



5419 E. Piping Rock Road, Scottsdale, AZ 85254-2952
602-228-2891 / 480 907-2196 (efax)
info@pvtgov.org http://pvtgov.org

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by George K. Staropoli

Latest AZ Superior Court holding supports OAH homeowner petition that raised CAI unconstitutionality challenges to OAH adjudications of HOA disputes

Do CAI¹ member attorneys and lobbyists Carpenter and Hazelwood qualify for appointment as Judge Pro Tems?

After 2 years of litigation, Nancy Waugaman wins her legal battle that sustains AZ Office of Administrative Hearings (OAH) findings of board error that was based on CAI attorney advice.

Waugaman's interpretation of Section 11.02 is preferable for either of two reasons. First, the Association's interpretation renders meaningless the phrase "total voting power" or, at minimum, construes it to mean "votes cast by those present." That reading is unsupported by both the plain language of the statute and the Association's actions taken prior to October 16, 2006. Second, even if Section 11.02 were to be held ambiguous, the relevant Restatement provision urges Waugaman's position. See Restatement (Third) of Property §6.17 cmt. b (2000).

(Maricopa County Superior Court, CV 2008-027251 Ruling of July 31, 2009).

One would think that those expert HOA attorneys, Carrie Smith of the Carpenter Hazelwood law firm, would know the law better. However, understanding that they will do everything to win for their HOA clients, no matter how frivolous, it is not surprising. They undoubtedly believe that the homeowner will eventually go away because of the personal costs to him, while the HOA spends the members' assessments on frivolous suits. **Congratulations to Nancy Waugaman for going the distance!**

¹ CAI, Community Associations Institute, is a national business trade organization that lobbies all state legislatures to protect planned community and condo associations. It claims that it stands for healthy, productive and harmonious communities, but has opposed all meaningful HOA reforms that have attempted to restore homeowner rights and freedoms, lost by the unconscionable CC&RS adhesion contract. See their websites at <http://caionline.org> and <http://www.cai-az.org>.

This decision, yep you guessed it, will most likely be appealed because the CAI attorney must prove his value, and that can only come by a victory no matter how much it costs the HOA.

The original 2007 OAH findings in Waugaman reveals that the board acted on their attorney's advice:

Following the discussion in executive session, the Board, upon recommendation of its attorneys, passed a Resolution interpreting Section 11.02 to mean that, rather than requiring an affirmative vote of at least 80% of the entire membership of the Association to amend the Declaration, only an affirmative vote of at least 80% of the members voting

Part of the legal advice imparted by the Association's attorney was that the Board should consider adopting the Resolution, which would interpret the voting requirements for amending the Declaration in a manner that would reduce the total number of affirmative votes necessary to effect such amendments.

IT IS FURTHER ORDERED vacating any amendments to the Declaration, passed after the Board's Resolution of October 16, 2006, and which were based upon the affirmative votes cast by 80% of the members, either in person or by absentee ballot at a meeting called for the purpose of amending the Declaration.

(No. 07F-H067029-BFS, ADMINISTRATIVE LAW JUDGE DECISION, August 13, 2007)

The attorneys for this Petition were Carrie and Jason Smith of the Carpenter Hazelwood law firm, the same attorneys involved in the constitutionality appeal of that case (LC2007-000598, decided October 2, 2008) as applied solely to the Troon Village HOA: "*Thus, the legislature's delegation of authority to the Department violates the separation of powers doctrine,*" and in the *Merrit v. Phoenix Townhouse* OAH case (No. 08F-H089004-BFS, August 4, 2008) that resulted in the Superior Court declaring OAH as unconstitutional violation of a separation of powers as applied to all HOAs in Arizona (LC 2008-000740, October 23, 2008). The *Merrit* HOA argument was based on Judge Downie's ruling in the *Waugaman* superior court appeal. (Disgracefully, the *Merrit* case was a default decision with nobody coming to defend the statute, including DFBLS, the Attorney General, who did an about face in the case, and the Legislature).

