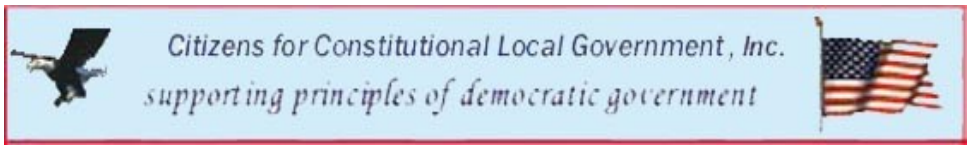

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HOA Disputes: Judicial Activism with politcal agendas

by George K. Staropoli

Our judicial system rebounds with mottos, slogans, quotes end even chiselings on building facades attesting to the goal of "justice for all" or "equal justice under the law." But we must ask whether justice was served in the Arizona ruling in *Gelb v. DFBLS*[1] that struck down an independent tribunal's adjudication of HOA disputes? We must ask was the ruling judicial activism in support of a political agenda?

Judicial activism can be viewed as a good thing, or as a harmful thing, such as retaining this country under the rule of law or under the rule of man. Auburn University takes a positive look that judges can reinterpret the Constitution and laws when they feel that the legislature ha failed to meet the needs of today's society.

> On such a view, judges should not hesitate to go beyond their traditional role as interpreters of the Constitution and laws given to them by others in order to assume a role as independent policy makers or independent "trustees" on behalf of society.[2]

On the other side, *Black's Law Dictionary* defines judicial activism as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions." In general, positive judicial activism is seen as a check and balance for the betterment of America[3].

As part of its reasoning for its opinion, the court introduced material of a political nature that contained no material information with respect to its opinion that relied on the *Hancock* and *Cactus Wren* opinions. The court made an undefined reference to two other cases (presumably *Waugaman* and *Meritt,* see note 4): "*The DFBLS further noted that two other cases found the Administrative Process violated the Arizona Constitution"s separation of powers provision . . . .*" (¶ 22). The court also took recognition of the Legislature's absence from the case (footnote 5) and the department's reluctance to respond. It concluded with an ambiguous citation to *Hancock*, while speaking of *Gelb* ,

> The DFBLS did not appeal in either case and, in January 2009, the DFBLS "completely discontinued processing any claims" under the Administrative Process. These actions -– by DFBLS based on its own experience -- are consistent with our conclusion that the Administrative Process creates a constitutionally improper mingling of separate departments. Id. at 405, 690 P.2d at 124. (¶ 22, p.15).

No mention was made that DFBLS had raised the filing fee to $2,000 without complying with the APA rulemaking statutes (quickly rescinded to $500, just a $50 increase). Nor that the Attorney General, attorney for DFBLS, had submitted a brief supporting constitutionality in one of the two undisclosed cases, *Waugaman,* and that the DFBLS decision to cease accepting Petitions was based on *Meritt* with its questionable status (there was no longer "a person of interest" necessary for adjudicable controversy).[4] Yet, apparently, the court only saw what DFBLS gave them and looked no further.

And, with the only other ruling on constitutionality in *Waugaman,* by a superior court judge, the *Gelb* decision was based on the narrow holdings of two cases: *Hancock* and *Cactus Wren*. (*Meritt* was a default decision based on *Waugaman* opinion). These two cases are distinguishable from *Gelb* by the fact that DFBLS was granted explicit powers (to adjudicate the limited arena of HOA disputes) whereas neither agencies in these cases were granted such explicit powers. Furthermore, under the four factor test in *Hancock*, used as the basis for analysis in both *Waugaman* and *Gelb*, there is no test requirement for a sufficient degree of regulatory powers for agency adjudication. However, this unsupported by legal authority criteria served as the basis for the opinion in *Gelb*. The Hancock court made a point of stating that "We do not wish to imply that these are the only factors which should be considered but it seems to us that they have special significance in determining whether a usurpation of powers has been demonstrated."

The *Gelb* court also failed to look into an identical grant of powers in regard to hearing mobile home parks residential landlord tenant complaints to to DFBLS under ARS 41-2141, and under ARS 41-2198. In *Hancock* itself, the court noted that although the Arizona Constitution declares the branches of government as "separate and distinct",

> The 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 . . . Courts today also recognize that absolute independence of the branches of government and complete separation of powers is impracticable. . . .We also believe public policy favors such a blending of powers here.

