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5 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
6 **IN AND FOR THE COUNTY OF MARICOPA**

8 APACHE WELLS HOMEOWNERS
ASSOCIATION, INC., an Arizona non-profit
9 corporation,

10 Plaintiff,

11 v.

12 DEPARTMENT OF FIRE, BUILDING AND
LIFE SAFETY; OFFICE OF
13 ADMINISTRATIVE HEARINGS, an
independent agency; WALTER A. STROMME,
a married man,

14 Defendants.

No. LC2007-000189

**PETITIONER/DEFENDANT WALTER
STROMME'S ANSWERING BRIEF**

(Assigned to Hon. Margaret H. Downie)

15
16 Petitioner/Defendant Walter A. Stromme ("Stromme"), pursuant to the Rules of
17 Procedure for Judicial Review of Administrative Decisions, Rule 7(b), hereby submits his
18 Answering Brief. Stromme respectfully requests the Superior Court affirm the decision of the
19 Department of Fire, Building and Life Safety (the "Department") in favor of Stromme and
20 against Respondent/Plaintiff Apache Wells Homeowners Association, Inc. (the "Association"),
21 issued on February 14, 2007. This Answering Brief is supported by the entire Record on
22 Review, this Court's file of record, and the within Memorandum of Points and Authorities.

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. STATEMENT OF THE CASE

3 This case is about the Association's unreasonable, arbitrary and capricious decision to
4 increase its transfer fee¹ from \$300.00 to \$950.00. Stromme filed a petition with the
5 Department challenging the transfer fee increase. Stromme disputed the Association's ability
6 to even impose a transfer fee in the first place, but stipulated that he would not challenge the
7 original \$300.00 fee. Transcription of Hearing, 28:14-20, attached to Notice Filing Transcript
8 dated April 19, 2007; Record on Review ("RR") ¶ 47, Administrative Law Judge Decision,
9 Conclusions of Law, ¶ 28, 30. Stromme argued that the transfer fee is not authorized by the
10 governing documents, does not relate to the actual costs of transfer, and therefore requires
11 membership approval before it can be instituted. Transcription of Hearing, 39:2-6, 40:15-20,
12 46:12-20, 48:1-3; attached to Notice Filing Transcript dated April 19, 2007. The Association,
13 on the other hand, argued it was free to set transfer fees on its own without input from the
14 members, so long as the fees related in some way to the expenses of the Association. RR ¶
15 47, Administrative Law Judge Decision, Conclusions of Law, ¶¶ 29, 32. The Association
16 justified the transfer fee by alleging various expenses, such as budget shortfalls, security costs,
17 and the need for a reserve fund. RR ¶ 47, Administrative Law Judge Decision, Conclusions
18 of Law, ¶ 29. The Association acknowledged its transfer fee does not relate in any way to the
19 actual costs of transfer. Transcription of Hearing, 95:13-21, attached to Notice Filing
20 Transcript dated April 19, 2007; Administrative Law Judge Decision, Findings of Fact, ¶
21 15(g).

22 Administrative Law Judge Lewis D. Kowal issued a decision on February 12, 2007
23 finding the Association's transfer fee increase was unlawful. Specifically, Judge Kowal held
24 that the Association "acted arbitrarily, capriciously and unreasonably in increasing the transfer
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26 ¹ The transfer fee is a fee charged by the Association to new members upon purchasing property in
the community. Administrative Law Judge Decision, Findings of Fact, ¶ 15(c).

1 fee from \$300.00 to \$950.00. Therefore, the increase of the transfer fee is voided and the
2 transfer fee shall be \$300.00.” RR ¶ 47, Administrative Law Judge Decision, Order. The
3 Association filed this appeal challenging this aspect of Judge Kowal’s decision. Stromme
4 asserts that Judge Kowal’s decision should be affirmed, as applicable law demonstrates the
5 Association has no authority for its transfer fee increase.

