Documents or Planned Community Documents, which you believe have been violated.

E. **Any petition that does not separately state each act or condition in the table with a separate citation to the specific section of the statute that relates to each act or condition, or fails to list the specific provisions of the Condominium or Planned Community documents in the table will be considered to be incomplete and will be returned. All information must be provided in the table. Do not say "see attached" instead of filling in the table.**

F. If the complaint involves the failure to receive the Condominium or Planned Community documents, specifically state that they are unavailable and the facts and circumstances why they cannot be provided with the petition.

G. Please provide copies of relevant or actual text/pages of the bylaws or documents sections. Please keep all other correspondence or evidence for admission at the hearing.

*** Single Count Violations Fill in the Shaded Box:**

On or about JUNE 23, 2008 (specify date), the Respondent committed the specific following act, or specifically failed to act in the following manner, or caused the following condition to occur:

HOA IS IN VIOLATION OF A.R.S. TITLE 33, CHAPTER 9, SUBSECTION 33-1242, LINES C, 1, 2, 3 in violation of the following provisions of the condominium or planned community documents and/or A.R.S. § Title 33 (Chapter 9 (condominium) or A.R.S. Title 33, Chapter 16 (planned community).

Please specify the subsection: 33-1242

On or about _____ (specify date), the Respondent committed the specific following act, or specifically failed to act in the following manner, or caused the following condition to occur:

_____

_____

_____, in violation of the following provisions of the condominium or planned community documents and/or A.R.S. § Title 33, Chapter 9 (condominium) or A.R.S. Title 33, Chapter 16 (planned community).

Please specify the subsection: _____

*** Additional Counts Should Use Same or Similar Format to Above ***

RELIEF REQUESTED

5. Petitioner requests that the following relief be awarded regarding the acts, omissions, or conditions described in the table above (check all relief requested):

X Order a party to abide by the statute(s) specified in the table above.

X Order a party to abide by the section(s) of the condominium document(s) or community document(s) specified in the table above.

X Impose a civil penalty on the basis of each violation specified in the table.

X If the petitioner prevails, order the respondent to pay to the petitioner the filing fee required by A.R.S. § 41-2198.01.

6. Petitioner expects to call the following number of witness at hearing: 1.

7. By signing below, Petitioner requests that a hearing be held before the Office of Administrative Hearings. If Petitioner is an Association, the signer is authorized to sign on behalf of the Association.

Petitioner's Signature Ron Merritt Date 8/4/08

Print Name RON MERITT

Title, if Petitioner is an Association _____

REMINDER: If you do not fully complete the Petition as indicated, enclose the filing fee, and, if applicable, attach the Condominium or Planned Community documents, the Petition will be returned to you as incomplete.

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PHXTWHS.0049

Attorneys for Plaintiff

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

PHOENIX TOWNHOUSE HOMEOWNERS ASSOCIATION, an Arizona nonprofit corporation,

Plaintiff,

vs.

ARIZONA OFFICE OF ADMINISTRATIVE HEARINGS; ARIZONA DEPARTMENT OF FIRE, BUILDING AND LIFE SAFETY; and HONORABLE BRIAN TULLY, ADMINISTRATIVE LAW JUDGE;

Defendants,

and

RON MERITT AND JOHN HERNANDEZ,

Real Parties in Interest.

Case No. LC2008-000740-001

COMPLAINT FOR SPECIAL ACTION, DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. Declaring A.R.S. § 41-2198 *et seq.* void and unconstitutional as a violation of the separation of powers doctrine;

b. Enjoining the Defendants from adjudicating this and other private party disputes pursuant to A.R.S. § 41-2198 *et seq.*;

c. Awarding the Plaintiff its costs and attorneys' fees incurred herein; and

d. Granting Plaintiff such other relief deemed just and proper in the circumstances.

Respectfully submitted this 23rd day of October, 2008.