There is no more authority under 2141 to regulate disputes for landlord tenants than found with HOAs. This fact was brought to the attention of the court in the Attorney General's brief in *Waugaman*, pointing out that the *Cactus Wren* court found that *"the authority for the Department's [DFBLS] hearing officer to resolve disputes between mobile home parks and tenants was a proper exercise of regulatory authority."*

With the above understanding, we must ask how the court arrived at its opinion that, *"In accordance with well-established legal authority, the HOA has overcome the presumption of constitutionality . . . "* (¶ 24). Apparently, the court dismissed the intentions of the bill that served to assist the civil courts, provide justice for homeowners over the HOA hearing process of the accusers judging the accused, and the public policy of "justice for all." In court seemed to have misplaced the explicit recognition of the

intent by the sponsor of the bill underlying the statutes, HB 2824, who stated that, "*The amendment was designed to hold homeowners 'associations accountable without prohibitive costs to homeowners'",* and that the committee minutes "*indicated [that] issues with homeowners" associations continued to be problematic and that going to court was not an adequate remedy for homeowners."*

Of further interest to the court would have been the change in boiler plate wording contained in the legislature's Summary/Fact Sheets submitted to the legislators along with the actual bill. In 2007, the representative boiler plate read, *"The Planned Communities statutes took effect in 1994 and constitute the first regulations pertaining specifically to the formation and operation of master planned community HOAs."* (It is pertinent to note that the Attorney General's brief in support of constitutionality in *Waugaman*, opens with, "*In 1994, the Legislature first enacted statutes regulating planned communities."*) In 2008 it read, *"Title 33, Chapters 9 and 16, Arizona Revised Statutes (A.R.S), outline the regulatory requirements for condominiums and planned communities . . . ."* It is quite apparent that the legislature did indeed believe that the Planned Community and Condominium Acts, Title 33, Ch. 16 and 9, respectively, regulated HOAs and condos. It is quite apparent that such boiler plate wording was altered to reflect the political agenda and court decisions to strip DFBLS adjudication of HOA disputes.

Nor did the court realize that for the two years prior to the passing of HB2824 in 2006, the legislature had failed to pass two bills seeking to balance the HOA litigation playing field through revisions to the Justice of the Peace courts statutes — HB2377 in 2004 and HB2144 in 2005.

And finally, the court was not informed by DFBLS that the other two cases also had the Carpenter Hazlewood, Delgado and Woods law firm representing the respective HOAs. Principals Carpenter and Hazlewood are long standing members of the national lobbying group supporting the HOA industry, Community Associations Institute (CAI), that opposes constitutional protections for homeowners[5] and that opposed all above mentioned bills seeking to bring due process protections to homeowners in HOAs. Apparently, given the fact that it was the homeowner, *Gelb*, filing the superior court appeal of the ALJ decision, the court did not question why the Sedona Casa Contenta HOA would allow Carpenter Hazlewood to undertake a constitutionality challenge when the ALJ had decided in its favor.

I ask once again: Was justice served? Definitely not, in spite of those high sounding affirmations to the contrary. Was the ruling the result of judicial activism in support of a political agenda? Taken as a whole, definitely yes. Who will prosecute for Lady Justice? For the Homeowners?

Notes

1. *Gelb v. DFBLS*, CA-CV 09-0744 (Ariz. App. Div. 1 Oct 28, 2010).
2. *A Glossary of Political Terms*, Auburn Univ., http://www.auburn.edu/~johnspm/gloss/judicial_activism.
3. See, "*A Cheer for Judicial Activism"*, Clint Bolick, (Cato Institute web page).
4. See the court filings links in *Meritt v. Phoenix Townhouses*. The Petitioner/Plaintiff was no longer a member of the HOA. Attempts to inform the court of these findings was met with a denial to intervene, and an order not to accept input from the Intervenor. It should be noted that a copy of the Attorney General's brief in *Waugaman* was included in the Intervenor's Answer.
5. *Committee for a Better Twin Rivers v. Twin Rivers,* 929 A.2d 1060 (NJ 2007). (CAI amicus brief in the appellate decision, p. 19)..