6 **II. STATEMENT OF FACTS**

7 The facts relevant to this matter are not in dispute. The Association raised its transfer
8 fee from \$300.00 to \$950.00. RR ¶ 47, Administrative Law Judge Decision, Findings of
9 Fact, ¶ 14. The Association did so through its Board of Directors, without putting the issue to
10 a vote before the homeowners. RR ¶ 47, Administrative Law Judge Decision, Findings of
11 Fact, ¶ 4(b). The Association claims the transfer fee is needed for various costs, such as
12 budget shortfalls, security, and building maintenance. Transcription of Hearing, 93:21-95:21,
13 attached to Notice Filing Transcript dated April 19, 2007; RR ¶ 47, Administrative Law Judge
14 Decision, Conclusions of Law, ¶ 29. The Association is subject to governing documents for
15 Apache Wells, including CC&Rs and Bylaws.

16 As neither party disputes these underlying facts, the only issue to be decided is whether
17 the Association had authority to impose the transfer fee increase. The Administrative Law
18 Judge, after a hearing on the issue, determined the Association lacked authority for the
19 increase. The procedural history resulting in that decision is set forth below.

20 Stromme filed a Petition with the Department challenging the Association’s ability to
21 impose a transfer fee upon new members in the amount of \$950.00. RR ¶ 47, Administrative
22 Law Judge Decision, Findings of Fact, ¶ 2, 4(b). Stromme argued that the Association did not
23 have any authority to impose a transfer fee at all. Transcription of Hearing, 28:14-20, 39:2-6,
24 112:17-23, attached to Notice Filing Transcript dated April 19, 2007; RR ¶ 47, Administrative
25 Law Judge Decision, Conclusions of Law, ¶ 28, 30. Specifically, the governing documents
26 for Apache Wells do not authorize transfer fees, and do not even reference transfer fees.

1 Transcription of Hearing, 28:16-20, attached to Notice Filing Transcript dated April 19, 2007.
2 Stromme argued that any transfer fee imposed without specific authority in the governing
3 documents should relate only to the actual costs of transfer. Transcription of Hearing, 28:16-
4 20, 39:2-6, 40:15-20, attached to Notice Filing Transcript dated April 19, 2007. As such,
5 Stromme argued, the governing documents provide two ways in which the Association can
6 raise funds - through a general assessment or special assessment. RR ¶ 22, Petitioner's
7 Memorandum of Facts and Legal Authorities, p. 7-10; Transcript of Hearing, 114:16-21,
8 attached to Notice of Filing Transcript dated April 19, 2007. If the transfer fee is a general
9 assessment, the Association lacked authority to raise it by more than ten percent (10%) without
10 membership approval. Transcription of Hearing, 46:12-20, attached to Notice Filing
11 Transcript dated April 19, 2007. If the transfer fee is a special assessment, the Association
12 lacked authority to raise it at all without membership approval. Transcription of Hearing,
13 113:19-23, attached to Notice Filing Transcript dated April 19, 2007.

14 Because the Association did not obtain membership approval for the transfer fee
15 increase, Stromme argued the Association lacked authority and therefore acted arbitrarily,
16 unreasonably, and capriciously in imposing the increase. Transcription of Hearing, 28:16-
17 29:13, 29:7-13, 114-115:22-3, attached to Notice Filing Transcript dated April 19, 2007.
18 Stromme noted that for purposes of the Petition, he was not challenging the Association's
19 original fee in the amount of \$300.00, although he made it clear he contended there was no
20 authority for any transfer fee at all. Transcription of Hearing, 39:2-6, attached to Notice
21 Filing Transcript dated April 19, 2007; RR ¶ 47, Administrative Law Judge Decision,
22 Conclusions of Law, ¶ 28, 30.

23 The Association responded to Stromme's challenge by arguing the Restatement (Third)
24 of Property - Servitudes authorized its transfer fee increase. Transcription of Hearing, 34:17-
25 20, attached to Notice Filing Transcript dated April 19, 2007; RR ¶ 47, Administrative Law
26 Judge Decision, Conclusions of Law, ¶ 30. The Association maintained it is free to set the

1 transfer fee at any amount, so long as there is some rationalization for it. RR ¶ 47,
2 Administrative Law Judge Decision, Conclusions of Law, ¶ 32. The Administrative Law
3 Judge, applying the Restatement, found that the Association did not rationally justify its
4 transfer fee increase. RR ¶ 47, Administrative Law Judge Decision, Conclusions of Law, ¶
5 34. Instead, Judge Kowal found that the Association had arbitrarily, unreasonably and
6 capriciously set the amount of the increase, as it was unable to present any evidence as to how
7 it arrived at the amount needed. RR ¶ 47, Administrative Law Judge Decision, Conclusions
8 of Law, ¶ 34.

