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CHEIFETZ IANNITELLI
MARCOLINI, P.C.

9 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
10 **IN AND FOR THE COUNTY OF MARICOPA**

11 APACHE WELLS HOMEOWNERS
12 ASSOCIATION, INC., an Arizona non-profit
13 corporation,

14 Plaintiff,

15 v.

16 DEPARTMENT OF FIRE, BUILDING AND
17 LIFE SAFETY; OFFICE OF
18 ADMINISTRATIVE HEARINGS, an
19 independent agency; WALTER A. STROMME
20 and JUDITH A. STROMME a married man,

21 Defendants.

Case No.: LC2007-000189

**APPLICATION FOR STAY OF
THE ADMINISTRATIVE ORDER
RE: TRANSFER FEE INCREASE**

(Assigned to the Honorable Margaret
H. Downie)

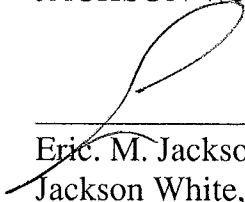
21 Plaintiff APACHE WELLS HOMEOWNERS ASSOCIATION ("Plaintiff"), by and
22 through counsel undersigned, hereby respectfully petitions this Court for an Order Staying the
23 Administrative Order Re: Transfer Fees Increase on the grounds and for reasons set forth in
24 the accompanying Memorandum of Points and Authorities consistent with the requirements
25 of this Court's minute entry of April 30, 2007 and Mehta v. Jones, 211 Ariz. 505, 23 P. 3d
26 1142 (App. 2005).

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28 Calendared By JF Date 6-18-07
Val for SWC, SFC, MCM, JRC 2330.4
7-3-07 RESPONSE

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DATED this 14th day of June, 2007.

JACKSON WHITE, P.C.



Eric M. Jackson
Jackson White, P.C.
40 N. Center St., Suite 200
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Attorneys for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

Pursuant to Mehta v. Jones, 211 Ariz. 505, ¶25, 123 P. 3d 1142 (App. 2005), a stay of an administrative order is obtained if the petitioner can “establish a colorable claim of error, and that the balance of harm favored granting stay.” The application made herein should be granted as 1) a colorable claim of error exists 2) a balance of harm favors granting the stay, and 3) adequate protections have been established by the Association for those who might be harmed by the granting of the stay.

I. A Colorable Claim of Error is Clearly Evidenced in the Conflicting Administrative Decision and Order.

This appeal is necessarily brought because the Administrative Decision expressly contradicts itself. On the one hand, the Administrative Decision states the increase in the fee to \$950.00 is “arbitrary and capricious” and “shall be \$300.00.”¹ On the other hand, the Agency concluded as a matter of law that the Restatement (Third) of Property: Servitudes

¹ Administrative Law Judge Decision, Order.

1 §3.5 controls and the \$950.00 transfer fee is valid “if there is some rational justification for
2 such increase.”² Under the Restatement §3.5, “some rational justification” exists when “the
3 amount of the fee is **set by the governing board** of the association and the funds are used for
4 **operating expenses** of the association.”³ The Agency concluded that the \$950.00 transfer fee
5 had “some justification” as the transfer fee funded operating expenses.⁴ In fact, the Agency
6 concluded as a matter of law that the expenses covered by the \$950.00 transfer fee were
7 operating expenses, “e.g., security costs, repairs **needed** for existing buildings in the strip
8 mall, and the need for a reserve.”⁵ The analysis should have stopped there. It did not.

11 The colorable claim of error comes in the Administrative Decision to arbitrarily
12 impose a new “reasonably related to specific expenses”⁶ standard, affronting the controlling
13 “some rational justification” standard requiring only that transfer fees be used for **general**⁷
14 operating expenses, not **specific** operating expenses. Even if the Restatement standard
15 required transfer fee funds to be used for specific operating expenses, which it does not,
16 Apache Wells satisfied that burden. The Administrative Decision concluded specific
17 operating expenses funded by transfer fees included “repairs to existing buildings in the strip
18 mall,” “security costs,” and “need for reserve.”⁸

22 The Decision further erred in ruling the fee was not “reasonably related” to specific

24 ² Administrative Law Judge Decision, Conclusions of Law, ¶31. See also ¶30 at footnote 2.