CARPENTER, HAZLEWOOD, DELGADO & WOOD, PLC

By: _____

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

Michael K. Jeanes, Clerk of Court
*** Filed ***
10/03/2008 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2007-000598-001 DT 10/02/2008

HON. MARGARET H. DOWNIE

CLERK OF THE COURT
T. Melius
Deputy

TROON VILLAGE MASTER ASSOCIATION CARRIE H SMITH

v.

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

MICHELLE L WOOD
MELANIE C MCKEDDIE

OFFICE OF ADMINISTRATIVE HEARINGS
REMAND DESK-LCA-CCC

RECORD APPEAL RULE / REMAND

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

Factual and Procedural Background

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

[1] The Department is appearing as a nominal party in these proceedings.

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Attorneys for Plaintiff

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

PHOENIX TOWNHOUSE HOMEOWNERS ASSOCIATION, an Arizona nonprofit corporation, **Plaintiff,** **vs.** **ARIZONA OFFICE OF ADMINISTRATIVE HEARINGS; ARIZONA DEPARTMENT OF FIRE, BUILDING AND LIFE SAFETY; and HONORABLE BRIAN TULLY, ADMINISTRATIVE LAW JUDGE;** **Defendants,** **and** **RON MERITT AND JOHN HERNANDEZ,** **Real Parties in Interest.**	**Case No. LC2008-000740-001 DT** **PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION** **(Assigned to the Honorable Paul J. McMurdie)**

Plaintiff, Phoenix Townhouse Homeowners Association, an Arizona nonprofit corporation ("Plaintiff" or the "Association"), by and through undersigned counsel,

hereby moves the Court pursuant to Rule 7.1(b), Ariz.R.Civ.P., for summary disposition of the Association's claims for declaratory and injunctive relief. The Plaintiff filed the complaint in this case seeking a declaration pursuant to A.R.S. § 12-1831 *et seq.* that A.R.S. § 41-2198.01 is unconstitutional and also seeking a permanent injunction against the Department of Fire, Building & Life Safety ("DFBLS") and the Office of Administrative Hearings ("OAH") from accepting petitions and hearing adjudications pursuant to that statute.

The Plaintiff has properly served the State of Arizona as required by A.R.S. § 12-1841(A) and this Court's minute entry dated November 21, 2008. However, the Attorney General, having been served with the Notice of Unconstitutionality and the Complaint in this matter, filed a notice with this Court that is will not file a brief defending the constitutionality of the statute at issue. Furthermore, undersigned counsel has spoken directly with Paula Bickett, Chief Counsel for Civil Appeals at the Attorney General's Office on December 30, 2008, and Ms. Bickett confirmed that the Attorney General's Office similarly declines to participate in oral argument on the issues presented.

The OAH, Judge Tully and DFBLS are also represented by the Attorney General's Office, but their respective counsels appeared and requested to be given nominal party status. The Real Parties in Interest have been served but have failed to appear or otherwise defend in this matter.

Ariz.R.Civ.P. 7.1(b) provides, in relevant part:

> [I]f the opposing party does not serve and file the required answering memorandum . . . such non-compliance may be deemed a consent to the denial or granting of the motion, and the court may dispose of the motion summarily.

Based upon this rule and the Attorney General's notice refusing to file a brief or to participate in oral argument, the Court should find that the State has consented to the entry of the judgment requested by the Plaintiff. The issues before the Court are purely legal and need no factual investigation or proof.

Plaintiff therefore requests that the Court enter an order declaring A.R.S. § 41-2198.01 *et seq.* violates the separation of powers provision of the Arizona constitution; enjoining the OAH and DFBLS from taking any further actions under the statute in the Plaintiff's case or any other pending case or from accepting any new petitions; and award Plaintiff its attorneys' fees pursuant to A.R.S. § 12-348(A)(4).

Respectfully submitted this 31th day of December, 2008.