9 Although Stromme agrees with the result of the Administrative Decision, he agrees
10 with the Association that Judge Kowal applied the wrong standard in reaching the result. As
11 Stromme maintains the decision should stand, Stromme did not file a cross-appeal, nor was he
12 required to do so. A reviewing Court has authority to affirm a lower court decision for any
13 reason, not just that relied upon by the lower Court judge. See, e.g., Tovrea Land & Cattle
14 Co. v. Linsenmeyer, 100 Ariz. 107, 114, 412 P.2d 47, 51 - 52 (Ariz. 1966) (“if the facts are
15 undisputed, we may ignore the trial court's findings and substitute our own analysis of the
16 record” and “[w]e are not bound by the conclusions of law made by the trial court.”)

17 **III. STATEMENT OF ISSUES PRESENTED FOR REVIEW**

18 The only issue presented for review is whether the Association had authority to increase
19 its transfer fee from \$300.00 to \$950.00, or whether it acted without authority, in an
20 unreasonable, arbitrary, and capricious manner.

21 **IV. LEGAL ARGUMENT**

22 **a. Standard of Review**

23 The Superior Court reviews administrative decisions and determines if the “action
24 was either illegal, arbitrary, capricious, or was an abuse of discretion.” Smith v. Arizona
25 Long Term Care System, 207 Ariz. 217, ¶14, 84 P.3d 482, ¶14 (App. 2004) citing
26 Ethridge v. Ariz. St. Bd. of Nursing, 165 Ariz. 97, 100, 796 P.2d 899, 902 (App. 1989);

1 Berenter v. Gallinger, 173 Ariz. 75, 77, 839 P.2d 1120, 1122 (App. 1992). In
2 undertaking such a review, the “court has authority to make its own rulings on questions of
3 law.” Id. citing Bucciarelli v. Ariz. Dep’t of Transp., 166 Ariz. 67, 68, 800 P.2d 54, 55
4 (App. 1990). The administrative decisions on law are owed no deference upon review and
5 the Superior Court may substitute its own findings of law. Gardiner v. Arizona Dep’t of
6 Economic Security, 127 Ariz. 603, 606, 623 P.2d 33, 36 (App. 1981).

7 This Court may uphold the decision of the Administrative Law Judge for any legal
8 reason, so long as the Court does not “re-weigh” the evidence or substitute its own factual
9 findings for that of the lower court. Smith at ¶14 citing Plowman v. Ariz. St. Liquor Bd.,
10 152 Ariz. 331, 335, 732 P.2d 222, 226 (App. 1986). In fact, when “reviewing factual
11 determinations, the court determines only *whether there is substantial evidence to support*
12 *the administrative decision.*” Id. (emphasis added) citing Woerth v. City of Flagstaff, 167
13 Ariz. 412, 417, 808 P.2d 297, 302 (App. 1990). When there is evidence to support the
14 decision, regardless of how the Administrative Law Judge reached the decision, it “may
15 not be set aside as being arbitrary and capricious.” Id.

16 The Association claims that because there is some inconsistency with the
17 Administrative Law Judge’s analysis, the decision must be set aside. However, when “two
18 inconsistent factual conclusions could be supported by the record, then there is substantial
19 evidence to support an administrative decision that elects either conclusion.” DeGroot v.
20 Arizona Racing Commission, 141 Ariz. 331, 336, 686 P.2d 1301, 1306 (App. 1984) citing
21 Webster v. State Board of Regents, 123 Ariz. 363, 366, 599 P.2d 816, 818 (App. 1979).
22 An administrative decision should not be reversed because “some conflicts” exist in the
23 record. DeGroot at 336, 686 P.2d at 1306. The Superior Court should look through “the
24 smokescreen created by strong appellate advocacy” which “highly overstates the minor
25 conflicts which do exist in the record” and “objectively” evaluate the evidentiary record.
26 Id.