25 ³ Restatement §3.5, Comment c, Illustrations ¶5 (emphasis added).

26 ⁴ Administrative Law Judge Decision, Findings of Fact, ¶15; Conclusions of Law, ¶32.

27 ⁵ *Id.* (emphasis added).

28 ⁶ Administrative Law Judge Decision, conclusions of law, ¶34 (“The evidentiary record reflects that the determination as to the amount of the increase of the transfer fee was arbitrarily and capriciously selected and not reasonably related to specific expenses that are anticipated.”)

⁷ Restatement §3.5, Comment c, Illustrations ¶5.

⁸ Administrative Law Judge Decision, Findings of Facts, ¶15; Conclusions of Law, ¶32.

1 expenses, because it was. *Assuming arguendo* a “reasonably related” standard exists, Apache
2 Wells provided ample testimony that the increased transfer fee was not only reasonable, but
3 required to compensate for the shortfall in the budget.⁹ *See also* Response to Defendants’
4 Stromme Motion for Order to Show Cause as to Why Association Should Not be Held in
5 Contempt filed herewith. Indeed, the Association’s extensive investigation prior to
6 implementing the \$950.00 transfer fee revealed that many associations have transfer fees;
7 several of which are much higher than \$950.00.¹⁰
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10 In fact, the Restatement §3.5 justifies transfer fees from \$2000 to tens of thousands of
11 dollars. For example, the Restatement cites to de Mello v. 79th St. Tenants Corp., 136 Misc.
12 2d 73, 517 N.Y.S. 2d 892 (1987), holding that vendor of cooperative apartment is liable for
13 transfer fee equal to 10% of net profit of the sale of units.¹¹ The Restatement also cites to
14 Mayerson v. 3701 Tenants Corp., 123 Misc. 2d 235, 473 N.Y.S. 2d 123 (1984) (“transfer fees
15 or ‘flip taxes’ imposed by cooperative in the amount of 7.5% on transfer of proprietary shares
16 to raise revenues for the cooperative and to promote stability in ownership are legal”); and
17 Jamil v. Southridge Cooperative Sec. No 4 Inc., 102 Misc. 2d 404, 425 N.Y.S. 2d 905 (1979),
18 aff’d, 77 A.D. 2d 822, 429 N.Y.S. 2d 340, cert. denied, 450 U.S. 919 (1981) (\$2000 transfer
19 fee for waiver of corporation’s right of first refusal).¹²
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26 ⁹ Transcription of Hearing, 93:21-25 on record with this Court; Administrative Law Judge Decision, Conclusions of
27 Law, ¶29.
28 ¹⁰ *Id.*, Findings of Facts, ¶16;
¹¹ Restatement §3.5, Reporters Note, Transfer Fees, page 471 and 472.
¹² *Id.*

1 **II. A Balance of Harm Favors Granting the Stay Because Both the Association and**
2 **its Members Will Suffer Substantial Financial Hardship Without the \$950.00**
3 **Transfer Fee.**

4 Without a \$950.00 transfer fee, the Association is left with disastrous results. Apache
5 Wells has twenty-year-old buildings requiring extensive renovation and repair.¹³ It also
6 requires increased security because of the substantial jump in burglaries within the
7 community.¹⁴ The prior budget failed to account for these new and pressing needs.¹⁵ Indeed,
8 the Association's failure to respond to these needs would create civil liability.¹⁶ The shortfall
9 in the budget to cover these operating expenses was addressed by increasing the transfer fees
10 from \$300.00 to \$950.00.¹⁷ The monies raised by the increase in transfer fees funded over
11 \$90,000 in required operating expenses over the last several years.
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14 Without the funds generated by the increased transfer fees, the previously unforeseen,
15 but mandatory expenses of the Association, cannot be met. The effects, even during
16 pendency of this appeal, are potentially devastating. For example, reduction in security
17 attracts increased burglaries in an elderly community such as this that is largely vacant during
18 summer months.
19

20 Apache Wells' alternative to cover the shortfall in the budget is to substantially
21 increase the financial burdens of its members by increasing the general assessments to the
22 maximum amount permitted annually or propose special assessments until the required funds
23 become available. Clearly, the better of the two alternatives is to require a reasonable
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26 ¹³ Id.; Transcription of Hearing, 93:22-25; 94:12-21.