CARPENTER, HAZLEWOOD, DELGADO & WOOD, PLC

By: _____

Jason E. Smith, Esq.
Carrie H. Smith, Esq.
Scott B. Carpenter, Esq.
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Attorneys for Plaintiff

CERTIFICATE OF SERVICE

Original of the Foregoing filed
this 31st day of December, 2008 with:

Clerk of the Superior Court

Copy of the foregoing hand delivered
this 31st day of December, 2008 to:

The Honorable Judge Paul J. McMurdie

Copies of the foregoing mailed
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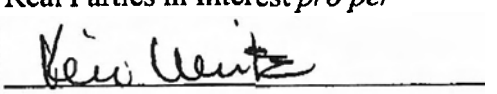
Real Parties in Interest *pro per*



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SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

PHOENIX TOWNHOUSE HOMEOWNERS ASSOCIATION, an Arizona nonprofit corporation, **Plaintiff,** **vs.** **ARIZONA OFFICE OF ADMINISTRATIVE HEARINGS; ARIZONA DEPARTMENT OF FIRE, BUILDING AND LIFE SAFETY; and HONORABLE BRIAN TULLY, ADMINISTRATIVE LAW JUDGE;** **Defendants,** **and** **RON MERITT AND JOHN HERNANDEZ,** **Real Parties in Interest.**	**Case No. LC2008-000740-001 DT** **ORDER FOR DECLARATORY AND INJUNCTIVE RELIEF** **(Assigned to the Honorable Paul J. McMurdie)**

The Court having reviewed the pleadings and briefs herein and having given the State of Arizona the opportunity to respond to Plaintiff's claim of unconstitutionality,

which the State refused to do, and no other party having appeared and defended, and good cause appearing:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Laws 2006, Ch. 324, § 6, which amended A.R.S. § 41-2198.01 *et seq.* and A.R.S. § 33-1242 and § 33-1803, violates the Arizona Constitution's separation of powers clause and therefore is unconstitutional to the extent that it created an administrative hearing process involving planned community and condominium associations and their members;

2. The Arizona Department of Fire, Building & Life Safety and Office of Administrative Hearings are enjoined from taking any further action in any pending administrative adjudication and from accepting any new petitions for administrative adjudications; and

3. ~~Plaintiff is the prevailing party and is entitled to an award of reasonable attorneys' fees and costs pursuant to A.R.S. § 12-348 and may submit an application and affidavit in support of the same.~~ PSM

IT IS SO ORDERED.

DATED this 29th day of January, 2009.

PAUL J. MC MURDIE
JUDGE OF THE SUPERIOR COURT

Honorable Paul J. McMurdie

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

MOTION TO INTERVENE BY GEORGE K. STAROPOLI

(assigned to the Honorable Paul J. McMurdie)

Pursuant to the Ariz. R. Civil P. R24(a)(2), (b)(2), and (c) George K. Staropoli ("Intervenor"), a member of a homeowners association in Maricopa County who seeks to protect his interest concerning a matter of law and fact in common, submits this Motion to Intervene. Intervenor is

aware that a brief was filed by the plaintiff and that a judgment was rendered. If the Court allows this intervention, a response to the brief can be filed rather quickly, if the Court so desires.

MEMORANDUM OF POINTS AND AUTHORITIES

A. Lack of Awareness of the litigation -- late involvement

Intervenor first became aware of this particular case involving a challenge to OAH constitutionality when he received an email announcement of the decision from the HOA attorneys. At a meeting on January 5, 2009 at the invitation of the Director of the Department of Fire, Building and Life Safety (DFBLS) to discuss this constitutionality issue, at which an Assistant Attorney General and Deputy Director Stahmer were present, I asked if anyone was aware of any case pending or in appeal on this issue. There was no acknowledgement of open and forthcoming cases. The invitation was the result of an exchange of emails in which DFBLS Deputy Director had responded that he could not answer questions about future cases, and other concerns. *"Please understand that is impossible for the Department of Fire, Building and Life Safety to determine what the Superior Court or the Home Owner's Association will do with any future cases.*" (The December 3, 2008 response to an email from a "Tenbu Tamonten" by John Stahmer, a copy of which is attached as Exhibit A). Although the Office of Administrative Hearings (OAH) provides much transparency to the public, there was no information available to the public concerning this special action, nor does OAH offer an "alert" service.