1 The Association's purported standard of review is contradictory and incorrect.
2 First, the Association cites to cases articulating the standard of review for administrative
3 decisions, which cases clearly establish questions of law are reviewed de novo. See, e.g.,
4 Smith v. Arizona Long Term Care System, 207 Ariz. 217, 84 P.3d 482 (App. 2004).
5 Then, the Association contradicts itself completely by citing repeatedly to City of Phoenix
6 v. Geyler, 144 Ariz. 323, 697 P.2d 1073 (1985), which concerns the standard of review
7 from a trial court's order regarding Rule 60 of the Arizona Rules of Civil Procedure. City
8 of Phoenix does not concern administrative decision review, and instead concerns a
9 particular standard of law at issue in the lower court (Rule 60 relief from judgments). In
10 other words, the Association's argument that Judge Kowal's decision should be overturned
11 because it misapplies the law is wholly without merit. As established above,
12 misapplication of the law is not grounds for reversing an administrative decision.

13 In light of the foregoing, Stromme asserts that this Court is more than permitted to
14 apply appropriate legal authority to uphold the decision of Judge Kowal. While Judge
15 Kowal undertook the wrong legal analysis, he arrived at the right result. Judge Kowal's
16 decision is strongly supported by the Record on Review. The facts are undisputed, and
17 applicable law makes it clear that the Association's transfer fee increase cannot stand.
18 Accordingly, Judge Kowal's decision should be affirmed.

19 **b. The Administrative Law Judge Decision Should be Affirmed.**

20 Both parties agree that the Restatement (Third) Property - Servitudes controls this
21 case because there is no authority in the governing documents for the imposition of transfer
22 fees. See, e.g., Transcript of Hearing, 34:17-20, attached to Notice Filing Transcript dated
23 April 19, 2007; RR ¶ 24, Petitioner's Memorandum in Response to Respondent's
24 Supplemental Memorandum. However, the Association only recites portions of the
25 Restatement, and in so doing conveniently fails to apprise the Court of those provisions
26 that actually govern this case. First, the Association completely ignores the actual text of

1 the rule set forth in Section 3.5, which concerns the validity of recorded servitudes.² The
2 Association's decision to impose a transfer fee and thereafter increase said fee to \$950.00
3 was not made pursuant to any provision in the servitudes applicable to Apache Wells.
4 Indeed, there are no provisions in the CC&Rs or Bylaws that authorize a transfer fee. In
5 order for the Association to be authorized to increase a transfer fee, clearly it must be
6 authorized to impose a transfer fee in the first place. Stromme's decision not to contest the
7 \$300.00 transfer fee amount does not equate with an admission that the Association has
8 authority to impose such fees, which fact was made abundantly clear at the hearing in the
9 Court below. Transcription of Hearing, 28:16-20, 39:2-6, 112:17-23, attached to Notice
10 Filing Transcript dated April 19, 2007; Administrative Law Judge Decision, Conclusions of
11 Law, ¶ 28, 30.

12 Comment C to Section 3.5 is presented as an explanation for the actual rule, and as
13 such the Association's reliance on the portions of the comments explaining when transfer fees
14 are permitted pursuant to that rule is completely misplaced. Each and every provision of
15 Section 3.5, Comment C cited by the Association hinges on the presumption that an actual
16 servitude exists expressly authorizing the imposition of transfer fees. This fact is evident by
17 the comment's illustrations, which provide, in pertinent part: "The declaration for a
18 condominium development requires payment of a transfer fee to the property-owners
19 association on each transfer of a unit by sale or lease," (*Id.* at Illustration 5), "The deed
20 included a covenant requiring the grantee and the grantee's successors to pay 10 percent of the
21 gross sales price of the first sale of each improved lot to the grantor," (*Id.* at Illustration 6),
22 and "The declaration for Sand Acres, a common-interest community developed in an
23 ecologically sensitive area, requires payment of a transfer fee of one percent on the sale of

24 ² Section 3.5 provides "(1) An otherwise valid servitude is valid even if it indirectly restrains
25 alienation by limiting the use that can be made of property, by reducing the amount realizable by the
26 owner on sale or other transfer of the property, or by otherwise reducing the value. (2) A servitude that
lacks a rational justification is invalid." (emphasis added).