The persistent role of the Carpenter Hazelwood law firm in pursuing these unconstitutionality challenges raised the question of who were they fighting for? The two separate HOAs? Or, all the HOAs in Arizona? This objective of "all HOAs" reflects the interests of the CAI national lobbying trade group: that of keeping constitutional protections away from homeowners in HOAs.

"In the context of community associations, the unwise extension of constitutional rights to the use of private property by members" (CAI amicus curiae brief, p. 19, to NJ appellate court in Twin Rivers HOA free speech case).

Detailed information on all these cases can be found by searching my Commentary website, <http://pvtgov.wordpress.com>, and clicking on the following online links in the "CAI Judge Pro Tems" entry:

The initial Waugaman and *Merrit v. Phoenix Townhouse* filings, with links at [*The State of Arizona will not protect buyers of HOA homes!*](#)

With respect to the default ruling in Merrit (in chronological order):

[*Intervenor files for justice in OAH constitutionality case*](#)

[*Intervenor motion denied in OAH fair trial constitutionality case*](#)

[*New facts in HOA constitutionality due process case*](#)

[*Judicial integrity: support Constitutional protections or the New America of HOAs*](#)

[*Actions by AZ judge in HOA constitutionality case found ethical*](#)

Important Addendum

Carpenter Hazelwood partners, Carpenter and Hazelwood, were appointed as Maricopa County Superior Court Judge Pro Tems by Presiding Judge, [MUNDELL, Barbara Rodriguez](#) .

Recall that CAI opposed legislation to level the litigation playing field, SB1162 and HB2724 (2008), bills that would have imposed fines on abuse of process by attorneys at OAH or in the courts. Here's the CAI Call to Action of May 14, 2008, published by its legislative action committee (LAC) that was co-chaired by Scott Carpenter:

CAI's Arizona Legislative Action Committee (AZLAC) needs your assistance to help fight a new bill we believe will be harmful for Arizona's planned communities and condominium associations. SB 1162 is another bill that at first read seems like a good idea. However, it is really a "litigation machine" that restricts the association's ability to solve CC&R problems and avoid litigation.

SB1162 would do two things: (1) provide for awarding the winning party in an administrative action attorneys' fees in certain situations, and (2) restrict certain types of amendments. The AZLAC has no objection to the portion regarding attorneys' fees in an administrative action. We do have concerns about the amendment provisions.

A forerunner bill that year to SB1162 was HB2724 (both defeated, and both attempted to provide effective levels of due process protections for homeowners in terms of fair adjudication by an independent tribunal, OAH) that contained the same litigation reforms as well as a prohibition on HOA "ex post facto" amendments. Ex post facto laws are prohibited by the Constitution, which is not applicable to HOA governments. This bill would have brought HOA justice into line with the Constitution. See actual video of the legislative committee hearing and CAI's position on HB2724 at [Ils of Society](#) and [ex post facto](#) (Mr. Morgan is a partner in a law firm where the other partner, Maxwell, is a long-time CAI member attorney).

Please let Judge Mundell know how you feel about these appointments.

Please, be factual, firm, polite and non-argumentative. Bitching and bellyaching will hurt our cause!

Feel free to use any of the above in your letter/fax, but use your own information and just refer to this writing as "more info". Write or fax:

Presiding Judge Mundell

Maricopa Court
Old Court House-510
125 W. Washington
Phoenix, AZ. 85003-2243
602.506.6130

It is also important that we inform other important persons of our feelings in this matter.

The Honorable Chief Justice Rebecca White Berch

The Supreme Court of Arizona
1501 West Washington Street
Phoenix, Arizona 85007-3231

Fran McCarroll

Maricopa Board of Supervisors
Clerk of the Board
301 W. Jefferson - 10th Floor
Phoenix, AZ 85003
602.506.3767
Fax: 602.506.6402