Intervenor was quite disturbed by the failure of any of the named defendants or real defendants to respond to the Complaint, recognized by the Court in its order as, in reality, a default judgment.

Intervention after a judgment has been rendered does not automatically preclude intervention (*Winner Enterprises, Ltd v. Superior Court*, 765 P.2d 116 (App. 1998)), nor will intervention in this case "unduly delay or prejudice the adjudication of rights of the original parties" (Ariz. R. Civ. P 24(b); State of Arizona ex rel. Napolitano v. Brown & Williamson Tobacco Corp., 998 P. 2d 1055 (2000). Rather, Intervenor is protecting his right to OAH access, and the rights of others, in the presence of an about face by the Attorney General who, after filing a brief in support in Waugaman, and an Answer in *Terravita v. Brown* (LC2007-000588, 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), declined to become involved in this "round 2" of the OAH constitutionality issue, "round 1" being the Waugaman case.

B. Intervention by right

Intervenor asserts his right to intervene under Ariz. R. Civ. P. 24(a)(2) since he is a homeowner living in an HOA in Maricopa County and his right to seek a fair and just adjudication of complaints against his HOA under the statute in question. (*John F. Long Homes, Inc. v. Holohan*, 97 Ariz. 31 (1964); *Weaver v, Synthes*, 784 P.2d 268 (198)). These rights may become non-existent and impair his interests in the issue of constitutionality. if the plaintiff prevails. Furthermore, the failure of any of the defendants to respond and defend the constitutionality of the statute allows intervention under R 24(a*), "unless the applicant's interest is adequately represented by existing parties."*

C. Undue delay and prejudice to original parties.

By the nature of this constitutionality challenge, the appearance of the Intervenor will not *"prejudice the adjudication of rights of the original parties"*, since justice will be done in place of a default judgment resulting from the absence of the Attorney General and Legislature to defend the statute that has been in existence since September 2006. "Because an intervenor of right may be seriously harmed if not permitted to intervene, the court should be reluctant to dismiss a request for intervention." *Winner Enterprises, Ltd v. Superior Court*, 765 P.2d 116 (1988). The Winner court held that because the time frame was shortened by the special action and that other parties would not be prejudices, it allowed the intervention even though a judgment had been rendered. This Intervenor's appearance will not unduly delay proceedings, but will serve the interest of justice that was lacking by the current default judgment. A response to the plaintiff's brief can be quickly filed, if the Court deems necessary or appropriate.

Wherefore, Intervenor requests the Court's indulgence and allow this intervention by right or permission as permitted under Ariz. R. Civ. P. 24(a)(2) and (b).

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:

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_____
George K. Staropoli

EXHIBIT A. DFBLS email denying any knowledge of any appeals

(emphasis added)

--- On **Wed, 12/3/08, John Stahmer <*john.stahmer@dfbls.az.gov*>** wrote:

From: John Stahmer <john.stahmer@dfbls.az.gov>
Subject:
To: tenbutamonten@yahoo.com
Date: Wednesday, December 3, 2008, 4:34 PM

Dear Mr. Tamonten:

This is in response to your inquiry regarding Case No. LC2007-000598**. Please understand that is impossible for the Department of Fire, Building and Life Safety to determine what the Superior Court or the Home Owner's Association will do with any future cases.**

Should you have further questions, please do not hesitate to contact me.

Thank you for your inquiry if necessary please seek the advice of legal counsel as the Department of Fire, Building and Life Safety does not render legal advice.

Sincerely,

John Stahmer

On Behalf of: Bob Barger

####

Copy received by email 12/8/09

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

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

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_____
George K. Staropoli

EXHIBIT A.