1 each lot to the Sand Acres Foundation.” (Id. at Illustration 7). The CC&Rs and Bylaws for
2 Apache Wells contain nothing relating to transfer fees, and as such, the provisions of Section
3 3.5 cited by the Association do not apply to this case.

4 In limiting its analysis to only certain inapplicable sections of Comment C of Section
5 3.5, the Association fails to apprise the Court of the most important language contained
6 therein. Comment C expressly provides that “the power of a common-interest community
7 to impose such fees is governed by the rule stated in § 6.5.” RESTATEMENT (THIRD)
8 PROPERTY – SERVITUDES, § 3.5, Cmt. C (emphasis added). Because Section 3.5 concerns
9 those situations where governing documents expressly authorize transfer fees, the
10 Restatement points the reader to another section to evaluate transfer fees in cases where
11 governing documents do not expressly authorize transfer fees.

12 As directed in Section 3.5, the analysis regarding the Association’s transfer fee
13 increase should have been undertaken pursuant to Section 6.5. That Section provides, in
14 pertinent part:

- 15 (1) Except as limited by statute or the declaration:
16 (a) a common-interest community has the power to raise the funds
17 reasonably necessary to carry out its functions by levying
18 assessments against the individually owned property in the
19 community and by charging fees for services or for the use of
20 common property;
21 (b) assessments may be allocated among the individually owned
22 properties on any reasonable basis, and are secured by a lien
23 against the individually owned properties.
24 (2) Unless expressly authorized by the declaration, fees for
25 services rendered, or for the use of common property, must be
26 reasonably related to the costs of providing the service, or
providing and maintaining the common property, or the value of
the use or service.

1 RESTATEMENT (THIRD) PROPERTY - SERVITUDES, § 6.5. With regard to transfer fees,
2 Comment F to Section 6.5 explains the proper application of the rule. Pursuant to Comment
3 F, “[u]nless the declaration expressly provides otherwise, the amount of user fees and service
4 charges must be reasonably related to the association's costs. This limitation is an
5 application of the association's duty to treat the members of the common-interest community
6 fairly under § 6.13.

7 Further, Comment F contains an illustration as to proper evaluation of transfer fees in
8 particular. At Illustration 9, the Restatement makes it clear that the Association’s transfer fee
9 increase is invalid.

10 Sand Acres is a 200-lot subdivision with a property-owners
11 association that owns a clubhouse, pool, and tennis courts, and
12 provides landscaping for the entrance to the subdivision. The
13 association adopted a \$350 transfer fee for changing its
14 membership records and issuing membership cards when a lot was
15 sold or rented. In the absence of other facts or circumstances, the
16 conclusion would be justified that the fee is invalid *unless
authorized by the declaration or reasonably related to the
association's costs of changing the membership records.*
(Emphasis added).

17 As the Association’s transfer fee is neither authorized by the governing documents for Apache
18 Wells nor reasonably related to the Association’s costs of completing a transfer, it is invalid as
19 a matter of law.

20 The Association attempts to justify its unauthorized transfer fee by relying on cases
21 of other jurisdictions, each of which are referenced in the Restatement. Notwithstanding
22 the fact that the cases cited by the Association are not controlling authority in this Court,
23 said cases actually support Stromme’s position and therefore the affirmation of the
24 Administrative Law Judge’s decision. In de Mello v. 79th Street Tenants Corp., 136
25 Misc.2d 73 (N.Y. City Civ. Ct. 1987), for example, the Court upheld the transfer fee at
26 issue *because* the fee was expressly authorized by the governing documents. Similarly, in