27 ¹⁴ Transcription of Hearing, 94:1-6.

28 ¹⁵ Transcription of Hearing, 93:21-25.

¹⁶ Duty to Maintain the Common Area pursuant to the CC&Rs.

¹⁷ Id.

1 contribution through transfer fees by new purchasers in the amenities they will enjoy that
2 have been paid for by prior owners and which need to be maintained.¹⁸

3 **III. Adequate Protections Have Been Established by the Association for Those Who**
4 **Might be Harmed by the Granting of the Stay.**

5 Since the Administrative Order was entered, the Association has been depositing the
6 collected transfer fee amounts into a separate trust account to be held by the Association
7 pending this appeal. If this court deems the increase justified, those amounts will be
8 transferred to the Association's general accounts to be used for required operating expenses.
9 If this court deems the increase unjustified, the Association will return said funds to those
10 from which the fees were collected. The Association will provide an accounting of all
11 transfer fees collected should this court require.
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14 **IV. Conclusion**

15 A colorable claim of error is evidenced in the conflicting and contradictory
16 conclusions of the Administrative Decision and Order. Deeming the \$950.00 transfer fee
17 void and requiring it be set at \$300.00 creates a "heads we lose, tails we lose" situation that
18 disregards the operating expenses recognized by the Administrative Decision as legitimate
19 expenses requiring additional funding.¹⁹ Those expenses require immediate attention.
20 Security, for example, in a community largely vacant during the summer months, is an
21 immediate need. In addition, without the \$950.00 transfer fee, proper service cannot be
22 provided by the Association to its members, thereby resulting in a forced breach of its duty to
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28 ¹⁸ Transcript of Hearing, 95:13-25; 96:1-9.

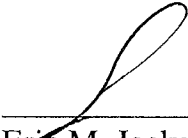
¹⁹ Administrative Law Judge Decision, Findings of Fact, ¶15; Conclusions of Law, ¶32.

1 properly maintain the common area.

2 If the transfer fee is reduced to \$300.00, the members of the Association would be
3 harmed. The members would mandatorily be required to pay substantially increased
4 assessments and go without required services until funds were collected in a different fashion.
5 Conversely, none are harmed by continued collection of the transfer fees because those whose
6 transfer fees have been collected during this appeal are held in a separate account to be
7 reimbursed or used for general operating expenses pursuant to this court's order. For these
8 reasons, the Association respectfully requests this court grant its Application for Stay of the
9 Order Re: Transfer Fees.
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11

12 DATED this 14th day of June, 2007.

13
14 JACKSON WHITE, P.C.

15
16 
17 Eric M. Jackson
18 40 N. Center St., Suite 200
19 Mesa, AZ 85201
20 *Attorneys for Plaintiff*

21 ORIGINAL hand delivered this 14th day of
22 June, 2007, to:

23 The Clerk of the Court

24 COPIES of the foregoing hand
25 delivered this same day to:

26 The Honorable Margaret H. Downie
27 201 W. Jefferson, Room 4A
28 Phoenix, AZ 85003-2243

1 COPIES of the forgoing mailed
2 this same day to:

3 Department of Fire, Building, and Life Safety
4 11110 W. Washington, #100
5 Phoenix, AZ 85007

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7 Cheifetz Iannitelli Marcolini, P.C.
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9 Phoenix, AZ 85004
10 *Attorneys for Defendants Stromme*

11 By:  _____