Attorney General's Brief in Support of Constitutionality

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Attorney General
Firm Bar No. 14000

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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

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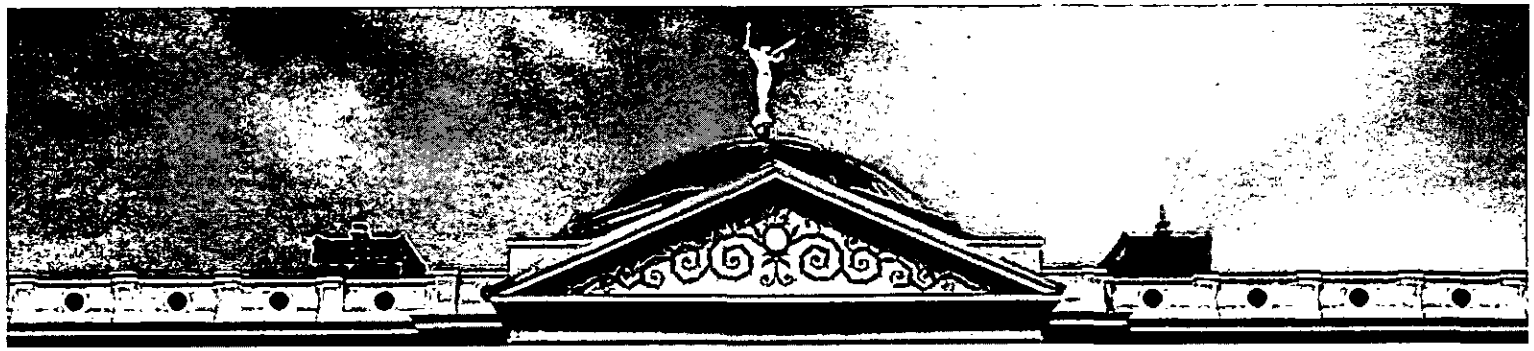
Secretary to Paula Bickett

PHX-#223425-v1-TROON_VILLAGE__(FINAL)_MEMO_IN_SUPPORT_OF_CONSTITUTIONALITY.DOC



---------- DOCUMENT HEADER ----------

---------- DOCUMENT HEADER ----------

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.

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
02/19/2009 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2008-000740-001 DT 02/18/2009

HONORABLE PAUL J. MCMURDIE

CLERK OF THE COURT
S. LaMarsh
Deputy

PHOENIX TOWNHOUSE HOMEOWNERS ASSOCIATION
GEORGE K STAROPOLI

HUNTER F PERLMETER
GEORGE K STAROPOLI
5419 E PIPING ROCK RD
SCOTTSDALE AZ 85254

v.

ARIZONA DEPARTMENT OF FIRE BUILDING AND LIFE SAFETY (001)
HONORABLE BRIAN TULLY (001)
RON MERITT (001)
JOHN HERNANDEZ (001)
ARIZONA OFFICE OF ADMINISTRATIVE HEARINGS (001)

CAMILA ALARCON

REMAND DESK-LCA-CCC

MINUTE ENTRY

The Court has received and considered the Motion to Intervene by George K. Staropoli.

IT IS ORDERED denying the Motion.

George K. Staropoli
5419 E. Piping Rock Road, Scottsdale, AZ 85254-2952
602-228-2891 / 602-996-3007 (f)
george@pvtgov.org http://pvtgov.org

February 23, 2009

Hon. Paul J. McMurdie
Maricopa Superior Court
101 W. Jefferson # 413
Phoenix, AZ 85003-2243

Re: LC2008-000740
special action from OAH 08F-H089004-BFS
new facts

Dear Judge McMurdie:

If I had been permitted to intervene, these facts, discovered subsequent to filing the Motion to Intervene, would have been presented appropriately. Rule 60(c)(6) *"does not limit the power of a court to entertain an independent action to relieve a party from judgment, order . . . or to set aside a judgment for fraud upon the court*."