1 Mayerson v. 3701 Tenants Corp., 123 Misc.2d 235 (N.Y. Sup. 1984), and Jamil v.
2 Southridge Co-op. Section No. 4 Inc., 102 Misc.2d 404, 405 (N.Y. Sup. 1979), the Courts
3 upheld the transfer fees at issue *because* they were expressly authorized by the governing
4 documents. Stromme addressed the other issues associated with the Association's
5 purported authority in his Response to the Association's Application for Stay, which
6 Stromme incorporates herein by reference. To summarize, the cases cited by the
7 Association do not concern homeowners associations, are governed by New York law
8 (which expressly addresses the fees at issue), and are not even persuasive authority in this
9 Court.³

10 The Restatement cites to another case that the Association completely ignores for
11 obvious reasons. In Fe Bland v. Two Trees Mgmt. Co., 66 N.Y.2d 556, 498 N.Y.S.2d 336,
12 489 N.E.2d 223 (1985), the Court of Appeals of New York held that a corporation's decision
13 to impose a transfer fee for transfer of shares, otherwise known as a "flip tax," was not
14 authorized by the corporate bylaws or other governing documents, and therefore the Board of
15 Directors lacked authority to impose such fees. In so ruling, the Court held that the business
16 judgment rule did not afford these directors with any protection.

17 The business judgment doctrine on which the corporations also
18 rely stands them in no better stead. . . . Although it may protect
19 directors against individual liability to the corporation in a
20 stockholders' derivative action, **it constitutes no grant of general**
21 **or inherent power in the directors to enforce against a**
22 **shareholder an edict of the directors beyond their authority to**
23 **make under either the bylaws of the corporation or, in the case**
24 **of a cooperative apartment corporation, the contract between**
25 **the corporation and its shareholder/lessees** embodied in the
26 proprietary lease.

25 ³ Two of the cases cited by the Association are from the New York City Civil Court and New York
26 Supreme Court, which are New York's *trial* courts. The other case is from lower level appellate court,
which is only authoritative for the Second Department in New York, and as such is by no means
authoritative for the entire state of New York, let alone Arizona.

1 Id. at 565, 489 N.E.2d at 228, 498 N.Y.S.2d at 341 (emphasis added). Accordingly, the
2 Association's arguments relating to the business judgment rule are completely without merit.
3 The Association, like the directors in Fe Bland, cannot seek business judgment rule protection
4 for an act it was not authorized to undertake.

5 The Association's reliance on alleged transfer fees in other communities in Arizona is
6 also completely off base. As the Administrative Law Judge noted, the Association provided
7 no evidence whatsoever regarding the governing documents for those communities.
8 Transcription of Hearing, 39:2-6, attached to Notice Filing Transcript dated April 19, 2007;
9 RR ¶ 47, Administrative Law Judge Decision, Findings of Fact, ¶ 17. Again, the Association
10 ignores that crucial fact and would have this Court believe that it can circumvent both the
11 governing documents and applicable law by imposing transfer fees without any authority to do
12 so.

13 The Association's argument that the governing documents for Apache Wells provide
14 authority for transfer fees is puzzling, at best. The Association cites to various provisions of
15 the CC&Rs and Bylaws, each of which provide the Association with authority (and in fact the
16 duty) to maintain common areas. Here, the Association's apparent reliance is on Section 3(O)
17 of the CC&Rs, which provides the Association with discretion to maintain the common areas
18 and landscaping. By no stretch of the imagination does the Association's discretion relating to
19 management of the common areas (CC&Rs, Section 3O) somehow translate into discretion in
20 assessing members, as the Association suggests. Rather, the governing documents along with
21 applicable law provide distinct parameters for the Association's ability to assess members. To
22 put it simply, the Association has very limited discretion relating to assessments to members,
23 and instead is bound to adhere to the rigid requirements imposed by the governing documents
24 and applicable law. See, e.g., A.R.S. §§ 33-1803 and 33-1806(C). See also Bylaws, Article
25 V, Section 5(B)(4)(a) and (b) (the Board of Directors has the duty to establish and collect
26 general and special assessments pursuant to the authority provided in the CC&Rs); Bylaws

1 Article X (explaining the two types of assessments in the community are general assessment
2 and special assessments, and proscribing strict limitations as to the Association's authority for
3 imposing and collecting each). It is just ridiculous for the Association to claim that
4 "determining how to assess (i.e. charge) the members to fund the general reserve for
5 maintenance is left in the 'sole discretion' of the board." Reply to Defendant Stromme's
6 Response to Application for Stay, p. 5. Naturally, the Association has no authority
7 whatsoever to support this contention.