In short:

1. Petitioner and real party in interest, Ron Merrit, had quitclaimed his deed to his co-owned property in the Phoenix Townhouse subdivision on October 10, 2008, prior to the superior court special appeal of October 23. (Exhibit 1). I believe this issue became moot at that point.
2. The new co-owner is the legal person of Big Henge Enterprises, LLC whose two members are Merrit and Hernandez. Big Henge is not a successor in interest to the Merrit Petition.
3. John Hernandez, the other real party in interest, and co-owner of the Phoenix Townhouse with along with Merrit, did not file a Petition, but was falsely named as a defendant in the special action. Hernandez is listed on the Petition as a homeowner, but did not sign it! (Exhibit 2). It appears that there are no valid real parties in interest in the special action.
4. There is no legal entity named "Phoenix Townhouse Association", the stated Plaintiff. The name appears on the court/OAH filings and in correspondence attached as exhibits to the supplemental Petition filed by Merrit on September 22. There are no records or names of any directors of the board or president on any of these documents. The "Association" named in the Phoenix Townhouse declaration is "Phoenix Townhouse Corp." (Exhibit 3) whose president is Richard Flood with Maggie O'Dell as a director (as shown on the ACC annual reports). There is no trade name filed as such.
5. The 2004 notice filing required under ARS 33-1807(J) also falsely names "Phoenix Townhouse Association" as the legal name of the subdivision (Exhibit 4). It was filed by the "managing agent", an alleged "Mutual Management

Services, Inc" entity, but is notarized without any signature! As an aside, Mutual Management is not a legal corporation, but "Management Mutual Services" is a trade name of Cimros, Inc., a corporation in good standing.

For these reasons, I feel that the decision in the special action be set aside and a bona fide case be brought before the court for adjudication. As it stands, the declaration of unconstitutionality and the injunction against any further adjudication of HOA complaints by DFBLS/OAH should be vacated.

Respectfully,

George K. Staropoli

ecc: Camila Alarcon, Assistant AG
Hunter Perlmeter, Assistant AG
Kirk Adams, Speaker of the House
Bob Burns, President of the Senate
Bob Barger, Director DFBLS
Cliff Vanell, Director, OAH

EXHIBIT 1.

20080882684

Quitclaim Deed

THIS QUITCLAIM DEED, executed this **10th day of October, 2008**

by first party, Grantor, **Ron Meritt**

whose post office address is **3154 East Brookwood Court, Phoenix, AZ 85048**

to second party, Grantee, **Big Henge Enterprises, LLC**

whose post office address is **11022 South 51st Street, Suite 201, Phoenix, AZ 85048**

WITNESSETH, That the said first party, for good consideration and for the sum of

Zero Dollars ($0.00) paid by the said second party, the receipt whereof is hereby acknowledged, does hereby remise, release and quitclaim unto the said second party forever, all the right, title, interest and claim which the said first party has in and to the following described parcel of land, and improvements and appurtenances thereto in the County of **Maricopa**
State of **Arizona** to wit:

1592 W. Campbell Avenue
Phoenix, AZ 85016

Unit 130, Phoenix Townhouse, according to Declaration of Horizontal Property Regime recorded in Docket 5051, Page 421, and plat recorded in Book 105 of Maps, Page 45 and Page 46, records of Maricopa County, Arizona

Parcel ID Number: 512 21 010

A.R.S. 11-1134 **B9**

EXHIBIT 2. PETITION SIGNATURE

On or about _____ (specify date), the Respondent committed the specific following act, or specifically failed to act in the following manner, or caused the following condition to occur:

_____

_____

_____, in violation of the following provisions of the condominium or planned community documents and/or A.R.S. § Title 33, Chapter 9 (condominium) or A.R.S. Title 33, Chapter 16 (planned community).

Please specify the subsection: _____

*** Additional Counts Should Use Same or Similar Format to Above ***

RELIEF REQUESTED

5. Petitioner requests that the following relief be awarded regarding the acts, omissions, or conditions described in the table above (check all relief requested):

X Order a party to abide by the statute(s) specified in the table above.

X Order a party to abide by the section(s) of the condominium document(s) or community document(s) specified in the table above.

X Impose a civil penalty on the basis of each violation specified in the table.

X If the petitioner prevails, order the respondent to pay to the petitioner the filing fee required by A.R.S. § 41-2198.01.

6. Petitioner expects to call the following number of witness at hearing: 1.

7. By signing below, Petitioner requests that a hearing be held before the Office of Administrative Hearings. If Petitioner is an Association, the signer is authorized to sign on behalf of the Association.

Petitioner's Signature Ron Merritt Date 8/4/08

Print Name RON MERITT

Title, if Petitioner is an Association _____

REMINDER: If you do not fully complete the Petition as indicated, enclose the filing fee, and, if applicable, attach the Condominium or Planned Community documents, the Petition will be returned to you as incomplete.

2. Each townhouse shall be a separately designated and legally described freehold estate consisting of an area of cubic space and the improvements therein, together with an undivided 1/251 interest in the common elements of said condominium, as designated in that Declaration of Horizontal Regime recorded in Docket 5051, page 421 in the office of the County Recorder of Maricopa County, Arizona. Said freehold estates are herein defined and referred to as "townhouses."

3. The "common elements" shall be as defined in said Declaration of Horizontal Regime referred to in paragraph 2 above, and shall include, but not be limited to the land upon which the townhouses are situate, recreational facilities, community and commercial facilities, if any, swimming pools, pumps, trees, pavements, streets, pipes, wires, conduits and other public utility lines, and any air space not otherwise specifically designated as a townhouse unit.

4. Notwithstanding any provisions herein contained to the contrary, it shall be expressly permissible for the Builder of a major portion of said townhouses to maintain during the period of construction and sale of said townhouses, upon such portion of the premises as such Builder may choose, such facilities as in the sole opinion of said Builder may be reasonably required, convenient or incidental to the construction and sale of said townhouses, including, but without limitation, a business office, storage area, construction yards, signs, model units and sales office.

5. No animals, livestock or poultry of any kind shall be raised, bred or kept on any lot, except that dogs, cats or other household pets may be kept provided that they are not kept, bred or mai[illegible] for any commercial purpose.

6. No advertising signs (except one of not more than five square feet "For Rent" or "For Sale" sign per parcel), billboards, unsightly objects, or nuisances shall be erected, placed or permitted to remain on the premises, nor shall the premises be used in any way or for any purpose which may endanger the health or unreasonably disturb the owner of any townhouse or any resident thereof. Further, no business activities of any kind whatever shall be conducted in any building or in any portion of the premises. Provided, further, however, the foregoing covenants shall not apply to the business activities, signs and billboards, or the construction and maintenance of buildings, if any, of the Builder, its agents and assigns during the construction and sale period, and of PHOENIX TOWNHOUSE CORP., a non-profit corporation incorporated or to be incorporated under the laws of the State of Arizona, its successors, and assigns, (hereinafter referred to as the Association), in furtherance of its powers and purposes as hereinafter set forth.

7. All clotheslines, equipment, garbage cans, service yards, woodpiles, or storage piles shall be kept screened by adequate planting or fencing so as to conceal them from view of neighboring townhouses and streets. All rubbish, trash, or garbage shall be regularly removed from the premises, and shall not be allowed to accumulate thereon. All clotheslines shall be confined to patio areas.