8 Finally, the Association's claims of hardship are simply absurd. To begin, a party
9 cannot be heard to complain of hardship when the conduct at issue is a violation of applicable
10 CC&Rs. Burke v. Voicestream Wireless Corp. II, 207 Ariz. 393, 399, 87 P.3d 81, 87 (App.
11 2004). Beyond that, the facts attested to by the Association's own witnesses at the
12 administrative hearing demonstrate no hardship could possibly exist. The Association's
13 former President and witness, Brian Johnson, testified that the Association has been making
14 double payments on a loan of approximately \$600,000.⁴ Transcription of Hearing, 74:1-5,
15 attached to Notice Filing Transcript dated April 19, 2007. If the Association were in such dire
16 need of funds that it has to assess new members in the amount of \$950 each, why would it be
17 making approximately \$5,000 in unnecessary payments every month? Moreover, the
18 Association's own witnesses also testified the Association provides a \$100 "gift" to another
19 entity, the Country Club, each time it collects the transfer fee. Transcription of Hearing,
20 94:22-95:12, attached to Notice Filing Transcript dated April 19, 2007; RR ¶ 47,
21 Administrative Law Judge Decision, Findings of Fact, ¶ 15 (e). Why would the Association
22 provide such a "gift" to the Country Club, which represents about 17% of the amount of the
23
24

25 ⁴ These facts are not "new" as the Association argued in its Reply in Support of Application for
26 Stay. The Association's own witnesses testified about these facts at the hearing and as such, these facts are
part of the record.

1 transfer fee at issue, each and every time it collects the fee if it were truly in need of the
2 funds?

3 The facts attested to by the Association's own witnesses at hearing directly contradict
4 any claims of alleged hardship. More importantly though, a claim of hardship cannot justify
5 an action by the Association that is not authorized by governing documents or applicable law.
6 Even if the Association truly needed funding, it must adhere to the governing documents and
7 applicable law in raising money.

8 **V. CONCLUSION**

9 The Association has failed to meet its burden of proof in establishing the Administrative
10 Law Judge's Decision is not supported by "substantial evidence" and should be reversed.
11 Instead, the Association has made it clear to the Court that it was not authorized to impose the
12 transfer fee at issue, and therefore the transfer fee increase is invalid as a matter of law.

13 For each of the foregoing reasons, Stromme respectfully requests the Court affirm the
14 Decision of the Administrative Law Judge, upholding the finding that the Association lacked
15 authority to increase its transfer fee and therefore acted unreasonably, arbitrarily, and
16 capriciously in imposing the increase. Stromme respectfully requests the Court affirm the
17 Administrative Law Judge's Decision that the transfer fee increase is void and invalid as a
18 matter of law.

19 DATED this 30th day of July, 2007.

CHEIFETZ IANNITELLI MARCOLINI, P.C.

21 By Melanie McKeddie
22 Steven W. Cheifetz
23 Melanie C. McKeddie
Attorneys for Petitioner/Appellee

24 ORIGINAL of the foregoing filed
25 this 30th day of July, 2007 with:

26 Clerk
MARICOPA COUNTY SUPERIOR COURT

1 201 West Jefferson
Phoenix, Arizona 85003-2243

2
3 COPY of the foregoing hand-delivered
this 3rd day of July, 2007 to:

4 The Honorable Margaret H. Downie
MARICOPA COUNTY SUPERIOR COURT
5 201 West Jefferson, Room 4A
Phoenix, Arizona 85003-2243

6
7 COPIES of the foregoing mailed
this 3rd day of July, 2007 to:

8 DEPARTMENT OF FIRE, BUILDING & LIFE SAFETY
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