EXHIBIT 4. NOTICE FILING

When recorded, return to:
Mutual Management Services, Inc.
P. O. Box 27008
Phoenix, AZ 85061

NOTICE
OF COMMUNITY ASSOCIATI

Pursuant to A.R.S. §33-1256(J) or 33-1807(J), notice is hereby given of the following information:

1. Legal/Corporate Name of Association: Phoenix Townhouse Homeowners Association
2. Trade or aka Name of Association: Phoenix Townhouse
3. Managing Agent: Mutual Management SErvices
4. Association address: P.O. Box 27008 Ohoenix, AZ 85061
5. Association telephone number: 602-248-4466
6. Name of Community/Subdivision/Condominium: Phoenix Townhouse
7. Declaration Recording Information:

Date	Recording Number
5053	5/14/64

[ASSOCIATION NAME]

By: Phoenix Townhouse Homeowners Association

STATE OF ARIZONA)
)
County of Maricopa)

ACKNOWLEDGED before me this 19 day of August, 2009
by JANE KNUT, MANAGER of the Association.

Notary Public

JANE S. KNUT
NOTARY PUBLIC - State of
MARICOPA
My Comm. Exp.

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
02/13/2009 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2008-000740-001 DT 02/11/2009

HONORABLE PAUL J. MCMURDIE

CLERK OF THE COURT
S. LaMarsh
Deputy

PHOENIX TOWNHOUSE HOMEOWNERS ASSOCIATION — HUNTER F PERLMETER

v.

ARIZONA OFFICE OF ADMINISTRATIVE HEARINGS (001) — CAMILA ALARCON
ARIZONA DEPARTMENT OF FIRE BUILDING AND LIFE SAFETY (001)
HONORABLE BRIAN TULLY (001)
RON MERITT (001)
JOHN HERNANDEZ (001)

REMAND DESK-LCA-CCC

MINUTE ENTRY

The Court has received and considered Defendant's Joint Motion Seeking Clarification of Order for Declaratory and Injunctive Relief.

IT IS ORDERED that the Petitioner and Real Party in Interest shall file a response no later than February 25, 2009.

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
03/02/2009 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2008-000740-001 DT 02/26/2009

HONORABLE PAUL J. MCMURDIE

CLERK OF THE COURT
S. LaMarsh
Deputy

PHOENIX TOWNHOUSE HOMEOWNERS ASSOCIATION

HUNTER F PERLMETER

v.

ARIZONA OFFICE OF ADMINISTRATIVE HEARINGS (001)
ARIZONA DEPARTMENT OF FIRE BUILDING AND LIFE SAFETY (001)
HONORABLE BRIAN TULLY (001)
RON MERITT (001)
JOHN HERNANDEZ (001)
GEORGE K STAROPOLI

CAMILA ALARCON
GEORGE K STAROPOLI
5419 E PIPING ROCK RD
SCOTTSDALE AZ 85254

REMAND DESK-LCA-CCC

MINUTE ENTRY

The Court has received and considered the Joint Motion Seeking Clarification of Order for Declaratory and Injunctive Relief.

IT IS ORDERED granting the Motion, all in accordance with the formal written order signed by the Court on February 24, 2009 and filed by the Clerk on February 26, 2009.

Michael K. Jeanes, Clerk of Court
*** Filed ***
10/03/2008 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2007-000598-001 DT 10/02/2008

HON. MARGARET H. DOWNIE

CLERK OF THE COURT
T. Melius
Deputy

TROON VILLAGE MASTER ASSOCIATION CARRIE H SMITH

v.

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

MICHELLE L WOOD
MELANIE C MCKEDDIE

OFFICE OF ADMINISTRATIVE HEARINGS
REMAND DESK-LCA-CCC

RECORD APPEAL RULE / REMAND

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

Factual and Procedural Background

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

[1] The Department is appearing as a nominal party in these proceedings.

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

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

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

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

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

Legal Analysis

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

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

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

Article III of the Arizona Constitution states:

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

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

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

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

[3] A.R.S. § 33-1401, *et seq.*

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

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

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

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

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

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

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

4. The practical result of the mingling of roles.

The "Essential Nature" of the Power Exercised

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Practical Result of the Mingling of Roles

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

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

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

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

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

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

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

Conclusion

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

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

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

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

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